IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2008-100-000036
[2011] NZWHT AUCKLAND 27

BETWEEN	VIVIENNE DIANA LOWE, GRAHAM BRENTLEIGH BOND and LORRAINE LILA BARTLEY as Trustees of the VIVIENNE HICKS FAMILY TRUST Claimant
AND	ROGER MORRISON First Respondent
AND	AUCKLAND COUNCIL Second Respondent
AND	STUART SAVILL (KERIAN SAVILL removed) Third Respondents
AND	MAJORIE and ROBERT JANSEN Fourth Respondents
AND	PLASTER SYSTEMS LIMITED Fifth Respondent
AND	MATTHEW VESEY Sixth Respondent

Hearing: 28 February, 1-5 March and 14-16 March 2011

Appearances: D Cowan & D Garrett for the claimants
A Dodds (lay representative) for the first respondent
D Heaney SC and C Goode for the second respondent
Third respondent self represented
Fourth Respondent – no appearance
T Rea for the fifth respondent
Sixth respondent self represented

Decision: 20 May 2011

FINAL DETERMINATION
Adjudicators: M A Roche & P A McConnell

CONTENTS

INTRODUCTION

[1] Clint Brown and Vivienne Hicks live in a house at 392C Mt Eden Road, Auckland City (the house) which is owned by the trustees of the Vivienne Hicks Family Trust (the claimants). In 2005 Mr Brown and Ms Hicks discovered that the house leaked and in February 2006 the claimants lodged a claim with the Weathertight Homes Resolution Service (WHRS). The WHRS assessor concluded that the house required extensive remedial work. The claimants now claim that Roger Morrison, the Auckland Council, Stewart Savill, Robert Jansen, Plaster Systems Limited and Matt Vesey are each liable for the full costs of the remedial work, consequential losses and damages.

[2] Mr Morrison was the architect who designed the house. The Auckland Council was the territorial authority responsible for issuing the building consent, the Code of Compliance Certificate (the CCC) and for conducting building inspections. Mr Savill was the director of the development company, Rilee Resources Limited. Mr Jansen was the builder. Plaster Systems Limited was the designer and manufacturer of the Insulclad installation and finishing system (EIFS) which was used as the exterior cladding for most of the house. Mr Vesey was the Insulclad installer.

BACKGROUND FACTS

[3] In 1993 Mr Savill and his wife bought the property which at the time consisted of a dilapidated two storey villa on a 2000 square metre section. After living in the villa for several years, the Savills decided to develop the site. Rilee Resources Limited was incorporated for this purpose and, following the grant of resource consent, the property was transferred to the company of which Mr and Mrs Savill were directors.

[4] In 1994, Rilee Resources Limited engaged Mr Morrison to design the four townhouses which comprised the development. The house owned by the claimants was built after the first two townhouses were completed. Although originally designed to be clad in the James Hardie Harditex System, Rilee instructed Mr Morrison to change the cladding to EIFS prior to a building consent application being lodged.

[5] On 1 October 1996, the application for building consent was lodged by Mr Morrison. It was granted on 8 October 1996. This was the end of Mr Morrison's involvement with the project. He had had a supervisory role in the construction of the first two townhouses but was not engaged to supervise the second two. During the construction of the house, no one contacted him to ask any questions about the consented plans.

[6] Rilee Resources Limited contracted with M and R Jansen Limited to build the second two townhouses (of which the claimants' house was one). This was a build and supervise contract. Mr Jansen personally supervised the construction. The house was built between October 1996 and May 1997. Mr Jansen regularly saw Mr Savill during the construction period because Mr Savill was living in one of the completed townhouses on the site.

[7] The EIFS cladding was installed by Mr Vesey who was a licensed Plaster Systems contractor. He employed staff to carry out the cladding installation on this and a number of other jobs he was running but kept an overall supervisory role. His staff were not licensed Plaster Systems contractors.

[8] The Council carried out nine inspections while the house was being built and issued a Code of Compliance Certificate on 29 May 1997.

[9] On 26 June 1998, Rilee Resources Limited sold the house to Richard and Judith Burrows who sold it to the claimants on 21 September 2001.

[10] In or around 2005 the claimants put the house on the market. In June 2005 they received an offer conditional on inspection. The builder engaged by the perspective purchasers identified weathertightness concerns with the house and the offer to purchase the house was withdrawn.

[11] In 2006 Ms Hicks and Mr Baker noticed a small crack on the inside corner of the lower lounge. They engaged a builder to investigate who reported to them that much of the timber in the corner of the lounge was rotten. The builder also made them aware of cracking around window sill joinery and other places in the house and pointed out possible water entry points around the hand railing on top of the balustrades to the top and middle decks. The claimants undertook some repairs recommended by their builder but could not afford to complete the repairs of the house.

[12] They applied for a WHRS assessment in February 2006 and received a WHRS assessor's report dated 6 June 2006 prepared by the assessor, Neil Alvey. This report estimated the cost of necessary remedial works to be in the order of $200,000 for a full reclad without a drain and ventilated cavity and $243,000 with a cavity.

[13] The claimants resolved to repair their house before pursuing the claim further in order to achieve greater certainty concerning the cost of repair.

[14] After engaging architects and going through a tender process for the repairs, the claimants engaged a builder who carried out a small alteration in addition to the remedial work.

THE ISSUES

[15] The issues that we need to address are:

i. Why did the house leak? In particular, what are the defects which have caused water ingress?
ii. What was the appropriate scope and cost of remedial work. What other damages should be awarded?
iii. Did Mr Savill owe the claimants a duty of care as the developer or project manager of the development? If so, did he breach that duty?
iv. Was Mr Morrison, the architect, negligent, and if so, was his negligence causative of loss?
v. Was the Council negligent in issuing the building consent, the Code of Compliance or carrying out inspections?
vi. Did Mr Jansen breach his duty of care in building and supervising the construction?
vii. Did Mr Vesey breach his duty of care to the claimants?
viii. Did Plaster Systems Limited owe a duty of care to the claimants and, if so, did any breach of that duty cause or contribute to the claimants' loss?

WHY DOES THE HOUSE LEAK?

[16] Richard Angell, the claimants' expert, and Neil Alvey, the Department of Building and Housing assessor gave their evidence concurrently on defects that have caused leaks. Neil Summers, the Council's expert gave evidence primarily on design issues.

[17] The experts agreed that the primary cause of the leaks and subsequent damage were the insufficiently weatherproofed horizontal surfaces to the parapet and balustrade walls. The other significant weathertightness defect related to the window and door joinery flashings, inadequately sealed penetrations through the EIFS

cladding, ground clearance and inadequately installed rubber membranes and plywood substrates.

Horizontal surfaces to the parapet and balustrade walls

[18] The experts agreed that deficient design and construction of the parapets and balustrades was a primary cause of damage. The remedial work to rectify these problems required a full re-clad of the house and replacement of the membrane roofs and balconies.

[19] A combination of defects contributed to leaking through the horizontal surfaces of the parapets and balustrades:

- In some places the absence of, and in others the inadequate installation of, a waterproof membrane under the fibre cement cap on the surfaces. In the parapets to the upper roof, the membrane was carried up and over the parapets but was still a weak point where the butynol stopped.
- The cladding material used on top of the parapet was fixed through underlying membrane rather than glued on to it. This made the membrane ineffective.
- Mesh was not continuously taken over on the top plate under the plaster finish. This allowed cracking to the fibre cement joints and at the corners of parapets and balustrades to develop, allowing water entry through the cracking.
- A handrail fixed to the deck balustrade top without spacers which effectively created a continuous upstand for water to pond against.
- The surface slope which was 6 degrees rather than the 15 degrees specified in the EFIS literature.

