IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2008-101-000079 to 92
[2010] NZWHT WELLINGTON 15

BETWEEN	**BODY CORPORATE 81738** First Claimant
AND	**JAMES C FORGIE, SIMON BATACHEL and JESSICA K FORGIE** Second Claimants
AND	**DAVID R MARTIN** Third Claimant
AND	**ALLISTER J GORMAN** Fourth Claimant
AND	**JONATHAN C WATT** Fifth Claimant
AND	**PETER D BERGSTROM and SHARON E BERGSTROM** Sixth Claimant
AND	**ANN MARIA DEN BOER** Seventh Claimant
AND	**YVONNE YANG** Eighth Claimant
AND	**M & K THOMSON FAMILY TRUST** Ninth Claimant
AND	**SHEILA V BURGESS** Tenth Claimant
AND	**JAMES COUBROUGH and ELIZABETH P COUBROUGH** Eleventh Claimant
AND	**VINA CULLUM** Twelfth Claimant
AND	**LAURINE B FORD** Thirteenth Claimant
AND	**KEITH A ROBERTS and SUSAN R ROBERTS** Fourteenth Claimant
AND	**WELLINGTON CITY COUNCIL** First Respondent
AND	**R A BLUNDELL DESIGN LIMITED** Second Respondent
AND	**SHERYLEE A WILLIAMS**

Third Respondent

AND **GLOBE HOLDINGS LTD**
Fourth Respondent

AND **RAVENWOOD CONSTRUCTION LTD**
Fifth Respondent

AND **COLIN DAVIS-GOFF (REMOVED)**
Sixth Respondent

AND **DAVID CREED**
Seventh Respondent

AND **BONAVISTA COATINGS 2000 LTD**
Eighth Respondent

AND **ANDREW FAWCETT**
Ninth Respondent

AND **NORMAN LAMBERS**
Tenth Respondent

AND **JOHN WILSON**
Eleventh Respondent

AND **JONATHAN FAWCETT**
Twelfth Respondent

AND **AMARDA ROOFING LTD (REMOVED)**
Thirteenth Respondent

AND **ROBERT J THOMAS**
Fourteenth Respondent

AND **RICHARD A BLUNDELL**
Fifteenth Respondent

Hearing:	20 January 2010
Appearances:	Paul Robertson, representing the First Respondent as Assignees of the Claim by the Claimants
Final submissions:	29 May 2010
Decision:	4 June 2010

FINAL DETERMINATION
Adjudicator: C Ruthe

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I. INTRODUCTION

History

[1] 93A Kelburn Parade, Kelburn, comprises two separate apartment blocks. The northern apartment block was constructed between 1995 and 1996 comprising five double-storey units numbered 9 to 13 (Stage 1). The southern block was constructed in 1996 and 1997 comprising eight units numbered 1 to 8 (Stage 2). Stage 2 is four storeys high and contains a substantial subfloor area.

[2] An earlier application under the Weathertight Homes Resolution Services Act 2002 was made on 3 December 2002.

[3] Some evidence was heard in those proceedings, particularly from Mr Blundell before they were abandoned with the new applications being filed with this Tribunal between 1 August 2008 and 24 September 2008 under the WHRS Act 2006.

[4] Both buildings leaked. The claimants proceeded to have repairs carried out to the two blocks. Tenders were sought and the remediation was finally effected for the sum of $1,044,165.82 (including GST).

[5] On 29 January 2009, the claimants reached a substantial partial settlement with the first, fifth, seventh, eleventh and twelfth respondents as set out below.

[6] The claimants' counsel advised that the terms of the settlement were identical to those considered by Randerson J in *Petrou v Weathertight Homes Resolution Service*[1] where His Honour held at [27] and [28] that rights of subrogation vested by operation of law. In other words, the Council stands in the equivalent position to

that of an insurer. This is the way this claim has proceeded before this Tribunal.

[7] Prior to the commencement of this hearing, there was a further partial settlement with the third respondent, designer of stage two, Ms Williams and the ninth respondent, Mr Andrew Fawcett, one of the directors of the development company.

[8] The matters for determination include:

- The claim against the designer of Stage 1, RA Blundell Design Limited, the second respondent, and Richard Blundell, the fifteenth respondent;
- The claim against the eighth respondent, Bonavista Coatings 2000 Ltd;
- The claim against the tenth respondent, Norman Lambers the director/employee of the building company contracted for Stage 1;
- The claim against the fourteenth respondent, Robert Thomas.

