WEATHERTIGHT HOMES TRIBUNAL
CLAIM NO. TRI 2008-100-94

BETWEEN	**JOAN McGREGOR, DAVID GRAHAM SMITH & JOHN PHILLIPS** Claimants
AND	**WILLIAM RAYMOND JOHN JENSEN** (Bankrupt and therefore Removed) First Respondents
AND	**ANDRE SCOTT KEMP-UPTON** (Removed 16 October 2008) Second Respondent
AND	**AUCKLAND CITY COUNCIL** Third Respondent
AND	**ROLLO ROOFING LIMITED** (Removed 29 November 2007) Fourth Respondent
AND	**MASTERBUILD SERVICES LIMITED** Fifth Respondent
AND	**CARL BRAMWELL** (Removed 10 July 2008) Sixth Respondent
AND	**HOUSE APPRAISALS LIMITED** (Removed 26 September 2008) Seventh Respondent
AND	**JOHN EDWARD BOYD** Eighth Respondent
AND	**STEPHEN MATTHEW HALLIDAY** Ninth Respondent
AND	**NIGEL HAY** Tenth Respondent
AND	**ARTHUR TAYLOR BUILDERS LIMITED** Eleventh Respondent

AND	**ARTHUR TAYLOR** Twelfth Respondent
AND	**OWEN COOPER** Thirteenth Respondent (Removed)
AND	**PHOENIX ALUMINIUM DOORS AND WINDOWS LIMITED** Fourteenth Respondent (Removed 2 June 2009)

Hearing: 22, 23 and 29 June 2009

Appearances: Andrew Hough and Brian Easton, for the claimants;
David Heaney and Paul Robertson, for the third respondents;
Graham Kohler, for the eighth and ninth respondents;
No appearance by tenth respondent.

Decision: 24 July 2009

FINAL DETERMINATION
Adjudicator: P A McConnell

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INTRODUCTION

[1] Joan McGregor, David Graham Smith and John Phillips are the owners of a house at 336B Hillsborough Road. The house was built as a home for Mrs McGregor. There were however defects in the construction of the house which caused leaks resulting in damage to the cladding and wooden framing. The remedial work included a complete reclad. Further work is still required to repair leaks associated with masonry block retaining walls.

[2] That claimants allege that the Auckland City Council, John Boyd, Stephen Halliday and Nigel Hay are responsible for the defects and the resulting damage. Auckland City Council is the local authority who undertook inspections during the construction process and issued the Code Compliance Certificate. Mr Boyd and Mr Halliday were the labour only subcontractors engaged to carry our building work and Mr Hay was a plasterer subcontracted to inspect the cladding and undertake texture coating and painting. Mr Hay did not attend the hearing although he did file a response and was served with notice of the hearing.

[3] Other parties had been included in the claim but prior to hearing a partial settlement was reached with Masterbuild Services Limited, Arthur Taylor Builders Limited and Arthur Taylor, the three parties who were involved in earlier remedial works associated with the deck area. As a result of that settlement, the claim did not proceed against those parties and defects in relation to the deck did not form part of this adjudication.

THE ISSUES

[4] The issues I need to decide are:

- What are the defects that caused the leaks?
- The liability of the Auckland City Council. In particular should the Council have detected the defects during the inspection regime?
- Are Mr Boyd and Mr Halliday liable in negligence?
- Is Mr Hay responsible for the defects?
- What is the quantum of damage the respondents should pay?
- What contribution should each of the liable respondents pay?

MATERIAL FACTS

[5] Joan McGregor, David Graham Smith and John Phillips (the Trust) purchased the section at 336B Hillsborough Road, Hillsborough with the intention of building a home on it for Mrs McGregor. Mr Smith and Mr Phillips are the owners in their capacity as the executors of the late Mr McGregor's estate. Mr and Mrs Winter, the vendors of the section, had prior to its sale engaged Concept Design and Development Limited (Concept Design) to provide simple concept plans to building consent stage. After the purchase, Mrs McGregor contacted Concept Design and agreed to purchase the plans off them for the cost of the balance of fees owing by Mr and Mrs Winter.

