IN THE WEATHERTIGHT HOMES TRIBUNAL
TRI 2008-100-000034

	BETWEEN	**LEE FINDLAY AND MICHAEL ARNE SANDELIN as Trustees for LEE FINDLAY FAMILY TRUST** Claimant
	AND	**AUCKLAND CITY COUNCIL** First Respondent
	AND	**ROY STANLEY SLATER** Second Respondent

Hearing:	27, 28, 29 July 2009 and 26 August 2009
Counsel Appearances:	E St John, counsel for claimants. D Heaney SC and S Mitchell, counsel for first respondent. M Frogley, counsel for second respondent.
Appearances:	Mr Warren Nevill, WHRS assessor. Mr Lee Findlay, claimant. Ms Joanne Findlay. Mr Sean Marshall, expert for the claimants. Mr Bill Cartwright, expert for the claimants. Mr Peter Gillingham, expert for the first respondent. Mr Roy Slater, second respondent. Mr Fraser Stewart.
Decision:	9 September 2009

FINAL DETERMINATION
Adjudicator: K D Kilgour

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INTRODUCTION

[1] This claim involves a home at 64 Arney Road, Remuera. Mr Lee Findlay caused the building of the home during mid 1990's. The home has suffered water ingress causing extensive structural damage requiring substantial repair and a full recladding of the exterior.

[2] The owners of the home are the trustees of the Lee Findlay Family Trust. The Trust is governed by one of the trustees solely, Mr Lee Findlay. His co-trustee, Mr M Sandelin, an Auckland legal practitioner, has taken no part in this claim other than lending his name to the claimants, as a joint registered proprietor of the property. The claim is brought against the Auckland City Council, the territorial authority responsible for certifying that the building of the home complied with the Building Act 1991; and against Mr Roy Slater, a carpenter employed by Mr Findlay on a labour-only basis to carry out the carpentry component of the building works, and, Mr Findlay alleges, to act as site foreman and supervisor of the build.

[3] The home was constructed with a number of structural defects allowing water to ingress. Mr Findlay is seeking damages, to compensate the cost of the remedial work he undertook to repair the damage and general damages, from the Auckland City Council and Mr Slater.

[4] Mr Findlay organised the building of the home by directly contracting with the architect and each of the trades involved in its construction. The Auckland City Council and Mr Slater submit, amongst their defences to the claim, that he failed to take reasonable care in looking after the owners' interests by not properly instructing and managing the contractors and ensuring an oversight of the quality of their construction work and thereby contributed to his and the claimant trust's own loss.

Factual Background

[5] In late August 1995, Mr Findlay purchased at auction the residential section situated at 64 Arney Road, Remuera. He then took advice from his property lawyer, Mr Michael Sandelin, and instructed the formation of the Lee Findlay Family Trust. Mr Findlay and Mr Sandelin are the two trustees. The Trust acquired title to the property.

[6] Following purchase of the land, Mr Findlay and his then wife, Ms Joanne Findlay (who was not a trustee), began looking at house designs and in time engaged Leuschke Group Architects Limited to design a three-bedroom dwelling which would have a solid plaster look. Mr Findlay by his own admission, and confirmed by Ms Joanne Findlay, had no experience of house building or design. They chose Leuschke Group as their architects because their quotation for design came in substantially lower than two other design quotations.

[7] Mrs L Leuschke prepared preliminary design sketches which Mr Findlay liked, and was convinced by the architect that it was better to build the home at the bottom of the land rather than up at road level, which Mr Findlay originally envisaged.

[8] Mr Findlay's chosen home design was of a three-bedroom family home, clad in stucco, on a rigid backing, with a monier tile slate roof, and a small cantilevered balcony, but with no eaves or verge overhangs.

[9] The architectural design was completed and the building consent was obtained from the local authority in the first quarter of 1996. Mr Findlay's terms of engagement with Leuschke Group was that the architect would carry out all dealings with the local authority and obtain the necessary building consent.

[10] Leuschke Group's quotation included construction supervision but Mr Findlay chose not to engage the architect for construction supervision.

[11] Mr Findlay's testimony was that at that stage of their engagement with the architect, they had lost confidence in Mrs L Leuschke. When asked whether, in their earlier engagements with the architect, they discussed the building process, how to go about contracting builders and how to manage the construction process, Mr Findlay said he could not remember.

[12] Mr Findlay and his then wife, whilst inexperienced at house building, testified that they were concerned about the quality of the finished product. Mr Findlay was surrounded by building expertise; namely Leuschke Group Architects who had quoted (and seemingly most modestly) to supervise the build, and his co-trustee (whom it appears Mr Findlay did not engage with at all concerning the build) an experienced property lawyer. Instead Mr Findlay chose to directly contract with each of the necessary trades and thereby control the building project himself. This included the engaging of the second respondent, Mr Slater, as a labour-only carpenter. As this decision will point out in the section dealing with Mr Slater's responsibility, Mr Findlay failed to find out whether Mr Slater was the appropriate person for the tasks Mr Findlay had in mind.

[13] The building of the claimants' home started in mid 1996 and was completed early in 1997. Mr Findlay and his family, moved into occupation in early February 1997.

[14] The south west corner exhibited a leak some 18 months after occupation. It underwent a targeted repair by a builder whom Mr Findlay had engaged for fencing construction at the time. He was on site working on the fences when the south west corner leaked. Instead of calling Mr Slater back, he chose to engage his then builder to advise and to repair the south west corner leak problem.

[15] Some years later, Mr Findlay noticed dampness in the south west corner and also in the study and the lining under the second bedroom window (upstairs) and other parts of the house started to show signs of deterioration. Mr Findlay in early 2005 called in Prendos Limited, building surveyors who are construction experts. It was upon their advice that Mr Findlay lodged this claim in early September 2005. The WHRS assessor concluded in his report of December 2005 that the concerned dwelling was a leaky home.

ISSUES

[16] The issues for determination of this claim are:

(a) What were the building defects which contributed to the damage, what repairs were necessary and their costs?
(b) What is the liability, if any, of each of the respondents for the damage and consequential costs?
(c) What was the role of Lee Findlay in the construction process and was he contributorily negligent?
(d) Are the claimants, as trustees of a Family Trust, entitled to general damages?

WHAT WERE THE BUILDING DEFECTS WHICH CONTRIBUTED TO THE DAMAGE, WHAT REPAIRS WERE NECESSARY AND THEIR COSTS?

Experts' Evidence

[17] The claimants' expert, Mr Sean Marshall, and the WHRS assessor, Mr Warren Nevill, agreed on the weathertightness risk factors immediately apparent on their respective inspections of the concerned dwelling. These risk factors included monolithic stucco cladding, stucco finishing to ground level, cantilevered balcony, no

eave or verge overhangs, stucco finishing to fascia boards with gaps at ends, unsealed penetrations (pipe work, metres and gas heater) cracking at window and door jambs, no sill flashings and a lack of an adequate fall at the entrance porch.

[18] The second respondent and his co-carpenter, Mr Stewart, assembled the monolithic cladding, the fascia gable junction, partially installed the windows to secure "close in" of the home for roof assembly. The engaged plasterer independently, without any co-ordination with the carpenters, applied the stucco finish including completing the window installations. After both these trades had completed their tasks, Mr Findlay engaged the concreter who imbedded the concrete surrounds into the stucco cladding.

