IN THE WEATHERTIGHT HOMES TRIBUNAL
TRI 2008-100-000031

BETWEEN	**MARYWIL INVESTMENTS LIMITED as Trustee of the MARYWIL TRUST** Claimant
AND	**NORTH SHORE CITY COUNCIL** First Respondent
AND	**MURRAY AITKEN** Second Respondent
AND	**PLASTER SYSTEMS LIMITED** Third Respondent
AND	**RICHARD POTTER** Fourth Respondent
AND	**MW AITKEN ENTERPRISES LIMITED** Fifth Respondent
AND	**HENDRIK KANON** Sixth Respondent

Hearing:	9 and 10 June 2009
Appearances:	S Thodey and R Karalus for claimant and first respondent C Twigley and J Natusch for sixth respondent
Decision:	14 July 2009

INTERIM DETERMINATION
Adjudicator: P A McConnell

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INTRODUCTION

[1] Marywil Investments Limited as trustee of the Marywil Trust (the Trust), is the owner of a dwelling house at 260 Lake Road, Takapuna. In 2004 after seeing evidence of damage from leaks, the Trust registered a claim with the Weathertight Homes Resolution Service. After carrying out his investigations the assessor confirmed the dwelling was a leaky house.

[2] The Trust filed a claim with the Weathertight Homes Tribunal naming the North Shore City Council (the Council), the territorial authority, which undertook inspections and issued the Code Compliance Certificate (CCC) as the only respondent. Several other parties were subsequently joined to the claim and the claim was referred to mediation on 20 March 2009. A partial settlement agreement was reached between all parties other than Hendrik Kanon, the sixth respondent. The settlement agreement included a provision that the Council could take an assignment of the claim against Mr Kanon on behalf of the claimant. The claim proceeded to an adjudication hearing against the sixth respondent only on 9 and 10 June 2009.

[3] Mr Kanon was a director of Famkanco Construction Limited (Famkanco), a company which undertook labour-only building work during the construction of 260 Lake Road under contract with Apex Homes (1993) Limited (Apex). The building work was carried out by Mr Kanon, his work partner Bob Sprenkeling and his sons, Messrs Patrick and Arnold Kanon.

BACKGROUND AND MATERIAL FACTS

[4] Apex were the previous owners of land at 260 Lake Road. In 1993, it engaged Butt Design Limited to prepare drawings and specifications for the property. A building consent was issued based on those drawings on 28 February 1994. The house was constructed between February 1994 and February 1995. The North Shore City Council carried out inspections during the construction work with the final CCC being issued on 8 February 1995.

[5] Famkanco was contracted by Apex to provide labour-only building work for the construction. A written agreement was entered into but a copy of that agreement is no longer available. The contract was for a fixed price and was to cover pouring the concrete

foundation, timber framing, installing hardibacker, laying plywood on the roof trusses, completing the internal gibbing and installation of internal doors. Famkanco was not in control of the site nor did it have any supervisory responsibilities for subtrades. Throughout construction Apex had a project manager on site who checked off work being done by contractors on site on a daily basis.

[6] Famkanco's work was done primarily in two blocks. Initially it was on site for approximately six weeks from February to early April 1994. The Kanons then left to work on other sites returning to complete the internal fit-out several weeks later, most likely in August and September 1994. There is no evidence that Famkanco or any of its employees were onsite after October 1994.

[7] On 22 November 1994, Raymond Mellor Adams entered into an agreement for sale and purchase to buy the property at 260 Lake Road for $655,000.00. Mr Adams is one of the directors of Marywil Investments Limited whom he nominated as the transferee.

[8] The purchase was supposed to settle in 27 January 1995, but was delayed due to a failed final inspection. Mr Adams and his wife moved into the property on 10 February 1995. On final settlement, $10,000.00 was retained because of various aspects of the house that were not completed to a reasonable standard. These were attended to by Apex together with a leak, which occurred in the main upstairs bedroom shortly after the Adams moved in. There were various other construction defects with the house which Mr Adams sought to resolve directly with Apex.

[9] In 2004 after further damage was evident from a leak in the main upstairs bedroom, Mr Adams engaged a builder and roofer to look into the problem but neither were able to locate the fault. On 12 January 2005 he registered the claim with the Weathertight Homes Resolution Service. The assessor's report concluded the house was

a leaky home and the claim was found to be eligible by letter dated 29 April 2005.