[20] In addition to the above defects, the length of the horizontal surface of the balustrades and parapets created difficulties. It was

not possible to build the surfaces with control joints and therefore, inadequate allowance for thermal movement was made. Mr Alvey and Mr Angell both expressed the view that it would be difficult to control movement in the long runs of the parapets/balustrades.

Joinery

[21] Mr Angell gave evidence that when he inspected the property, he observed some visible decay around the windows. Although there was not damage below or adjacent to every window opening, a sufficient number had failed to indicate the others would have likely failed in the future and that a full re-clad was required. He disagreed that targeted repairs would have been possible because the removal of cladding was necessary in order to determine which windows had failed.

[22] Mr Angell said that the head flashings failed to extend past the jamb flashings which was a defect because this provided a potential path for moisture to ingress at the junction. In addition, after testing with dye, he had concluded that the jamb flashings had not been adequately sealed to the sill. As a consequence, moisture would be directed in behind the cladding rather than being directed off the front edge of the sill flashing to the outside edge of the EFIS cladding.

[23] Although as described above, there were design and installation defects which could result in leaks, the experts generally agreed that the problems with the windows were primarily caused by the flashings having been plastered over by the plasterer rather than finishing the plaster flush with the step or lip in the jamb or sill. This had the effect of rendering the flashings redundant.

Inadequately sealed penetrations and ground clearance

[24] There were problems with inadequately sealed penetrations to the cladding. At the hearing, evidence was given concerning problems with the wooden pergola framing and scupper openings.

[25] Mr Angell's evidence was that the pergola framing which was fixed abutting the EIFS cladding was a matter of future likely damage as water could become trapped against the cladding and enter via any cracks or pinhole penetrations. Timber packers were installed to allow the pergolas to be fixed back to the dwelling and the cladding sheets were notch installed around them. Mr Angell's evidence was that these penetrations were not weathertight as the underlying lintel and the packer itself was found to be excessively decayed in one location.

[26] The experts agreed that the inadequately sealed penetrations were not of themselves sufficient to warrant a re-clad of the house and could have been fixed with targeted repairs. Similarly, there was little damage attributed to the inadequate ground clearance which could also have been fixed by targeted repairs. The ground clearances were insufficient, particularly around the garage where the cladding had been taken to below ground level. Although this is permissible with Insulclad, the manufacturer's instructions specified that a "Z" flashing should be installed to act as a water bar to prevent capillary rise. No "Z" flashing had been installed.

Conclusion

[27] The multiple defects associated with the horizontal surfaces on the balustrades and parapets are the main cause of water ingress that has resulted in damage. The major problems were the absence of a continuing coating of mesh over the horizontal surfaces and the penetrations to the membrane made by nailing the cement sheet to it and the weak spot where the membrane stopped after being lapped

over the parapets. Water ingress was also contributed to by the installation of the surface fixed handrail without spacers and the inadequate slope of the horizontal surface.

[28] The second major defect was the window joinery. Although not a source of major damage at the time the cladding was removed, we accept that the problems were such that future damage was likely and that this in itself necessitated a full re-clad. The main defects associated with the windows were the inadequate seal between the jamb and sill flashing and the covering over of the flashings with plaster.

[29] There was minimal damage attributed to the inadequately sealed penetrations and lack of clearance with ground level combined with the absence of a "Z" flashing. However, we accept that these were causes of future likely damage.

The claim against the First Respondent

[30] The claimant's case against Mr Morrison is that as the person who designed the house, he owed a duty of care to them as future purchasers. They have claimed that he breached that duty in failing to exercise reasonable care and skill in preparing the plans and specifications for the house and those deficiencies in Mr Morrison's design caused weathertightness defects to be created. In the particulars of claim, a number of alleged deficiencies in the drawings prepared by Mr Morrison were identified. Some of these have been linked to significant weathertightness defects.

[31] The Council also cross claimed against Mr Morrison. It submitted that his design of the parapets and balustrades was inadequate, that there were deficiencies in his specification for butynol waterproofing and that he was also negligent in specifying a top fixed handrail rather than a vertical one.

[32] There was some conflict in the evidence and submissions concerning what butynol detail was provided for in the plans and specifications and what was actually built. There was also some dispute regarding the material that had been used for the horizontal and inside surfaces of the balustrades and parapets. This is significant as Mr Morrison gave evidence that he specified harditex as the top cap and inside face material and that as a result, the Hardies standard detail for weatherproofing should have been followed. As a back up to this, he included underlying butynol as a detail for parapet weatherproofing.

[33] The evidence at the hearing was that Insulclad was used for the inside faces and that hardibacker or hardiflex was used for the horizontal surfaces. This was a different material from the harditex specified by Mr Morrison. Accordingly, the Hardies standard waterproofing detail he had intended to be followed was not implemented. Mr Angell gave evidence that the hardibacker product did not have literature for its use on horizontal surfaces.

[34] In his evidence Mr Summers agreed that the butynol membrane was not installed in accordance with Mr Morrison's drawings. Mr Morrison had specified that it should fully cover the parapet cap. It did not.

[35] Mr Morrison's design details may have been "skinny". However, it has not been established that the builder could not have constructed the building and achieved a workmanlike result by reference to the plans and the correct manufacturer's details.[1] It is also significant that at no time did the builder or anyone else contact Mr Morrison to clarify any issue relating to his design. In the specifications at clause H20 it was noted that, 'Any conflicts between manufacturer's instructions and the drawings will be brought to the attention of the Architect prior to installation'.

[1] *North Shore City Council v Body Corporate 188529 (Sunset Terraces)* [2010] NZLR 486 (CA) at [188] and [120]-[121].

[36] We find that the as-built balustrades and parapets departed significantly from Mr Morrison's drawings and specifications. The changes between the way the balustrades and parapets were designed and the way they were built were sufficiently significant to break the chain of causation between the design and the defects. These differences were the change of capping and inside face material, the failure to fully install the membrane as specified by Mr Morrison and the failure to place the spacers he specified between the handrail and the balustrade top.

[37] The Council submitted that it was negligent of Mr Morrison not to have specified that the cement cap over the butynol membrane was to have been glued rather than nailed. Simultaneously, it has presented evidence from Mr Summers that it was reasonable for the Council, when processing the plans, to have assumed that it would be fixed with glue and that the Council was therefore not negligent in approving this detail. Mr Morrison in addition to the Council is entitled to the benefit of this evidence and it is found that this aspect of the design was not negligent.

[38] It is also found that the top fixed rail detail was not negligent as alleged by the Council. The rail was not installed in accordance with Mr Morrison's design and it has not been established that if it had been properly installed with the specified spacers and sealed penetrations, that it would not have been weathertight. It is of little relevance that today's standards require all such rails to be vertically fixed; the Tribunal's concern is with the standards that were considered reasonable in 1996.

