IN THE WEATHERTIGHT HOMES TRIBUNAL
TRI 2009-100-000008

BETWEEN	**JAMES HOLLAND, ALAN IVORY and YVONNE VAN DONGEN as Trustees of the HARBOURVIEW TRUST** Claimant
AND	**AUCKLAND CITY COUNCIL** First Respondent
AND	**L REEVE CONSTRUCTION LIMITED (in Liquidation)** (Removed) Second Respondent
AND	**LLOYD FREDERICK REEVE** (Bankrupt therefore removed) Third Respondent
AND	**LAUREEN EDITH REEVE** Fourth Respondent
AND	**MAX GRANT ARCHITECTS LIMITED** Fifth Respondent
AND	**MAX GRANT** Sixth Respondent
AND	**DAY CONSULTANTS LIMITED** (Removed) Seventh Respondent
AND	**TONY GRAHAM DAY** (Removed) Eighth Respondent
AND	**REGAN FROST** (Removed) Ninth Respondent
AND	**REGENCY PLUMBING LIMITED** (Removed) Tenth Respondent
AND	**CRAIG GORDON** (Removed) Eleventh Respondent

	AND	**MARK PAINTON** Twelfth Respondent
	AND	**ELDON ARCHER** (Removed) Thirteenth Respondent

Hearing:	28 and 29 October 2009 and 20 November 2009
Appearances:	Michael Keall for the claimants Paul Robertson, for the first respondent Eugene St John, for the fifth and sixth respondents Peter Craighead, for the twelfth respondent
Decision:	17 December 2009

FINAL DETERMINATION
Adjudicator: P A McConnell

CONTENTS

INTRODUCTION

[1] James Holland, Alan Ivory and Yvonne van Dongen as trustees of the Harbourview Trust are owners of a house at 11 Selby Square. The Trust purchased the house in April 2002 as a home for Mr Holland, Ms Dongen and their children. By the winter of 2005 it was apparent that the house was leaking. The claimants filed a claim with the Weathertight Homes Resolution Services in February 2008 and the assessor concluded that defects in the construction had caused leaks resulting in damage to the cladding, roof and the framing. Remedial work currently being undertaken will include a full reclad.

[2] The claimants allege that the Auckland City Council, Max Grant, Max Grant Architects Limited and Mark Painton are responsible for the defects and resulting damage. Auckland City Council is the local authority that issued the building consent, undertook inspections during the construction process and issued the Code Compliance Certificate. Max Grant and Max Grant Architects Limited were the designers of the property and Mr Painton was the plastering contractor engaged to undertake the plastering work.

THE ISSUES

[3] The issues I need to decide are:

- What are the defects that caused the leak;
- What are the appropriate costs to rectify the defects? In particular, are there aspects of betterment included in the repair costs being claimed?
- The liability of the Auckland City Council. In particular, should the Council have detected the defects during the inspection regime?

- Are Max Grant and Max Grant Architects Limited liable in negligence? In particular, are there any shortcomings or defects in the plans which are causative of water ingress and subsequent damage?
- Is Mr Painton responsible for any of the defects and consequential damage?
- What is the quantum of damage the respondents should pay?
- What contribution should each of the liable respondents pay?

MATERIAL FACTS

[4] In December 2001, Mr Holland signed an agreement for sale and purchase to purchase the property at 11 Selby Square. The transfer to the claimant trust took place in April 2002 and Mr Holland and his family have lived in the property since that time. At the time of purchase, the property was only a few months old with the Code Compliance Certificate (CCC) having been issued on 2 October 2001. Prior to signing the agreement for sale and purchase, Mr Holland made enquiries to ensure that the property did have a CCC and his solicitor made similar enquiries of the Auckland City Council prior to settling the purchase.

[5] The property was designed by Max Grant Architects Limited. Its involvement was up to building consent stage only and it had no involvement in the supervision of the construction process. The developer and builder of the property was L Reeve Construction Limited and its director, Lloyd Frederick Reeve, was project manager and personally undertook some of the construction work. Mr Reeve is now bankrupt and L Reeve Construction Limited is in liquidation.

[6] Mark Painton was subcontracted by Lloyd Reeve to apply the plaster which was done over a non-rigid backing.

[7] Building consent was issued on 26 January 2000. Construction of the dwelling commenced on or about November 2000 with final inspection by the Auckland City Council taking place on 27 September 2001 and the CCC being issued on 2 October 2001.

[8] The house is built on three levels overlooking Selby Square to the west with harbour views to the north. The property occupies 330 square metres of the 506 square metre site and is built with two main levels of accommodation and split levels to take advantage of the sloping site.

[9] The ground floor of the dwelling is cast on a concrete slab with concrete foundations. Floor and walls to the northern wing are constructed with concrete panels and a concrete midfloor with all other areas being timber framed. The external walls are a combination of solid plaster over a non-rigid backing, cedar weatherboard over building paper and solid concrete panels overlaid with building paper and solid plaster. The roofing is predominantly pitched roof areas overlaid with timber shingle tiles with smaller areas of rubber membrane clad flat roof. Fascias are finished timber with no eaves overhang.

[10] The claimant first became aware of water ingress problems in the winter of 2005 when leaks occurred in and about the covered entrance way on the north west elevation. Since that time the house has leaked in at least four separate areas including the children's bathroom, the bottom bathroom, the downstairs study and the cupboard under the stairs on the northern elevation. Mr Reeve, the builder, was called back to remedy the known defects in 2006 but the work done did not address the ongoing problems. Mr Williams, an architect, was engaged by the claimants to carry out further investigations and he wrote reports dated 16 February 2006 and 2 March 2006. The claimants subsequently applied to Weathertight Services on 21 February 2008. The assessor produced his report

dated 8 September 2008 which concluded that the house was a leaky home and that the Trust had an eligible claim.

[11] The claimants referred the report to the architects engaged to prepare remedial plans and Kaizon Limited was engaged to prepare indicative costings and manage the tender process. Kaizon Limited has also been employed to supervise the remedial work which is being undertaken by Forme. Remedial work commenced in late October 2009 and is ongoing. The claim for remedial work is based primarily on the amounts in the successful tender documents.

WHAT ARE THE DEFECTS THAT CAUSED THE LEAKS?

[12] Phillip Brown, appointed as an expert to assist the Tribunal in the absence of the assessor Laurence Elliot; Barry Gill, the claimants' expert; Keith Rankine, the Council's expert; Clint Smith, the fifth and sixth respondents' expert and Patrick O'Hagan, the twelfth respondent's expert, gave their evidence concurrently on the defects to the dwelling and subsequent damage.

[13] While there was some disagreement as to damage that resulted from different alleged defects and the seriousness of different defects, the experts in general agreed on the various defects present at this property as set out in the following paragraphs.

Defects and Subsequent Damage to the Roof Area

[14] The assessor and Mr Gill noted a number of defects to the roof of the dwelling. Mr Gill's opinion was that defects in relation to the roof contributed approximately 30% of the remedial costs. All the other experts agreed there were some defects but considered the contribution of the roof defects to be lower than the 30% attributed by Mr Gill.