[6] In November 1997, the Trust contracted Woodtec to construct the house on the property. John Jensen was a director of Woodtec Projects Limited and was the project manager during the construction. The construction work was carried out by employees of Woodtec together with a number of subcontractors. These subcontractors included John Edward Boyd and Stephen Matthew Halliday and Nigel Hay.

[7] Mr Halliday and Mr Boyd were working in a partnership and that partnership was contracted on a labour-only basis at a fixed price of around $21,000.00. The contract covered the carpentry work on site including framing, installation of windows and erecting the gib board and attending to interior fit-out. It eventuated that Mr Boyd and Mr Halliday did not erect the gib board to the interior and a credit for this work was given to Woodtec.

[8] Mr Hay, the tenth respondent, was engaged by Woodtec to inspect the cladding after it was installed and to carry out the plastering and texture coating of the property. Mr Jensen in his evidence stated that he contracted Mr Hay as he was an expert in the Harditex system and that he relied on his expertise.

[9] The construction was sufficiently completed by 4 April 1998 for Mrs McGregor to move into the property. The date of the final inspection was 15 May 1998 with a further check in December 1999. The CCC was not however issued until 28 July 2000.

[10] The house is built on three levels and is situated one house back from Hillsborough Road on a sloping section, the fall from the road north to the back boundary exceeds 9 metres. The exterior walls are lined with Harditex fibre cement sheet, which is texture coated and painted. James Hardie Limited provided a technical information catalogue with this product which was required to be followed by those involved in the dwelling construction. The relevant catalogue for the construction of this dwelling is the 1996 version. It contains detailed information about how the product was to be installed and fixed to other structural components.

[11] Aluminium joinery was used and this included three large windows with a curved topped, referred to as moon windows, two installed in the south wall and one in the west. These three windows were all installed without head flashings.

[12] Shortly after moving in Mrs McGregor had problems with leaks through the block walls, cladding and deck. In September 2001, she made a claim on the Masterbuild guarantee as a result of these problems. Masterbuild accepted the claim relating to the deck only and arranged for contractors to carry out repairs to the deck between September and December 2001.

[13] This remedial work did not fix the problems and in May 2003, the Trust applied to the Weathertight Homes Resolution Service. The assessor produced his report dated 20 May 2004 which concluded that the house was a leaking home and that the Trust had an eligible claim.

[14] In 2006, Mrs McGregor engaged CoveKinloch Consulting Limited to assess the defects and repairs needed. Following advice received from CoveKinloch, Samson Construction Services Limited was contracted to undertake the recladding work to the house. All the remedial work has now been completed apart from re-waterproofing block work walls.

WHAT ARE THE DEFECTS THAT CAUSED THE LEAKS?

[15] David Medricky, the assessor, James Morrison, the claimant's expert and Trevor Jones, the Council's expert gave their evidence largely concurrently on the defects of the dwelling and subsequent damage. Simon Paykel also gave some evidence in relation to damage to the dwelling but that was largely in the context of potential Council liability.

Installation of Joinery

[16] All the experts agreed that the absence of head flashings on the curved windows was a significant cause of water ingress and subsequent damage. All experts further agreed that it was a fundamental requirement for mechanical head flashings to be fitted to

windows in harditex homes. There were no head flashings included in the plans. This would not necessarily be a problem if specifications or the technical literature provided more detailed information as to the nature of the head flashings required and the installation of them. However, in this case there is no evidence that there were any further specifications and the experts all agreed that the technical literature available at the time (the 1996 Hardie's manual) did not provide any detailing for arched windows.

