IN THE WEATHERTIGHT HOMES TRIBUNAL
TRI 2008-101-000052

BETWEEN	**RIVER OAKS FARM LIMITED & C & A M THURNELL & L HORNE AS TRUSTEES OF INGODWE TRUST** Claimant
AND	**TIMOTHY OLSSON, CHARLOTTE OLSSON & JOHN CRONIN AS TRUSTEES OF THE PICOLLO TRUST** First Respondent
AND	**TIMOTHY OLSSON** Second Respondent
AND	**DENTON PERRY** Third Respondent
AND	**KENT JARMAN** Fourth Respondent
AND	**WARWICK SWEETMAN** Fifth Respondent
AND	**MAXI HOLDINGS LIMITED** Sixth Respondent
AND	**W B HOLLAND & ORS TRADING IN PARTNERSHIP AS THE LEGAL FIRM HOLLAND BECKETT** Seventh Respondent
AND	**GIANNI MARCHESAN** Eighth Respondent
AND	**MALCOLM HUNT** Ninth Respondent
AND	**GAVIN COSFORD** Tenth Respondent
AND	**SIMON NOEL MORAN** Eleventh Respondent

Hearing:	16 & 17 March 2009
Final Submissions:	29 June 2009
Appearances:	Claimant: Chris Thurnell Anna Thurnell Gareth Lewis (counsel)

First & Second Respondent:
Timothy Olsson
Charlotte Olsson
Grant Brittain (counsel)

Fourth Respondent:
Kent Jarman

Fifth Respondent:
Warwick Sweetman

Seventh Respondent:
Tracy Stewart (counsel)
Simon Hamilton (counsel)

Ninth & Tenth Respondent:
Matthew Ward-Johnson (counsel)

Eleventh Respondent:
Simon Moran

Other Witnesses:
Robert Eades (Expert Witness)
Ronald Crowther (Expert Witness)
Rex Moyle (Expert Witness)
Timothy Jones (Expert Witness)
Simon Collett (Partner at Holland Beckett)
Clint Smith (Expert Witness)
Christopher Jackson (Expert Witness)
Ross Hamilton (Expert Witness)
Philip Browne (Assessor)

Decision: 5 AUGUST 2009

FINAL DETERMINATION
Adjudicator: C B RUTHE

CONTENTS

PART I – PRELIMINARY MATTERS

I. Introduction

- Scheme of decision;
- Nature of proceedings;
- Background to the Claim;
- Agreement reached at Experts Conference;
- Pre-hearing settlement between claimant and various respondents.

Scheme of decision

[1] This claim falls into a number of parts:

- The first to be dealt with are the claims in negligence against various parties involved in the building process. This is dealt with first as it involves most of the respondents in this claim.
- Secondly is the claim against the Piccolo Trust which sold the property to the claimant. It is alleged the Piccolo Trust had made a pre-contractual misrepresentation. The second leg of the claim against the Trust is that it breached clause 6.2(5) of the sale and purchase agreement. This part of the claim only involves Ingodwe Trust and the Piccolo Trust.
- Thirdly there is the claim against the solicitors. This cause of action only involves Ingodwe Trust and Holland Beckett.
- Fourthly, quantum and its apportionment amongst various respondents is dealt with.
- Fifthly, the claim by Ingodwe Trust for general damages and mental distress is considered.

Nature of proceedings

[2] All of the parties filed witness statements. As each witness gave evidence they swore to the statements. Each witness was questioned first by the Tribunal and then by the parties pursuant to section 73 (1)(a) of the Weathertight Homes Resolution Services Act 2006. This decision is made pursuant to section 72 of the Act. All the evidence including

statements and documents that have been taken into account in making this determination are listed in Annexure 1.

II. Background

Claimant

[3] Dr and Mrs Thurnell had decided to settle in Tauranga. Dr Thurnell is a respected paediatrician. When they first arrived in New Zealand they lived in Christchurch before moving to the Bay of Plenty. They purchased three investment properties before finding their “dream” property. Previously they had owned property in England, so were experienced in property matters. They were drawn by the large six hectare block in a rural setting yet close to town. The outdoor life and the “small holding” farming beckoned. There was a river boundary. The views were outstanding. The house is surrounded by graceful lawns folding down to the river below. Perfectly understandable was the enthusiasm shown by Dr Thurnell when he went to the family solicitor to have a sale and purchase agreement engrossed. *"Jumping out of his skin"* was the solicitor's description of his client's enthusiasm.

[4] The house and land were purchased, not by Dr and Mrs Thurnell, but by River Oaks Farm Ltd and the Ingodwe Trust (in this decision, the claimant will be referred to as either the Thurnells or Ingodwe Trust).

[5] All was well until about a year later when the first leak was noticed. This was to be followed by further leaks. In 2005 the first WHRS assessor's report was done. It indicated minor problems with remediation estimated at $12,000. This assessment has proved, with the effluxion of time, to have been optimistic. Dr Thurnell described the great sense of relief he and his wife felt when they received this almost clear bill of health and not the feared diagnosis of leaky home syndrome. It was a misdiagnosis. The building was continuing to leak – hence the current claim.

First and second respondents

[6] The first respondents are the trustees of the trust that sold the property to the claimant (hereinafter called the Picollo Trust). It conceded it had a role in the development. The second respondent, Mr Timothy Olsson, was not only one of the trustees but also directly involved in the building of the house. He had served a building apprenticeship and renovated at least one other house.

[7] This house was not built for the purpose of immediate resale. The Olssons set out to build a quality home. It was to be, and became for a short period, the Olsson family home before circumstances changed.

Other dramaticus personae (respondents)

[8] The other dramaticus personae are:

- Kent Jarman, fourth respondent, a qualified builder employed on a labour only contract. The nature of his role and extent of his responsibilities is one of the issues in contention before the Tribunal.
- Mr Sweetman, fifth respondent, an uncertified applicator who undertook the application of waterproofing membranes to the gullies, decks and other areas.
- Maxi Holdings Limited, sixth respondent, the licensed/authorised applicator of the Equus waterproofing product.
- Mr Marchesan, eighth respondent, the plasterer and opponent of metal flashings on the top of parapets.
- Mr Moran, eleventh respondent, principal of Maxi Holdings, a licensed applicator, who undertook limited remediation work and was the signatory to a producer certificate the import of which emerges below.
- W B Holland and Ors trading as the law firm of Holland Beckett, solicitors of the claimant, seventh respondent.

PART II – CLAIMS IN NEGLIGENCE

I. Prologue

[9] In coming to a determination of the various claims in negligence the Tribunal will consider the issues as follows:

(i) Causation of leaks;
(ii) Liability of Picollo Trust, first respondent as alleged developer;
(iii) Liability of T. Olsson, second respondent – personal liability as builder;
(iv) Liability of Jarman, fourth respondent – carpenter;
(v) Liability Sweetman, fifth respondent – applicator;
(vi) Liability Maxi Holdings Limited, sixth respondent, remediation applicator, issuer of producer statement;
(vii) Liability of Marchesan, eighth respondent- plasterer;
(viii) Liability of Moran, eleventh respondent - applicator at remediation.
(ix) Was there contributory negligence by Ingodwe Trust?
(x) Did Ingodwe Trust properly maintain?
(xi) Did it take reasonable steps to rectify?

[10] To establish liability of any party there has to be a determination as to causes of leaks. In this case these were resolved at a conference of all the experts who conferred in the absence of counsel.

II. Causation of leaks

Agreement reached at expert's conference

[11] The expert's conference was held in this matter on 2 March 2009. The conference was chaired by Adjudicator Kilgour. The experts in attendance were Mr Browne, assessor, Mr Smith, Mr Moyle, Mr Crowther and Mr Johnston. The conference identified leak locations, the cause of those leaks, the damage due to the leaks, the repairs required for effecting remediation and the percentage of attribution of each leak to the overall claim. (References to percentages in this determination are not to

be read as an attempt to achieve mathematical precision, but as an indicator or proportional contribution to overall loss).

[12] Five leak locations were identified. The first was the parapet walls. The cause was the result of lack of metal cappings or waterproof membrane; more particularly there was a lack of metal flashings as between EIFS and the Harditex. As a result damage has occurred to the timber framing and the cladding itself due to moisture ingress. The repair required is a total reclad. The experts considered this to amount to 50% of the claim.

[13] The second leak location was the internal gutters. The cause was poor application of membrane and the fibre cement cladding was “too low into the gutter”. The damage was to the timber walls and roof framing, interior linings and floor coverings. The repair required assuming a total reclad was the rebuilding of the internal gutters and removal and replacement of the lower roofing. This area of leaking contributed to 25% of the damage.

[14] The third area of leak location was water penetration around metal brackets at the kitchen windows. The damage arising was damage to timber framing, cladding and interior linings within the vicinity of the kitchen window. This was an isolated fault requiring a targeted repair. The percentage of the total remediation costs was estimated at 5%.

