

IN THE WEATHERTIGHT HOMES TRIBUNAL

**TRI-2011-100-000011
[2012] NZWHT AUCKLAND 6**

| | |
|---------|---|
| BETWEEN | FRASER HALL AND DUNCAN BINNIE Claimants |
| AND | AUCKLAND COUNCIL First Respondent |
| AND | ULSTER PROPERTIES LIMITED Second Respondent |
| AND | MARK ALLAN BLACK Third Respondent |
| AND | BRUCE BEAZLEY Fourth Respondent |
| AND | KEVIN WILLIAM ANDERSEN (<u>Bankrupt and Removed</u>) Fifth Respondent |

Hearing: 5, 6 and 7 October 2011 (Closing submissions on 12 October 2011)

Appearances: Glenn Satherley, for the claimant
Jo-Anne Knight and Marie Harrison, for the first respondent
Bill Endean, for the third respondent
David Wilson, for the fourth respondent

Decision: 16 February 2012

FINAL DETERMINATION
Adjudicator: S Pezaro

[1] Fraser Hall owns Unit 16A/15 Harrison Road, Ellerslie and Duncan Binnie owns Unit 16. These two units form a duplex and both units are leaky buildings.¹ Mr Hall and Mr Binnie (the claimants) repaired their units before they filed their application for adjudication. They now claim the cost of totally recladding their units, consequential losses and general damages. At hearing the claimants reduced the amount claimed for remedial costs after James White, their expert on quantum, accepted that some deductions made by the Council's expert, Keith Rankine, were reasonable.

[2] The amount now claimed is:

| | |
|---|---------------------|
| Unit 16A (repairs & consequential losses) | \$258,058.89 |
| Photocopying | \$953.00 |
| General damages | \$25,000.00 |
| TOTAL 16A Hall | \$284,011.89 |
| | |
| Unit 16 (repairs & consequential losses) | \$253,155.15 |
| Photocopying | \$953.00 |
| General damages | \$25,000.00 |
| TOTAL 16 Binnie | \$279,108.15 |

[3] The Auckland Council, the first respondent, issued the building consent, carried out all building inspections and issued the Code Compliance Certificate. It is claimed that the Council should not have issued the building consent because the plans did not contain sufficient detail and that the Council was negligent when carrying out the inspection process and issuing the Code Compliance

¹ These units are held in unit title ownership and do not have any common property. The units are therefore defined as a standalone complex under the Weathertight Homes Resolution Services Act 2006 (the Act).

Certificate. The second respondent, Ulster Properties Limited, sold the units to the claimants. The original claim against Ulster was for breach of vendor warranties contained in the sale and purchase agreements. The amended claim pleaded in the alternative that Ulster was the developer. In opening submissions Mr Satherley stated that Ulster was the developer but had not traded for some time and was likely to be irrelevant to recovery. No further submissions were made on Ulster's liability and no evidence has been adduced to support the claim of developer. For these reasons the claim against Ulster is dismissed.

[4] The third respondent, Mark Black, was the builder employed by Winslow Properties Limited, one of several companies related to the second respondent. Mr Black accepts that he carried out certain aspects of the construction but denies liability for the defective work. Bruce Beazley, the fourth respondent, was employed by Winslow as the project manager. Mr Beazley denies that he owed a duty of care and that he caused any loss to the claimants. The fifth respondent (now removed), Kevin Andersen, was the sole director of Winslow.

[5] The issues that I need to decide are:

- a) What defects caused the units to leak?
- b) What is the appropriate scope and cost of remedial work?
- c) What are the reasonable consequential losses?
- d) What general damages should be awarded?
- e) Was the Council negligent in issuing the building consent, carrying out inspections or issuing the Code Compliance Certificate? If so, has its breach caused loss?
- f) Did Mr Black breach his duty of care to the claimants causing loss?
- g) Was Mr Black prejudiced by not being notified of the claim until repairs were completed?
- h) Did Mr Beazley owe a duty of care to the claimants? If so, did he breach it causing loss?

- i) Was either of the claimants contributorily negligent? If so, to what extent?
- j) How should liability be apportioned between the liable respondents?

DEFECTS

What were the primary defects?

[6] The claimants' expert, David Medricky, and the Council's expert, Keith Rankine, inspected the units before the remedial work began and during remediation. The WHRS Assessor, Mark Hadley, carried out an inspection and invasive testing in 2007 then issued his report. Because the application for adjudication was filed after the repairs were completed, Mr Hadley did not inspect the units again. Alan Light, was the expert engaged by Mr Black. Mr Black was not notified of the claim until the repairs were complete and Mr Light did not observe the remedial work. At the experts' conference the five primary defects identified were the incorrect installation of the:

1. concealed internal gutters;
2. apron flashings;
3. inter-storey joints and bands;
4. windows on the east elevation in the fibre cement weatherboards; and
5. balustrades on the east deck (lack of waterproofing) and the timber joists on the west deck.

[7] At adjudication the experts clarified that it was not the installation of the fibre cement weatherboards on the east elevation that was defective but the manner in which the head flashings were installed on the windows in this area. Mr Light was the only expert who thought that this defect was a secondary rather than a primary defect.

The secondary defects

[8] Mr Hadley, Mr Medricky and Mr Rankine agreed that as a result of the primary defects the entire east and west elevations required recladding. Therefore I have only considered those secondary defects which potentially affected the north and south elevations – the ground clearance, the joinery, and penetrations through the cladding. The experts agreed that it was difficult to isolate any damage caused by the penetrations.

[9] Two aspects of cladding clearances were considered by the experts; the ground to cladding clearance and the clearance between the internal and external ground levels. The experts agreed that the gap between the cladding and concrete slab was variable and complied in some areas. Mr Hadley said in evidence that this gap was within tolerance and he did not find evidence of damage caused by a lack of clearance.

[10] Mr Medricky agreed that it was difficult to detect what damage was caused by water wicking up from the ground level where there was insufficient ground clearance. The only damage proved to be caused by a lack of clearance between the cladding and the ground is around the garage on the east elevation. I conclude that the lack of clearance between the cladding and the slab and the cladding and ground level did not cause damage on the north or south elevations.

[11] The only aspect of the joinery, apart from the head flashings on the east elevation, which the experts concluded caused damage was the failure of the mitre joints. This defect caused damage on all elevations. The experts agreed that the lack of sill flashings exacerbated the damage but was not a cause.

What repairs were required?