[17] The experts also agreed that the installation of the other windows in the dwelling was inadequate. Whilst sill and jamb flashings were not required at the time, their opinion was that the windows were inadequately sealed. Mr Boyd and Mr Halliday confirmed in their evidence that no sealant or in-seal had been provided behind the windows. The experts agreed that this was a defect and inconsistent with the technical information and standard practice at the time. There were submissions made that there was no evidence of damage caused by water ingress from other windows. However, I am satisfied from the evidence of Mr Medricky and Mr Morrison in particular, that defects in the installation of all windows has contributed to the damage at this property. Whilst photographic evidence of this is limited, their opinion which is based on their investigation, is evidence I accept. In addition the moisture readings establish water ingress around some of the windows.

Defective Installation of Cladding

[18] All the experts agreed that there were defects in the installation of cladding but there was some disagreement as to individual defects and their contribution to water ingress and subsequent damage. Mr Medricky considered that the defective installation of cladding contributed between 30-50% to the damage of the building and Mr Morrison considered its contribution was between 30-40%.

[19] The experts agreed that the cladding being finished too close to ground levels, particularly by the front entrance and garage wall, contributed to the dwelling leaking. The experts also agreed there were no vertical or horizontal relief joints however, this was most likely not a requirement for this building. Mr Medricky was also of the opinion that there had been sheet joints placed against windows and doors which was contrary to the technical literature and this had added to damage and water ingress around the windows. When challenged on this issue by Mr Heaney, Mr Medricky was only able to point to one photograph which was near a curved window. On reviewing the photographs, this defect is evident around at least two of the curved windows. I am also satisfied from Mr Medricky's evidence that defects in the location of sheet joints was more than an isolated incident. However, it appears to have been a problem primarily around the curved windows on the south and west elevations.

[20] It was also established that there was no in-seal strip at the base of the cladding which is required by the technical literature. On the evidence presented I am not however satisfied that this was a cause of water ingress. Mr Jones' evidence, which I accept, was that the in-seal strip was more likely to prevent water from coming out than causing water to ingress the building.

Texture Coating Poorly Applied

[21] Mr Medricky stated that with a face sealed system such as harditex the sealer, filler and texture coating is an integral part of the harditex fulfilling its function. His investigation showed that the texture coating was not installed uniformly, there were thinner patches and visible pinholes. When questioned Mr Medricky acknowledged he was not in a position to say whether this would have been evident at the time the building was constructed. His opinion however was that the poor application of texture coating contributed between 5-15% to the dwelling leaking. The other

experts acknowledged this could have been an issue but agreed it was a more minor issue.

Defects with the Butyl Rubber Roof

[22] Both Mr Medricky and Mr Morrison gave evidence that the way the butyl rubber roof had been finished into the fascias and cladding had left open holes where wind driven rain could enter the framing and affect the building fabric. Mr Jones acknowledged that on close scrutiny this problem may have been observed but it was unlikely that a Council officer would have seen it from the ground. He was also unaware if the defect had caused damage or if water had penetrated the cladding at this point. I am satisfied this was a defect which has contributed to the dwelling leaking.

Defective Waterproofing of Masonry Retaining Walls

[23] All the experts agreed that water was getting into the property through the block walls. In particular they acknowledged water was entering through the retaining wall, that is still to be fixed, which forms part of the wall downstairs at the northern elevation of the property. Mr Jones however noted that water could also be getting into the house through the floor slab and the water ingress into this area may not have been caused only by the masonry retaining wall.

[24] Mr Jensen, when he gave evidence, stated that he was on site and checked that the waterproofing had been properly done on the block work. He said there were weak points in the waterproofing that could have caused the leak which is where there is a footing that had a hole punched through it for the nova flow. He thought it was possible that in these locations the waterproofing had broken down.