Faced Fixed Flashings and Upstands to the Porch Entrance Roof

[15] All experts agreed there were issues with the small roof area over the front porch. Mr Rankine noted that the moisture readings in this area were low which suggested that no damage had been caused by this alleged defect. The other experts agreed that whilst there were deficiencies in the installation, it was at most a future likely damage issue. This roof area was not constructed in accordance with the plans and it is doubtful whether any defects could reasonably have been seen by a Council officer. In addition any construction defects could have been remedied by targeted repairs if this was the only defect.

Insufficient Cover Provided To Roof Parapets Causing Water Ingress

[16] The experts agreed that this was a sequencing issue. The plaster was applied after installation of the gutters and fascias and needed to be pushed up behind the flashings. As a result the plaster was not taken up behind these features creating the potential for water to ingress into the building envelope. This is more a cladding issue than a roof issue. This defect is not a design issue and nor is it an issue that should reasonably have been detected by the Council inspector. Remedial work to address this issue would require gutters to be removed which may cause some damage to the roof edges but would not require a complete re-roof.

Cracking of Plaster Cladding at Parapets

[17] There is evidence that there was no damp proof course between the timber and the concrete and that the cladding bond has failed. Photograph 8.3 in the assessor's report showed that there had been water ingress in this area due to dark staining to the end of the plywood. A moisture reading of 17.4 in that location is just within the acceptable range. The water ingress at this area may however be causing damage further down if water is unable to escape. This

however is unlikely to be a defect for which any of the current respondents would have any liability.

Top Fixed Timber Edged Flashings

[18] This was identified by Mr Gill and the assessor as a potential defect. The moisture readings taken in this area are low. The issue again appears to be one of sequencing with the flashings having been put on before the plastering.

Timber Fascia's Penetrate the Cladding

[19] Some of the facia boards have been installed prior to the application of plaster and without any back flashing. This is primarily caused by poor programming as the plaster should have been completed before the fascias were installed. This was agreed to be a defect although the moisture readings in the area were low. Staining indicated water ingress damage and Mr Gill and Mr Rankine in particular accepted there was evidence of damage. Mr Smith and Mr O'Hagan also accepted there was damage but considered the apron flashing was more a problem in this area than the timber fascia. Mr Rankine, Mr Gill and Mr Brown considered it was a combination of both.

Poorly Detailed Membrane – Shingle Junctions

[20] Mr Gill considered the lack of detail with regards to the junction between the shingle and membrane roof was a design issue because no details had been provided in the plans. However all experts agreed that the roof in these areas had not been built in accordance with the plans. The plans provided for nuraply roofing falling into a gutter around the edge. However as built, a gutter was not provided with water being directed over the plaster rather than into a gutter. In addition, polystyrene caps to the parapets were provided for in the plans and were not installed. The nuraply membrane was also substituted with an off-the-shelf type rubberised membrane. The

nuraply membrane specified was a proprietary system applied by licensed applicators.

[21] Mr Rankine considered that this issue was not necessarily a defect because if there had been an adequate drainage plane, any water would have been directed out. Mr Brown and most other experts however expressed the opinion that directing water off a roof into a cavity was not good practice.

[22] I am satisfied that there is a defect in relation to the membrane/shingle roof junctions that has caused damage to the property. This is appropriately described as being poorly detailed in the sense that what has been built was poorly detailed and poorly constructed. The roof as built is a significant departure from the plans and for that reason there is no causative link between the architect's work and this defect. The Council however should have noted the changes to the plans in these areas (during the course of its inspections) and ensured the design details of the roof as built complied with the Code.

Poor Membrane Installation

[23] The poor standard of roof membrane installation further contributed to the damage to the roof area. Whilst a split in the membrane could also have been a cause of water ingress, the general, but not universal, opinion of the experts was that the membrane split was not the only cause as damage is evident in a number of areas. This is not a defect that could reasonably have been detected by the Council inspector. In addition the fifth, sixth and ninth respondents have no responsibility for this defect.

Summary – Roofing Defects and Damage

[24] There are defects to the roofing which have caused damage. These are primarily around the membrane shingle junction as outlined in paragraphs 20-22 and also due to poor membrane installation.

There is also evidence of water ingress around the plaster parapets which were constructed with flat tops and it appears that there was no damp proof course between the timber and concrete. In addition deficiencies in the installation of the porch entrance roof could in future result in damage. Other areas of damage such as insufficient cover to roof parapets, timber fascias penetrating the cladding and top fixed timber edged flashings contributed to water ingress. These issues may more appropriately be categorised as cladding defects rather than roof defects.

Ground Clearances

[25] There were no details clearly showing appropriate base clearances on the original plans. However during the building consent process the Council added a number of stamped endorsements to the plans including one that stipulated minimum ground clearances. Technical documents that were relevant at the time also stipulated minimal ground clearances. These included the Good Stucco Guide 1996, NZ3604 and NZA31.

[26] All experts agree that there were inadequate clearances between the bottom of the stucco plaster and horizontal surfaces in a number of locations. This was primarily an issue in relation to the front deck area but was also evident in other locations at ground level. The total length of the ground level areas without suitable clearances amounted to approximately 10 metres. Mr Gill and Mr O'Hagan considered the ground clearance issues contribution to the total remedial cost was approximately 22%. Mr Smith considered it to be about 10%. Mr Brown's view was that other issues were probably more significant than ground clearances particularly in relation to the deck but they would have been a contributing factor.

Deck and Balustrade

[27] All experts agreed that the construction of the balustrade was a key defect and cause of water ingress in relation to the balcony at

the front of the house. The top fixed handrail caused water ingress from the top fixings into the balustrade causing damage. It was also agreed that the glass balustrade contributed to water ingress and damage by trapping water running down the balustrade causing it to pool around the top of the metal balustrade fixing. It appears that no membrane had been installed over the horizontal surfaces and that the penetrations had been inadequately sealed. These issues contributed to damage in this area. Once again construction did not follow the plans as the plans provided for nuraply on plywood with over flashings and did not include a glass balustrade.

[28] The Council submitted there was no evidence of when the glass balustrade was installed and that it may have occurred after the CCC was issued. The opinion of at least one of the experts was that the glass balustrade was likely to have been fitted for compliance reasons in order to obtain the CCC. I accept it is more likely than not that the glass balustrade was installed prior to the final inspection. The final inspection was on 27 September 2001, only two months before the claimant Trust agreed to purchase the property and the evidence suggests it was installed to comply with Council requirements.

Joinery Installation

[29] All the experts agreed that defects in the installation of the windows and the sporadic way in which flashings were installed contributed to the dwelling leaking. Windows leaked on both the plaster and weatherboard parts of the dwelling and this affected every elevation. Flashings around the plaster windows were not consistently installed. Some had jamb flashings, some had sill flashings, but none had a full set. The windows in the weatherboard clad areas had no sealant, plugs or scribers along the sides of the windows. In addition, bevelled back weatherboards as drawn in the plans had been changed to rusticated weatherboards. The details in relation to aluminium joinery should have been different for the

different types of weatherboards. All experts agreed that the flashings were not done in accordance with the plans or in accordance with acceptable practices at the time.