[12] The experts agreed that all elevations on the top floor required recladding as a result of the gutter installation and that all three levels of the east and west elevations required recladding due to the apron flashing defects. Mr Rankine agreed with Mr Medricky that the defective installation of the inter-storey bands caused damage necessitating a reclad to the north, south and west elevations where Harditex was used and that all elevations needed to be reclad because the recladding process could not stop at the weatherboards on the east elevation. Mr Hadley accepted their conclusion because they had inspected the building with the cladding removed. Mr Light was the only expert who believed that a full reclad was not required. He did not consider that it was necessary to reclad the north or south elevations and thought that the inter-storey joints could have been cut out, timber replaced as required, and a cavity band system installed.

[13] As Mr Medricky and Mr Rankine who inspected the units during remediation and Mr Hadley accepted that a full reclad was required, I prefer their evidence to that of Mr Light and conclude that all elevations needed to be reclad.

WHAT IS THE REASONABLE COST OF THE REMEDIAL WORK?

[14] The claimants and the Council were the only parties to produce expert evidence on costs. In Mr Rankine's opinion there are costs claimed, other than those amounts conceded by the claimants, that either are not reasonable or amount to betterment. The disputed costs are primarily the amounts claimed for timber replacement. Other items in dispute are:

- a) the cost of repairing the timber deck;

- b) the contractor's margin for provisional sums and variations; and
- c) the cost of the stainless steel beam caps and gutters.

Timber Replacement

[15] The amount disputed by the Council in relation to timber replacement is \$8,765 (unit 16) and \$7,727 (unit 16A).² The Council submits that the claimants have not provided an adequate record of timber replaced or the quantity supplied to prove the cost claimed. Mr Rankine said that he challenged the cost of timber replacement because the provisional sum for this item was \$13,500 based on 40% timber replacement. Mr Rankine said that if the sum actually claimed for timber replacement was based on this estimate, the amount of timber replaced would be 104% for unit 16 and 92% for unit 16A. In Mr Rankine's opinion the cost of timber replacement should be reduced by 25%. He described this percentage as 'an arbitrary figure'.

[16] Mr White's response was that the estimate based on 40% timber replacement was a guide only. He did not accept that it was reasonable to do a pro rata calculation on the basis of the estimate. Mr Medricky said that the timber he marked up for replacement was generally what was replaced and he assumed that the checking process provided by the contractor and the quantity surveyor had occurred. Mr White said that Kwanto checked the invoices and, given time, he could calculate from the invoices the lineal metreage supplied and produce the spreadsheet used for his calculation.

[17] An estimate should provide a realistic guide to the final cost. In this case it did not do so. However, I accept that Mr Medricky and Kwanto carried out a degree of oversight of the timber replacement and costs. The deduction proposed by Mr Rankine of 25% is

² BOE Keith Rankine at 173.

arbitrary and he is not a quantity surveyor. I do not accept that Mr Rankine's estimate is likely to be more reasonable than the actual costs incurred. Given the steps taken by Mr Medricky and Kwanto to monitor the cost of remedial work, I am not satisfied that the cost claimed for timber replacement is unreasonable.

Timber for the Deck

[18] Two small decks on the east elevation were re-designed to create one deck to improve the weathertightness. Mr Hadley agreed with Mr Medricky that the re-design was necessary to achieve watertightness and on the basis of their evidence I accept that this solution was reasonable.

[19] The Council disputes the cost of the new timber for this deck because Mr Rankine said that the existing timber could be re-used. Mr Hadley thought that the original timber may have had some residual value. In Mr White's view the labour was the most significant component of the cost of this deck and not the timber. However he accepted that it may be slightly less cost effective to replace the timber rather than re-use the existing timber. In Mr Rankine's brief he said that the full cost of the new timber should be deducted however in evidence he accepted that he made no allowance for the labour cost involved in re-using the existing timber. I therefore do not accept that the deduction made by Mr Rankine is reasonable.

[20] At hearing I indicated that I would allow the claimants and the Council an opportunity to provide further evidence on the cost of timber replacement if I accepted that the amounts claimed were not reasonable. However in my view the cost to the parties and the Tribunal of taking such a step would be disproportionate to the amount in issue. Further, I am not satisfied that any deduction from the amount claimed could be justified where the scope of work is

reasonable and the repairs have been supervised by a remedial expert and a quantity surveyor and the party challenging quantum has failed to provide a reasonable basis for its proposed cost. For these reasons I award the full sum claimed for timber replacement and the timber for the deck.

Framesaver

[21] Mr Rankine said that he observed timber that had been treated with Framesaver preservative removed from the building. In his opinion the sum of \$477.00 should be deducted from the cost claimed for this item for each unit. Mr White rejected this deduction because he said the Framesaver was an actual cost which was reasonable. The sum of \$477.00 per unit is an estimate and does not relate to the quantity of timber which was removed after Framesaver was applied. I accept that the checks implemented by Mr Medricky and Kwanto were adequate to ensure that, if any timber treated with Framesaver ultimately needed replacing, the additional cost incurred was negligible.

[22] When considering the previous three items which all relate to timber replacement, I had regard to the fact that the claimants accepted the lowest tender for their remedial work. For this reason, even if there may have been some inefficiency in relation to timber replacement, I am satisfied that the impact on the liable parties is negligible.

Strip drain

[23] Mr Rankine believed that installing a low concrete nib would have been a more economical solution to the issue of ground clearance than installing a strip drain. He therefore deducted the cost of the strip drains and substituted the cost of a concrete nib.

This amounted to a deduction of \$782.00 for unit 16 and \$869.00 for unit 16A.

[24] Mr White rejected this deduction on the basis that the strip drain was required by the Council. The Council did not dispute that it ultimately required the strip drain to be installed but Mr Rankine argued that if a nib was incorporated into the original reclad design, the Council would not have required the strip drain. However it is not clear why, if the plans did not meet the Council's requirements, the Council did not require a nib to be provided before issuing the consent. The strip drain was necessary to obtain the Code Compliance Certificate and was not betterment. I therefore award the sum claimed for this item.

The stainless steel gutters and beam caps

[25] Mr Rankine said that the original PVC gutters should have been re-used rather than being replaced with stainless steel. Mr Medricky said that the original PVC gutters were broken and could not be reused and that colour steel gutters were used because they were more durable and, as the units are three stories high, the gutters are not easily accessible for maintenance. Mr Rankine's view was that the stainless steel caps were not required. Mr White said that they had been deemed necessary by the remedial experts but he accepted that colour steel caps would have been cheaper than stainless steel.

[26] Mr Rankine deducted the whole amount claimed for the cost of replacing and installing stainless steel beams caps and gutters - \$1364 for Unit 16 and \$1550 for Unit 16A for the caps and \$1492 per unit for the gutters. However in evidence Mr Rankine accepted that the gutters needed replacing and that the amount in dispute was the difference in price between the PVC and stainless steel guttering and caps.

