**IN THE WEATHERTIGHT HOMES TRIBUNAL**
**TRI 2009-101-15 and 18**

| | |
|---|---|
| **BETWEEN** | **DAVID ALFRED FRANKLIN and DIANE HOLROYD FRANKLIN – Claimants in TRI 2009-101-15 AND NGAIRE ANN SHERWIN and HTT 2003 LIMITED AS TRUSTEES OF THE KEREOPA WHANAU TRUST– Claimants in TRI 2009-101-18 – known as MAYFAIR STREET UNITS**<br>Claimants |
| **AND** | **LYNN and MERLYN SPARGO**<br>First Respondents |
| **AND** | **NORFOLK HOMES LIMITED**<br>Second Respondent |
| **AND** | **LINDSAY MACK**<br>Third Respondent |
| **AND** | **GIANNE MARCHESAN**<br>Fourth Respondent |
| **AND** | **ROSS BRYANT DESIGN NETWORK LIMITED**<br>Fifth Respondent |
| **AND** | **ROSS BRYANT**<br>Sixth Respondent |
| **AND** | **BRYAN WAKELIN (REMOVED)**<br>Seventh Respondent |
| **AND** | **BRYCE ARMSTRONG (REMOVED)**<br>Eighth Respondent |
| **AND** | **DAVID WASHER**<br>Ninth Respondent |
| **AND** | **JEFFREY WILLIAMS**<br>Tenth Respondent |

| | |
|---|---|
| Hearing: | 28 October 2009 |
| Final Submissions: | 13 November 2009 |
| Appearances: | Claimants – G Moorcroft<br>First Respondent – Lynn and Merlyn Spargo<br>Second Respondent – No appearance<br>Third Respondent – No appearance<br>Fourth Respondent – No appearance<br>Tenth Respondent – Jeffrey Williams |
| Decision:<br>Amended Decision: | 21 December 2009<br>31 May 2010 |

**AMENDED FINAL DETERMINATION**
**Amendments made to para [96] pursuant to s 92(2), WHRS Act 2006**
**Adjudicator: C Ruthe**

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## I. SETTING THE SCENE

### 1.1 Introduction

*Preamble*

[1] Both the claimants and the first respondents filed submissions. The first respondents were self represented. They filed well thought out submissions.

*The Claims*

[2] There are two claims in these consolidated proceedings.

[3] Claim WHT TRI 2009-101-15 relates to Unit 11, 20 Mayfair Street, Tauranga. It is owned by Mr David and Mrs Diane Franklin. The Franklin claim is for $255,049.09 (including $50,000.00 for mental distress) less settlement payments of $22,700.00, being $232,349.09.

[4] Claim WHT TRI 2009-101-18 relates to Unit 12, 20 Mayfair Street, Tauranga. This is owned by Kereopa Whanau Trust. It is for $298,508.79 including mental distress of $25,000.00 less settlement payments of $40,300.00, being $258,208.79.

[5] The settlement payments, in both claims, have been made by the fifth and sixth respondents (designer) and ninth respondent (roofer).

[6] The parties involved in the development and construction of both units are identical. Therefore the determination will consider issues of liability and any apportionment flowing there from in a unitary decision.

*History of Development*

[7] 20 Mayfair Street commenced its life as a commercial motel prior to 1999. Riverside Holdings Limited purchased the property on 15 September 1999. The first respondents were the directors of Riverside Holdings Limited, which subsequently became Mayfair Court Limited. On 1 May 2000, a subdivision application for 13 freehold unit titles was

filed in the name of L and M Spargo. The building consent was issued on 12 May 2000 in their names.

[8] The conversion proceeded with Units 11 and 12 being completed sometime in 2002/2003. On 14 January 2004, the Franklins entered into a sale and purchase agreement for the purchase of Unit 11. On 27 November 2003, Kereopa Whanau Trust purchased Unit 12.

1.2 The Parties and their Alleged Roles

[9] The claimants' roles have been outlined at [3] and [4] above. The roles and/or alleged roles of the other parties are set out as follows:

- The first respondents, Lynn and Merlyn Spargo, have three claims against them:
    (a) as co-developers of the complex,
    (b) as directors of the development company,
    (c) as the vendors of unit 11.

  Lynn and Merlyn Spargo were the directors of Mayfair Court Limited. (This company was struck off the Register on 17 September 2003).
- The second respondent, Norfolk Homes Limited, was contracted by Mayfair Court Limited to build and supervise the entire development.
- The third respondent, Lindsay Mack, is a company director of Norfolk Homes Limited. There are two claims against him. First, he is alleged to have been the project manager who supervised all the work carried out on units 11 and 12 in his personal capacity. Secondly, he is alleged to be liable as company director.
- The fourth respondent, Gianne Marchesan, was the plasterer and texture coating system applicator. He was also the managing director of Europlast Systems Limited.
- The fifth respondent, Ross Bryant Design Network Limited, was the designer of the units. Prior to hearing, this respondent settled its claim with the claimants. This company is therefore removed from this claim. The sixth respondent, Ross Bryant, is the director of Ross Bryant Design Network Limited. Mr Bryant settled his claim

with the claimants prior to the hearing. He is removed from this claim.

- The ninth respondent, David Washer, was the butynol membrane applicator. Mr Washer settled his claim with the claimants prior to the hearing. He is therefore removed from this claim.
- The tenth respondent, Jeffrey Williams, was a pre-purchase inspector engaged by the House Inspection Company (BOP) Limited (struck off). The Kereopa Whanau Trust contracted with the House Inspection Company (BOP) Limited to undertake a pre-purchase inspection of Unit 12.

1.3 Schedule of Evidence Considered

[10] In Weathertight Homes proceedings the evidence starts accumulating from the very beginning with the filing of the assessor's report. Annexed to this determination is a list of all of the written evidence before the Tribunal and taken into account by the Tribunal (see Annexure 1). This has been supplemented by the evidence of the following witnesses who were questioned at the final stages of the hearing process:

(i) Diane Franklin,
(ii) Ngaire Sherwin,
(iii) Mr Lynn Spargo,
(iv) Mr J Williams,
(v) Ms McCain, previous owner,
(vi) Mr Graham Hodgson, assessor.

## II. ISSUES

*Claims against Mr and Mrs Spargo*

- Did the Spargos owe a duty of care to the claimants, either as company directors of Mayfair Court Limited or in their personal capacities?
- If there was such a duty of care, did the Spargos breach that duty?
- If there is liability what is the extent of any liability?

- Claim in Contract (Franklin Claim) – Were the First Respondents the Vendors?
- If they were, have they breached the warranty?

