IN THE WEATHERTIGHT HOMES TRIBUNAL
TRI 2008-100-000101

BETWEEN	**BRUCE McGREGOR JOHNSTON and HEATHER LILLIAN JOHNSTON** Claimants
AND	**ABIDE HOMES LIMITED** First Respondent
AND	**ALBERT LAURENCE SANDS** (Removed) Second Respondent
AND	**GEOFFREY and PEGGY TOWNE** Third Respondent
AND	**STUART GRAHAM SIZEMORE** (Removed) Fourth Respondent
AND	**ANTHONY PAUL GRUBNER** Fifth Respondent
AND	**MURRAY SCOTT ABBOT** Sixth Respondent
AND	**ELLIS ALBERT MILLER** Seventh Respondent
AND	**IAN WILLIAM (BLUE) WRATT** Eighth Respondent

Hearing: 8, 9, 10 June 2009, 7, 8 July 2009

Appearances:	Claimants	- Self represented
	First Respondent	- No appearance
	Third Respondent	- Nathan Smith and Geoff Shaw
	Fifth Respondent	- Self represented
	Sixth Respondent	- Self represented
	Seventh Respondent	- Self represented
	Eighth Respondent	- No appearance

Decision: 11 August 2009

AMENDED FINAL DETERMINATION
Issued to correct numerical error in paragraph [73]
Adjudicator: S Pezaro

Contents

INTRODUCTION

[1] Mr and Mrs Johnston (the Johnstons) claim the cost of repairing their leaky house. The two storey house was constructed in 1997 of Harditex cladding over untreated timber framing. In 2004 the Johnstons purchased the house from the third respondents, Mr and Mrs Towne ("the Townes"). When the Johnstons began to renovate the downstairs bathroom they discovered that the external wall was rotten. They filed an application with the Weathertight Homes Resolution Service for an eligibility report ("the first report") and the WHRS assessor detected further damage. The Johnstons repaired their house and claim the cost of these repairs, interest and general damages.

THE PARTIES

[2] The first respondent, Abide Homes Limited (Abide), was engaged by the Townes to build 55 Kulim Avenue. Abide did not appear at the hearing or file any defence to the claim. Albert Sands, the second respondent and the sole director of Abide Homes Limited was removed on 24 December 2008. Stuart Sizemore, the fourth respondent, was the designer. He was also removed on 24 December 2008 because the plans which he prepared were altered by another designer prior to the application for building consent.

[3] The third respondent, Mr and Mrs Towne (the Townes) were the previous owners of the dwelling. The Johnstons' claim against

the Townes is firstly, in contract for breach of clause 6.2(5) of the Agreement for Sale and Purchase (Auckland District Law Society, seventh edition, 2 July 1999), and secondly in tort for breach of a duty of care as developers.

[4] The fifth respondent, Anthony Grubner, was contracted by Abide to do the building work on the dwelling. The seventh respondent, Ellis Miller, worked for Mr Grubner. The sixth respondent, Murray Abbot, was employed by Abide as its Building Contracts Manager.

[5] The eighth respondent, Ian Wratt, supplied and fixed butynol products on the roof area above the front entry to the dwelling and on the deck. Counsel for Mr Wratt filed a memorandum and a medical certificate advising that Mr Wratt was not fit to attend the adjudication and could not afford legal representation. Mr Wratt did not file a response to the claim or appear at the hearing. The Johnstons did not claim against Mr Wratt and in their closing submissions said that they believed he had no liability. The inspections required for the purpose of issuing the Code Compliance Certificate were carried out by Bay Building Certifiers Limited, now in liquidation.

[6] None of the respondents filed formal cross-claims however section 72(2) of the Weathertight Homes Resolution Services Act 2006 (the Act) provides that the Tribunal can determine any liability of any respondent to any other respondent. I will therefore consider whether any respondent is liable to contribute to the sum awarded against any other respondent.

THE ISSUES

[7] The issues that I address are:

- What caused the water ingress?
- What damage occurred as a result of water ingress?
- What work was required to repair the damage?

- What was the reasonable cost of that work?
- Liability for the damage
- Interest
- General damages

THE DEFECTS

The Requirements for the Dwelling

[8] The dwelling was constructed with Harditex cladding with a texture finish, a tile roof, and aluminium joinery. At the time of construction there was no requirement for a cavity system. James Hardie provided technical information and specifications for the use of Harditex in the form of a manual which was required to be followed by those involved in the construction. The relevant manual for this dwelling is dated February 1996. This manual contains instructions on fixing the cladding, installing doors and windows and on the joint and coating systems.

[9] Section 7 of the Building Act 1991 (The Building Act) required that all building work for residential properties comply with the Building Code which was part of the regulations enacted by the Building Act. The Building Code set functional and performance requirements for all building work. For the purposes of this claim the relevant clauses of the Building Code are clauses B2 (durability) and E2 (external moisture).

The Three Stages of Repair

[10] The damage to the Johnstons' house has been remedied by targeted repairs carried out in three stages. The repairs overlapped with the preparation of the first report and the subsequent addendum report prepared by David Watson, the WHRS assessor.

The Amount Claimed

[11] The amount claimed for the three repairs is $133,368.93. The total claim is $157,892.93, calculated as follows:

First Repairs	$3,649.80
Second Repairs (excluding the cost of the IPMS report and work on the garden which the Johnstons have identified as betterment)	$46,061.70
Third Repairs	$83,657.43
Total for repairs	**$133,368.93**
Interest calculated to 31 January 2009	$6,524.00 (plus interest to the date of the decision)
General Damages	$18,000.00 ($9,000.00 each)
Total sum claimed	**$157,892.93**

The Evidence of the Defects

[12] The Johnstons rely for evidence of the defects on the first report and the addendum report by Mr Watson, the Evidence File prepared by Independent Project Management Services Limited (IPMS) which documents the second and third repairs, and the evidence of Wayne Pittams, a director of IPMS. None of the respondents engaged an expert or produced evidence other than their own.

[13] IPMS based its repairs to a large extent on Mr Watson's reports although some of the second repairs went beyond those recommended in the first report.

[14] The Johnstons declined to attend mediation and indicated that at adjudication they would rely on Mr Watson's evidence and

would not call any witnesses. I therefore set out in Procedural Order No.8 dated 30 January 2009, directions for the Johnstons on preparing their briefs. I recorded that:

> "The extent to which the claimants are relying on the assessor's report is not clear however they should be aware that the evidence of the WHRS assessor may be tested at hearing".

And that:

> "The Johnstons will need to ensure that the appropriate representative of IPMS is present at any hearing to answer questions from the Tribunal or the respondents on the remedial work and the costs incurred".

I then stated that the Johnstons:

> "[A]re advised to file a brief of evidence and a leaks list from any person who investigated, recommended and oversaw the remedial work carried out on their property".