[39] Mr Morrison's drawings were not the cause of the primary contributing factors to the failure of the horizontal surfaces. These were the lack of mesh and the ponding of water behind the handrail. Mr Angell and Mr Alvey commented at the hearing that there was an inherent design fault arising from the length of the horizontal surfaces

which could not incorporate control joints. However, the significant departures from Mr Morrison's plans, in particular, the change of surface material used, breaks the chain of causation between the design and the defect in this regard.

[40] We find that there is no causal link between Mr Morrison's design and the weathertightness defects.

WAS THE COUNCIL NEGLIGENT IN ISSUING THE BUILDING CONSENT, THE CODE OF COMPLIANCE CERTIFICATE AND CARRYING OUT INSPECTIONS?

[41] The Council did not deny that it owed the claimants a duty of care in issuing a building consent, inspecting the building work during construction and issuing a Code of Compliance Certificate. Its liability is well established.[2] The question is whether it breached this duty in respect of the consent, the inspections or the issue of the CCC.

The Consent

[42] The claimants submit that the Council was negligent in approving inadequate plans and specifications for the building work. They suggest that the Council itself supported this allegation by being highly critical of the plans and specifications prepared by Mr Morrison. The Council has denied liability and submitted that the plans and specifications were adequate and up to the standard of the day.

[43] When considering Council liability for issuing building consents the Court of Appeal in *Sunset Terraces* [3] upheld Heath J's finding that Councils did not need to ensure manufacturers

[2] *Sunset Terraces* above n1 and *North Shore City Council v Body Corporate 189855 (Byron Avenue) & Ors* [2010] NZSC 78.
[3] *Sunset Terraces* above n1.

specifications were attached to the consent documentations. They were entitled to assume that reasonably competent builders would have access to and refer to this information. In the High Court 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. Heath J stated:[4]

> 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. We 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.
>
> 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.

[44] Having identified the primary and secondary defects, it is necessary to consider whether any of these relate to problems with the design that should have properly been detected by the Council prior to the issue of building consent.

[45] The inadequacy of the window joinery installation and the plastering over of window flashings is one of two primary defects. There is no evidence before us that these defects arose from problems with the plans that should have been identified at the building consent stage.

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

[46] The second primary defect is the balustrade and parapet tops which failed due to a combination of absence of mesh, handrail installation, slope, and waterproofing failure. The absence of mesh is obviously not a matter which relates to design. The handrail installation was contrary to the approved plans. With regard to the slope, there was some conflict in the evidence concerning what had been specified on the plans. Mr Summers gave evidence that no slope was specified but that it was reasonable for the Council to have confidence that there was sufficient guidance in the literature. Mr Morrison stated in his brief that a one in ten slope was specified in the original plans which was correct for the Harditex cladding system originally specified in his drawings but not for the Insulclad system.

[47] The failure to construct the balustrade with adequate slope was attributable to the failure of the builder, Mr Jansen, to follow the technical literature rather than an inherent design fault. The Council was not negligent for approving the plans with the slope specified by Mr Morrison which was correct for the Harditex system he had intended to be relied on. In any case, the issue of slope was ultimately made irrelevant by the failure to install spacers beneath the handrail.

[48] With regards to the waterproofing failure, the evidence of Mr Summers was that the Council probably expected the top panel to be glued to the underlying butynol rather than being nailed or stapled down through it. It is not established that the Council should not have accepted this aspect of the plans.

[49] The final issue to consider with respect to the building consent was whether there was an inherent design fault in the parapet and balustrade surfaces. At the hearing, Mr Angell and Mr Alvey commented that the horizontal surfaces of the balcony and parapets were simply too long to be weathertight. Their length, and the absence of control joints, meant that cracking as the result of the

thermal movement of the fibre sheets was inevitable. Neither in the particulars of claim or in the submissions of any party was this matter raised as a design defect for which the Council or Mr Morrison should have liability. It is not established that this is a defect for which the Council is liable.

The Inspections

[50] As noted earlier, the Council carried out nine inspections during the construction of the house. The claimants' case is that the Council was negligent as it failed to exercise all reasonable skill and care in carrying out its inspections.

[51] The standards by which the conduct of a Council officer should be measured were considered in *Askin v Knox*[5] where Cook J concluded that a council officer's conduct will be judged against the knowledge and practice at the time at which the negligent act or omission was said to have taken place.

[52] This was also reinforced in *Hartley v Balemi* which states:[6]

> It is an objective standard of care owed by those involved in building a house. Therefore, the Court must examine what the reasonable builder, council inspector, architect or plasterer would have done. This is to be judged at the time when the work was done, i.e. in the particular circumstances of the case...

[53] The Court of Appeal in *Byron Avenue* when considering an appropriate inspection regime concluded:[7]

> I consider that the Hamlin principle imposes on councils in respect of residential apartments a duty of reasonable care when inspecting work that is going to be covered up and so becomes impossible to inspect without destruction of at least part of the fabric of the building, even

[5] *Askin v Knox* [1989] 1 NZLR 248.
[6] *Hartley v Balemi* HC Auckland, CIV-2006-404-2589, 29 March 2007, at [71].
[7] *Byron Avenue* [2010] NZCA 65,at [59]

> before issuing a code compliance certificate (or advice serving the same function). The effect of carelessness in the inspection phase was to lock in a defective condition which was not reasonably detectable by purchasers. They were entitled to rely on due performance by the Council of its inspection function, whether performed by itself or by an expert.

[54] It is now generally accepted that the adequacy of the Council's inspections needs to be considered in light of accepted building practices of the day provided those practices enabled it to determine whether the Code had been complied with. Heath J in *Sunset Terraces* stated:[8]

> 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.

[55] 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.

[56] The obligation on a council is to take all reasonable steps to ensure that the building work is being carried out in accordance with the consent and the Building Code. It is however not an absolute obligation to ensure the work has been done to that standard as the Council does not fulfil the function of a clerk of works. In determining whether the Council met this duty it is appropriate to consider each area of defect as established in paragraphs [16] to [29].

[8] Ibid at [450].

[57] Starting with the parapets and balustrades, the question is whether the defects which caused them to leak could or should have been detected by the Council inspector. The defects created by the handrail would have been possible to detect. The evidence before the Tribunal is that this handrail was designed to have 3mm spacers underneath it to allow water to run underneath and off the surface. However, the spacers were omitted resulting in 'ponding' of water against the handrail that could then ingress. We find that a reasonable Council inspector at the time would have detected the lack of spacers and the Council was negligent in failing to detect this defect in its inspections.

[58] Similarly, the slope of the hand rail which was required to be 15 degrees by the relevant Insulclad datasheet was only 6 degrees. The evidence at the hearing was that this matter would have been difficult to detect in a visual inspection. It is unclear whether the screw fixing heads to the handrail were adequately sealed at the time of the Council inspection and we make no finding in this regard.

[59] The evidence before the Tribunal was that the remaining construction defects (the lack of a continuous cover of mesh, penetrations through the membrane and inadequate installation of membrane) would not have been visible when inspected. However, in such a case, a producer statement should have been required from the cladding installer (Mr Vesey) so that the inspector could satisfy him or herself that the cladding, including the mesh layer, had been installed in compliance with the Building Code. The evidence at the hearing was that no producer statement was called for or produced. There was therefore no basis for the Council to have been satisfied that the required cover of mesh was present. We find therefore that the Council breached its duty of care in this regard.