[15] The fourth leak location was the main roof’s internal gutter caused by poor application of membrane and an incorrect overflow connection with a double entry into the down pipe. The damage contributable was to the timber walls and roof framing and internal walls as well as floor coverings. The repair required was the removal of the main roof and a re-build of the internal gutter with provision for adequate overflow. The percentage attribution was 10%.

[16] The fifth leak location was to the deck. The cause of the leaks was that the balustrade tops were flat instead of having an angle for water deflection and they were without a membrane. The deck which forms a roof to the ground floor room lacked any fall and there was a lack of saddle flashings. The resulting damage was to timber framing and the cladding of the balustrades. The suggested remedy was a reconstruction of the deck area at an attribution of 10% of remediation costs. The Tribunal has decided that $30,000 of the remediation costs for creating a fall in the deck amounts to betterment as it had not leaked nor was it likely to leak due to this fault.

[17] The Tribunal accepts the factual findings by the experts. The attribution of responsibility for each leak will be dealt with in relation to the claim against each respondent or under quantum.

Pre-hearing settlement between claimant and various respondents

[18] On 13 March 2009 Mr Ward-Johnson advised of settlement being reached with three of the respondents, Denton Perry the third respondent - designer, Malcolm Hunt the ninth respondent and Gavin Cosford the tenth respondent both employees of the certifier, Bay Building Certifiers Ltd (in liquidation). These parties agreed to make “without prejudice” payments of $10,000 each. This settled all claims against them.

III. Liability of Picollo Trust[1], First Respondent as project manager/developer

[19] The claim against the trustees of the Picollo Trust is based on the assertion it was a developer of the property. The Trust conceded its role in its response (pleading). The claimant also relies on the observation of Harrison J in the developer at [32].

[20] A detailed examination of the facts and issues concerning builder/project manager negligence are dealt with below when considering

Mr Olsson's liability in negligence. There is no need to cover the same material twice. The Picollo Trust having conceded it had a role in the development it is therefore liable in negligence, albeit to a limited extent through its inadequate supervision.

IV. Liability of Mr Olsson, Second Respondent - as builder/project manager

[21] Mr Olsson in his evidence confirmed that he was involved in the building of the property although he said much of the early construction work was undertaken by the fourth respondent Mr Kent Jarman, under whom Mr Olsson served his builder's apprenticeship in the early 1980's.

[22] Mr Olsson said that he and his wife decided to build the house using labour only carpenters. Mr Olsson's counsel argued that he was not the head contractor/developer/supervising builder i.e. he was not the builder with any supervisory role. He relies on the decision of the Court of Appeal in *Riddell v Porteous*[2] where Blanchard J stated:

> "It seems that Hansen J was encouraged to ignore this warning [not to overturn a credibility finding] by his belief that the Riddells could properly be characterised not merely as owners or employers in relation to Mr Porteous but as head contractors to whom he and the specialist tradesmen were subcontractors. This characterisation was in error. It does not follow that because a landowner engages a building contractor on a labour only basis that the former plays the role of a head contractor or even undertakes to perform the functions of a supervisor or clerk of works. The owner may elect to leave the carrying out of the contract entirely in the hands of the contractor just as he or she would do if the engagement was an ordinary contract with a price fixed for labour and materials….The Riddells were the employer and Mr Porteous was their contractor (or, more correctly, one of the contractors). It can be accepted that he did not have responsibility for the work of the other tradesmen."

[23] Each case must be decided on its own facts. In this case there is clear evidence Mr Olsson himself was involved in some of the physical building work. Further in this case it is Mr Olsson who made application for the building consent with Bay Building Certifiers Limited. He paid the application fee. Mr Olsson at paragraph [37] of his statement said he organised for Mr Gianni Marchesan to undertake the installation of the

---

1 The claimant properly concede Mr Cronin as trustee has a limited liability in terms of the Deed of the Picollo Trust and as set out in clause 18 of the sale and purchase agreement.

2 [1999] 1 NZLR 1 (CA) at page 6 line 37.

cladding system. This distinguishes his role from that of the Riddells in *Riddell v Porteous.*

[24] Mr Olsson identified some of the tradesmen who undertook work, but he did not name contractors who built the deck, which the experts considered to be faulty due to a lack of fall and thus a potential for future water ingress. Having given a detailed account of who was involved in the construction of other parts of the building the only inference the Tribunal can draw is Mr Olsson undertook that work himself.

[25] Building contractors are under a duty of care. This was so held in the Court of Appeal decision in *Bowen & Anor v Paramount Builders (Hamilton) Ltd and Anor*[3]. In *Wilson & Anor v Welch & Ors*[4] Adjudicator McConnell, in following the decisions of *Lester v White*[5] and *Chase v De Groot,*[6] held that owners who were also builders owe a duty of care.

[26] Mr Olsson had been in the building industry. He undertook this project with an eye on the budget and at the same time striving to achieve an imposing building. He did not engage the architects to supervise the works. He assumed the responsibility of the project management and supervision by taking on the role normally undertaken by an architect. By engaging Mr Jarman as a labour only contractor, thus saving the supervision fees and margins payable when the builder is hired to take overall responsibility for a project, he came to shoulder this responsibility. The arrangement for Mr Olsson to apply the final membrane coat on gutters, discussed fully later, was another example of a cost saving approach. The Tribunal concludes this respondent has liability due to his negligence as the supervising builder.

---

3 [1977] 1 NZLR 394.
4 (28 March 2008) WHT, DBH 04734.
5 [1992] 2 NZLR 483.
6 [1994] 1 NZLR 613 at [50],[57].

Mr Olsson's failure to apply membrane

[27] The second area of leaks described in paragraph [10] supra related to the internal gutters. The evidence pointed to Mr Sweetman applying the first coats, leaving the product with Mr Olsson for him to apply. Moran said he was party to a conversation in a pub one evening when he heard Mr Sweetman castigate Mr Olsson for having not applied the final coat, a conversation disputed by Mr Olsson.

[28] Putting aside this conversation the Tribunal considers on the balance of probabilities Mr Olsson had taken responsibility for doing the final coat in the gutters. There was no benefit to Mr Sweetman by not doing the work. In fact he was depriving himself of income. Mr Olsson was a friend and whose objective was to build the house as economically as possible. In hindsight Mr Sweetman somewhat foolishly agreed to Mr Olsson doing the final coat. Mr Jackson the regional technical sales manager for Equus Industries Ltd, the supplier of the product, in his evidence said he was made aware Mr Sweetman had not applied the final coat.

[29] As one of the project managersand director of operations concerning the application of membrane to internal gutters Mr Olsson must take responsibility for its poor application at location one (see [13] supra, being 25% remediation costs). He is also responsible for attaching the brackets at the kitchen window, being leak location three (see [14] being 5%), lack of membrane coating at leak location four (see [15] being 10%), and the lack of deck slope at leak location five (see [16] being 10%).

V. Liability of Mr Jarman Fourth Respondent, builder

[30] Mr Jarman was employed by Escort Building Limited. This company appears to have been a one man band as described by Priestley J in *Body Corporate 183523 & Ors v Tony Tay & Associates*

Limited & Ors [7] at [101-107-151-152-154-155-156]. For the purposes of this decision Mr Jarman is deemed to be the party exposed to any claim in negligence.

[31] The Tribunal accepts that there were no building defects in the work undertaken by Mr Jarman himself. The only issue relates to whether he had a supervisory role. There can be more than one person in the role of project manager.

[32] Mr Olsson in his evidence says Mr Jarman was engaged to build the house and proceeded to organise the sub-trades. Mr Olsson said all construction decisions were made by Mr Jarman particularly during the December period. Even if this were the case there was no evidence that this was when building faults ultimately giving rise to leaks were created. It was too early in the stage of construction.

[33] Mr Jarman in his evidence said Mr Olsson had total control of the construction, sub-contractors, and the site throughout the project. He acknowledged Mr Olsson had been his apprentice in the early 1980's, but this had no bearing on his role on this construction site. He said Mr Olsson had approached him saying he intended to build a house and asked Mr Jarman if he would help him build it. This is consistent with Mr Jarman's evidence that he was mainly involved at the framing and trussing stages. This claim is therefore dismissed.

[34] Mr Jarman said Mr Olsson had carried out all supervisory functions required. He referred to his own invoices which showed there was no charging for supervision. He said he was paid at an hourly rate of $25.00 and this rate reflected the fact no supervision was involved. The Tribunal accepts Mr Jarman's evidence that he was employed as a labour only carpenter with no project management role. He was not personally responsible for any of the faulty workmanship that led to leaks. He has no liability.

[7] (30 March 2009) HC, Auckland, CIV 2004-404-4824.