[19] The hearing commenced by panelling the two experts who had reported on the property before remedial work had commenced - namely the WHRS assessor, Mr Warren Nevill, and the claimants' expert, Mr Sean Marshall of Prendos Limited. Included on the panel was the first respondent's expert, Mr Peter Gillingham, and Mr Slater's expert, Mr Newmarsh. Mr Newmarsh had filed his brief of evidence but was not subsequently called by Mr Slater's counsel for cross-examination. It was therefore agreed that the evidence of Mr Newmarsh would be withdrawn and so excluded. I have not given any consideration to Mr Newmarsh's comments while on the experts' panel.

[20] Incidentally, Mr Gillingham and Mr Newmarsh never saw the home before remedial work was completed and indeed have never visited the home. As a consequence I have placed less weight on Mr Gillingham's evidence.

[21] All three experts were of the view that the building site was somewhat difficult, the access down the steep driveway added to the complexity of the build, and because it was an architectural designed home, Mr Nevill and Mr Gillingham both agreed that it was a complex

and somewhat large three-bedroom home with a prominent roof formation. Mr Marshall did not opine that the design of the home had any significant complexity but did agree that it had a higher risk matrix than a house with an eave.

[22] At the hearing the panel of experts agreed on the leak locations, causes and remedial work necessary and based on their findings I conclude that the water ingress damage was due to:

(i) The fascia being buried into the plaster as it should have been spaced off the plaster work;
(ii) The windows did not have sealant protecting the jambs and sills;
(iii) The cladding was embedded in the ground and concrete surrounds; and
(iv) There was no waterproof membrane beneath the tiles on the balcony.

All experts agreed that the house required a full reclad. The remedial costs of $445,420.42 were not disputed after the Council concluded that the master bedroom ensuite did require a full re-build.

[23] The experts' evidence suggested that the lack of proper management of the build, in particular co-ordination and sequential application and supervision of the trades significantly contributed to the defects.

Remedial Costs

[24] The claimant Trust has completed the remedial work which involved a full reclad of the home. As a result the quantum claimed for those repairs is $445,420.42, made up as follows:

Building Consent	$4,605.50
Works Insurance	$807.46

Prendos Limited report for remedial works	$6,215.23
Project management costs	$44,448.33
Reclad costs	$387,789.79
Deck tiles	$1,314.11
Painting report	$240.00
TOTAL – Quantum of claim for remedial works	$445,420.42

[25] The evidence in relation to these costs was given by Mr Sean Marshall, Mr Findlay's expert.

[26] The respondents offered no evidence to dispute the remedial costs after the Council conceded that the main bedroom's ensuite required a full re-build. Accordingly the above mentioned total is the amount the claimant Trust is entitled to claim for the repair costs.

[27] The remedial work involved a total reclad of the home. All experts agreed the remedial work required a full reclad of the home.

Limitation

[28] Mr Slater's counsel submitted that the leak which the claimants noticed about 18 months after occupation was sufficiently concerning that Mr Findlay called in an expert, the builder. Consequently the second respondent's counsel argued that the limitation period for tortious causes of action began from that point in 1998.[1]

[29] I find after examining the evidence that this leak was not sufficiently concerning as to call for an expert. Indeed Mr Findlay simply engaged the builder then working on the Trust property's fences to look at the problem. That builder suggested a fix and repaired it. The Tribunal therefore finds that it was reasonable for Mr

[1] See *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC).

Findlay to believe that the leak had been fixed and therefore this leak was not sufficient to put the claimants on notice that the house was a leaky home. The limitation defence must therefore fail.

POSITION OF THE FIRST RESPONDENT, AUCKLAND CITY COUNCIL – TERRITORIAL AUTHORITY

[30] The claim against the Auckland City Council is that as the responsible territorial authority, it owed the claimant Trust a duty to exercise proper care and skill in carrying out its functions in approving the architectural design plans for the home, inspecting the construction stages of the home, and issuing a Code Compliance Certificate in respect of the finished build of the home.

[31] The claim is that Auckland City Council was negligent in respect of its actions in approving the design plans, in respect of its inspections and approval, and in issuing the Code Compliance Certificate.

[32] In response to those claims, the submissions made by Mr Heaney SC for the Council was that the claimant, as builder/developer of this home, is not owed a duty of care by the Council. Mr Heaney SC cited the decision of Venning J in *Three Meade Street Ltd v Rotorua District Council.*[2]

[33] Three Meade involved a commercial property and a commercial property owner whereby the Court negated that the Council owed a duty of care to commercial property owners in such circumstances. The present case however is factually different to *Three Meade* in the sense that the property in question is a private residential dwelling. Therefore the current law applicable to the present case is *Invercargill City Council v Hamlin*[3] (now supported by

[2] [2005] 1 NZLR 504 (HC).
[3] See n 1 above.

Sunset Terraces,[4] *Byron Avenue*[5] and other recent High Court decisions). These decisions provide unequivocal authority for saying that territorial authorities owe a duty of care to residential homeowners and subsequent residential owners; and will be liable to them for economic loss arising out of defects caused by the Council's negligence in the course of the building process.

[34] Mr Findlay is one of two trustees that owns the subject home and therefore as an owner of this property, he is owed the Hamlin duty of care by those involved in its construction, including the Council.

[35] Moreover, whilst it is accepted that Mr Findlay's role in the construction project was significant, his role does not negate the duty of care owed to him as an owner-occupier of a newly built residence.

[36] I therefore reject Mr Heaney SC's argument and find that the Council owed a duty of care to the claimants as owners of the subject dwelling, regardless of whether Mr Findlay assumed the responsibility of site/project managing the construction of the house, or not.

Issue of Building Consent

[37] Mr Findlay's architect lodged the design plans with Auckland City Council for building consent. Auckland City Council duly processed the building consent application and in March 1996 issued the necessary building consent. This was notwithstanding that there were design details lacking with the plans.

[38] All experts were of the view that there was insufficient detail on the plans; especially concerning the roof and wall junctions, the weathertight junctions between the wall cladding and the windows

[4] *Body Corporate 188529 & Ors v North Shore City Council & Ors* (No 3) [2008] 3 NZLR 479, (HC), Heath J.
[5] *Body Corporate 189855 & Ors v North Shore City Council & Ors* (25 July 2008) HC, Auckland, CIV 2005-404-5561, Venning J.

and the ground levels were not clearly shown relative to the lower edge of the cladding. There was no detail for the balcony construction, for the exterior windows, and no tiling and waterproofing specification details for the deck and outside terrace.

[39] Mr Nevill's evidence was that whilst the plans would conform to the typical standard of the time (1995-1996), nevertheless the plans did not provide sufficient detail in a number of respects. Mr Findlay's experts, Mr Marshall and Mr Cartwright concurred that the plans very clearly lacked detail.

[40] Whilst the consented plans lacked certain design detail, I accept the opinion of Mr Nevill at the hearing that the plans are more specific and of better detail than the plans approved in *Sunset Terraces*.[6] The plans in *Sunset Terraces* were also prepared for consent purposes.

[41] The High Court decided in *Sunset Terraces* that the territorial authority had no liability in respect of issuing the building consent for the plans, notwithstanding their lack of design detail. At para [252] of *Sunset Terraces*, Heath J stated that:

> "... [I]n exercising its 'building consent' function, the Council was entitled to assume that the construction work would be undertaken in conformity with the consent. Importantly, the assessment is predictive in nature. Greater leeway ought to be given to decision-makers who are required to predict what might happen, as opposed to those who determine, with the benefit of hindsight, what did, in fact, happen."