[60] A primary defect was the joinery installation. It was accepted by the experts that the problems with the joinery (length of head

flashing, inadequate sealing) would not have been apparent on inspection as they were concealed by plaster. However, in such a case, a producer statement would have allowed the inspector to satisfy him or herself that the joinery had been installed in compliance with the Building Code. As noted above, no producer statement was called for or produced.

[61] In the absence of a physical inspection or the production of a producer statement, there was simply no basis for the Council inspector to be satisfied that the joinery had been installed in accordance with the Building Code. It had not been installed in accordance with the Building Code but rather, had been installed with defects.

[62] In addition to the "hidden" joinery installation defects, the flashings were plastered over rather than the plaster finishing flush with the step or lip in the jamb or sill. This defect could and should have been detected on visual inspection by a competent building inspector.

[63] We conclude that the Council was negligent in failing to detect this defect and for accepting that the joinery had been properly installed without any evidence that this was the case.

[64] The final defects which are secondary relate to issues of ground clearance and pipe penetrations. In his witness statement Mr Angell asserted that while the Council should have identified the lack of flashings to the pergola fixings, it would not have been possible for the Council inspector to have determined how or whether the scupper outlets and/or pipe penetrations were sealed behind the plaster finish. Similarly, following plastering it would not have been possible for the Council to have determined whether the cladding which terminated below ground level was protected by a Z finish.

[65] Again, the effect of the failure to require a producer statement from Mr Vesey is that the Council is liable for these hidden defects. However, it is also noted that the actual damage attributed to them is minor and on their own they are defects which could have been remedied by targeted repairs.

Conclusion on Council liability

[66] In summary, we conclude that the Council was negligent in failing to identify defects in relation to the installation of the joinery, in failing to identify the absence of a continual coating of mesh over the horizontal parapets and balustrades surfaces, and for failing to identify the lack of spacers between the handrail and balustrade surface. Given that the joinery defects in themselves necessitate a full re-clad, and the failure of the parapets and balustrades independently necessitate a full re-clad, we conclude that the Council has contributed to defects that necessitate the full re-cladding of the house. Accordingly we find the Council jointly and severally liable for the full amount of the established claim.

[67] In view of this conclusion it is unnecessary to consider the claimants' alternative claim against the Council in respect of negligent misstatement.

DID MR SAVILL OWE THE CLAIMANTS A DUTY OF CARE AS THE DEVELOPER OR PROJECT MANAGER OF THE DEVELOPMENT?

[68] It has been argued by the claimants and by the Council that Mr Savill, together with Rilee Resources Limited, was a co-developer of the townhouse subdivision. They say that, as such, he owes a non-delegable duty of care to the claimants in respect of the defects that were created. In the alternative, they argue that Mr Savill was a project manager and his role was such that he had a duty of care to

the claimants. They say that he breached that duty of care and is liable in respect of the defects. Mr Savill denies that he was either a developer or a project manager.

[69] We will turn first to the question of Mr Savill's liability as a developer.

[70] Mr Savill and his wife were the owners of the land that was subdivided for the development. Mr Savill personally managed the initial stages of the development including making an application for resource consent and corresponding with geotechnical consultants.

[71] On 1 May 1995, following the grant of resource consent, Rilee was incorporated to be the developer of the townhouse complex. Its shareholders were Mr Savill and his wife. Rilee was incorporated by Mr Savill on legal advice in order to limit his liability in respect of the development. Ownership of the land was transferred to Rilee. The contract to design the claimants' house was between Rilee and Mr Morrison. The contract to build the house was between Rilee and M and R Jansen Limited. This was a build and supervise contract pursuant to which M and R Jansen Limited engaged subcontractors, including Mr Vesey. Following completion of the building process, the house was sold by Rilee to the initial purchasers (the Burrows).

[72] Mr Savill authorised progress payments and signed cheques for progress payments on behalf of Rilee.

[73] It is unquestionable that Rilee was the developer. However, it is necessary to make a finding as to whether Mr Savill remained a co-developer after the incorporation of Rilee. In other words, whether his actions as the 'human face' of Rilee were actually the actions of a developer *per se*. This is important as a developer has a

non delegable duty of care.[9] A director who is not a developer may still be liable but their negligence must arise from their actions and be established on the facts.

[74] In *Body Corporate No 188273 v Leuschke Group Architects Ltd (Leuschke)*[10] Harrison J noted that, the term "developer" is not a term of art or a label of ready identification like a builder or an architect. He characterised the developer (of which he accepted there can be more than one) as the party who sits at the centre of, and directs the project, almost always for its own financial benefit, who decides on and engages the builder and others, and has the power to make all important decisions. He went on to say that policy demands that the developer owes actionable duties to owners of the buildings it develops.

[75] Mr Savill did make important decisions in respect of the development. He initiated the project with his wife, and commenced the development. Following the incorporation of Rilee, he continued to make important decisions in respect of the development, choosing the architect and the builder and contracting with them on behalf of Rilee. He directed the change of cladding material for the second two townhouses from harditex to Insulclad. However, it is his case that he did these things as an officer of Rilee and not on his own behalf.

[76] It was clear to all who were dealing with the development that their contract was with Rilee, notwithstanding that Mr Savill signed documents on its behalf. Mr Jansen and Mr Morrison's evidence on this point was unequivocal.

[77] There is no evidence that after Rilee's incorporation that Mr Savill did anything in respect of the development other than on behalf

[9] *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 2345 (CA) at 240-241.
[10] *Body Corporate No 188273 v Leuschke Group Architects Ltd (Leuschke)* (2007) 8 NZCPR 914 (HC).

of the company. Although the Council suggested in its submissions that Mr Savill had personally paid tax on the profit derived from the development this was not his evidence. When asked whether he or the company had paid any tax, he agreed that some tax had been paid although he commented that the development barely broke even. He did not state that the tax was paid by him personally.

[78] The effect of incorporation of a company is that the acts of its directors are usually identified with the company and do not necessarily give rise to personal liability.[11] As noted by Priestly J in *Body Corporate 183523 v Tony Tay & Associates Ltd (Tony Tay)*,[12] the mechanism by which a limited liability company makes decisions, commitments, and enters into legal relationships, is through the physical actions of its directors.

[79] Although Priestly J noted in *Tony Tay* that the directors of one person or single venture companies are more likely to be exposed in leaky building claims,[13] we find that following the incorporation of Rilee, Mr Savill's actions in relation to the development were those of a director on behalf of a company and not of a developer in his own right. To find him personally liable as a developer would require a finding that the incorporation of Rilee as the development vehicle for the townhouse subdivision was of no effect with respect to Mr Savill's personal liability. There is no obvious rationale for finding him to be a developer simply because Rilee was incorporated to develop one, as opposed to multiple townhouse subdivisions.

[80] We find that Rilee was the developer and that only Rilee had a non delegable duty of care. However, just because Mr Savill was not the developer, does not mean that he is absolved from liability in

[11] *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517 (CA).
[12] *Body Corporate 183523 v Tony Tay & Associates Ltd (Tony Tay)* HC Auckland, CIV 2004-404-4824, 30 March 2009 at [150].
[13] Ibid at [156].

respect of the development. Limited liability does not provide company directors with a general immunity from personal liability and where a company director exercises personal control over a building operation he or she will owe a duty of care, associated with that control.[14]

[81] The existence and extent of any duty of care owed by Mr Savill in respect of the construction of the house is determined by a consideration of his role and responsibilities on the site.[15] Whether a director assumes the role of project manager is a question of fact to be determined on the evidence of what that director actually did. It must be established that Mr Savill had sufficient control (either by doing the work or assuming responsibility for management and supervision) to give rise to a duty of care.