*Claim against Norfolk Homes Limited*

- Did it breach its duty of care to the claimants?
- If so, what is the extent of its liability?

*Claim against Mr Mack*

- Was he an employee of Norfolk Homes Limited?
- Was he a hands-on company director attracting personal liability?

*Claim against Mr Marchesan*

- As the plasterer, was there negligent application of plaster and texture coating causing leaks?
- Was he a hands-on company director of Europlast Systems Ltd attracting personal liability?

*Claim against Jeffrey Williams (in relation to unit 12)*

- Did the Kereopa Whanau Trust (KW Trust) have a contractual relationship with Mr Williams?
- Was he in breach of a duty of care?
- Did Mr Williams make a negligent misstatement?

## III. TWO LEAKY UNITS – WHERE DO THEY LEAK?

[11] The only expert evidence was from Mr Graham Hodgson, the assessor. He gave evidence at the hearing and also provided his analysis of the damage caused by each area of water penetration.

[12] Fuller details of leaks and related damage are set out in Annexure 2 of this Determination. There is no need to repeat all the details here, save to say the analysis undertaken by the assessor has been fully taken into account and his findings as to leaks and their causes, and what contractor was responsible are accepted by the Tribunal.

3.1 Leaks at Unit 11 – Franklin Claim

[13] The assessor identified a number of elements in the building where leaking had occurred resulting in damage due to water ingress. These are summarised as follows:

- Balustrades/handrail
- Cladding clearances on balcony deck
- Ground clearances and threshold step heights
- Deck drainage
- Inter-storey band/junctions
- Roof parapet cappings
- Windows
- Roof/cladding junctions

3.2 Leaks at Unit 12 – KW Trust Claim

[14] Mr Hodgson identified similar areas of fault to unit 11 as noted above and in Annexure 2.

## IV. CLAIM AGAINST MR AND MRS SPARGO

4.1 Did the Spargos owe a duty of care to the claimants, either as company directors of Mayfair Court Limited or in their personal capacities?

[15] The claims against the Spargos are based on two grounds. First, they had liability as company directors and secondly in their personal capacity.

[16] In *Body Corporate 183523 & Ors v Tony Tay & Associates Ltd & Ors*[1] Priestley J at [156] noted that generally in leaky homes cases there is a category of company where directors of one man or single venture companies are exposed to claims. In "one man band" companies which may be involved in a number of projects it is necessary to find that the director was personally involved in site and building supervision or architectural and design detail. In single venture

[1] (30 March 2009) HC, Auckland, CIV 2004-404-4824.

companies this is not so. Mayfair Court Limited, previously known as Riverside Holdings Ltd, was effectively such a company and the Tribunal draws the inference from it being wound up after the finalisation of the development as support for this interpretation.

[17] Having considered the evidence the Tribunal has come to the conclusion that the delineation of the roles of Mr and Mrs Spargo and Mayfair Court Limited were so ill defined and interwoven that it is impossible to come to any conclusion as to when their individual involvement ended, they being the originally named applicants for subdivisional consents (see [7]) or when they were purportedly only involved in the capacity of company directors. This confusion was summarised at [11] of the claimants' opening submissions.

[18] The Tribunal finds the Spargos were personally involved as developers, therefore there is no need to make a finding as to their liability, or otherwise as directors and would have personal liability if there was a breach of any duty of care.

4.2 <u>If there was such a duty of care, did the Spargos breach that duty?</u>

*4.2.1 Background Facts*

[19] Mr Spargo stated that he had never been involved in building. He had previously owned a pub which was later sold and the motel units in Tauranga were acquired. However the motel business turned out to be a failing concern. The Spargos were advised that their best option was to knock down the motel and build townhouses in its place.

[20] Following that advice, Mr Spargo approached Mr Mack who had previously built the Spargos' home. Mr Mack was a registered master builder with many decades of experience and of high repute in the trade. Based on their personal experience of the quality of his workmanship the Spargos considered Mr Mack to be an excellent builder and thus sought his services.

[21] Mr Mack recommended the engagement of Ross Bryant Design Network Limited (RB Designs) to do the design work for the complex.

The Spargos were told that Norfolk Homes had previously used RB Designs on other projects, considered the firm competent and further, Norfolk Homes and RB Designs worked well together as a development team. The Spargos acted on these recommendations.

*4.2.2* If there is liability what is the extent of it?

Were the First Respondents Neglectful?

[22] The answer is no, they were not. The Tribunal accepts Mr Spargo's evidence that Norfolk Homes and Mr Mack agreed to take responsibility and all matters pertaining to the construction of the units were dealt with by them. The Spargos' involvement was limited to only accepting the designs for the units, authorising the making of necessary applications and making payments on the invoices as they were received. Mr Spargo was not challenged on this evidence.

[23] It is accepted neither Mr nor Mrs Spargo had any expertise in building and construction and as a result they relied on the experts and had every reason for relying on those experts. The Tribunal also accepts the Spargos proceeded with caution and care before deciding to contract with Norfolk Homes Ltd. There is nothing more they could have done to try and ensure quality.

*4.2.3 What Exposes Them to Liability*?

[24] The answer to this question is that they were the developers. There can be more than one - see *Body Corporate 188273 & Ors v Leuschke Group Architects Limited & Ors*.[2] The Tribunal is inexorably led to the decision by failing to set up the development company before the commencement of the project, and by failing to produce evidence of any transfer of their personal interests to the development company, the Spargos cannot hide behind the company structure. The company is ultimately of no relevance in the light of their personal responsibility. As such they owed a non-delegable duty of care to the claimants, as stated in *Mt Albert Borough Council v Johnson*.[3] Lay persons undoubtedly find it difficult to grasp this doctrine. Even academics wrestle with it.

[2] (2007) 8 NZCPR 914, Harrison J (HC).
[3] [1979] 2 NZLR 234 (CA).

Stephen Todd et al in *The Law of Torts in New Zealand*[4] at page 1057 (22.5.02) states:

> "The concept of a non-delegable duty is problematic. Since, in strict terms, a person under a duty to use care cannot delegate that duty to someone else, the creation of a class of non-delegable duties seems to be self-contradictory... No single unifying principle is associated with the cases in which a non-delegable duty has been held to exist."

[25] Even the Court of Appeal noted the difficulties concerning non-delegable duty saying it was difficult to state clear principles (at p31). In *Mt Albert Borough Council v Johnson* a development company which had acquired and subdivided land and homes built on it was held to be under a non-delegable duty to see that proper care and skill is exercised in the building of the houses. Cooke J (as he then was) put it this way at p 240, line 47 to p241 line5:

> "In the instant type of case a development company acquires land, subdivides it, and has homes built on the lots for sale to members of the general public. The company's interest is primarily a business one. For that purpose it has buildings put up which are intended to house people for many years and it makes extensive and abiding changes in the landscape. It is not a case of a landowner having a house built for his own occupation initially – as to which we would say nothing... There appears to be no authority directly in point on the duty of such a development company. We would hold that it is a duty to see that proper care and skill are exercised in the building of the houses and that it cannot be avoided by delegation to an independent contractor."