[27] I accept that the gutters needed replacing and that some form of beam capping was required. The Council has not provided any evidence of the difference in cost between the PVC and stainless steel guttering or between the colour steel caps and stainless steel. While the onus is on the claimants to prove that the cost claimed is reasonable, the Council has not demonstrated that any unnecessary cost incurred is more than minimal in these circumstances. In the absence of any such evidence, I award the amount claimed for these items.

Contractor's margin

[28] The claimants claimed 15% for the contractor's margin and variations. Mr Rankine was of the opinion that 10% was more reasonable on the basis that Alexander & Co Limited typically has margins between 8 and 10%. Mr Hadley's view was that between 12% and 14% was a reasonable margin at the time that the remedial work was carried out. This approximates the 15% charged by Reconstruct who carried out the remedial work and provided the lowest tender. I therefore conclude that the amount claimed is fair and appropriate.

[29] The claimants have proved the amount claimed of \$167,919 for the cost of remedial work for Unit 16A (Hall) and \$167,439 for Unit 16 (Binnie).

CONSEQUENTIAL COSTS

[30] The Council submitted that the following items claimed as consequential losses should not be awarded:

| | Unit 16 (Binnie) | Unit 16A (Hall) |
|----------------------------|------------------|-----------------|
| Maintenance Report | | \$489.38 |
| Moisture Detection Probes | \$4,941.38 | \$5,205.63 |
| Chemwash | | \$337.50 |
| Water Main | \$315.24 | |
| DBH Fee | \$704.45 | \$500 |
| Expert Fees for Litigation | \$9,306.01 | \$12,849.12 |
| Totals | \$15,267.08 | \$19,381.63 |

- a) *Maintenance report:* At hearing Mr Hall accepted that this item should be deducted.
- b) *Moisture detection probes:* Mr Hall and Mr Binnie accept that probes were installed to gather evidence for the proceedings. The cost of these probes therefore is not awarded. Mr Hall said that the probes installed after remediation were intended to warn of any further weathertightness failures and Mr Binnie accepted that it was a condition of Mr Medricky agreeing to be their remedial expert that they install these probes after the repairs. I do not accept that the negligence of the liable parties is a proximate cause of this cost and therefore I decline to award the amount claimed for these probes.
- c) *Chemwash:* Mr Hall accepted that the chemical wash of the house was normal maintenance and therefore this claim is not awarded.
- d) *Water main:* Mr Binnie claimed the cost of a water main ruptured by contractors who were cutting down hedges in order to install scaffolding. This damage is unrelated to any of the defective work carried out by the respondents and therefore I have not awarded this sum.
- e) *The DBH and Tribunal fee:* The Council disputes liability to pay the DBH fee for obtaining the WHRS Assessors report in reliance on *Holland as Trustees of the Harbourview Trust v*

*Auckland City Council*³. The fee declined in *Holland* was not the DBH fee but the Tribunal filing fee. Mr Binnie has claimed the sum of \$204.45 being half the cost of the Tribunal filing fee and this sum is not been awarded as I accept that it is a cost of the proceedings. However I do not accept that fee paid to DBH for the assessor's report is a cost of the proceedings. It is a requirement for determining eligibility. I therefore award each claimant the sum claimed of \$500 for the cost of the report.

- f) *Expert fees for litigation*: The Council disputes liability for some invoices issued by Kwanto and South City Building Surveyors Limited (SCB) for preparation for hearing.

[31] The invoice issued by SCB on 14 April 2011 to Mr Hall is divided into two parts. The second amount of \$3,805.37 (incl GST) is for compiling reports, communications with legal advisors, and matters relating to the disputes process. The following four invoices issued by SCB to Mr Hall relate to preparation and attendance at the experts conference, communication with Mr Hall and Mr Satherley, review of information for the experts' conference and preparation of brief of evidence, meeting with Lighthouse to prepare for attendance at mediation and attendance at mediation. Mr Hall also claimed for a 'September estimate' from SCB of \$2,000.00 and an invoice from Kwanto for \$2000 for preparation for adjudication. Each of these items is a cost of litigation and therefore Mr Hall is not entitled to the sum claimed. The total deducted from Mr Hall's claim for expert fees is therefore \$12,849.12 calculated as follows:

| Company | Invoice No. | Total Cost \$ |
|---------------------|--------------------|----------------------|
| South City Building | 463164 | \$3805.37 |
| South City Building | 184754 | \$1222.97 |
| South City Building | 184755 | \$536.33 |

³ *Holland as Trustees of the Harbourview Trust v Auckland City Council* WHT TRI-2009-100-00008, 17 December 2009.

| | | |
|---------------------|---------------|--------------------|
| South City Building | 184756 | \$2028.58 |
| South City Building | 463199 | \$1255.87 |
| South City Building | Sept-Estimate | \$2000.00 |
| Kwanto Ltd | 10-1099-8 | \$2000.00 |
| TOTAL | | \$12,849.12 |

[32] The claim by Mr Binnie for payments to SCB on invoices issued from 21 August 2011 to 12 September 2011 is declined for the same reasons. The total deducted from Mr Binnie's claim for expert fees is therefore \$9306.01 calculated as follows:

| Company | Invoice No. | Total Cost \$ |
|---------------------|--------------------|----------------------|
| South City Building | 463163 | \$4267.51 |
| South City Building | 463188 | \$1754.05 |
| South City Building | 184753 | \$2028.58 |
| South City Building | 463198 | \$1255.87 |
| TOTAL | | \$9,306.01 |

Photocopying

[33] The claimants have claimed \$953 each for the cost of photocopying documents in preparation for hearing. This is also a cost of the proceedings and is declined.

Conclusion on consequential losses

[34] The claimants set out the consequential losses claimed in schedules filed on 7 September 2011. On the basis of these schedules and the deductions set out above, the claimants have proved the following consequential losses:

| | | |
|-----------|------------|-------------|
| Mr Hall | (Unit 16A) | \$66,062.97 |
| Mr Binnie | (Unit 16) | \$75,856.38 |

GENERAL DAMAGES

[35] Mr Hall and Mr Binnie have each claimed \$25,000.00 for general damages. The only challenge to this claim arises from the defence raised of contributory negligence which fails for the reasons that follow. I accept that on the basis of the evidence given in their briefs the claimants are entitled to an award of \$25,000 each for general damages.