[82] Mr Savill took no hands on role in the construction of the house. He had no responsibility for the organisation or supervision of the construction work. J and M Jansen Limited had this responsibility as it was engaged on a full build and supervise contract. Mr Jansen and Mr Savill met frequently on the site while the house was being built only because Mr Savill was living in one of the completed townhouses adjacent to the site. Mr Jansen was not directed or supervised by Mr Savill who at the time was working full time running a leather goods manufacturing business. Although he made progress payments on Rilee's behalf, there is no evidence that he assessed the quality of the building work prior to doing so as submitted by the claimants.

[83] Directors are particularly exposed to liability where there are factual findings that they were personally involved in site and building supervision or architectural and design detail.[16] The claimants and

[14] *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548 (HC).
[15] *Auckland City Council* v *Grgicevich* HC Auckland, CIV-2007-404-6712, 17 December 2010 at [72]-[75] and *Chee v Stareast Investments Limited* HC Auckland, CIV-2009-404-5255, 1 April 2010.
[16] *Tony* Tay, above n 12, at [156].

other respondents have failed to prove any such involvement on behalf of Mr Savill. The evidence of Julie Mackie that Mr Savill's wife told her that Mr Savill was the project manager of the house is hearsay, and was not supported by any evidence of Mr Savill's actual activities.

[84] At the hearing, some emphasis was placed on the fact that Mr Morrison had been retained by Rilee during the construction of the first two townhouses but not for the second which included the claimant's house. It has been suggested that in Mr Morrison's absence, Mr Savill himself assumed a supervisory or project management role in respect of the construction.

[85] In short, the fact that Mr Morrison was not retained during the construction of the second two town houses does not make Mr Savill a project manager. Neither was Rilee or Mr Savill personally negligent for failing to appoint a project manager. Rilee contracted with M and R Jansen Limited to build and supervise. It was reasonable for Rilee and Mr Savill to expect that this arrangement ensured sufficient supervision of the building project.

[86] Mr Savill did not personally carry out work on the house. Neither did he supervise it or have any day to day involvement with the construction. His role was an administrative one performed on behalf of Riley. No personal carelessness on his part caused harm to the claimants.

[87] We find therefore that he did not owe the claimants a duty of care in respect of his role in the development and is not liable.

DID MR JANSEN BREACH ANY DUTY OF CARE IN BUILDING AND SUPERVISING THE CONSTRUCTION?

[88] The contract to build the house was between M and R Jansen Limited and Rilee Resources Limited. However, Mr Jansen personally undertook the work of building and supervising the construction and owed a duty of care to the claimants (as future owners) in doing so.[17]

[89] In his evidence, Mr Jansen stated that he supervised the work of the subcontractors he employed on the site to assist with building. There was no project manager or supervisor other than him.

[90] As noted earlier in this decision, defects in the installation of the windows were a principle cause of the damage to the house. There was an inadequate seal between the jamb and sill flashings. The head flashings also failed to extend past the jamb flashings providing a potential path for moisture to ingress. These defects were compounded by the plastering over of the flashings by the plasters however, in themselves would have necessitated a re-clad of the house.

[91] Mr Jansen was unclear in his evidence regarding his role in the installation of windows and the flashings. Given the passage of time, this is understandable. At the hearing, Mr Vesey accepted that he or his subcontractors would have installed the window flashings. Mr Evans, who was a witness for Plaster Systems Limited, also gave evidence that the licensed Insulclad applicator would install the jamb and sill flashings which were supplied as part of the Insulclad system. We find that Mr Jansen has no liability arising from the defects with the window joinery.

[17] *Dicks v Hobson Swan Construction Ltd (in liq)* (2006) 7 NZCPR 881 (HC).

[92] Mr Jansen is responsible in part for the problems with the balustrade. He or his company contracted Kerr Engineering Services, to fabricate and install the balcony handrail. The handrail was installed without the spacers specified by Mr Morrison in the plans. This had the effect of damming water on the balustrade which was able to ingress.

[93] Mr Jansen was responsible for supervising his subcontractors including Kerr Engineering Services. In failing to ensure that this part of the construction complied with the plans, he breached his duty of care to the claimants.

[94] Mr Jansen was also responsible for three other components of the failure of the balcony and parapets. These were the failure to construct them with adequate slope on their horizontal surfaces, the nailing of the top fixing board through the membrane, and the departure from Mr Morrison's plans regarding the material to be used for the horizontal surfaces and inside faces.

[95] Mr Jansen could have ascertained the correct slope of the horizontal surfaces by reference to the construction details provided in the product literature (the Insulclad data sheet) or by making enquiries with the architect. His failure to do either and to proceed to construct the horizontal surface with insufficient slope breached his duty of care to the claimants. Similarly, Mr Jansen should have ensured that the top of the fixing board was attached in a weathertight manner. The evidence of Mr Summers was that the reasonable assumption to make from the plans was that it was to be glued onto the underlying butynol membrane. If Mr Jansen had been uncertain he could have sought advice from Mr Morrison. It is irrelevant in this regard that Mr Morrison was not specifically retained during the construction period.

[96] Mr Jansen had no recollection of the decision to depart from Mr Morrison's plans in respect of the material used on the insides and top surfaces of the balustrades and parapets. In his evidence he stated that he was sure that this would have been the subject of discussion but was unable to recall such a discussion or why the change had been made. As the person responsible for fulfilling the build and supervise contract, Mr Jansen was essentially the project manager. We find that he was responsible for ensuring that Mr Morrison's plans were followed and in particular, that the material specified by Mr Morrison was used. In failing to do this or to refer back to Mr Morrison to resolve any uncertainty, he breached his duty of care to the claimants.

[97] As noted above, Mr Jansen was essentially the project manager during the construction of the house. The question arises whether, as such, he is responsible for the defects created by Mr Vesey whom he engaged as a subcontractor.

[98] In his evidence, Mr Jansen stated that this was the first time he had constructed an Insulclad house and therefore he 'went to a lot of trouble to get a good contractor'. Mr Vesey, who was a licensed plaster systems installer, had been recommended to him as one of the better contractors. In his evidence, Mr Evans confirmed that Mr Vesey's business, Cladrite Developments, was a significant presence in the industry at the time and had a good reputation.

[99] Mr Jansen relied on Mr Vesey to install the cladding and the plaster properly. He did not have any personal experience with Insulclad and was unable to supervise Mr Vesey. Rather, he trusted him to do the job properly. He did ask Mr Vesey to ensure that his work would be weathertight.

[100] We find that Mr Jansen is not liable for the weathertightness defects caused by Mr Vesey. He was entitled to assume that by contracting an experienced and reputable Plaster Systems installer,

he had taken adequate steps to ensure that the cladding installation and plastering was done properly. He could not be expected to sensibly inspect Mr Vesey's work and, given Mr Vesey's reputation, it was reasonable for him to expect that it was being done in accordance with the technical requirements of Plaster Systems Limited. Responsibility for the defects caused by Mr Vesey rests with Mr Vesey and the Council.

[101] Given the extent of the damage caused by defects for which he is liable (principally the defects relating to the balustrade and parapet tops), we conclude that Mr Jansen has contributed to defects that necessitate the full re-cladding of the dwelling. He is accordingly liable for the full amount of the established claim.