Further at para [545] in relation to the designer's responsibility for the plans and specifications provided for consent, Heath J found that:

> "Despite the faults inherent in the plans and specifications, 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

[6] See n 5 above.

> 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 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."

[42] The claim against Auckland City Council for approving the plans must therefore fail.

Inspections

[43] Sections 43(3) and 76(1) of the Building Act 1991 imposes a duty on territorial authorities (in this case Auckland City Council) to ensure that not only are inspections of the home carried out but also that the home was being built in accordance with the building regulations, and the building work was being conducted by suitably qualified personnel. In addition, during the Auckland City Council's inspections, all reasonable steps were to be taken to ensure that the building work was being inspected and being completed in accordance with the building consent.

[44] The Auckland City Council admitted that its conduct will be measured against that of a reasonable Council officer carrying out the tasks complained of. This principle has been confirmed in two relatively recent High Court decisions: *Sunset Terraces* (supra) and *Byron Avenue* (supra).

[45] It is clearly apparent from recent superior court decisions that the definitive test is not only what a reasonable territorial authority, judged according to the standards of the day, should have observed. A territorial authority may also be liable if defects were not detected due to its failure to establish a capable inspection regime for identifying critical waterproofing issues.

[46] Baragwanath J stated in *Dicks v Hobson Swan Construction Ltd (In Liquidation)*:[7]

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

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

[47] More recently, Heath J stated in *Sunset Terraces* (supra) that:

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

[48] The available Auckland City Council inspection record shows that it undertook 19 inspections during the course of construction, 17 of which are significant for the purposes of this proceeding.

[7] (2006) 7 NZCPR 881 (HC).

[49] Aspects of the Auckland City Council's inspection regime failed to detect significant water ingress defects identified by the experts in this hearing. Moreover despite the Council's failure to notice the defects, it still issued a Code Compliance Certificate. By doing so, the Auckland City Council was negligent.

[50] The final inspection was in April 1999, some two years after the home was occupied; certainly on that site visit the Council should have then detected, if not earlier, the defects, especially the very obvious ground clearance problem. This therefore suggests that the Council did not have a sufficiently effective approval and inspection regime to detect the significant water ingress problems with this home such as cladding embedded in the concrete, windows installed lacking sealant protecting the jambs and sills, the deck lacking a waterproof membrane under the tiles, and the fascia not being spaced off the plaster work.

[51] Based on those findings, the Tribunal accordingly determines that the Auckland City Council failed to carry out adequate and satisfactory building inspections. The building defects agreed by the experts should have been observed when inspections were carried out and the faults ordered to be corrected. The lack of a sufficient inspection regime to detect the significant water ingress problems is not a justification for diminishing the duty of care owed to homeowners.

Causation

[52] The Council submitted that if the Tribunal finds that the Council owed a duty of care to the claimants, there was no causation. It submits that if its inspection had found any one of the three major defects with the build, then the home at that point would still have required a full reclad in any case, as suggested by Mr

Marshall's evidence. On that basis the Council argues that the Council is not causative in any case.

[53] I reject this submission and find that there was causation on the part of the Council in relation to the defects and the loss suffered by the claimants. The preponderance of expert evidence is that the Council's inspection regime should have detected the defects (at least the lack of waterproofing of the window joins and the concrete embedded in the wall cladding). The *Dicks, Sunset Terraces* and *Byron Avenue* decisions all state that the Council's inspection regime must be sufficiently robust to ensure compliance with the Building Act and Regulations. I find that in this case it was not met.

[54] Mr Heaney SC submitted the English Court of Appeal decision of *Performance Cars Ltd v Abraham*[8] as authority for these submissions. That decision states that where a defendant causes further damage to the plaintiff's property which at the time is already damaged and in need of repair, the plaintiff's need for repair did not flow from the defendants' wrongdoing. The Council submits that, like the plaintiff in *Performance Cars*, the claimant in the present case has not suffered any greater burden in the matter of repairing its property and so the Council is not liable for the repair costs.

[55] The evidence of Mr Nevill and Mr Gillingham suggested that if the defects were captured and remedied at the proper time of construction, the required and more targeted fix would have been attended to at that time. There would have been a targeted fix or partial reclad at the time a Notice to Fix should have been issued by the Council. However the critical factors were the timing of the inspections, detection at the early and proper stage in the construction, and the prompt issue of the Notice to Fix, which would have avoided the much greater resulting damage that occurred some years later. In any event, the repair costs would have been

[8] [1962] 1 QB 33.

considerably less had the Notice to Fix been issued – at least by that time both the claimants and the contractor who did the impugned work, would have been on notice of the damage occurring to the home and therefore would have had an obligation to fix such defects at that time as required by the Building Act and the contractor's terms of engagement with the claimants. No such notice was given by the Council and therefore no targeted repairs were carried out.

[56] The Tribunal therefore finds the errors of the Auckland City Council were causative of the major defects experienced by the claimants' home and thereby concludes that the Auckland City Council is liable for the full amount of the established claim.

POSITION OF SECOND RESPONDENT, ROY SLATER – LABOUR ONLY CARPENTER

[57] Mr Findlay's claim against Mr Slater is that Mr Findlay selected Mr Slater with the care appropriate to the occasion and was entitled to leave Mr Slater the building tasks and the site supervision role. Furthermore, Mr Findlay's claim is that the fact that he engaged Mr Slater on a labour-only contract and that he had directly engaged the other contractors did not make him the head-contractor. Mr Findlay claims that Mr Slater owed the claimants a duty of care to ensure that the building work was performed in accordance with the specifications.

Mr Slater's Construction Experience

[58] Mr Findlay contracted with his friend Mr Armstrong for the electrical work. He sought advice from Mr Armstrong concerning house building and it was following such advice that he engaged the second respondent, a carpenter. Mr Findlay visited a recently constructed home (Lovelock home), also monolithic clad, which Mr Slater had worked on as a carpenter. He was impressed with the

finish of that home and the quality of the carpentry work. However that was the sum total of Mr Findlay's "due-diligence" as to the carpentry quality and building experience of Mr Slater.

[59] If Mr Findlay had asked Mr Slater how many homes he had built, he would have learned that Mr Slater had not built any homes from beginning to finish. Indeed, Mr Slater testified that he had no competency or experience with other house building trades and certainly not with their supervision or management. Whilst his life had been in the building industry, it had mainly been with interior carpentry work, alterations and renovations.

[60] The only other monolithic home Mr Slater had involvement with was the Lovelock home which Mr Findlay inspected. But Mr Findlay did not ask Mr Slater his terms of engagement or the extent of his involvement with the Lovelock home. Evidence establishes that the Lovelock home was the first and only home Mr Slater had experience with monolithic cladding.

[61] Whilst that was a monolithic clad home, its roof line extended beyond the wall cladding, it had eaves, and the flashings were at the end of the eaves. That home was different from the design chosen by Mr Findlay.

[62] Although Mr Findlay's evidence is that he chose Mr Slater because he was "a competent" carpenter who came well recommended, I find that based on the above information, Mr Findlay's "due-diligence" of Mr Slater's competency inadequate and that his selection process for site foreman supervisor was flawed.

[63] Mr Findlay stated that he and his then wife, Ms Joanne Findlay, met with Mr Slater on two occasions before engaging him as one of the carpenters on the job. The Findlays' evidence alleges that subsequent to a discussion between Mr Findlay and Mr Slater, Mr Findlay appointed Mr Slater as the site supervisor and foreman. This

was apparently done with the intent and expectation that Mr Slater would oversee the co-ordination of the various trades, the necessary sequential operations, and the quality of the various workings.

