IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2009-100-000029
[2010] NZWHT AUCKLAND 16

BETWEEN	**HUANG FU JIN, HUANG SHU FANG, HUANG SHU XIAN** Claimants
AND	**ELSA LEUNG** First Respondent
AND	**SEAN CHEN** Second Respondent
AND	**DAVE SANG** Third Respondent
AND	**ROSE MARY MCLAUGHLAN** Fourth Respondent
AND	**BALA RAMAN NAIKER** Fifth Respondent
AND	**JOHN LEUNG** Sixth Respondent

Hearing:	8 and 9 April 2010
Appearances:	T Rainey for Claimants and First and Sixth Respondents Second Respondent (Self-Represented) D Gatley for Third Respondent Fourth Respondent (Self-Represented) Fifth Respondent, No Appearance
Decision:	10 June 2010

FINAL DETERMINATION
Adjudicator: S G Lockhart QC

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INTRODUCTION

[1] This decision is in respect of a residential dwellinghouse at 26 Attymon Lane, Dannemora in Auckland, owned by the claimants. After filing their claim with the Department of Building and Housing on 17 September 2008, a full assessor's report dated 3 December 2008 was obtained confirming that the claimants' dwelling is a leaky building requiring a complete re-clad. Consequently the claimants seek an award of damages in the amount of $396,445.00 made up of:

a) $371,445.00 in remedial costs to repair the defects and damage to the dwelling as detailed in the brief of evidence of Mr Westmoreland dated 22 October 2009; and

b) $25,000 in general damages for (each of) three claimants

[2] In seeking an award of damages from the Tribunal, the claimants pursued their claim against:

a) The first respondent, Ms Elsa Leung – the alleged developer of the property;

b) The second respondent, Mr Sean Chen – a builder who was involved in the construction of the dwelling;

c) The third respondent, Mr Dawei (Dave) Sang – the designer of the property;

d) The fourth respondent, Ms Rose Mary McLaughlan – the private building certifier who issued a building certificate, carried out an inspection and issued a Code Compliance Certificate in respect of the property;

e) The fifth respondent, Mr Bala Raman Naiker – the plasterer who carried out the pointing compound to joints between the sheets of the fibre cement cladding and then supplied the texture coating to the cladding; and

f) The sixth respondent, Mr Li-Chiang (John) Leung – alleged to have assisted his sister, the first respondent with the development of the property.

Partial Settlements

[3] The first and sixth respondents (Leungs) reached a settlement with the claimants, the terms of which were made available to the Tribunal and all parties. According to the terms of that settlement, the first respondent agreed to advance a sum of $250,000 to the claimants on account of any damages they might recover at the hearing, and the claimants agreed:

a) Not to continue to sue or seek compensation from the first respondent or her brother, the sixth respondent;
b) To allow the first respondent to have the right to control and conduct a proceeding as she saw fit including reaching a settlement with any or all of the remaining parties, if necessary; and
c) To assign to the first respondent the benefit of any damages award on terms that the first respondent would receive $250,000.00 of any damages recovered with the excess to be paid to the claimants.

In accordance with the terms of the settlement agreement, the claimants do not seek any award of damages against the first or sixth respondents.

[4] In a letter to the Tribunal dated 16 December 2009, counsel for the claimants, Mr Rainey advised that he had been instructed to also act for the first respondent. He also advised that pursuant to the terms of the settlement agreement, the first respondent has taken an assignment of the benefit of the claim and has therefore effectively

"subrogated" to the rights of the claimants against the other respondents (clause 4).

[5] The decision of Randerson J in *Petrou v Weathertight Homes Resolution Service*[1] sets out the law in relation to assigned and subrogated claims. At [27] and [28] Randerson J held that a right of subrogation, vested by operation of law, enables another party to continue on in a claim in the shoes of the claimants. Accordingly the Tribunal issued Procedural Order No. 7 dated 18 December 2009 allowing the existing proceedings to remain alive in order for the claimants and the first and sixth respondents to continue the action against the non-settling parties.

[6] On 29 January 2010 the first respondent negotiated a settlement with the third respondent, Mr Sang, and the fourth respondent, Ms McLaughlan. As a result, this determination focuses on the claims against the two remaining respondents with whom there is no settlement – the second respondent, Mr Sean Chen and the fifth respondent, Mr Bala Raman Naiker.

[7] Mr Rainey, counsel for the claimants and consequently the first and sixth respondents as well, submits that the abovementioned settlements do not prevent the claimants from continuing to pursue their claim against the remaining respondents as they are partial settlements of a liability *in solidum*. Accordingly Mr Rainey argues that the claimants are entitled to seek judgment against the remaining respondents for the full amount of their loss.

[8] The Tribunal accepts that submission and therefore in accordance with the principles outlined in the decision of Duffy J in *Body Corporate 185960 v North Shore City Council (Kilham Mews)*,[2]

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[1] HC Auckland, CIV-2009-404-1533, 24 November 2009.
[2] HC Auckland, CIV-2006-004-3535, 28 April 2009.

the claimants are entitled to seek judgment against the remaining respondents for the full amount of their claim. However as noted by Duffy J in *Kilham Mews*, this does not mean that the claimants can recover damages for more than his or her whole loss.[3] This point was reinforced by Randerson J in *Petrou*:

> [16] It would thus be unjust and contrary to the common law to allow recovery for the full amount of the damages against [the remaining respondents], considering that the [respondents have settled with the claimants]. The paramount rule to take into consideration here is that the [claimant] cannot recover damages for more than his or her whole loss (*Allison v KPMG Peat Marwick*).

[9] In following the decisions of the High Court in *Kilham Mews* and *Petrou* the claimants are entitled to entry of judgment against Mr Chen and Mr Naiker for the full amount of the damages claimed. However, since the claimants have already settled with the first and sixth respondents for the sum of $250,000, the claimants cannot recover from both Mr Chen and Mr Naiker an amount which would cause the claimants to recover more than the total amount established below.

[10] Moreover, the Tribunal is satisfied that the claims against Mr Chen and Mr Naiker are pursued not only by the claimants but the first and sixth respondents as well. Therefore in following *Petrou*, the Tribunal will deal with the first and sixth respondents' claims against Mr Chen and Mr Naiker by way of a cross-claim whereby the first and sixth respondents may only pursue contribution or indemnity from Messrs Chen and Naiker for the $250,000 they have paid to the claimants.

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[3] Ibid [16] in following *Allison v KPMG Peat Marwick and Robinson v Tait* [2002] 2 NZLR 30 (CA).

