CLAIM NO: 00499

UNDER The Weathertight Homes Resolution Services Act 2002

IN THE MATTER OF an adjudication

BETWEEN	**PETER WILLIAM GRAY and SUSAN FRANCES GRAY**
	Claimants
AND	**TULIP HOLDINGS LIMITED**
	First respondent

(Intituling continued next page)

Hearing:	8 & 9 November 2005
Appearances:	Grant Shand for the Claimants No appearance by or on behalf of the First respondent John Bierre and Andrew Wedekind for the Fifth respondent
Determination:	30 June 2006

DETERMINATION

AND **NORTH SHORE CITY COUNCIL**
(Now struck out)
Second respondent

AND **JAMES MICHAEL FAIRGRAY**
(Now struck out)

Third respondent

AND **RICHARD ARTHUR ZGIERSKI-BOREYKO**
(Now struck out)

Fourth respondent

AND **BROWN DAY ARCHITECTS LIMITED**

Fifth respondent

AND **A J FORD DEVELOPMENTS LIMITED**
(Now struck out)

Sixth respondent

AND **SEAN LAKE**
(Now struck out)

Seventh respondent

AND **NORTH HARBOUR ROOFING LIMITED**
(Now struck out)

Eighth respondent

INDEX

INTRODUCTION

[1] This is a claim concerning a "leaky building" as defined under s5 of the Weathertight Homes Resolution Services Act 2002 (**the Act**).

[2] The Claimants, Peter William Gray and Susan Frances Gray are the owners (**the owners**) of a dwellinghouse located in a multi unit complex at 1/9 Pannill Place, Browns Bay, (**the property**) and it is the owners' unit that is the subject of these proceedings.

[3] The First respondent, Tulip Holdings Limited (**THL**), is a duly incorporated company having its registered office at 1 Antares Place, Mairangi Bay, Auckland and carries on the business as a property developer. THL was previously named Buildcorp Holdings Limited and has been named THL since 29 October 2002.

[4] The Second respondent, North Shore City Council (**the Council**), is the Local Authority responsible for issuing the Building Consent and Code Compliance Certificate for the owners' dwellinghouse.

[5] The Third respondent, James Michael Fairgray is a builder

[6] The Fourth respondent, Richard Arthur Zgierski-Boreyko, carries on business as a draughtsman trading under the name of CAD Technologies.

[7] The Fifth respondent, Malcolm Brown Murray Day Architects Limited (**Brown Day**), is a duly incorporated company having its registered office at the offices of McElroy Dutt & Thompson, Level 2, 161 Manukau Road, Epsom and carries on the business as architects. Brown Day was responsible for designing the units and producing the plans and specifications for them.

[8] The Sixth respondent, AJ Ford Developments Limited, is a duly incorporated company having its registered office at Burns McCurrach, Citibank Centre 23 Customs Street East, Auckland and carries on the business as a builder.

[9] The Seventh respondent, Sean Lake was the project manager in relation to the construction of the owners unit.

[10] The Eighth respondent, North Harbour Roofing Limited, is a duly incorporated company having its registered office at 7 Parkhead Place Albany and carries on the business as a roofer.

[11] On 29 August 2005, the Second, Third, Fourth, Sixth, Seventh and Eighth respondents were struck out as parties to the adjudication proceedings (on application by counsel for the Claimants) on the ground that it was fair and appropriate in all the circumstances, the Claimants having resolved the claims against all those respondents at mediation in the aggregate amount of $90,000.00.

[12] The Claimants elected to continue with their claims against the First and Fifth respondents and on 8 & 9 November 2005 the Claimants' claims against the First and Fifth respondents were heard at the same time as WHRS Claim No.692 – Carter v Tulip Holdings & Ors which was a claim against the same respondents in relation to a similar and neighbouring unit on the property.

MATERIAL FACTS

[13] Distilling the situation as best I can, the relevant material facts are these:

[14] In 1998, Brown Day were engaged by Melview Ponderosa Limited (**Melview**) to prepare drawings and a specification for three blocks of terrace style units for building consent purposes. Brown Day had undertaken previous work for Melview.

[15] After the construction of two of the blocks, Melview sold the development including the plans prepared by Brown Day to Buildcorp Developments Limited. Brown Day was not consulted about the sale.

[16] On or about 6 October 1999, the owners entered into a written agreement to purchase unit 1/9 Pannill Place, Browns Bay, from Buildcorp Developments Limited for $199,000.00 (**the agreement**). The owners bought the unit "off the plans" as it was yet to be constructed.

[17] The owners' unit is on three levels and is one of eight in a block of units built parallel to Pannill Place, Browns Bay. Pannill Place slopes downward from East to West and every second unit in the block steps down from its uphill neighbour by approximately 1.4 metres in order to follow the contours of the ground. The ground also slopes upward to the rear of the properties so that the first floor of each unit opens out to a small rear courtyard/service court a few steps down from the first floor level.

[18] By written deed of assignment dated 17 November 1999, Buildcorp Developments Limited assigned the benefit of the agreement to Buildcorp Holdings Limited (**Buildcorp**) (now THL) and Buildcorp covenanted for the owners' benefit to observe and perform all of the terms and conditions of the agreement contained or implied on the part of the vendor thereunder to be observed or performed.

[19] On or about 18 October 2000 the owners settled the purchase of the property. The purchase price had increased to about $205,000.00 after the owners added some extras to the original specification. Due to financial pressures caused to a large measure by the delay in completion of the unit by Buildcorp, the owners arranged a second loan with Buildcorp for $14,000.00 to be paid over a period of 12 months.

[20] The owners finally moved into the unit on Labour weekend 2000.

[21] The owners began to notice nail popping and cracked joints between the sheets of wall linings after about 3 months and in or about August 2001 the owners noticed a watermark on the ceiling in the lounge. Sometime shortly thereafter the owners also noticed hairline cracks in the textured coating on the inter-tenancy walls.

[22] The owners corresponded with Buildcorp regarding the problems and defects they were experiencing. Buildcorp responded by advising that its plumber would attend to the repair work relating to the shower leak but that the cracking and nail popping etc. is regarded as maintenance work and that the owners might be able to negotiate a reduced rate for that work from the plumber's painting contractor.

[23] The owners sought to withhold the balance of the monies then owed to Buildcorp under the mortgage arrangement until the building defects had been remedied by Buildcorp, however, when Buildcorp threatened legal action to recover the monies, the owners reluctantly paid up.

[24] During a Body Corporate meeting convened in September 2001, other unit owners confirmed that they had noticed cracks had appeared in their units and it was agreed that the Body Corporate would have the matter investigated by Mr Walls of Building Code Consultants Limited. It would

appear that the investigation process and the reporting of the same proved to be unsatisfactory to many of the unit owners and resulted in certain of the unit owners undertaking remedial work on an ad hoc and independent basis. Eventually the angst that was caused by the inability to obtain a common and unified approach to the building problems led to the Body Corporate management company being removed by the owners of all of the units in October 2003.

[25] The lack of a cohesive approach to resolving the problems on the part of all of the owners of units on the property caused the owners in the present case to undertake their own investigations of the Council's property files and to ultimately engage Mr Maiden of Prendos Limited (**Prendos**), building consultants, and Mr Ware of Jump NZ Ltd (**Jump**), building services providers, to identify the problems with their unit and to carry out the rectification work.

[26] By the end of 2003, Jump had completed the rectification work required for units 7 & 8 and had commenced work on unit 3. Jump started work on the owners' unit in May 2004. When Jump removed the cladding by the front door on the bottom level in or about July 2004 and discovered that the timber framing supporting the deck and upper levels was rotten, the owners were advised by Prendos to move out of the unit for safety reasons.

[27] The owners moved out of the unit on 17 July 2004 and rented alternative accommodation in Whangaparaoa until June 2005 whilst the remedial work was completed.

[28] On 13 March 2003 the owners filed a claim with the Weathertight Homes Resolution Service ("the WHRS") and in November 2003, the WHRS Assessor, Mr Stephen Ford, provided a report concluding that the

owners' dwelling was a leaky building and he assessed the cost of repairing the damage to the owners' dwelling at $39,936.00.