VI. Liability of Mr Sweetman, Fifth Respondent, applicator

[35] Mr Sweetman had a limited role to play. He was the applicator who had been deputised to apply the Equus system to the gutters. He applied the first two coats. He did not apply the final coat. The Tribunal has already held he had come to an arrangement with the builder for Mr Olsson to apply the final coat, at the request of and ostensibly for Mr Olsson. He had every reason to trust Mr Olsson to do this work particularly as the Olssons had a personal interest, it being their home, as well as Mr Olsson being a qualified builder. This means Mr Sweetman was not negligent in his agreeing to Mr Olsson, as a competent tradesman, applying the final coat in accordance with the suppliers/manufacturers instructions. (This work is separate to the $1600 job Mr Sweetman did for the Thurnells and considered below.)

[36] The claimant alleged it had a specific contract for remediation with Mr Sweetman originally in the sum of $2,400 but amended in counsel's final submissions to $1,600. There is sufficient evidence to accept there was a contract. The remediation failed. Mr Sweetman was liable in the sum of $1,600.

VII. Liability of Maxi Holdings Limited, Sixth Respondent, remediation applicator

[37] There are two legs to Maxi Holdings Limited alleged responsibility. The first relates to the application itself, which failed to be remedial. The second relates to the issuing of a producer statement.

[38] Maxi Holdings Limited was engaged to undertake remediation at the request of Mr Olsson and or the Picollo Trust. Mr Moran said he went to the site to carry out an inspection of the parapets recommending the parapets be covered in a bandage like material over the tops of the parapets and extending a way down the sides of the parapets. He said Mr Olsson was against taking it down the sides of the parapets. Apparently this was for aesthetic reasons.

[39] A diagram was drawn of what was recommended to be done for the application (Exhibit 7) showing strips part way down either side of the parapets. The Tribunal accepts Mr Olsson persisted with his instructions despite advice. So whilst the coating applied worked to the extent it prevented moisture penetration through the top of the parapets, it failed as a remedy because water continued to penetrate the parapets laterally. Mr Moran warned that the remediation may not work.

[40] In any event as the failed repair obviously was not a cause of the original leaking and did not worsen it the remedy is repayment of the charge for repair. This was so held in *Body Corporate No. 189855 & Ors v North Shore City Council & Ors (Byron Ave),*[8] where there was a failed remediation. Venning J stated:

> "[229] The "but for" test is the starting point for causation but it is not the complete analysis: *Sew Hoy & Sons Ltd (In Receivership and in Liquidation) v Coopers & Lybrand* [1996] 1 NZLR 403; *Price Waterhouse* v *Kwan & Ors* [2000] 3 NZLR 39. As the Court of Appeal observed in the *Price Waterhouse* case*:*
>
> > "[28] There is a material, indeed a crucial difference between causing a loss and providing the opportunity for its occurrence. The line between these concepts can often be difficult to draw but the distinction is vital. … Plaintiffs in this field must show that the defendant's act or omission constituted a material and substantial cause of their loss. It is not enough that such act or omission simply provided the opportunity for the occurrence of the loss. The concept of materiality denotes that the act or omission must have had a real influence on the occurrence of the loss. The concept of substantiality denotes that the act or omission must have made a more than de minimis or trivial contribution to the occurrence of the loss. Looking at the question in this dual way is both a reminder of the difference between opportunity and cause, and a touchstone for distinguishing between them. In some instances the words used have been material or (as opposed to and) substantial. It is preferable, for the reasons just mentioned, to focus on both concepts for they are each relevant to causation issues. No form of words will ultimately provide an automatic answer to what is essentially a question of commonsense judgment.*"*

[41] This was also the approach in *GW Atkins Ltd v Scott*[9].

[42] The real test of the liability of Mr Moran is the application of the *"but for"* test. Would the house have leaked but for the failed remediation? The answer is yes. The only loss is that suffered by Mr Olsson who paid for an ineffective remediation. The Tribunal considers this was of his own

---

8 (25 July 2008) HC, Auckland, CIV 2005-404-5561 at [229].

making as he specifically directed the scope of the work. The result is this company is not liable in negligence.

Did the issuing of a producer statement create liability?

[43] A producer statement was required by the Certifier before it would issue a Code Compliance Certificate. This was not issued until November 2003 some 18 months after the Olssons had moved in.

[44] Mr Olsson was in a bind. Mr Sweetman who had done the original membrane application was not licensed or an approved applicator for Equus Industries. Further, in order to save Mr Olsson costs Mr Sweetman had entered into an arrangement with Mr Olsson to allow the latter to do the final coat on the exposed areas of the gullies.

[45] Mr Moran was questioned at some length by Mr. Brittain. It was put to Mr Moran that he was helping his "mate" Mr Sweetman out of a fix by signing a producer statement. The Tribunal accepts Mr Moran was not helping out Mr Sweetman. Mr Sweetman did not have a problem. It was Mr Olsson who needed the producer statement. There was no possible benefit to Mr Sweetman by giving a statement. He had already done the work and been paid for it. Mr Sweetman was on friendly terms with Mr Olsson.

[46] What is the point of the producer statement? In this case it was to confirm that a recognised product had been used and applied. Mr Moran said that certifiers had only started to request these statements at about this time and he was very unfamiliar with them. I accept this evidence. Maxi Holdings was not responsible for the producer statement so has no liability in this respect. The claim against it is dismissed.

VIII. Liability of Mr Marchesan, Eighth Respondent, plasterer

---

[9] See (1980) 7 Const LJ 215 CA.

[46] The plasterer took no part in these proceedings. The experts' findings in relation to the first, third and fifth leak locations set out above were attributable to the plasterer who failed to install a capping or appropriate waterproofing membrane. In the experts estimate this amounted to a total of 55% of the claim. The Tribunal finds the eighth respondent responsible for those leaks. He is also contributorily negligent in having applied plaster to fibre cement cladding protruding too deeply into the internal gutters – a 25% allocation of remedial costs according to all the experts (see [13] above). He is also primarily responsible for the fifth leak location being the deck balustrades.

IX. Claim against Mr Moran, Eleventh Respondent, employee of Sixth Respondent

[47] Mr Moran was a licensed applicator of Equus products and applied the product to the top of the parapets as part of remedial work. There is no suggestion there was fault with the application rather the application did not go far enough down the sides. Mr Moran's evidence has been dealt with in the claim against Maxi Holdings and needs no repeating.

[48] Mr Olsson insisted that his "cure" be applied. Mr Moran proceeded to do the limited work he was contracted to do. He cannot be considered negligent by doing so. Further there is no evidence to suggest that he knew or ought to have known the repair would inevitably fail and was thereby negligent. The claim against Mr Moran is dismissed.

X. Ingodwe Trust - contributory negligence?

[49] The Picollo Trust and Mr Olsson submit the claimant made a contribution to the loss because in 2004 there had been publicity about leaking buildings and on the balance of probabilities Ingodwe Trust should have been aware of the "leaking building syndrome" as the Thurnells were experienced property purchasers. (The extent of their experience is considered in Part IV).

[50] Having heard the evidence the Tribunal does not consider it a failure to obtain a pre-purchase inspection report. The Picollo Trust relies on *Body Corporate 189855 (Byron Avenue)* supra at [329], [334], [337] and [354]. In that case the Council had refused to issue a code compliance certificate. The paragraphs cited by Mr Brittain in support of his argument relate to a plaintiff who knew there was remediation work to be done yet went ahead and purchased.

[51] Mr Brittain then referred to Venning J's comments about the considerable publicity concerning leaky homes. In that case the Court was referring to May 2005 in Auckland. Here we are dealing with Tauranga a year earlier.

[52] The Thurnells had no particular knowledge of leaky buildings but the question remains as to whether the doctrine of caveat emptor implied a duty to make further enquiry. What would an average prudent buyer have done? The house is framed with untreated pine to which is affixed a monolithic cladding – an unproven building technique compared to the traditional New Zealand homes of wooden framing and weatherboards, or brick veneer, or concrete block, with eaves. It had parapets and internal gutters. In torrential rain, gutters and spouting may fail to cope with extreme water volumes. With external guttering the water falls innocuously onto the ground. Here it is trapped. There is a choice between aesthetics and higher risk profile and the prosaic low risk option.

[53] Dr Thurnell made it plain his primary concern was aesthetics over weathertightness as evidenced by not countenancing having a mono-pitch roof with eaves replace the existing roof at the risk of design issues as part of the remediation.

[54] One of the plaintiffs in *Byron Ave,* Ms Kim was found not to have knowledge of leaky buildings and did not know there were any problems with her unit (at [354]) ,nevertheless the Court held she was contributorily negligent. Venning J said this was because she had not made proper

inquiry or taken any steps to protect her position. Her contribution was set at 25%.

[55] The Tribunal accepts Mr Brittain's submission that the Thurnells, as educated and experienced purchasers of property, were willing to purchase a house of a cladding and design system that was relatively unproven. They continue to insist on the house being remediated with internal gulleys, spouting and parapets despite now knowing of their inherent flooding propensities discussed elsewhere in this determination. The information available to them would have been less than that available to Ms Kim and so is assessed at 15%.