[30] Whilst Mr Smith put the contribution of this defect to the remedial work at 70%, most of the other experts considered it to be nearer 25%. It is however clear that this defect affected all elevations and therefore even if this had been the only defect, it is likely that a full reclad would have been necessary.

Plastering

[31] Mr Rankine in his witness statement stated that defects in the application of the plaster was possibly the most significant cause of the dwelling leaking. His opinion however was primarily based on a caption added to one of the assessor's photos indicating that the stucco plaster had been applied as a single coat. Whilst this conclusion may have been reasonable on a visual inspection of the photograph I accept the opinion of Mr O'Hagan that a definitive conclusion could not be reached without further investigation of the plastering. Some photographs tend to show at least two layers and the expert's inspection of the plastering during the course of the hearing indicated that at least a two layer system was applied. Mr Painton's evidence also was that he applied two layers of plaster.

[32] I am satisfied that two layers of plaster were applied to this dwelling and not a single layer. The only evidence of a single layer is one photograph in the assessor's report and the interpretation of that photo is not determinative. Even a two coat plaster system however did not comply with the compliance system in force (which required three coats) at the time this dwelling was built. With the exception of Mr Rankine, all the experts agreed that a two coat system would perform the same way as a three coat system. On the evidence before me I conclude that the failure to apply a third coat, which was largely decorative, was not a cause of water ingress. There is also

insufficient evidence to establish that this would have contributed in any significant way to the cracking in the plaster.

[33] Mr Rankine in his brief outlined other reasons for the stucco plaster cracking. These defects included overworking of the finished surface, poor mix proportions, poor pouring or dirty sand. There is however no evidence that any of these issues occurred in this dwelling.

[34] The experts all agreed that there were no control joints in the inter-storey junction as required by NZ4251. The need for control joints was well documented at the time of construction. The conclusion by the experts however was that there is little, if any, evidence that the lack of control joints contributed to water ingress in this property. The most that can be said is that it may have contributed to the cracking of the plaster cladding.

[35] In a limited number of locations the plaster cladding was installed hard down into the head flashings. It was agreed this was contrary to good practice where the dwelling was constructed with a non-rigid backing. However the moisture readings in these areas were below the 18% threshold. The experts also noted that head flashings had been embedded within the plaster however it was accepted that, at most, this had potential to cause water ingress. There was no evidence of damage as a result of this alleged defect.

[36] The claimants in their closing submissions submit failure or cracking in the cladding was a defect that caused damage, referring to paragraph 15.2.1 of the assessor's report. Whilst I accept that cracking in the stucco cladding has caused damage, there is little if any evidence that deficiencies in the application of the plaster itself were the cause.

Inadequate Flashings with regard to Junctions between the Dissimilar Cladding Materials

[37] The experts all agreed that failure to install flashings to the junctions between dissimilar cladding materials was a cause of water ingress to the dwelling and resulting damage. This defect was primarily an issue in the junctions between the timber weatherboards and the stucco cladding but was also an issue with the stucco-concrete junctions.

[38] Mr Gill and Mr Rankine considered this to be a design fault as no flashings were detailed on the plans. At p.38 of the specifications accompanying the plans, the builder is instructd to install flashings in accordance with BRANZ 304 and 305. The flashing details in BRANZ 304 and 305 were detailed for weatherboard to weatherboard junctions and not junctions of dissimilar materials. Mr Rankine did however accept it would be logical for a builder to follow similar detailing with claddings between dissimilar materials.

[39] The experts who were familiar with building practices in New Zealand at the time this property was built, agreed that it was standard building practice for flashings to be installed in junctions between cladding materials and this was not necessarily a detail that needed to be specifically addressed in the plans. Standard flashing details would have been all that was necessary here. If there was any doubt on the part of the builder, he should have referred the matter back to the architect for further details.

[40] In closing submissions, some counsel put significant emphasis on the fact that the flashing details contained in the technical literature were for weatherboard junctions and not junctions of dissimilar materials. In those circumstances they submitted there was negligence on the part of the designer in not providing specific details where none existed. In my opinion, counsel for the claimants

and the first respondent were reading technical information from the point of view of lawyers and not of builders. I accept Mr Rankine, Mr Smith and Mr Cook's evidence that it would be logical for a builder to follow similar detailing as that for weatherboard to weatherboard junctions. I also accept Mr Cook's evidence that any competent builder would have known these areas needed to be flashed and would have known how to do it.

[41] The experts placed the contribution of this defect to the total remedial cost between 5 and 20%. Given the number of locations where there were junctions between different materials and the fact that these junctions occurred on both horizontal and vertical planes, I assess the contribution of this defect to the total remedial cost of being approximately 15%.

Drainage Plane

[42] The lack or inadequacy of the drainage planes installed in this property was considered by Mr Rankine to be a significant cause of damage. In his brief he noted that the details within the drawings for the bottom of the drainage plane would not have been effective because the architect had specified horizontal battens and flexible sealant which would have blocked the drainage path. Mr Rankine's opinion was that the drainage plane as designed and as built was inadequate and has contributed to the dwelling leaking.

[43] There were however wide spread departures from the plans with cavities not being installed in some places where they were drawn. In addition the cavity battens used were untreated rather than treated timber as specified in the plans. Mr Smith noted that in locations where a cavity had been installed the moisture readings taken were 10-13% and therefore within acceptable levels.

[44] The consented plans also had stamped on them the requirement that the cavity between the backing and the building

paper was to be sealed from the roof space and the subfloor and opened at the bottom to drain moisture to the outside but protected against the entry of vermin.

[45] I accept that the lack of an adequate drainage plane or the sealing of the drainage plane has contributed to the damage resulting from water ingress. The responsibility for this defect lies primarily with the builder. The areas where damage is evident is where the cavity provided in the plans has not been included and the stucco is direct by fixed. The cladding battens installed contained no treatment which has resulted in damage and this is also contrary to the plans. The provisions for flexible sealant which blocked the drainage path in the as drawn plans was not installed. Instead plaster was carried over both substrates.

Conclusion in Summary as to Damage

[46] Based on the evidence provided by the experts, I am satisfied that the key defects causing water ingress and damage to this dwelling are:

- Inadequate flashings and waterproofing of joinery;
- Lack of flashings in joins between dissimilar cladding;
- Insufficient ground clearances in relation to the front deck and to approximately 10 metres of cladding at ground level;
- Top fixing of deck balustrade and installation of glass balustrade;
- Failure to provide sufficient flashings to flat roof details and other roofing defects;
- Inadequate drainage planes also contributed to the damage primarily in areas where no cavity was installed.

[47] Reference was also made by various experts and in the assessor's report to other possible defects and allegations of poor workmanship or poor detailing in the cladding. Whilst there were other issues with this dwelling, there was little evidence that any of the other matters were causative of damage to the dwelling. In addition whilst some experts referred to a number of other alleged deficiencies in the plans either there is no evidence of damage from these deficiencies or the plans were not followed by those involved in the construction.