[29] It has cost the owners $191,360.44 to carry out the work to remedy the damage caused by the unit being a leaky building. They have also incurred costs of $4,089.94 paid to Prendos for advice/supervision relating to the remedial work, financing costs as a result of obtaining mortgage monies and costs of $15,808.93 for alternative accommodation.

THE HEARING

[30] The hearing of this matter was convened at 10.45am on 8 November 2005 at the WHRS Auckland Office, Level 8 AA Centre, 99 Albert Street, Auckland and continued on 9 November 2005.

[31] The Claimants and the Fifth respondent, Brown Day were represented by counsel at the hearing. The was no appearance for or on behalf of the First respondent, THL.

[32] Mr Ford, the independent building expert appointed by WHRS to inspect and report on the owners' property, attended the hearing and gave sworn evidence.

[33] The witnesses (who all gave sworn or affirmed evidence) in support of the claim were:

- Mrs Susan Frances Gray (Mrs Gray is a Claimant in this matter)
- Mr Peter William Gray (Mr Gray is a Claimant in this matter)

- Mr Richard Linton Maiden (Mr Maiden is a Registered Building and Quantity Surveyor and is employed by Prendos Limited. Prendos was engaged by the owners to identify building defects associated with their unit and to recommend and oversee the remedial work)

- Mr David Ware (Mr Ware is the manager of the Auckland office of Jump NZ Limited. Jump carried out the remedial work on several of the units including that of the owners at Pannill Place, Browns Bay)

- Mr Donald Henderson McRae (Mr McRae is a Registered Architect)

[34] The witnesses (who all gave sworn or affirmed evidence) to defend the claim for the Fifth respondent, Brown Day, were:

- Mr Malcolm Donald Brown (Mr Brown is an Associate of the New Zealand Institute of Architects, an Associate of the Royal Institute of British Architects, and a director of Brown Day, the Fifth respondent in this matter)

- Mr Norrie Johnson (Mr Johnson is a Registered Architect, a principal of Architects Process Consultants in Auckland and a technical editor at Construction Information Limited)

- Mr Dale Christopher Bainbridge (Mr Bainbridge is an architectural designer and consultant, a Registered Master Builder, and a director of Hybrid Residential Limited and Hybrid Construction Limited).

- Mr Mark Christopher Hill (Mr Hill is a Registered Quantity Surveyor and a director of Hughes Hill & Co. Limited, quantity surveyors and construction cost consultants).

[35] I undertook a site visit and inspection of the Claimants' dwelling on the morning of 8 November 2005 in the presence of representatives of the Claimants and the Fifth respondent, and the WHRS Assessor, Mr Ford.

[36] Following the close of the hearing, the Claimants and the Fifth respondent presented helpful and detailed closing submissions which I believe canvass all of the matters in dispute

THE CLAIM

[37] In the Notice of Adjudication filed on or about 10 September 2004, the owners claimed the cost of making the unit weathertight and to repair the damage resulting from the unit being a leaky building, financing costs in relation to monies borrowed for the purpose of effecting repairs to the unit, costs of alternative accommodation whilst repair work was undertaken, general damages in the amount of $20,000.00 each, and $40,000.00 loss in value of the unit by reason of stigma associated with the unit being a leaky building. At the time of filing the Notice of Adjudication, the repair work was not complete and the owners were still residing in rented accommodation.

[38] In the end, the owners claim that it has cost $191,360.44 to carry out work to remedy the damage caused by the unit being a leaky building, they claim $15,808.93 for alternative accommodation on the ground that their unit was uninhabitable whilst Jump carried out repairs, general damages of $40,000.00 ($20,000.00 each) for stress and anxiety

associated with their home being a leaky building, and interest on monies expended in pursuit of effecting the necessary repairs to the unit. The owners elected not to pursue the claim for stigma and do not pursue a claim for costs.

[39] The owners acknowledge that at a mediation on 16 August 2005 they resolved their claims against the Second, Third, Fourth, Sixth, Seventh and Eighth respondents in these proceedings in the amount of $90,000.00 as contribution to their losses, including legal costs. On 8 November 2005, the adjudication hearing commenced against the First respondent, THL, and the Fifth respondent, Brown Day.

[40] The owners accept they cannot recover more than the total amount of their loss from any party, however they say they are entitled to a claim against THL for the entire loss.

[41] During the course of the hearing, the experts for the Claimants and the Fifth respondent met and agreed that the cost of the repair work in relation to those parts of the unit where it is alleged the Fifth respondent's negligence caused loss and damage amounted to $53,886.00. The owners seek an award in that amount from the Fifth respondent together with consequential losses, interest and general damages.

CAUSES OF ACTION

[42] The owners claim against THL in contract. The contractual liability is claimed to arise out of THL's breaches of the terms of the written agreement for sale and purchase of the unit dated 6 October 1999.

[43] The owners claim against Brown Day in tort. There are four allegations of negligent design against Brown Day, namely in respect of the balustrade, problems with the junctions/flashings to the sloping inter-tenancy walls, sub-floor ventilation and drainage issues, and parapet cap flashings. The owners accept that Brown Day had no involvement in the actual construction of the units but say that Brown Day's design/drawings/specifications were defective/deficient and these deficiencies led to water ingress and damage to the unit.

THE DEFENCE FOR THE FIRST RESPONDENT, THL

[44] THL has not denied liability for the loss and damage claimed by the owners in these proceedings and elected not to file a written response to the adjudication claim pursuant to its entitlement under section 28 of the Weathertight Homes Resolution Services Act 2002 (**the Act**). Rather, THL sought to be removed as a party to the proceedings on or about 20 September 2004 and again on 26 August 2005 on the grounds that it had ceased trading approximately 5 years ago and there were no funds or assets held by the company. The applications for removal were opposed by the Claimants and were rejected in each case on the grounds contended for.

[45] THL elected to take no part in the hearing, although it was invited to do so, and was served with all relevant Procedural Orders, claim documents, and notices regarding the hearing date and venue.

THE DEFENCE FOR THE FIFTH RESPONDENT, BROWN DAY

[46] Brown Day accepts that it owes the owners a duty of care as an architect but submits that the duty is not limitless and is circumscribed by the contractual obligations assumed. Brown Day contends that the scope of its obligations was to prepare plans and a specification for building consent purposes only and that its work was of the standard of the reasonably competent and skilled practitioner prevailing at the time the professional services were performed. Brown Day denies that it breached the duty of care that it owed to the owners when it performed the particular professional services that the claim is based on.

THE DAMAGE TO THE CLAIMANTS' DWELLING

[47] It is a significant factor in this claim that the existence and the nature of the damage caused by water ingress and the amount claimed by the owners to carry out work to remedy that damage is not disputed or considered unreasonable in the circumstances by the respondents.

THE CLAIMANTS' LOSSES AS A RESULT OF THEIR DWELLING BEING A LEAKY BUILDING

[48] The owners claim that they have suffered the following foreseeable losses as a result of the First respondent's breaches of the Agreement:

a.	Repairs and associated costs	$191,360.44
b.	Borrowing costs	$ 5,200.00
c.	Alternative accommodation	$ 15,808.93
d.	General damages ($20,000 each)	$ 40,000.00
	Total	$252,369.37

The owners also claim interest at 7.5% per annum on the payments they have made in relation to a & c above.

[49] The owners claim that they have suffered the following foreseeable losses as a result of the Fifth respondent's breaches:

a.	Repair costs	$ 53,886.00
b.	North Shore City Council charges	$ 2,582.50
c.	Prendos diagnosis and assessment	$ 4,089.94
d.	Borrowing costs	$ 5,200.00
e.	Alternative accommodation	$ 15,808.93
f.	General damages ($20,000 each)	$ 40,000.00
		_____
Total		$121,567.37

The owners also claim interest at 7.5% per annum on the payments they have made in relation to a, b, c & e above.

Repair costs

[50] As stated earlier, the repair costs were not contested by THL and are agreed and accepted by Brown Day and the owners to the extent of $53,886.00.