Adjudication Hearing

[11] An adjudication hearing was initially set down to commence on Tuesday 2 February 2010 at 10am. However by the end of the day on Friday 29 January 2010 the Tribunal was advised that the abovementioned settlements had been reached, with the exception of the second and fifth respondents. Accordingly it appeared that the hearing would solely involve the claimants' claim and the first respondent's claim for contribution against Mr Chen and Mr Naiker – neither of whom were expected to attend as they both failed to participate in any of the pre-hearing meetings held by the Tribunal.

[12] A letter from Mr Chen dated Saturday 30 January 2010 was received by the Tribunal advising that he had very recently returned to New Zealand and that he wanted the hearing adjourned. Indeed, at the scheduled hearing on Tuesday 2 February 2010 Mr Chen advised that he had been out of New Zealand for some time and it was only when he returned four days ago that he became aware that the adjudication hearing was to be heard on 2 February 2010. Consequently he applied for an adjournment.

[13] Following discussions it was agreed that the hearing scheduled for Tuesday 2 February 2010 would be adjourned so that Mr Chen had an opportunity to instruct a lawyer to act for him and upon that basis another adjudication date would be advised. There was still no response from the fifth respondent, Mr Naiker.

[14] On Thursday 4 February 2010, a case conference was held which included Mr Chen and Mr Piggin, who had accepted instructions to act as counsel on behalf of Mr Chen. An adjudication hearing was then set to commence on 8 April 2010 at 10am.

[15] On Wednesday 31 March 2010 Mr Piggin filed the following documents on behalf of Mr Chen:

a) Response to Amended Statement of Claim
b) Brief of Evidence of Mr Sean Chen;
c) Brief of Evidence of Rui Jiang
d) Brief of Evidence of Bin Chen
e) Brief of Evidence of James Barrie Morrison
f) Second respondent's Bundle of Documents

[16] However on Tuesday 6 April 2010 Mr Piggin filed notice of change of representation for Mr Chen whereby Mr Piggin sought leave to withdraw as counsel for Mr Chen and that Mr Chen will be representing himself. As a result, Mr Chen represented himself at the hearing which reconvened on Thursday 8 April 2010.

FACTUAL BACKGROUND

[17] On 3 November 2000 the Leungs acquired an empty section at 26 Attymon Lane, Dannemora to construct a dwelling and sell it for profit. Consequently the Leungs engaged a number of parties for the construction of the dwelling in or about September 2001, including:

(a) The third respondent was engaged to prepare plans and specifications;
(b) The second respondent was engaged to carry out building work on the property; and
(c) The fourth respondent was engaged to process the plans, carry out inspections and issue a code compliance certificate for the construction.

[18] On 17 September 2001 a building consent application was lodged by the fourth respondent on behalf of the Leungs and on 26 September 2001 the Council issued the Building Consent for the

construction of the dwelling in reliance upon a building certificate issued by the fourth respondent. A Code Compliance Certificate for the dwelling was later issued by the fourth respondent on 19 March 2002.

[19] By written agreement dated 1 March 2002, the claimants agreed to purchase the property from the Leungs for $432,000. The claimants settled their purchase on 26 March 2002 and became the registered proprietors on 12 April 2002.

[20] On 17 September 2008, the claimants lodged a claim with the Department of Building and Housing regarding their leaky home.

ISSUES

[21] The issues to be determined by the Tribunal in relation to the claims made against Mr Chen and Mr Naiker are:

- What are the defects that caused the leaks?
- Is Mr Chen responsible for the defects and consequential damage?
- Is Mr Naiker responsible for the defects and consequential damage?
- What is the quantum of damage the liable respondents should pay?
- What contribution should each of the liable parties pay?

DEFECTS

[22] The experts who provided opinion on the dwelling's defects and the damage that ensued, included the WHRS Assessor, Mr Probett; Mr Grigg for the claimants and first and sixth respondents; and Mr Morrison for the second respondent.

[23] At 15.2 of the Assessor's Report, Mr Probett identified the following defective areas:

(a) Failed cladding;

(b) Failed inter-storey horizontal bands;

(c) Cladding taken to the ground; and

(d) Inadequate seal between joinery and cladding

[24] Mr Grigg, a registered architect and Principal of an architectural and engineering consultancy, filed an Amended Brief of Evidence. At paras 46-47 of that document, Mr Grigg specifically listed the defects he identified during his investigations. Although Mr Grigg further elaborates on the findings already made by the Assessor, the findings and opinions of Mr Grigg and the Assessor are substantively the same and therefore not disputed.

[25] Mr Morrison, the expert called by Mr Chen, is a registered architect and building consultant. The conclusions made by Mr Morrison are summarised in para 27(a) of his Brief of Evidence. As confirmed in the Closing Submissions for the claimants and first and sixth respondents, all experts agreed that the most significant defects requiring a complete re-clad of the dwelling were those as summarised by Mr Morrison at para 27(a) which included:

(a) The cracks in the cladding at the sheet joints, specifically the joining of the sheets of cladding and texture-coating the cladding;

(b) The installation of the inter-storey band;

(c) The absence of sealants at the jambs to the windows

[26] The Tribunal notes that the only concerns raised by Mr Morrison which differed to the opinions of the Assessor and Mr Grigg related to the Eterpan fibre cement sheeting. Mr Morrison opined that:

(i) The minor number of cladding junctions that align with the jambs have not contributed to moisture ingress;

(ii) The proximity of the Eterpan to the head flashing is not a cause of water ingress and even if it was fixed hard down on the head flashings, not only was that acceptable under the applicable Eterpan technical detail but the plasterer also sprayed the area with textured coating thereby inhibiting any water drainage away from that area;

(iii) The lack of sill flashings specified in the Eterpan detail has not caused water ingress; and

(iv) The appropriate cladding to ground clearance was compromised when other parties laid the concrete.

[27] In response, the submissions of the claimants and first and sixth respondents were that:

(i) In cross-examination Mr Morrison accepted that sheet alignment and control joints were not carried out correctly and that this was a contributing cause of the cracking to the sheet joints;

(ii) Although Mr Chen admitted that he had not used Eterpan before, he was advised to follow the James Hardie technical information for Harditex. However Mr Chen did not follow that technical information. The evidence of both the Assessor and Mr Grigg was that the failure to follow the technical information for fixing cement cladding sheets was a contributing cause;

(iii) The Assessor's Report noted seven high moisture readings at the window sill level; and

(iv) A competent builder would have worked out where finished ground levels were to be and finished the cladding accordingly.

[28] At the hearing Mr Morrison acknowledged that his investigations were purely visual and that he did not carry out any destructive testing or moisture readings. Instead he admitted that he relied on the information in Mr Grigg's evidence and the Assessor's Report. Based on Mr Morrison's limited investigations and in accepting the submissions made in response to Mr Morrison's difference of opinion, the Tribunal accordingly holds that where the evidence of Mr Morrison differs with that of Mr Grigg and the Assessor, the evidence of the Assessor and Mr Grigg have to be preferred.