XI. Contributory Negligence - failure to maintain

[56] Piccolo Trust submits a failure to recoat the guttering system with a Chevaline Dexx membrane at the earliest opportunity in January 2006 as a temporary repair and undertaking a repaint. The Thurnells' sought help from the vendor. Mr Olsson took steps towards repair. They were entitled to rely on his representations that repairs were under control. There is no evidence to support this assertion against the Thurnells and the other allegations relating to maintenance also are not considered of sufficient weight to be taken into account.

PART III – CLAIM AGAINST VENDORS IN CONTRACT

[57] The claimant has various claims against the first respondent being:

- Pre- contractual misrepresentation;
- Breach of vendor warranty;
- Claim in negligence against the first respondent as developer;
- Claim in negligence against the second respondent as builder.

The Tribunal has already held that the claimant has proven its claim in tort. There is therefore no need to consider the claim based on alleged

breach of contract. Even if the Tribunal was to hold there had been a breach of the terms of the sale and purchase agreement the outcome, as far as Ingodwe Trust is concerned, would be the same.

PART IV– CLAIM AGAINST SOLICITORS

I. Background

[58] Mr Collett is a partner at the Tauranga law firm of Holland Beckett the seventh respondents in this proceeding (herein after called “Hobec”). Mr Collett had acted for the claimant, Dr and Mrs Thurnell in conveyancing and property matters from late 2002 until February 2008.

[59] In early July 2004 Dr and Mrs Thurnell instructed Mr Collett to act for them on the proposed purchase of 37 Riveroaks Drive, Tauranga. Dr and Mrs Thurnell had entered into direct negotiations with the vendors. There was no land agent. They wanted to have the oral agreement negotiated between themselves and the claimant reduced to writing, hence the instruction to Mr Collett.

[60] Mr Collett hand drafted a sale and purchase agreement on the real estate form approved by the Real Estate Institute of New Zealand and by the Auckland District Law Society, seventh edition (2) July 1999 (attached as “E” to his witness statement of 20 February 2009). The agreement was at a purchase price of $1,225,000 and was conditional only upon a prior conditional agreement, which contained a “cashout” clause, being cancelled by 4.30pm on Thursday 22 July. (Whether the Thurnells needed to present a “clean” unconditional agreement became a matter of dispute among the experts as noted later in this determination).

II. What was the scope of Hobec's retainer?

[61] Counsel for Ingodwe Trust relied on the decisions in *Gilbert v Shanahan & Ors,*[10] *National Home Loans Corp v Giffin Couch & Archer,*[11] *Clark Boyce v Mouat,*[12] and *Bristol & West Building Society v Mothew (t/a Stapley & Co).*[13]

[62] The Court of Appeal in *Gilbert v Shanahan*[14] in Tipping J's judgement stated:

> "Solicitors' duties are governed by the scope of their retainer, but it would be unreasonable and artificial to define that scope by reference only to the client's express instructions. Matters which fairly and reasonably arise in the course of carrying out those instructions must be regarded as coming within the scope of the retainer."

[63] In *Clark Boyce* (supra) the appeal concerned the alleged negligence of a solicitor who carried out a conveyancing transaction on behalf of both parties with conflicting interests. In that case the Privy Council held that there was no contractual duty on Mr Boyce, the solicitor, to advise Mrs Mouat, the client, of the wisdom of entering into the transaction. The Privy Council expressly rejected the notion that the solicitor could also be liable for a breach of fiduciary duty. The Privy Council in its judgment quoted from the Judge at first instance,

> "In this case at p190, Holland J was satisfied that Mrs Mouat was not concerned about the wisdom of the transaction and was:
>
> > "…merely seeking the services of the solicitor to ensure that the transaction is given proper and full effect by way of ascertaining questions of title and ensuring that by appropriate documentation the parties achieve what they have contracted for."

[64] The claimant referred to the decision in *Crocombe v Devoy*[15]. This case is of limited assistance. In *Crocombe* the solicitor's breaches of duty were described as numerous at [91] including the failure to keep the client advised, failure to carry out specific instructions, failure to advise the

---

10 [1998] 3 NZLR 528 at 537 (CA).
11 [1997] 3 All ER 808 at 813 at 813
12 [1993] 3 NZLR 641 at 648 (PC).
13 [1996] 4 All ER 698 at 703 (CA)
14 See n 10 above, 537.
15 (29 November 2006) HC, Tauranga, CIV 2005-470-905, Lang J.

client that monies were required on settlement date, and failing to settle a transaction. These breaches were of the essential functions and duties of a conveyancer quite distinguishable from the facts here where the alleged breach is an omission to proffer unsought advice.

[65] The claimant asserts Hobec owed concurrent duties of care in tort and contract. They rely on *Frost & Sutcliffe v Tuiara*[16]. There is no doubt the firm owed a duty of care in tort. No duty of care arises in an action based on an alleged breach of contract. Rather the cause of action is the alleged breach of the terms of the contract. Solicitor's contractual obligations are commonly referred to as the solicitor's duty, but this is not to be confused with *"duty of care"*.

[66] In the terms of the specific retainer was there a duty or implied term Hobec would advise on the advisability of obtaining a pre-purchase building inspection?

[67] The claimant says the solicitors were not engaged solely for the purposes of drawing and engrossing a sale and purchase agreement - the essential terms of which had already been negotiated directly between the parties, but also for the purpose of being properly advised, including being told of the need for a pre-purchase building report.

[68] It is common ground specific advice was sought and given in relation to the structuring of the agreement to maximise any taxation advantages to the claimant. It is also common ground the Thurnells had directly arranged with their bank for funding to enable the purchase so no solicitor's advice was sought in this regard. Mr Collett was also told he was not to obtain a LIM report from the Tauranga City Council as the Thurnells' had already been to the Council offices and spoken with a senior planner.

---

16 [2004] 1 NZLR 782.

III. The evidence

The evidence of Dr Thurnell

[69] Dr Thurnell stated:

> "…Mr Collett ought to have had advised me to insert a condition in the sale and purchase agreement making it conditional upon a satisfactory building report on the property." (Statement of evidence of Dr Christopher Alain Thurnell dated 4 February 2009 [19]).

[70] Conflicting evidence flows around this question not only between Dr Thurnell and his former solicitor Mr Collett, but between the experts, Mr Eades for the claimant and Mr Jones for the seventh respondent.

[71] Dr Thurnell said:

> "At one of my meetings with Mr Collett on 19 July 2004, I believe it was the second meeting, Mr Collett asked me what sort of house it was. I said it was described in the sales sheet as 'Tuscany Style'. Mr Collett asked if the house was monolithic. I didn't know what that was. He asked what the house was made of. I said that it looked like square concrete slabs but apparently was plaster over polystyrene. Mr Collett asked if it had a cavity. I said I didn't know. He asked what the roofs were like. I said that they were flat and that you couldn't seethe roofs from the outside of the house. Mr Collett asked if it had internal gutters. I said that I didn't know what those were. Mr Collett asked if the house had gutters running around the perimeter of the house. I said that I didn't think so."
>
> (Statement of evidence of C Thurnell 4 February 2009 [18]).

[72] Dr Thurnell was questioned at some length about this alleged discussion. It was put to him that it did not take place. He was adamant it did. Dr Thurnell said he had not contemplated getting a pre-purchase inspection report. He did not know, and was not aware, of any reason why he would need to do so.

Mr Collett's evidence re instructions

[73] Mr Collett unfortunately had not kept interview notes of what was said at this meeting about the purchase however he said the hand drafted agreement read in conjunction with the reporting letter to his clients that he dictated on 22 July 2004 encapsulated what was discussed with his client. He was adamant there was no discussion concerning the nature of the house. In his statement of 20 February 2009 at [4.4] and which became part of his sworn evidence at the hearing Mr Collett stated:

> "At the time that Chris and Anna entered into the agreement, I had no knowledge of:
> 1) The type of house Chris or Anna was purchasing
> 2) When the house had been built or even that the vendor had built the house
> 3) The type of construction in the dwelling on the property."

[74] Mr Collett said he was acutely aware the Thurnells, who had presented to him as being very enthusiastic about purchasing this property, needed to present an unconditional agreement. He said he was very aware that any agreement drafted needed to reflect the essence of the bargain that had been orally struck between the Thurnells and the vendor if it was to have a chance of success.

[75] Mr Collett said he considered his clients to be intelligent individuals who were experienced in buying and selling properties. From his observations the Thurnells frequently did things for themselves. In a previous transaction they had objected to him getting a title search when they had already obtained one. In this case they had already been to the Council and satisfied themselves on compliance and other issues. One gains the distinct impression they would not be impressed were their solicitor to undertake matters beyond the instructions given in their initial brief.