[15] The Johnstons filed a brief from Mr Pittams and indicated that Geoff Seagar who prepared the IPMS report would be available to give evidence on his report at the hearing. However prior to the hearing the Johnstons advised the Tribunal that Mr Seagar would not attend. In response to a question from the Case Manager they stated that they did not wish to have him summoned. At the pre-hearing conference I told the Johnstons that because Mr Pittams did not take the photographs or prepare the IPMS report his evidence was likely to have less weight than the evidence of Mr Watson.

WHRS Assessor, Mr Watson

[16] Mr Watson's qualifications and experience are set out on page 25 of his first report. He is qualified as an architect and is a member of the New Zealand Institute of Building Surveyors. He has had extensive experience in preparing reports for the Department of Building and Housing. He prepared the estimated cost of repairs in

the first report however the estimate in his addendum report was prepared by Kwanto International, a firm of quantity surveyors.

[17] I found Mr Watson equivocal and at times unclear when giving evidence about the reasons for his conclusions. In particular I found that his reasons for apportioning a high percentage of damage to the cladding installation were not supported by his reports and his oral evidence. Therefore I am not satisfied that the cladding installation was defective to the extent that Mr Watson indicated in his leaks list. Based on the evidence, in particular the photographs of the Johnstons and Mr Watson's reports, I find that in those areas where the cladding did contribute to the damage, the joinery installation, deck construction and penetrations (especially the gas meter box) were a more significant cause of damage than the cladding installation. However, I am satisfied that any error in Mr Watson's apportionment of damage in relation to the cladding is immaterial to the outcome as the same parties were responsible for the work that gave rise to all damage, other than that repaired on Elevation A in the second repairs.

Mr Pittams

[18] Mr Pittams stated in evidence that he is a qualified A grade mechanic and that he has no experience as an expert witness. Mr Pittams said he had held management roles in the building industry for approximately eighteen years. His work history includes a re-cladding business and a framing fabrication business. He has undertaken courses on business management and is currently completing a diploma in project management. According to Mr Pittams, IPMS has project managed and collated information for leaky building projects for approximately three years. Mr Pittams stated he is not a building surveyor and is not qualified in that field. He said that IPMS relies on WHRS assessor reports for diagnosing defects.

[19] Mr Pittams said that he was on site two to three times a week during the course of the Johnstons' repairs. He said that Mr Seagar has "a background in quantity surveying work" but was not a qualified quantity surveyor. Mr Pittams said that he "peer reviewed" the text of the IPMS report which was mostly written by Mr Seagar. Mr Seagar project managed and collated all the information for the second repairs and Mr Pittams project managed the third repairs.

[20] In addition to Mr Pittams' lack of relevant qualifications, a further difficulty with the Johnstons' reliance on Mr Pittams' evidence and the IPMS report is that the Johnstons disagree with some aspects of this report. In Appendix D to Mr Johnston's brief of evidence he comments that IPMS did not clearly show the pathway of rain water after it entered the roof structure above the front entry, that IPMS was not on site during the second repairs when the cladding was removed from above the garage window, and that the IPMS conclusion that moisture entered from the bottom edge of the wall cladding and caused decay conflicts with another observation of IPMS as to the cause of decay in this area. At paragraph 1.3 of Appendix D Mr Johnston gives his opinion that decay in the bottom plate is caused by water flowing down the walls rather than running up. This opinion is consistent with the conclusions of Mr Watson but not with those of Mr Pittams.

[21] Mr Pittams' lack of qualifications or experience in identifying weathertightness defects and causes of damage in relation to leaky buildings means that where there is any disagreement between Mr Watson and Mr Pittams on the cause of water ingress or the remedial work required and there is no other determinative evidence, I will tend to prefer the evidence of Mr Watson.

THE DAMAGE TO THE DWELLING

[22] On the second day of hearing I directed Mr Watson and Mr Pittams to complete separate leaks lists. I required them to do so in relation to each of the three stages of repairs by identifying:

- the probable dominant cause or causes of water ingress in relation to each elevation using Mr Watson's description of the elevations as A, B, C and D;
- assessing, where there is more than one cause on an elevation, the percentage of the damage on that elevation that they attribute to each cause;
- which defects were primary and secondary causes of water ingress.

[23] Because the repairs were targeted and carried out in stages and the dwelling was not completely re-clad, the causes of the damage and the scope of each of the repairs will be discussed in relation to each elevation.

The First Repairs

Elevation A

[24] The Johnstons' photographs on pages 84 to 91 of the first report show the damage around the bathroom wall (part of the area referred to as Elevation A in the addendum report). The Johnstons identify the remedial work to this area as 'the first repairs'. These repairs were largely finished before the first report was completed on 21 November 2006.

[25] In the first report Mr Watson noted that the Johnstons had commented on damage to the front door entrance canopy soffit framing and adjacent wall cladding which had happened after a

storm in May 2005. At paragraph 6.1.3.1 of the first report, Mr Watson identified the cause of the roof leaks in this area and at paragraph 6.3.3.1 he described the remedial work required.

[26] At paragraph 6.4.3.2 Mr Watson recommended removing the external cladding and windows on both floors of the dwelling and fitting a cavity system on the length of this wall whereas the Johnstons' first repairs involved removing and replacing only the cladding on the ground floor around the bathroom. They did not install a cavity. The difference between the extent of the first repairs and the repairs recommended in the first report is reflected in the difference in remedial costs. The claim for the first repairs is $3,649.80 compared with $11,500 estimated in the WHRS report for the recommended repairs.

[27] None of the respondents have challenged the amount claimed for the first repairs. Based on the first report I am therefore satisfied that the first repairs were necessary as a result of water ingress and that the cost claimed was reasonable as it was less than the estimate by Mr Watson.

i) Causes of Damage to Elevation A

[28] The evidence of Mr Watson is that the damage in this area was attributable in equal proportions to the fixing of the cladding, the window installation and the application of the surface coating. For the reasons given, I am not convinced that the fixing of the cladding and the installation of the windows contributed equally to the damage in this area. However, as the same parties were responsible for the cladding and window installation it is not necessary to apportion liability for these defects at each stage of the repairs.

The Second Repairs

[29] On 2 February 2007 the Johnstons were advised that the claim was eligible. In July 2007 they engaged IPMS to manage the repairs to the roof area ("the second repairs") recommended in the first report. This work began on 24 October 2007 however when the repairs started it was apparent that the damage around the front entry area was more extensive than indicated in the first report.

[30] On 18 February 2008 the Johnstons applied for an addendum report. While that report was being prepared the Johnstons completed the second repairs, including work in addition to that recommended in the first report. This work was supervised by IPMS and received a Code Compliance Certificate on 7 March 2008. On 10 April 2008 IPMS issued a report documenting the second repairs.