WHAT ARE THE APPROPRIATE REMEDIAL COSTS TO RECTIFY THE DEFECTS?

[48] The claimants are seeking $520,153.23 for the remedial work and associated costs. This amount is calculated as follows:

Repair Costs Forme[1]	$442,057.38
Uplifting, storing and relaying carpet	$2,250.00
Remove store and re-hang drapes	$1,950.00
Kaizon Limited project management supervision	$22,162.50
Kaizon Limited mileage and timber testing	$3,892.40
Remedial Design	$31,731.42
ACC Resource Consent	$1,600.00
Auckland City Building Consent Fees	$9,643.66
Disbursements	$152.98
Construction Insurance	$1,125.77
Initial assessments[2]	$1,977.13
Engineer re balustrade	$1609.99

[49] All the experts agreed that a complete reclad was the only acceptable solution. The claimants acknowledged that in the scope

[1] After deductions for betterment for Skylights, Bbq and Pergola and less the $8,385.23 double costed.
[2] Norm Williams $1,477.13 and DBH application fee $500.00.

for remedial works they had included additional work which could be considered as betterment. They have made deductions from the amount claimed for this work. There was no specific dispute with the amount deducted for these areas. There was however dispute in relation to the following parts of the claim for remedial work:

- The amount of $12,960.00 for what was called a hidden contingency.
- Some debate over provisional sums included for landscaping and thermal installation.
- The first respondent submits that there are elements of betterment in the claim for interior and exterior painting.
- The claim for the roof - The first respondent submits that part of the cost of the over roof proposal is betterment and a deduction should accordingly be made.
- Submissions that design and consultancy fees should be adjusted for identified betterment and additional Council fees incurred in relation to those works.

Hidden Contingency Fee

[50] The so called hidden contingency fee relates to areas where Kaizon stipulated various provisional sums to be included in the tender documents when submitting a tender. Forme, the successful tenderer, in some areas included different amounts than those allocated by Kaizon. The amounts included by Forme in relation to these contingency amounts was $12,960.00 less than the standard PC sums set. It was Mr Gill's opinion that the standard PC sums, as stipulated by Kaizon, should be allowed as his experience was that these set provisional sums were reasonable based on Kaizon's experience with leaky home renovations.

[51] I consider it is appropriate for the claimants to use the standard PC sum set by Kaizon in calculating the amount of the proposed remedial work. No significant issue is taken with any of the

set provisional sums in themselves. On the basis of the information provided by Mr Gill, I accept that they are reasonable.

Dispute over amount claimed for Insulation and Landscaping

[52] The first respondent submits that the amounts Forme had included for insulation and landscaping are high as the amounts included in their tender documents was higher than either Insite or Lifebuilt. However overall Forme was the lowest as well as being the successful tenderer. I accept the claimants' submissions that you cannot mix and match tender sums in the way suggested by the first respondent. There is no allegation that the tender process was inadequate. In those circumstances as the lowest tender was accepted, with the exception of the issue regarding the hidden contingency, the amount claimed for individual items are not appropriately reduced in the way suggested.

Betterment / Painting

[53] The respondents submit that the costs for both interior and exterior paintings should be reduced to take into account the fact that new is being substituted for old. The exterior of the dwelling was repainted in 2006, approximately three years before the remedial work commenced. It was agreed that the life expectancy of exterior paint is 8-9 years. Accordingly the exterior paintwork is approximately 1/3 the way through its normal life expectancy. The claimants did not dispute, and therefore I accept that the interior of the dwelling was approximately 75% through its normal life expectancy.

[54] Replacing new for old in these circumstances can be regarded as betterment. I accordingly conclude that the costs claimed for painting should be reduced due to betterment. The cost of the external paint should be reduced by 1/3 and the internal painting by 2/3. The claimant Trust did not dispute the quantum of deductions submitted by the Council but only the issue of whether painting costs were betterment. I accordingly accept its calculations establishing the

value of betterment for painting as being $6,449.00 for exterior painting and $4,219.00 for interior painting.

The Roof

[55] Rather than replacing like-for-like the remedial work incorporates a new roof system which includes construction of an over roof with eaves rather than deconstructing and reconstructing the damaged areas of the existing roof. The respondents submit that the roof proposal contains significant elements of betterment and that any roofing defects could be remediated more cost-effectively without the installation of a new roof and eaves. Whilst initially it was suggested the installation of eaves was required to reduce the risk matrix and therefore obtain building consent, the claimant's expert accepted at the hearing that this was not the case. The new roof does not in fact reduce the risk matrix and therefore the extension of the roof to include eaves is not linked to the need for repairs.

[56] The claimants however submit that the cost of re-roofing is either no more expensive or only marginally more expensive than carrying out like-for-like remedial work. The over roof proposal requires the demolition of the three parapets but not their reconstruction. In addition, in order to carry out repairs, the claimants submit a significant number of the existing cedar tiles will need to be lifted and their estimation is that only a few would be suitable to be re-laid due to being damaged in removal. There would accordingly be a significant expenditure on new tiles. The over roof proposal however uses a cheaper tile system which Mr Hodge estimates will result in saving a sum of $12,690.00 plus GST. In addition, Mr Hodge gave evidence that the over roof proposal will not require the reconstruction of the membrane clad gutters that run east to west over the North and South elevations. He estimated that the cost of replacing like-for-like would be approximately $62,000.00.

[57] Mr Ewen, the Council's quantum expert, however believed that the cost of replacing like-for-like would be more likely in the vicinity of $40,000.00. He believed the amount included by Mr Hodge for reconstructing the parapets and also shingle replacement were high.

[58] On the basis of the evidence presented, I accept that the over roof with eaves is a reasonable proposition for the claimants to adopt in terms of the remedial work for the roof. I however conclude that there is an element of betterment in relation to the over roof proposal. The over roof proposal eliminates potential risky areas but also has the advantage to the claimants of creating eaves. The eaves give protection to the cladding, provide protection to the upstairs windows to reduce the risk of rain entry when they are left open and an aesthetic benefit. I also consider that Mr Gill has been generous in his estimates for the over roof proposal. In addition the only defects with the roof were those for which either the Council or Mr Painton had some liability, the repair costs would have been significantly less than the amount sought by the claimant.

[59] All parties agreed that if I were to make a reduction for the remedial costs for the roof on the basis of betterment or for any other reason this could be based on my estimate. Parties agreed that obtaining further detailed information to enable a detailed and accurate decision on this point would likely cost more to the parties than the amount in dispute. Based on my evaluation of the evidence presented by Mr Hodge and Mr Ewen, I assess that the amount of betterment over and above the costs required to remedy the defects for which any respondent in this claim could have liability is $30,000.00. In calculating this figure, I have taken into account my conclusions that a number of the roofing defects are not the responsibility of any parties to these proceedings. In particular I accept that the defects in the membrane installation are not the responsibility of the architect or the plasterer and would not reasonably have been noted by any Council inspector.

Professional Fees

[60] The first respondent submits that the professional fees charged for management and supervision of the project and remediation design should be reduced to take into account the issues of betterment and other deductions. This would primarily relate to the roof issue as painting does not normally form part of either the remedial experts' supervision work or the remedial designer's work.