[64] In support of his claim, Mr Findlay illustrated that Mr Slater asked for a telephone to be installed on the site, organised a number of Council inspections, and he ordered and accepted the delivery of the pre-build framing timber, Hardibacker sheets, the gib board, and internal doors, amongst other building componentry.

[65] The Tribunal finds that:

i. The permitted specifications provided for a site phone to be installed by the employer, Mr Findlay;
ii. As the employer, Mr Findlay had an obligation to call for Council inspections at the appropriate construction stage; and
iii. Mr Findlay engaged the pre-cut manufacturer and required Mr Slater to order the pre-build and other components when required, but Mr Findlay paid for such materials.

[66] A further illustration provided by Mr Findlay as to Mr Slater's assumption of supervisory control was when Mr Slater noticed sagging in the kitchen ceiling and brought it to Mr Findlay's attention. I prefer Mr Slater's explanation that having noticed this problem he mentioned it to Mr Findlay who then engaged his engineer to find and implement a fix. In any event, Mr Findlay in his evidence stated that he expected Mr Slater to acquaint him with any concerns. Mr Nevill and Mr Gillingham also deposed that it would not be usual for a carpenter engaged on labour-only terms to question the plans of an architect and certainly not to modify an architecturally designed detail.

[67] Mr Findlay's terms of engagement with all the trades involved were not in writing. Indeed he did not reduce any agreement or understanding to writing.

[68] However he appeared to have a clear recollection of some matters, yet lacked total recall of other salient matters, for instance, what he discussed with his architect and co-trustee (if he indeed discussed anything with Mr Sandelin and what he really talked about with Mr Slater). Mr Findlay also had difficulty during the early part of this claim recalling the names of the carpenter and plasterer. Mr Findlay may have believed that he had covered on site management with Mr Slater, which he understood to include the supervision of other trades. I find however, that this was more an assumption of what he understood Mr Slater would undertake.

[69] Mr Findlay recollects he had a lengthy conversation with Mr Slater whereby the understanding was that Mr Slater would be site foreman and his engagement would involve management and supervisory functions regarding the overall build particularly the co-ordinating and sequential management of the other trades. However the Tribunal concludes that this conversation did not take place and that these terms of engagement were not the understanding nor the arrangement he concluded with Mr Slater. Whilst Mr Findlay may believe that this was the arrangement, the Tribunal considers that this was not at all credible and that Mr Findlay is honestly mistaken. I therefore prefer the evidence of Mr Slater and Mr Stewart.

[70] The testimonies of Mr Slater and his co-carpenter, Mr Fraser Stewart deny that Mr Slater was ever engaged as a site supervisor and foreman. Indeed, Mr Slater and Mr Stewart testified that Mr Slater had no competency to direct or supervise other trades. Mr Slater claimed that he and Mr Stewart only ever accepted labour-only roles and were always engaged as carpenters only on labour-only rates for the installation of pre-build framing and cladding delivered to the building site, and any necessary carpentry work inside and out.

They never entered into fixed sum contracts, never assumed responsibility beyond their own trade, and certainly never accepted responsibility for site management or supervision and oversight of other trades.

[71] Mr Slater's evidence is that he ordered building materials (such as those mentioned above) which he required for his tasks from the pre-build manufacturer, engaged by Mr Findlay, whose salesman visited the site on a weekly basis to take such orders, and he arranged such deliveries.

[72] In addition, Mr Slater only recalls attending one meeting with the Findlays where he agreed to the hourly rate (which was to be the same for Mr Stewart) and collected the plans to take to the pre-build manufacturer for a quotation. Mr Slater's evidence is that he was a labour-only carpenter with no project management role and indeed his hourly rate reflected the fact that no supervision was involved.

[73] The labour-only carpenters, Mr Slater and his co-carpenter Mr Stewart, were involved in the carpentry work including the framing-up (the trussing stages, assembly of the pre-cut) of the outside cladding fixing. Once the home was enclosed, they then moved inside to complete the inside work usually undertaken by carpenters. Any role at that point concerning outside completion had ceased for Mr Slater.

[74] I find that Mr Slater's contract was to attend to the carpentry build in accordance with the permitted plans and specifications. Whilst the plans lacked design detail in significant areas, I find Mr Slater complied strictly (as his competency and experience allowed) with the terms of his contract. He performed his carpentry role in accordance with the plans and specifications and so did not breach his labour-only contract. Independent contractors, even labour-only, like Mr Slater, can owe a duty of care in tort to their principals.[9] But such a tortious duty of care is no greater than that which his

[9] See *Riddell v Porteous* [1999] 1 NZLR 1 (CA) Thomas, Keith and Blanchard JJ.

contractual obligations imposed in *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd*.[10]

[75] The clear and credible evidence of Mr Slater and Mr Stewart is that Mr Slater was engaged by Mr Findlay to do what he was told – that is, to undertake the carpentry work in accordance with the permitted plans and specifications. Mr Slater would never assume the responsibility for site management and the co-ordination of other trades. When asked who was in charge of co-ordinating the various trades involved with the build, Mr Stewart responded most definitely, Mr and Mrs Findlay.

[76] The Tribunal accepts Mr Slater's evidence and finds that Mr Slater was employed as a labour-only carpenter with no project management/supervisory/site management role. Mr Slater solely agreed to undertake a labour-only carpentry role and to do just what he was directed to do by the plans and specifications. He was paid an hourly rate of $25.00 by cheque and a lesser sum by cash thereby reflecting the fact that no supervision was involved. Indeed, his evidence, and that of Mr Stewart, is that they only ever undertook labour-only carpentry project with no responsibility or supervisory role involving the entire project and/or management of other trades.

[77] In conclusion, the evidence satisfies me that Mr Slater had no supervisory or managerial role. Instead, I find that Mr Findlay had total control of the contractors throughout the project.

Causation

[78] Section 32(1) of the Building Act 1991 provides that the building works are to be carried out adhering to the specifications. The permitted specifications formed part of the contract between Mr Findlay and Mr Slater, and governed the building work as a whole. Therefore even though the Tribunal has found that Mr Slater cannot

[10] [2005] 1 NZLR 324 (CA), Gault P, Anderson and Glazebrook JJ.

have any responsibility relating to the supervision of the construction, it is still required to look at the work Mr Slater in fact carried out in determining whether he breached his contractual and/or tortious obligations.

[79] There is no dispute that Mr Slater was engaged on a labour-only contract. His contract was to undertake the carpentry work of the build in accordance with the consented plans and specifications. *Riddell v Porteous*[11] is authority for finding that Mr Slater did owe the claimant a duty of care in tort but that duty is no wider than Mr Slater's contractual obligations under his labour-only contract with Mr Findlay.[12]

[80] The evidence has shown that the principal defects causing the losses suffered by the claimants are:

i. Ground clearances and stucco into concrete

[81] Contractors employed by Mr Findlay set the ground clearances before Mr Slater came onto the building site. Concrete contractors also employed by Mr Findlay laid the concrete against the stucco after Mr Slater completed his contract. Mr Slater therefore had no responsibility or liability for this defect.