Elevation A

[31] Elevation A is at the front of the house. The second repairs on this elevation involved the roof gutter and the pillar at the entrance. In his first report Mr Watson identified the damage caused by the roof gutter but he did not take moisture readings around the pillar or detect any damage in this area. The second repairs were complete by the time Mr Watson investigated for the addendum report and therefore he did not have the benefit of seeing this area with the roof opened up and the cladding removed. Mr Watson confirmed that his evidence and his leaks list prepared during the hearing were based on his first investigation and the photographs of the second repairs to Elevation A taken by the Johnstons and IPMS. Mr Watson said that on the basis of this information he considered that the repairs to the front entry roof and pillar were justified.

i) Causes of Damage to Elevation A

[32] Both Mr Watson and Mr Pittams attribute a high proportion of the damage in this area to the construction and layout of the roof and the internal gutter which had insufficient capacity to cope with the rainwater.

[33] On the first day of the hearing Mr Watson's evidence was that the finished ground level had little impact in this area because the water tracking down was the primary cause of the damage. Subsequently in the hearing, after producing his leaks list, Mr Watson attributed 50% of the damage in this area to the construction of the butyl roof gutter and the other half of the damage to the lack of clearance around the pillar caused by the way that the cobblestone pavers were laid.

[34] When questioned, Mr Watson said that the reason he attributed the damage equally between the roof construction and the ground level was that either defect would have required this area to be re-clad. He identified a lack of supervision as a minor secondary cause of the lack of ground clearance although he said that the person laying the paving should have known the requirements for ground clearance. However Mr Abbot said that although he arranged for the Council inspections and would have received a copy of the record of inspections, he could not recall being on site at the last inspection when the inspector warned the cobblestone layer about the ground levels. I accept Mr Abbot's evidence that Abide is likely to have completed its work and left the site before the last inspection because the Townes were required to pay Abide's final account before moving into the house and doing the landscaping. I therefore find that Abide was not responsible for the laying of the pavers. Moreover, as later in this decision I find that the Townes are not developers, they were entitled to rely on the expertise of the person laying the pavers and are not liable for the lack of ground clearance.

[35] In his leaks list Mr Pittams attributed 75% of the damage in this area to the way in which the water from the roof drained and the construction of the internal gutter and 25% to the lack of ground clearance and the fact that the pillar framing was not on a concrete plinth or footing. I do not accept that Mr Pittams has the required expertise in relation to the construction of the pillar for me to make a finding based on his evidence. I am therefore not satisfied that the construction of the pillar has contributed to water ingress as there is no expert evidence to support such a conclusion.

[36] In Mr Johnston's Appendix D to his brief he states that:

> "[1.3] It is more likely that the bottom plate has decayed from rainwater that had entered at the roof/wall junction. That water had run via the soffit and down the wall framing in the window area. It was then trapped around the bottom plate by the black polythene upturn over the outer face of the plate.
>
> [1.4] The frame decay in the roof area and down through the wall framing and pillar to ground level, can primarily be said to have arisen from rainwater that entered via a badly designed and constructed roof/wall junction above the front entry area."

The four photographs in Appendix D illustrate these points.

[37] In determining the cause of the damage to this area I prefer the evidence of Mr and Mrs Johnston to the later evidence of Mr Watson because the Johnstons observed and extensively photographed the repairs. In addition, their evidence that the water tracked down to this area from the edges of the soffit between the pillar and the garage window is consistent with the evidence that Mr Watson gave first on the cause of damage to this area. Mr Watson's first evidence on this issue was consistent with his first report and his addendum report. He did not identify the ground clearance as being an issue in either of these reports, although he noted on page 9 of

the addendum report that the distance between the internal floor level and external ground level did not comply with the Building Code. Mr Watson did not link this issue to any damage however Bay Building Certifiers recorded on 18 August 1997 that the building inspection was passed although the inspector "warned the cobblestone layer about ground levels".

[38] I find that the lack of ground clearance between the pavers and the pillar caused water to enter the pillar although this was a less significant cause of damage than the roof gutter defect. Based on the photographs produced by the Johnston and those in the IPMS report, I find that the damage caused to the pillar was a combination of the defects in the roof and the lack of ground clearance. The fact that the party laying the cobblestone pavers is not a party to these proceedings has no effect on the amount awarded to the Johnstons for these repairs or the liability of the respondents. Those parties responsible for the damage caused by the roof gutter defect are liable for all costs arising from the second repairs to Elevation A as the repairs carried out were required as a result of the damage they caused. I find that none of the damage to this area was caused by the installation of the cladding or the joinery.

Elevation C

[39] In the first report Mr Watson identified the area around the rear window of the garage as damaged and estimated the repair cost at $4,500.00 plus GST. The cost claimed for the repairs in this area is $12,950.00. In evidence Mr Watson accepted that this cost was reasonable.

i) Causes of Damage to Elevation C

[40] Mr Watson said that the cause of the damage in this area was the window installed without adequate flashing and the raised bands around it. He attributed the damage in this area equally to the

fixing of the cladding, the window installation and the surface coating application.

[41] Mr Pittams attributed all of the damage in this area to the layout of the cladding. The photographs produced by the Johnstons of this area show that there was vertical cracking under the centre of the window (photograph 9.2). Photographs 10.4 and 11.1 show the corners of this window and there is no evidence of cracking at these corners.

[42] Mr Watson and Mr Pittams agree that the Harditex manual required the cladding to be offset at the windows and that this was not done in all cases. However Mr Watson said that if this defect in the sheet layout had caused cracking it would be evident at the corners of the windows. It was not Mr Watson's opinion that the cladding layout caused any cracking and I do not accept Mr Pittams' opinion that the entire damage in this area was caused by the sheet layout. I prefer the evidence of Mr Watson that the damage in this area was caused by the installation of the cladding, the installation of the window and the surface coating application. However I do not accept that these factors contributed equally to the damage.

The Third Repairs

[43] On 26 July 2008 the addendum report was completed identifying further areas of water ingress and recommending remedial work to all elevations. The Johnstons then engaged IPMS to manage the repairs recommended in the addendum report ("the third repairs"). A Code Compliance Certificate was issued for this work in January 2009.

Elevation B

[44] The area of damage that is referred to as Elevation A/B by Mr Watson and Elevation B by Mr Pittams is around the gas meter box on the rear garage wall.

i) Causes of Damage to Elevation B

[45] Both Mr Watson and Mr Pittams believe that the installation of the cladding and the lack of flashing around the meter box caused the damage in this area. Mr Pittams did not indicate how he would apportion the damage between these two factors. Mr Watson, in his leaks list, indicated that the cladding installation and lack of flashing were equal primary causes of the damage. He identified a lack of design specifications and supervision as secondary causes. However in evidence (on 7 July 2009) Mr Watson said that it would have been obvious to the surface coat applicator that there was no flashing around the meter box, indicating that this trade also had liability for the damage.