[61] Mr Gill however advised that fixed sums in relation to Kaizon fees were set and agreed before the extent of the work was known. Any work not included in the scope would accordingly not have affected the fee. There is a stronger argument to reduce the design fees to reflect the betterment issues regarding the roof. However significant design work would still have been required even if the new roof design with eaves were not included. I am not satisfied that these costs would have been significantly less than what was incurred in design fees for the roof redesign.

Other Amounts Claimed

[62] In addition to the costs associated with the remedial work to the property, the claimants seek the following:

Alternative accommodation for 22 weeks	$19,800.00
Letting fee	$1,012.50
Packing and storage	$12,151.25
Dog –relocation costs	$560.00
WHT application fee	$400.00
Valuation fee for financing	$900.00
Total	**$34,823.75**

[63] Mr Craighead, on behalf of the twelfth respondent, submits that the cost of the alternative accommodation is too high and that the

claimants should have considered out of town accommodation which he believes would have been obtained for a lower price. His submission that a four bedroom house in the suburbs could be rented for 50% less, is in my opinion, somewhat optimistic. Whilst I accept some savings could have been made if a house had been rented outside of the central suburbs, it is more likely to be the vicinity of $200.00 a week, not $450.00. In any event, where claimants are required to move out of a property to enable remedial work to take place, it is reasonable for them to be able to find alternative accommodation within the community in which they reside. Mr Holland and Ms Dongen have two teenage children who attend schools and no doubt have a number of extracurricular activities in the community.

[64] I accept the amount claimed and the length of time for which alternative accommodation is claimed are reasonable and these amounts are allowed. No significant dispute was made with the packing and storage costs or with the dog relocation costs. These claims are reasonable and allowed. By implication all parties also accepted the valuation fee for re-financing of $900.00 as being an amount claimable.

[65] The respondents however dispute the jurisdiction for the Tribunal to award the $400.00 Tribunal application fee. Section 91 of the Act provides that the Tribunal can only award costs of adjudication proceedings in limited circumstances which do not appear to apply in this case. The application fee is by definition one of the costs of adjudication proceedings and accordingly the Tribunal only has jurisdiction to award it in the circumstances set out in section 91. The claim of $400.00 for the application fee is therefore dismissed.

Summary in Relation to Quantum

[66] I am satisfied that the quantum is proven in the amount of $512,308.98. This of course is subject to liability findings against particular respondents. The $512,308.98 is calculated as follows:

Remedial work as claimed		$520,153.23
Betterment painting	$10,668.00	
Roof deductions	$30,000.00	
ACC Resource consent	$1,600.00	$42,268.00
		$477,885.23
Alternative accommodation and letting fee		$20,812.50
Packing and storage		$12,151.25
Dog relocation		$560.00
Valuation fee		$900.00
TOTAL		**$512,308.98**

LIABILITY OF THE AUCKLAND CITY COUNCIL

[67] The claim against the Council is that it was negligent in the processing of the building consent application, in carrying out inspections during construction and in issuing the code compliance certificate. In particular it is alleged that it was negligent in failing to identify the weathertightness defects both in the plans and during the inspections undertaken.

[68] The claimants allege that there were inadequacies in the design of the dwelling and that the drawings and specifications, on which the consent was based, did not contain sufficient details to ensure defects did not occur during construction. In processing the building consent application, the claimants allege the Council should have been mindful of the issues that these inadequacies raised. The Council therefore breached their duty of care to the claimants in approving the building consent application.

[69] In *Body Corporate 188529 & Ors v North Shore City Council & Ors* (No 3) [2008] 3 NZLR 479 (*Sunset Terraces*) Heath J

concluded it was reasonable for the Council to assume, in issuing building consents, that the work could be carried out in a manner that complied with the Code. He stated:

> "[399]…To make that prediction, it is necessary for a Council officer to assume the developer will engage competent builders or trades and that their work will be properly co-ordinated. If that assumption were not made, it would be impossible for the Council to conclude that the threshold for granting a consent had been reached.
>
> ……
>
> [403] In my view, it was open for the Council to be satisfied, on reasonable grounds, that the lack of detail was unimportant. I infer that the relevant Council official dealing with this issue at the time concluded that the waterproofing detail was adequately disclosed in the James Hardie technical information and had reasonable grounds to be satisfied that a competent tradesperson, following that detail, would have completed the work in accordance with the Code."

[70] By and large, the defects with this property arose through the builder not following the consented plans and the specific endorsements made to those plans by the Council. The Council cannot be liable for issuing a building consent where the defects have arisen through failure by the builder or other contractors on site to follow the consented plans.

[71] There are however some areas where defects have arisen which were not included in the plans. The most significant of these relates to the lack of flashing with regard to the junctions between similar cladding materials. I however accept that installation of flashings in these junctions was something a Council officer would assume a competent builder or trades person would install even if not detailed in the plans. In my view, therefore the Council had reasonable grounds on which it could be satisfied that the provisions of the Code could be met if the building work was completed in accordance with the plans, specifications and technical literature by a

competent builder. I accordingly conclude that the claimants have not proved negligence, at the building consent stage, on the part of the Council.

The Inspection Process

[72] The claim that the Council failed to exercise due care and skill when inspecting the building work is based on failure to inspect with sufficient care. It is further alleged that this failure amounted to negligence and caused the claimants loss.

[73] The Council inspections were carried out by Council officers pursuant to section 76 of the Building Act 1991. At least 11 inspections were carried out during the construction process with a final inspection in September 2001 resulting in a CCC being issued on 2 October 2001.

[74] The Council submits that many of the issues with the dwelling would not have been identified as defects at the time of construction. In particular it submits that a Council officer should be judged against the conduct of other Council officers and against the knowledge and practice at the time at which the negligent act/omission was said to take place.

[75] I accept that the adequacy of the Council's inspections needs to be considered in light of accepted building practices of the day. The High Court in recent cases has set out the responsibility on territorial authorities in carrying out inspections. Heath J in *Sunset Terraces* states that:

> "[450….[A] reasonable Council ought to have prepared an inspection regime that would have enabled it to determine on reasonable grounds that all relevant aspects of the Code had been complied with. In the absence of a regime capable of identifying waterproofing issues involving the wing and parapet walls and the decks, the Council was negligent."

[76] And at paragraph 409,

> "The Council's inspection processes are required in order for the Council (when acting as a certifier) to determine whether building work is being carried out in accordance with the consent. The Council's obligation is to take all reasonable steps to ensure that is done. It is not an absolute obligation to ensure the work has been done to that standard."

[77] In *Dicks v Hobson Swan Construction Limited* (in liquidation),[3] the court did not accept that what it considered to be systemically low standards of inspections absolved the Council from liability. In holding the Council liable at the organisational level for not ensuring an adequate inspection regime, Baragwanath J concluded:

> "[116]…It was the task of the council to establish and enforce a system that would give effect to the building code. Because of the crucial importance of seals as the substitute for cavities and flashings it should have done so in a manner that ensured that seals were present."

