IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2010-100-000060
[2011] NZWHT AUCKLAND 45

BETWEEN	KEVEN INVESTMENTS LIMITED Claimant
AND	PHILIP ARTHUR & ROBERTA ANN DENNE MONTGOMERY AND BRIAN LAWRENCE BRAMWELL First Respondents
AND	IAN ROBERT SIMPSON Second Respondent

Hearing:	2 June 2011
Closing Submissions:	17 June 2011
Appearances:	G Shand and L Chapman for claimants D Wilson for first respondent I Simpson, the second respondent, self represented
Decision:	16 September 2011[1]

FINAL DETERMINATION
Adjudicator: P A McConnell and P Cogswell

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[1] Decision delayed in order for claimant to investigate eligibility for the Financial Assistance Package

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INTRODUCTION

[1] In June 2007 Keven Investments Limited (Keven) bought a property at 38 Wakelin Road, Beachlands from Philip and Roberta Montgomery and Brian Bramwell. The property consisted of a three-storey residential dwelling with a ground floor apartment as well as separate commercial premises. By 2009 the residential dwelling was leaking and a claim was lodged with the Department of Building and Housing on 13 July 2009. The assessor's report concluded that the dwelling was a leaky home and recommended a full reclad over a cavity.

[2] Keven carried out the recommended remedial work in 2010 and is claiming remedial costs of $360,780 from Mr and Mrs Montgomery, Mr Bramwell and Mr Simpson. Keven

alleges that Mr and Mrs Montgomery were developers and also that they, together with Mr Bramwell, breached the warranty under clause 6.2(5) of the agreement for sale and purchase. Mr Montgomery accepts that he was the owner of the property at the time the dwelling was constructed but denies that he or his wife were developers. They also deny that they breached the warranty under the agreement for sale and purchase as they submit the dwelling was constructed in accordance with the building consent and that the appropriate certifications were obtained. Mr Simpson was the director of the building company that built the dwelling. Mr Simpson accepts his company built the dwelling but denies that he is personally responsible for any of the defects that have caused leaks.

ISSUES

[3] The issues we therefore need to decide are:

- Were Mr and Mrs Montgomery developers?
- Why does the dwelling leak?
- Have Mr and Mrs Montgomery and Mr Bramwell breached the vendor warranty as set out in clause 6.2(5) of the agreement for sale and purchase? In particular was the work completed in accordance with the building consent and consented plans?
- Does Mr Simpson personally owe the claimants a duty of care? If so, has he breached that duty of care?

BACKGROUND FACTS

[4] In January 1993 Mr Montgomery purchased 38 Wakelin Road, Beachlands. At that time the only building located on the land was a commercial building occupied by the Post Office. The land was zoned commercial with residential use being

discretionary. Mr Montgomery owned and operated the Post Office outlet operating from the property.

[5] In 1999 Mr and Mrs Montgomery decided to build a house on the land so that they could live near where they worked. They engaged Compass Certification Limited to deal with the necessary consents and Simpson Builders Limited (Simpson) to construct the dwelling. The contract with Simpson was a build and supervise contract with Simpson being responsible for contracting the majority of the subcontractors. Mr and Mrs Montgomery were not involved in the building work or supervision of the building work other than making the choices usually made by owners such as those relating to design and aesthetic matters.

[6] The dwelling is three stories with a three bedroom house with flat roofs on the upper two floors and a self contained two bedroom apartment on the lower level. Three balcony areas are located on the upper two floors. The dwelling was constructed with concrete block walls to the ground floor with timber framed walls clad with texture coated fibre-cement sheets to the upper two floors. The flat roofs were clad with butyl rubber membrane. A Code Compliance Certificate (CCC) was issued in September 2000.

[7] Mr and Mrs Montgomery lived in the property from 2000 until it was sold to Keven in August 2007. After completing the construction of their new home Mr and Mrs Montgomery also arranged for the old Post Shop building to be replaced with new commercial premises incorporating two separate spaces. In January 2001, during the course of that construction, the property was transferred from Mr Montgomery to Mr and Mrs Montgomery and Mr Bramwell as trustees of the Montgomery Family Trust.

[8] Mr and Mrs Montgomery and Mr Bramwell sold the property to Keven Investments Limited by contract dated 18 June 2007. Douglas Rodney Keven is the sole director of Keven and the person who entered into the agreement on behalf of the company. The property was purchased as an investment and the residential part of the property, which forms the subject matter of this adjudication, has been tenanted since Keven bought the property.