[25] Mr Jensen also gave evidence referring to the photographs provided which illustrate that the waterproofing work was done in

accordance with standard building practices, and noted that the photographs confirmed this. He said that after the block work had been put down it was prepared for waterproofing by rubbing the surface of the block work down with a bisket to remove the potential daggs. Once this was done a primer was applied. A stick-on membrane sheet was then applied after which the waterproofer went around with the sealant and sealed the joints along the top edges. After that a polystyrene protection was installed to protect the membrane when the area behind the block work was back-filled. The primer and membrane application can be seen in the photograph on page 922 of the claimants' documents and the polystyrene covering in the photograph on page 1079.

[26] There was considerable discussion about what was actually evident from the photograph on page 1079 of the claimants' bundle. Mr Jensen stated that the lighter area at the bottom of the wall behind the blue pipe was the polystyrene covering as masonry joins were not visible. What appears to be torn membrane was in fact the area where the polystyrene covering had broken away. Mr Morrison and Mr Medricky considered that the lighter area was masonry work rather than the polystyrene protective layer.

[27] It is somewhat unusual in this claim that, although the remedial work has largely been completed, the claimants have chosen not to produce the best evidence available of the damage discovered and any evidence of the causes gathered during remedial work. Whilst the claimants have produced copies of photographs taken during the remedial work these were annexed to the quantity surveyor's evidence. The claimants have brought no other direct evidence of the damage observed during remedial work. In addition their expert Mr Morrison did not visit the site during the remedial work and therefore could not give evidence other than from the photographs. This is particularly surprising given the fact that it was known to the claimants that the investigative work done by Mr Medricky was somewhat limited.

[28] The Tribunal is therefore in the difficult position of having to make a decision on causes of damage and the extent of damage where the expert's evidence is based on limited investigative work prior to the remedial work and photographs taken during construction and the remedial work. This is not a criticism of any of the experts who gave evidence in this claim. It does however mean there are some instances where there is insufficient evidence on which to base a conclusion on either the cause or extent of damage. The situation with the masonry retaining walls is one of these.

[29] Whilst I accept the masonry wall leaks on the evidence before me, the claimants have failed to provide sufficient proof of the causes of the leaks. As at least one wall has been repaired, the claimants were in a position to provide further and better evidence from their remedial builders or remedial experts as to what they discovered during the remedial process on this wall. They have failed to do this, possibly because the result of that work was also inconclusive.

[30] While I am inclined to prefer the evidence of Mr Medricky as to the causes of leaks through the masonry retaining walls, I am mindful that he did not carry out invasive investigations in these areas. In addition he was not in a position to see anything other than the photographs taken during the remedial work. Mr Jensen is the only person who gave evidence who has first hand knowledge of how the walls are built. His account of the process accords with what is set out in the assessor's report as the appropriate construction process. In addition a producer statement was obtained and the author confirmed he was satisfied that the masonry walls were completed in accordance with the building consent and Building Code.

[31] The evidence before me therefore does not establish the specific causes of water ingress and discharge the onus of proof on

the claimants in relation to this part of the claim. While I accept the masonry walls leak, there is insufficient evidence to establish the cause of these leaks.

THE LIABILITY OF THE AUCKLAND CITY COUNCIL

[32] The claim against the Council is that it was negligent in both the processing of the building consent application and in carrying out inspections during the construction and certifying process. In particular it is alleged that the Council was negligent in failing to identify the weathertightness defects during the inspections undertaken.

[33] It is well accepted that a local authority owes a homeowner a duty of care in issuing the building consent, inspecting the building work during the construction and in issuing a CCC.[1] The issue therefore is whether the Council breached that duty of care and whether any such breach relates directly to the defects which caused damage.

Claim in relation to Building Consent Process

[34] The claimants allege that there were inadequacies in the design of the dwelling and that the drawings and specifications, on which the consent was based, do not contain sufficient details to ensure defects did not occur and that construction could be adequately completed. The claimants allege that in processing the building consent application, the Council should have been mindful of the issues that these inadequacies raised. It therefore breached its duty of care to the claimants in approving the building consent application.