[26] In *Body Corporate 202254 & Anor v Taylor (Siena Villas)*[5] stated:

> "In the instant type of case a development company acquires land, subdivides it, and has homes built on the lots for sale to members of the general public. The company's interest is primarily a business one. For that purpose it has buildings put up which are intended to house people for many years and it makes extensive and abiding changes in the landscape. It is not a case of a landowner having a house built for his own occupation initially – as to which we would say nothing except that Lord Wilberforce's two-stage approach to duties of care in [*Anns v Merton London Borough Council* [1978] AC 728] may prove of

[4] (5th edition, Wellington, 2009, Brookers Ltd).
[5] [2008] NZCA 317 (CA).

> guidance on questions of non-delegable duty also. There appears to be no authority directly in point on the duty of such a development company. We would hold that it is a duty to see that proper care and skill are exercised in the building of the houses and that it cannot be avoided by delegation to an independent contractor."

[27] The *Siena Villas* decision reinforces the importance of a Tribunal looking at the development from the start. In *Siena Villas* it was the development company acquiring land. In this case it was the Spargos.

[28] In *Leuschke*, Harrison J stated:

> "[32] The developer, and I accept there can be more than one, is the party sitting at the centre of an directing the project, invariably for its own financial benefit. It is the entity which decides on and engages the builder and any professional advisers. It is responsible for the implementation and completion of the development process. It has the power to make all important decisions. Policy [therefore] demands that the developer owes actionable duties to owners of the buildings it develops."

[29] Mr and Mrs Spargo in their submissions referred to the decision of the Court of Appeal in *Siena Villas*. It is relevant but does not derogate from the decision in *Mt Albert Borough Council v Johnson* (supra).

[30] If it were not for this legal principle of non-delegable duty the Spargos would have no liability. However the rule in *Mt Albert Borough Council v Johnson* is binding on this Tribunal. This means that the first respondents are jointly and severally liable. They are entitled to 100% recovery of that liability from the second, third and fourth respondents. More particulars in this regard are set out below.

4.3 <u>Claim in Contract (Franklin Claim) – Were the First Respondents the Vendors?</u>

[31] The Franklins purchased their townhouse from the Spargo Trust comprising three trustees, namely Mr and Mrs Spargo and Mr Slavich. As noted above the three trustees as trustees of the Spargo Trust were not a party to the proceedings.

[32] In counsel's closing submissions on behalf of the claimants, Mr and Mrs Franklin, Mr and Mrs Spargo are referred to as the vendors of unit 11. The Sale and Purchase Agreement at page 1 shows the vendor as being Spargo Trust. It was the owner.

[33] Mr and Mrs Franklin rely on the warranty in clause 6.2(5) of the sale and purchase agreement which warrants that a Code Compliance Certificate has been obtained. No such certificate had been obtained in this instance.

[34] Counsel for the claimants referred to decisions where vendor warranties have been upheld including *Smith v Waitakere City Council & Ors*[6] and *Tabram v Slater & Anor.*[7] The recent decision in *Tweeddale v Pearson & Ors*[8] is consistent with this line of authority. However the issue is whether the Spargos, as vendors, are bound by the relevant vendors' warranty, as they are only two of the three trustees named in this claim.

4.4 Can a Trust Be Held Liable in Contract When It Is Not a Party to the Proceedings?

[35] It is a fundamental principle of natural justice that parties have the opportunity to be heard. In this case the Spargos were aware of the claim in contract against them but did not have the advantage of legal representation. No questions were asked of them as to their role as trustees. The Spargos produced as an annexure to their closing submissions a copy of a Deed between Mayfair Court Ltd and Lyn Spargo, Merlyn Spargo and John Slavich as trustees of the Spargo Family Trust to authenticate the existence of the Trust as a separate legal identity.

[6] (12 July 2004) WHRS, DBH 00277, Adjudicator J Green.
[7] (17 April 2009) WHT, TRI 2008-100-000001, Adjudicator S Pezaro.
[8] (1 December 2009) WHT, TRI 2008-101-000067, Adjudicator R Pitchforth.

[36] The claimants could have sought the joinder of the Trust at any stage, but failed to do so prior to the conclusion of evidence. This would have enabled matters of the Trusts' position to be scrutinised.

[37] In *Santa Barbara Homes Ltd v Cozzolino*[9] the Court spelt out the need to correctly name a trust as a party. In that case Mr and Mrs Cozzolino had sought recovery in an arbitration when in fact the party suffering damage and loss was a trust of which Mr and Mrs Cozzolino were two of the four trustees. Hansen J overturned the finding of the arbitrator, holding that although there had been discussion of the trust, or more accurately the trustees, being joined as a party to the arbitration, the trust itself was never joined – see [34]. At [37] the Court held all the trustees would have had to be joined referring to *Lewin on Trusts*, para 43-01. Consideration was given to the nature of trusts at [30].

4.5 Can Lyn and Merlyn Spargo and Mr Slavich as trustees of the Spargo Family Trust Be Joined to These Proceedings after the Conclusion of Evidence?

[38] In *The Normac Trust v Stevenson & Ors*[10] the Court held at [102] that a failure to plead an allegation based in tort was not fatal because no formal pleadings are required in claims under the Weathertight Homes Resolution Services Act 2006 and could readily be rectified.

[39] The question is whether an amendment and joinder of a new party can be seen as analogous to an amendment to the pleadings of causes of action. I do not consider the failure to claim against a party should be treated as the equivalent of a rectifiable amendment to a claim.

[9] (12 May 2004) HC, Auckland, CIV 2002-404-2577, Rodney Hansen J.
[10] (5 November 2009) HC, Auckland, CIV 2009-441-437, Potter J.

[40] As the first respondents were not the vendors they cannot be liable for the breach of the vendor warranty. This claim in contract against the Spargos fails.

## V. CLAIM AGAINST THE SECOND RESPONDENT, NORFOLK HOMES LIMITED AS HEAD CONTRACTOR AND PROJECT MANAGER

[41] The claimants submit that Norfolk Homes Ltd was the head-contractor and project manager. The Tribunal has already referred to the company's role at [19] to [23] above when discussing the contract with the Spargos. These facts do not need repeating. Mr Spargo stated while there was no written agreement with Norfolk Homes Ltd he was unequivocal in his evidence that Norfolk Homes Ltd was the head contractor and undertook all the building work beyond completion of the building to including landscaping. It was responsible for the engagement of subcontractors. It had sole supervisory functions.