[46] Mr Grubner said in evidence that he installed the gas meter box. He said that he was not provided with any flashings or instructions for installation and that at the time the new silicones which were available were considered adequate to prevent water ingress. I am not satisfied that this was a reasonable conclusion for a builder with Mr Grubner's experience. I find that the failure to adequately seal around the gas meter box is due to a lack of care by Mr Grubner, the failure by Mr Abbot to co-ordinate and supervise the trades on site, and the failure of Abide to ensure that satisfactory details were provided to the builder and installer of the meter box.

ii) Cost of Repairs for Elevation B

[47] Mr Watson estimated the cost of this repair as $11,905.00 inclusive of GST, less than the cost claimed of $10,386.11. I therefore find the cost of this repair reasonable.

Elevations A/D/C

[48] The third repairs on the deck of the upper floor main bedroom (Elevation C), around the windows on Elevation D, and the junctions of Elevations A, D and C.

i) Causes of Damage to Elevations A/D/C

[49] Mr Watson said that he assumed when he prepared his two reports that the cladding and the surface coating were applied by the same trade and that this assumption was reflected in his reports. It became clear at the hearing that this was not the case. In his leaks list Mr Watson said that the damage in this area was due to a combination of lack of flashing, the installation of the cladding and the application of the surface coating. He said that two-thirds of the damage in this area was due, in equal proportions, to the way in which the windows were installed and the application of the texture coating. Mr Watson identified the raised bands around the windows as a further contributing factor to the damage around the upper floor bedroom windows. He attributed the remaining third of the damage to the open deck-to-wall joint on the deck of the main bedroom. Mr Watson apportioned this third of the damage equally to the fixing of the cladding, the installation of the deck membrane and the application of the surface coating and said that insufficient design, specifications and site supervision was a secondary cause of the damage in this area. However, as recorded at paragraph [42], Mr Watson said that there was no visible horizontal cracking in the

cladding and that he did not see any cracks caused by an incorrect layout of the Harditex sheets.

[50] Mr Watson said that the defect in the surface coating was that it was not applied evenly to all surfaces. In particular the applicator had failed to seal under the bottom edges of the cladding. I note that although there was an application to join the directors of the company which carried out the texture coating, this application was not granted because there was no evidence that the sales manager and director of the company had any personal involvement or control over the work carried out on site (refer Procedural Order No.8).

[51] Mr Pittams referred to the damage in this area by separating his comments in relation to elevations A, C and D. In his leaks list he apportioned 85% of the damage repaired on elevation A in the third repairs to the installation of the cladding and 15% to the texture application. He commented that the poly bands should not have been installed without flashings.

[52] In relation to elevation C, he apportioned 35% of the damage to the fact that the cladding was not installed to specifications, 55% to the lack of flashing at the deck to wall junction and the remaining 10% equally to the lack of clearance between the deck and the door and the need to install a RELN drain. In evidence, Mr Pittams said that the 10% he had apportioned to creating the clearance and the drain did not reflect damage but this work was required to obtain building consent at the time of repair. I therefore conclude that the only defects that Mr Pittams identifies in this area that have caused water ingress are the cladding installation and the open deck to wall junction.

[53] In relation to Elevation D, Mr Pittams apportioned 40% of the damage to the failure to install the Harditex to specifications, 40% to the lack of flashing around the deck to wall junction and 20% to the

lack of ground clearance or finished floor level. In evidence Mr Pitttams said that there was a small amount of damage due to the finished floor level.

[54] I conclude that the damage giving rise to the third repairs was caused by the combination of the incorrect installation of the windows, the open deck to wall junction and to a lesser extent the cladding installation and surface coating. An overriding factor was the failure to provide the trades involved with adequate designs and specifications and to co-ordinate their work.

ii) Cost of Repairs to Elevations A/C/D

[55] The estimate for these repairs in the addendum report was $115,538 inclusive of GST which is more than the amount claimed. I therefore find that, other than the deductions made below, the cost claimed for these repairs is reasonable.

QUANTUM

[56] There has been no challenge to the repair costs claimed by the Johnstons other than questions raised by the Townes about the claim by the Johnstons for their own labour and for repairs to a light, handrail and the garage door, and betterment.

Labour Charges

[57] The labour costs claimed are set out in Appendix B to Mr Johnston's brief of evidence. These labour claims are for gardening work, storage (in other words preparing and packing and unpacking household items for storage), removing furnishings, wrapping and covering furniture left in place during the remedial work and reinstating handrails and cleaning decks. The Johnstons have charged $25.00 per hour for this work and added their labour charges to the cost of the second and third repairs. Their labour

charges are therefore included in the amount on which they claim interest.

[58] For the Townes, Mr Smith submitted that he had reviewed all Tribunal decisions for the past three years and had been unable to find a case in which claimants were awarded damages for their own labour. Mr Smith cited the case of *Meister v Carey & Anor*[1] involving repairs to a boat. In this case Wild J rejected the plaintiff's claim for compensation for his own labour finding that the labour was spent in his spare time and therefore the claimant could not claim that he had "lost earnings" as a result.

[59] As Mr Smith submitted, because Mr Johnston is retired he did not lose income as a result of the work he did during the repairs. There is no suggestion that Mrs Johnston would have been in paid employment during the time that she did the relevant work. The Johnstons describe the work they did in Appendix G at paragraph 7.4 in the following way: "[O]ur enjoyment of our gardens gave way to our struggle to save what we could from damage and decline" and at 11.1 they state that "significant areas of our garden had to be disestablished and then restored later".

[60] At paragraph 11.5 they state that "despite all of our moving of furniture for the works and the covering of it with polythene, there has been a major task for a cleaning of the house interior from construction dust". While I accept that the work the Johnstons did was required because of the weathertightness damage, I am not satisfied that there is any basis for awarding the costs claimed. The work involved in either moving out during repairs or making it possible to remain in a house while repairs are carried out is, I consider, appropriately compensated by an award for general damages which recognises the stress and inconvenience suffered by claimants in this situation. For these reasons I decline to award the labour charges claimed by the Johnstons and therefore deduct the

[1] [3 July 2006] HC Blenheim, CIV 2005-406-000008, Wild J.

sum of $125.00 from the second repairs and $1,875.00 from the third repairs.

[61] I find that the amount of $74.25 for replacing a light cover due to damage by the Johnstons' contractor, the sum off $135.00 for repairing the handrail which was damaged when the light fitting fell on it, and the amount of $74.25 for servicing the garage door are not costs arising from weathertightness defects. These amounts, a total of $283.50, are therefore deducted from the Johnstons' claim for the third repairs.