[10] Jim Morrison of CoveKinloch Consulting Limited was contracted to prepare plans and specifications, obtain the building consent and manage building construction tenders. Tenders were received from Reconstruct and Andels Construction but the claimant decided to engage North Head Builders Limited to carry out the remedial work. O'Hagan Building Consultants Limited was engaged as a consultant to verify what timber was required to be removed and see that the replacement framing was of the correct type. The cost to fix the house was $334,997.24. The Trust had to borrow the money to pay for the remedial work and as at 16 March 2009 had incurred finance costs and interest of $68,612.66. The claimant is also seeking general damages of $25,000.00.

THE DWELLING

[11] 260 Lake Road is a free-standing two-storey townhouse. It had monolithic wall cladding known as duraplast, a Plaster Systems Limited light weight solid plaster. The dwelling has concrete foundations and a concrete floor slab with tanalised timber piling to internal foundations. The roof and walls are timber framed with the roof being fibreglass reinforced shingles. Powder coated aluminium joinery was used throughout the house and internal linings are gib board. The house has two decks on both the upper and lower levels and there is a small porch area by the main entrance.

[12] There was extensive damage to the house caused by water ingress including decay damage to both flooring levels particularly particle board flooring, boundary joists and carpet damage. In addition there was widespread decay to the wall framing, flooring and boundary joist timbers at mid-floor level and also damage at ground floor level. Mildew had damaged wall linings and moisture had migrated through the handrail bracket fixing of the deck areas into

the plastered walls. There was also paint and mildew damage to the ceiling and to wall linings and water staining to the substrate roof lining.

TECHNICAL BACKGROUND

[13] The technical background to these claims is now well understood. Section 7 of the Building Act 1991 (the Building Act) requires that all building work for residential properties, such as the subject dwelling, comply with the Building Code which is part of the regulations enacted under the Building Act. Section 32 of the Building Act requires building work to be done in accordance with a Building Consent; and the local authority, in terms of section 43, shall only issue a CCC if it is satisfied on reasonable grounds that the building work complies with the Building Code.

[14] The Building Code sets functional and performance requirements which all building work must meet. The relevant clauses of the Building Code for this claim are clauses B2 (durability), E1 (surface water) and E2 (external moisture).

[15] Water penetration into the dwelling has contravened the provisions of the Building Code particularly E2 – external moisture, and the result of decay and damage to the timber framing contravened clause B1- structure. The damage to the dwelling also contravened clause B2 – durability.

DAMAGE TO THE DWELLING AND ITS CAUSES

[16] Alan Bolderson, the assessor, Mark Powell, the Council's expert and Simon Munro, the remedial builder, gave evidence on the defects to the dwelling and the subsequent damage. Mr Hendrik Kanon and Mr Arnold Kanon also gave evidence based on their

expertise in this area as did Mr Edward Logan, the weathertightness case manager from the North Shore City Council.

[17] While there were a large number of defects alleged to have been responsible for water ingress, the specific defects for which Mr Kanon has allegedly some liability are in four main areas. A claim in relation to a fifth defect, lack of adequate under house ventilation, was withdrawn at the beginning of the hearing.

Roof to Wall Junctions and Flashing

[18] The expert evidence established that a significant cause of water entering the dwelling house was the lack of sealant and/or poor workmanship in the wall to roof junction flashings including the parapet wall to roof junctions. The assessor's report clearly establishes that the parapet wall to roof junction in the dining room corner/ensuite and the roof to wall junction in the dining room ensuite area have caused moisture ingress resulting in damage to both flooring levels. I accept that a significant cause of water entering the dwelling was defective workmanship in relation to junction flashings, this included inadequate sealing of roof to wall junctions and the parapet wall to roof junctions.

Windows

[19] The undisputed evidence of all experts established that defects in the installation of the windows was a major contributing factor to the dwelling leaking. In particular, the windows were inadequately flashed and sealed.

Construction of Decks

[20] The expert evidence established that the defects in the construction of the decks were a major contributing factor to the dwelling leaking. The major defect causing leaks with the upper level decks was moisture migrating through the handrail bracket fixings

through the flat top edge of the plaster walls. Mr Kanon and his company were not responsible for this work. The work on the deck for which it is alleged he is responsible is the lack of ground clearances, the flat surface of the decks and the lack of step down under the door joinery on both the upper and lower decks.

[21] In relation to the lack of clearances, all experts agree this was a defect at the time the dwelling was constructed and was a contributing factor to the dwelling leaking. The assessor concluded that whilst the lack of step down was contrary to the technical literature and accepted building practices at the time there was no evidence that any damage had been caused by the lack of step down. Other experts considered it may have contributed to damage but was a minor cause. I accordingly conclude that whilst it may be a defect the lack of step down is not a substantial or material cause of the dwelling leaking.