[42] The Tribunal notes that the second respondent, Norfolk Homes Limited did not appear at the adjudication hearing, neither did Mr Mack. As outlined by section 74 of the Weathertight Homes Resolution Services Act 2006 (the Act), a party's failure to act does not affect the Tribunal's powers to determine the claim:

> **74 Parties' failures to act do not affect tribunal's powers to determine claim**
>
> The tribunal's powers to determine a claim are not affected by –
>
> (a) The failure of a respondent to serve a response on the claimant under section 66; or
>
> (b) The failure of any party to –
>
> (i) make a submission or comment within the time allowed; or
>
> (ii) give specified information within the time allowed; or
>
> (iii) attend, or participate in, a conference of the parties called by the tribunal; or
>
> (iv) do any other thing the tribunal asks for or directs.

[43] Section 75 of the Act provides:

> **75 Tribunal may draw inferences from parties' failures to act and determine claim based on available information**

> If any failure of the kind referred to in section 74 occurs in adjudication proceedings, the tribunal may –
>
> (a) draw from the failure any reasonable inferences it thinks fit; and
>
> (b) determine the claim concerned on the basis of the information available to it; and
>
> (c) give any weight it thinks fit to information that–
>
> (i) it asked for, or directed to be provided; but
>
> (ii) was provided later than requested or directed.

[44] Based on sections 74 and 75, the Tribunal therefore makes the following considerations and determines the second and third respondents' involvement and responsibility based on the available information.

5.1 An Adequate Quality Management Regime?

[45] In *Chapman v Western Bay of Plenty District Council & Ors*.[11] Adjudicator Pitchforth followed the decision in *Body Corporate 199348 & Ors v Nielsen.*[12] The facts in *Chapman* were that the building company held itself out to be a builder of good quality. In fact it had no quality management program.

[46] Was Norfolk Homes Ltd in breach of its obligations concerning supervision? There is no doubt the company was in breach of those obligations. The Tribunal therefore holds the second respondent liable in tort.

## VI. CLAIM AGAINST THIRD RESPONDENT, MR MACK

6.1 Mr Mack's Liability as Director

[47] Mr Mack was the managing director of Norfolk Homes Limited.

[48] The claimants did not specifically plead Mr Mack's liability as Norfolk Homes' director and it was at the outset of the hearing that the claimants clarified this issue. However it had been foreshadowed in the witness statement filed on behalf of the claimants. These proceedings

[11] (11 November 2009) WHT, TRI 2008-101-000100.
[12] (3 December 2008) HC, Auckland, CIV 2004-404-3989.

are not pleadings based. The Tribunal applies the principles for amendment set out in the decision in *The Normac Trust v Stevenson & Ors* at [103]. The error is rectified and the issue is now considered .

6.1.1 The legal criteria for exposure as company director

[49] Various criteria have been set down by the Courts in relation to the liability of directors. There is the assumption of personal responsibility test enumerated in *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd*[13] at [97]–[100]; *Body Corporate 189855 & Ors v North Shore City Council & Ors (Byron Ave)*[14] at [290]; *Leuschke* at [55]; and *Williams v Natural Health Foods Ltd*.[15] There is also the "control of a project" test as enunciated in *Morton v Douglas Homes Limited*[16] and *Hartley & Anor v Balemi & Ors*[17] at [80]-[94].

[50] The Court of Appeal in *Trevor Ivory Ltd v Anderson*[18] emphasised the importance of examining the factual matrix in each case before determining whether a director was personally responsible. The principles in *Trevor Ivory* were reaffirmed in the recent Court of Appeal decision in *Siena Villas.* William Young P in his judgment delivered on behalf of himself and Arnold J, extensively reviewed *Trevor Ivory* and the decision of the House of Lords in *Williams.*

[51] In *Body Corporate 183523 & Ors v Tony Tay* & Associates *Ltd & Ors* Priestley J after referring to the decisions in *Drillien v Tubberty*,[19] *Hartley v Balemi & Ors* and *Byron Avenue* (relevantly at [202] – [210]) stated:

> "[152] Similarly Heath J in *Nielsen* held that a director was personally exposed in a situation where he had primary responsibility for supervising construction work, which supervision extended to co-ordinating subtrades and ensuring work was carried out in accordance with the plans and specifications…"

[13] [2005] 1 NZLR 324 (CA).
[14] (25 July 2008) HC, Auckland, CIV 2005-404-5561 per Venning J.
[15] [1998] 1 WLR 830 (HL).
[16] [1984] 2 NZLR 548 (HC).
[17] (29 March 2007) HC, Auckland, CIV 2006-404-2589 per Stevens J.
[18] [1992] 2 NZLR 517.
[19] (2005) 6 NZCPR 470.

The role of director in *Nielsen was* parallel to that of Mr Mack in this case.

6.2 Mr Mack's Direct Involvement

[52] The claimants say the evidence of Mr Mack's direct involvement is unequivocal. He personally arranged for PC Limited, the surveyors, to provide information on the initial subdivision. He personally prepared the pricing for the units. He filled out and submitted a building consent application naming himself as a contact person. He was involved in the design process. Mr Bryant, the designer, stated in his affidavit that Mr Mack was personally involved in the design process.

[53] He supplied all the materials and organised all the subcontractors. He was the only person in the company who could do the supervision. He carried it out.

[54] Ms McKain (the first owner of Unit 12) in her brief of evidence said she dealt directly with Mr Mack throughout the construction of that unit. She also said Mr Mack returned to unit 12 to effect building repairs.

[55] As Heath J stated in *Patel, Raman & Offord & Ors* [16 June 2009] HC, Auckland, CIV 2009-404-301, on appeal of one of this Tribunal's decisions:

> "[31] In my view, it was unnecessary for the Adjudicator to make any finding that Mr Patel was a "developer", of the type to which the *Mount Albert Borough Council v Johnson* duty attached… All that was required was for the Adjudicator to weigh in the balance the tasks undertaken by Mr Patel in relation to work undertaken negligently by other actors and then to determine relative contributions to the damages awarded.

[56] Mr Mack's personal involvement was extensive. Hence the Tribunal has concluded he has personal liability as company director being the person very much in control of the whole project, so much so he could be described as the field marshal. The claim against Mr Mack succeeds. The extent of his liability is dealt with in the Apportionment – Contribution section below.

6.1 Mr Mack as Employee

[57] The claimants' asserted Mr Mack was employed by Norfolk Homes Limited as project manager. There is no evidence to show he was so engaged. This part of the claim is dismissed.