Betterment

[62] The house was nine years old when the first repairs were carried out and approximately eleven years old by the time of the third repairs. This raises questions about whether there has been any betterment in terms of the interior and exterior painting and the texture coating.

Interior and Exterior Painting

[63] It is generally accepted that interior paint work has a life expectancy of five years. This guideline was applied in *Tabram & Anor v Slater & Ors.*[2] In that case expert evidence was given that exterior paint should last ten years. Mr Watson said that in his opinion exterior paint has a life of seven years and although he is not strictly qualified in painting or surface coating I accept his evidence as reliable given his background and experience. I am satisfied that ten years is the outside limit for exterior paint work and as the majority of repairs were carried out when the house was more than ten years old, it makes no difference which estimate is adopted. On this basis it is appropriate that the total cost of interior and exterior painting is deducted from the claim.

[2] [17 April 2009] WHT TRI 2007-100-000041/ DBH 05001, Adjudicator S Pezaro.

[64] The estimate submitted by the Johnstons for the amount of betterment in the painting cost is not the best evidence available as the actual cost has been incurred and claimed. For these reasons the total cost of painting of $5,318.00 is deducted.

The Texture Coating

[65] The evidence of Mr Watson was that the texture coating should be expected to last for 15 years. As stated, Mr Watson's evidence was the best available on this issue. Given the age of the house I therefore make a deduction for betterment of two-thirds of the cost of the coating. The amount deducted is $466.67 from the first repairs; $1,921.33 from the second repairs; and $8,745.00 from the third repairs.

Repair Costs Awarded

[66] Based on my findings above the repair costs awarded are calculated as follows:

First Repairs	
Amount claimed	$3,649.80
Less painting	$466.67
Less ⅓ texture coating	$432.00
	$2,751.13

Second Repairs (Elevation A)	
Amount claimed	$33,111.11
Less claimant labour	$125.00
Less painting	$1,725.57
Less ⅔ texture coating	$1,055.67
	$30,204.87

Second Repairs (Elevation C)	
Amount claimed	$12,950.44
Less painting	$1,109.29
Less ⅔ texture coating	$575.82
	$11,265.33

Third Repairs	
Amount claimed	$83,657.43
Less claimant labour	$1,875.00
Less light/handrail/garage door	$283.50
Less painting	$2,420.90
Less ⅔ texture coating	$8,745.00
	$70,333.03

Interest

[67] The Johnstons claim interest up to the date of determination of the claim. The Tribunal has the power under Schedule 3, Part 2 cl 16(1) of the Act to award interest at a rate not exceeding the 90-day bill rate plus 2%. The 90-day bill rate at the commencement of the hearing on 8 June 2009 was 2.7% and therefore I calculate interest at the rate of 4.7%.

[68] At a telephone conference convened on 21 January 2009 the Johnstons confirmed that they would not attend mediation. They were given an opportunity to reconsider by 16 February 2009. At this stage of the proceedings all respondents were represented by counsel and, apart from Mr Wratt, agreed to mediate. Each party has the right to choose whether or not to participate in mediation and it is not compulsory under the Act. However in this case I consider that mediation was appropriate as:

- there was no contradictory technical evidence produced by the respondents
- the claimants were reluctant to call any witnesses
- the claimants did not claim against the only respondent not attending mediation
- the cost to the claimants of attending mediation was minimal as they are retired and self-represented

[69] The Tribunal has the discretion to award interest under Schedule 3, Part 2 cl 16(1) of the Act. For the reasons outlined

above, I consider that the claimants and not the respondents should bear any loss of interest accruing after the date when the claimants declined to attend mediation. I therefore award interest up to 16 February 2009.

First Repairs	$2,751.13
Interest (from 30-9-06 to 16-2-09 = 870 days)	$308.20
Second Repairs (Elevation A)	$30,204.87
Interest (from 31-12-07 to 16-2-09 = 413 days)	$1,606.57
Second Repairs (Elevation C)	$11,265.33
Interest (from 31-12-07 to 16-2-09 = 413 days)	$599.01
Third Repairs	$70,333.03
Interest (from 31-10-08 to 16-2-09 = 108 days)	$978.11
Total Interest	**$3,491.89**

General Damages

[70] The Johnstons have claimed $9,000.00 each for general damages. The High Court has awarded general damages of up to $25,000.00 per occupier to plaintiffs in leaky building claims.[3] There has been no challenge to the Johnstons' statements in evidence in support of their claim for damages other than the submissions for the third respondent on the amount generally awarded for damages in Weathertight Homes Resolution Service and Tribunal cases. Mr Smith acknowledges that recent cases have reflected higher awards but submits that general damages at the lower end of the scale are appropriate because targeted repairs were carried out, the Johnstons did not have to move out, and the repairs were supervised by project managers. Mr Smith also submits that the claim could have been resolved at an earlier stage with less stress to the Johnstons had they agreed to attend mediation.

[3] *Body Corporate No 183523 & Ors v Tony Tay & Associates Ltd & Ors* [30 March 2009] HC, Auckland, CIV-2004-404-004824, Priestley J; and *Body Corporate 191608 & Ors v North Shore City Council & Ors* [19 February 2009] HC Auckland, CIV 2008-404-002358, Asher J.

[71] Given recent awards by the High Court the amount of damages claimed by the Johnstons is in my view an appropriate level of award in this case. I therefore award the Johnstons $9,000.00 each, a total of $18,000.00.

[72] General damages are apportioned to each stage of repair as follows:

General Damages	**Amount**	**% of Total Repair Costs Awarded**	
First Repairs	$2,751.13	2.40%	$432.00
Second Repairs (Elevation A)	$30,204.87	26.37%	$4746.60
Second Repairs (Elevation C)	$11,265.33	9.83%	$1769.40
Third Repairs	$70,333.03	61.40%	$11052.00
TOTAL	**$114,554.36**	**100%**	**$18,000.00**

Summary of Quantum

[73] Based on the findings made above, I conclude that the Johnstons are entitled to claim from the respondents the sum of $114,554.36 for repairs, $3,491.89 for interest and $18,000 general damages, a total of $136,046.25 calclulated as follows:

First Repairs	
Amount claimed	$3,649.80
Less painting	$466.67
Less ⅓ texture coating	$432.00
	$2,751.13
Interest [4.7% from 30/09/06 to 16/02/09 = 870 days]	$308.20
General Damages	$432.00
TOTAL	$3,491.33

Second Repairs (Elevation A)	
Amount claimed	$33,111.11
Less claimant labour	$125.00