[22] The final area in relation to the deck relates to the lack of fall on the deck surface. In 1994 when the dwelling was constructed, there was no specific requirement for decks to be constructed with a fall. While it may have been best practice it was not specifically required under the Building Act or Building Code and was also not required by Councils in issuing building consents and CCCs. In addition, these decks were drawn flat in the plans and Mr Truman, the project manager, directed the decks be built flat in accordance with the plans. In all these circumstances I conclude the builders of this house were not negligent for not building the decks without a slope. In any event the lack of fall is only a minor contributing issue to the leaks associated with the deck.

Sealing of penetrations

[23] It was clearly established that there are a number of penetrations of the cladding that have not been adequately sealed and these have allowed water ingress into the building. The most

significant of these is the main bedroom deck drainage scupper. I accept this is a significant cause of the leaks and that the lack of sealant and adequate waterproofing in this area is a construction defect.

THE ISSUES

[24] The major issues to be determined in relation to this claim are:

(a) Is the Council able to bring this claim on an assigned basis?
(b) Is the claim limitation barred pursuant to section 91 of the Building Act 1991?
(c) Did Mr Kanon owe the claimants a duty of care?
(d) The work undertaken by the sixth respondent, Mr Kanon and his company: - did Mr Kanon perform the defective work?
(e) Did Mr Kanon breach any duty of care he owed to the claimants?

JURISDICTION TO BRING ASSIGNED CLAIM

[25] Mr Kanon submits it is an abuse of process for the claim to be brought in the way that it has. There are two parts to this submission, firstly, it is submitted that the assignment is invalid as the Tribunal has no jurisdiction to deal with an assigned claim. It is further submitted that it is an abuse of process for an assigned claim to be brought for the full amount as it could result in the Council benefiting from the process.

[26] In relation to the assignment issue, I accept that there is no specific provision in the Weathertight Homes Resolution Services Act

2006 (the Act) that authorises assignment of claims. On the other hand there is nothing that precludes this either.

[27] Section 57 of the Act provides that the Tribunal must manage adjudication proceedings in a manner that tends best to ensure they are speedy, flexible and cost-effective, and in doing so must, amongst other things, encourage the parties to work together on matters agreed. Allowing an assignment of claim where claimants are subsequent purchasers or owners to parties that were key players in the construction development, or inspection as part of a partial settlement, is one way of assisting flexible and cost-effective adjudication of claims. It also encourages parties to work together towards an appropriate settlement.

[28] In *Auckland City Council (as assignee) of Body Corporate 16113 v Auckland City Council*[1] Heath J concluded that the Council had a genuine commercial interest in completing settlement and in taking an assignment of the claims. He concluded there was no rule of public policy to prevent genuine settlement of this type and that owing to the law of contribution there was no prejudice to the other defendants. There is nothing in the Act which would preclude the Tribunal from taking the same approach as the High Court on these issues.

[29] The inability of respondents in the adjudication process not to be able to approach matters in a way where some can reach a settlement with the claimants would mean that a partial settlement with some parties would never be possible. I accept Ms Thodey's submissions that this would mean that one respondent could hold the remaining parties to ransom. This is clearly against the policy of the Act and its aim to encourage speedy and cost-effective resolution of claims. I accordingly conclude that the Council is able to continue with this claim on an assigned basis.

[1] [2008] 1 NZLR 838.

[30] I accept that there are circumstances where allowing one party to be pursued for the full amount after settlement with other parties could result in unfairness. This could be the case if the Tribunal were to make an order for the full amount against the party not involved in any partial settlement. That however is primarily a theoretical objection as what is being sought in this case is primarily an order of a sum equivalent to Mr Kanon's appropriate apportionment. In addition, even if the Tribunal were to make an order against Mr Kanon for the full amount of the claim, it would include in that order a provision that the claimants would only be able to enforce this order up to the difference between the settlement amount and the total amount claimed. This was the approach taken by Duffy J in *Body Corporate 185960 & Ors v North Shore City Council & Ors.*[2]

IS THE CLAIM LIMITATION BARRED?