[29] In summary, the defects relevant in determining the claims against Mr Chen and Mr Naiker are:

(a) The cracks in the cladding at the sheet joints;
(b) The inter-storey band;
(c) The absence of sealants at the jambs to the windows

IS MR CHEN RESPONSIBLE FOR THE DEFECTS AND CONSEQUENTIAL DAMAGE?

[30] The claim against Mr Chen is in tort based on the building work he carried out on the property. Specifically the claimant's claim is that Mr Chen breached the duty of care he owed to them by failing to exercise reasonable skill and care when he carried out the building work on the property that has caused the defects.

[31] According to the claimants, the relevant defects which Mr Chen ought to be held responsible for include:

(a) The failure to install the windows in accordance with relevant technical information or good trade practice of the time; and
(b) The fixing of the fibre cement sheets that made up the cladding:

(i) Lack of vertical control joints
(ii) Incorrect layout of cladding sheets
(iii) Lack of adequate ground clearance for cladding
(iv) Poorly installed horizontal joints in cladding sheets

[32] In response, Mr Chen admits that he was engaged by the first and sixth respondents (the Leungs) to erect the framing, affix the fibre cement cladding sheets, affix the aluminium windows, and carry out interior lining work. However he maintains that he was only a labourer employed on a labour-only basis, and that the Leungs were the builders as well as the developers and project managers of the dwelling's construction.

[33] In his brief of evidence Mr Chen stated that he worked on the claimants' property on a labour-only basis doing only the specific jobs he was contracted to do; and although he had two hammerhands working for him, Mr Chen stated that the Leungs did not want him to do anything more than the work agreed upon. Indeed, Mr Chen pointed out that aside from purchasing the necessary building materials and supplies for the construction of the dwelling, the Leungs and their entire family carried out most of the building work themselves including some of the work Mr Chen was contracted to do. The second respondent, Mr Chen also stated that the Leungs checked every aspect of the job as they were on site daily and often twice a day to inspect the work. Mr Chen's account of the way the Leungs ran the construction project was reiterated in the briefs of evidence filed by the two hammerhands, Messrs Rui Jiang and Bin Chen. The Leungs however deny that they carried out any building work on the property.

[34] In claims involving leaky residential dwellings, the terms "builder" or "contractor" have been given a wide meaning to include all specialists or tradespeople involved in the building or construction

of a dwellinghouse or multi-unit complex. For instance, in *Body Corporate 185960 v North Shore City Council*[4] 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.

[35] The Tribunal has adopted that same view as seen in the decision of *McGregor v Jensen*:[5]

> [66] … 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.

[36] This was confirmed on appeal in the decision of H Williams J in *Boyd v McGregor*[6] where he stated:

> [28] …[T]he Court's view is that labels are arid ground for debate: in issue are the functions assumed by those said to be liable, what legal obligations may flow from their assumption of those functions, and whether those obligations have been breached (see eg *Body Corporate 199348 v Nielsen* HC Auckland, CIV-2004-404-3989, 3 December 2008 paras [66], [67]). The adjudicator in this case was correct to note that attempts to differentiate between the roles of people based on their descriptions as "builder" or "contractor" creates an artificial distinction when all play their respective parts.

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[4] HC Auckland, CIV-2006-404-3535, 22 December 2008, Duffy J.
[5] WHT, TRI-2008-100-94, 24 July 2009, Chair PA McConnell, at [66].
[6] HC Auckland, CIV-2009-404-5332, 17 February 2010.

[37] As these case authorities show, the courts 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.[7] Upon that reasoning, the role Mr Chen agreed to, and did indeed, undertake during the construction of the dwelling means that he is not in a significantly different position than other builders engaged to do construction work on dwellings who have been found to owe a duty of care. It is acknowledged that Mr Chen accepts that he owes such a duty to the claimants as a labourer. However before turning to the issue of whether Mr Chen breached that duty, the Tribunal must deal with Mr Chen's primary contention that he was not the "builder" of the dwelling per se.

[38] In his brief of evidence and closing submissions Mr Chen discloses that although he is a member of the Master Builders Federation, at the time the claimants' property was built, he had only been in the construction industry for approximately one year in New Zealand and therefore he was not a "qualified Builder". The Tribunal accepts that during construction Mr Chen was not a "qualified" builder in the sense that he had not obtained trade qualifications in New Zealand until 2003. However it does not necessarily follow that a person's lack of experience or skill means that a finding of negligence cannot be made against them. As stated by Asher J in *Lake v Bacic*:[8]

> [34] The fact that a person has no experience or skill in a particular area does not mean that that person owes no duty of care if that person has, despite lack of experience and skill, assumed responsibility for skilled work…

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[7] *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA); *Dicks v Hobson Swan Construction Ltd* (2006) 7 NZCPR 881 (HC); *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 2 NZLR 394 (CA); *Body Corporate 189855 v North Shore City Council (Byron Ave)* HC Auckland, CIV-2005-404-5561, 25 July 2008 (HC).
[8] HC Auckland, CIV-2009-004-1625.

[39] The Tribunal acknowledges that there is a dispute of the facts regarding whether the Leungs carried out some of the building work themselves. However a finding as to whether the Leungs did in fact carry out some of the building work which has led to the causes of the damage is an issue of contribution which will be dealt with in the "Contribution" section below, and therefore does not affect a determination as to whether or not Mr Chen ought to be held responsible for the building work he in fact carried out. On that basis, although Mr Chen may not have been the sole builder of the dwelling, he was in fact a person who carried out building work on the property for which he ought to be held responsible if that building work caused the leaks, qualified or not.

[40] Turning to the defects, the claimants and first and sixth respondents allege that the evidence establishes that Mr Chen breached his duty of care in respect of the following key defects:

(a) Firstly, in the installation of the windows which Mr Chen accepted he was responsible for [at the hearing]. The expert evidence clearly establishes that the windows were not installed in accordance with the relevant technical information or good trade practice at the time of construction; and

(b) Secondly, in the fixing of the fibre cement sheets that made up the cladding which Mr Chen also accepted he was responsible for [at the hearing]. The defects in the cladding include:

    (i) Lack of vertical control joints
    (ii) Incorrect layout of cladding sheets
    (iii) Lack of adequate ground clearance for cladding
    (iv) Poorly installed horizontal joints in cladding sheets

[41] There is no dispute that Mr Chen was responsible for the installation of the windows and the fixing of the fibre cement sheets, particularly since Mr Chen admits that these were the tasks he was contracted to do. However the Tribunal also finds that when Mr

Chen was engaged by the Leungs to carry out the specific building tasks in the construction of the dwelling, it was implicit that Mr Chen put himself forward to the Leungs as having particular building skills necessary for completing the contracted building work. As a result the Leungs specifically relied on Mr Chen to apply those skills to carry out the contracted building work. If Mr Chen did not have the required skills for that work, he should not have agreed to carry out that work as it would have been beyond his expertise. In any case, as he carried out the work found to be defective, any direct loss to the Leungs or the claimants arising from the work he carried out and his lack of building experience was foreseeable. For these reasons, Mr Chen must therefore have responsibility.