Less painting	$1,725.57
Less ⅔ texture coating	$1,055.67
	$30,204.87
Interest on $30,204.87 [4.7% from 31/12/07 to 16/02/09 = 413 days]	$1,606.57
General Damages	$4,746.60
TOTAL	$36,558.04

Second Repairs (Elevation C)	
Amount claimed	$12,950.44
Less painting	$1,109.29
Less ⅔ texture coating	$575.82
	$11,265.33
Interest [4.7% from 31/12/07 to 16/02/09 = 413 days]	$599.01
General Damages	$1,769.40
TOTAL	$13,633.74

Third Repairs	
Amount claimed	$83,657.43
Less claimant labour	$1,875.00
Less light/handrail/garage door	$283.50
Less painting	$2,420.90
Less ⅔ texture coating	$8,745.00
	$70,333.03
Interest [4.7% from 31/10/08 to 16/02/09 = 108 days]	$978.11
General Damages	$11,052.00
TOTAL	$82,363.14
TOTAL AWARDED	**$136,046.25**

THE CLAIM AGAINST THE FIRST RESPONDENT, ABIDE HOMES LIMITED

[74] The third respondents, the Townes, contracted Abide to build the house at 55 Kulim Avenue. Abide employed Murray Abbot as its building contracts manager and engaged all subcontractors involved in the construction. As recorded in Procedural Order No.1, Abide initially refused service of documents to its registered office. After

establishing that the registered office of Abide was also the address of Albert Sands, a director of Abide, I ordered that all documents were to be served to the first respondent at that address. The following documents were then filed by Mr Sands on behalf of Abide and have been considered:

- 13 October 2008 – list of documents for discovery by second respondent for first respondent.
- 20 October 2008 – confirmation that no other documents held by first respondent.
- 14 November 2008 – application by first respondent for the joinder of Ian Wratt and Tauranga City Council and an affidavit in support by Albert Sands.
- 15 December 2008 – memorandum on behalf of Abide regarding joinder application for the Council.
- 23 January 2009 – memorandum re joinder of the Council.

[75] I have also considered the affidavit filed by Albert Sands sworn on 12 December 2008 in support of his application for removal.

[76] It is well established that a builder owes a duty of care to a subsequent purchaser[4] and therefore in the circumstances of this particular claim, Abide owed a non-delegable duty of care to subsequent owners of the dwelling. Abide was responsible for engaging and co-ordinating all subtrades involved in the construction, for supplying the material and ensuring the standard of the work carried out by all trades. I find that Abide was negligent in failing to ensure that the work was carried out to the required standards. Abide is therefore jointly and severally liable for the costs arising from the defects in the Johnstons' dwelling.

[4] Bowen v Paramount Builders (Hamilton) Ltd [1977] 1 NZLR 394 (CA).

THE CLAIMS AGAINST THE THIRD RESPONDENTS, TOWNES

Claim in Negligence - Breach of Duty of Care as Developers

[77] The Johnstons allege that the Townes acted as developers in building the dwelling at 55 Kulim Avenue. This claim is set out at paragraphs 35 to 43 of the Johnstons' statement of claim and in the brief of evidence of Bruce Johnston at paragraphs 39 to 47 and appendix F to this brief. Mrs Towne filed a brief and gave evidence at the hearing however Mr Towne did not give evidence and the Johnstons did not apply to summon him.

[78] The Johnstons allege that the Townes acted as developers because they removed the original dwelling from the section, subdivided it and built two houses, 55 and 57 Kulim Avenue, subdivided another property and built a house on it and made a profit. At paragraph 43 of his brief, Mr Johnston states that "throughout the planning stage, the Townes had been exercising direct control of the project that was likely to bring them future profit." However Mr Johnston contradicts this statement at paragraph 41 where he states that "…the Townes may not have been 'hands on' developers but were still the developers of this property".

[79] The Johnstons have not identified any aspect of the construction that the Townes directly controlled but claim that the Townes applied for council consent to build below the specified datum level and amend plans in relation to the daylight requirements.

[80] Mrs Towne said that she was aware that the plans needed to be altered but that she did no more than deliver the plans to the Council for filing. There is no evidence that the Townes were involved in making the decisions that led to these applications to vary the plans or depart from the Council's usual requirements or that the Townes made any other decisions that gave rise to relevant defects.

[81] Mrs Towne said that the only time she was consulted on a matter of construction was when Mr Sands discussed changing the upper deck balustrades from glass to aluminium. Mrs Towne said she did not consider or discuss the implications of this change. Mrs Towne's evidence was that she and Mr Towne built 57 Kulim Ave with the idea of renting it but sold within a year to fund the construction of 55 Kulim Ave. They lived in 55 Kulim Avenue for approximately seven years before selling the house to the Johnstons, retiring and moving to Australia.

[82] The Johnstons emphasise the financial gain that they believe the Townes had from 55 Kulim Avenue as evidence that the Townes acted as developers. In support of this submission the Johnstons cite a decision issued under the Weathertight Homes Resolution Services Act 2002, *Tidmarsh & Anor v Glover & Ors*[5]. In this case the adjudicator was satisfied that "*it is both just and reasonable to hold that a 'developer' may be described as any person who stands to obtain a profit or valuable benefit by carrying out, or engaging others to carry out, development work, whether in trade or otherwise*." The Tribunal is only bound by decisions of a higher court therefore I am not bound by this decision.

[83] The Court of Appeal has described a developer as acquiring land, subdividing it and building homes on the lots for sale to members of the general public.[6] Harrison J addressed the definition of a developer in his decision of *Body Corporate 188273 v Leuschke Group Architects Limited & Ors*:[7]

> "[31] The word 'developer' is not a term of art or a label of ready identification like a local authority, builder, architect or engineer, whose functions are well understood and settled within the hierarchy of involvement. It is a loose description, applied to the legal entity which by virtue of its ownership of the property and control of the consent, design,

[5] [28 September 2006] WHRS, DBH Claim No. 01086, Adjudicator J Green.
[6] Mt Albert Borough Council v Johnson [1979] 2 NZLR 234 (CA).
[7] [28 September 2007] HC, Auckland, CIV 2004-404-002003, Harrison J.

construction, approval and marketing process qualifies for the imposition of liability in appropriate circumstances.

[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 advisers. 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."

[84] The definition applied by Harrison J emphasises the degree of control and decision making power that the relevant person has exercised in relation to the building work as the factors giving rise to the actionable duty of care owed by a developer. The question of profit is relevant but not determinative.

[85] The fact that the Townes subdivided sections and built houses for rental purposes does not justify a finding that they assumed the role of a developer in relation to 55 Kulim Ave although it may be arguable that they assumed this role in relation to number 57. For these reasons, I find that this limb of the claim against the third respondent fails.