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[1] *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 at 526-40, *Bowen v Paramount Builders (Hamilton) Limited* [1977] 1 NZLR 394, *Sunset Terraces*, n 2 below.

[35] In *Body Corporate 188529 & Ors v North Shore City Council & Ors* (No 3) (*Sunset Terraces*),[2] Heath J concluded it was reasonable for the Council to assume, in issuing building consents, that the work could be carried out in a manner that complied with the Code. He stated:

> "[399]…To make that prediction, it is necessary for a Council officer to assume the developer will engage competent builders or trades and that their work will be properly co-ordinated. If that assumption were not made, it would be impossible for the Council to conclude that the threshold for granting a building consent had been reached.
>
> [403] In my view, it was open for the Council to be satisfied, on reasonable grounds, that the lack of detail was unimportant. I infer that the relevant Council official dealing with this issue at the time concluded that the waterproofing detail was adequately disclosed in the James Hardie technical information and had reasonable grounds to be satisfied that a competent tradesperson, following that detail, would have completed the work in accordance with the Code."

[36] In my view, the Council in this case had reasonable grounds, in all respects other than the curved windows, on which it could be satisfied that the provisions of the Code could be met if the building work was completed in accordance with the plans and technical literature. The plans however did not show flashings for the curved windows nor were they detailed in the technical information. The James Hardie manual provides no detailing for curved windows. No other specifications have been provided and there is no evidence to establish that any specifications have been lost.

[37] I therefore conclude that the Council did not have reasonable grounds on which it could be satisfied that the provisions of the Code could be met in relation to the installation of the curved windows. The lack of detailing for flashing of the curved windows was in part

[2] [2008] 3 NZLR 479.

causative of the claimants' loss. I accordingly conclude that the claimants have established negligence on the part of the Council at the building consent stage in this respect.

The Inspection Process

[38] The claim that the Council failed to exercise due care and skill when inspecting the building work is based on failure to inspect with sufficient care. It is further alleged that this failure amounted to negligence and caused the claimants loss.

[39] The Council inspections were carried out by Council officers pursuant to section 76 of the Building Act 1991. At least 14 inspections were carried out during the original construction process and two final inspections between April 1998 and 28 July 2000 when the CCC was issued.

[40] The Council submits that the standard against which the conduct of a Council officer may be measured is clear-cut. In *Askin v Knox,*[3] Cooke P concluded that a Council officer should be judged against the conduct of other Council officers and against the knowledge and practice at the time at which the negligent act/omission was said to take place.

[41] The Council therefore concludes that it can only be liable for defects that a reasonable Council officer, judged according to the standards of the day, should have observed during the course of inspection. It acknowledges that the lack of flashing of the curved windows should have been detected during inspection. The Council however submits that the other defects either could not have been detected by a Council officer or were not considered to be defects when judged by the standards of the day.

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[3] [1989] 1 NZLR 248, Cooke P.

[42] I accept that the adequacy of the Council's inspections needs to be considered in light of accepted building practices of the day. The High Court however has in more recent cases placed a greater responsibility on territorial authorities than the level submitted as appropriate by its counsel in this case. Heath J in *Sunset Terraces* states that:

> "[450….[A] reasonable Council ought to have prepared an inspection regime that would have enabled it to determine on reasonable grounds that all relevant aspects of the Code had been complied with. In the absence of a regime capable of identifying waterproofing issues involving the wing and parapet walls and the decks, the Council was negligent."

[43] And at paragraph 409,

> "The Council's inspection processes are required in order for the Council (when acting as a certifier) to determine whether building work is being carried out in accordance with the consent. The Council's obligation is to take all reasonable steps to ensure that is done. It is not an absolute obligation to ensure the work has been done to that standard."