[31] Mr Twigley, counsel for Mr Kanon, submitted that the claim was limitation-barred because of the ten year long-stop provision in section 393(2) of the Building Act 2004. It was the 1991 Building Act that was in force at the time this home was constructed but section 91 of that Act contains an identical limitation defence to that contained in s 393(2) of the 2004 Building Act. Section s91 provides:

> **91. Limitation defences** –
>
> (1) Except to the extent provided in subsection (2) of this section, the provisions of the Limitation Act 1950 apply to civil proceedings against any person where those proceedings arise from –
>
> (a) Any building work associated with the design, construction, alteration, demolition, or removal of any building; or
>
> (b) The exercise of any function under this Act or any previous enactment relating to the construction, alteration, demolition, or removal of that building.

[2] [28 April 2009] HC, Auckland, CIV 2006-404-3535.

> (2) Civil proceedings relating to any building work may not be brought against any person 10 years or more after the date of the act of omission on which the proceedings are based.

[32] It was accepted by all parties that Mr Kanon was not involved in construction work on site after October 1994 at the latest. The claim was filed with the Department of Building and Housing on 12 January 2005. This was more than ten years and two months after the Kanons completed working on site. Mr Twigley therefore submits that any actions or omissions that form the basis of this claim occurred more than ten years before the claim was filed and therefore the claim against Mr Kanon is limitation-barred under section 91 of the Building Act.

[33] Mr Twigley accordingly submits that the only issue that requires consideration is whether any of the existing respondents, in this case the Council, can effectively "claw back" any liability on the part of Mr Kanon for events that took place before 12 January 1995. Mr Twigley notes that an initial application for removal was dismissed due to the Tribunal following *Cromwell Plumbing Drainage and Services Limited v De Geest Brothers Construction Limited* (*Cromwell Plumbing).*[3] However since that time, Mr Twigley submits there have been a number of High Court decisions which call into question the approach in *Cromwell Plumbing*. In particular, Randerson J in *Carter Holt Harvey Limited v Genesis Power Limited & Ors* (No 8)[4] endorsed the obiter comments of Courtney J in *Dustin*[5] and stated:

> [44] "Despite a civil proceeding being brought within time under the Limitation Act, a civil proceeding may not be brought against any person ten years or more after the date of the act or omission on which the proceedings are based. In that respect, I agree with the conclusions reached by Courtney J in *Dustin…*and with her analysis at [15] to [35]."

[3] (1995) PRNZ 218.
[4] [29 August 2008] HC Auckland, CIV 2008-404-1974.
[5] [25 May 2006] HC, Auckland, CIV 2006-404-276

[34] More recently Faire AJ declined to follow *Cromwell Plumbing* in *Davidson & Ors v Banks & Ors.*[6] Mr Twigley therefore submits that the preponderance of High Court opinion is now contrary to *Cromwell Plumbing* and in favour of a conclusion that the ten year long-stop period applies also to cross-claims filed under the Law Reform Act 1936.

[35] While the absence of detailed reasoning in *Davidson v Banks* makes it difficult to apply as a precedent I accept that the preponderance of High Court opinion tends to be swinging against the conclusions in *Cromwell Plumbing*. This however is not necessarily a determinative issue in this case. The key issue to be considered in this case is: - when did the "act or omission" on which these proceedings are based occur?

[36] Ms Thodey submitted that it would be artificial to determine that the act or omission of any particular party involved in the construction of a dwelling occurred, at the latest, by the date each party involved in the construction left the site. She suggested this would be contrary to the purposes of the Act that puts an emphasis on a 'built-by' date and requires claims to be dealt with in a speedy, flexible and cost-effective manner.

[37] Having to determine the exact date of an act or omission in the context of a domestic building contract based on the specific dates when each tradesman did particular work on site would not only be very difficult but would add to the complexity and length of any hearing. Ms Thodey submits that a building contract should be regarded as a whole in determining the date of the act or omission. She noted that where a claim is based on both acts and omissions it cannot be determined that an omission has occurred until construction is completed because there is always a possibility that the person could be required to come back and rectify any omission.

[6] [23 March 2009] HC, Auckland, CIV 2006-404-006150, Faire AJ.

[38] In *Johnson v Watson,*[7] the Court of Appeal acknowledged that in a building dispute claimants could not be expected to point to an exact day on which an act or omission took place. Tipping J stated:

> "…Indeed, in a case like the present where the Johnsons could not be expected to point to an exact day on which the act or omission took place, there may be an argument saying that where original building work is faulty the builder is under a continuing duty to remedy it right through until the date of completion, and there is a continuing 'omission' until that date."