Claim in Contract - Breach of Vendor Warranties

[86] The Johnstons rely on clause 6.2(5) of the Agreement for Sale and Purchase (Auckland District Law Society, seventh edition, 2 July 1999). Clause 6.2 (5) provides that:

(5) Where the vendor has done or caused or permitted to be done on the property any works for which a permit or building consent was required by law:
   (a) The required permit or consent was obtained; and
   (b) The works were completed in compliance with that permit or consent; and
   (c) Where appropriate, a code compliance certificate was issued for those works; and

(d) All obligations imposed under the Building Act 1991 were fully complied with.

[87] There is no allegation that there has been any breach of 6.2 (5) (a) or (c). The only potential for breach is in relation to clauses (b) and (d). In particular the Johnstons claim that the Townes are responsible for water ingress resulting from the lowered ground level. However, as stated, there is no evidence that the Townes made this decision and, even if they had, there is no expert evidence supporting the claim that this aspect of the construction resulted in damage. Further, it was a change for which Building Consent was granted. In relation to (d) the claim is that because the building has leaked, it has not performed to the requirements of Section 7 of the Building Act 1991, in respect of the requirements for durability (B2) and external moisture (E2.2 and E2.3.2).

[88] In their closing submissions the Johnstons referred to the case of *Theobald v Coulter & Anor*[8] decided under the Weathertight Homes Resolution Services Act 2002. Adjudicator Dean held that the Coulters were liable for breach of clause 6.2(5) of the same edition of the ASP. The Townes' position can be distinguished from that of the Coulters who identified themselves as the builders on the application for building consent, supplied the building materials and co-ordinated and managed the construction process.

[89] Given my finding that the Townes did not exercise control or decision making power over the manner in which 55 Kulim Avenue was constructed, I would have to find that clause 6.2(5)(b) of the Agreement for Sale and Purchase operated, and was intended to operate, to not only warrant that the required permits or consents were obtained and issued but also, that where a code compliance certificate was issued, that certificate was properly issued. The Townes were entitled to think that once a code compliance certificate had been issued the works had been completed in accordance with the building consent. I am not bound by the decision of *Theobald*

[8] [10 June 2005] WHRS, DBH Claim No. 0300.

and there is no legal basis for holding the Townes liable for breaching the warranty when they did not exercise any control over the construction and had obtained the necessary Code Compliance Certificate. The claims against the Townes, in both negligence and contract, are therefore dismissed.

THE CLAIM AGAINST THE FIFTH RESPONDENT, MR ANTHONY GRUBNER

[90] The Johnstons claim that Mr Grubner negligently breached his duty of care as the builder by incorrectly installing the Harditex cladding and the windows and making those errors and omissions listed at paragraph 55 of the claimants' statement of claim.

[91] Mr Grubner states that he had been building for a number of reputable companies for 20 years. He says that when the dwelling was constructed the on site initiative, experience and advice from other builders and contractors was used and that this was considered the norm. Mr Grubner said that no technical information was supplied by Abide and that he did not possess the Harditex manual or know that one existed. Mr Grubner admits that the Harditex sheets were not offset but says that this was not a contributing factor causing leaks. Mr Grubner says that he consulted Mr Abbot on the lack of PVC flashing at the mid-floor horizontal sheet joints and that after Mr Abbot consulted the texture applicator he told Mr Grubner that the flashing was not required.

[92] Mr Grubner says that the inspector, Brian Billings, instructed him to line up some joints with the edge of openings to act as relief joints and that he had to re-do some sheets of cladding in response to this instruction. Mr Grubner says that he does not know whether the texture applicators treated the relief joints correctly as he had left the site before they carried out their work.

[93] Mr Grubner says that he was not responsible for the design or construction of the roof wall junction. He was not provided with any detail for the construction of the entry pillar base. He says that he has no recollection of the gap between the deck joist and the wall which is not flashed. In his affidavit dated 3 December 2008 at paragraph 9, Mr Grubner says that he and Ellis Miller left the site when the gib-board was fixed and internal finishing timber installed. He said that the job was far from finished when he left it and that weatherproofing work such as the Harditex jointing, stopping, sealing and texture coating had not been done nor had the ground works or paving.

[94] Mr Abbot was responsible for ensuring that Mr Grubner had clear instructions for the work that was required of him. However, Mr Grubner was engaged by Abide as a builder who was competent to carry out the work for which he was contracted. He describes himself as an experienced builder at that time and therefore it would be unreasonable to expect his work to be closely supervised in the way that Mr Grubner says that he supervised Mr Miller. Mr Grubner must have led Abide to believe that he had the necessary knowledge. If he did not have the required knowledge, he either should not have accepted the contract or should have ensured that he obtained the technical specifications required.

[95] I find that like Abide, Mr Grubner also breached his non-delegable duty of care as builder and is jointly and severally liable for those remedial costs awarded as a result of the defects arising from his work, that is all damage other than that repaired during the second repairs on Elevation A.

THE CLAIM AGAINST THE SIXTH RESPONDENT, MR MURRAY ABBOT

[96] Murray Abbot accepts that he was employed by Abide as a building contracts manager. Mr Abbot stated that at the same time

that he was the building contracts manager, he ran a joinery shop for Abide. He said he spent his time divided between the two roles. Mr Sands, in his affidavit sworn on 12 December 2008, set out Mr Abbot's role. He described it as:

- Ordering and supervising the supply of materials.
- Responsibility for communication/organisation with regard to subcontracts and meeting clients' requirements, as well as scheduling of the work.
- Invoicing progress payments.
- Checking subcontractors' invoices and approving them.
- All matters pertaining to the establishment on site and the dis-establishment of the building operations.
- Dealing with building detail enquiries.
- Checking that Abide Homes Limited standards were met.

[97] Mr Abbot said that he had been a contracts manager since 1992. Mr Abbot said that his purpose on site was to ensure that progress on the job was on time and to arrange for subcontractors. Mr Abbot denies that his responsibilities included dealing with building detail enquiries or checking that Abide's standards were met. Mr Abbot stated that he would visit the site to check on progress but did not visit the site to check the quality of the work of the builders although he accepted that he approved progress payments. Mr Abbot says that Mr Sands had the overriding responsibility of supervision for the work. In his statement of defence, Mr Abbot denies that he had a duty to be familiar with the technical instructions for the use of Harditex and to ensure that these instructions were followed by the builders.

[98] Mr Abbot said that Mr Sands determined the materials that were to be ordered for the job. Mr Abbot agreed with Mr Grubner that there were site plans and a set of specifications on site but no specifications for the cladding. Mr Abbot said that if a technical question arose he referred that question to Abide or to the supplier.

Mr Abbot said that when he had a query about the horizontal joints in the cladding he called the texture coater and relayed his advice to Mr Grubner.