[76] Mr Collett impressed as a conscientious conveyancing solicitor. His letter to Dr and Mrs Thurnell of 22 May referred to earlier was comprehensive and included such attachments as a copy of the signed agreement, a copy of certificate of title, a copy of two plans, a consent notice, fencing covenant, a height and building covenant as well as an easement certificate. It noted that those documents had been discussed. The letter went on to indicate the nature of the title that was issued, purchaser risks and the advisability of having insurance cover in case the property was partially damaged between the signing of the agreement and the settlement. The letter raised the Land Information Memorandum matter, noting that Mr Collett had been told not to seek one. The warranty of the vendor was referred to and it was suggested the Thurnells

separately check with the Council to ensure this work had been properly consented.

[77] Would a solicitor who showed such diligence and care in all other respects relating to this property transaction and who, after the client interview in the letter of 22 May, recorded in considerable detail the advice given have omitted reference to a discussion of matters relating to the structure of the house which flagged weathertight issues? The Tribunal thinks not. Further it has no doubt that if watertight matters had been raised Mr Collett would have advised his clients appropriately. The Tribunal concludes this conversation did not take place at the time stated by Dr Thurnell. Dr Thurnell genuinely believes this conversation took place, but the Tribunal considers he is honestly mistaken.

Mr Eades, claimant expert

[78] Mr Eades is the expert for the claimant. He is a highly respected law practitioner with vast experience having practised the law for 53 years. He was a member of the Council of the Auckland District Law Society from 1978 to 1987 and President of that Law Society in 1987/88. He was also a member of the Council of the New Zealand Law Society and vice president of that society. He has served extensively on various law society committees and for several years lectured in ethics at the University of Auckland.

[79] Mr Eades had reviewed the Hobec file and also read the statement of Dr Thurnell dated 4 February 2009. Mr Eades said he took the following events into account when looking at the question of recommending the obtaining of a building report:

(i) The Thurnells had inspected the property;

(ii) They had satisfied themselves that according to the local body records everything was in order;

(iii) The Thurnells did not raise any concerns about the building on the property;

(iv) Dr Thurnells version of the discussion with Mr Collett concerning a Tuscany style house.

[80] Mr Eades' evidence that Mr Collett should have recommended a pre-purchase report is predicated on the brief Mr Eades received from his instructing solicitors that the conversation, between Mr Collett and the Thurnells, raising construction issues took place. Mr Eades said:

> "But in this case, Mr Collett is said to have made detailed inquires of the Thurnell's about the construction of the house. All of the responses would seem to point to the sort of building which might be a candidate for leaky building problems" Brief of Evidence [28].

[81] Mr Eades stated that in his opinion there would be few people and even fewer lawyers who were unaware with problems with leaky buildings by 2004. He said even before the emergence of leaking buildings a lawyer acting for a purchaser of a residential building would often seek a pre-inspection report:

> "In reply to: more recent years in the shadow of leaking buildings, a lawyer would usually raise with the prospective purchaser whether a report was desirable or necessary and the agreement framed accordingly".

[82] The Tribunal agrees that if the conversation described by Dr Thurnell had taken place Mr Collett would have been negligent and failed to act within the scope of his retainer in failing to suggest a report be obtained from a suitably qualified building inspector.

[83] Mr Eades went on to say he did not think there is a blanket requirement for a lawyer to advise that a purchase be made subject to a building report. He outlined situations where a solicitor would have met the appropriate professional standards and not failed to meet either the scope of instruction or any duty of care, being where:

(a) the purchasers themselves are knowledgeable;
(b) the purchasers have already made adequate inspection/ inquiries;
(c) the age and nature of the house;
(d) the reputation of the builder, and or architect;
(e) the existence of competing offers or a back up agreement;

(f) time constraints on obtaining a building report;

(g) where clients do not require their lawyers' input or are dismissive of it.

[84] Mr Eades said he had not been made aware that any of these circumstances applied in this case. Mr Eades expert evidence and analysis setting out the factors to be taken into account in deciding whether a solicitor had failed to properly advise a client on these general matters is accepted and is adopted by the Tribunal. Mr Jones, the seventh respondent's expert, agreed with Mr Eades' analysis.

Mr Jones' Evidence – Seventh Respondent's Expert

[85] Mr Jones is a partner in a law firm of Glaister Ennor and has been practising law since 1975 specialising in property matters including residential conveyancing. His practice primarily consists of residential and commercial property work specialising in advice on land and building development. He is currently a member of the Auckland District Law Society Forms Committee. Mr Jones also has extensive experience and served on a number of Auckland and New Zealand Law Society committees including being a former member of the Executive of the Property Law Section of the New Zealand Law society.

[86] The conflict between these two eminent experts was in relation to the knowledge of solicitors in July 2004 as to the extent of weathertight problems in buildings outside Auckland, and concerning single dwellings as opposed to multi unit complexes. In Mr Jones' view the public and legal community were beginning to understand the magnitude of the leaky building problem but were not as aware of it as today. He said that in July 2004 there would not have been a duty on a residential conveyancing solicitor to inquire into the nature of a building so as to ascertain whether the building was at risk of leaking.

[87] Mr Jones went on to say:

> "In addition, for the reasons stated above, there would have been no corresponding duty on a conveyancing practitioner acting for a purchaser of

> residential property to recommend that an agreement for sale and purchase be made conditional on the purchase obtaining a satisfactory builders report"

[88] The Tribunal considers the evidence on this point to be a matter of intelligent assumption rather than on expert evidence bases on empirical data. There being no real conflict in the experts' evidence the Tribunal will examine the evidence against the Eades' criteria.

IV. The Eades' Test for Scope of Instruction

Were the purchasers knowledgeable?

[89] Dr Thurnell said he was not a commercial person. He did confirm that he had been involved in three Tauranga property purchases in the two years prior to this purchase and indicated he had also purchased a home in England as well as one in Christchurch. He said he and his wife were prudent.

[90] In this transaction Dr and Mrs Thurnell had no hesitation in negotiation directly with the vendor. They were aware of the value of the property and in particular waterfront property. Dr Thurnell in his evidence said that he only brought on the basis of "location, location, location" adding that all the properties he and his wife had brought in Tauranga were waterfront, either seafront or, in the case of the River Oaks property, riverfront. The land being 6.32 hectares was seen as having the added advantage of potential for further subdivision, an angle Dr Thurnell pursued with some vigour.

[91] When one examines the first hand-drafted sale and purchase agreement it indicates the claimant had some commercial awareness including taxation implications. On Dr Thurnell's own evidence it is clear he and his wife were reasonably experienced in buying a residential property both in New Zealand and overseas. They felt confident to undertake their own negotiations.

Had they made enquiry?

[92] The claimant had themselves had gone to the Council and expressly directed their lawyer not to obtain a LIM report. This shows a degree of knowledge and familiarity with property matters greater than one would have expected of the ordinary residential purchaser.

[93] They engaged Mr Rex Still to carry out a building inspection. Dr Thurnell initially referred to Mr Still as a part time builder, though later he tended to denigrate Mr Still's skills. He said Mr Spill had inspected the house and it seemed sound. The Thurnells themselves visited the house on five occasions as referred to in [8], [10], [12], [13], and [15] of Dr Thurnell's first witness statement. They did make enquiry.

Age and nature of house, reputation of builder and architect

[94] This was a recently built house. With regard to the nature of the house, Dr Thurnell confirmed he did not tell the solicitor about it.

Where clients do not require their lawyers input or are dismissive

[95] The Tribunal finds that the claimant did not require their lawyers' input. They were cost conscious and had previously indicated to Mr Collett that he was to act within the scope of client instructions. If they had wanted his input they would have expressly asked for it. Dr Thurnell agreed when questioned that if a report had been obtained there was a relatively low risk he would have still bought the house. The claimants were also likely to be dismissive of advice having organised their own inspection.

V. What was the scope of instruction*?*

Is there an implied contractual obligation to recommend report?

[96] Both solicitor and client agreed the clients did not specifically raise the matter of weathertightness or whether there should be a building report.

[97] In the Court of Appeal *Gilbert* (supra) at p 537 Tipping J, stated:

> "Solicitors' duties are governed by the state of their retainer, but it would be unreasonable and artificial to define that scope by reference only to the client's express instructions. Matters that fairly and reasonably arise in the course of carrying out those instructions must be regarding as coming in the scope of the retainer." (this quote has already been quoted at para [63] above)

[98] The Court of Appeal held the scope of the retainer is limited to matters which fairly or reasonably arise in the course of carrying out the instructions. This can only be determined on the facts of each case.

[99] Here there are a number of undisputed facts. First the claimant had been involved in six purchases prior to this transaction. They were familiar with the requirement of building surveys in the United Kingdom where they bought a property. This is not a case where the client was oblivious to the possibility of pre-purchase inspections. Further the claimant concedes they had Mr Still inspect the property and were reassured the house they were about to buy was in sound condition.

[100] Having read the evidence I have no difficulty in coming to the following conclusions:

- The Thurnells' primary attraction to the property was the size of the land and its location.
- Dr Thurnell gave very clear evidence he was only interested in buying land that bordered on water hence his other properties were waterfront and this was riverfront.
- Dr Thurnell was not primarily concerned with the structures on the land he bought. He was very specific on this issue when questioned about the investment properties. He said he was not interested in the quality of the houses on the land, when being asked questions about maintenance. He referred to *"location, location, location"*. He and his wife are clearly investors/home buyers who see location as being of primary importance.