DID MR VESEY BREACH ANY DUTY OF CARE TO THE CLAIMANTS?

[102] At the time the house was constructed, Mr Vesey was trading as Cladrite Developments. He had no recollection of installing the cladding on the house. However, Mr Jansen gave unequivocal evidence that he had subcontracted the job to Mr Vesey. In addition, a quote for the plastering work on the house from Cladrite Developments signed by Mr Vesey and a final invoice for the quoted amount were produced and formed part of the hearing documents. We are satisfied on the evidence presented that Mr Vesey was contracted by Mr Jansen or M and R Jansen Limited to supply and install the EIFS cladding system.

[103] We have already concluded that poor workmanship in the installation of the cladding has been causative of leaks. In particular, the absence of a continuous coating of mesh on the horizontal surfaces of the balustrades and parapets was a major contributor to their failure, the windows flashings were inadequately installed, and the plastering over of them made them redundant in any case.

[104] In his closing submissions, Mr Vesey denied that there was not a continuing coating of mesh over the horizontal surfaces. He stated that it had been his longstanding practice to roll mesh over parapets and bend it down the front and inside faces and to instruct his employees to do the same. He also said that had the mesh not been present, the horizontal surfaces would have had cracking all over them after one year.

[105] Because Mr Vesey had no recollection of working on the house, he was only able to give evidence of his usual practice at the time in respect of the installation of mesh. The absence of mesh was clearly documented in the assessor Mr Alvey's report. In particular, photographs 24 and 30 of the report show cutaway sections of both the balustrade and a parapet. Both show clearly that there is no mesh present at the cutaway section. In addition, Mr Angell's report also features a photograph of the underside of the cladding used over the top of the parapet wall in which the absence of mesh is apparent.[18]

[106] We are satisfied that the evidence establishes that there was not a continuous coating of mesh over the horizontal surfaces of the balustrades. As noted above, this was a major defect which allowed water to ingress.

[107] Mr Vesey is also liable for the failure to install a "Z" flashing at the bottom of the cladding which gave rise to the ground clearance defect. This defect was secondary, did not cause significant damage and could, in isolation, have been remedied by targeted repairs.

[108] Given the extent of the damage caused by defects for which Mr Vesey is liable we conclude that he has contributed to defects that necessitate the full re-cladding of the dwelling. He is accordingly liable for the full amount of the established claim.

[18] See photograph 241, p 278 Maynard Marks Defects and Damage Report.

DID PLASTER SYSTEMS LIMITED OWE A DUTY OF CARE TO THE CLAIMANTS AND, IF SO, DID ANY BREACH OF THAT DUTY CAUSE OR CONTRIBUTE TO THE CLAIMANTS' LOSS?

[109] The claimants alleged that Plaster Systems Limited was negligent in the design of an aspect of the Insulclad cladding system relating to parapet and balustrade tops. It is their case that the house's balustrades and parapets were constructed in accordance with the Insulclad detail apart from minor variances. These were the construction of six degree rather than 15 degree slopes on the horizontal surfaces, and the failure to seal isolated screw heads on the handrail. The claimants submitted that these variances were not the sole cause of failure. As the parapets and balustrades were otherwise built in accordance with the Plaster System's literature, the claimants allege that the system itself did not work and therefore did not comply with the Building Code.

[110] Robert Nelligan gave expert evidence on behalf of Plaster Systems Limited. He described the variances between the Insulclad details and the as-built structure as fundamental rather than minor. In his view, these variances were the failure to properly waterproof tops, the variation in the slope, the unsealed penetrations (screw heads on the handrail), the installation of the balustrade handrail without spacers, and the failure to adhere to the Plaster Systems requirement of continuous fibreglass re-enforcing mesh embedded within the plaster.

[111] Mr Nelligan gave evidence that he had inspected a large number of properties involving weathertightness failures, including properties built with the Insulclad. He said that he had never seen any instance of failure of this cladding system which did not involve faults in construction which were significant departures from good trade practice.

[112] David Evans also gave evidence on behalf of Plaster Systems Limited. He is a consultant to Nuplex Industries Limited (Nuplex) which is the parent company of Plaster Systems Limited. Prior to becoming a consultant, he was a long-term employee of Nuplex and was involved in the acquisition by it of Plaster Systems Limited in 1996. Prior to acquisition, due diligence was undertaken on Plaster Systems Limited which identified no concerns regarding the Insulclad system.

[113] Mr Evans gave evidence that he had been involved in a number of appraisals and reappraisals of Insulclad by BRANZ for matters such as weathertightness. To his knowledge, no concerns about the Insulclad system were ever raised by BRANZ. Mr Evans is unaware of any instance of failure of a properly constructed Insulclad parapet or balustrade.

[114] Mr Evans gave evidence that Plaster Systems Limited maintained a network of licensed contractors who were experienced plasterers, trained in correct Insulclad installation methods, and provided with complete technical instructions which are updated regularly. Plaster Systems in this way has tried to reduce the scope for human error but is not able to completely remove this risk and accordingly, specifies in written materials that it does not accept liability for workmanship as on-site application is beyond its control. He stated that he would have expected that Mr Vesey would have personally undertaken the work on the house or personally supervised it. Otherwise, the purpose of only allowing licensed contractors to supply and install Insulclad is defeated.

[115] We accept that the variation between the as-built parapets and balustrades and the specifications on the Insulclad datasheet were fundamental rather than minor. The most significant variance was the absence of continuous fibreglass re-enforcing mesh embedded within the plaster. The difference in slope combines with

the absence of handrail spacers to constitute a variance that is also significant and which had significant consequences. Although the experts referred to the handrail screw heads being unsealed (another variance that would have compounded the handrail related defects) it was not established in evidence that they were in fact unsealed. Mr Angell's evidence was that it was not possible to tell either way by the time he examined the house.

[116] Mr Summers and Mr Angell gave evidence that a top fitted handrail in the light of today's knowledge was unsuitable and a "bad idea". Such handrails are now always side fixed. However, it was not established that had the handrail been constructed in accordance with Insulclad requirements (sealed penetrations, spacers, correct slope, continuous mesh) that it would have failed. Similarly, it was not established by the claimants that the Insulclad system could not work and did not therefore comply with the Building Code. To the contrary, the uncontradicted evidence of Mr Evans and Mr Nelligan was that they had no knowledge of a properly constructed Insulclad system failing.

[117] It is accepted that Plaster Systems Limited did owe a duty of care to the claimants to ensure that the Insulclad System complied with the performance requirements of the Building Code. It has not been established that this duty of care was breached. The system of maintaining a licensing system in order to avoid or minimise human error during installation was reasonable and Plaster Systems Limited is not liable for the variances between the as-built house and the Insulclad details.

[118] It has been suggested by the claimants in their closing submissions that the Insulclad data sheet did not comply with the Building Code until 1997 when proprietary waterproofing of parapets and rubber gaskets around handrail fixings were included. The 1997 addition of these requirements is of little relevance given the

established variations with the Insulclad specifications in place at the time which caused defects. Similarly, it is submitted that the literature did not specify whether there should be individual stanchions or a continuous rail across the balustrade. It appears to be suggested that the necessary spacers for the handrail were not specified on the data sheet. However, even were this the case, there is no causal link to the defect as spacers were specified on Mr Morrison's plans.