[82] Mr Findlay chose not to bring a claim against the concrete contractor who took the driveway and paving edges above the bottom of the stucco cladding finish to the home. All experts agreed that this was another significant cause of water ingress and damage.

ii. Cantilevered deck

[83] The experts agreed that the defect with the cantilevered deck was the lack of waterproof membrane, which was the responsibility of the tiler engaged by Mr Findlay and whose role commenced after Mr

[11] See above n 9.
[12] *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd*, above n 11.

Slater and Mr Stewart constructed the framework supporting the deck. Again, no liability attaches to Mr Slater.

iii. Fascia

[84] The problem with the fascia was the juncture between the fascia and the gable. Mr Nevill gave evidence that this was a design defect. Ideally the fascia should have been installed after the plasterer had completed his role. In evidence, Mr Slater stated that he would have removed the fascia had the plasterer asked him.

[85] Mr Findlay engaged the plasterer who came on site after Mr Slater had finished his role with the outside build. Mr Findlay had not arranged any site co-ordination so that there was no engagement between the plasterer and the carpenters. Mr Stewart's evidence was unequivocal. His understanding was that Mr Findlay was in charge of co-ordinating the trades involved. Mr Slater and Mr Stewart were of the view that it was not part of their role to inspect the work of the plasterer.

[86] Mr Slater explained that at that time, houses were built by installing the fascia before the plasterer had undertaken his role so that the pre-lining could be completed promptly thereby enabling the roof to be installed. Mr Slater's practice was that the roof was the main thing to get on and therefore in order for the roof to be put on, Mr Slater said that the fascia and the spouting would have to be firstly installed.

[87] I find that on examination of the evidence, Mr Slater fixed the fascia in accordance with the plans and his then understanding of the required sequence of events so that the house could be closed-in as soon as possible. I therefore conclude that the fault with the fascia is a combination of a design defect, the plasterer's inadequate plastering job, and the lack of onsite oversight of the various trades. Co-ordination of the trades however was the responsibility of Mr

Findlay and not Mr Slater and therefore Mr Slater cannot be found liable for this particular defect.

iv. Aluminium joinery

[88] The windows were installed without adequate flashings or waterproofing sealant down the horizontal and across the sill. I attribute greatly the damage in this area to the lack of oversight and co-ordination of the fixing of the cladding, the window installation, and the exterior surface coating application.

[89] The windows were not truly face fitted, because as Mr Nevill said in response to a question from Mr Heaney SC, the windows went in first. They did not have mechanical jamb and sill flashings as set down in the architect's joinery installation details.

[90] Mr Slater installed the Hardibacker cladding and the windows. Ideally, Mr Slater should not have installed the windows until required, or in conjunction with, the plasterer. I find Mr Slater's window installation, whilst out of sequence with the build, was not, in proportion to the entire claim, sufficient to incur any significant culpability. Because the windows were installed before the stucco, Mr Nevill said it would have been pointless for Mr Slater to put a bead of sealant on the back of the flange because it would have dried some time before the plasterer came on site to apply the stucco. Mr Nevill's evidence is that what was required here was a waterproof sealant to be applied to the back of the window face and pushed on to the stucco to bond with the stucco.

[91] Mr Findlay engaged the plasterer and the plasterer's quotation of 24 May 1996 allowed for the application of "mastic where required". This indicates that the intention was for the plasterer to provide a mastic seal to the external joinery jambs, sills and other penetrations. It would therefore have been obvious to the surface coat applicator that there was no flashing around the window

jambs and sills, indicating that the plasterer would have liability for this damage. Mr Slater should have been called back by the plasterer and/or Mr Findlay to assist at the time of plastering with the re-fit, waterproofing and window installation.

[92] I find that with this house build this was the plasterer's role. The lack of design specifications and supervision of the plasterer were significant causes to this defect.

[93] Furthermore, I find that the claimant ordered the wrong windows as the windows supplied did not provide mechanical flashings for the jambs and sill. This meant that the approved waterproofing was non-existent as the plasterer failed to seal the window and door units. The responsibility for ensuring that the windows and door surrounds were properly flashed, sealed, and watertight therefore lay with the plasterer and Mr Findlay to provide the required detail and supervision for the work to ensure that the installation of the windows were completed to a satisfactory standard. Mr Slater's role in the construction however did not extend this far and therefore he has no liability for this defect.

[94] A significant leak cause, was the fascia ends adjacent to the gable roof which concerned plastering finish up to the fascia, the plasterer's inadequate waterproofing of the window joinery jambs and sill ends was further impugned plastering. Mr Nevill opined that the plastering work was below standard. The Tribunal finds that these water ingress locations, their cause and the resulting damage were all the result of inadequate work by the plasterer. However, Mr Findlay for reasons best known to him did not bring a claim against the plasterer.

Mr Slater's Responsibility - Conclusion

[95] There is no evidence of Mr Findlay discussing with the architect regarding how to go about the build, how detailed the plans

needed to be for a builder, and what details are or are not appropriate to be left for a builder to interpret from the plans. The evidence is that the plans provided no design detail for parts of the carpentry role. The design of this home was complex and given the complexity of the design, the designer provided insufficient site specific details to enable, even a competent builder, to follow the details and construct the home as intended and consented. The Tribunal does not believe that it is appropriate for such details to be left to a labour-only carpenter to design his own solution. Indeed the evidence of Mr Slater is that he was not expecting, let alone accepting, such responsibility.

[96] In this case there is a claim in tort and contract by Mr Findlay against Mr Slater. I have found that Mr Slater had no controlling role in the build. He was not the site foreman or project supervisor. Whilst I agree that Mr Slater owed Mr Findlay a duty of care to carry out his contractual obligations in accordance with their terms, I find that it has not been shown on the balance of probabilities that Mr Slater breached his labour-only contract or was negligent. He therefore had no responsibility for the defects in the build of the home, which have led to this claim.

[97] Given those findings, I find that Mr Slater did not breach his labour-only contract with Mr Findlay. Nor is he liable in negligence for his carpentry work. He is not responsible for any of the water ingress defects. As Mr Slater is not found to be a tortfeasor or to be in breach of contract, he has no liability to the claimants and therefore has no liability to contribute to the first respondent in terms of the Law Reform Act 1936.

POSITION OF MR FINDLAY

Contributory Negligence – Legal Principles

[98] A claimant who sues another in tort, but has failed to take reasonable care in looking after his or her own interests and in that respect has contributed to his or her own loss, may be met with the defence of contributory negligence.

[99] The defence was pleaded by the first and second respondents. The burden of proof is on the respondents.[13] If the defence is successful then the Tribunal may apportion responsibility for the damage between the claimant and respondents under the Contributory Negligence Act 1947. Section 3(1) of the Contributory Negligence Act 1947 is the principal provision and provides:

> "Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage..."

[100] Contributory negligence involves an objective test ruled Stevens J in *Hartley & Anor v Balemi & Ors*:[14]

> "[138] As summarised at [104]-[106] earlier, the question of fault is to be determined objectively and requires the claimant (in relation to his or her own safety) to exercise such precautions as would someone of ordinary prudence. This requires the application of the test of reasonable foreseeability in relation to which the personal equation is eliminated..."

[13] See *Kenny v Dunedin City Corporation* [1920] NZLR 513 (CA) and *Goldstine v R* [1947] NZLR 588 (CA).
[14] (29 March 2007)HC, Auckland, CIV 2006-404-002589 (HC).

[101] Contributory negligence does not depend on a breach of duty. Contributory negligence is a person's carelessness in looking after their own safety.