[78] These authorities establish that the Council is not only liable for defects that a reasonable Council officer, judged according to the standards of the day, should have observed. It can also be liable if defects were not detected due to the Council's failure to establish a regime capable of identifying whether there was compliance with significant aspects of the Code. I will therefore be applying this test in determining whether the Council has any liability. In doing so, it is appropriate to consider each area of defect as established in paragraphs 12 to 47.

[79] The inadequate ground clearances on both the balcony and ground level should have been detected by Council inspectors. This is particularly the case as the Council provided a specific endorsement on the consented plans requiring these clearances to be installed. I accordingly find that the Council was negligent in failing to

[3] (2006) 7 NZCPR 881 per Baragwanath J (HC) at para [116].

note the insufficient clearances and in issuing the CCC when this defect existed.

[80] I am also satisfied that a Council officer should have detected the inadequate flashings and waterproofing of the joinery and the lack of flashings between the junctions of dissimilar materials. Mr Smith's undisputed evidence was that during the 1990's the Auckland City Council made it mandatory as part of the Council inspections to ensure that two inspections were undertaken of the stucco plaster system during the construction process. The first inspection was to inspect the substrate prior to plastering which would allow the inspector to view the mesh, window flashings, vermin proofing for the cavity and the allowance for control joints. Once this inspection was undertaken, plastering was allowed to take place. If such inspection had taken place, the lack of flashings and adequate waterproofing detail should have been readily apparent to the inspecting officer. If the inspection had not taken place then the Council was negligent in failing to ensure the appropriate inspections took place and in failing to establish a regime capable of identifying that significant watertightness aspects of the Code had been complied with in relation to this dwelling.

[81] I accept that the Council inspector would not necessarily have been able to determine the adequacy of the drainage plane as built in all respects. However the inspector should have noted during the stucco inspection undertaken on 16 May 2001, the departures from the plans in areas where a cavity had not been installed.

[82] In relation to the balcony and the deck, the Council submits that the fixing of the balustrade was a key cause of water ingress but that the balustrade was standard for the time. It further submits the glass balustrade was not a consented structure and there was no evidence that it was inspected and passed by the Council. I have already concluded that it is more likely than not that the glass balustrade was installed prior to the final inspection. This was an

issue that should not have been passed by the Council without further enquiries. Whilst the top fixing of the handrail was a common practice, the manner in which this handrail was affixed was a departure from the consented plans. The clear evidence of Mr O'Hagan, Mr Smith and Mr Gill was that the changes from the plans were a significant contributing factor to the balustrade leaking. These changes should have been identified during the inspection process.

[83] I have already concluded that a number of the roofing defects, particularly in relation to the installation of the membrane roofing would not reasonably have been detected during Council inspection. Once again however with the roofing, there were clear departures from the consented plans. These departures should have been noted by the Council officer and amended consents obtained. The areas of departure are also key areas of water ingress in relation to the roof and accordingly the Council was remiss in not identifying both the changes to the consented plans and also the watertightness deficiencies in relation to these changes. I accept that the roofing defects for which the Council could be held liable would not have required the re-roofing with eaves as has been claimed by the claimants. I have taken these factors into account when determining the appropriate reduction to be made to the remedial costs ordered for the roof remedial work.

Conclusion on Council Liability

[84] In summary I conclude the Council was negligent in failing to identify defects in relation to the installation of flashings with regards to junctions between similar cladding materials and in relation to the inadequate flashing and waterproofing of the joinery. In addition, the Council was negligent in failing to identify the ground clearance issues on the front deck and on approximately 10 metres of ground level wall. I am also satisfied that the Council should have noticed the change from the consented plans in relation to some of the roof construction details. This would have highlighted the issue of non-

compliance with the consented plans and put them on notice to make further enquiries.

[85] There are clearly areas of damage where it is not reasonable to have expected the Council to have noticed. Given however the extent of the damage that has been caused by the defects that should have been detected by the Council and the fact that they occur on all elevations, I conclude that the Council has contributed to defects that necessitated the full recladding of the house.

[86] I also conclude that the Council officer should have noticed some of the changes in the plans from the roof as designs to the roof as built. They were negligent in issuing a CCC without ensuring amended consents were obtained and that these changes were appropriate. The departures from plans that should have been identified by the Council are a contributing factor to the roof leaking and the consequence damage.

ARE MAX GRANT AND MAX GRANT ARCHITECTS LIMITED LIABLE IN NEGLIGENCE?

[87] The claimant trust submits that Max Grant and Max Grant Architects Limited (MGA) owed it a duty of care to exercise all reasonable care and the discharge of its duties relating to the design of the dwelling. It further submits that MGA were negligent in providing consented plans that failed to detail proper weathertightness detail in relation to several features. Such negligence it submits was a major contributor to the lack of watertightness identified by the experts.

[88] MGA were contracted to provide design work up to the building consent stage only. There is no evidence they were involved on site in terms of management or ongoing construction. There is also no reliable evidence that the builder sought further details from them during the construction process.

[89] MGA accept they owed the claimants a duty of care, they however submit they met that duty. In particular they submit that the weathertightness defects were not caused by design defects but by wide spread deviation by the builder from the consented plans and specifications and the poor building practices of the builder and subcontractors. MGA submit that their plans and specifications were more detailed than the general practice of the day and the standard of care needs to be established by reference to the general practice at the time.

[90] It is well established that the standard of care required of an architect in discharging his or her duties is the reasonable care, skill and diligence of an ordinarily competent and skilled architect.[4] Mr Keall and Mr Robertson appear to be suggesting 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 dwelling house. This is not however the test that the courts or tribunal apply in determining whether an architect has breached any duty of care.

[91] In *Body Corporate 188529 v North Shore City Council*[5] (*Sunset Terraces*), Heath J concluded that an architect or designer is entitled to assume that a competent builder would refer to manufacture's specifications or established literature for construction where there was insufficient detail in the plans. In that case, even though the plans were skeletal in nature, did not contain references or detail relating to manufacturer specifications and the specifications were poorly prepared and contained outdated references, the Court was satisfied that the dwelling could have been constructed in accordance with the Building Code. Heath J stated:

[4] *Eckersley v Binnie & Partners* [1955-1995] P.N.L.R 348 and *Saif Ali v Sydney Mitchell & Co* [1978] 3 or E R 1003.
[5] [30 April 2008] HC Auckland, CIV 2004-404-3230, Heath J.

> [545] *"I am satisfied, for the same reasons given in respect of the Council's obligations in relation to the grant of building consents that the dwellings could have been constructed in accordance with the Building Code from the plans and specifications. That would have required builders to refer to known manufacturer's specifications. I have held that to be an appropriate assumption for Council officials to make. The same tolerance ought also to be given to the designer. In other respects, the deficiencies in the plans were not so fundamental, in relation to either of the two material causes of damage, that any of them could have caused the serious loss that resulted to the owners.*
>
> *[546] In particular, the allegation in relation to inadequate waterproofing detail for the decks and the absence of any detail in the plans demonstrating how the tops of the wing and the parapet walls were to be waterproofed are answered fully by the reasons given for rejecting the negligence claim against the Council based on its decision to grant a building consent."*

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

[93] The relevant question to address therefore is whether the claimants have established that at the relevant time it was the practice of the architectural profession to include the level of detail asserted by the claimants and the Council. If so, the question then is whether the act or omission, in failing to provide this detail, was causative of loss.