[42] Accordingly, the evidence before the Tribunal clearly establishes that the second respondent, Mr Chen is liable for the defective work he actually carried out which caused the leaks and the subsequent loss to the claimants, the amount of which will be determined in the "Contribution" section below.

IS MR NAIKER RESPONSIBLE FOR THE DEFECTS AND CONSEQUENTIAL DAMAGE?

[43] Mr Naiker is a plasterer and was joined to these proceedings by an application filed by the first respondent dated 16 July 2009 on the grounds that the first respondent entered into an oral contract with Ray Plasterers Ltd (RPL) to carry out the plastering work on the property. RPL has since been struck off the Companies Register. However it is submitted that the actual plastering work was completed by a man who used the English name Raymond, but whose actual name is in fact Bala Raman Naiker, and that it was he who therefore carried out the negligent plastering work that has caused or contributed to the defects. Paragraph 16 of the WHRS Assessor's Report supports the finding that Bala Raman Naiker as

the plasterer has caused or contributed to water ingress issues at the house. In those circumstances, the Tribunal held that there was tenable evidence for granting the joinder of Mr Naiker to these proceedings, and he was thereby joined by way of Procedural Order No. 3 dated 31 July 2009.

[44] The Tribunal received a fax dated 1 September 2009 from Mr Rohineet Sharma advising that he has been instructed to act as counsel for Mr Naiker. Mr Sharma attended the mediation for this claim on 17 September 2009 with Mr Naiker. However in an email date 9 November 2009, Mr Sharma advised that he was no longer acting for Mr Naiker. Throughout these proceedings Mr Naiker has never filed any statements or evidence in relation to this claim, nor participated in any of the Tribunal's pre-hearing conferences or the hearing itself.

[45] A party's failure to act do not affect the Tribunal's power to determine the claim against them. Section 74 of the Weathertight Homes Resolution Services Act 2006 provides that the Tribunal's powers to determine a claim are not affected by:

> (a) The failure of a respondent to serve a response on the claimant under section 66; or
> (b) The failure of any party to:
>   (i) make a submission or comment within the time allowed; or
>   (ii) give specified information within the time allowed; or
>   (iii) attend, or participate in, a conference of parties called by the Tribunal; or
>   (iv) do any other thing the Tribunal asks for or directs.

[46] Moreover section 75 of the Act provides that the Tribunal may draw inferences from a party's failure to act and determine the claim based on available information:

> If any failure of the kind referred to in section 74 above occurs in adjudication proceedings, the Tribunal may –
>
> (a) draw from the failure any reasonable inferences it thinks fit;
> (b) determine the claim concerned on the basis of information available to it; and
> (c) give any weight it thinks fit to information that –
>
> (i) it asked for, or directed to be provided; but
> (ii) was provided later than requested or directed.

[47] Based on sections 74 and 75, the Tribunal therefore makes the following considerations and determines Mr Naiker's involvement and responsibility based on the information available before it.

[48] The claim made against Mr Naiker is similar to that against Mr Chen which is that as a person involved in the construction of the house, Mr Naiker owed the claimants and the first respondent, a duty of care. Specifically it is claimed that Mr Naiker breached that duty as his work in joining the sheets of cladding, texture-coating the cladding and installation of the inter-story band were defective and contributing causes requiring a complete re-clad of the dwelling.

[49] In *Body Corporate 189855 v North Shore City Council (Byron Ave)*[9] Venning J concluded that the plasterer owed a duty of care to subsequent owners. In reaching that 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.

Upon that basis, Mr Naiker owes a similar duty of care as Mr Chen based on the legal principles outlined at [34] to [37] above. The question then however is whether Mr Naiker breached that duty owed to the claimants.

[9] HC Auckland, CIV-2005-404-5561, 25 July 2008.

[50] The claimants and the first and sixth respondents allege that the evidence establishes that Mr Naiker breached his duty of care as he was responsible for the jointing of the cladding sheets, texture-coating the cladding, and the installation of the inter-story band which were contributing causes of the damage. Both Mr Grigg and Mr Morrison agree that Mr Naiker could not have considered the plastering to be compliant with the Building Code when he issued the Producer Statement. This was because:

(a) The plastering, especially at the corners and sheet joints, has been reinforced with internal reinforcing mesh rather than the external mesh;

(b) An absence of reinforcing tape in the plaster at corners;

(c) The non-application of a fibre-glass mesh to polystyrene inter-storey joint covers causing erosion of the plaster coating;

(d) Apparent lack of a plaster/acrylic paint mix application to PVC extrusions as is common practice to aid adhesion;

(e) The plaster used being an inappropriate material generally for the Harditex product.

[51] Mr Naiker's failure to attend the hearing as well as the failure to file any documents disputing that evidence has meant that the Tribunal must make a determination based on the information available to it, pursuant to section 75 of the Act. Accordingly, the only evidence before the Tribunal clearly establishes that the fifth respondent, Mr Naiker is liable for the defective plastering work he carried out which caused the leaks and the subsequent loss to the claimants. As there were no cross-claims filed by Mr Naiker against any of the other respondents, Mr Naiker is thereby responsible for the full amount established at para [76] below.

QUANTUM

[52] The amount claimed by the claimants in the adjudication of this claim is $396,445.00 consisting of:

Repair costs $371,445.00

General damages $25,000.00

Remedial Costs

[53] At 15.7 of the Assessor's Report, the Assessor outlined his estimate of the cost of repairs at $263,790.00 (including GST). The claimants however do not rely on the estimate of the Assessor but instead claim $371,445.00 for remedial costs based entirely on the Brief of Evidence of Mr Westmoreland dated 12 October 2009.

[54] Mr Westmoreland is a quantity surveyor for a multi-disciplinary architectural and engineering consultancy in Auckland with extensive experience in the construction industry including working as a Contracts Manager for a re-cladding company repairing leaky buildings. The Tribunal therefore finds that Mr Westmoreland is qualified to provide estimates for the complete re-clad required for the claimants' dwelling.