[44] In *Dicks v Hobson Swan Construction Limited* (in liquidation),[4] the court did not accept that what it considered to be systemically low standards of inspections absolved the Council from liability. In holding the Council liable at the organisational level for not ensuring an adequate inspection regime, Baragwanath J concluded:

> "[116]…It was the task of the council to establish and enforce a system that would give effect to the building code. Because of the crucial importance of seals as the substitute for cavities and flashings it should have done so in a manner that ensured that seals were present."

[45] I accordingly conclude that the Council is not only liable for defects that a reasonable Council officer, judged according to the

[4] (2006) 7 NZCPR 881 per Baragwanath J (HC) at para [116].

standards of the day, should have observed. It can also be liable if defects were not detected due to the Council's failure to establish a regime capable of identifying that all significant aspects of the Code had been complied with. I will therefore be applying this test in determining whether the Council has any liability. In doing so, it is appropriate to consider each area of defect as established in paragraphs [16] – [31].

Installation of Joinery

[46] The Council accepts that the curved windows required head flashings and further accepts that the absence of head flashings caused damage on each of the elevations where those windows occur. It also accepts that the Council building inspector should have identified the absence of head flashings on these windows. It however submits that there is no recoverable damage in relation to the two windows on the southern elevation due to the settlement with Mr Taylor and Masterbuild regarding the deck. I do not accept this submission as the settlement with Mr Taylor and Masterbuild only relates to the deck and not to the whole elevation. The terms of settlement are that the claim in relation to defects alleged against the fifth, eleventh and twelfth respondents were withdrawn against all respondents. The defects pleaded related to the deck and not the windows. This does not mean that other defects in relation to that elevation cannot be considered in determining liability. That was not the intention of the claimants at the time they entered into the settlement agreement and is not the reasonable interpretation of the settlement agreement.

[47] The Council further accepts that there were inadequacies in relation to the sealing of the other windows but submit that this would not have been identifiable by a Council building inspector at the time. It submits that the present claim can be distinguished from what was considered by Baragwanath J in *Dicks*. There the house had been clad in solid plaster and his Honour held that the presence or absence of sealant would have been apparent, as there ought to

have been a bead of silicone at the corner of the window flanges. In the present claim, sealant was applied but only after the windows had been installed. The Council submits that the only way a building inspector could have detected the absence of the in-seal would be if they had been present at the time the windows were fitted.

[48] I accept that the application of silicone around the outside of the windows was not in accordance with the harditex manual and was also a cause of damage. However to hold the Council liable for this defect would in effect be putting them in the role of a clerk of works or project manager. This is not its role and I accept this defect would not have been reasonably apparent to the Council officer during inspection unless he or she had been on site at the time of installation. I accordingly conclude that the Council has no liability in relation to this defect.

Defective Installation of Cladding

[49] The key defects established in relation to the installation of the cladding are the joining of the harditex sheet in line with window or door openings, and the lack of ground clearances. The inappropriate joining of sheets around the joinery largely occurred in conjunction with the curved windows and the lack of head flashings and was the dominant cause of water ingress in these areas. The sheet joins however were capable of being seen during the course of inspections and should have been picked up by the Council officer.

[50] I have already concluded that the lack of ground clearances particularly in the area of the garage and the front door were defects which contributed to damage. The Council argues that there is no evidence to establish that the finished ground levels at the time of inspection or at the time of the final inspection gave rise to the CCC. I do not however accept this submission. The photographs taken during the construction work clearly showed that the driveway and concrete work were completed well before the final inspection and

issuing of the CCC. These are issues which should have been seen and noted by the Council inspector.

[51] In my opinion, a prudent Council officer ought to have noticed the cladding defects detailed above. Instead the Council approved defective building work culminating in the issuing of the CCC in July 2000. In doing so, it contributed to the defects that necessitated significant remedial work to the dwelling.

Texture Coating Poorly Applied

[52] I previously concluded that inadequacies in the texture coating was a minor contributing issue to the dwelling leaking. I am not however satisfied that this was an issue that a prudent building inspector would necessarily have been able to see at the time of construction. I accordingly conclude that the Council has no liability for this defect.