[101] I have no doubt Mr Collett, who had acted on all the previous Tauranga transactions, would have been aware of the focus of Dr and

Mrs Thurnell. He appropriately took into account his personal knowledge of the Thurnells' expectations that their solicitor follow instructions and not deviate from them as they were mindful of costs.

[102] Mr Collett carried out his duties as a conveyancing solicitor properly and gave full effect to the instructions he was given which included preparing a sale and purchase agreement that would be attractive to the vendor enabling the claimant to gazzump an earlier higher-priced but conditional agreement. Ingodwe Trust was able to pay less than the existing offer because its offer was unconditional.

[103] The Tribunal also concludes that all matters that fairly and reasonably arose in the cause of carrying out those instructions were attended to by Mr Collett. The scope of instructions did not include giving advice on structural or watertight matters.

VI. Affirmative defences –

(1) *No causation*

[104] There is no claim that can be sustained against the seventh respondents in contract or tort and that should be the end of the matter. However if the Tribunal is wrong in that finding and for the sake of completeness the question of no causation of loss is addressed.

[105] The English Court of Appeal in *Allied Maples Group Ltd v Simmons and Simmons (a firm)*[17] considered the matter of causation of loss in a hypothetical situation. In the present case the hypothetical situation according to the claimant's case is that if they had been advised by their solicitor to obtain a pre-purchase report they would have followed such advice and any report so obtained would have disclosed major weathertight problems. This would have resulted in them withdrawing from the contract.

---

17 [1995] EWCA CIV 17.

[106] Counsel for the seventh respondent argued that the claimant had to show there was a real or substantial chance of the outcome presaged by the claimant, occurring rather than being merely speculative. The distinction was elaborated upon by Stuart Smith LJ at paragraphs [33], [34] and [45] of the *Allied Maples* decision.

[107] First, the Tribunal has no difficulty in concluding the chances of the claimant accepting advice to make the contract subject to a pre-purchase report as being extremely low. They had already asked Mr still a builder for an assessment. The claimant was cost conscious and would not have been reluctant to spend money on a report.

[108] Secondly, there is no evidence that had a report been commissioned it would have disclosed the building defects which have given rise to the leaks. It is not accepted that a competent pre-purchase inspector would have identified watertightness defects. In this case a thorough and extensive assessment was carried out by a Weathertight Homes Assessor some two years after the purchase yet that assessor failed to identify the leaks that form the basis of this claim. It is therefore most unlikely such leaks would have been detected at the pre-purchase stage. Causation of loss has not been established on the evidence produced.

(2) *Counter to*: (a) New Zealand Conveyancing Practice, and
(b) Public Policy

[109] There is no need to come to a finding on these defences in light of the finding on causation, and the claim against Hobec is dismissed.

VII. Ingodwe Trust's Claim for Loss of Chance

[110] The claimant said that loss can clearly be established and rely on the *"loss of chance"* doctrine as set out in Mc*Gregor on Damages 2003* [8-015] to [8-064] and on *Allied Maples v Simmons*[18]. Ingodwe Trust asserts

[18] [1995] 1 WLR 1602.

it would not have proceeded with the contract if there was a negative report showing significant defects and as any report obtained would inevitably have revealed defects, *ipso facto* Hobec are liable for all losses and should reinstate Ingodwe Trust to the position it would have been in if the purchase had not gone ahead.

[111] In the light of the Tribunal's findings that Hobec was not negligent, and even if it were any building report obtained would have been less than likely to disclose leaking any chain of causation has been broken. Therefore this claim fails.

PART V – QUANTUM

I. Amount claimant claims

[112] The claimant seeks the measure of loss to be set at the cost of repairs. In their claim they seek:

(a) Cost of remediation;

(i)	Designs	$29,700.00;
(ii)	Building consent	$4,500.00;
(iii)	Project management	$ 22,500.00;
(iv)	Construction	$609,931.00;
(v)	Insurance	$4,888.00;
(vi)	Carpet replacement	$6,813.00
	Total Remedial costs	**$678,332.00**

(b) Consequential losses:

(i)	House Warrant of Fitness Co. Ltd	$2,327.00
(ii)	Warwick Sweetman	$2,400.00
(iii)	Alternative Accommodation $850 per week x 30 weeks	$25,500.00
(iv)	Storage $500 per week x 8 months	$4,000.00
	Total consequential losses	$34,227.00

(c)	General damages	$60,000.00
	Total	**$772,559.00**

[113] The evidence in relation to this quantum was given by Mr Smith. He provided both an initial statement and reply statement dated 26 February 2009.

II. Damages for Economic Loss or Remediation?

Parameters of loss

[114] At the hearing there had been no submissions made on the issue of whether there was an effective ceiling on any claim for remediation costs imposed by the fundamental rule that damages can only be awarded to the extent of actual economic loss represented by drop in market value. Counsel for the claimant's submission that the Tribunal was proposing a departure from this approach is wrong. Counsel were invited to make submissions.

[115] In the Privy Council decision in *Invercargill City Council v Hamlin*[19] their Lordships held "the measure of the loss will…be the cost of repairs, if it is reasonable to repair, or to depreciation and the market value if it is not."

[116] This decision was followed in *Byron Ave*[20], where the High Court stated that in Weathertight Home cases this was the law to be applied. In *Byron Avenue* the extent of remedying the defects did not exceed the value of the property.

Valuation evidence

[117] The amount of damages a claimant can seek is governed by the financial loss they have suffered. In this case the only evidence on valuation produced to the Tribunal was by Mr Passey dated 24 February

19 [1996] 1 NZLR 513.

2009. All parties consented to this valuation being adduced but subsequently would not agree on an update.

[118] Mr Passey, a registered valuer, assessed the land value (as at November 2006) at $730,000.00 and the improvements - the dwelling and garage at $462,000.00. At [11] of his valuation he stated the current market value of the property with the house removed was $883,000.00 comprising $730,000.00 for the land, the dwelling at salvage value of $60,000.00, the shed and sleep-out at $51,000.00, other improvements at $25,000.00, and chattels at $17,000.00. The market value of the property with the house weathertight was $1,285,000.00.

[119] Based on this uncontested valuation the extent of loss suffered by the claimant is $402,000.00.

III. Remediation costs

Claimant figures

[120] As noted at [129] Ingodwe Trust seeks remediation costs of $678,332.00. Mr Smith appeared as its expert. He is a registered building surveyor and has had experience in residential building construction in New Zealand over a period of 27 years.

[121] Mr Smith undertook what could be described as a “pseudo” or Clayton’s tender. Mr Smith completed a scope of works and approached three Tauranga building contractors. “Tenders” were lodged but none of the builders were interested in undertaking work, undermining the point of a true tendering process. The object of the exercise was to get a picture of a likely range of costings. The prices submitted ranged from $596,457.79 to $613,140.69. Mr Smith considered the Form Building Developments “tender’ the best and that a provisional sum of $73,500 and an allowance of nearly 12% of the overall cost was fair and reasonable.

---

[20] (25 July 2008) HC, Auckland, CIV 2005-404-5561 Venning J.

[122] The Tribunal has formed the view Mr Smith's figures are inflated. There are a number of reasons for this conclusion. For example the estimate for the cost of architectural drawings is $29,400. The sum seems particularly high when one considers the architect's invoice for the approval drawings for the original house was $3,500. A further example is an allowance of $40,000 for the replacement of framing timber – more than the original cost of all exterior framing of the whole house. There was no evidence to support such a high figure. The provision of $25,000 for making good the interior is also not supported by detail nor any allowance given for betterment.

The law on reasonableness

[123] In *Axa v Cunningham*[21] Lord Pearson observed at p51 that a plaintiff can adopt an expensive approach to repairs but can only recover by way of damages the sum that that reasonably needs to be expended to make good the loss. This needs to be kept in mind as does the dicta of Hardie Boys J in *Brown v Heathcote County Council*[22] where he said reasonableness as to mitigating damage is to be gauged with reference to the defendant's interests as well as the plaintiffs, following *Darbishire v Warran*[23].

The first and second respondents

[124] Mr Crowther is an experienced Tauranga builder who has repaired a number of leaky homes. Mr Browne stated Mr Crowther had previously undertaken successful remediation work in Tauranga on more than one occasion and under budget. This evidence gives weight to the Crowther estimate as does the fact that in many respects it reflects the assessor's figures. (He is not a qualified quantity surveyor and this is reflected in some of the contingent costs not being included in his estimate.

---

21 [2007] EWHC 3032 (QB).
22 [1982] 2 NZLR 584 at 615.
23 [1963] 1 WLR 1067 at 1072 per Harman LJ (CA).