Diagnosis/Assessment

[51] The owners say that in addition to the amount of $181,688.00 that was paid to Jump for undertaking the remedial work, they paid $2,582.50 to the Council for consent fees and $4,089.94 to Prendos for expert advice in relation to reporting and supervising the remedial work.

[52] I am satisfied that in the circumstances of a leaky building, it is entirely foreseeable that an owner will incur costs in relation to obtaining expert advice regarding the nature of any building defects causing or contributing to water penetration and the appropriate remedial work to be undertaken to repair the cause and any consequential damage. An owner would be required in the event of all but the most cosmetic of repair works to obtain a building consent for that work and to pay the appropriate fees. The cost of obtaining such advice and consent to effect repairs thus arises naturally out of the breach of contract contended for in the present case and was foreseeable at the time the agreement was entered into as likely to arise in the event of a breach on the part of THL. The claim meets the test for remoteness of damage established in *Hadley v Baxendale* (1854) 9 Exch 341 and was therefore a foreseeable loss in the event of a breach of the duty of care by the architect.

Alternative accommodation

[53] The owners say that their unit was unsafe and uninhabitable as a result of the water damage and the necessary remedial work undertaken by Jump. The owners claim the aggregate amount of $15,808.93 as damages for alternative accommodation being a bond of $900.00, a letting fee of $337.50 and rent of $14,571.43 up to the time they were able to rent out their unit following completion of the remedial work.

[54] I am satisfied that the claim meets the test in *Hadley v Baxendale* for remoteness and foreseeability to the extent of $14,908.93. There is simply no causal nexus between the loss (if any) associated with the payment of a bond ($900.00) in respect of the owners' alternative rented accommodation and the respondents alleged breaches and that part of the claim fails accordingly.

Interest

[55] The owners claim interest under two heads, namely borrowing costs and interest under clause 15, Part 2 of the Schedule to the Act. First, the owners claim interest for 12 months on $70,000.00 borrowed from Westpac to finance repairs at a rate of 7.5%. Secondly, the owners claim interest at 7.5% per annum on various amounts paid to effect repairs in accordance with certain schedules and calculations attached at Tabs 1 & 2 to their closing submissions.

[56] An award of interest (or financing costs) as common law damages in relation to leaky building claims is intended to reimburse or compensate a claimant for losses incurred as a result of either borrowing money to effect repairs, or the loss of the opportunity for the profitable employment of the Claimant's own funds used to effect repairs, the extent of such loss measured by the commercial value of the money (the amount of interest the funds would have attracted if placed in a bank in an ordinary interest earning account). Interest or financing costs as common law damages are recoverable under both limbs of the rule in *Hadley v Baxendale.*

[57] Under clause 15, Part 2 of the Schedule to the Act, an Adjudicator has a discretionary power to award simple interest at a prescribed maximum rate on the whole or part of any amount determined to be paid to the claimant(s) for the whole or any part of the period between when the cause of action arose and the date of payment in accordance with the judgment.

[58] The effect of the two claims made in the present case is to claim twice for the same loss, or at least for there to be an overlap in part because the $70,000.00 the owners borrowed from Westpac in or about May

2004 (and in respect of which interest is claimed for the following 12 month period) went towards meeting the costs of the remedial work undertaken by Jump, in respect of which costs, interest is also claimed pursuant to clause 15, Part 2 of the Schedule to the Act from the commencement of these proceedings on 8 September 2004. Mrs Gray gave evidence (para. 34 of her brief of evidence) that Jump started work in May 2004.

[59] The Fifth respondent accepts that an Adjudicator has the jurisdiction to award interest on any damages from a date considered appropriate and has agreed that a rate of 7.5% should apply to interest calculations.

[60] I am satisfied that in the circumstances of the claim, the justice of the matter will be served if I assess the amount of the owners claims for interest at the (agreed) rate of 7.5% in accordance with the dates for various payments made by the owners set out at Tabs 1 & 2 of their closing submissions to the date of this determination, as follows:

Alternative accommodation: Total $15,808.93

Made up of $300 per week paid for 48.6 weeks (340 days) until 1 June 2005 together with bond of $900.00 and a letting fee of $337.50 paid in May 2004.

Interest on Bond		
$900 for 340 days at $0.18 per day	$	61.20
Interest on rent and letting fee		
$14,908.93 for 340 days to 1 June 2005		
at $3.06 per day x 50% (for simplicity of calculation)	$	520.20
$14,908.93 from 1 June 2005 to 30 June 2006		
being 395 days at $3.06 per day	$	1,208.70
Total amount of interest - alternative accommodation	**$**	**1,790.10**

Remedial costs:

Interest on monies paid to Strata Titles

$3,000.00 from 1 March 2002 to 30 June 2006		
being 1,582 days at $0.62 per day	$	980.84

Interest on monies paid to the Council

$2,582.50 from 1 June 2004 to 30 June 2006		
being 760 days at $0.53 per day	$	402.80

Interest on monies paid to Prendos

$4,089.94 paid to Prendos as follows:

$ 765.00 on 20 August 2004
$1,755.00 on 30 August 2004
$1,209.94 on 18 September 2004
$ 360.00 on 13 December 2004

$765.00 from 20 August 2004 to 13 December 2004		
being 115 days at $0.16	$	18.40
$1,755.00 from 30 August 2004 to 13 December 2004		
being 105 days at $0.36	$	37.80
$1,209.94 from 18 September 2004 to 13 December 2004		
being 86 days at $0.25	$	21.50
$4,089.94 from 14 December 2004 to 30 June 2006		
being 564 days at $0.84 per day	$	473.76
Subtotal First and Fifth respondents	**$**	**1,935.10**

Add Interest on monies paid to Jump (First respondent)

$181,688.00 from 8 September 2004 to 30 June 2006		
being 670 days at $37.33 per day	$	25,011.10
Total amount of Interest on remedial costs claimed against the First respondent	**$**	**26,946.20**

Subtotal First and Fifth respondents	**$**	**1,935.10**
Add Interest on monies paid to Jump (Fifth respondent)		
$53,886.00 from 8 September 2004 to 30 June 2006		
being 670 days at $11.07 per day	$	7,416.90
Total amount of Interest on remedial costs claimed against the Fifth respondent	**$**	**9,352.00**

[61] To summarise the position therefore, the claimants claim interest on monies they expended in relation to alternative accommodation and remedial costs in the amount of $28,736.30 from the First respondent THL, and the amount of $11,142.10 from the Fifth respondent Brown Day.

LIABILITY FOR LOSS CAUSED BY THE CLAIMANTS' DWELLING BEING A LEAKY BUILDING

The liability of the First respondent, THL in contract

[62] The alleged contractual liability arises out of the warranties contained in the original agreement for sale and purchase dated 6 October 1999 between the owners and Buildcorp Developments Limited (**the Agreement**).

[63] By written deed of assignment dated 17 November 1999, THL (Buildcorp Holdings Limited as it was then named) took assignment of certain agreements for sale and purchase for property at Lots 64 and 65, DP 182128, Pannill Place, Browns Bay, from Buildcorp Developments Limited, including the agreement in relation to the owners' property in the present case. THL covenanted to observe and perform all of the terms

and conditions of the agreements and accordingly became liable for any breaches of those agreements.

[64] Under clause 6.1 of the Agreement, THL expressly warranted inter alia; that the construction of the unit would comply with the Building Act 1991 and that where it had done or caused, or permitted to be done on the property any works for which a permit or building consent was required by law, such permit or building consent was obtained for those works and they were completed in compliance with that permit or consent, and where appropriate, a code compliance certificate was issued for those works.

[65] The decision of the Court of Appeal in *Riddell v Porteous* [1999] 1 NZLR 1 is authority in New Zealand that a vendor will be liable to a purchaser for a breach of warranty that building work done or caused or permitted to be done by the vendor, complies with the Building Act 1991.

[66] Therefore the claim against THL may be dealt with in relatively short order.

[67] Section 7 of the Building Act 1991(in force at all material times) provided that all building work was to comply with the New Zealand Building Code.

[68] The Building Code, then found in the First Schedule to the Building Regulations 1992, contains mandatory provisions for meeting the purposes of the Building Act. The Building Code is performance based, that is to say it states what objectives and functional and performance requirements are to be achieved in respect of building work.