WERE MR AND MRS MONTGOMERY DEVELOPERS?

[9] Keven alleges that Mr and Mrs Montgomery were developers and as such they owe it a non delegable duty of care. Mr and Mrs Montgomery however submit that Mr Montgomery was a lay owner of the property only whose involvement was limited to hiring others to design and construct the dwelling for their own domestic use. They deny they were developers as they were not in trade and therefore they do not owe Keven a duty of care.

[10] The Building Act 2004, although not definitive gives some useful guidance as to the definition of "a residential property developer". For the purposes of that Act, a residential property developer is defined at s 7 as:

> A person who, in trade, does any of the following things in relation to a household unit for the purpose of selling the household unit:
>
> (a) Builds the household unit; or
>
> (b) Arranges for the household unit to be built; or
>
> (c) Acquires the household unit from a person who built it or arranged for it to be built.

[11] Harrison J in *Body Corporate 188273 v Leuschke Group Architects Ltd*[2] observed that the word developer is not a

[2] HC Auckland, CIV-404-404-2003, 28 September 2007 at paras [31] and [32].

"term of art or a label for ready identification", unlike a local authority builder, architect or engineer. It is the function carried out by a person or entity that gives rise to the reasons for imposing a duty of care on the developer. Whether someone is called a site manager, project manager or a developer does not matter. The duty is attached to the function in the development process and not the description of a person.

[12] At the time of construction Mr Montgomery was a real estate agent who owned land adjacent to his former business which was then being run by Mrs Montgomery. They decided to build a home for themselves on that land with an attached flat so they could live nearer to their work. They engaged a reputable building company on a full contract to undertake the construction of the house. They were not in trade in the sense that it is used in s7 of the Building Act 2004. They were building the dwelling as a home for themselves not as an investment or to sell for profit.

[13] The decision to build the home however was in made conjunction with a longer term plan to further develop the commercial premises also located on the same piece of land. Like most prudent home builders they wanted the planned construction work to have long term financial benefits as well as providing them with a home. They accordingly saw the plan to construct a new home and adjoining apartment as contributing to their retirement assets or income.

[14] In *Findlay v Auckland City Council*[3] Ellis J concluded that organising the building of a house in which to live does not make someone a developer. Mr Montgomery had even less involvement in the construction than Mr Findlay did in that case. Unlike Mr Findlay he did not engage builders on labour-only

[3] HC AK CIV-2009-404-6497, 16 September 2010

contracts but appointed an experienced building company to manage the construction.

[15] Mr Shand however submits that there are two significant differences between Mr and Mrs Montgomery's situation and that of other land owners who have arranged for a house to be built for their own use. Firstly the dwelling was built on land that also incorporated a commercial building with the construction of the home being the first stage of a redevelopment plan for the whole site. Secondly Mr Shand notes that it was not just a home that was being built but a home with an attached self contained two bedroom flat which Mr and Mrs Montgomery rented out in order to obtain an income.

[16] We do not consider that the inclusion of the apartment into the residential dwelling changes Mr Montgomery's position from a person who is building a home for his own use to a developer in the business of constructing dwellings for profit. In *Body Corporate 187820 v Auckland City Council*[4] Dougue AJ concluded, after in analysis of New Zealand cases concerning the liability of developers, that there were two essential considerations that give rise to a non-delegable duty. These were:

- Direct involvement or control in the building process, for example by way of planning, supervising or directing the work. In this regard he noted that if the role of the defendant was not to direct or control the quality of the building then it was difficult to see how his actions would result in foreseeable harm to subsequent purchasers.
- The developer being in a business of constructing dwellings for other people for profit.

[4] (2006) 6 NZCPR 536.

[17] In *Mowlem v Young*[5] Robertson J concluded that Mr Young, a professional man building a house who got appropriate workman to do the physical jobs was not a contractor of developer. To make him such would in the Robertson J's opinion, "miss the import of the distinction which the Court of Appeal was drawing in *Mt Albert Borough Council".*[6] This conclusion was reached even though Mr Young had some experience as a developer.

[18] Mr and Mrs Montgomery's motivation in building this dwelling was to build a home in which to live. They neither directed nor supervised the construction work nor was Mr Montgomery in the business of constructing dwellings for profit. The courts have consistently held that land owners who arrange for people to build them a home are not then head contractors or developers. We accept that Mr Montgomery at the time he arranged for the house to be built was also intending to rebuild the commercial buildings on the site. This however does not make Mr Montgomery a developer in relation to the residential building. The claim that Mr and Mrs Montgomery were developers therefore fails.