[125] Mr Crowther estimated the costs for repairs (with the parapets being retained) and with a 15% replacement of the timber framing at $291,375.and with 25% framing replacement at a sum of $299,250.00.

[126] It is noted the first and second respondents offered to have this work undertaken by Mr Crowther prior to this hearing starting but this offer was declined by the claimant who were not willing to rely on Mr Crowther's expertise.

Assessor's assessment

[127] Paragraph [16.8.1] of Mr Browne's report dated 3 September 2007 summarises his estimate as follows:

Current Damage

• Parapet walls	$ 124,800
• Internal gutters	74,400
• Flat top balustrades	23,700
• Kitchen window	15,500
Current damage subtotal	$ 238,400

Future Likely Damage

• Cladding and windows	$146,800
• Main roof	44,600
• Deck roof	11,100
• Deck	41,500
• Garage roof	12,600
Future likely Damage	$256,600
Total	**$495,000**

Setting repair costs

[128] The Tribunal accepts Mr Browne's figures as the benchmark, subject to the adjustments outlined here. The reasons for the variation between the Crowther estimate and Mr Browne's figures become self evident upon closer scrutiny. Mr Browne allows for $15,400 for the Council and building consent documentation. The Tribunal accepts this figure. He allows $20,900 for supervision, the garage roof at $12,600, the creation of a cavity ($16,000) and $52,600 for the deck and deck roof.

Mr Crowther's figures do not include these amounts save for an estimate on deck repairs of $5,625. These contingencies alone amount to $111,900.

[129] The ancillary expenses covered by Mr Browne's figures referred to above is a parcel of recoverable damages. Mr Crowther's amount for the deck repair is deemed appropriate. The lack of slope has not caused nor after 9 years is likely to cause a leak. The cost of a new deck is treated as betterment, or alternatively beyond the range of reasonable repair as per *Axa* (supra [125]) (hereinafter called 'betterment').

[130] It is understandable for Mr Crowther not to have priced for a cavity, as not all Councils require a cavity to be installed on remediation. The experts' conference treated this cost as not being betterment. This is not a finding open to the experts and $16,000 is deducted from the damages figure for this.

[131] The Tribunal now list the larger items where adjustments need to be made. It accepts the Olssons' contention that supervision at $20,900 is excessive. One hundred hours at $80 an hour is allowed, being $8,000. The scaffolding costs have been allowed at four months. There is no reason for a properly managed project to take more than two months, nevertheless three months will be allowed. The Crowther figure of $19,500 is accepted as being appropriate.

[132] Mr Browne confirmed the property was due for a repaint and he costed this at $59,990, as against Mr Crowther's $40,000. The Tribunal finds that $50,000 is allowed for this from which is to be deducted a betterment component of 80% being $40,000. The Browne figures on internal repairs to the carpet and for redecorating needs a re-adjustment downwards of $7,000 in light of Mr Crowther's quote.

[133] The Assessor set $256,000 of his $485,000 estimate as prospective damage, meaning there is a significant betterment

component. Betterment relating to the cladding and deck has been considered. Those relating to the windows and roof have not. In this case the substantive part of the roof is fine, only the valleys are a problem. Its entire replacement is apparently required because no expert is able to say that a limited area of defect, namely the valleys, can be rectified without a demolition of the entire roof. There is betterment in the roof already having aged a substantial proportion of its 15 year building code life. A similar analysis can be made re the windows and garage roof. A conservative allowance for the betterment element is $16,000.

[134] The Tribunal finds the reasonable cost of repair is $392,000.

IV. Consequential Losses

[135] Consequential losses amounting to $33,427 have been sought as set out in counsel's closing submissions. This sum is made up of the following:

(i)	House warrant of fitness	$ 2,327
(ii)	Warwick Sweetman	$ 1,600
(iii)	Alternative accommodation 30 weeks @ $850 per week	$25,500
(iv)	Storage 8 months @ $500 per month	$ 4,000
	Total	**$33,427**

[136] The first and second respondents obtained an estimate from a real estate agent of $420 to $450 per week for a good quality four bedroom home. This is reasonable but $500per week will be allowed for short-term rental. The Tribunal will allow 13 weeks with storage for three months. The amounts allowed are therefore:

(i)	House warrant of fitness	$ 2,327
(ii)	Alternative accommodation 13 weeks @ $500 per week	$ 6,500
(iii)	Storage 3 months @ $500 per month	$ 1,500
	Total	**$10,327**

[137] The sum for the Sweetman work has variously been stated as $2,483 and $1,600. The lower figure is treated as the most accurate being the last figure provided. Mr Sweetman is ordered to repay $1,600 for ineffective repair.

[138] The total damages amount to $403,927.

Claimant's legal argument in favour of repair costs

[139] The claimant refers to the Privy Council decision in the *Invercargill City Council v Hamlin* (supra) and *Ruxley Electronics & Construction Limited v Forsyth.*[24] The claimant argued that only in exceptional circumstances is there a departure from a prima facie rule that the cost of repair is the appropriate measure of loss irrespective of the cost of repairs. The Tribunal does not accept there has to be exceptional circumstances.

[140] The Ingodwe Trust further argues:

> "The entire body of leaking building case law in New Zealand has adopted the cost of cure as the appropriate measure of loss".

[141] It relies on *Dicks v Hobson Swan Construction*[25] where the evidence was that the loss in value were the house to be demolished would have been $185,000 compared to the cost to reinstate of $206,081 supports its case. The differential between loss in value and cost of reinstatement was less than 10% of the reinstatement figure. The differential in this case would be over 50% in excess of loss if the claimant's figures for quantifying loss were accepted.

[142] The Tribunal accepts an expression of intent to repair is one of a number of factors to be taken into account as noted in *Stevenson Precast Systems Limited v Kelland*[26].

---

24 [1996] AC 344.
25 (2006) 7 NZCPR 881.
26 [2001] BCL 807.

Respondents' submissions

[143] Mr Brittain also relied on the *Hamlin* decision and the Court of Appeal decision in *Warren & Mahoney v Dynes*[27] where McMullin J who after referring to the prima facie rule that the measure of damages will usually be the cost of rectification went on to say:

> "But the High Court went on to explain that this prima facie rule was subject to the qualification that the doing of the rectification work must be a reasonable course to adopt. In the *Bevan*[28] case Richard P interpreted the High Court judgment to mean that the prima facie rule should be adopted until the Court was satisfied that some lessor basis of compensation could in all the circumstances be fairly adopted. In many cases where the plaintiff wants his property restored to the same state it was in before the commission of the tort the cost of the restoration will be substantially greater than the amount by which the value of the property has been diminished and the test of reasonableness mentioned in *Bellgrove v Eldridge*[29] and *Bevan* will become important."

[144] Ultimately the decision comes down to the extent of any differential between loss in value and repairs. At the point at which the differential can only be considered excessive loss in value must be the ceiling on damages. In this case the answer lies in determining what is a reasonable cost of repair. This figure comes to $392,000 whereby consequential losses have been set at $10,327, plus the Sweetman $1,600 leaving a total loss of $402,327. This is only marginally above the ceiling of $402,000 without adjustments for contribution.

PART VI - GENERAL DAMAGES

Can a trust seek general damages?

[145] The claimant seeks general damages in the sum of $60,000.

[146] The essence of a claim for general damages is the mental distress caused to an individual. In this case the claimant is River Oaks Farm Limited and C & A Thurnell and L Horne as Trustees of the Ingodwe Trust. The claimant is not an individual. Neither River Oak Farm Ltd nor Mr Horne (one of the trustees) are seeking general damages.

---

27 (26 October 1988) CA, 49-88.

28 See Bevan Investments Limited v Balckhal and Struthers (2) [1978] 2NZLR 97.

29 See Bellgrove v Eldridge (1954) 90 CLR 613 (HC of A).

[147] Although not articulated as such the underlying basis of the Thurnells' claim for general damages appears to be their mental distress as tenants.

[148] The Thurnells are not the claimant. In this jurisdiction only an owner can be a claimant. This precludes individual trustees as tenants or occupiers seeking redress, the Tribunal having no jurisdiction to award general damages for individuals who are not owners.

[149] Further, the point of a trust is to create a legal persona quite distinguished from the person who is the beneficiary. Family trusts are formed to protect the assets from the beneficiaries' creditors and to isolate the trust from any other property interest or obligations of each of the trustees. The intention is to ensure the beneficiary is not the owner. In *The Contradictors v Attorney General*[30] the Court gave a very clear indication of the necessity to treat trustees and beneficiaries as having different interests.

[150] In this case the Trust is a genuine trust, with an independent third trustee, unlike that described in *Manuel & Ors v Waitakere City Council*[31] in which Adjudicator S Lockhart QC said at [34]:

> "This Tribunal is of the opinion that due to the apparent and extremely important role played by both the Manuels in the control of the Trust, both the Manuels and the Trust can be held to be analogous to each other."