[69] The relevant provisions of the Building Code in this case are B1-Structure, B2-Durability, and E2-External moisture. Those provisions state, inter alia, the following objectives and functional and performance requirements that are to be achieved in respect of all building work:

> "**CLAUSE B1 - STRUCTURE**
>
> OBJECTIVE
>
> (a) Safeguard people from injury caused by structural failure
>
> (b) Safeguard people from loss of amenity caused by structural behaviour, and…
>
> FUNCTIONAL REQUIREMENT
>
> B.1.2 Buildings, building elements and site work shall withstand the combination of loads that they are likely to experience during construction or alteration and throughout their lives.
>
> PERFORMANCE
>
> B 1.3.1 Buildings, building elements and siteworks shall have a low probability of rupturing, becoming unstable, losing equilibrium, or collapsing during construction or alteration and throughout their lives.
>
> B 1.3.3 Account shall be taken of all physical conditions likely to affect the stability of buildings, building elements and sitework, including:…..
>
> (e) Water and other liquids
>
> (m) Differential movement
>
> B1.3.4 Due allowance shall be made for:
>
> (b) The intended use of the building
>
> **CLAUSE B2 - DURABILITY**
>
> OBJECTIVE
>
> The objective of this provision is to ensure that a building will throughout its life continue to satisfy the other objectives of this code.
>
> FUNCTIONAL REQUIREMENT
>
> Building materials, components and construction methods shall be sufficiently durable to ensure that the building, without reconstruction or major renovation, satisfies the other functional requirements of this code throughout the life of the building.

PERFORMANCE

From the time a code compliance certificate is issued, building elements shall with only normal maintenance continue to satisfy the performances of this code for the lesser of; the specified intended life of the building, if any or:…..

CLAUSE E2 - EXTERNAL MOISTURE

OBJECTIVE

E.2.1 The objective of this provision is to safeguard people from illness or injury which could result from external moisture entering the building.

FUNCTIONAL REQUIREMENT

E.2.2 Buildings shall be constructed to provide adequate resistance to penetration by, and the accumulation of moisture from the outside.

PERFORMANCE

E.2.3.2 Roofs and exterior walls shall prevent the penetration of water that could cause undue dampness, or damage to building elements.

E.2.3.3 Walls, floors and structural elements in contact with the ground shall not absorb or transmit moisture in quantities that could cause undue dampness, or damage to building elements.

E.2.3.5 Concealed spaces and cavities in buildings shall be constructed in a way which prevents external moisture being transferred and causing condensation and the degradation of building elements.

[70] It is common ground that moisture entered the owners' dwelling through the external envelope and that there was damage and decay and degradation of the timber framing and interior linings and finishes as a result.

[71] It is clear therefore that the water penetration contravened the provisions of the Building Code Clause E2-External Moisture, the resultant decay and damage to the timber framing contravened Clause B1-Structure, and the resultant damage and reconstruction of the dwellinghouse contravened Clause B2-Durability.

[72] Accordingly, the building work done or caused or permitted to be done by the First respondent as assignee of Buildcorp Developments Limited does not comply with the Building Code and thus the Building Act 1991, and the Claimants have established a prima-facie case that the First respondent THL is in breach of the terms of the Agreement for Sale and Purchase.

[73] Therefore, I find the First respondent, THL breached the terms of the Agreement for Sale and Purchase and is liable to the claimants for damages for that breach in the aggregate amount of $235,005.67 calculated as follows (for general damages see para 141 *et seq*):

Repairs and associated costs	$ 191,360.44
Alternative accommodation	$ 14,908.93
Interest on the above amounts to the date of this determination (see paras. 55-61 supra)	$ 28,736.30
Total	$ 235,005.67

[74] I note that the owners provided further particulars of alleged breaches of the terms of the Agreement by THL including the failure to obtain a code compliance certificate, but in the end, having found against THL for the entire loss caused by water penetration, I am not required to consider those further matters and/or whether they caused or contributed to any extent to the owners' losses.

The liability of the Fifth respondent, Brown Day, in tort.

[75] There are four allegations of negligent design causing loss and damage to the extent of $53,886.00 made against the Fifth respondent architect, Brown Day, namely:

a. The balustrade ($11,850.00); and
b. Problems with junctions/flashings to the sloping inter-tenancy walls (11,376.00); and
c. Subfloor ventilation and drainage issues ($24,660.00); and
d. Parapet cap flashings ($6,000.00).

[76] The law is well settled in New Zealand that an architect or an engineer owes a duty of care to persons whom the architect or engineer should reasonably expect to be affected by their work and may arise out of either negligent design or negligent supervision of the contract works. That position was made clear by the Court of Appeal in *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394, and was subsequently followed in a number of other professional negligence cases including inter alia, *Young v Tomlinson* [1979] 2 NZLR 441, *Warren and Mahoney v Dynes* Unreported 26 October 1988, CA49/88, and *Rowlands v Collow* [1992] 1 NZLR 178. The duty of an architect in tort is founded in the principles derived from the decision in *Hedley Byrne & Co v Heller & Partners Limited* [1964] AC 465, namely that in circumstances where a person is called upon to exercise judgment or skill or to make careful enquiry and he or she knows that another person will place reliance upon it, a duty of care will arise where he or she gives such information or advice or allows that information or advice to be passed on to another person.

[77] Brown Day quite properly accepts that it owes the owners a duty of care to exercise due care, skill and diligence in the execution of its professional duties, but says the scope of that duty is defined by Brown Day's engagement, namely preparing plans and a specification for building consent only. Brown Day denies that it breached the duty of care that it owed to the owners in the present case.

The standard of care

[78] In *Eckersley v Binnie & Partners* [1955-1995] P.N.L.R. 348, Lord Bingham stated at para 17.34:

> The standard is that of the reasonably average. The law does not require of a professional man that he be a paragon combining the qualities of polymath and prophet.
>
> In deciding whether a professional man has fallen short of the standards observed by ordinarily skilled and competent members of his profession, it is the standards prevailing at the time of his acts or omissions which provide the relevant yardstick.

[79] It is common ground that the standard of competence, care and skill that an architect is required to discharge in relation to the execution of his or her duties in any particular circumstance, is that of the reasonably competent practitioner prevailing at the time the services were performed.

Evidence of the standard

[80] Mr Bierre submits that expert evidence that a reasonably competent professional would not have committed the act or omission complained of is essential for finding a breach of duty.

[81] In *Saif Ali v Sydney Mitchell & Co* [1978] 3 All ER 1033, Lord Diplock stated:

> No matter what profession it may be, the common law does not impose on those who practice it any liability for damage resulting from what in the result turn out to be errors of judgment, unless the

> error was such that no reasonably well-informed and competent member of that profession could have made.

[82] Mr Bierre further submits that the evidence should be evidence of the opinion of a reasonable body of the profession, or a recognised practice within the profession and if the evidence is not of this nature it should be discounted as merely being the witness' personal opinion of what should have been done.

[83] In *JD Williams & Co Ltd v Michael Hyde & Associates Ltd* [2001] BLR 99 the English Court of Appeal cited with approval the following passage from the judgment of Oliver J in *Midland Bank Trust v Hett, Stubbs & Kemp (a firm)* [1979] Ch 384, 402:

> Clearly, if there is some practice in a profession, some accepted standard of conduct which is laid down by a professional institute or sanctioned by common usage, evidence of that can and ought to be received. But evidence which really amounts to no more than an expression of opinion by a particular practitioner of what he thinks that he would have done had he been placed, hypothetically and without the benefit of hindsight, in the position of the defendants, is of little assistance to the Court…

[84] In *McLaren Maycroft & Co v Fletcher Development Co Ltd* [1973] 2 NZLR 100 the Court of Appeal overturned the trial judge's finding of negligence on the part of the engineer as the Court was not satisfied that the expert evidence accepted by the trial judge established the existence of a general practice among engineers which had not been followed.