## VII. CLAIM AGAINST FOURTH RESPONDENT, GIANNE MARCHESAN, PLASTERER

[58] The claimants in their claim state that Europlast Systems Limited was the subcontractor that applied the texture coating to the units. This is clearly the case. As in other claims which have been brought against Europlast Systems Limited and Mr Marchesan they remained conspicuous by their absence and non-participation at any stage of the process. For the reasons outlined in [43] and [44] above, pursuant to section 74 and 75 of the Act the Tribunal proceeds to consider this claim.

[59] The legal basis of the claim against Mr Marchesan is the same as the basis for the claim against Mr Mack, namely he was the director of a one man band company who undertook all the plastering work the company was contracted to do.

[60] Having considered the factual matrix and the case authority discussed at [49] to [51] above, the Tribunal considers that due to his direct involvement, Mr Marchesan has breached his duty of care. The question of the extent of such liability is dealt with under the Apportionment – Contribution section below.

## VIII. CLAIM AGAINST JEFFERY WILLIAMS, PROPERTY INSPECTOR (Unit 12 Claim Only)

8.1 Was there a Contract with Mr Williams?

[61] The claim against this respondent fails for the reasons outlined below.

[62] The evidence of Ms Sherwin, a trustee for the claimant Trust, is that the House Inspection Company Limited was contracted to provide a pre-purchase cladding inspection. Her contract was with that company. She had no contractual relationship with Mr Williams. Both Ms Sherwin and Mr Williams testified he personally never received instructions from Ms Sherwin prior to the inspection being carried out.

[63] Mr Williams in his evidence said he had just commenced doing inspection work for the House Inspection Company Limited. He had previously been a builder. This was only his second inspection and so was being supervised by Mrs Armstrong, the company director, as part of his "on the job" training.

[64] He said he was told by Mrs Armstrong of the House Inspection Company Limited that his job was limited to carrying out moisture reading tests. He said he went to the house and did such tests under the direct supervision of Mrs Armstrong. It is significant that it was Mrs Armstrong who wrote the final report for Ms Sherwin. Mr Williams was not its author.

[65] There is no doubt the report was inadequate from the claimants' perspective, but the Trust's claim lies against the House Inspection Company Limited rather than Mr Williams.

8.2 Was he in breach of a duty of care?

[66] For the sake of completeness, the Tribunal accepts Mr Williams' inspected the building for elevated moisture levels on the property inside and out and on the roof. He was familiar with the operation of the moisture meter and there were no elevated readings.

[67] In the course of his evidence, the assessor was questioned about the likelihood of water damage being noted and he proffered an opinion on the degree of decay that would have been observable. The assessor is not an expert on the dating of timber decay and his evidence so the Tribunal can place no weight on these observations Mr

Williams was an honest witness and it is accepted he who saw no evidence of decay.

8.3 A "Hedley Byrne" Misstatement or Simply an Aside?

[68] The claimant argues Mr Williams made a misstatement that creates liability. The claimant relies on the oft quoted passage of Lord Reid in *Hedley Byrne v Heller*[20] at 486 which commences:

> "A reasonable man, knowing that he was being trusted or that his skill and judgement were being relied on…"

This argument has little merit.

[69] Reliance is placed on an out of the blue telephone call Mr Williams received from Ms Sherwin. In the course of that conversation she asked Mr Williams if he would buy the house himself. Mr Williams accepted he may have made some comment as he thought the house was well constructed. However he said he never intended his comments as amounting to advice.

[70] There is no evidence to suggest Ms Sherwin told Mr Williams her decision to buy rested on Mr Williams' answer. He was unaware of the significance Ms Sherwin now states she was placing on the answer and the Tribunal cannot accept she was seeking such purportedly important advice in such an offhand manner.

[71] Ms Sherwin was asked by her counsel (in what could be described as the perfect leading question) whether she would have bought the house if Mr Williams had not said he would be happy to buy it. She gave the equally perfect answer: no she would not have.

[72] The comment could not reasonably be construed as a professional opinion upon which the claimant would place reliance. The English Court of Appeal case of *Howard Marine & Dredging Co Ltd v A Ogden & Sons Ltd*)[21] was one where a serious business inquiry, and known as such, was made over the telephone. Nevertheless even

[20] [1964] AC 465.
[21] [1979] QB 574, 591-592.

though the “advisor” had knowledge of the seriousness of the inquiry the Court held there was no liability. The conversation with Mr Williams was far less formal, and he was not giving expert opinion.

8.4 Fair Trading Act 1986

The claimants also argued Mr Williams has a liability under the Fair Trading Act 1986. There were no particulars in this Fair Trading Act claim against Mr Williams outlining, for instance, whether his conduct, or the report itself (which he did not author in any case) was misleading or deceptive as required under sections 9 and 10 of the Fair Trading Act. The Tribunal therefore considers that a case has not been made out under the Fair Trading Act. For completeness, the Tribunal finds that in any event, the evidence of Mr Williams’ involvement does not indicate that his conducted was at all misleading or deceptive conduct. A claim against Mr Williams under this Act would have been unsuccessful.

## IX. CONTRIBUTION - APPORTIONMENT (BOTH CLAIMS)

[73] Section 72(2) of the Act provides that the Tribunal can determine any liability of any other respondent and remedies in relation to any liability determined. In addition, section 90(1) enables the Tribunal to make any order that a Court of competent jurisdiction could make in relation to a claim in accordance with the law.

[74] Under section 17 of the Law Reform Act 1936 any tortfeasor is entitled to claim a contribution from any other tortfeasor in respect of the amount to which it would otherwise be liable.

[75] The basis of recovery of contribution provided for in section 17(1)(c) is as follows:

> Where damage is suffered by any person as a result of a tort… any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is… liable in respect of the same damage, whether as a joint tortfeasor or otherwise…

[76] Section 17(2) of the Law Reform Act 1936 sets out the approach to be taken. It provides that the amount of contribution shall be what is fair taking into account the relevant responsibilities of the parties for the damage.

[77] The assessor provided an analysis and breakdown of assessment of potential responsibility in relation to each of the areas of leaking but not an overall apportionment of liability in respect of the total damage. The assessor's report included areas of leaking where he considered the designer and roofer were at fault. The designer and roofer have settled their claims and their total joint contribution was very close to the degree of liability the expert evidence indicated. It is therefore appropriate to make the apportionment between the remaining respondents on the amounts of the claims outstanding and for simplicity appears in the apportionment below.