[102] A person is contributorily negligent if that person ought to reasonably have foreseen that if they did not act as a reasonable prudent person (such as selecting and instructing independent contractors with the appropriate skill and care for the build and to give appropriate instruction and supervision or cause the appointment of someone with that skill and task to oversee), that person would cause harm to themselves. And, as Stevens J determined in *Hartley v Balemi* (supra) there needs to be a causal connection between the fault (contributory negligence) and the loss and relative blameworthiness.

Project / Site Management – Evidence

[103] The building of the home was undertaken by a number of relevant trades, all of whom were directly contracted by Mr Findlay. He mentioned to the WHRS assessor that he was the developer. I have determined that Mr Findlay caused and essentially controlled the build. I find that Mr Findlay was not a "developer" in the sense of that label in *Mount Albert Borough Council v Johnson*.[15] However, by electing to engage and instruct the contracted trades himself, Mr Findlay put himself in the effective position similar to that of a head-contractor and manager of the building project.

[104] Mr Nevill stated that in order to properly build a home with the complexity of this house there would need to be a competent and proper site management co-ordination with the trades throughout. However the evidence establishes that there was no building contractor engaged throughout the entire project with responsibility for the interface between the different trades. Mr Nevill's evidence

[15] [1979] 2 NZLR 234 (CA), Richardson and Somers JJ.

was that the failure with this home build was the lack of interface between the different trades.

[105] Mr Findlay's evidence is that he had covered site management in the appointment of Mr Slater as site foreman. He said Mr Slater understood this role to include supervision of other trades and the quality of their work. However Mr Slater stated that he accepted no such site foreman role or responsibility. Instead he agreed solely to undertake carpentry work and to do just what he was directed by Mr Findlay and by the plans and specifications.

[106] I find that Mr Findlay's subsequent recollection of these events was more an assumption of what he understood rather than what actually occurred. I therefore prefer the evidence of Mr Slater and Mr Stewart and find that in Mr Findlay's building project, the carpenter did not assume any site foreman or project management role.

[107] Mr Findlay's evidence established that he had an understanding (and so too did Ms Findlay) for the importance of managing a residential building project to avoid careless workmanship and defective construction. But the overwhelming evidence of Mr Slater and Mr Stewart, which I find credible, points out that Mr Findlay did not appoint anyone experienced with site management and project oversight roles.

[108] Nor did Mr Findlay take any advice on how to go about contracting the building trades or the importance of written building contracts evidencing the terms of engagement. If he did obtain any such advice from his co-trustee, the evidence suggests that he did not take it. Instead, Mr Findlay left it to himself to organise the construction of this home with no building experience and with no proper building management support.

[109] Mr Findlay said that he made detailed enquiries about how to go about constructing the home. But even though Mr Findlay had the appropriate expertise surrounding him (namely, the architect and his co-trustee, a property lawyer), he nevertheless chose not to enquire of and seek advice from them. Mr Findlay's explanation as to why not was difficult to understand. It is however clear that Mr Findlay was definitely cost-conscious and was concerned with operating within the scope of his budget.

[110] Furthermore, Mr Findlay chose to curtail the involvement of the architects to solely designing the home and providing drawings for consent purposes. He chose not to avail himself of any assistance from the architects who offered to manage the construction process. Had he done so, then their site management would have provided the design details missing from their plans concerning the fascia gable junction, window joints and sill waterproofing, and deck construction and waterproofing.

[111] The decision of *Body Corporate 185960 & Ors v North Shore City Council & Ors* ("*Kilham Mews*");[16] *Gardiner & Anor v Howley & Anor*[17]; *Shepherd & Ors v Lay & Ors*;[18] and the *Wilson & Anor v Welch & Ors*,[19] are all authority for the proposition that by engaging tradesmen on a labour-only basis directly and without engaging someone to supervise their building work, such claimants assume the responsibility often associated with project managers.

[112] Mr St John submitted in response to the defence of contributory negligence, that the law states the standard of care for a claimant is not as great as that of the tradesman respondent and Mr Findlay may only be judged in terms of the standard of the day. Mr

[16] [22 December 2008] HC, Auckland, CIV 2006-404-3535, Duffy J.
[17] [17 May 1994] HC, Auckland, HC 117/92, Temm J.
[18] [11 March 2005] WHRS, DBH Claim No 00939, Adjudicator AMR Dean.
[19] [28 March 2008] WHT, DBH Claim No 04734, Chair PA McConnell.

Nevill opined that it may not have been normal practice in Auckland at the time of this build to employ a project manager, but quality control most definitely demanded that there be a competent site foreman with overall control to make certain the building construction worked. Mr Cartwright stated that often the carpenter acted as site foreman. In this case Mr Slater was not the site foreman. Instead, the following tasks carried out by Mr Findlay during the construction exposes him to the inference that he was the site foreman:

I. Mr Findlay employed all the contractors;
II. Ordered and supervised the supply of materials that the contractors did not themselves organise;
III. Was responsible for communications, organisations, co-ordinating the sequential application with regard to all the necessary contractors, as well as scheduling of their works;
IV. Paid progress payments and ensured that such payments were backed with construction input – that is, by checking the contractors' invoices and approving them for payment by the Trust;
V. All matters pertained to the establishment on site and the dis-establishment of the various building contractors and their respective operations;
VI. Dealt with building detail enquiries (such as detail regarding the ordering of the joinery for windows); and
VII. Checked that standards were met (Mr Findlay was strong on his desire for a quality job, but was equivocal on how this was to be achieved).

Mr Findlay's Role in the Construction

[113] Mr Findlay's counsel submitted that much has been made by the respondents' counsel of "labels" in this case. Mr St John referred

to Heath J's comments in *Body Corporate 199348 & Ors v Nielsen*[20] at para [67] where he said:

> "...[T]he duty is neither justifiable nor inapplicable because a particular label is used to describe a person's function in the development process."

[114] Mr St John submits that the decision in *Riddell v Porteous,* is binding authority in support of the claimant's position that by employing and organising the contractors does not make Mr Findlay the head-contractor nor project manager. Mr St John argued that the Court of Appeal in that case rejected that an owner who hires various contractors becomes the head-contractor or the builder. Instead Mr St John maintains that in *Riddell*, the correct phrase to use in reference to such an owner is "employer" and "contractor". This is consistent with the leading text, *Keating on Construction Contracts*,[21] which states, amongst other things:

> "The employer whose benefit the work is carried out and the contractor who must carry out the work are the principal parties to the construction contract. The employer has frequently been termed "as the building owner", and the contractor of the "builder" or the "building contractor".

[115] The Tribunal's position is that a label used to describe a function carried out by an individual is not determinative. Rather the Tribunal's role is to make a determination of responsibility of a tortfeasor irrespective of the label used to describe the role in a residential building development.[22] The Tribunal will therefore make a determination of the extent of Mr Findlay's responsibility based on the work he carried out.

[116] In response to the argument made by Mr St John, Mr Heaney (and Mr Frogley) submitted that *Riddell v Porteous* is

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[20] [3 December 2008] HC, Auckland, CIV 2004-404-3989, Heath J.
[21] Donald Keating *Keating on Construction Contracts* (Sweet & Maxwell, London, 2006) at 1-003.
[22] See *Patel v Offord & Ors* (16 June 2009) HC, Auckland, CIV 2009-404-301, Heath J. See also *Nielsen*, above n 21.

distinguishable on its facts from this case. Moreover Counsel argued that the findings of fact in that decision cannot be elevated to be a statement of legal position that a homeowner cannot be liable in all situations where various trades are directly engaged by that homeowner on a labour-only basis.