WHAT IS THE APPROPRIATE SCOPE AND COST OF THE REMEDIAL WORK?

[119] It was accepted by Mr Alvey and Mr Angell that a full re-clad and replacement of the decayed timber was necessary. Although the Council and Mr Morrison made submissions that targeted repairs would have sufficed, this was not supported by expert evidence and we are satisfied that a full reclad and replacement of decayed timber was necessary and appropriate.

[120] The remedial work was carried out in late 2009 and early 2010. The house was reclad with weatherboards rather than monolithic cladding. The window facings were also altered. A bedroom and bathroom extension was added.

[121] The change of cladding, window style and the extension constitute betterment. It is necessary therefore to determine the appropriate deduction to make for these items from the total cost of the remedial work which was undertaken. Associated issues are whether there should be a proportional deduction made from design fees and fees paid to remediation experts, and whether some or all of the cost of painting the remediated house should be included.

[122] Mr Ranum for the claimants and Mr White for the Council gave expert evidence to the Tribunal concerning the appropriate deductions to be made for betterment. Mr White is a quantity

surveyor and the director of Kwanto Limited which is a quantity surveying company specialising in remedial estimation. He was engaged by the Council to review documents relating to the claimant's remedial work to see whether the amounts claimed were established and to calculate the amount to be deducted for betterment.

[123] Mr Ranum is a quantity surveyor and the director of the consultancy Mallard Cooke and Brown. He was engaged by the ASB bank in 2010 to ensure that progress payments made to the builders who carried out the remedial work were certified before funds were released. He was subsequently instructed to audit Mr White's calculations.

[124] The total claimed for remedial works in the third amended statement of claim was $423,786.70 which includes construction costs, design fees, painting costs, and fees paid to Mallard Cooke and Brown. At the hearing Mr White agreed that he had seen invoices supporting this entire amount however he had not been able to view supporting timesheets in respect of invoices totalling approximately $54,000. He accepted that these invoices had been paid by the claimants.

[125] Mr Ranum gave evidence that he had certified only six of the eight builder's progress payments because the bank had not required his services in respect of payments seven and eight. The Council has submitted that the effect of this is that the claimants' claim is not established in respect of these two payments. This is not accepted. It is not disputed that these two payments were made by the claimants and the lack of engagement of Mr Ranum in respect of them is not a basis for disallowing them. Mr Ranum gave evidence that he had seen documentation supporting all the payments detailed in schedule 5 of the claimants' third amended statement of claim. We accept this evidence.

[126] At the hearing it was suggested by Mr White that the figure $326,949 was an appropriate starting point, being the tender price for construction. Mr Ranum's evidence was that this tender was not relied on and that the work ultimately proceeded on an agreed hourly rate. We accept this evidence and accept that $423,786.70 is the appropriate starting point for calculating the remedial costs to be awarded. There was some suggestion made by Mr Cowan at the hearing that additional design fees from the company Passion and Soul Limited should be added to the $423,786.70 start point. This claim was not supported in either the amended statement of claim, the evidence, or referred to in the claimants' closing submissions. It is not established.

[127] Both Mr Ranum and Mr White agreed that the sum of $24,613 should be deducted as being the direct cost of the extension. This deduction did not include the proportion of the waterproofing costs that should be attributable to the extension.

[128] The total cost of waterproofing was $19,140 plus GST ($22,943). In addition to the extra area created by the extension there was a substitution of material and a superior product to the butynol membrane originally used was applied. Messrs White and Ranum used different methodologies to calculate the cost to be deducted for the extra area and improved material.

[129] Mr White calculated that the correct deduction was $11,159 (excluding GST). This figure was obtained by reference to the tender documents and by calculating from measurements.

[130] Mr Ranum calculated the deduction to be $6,153 (excluding GST). This figure was calculated following consultation with the waterproofing contractor regarding the price of doing the job in butynol and then making a deduction for the additional area.

[131] It has not been established that either calculation is incorrect or unreasonable. Both Mr Ranum and Mr White agreed that a figure in between their two estimates would be reasonable. Accordingly we find that the appropriate deduction is $8,658 which is the half way point between the two estimates. Adding GST, the figure is $9620.

Weatherboards and window improvements

[132] Messrs Ranum and White calculated different figures for the deduction to make for the improved cladding and windows. Mr Ranum calculated the deduction for betterment for both cladding and windows to be $53,303, while Mr White calculated $46,098.89 for cladding plus $17,521.75 for windows, totalling $63,620.64. Both used different methods for calculating the cost of the cladding and window betterment. Mr White's figure was obtained taking line items from a tender document while Mr Ranum used a calculation methodology based on actual material costs and allowances for labour, wastage and fixings. Specifically, he allowed for the deduction of three weeks labour costs for betterment being two weeks for the affixing of the boards and one week for painting them.

[133] We prefer Mr Ranum's figure to that provided by Mr White. Mr Ranum had familiarity with the remedial work because of his role in certifying progress payments. His figure is reasonable and he has provided an explanation for its calculation. It has not been established that Mr White's figure is more reliable. We find therefore that the appropriate betterment deduction to be made for the improved cladding and window facings is $53,303.

Painting

[134] The experts agreed that the correct figure for painting is $16,791.68 (GST excl). The question is whether the cost of the painting or a part of it constitutes betterment. Painting would have

inevitably been required at some stage as a part of the natural maintenance cycle of the house. Mr Baker's evidence was that the house had been painted in summer 2001/2002, and had a ten year guarantee. The painting that was necessitated by the remedial work in 2010 was therefore carried out a year in advance of the normal maintenance cycle. As the paint had only one tenth of its guaranteed life cycle remaining we find that it is appropriate to deduct 90% of the cost of painting as betterment. Accordingly the deduction in respect of painting is $15112.51.

Professional fees

[135] The professional fees claimed in respect of the remedial work were $13880.25. In Mr White's calculations he deducted $4346.19 from this total as a proportion of the extension. Mr Ranum's evidence was that design fees for the bedroom and bathroom extension had already been deducted and that no further deduction was warranted. He also stated that the claimed cost for professional fees was low. We agree, and determine that no deduction from the quantum of claimed fees is warranted.

Preliminary and general

[136] Similarly, Mr White calculated a deduction of $14,982.38 for preliminary and general work. Mr Ranum disagreed with this deduction being made on a proportional basis as these costs are a combination of fixed costs and time related items. He calculated a figure of $2902.00 based on the extended construction programme necessitated by the weatherboard cladding and the exterior painting time. Mr Ranum's figure and his reasoning are accepted. The deduction to be made is $2902.00.

[137] We find that the claimants have established their claim in relation to the remedial work to the amount of $319,197.30 which is calculated as follows

	$423, 786.70
Less – Extension	$24,613.89
Less – Weatherproofing	$8, 658.00
Less - Betterment of cladding and windows	$53,303.00
Less – Painting	$15,112.51
Less - Preliminary and general	$2,902.00
TOTAL	**$319,197.30**

Pre-remedial work

[138] The claimants have claimed the sum of $9690.75 in respect of pre-remedial work. This relates to work that was carried out in early 2006 after the weathertightness issues in respect of the house were discovered. This work involved applying sealant around the door and window frames, to cracks around the window frames and to cracks on top of the balustrades. It also included some repairs to the roof membrane. The claim for this sum is opposed by the Council who have characterised it as representing the cost of "failed repairs".