WHY DOES THE DWELLING LEAK?

[19] Frank Weimann, the assessor, carried out his investigations in mid 2009. His investigations and conclusions are set out in his report. Mr Bukowski the claimant's expert visited the site while the remedial work was in progress. His conclusions and some photographs that he took are included in his witness statement. He did not however file a report and his witness statement outlines conclusions but provides no detailed information linking the alleged defects to the damage. Clint

[5] HC Tauranga AP 35/93, 20 September 1994, Robertson J.
[6] *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA).

Smith, an expert engaged by the Mr and Mrs Montgomery, was not engaged until after remedial work had been completed. His opinion is based on the reports and documents from the other experts. His evidence was largely confined to whether the dwelling was built in accordance with the consented plans and the quantum of the remedial work. All three gave their evidence concurrently at the hearing and they were joined by Mr Ranum when discussing the quantum of remedial work.

[20] The experts agreed that the primary cause of water ingress causing damage was the way the joinery was installed. The windows were receded and framed with a polystyrene boarder. Only head flashings were installed with no sill and jamb flashings. The head flashings had no stop ends and did not extend past the window jambs. The weathertightness of the windows largely relied on sealant for their integrity and in several locations the sealant had either failed or was inadequate.

[21] Mr Wiemann identified that a further cause of water entry was the fibre cement cladding being installed hard up against the block work. This was not however identified as a defect by Mr Bukowski nor was it included in the list of defects set out in the claimants' particulars of claim. We however accept Mr Wiemann's evidence on this issue.

[22] Mr Smith, Mr Weimann and Mr Bukowski considered that issues with the installation of the scupper drains also caused leaks. In particular the installation of the butyl membrane to the scupper drains was not fabricated in a waterproof manner.

[23] The experts also agreed that deficiencies in the construction and installation of the balustrade and parapet junctions had caused water ingress. In particular no saddle

flashings were installed and the parapet tops were clad in fibre cement with no falls to the surface of the parapet. The plans did not indicate any areas where saddle flashings were to be used or any details on how to form saddle flashings.

[24] Other deficiencies in the way the balconies were constructed were also identified. Mr Wiemann considered that the primary cause of water ingress in the deck area, other than the balustrade issues, was failure of the membrane but he could not establish the cause of this. Mr Bukowski also said it was clear when undertaking the remedial work that water ingress had occurred through the membrane but he was also unable to determine the cause of the ingress.

[25] Mr Wiemann's, largely unchallenged, evidence was that while the tiling over the butynol created a high risk situation the addition of tiles as such had not caused water ingress. The consequential reduction in the clearances between the deck surface and the cladding system could have been a contributing factor but he had not seen any evidence of water ingress caused by the installation of the tiles alone. He also identified the lack of fall as possibly contributing to the damage that occurred.

Conclusion

[26] We accordingly conclude that the primary defect with the dwelling related to the installation of the joinery. There were also a number of deficiencies in relation to the decks and the balustrades that resulted in water ingress. The most significant of these related to the construction of the balustrades to the decks on levels one and two, the lack of saddle flashings, issues with the scuppers and water ingress through the membrane from some unidentified cause. Less significant contributing factors were the inadequacy of the step down of

the deck to internal floor levels and the lack of fall. In addition at the hearing Mr Wiemann accepted that lack of clearance between the horizontal deck surfaces and the vertical cladding contributed to water ingress. This was not a defect which Mr Weimann listed in his summary at 15.2 of his report and it is also not a defect that was listed in Mr Bukowski's brief as being causative of leaks. Damage has also resulted from the cladding being installed hard against the block work.

HAVE MR AND MRS MONTGOMERY AND MR BRAMWELL BREACHED THE VENDOR WARRANTY AS SET OUT IN CLAUSE 6.2(5) OF THE AGREEMENT FOR SALE AND PURCHASE?

[27] Keven submits that Mr and Mrs Montgomery and Mr Bramwell breached clause 6.2 of the sale and purchase agreement because Mr Montgomery caused or permitted work to be done on the property for which a building consent was required by law. Mr Shand submitted that Mr and Mrs Montgomery and Mr Bramwell were in breach of the warranty if it was established that at the date of giving of possession the building work did not comply with the Building Code. He made the submission on the basis that the building consent application says that the building application is accompanied by:

> The drawings, specifications and other documents according to which the building is proposed to be constructed to comply with the provisions of the New Zealand Building Code."