[99] I am satisfied that Mr Abbot was responsible for supervising the quality and standard of the work carried out by the builders and other subtrades on site. There does not appear to be anyone else who had this role and Mr Abbot accepts that it was his responsibility to approve payments to contractors. This decision must have required Mr Abbot to ensure that the work was of an acceptable standard. It is unlikely that Mr Abbot's role was confined to deciding whether or not each stage of the work was complete without any regard to quality.

[100] Mr Watson identified a failure to follow the Harditex technical information and the installation of the windows as significant causes of defects as well as the design and construction of the roof gutter and the ground clearance. A secondary cause was the lack of supervision and co-ordination of the work of the subtrades. In particular, in relation to the installation of the joinery, Mr Grubner said that when he was not sure of the height or layout in respect of installation of horizontal joints, he contacted Mr Abbot who spoke to the texture applicator and then according to Mr Grubner, decided that PVC joints were not needed. Mr Grubner stated in evidence that Mr Abbot looked at his work on site and checked the quality of it. Mr Grubner said that Mr Abbot would tell him if he was unhappy with his work.

[101] In relation to the roof defects on Elevation A, Mr Abbot said he could not recall if he discussed the roof to wall junction with the relevant trades. Mr Abbot states that he did not know who had built the roof gutter and that he had not seen the pillar being built. However, Mr Abbot accepts that part of his responsibilities included scheduling the work, communicating with subcontractors and all matters pertaining to the establishment and dis-establishment of

building operations. I therefore find that he was responsible for setting the order in which the work was to be carried out and co-ordinating that work. As the contracts manager responsible for supervising the builders and other trades, Mr Abbot owed a non-delegable duty of care to subsequent owners.[9] Mr Abbot is therefore jointly and severally liable for the weathertightness defects in this dwelling.

THE CLAIM AGAINST THE SEVENTH RESPONDENT, MR ELLIS MILLER

[102] The claim against Ellis Miller is that as a builder employed on site he owed the Johnstons a duty to use proper care and skill in the building of the house. The Johnstons allege that he failed to exercise a proper duty of care and as a result they have suffered a loss. Mr Miller did not formally defend the claims made against him other than in relation to the terms of his employment as a hammerhand with Mr Grubner. Mr Miller described himself in his response to the claim dated 4 May 2009 as Mr Grubner's builder's labourer. He said by the time he was working on the Townes' dwelling, he would have been considered a hammerhand getting 40% of the fee for which Mr Grubner contracted with Abide Homes Limited. Mr Miller gave evidence that he saw Mr Grubner and Abide Homes Limited as being "his boss" as they determined his pay, directed his work and could terminate his employment at any time.

[103] Mr Grubner confirmed Mr Miller's description of his role and said that he employed Mr Miller even though the method of payment did not reflect that. Mr Grubner said that he supervised Mr Miller and that Mr Miller had no decision-making role and was not left alone to do anything.

[9] See Body Corporate 185960 & Ors v North Shore City Council & Ors (Kilham Mews) [22 December 2008] HC, Auckland, CIV 2006-404-3535, Duffy J, [102].

[104] Abide Homes Limited had the ultimate responsibility for ensuring the quality of the construction. Mr Miller's work was directly supervised by Mr Grubner and in turn Mr Grubner's work was monitored by Mr Abbot. Mr Miller did not have any discretion over the way in which his work was carried out and the scope of any duty owed by him to the Townes or subsequent owners must be limited to the type of work that he performed. I am not satisfied that there is any evidence that in carrying out his work on site he breached his duty of care in a manner that caused any of the relevant defects. For these reasons the claim against Mr Miller is dismissed.

APPORTIONMENT OF LIABILITY

[105] Section 72(2) of the Act provides that the Tribunal can determine any liability of any respondent to any other respondent. Section 90(1) empowers the Tribunal to make any order that a court of competent jurisdiction could make in relation to a claim in accordance with principles of law. The Tribunal apportions liability between joint tortfeasors by having regard to what is just and equitable taking into account the relevant responsibilities of the parties for the damage.

[106] The first, fifth and sixth respondents are jointly and severally liable for the costs arising from the first repairs, the second repairs to Elevation C and the third repairs. The total awarded in respect of these repairs is $99,488.21 including interest and general damages.

[107] The first, sixth and eighth respondents are liable for the cost of the second repair to Elevation A including interest and general damages being $36,558.04.

[108] Abide Homes Limited has the greatest responsibility for the manner and standard of construction and for ensuring that Mr Abbot, as its employee, performed his tasks to the required standard. Mr

Grubner and Mr Wratt were engaged by Abide for their particular expertise and although Mr Abbot had to ensure that their work met the required standard it would be unreasonable to expect him to observe every aspect of their work. I therefore apportion responsibility to Abide at 70%, Mr Abbot at 15% to either Mr Grubner or Mr Wratt depending on the particular repairs at 15%.

CONCLUSION AND ORDERS

[109] Abide Homes Limited is to pay Bruce and Heather Johnston the sum of $136,046.25 forthwith. Abide Homes Limited is entitled to recover a contribution from the fifth, sixth and eighth respondents for any amount paid in excess of $95,232.37 as follows:

From Anthony Grubner	$14,923.24
From Murray Abbott	$20,406.94
From Ian Wratt	$5,483.70

[110] Anthony Grubner is to pay Bruce and Heather Johnston the sum of $99,488.21 forthwith. Anthony Grubner is entitled to recover a contribution from the first and sixth respondents for any amount paid in excess of $14,923.24 as follows:

From Abide Homes Limited	$69,641.74
From Murray Abbott	$14,923.24

[111] Murray Abbott is to pay Bruce and Heather Johnston the sum of $136,046.25 forthwith. Murray Abbott is entitled to recover a contribution from the first, fifth and eighth respondents for any amount paid in excess of $20,406.94 as follows:

From Abide Homes Limited	$95,232.37
From Anthony Grubner	$14,923.24
From Ian Wratt	$5,483.70

[112] As the Johnstons did not claim against Ian Wratt they are not entitled to payment from him. The first and sixth respondents are jointly and severally liable to pay the sum of $5,483.70 being the amount for which Ian Wratt is liable.

[113] The claims against Geoffrey and Peggy Towne are dismissed.

[114] In summary, if the first, fifth and sixth respondents meet their obligations under this determination, the following payments will be made by them to the claimants:

First respondent, Abide Homes Limited	$95,232.37
Fifth respondent, Anthony Grubner	$14,923.24
Sixth respondent, Murray Abbot	$20,406.94
First and sixth respondents, jointly and severally	$5,483.70

[115] If the first, fifth, or sixth respondents fails to pay its or his apportionment, the claimants may enforce this determination against any one of them up to the total amount ordered payable in either paragraphs [108], [109], or [110] above.

DATED this 11th day of August 2009

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S Pezaro
Tribunal Member