Parties

Claimants

[9] The Claimants are the owners of the 13 units in the development and Body Corporate 81738. As they had reached a settlement with the Council, they were represented at the hearing by Mr Robertson on behalf of the Council.

Respondents

[10] Wellington City Council, the first respondent, was the territorial authority that granted the building consent and carried out the inspections. It was a party to the partial settlement entered into

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[1] HC Auckland, CIV-2009-404-1533, 24 November 2009.

in January 2009. Pursuant to that settlement agreement it continued to pursue the claim further to the rights of subrogation vested in it by the agreement against:

- *RA Blundell Design Ltd*, second respondent: design company engaged to prepare drawings for Stage 1
- *Richard Blundell,* fifteenth respondent: joined as the actual designer of Stage 1
- *Sherylee A Williams*, third respondent: designer of Stage 2. Ms Williams settled
- *Globe Holdings Ltd*, fourth respondent: removed
- *Ravenwood Construction Ltd*, fifth respondent: builder of Stage 1. Mr John Wilson, eleventh respondent, and Mr Jonathan Fawcett, twelfth respondent, were directors and entered into a settlement agreement
- *Colin Davis-Goff*, sixth respondent: removed
- *David Creed*, seventh respondent: director and shareholder of the developer company, Bolton Securities Ltd (struck off). Mr Creed settled.
- *Bonavista Coatings (2000) Ltd*, eighth respondent: coating systems applicator that physically carried out work on Stage 1 and directed and supervised the installation of the polystyrene substrate and windows in Stage 2
- *Andrew Fawcett*, ninth respondent: director and shareholder of Bolton Securities Ltd and Globe Holdings Ltd. Mr Fawcett settled.
- *Norman Lambers*, tenth respondent: the director/employee of the building company contracted to carry out building work on Stage 2
- *John Wilson*, eleventh respondent: settled
- *Amarda Roofing Limited*, thirteenth respondent: removed

- *Robert Thomas*, fourteenth respondent: roofer of both blocks as well as the butynol membrane applicator

Evidence Considered

[11] The totality of the material before the Tribunal includes various briefs of evidence and expert reports set out in Schedule 1. Further evidence was given at the adjudication by: Mr Williams (expert for the Council), Ms Williams (for the third respondent), Mr Gorman (the Body Corporate Secretary) and Mr Boucken (WHRS Assessor), who were questioned on their previously filed briefs.

[12] There were no appearances by RA Blundell Design Ltd, Ravenwood Construction Ltd, Bonavista Coatings (2000) Ltd, Robert Thomas, Richard Blundell, or Norman Lambers – though the latter two parties had participated in the 2002 Act proceedings.

[13] Section 74 of the Act provides that the Tribunal's powers to determine a claim are not affected by the failure of a respondent to take steps. Section 75 of the Act provides that the Tribunal may draw inferences from a party's failure to act and determine the claim based on the available information.

Apportionment of Damage between the Two Development Blocks

[14] As there were two development blocks it is important to get the apportionment between the two blocks correct. Mr Robertson, in Schedule 3 to Closing Submissions on behalf of the Claimants and the Council of 20 January 2010, apportioned the percentage of remedial work done on each unit in the two blocks.

[15] In Block One (being the first completed) which contains units 9 to 13 the following apportionments were made:

Unit 9 9.05%

Unit 10	7.42%
Unit 11	7.42%
Unit 12	7.42%
Unit 13	9.58%
TOTAL	**40.89%**

[16] In Block Two which contains units 1 to 8 the following apportionments were made:

Unit 1	5.61%
Unit 2	5.61%
Unit 3	6.75%
Unit 4	6.39%
Unit 5	9.23%
Unit 6	9.23%
Unit 7	7.15%
Unit 8	9.14%
TOTAL	**59.11%**

[17] These are the apportionments applied in this decision when considering liability in relation to each of the two blocks. It was noted during the course of the hearing that Stage 1, being 5 primarily double storey units, was considerably smaller than Stage 2, being 8 units up to four storeys high.

II. WHERE DID THE BUILDINGS LEAK?

[18] The expert evidence was that the primary defects were present throughout both of the buildings in the complex so there is little to be gained by describing each defect in each unit. These have been detailed in the Assessor's Reports on each unit and updated Assessor's Reports as well as in the Joyce Group Report.