[55] To summarise, Mr Westmoreland's estimate of the costs for repairs comprised the following:

Item	Description	Total ($)
1	Remove cladding	18,022.50
2	Scaffolding, fully planked, neeting, ladders etc	18,562.50
3	Covers over roof	16,875.00
4	External windows remove & re-fit with flashings, etc	10,271.25
5	External large doors, remove, flash & reinstall	2,700.00
6	New Building wrap	901.13
7	External single door, remove, flash & reinstall (Garage)	5,400.00
8	Install new cladding with cavity	76,595.63
9	External painting	6,007.50
10	Framesaver to 60% of the house	3,960.00
11	Timber replacement to 40% of house	9,630.00
12	Insulation replacement to 20% of insulation	596.25
13	Extend roof over thicker wall, new fascias, edge flash'g	11,250.00

14	Install new kick-outs	337.50
15	Disconnect pipe penetrations, etc tape, flash & reinstall	1,687.50
16	DP removal adjust & re-fix	675.00
17	Cut and install new slot drain	6,300.00
18	Connect to stormwater drain	2,700.00
19	Remove & rebuild columns	1,125.00
20	Electrical works exterior	2,250.00
21	Plumbing exterior	1,125.00
22	Security	562.50
23	Concrete nibs to raise areas	9,900.00
24	Internal wall works, Gib replacement, stopping	11,250.00
25	Internal window reveal replacement, etc	1,608.75
26	Internal door reveal replacement, etc	219.38
27	Internal ceiling works, Gib replacement, stopping	5,625.00
28	Interior Painting	3,937.50
29	Electrical works interior	1,125.00
30	Preliminary & general – 8%	18,495.99
31	Contractors margin – 10%	24,969.59
32	Contingency – 15%	41,199.82
33	Design & contract administration – 15%	47,379.79
34	Disbursements 5% of fees	2,368.99
35	Council fees	5,831.00
36	**Total estimate repair cost**	**371,445.05**

[56] Alternative costs for remedial work was filed by Mr Morrison for Mr Chen who estimated the cost of repairs at $205,321.79. At the hearing Mr Morrison acknowledged that this estimate was based on Mr Grigg's revised figures of $274,000 and from that amount, reductions were made based on items that were not part of Mr Chen's evidence, which included:

(i) 9 – external painting – this should be deleted. The owner would need to incur this cost in any event. The house appears never to have been repainted since new and after seven years painting is overdue.

(ii) 13 – extend roof etc – this is a roof issue, unrelated to cladding. In any event I do not believe as a design issue that the roof has to be extended. An over flashing under the fascia and over the new cladding is a perfectly effective solution, and therefore item 13 should be deleted from the estimate.

(iii) 14 – new kick outs – this is a roof issue unrelated to cladding

(iv) Items 17,18 and 23 – these relate to remedying the paving and cladding to ground clearance issues. I am advised that the paving work was not carried out by Mr Chen

(v) 19 – I am advised that Mr Chen did not install the cladding around the columns, that work being carried out by the first and sixth respondents

(vi) 27 – internal sealing works, gib placement and stopping – this item should be deleted as it is already included in item 24

(vii) 29 – interior electrical works – this is unrelated to cladding issues

30. As regards contingency, it is not unusual in my experience for the contingency not to be used at all, and which if awarded would be a windfall for the owner.

31. The contingency is also often expended to deal with bad workmanship issues uncovered which are unrelated to weathertight issues.

Item 9: External Painting

[57] The challenge to the remedial cost for external painting is an issue of betterment. It has been approximately seven years since construction was completed on the dwelling and as Mr Morrison states, the house has never been repainted since new. Although counsel for the claimants and the first and sixth respondents correctly point out that Mr Chen did not choose to cross-examine Mr Westmoreland at the hearing, it is reminded that Mr Chen was a self-represented party and that the failure to cross-examine a witness does not discount evidence already filed as part of a party's case. As Mr Morrison's Brief of Evidence was filed in the Tribunal and accepted as part of Mr Chen's case, in the interests of justice the Tribunal does not disregard Mr Morrison's statements made therein made on the back of Mr Chen's failure to cross-examine Mr Westmoreland.

[58] Mr Rainey questioned Mr Morrison at the hearing regarding his alternative estimate, which indicated that the external painting all has to be done as part of the reclad. However the issue he focused

on was whether the claimants may have saved some future expenditure as a result of having to be forced to do the complete reclad. The Tribunal does not accept that view for in regards to betterment, the concern is whether the claimants are receiving a benefit from the immediate repairs rather than whether after the required re-clad, the amount claimed will cover the need for a future repaint. Accordingly the Tribunal determines that saving the claimants from some *future* expenditure of a repaint is a true pecuniary benefit and therefore reductions ought to be made to the cost of external painting upon that benefit.

[59] Guidelines as to how much ought to be reduced from the claim for betterment relating to external painting are provided by decisions such as *Body Corporate No 189855 v North Shore City Council (Byron Ave)*[10] whereby Venning J accepted that a repaint would be required at least once every eight years. Further guidance is provided by expert evidence provided in the decision of *Tabram v Slater*[11] expert evidence was provided asserting that exterior paint should generally be expected to last 10 years.

[60] Although no evidence addressing the life expectancy of exterior paint was given in this adjudication claim, the Tribunal is satisfied that in normal circumstances ten years is the maximum limit for exterior paint work. Therefore given that the claimants' dwelling is seven years old, the claim for external painting is specifically reduced by 70% amounting to $1,802.25 – ie $6,007.50 less $4,205.25.

Item 27: Internal ceiling works, gib placement and stopping

[61] Mr Morrison stated that the cost for item 27 ought to be deleted as it is already included in item 24 which was listed as: "Internal wall works, Gib replacement, stopping". However at the

[10] HC Auckland, CIV-2005-404-5561, 25 July 2008, Venning J, at [374].
[11] WHT TRI-2007-100-41, 17 April 2009, Adjudicator Pezaro, at [115].

hearing, Mr Morrison acknowledged that such a cost ought to be partially allowed rather than removed in full in recognising that some of this cost should have gone to the external walls. Mr Rainey did not dispute that this cost ought to be partially allowed.

[62] There has been no evidence provided to the Tribunal regarding how much ought to be partially allowed for this item. However in accepting that some of the matters included in item 27 are already included in item 24, the Tribunal determines that a 30% reduction ought to be made to the cost of item 27 amounting to $3,937.50 – ie $5,625.00 less $1,687.50.

Items 13, 14, 17, 18, 19, 23 and 29

[63] Mr Morrison challenged the amounts for these items primarily on the bases that they do not relate to the work specifically carried out by either Mr Chen or Mr Naiker. In determining that the defective work of Mr Chen and Mr Naiker has caused damage to the claimants' dwelling thereby requiring a complete reclad, the Tribunal finds that these associated items would also need to be undertaken as a result.