[28] The building consent in turn states:

> The building consent is a consent under the Building Act 1991 to undertake building work in accordance

> with attached plans and specifications so to comply with the provisions of the Building Code.

[29] Mr Wilson submitted that the proposition that a breach of warranty would be established if at the date of giving and taking of possession (26 July 2007) the work did not comply with the Building Code was not sustainable. He submitted the plain wording of the warranty in 6.2(5)(b) relates to the time when work was completed. It is therefore at the time the work was done that is the relevant time for consideration as to whether appropriate consents were obtained. In addition he submitted the argument that the building consent required compliance with the Building Code is not sustainable because none of the conditions contained in the actual building consent stipulated any requirements to the effect of complying with the Building Code. It is the responsibility of the territorial authority to determine that the work, when completed, will comply with the Building Code before issuing a building consent.

[30] The sale and purchase agreement at issue here is on the form of the 8th edition of the Law Society sale and purchase agreement. 6.2 of the agreement for sale and purchase states:

> 6.2 The vendor warrants and undertakes that at the giving and taking of possession:
>
> (5) Where the vendor has done or caused or permitted to be done on the property any works:
>
> (a) Any permit, resource consent or building consent required by law was obtained; and
>
> (b) The works were completed in compliance with those permits or consents; and
>
> (c) Where appropriate, a code compliance certificate was issued for those works.

[31] Prior to the 8th edition the warranties given by the vendor included one to the effect that all obligations of the Building Act

were complied with. This was interpreted as meaning that, in line with section 7 of the Building Act 1991 there was a warranty that building work complied with the Building Code. Changes were made to the agreement for sale and purchase because the authors of the form were of the view that a warranty as to complying with all obligations of the Building Act was excessively onerous. The paper presented for the Auckland District Law Society seminar on the 8th edition for the agreement for sale and purchase real estate stated:

> The subcommittee considered, particularly in the light of the litigation arising out of the "leaky home" crisis, that it is inappropriate for a vendor to give a blanket warranty that all obligations under the Building Act have been fully discharged, especially as the obligations are not limited in clause 6.2(5)(d) of the 7th edition form to those imposed on the vendor and that the parties to whom the vendor might have recourse if the warranty proves to be incorrect, such as the architect, builder or territorial authority, may be protected from liability through the expiry of limitation periods, especially as there is a 10 year longstop under the Building Act. It is considered that so long as the vendor obtains a building consent (and resource consent, if that should be necessary) and then carries out the work in accordance with those consents and obtains, at the end of the job, a code compliance certificate, then that should be the end of the vendor's responsibilities.

[32] In our opinion this is an accurate summary of the ordinary meaning of the provisions as set out in 6.2. It would be wrong to read back into this clause a warranty that any construction work complied with the Building Code when the former provision which required this was specifically omitted. The natural and ordinary meaning is that at the time of sale the vendors warrant that:

- they obtained the necessary resource and building consents for any work done that required such consents; and
- they carried out the work in accordance with those consents; and
- at the end of the job they obtained a Code Compliance Certificate.

It is not, and should not be interpreted as, a warranty that the dwelling complied with the Building Code at the time of sale.

[33] In this case Mr Montgomery obtained the appropriate permits and building consent for the construction of the dwelling. He engaged appropriately qualified builders to carry out and supervise the construction of the dwelling and he obtained a Code Compliance Certificate on completion of construction. The only evidence of work carried out without a building consent was the subsequent tiling of the decks. The claimants provided no evidence that a building consent was required for this work. Mr Smith's opinion was that tiling the decks probably did not require a building consent at the time the work was done. There was no contrary opinion expressed. In any event Mr Wiemann's evidence is that while tiling over the butynol created a high risk situation he could not directly connect water ingress with the application of the tiles. The best he could say was that it had not helped. There is accordingly no evidence of a causative link between the tiling of the decks and the leaks causing damage and loss.

[34] Keven however submits that even with the narrower interpretation of the meaning of clause 6.2 that we have adopted Mr and Mrs Montgomery and Mr Bramwell are still liable under the vendor warranty because the building was not constructed in accordance with the plans which were part of the consent. In his opening submissions Mr Shand alleged that

there were nine items that were not constructed in accordance with the plans. By the end of the hearing and in final submissions these had been reduced to two, namely the:

- height difference between the finished floor levels and balconies; and
- clearances between the base of cladding and balcony surfaces.