[85] Where there are conflicting views as to what constituted an accepted practice within a profession at a particular time and both views are logically founded and supported by a responsible body of professionals, the court will not attempt to resolve the conflict as it has no expertise to

do so and the onus of proving negligence rests firmly upon the person who alleges it. The test as to whether a professional has discharged the duty of care is that formulated in a medical negligence case *Bolam v Friem Hospital Management Committee* [1957] (**the Bolam test**) and was applied to an architect by the English Court of Appeal in *Nye Saunders & Partners v Alan E Bristow* [1987] 37 BLR 92.

The standard of plans and specifications generally

[86] The real issue in this case, and in many other leaky building claims, is not so much whether the plans and specifications provided by the architect (and I use this term in a generic sense to include all persons who design dwellinghouses) contained construction details that departed from accepted principles of building or engineering and/or whether the design was novel and therefore at the very edge of the established art and science of architecture, but it is entirely to do with the degree of construction detail disclosed in the plans and specifications.

[87] It was the emphatic evidence of Mr McRae, the Claimants' expert architect, that there was and is only one standard for the preparation of plans and specifications, namely that the plans and specifications "are accurate and full enough to show how the building is proposed to be constructed". Mr McRae opined that the drawings should have contained sections through various parts of the dwelling, junctions between the solid balustrade and other building elements, flashing details and weathering details. Mr McRae did concede under cross examination that an adequate set of drawings may not include all drawings normally associated with a "full set of construction drawings", however I gained the very clear impression from him that the only drawings that he considered were not necessary were extremely limited and confined to those that described the most cosmetic of fitout details. I must not be

taken to be criticising Mr McRae's professionalism and the standards that he personally sets and works to, I am certainly not, but I am seized in this case with determining the appropriate standards in relation to the preparation of plans and specifications for residential dwellings by reference to accepted standards and common usage in 1998. It was Mr McRae's evidence that he was involved in designing multi unit high rise developments in 1998 and that he had no personal experience in the preparation of plans and specifications for dwellings with monolithic claddings in 1998 and neither had he had occasion to observe other architects' plans in relation to that type of residential work in 1998.

[88] Mr McRae deposed that the contractual obligations of the architect, and the person to whom those obligations are owed, are irrelevant to determining the standard (and by inference, the degree of detail provided) of the plans and specifications prepared in relation to any project. Mr McRae considered the plans prepared by Brown and Day for the development at Pannill Place, Browns Bay, were deficient and below the appropriate standard of a reasonable and prudent architect and the defective plans and specifications have directly led to the building leaking. I shall deal with the specific allegations of Mr McRae in the sections to follow.

[89] Mr Johnson and Mr Brown expressed opposing views, and both were equally emphatic that the standard of plans and specifications (the degree of detail provided) is largely determined by the contract for engagement. Mr Johnson, Mr Brown and Mr Bainbridge all gave evidence that the plans prepared by Brown Day for the Pannill Place development were of an adequate standard for the purpose of obtaining a building consent and were perfectly adequate for construction. Mr Johnson gave evidence that he was well acquainted with the work of other architects involved in the preparation of plans and specifications

for residential dwellings with monolithic claddings in 1998 because he was reviewing them for his specialised work in preparing contract documents and specifications for use by the profession at that time.

[90] The WHRS Assessor, Mr Ford, who confirmed that he was not an architect, stated that he considered there was a lack of detail for the front balustrades and felt further details on the plans "would have been helpful".

[91] Mr Shand submits that one of the functions of design is to indicate to any contractor what it is that the contractor has to build and that a design will be deficient if it is not comprehensive (*Construction Law in NZ* Butterworths; Tomas Kennedy-Grant QC, para 5.46).

[92] In his closing submissions, Mr Shand accepts that the terms of any contract between the architect and its employer are relevant, but submits they are not decisive in determining the architect's liability. Mr Shand further submits that other factors relevant to determining the extent of the architect's duty/exposure to liability are:

- The vulnerability of the future home owner to mistakes by the architect; and
- The fact that imposition of the duty will encourage professional competence; and
- There is no real risk of indeterminate liability by reason of the 10 year limitation period in the Building Act 1991 (and BA2004) and the limited number of likely claimants; and
- That professionals ought to be more accountable for their products/services; and
- Architects generally carry indemnity insurance and are better able to protect themselves than are future purchasers.

The liability of Architects in NZ NZBLQ 10(3) Sep 2004; pp258-279; Darroch & Watson.

[93] Mr Shand and Mr McRae appear to be advocating that the scope of duty and liability of an architect extends to providing each and every detail necessary for the proper and complete construction of a dwelling in any set of plans and specifications prepared for a dwellinghouse. Mr Ford, on the other hand, merely opines that it would be helpful to have certain construction detail. There is a vast difference between being obliged to provide detail and helpfully providing detail. Whilst it is almost trite to say that more construction detail is better than less, the helpfulness and utility of that state of affairs falls far short of creating a legal duty and liability in the event of a breach.

[94] The extent of an architect's duty to third parties in tort is encapsulated in the passage in the judgment of Richardson P in the Court of Appeal decision in *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394, at 407:

> It is clear that a builder or architect cannot defend a claim in negligence made against him by a third person by saying that he was working under a contract for the owner of the land. He cannot say that the only duty which he owed was his contractual duty to the owner. Likewise he cannot say that the nature of his contractual duties to the owner sets a limit to the duty of care which he owes to third parties…Nevertheless the nature of the contractual duties may have considerable relevance in deciding whether or not the builder was negligent. In relation to a claim against an architect, Windemeyer J in *Voli v Inglewood Shire Council* (1963) 110 CLR 74 put the matter in the following way:
>
> > …Neither the terms of the architect's engagement, nor the terms of the building contract, can operate to discharge the

> architect from a duty of care to persons who are strangers to those contracts. Nor can they directly determine what he must do to satisfy his duty to such persons. That duty is cast upon him by law, not because he made a contract, but because he entered upon the work. Nevertheless his contract with the building owner is not an irrelevant circumstance. It determined what was the task upon which he entered. If, for example, it was to design a stage to bear only some specified weight, he would not be liable for the consequences of someone thereafter, negligently permitting a greater weight to be put upon it.

[95] That passage was subsequently cited with approval by Potter J in *Body Corporate 114424 v Glossop Chan Partnership Ltd & Anor* (unreported, Auckland High Court 22.9.97) in which case the Judge held that the duty of care of the architect to the plaintiff is a limited duty, circumscribed by the task it was contracted to perform.

[96] The learned author of *Construction Law in NZ* (supra) dealt with the issue of the degree of detail to be contained in drawings in the following terms:

> The degree of detail contained in drawings differs according to the stage at which and the purpose for which they are prepared. The question of whether an omission is negligent will be determined by the stage and purpose of the drawings and the nature of the omission. For example, the omission of fixing details may or may not be negligent depending upon whether there is an established fixing practice which can be relied upon as coming within the good trade practice provisions of the specification.

[97] It is clear to me from the evidence and the authorities to which the parties have referred that plans and specifications for a dwellinghouse are instruments of service and the degree of detail provided in plans and

specifications will be circumscribed by the contractual obligations assumed by the architect under the contract for service and will to a large measure be determined by statutory, political and commercial exigencies prevailing at any particular time. Clearly, where plans and specifications for a dwellinghouse include building work that is required to be undertaken outside the scope and requirements of NZS 3604 (the New Zealand Standard Code of Practice for the design and construction of timber framed buildings not exceeding 3 storeys high), namely work requiring specific engineering design, such work requiring specific design shall be sufficiently detailed to enable a reasonably competent building contractor to undertake its proper and effective construction in all respects because it is work sufficiently outside established practice (NZS 3604) such that the good trade practice provisions of a specification cannot be relied upon (See *Construction Law in NZ* - Para 94 supra).