[39] French J in *O'Callaghan & Ors v Drummond & Ors*[8] considered a strike out application from a party who claimed they had not been on site within a ten year period of the claim being filed. She concluded that it was at least arguable that an act or omission in terms of a building contract did not occur until the building was complete based on arguments put forth on behalf of the Christchurch City Council that the developer owed a continuing duty up to the time of completion of construction. She however did note that she was not convinced that this was the case.

[40] As noted by the Court of Appeal in *Johnson v Watson*, it is particularly difficult in domestic construction cases to point to an exact day on which an act or omission took place. Concluding that a contracted builder or developer would generally be under a continuing duty to remedy any act or omission through until the date of completion is reasonable given the nature of building projects. It is unnecessary for me in the purposes of this claim to determine whether a continuing duty to remedy should apply to all trades people involved in construction or even to all builders. In the circumstances of this case however where there was a building contract for the completion of certain work, it would be artificial to conclude that any omission occurred on the date Mr Kanon and the other builders left the site. Mr Kanon's company was contracted to

[7] [2003] 1 NZLR 626 at para 27.
[8] [21 October 2008] HC, Christchurch, CIV 2007-409-001441.

perform certain work and they could have been required to return to the site up until completion of the project to complete further work or rectify any defective work.

[41] I accordingly conclude that the act or omission on which any claim against Mr Kanon is based did not occur until the house was completed. In determining when a dwelling is completed or built, a number of issues need to be considered. The date for issuing a CCC is clearly relevant to this consideration but is not necessarily definitive. This would particularly be the situation in cases where the CCC has never been issued or was issued some time after the completion of the construction work.

[42] In the circumstances of this case the earliest at which it could be considered that the house was completed would be early February 1995. Settlement was delayed from 27 January 2009 to early February because work had not been completed and a CCC had not issued. Even on settlement, $10,000 was retained to cover any additional work required to be completed. I accordingly conclude that the date from which the ten year long-stop provision would start running in relation to any claim against Mr Kanon would be, at the beginning of February 1995. The claim was filed within ten years of the beginning of February and accordingly the limitation defence fails.

DID MR KANON OWE THE CLAIMANTS A DUTY OF CARE?

[43] Mr Kanon was the director of Famkanco, the company contracted to carry out the building work. There is no dispute that builders owe homeowners a duty of care to carry out building work on a house in accordance with the Building Act, the Building Code and in a workmanlike manner. In addition Mr Kanon does not dispute that he was actively involved in the building work and in the supervision of the building work undertaken by Famkanco. It is now reasonably well established that directors of building companies who

actually carry out the building work can be personally liable for any negligent work they undertook.[9]

[44] Mr Kanon, at least by implication, accepted that the degree of his involvement could attract some personal liability. He however submitted that as a labour-only contractor performing work under the supervision of Apex's site or project manager, Mr Truman, he should not be held liable for any defective work performed. I do not accept the submission that the fact there was a site manager or project manager employed by the developers negates any duty of care Mr Kanon or his company owed the claimants. Whilst these issues are relevant to considering the factual responsibility and liability of Mr Kanon, I do not consider they negate any potential duty of care he may owe. The terms of the contract are however relevant considerations when deciding whether he breached any duty of care owed.

[45] I accordingly conclude that Mr Kanon did owe a duty of care to the claimants to ensure the building work carried out on the house was carried out in accordance with the Building Act 1991, the Building Code and in a workmanlike manner.

[46] Mr Twigley submitted Mr Kanon was in a similar position to Mr Tribe in *Sell v Harris & Ors.*[10] I do not accept this submission, Mr Tribe was a hammer hand with little training and experience working under the direction of the main builder. Mr Kanon was in effect the main builder and the labour-only nature of the contract does not mitigate against concluding he owed the claimants a duty of care.

DID MR KANON PERFORM ANY DEFECTIVE WORK

[47] In determining whether Mr Kanon performed any defective work, I will concentrate primarily on the specific defects for which it has been alleged Mr Kanon has some liability.

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[9] *Dicks v Hobson Swan Construction Limited (in liquidation) & Ors* (2006) 7 NZCPR 881 (HC).
[10] [13 May 2009] WHT TRI 2008-100-01, P McConnell.

Roof to Wall Junctions and Flashings

[48] Mr Kanon does not dispute that there are defects in this area nor does he dispute that they caused water ingress. He however claims it was not his, or his company's, responsibility as they only installed the hardibacker. Mr Kanon's evidence is neither he nor his company installed the flashings or the roof and in addition he was not responsible for applying the texture coating and plastering. He understood that subsequent to the installation of the hardibacker, a specialist sealer would be engaged to do the sealing work prior to the plastering. He also noted that there was a project manager/site manager, Dick Truman, who was responsible for the sequencing of the subtrades and ensuring work was done.