CONCLUSION ON QUANTUM

[36] The amount proved by Mr Hall and Mr Binnie for remedial costs, consequential losses, and general damages is therefore \$527,277.35 calculated as follows:

| | Unit 16A - Hall | Unit 16 - Binnie |
|---------------------|------------------------|-------------------------|
| Remedial costs | \$167,919.00 | \$167,439.00 |
| Consequential costs | \$66,062.97 | \$75,856.38 |
| General damages | \$25,000.00 | \$25,000.00 |
| TOTAL | \$258,981.97 | \$268,295.38 |

THE LIABILITY OF THE COUNCIL

[37] When processing a Building Consent or carrying out inspections the Council is negligent if its officer fails to exercise reasonable care in the performance of these roles.⁴ The standard of reasonable care is measured against the practice of other councils subject to proof of current practice dictated by common sense.⁵

⁴ *Askin v Knox* [1989] 1 NZLR 248 (CA).

⁵ *McLaren Maycroft & Co v Fletcher Development Co Ltd* at 102 applied in *Dicks v Hobson Swan Construction Ltd (in liquidation)* (2006) 7 NZCPR 881 (HC) at [76].

Was the Council negligent in issuing the building consent?

[38] When granting an application for building consent, the Council is required to be satisfied on reasonable grounds that a Building Consent should issue. Mr Medricky gave evidence for the claimants and Mr Gillingham for the Council on the standard of plans required for building consent. Mr Medricky is a registered building surveyor, an assessor for the Tribunal, and a panel member for the DBH determinations group. He was a senior building inspector for a territorial authority for five years and a divisional building inspector for two and a half years, training building inspectors at Manukau City Council. However Mr Medricky was not employed by a territorial authority after the 1991 Building Act was enacted or at the time of construction of the claimants' dwellings.

[39] Mr Gillingham has 20 years' experience in the building industry in the UK and 15 years' experience subsequently in New Zealand. He is also a registered building surveyor and was employed as a council officer between January 1996 and November 2003 during which time he processed building consents and carried out building inspections. It was during this period that the claimants' units were built.

[40] Mr Medricky said that he could not give an opinion based on the plans on whether it was usual at the relevant time for the Council to require plans and specifications to include references to manufacturer's technical information or standards. However Mr Medricky said that in his opinion, based on his involvement in construction during the relevant period, the standard of the plans was lower than was considered acceptable in 1987 when he was last a Council Officer.

[41] I accept that Mr Medricky's experience in the building industry qualifies him as an expert on construction however the standard applied at the time by council officers to plans submitted for

building consent is the appropriate test. I therefore prefer the evidence of Mr Gillingham on this issue and conclude that the Council was not negligent in issuing the building consent.

Was the council negligent in carrying out its inspections or in issuing the Code Compliance Certificate?

[42] When issuing a Code Compliance Certificate a certifier is required to be satisfied on reasonable grounds that the building work complies with the provisions of the building code on the date of certification.⁶ A reasonable Council ought to have an inspection regime that enables it to determine on reasonable grounds that there has been compliance with all relevant aspects of the code.⁷ The Council accepts that its inspectors should have detected the lack of clearance between the cladding and the tiles on the east deck and between the cladding and the finished ground level and that it is liable to contribute to any resulting damage. However the Council submits that the amount of damage caused by the lack of clearance on the east deck is difficult to isolate from the damage caused by other defects and that the only damage caused by lack of ground clearance is around the garage on the east elevation.

[43] Ms Knight submits that either it was not possible for a Council officer to detect any other defects or that the other aspects of construction which caused damage were standard practice at the time. The Council contends that Mr Medricky's evidence of standard practice at the time should not be given as much weight as the evidence of Mr Gillingham because Mr Medricky was not a council officer during the relevant period and his evidence is 'tainted with the hindsight gained from eight years of leaky building claims'.

[44] It is not clear why Ms Knight suggests that a witness's experience in leaky building claims taints evidence rather than

⁶ s.43(3)(a) Building Act 1991.

⁷ *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479 (HC) at [450].

enhances it. I accept that Mr Gillingham has more relevant experience of Council practice at the time and that this is the ultimate test of Council liability. However evidence of the standard practice of Council officers does not necessarily reflect standard practice in the construction industry. Where the Council is arguing that it should not be held liable for defects because they were standard practice at the time, it is appropriate to consider evidence from witnesses with direct knowledge and experience on construction sites in order to determine the standard practice. I accept Mr Medricky's expertise in this area.

[45] I now consider whether the Council was negligent in relation to the proven primary defects.

Installation of the gutters

[46] All experts agreed that the installation of the gutter system was a primary defect. Mr Medricky, Mr Rankine and Mr Hadley agreed that the entire top floor would require recladding as a result of this defect. Mr Medricky believed that the middle floor also required recladding as a result of this defect. The gutter system used was a proprietary product. There was some debate about whether it was an internal or external system. An external gutter system was an acceptable solution however an internal gutter system was deemed to be an alternative solution and the Council had to be satisfied that the installation met the requirement of the Building Code.

[47] Mr Rankine said that if the gutter system was internal it was required to have a greater capacity than an external gutter. Mr Gillingham said that he had not seen the gutter and could not give an opinion on whether it was internal or external but he accepted that the profile of the gutter was such that the internal up-stand was lower than the outside up-stand and therefore there was a risk that when the gutter became full to capacity it overflowed towards the inside rather than the outside.

[48] The report of the experts' conference recorded that Mr Rankine and Mr Hadley were of the view that the gutter system was an external gutter whereas Mr Medricky and Mr Light considered it to be an internal gutter system. In evidence Mr Rankine accepted that the technical specifications provided with the gutter system described it as an internal gutter and that it was not correctly installed. The technical specifications provided with the gutter system must be determinative of this issue. I therefore conclude that the gutter system should have been treated as an internal gutter by the Council when it assessed it for compliance with the Building Code.

[49] Mr Gillingham said that there would have been a cursory, if any, inspection of the gutters by the Council officer and that it would have been difficult due to the height of the gutters for the Council officer to inspect them unless there was a scaffold in place. Mr Gillingham said that in the year 2000 the Council relied on the good practice of the roofer.

[50] The Council needed to have a regime that ensured that it could be satisfied that the gutter was installed in a manner that complied with the building code. The fact that scaffolding was not in place at the time of inspection does not affect this duty. There is no evidence that the Council took any appropriate steps, such as obtaining a producer statement, to ensure that the gutters met the requirements of the building code. I therefore conclude that the Council was negligent and is liable for the resulting damage.

Metal roofs and apron flashings

[51] The experts agreed that the installation of the apron flashings was a primary defect which necessitated the recladding of all three levels on the east and west elevations.