[94] The claimant and first respondent made a large number of criticisms of the designer's plans in the briefs and submissions filed. Many areas of criticism however were in relation to the areas where the plans were not followed and where what was built was significantly different than what was specified in the plans. In relation to these issues, there can be no causative link between the plans and the defects which caused water ingress. There are also a number of

other criticisms of the plans where it was alleged that the plans were deficient but there is no evidence of any water ingress as a result of those alleged defects.

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

a) Poorly detailed membrane shingle junctions;
b) Failure to specify appropriate ground clearances;
c) Inadequate detail in relation to decks and balustrade;
d) Failure to provide details for flashing of junctions between dissimilar cladding materials; and
e) Poor detailing of drainage planes.

[96] It was generally accepted by all parties and their experts that the plans produced were more detailed than the general standard of the day. They were accompanied by detailed specifications which also contained references to appropriate manufacturer specifications and other documentation.

[97] In relation to several of the specific allegations made against the designer, the plans that were provided were not followed. This applies to the roofing defects, the defects in relation to the decks and balustrades and the joinery flashings. Whilst it could be argued that ground clearances were not adequately detailed in the plans, there was an endorsement on the consented plans requiring the dwelling to be built with the appropriate clearances. In addition, the other technical information referred to in the plans provided clear directions as to ground clearances. Even if there were deficiencies in the plans, they were not causative of loss as the consented plans and specifications included the Council endorsements.

[98] The key area which caused damage in which it was alleged the designer was negligent was in the failure to provide flashings for the junctions between dissimilar materials. MGA submitted that any

competent builder would have understood the need for flashings at these junctions. Evidence was given, which I accept, that these flashings were regularly available from retailers. Mr Robertson and Mr Keall submitted that there were in fact no specifications detailing junctions between dissimilar materials as the plans and other documentation only provided details for junctions between similar materials and generally at corners. When this issue was put to the experts, their view however was that a competent builder would logically follow similar flashing details for dissimilar materials and this would have worked.

[99] I accept on the basis of the evidence provided that a reasonably competent builder would have known to install flashings behind the cladding at the junctions between plaster and weatherboard and plaster and masonry. In this regard, I also agree with Adjudicator Green in *Carter v Tulip Holdings*[6] when he concluded:

> [10] ....*"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 the 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 should have no complaint as against the architect and neither will a subsequent owner."*

[100] In conclusion therefore I accept MGA owed a duty of care to the claimants but that they met the standard of care required of them. The claimant trust has failed to establish that the plans and specifications prepared by MGA were not prepared with the reasonable care, skill and diligence of an ordinary competent architect by reference to the general practice of the day. I also accept that the

[6] (30 June 2006) WHRS, DBH 00692, Adjudicator J Green.

cause of the defects to this property are not the design but rather the widespread deviation by the builder from consented plans and specifications and poor building practices by the builder and subcontractors. The dwelling could have been built weathertight by a competent builder from the plans and specifications if the builder had referred to known manufacturer specifications and other details referred to in the plans. There are accordingly no material losses suffered by the claimants caused by any alleged deficiencies in the plans. The claim against Max Grant and Max Grant Architects Limited is accordingly dismissed.

IS MR PAINTON RESPONSIBLE FOR THE DEFECTS AND CONSEQUENTIAL DAMAGE?

[101] Mr Painton was contracted on a labour-only basis to carry out the plastering work on the dwelling. Mr Craighead, on behalf of Mr Painton, submitted that Mr Painton did not owe the trust a duty of care. He was subcontracted by the builder on a labour-only basis working under the direction of the head builder and therefore there was no duty of care owed or assumption of liability on the part of Mr Painton. Mr Craighead submits that the situation of Mr Painton is analogous to the subcontractors in *Northern Clinic Medical and Surgical Centre Limited v Kingston & Ors*[7] (*Northern Clinic*) and *Body Corporate 114424 & Ors v Glossop Chan Partnership Architects Limited*[8] (*Glossop Chan*).

[102] In the *Northern Clinic* case, Keane J concluded that Mr Vesey, the cladding applicator who was a subcontractor to the head-contractor, did not owe Northern Clinic, the building owner, a duty of care. A claim had been filed against Mr Vesey in both contract and tort. In striking out the claim against Mr Vesey, Keane J concluded that the claim against Mr Vesey in contract was unsustainable on the

[7] [3 December 2008] HC Auckland, CIV 2006-404-968, Keane J.
[8] [22 September 1997] HC Auckland, CP 612/93, Potter J.

evidence and that the claim in negligence failed for want of duty of care.

[103] Whilst the situation in the *Northern Clinic* case has analogies to the current situation, there are a number of distinguishing features as noted by the claimants and the Council. Firstly, the *Northern Clinic* case involved a commercial building and not a residential dwelling. In his decision, Keane J noted that the final consideration pointing away from proximity was that the loss was economic and therefore carried with it the problem of an indeterminate transmissible warranty. He however went on to note that economic loss incurred in respect of defective domestic dwellings constitutes an exception to the rule that economic losses are not recoverable in tort in the absence of a special relationship or proximity.

[104] There are also other distinguishing features including the fact that the claim was argued in both contract and tort, Mr Vesey was not fully paid and Mr Vesey had been asked to give a guarantee but had refused to do so.

[105] I however accept that the *Glossop Chan* case involved a multi-unit residential complex and in that case the High Court concluded that a subcontractor did not owe a duty of care to subsequent owners. *Glossop Chan* however was decided in 1997 and there have been developments in the law since that time particularly in relation to leaky residential dwellings. In *Body Corporate 189855 & Ors v North Shore City Council & Ors* (*Byron Avenue*),[9] the Court concluded that the plasterer did owe a duty of care to subsequent owners. The plasterer in that case was a subcontractor. In reaching this decision, Venning J stated:

> "[296] For the sake of completeness I confirm that I accept a tradesman such as a plasterer working on site owes a duty of care to the owner and to the subsequent owners, just as a builder does."

[106] In *Body Corporate 185960 v North Shore City Council,*[10] Duffy J observed that:

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

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

[108] Courts and tribunals have consistently held that builders, whether as head-contractors or labour-only contractors, of domestic dwellings owe the owners and subsequent owners of those dwellings a duty of care.[12] In addition courts in recent times have generally concluded other appropriately qualified subcontractors, such as plasterers, involved in residential construction owe subsequent home owners a duty of care.

---

[9] [25 July 2008] HC Auckland, CIV 2005-404-05561, Venning J.
[10] [22 December 2008] HC Auckland, CIV 2006-404-003535, Duffy J.
[11] *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234; *Dicks v Hobson Swann Construction Limited*; *Bowen v Paramount Builders (Hamilton) Limited* [1977] 2 NZLR 394, *Byron Avenue* n 6 above, *Heng & Anor v Walshaw & Ors* [30 January 2008] WHRS 00734, Adjudicator John Green.
[12] Ibid

[109] I accept that Mr Painton was contracted on a labour-only basis to carry out the plastering and was not responsible for installation of flashings or other building work or the supervision of other builders. However, his position is no different from any other qualified tradesman contracted to do construction work on the dwelling that has been found to owe a duty of care. In particular, Venning J concluded that the plasterer in the *Byron Avenue* case did owe a duty of care to subsequent homeowners.