[98] Under the Building Act 1991 (now the Building Act 2004) all building work is required to be undertaken in accordance with the minimum performance criteria specified in the New Zealand Building Code. The Building Code contains the mandatory provisions for meeting the purposes of the Building Act, namely to ensure that buildings perform in such a way as to safeguard people from injury and illness, to safeguard people, particularly those with disabilities, from loss of amenity, to protect other property from damage, to facilitate the efficient use of energy, and to promote sustainable development. Therefore, if construction details are provided by an architect and building work undertaken strictly in accordance with those details fails to meet the mandatory performance criteria prescribed in the New Zealand Building Code because a detail is inherently flawed or a key element, or elements critical to its proper and effective construction are omitted, an architect

will prima facie be liable to the owner of a dwellinghouse for the resultant damage because

[99] If construction details for building work are omitted from plans and specifications and the building work undertaken subsequently fails to meet the mandatory performance criteria prescribed in the New Zealand Building Code, then it follows that the person who undertook that work in the absence of a prescribed detail, is prima facie, the designer of that detail and will be liable in the event of any failure. It seems quite clear to me that that person had two choices, either to ask the principal or the architect for the necessary detail, or to design that aspect of the building work, and if the latter option is chosen then that person shall have no complaint as against the architect and neither will a subsequent owner.

The standard of the plans and specifications of Brown Day

[100] It was the evidence of Mr Brown that the plans and specifications that are the subject of this claim were prepared for the purpose of obtaining a building consent. That was the contractual obligation assumed by Brown Day under the contract for service to its developer client, Melview Ponderosa Limited (**Melview**). There is no evidence that Melview was dissatisfied with the plans and specifications prepared by Brown Day or that Brown Day otherwise breached its contractual obligations.

[101] NZS 3604 1990 (the version of the standard applicable at all material times) provided at clause 2.7 of Section 2 – General, under the heading Building Consent Applications:

> **2.7.1**
> Together with every application for a building consent in accordance with the Building Act 1991 for a building purporting to comply with this Standard shall be included:

(a) A floor plan of each floor level;
(b) An elevation of each external wall;
(c) The type and location of each foundation element (for example: reinforced masonry foundation wall, anchor pile, cantilevered pile, and so on);
(d) Adequate information on all subfloor, floor, wall, and roof framing, including the type and location of each subfloor brace, and wall bracing units assigned to each wall bracing element;
(e) The type and location of cladding, sheathing, and lining.

[102] Mr McRae deposed that BRANZ Bulletin Number 365 dated January 1998 - Acceptable Plans And Specifications, contained the standards for reasonable plans and specifications. Whilst I accept that the recommendations contained therein are laudable, the document is not a standard, and simply "outlines what BRANZ believes are acceptable plans and specifications". The thrust of the document is stated to be to "reduce the possibility of time delays, inaccurate costing and litigation" Accordingly, the bulletin is largely focused on the role of plans and specifications as contract documents and the author acknowledges that "parties need to appreciate that good documentation does have an additional front-end cost, but the benefits gained can offset that cost" which serves to highlight that the views expressed are merely recommendations and not mandatory requirements.

[103] The uncontested evidence of Mr Johnson was that the plans and specifications prepared by Brown Day contained all of the details required pursuant to clause 2.7.1, Section 2, NZS 3604:1990. The (reasonably generic) specifications, so far as they are material to this claim, provided inter alia that the building work was to be executed in accordance with NZS 3604 and that the cladding was to be fixed to timber framing in accordance with the manufacturer's recommendations and to BRANZ Bulletin 326 "Cladding for buildings on exposed sites".

[104] A building consent was issued by the North Shore City Council to Melview for the construction of the units (including that of the owners in this case) at 60 – 65 Pannill Place, Browns Bay, based on the plans and specifications of Brown Day, engineering calculations and details and drainage plans prepared by the project engineers, Projenz Ltd, and acoustic and further engineering details provided by Marshall Day Acoustic Consultants.

[105] It is common ground that Melview sold the development including Brown Day's plans to Buildcorp Developments Ltd and it is accepted by the owners that Brown Day had no involvement in the observation or supervision of the construction of the units.

[106] Mr Brown gave evidence that Brown Day was not requested to provide, and did not provide, any further plans and specifications for the proposed development to THL, the Council, or to any building contractor or supplier involved in the construction of the units at Pannill Place.

[107] The units were subsequently constructed (albeit with certain defects that are the subject of this claim) based on the plans and specifications prepared by Brown Day and the other building consent documentation referred to in para [104] above.

[108] It is clear therefore that the plans and specifications of Brown Day met the requirements of NZS 3604:1990 being the relevant standard prevailing at the time, and although not determinative of their adequacy, satisfied the Council's requirements for plans and specifications for a building consent in 1998. The plans and specifications were clearly sufficient to indicate to the client what could be built on the site and were sufficient to indicate to the contractor what it was that the contractor was to build. The plans and specifications prepared by Brown Day thus

satisfied both limbs of the function of a design set out at para 5.46 of *Construction Law in NZ* and relied upon by Mr Shand.

[109] I accept Mr Johnson's evidence that he was well acquainted with plans and specifications prepared by other architects for monolithic clad residential dwellings in the late in 1990's. On the other hand, Mr McRae acknowledged that he had little or no experience of the practice of the profession in relation to that type of work at the time. Therefore, of the competing views as to the appropriate degree of detail that should have been provided in a set of plans and specifications for a building consent for a monolithic clad residential dwelling in 1998, I prefer the evidence of Mr Johnson to that of Mr McRae. Accordingly I find that the plans and specifications of Brown Day were of an adequate standard, they contained an acceptable and appropriate degree of detail for the nature and complexity of the construction work proposed measured against the general practice of reasonably competent architects prevailing in 1998 and they were neither deficient nor defective by virtue of the omission of further construction detail.

The specific allegations of defective design

[110] To prove negligence and liability on the part of Brown Day in light of my findings herein in respect of the appropriateness of the degree of detail provided by Brown Day and responsibility for the design in the absence of specific detail, the owners will need to establish that the building work claimed to be causative of their loss, did not, and would not have complied with the building code if undertaken strictly in accordance with Brown Day's plans and specifications.

Sub-floor drainage and ventilation issues

[111] There are two separate allegations:

(a) The plans failed to show a subsoil drain to the concrete block retaining wall between the units; and

(b) Insufficient ventilation was provided to the sub-floor areas.

[112] It is common ground that no drain coil is shown at the foot of the retaining wall on Plan C06b.

[113] Mr Brown gave evidence that all drainage work and retaining walls and associated works were designed and specified by Projenz and not Brown Day.

[114] Mr Johnson and Mr Bainbridge gave evidence that a builder with even the most basic of skills would know that a drain coil, water proofing and free draining backfill are required in these circumstances.

[115] I am satisfied that Brown Day was not obliged to design or detail any drainage work in relation to the Pannill Place development and that that work was undertaken independently by Projenz. Accordingly Brown Day has no liability for that drainage work (or any failure related thereto) and in respect of which it did not assume, either expressly or impliedly, any responsibility or legal obligations.

[116] Even if I were wrong in reaching that conclusion, there is simply no evidence that the drain coil was not installed and if so, whether any damage resulted from same. Accordingly, the omission was not causative of the loss.

[117] As regards the subfloor ventilation, the evidence of Mr Johnson, which was accepted by Mr McRae, was that the detail provided on the plans to prevent subfloor dampness, namely the provision of subfloor ventilation openings and a damp proof ground cover to the subfloor area conformed with the relevant standard, namely NZS 3604:1990, section 4.8.2, para. (f). The standard provides for either ventilation or a damp proof ground cover. Mr Johnson's evidence was also that Brown Day's drawing met the standard of the profession at the time.

[118] The owners' unit was constructed without the damp proof ground cover specified by Brown Day resulting in mould growth on the timber joists.

[119] The detail provided by Brown Day to prevent subfloor dampness complied with the provisions of the relevant standard, namely NZS 3604:1990 and therefore I am satisfied that Brown Day exercised the requisite degree of care and skill in relation to detailing the subfloor construction. Accordingly, I determine that Brown Day's plans and specifications were not defective in this respect and Brown Day did not breach the duty of care that it owed the owners in relation to designing the subfloor construction and is not liable for any of the owners' loss in the amount of $24,660.00 associated with the subfloor remedial work.

Problems with the balustrades and the inter-tenancy walls

[120] In his report at paragraph 5.1.1, the WHRS Assessor, Mr Ford, identified that the cause of water entry into the owners' unit included flat tops to hand rails and part walls that allowed exterior walls to absorb significant amounts of water affecting the untreated timber within.