[78] The Tribunal accepts the assessor's analysis as appended at Annexure 2. Having analysed the information in relation to each element of the areas of leaking, the Tribunal considers the appropriate apportionment as follows:

- The first respondents, Mr and Mrs Spargo, were involved in the development of the site. They did not perform any of their functions in a negligent manner. However they are jointly and severally liable as they breached their duty of care, a non-delegable duty of care. They are therefore jointly and severally liable to the extent of 100%.
- The second respondent, Norfolk Homes Limited breached the duty of care it owed as the builder.
- The third respondent, Mr Mack, as the director of the company was found by the Tribunal to have had significant involvement during the construction. Both Norfolk Homes and Mr Mack are liable to the extent of 45%.
- The fourth respondent, Mr Marchesan, negligently carried out the plastering work for the subject dwelling and is therefore liable for 55% of the claim.

[79] The claims against the fifth, sixth and ninth respondents have been settled. The claim against the tenth respondent, Mr Williams, has been unsuccessful.

## X. GENERAL DAMAGES – STRESS

10.1 Franklin Claim

[80] The claimants had sought $25,000.00 each for general damages. The basis for assessing the appropriate level of damages to be granted was considered in Tribunal decisions such as *Allan v Christchurch City Council & Ors*[22] and *Chee v Star East Investment Limited & Ors*.[23] In *Chapman v Western Bay of Plenty District Council*[24] at [232] to [248] Adjudicator Pitchforth considered four criteria to be examined. The Tribunal has previously, taken such factors into account and would have made an award for damages for stress accordingly.

[81] In *White & Anor v Rodney District Council & Ors* (19 November 2009) HC, Auckland, CIV 2009-404-1880, Woodhouse J at [76] held there was a consistency in awards in previous High Court cases involving leaky homes in the $20,000 to $25,000 range. That consistency is apparently paramount and is the tariff to be maintained. The Court allowed the appeal against the award of general damages in the sum of $10,000 and substituted $25,000 for each owner.

[82] It would also appear that the reasonable foresee ability of a respondent as causing mental distress, in this case the provincial builder and plasterer, is not a factor. Therefore $25,000 for each owner is awarded here.

10.2 KW Trust Claim - Can a Trust Suffer Mental Stress?

[83] In *Byron Avenue* Venning J held that a Trust was not entitled to damages for mental stress (see para [414]). This decision has been followed in *Hearn & Ors v Parklane Investments Limited & Ors* (*Interim*

[22] (21 July 2009) WHT, TRI 2009-101-000110, Adjudicator C Ruthe.
[23] (21 July 2009) WHT, TRI 2008-100-000091, Adjudicator C Ruthe.
[24] (11 November 2009) WHT, TRI 2008-101-000100, Adjudicator R Pitchforth.

*Determination)*,[25] *Crosswell v Auckland City Council & Ors*[26] at paras [52]-[61], and *River Oaks Farm Limited & Ors v Olsson & Ors (Ingodwe Trust)*[27] at [146]-[155] and specifically at [149]:

> "[149] Further, the point of a trust is to create a legal persona quite distinguished from the person who is the beneficiary. Family trusts are formed to protect the assets from the beneficiaries' creditors and to isolate the trust from any other property interest or obligations of each of the trustees. The intention is to ensure the beneficiary is not the owner. In *The Contradictors v Attorney General* [15 PRNZ 120 (PC)] the Court gave a very clear indication of the necessity to treat trustees and beneficiaries as having different interests."

[84] General damages in terms of section 50(2) of the Act can only be awarded to individuals who are owners. The stress claim is declined as such compensation cannot be awarded to a trust.

## XI. QUANTUM

[85] Quantum for the completed remediation was not contested. The only matters in issue are betterment and some ancillary charges such as supervision fees.

[86] As noted earlier no issue was taken with the need for a full reclad of both units. The assessor stated at paragraph [17.6.1] of his report for unit 12 and duplicated in his report for unit 11:

> 17.6 What Remedial Work is Required?
>
> "In the final analysis it is clear, however, that for this building to achieve the minimum 50-year lifespan, total cladding removal for intensive inspection will be required. Extensive timber replacement plus the application of suitable timber preservative treatments to all remaining sound timber will be required."

11.1 <u>Franklin Claim – Unit 11</u>

[87] The Franklins' remediation costs came to $191,021.13 comprising project management fees, building costs and labour costs.

[25] (30 April 2009) WHT, TRI 2008-101-000045, Adjudicator Pitchforth.
[26] (18 August 2009) WHT, TRI 2008-100-000107, Adjudicator Lockhart QC.
[27] (5 August 2009) WHT, TRI 2008-101-000052, Adjudicator CB Ruthe.

The total claim including $50,000.00 for mental stress, legal fees, interest and storage came to $255,049.09. The fifth and ninth respondents settled the claims against them for the total sum of $22,700.00. Set out here are the claimants' figures.

| Details of amounts claimed | Amount |
|---|---|
| Project Management comprising the following: | |
| 1. Designer - $2,620.91 | |
| 2. Quantity surveyor - $3,465.00 | |
| 3. Council certification fees - $3,175.23 | |
| 4. Micro morphology - $3,042.18 | |
| 5. Engineering - $580.08 | |
| 6. Project management - $26,324.27 | $ 39,207.67 |
| Remedial work – Yarrall Builders | $151,178.58 |
| Jim Swainson – labour | $ 634.88 |
| Furniture storage (Kennards) | $ 390.00 |
| TV Eye | $ 75.00 |
| Boarding of dog | $ 500.00 |
| Newpack Furniture Removal | $ 315.00 |
| Interest on Housing NZ Loan | $ 10,327.82 |
| Holland Beckett lawyers' conveyancing costs | $ 2,420.14 |
| Stress ($25,000 x 2) | $ 50,000.00 |
| Sub-total | $ 255,049.09 |
| Less settlement payments of $22,700 | - $22,700.00 |
| Total amount claimed | $232,349.09 |

11.1.1 *Betterment- Unit 11*

[88] Prior to the remediation work being carried out an estimate of remedial costs was undertaken by Kwanto in February 2008. They estimated cost of repairs for current and future damage at $149,626.00 for Unit 11. Kwanto indicated there was a betterment factor of $7,483.00 by the use of linear weatherboard as a replacement cladding system rather than the plaster system. There has been an escalation in the cost of repairs to $191,021.13, being almost 30%. Taking that into account the escalation in costs, betterment is adjusted to the sum of $9,727 rounded to $10,000.00.

11.1.2 *Fees discounted for Unit 11*

[89] The project management fees on a reclad are excessive. There has been no justification for a fee in excess of 10% of the reclad costs $15,100 will be allowed. There is no evidence to show why Sky or dog kennelling should be allowed, so these claims are deducted.