Difference between finished floor level and balconies

[35] Keven alleges that the plans depicted a step down between the interior floor levels and the balconies and that the photographs in the assessor's report show a lack of level difference between the interior floor level and the exterior balcony levels. While Mr Bukowski criticises the lack of level difference between the finished floor levels and balconies he gave no evidence as to whether the way the dwelling was built was in accordance with the plans. Mr Smith however said that due to the size of the deck and the requirement to get appropriate falls across the decks there was a requirement for the deck to be constructed in places at a higher level than the internal floor level. His opinion is that the height difference was anticipated by the designer and was shown on the long section of the building drawings on sheet 8A.

[36] Mr Wiemann, who is a qualified architect, did not consider this was an appropriate detail but he acknowledged it was sometimes done. Mr Wiemann was also clear that his criticism was not that the dwelling was built with no difference between the internal floor level and the deck level. His criticism was that the level of difference was insufficient. He however largely accepted Mr Smith's evidence in relation to what was drawn.

[37] We accept Mr Smith's evidence that no reliable measurements have been taken either of the step down provided for in the plans or as the dwelling was built. He stated at 4.17 of the transcript:

> There are no definitive measurements. No one has got a measurement on the plans and no one has taken a measurement on site to show exactly what the step down is. So we are making a certain amount of assumptions about what the measurement is on the plans which I think Mr Weimann and myself agree is about 35 mm and then from photo 6 in Mr Weimann's report I have expressed the opinion that might be 35-40mms. So I have reached a conclusion that from that information that is within cooey of what is shown in the plans

[38] We accordingly conclude that whilst the lack of level difference between the finished floor and the balconies may have contributed to water ingress there is no reliable evidence to establish that in this regard the dwelling was not built in accordance with the consented plans. Accordingly the claimant has failed to establish that there is any breach of clause 6.2(5)(b) in relation to this alleged defect.

Clearance between base of cladding and balcony surfaces

[39] Mr Wiemann accepted at the hearing that while the primary cause of water ingress from the deck surface was the failure of the membrane the lack of clearance between the vertical cladding and the horizontal surfaces of the deck was a contributing factor. Mr Smith accepted that the detail shown on plan A.7 detail 1 has 150mm clearance but stated that this detail relates to one location only. There is no photograph of that area and no evidence was given as to what the "as built" clearance was in that location. Mr Smith noted that where photograph 6 in the assessors report is of detail 2 of sheet 7 of

the plans and that drawing does not give a height for any of the cladding.

[40] Mr Smith's opinion was that the balustrade cladding/balcony surface was constructed in a manner that very closely resembled the details on the plans. He also concluded that the moisture readings taken by the assessor did not indicate any elevated readings as a result. He further noted that it did not appear to be an issue of moisture ingress identified by Mr Bukowski during the remedial work. Mr Smith accepted there should have been a clearance but in the majority of locations the plans do not make it specific as to the extent of the clearance.

[41] We have examined the plans and photographs and agree that there is a 150mm clearance shown on plan A7 detail 1. However there is no photograph of this location nor is there any evidence as to what the cladding clearances were in that location. For other locations there are no specific measurements for clearance and again there have been no specific measurements taken of either what the plans did portray or what the clearances were as built. As noted earlier there is no reference at all in Mr Bukowski's brief to what the plans specified or to lack of cladding clearances in the dwelling being causative of leaks. Mr Weimann in his report refers to lack of clearance between balustrade cladding and balcony tiled surfaces but again did not measure it or compare it to the consented plans. He also did not conclude, in his report, that this was a defect which has caused or contributed to water ingress.

[42] There is accordingly insufficient evidence on which we could conclude that the dwelling has not been built in accordance with the consented plans in relation to the

clearance between the base of the cladding and balcony surfaces.

Conclusion

[43] We accordingly conclude that the claimant has failed to establish any breach of warranty contained in clause 6.2 of the agreement for sale and purchase. In particular there is no evidence that the dwelling was not built in accordance with the consented plans in relation to the difference between finished floor level and balconies or the clearance between the base of the cladding and the balcony surfaces. We further note that even if we had concluded there were departures from the plans in relation to these two issues they were at most minor contributing causes of damage and not key defects. These two issues would not have necessitated a complete re-clad of the dwelling on their own and could have been adequately remedied by targeted remedial work to the affected balcony areas.