[64] As these remedial items are a necessary consequence of undertaking a complete reclad to the property in order for the dwelling to comply with the requirements of the Building Code, and because the parties allegedly responsible for these defects are involved in this determination, the Tribunal is satisfied that there is no need for a reduction in the amounts for these remedial items.

Contingency

[65] Mr Morrison has challenged the amount for contingency on the basis that this cost deals with workmanship issues unrelated to weathertight issues and that in his experience, amounts for contingency are not often used. However as no evidence was provided to show that the amount claimed for contingency will not be

used in repairing the claimants' dwelling, the Tribunal is satisfied that the claimants are entitled to claim this amount.

[66] The costs for contingency in the Tribunal and the courts have consistently been awarded in full. Therefore as there is no evidence to show that this consistent approach should be interfered with, no reduction to the amount for contingency is made.

General Damages

[67] The claimants claim a total of $25,000.00 for general damages for the distress and inconvenience they have suffered from discovering that they own a leaky home. The courts and indeed the Tribunal have consistently awarded general damages to owners of leaky homes for such distress and inconvenience. As there has been no evidence to show that this was not the case, the Tribunal is therefore satisfied that the claimants are entitled to general damages.

[68] In setting the level of general damages, the Tribunal is guided by the High Court and Court of Appeal. In *Byron Ave* the High Court ordered general damages to the successful plaintiffs in the amount of $25,000.00 for each owner-occupier claimant.[12] However on appeal, it was agreed that the amount of $25,000 is appropriate for cases of this kind, the award, the Court of Appeal held that the single sum of $20,000 to $25,000 is appropriate where the burden of owning a leaky home is shared.[13]

[69] There is nothing about this claim to suggest that the level of general damages should be lower than what was awarded by the Court of Appeal to owner-occupiers of leaky dwellings and therefore the aggregate amount of $25,000.00 to the claimants is awarded.

[12] *Byron Ave*, n 8 above. See also *White v Rodney District Council* HC Auckland, CIV-2009-404-1880, 19 November 2009, Woodhouse J.

Mitigation of Loss and Contributory Negligence

[70] Mr Chen sought to suggest to the Tribunal that the claimants' lack of maintenance was a contributing cause to the damage. Mr Chen only sought to raise these arguments at the hearing and did not further elaborate on these arguments in his closing submissions. The Tribunal accepts that Mr Chen's argument could either be seen as an allegation that the claimants are contributorily negligent as well as failed to take reasonable steps to mitigate their loss.

[71] The Tribunal notes that in her Statement of Defence, the fourth respondent, Ms McLaughlan, made the same argument stating that the claimants caused and/or contributed to their losses by failing to maintain the house. In addition, Ms McLaughlan argued that the claimants also caused and/or contributed to their losses by failing to properly inspect the house prior to purchase and/or failing to commission a suitably qualified and competent building consultant to carry out a pre-purchase inspection.

[72] In relation to the issue of maintenance, as pointed out by Mr Rainey in his Closing Submissions, the uncontested evidence in the Assessor's Report at para 12.1.1(g) suggests that some limited external maintenance was carried out to the cladding, including what appeared to the assessor to be either a sprayed on acrylic plaster or a cement modified spray on acrylic plaster. The Assessor pointed out that some major cracks have been sealed but given that the dwelling has upward of 150 cracks with many over two metres long, it would be a difficult job to attend to such defects with any success. Although the Tribunal accepts that some external maintenance was carried out to the cladding, there is no evidence that any additional maintenance would have resolved the damage occurring to the property.

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[13] *O'Hagan v Body Corporate 189855 (Byron Ave)* [2010] NZCA 65, at [129].

[73] In regards to the claimants' failure to obtain a pre-purchase report, it is now accepted that the failure to obtain a pre-purchase report does not amount to contributory negligence, particularly during a time when there was little, if any, media publicity regarding leaky homes in New Zealand. As stated by Heath J in *Body Corporate 188529 v North Shore City Council (No. 3) (Sunset Terraces)*:

> [577] To my knowledge, there has never been an expectation in New Zealand (contrary to the English position) of a potential homeowner commissioning a report from an expert to establish that the dwelling is soundly constructed. Indeed, it is a lack of a practice to that effect which has led Courts in this country to hold that a duty of care must be taken by the Council in fulfilling their statutory duties. Both *Hamlin*[14] and the Building Industry Commission Report[15] run counter to [the] argument on this point.

[74] The Tribunal is of the opinion that in New Zealand a prudent property/house owner in the position of the claimants in March 2002 was not expected to have taken steps to obtain a pre-purchase inspection report when they were acquiring the property. Accordingly the Tribunal does not find that the claimants contributed to their own losses when they failed to obtain a pre-purchase inspection report in March 2002.

[75] It is accepted that those parties raising the arguments of contributory negligence and mitigation of loss, carry the burden of proving that defence. However the lack of any influential evidence adduced at the hearing coupled with the Assessor's opinion that it would be difficult to attend to such defects with any success in any case, means that that both Ms McLaughlan and Mr Chen have failed to prove that the claimants have contributed to their own losses by failing to maintain the house or by failing to take any reasonable

[14] [1994] 3 NZLR 513 (CA) at 525 (per Richardson J); affirmed [1996] 1 NZLR 513 (PC).
[15] Report of the Building Industry Commission to the Minister of Internal Affairs "*Reform of Building Controls*" (1990) at para 2.10.

steps or by failing to obtain a pre-purchase inspection report. Accordingly these arguments are dismissed.

Summary of Quantum

[76] Based on the allowances and reductions made above, the Tribunal is satisfied that full amount of the claimants' losses has been proven to the extent of $390,552.25 summarised as follows:

• Remedial costs		$371,445.00
Less reduction for external painting		– $ 4,205.25
Less reduction for item 27		– $ 1,687.50
	Sub-total	$365,552.25
• General damages		$ 25,000.00
	Total	**$390,552.25**

Amount of Settlement

[77] As explained in [8] and [9] above, as the claimants have already settled with the first and sixth respondents any amount paid by the first and sixth respondents must be deducted from the full amount of the claim established. Accordingly the sum of $250,000 paid by the first and sixth respondents to the claimants is deducted from the sum $390,552.25 amounting to $140,552.25.

[78] Given the joint and several liabilities of both Mr Chen and Mr Naiker determined above, the claimants are entitled to recover from each of them any amount up to $140,552.25.

CONTRIBUTION

[79] Section 72(2) of the Act, provides that the Tribunal can determine any liability of 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.

[80] 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.