[49] Mr Bolderson's evidence is that the plasterer was primarily responsible to ensure things had been adequately sealed before he undertook his work. He did however indicate that the builder would have some responsibility for ensuring it was done as well. Mr Bolderson acknowledged that in a situation where you have a proactive onsite supervisor the sequencing of trades and ensuring work was done between various trades would primarily be that person's responsibility rather than the labour-only builders. Mr Munro however considered that the builder would still have some responsibility for ensuring penetrations, and junctions were adequately sealed and flashed.

[50] I accept the evidence of Mr Kanon and his sons that Mr Truman was a project manager engaged by Apex who was actively involved on site on a daily basis. This evidence was to some extent confirmed by Mr Potter, a director of Apex. Mr Kanon and his two sons gave evidence that Mr Truman was actively involved in checking their work and in directing it. There is no reason why I should disbelieve this evidence.

[51] I accept that in the normal course of events a builder would be responsible for ensuring sealing work was done when that was required as the next step in the process. However I also accept that that responsibility can change where builders are contracted on a labour-only basis and work under the direction of a site manager. In circumstances where they are not specifically required to undertake the sealing work, and reasonably believe others will be engaged to do it, they cannot be held to be responsible for inadequate sealing or defects caused by failure to sequence the subsequent work properly. I therefore conclude that Mr Kanon was not negligent in failing to ensure adequate sealing was done before flashings were installed and in areas which crossed over between the builder's work and that of other trades.

[52] Accordingly I conclude that neither Mr Kanon nor his company were responsible for the defects in the roof to wall junctions. Mr Kanon and his company were not involved in installing the flashings and they reasonably believed that other tradespeople would be engaged to carry out the relevant sealing and flashing work required to complete a weathertight home.

Sealing of penetrations and cladding material

[53] I accept that failure to adequately seal penetrations of the cladding has caused water ingress. The most significant cause of damage in this regard is the drainage scupper in the main bedroom deck.

[54] Mr Kanon's evidence is that he did not install the drainage scupper nor was he responsible for installing any of the other penetrations through the cladding. He believes it is the tradespeople who followed him that are responsible for sealing and ensuring weathertightness of these areas.

[55] For the reasons given in paragraph [49] – [52] above, I accept this was not primarily Mr Kanon's responsibility. Even if he did have some responsibility Mr Kanon's acts or omissions are not a substantial or material cause of the damage that has occurred. Therefore I conclude that he is not liable for failure to adequately seal penetrations in the cladding of the dwelling.

Installation of Windows

[56] All parties and experts accept the defective installation of the windows was a significant cause of the dwelling leaking. There is however a dispute as to whether or not the windows were installed by Mr Kanon or his company.

[57] Mr Kanon, his two sons and his business partner Mr Sprenkeling all gave evidence that they did not install the windows. They said the windows were late in arriving and they had left the site to work on other jobs for Apex by the time the windows arrived. They believed the windows were installed by the window manufacturers. Mr Potter gave evidence to the effect that it was not the window manufacturers who installed the windows as one of his workers transported them from the factory to the site. He however did not see the windows being installed and could not confirm that they were installed by Mr Kanon or other employees of Famkanco.

[58] Ms Thodey, submitted that I should not accept the Kanons' evidence as they have offered no sensible explanation as to who installed the windows. She also submits that under cross-examination their evidence contradicted what they had said in their earlier briefs and therefore I should not find it convincing. I agree that there was some variation both between the various witnesses for the sixth respondent and between the evidence given at hearing and the statements in their briefs particularly as to the dates Famkanco was actually engaged on site. This dwelling was however constructed in 1994, some 15 years ago. In those circumstances it is

understandable that the evidence was not completely consistent and that the witnesses' recollection of timing and some events would vary.

[59] Mr Kanon and his witnesses were all in agreement as to the general nature of the work they did and how it progressed. I accept that the evidence was credible in this regard. It is clear that Famkanco was originally involved on site for several weeks in which they undertook framing and installation of the hardibacker. They then left to work on other sites returning to complete the final fit-out. Mr Kanon accepted that originally their contract did include installation of windows but because they had not arrived at the time their initial block of work was completed, they went on to do other things. Their assumption was that the window manufacturer installed the windows. They could give no other explanation, as they did not undertake the work and were not on site when it was done.