[19] The Tribunal accepts the appropriate approach to the leaks is to take a building wide view, rather than a unit by unit assessment. The faults were generic to the whole structure. The Tribunal has proceeded on this basis with the apportionment of damage as between the units being helpfully set out in the claimants' schedule.

[20] In 2002 the Body Corporate engaged Joyce Group Ltd (in liquidation) to inspect and advise it concerning defects at 93A Kelburn Parade. An initial visual investigation by Joyce Group Ltd was followed by a further investigation and a Supplementary Report dated August 2002, listing faults attributed to negligent workmanship. A comprehensive summary of defects found during the course of the remedial work was set out at [1.12] of "Report on Building Defects at 93A Kelburn Parade for Body Corporate 081738" written by the Joyce Group, April 2008.

[21] Mr Boucken, a Department of Building and Housing Assessor, completed an Update to Assessor's Original Reports dated 14 December 2006.

[22] Mr Mark Hazelhurst the expert engaged by Wellington City Council in his Brief of Evidence dated 12 January 2009 set out the defects following the analysis undertaken by the Joyce Group. The defects were as follows:

i. Improper fixing of butynol in the vicinity of scupper outlets.

ii. Incorrect weatherproof detailing at parapet junctions.

iii. Incorrect flashings around windows and doors for EIFS installation.

iv. Inadequate clearances for boundary joists from ground.

v. Incorrect installation of butynol rubber membrane and balcony on unit 5.

vi. Defect in cantilever traversed joists along the general boundary joists.

vii. Absence of saddle flashings.

viii. Penetration of balustrade cladding by balcony substrate.

ix. Failure of butynol rubber membrane on unit 6.

x. Leaking around skylight and roof penetration.

xi. Full detailing at junction between fascia and EIFS cladding at entrances to units 9, 10, 11 and 12.

[23] Regarding the affixing of butynol in the vicinity of the scupper outlets, Mr Hazelhurst noted that the butynol at the gutter finished short and did not extend fully over the plywood. He said on the north side of the south block extensive damage had been caused by the incorrect workmanship and affixing of the butynol rubber in the vicinity of the scupper/rainheads resulting in water being diverted in the frame of the building instead of going down the gutters.

[24] Mr Hazelhurst considered the following parties liable:

(a) The builder who failed to ensure the roof properly drained into the rainhead and failed to construct a drip edge. The builder of this stage was the fifth respondent, Ravenwood Construction Ltd

(b) The roofer who failed to ensure the roof properly drained into the rainhead

(c) The butynol applicator, for poor workmanship and failing to ensure a drip edge. This person was the fourteenth respondent Mr Thomas who was also the roofer

(d) The project manager who failed to adequately supervise the project and who clearly failed to obtain design detailing around the complex rainheads

[25] The Joyce Group identified damage to timber framing below the parapets and rainheads had incorrect waterproof detailing at parapet junctions and scuppers to the rainheads.

[26] As for the incorrect weatherproofing of parapet junctions, Mr Hazelhurst saw no damage and sign of damage. This being the case any fault in this area is of no relevance to this claim.

[27] Further defects were the incorrect flashings around the windows and doors. Mr Hazelhurst concluded that any faults in the installation of the metal flashings had not contributed to leaks saying:

> "My view in summary is that the metal flashings used had performed as well as the details promoted by Plaster Systems Limited. There has been no systemic failure of a flashing."

[28] Concerning the EIFS installation Mr Hazelhurst noted there was cracking in the plaster caused by an absence of mesh or similar reinforcing and that there was water penetration through the plaster cracks. The Joyce Group Report assigned greater responsibility for the incorrect installation of flashings around windows and doors than identified by Mr Hazelhurst. The Tribunal accepts the Joyce Group Report on this matter as it physically saw the damage.

III. ISSUES

[29] The issues for determination are limited to the following as a result of the two partial settlement agreements:

i) Claim against Second Respondent, RA Blundell Design Ltd and the Fourteenth Respondent, Richard Blundell, Units 9 to 13 (Stage 1)

- Was there a design contract with RA Blundell Design Ltd?
- Was there a design contract with Richard Blundell?
- Did Richard Blundell breach a duty of care to third parties by failing to provide adequate and appropriate detailing?

ii) Claim against Eighth Respondent, Bonavista Coatings (2000) Ltd

- Was Bonavista negligent in the manner which it applied the texture coating to the EIFS polystyrene on both Stages One and Two? If so, did leaks result causing damage?
- Did Bonavista give directions, manage supervise and/or control the fixing of the EIFS frame and windows on Stage Two? If Bonavista is negligent in that regard, did leaks result causing damage?