[52] Ms Knight submits that even if the Council inspector could have seen the manner in which the roof and flashings were installed, a diverter flashing was not required at the time. However this submission is not consistent with the experts' conclusion that the apron flashing installation was not in accordance with the applicable standards and was a breach of NZS4217.

[53] In evidence Mr Rankine accepted that whatever mechanism was available at the time to ensure that water didn't get into the building envelope, it was a requirement that water not enter the building envelope and water from the roof had to be properly diverted away from the interior. Mr Rankine also accepted that the flashing tape used was not an acceptable solution.

[54] Mr Gillingham said that at the time of construction it was widely known that apron flashings were required however he said that there was no industry guidance to inspectors as to how the apron flashing termination should be installed. Mr Medricky and Mr Hadley said that it was common practice at the time to form a diverter flashing on site. Although Mr Medricky agreed that NZS4217 did not demonstrate the detail required to achieve compliance, he said that BRANZ issued several documents prior to 2000 referring to problems with apron flashing termination. Mr Medricky said that detail was not provided for many aspects of construction but good trade practice should be followed. Mr Rankine was not in New Zealand until 2007 whereas Mr Medricky and Mr Hadley were working in the construction industry at the relevant time therefore I prefer their evidence on this issue.

[55] Mr Gillingham said that it was not common practice in 2000/2001 for a Council officer to request a Producer Statement from a roofer. He accepted that this placed more emphasis on the Council inspections. The Council was reasonably required to inspect an element of construction as crucial as the roof when it did not

require a producer statement. I am satisfied that the apron flashing installation was not in accordance with the relevant standards. I conclude that the Council was negligent in failing to ensure that the installation of the apron flashings and cover flashings on the metal roof were installed in a manner that met the requirements of the Building Code.

Inter-storey joints and bands

[56] The experts agreed that failure to properly install the inter-storey joints and bands were primary defects. The Council will only be liable for damage caused by these defects if the Council inspector should have detected them during inspections.

[57] Harditex was an alternative solution therefore the Council had to be satisfied that it was installed in accordance with the Building Code. Mr Gillingham accepted that it was prudent for the inspector to assess the standard of construction against the manufacturer's technical information and to assess whether construction complied with the BRANZ publications. Mr Gillingham also accepted that probably there were not enough cladding inspections at the time. However he said that, although Harditex was an alternative solution, it had been on the market for about 13 to 14 years and there was a lack of understanding of the potential for this cladding to fail.

[58] Mr Medricky was the only expert who thought that it was possible for an inspector to determine, after the texture coating had been applied, whether the mesh was correctly installed. He accepted that it was not possible after the bands were installed for an inspector to detect the failure to form a notch behind the bands. Based on the evidence of the other experts I conclude that a Council officer could not reasonably detect these defects unless the inspection coincided with the appropriate stage of construction.

While the Council was required to ensure compliance with the code, I am not satisfied that it was reasonable at the time of construction for the Council officer to be present at every stage of the cladding installation.

Deck defects

[59] The experts agreed that the lack of a waterproofing membrane on the balustrades on the east deck was a primary cause of damage on this elevation. They agreed that there was not sufficient clearance between the cladding and the tiles on the east deck but also agreed that it was difficult to isolate any damage caused from the damage resulting from by the other defects in this area.

[60] In Mr Medricky's opinion, the Council inspector should have been able to detect whether the balustrades had been correctly waterproofed. He said that a 2-3mm line would be apparent on the horizontal faces of the balustrades and there would be a different texture. Mr Gillingham disagreed. He said that once the texture coating was applied it was not possible to see whether there was an underlying membrane. Mr Gillingham said that, at the time of construction, staged cladding inspections were not carried out and the inspectors relied on the contractor and approved applicator. I accept Mr Gillingham's evidence of the practice of the territorial authorities at the time and am not satisfied that any negligence on the part of the Council has contributed to this defect.

[61] On the west deck the experts agreed that the junction of the timber joists and the cladding was a primary defect although at hearing Mr Light described the damage as minor. The experts agreed that, if the fibre cement sheet was painted before fixing the bearer, this junction would meet the requirements of Hardies' technical literature. In his brief Mr Rankine stated that the BRANZ House Building Guide February 2000 provided details for the

installation of deck bearers which was an alternative solution. The BRANZ guide showed timber packers used to space the bearers off the face of the cladding. Mr Rankine concluded that the extent of water ingress would have been reduced substantially if this detail had been followed.

[62] The BRANZ guide is evidence of what was good practice at the time of construction.⁸ If, as the Council suggests, it was not possible for its inspector to be satisfied that the cladding had been painted before the stringer was installed, the inspector could not have been satisfied that the installation complied with the building code. Based on the photographs in Mr Hadley's report, I am satisfied that it was possible for the Council inspector to observe the deck stringer from the ground. If the installation of the stringer did not comply with the recommended BRANZ installation method and the inspector could not be sure that the cladding had been painted, the inspector could not be satisfied on reasonable grounds that this detail complied with the code.

[63] I conclude that the Council was negligent in failing to detect the lack of clearance on the east deck but that no loss resulted from this breach. The Council was negligent in failing to ensure that the junction between the timber stringer and the cladding on the west deck was properly constructed and is liable for the damage caused by this defect.

Failure of mitre joints

[64] The experts identified the failure of the mitre joints as a secondary defect. In evidence Mr Medricky accepted that the seals to the mitre joints may have been damaged before the joinery was delivered and that it was not possible to see if the seals were intact once the windows were installed. I therefore conclude that the

⁸ *Mok v Bolderson* HC Auckland, CIV-2010-404-7292, 20 April 2011.

Council could not reasonably be expected to detect during inspection any damaged or missing seals in the mitre joints.

Untreated timber

[65] The claimant submitted that the Council was negligent in failing to detect that untreated timber was used rather than the treated timber specified by the designer. It was Mr Gillingham's evidence that it was not a requirement of the Harditex Cladding System or the Building Code that treated timber be used and that it was not readily available. Mr Hadley accepted that treated timber would have been a special order. Although he accepted that using H3 timber would have averted the need for a reclad, Mr Hadley said that the use of untreated framing timber complied with the Building Code at the time. He did not consider the use of untreated timber a product substitution because the cladding system should have been capable of performing satisfactorily without the need for the treated timber framing. I conclude that although less damage would have occurred with treated timber, it was not negligent of the Council to accept untreated timber in this situation.