Defects with Butyl Rubber Roof

[53] I have also previously concluded that the defects in the butyl roof and the way it was finished into the fascias and cladding was a cause of water ingress that resulted in damage. Mr Medricky and Mr Morrison both gave evidence that open holes had been left where wind-driven rain could enter the framing and affect the building fabric. Mr Jones acknowledged that this defect was visible but stated it could not have been observed by a Council officer from the ground. On behalf of the Council it was submitted that none of the witnesses were able to tell the Tribunal what the finishing might have looked like at the time of the Council inspections. I am however satisfied from the evidence of Mr Medricky that it was the finishing onto the fascias and cladding that was a primary problem and this was more likely than not visible at the time of the original construction when

inspections were carried out. The Council appears not to have obtained a producer statement from the butyl layer and accordingly should have inspected this work themselves. It appears that there was scaffolding in place to enable access to the roof area during at least some of the Council inspections. I would conclude that if this area had been inspected, defects should have been noted.

Waterproofing of Masonry Walls

[54] There is no dispute that there has been water ingress through the masonry retaining walls. Mr Paykel on behalf of the claimants submitted that a prudent Council officer should have detected that the waterproofing of these walls had been changed from flintcoat to a mechanically fastened bituminous sheet membrane with a self-adhesive backing. While I accepted this submission, it has not been established that the substitution of the bituminous sheet membrane was a cause of the masonry walls leaking. In addition, Mr Paykel submitted that the Council officer should have detected that the top of the membrane had no flashing to the exposed top edges and that there was no protection in place against accidental mechanical damage. However it does appear from the evidence presented that a polystyrene protection was provided to the sheet membrane. In addition, there is a dispute about whether the top edges were sealed and flashed adequately.

[55] As already stated, the claimants have failed to prove the causes of water ingress through the masonry retaining walls. As repair work had been done to some of these walls, the claimants were in a position to bring better evidence if such existed. The Council is the only party in this adjudication who could have some liability in relation to this area. Without establishing what the cause of the leaking is, it cannot be established that the Council has any liability for the resulting damage or the remedial work required. The claim in relation to the remedial work required to the masonry walls accordingly fails.

Conclusion on Council Liability

[56] In summary I conclude that the Council was negligent in failing to identify defects in the installation of the cladding, the defects to the butyl roof and the lack of flashing to the curved windows. In addition the Council was negligent in approving the building consent without any details or specifications in relation to these flashings. Given the extent of the damage that has been caused by the defects and the fact that they occur on most, if not all elevations, I conclude that the Council has contributed to defects that necessitated the full recladding of the house. I accordingly conclude that the Council is jointly and severally liable for the full amount as set out in paragraph [98] below.

ARE MR BOYD AND MR HALLIDAY LIABLE IN NEGLIGENCE?

Work Done by Mr Boyd and Mr Halliday

[57] Mr Boyd and Mr Halliday were contracted on a labour-only basis to carry out the carpentry work on the dwelling. They were contracted by Woodtec to carry out this work for a fixed price of $21,000.00 and worked under the general supervision of Mr Jensen who carried out the role of project manager. They accept part of their work included the installation of windows. They further accept that they installed the curved windows with no head-flashings and that they did not provide any in-seal or sealant behind the other joinery when they installed it.

[58] There is some dispute as to whether Mr Boyd and Mr Halliday installed the cladding and the head flashings to some of the windows. Mr Jensen when summoned to give evidence earlier in the adjudication stated that his recollection was that the labour-only

builders undertook this work. However at the hearing Mr Jensen said he could not recall whether they did it or not. Mr Boyd and Mr Halliday were both adamant that they had not been contracted to install the cladding as they were inexperienced with the harditex product. I accept their evidence and conclude that they did not install the cladding. In addition, they were not responsible for the construction of the masonry walls or the plastering of the dwelling. The only potential area of liability therefore on the part of Mr Boyd and Mr Halliday relates to the installation of the joinery.