iii) Claim against Tenth Respondent, Norman Lambers for Units 1 to 8 (Stage 2)

- Did the terms of Mr Lambers' original contract of engagement include supervision? Was he a labour-only contractor?
- If he was a supervisor was he negligent regarding quality control?
- Was his own workmanship carried out in a negligent manner contributing to the cause of the leaks?

iv) Claim against Fourteenth Respondent, Robert Thomas for Units 1 to 8 and Units 9 to 13

- Was Mr Thomas negligent in carrying out the roofing of both development blocks? If so, did his faulty workmanship cause leaks resulting in damage?

IV CLAIMS AGAINST R A BLUNDELL DESIGN LTD AND RICHARD BLUNDELL (UNITS 9 TO 13)

Was there a Design Contract with RA Blundell Design Ltd?
Was there a Design Contract with Mr Blundell?

[30] The evidence points to the contract being with Mr Blundell personally. The critical document is a letter from Mr Blundell on RA Design Ltd letterhead dated 29 March 1995 and addressed to Globe Holdings Ltd for the attention of Mr Andrew Fawcett. In that letter Mr

Blundell set out the terms of the agreement, detailed below. The design work was done by Mr Blundell personally and any contract was with him. The claim against RA Blundell Design Ltd is dismissed.

[31] Mr Blundell's letter of 29 March 1995 stated (inter alia):

> "Upon acceptance, Globe Holdings Limited agrees to engage RA Blundell Design Limited to prepare documents for units (9-13 incl) Building Consent application as detailed below.
>
> - Site plans covering; Survey info, Excavation, U/G Services, and Vehicle access
> - Plans detailing; Floor layouts, Fire ratings, Electrical and Plumbing services
> - Cross Sections and Elevations, Window and Door schedule
> - Written trades specifications
>
> …
>
> It is assumed that the last design proposal 11-94-17-P2 prepared by myself along with revised elevations used to obtain WCC Resource Consent will remain largely unaltered and for the basis for the working drawings to be prepared from."

[32] There is no allegation that Mr Blundell was engaged in any supervisory capacity. It is clear that the original contract was simply to get building consent from the Council.

Did Mr Blundell Breach a Duty of Care to Third Parties by Failing to Provide Adequate and Appropriate Detailing?

The legal test re negligence in preparation of plans

[33] The approach to be adopted when considering whether a designer has breached his duty of care by failing to provide insufficient detail was set out in *Body Corporate 188529 v North Shore City Council (Sunset Terraces)*[2] where Heath J held that if the building could be built by a reasonable builder who would have

[2] HC Auckland, CIV-2004-404-3230, 30 April 2008.

access to the manufacturers' specifications no greater detail would be required to achieve a workmanlike result. This was upheld on appeal[3] where Baragwanath J said:

> [121] I agree with the Judge. No purpose would be served by requiring a designer to incur the cost of providing detail not reasonably necessary for the task. There being no carelessness it is unnecessary to discuss the leading authorities *Voli v Inglewood Shire Council*[4] and *Bowen*[5] which impose liability on a negligent designer whose carelessness causes loss.

[34] William Young P was of like mind stating:

> [152] An architect or engineer can only fairly be expected to provide services as contracted for by the developer. The actual involvement of the architect or engineer might be quite limited. The scope of the contract is, of course, highly relevant where tortious liability of architects or engineers is alleged because there are problems in imposing a duty of care which is more exacting than the contractual duty…

[35] This Tribunal is bound by the decisions of the High Court and Court of Appeal. This is a case where further detailing during the construction period was required but the designer was not engaged to undertake that task. This is responsibility assumed by the developer.

[36] Expert evidence was given by Mr Williams, an experienced architect being a Fellow of the New Zealanders of Architects and a former assessor for the Weathertight Homes Resolution Service. His brief was directed to design issues.

[37] Mr Williams noted that during the 1990s the standard of construction documents declined for various reasons including territorial authorities accepting drawings with less detail. Mr Williams in his brief of evidence at [55] postulated Mr Blundell would have "initially prepared a schematic design proposal for the site and the plans for the north lot required for resource consent".

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[3] *North Shore City Council v Body Corporate 188529 (Sunset Terraces)* [2010] NZCA 64.
[4] (1963) 110 CLR 74.
[5] *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 (CA).