[151] Clearly Adjudicator Lockhart QC considered the role of the Trust had been totally compromised by the degree of control exercised by the Manuels. This is not the case here. It is not a sham as discussed in an article *"Shames, Trusts and Mutual Intention"*[32].

[152] In *Byron Ave*[33] Venning J made various awards in favour of the claimant for general damages ranging from no payments to trustees (see [414]) through $12, 500 to $20,000 [403], [405], [411] and [420]. This

30 15 PRNZ 120 (PC).
31 (28 February 2008) WHT, TRI 2007-100-00030.
32 M Conalglen [2008] NZLJ 227.
33 (25 July 2008) HC, Auckland, CIV 2005-404-5561.

Tribunal is bound by this decision of the High Court to the effect trustees and trusts are unable to obtain general damages for mental distress.

[153] In *La Grouw v Cairns*[34] the High Court was dealing with an appeal. The factual situation is unclear but it does not support the contention that it is authority for awarding damages for mental distress to occupiers whose occupation is as beneficiary and not owner.

[154] In *Hearn & Ors v Parklane Investments Limited & Ors*[35] Adjudicator Pitchforth held that a trust was not in a position to suffer anxiety or loss. He further noted that Mrs Hearn was not a party in her own right but only as a trustee. It was held there was no jurisdiction to make an order in favour of a person who was not a party. (See [108] and [109]). This Determination was unsuccessfully appealed to the High Court. In line with this decision and for the reasons given the Tribunal concludes it is statutorily barred from making an order for general damages, and such damages cannot be ordered in favour of a trust in any event.

PART VII – RESULT

V. Amount of Damages to be Awarded if Cost of Remediation is Held to Represent Extent of Loss

[155] The Tribunal concludes the following amounts have been proven and the total award is as follows:

Loss for failed remediation	$1,600
Damages	$392,000
Other losses	$10,327
Sub Total	$403,927
Less contributory of 15%[36]	$60,588

34 (2004) 5 NZCPR 434.

35 (30 April 2009) WHT, TRI 2008-101-000045 – Interim Determination.

36 The amount of contribution due from Ingodwe Trust is its contributory negligence of 15% of $408,227 being $60,588

Total due to Ingodwe Trust $343,347

[156] A settlement was reached with the third, ninth and tenth respondents pursuant to which the claimant received payment of $30,000. This sum is deducted as is the $1,600 for apportionment purposes. The amount to be apportioned between the remaining parties is $311,747.

[157] For the reasons set out in this determination, the Tribunal makes the following orders:

(i) The first respondent Timothy Olsson, Charlotte Olsson and John Cronin as Trustees of the Picollo Trust have been negligent and accordingly is jointly and severally liable for $311,747 ;

(ii) The second respondent, Timothy Olsson breached the duty he owed to the claimant and is therefore jointly and severally liable to pay the claimant the sum of; $311,747;

(iii) The claim against the third respondent was withdrawn;

(iv) The fourth respondent, Kent Jarman has not been found negligent and accordingly claims against that party are dismissed.

(v) The fifth respondent, Warwick Sweetman has been found negligent in relation to failed remediation work and he is liable to the claimant in the sum of $1,600;

(vi) The sixth respondent, Maxi Holdings Limited has not been found negligent and accordingly claims against that party are dismissed;

(vii) The seventh respondent, W B Holland & Ors Trading in Partnership as the legal firm Holland Becket, has not been found to be either in breach of contract or negligent and accordingly claims against that party are dismissed;

(viii) The eighth respondent, Gianni Marchesan, breached the duty of care he owed the claimant and is therefore jointly and severally liable to pay the claimant the sum of $311,747;

(ix) The claim against the ninth respondent has been withdrawn;

(x) The claim against the tenth respondent has been withdrawn;

(xi) The eleventh respondent, Simon Noel Moran, has not been found negligent and accordingly claims against that party are dismissed.

I. Contribution issues

[158] As a result of the negligence referred to above, the first, second and eighth respondents are jointly and severally liable for the entire amount of the claims of $311,747. This means these respondents are concomitant tortfeasors and therefore each is entitled to contribution from the other according to the relevant responsibilities of the parties.

[159] Section 17 of the Law Reform Act 1936 governs issues of liability as between joint tortfeasors and s72(2) of the Weathertight Homes Resolution Services Act 2006 is the statutory provision empowering the Tribunal to apportion liability.

[160] What yardstick should be applied? In *Patel v Offord & Ors*[37], Heath J, stated:

> "[34] …The touchstone is what a Court finds "to be just and equitable having regard to the extent that person's responsibility for the damage."

[37] (16 June 2009) HC, Auckland, CIV 2009-404-301.

> [35] The question of contribution for apportionment of liability is an exercise in judgment. It is not a mathematical exercise. In *British Fame (Owners) v MacGregor (Owners)* [1943] AC197 (HL) at 201, Lord Wright (from whom other members of the House did not demur on this point) emphasised that the assessment was directed at the degree of fault and was different in kind from "a mere finding of fact in the ordinary sense". His Lordship described the question as one of "proportion, of balance and relative emphasis", through weighing different considerations. It was acknowledged that the assessment of contribution involved "an individual choice or discretion, as to which there may well be differences of opinion by different minds."

[161] The primary cause of leaking was the faulty work undertaken by Marchesan. The Tribunal considers he is liable for 70% of the claim.

[162] Picollo Trust conceded it was involved in the development with some role as project manager. Its role was very limited, being almost totally reliant on the second respondent, and is assessed at 5%.

[163] Mr Olsson was the builder, the principal developer and project manager. There was a clear failure in building work and supervisory function. His liability is 25%.

II. Conclusions and orders

[164] The claimant's claim is proved to the extent of $311,747. For the reasons set out in this determination the following orders are made:

(i) Picollo Trust is ordered to pay the claimant the sum of $311,747 forthwith. It is entitled to recover a contribution of up to $77,937 from the second and $218,223 from the eighth respondent.

(ii) T. Olsson is ordered to pay the claimant the sum of $311,747, forthwith. He is entitled to recover a contribution of up to $218,223 from the eighth and $15,587 from the first respondent.

(iii) W. Sweetman is ordered to pay the claimant the sum of $1,600 forthwith.

(iv) G. Marchesan is ordered to pay the claimant the sum of $311,747 forthwith. He is entitled to recover a contribution of up to $15,587

from the first respondent and $77,937 from the second respondent.

[165] To summarise, if all the respondents meet their obligations pursuant to this determination it will result in the following payments being made by the respondents to the claimant:

The first respondent	$15,587
The second respondent	$77,937
The fifth respondent (discrete)	$1,600
The eight respondent	$218,223
Total	**$313,347**

The matter of costs will be subject to a separate application.

DATED at WELLINGTON this 5 August 2009

SIGNED BY:

_____

C B Ruthe
Tribunal Member

APPENDIX 1

Listed below are the statements and documents that have become part of the proceedings:

(i) Assessor's Report, DBH, 26/01/2006;

(ii) Assessor's Addendum report, DBH, 03/09/2007;

(iii) Procedural Orders No's 1 – 7 including affidavits filed in relation to these procedural orders;

(iv) Leaks List, WHT, 02/03/2009

Claimant Documents

(i) The House Warrant of Fitness Company Report, March 2007;

(ii) Estimate of Form Building & Developments, 18/12/2007;

(iii) The House Warrant of Fitness Company Supplementary Report, 21/06/2007;

(iv) Statement of Evidence of Christopher Thurnell, 04/02/2009;

(v) Statement of Evidence of Anna-Marie Thurnell, 04/02/2009;

(vi) Statement of Evidence of Clinton Smith, 03/02/2009;

(vii) Exhibits & Photos for Thurnell Brief of Evidence for Clint Smith;

(viii) Statement of Evidence of Robert Eades, 04/02/2009;

(ix) Reply Statement of Evidence Christopher Thurnell, 27/02/2009;

(x) Reply Statement of Evidence Clinton Smith, 26/02/2009;

(xi) Reply Statement of Evidence Robert Victor Eades, 02/03/2009.

<u>1st Respondent – 2nd Respondent Timothy Olsson, Charlotte Olsson & John Cronin as Trustees of the Picollo Trust</u>

(i) Statement of Evidence Timothy Olsson 20/02/2009;

(ii) Statement of Evidence Rex Moyle;

(iii) Statement of Evidence Jason Coulson, 20/02/2009;

(iv) Statement of Evidence Ronald Crowther, 20/02/2009;

(v) Reply Statement Ronald Crowther, 06/03/2009.

7th Respondent – WB Holland & ORS trading in Partnership as the legal firm Holland Beckett

(i) Witness Statement of Timothy Jones, 20/02/2009;

(ii) Witness Statement of Simon Collett, 20/02/2009;

(iii) Witness Statement of Mark Passey, 24/02/2009;

(iv) Reply Witness Statement of Timothy Jones, 12/03/2009.

11th Respondent – Simon Noel Moran

(i) Statement of Evidence of Simon Moran