[121] The problems with the balustrade and the inter-tenancy walls can conveniently be dealt with together because they involve the same issue and the same allegations i.e. that no detail for flashings was provided.

[122] I am mindful that this issue must be considered in light of the fact that the plans and specifications for the owners' dwelling were prepared in 1998, four years before the leaky building crisis hit New Zealand in 2002 and became the focus of both the Report of the Overview Group on Weathertightness of Buildings (**the Hunn Report**) prepared for the Building Industry Authority and the Select Committee inquiry into weathertightness that ultimately led to the revision of NZBC Clause E2-External Moisture in 2005.

[123] In his brief of evidence dated 3 March 2005 para 16(5), Mr McRae identified that there were no details in any drawings of the capping flashings to the solid balustrade. It was also Mr McRae's evidence that a reasonable and prudent architect ought to have detailed the top of a solid balustrade so that it met the quality of the design, the needs of the client, and so that it was waterproof. In his view, not to provide that detail was negligent.

[124] Mr Johnson's evidence was that in mid to late 1990's it was not common practice for architects to provide details for flashings to parapets and balustrade walls for monolithic clad buildings.

[125] I accept Mr Johnson's evidence as properly stating the position in 1998, and significantly, Mr McRae properly conceded in cross-examination that it would not have been the practice of the profession at the time to include details of flashings over balustrades or inter-tenancy walls in drawings in 1998, particularly where there were adequate construction details included in a major product supplier's technical manual.

[126] The specification at Section 3101 Cladding, para 411, required the builder to fix the cladding to the manufacturer's recommendations. Section 1101 Preliminary and General, para 107 provided that the manufacturer's recommendations, instructions, specifications or details issued by them for their particular material, product or component means the latest edition.

[127] The relevant product manual for the cladding therefore was the James Hardie Building Products Technical Information for Harditex – July 1998 (**the Manual**). The Manual which ran to some 40 pages, included almost 70 carefully drafted and detailed drawings for fixing and finishing Harditex fibre cement sheet cladding including, notably, a fibreglass reinforced AGA Superflex 1 or similar membrane flashing detail for parapets that was described as being back-up waterproofing to the texture coating. Relevantly under Section 6 of the Manual, New Zealand Building Code (**NZBC**) Compliance, readers were advised that Harditex would meet certain provisions of the NZBC including E2 External Moisture "if used in accordance with this specification".

[128] Mr Maiden gave evidence that there was no evidence of any flashing material whatsoever when the Harditex cladding was removed during the course of the remedial work.

[129] Mr McRae accepted that the Harditex detail would have been an appropriate flashing for the parapets and the inter-tenancy walls and that a competent tradesman would have had access to the Manual containing the relevant detail.

[130] I accept Mr Johnson's evidence as convincing that it was not common practice for architects to provide details for flashings to parapets and balustrade walls for monolithic clad buildings in 1998. In the

circumstances I am satisfied that by specifying that the cladding was to be fixed to the manufacturer's latest recommendations, Brown Day's plans and specifications were not defective, that Brown Day did not breach the duty of care that it owed the owners in relation to the preparation of its plans and specifications and Brown Day is not liable for any of the owners' loss in the amount of $23,226.00 for remedial work to the cladding and the associated and resultant damage to the dwelling.

Parapet cap flashings

[131] This issue can be dealt with in relatively short order.

[132] Mr Ford reported that the parapet cap flashing did not provide sufficient cover over the corrugated metal roofing and Mr Maiden identified that the incorrect and in some cases non-installation of parapet wall cap flashings was a major reason for water ingress and resultant damage to the owners' unit.

[133] Mr McRae expressed the view that the detailing of the parapet cap flashing, being detail A on drawing CO7a was inadequate in that it did not show sufficient height from the roofing and was detailed as 'one piece' rather than a cap over two apron flashings.

[134] In the end however, the roofing material specified by Brown Day was changed by the developer from corrugated metal to concrete tile that necessitated the use of a different flashing material and flashing detail. Brown Day was not involved in that decision and can have no responsibility for any loss due to a failure of the materials and/or flashings that were used and that it did not detail or specify.

[135] Accordingly any loss that may have resulted from the changed specification was not caused by any defect in Brown Day's plans and specifications and Brown Day is not liable for any of the owners' loss in the amount of $6,000.00 for remedial work to the parapet cap flashings and the associated and resultant damage to the dwelling.

Summary of claims against the Fifth respondent

[136] To summarise the position of the Fifth respondent architect, I determine that:

- The standard of competence, care and skill that an architect is required to discharge in relation to the execution of his or her duties in any particular circumstance is that of the reasonably competent practitioner prevailing at the time the services were performed.

- The standard should be established by evidence of the opinion of a reasonable body of the profession, or a recognised practice within the profession, and if the evidence is not of this nature it should be discounted as merely being the witness' personal opinion of what should have been done.

- The test as to whether an architect has discharged the duty of care owed to another or others is that formulated in a medical negligence case *Bolam v Friem Hospital Management Committee* [1957] (**the Bolam test**), namely whether there was evidence that at the time the service was provided a responsible body of architects would have taken the view that the way in which the subject of enquiry carried out his or her duties was an appropriate way of carrying out that duty, and would not hold him or her guilty

of negligence merely because there was a body of competent professional opinion which held he was at fault. The threshold for negligence is thus set appropriately high.

- Plans and specifications for a dwellinghouse are instruments of service and the degree of detail provided in plans and specifications will be circumscribed by the contractual obligations assumed by the architect under the contract for service and will to a large measure be determined by statutory, political and commercial exigencies prevailing at any particular time.

- No regulations have yet been made under the Building Act 2004 in respect of the plans and specifications required to be submitted for a building consent. The adequacy/extent of documentation (plans, specifications and other information) for a building consent has, to date, been such that satisfies a territorial authority/building consent authority on reasonable grounds that the provisions of the building code would be met if the building work was properly completed in accordance with the plans and specifications submitted with application.

- A notation on architectural drawings, or a reference in a specification to a requirement that certain work be undertaken in accordance with NZS3604 or a recognised product manufacturer/supplier's technical recommendations, will be adequate specification (subject to any statutory, political and commercial exigencies prevailing at any particular time) to incorporate all of the technical requirements and/or construction details therein into the project plans and specifications without the need to reproduce those requirements and/or details *mutatis mutandis,* in whole, or in part, because NZS3604 and recognised

technical publications such as the James Hardie Manual are in universal usage and are readily accessible by any tradesman.

- Building work falling outside the scope of NZS 3604 requiring specific engineering design shall be sufficiently detailed to enable a reasonably competent building contractor to undertake its proper and effective construction in all respects because it is work that falls outside established practice such that implied terms of good trade practice and common usage cannot be relied upon.

- If construction details are provided by an architect and building work undertaken strictly in accordance with those details fails to meet the mandatory performance criteria prescribed in the New Zealand Building Code because a detail is inherently flawed or a key element, or elements critical to its proper and effective construction are omitted, an architect will prima facie be liable to the owner of a dwellinghouse for the resultant damage. The liability arises because under the Building Act 1991 (now the Building Act 2004) all building work is required to be undertaken, and by necessary implication designed, in accordance with the minimum performance criteria specified in the New Zealand Building Code.

- If construction details for building work are omitted from plans and specifications and the building work undertaken subsequently fails to meet the mandatory performance criteria prescribed in the New Zealand Building Code, then the person who undertook that work in the absence of a prescribed detail, is prima facie, the designer of that detail and will be liable in the event of any failure thereof.

- The plans and specifications of Brown Day were of an adequate standard, they contained an acceptable and appropriate degree of detail for the nature and complexity of the construction work proposed measured against the general practice of reasonably competent architects prevailing in 1998 and they were not deficient or defective by virtue of the degree of detail provided, or omitted there from.

- The building work claimed to be causative of the owners' loss was not undertaken in accordance with the plans and specifications prepared by Brown Day. There is no evidence that the building work would not have complied with the NZBC if it had been undertaken strictly in accordance with Brown Day's plans and specifications.

- The owners' loss was not caused by any deficiency or defect in Brown Day's plans and specifications.