[38] Mr Williams considered the Blundell design as simple in layout at [61] of his brief. Mr Williams said he was aware of the *Sunset Terraces* case and that he had been to the site. It was unclear if the visit was in the nature of a drive pass. He considered *Sunset Terraces* was smaller in scale being two storeys though it comprised 21 units, whereas Mr Blundell's design was for five units. He said Mr Blundell's design was more complex without being specific. When questioned, Mr Williams referred to the valleys in the roofs as being complex but he agreed were no more complex than those that were a feature of many colonial villas.

[39] Mr Williams referred to the use of Dexx in a confined area and considered it poorly thought out and inappropriate from a design perspective. The Tribunal considers that Mr Williams correctly identified elements of the design that would require more detailing as work progressed but his earlier description of Stage One being a simple design as being an accurate description.

[40] The crux of the case against Mr Blundell is whether the plans were of sufficient detail to enable a competent builder to build a weathertight structure. Mr Williams said this was the case. In light of this clear evidence the Tribunal is unable to find reasons to justify the finding of negligence against Mr Blundell.

[41] It is noted that Mr Blundell submitted that the claim made against him was out of time being ten years and three months since he completed work on the drawings. However as the claim against him is dismissed above, I make no finding on this point.

V CLAIM AGAINST BONAVISTA COATINGS (2000) LTD

Was Bonavista Negligent in Applying the Texture Coating to the EIFS Polystyrene for All Units?

[42] Bonavista elected not to participate in these proceedings.Mr Hazelhurst in his brief of evidence refers to the faulty workmanship of the junction between the fascia in the EPIS wall cladding (pp33). The Joyce Group Report identified the plasterer as being responsible for damage to timber framing below the parapet at Unit 13 and a number of areas for which the plasterer was at fault. Leaks did result.

Did Bonavista Direct, Manage and Control the Fixing of the EIFS Frame and Windows on Stage Two? Was it Negligent in this Regard?

[43] Counsel for the Council submitted that the primary liability of Bonavista Coatings (2000) Ltd was in giving erroneous advice to the builders on how to apply flashings to the windows and should therefore be liable .

[44] The claimants place reliance on the evidence given by Mr Lambers at the witness summons hearing in 2006 where he stated that Bonavista told the builders what to do and that the polystyrene was installed in accordance with Bonavista's instructions. In answer to a question from the Chair as to whether Bonavista was on site at the time and whether they had given specific directions, Mr Lambers said that Bonavista showed how it should be done – they were the experts. Mr Lambers confirmed that Bonavista provided all the materials being EIFS sheets and the flashings.

[45] Mr Lambers said his firm ended up putting on the EIFS because the plasterer was too busy to do it. Bonavista subsequently plastered the wall and so were able to see the workmanship of Mr

Lambers' hammerhands at close range. One would have expected Bonavista to have taken remedial action if required.

[46] The Tribunal accepts Bonavista gave the directions and supervised the builders and therefore it has responsibility for the fixing of the cladding.

VI CLAIM AGAINST NORMAN LAMBERS

What were the Terms of Mr Lambers' Original Contract and Was He a Supervising Builder or a Labour-Only Contractor?

[47] The Application for Adjudication and the Amended Application for Adjudication sought a determination against Mr Lambers as a builder. Mr Robertson argued that as the director of the building company engaged by Bolton Securities Ltd, he had responsibility for other builders employed by that company.

[48] The Tribunal accepts Mr Robertson's submission that the facts in this case concerning Mr Lamber's role are very similar to those in *Dicks v Hobson Swan Construction Ltd (in liq).*[6]

[49] The Tribunal also considers Mr Lambers falls into the "one-man band" category as enunciated by Priestley J in *Body Corporate 183523 v Tony Tay & Associates Ltd*[7] where His Honour said:

> "Although all those cases [*Drillien,*[8] *Hartley,*[9] *Nielsen*[10]*, Kilham Mews,*[11] *Byron Avenue*[12]] revolve around their individual facts, as a general rule directors facing claims in respect of leaky buildings will be exposed in

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[6] (2006) 7 NZCPR 881 (HC).
[7] HC Auckland CIV-2004-404-4824, 30 March 2009.
[8] *Drillien v Tubberty* (2005) 6 NZCPR 470, Faire AJ.
[9] *Hartley v Balemi* HC Auckland, CIV-2006-404-2589, 29 March 2007, Stevens J.
[10] *Body Corporate 199348 v Nielsen* HC Auckland, CIV-2004-404-3989, 3 December 2008, Heath J.
[11] *Body Corporate 185960 v North Shore City Council (Kilham Mews)* HC Auckland, CIV-2006-404-3535, 22 December 2008, Duffy J.
[12] *Body Corporate 189855 v North Shore City Council (Byron Ave)* HC Auckland, CIV-2005-404-5561, 25 July 2008, Venning J.