Conclusion on Council liability

[66] The Council is liable for the damage caused by the defective installation of the gutters, the apron flashings, and the west deck. The gutter defects required the entire top floor to be reclad and the apron flashings necessitated the reclad of all three levels of the east and west elevations. I have concluded that a full reclad was required and I am not satisfied that the damage for which the Council is liable could have been repaired discretely. If a defect is a contributing cause of damage the party causing that defect will be jointly liable for the cost of repairing the damage. The Council is therefore liable for the full cost of repairs.

THE LIABILITY OF MARK BLACK

Duty of care

[67] Initially Mr Black argued that because he was a labour-only builder he did not owe a duty of care. However in opening Mr Endean appropriately accepted that a labour-only contract did not preclude a duty of care. Mr Black denies liability for damage.

What work did Mr Black do?

[68] Mr Black accepted that he prepared the foundations, laid the floor slab, did the pre-framing, installed the building wrap and fixed the interior linings and finishing. He also accepted that he installed the fibre cement weatherboards on the east elevation, the windows with the exception of the flashings, and the west deck. Mr Black is liable for the damage arising from the incorrect installation of the deck stringer on the west deck.

[69] Mr Black denied installing more than a few sheets of the Harditex cladding and relied on a quote as proof that other than the fibre cement weatherboards the cladding installation was not part of his contract.⁹ This quote was dated 31 December 2000 and excluded gib and Harditex fixing but gave a separate price for these items. However this quote is not for the claimants' dwelling. It is a quote for another job at 96 Main Highway, Ellerslie. On the date this quote was issued, Mr Black had already been working on the claimants' dwelling at Harrison Road for some months as is apparent from the invoices that he produced. His first invoice for Harrison Road is dated 15 October 2000 and recorded that the concrete slab was down. Even if I accepted that the address on the 31 December invoice was an error, it is not plausible that Mr Black quoted for work some three months after he had started the job. I therefore do not

⁹ Exhibit A to BOE of Black

accept that this quote is for the claimants' dwelling. As no other quote or contract has been produced to show what work Mr Black did at Harrison Road, the best record is his own diary.

[70] Mr Black accepted that his diary note on 10 January 2001 recorded that he cut four sheets of Harditex. On 18 January 2001 there is a further record of cutting Harditex. Due to the discrepancies between Mr Black's invoices, diary notes and oral evidence I do not find it credible that he installed some but not all of the cladding, particularly as he installed the fibre cement weatherboards. I conclude that it is more likely than not that Mr Black or his employees installed all the cladding. I conclude that Mr Black was responsible for the defects in the inter-storey joints and bands.

[71] A primary cause of damage on the east elevation was the lack of waterproofing membrane on the balustrades. Mr Black had a duty to ensure that the substrate was appropriately prepared before he laid the cladding. He breached this duty and is therefore liable for the resulting damage.

[72] Mr Endean said in closing that it was Mr Black's evidence that he did not install the windows on the north and south elevations. However Mr Black deposed that he installed the windows after placing building wrap on the dwelling. Mr Endean's submission is not consistent with the evidence and I conclude that Mr Black installed all the windows in the dwelling. In evidence Mr Black said that he did not check the seals before installing the joinery however there is no evidence that the mitre joints failed either before or during installation. I therefore conclude that Mr Black is not liable for this defect.

[73] Mr Black claimed that there had been a breach of natural justice because the claimants did not notify him of their claim before the repairs were completed. Mr Endean submitted that there must

be adverse consequences for a claimant who fails to inform a party before remediation that there is a claim against them. He relied on s27(1) of the Bill of Rights Act 1990. This section refers to the right to the observance of principles of natural justice by any Tribunal or public authority and does not assist Mr Black. Mr Black was named as a party when this claim was filed and I am satisfied that he has been afforded natural justice by this Tribunal which has served him notice of all proceedings. I have considered however whether Mr Black was prejudiced by the delay in notifying him of the claim.

[74] The claimants did not explain why they did not attempt to locate Mr Black when they notified the other respondents that repairs were due to start. However, while I accept that it may have been of some benefit for Mr Black's expert to inspect the property during remediation, I am not satisfied that the loss of this opportunity has caused any real prejudice. The WHRS assessor's report provides an independent assessment of the property prior to remediation and both Mr Medricky and Mr Rankine documented the remedial work. The fact that repairs were carried out before Mr Black was served does not change the cause of the defects in the claimants' dwelling. Although Mr Light disagreed with the other three experts on some aspects of the defects and repairs required, there was a high level of consistency in the evidence of the other experts. The main issue in relation to Mr Black's liability is the extent of the work that he performed. Any delay in serving him with notice of the claim has not affected my findings on this issue.

Conclusion on the liability of Mr Black

[75] I conclude that Mr Black's negligence in installing the Harditex cladding, the balustrades on the east deck and the deck stringer on the west deck has caused the need for the dwellings to be fully reclad. Mr Black is therefore jointly liable for the full cost of repairs.

THE LIABILITY OF BRUCE BEAZLEY

[76] The claim against Mr Beazley is that he allowed untreated timber to be used contrary to what was specified in the plans and failed to check whether the building components were installed in accordance with the manufacturers' technical information, good trade practice and the requirements of the Building Code. Mr Satherley submitted that because Mr Beazley was the only person onsite in a project management role it is reasonable to impose a duty of care on him to check compliance with the plans and specifications and the quality of the building work. Ms Knight submits that it is clear from Mr Beazley's diary that he was involved in all aspects of construction projects from obtaining quotes, ordering materials coordinating deliveries and coordinating trades and dealing with the Council.

[77] In *Gaitely*¹⁰ the Court noted that it is not the title of a role which is decisive but the role to be undertaken that determines liability.¹¹ There was no written contract documenting Mr Beazley's role. The only evidence of the work he performed has been given by him and Mr Black.

[78] Mr Beazley's evidence is that he has no building qualifications or practical building experience. He said that he worked primarily as a jeweller then as a sales representative for a firm dealing with roofing lights and subsequently a contracts administrator for a construction company. He was employed by Winslow for 11 months and was given the title of project manager by Kevin Andersen, a director of Ulster Properties Limited. Mr Beazley says he was employed to assist Mr Andersen in administrative matters and had no responsibility for the quality of building work.

¹⁰ *Body Corporate 185960 v North Shore City Council* HC Auckland, CIV-2006-404-3535, 22 December 2008, Duffy J.

¹¹ At [103].