[60] There is no evidence before the Tribunal that Mr Kanon or employees of Famkanco Construction Limited installed the windows in the dwelling. Their evidence is that they tacked the hardibacker in place in the areas where the windows were to go so that it could easily be removed when installing the windows. I accept the evidence of Mr Kanon, his two sons, and Mr Sprenkeling in relation to the windows and accordingly conclude there is no evidence that Mr Kanon installed the windows or supervised the installation and accordingly he can have no liability in this respect.

Decks

[61] Mr Kanon was not involved in the fixing of the handrails which was identified by all experts as a major cause of leaking in the upper decks. In addition I have already concluded that he was not negligent in failing to install the decks with a fall, as whilst it may have been best building practice at the time, it was not required and the project manager requested the decks be built flat. I have further accepted that insufficient step down under the door joinery did not

contribute significantly to damage. The key area of potential liability in relation to the decks accordingly relates to the insufficient cladding clearances. This issue is most easily seen from photographs 46, 47 and 48 attached to the assessor's report.

[62] Photograph 47 is a photograph of the main bedroom deck and shows adequate cladding clearances. Photograph 46 and 48 are of the central upper deck and show that the external cladding system is installed hard into the tiling surface on that deck. This prevented water from draining through the bottom of the cladding and could also have been a contributing factor to moisture wicking up from the deck surface inside the cladding.

[63] This problem is primarily an issue on the central upper deck but is also evident on the ground level decks and around the front entry. The assessor's report however does not specifically conclude there is damage from lack of ground clearances on either of the lower level decks.

[64] In relation to the lower level decks, Mr Kanon stated that the original plans had intended these decks to take decking. During the course of construction Mr Truman directed a change and advised they were to use compressed sheets. Mr Kanon stated that when he left the site for the last time the lower decks still required a waterproof membrane to cover the compressed sheets. As installing the waterproof membrane was a specialist job, which they were not qualified to do, it was not part of their contract work.

[65] The decks had also not been designed for tiles to be laid and this was also undertaken by another contractor at a later date. Mr Kanon and his sons submit that there is no evidence of waterproofing on the lower decks and that laying the tiles directly on the compressed sheeting was the main cause of water ingress.

[66] Mr Kanon and his witnesses stated that they built both the upper decks in the same manner. In cross-examination, Arnold Kanon stated that the upper central deck had been "tampered" with after they left the site. He said that they had constructed the deck in the same manner as the bedroom deck but that it is clear from the photographs that changes were made. He stated that when they constructed the deck anglefillets were installed and there was clearance between the hardibacker and the surface of the deck. He said that after they left the site the deck was changed and someone must have deconstructed and then reconstructed the deck.

[67] Ms Thodey submitted I should not accept that evidence as it had not been put to any of the other witnesses. However there were no other witnesses who were involved on site to whom this evidence could have been put and Mr Powell, the Council's expert did have the opportunity to comment on it. In addition Arnold Kanon's comments were made in response to evidence given by Mr Munro that was not included in his brief.

[68] Ms Thodey also submitted that the evidence was preposterous and should be dismissed as being unreliable. I accept the evidence was surprising and what was suggested is somewhat unusual. However, unusual things do occasionally happen on building sites. Whilst it would be speculative to provide a scenario which could explain why the deck was deconstructed and reconstructed it is possible to think of some situations when this might occur.

[69] Other than the fact that such evidence was surprising and unusual, there is no other direct evidence, which refutes Arnold Kanon's evidence in this regard. The photographic evidence and evidence suggests that the two upper decks were constructed differently although the Kanons all say they constructed them in the

same way. This tends to support Arnold Kanon's allegation rather than refute it. I would accordingly need to conclude that Mr Kanon was lying if I were to dismiss his evidence. I found him to be a credible witness and the reasons he gave for his conclusion that the deck had been altered after they left the site were reasonable.

[70] There is insufficient evidence therefore to establish that Mr Kanon was responsible for work that resulted in the central upper deck leaking. The handrails were not affixed by him or his company. The lack of fall was not a defect at the time of construction and there is insufficient evidence to establish the lack of step was a significant contributing step issue to the leaking from the decks

[71] Similar defects are however apparent on the lower level decks. Installation faults in the junction of the cladding and decks resulting in insufficient drainage were noted by the experts on both the deck outside the kitchen (kitchen deck) and the semi circular deck outside the lounge and dining room (lounge deck). This is evidenced in photograph 1423 of the RMA bundle of the lounge deck. Photograph 1718 of the RMA bundle shows the same area with the cladding removed showing damage to internal framing.