> situations where the companies are one person or single venture companies or in situations where there are factual findings that the director was personally involved in site and building supervision or architectural or design detail…"

[50] The claimants seek recompense from Mr Lambers as director of Lambers Building Construction Ltd (in liquidation). It is submitted Mr Lambers had overall responsibility for the builders who constructed Stage 1. Mr Lambers was a shareholder and director of the company that did the building work on units 1 to 8, being Stage 2. This was confirmed in the evidence given by Mr Lambers in 2006.

[51] At the witness hearing referred to above Mr Lambers stated that his company was engaged on a labour-only contract. This is consistent with the other evidence which shows that the developers were cost-focused.

[52] The claim against Mr Lambers is somewhat limited. Having held that Bonavista was responsible for the cladding there is no evidence of negligence on the part of Mr Lambers in this regard.

Was Mr Lambers' Own Building Work carried out in a Negligent Manner thereby contributing to the Leaks?

[53] Mr Lambers had responsibility for those working under him in relation to the build and he was personally involved with the building of the block containing Units 1 to 8.

[54] The Joyce Group Report lists the builder as one of the party responsible for damage of timber framing below rainheads. However the principal cause was the improper fixing of butynol rubber membrane to the gutters, where the builder's responsibility appears to have been minimal. On the question of damage to timber framing below the parapets, there is no indication as to what the builder did to contribute to the leaks.

[55] With regard to damage to timber framing around windows and doors the Joyce Group Report is in conflict with that of the Council's expert, Mr Hazelhurst, who said that although the flashings were not properly formed, there had been no leaking through them. Mr Hazelhurst's analysis is more detailed and he also had the benefit of being familiar with the Joyce Group Report. His expert opinion is therefore preferred on this issue.

[56] Decay to the bottom plates was found as there was water leaking through the ceiling in Unit 5. There was some contribution by Mr Lambers but the main cause was the inadequate butynol application. At Unit 8 there was fault with the cantilevered joist but this was a safety issue not a water penetration one and therefore outside the jurisdiction of this Tribunal.

[57] There was damage to timber framing below the parapets due to faulty installation of flashings at the parapet junctions. Attribution for responsibility for this damage as I read the experts' reports is the fault of the builder and/or roofer. I thereby hold both responsible.

[58] An overall examination of the damage sustained in the second block built (Units 1 to 8) indicates that the builder's responsibility for the leaks is somewhat minimal. However negligence has been established.

VII CLAIM AGAINST ROBERT THOMAS

Was Mr Thomas Negligent in carrying out the Roofing of Both Development Blocks?

[59] Mr Thomas was the roofer and the butynol applicator that traded as Amarda Roofing. A number of leaking problems were attributable to faults in the butynol application and in the roofing as set out above. The Joyce Group Report attributes decay in timber

framing at the roof covers over entrance ways to unit 9, 10, 11 and 12. In Units 1 to 8 the lack of proper fixing of butynol rubber membrane to the gutters led to significant water ingress. The failure to install saddle flashings on the southern walls was attributed in part to the roofer. Amarda Roofing was responsible for the parapet wall roof junction at unit 8.

[60] The roofer and butynol layer has been considered negligent by the experts, in particular Mr Hazelhurst. The Tribunal accepts this evidence. This negligence has been a relatively major factor in the damage to the buildings in this development.

VIII QUANTUM

Repairs

[61] Joyce Group Ltd oversaw the tendering process on behalf of the Body Corporate and received three tenders. The tender submitted by Pipitea Building Solutions Ltd was accepted and as noted at [1.8] of the Joyce Group Report the units were able to remain occupied during the remediation work. (This fact assumed some significance in relation to loss of rental claims discussed below). The Tribunal accepts that the remedial work was carried out in the most cost-effective manner possible.

[62] The cost of the repairs amounted to $1,044,165.82. The Tribunal accepts the details of the various repair costs as particularised by the Claimants.