- Brown Day did not breach the duty of care that it owed the owners in relation to the preparation of its plans and specifications and Brown Day is not liable for any of the owners' loss. The claim against Brown Day in negligence fails accordingly.

THE CLAIM FOR GENERAL DAMAGES

[137] The owners claim general damages in the amount of $20,000.00 each for stress, depression, career disruption, relationship problems, the inconvenience associated with the repair work, and loss of enjoyment of their property whilst the defects were identified and remedied.

[138] I accept in principle that general damages can be awarded for stress, anxiety, disturbance and general inconvenience that was foreseeable in the event of a breach of a contract where the object of the contract was to bring about pleasure, enjoyment, relaxation, peace of mind or freedom from distress and the contract concerns one's personal, family or social interests, or, for stress, anxiety, disturbance and general inconvenience that was a reasonably foreseeable or contemplated consequence of a respondent's breach of a duty of care owed to a Claimant i.e. in a negligence cause of action.

[139] In *Waitakere City Council v Sean Smith* CIV 2004 - 090 - 1757, 28 January 2005, an appeal from my determination in Claim No. 00277, Judge FWM McElrea held in a reserved judgment issued on 28 January 2005, at para 78, that:

> "Standing back and looking at the matter overall, I am clear that the purpose and intent of the Act is not inconsistent with a power to award general damages but is in fact enhanced by it. Both in s29 dealing with jurisdiction and in s42 dealing with the substance of decisions, parliament used the widest language possible, and it would be inappropriate for the courts to try and cut that down so as to impose restrictions on the jurisdiction of the WHRS. The Act should be interpreted in a way that allows it to afford the fullest possible relief to deserving claimants."

[140] In *Maureen Young and Porirua City Council v Dennis and Jane McQuade & Ors* CIV–2003–392/2004 Judge Barber followed Judge McElrea's decision, and in that case, increased the amount awarded by the Adjudicator for general damages.

[141] I accept without hesitation Mr and Mrs Gray's evidence that they have suffered considerable stress, anxiety, inconvenience and disruption to their careers, their family and social interests, and that their personal

relationships have suffered under the pressures of dealing with their family home (which they understood to be new, well built and relatively maintenance free) being a leaky building.

[142] Accordingly, in the context of a long line of New Zealand property cases where awards for distress and anxiety have been made including inter alia: *Stieller v Porirua City Council* [1986] 1 NZLR 84(CA), *Rollands v Collow* [1992] 1 NZLR 178*, Chase v De Groot* [1994] 1 NZLR 613, *A-G v Niania* [1994] 3 NZLR106 at 113, *Stevenson Precast Systems Ltd v Kelland* (High Court Auckland, CP 303-SD/01, it is my view that Susan and Peter Gray should each be able to recover distress damages from a respondent, or respondents, found liable for breach of contract, or breach of the duty of care.

[143] A detailed examination of the authorities to which I have referred, discloses that the approach of the courts has generally been to award a modest amount for distress damages to compensate the stress and anxiety brought about by the breach, and not the anxiety brought about by the litigation itself.

[144] A review of the twelve WHRS determinations in respect of which awards of general damages have been made to date, discloses that awards have been made within the range of $2,000.00 - $18,000.00 for any one claimant. I am satisfied that an award of general damages in the amount of $10,000.00 for each of the owners in this matter falls within the established parameters for awards in relation to leaky building claims and recognises the degree of stress, anxiety, inconvenience and the loss of enjoyment of the property that I apprehend the owners have suffered in this case.

QUANTUM - THE EXTENT OF THE CLAIMANTS' LOSS

[145] A mediation on 16 August 2005 resolved the claims against all other respondents. At the mediation the owners accepted $90,000.00 as contribution to their losses, including legal fees.

[146] Mr Shand submits that the owners cannot recover more than their loss from any party and further submits that the owners are entitled to an order against THL in these proceedings for the entire loss.

[147] Mr Shand's submissions are only partially correct. A claimant may not recover damages for more than his or her whole loss: full satisfaction of the claimant's claim is always a bar to further proceedings. The owners reached a compromise with all other respondents in August 2005. Therefore the owners have had, or are to receive (enforcement of course is a matter for the owners) $90,000.00 towards their losses and costs in relation to this claim. The Claimant's Memorandum dated 8 November 2005, disclosed costs incurred to the extent of $21,468.23 to the end of August 2005. They would have incurred further costs in relation to preparation for and attendance at the hearing and attendance on closing submissions. Accordingly, I am satisfied in the circumstances that the justice of the matter will be satisfied if I set an allowance for costs in relation to the settlement amount of $20,000.00. Therefore the amount the owners are entitled to receive from the First respondent in these proceedings as special damages (no liability has been found in relation to the claim against the Fifth respondent) is as follows:

Compensation for repairs and associated costs	$191,360.44
Compensation for alternative accommodation	$ 14,908.93
Interest on the above amounts to the date of this determination (see para 55-61)	$ 28,736.30

Subtotal	$235,005.67
Less settlement amount agreed with other respondents adjusted to recognise the owners costs	($ 70,00.00)
Total loss	**$165,005.67**

[148] That is the maximum amount that in my view the claimants can now recover from the respondents as special damages in these proceedings, they having reached a compromise with the other respondents.

COSTS

[149] The power to award costs is addressed at clause 43 of the Act, which provides:

> **43 Costs of adjudication proceedings**
>
> (1) An adjudicator may determine that costs and expenses must be met by any of the parties to the adjudication (whether those parties are or are not, on the whole, successful in the adjudication) if the adjudicator considers that the party has caused those costs and expenses to be incurred unnecessarily by-
>
> (a) bad faith on the part of that party; or
>
> (b) allegations or objections by that party that are without substantial merit
>
> (2) If the adjudicator does not make a determination under subsection (1) the parties must meet their own costs and expenses.

[150] I think it is fair to summarise the legal position by saying that an Adjudicator has a limited discretion to award costs which should be exercised judicially, not capriciously.

[151] The owners do not make any further claim for costs against the respondents in relation to these proceedings.

[152] I am not persuaded that the owners acted in bad faith in bringing their claim against Brown Day or that their case was without substantial merit such that an award of costs against the owners would be appropriate in this case.

[153] I therefore determine that the parties shall bear their own costs in this matter.

CONCLUSION AND ORDERS

[154] For the reasons set out in this determination, and rejecting all arguments to the contrary, I determine:

[a] The First respondent, Tulip Holdings Limited, is in breach of contract and is liable to the Claimants jointly in damages for the loss caused by that breach in the sum of $165,005.67.

[b] The First respondent, Tulip Holdings Limited, is in breach of contract and is liable to Susan Frances Gray in general damages for stress anxiety and inconvenience caused by that breach in the sum of $10,000.00.

[c] The First respondent, Tulip Holdings Limited, is in breach of contract and is liable to Peter William Gray in general damages for stress anxiety and inconvenience caused by that breach in the sum of $10,000.00.

Therefore, I make the following orders:

(1) The First respondent is liable to pay the Claimants jointly the sum of $165,005.67.

(s42(1))

(2) The First respondent is liable to pay Susan Frances Gray the sum of $10,000.00.

(s42(1))

(3) The First respondent is liable to pay Peter William Gray the sum of $10,000.00.

(s42(1))

(4) Each party shall bear its own costs and expenses in this matter.

(s43(2))

(5) The amounts referred to in (1), (2) & (3) above shall carry interest at the rate of 7.5% simple interest from 1 July 2006 to the date of payment.

(Clause 15(1) Part 2, the Schedule to the Act)

Dated this 30th day of June 2006

_____

JOHN GREEN

ADJUDICATOR

STATEMENT OF CONSEQUENCES

IMPORTANT

Statement of consequences for a respondent if the respondent takes no steps in relation to an application to enforce the adjudicator's determination.

If the adjudicator's determination states that a party to the adjudication is to make a payment, and that party takes no step to pay the amount determined by the adjudicator, the determination may be enforced as an order of the District Court including, the recovery from the party ordered to make the payment of the unpaid portion of the amount, and any applicable interest and costs entitlement arising from enforcement.