[110] I accordingly conclude that Mr Painton does owe the claimants a duty of care. The issue that now therefore needs to be addressed is whether Mr Painton breached the duty of care he owed to the claimant.

[111] The claimants and the Council both submit that there were defects in the plastering itself and that on the basis of these defects Mr Painton has some liability. I have however already concluded that there is little reliable evidence that any defects in the actual plastering work have resulted in water ingress. While only two coats of plaster were applied rather than the required three I am satisfied from the evidence of the experts that the failure to apply a third coat has not affected the durability of the plaster. In addition, there is no evidence that in this dwelling the other issues raised by Mr Rankine as potential defects in his brief were present. Mr Painton did however fail to include control joints although he knew that they were required. Whilst he was directed by Mr Reeve not to install them, this was not necessarily a defence to any claim by the claimants. The experts were however of the opinion that the lack of control joints was not a significant cause of water ingress. At most it may have been an issue of future likely damage.

[112] I have found that the lack of adequate flashings around the windows and between the different cladding materials was a major cause of the dwelling leaking. Mr Painton was not responsible for

installing these flashings and accordingly is not the primary person responsible for this defect. Mr Painton is however an experienced plasterer and should have realised that applying plaster over inadequately flashed joinery and applying plaster to joins with dissimilar materials without adequate flashing would probably result in the plaster cracking and allowing water to penetrate the building envelope. I am satisfied that Mr Painton knew that applying stucco plaster over inadequate substrate would lead to leaking problems. I am also satisfied that although the building paper was up at the time Mr Painton came to do his work, if he had applied his mind to the adequacy of the substrate he would have known that appropriate flashings had not been installed. In these circumstances, he should have refused to build it in a way that would cause future problems.

[113] Mr O'Hagan, the only expert with plastering expertise, accepted that on a strict legal basis Mr Painton should have ensured the dwelling was appropriately flashed before undertaking the plastering work. He accepted that Mr Painton should have appreciated the need for flashings in areas where they were omitted in this dwelling. Mr O'Hagan submitted that in practical terms it probably would have made no difference as the builder was unlikely to have, on the request of Mr Painton, removed the building paper, taken out the windows, removed the weatherboard cladding and installed the appropriate flashings on the request of Mr Painton. I accept that it was likely that if Mr Painton had requested the flashings to be installed before he undertook the plastering, the builder would most likely have employed some other plasterer. To that extent Mr Painton's actions in relation to flashings, were not causative of the damage. In other circumstances this would have entitled him to receive some indemnity from the builder. It does not however completely absolve him from liability. It is however relevant to take into account when determining apportionment.

[114] A competent plasterer should either ensure there is flashing or appropriate jointing between the plaster and other materials such

as the block work junctions and the plaster to weatherboard junctions. NZS4251 states that control joints must be formed in the plaster to coincide with all locations and joints in the structure where movement is likely to occur, in particular control joints should be formed at all junctions between dissimilar substrates. Even if Mr Reeve had specifically directed Mr Painton not to include control joints, he should have refused to build it in a way that he can reasonably be expected to have known would probably cause problems in the future. I accordingly find that Mr Painton was negligent in failing to either ensure that the various joints were flashed or that the control joints were installed in the junctions between dissimilar substrates.

[115] I also conclude that Mr Painton had some responsibility for the defects identified as insufficient cover provided to roof parapets. This was caused by the plastering being applied after installation of the gutters and fascias. The plaster therefore needed to be pushed up behind the flashings resulting in the potential of water ingress. In addition, the timber fascias penetrating the cladding is again a sequencing issue as the plasterer should have completed the plastering work before the fascias were installed. Once again these are issues for which the builder was primarily responsible however Mr Painton knew, or should have known, that this was unsatisfactory and he should have realised that it would lead to leaking problems.

[116] In conclusion, I find Mr Painton was negligent and thereby in breach of the duty of care that he owed for the owners. His negligence led to water penetration and resulting damage on all elevations of the dwelling. The areas for which he has some liability would have required a complete reclad as part of the remedial work. I accordingly conclude that he is jointly and severally liable with the Council for the full amount of the claim established.

WHAT CONTRIBUTION SHOULD EACH OF THE LIABLE PARTIES PAY?

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

[118] 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.

[119] 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…

[120] 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.

[121] The difficulty with this claim is that the parties primarily responsible for the defects are not parties to the claim either because they could not be identified or because they were bankrupt or in liquidation. Mr Robertson, on behalf of the Council, accepted in his closing submissions that the Council in the circumstances would bear the greatest apportionment. He submitted that the Council would be responsible for 60% with the other two respondents responsible for 20%. I have however concluded that the designer has no liability.

The areas where Mr Painton has some liability are where, although the defective work was done by the builders, Mr Painton should have taken more care as he should have known that plastering over the defects would lead to leaking problems. In addition there are defects such as lack of centre joints and insufficient cover to roof parapets have not significantly primarily contributed to the damage. The Council also was not responsible for carrying out the building work nor was it a clerk of works. There were however widespread departures from the consented plans including endorsements stamped on those plans by the Council. Many of these departures resulted in leaks and were issues the Council should have detected if an adequate inspection regime was followed. In these circumstances I conclude contribution of Mr Painton should be set at 20% which leaves an 80% contribution on the part of the Council.

CONCLUSION AND ORDERS

[122] The claim by James Holland, Alan Ivory and Yvonne Van Dongen as trustees of the Harbourview Trust is proven to the extent of $512,308.98. For the reasons set out in this determination, I make the following orders:

I. The Auckland City Council is to pay James Holland, Alan Ivory and Yvonne Van Dongen as trustees of the Harbourview Trust the sum of $512,308.98 forthwith. The Auckland City Council is entitled to recover a contribution of up to $102,461.79 from Mark Painton for any amount paid in excess of $409,847.19.

II. Mark Painton is ordered to pay James Holland, Alan Ivory and Yvonne Van Dongen as trustees of the Harbourview Trust the sum of $512,308.98 forthwith. Mark Painton is entitled to recover a contribution of up to $409,847.19 from the Auckland City Council for any amount paid in excess of $102,461.79

III. The claim against Max Grant Architects Limited and Max Grant is dismissed.

[123] To summarise the decision, if the two liable respondents meet their obligations under this determination, this will result in the following payment being made by the respondents to the claimants:

First Respondent – Auckland City Council	$409,847.19
Twelfth Respondent – Mark Painton	$102,461.79

[124] If either of the parties listed above fail to pay its or his apportionment, this determination may be enforced against any of them up to the total amount they are ordered to pay in paragraph 121 above.

DATED this 17th day of December 2009

_____

P A McConnell
Tribunal Chair