Consequential Damages

[63] The claimants also seek consequential damages being interest incurred by the claimants with the cost of remedial work carried out at their request. There is a further claim for general damages.

Special Damages

[64] In *Taylor v Auto Trade Supply Ltd & Anor*[13] the High Court discussed matters pertaining to special damages. In that case, the Court allowed engineering architectural valuation fees as well as loss of rental (see p117-118).

[65] There were various claims for loss of rental. There was a wide discrepancy between the amounts of the claims. One claim was for compensation for a reduction of rental to $200 a week. Other claims varied between $30.00 and $160.00 a week. There was one claim based on the building being uninhabitable between 19 March and July but no evidence in support. The Joyce Group said the remediating company was chosen as it was able to do the remediation in such a way as not to interfere with occupation. There was no consistency in the periods in which it was alleged rents were lowered due to leaks. No inference could be drawn from the brief unsubstantiated owner statements filed due to the large inconsistencies between them.

[66] The claimants were given until 31 May 2010 to rectify this lack of evidence but have failed to do so. No affidavits were filed. No expert evidence was adduced to say whether any drop in rentals was due to actual leaks market forces or both. Further there was no consistent evidence as to the time period when leaks allegedly affected rental income. If evidence relating to rental losses had been adduced claims could have been considered.

[67] The following claims for special damages have been allowed:

- Unit 5 produced receipts for painting sealants amounted to $524.51.

[13] [1972] NZLR 102.

- Unit 6 for damage items amounting to $781.42 are allowed but I disallow the claim for a replacement toilet seat and unconnected power cables.
- Unit 10 having available invoices to establish repair costs $406.61 are allowed this claim.
- Unit 12 has sought in payment of $5,309.05 as compensation paid to tenants for loss of quiet enjoyment pursuant to a tribunal order. This claim has been proven.
- Unit 8 referred to curtains that were mouldy due to damp. This would have been allowed but there was no evidence of any receipts or dockets nor was any specific amount claimed.

Interest

[68] The claimants have sought interest on the full amount of the remediation costs from November 2006 to the date of this hearing, in terms of clause 16 of the Third Schedule of the Weathertight Homes Resolution Services Act 2006. However the claimants settled their claim with the first, fifth, seventh and twelfth respondents on 12 January 2009 for $900,000.00. Further the claimants caused delay by abandoning their claims under the previous Act when ready for hearing. Those delays and costs arising must be borne by the claimants.

[69] Counsel invited the Tribunal to take a pragmatic approach and set interest at 8.4% being the rate set in High Court and District Court proceedings pursuant to the Judicature Act. Counsel submitted that this rate approximated the floating average over the period and was sufficiently accurate not to want complicated calculations over time.

[70] The claim for interest totals the sum of $462,642.49. It is for compounded interest. The Judicature Act does not provide for compounding interest. Interest is allowed for the period 2006 to

January 2009 being two years and two months at 8.4% being $202,170.00. Further interest is allowed for the period January 2009 January 2010 on $144,165.00 at 8.4% being $12,109.86. Total interest allowed is $214,279.86. That interest is allocated in favour of each of the claimants and apportioned as follows:

Unit 1	5.61%
Unit 2	5.61%
Unit 3	6.75%
Unit 4	6.39%
Unit 5	9.23%
Unit 6	9.23%
Unit 7	7.15%
Unit 8	9.14%
Unit 9	9.05%
Unit 10	7.42%
Unit 11	7.42%
Unit 12	7.42%
Unit 13	9.58%

General Damages

[71] This claim was heard prior to the Court of Appeal decision in *Byron* Avenue [2010] NZCA 65. The claims for general damages were generally in line with this decision except that there were no claims for trustees. The Court of Appeal made the following reservations. Baragwanath J stated:

> "[112] This Court will interfere with an award of general damages only if satisfied that the award is wholly erroneous. That is for two reasons. One is that the trial judge, who has a feel for the case and the witnesses unattainable for reading briefs and transcripts, is better equipped than this Court to appraise their significance and the actual effect of stress resulting from the breach of duty... While because of a number of pending claims there would be real benefit from the provision of guidelines to assist settlements, the emphasis of the present case was understandably upon aspects other than general damages. We do not have the evidence nor did we receive the argument needed to provide guidelines…"

[72] His Honour commented that the judge's assessment was a generous one. The Court then analysed a series of High Court

decisions setting out those cases at paragraph [115]. The Court went on at [117]:

> "In the present appeal there is a range of cases within two broad classes: those who occupied the apartment and those who did not."