[139] We decline to allow the claim for pre-remedial work. The sealing of cracks in plaster is part of maintaining a monolithically clad house and we consider that this work, which was carried out some four years prior to the remedial work in 2010, is appropriately categorised as maintenance.

Consequential damages

[140] In addition to the remedial cost the claimants are also seeking consequential damages in the sum of $25,502.90. This includes Maynard Marks' defect and damage investigation costs and the engagement of Mr Angell as an expert witness. It also includes insurance, valuation costs, interest, and bank costs and fees. Finally

it includes the sum of $4,645.45 which represents rent paid by Mr Baker while the house was being repaired.

[141] The only part of the claim for consequential damages that was disputed was the rent payment made by Mr Baker. The Council was opposed to this sum being claimed on the basis that Mr Baker is not a claimant, not being a trustee of the claimant trust.

[142] We agree. The claimants have not established that they had any obligation to pay for Mr Baker's accommodation while the house was being repaired. The claim for rent is disallowed. In addition the cost of Mr Angell's engagement as an expert witness ($4,827.38) is disallowed. This expense is a matter of costs rather than damages. The balance claimed for consequential damages, $16,030.07 is awarded.

General damages

[143] The Court of Appeal in *Byron Avenue* confirmed that the availability of general damages in leaky building cases was generally in the vicinity of $25,000 for owner-occupiers.[19]

[144] General damages in the sum of $25,000 has been claimed. The Council has submitted that this award should not exceed $15,000 because the house is owned by a trust and, more importantly, Ms Hicks was overseas for a substantial part of the time during the repairs. The Council rely on, in this regard, the judgment of Venning J in the *Byron Avenue* decision.[20]

[145] The Council's submission is not accepted. While it is correct that Ms Hicks was overseas for a substantial period while the house was being remediated, this was only because she needed to work

[19] *Body Corporate 189855 & Ors v North Shore City Council & Ors* (*Byron Avenue*) [2010] NZCA 65.
[20] *Body Corporate 188529 v North Shore City Council*, above n 4.

overseas in order to earn a sufficient salary to qualify for the bank loan required to fund the remedial work. She would not have otherwise been overseas and had to endure a separation from Mr Baker in addition to the considerable stress involved in finding herself the owner of a leaky home. In her brief, Ms Hicks described the symptoms caused by the anxiety and stress she experienced as a result of the problems arising from her leaky home. In her circumstances, we accept that the usual award for damages should be followed in this case and general damages is set at $25,000.

Conclusion as to Quantum

[146] The claim has been established to the amount of $360227.37 which is calculated as follows:

Remedial work	$319,197.30
Consequential damages	$16,030.07
General damages	$25,000.00
TOTAL	$360,227.37

Interest

[147] The claimants are seeking interest on the loans to fund repairs. The Act provides for interest to be awarded at the rate of the 90 day bill rate plus 2%. In the circumstances of this case it is appropriate that interest be awarded from the payment of the second progress claim to Kris Anderson Builders Limited which was most likely at the end of February 2010.

[148] The established costs, exclusive of general damages, are $335,227.37. The 90 day bill rate plus 2% is 4.68% which means interest accrues at $42.98 a day. There are 445 days between days between 1 March 2010 and 19 May 2011. Interest of $19,126.10 is

therefore awarded. The final amount for the established claim including interest is $379,353.47.

WHAT CONTRIBUTION SHOULD EACH OF THE LIABLE PARTIES PAY?

[149] 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.

[150] 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.

[151] 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…

[152] 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.

[153] We have found that three of the respondents are liable for the full amount of the established claim. They are the Auckland Council, Mr Jansen and Mr Vesey. There are no submissions before us as to the appropriate apportionment of the claim. We find that Mr Vesey should bear the greatest apportionment because he was

solely responsible for one of the significant defects which necessitated a reclad, the windows, and substantially responsible for the other significant defect, the failure of the horizontal surfaces to the parapets and balustrades.

[154] Mr Vesey was trusted as the licensed installer of the Insulclad system to ensure that the system was properly installed. He should have taken more care. He should have known the plastering over the window flashings would lead to leaking problems. Although he made submissions as to his practice with regards the installation of mesh over parapets, it is clear that he either failed to follow his own practice in this regard, or there was a failure of supervision of his employees who were not, like him, certified Insulclad installers. We conclude that the contribution of Mr Vesey should be set at 50%.

[155] Mr Jansen was responsible for failing to ensure that the handrail installation complied with the plans, failing to construct the horizontal surfaces of the balcony and parapets with adequate slope, the nailing of the top fixing board through the membrane and for the substitution of material on the surfaces and inside facings in variance with the plans. These factors significantly contributed to the failure of the parapets and balustrades which in itself necessitated a reclad of the property. As the person who was essentially the project manager, Mr Jansen should have taken more care with respect to the construction. In the circumstances we conclude that the contribution of Mr Jansen should be set at 30% which leaves a 20% contribution on the part of the Council.

[156] Although the Council was not responsible for carrying out the building work and nor was it a clerk of works, it failed to properly carry out its inspections. In the absence of a producer statement from Mr Vesey it had no basis for being satisfied that the joinery had been installed in accordance with the Building Code or that the required cover of mesh on the horizontal surfaces was present. It

also should have identified on inspection that the handrail had not been installed with the spacers specified on the plans.

CONCLUSION AND ORDERS

[157] The claim by Vivienne Diana Lowe, Graham Brentleigh Bond and Lorraine Lila Bartley as Trustees of the Vivienne Hicks Family Trust is proven to the extent of $379,313.42. For the reasons set out in this determination we make the following orders:

i. The Auckland Council is to pay Vivienne Diana Lowe, Graham Brentleigh Bond and Lorraine Lila Bartley as Trustees of the Vivienne Hicks Family Trust the sum of $379,313.42 forthwith. The Auckland Council is entitled to recover a contribution from Robert Jansen of up to $113,794.02 and from Matthew Vesey of up to $189,656.71 for any amount paid in excess of $75, 862.68.

ii. Matthew Vesey is ordered to pay Vivienne Diana Lowe, Graham Brentleigh Bond and Lorraine Lila Bartley as Trustees of the Vivienne Hicks Family Trust the sum of $379,313.42 forthwith. Matthew Vesey is entitled to recover a contribution of up to $75, 862.68 from the Auckland Council and from Robert Jansen of up to $113, 794.02 for any amount paid in excess of $189,656.71.

iii. Robert Jansen is ordered to pay Vivienne Diana Lowe, Graham Brentleigh Bond and Lorraine Lila Bartley as Trustees of the Vivienne Hicks Family Trust the sum of $379,313.42 forthwith. Robert Jansen is entitled to recover a contribution of up to $75, 862.68 from the Auckland Council and from Matthew Vesey of up to $189,656.71 for any amount paid in excess of $113, 794.02.

iv. The claim against Roger Morrison, Stuart Savill and Plaster Systems Limited is dismissed.

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

Second Respondent – Auckland City Council	$75, 862.68
Fourth Respondent – Robert Jansen	$113, 794.02
Sixth Respondent – Matthew Vesey	$189,656.71

[159] 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 [156] above.

DATED this 20th day of May 2011

_____	_____
M A Roche	P A McConnell
Tribunal Member	Tribunal Chair