[72] The moisture readings taken by the assessor also show high moisture readings at the junction of the deck and the house by the lounge deck. Mr Bolderson however noted that there were other causes contributing to this and said that whilst cladding being taken down to the deck could result in moisture being drawn up in the plaster system, he saw little evidence of damage directly from that defect. He considered it to be more an issue of potential or future damage. Mr Munro however considered that this defect had contributed to damage to the bottom plate and boundary joists.

[73] The experts agreed that there were a number of other contributing issues to the moisture ingress. In relation to the kitchen deck, Mr Munro refers in particular to the lack of waterproofing and

flashings around the kitchen windows. There were also joinery installation issues contributing to the leaks in the lounge deck. It is also clear from the assessor's report that there was also significant water ingress from above the deck level which no doubt drained down to the bottom plate and contributed to the damage.

[74] In conclusion I accept that there were some deficiencies in the installation of the cladding associated with the decks that resulted in inadequate moisture breaks between the cladding and the deck surfaces. However the claimants have failed to establish that Mr Kanon or Famkanco were responsible for this defect on at least one of the upper decks. They were however responsible for this defect in relation to the lower level decks. In this respect only it has been established that the work done by Mr Kanon contributed to moisture ingress and subsequent damage.

[75] The lack of adequate clearances was not a primary or significant cause of water ingress. The assessor does not include this defect in his summary of key defects and considers it to be a minor contributing matter only. The primary causes of leaks were inadequate sealing and defects in the installation of windows, defects with the parapet wall to roof junctions and lack of sealant in penetrations and other junctions.

[76] If the only defect to this dwelling had been the lack of ground clearances I am satisfied that the damage would not have been particularly significant and the issues could have been remedied by targeted repairs. At most Mr Kanon would be jointly and severally liable for the cost of carrying out targeted repairs to some of the decks and the entrance area. Whilst it would be difficult to put a dollar value on this work from the evidence before me I would assess that Mr Kanon's total potential (joint and several) liability would most likely be between 10 and 20% of the total remedial costs.

QUANTUM

[77] The claim as pleaded against Mr Kanon was for remedial costs of $265,985.24, general damages of $25,000 and interest pursuant to clause 16 of Schedule 3 of the Weathertight Homes Resolution Servcies Act 2006. The claim for general damages however was not actively pursued at the hearing and no case has been made out for general damages. Whilst I accept Mr Adams has suffered stress and inconvenience from living in a leaky home he is not the claimant in this claim. The claimant is Marywill Investments Limited as trustee for the Marywil Trust. It is well established that a company cannot get general damages.

[78] In relation to the claim for remedial work Mr Twigley raised an issue of potential conflict of interest because of the relationship between the remedial builders and Mr Adams. However prior to engaging North Head Builders Limited (North Head) the work was put out to tender and the amount paid to North Head was lower than either of the amounts tendered. I am satisfied on the evidence presented that the cost of remedial work was reasonable and has been established.

[79] Mr Twigley raised some concerns about Mr Kanon's inability to adequately address the issues of quantum due to the lack of time to prepare for the hearing. Ms Thodey however submitted that the amount being sought against Mr Kanon would be his apportionment or contribution only. At the hearing the parties agreed that I would issue an interim decision as to quantum with a dollar figure given to Mr Kanon's contribution only. Parties would then have ten working days to advise whether they wished to have the opportunity of making further submissions on the issue of quantum before a final decision was issued.

CONTRIBUTION

[80] I have already concluded that the defective work for which Mr Kanon was responsible was not a primary cause of the dwelling leaking. The remedial work in relation to the areas for which Mr Kanon has some responsibility I assess to be between 10 - 20% of the total remedial costs. The work done by Mr Kanon was not the major cause of leaks even in relation to the decks. Other parties also potentially have liability for those areas. I would accordingly assess Mr Kanon's contribution to the total cost of remedial work to therefore be 5% of the amount established for remedial work which is $13,300.00.

CONCLUSION AND ORDERS

[81] The claim is proven to the extent of $13,300.00. For the reasons set out in this determination I order Hendrik Kanon to pay the claimants $13,300 plus interest pursuant to clause 16 of Schedule 3 of the Weathertight Homes Resolution Servcies Act 2006.

[82] If any party wishes to provide further evidence or submissions in relation to the issue of quantum they are to advise the Tribunal of this in writing within the next 10 working days. If any submissions are received a timetable will be set to deal with this issue. If no submissions are received this order will be issued as a final order.

DATED this 14th day of July 2009

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P A McConnell

Tribunal Chair