[73] The Court went on to say that in relation to non-residents the sum of $15,000 was appropriate and in the single sum where the burden is shared of between $20,000 and $25,000.

[74] The claimants' claims fall generally within these guidelines. No damages had been sought for trusts. The following awards are thereby made:

Unit		
1	Graham Forgie	12,500
2	David Martin	12,500
3	Alistair Gorman	25,000
4	Jonathan Watt	25,000
5	Peter and Sharon Bergstrom	20,000
6	Ann Den Boer Trust	00.00
7	Yvonne Yang	12,500
8	Evan K Thomson Family Trust	00.00
9	Sheila Burgess	12,500
10	James and Elizabeth Coubrough	20,000
11	Vina Cullum	12,500
12	Laurine Ford	12,500
13	Keith and Susan Roberts	20,000

Summary of Quantum

[75] The proven damages are as follows:

Remediation costs	$1,044,165.82
General damages	$185,000.00
Interest	$214,279.86
Other special damages	$7021.59
Total	**$1,450,467.27**

IX APPORTIONMENT

[76] To properly undertake the task of apportionment of liability the Tribunal needs to notionally make attributions of liability in respect of the settling respondents when considering the liability of the non-settling respondents.

[77] The developers, who were also project managers, have the largest liability in relation to the development. The developers in this development did not engage an architect, but rather a designer who was contracted to do minimal drawings with trade/producer specifications just sufficient to get the project under way. They did not have an architect undertake supervision and they engaged a builder as a labour-only contractor.

[78] Being aware the plans were minimal the project required proper supervision by the developer who would have been expected to ensure those working on the project were supplied with appropriate design detailing as the building progressed. This was not done. The developers as project managers were responsible for the workmanship and quality of the overall development. The Tribunal accordingly considers the appropriate notional apportionment to be 45%.

[79] The Council failed in its inspection regime. This was a project in which the Council was aware that there was no supervising architect. It did not pick up faults on its inspection regime. The failure of the Council in this claim is similar to that in many claims where liability has been set at **25%**. This is the appropriate apportionment here.

[80] The roofer and butynol layer has been negligent. The degree of contribution by this party is considerable, and has liability in relation to both stages. The Tribunal considers that to be **15%**.

[81] The plasterer was involved in the whole project. Rather than attempt to apportion liability to each stage the global approach of the claimants is adopted. Bonavista is considered to be liable to the extent of 10**%.**

[82] Having considered all the evidence the Tribunal considers the builder is liable to the extent of **5%** for Stage 2

X ORDERS SOUGHT

[83] Mr Robertson requested orders to be made in respect of only those respondents who have not settled as those parties that have settled have been indemnified by the Council. I have adopted this approach. The Council did not seek a contribution towards its liability to the claimants relying on its contractual rights pursuant to the settlement.

XI CONCLUSION AND ORDERS

[84] The claims have been proved to the extent of $1,450,467.27

[85] For the reasons set out in this determination, the following orders are made:

i. The claim against the second respondent, RA Blundell Design Ltd has not been proven and it is thereby dismissed.

ii. The claim against Bonavista Coatings 2000 Ltd, the eighth respondent, has been proved to the extent of $145,046.72 and having joint and several liability with Norman Lambers, the tenth respondent. Bonavista Coatings 2000 Ltd is ordered to pay the said sum to the claimants forthwith.

iii. The tenth respondent, Norman Lambers, is jointly and severally liable with the eighth respondent. He is ordered to pay the claimants the sum of $43,873.97 made up as follows:

- 5% of remediation costs Stage 2 (which is 59.11% of $1,044,165.82 being $617,206.00) amounting to $30,860.00;
- 5% of $107.500.00 general damages awarded to Stage 2 owners being $5375.00
- 5% of apportioned interest of $126,660.82 being $6333.04
- 5% special damages, Stage 2 owners, of $1305.93.
- The tenth respondent is ordered to pay the sum of $43,873.97 to the claimants forthwith.

iv. The fourteenth respondent, Robert J Thomas, is ordered to pay the claimants the sum of $217,570.08 forthwith.

v. The claim against the fifteenth respondent, Richard Blundell, was not proven and is dismissed.

Dated at WELLINGTON this 4th day of June 2010

C Ruthe
Tribunal Member