DOES MR SIMPSON OWE KEVEN A DUTY OF CARE

[44] There is no dispute that Mr Simpson's company was contracted to build the dwelling on a full build and supervise contract. The issue however is whether Mr Simpson personally owes Kevin a duty of care. The effect of the incorporation of a company is that the acts of its directors are usually identified with the company and do not give rise to personal liability. However, the courts have for some time determined that while the concept of limited liability is relevant it is not decisive. Wylie J in *Chee v Stareast Investment Limited*[7] concluded that limited liability is not intended to provide company directors with a general immunity from tortious liability.

[7] HC Auckland, CIV-2009-404-5255, 1 April 2010.

[45] In *Morton v Douglas Homes Ltd,*[8] Hardie Boys J concluded that where a company director has personal control over a building operation he or she can be held personally liable. In *Dicks v Hobson Swan Construction Ltd (in liq),*[9] Baragwanath J concluded that as Mr McDonald, the director of the building company, actually performed the construction of the house he was personally responsible for the defects which resulted in the dwelling leaking and therefore personally owed Mrs Dicks, the home owner, a duty of care.

[46] In *Hartley v Balemi,*[10] Stevens J concluded that personal involvement does not necessarily mean the physical work needs to be undertaken by a director but may include administering the construction of the building. The Court of Appeal in *Body Corporate 202254 v Taylor*[11] considered director liability and analysed the reasoning in *Trevor Ivory Limited v Anderson.*[12] It held that the assumption of responsibility test promoted in that case was not an element of every tort. Chambers J expressly preferred an "elements of tort" approach and noted that assumption of responsibility is not an element of the tort of negligence.

[47] If an element of torts approach is adopted in this case what needs to be considered is whether the elements of the tort of negligence are made out against Mr Simpson personally. In *Hartley v Balemi*, Stevens J observed:[13]

> Therefore the test to be applied in examining whether the director of an incorporated builder owes a duty of care to a subsequent purchaser must, in part, examine the question of whether, and if so how the director has taken actual control over the process and of

[8] [1984] 2 NZLR 548 (HC).
[9] (2006) 7 NZCPR 881 (HC), Baragwanath J.
[10] HC Auckland CIV-2006-404-2589, 29 March 2007.
[11] [2009] 2 NZLR 17 (CA).
[12] [1992] 2 NZLR 517 (CA).
[13] *Hartley v Belemi*, above n 8, at [92].

> any particular part thereof. Direct personal involvement may lead to the existence of a duty of care and hence liability should that duty of care be breached.

[48] No particulars of claim were set out against Mr Simpson other than the information provided in the application to join him. This information was not detailed and largely contained a general allegation that Mr Simpson was involved in the building work. The claimants and the first respondent submit that judgment should be entered against Mr Simpson because he filed no defence and no written brief of evidence. We do not accept this submission as there was no articulated claim against him to which he could file a response.

[49] In addition neither the claimants nor the first respondent called any evidence of Mr Simpson's personal involvement in the construction work. In particular Mr Shand provided no details of Mr Simpson's alleged involvement in either opening or final submissions. Keven made no specific allegations, or called any evidence, that work done or supervised by Mr Simpson personally was defective or causative of leaks. While Keven summonsed Mr Simpson to give evidence, neither Mr Shand nor Mr Wilson asked him any specific questions as to his personal involvement in the construction work.

[50] When questioned by the Tribunal Mr Simpson gave uncontested evidence that at the time of construction his company employed approximately 30 workers and that it had several builders working on this site including a qualified site foreman. Mr Simpson accepted he was involved in some of the decision making during the construction and also in some of the building work. About three quarters of the way through the construction work he broke his back as a result of an accident on site. He stated that any of the work he personally undertook

or supervised was done in accordance with good building practices of the day.

[51] Mr Simpson's role in the construction was one that could result in him personally owing a duty of care to subsequent home owners. However there is no evidence that any breach of that duty of care has resulted in the defects that have caused the leaks. No evidence has been presented to establish that Mr Simpson either carried out the defective building work or that he directly supervised or controlled it. Therefore even if we were to conclude that Mr Simpson owed a duty of care there is insufficient evidence to establish that he breached that duty or that any breach has caused or contributed to Keven's loss.

[52] The claim against Mr Simpson therefore also fails.

DATED this 16th day of September 2011

_____	_____
P A McConnell	P Cogswell
Tribunal Chair	Tribunal Member