[79] Mr Beazley stated that while he worked for Winslow he was involved with 10-15 building sites and took directions from Mr Andersen. Mr Beazley was responsible for getting quotes, engaging sub-trades, taking plans to building suppliers for pricing, and co-ordinating the various trades and maintenance staff. He accepts that he discussed invoices with Mr Black but said that he would have referred any queries about the accounts to Mr Andersen. Mr Beazley stated that he was not involved with invoicing of materials, timeframes, or budgets and it was not his responsibility to make any decisions about variations to the work or plans. Mr Beazley stated that he signed the building consent on instruction from Mr Andersen who filled out the form but it was never his responsibility to be familiar with the plans or to check that any work was done in compliance with the plans.

[80] Mr Black says that when building issues arose they were discussed on site with Mr Beazley and that Mr Beazley gave him the impression that he was competent and familiar with building issues. Mr Black said that Mr Beazley was on site regularly to confer with him about the way in which Winslow wanted the job completed. Mr Black gave three examples of his contact with Mr Beazley:

- (a) Mr Black discussed with Mr Beazley the manner in which the deck stringer was fitted and that the cladding needed to be fixed to the building before he fixed the stringer. Mr Black states that Mr Beazley arranged for the cladding to be fixed so that he could carry on and construct the deck structure.
- (b) Mr Black consulted Mr Beazley when rocks were discovered on site.
- (c) Mr Beazley arranged with Placemakers for the delivery of pre-frames and pre-nail trusses.

(d) Mr Beazley requested the outside cladding be changed in the east and west elevations to provide for Hardies weatherboard.

[81] The first three examples are consistent with Mr Beazley's evidence. Mr Black's request for Mr Beazley to ensure the cladding was installed before the deck stringer and the consultation about rocks demonstrate that Mr Beazley took responsibility for sequencing and ensuring that the trades could carry out their work, not that he determined the manner of construction. Given the inconsistency of Mr Black's evidence, I prefer the evidence of Mr Beazley and do not accept Mr Black's evidence that Mr Beazley decided what cladding would be used. However, even if I did accept Mr Black's evidence, there is no link between the choice of cladding and the weathertightness defects.

[82] There is no evidence that Mr Beazley performed a hands-on or decision making role in relation to the construction. None of the evidence relied on by Ms Knight or given by Mr Black demonstrates that Mr Beazley took responsibility for decisions or omitted to carry out any tasks required of him that have caused the identified weathertightness defects. I conclude that Mr Beazley was not engaged to take responsibility for the quality of the construction or to make decisions on how the construction work was to be carried out and therefore did not owe a duty of care.

[83] While it may have been negligent for Mr Beazley to sign the advice of completion of building work, I do not accept that in the administrative role which Mr Beazley performed he owed a duty of care. Even if I am wrong, the advice of completion has not caused the claimants' loss. For these reasons the claim against Mr Beazley is dismissed.

DID FRASER HALL OR DUNCAN BINNIE CONTRIBUTE TO THEIR OWN LOSS

[84] The Council submits that there has been contributory negligence on the part of the claimants and that the damages awarded to them should be reduced as a result. Section 3 of the Contributory Negligence Act 1947 provides:

3 Apportionment of liability in case of contributory negligence

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

Provided that—

- (a) This subsection shall not operate to defeat any defence arising under a contract:
- (b) Where any contract or enactment providing for the limitation of liability is applicable to the claim, the amount of damages recoverable by the claimant by virtue of this subsection shall not exceed the maximum limit so applicable.

[85] Contributory negligence identifies any contribution by a claimant to the damage that they have suffered and apportions responsibility on a percentage basis. A reasonably foreseeable risk of harm by a claimant is a pre-requisite to a finding of contributory negligence.¹² Any negligence by the claimant must be a proximate cause of damage.

[86] The standard of care expected of a claimant for his or her own safety is in practice less exacting than the standard expected of the defendant. The reasonable claimant is allowed to have lapses

¹² *Hartley v Balemi*, HC Auckland, CIV-2006-404-2589, 29 March 2007.

whereas the reasonable defendant is not.¹³ The principles applicable to a finding of contributory negligence were reviewed by Stevens J in *Hartley v Balemi*.¹⁴ His Honour concluded that it is necessary to be cautious about importing subjective elements into an assessment of contributory negligence. The appropriate test for contributory negligence is a question of fact, generally determined by whether the claimant acted reasonably in all the circumstances. Apportionment of contributory negligence is a discretion turning on the relevant degrees of causation and blameworthiness of the parties.

[87] Mr Hall signed the agreement for sale and purchase on 2 September 2005 conditional on title issuing by 30 September 2005 and his obtaining a satisfactory building report. The Council submits that the report to Mr Hall from Futuresafe Building Inspections 2004 Limited highlighted several issues including:

- the building did not have a cavity;
- it was constructed using untreated timber;
- work was in progress to repair cracks in the cladding that had caused minor moisture ingress on the north elevation; and
- the lack of clearance between the cladding and tiles on the deck.

[88] It is submitted that Mr Hall was negligent in failing to investigate the reason for the cracks in the cladding and by not asking Futuresafe to check the work on the northern elevation before settlement. The Council also argues that Mr Hall failed to take the opportunity to obtain an updated report when the title failed to issue by the due date, delaying settlement by some months.

¹³ S Todd (ed) *The Law of Torts in New Zealand* (5th ed, Thomson Reuters, Wellington, 2009) at 21.2.05.

¹⁴ At [111].

[89] The Council submits that Mr Binnie was negligent because the pre-purchase report, also prepared by Futuresafe, purchased from another prospective purchaser was five months old. It is submitted that the condition of the property could have changed and, as the report was not prepared for Mr Binnie, he did not have the opportunity to ask questions of the report writer or any recourse for errors in the report. Further it is submitted that although Mr Binnie had some knowledge of leaky buildings he did not make any enquiries about the issues identified in the pre-purchase report or obtain an updated report when the settlement was delayed.

[90] The claimants submit that although the pre-purchase reports did identify some defect areas they generally classified the buildings as low risk and did not recommend further invasive testing. Mr Hall said that he was reassured by the comments that a regular maintenance schedule would mean that little significant remedial work was required, the fact that issues identified were described as minor, and the assessment of the risk for moisture ingress as minimal.

[91] Mr Binnie said his pre-purchase report did not identify any significant defects and he was assured by the real estate agent that the work being carried out on Mr Hall's unit was interior and minor. It is submitted that Mr Hall and Mr Binnie were prudent purchasers who obtained reports and accepted the recommendation of the report writer to obtain a maintenance report and implement a maintenance schedule.