[81] 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…

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

[83] Mr Chen claims a contribution against all respondents in this claim stating in his Response to the Claimants' First Amended Statement of Claim that if he is found liable to the claimants (which he denied), he claims indemnity or contribution from the first, third, fourth, fifth and sixth respondents under section 17(1)(c) of the Law Reform Act.

[84] As correctly stated in Mr Rainey's Closing Submissions, before an apportionment can be made Mr Chen must establish that the other respondents are tortfeasors meaning that but for their settlement with the claims, they would have been found liable to the claimants.

Third Respondent, Mr Sang - Designer

[85] Mr Chen argued that as the designer of the dwelling Mr Sang breached the duty of care he owed the claimants by failing to provide adequate plans and specifications. At the hearing, Mr Sang stated that such plans and specifications were prepared for building consent and that he had no further involvement after the preparations of those plans. This was not disputed.

[86] In *Body Corporate 188529 v North Shore City Council (Sunset Terraces)*[16] Heath J held:

> [545] Despite the faults inherent in the plans and specifications, I am satisfied, for the same reasons given in respect of the Council's obligations in relation to the grant of building consents, that the dwelling could have been constructed in accordance with the Building Code from the plans and specifications. That would have required builders to refer to known manufacturers' specifications. I have held that to be an appropriate assumption for Council officials to make. The same tolerance ought also to be given to the designer.

That finding was upheld on appeal.[17]

[87] Upon that basis, the Tribunal finds that Mr Sang's role in the construction of the claimants' dwelling was limited to preparing plans and specifications for building consent. His role is therefore identical to that of the designer in the *Sunset Terraces* case whereby he was entitled to assume that competent tradespersons would be able to build the dwelling in accordance with the building consent and the Building Code. Accordingly Mr Chen has failed to show that Mr Sang is liable to the claimants as a tortfeasor and therefore the cross-claim against Mr Sang is dismissed.

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[16] [2008] 3 NZLR 479 (HC).

[17] *Body Corporate 188529 v North Shore City Council (Sunset Terraces)* [2010] NZCA 64 (CA), per Baragwanath J at [121] and William Young P at [152].

Fourth Respondent, Ms McLaughlan – Building Certifier

[88] Ms McLaughlan is one of the respondents which settled with the first and sixth respondents and as a result the claimants and the first and sixth respondents are no longer pursuing their claims against Ms McLaughlan. Therefore the only issue left to determine in relation to the work she carried out is the matter of contribution raised by Mr Chen.

[89] The claim against Ms McLaughlan is in negligence as a private building certifier trading as A1 Building Certifiers. In her Statement of Defence, Ms McLaughlan stated that she and her company were instructed to undertake plan processing, field inspections and the issuing of a Code Compliance Certificate for the construction of the dwelling, and later she accepted that she owed a duty to exercise reasonable grounds that the building work complied with the Building Code having regard to the expectations and knowledge of building certifiers under the Building Act, as at August-September 2001. As there was no dispute from Ms McLaughlan as to whether she owed a duty of care to the claimants, the Tribunal accordingly finds that Ms McLaughlan owed a duty relating to the inspections she carried out and for certifying the dwelling. The issue however is whether she breached that duty of care.

[90] It was firstly alleged that Ms McLaughlan failed to exercise reasonable skill and care in the issuing of the Building Consent when the plans and specifications were not sufficient to allow her to be satisfied on reasonable grounds that the proposed building work would comply with the Building Code. However for the same reasons outlined at [86] above, the Tribunal finds that Ms McLaughlan was entitled to assume that competent tradespersons would be able to build the dwelling in accordance with the building consent and the Building Code. Accordingly this part of the claim against Ms McLaughlan is dismissed.

[91] The second part of the claim against Ms McLaughlan was in relation to the inspections she carried out pointing out that:

(a) Her inspection regime was not robust enough to ensure that any errors and/or deficiencies in the plans and specifications/building work itself were addressed during her inspections

(b) She did not detect the following defects:

   (i) Poorly installed fibre-cement sheeting including

   (ii) Lack of vertical control joints

   (iii) Incorrect layout of cladding sheets

   (iv) Lack of adequate ground clearance for cladding

   (v) Poorly installed horizontal joints in cladding sheets

   (vi) Poorly installed joinery with no jamb or sill flashings

(c) She issued the Code Compliance Certificate despite the above defects which meant she never had reasonable grounds to be satisfied the building work complied with the Building Code

[92] Ms McLaughlan denies these allegations and stated that her practice as a private certifier was consistent with accepted practice amongst her peers applicable to 2001. In support of her response briefs of evidence were filed by building professionals, some of whom are Council officers, indicating the expected standard of inspections in 2001.

[93] The Tribunal accepts that those certifying the construction work are not a clerk of works or a project manager. Notwithstanding that view however, as Heath J points out in *Sunset Terraces*:

> [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.

[94] Heath J expanded on that point in stating 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… the Council was negligent.

[95] In *Dicks v Hobson Swan Construction Ltd (in liq)*[18] the court did not accept 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 at [116]: "It was the task of the council to establish and enforce a system that would give effect to the building code."

[96] These authorities establish that Ms McLaughlan is not only responsible for defects that a reasonable building inspector, judged according to the standards of the day, should have observed but also if defects were not detected due to the failure to establish a regime capable of identifying whether there was reasonable compliance with significance aspects of the Code. As Ms McLaughlan undertook these tasks, she was effectively in the shoes of a territorial authority. As a result, the same legal principles that apply to Council officers equally apply to her as well.

[97] Based on these case authorities, the Tribunal is satisfied that Ms McLaughlan was negligent in failing to establish an appropriate inspection regime capable of identifying building work which did not

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[18] (2006) 7 NZCPR 881 (HC).

comply with the Building Code. As a result Ms McLaughlan failed to identify the defects listed at [91](b) above which contributed to the leaks and thereby breached the duty of care she owed to the claimants.

[98] For these reasons, Ms McLaughlan is jointly and severally liable for the full amount of the established claim. However as it is correctly identified by Mr Rainey in his Closing Submissions, on ordinary principles the liability of Ms McLaughlan would be no more than that of a council officer fulfilling the same role. Mr Rainey therefore submitted that if Ms McLaughlan is found liable, her contribution should be limited to no more than 20% of the claim. As there are no specific circumstances requiring that such an amount be adjusted to a greater or lesser extent, the Tribunal sets Ms McLaughlan's contribution at 20%.