11.2 *The claim as allowed for Unit 11*

[90] The claim allowed is as follows:

| | |
|---|---|
| • Remedial costs | $151,178.58 |
| • Design management fees etc | $27,983.40 |
| • Related costs | $14,087.02 |
| Subtotal: $193,249.00 rounded to | $193,200.00 |
| • Less settlement with two respondents | -$22,700.00 |
| • Less betterment | -$10,000.00 |
| Subtotal: $160,549.00 rounded to | $160,500.00 |
| • General damages | $50,000.00 |
| **Total** | **$210,500.00** |

12.1 Kereopa Whanau Trust – Unit 12

| Details of amounts claimed | |
|---|---|
| Project management and expert fees comprising :<br>1. Designer - $2,340.90<br>2. Quantity surveyor - $3,960.00<br>3. Council certification fees - $3,087.54<br>4. Micro morphology - $3,355.00<br>5. Project management fees - $29,675.64 | $ 42,919.08 |
| Remedial work – MJ Builder (remedial work) | $227,058.69 |
| Kennards Storage/furniture storage | $ 2,265.90 |
| Bay Tiles Ltd | $ 1,765.20 |
| Stress (Note: the Tribunal has already found at 10.2 above that the Tribunal cannot make this award) | $ 25,000.00 |
| Sub-total | $298,508.87 |

| | |
|---|---|
| Minus settlement payments of $40,300 | -$ 40,300.00 |
| Total amount claimed | $258,208.87 |

11.2.1 *Betterment*

[91] For the same reasons mentioned at [88] betterment should be allowed in the sum of $12,000.00 for linear cladding.

11.2.1 *Fees discounted for Unit 12*

[92] The project management fees on a reclad are excessive. There has been no justification for a fee in excess of 10% of the reclad costs $22,700 will be allowed. There was no evidence to show why furniture needed storing with the majority of work being a reclad. $1,000 is allowed.

11.2.1 *The final claim*

The claim allowed is as follows:

- Remedial costs $227,058.69
- Design management fees etc $35,443.44
- Related costs $4,031.10

  Subtotal: $266,533.23 rounded to $266,500.00
  - Less settlement with two respondents - $40,300.00
  - Less betterment - $13,000.00

  **Total** **$213,200.00**

## XII CONCLUSION AND ORDERS

12 .1 Claim Re Unit 11(Franklins)

[93] The claimants claim is proved to the extent of $210,500.00. For the reasons set out in this determination, the following orders are made:

(i) The first respondents, Lyn and Merlyn Spargo, having joint and several liability are ordered to pay the claimants the sum of $210,500.00 forthwith. They are entitled to recover a contribution of and up to $94,725.00 from the second respondent and third respondent and up to $115,775.00 from the fourth respondent.

In other words, they are entitled to full recovery of the order made against them.

(ii) Norfolk Homes Limited is ordered to pay the claimants the sum of $210,500.00 forthwith. It is entitled to recover a contribution of up to $115,775.00 from the fourth respondent.

(iii) Lindsay Mack is ordered to pay the claimants the sum of $210,500.00 forthwith. He is entitled to recover a contribution of up to $115,775.00 from the fourth respondent.

(iv) Giane Marchesan is ordered to pay the claimants the sum of $210,500.00 forthwith. He is entitled to recover a contribution of up to $94,725.00 from the second and third fourth respondent.

(v) As the claimants settled its claims against the fifth, sixth and ninth respondents prior to the hearing, and there are no cross-claims against those respondents, the fifth and sixth respondents are dismissed.

In summary if the first, second, third and fourth respondents all meet their obligations under this determination the following payments will be made by them to the claimants:

| | |
|---|---|
| Third Respondent, Mr Mack | $94,725.00 |
| Fourth Respondent, Mr Marchesan | $115,775.00 |

12.2 Claim Re Unit 12 (Kereopa Whanau Trust)

[94] The claimants claim is proved to the extent of $213,200.00. For the reasons set out in this determination, the following orders are made:

(i) The first respondents, Lyn and Merlyn Spargo, having joint and several liability are ordered to pay the claimants the sum of $213,200.00 forthwith. They are entitled to recover a contribution of up to $95,940.00 from the second respondent and up to $95,940.00 from the third respondent, and up to

$117,260.00 from the fourth respondent. In other words, they are entitled to full recovery of the order made against them.

(ii) The second respondent, Norfolk Homes Limited is ordered to pay the claimants the sum of $213,200.00 forthwith. It is entitled to recover a contribution of up to $95,940.00 from the fourth respondent.

(iii) The third respondent, Mr Mack is ordered to pay the claimants the sum of $213,200.00 forthwith. He is entitled to recover a contribution of up to $117,260.00 from the fourth respondent.

(vi) The fourth respondent, Mr Marchesan is ordered to pay the claimants the sum of $213,200.00 forthwith. He is entitled to recover a contribution of up to $95,940.00 from the second, third and fourth respondents.

(vii) As the claimants settled its claims against the fifth, sixth and ninth respondents prior to the hearing, and there are no cross-claims against those respondents, the fifth and sixth respondents are dismissed.

(viii) The claims against the tenth respondent, Mr Williams, are dismissed.

[95] **In summary** if the first, second, third and fourth respondents all meet their obligations under this determination, the following payments will be made by them to the claimants:

| | |
|---|---|
| Third Respondent, Mr Mack | $95,940.00 |
| Fourth Respondent, Mr Marchesan | $117,260.00 |

[96] If any of the parties listed above fail to pay its or his apportionment, this determination may be enforced against any of them up to the total amount they are ordered to pay in [93] and [94] above.

**DATED** this 22nd day of December 2009

_____

C Ruthe

Tribunal Member

| | **Description:** | **Dated:** |
|---|---|---|
| | **Weathertight Homes Tribunal Documents** | |
| | Assessors Report – Unit 11 | 20/10/07 |
| | Assessors Report – Unit 12 | 20/01/08 |
| | Procedural Order # 1 | 04/05/09 |
| | Procedural Order # 2 | 11/06/09 |
| | Procedural Order # 3 | 02/07/09 |
| | Procedural Order # 4 | 24/08/09 |
| | Procedural Order # 5 | 14/09/09 |
| | Procedural Order # 6 | 12/10/09 |
| | **Claimants Documents** | |
| | Amended Claim – Application for Adjudication – Unit 11 – TRI-2009-101-000015 | |
| | Amended Claim – Application for Adjudication – Unit 11 – TRI-2009-101-0000018 | |
| | Application for Adjudication – Unit 11 (Includes Eligibility Letter from DBH & Certificate of Title) | 03/04/09 |
| | Application for Adjudication – Unit 12 (Includes Eligibility Letter from DBH & Certificate of Title) | 03/04/09 |
| | Statement of Evidence of Michi Jungwirth | 14/10/09 |
| | Statement of Evidence of Diane Holroyd Franklin | 30/09/09 |
| | Statement of Evidence of Elizabeth Nadine McKain | 30/09/09 |
| | Statement of Evidence of Ngaire Ann Sherwin | 30/09/09 |
| | Affidavit of Ngaire Ann Sherwin | 08/08/09 |
| | Affidavit of Michi Jungwirth | 12/06/09 |
| | Affidavit of Service of Arthur Charles Miromiro Twyford | 17/07/09 |
| | ***Separate Bundles and Folder (Claimants):***<br>***-*** *Bundle of Documents of Diane Holroyd Franklin* | 30/09/09 |