[92] In *Coughlan v Abernethy*¹⁵ White J considered an appeal by the Abernethys against the Tribunal's decision to reduce the damages awarded for contributory negligence. The Abernethys purchased their house in 2003 after obtaining a building report which identified a number of defects including cracks in the exterior

¹⁵ *Coughlan v Abernethy* HC Auckland, CIV-2009-004-2374, 20 October 2010.

cladding which the report writer considered had arisen because of a lack of proper maintenance. These defects were estimated to cost around \$10,000 to remedy. The Abernethys negotiated a \$3,000 reduction in the purchase price and after settlement arranged for the repairs to be carried out. Subsequent defects were then discovered and extensive repairs were required. The Tribunal held that the Abernethys knew that there were risky materials, that the property had been neglected by the vendors and that there was likely moisture penetration. The High Court upheld the Tribunal's finding of 10% contributory negligence.

[93] The question of contributory negligence was subsequently considered in *Jung v Templeton*.¹⁶ Justice Venning concluded that a solicitor's advice to the claimant at mediation that the claimant was exposed to a finding of contributory negligence between 10-50% was not negligent on the part of the solicitor. His Honour considered that the claimant may have been found to be contributorily negligent on the basis of a pre-purchase report obtained in 2003 which advised that although the unit was in good condition it required remedial work. The report identified cracking around the parapet cladding where there was a possible water leak, moisture readings of 20%, rotten door jambs, and advice that the purchaser should request records of a repair to a balcony. Venning J concluded that the solicitor's advice that on the basis of this report the plaintiff's contributory negligence would have been between 25-75% and that the solicitors' advice that a contributory negligence finding may have been between 10-50% was conservative.¹⁷

[94] In *Coughlan* and *Jung* the reports recorded higher than acceptable moisture readings and noted signs of moisture ingress and structural deterioration. This was not the case with the reports obtained by Mr Hall and Mr Binnie. Ms Knight's submission that the fact that Mr Hall's report highlighted the lack of a cavity should have

¹⁶ *Jung v Templeton* [2010] 2 NZLR 255 (HC).

¹⁷ At [62].

put him on notice of possible weathertightness issues does not accurately reflect the relevant extract from the report:¹⁸

“Despite the fact that the cladding system detailed above is without a cavity and may have been constructed using untreated or kiln dried timber the risk for moisture ingress to this dwelling is minimal. There have been failures of similar cladding systems with sometimes catastrophic results. I would like to comment however that most failures are the result of poor installation of materials rather than materials themselves. The fibre cement system installed here will allow a certain level of air movement between the substrate and the building paper below due to the flexible nature of the product. The lack of an enclosed balcony on this dwelling is another contributory factor to my assessment as a minimal risk dwelling.”

[95] The same paragraph was repeated in the report provided to Mr Binnie and I conclude that it was reasonable for the claimants to feel reassured by these comments. Ms Knight also submitted that the comment in the reports that the joinery needed to be constantly monitored and any defects repaired immediately should have put the claimants on notice of weathertightness defects. Again Ms Knight cited the report out of context and the result is misleading. The paragraph from which she has quoted is as follows:

“Window and door joinery installed to this dwelling are an aluminium awning and folding type and generally in good condition. The windows have been installed correctly with head formed to displace water collected above. All windows provide adequate protection from moisture ingress. With any joinery constant monitoring will need to be undertaken at the junction between plaster finish and aluminium extrusion with any defects repaired immediately.”¹⁹

[96] There are many other examples within the reports where the report writer commented that there were no high moisture readings,

¹⁸ Page 392 of the common bundle.

¹⁹ Page 335 of the common bundle.

no sign of deterioration and that the property had been generally well constructed. The maximum recorded level of moisture ingress was 15%, on the south elevation.

[97] While I accept that Mr Hall and Mr Binnie had some knowledge of the leaky building issue from the media, I am satisfied that they acted reasonably in obtaining reports before they purchased and that the tenor of these reports was generally reassuring. There was nothing in these reports that should have put the reasonably prudent purchaser on notice of the significant weathertight problems which were subsequently discovered. To find otherwise would be to conclude that any purchaser with a report that identifies characteristics of leaky buildings should not proceed with their purchase, irrespective of the condition of the property.

[98] As far as the allegation by the Council that Mr Binnie was negligent because he purchased his report from another prospective purchaser, I am not satisfied that a purchaser at that time could reasonably be expected to anticipate that the condition of the property was likely to change in the five or six months since the original report was written and there is no evidence that this occurred. Any risk Mr Binnie may have taken as a result of not having a contractual arrangement with the report writer is irrelevant to this determination. Similarly I see no negligence in the fact that the claimants did not seek an updated report before they settled their purchases. For these reasons I conclude that there has been no contributory negligence on the part of these claimants.

APPORTIONMENT

[99] Section 72(2) of the Weathertight Homes Resolution Services Act 2006 provides that the Tribunal can determine liability of any respondent to any other respondent and remedies in relation to any liability determined. In addition, section 90(1) enables the

Tribunal to make any order that a court of competent jurisdiction could make in relation to a claim in accordance with the law.

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

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

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

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

[103] The extent of the damage caused by each party is relevant when determining apportionment. However, as there is not usually clear evidence of the amount of damage caused by a particular defect, apportionment cannot be an exact science. Such decisions must be made on the evidence available and any difficulty in calculating the apportionment of damages is not a justification for avoiding a finding of liability.

[104] The Council submits that its liability should be no more than 20% which is consistent with the decisions of *Mt Albert Borough Council v Johnson*,²⁰ *Dicks v Hobson Swann Construction Limited*,²¹ and *North Shore City Council v Body Corporate 188529 (Sunset*

²⁰ *Dicks v Hobson Swan Construction Ltd (in liq)* HC Auckland, CIV-2004-404-1065, 22 December 2006.

²¹ *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA).

Terraces).²² I accept that this is reasonable under the circumstances and have therefore apportioned liability at 20% to the Council and 80% to Mark Black. I therefore make the following orders:

- i. Auckland Council and Mark Black are jointly and severally liable to pay Fraser Hall the sum of \$258,981.97 immediately.
- ii. Auckland Council and Mark Black are jointly and severally liable to pay Duncan Binnie the sum of \$268,295.38 immediately.
- iii. The Auckland Council is entitled to recover from Mark Black any amount that it pays to the claimants over and above the sum of \$105,455.47 being 20% of \$527,277.35.
- iv. Mark Black is entitled to recover from Auckland Council any amount that he pays to the claimants over and above the sum of \$421,821.88 being 80% of \$527,277.35.

DATED this 16th day of February 2012

S Pezaro
Tribunal Member

²² *Body Corporate 188529 v North Shore City Council* HC Auckland, CIV-2004-404-3230, 30 April 2008 [*Sunset Terraces*].