[117] In *Riddell v Porteous*, the Court held that even though Mr Riddell directly contracted with a labour-only carpenter, Mr Riddell was not liable for the building work undertaken by that carpenter. This was because the carpenter in that case, Mr Porteous, had effected an unauthorised plan variation and so Mr Riddell was not found to be the "creator" of Mr Porteous' poor workmanship. The decision reached by the Court in that case was therefore based on its particular facts. Additionally, the Court left open the question of whether Mr Riddell may have been contributorily negligent as contributory negligence was not pleaded.

[118] I reject the claimants' argument concerning *Riddell v Porteous* as that case is clearly distinguishable on its facts for the following reasons. Firstly, the evidence in this case establishes that unlike Mr Porteous, Mr Slater did not depart from the plans and specifications.

[119] Secondly, the co-ordination of the trades was critical in the present case and by his own evidence, Mr Findlay chose to directly contract with each trade involved to ensure that he retained control over and have more input into the quality of the build. Mr Riddell however did not carry out a similar supervisory/managerial role. Instead he simply employed the contractors.

[120] The evidence establishes that whilst Mr Findlay did not physically build the home, he did on inadequate advice decide against engaging a builder under a fixed sum "turn-key" form of contract to carry out the construction's supervisory responsibilities. Therefore with little knowledge of the building industry, Mr Findlay chose to directly engage all the trades involved himself (whether or

not he was properly delegated such authority by his co-trustee). Mr Findlay stated that he felt that the administration and organisational side of the build was not a major concern to him for he could do that quite well. He further stated that he was comfortable about undertaking the organisational side, principally because of his business experience as a line manager with organisational experience.

[121] Finally, even though the Court of Appeal stated in *Riddell v Porteous* that an owner could face liability by way of contributory negligence, the Court did not address that issue as it was not pleaded in that case. Both the first and second respondents however have pleaded contributory negligence in the present case upon the ground that whilst Mr Findlay was not the "creator" of the poor workmanship carried out by the plasterer, concreter and tiler/membrane applicators, the failure to oversee the construction has contributed to the defects. In *Riddell v Porteous,* Mr Riddell was not engaged in a similar role.

[122] Based on these reasons, I find that the findings in *Riddell v Porteous* are properly distinguishable from this case as the present case is factually different from what the Court of Appeal dealt with in *Riddell v Porteous.*

Contributory Negligence - Causation

[123] The specifications provided by the architect, which were submitted to the Auckland City Council for building consent, contained specific provisions about how the building work should proceed. These specifications also named J and L Findlay as employers. Such specifications govern the building work as between Mr Findlay and the Auckland City Council.

[124] Section 32(1) of the Building Act 1991 requires that the building work proceed in accordance with the consented

specifications. Therefore pursuant to section 32 of that Act, Mr Findlay, as employer of the contractors, was obliged to ensure that the work being carried out adhered to the specifications and complied with the relevant building regulations. However I find that Mr Findlay failed to control the building project according to the consented specifications.

[125] As a result, I find that the evidence establishes that the lack of co-ordinating management caused:

(i) The fascia to be buried in the plaster at the gable ends. The essential building defect with the fascia is that the plaster on the gable ends came up to and abutted the fasica ends, so that the differential expansion and weathering of these two different building materials caused gaps to occur between the plaster and fascia to permit water to enter. According to the panelled experts this accounted for something like 40% of the defects suffered by the home;

(ii) Mr Findlay's lack of co-ordinating the window manufacturer and supplier with the carpenter and the plasterer when it came to installation of the aluminium windows. According to the experts this accounted for another 40% of the problems suffered by the house. The window detail was prepared in May 1996 by the architects for the aluminium window supplier and forwarded to Mr Findlay at his then home address. The evidence suggests that that detail did not get passed onto the carpenter and it is uncertain whether the aluminium window supplier had the details. What is clear from the evidence is that there was no co-ordination between the window supplier, the carpenter who partially installed the windows, and, more particularly and of more critical importance, there was no co-ordination between the carpenter and the

plasterer concerning who would install the sealant to protect the windows against water ingress. The plasterer had the last and proper opportunity.

(iii) Mr Findlay engaged the concrete contractor whose work resulted in the plaster cladding being buried in the concrete paving surrounding the house. The panelled experts agreed this defect accounted for 20% of the remedial costs.

[126] These above matters clearly demonstrate that the construction of the claimants' dwelling required proper onsite co-ordination and responsibility. I find that it was non-existent.

Contributory Negligence - Findings

[127] I have found on the balance of probabilities that Mr Findlay, by contracting the trades involved and without engaging someone of competence to supervise their construction work, that he assumed responsibility for the build's management.

[128] I find that the above mentioned failures provided the opportunity for the building defects to occur causing the loss now claimed for. The Tribunal finds that the above carelessness on the part of Mr Findlay was causative of the damage, in the sense that it considerably contributed to the occurrence of the building defects leading to the water ingress and the resulting damage to the home.

[129] Mr Findlay's lack of experience with the building industry and home building, and as his former wife Ms Findlay put it, their naivety, resulted in Mr Findlay controlling the build himself.

[130] Mr Findlay admits in his testimony that he undertook the project with an eye on the budget, but at the same time striving to achieve quality and an imposing building. As a result he did not engage the architects to supervise the works. Neither did he engage

his co-trustee for advice on managing a building job and contracting trades. Instead he engaged all contractors directly saving supervision fees and the margins payable when the builder is hired to take overall responsibility for a project. Mr Findlay unilaterally elected to undertake control of the building project and consequently Mr Findlay shouldered overall responsibility for the project himself.

[131] The architect's plans lacked a number of design details which could have been properly addressed by the architect on site if the architect or a competent building site manager had been engaged to manage the construction process. From the evidence, the plasterer, the concreter and the tiler/membrane applicator, who were all engaged directly by Mr Findlay, are blameworthy, and yet Mr Findlay has not joined any of these three tradesmen to this claim.

[132] I find that his whole objective was to build the home as economically as possible, but, by doing so Mr Findlay failed to take reasonable care in looking after his and his Trust's interests with the building project. That is, he failed to properly instruct, supervise and manage their sequential roles (and by his own admission he had no building experience, so he did not know how). He failed to implement site management and quality supervision. Indeed, he appointed no one to undertake the supervisory role normally undertaken by a contracted project manager or architect (the architect had quoted to undertake such a role). He was, he said in evidence, most definitely aware of the need for project management. He failed to properly and competently manage the project and for that he is to blame significantly for the damage. In failing in this organisational aspect, Mr Findlay took on the responsibility for ensuring the work done by the contractors was done properly, whether knowingly or not.

[133] I agree with Mr Heaney SC's submission that Mr Findlay as employer of the contractors and named employer under the consented specifications did not adhere to the specifications. Just

two examples of Mr Findlay's departures from the specifications were:

(i) Failure to invite tenders from contractors, provide them an approved programme, employ only experienced workers familiar with the materials and specified techniques; and

(ii) Failure to hold site meetings with the architect, the main contractors' representative and the site foreman.

[134] The Auckland City Council when approving the specifications submitted by Mr Findlay, expected, and so provided, that the architect was to supervise construction and the specifications.