First and Sixth Respondents, Elsa and John Leung

[99] Mr Chen has repeatedly argued that Mr and Ms Leung were together the builders, developers and project managers of the dwelling and should therefore be responsible for the loss suffered by the claimants. According to the evidence of Mr Chen and the two hammerhands who worked for him on the property, the Leungs were in control of the construction site by way of:

(i) Engaging labour-only contractors to carry out the construction work;
(ii) Purchasing and preparing the materials for construction each day;
(iii) Visiting the property every day during construction, sometimes more than once a day;
(iv) Making decisions regarding the construction work; and
(v) Carrying out some of the building work themselves;

[100] Ms Leung acknowledged that her family had been involved in the construction and sale of residential properties using the company owned by her parents, Hong Kong Arts and Furniture Ltd. However she contends that although that company may be a property developer in relation to other properties that does not mean that she was acting as a residential property developer for the dwelling in question. According to Ms Leung, this is particularly the case since she purchased the land and had the house designed and built for her to live in with her family.

[101] Notwithstanding that information however, Ms Leung accepts that she did exercise a degree of control over construction and would owe the claimants a duty to exercise reasonable and care in carrying out her role in co-ordinating the various contractors she employed to work on the property. Equally in Mr Rainey's Closing Submissions it is also acknowledged that Mr Leung has a duty to exercise reasonable skill and care in assisting his sister with the co-ordination of the construction of the property. However the issue which must be determined in order for an entitled to indemnity or contribution is whether the Leungs breached that duty of care.

[102] Although the Tribunal has found it very difficult to determine whether the Leungs in fact carried out any of the building work on the property given the denials of both Ms Elsa Leung and Mr John Leung, it is accepted that the Leungs are responsible for the co-ordination of the construction for which they acknowledge was under their control. In considering whether the Leungs were indeed the developers or project managers for the construction of the dwelling, guidance is provided by the decision of Heath J in *Body Corporate No 199348 v Nielsen*[19] by which the Tribunal is bound:

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[19] HC Auckland, CIV-2004-404-6-3989, 3 December 2008.

> [66] In *Leuschke Group Architects Ltd*,[20] Harrison J observed that the work 'developer' is not 'a term of art or a label of ready identification', unlike a local authority, builder, architect or engineer. His Honour regarded the term as 'a loose description, applied to the legal entity which by virtue of its ownership of the company and control of the consent, design, construction, approval and marketing process qualifies for the imposition of liability in appropriate circumstances' at [31]. Harrison J added:
>
> > [32] The developer, and I accept there can be more than one, is the party sitting at the centre of and directing the project, invariably for its own financial benefit. It is the entity which decides on and engages the builder and any professional advisors. It is responsible for the implementation and completion of the development process. It has the power to make all important decisions. Policy demands that the developer owes actionable duties to owners of the buildings it develops.
>
> [67] I agree with those sentiments. It is the particular function that gives rise to the policy reason for imposing a duty of care on the developer. Whether someone is called a 'site manager', a 'project manager', a 'developer' (or some similar title) does not matter. The duty is neither justifiable nor inapplicable because a particular label is used to describe a person's function in the development process.

[103] By focusing on the responsibilities assumed by the Leungs rather than the particular label of whether they were "developers" or "project managers" for the construction of the dwelling, the Tribunal makes its determination based on the tasks listed in [99] above together with the information that Ms Leung applied for building consent to begin construction on the property and that neither Mr nor Ms Leung engaged an architect, a construction manager or a project manager to oversee the construction. In balancing the evidence regarding the involvement of Mr and Ms Leung, the Tribunal is satisfied that the Leungs ought to be held accountable for the supervisory and organisational tasks they assumed.

[20] HC Auckland, CIV-2004-404-2003, 28 September 2007.

Decision on Contribution

[104] Based on the liabilities determined above, the Tribunal finds that the Ms and Mr Leung, Mr Chen, Ms McLaughlan and Mr Naiker are jointly and severally liable for the entire amount of the claim for the work they undertook in the construction of the dwelling.

[105] It has been well established that the parties undertaking the work should have a greater responsibility than the party which certified the work. As there are no specific circumstances in this claim which dictate that a greater or lesser amount than that established in decisions of the courts and indeed the Tribunal, contribution is set in the following amounts:

- Mr Chen 35%
- Mr Naiker 15%
- Leungs 30%
- Ms McLaughlan 20%

[106] In this case some respondents have settled with the claimants. To adopt a similar approach to that of Duffy J in *Kilham Mews*[21] or Randerson J in *Petrou v Weathertight Homes Resolution Service*[22] I conclude that the claimants could only enforce the balance between the amount established and the amount already received in settlement. As determined above, the established loss that the claimants have suffered is $390,552.25 and therefore the claimants are entitled to recover that full amount. However this does not mean that the claimants can recover damages which are more than the whole loss they have suffered, and so in the present case the amount received by the claimants in partial settlement must be taken into account. As a result, the full amount which the claimants

[21] HC Auckland, CIV-2006-004-3535, 28 April 2009.
[22] HC Auckland, CIV-2009-404-1533, 24 November 2009.

can enforce against Mr Naiker and Mr Chen is $140,552.25 – that is, the difference between the proven claim ($390,552.25) and the amount received by the claimants from the settling parties ($250,000.00).

[107] Mr Chen has filed claims for contribution against the other respondents, and the first and sixth respondents are entitled to seek contribution towards its settlement payment from Mr Naiker and Mr Chen. In considering these claims for contribution I have determined that Mr Chen's contribution should be set at 35% (or $136,693.28), Mr Naiker at 15% (or $58,582.84), Ms McLaughlan at 20% (or $78,110.45), and Elsa and John Leung at 30% (or $117,165.67).

CONCLUSION AND ORDERS

[108] The plaintiffs have proven their claim against Mr Naiker and Mr Chen to the amount of $140,552.25 being the difference between the amount proven and the amount received from the settling parties. As a consequence of the above findings, I make the following orders:

(i) The second respondent, Sean Chen is ordered to pay the claimants the sum of $140,552.25 forthwith. Sean Chen is entitled to recover a contribution from the first, fourth, fifth and sixth respondents for any amount paid in excess of $136,963.28.

(ii) The fifth respondent, Bala Raman Naiker is ordered to pay the claimants the sum of $140,552.25 forthwith. Bala Raman Naiker is entitled to recover a contribution from the first, second, fourth and sixth respondents for any amount paid in excess of $58,582.84.

(iii) The first and sixth respondents have proven their claim in contribution against Mr Naiker and Mr Chen. They are entitled to recover a contribution from the second

and fifth respondents for any amount paid in excess of $117,165.67.

(iv) If the parties cannot determine the amounts recoverable after the various amounts paid and received in settlement have been taken into account, leave is reserved for the parties to return to the Tribunal to resolve the issue of the contribution amounts payable between the various respondents.

DATED this 10th day of June 2010

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SG Lockhart QC
Tribunal Member