| | | |
|---|---|---|
| | *- Bundle of Documents of Ngaire Ann Sherwin*<br>*- Claimants' Bundle of Documents*<br>*- Folder of Photographic Evidence (Tabbed 1-23)*<br>*- IPMS Report – Evidence Report – Franklin*<br>*- IPMS Report – Evidence Report – Kereopa Whanau Trust* | |
| | **First Respondents Documents** | |
| | Affidavit of Lynn Eval Spargo | 18/06/09 |
| | Affidavit of Merlyn Ruth Spargo | 18/06/09 |
| | **Second and Third Respondents Documents** | |
| | Third respondent's response to claim | |
| | Further removal application which includes further responses to the claim | 25/06/09 |
| | **Tenth Respondents Documents** | |
| | Application for Removal | 19/10/09 |
| | Affidavit of Jeffrey Williams | 04/09/09 |

| D&D Franklin –Unit 11 – WSG Assessment 05322 | | | | |
|---|---|---|---|---|
| **No.** | **Damaged element due to water ingress** | **Analysis** | **Parties to defect/failure** | |
| 1. | Balustrade/ handrail West elevation | Leaks have occurred due to an accumulation of water on flat-topped balustrade. Lack of shedding angles applied or weatherproofing membranes, has enabled water entry and the establishment of decay to structural timber | Builder | |
| | | Lack of proprietary saddle flashings installed at balustrade/apartment wall junctions and the inter-tenancy firewalls, has enabled water entry and the establishment of decay to structural timber | Builder | |
| | | Inadequate plaster layup has not incorporated suitable waterproofing membranes or shedding angles. This omission has enabled water entry and the establishment of decay to structural timber | Texture coatings applicator | |
| | | Top fixed handrails installed without due care to waterproofing. This omission has enabled water entry and the establishment of decay to structural timber | Handrail fabricator/installer | |
| | | Inadequate design detail – inevitable failure | Architectural designer | |
| | | | Total | |
| 2 | Cladding clearances at balcony decks | Fibre-cement sheet claddings have been installed without adequate clearance from deck tiling. This has enabled capillary water action and wicking to enter the frame work and damage structural wall plates | Builder | |

| | | | | |
|---|---|---|---|---|
| | | | | |
| | | | Total | |
| 3 | Threshold step heights | Inadequate height variation (design and construction) between the interior floor height and finished balcony deck heights has made<br>Correct installation of claddings and membrane water proofing impossible. Water has entered by ponding, wind pressure and capillary action, causing decay to structural wall plates | | |
| | | | | |
| | | | | |
| 4 | Deck drainage | Inadequate fall away from the building has caused water ponding and poor drainage to the formed gutter outlets. This has increased weather loading at critical junctions (threshold steps). | Builder | |
| | | Emergency overflows have been obstructed with the over cladding of the outlets. Sealing around these penetrations at the outside of the<br>baluster has failed and resulted in water ingress and contributory damage and further decay | Builder | |
| | | Inadequate membrane junctions at gutter outlets have allowed the entry of water into the timber deck joists. These failed junctions have<br>enabled water entry and the establishment of decay to structural timber deck joists | Membrane applicator | |
| | | | | |
| | | | | |

| | | | | |
|---|---|---|---|---|
| | | The inter-storey junctions have not been formed as per the manufacturer's specifications and recommendations. Sheet jointing has not been completed or sealed prior to the installation of the polyforms. These forms have not been meshed or adequately weather sealed at the top of the form to the building.<br>Water has entered behind the sections to be trapped over long timeframes and has transferred through incomplete joints and the porous unsealed fibre-cement sheets to the structural floor joists. These failed sections have enabled water entry and the establishment of decay to both structural timber deck joists, and the timber midfloor of the building | | |
| | | | | |
| 6 | Roof Parapet cappings | Not protected the framework of the building adequately. Wind driven rain has entered the outboard edge of the flashing where there has been in-sufficient depth of downturn and no secure proprietary fixings to hold them in place. The cap flashings did not incorporate adequate shedding angles and the sealed and riveted junctions have failed to stop the ingress of water. Some leaking has occurred due to the type of open rivets used. Wind has also driven rain under cap flashings at the clerestory window section where trimming of the flashings to suit roof falls has further weakened the flashing system | Roofing contractor<br><br>Builder | |
| | | Inadequate design detail | Architectural designer | |
| | | | | |
| 7 | Ground clearances | Inadequate clearance between finished ground heights and the top of interior floors has seen the installation of wall-cladding ground<br>clearances, well below the manufacturers and code compliance requirements. Due to capillary action and wicking of the claddings<br>moisture damage by decay has occurred to the coatings, the cladding sheets and | Builder<br><br>Designer | |

| | | | | |
|---|---|---|---|---|
| | | the timber wall plates. | | |
| | | | | |
| 8 | Cladding Penetrations | Inadequate attention has been applied to the weathering aspects of piping serving the instantaneous gas water-heating system,<br>mounted direct to the wall claddings. UV exposed sealant and direct through cladding screw fixing, has enabled water to penetrate<br>the claddings and cause damage by decay to structural framing. This has occurred with the air conditioning installation also (possibly post<br>construction installation). | Plumbing/Gas fitting contractors<br><br>HVAC Installers<br><br>Builder | |
| | | | Total | |
| 9 | Kitchen Greenhouse window | Inadequate installation of this high-risk window<br>has seen water enter through jamb, glazing<br>and sill sections, sufficient to cause decay to<br>structural framing. | Joinery manufacturer<br><br>Builder/ installer | |
| | | | | |
| 10 | Roof/ cladding junctions | Inadequate installation of roof/wall apron flashed junctions, where open sections at the<br>low end of these flashings have not been fitted<br>with diverters to stop water channelling behind<br>claddings (highly likely future damage). | Metal roofing contractor<br><br>Builder / cladding backing installer<br><br>Texture coating application | |
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