[135] Mr Findlay was in control of the building project and thereby assumed responsibility for its management/oversight. As in *Morton v Douglas Homes Ltd*,[23] Mr Findlay's acts and omissions were directly linked to and causative of the significant building defects. Personal involvement with the build does not necessarily mean physical building work – the degree of control, as I have found on the evidence in this claim, can include personal involvement with administering and co-ordinating the construction of the building.

[136] I find Mr Findlay considerably at fault. The evidence establishes that the claimant trust allowed (it seems without any explicit authority of the other trustee) Mr Findlay to undertake and manage the construction of this complex home. In that respect Mr Findlay has failed and so has significantly contributed to the claimant Trust's own loss. I therefore find that the claimant Trust was contributorily negligent to the extent of 85%.

[137] Mr Frogley raised a further defence to the claim, namely *ex turpi non oritor action*: the Court will not assist a claimant whose

[23] [1984] 2 NZLR 548 (HC), Hardie Boys J.

claim is based on their own failure to comply with the Building Act or its regulations – *Holman v Johnson*[24] and *Moore Stephens* (a firm) *v Stone Rolls Ltd (In Liquidation)*.[25] Mr Frogley further submitted that in *Morton v Douglas Homes* (supra) the Court treated the developer as an "owner-builder" and was found to have a non-delegable duty to adhere to the building laws and permit. It has not been necessary to make any determination regarding this defence as I have found in favour of Mr Frogley's defence of Mr Slater having no causation and the claimants' contributory negligence.

ARE THE CLAIMANTS, AS TRUSTEES IN THE FAMILY TRUST, ENTITLED TO GENERAL DAMAGES

[138] The claimant seeks general damages in the sum of $40,000.00.

[139] The essence of the claim for general damages is the anxiety, the stress and the inconvenience and disruption caused to Mr Findlay and his family. In this claim, the claimant is an inter-vivos family trust. Mr Findlay and Mr Sandelin are the trustees. The claimant then are two trustees, not an individual home occupier and owner. Mr Sandelin does not live in the home, nor has he taken any part in this proceeding.

[140] Although not articulated as such in the pleading or in Mr Findlay's evidence, the underlining basis of Mr Findlay's claim for general damages appears to be his family's anxiety and distress as tenants. But Mr Findlay's family are not the owners of the home or claimants in this proceeding. This precludes individual trustees as tenants or occupiers seeking redress. The Tribunal therefore has no jurisdiction to award general damages for individuals who are not owners.

[24] (1775) 1 Cowp 341; 98 All ER Rep 1120.
[25] [2009] UKHL 39 (HL).

[141] Furthermore, the purpose of a Trust is to create a legal persona quite distinct from the person who is the beneficiary. Family trusts are formed for estate planning, asset protection and creditor protection purposes in order to isolate the Trust and its assets from any other property interest or obligations of each of the trustees. The intention then is to ensure the beneficiary is not the owner. In *The Contradictors v Attorney-General*[26], the Court gave a very clear indication of the necessity to treat trustees and beneficiaries as having different interests.

[142] In this case, the Trust is a genuine Trust with an independent trustee, namely Mr Sandelin.

[143] In *Byron Ave*[27] Venning J made various awards in favour of claimants for general damages ranging from no payments to trustees. It is noted that the High Court reached this decision when one of the trustees was an owner-occupier. This Tribunal is bound by this High Court decision to the effect trustees and trusts are unable to obtain general damages.

[144] In *La Grouw v Cairns*[28] the High Court was dealing with an appeal. Whilst the factual situation is unclear, this decision does not support the contention that it is authority for awarding damages for mental distress to occupiers whose occupation is as beneficiary and not owners.

[145] Mr Findlay is not a party to this claim in his own right but only as a trustee.

[26] [2001] 3 NZLR 301; (2001) 15 PRNZ 120 (PC).
[27] See above n 6.
[28] [2004] 5 NZCPR 434 (HC), O'Regan J.

[146] In line with the Tribunal decisions *Hearn & Ors v Parklane Investments Ltd & Ors,*[29] *River Oaks Farm Ltd v Olsson & Ors*,[30] *Crosswell & Anor v Auckland City Council & Ors*,[31] and for the reasons above given, the Tribunal concludes it is statutorily barred from making an order for general damages in favour of a Trust.

[147] The claim for general damages is declined.

CLAIM FOR INTEREST

[148] Mr Findlay claims interest from the date this claim was filed with the Tribunal (7 May 2008) up to the date of determination of this claim. The interest claim is based on the cost of the repair expenses which Mr Findlay's Trust incurred to complete the remedial work.

[149] The Tribunal has power under schedule 3, part 2, clause 16(1) of the Weathertight Homes Resolution Services Act 2006 to award interest at a rate not exceeding the 90-day bill rate plus 2%. The 90-day bill rate at the commencement of the hearing was 2.7%.

[150] I am entitled to order interest at the rate of 4.7% on the amount of the remedial costs, namely $445,420.42. The Act states that "the Tribunal may, if it thinks fit and subject to subclause (2), order the inclusion, in the sum for which a determination is given, of interest…."

[151] The Court of Appeal decision of *Day v Mead*[32] is authority for the proposition that interest is compensatory but the discretion to

[29] Interim Determination (30 April 2009) WHT, TRI 2008-101-000045, Adjudicator R Pitchforth.
[30] (5 August 2009) WHT, TRI 2008-101-000052, Adjudicator CB Ruthe.
[31] (17 August 2009) WHT, TRI 2008-100-000107, Adjudicator SG Lockhart QC.
[32] [1987] 2 NZLR 443 (CA).

so award must be exercised according to what the justice of the case requires.

[152] In this case, the justice of the claim enables the Tribunal to exercise its discretion to order interest. The Tribunal orders interest from the filing of this claim with the Tribunal on 7 May 2008 until the date of this final determination, 16 months, at 4.7% on the remedial costs. The interest ordered amounts to $27,913.00.

CONCLUSION AND ORDERS

[153] The following is the quantum amount that the claimant Trust is entitled to claim for from the Auckland City Council:

The undisputed remedial cost sum fixed by the claimants' expert – repair costs	$445,420.42
Interest at 4.7% on remedial costs for 16 months from 7 May 2008 to 9 September 2009	$27,913.00
Subtotal	**$473,333.42**
Less 85% (contributory negligence)	$402,333.40
Total payable by Auckland City Council to claimants	**$71,000.02**

[154] The Tribunal has found the Auckland City Council breached its duty of care in tort, which it owed to the claimant Trust. Auckland City Council is a tortfeasor or wrongdoer and is liable in tort for the losses suffered by the claimant Trust to the extent outlined in this decision. The Tribunal therefore orders the Auckland City Council to pay to the claimant $71,000.02.

[155] The Tribunal has also found that the second respondent, Mr Slater, is not liable to the claimants in either tort or contract for the work he carried out on the property the claims against the second respondent are accordingly dismissed.

DATED this 9th day of September 2009

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K D Kilgour
Tribunal Member

Statement: The Tribunal has ordered that the first respondent, Auckland City Council, is liable to make a payment to the claimant. If this respondent takes no steps to pay the claimant the amounts ordered, the claimant can take steps to enforce the determination in accordance with law.

These steps can include making an application for enforcement through the Collections Unit of the Ministry of Justice for payment of the full amount which each party has been found liable to pay.

These are various methods by which payment may be enforced. These include:

- An attachment order against income;
- An order to seize and sell assets belonging to the judgment debtor to pay the amounts owing;
- An order seizing money from bank accounts;
- A charging order registered against a property;
- Proceeding to bankrupt or wind up a party for non-payment.