Do Mr Boyd and Mr Halliday Owe the Claimants a Duty of Care?

[59] Mr Kohler on behalf of Mr Boyd and Mr Halliday submitted that Mr Boyd and Mr Halliday did not owe the Trust a duty of care. They were subcontracted labour-only builders working under the direction of the head builder and there was therefore no contractual tie or assumption of liability. Mr Kohler submits that the situation of these respondents is analogous to the subcontractors in *Northern Clinical Medical and Surgical Centre Limited v Kingston & Ors*[5] (*Northern Clinic*) and *Body Corporate 114424 & Ors v Glossop Chan Partnership Architects Limited*[6] (*Glossop Chan*).

[60] In the *Northern Clinic* case, Keane J concluded that Mr Vesey, the cladding applicator who was a subcontractor to the head-contractor, did not owe Northern Clinic, the building owner, a duty of care. A claim had been filed against Mr Vesey in both contract and tort. In striking out the claim against Mr Vesey, Keane J concluded that the claim against him in contract was unsustainable on the evidence and that the claim in negligence failed for want of duty of care.

[61] Whilst the situation in the *Northern Clinic* case has some analogies to the current situation, as noted by the claimants and the

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[5] [3 December 2008] HC Auckland, CIV 2006-404-968, Keane J.
[6] [22 September 1997] HC Auckland, CP612/93, Potter J.

Council, there are a number of distinguishing features. Firstly, the *Northern Clinic* case involved a commercial building and not a residential dwelling. In his decision, Keane J noted that the final consideration pointing away from proximity was that the loss was economic and therefore carried with it the problem of an indeterminate transmissible warranty. He however went on to note that economic loss incurred in respect of defective domestic dwellings constitutes an exception to the rule that economic losses are not recoverable in tort in the absence of a special relationship or proximity.

[62] There are also other distinguishing features including the fact that the claim was argued in both contract and tort, Mr Vesey was not fully paid and Mr Vesey had been asked to give a guarantee but had refused to do so.

[63] I accordingly conclude that any precedent set by the *Northern Clinic* case does not require me to conclude in the circumstances of the present case that Messrs Boyd and Halliday did not owe the claimants a duty of care.

[64] I do however accept that the *Glossop Chan* case involved a multi-unit residential complex and in that case the High Court concluded that a subcontractor did not owe a duty of care to subsequent owners. *Glossop Chan* however was decided in 1997 and there have been developments in the law since that time particularly in relation to leaky residential dwellings. In *Body Corporate 189855 & Ors v North Shore City Council & Ors* (*Byron Avenue*),[7] the Court concluded that the plasterer did owe a duty of care to subsequent owners. The plasterer in that case was a subcontractor. In reaching this decision, Venning J stated:

> "[296] For the sake of completeness I confirm that I accept a tradesman such as a plasterer working on site owes a duty of

[7] [25 July 2008] HC Auckland, CIV 2005-404-05561, Venning J.

> care to the owner and to the subsequent owners, just as a builder does."

[65] In *Body Corporate 185960 v North Shore City Council,*[8] Duffy J observed that:

> "The principle to be derived from *Bowen v Paramount Builders* will apply to anyone having a task in the construction process (either as contractor or subcontractor) where the law expects a certain standard of care from those who carry out such tasks. Such persons find themselves under a legal duty not to breach the expected standard of care. This duty is owed to anyone who might reasonably be foreseen to be lightly to suffer damage."

[66] What appears to be occurring in claims involving leaky residential dwellings is that the terms "builder" or "contractor" as used in leading cases such as *Bowen* have been given wide meaning to include all specialists or trades people involved in the building or construction of a dwelling house or multi-unit complex. Given the nature of contracts in residential dwelling construction, attempts to differentiate between the respective roles of these persons in the contractual chain that delivers up dwelling houses in New Zealand can create an artificial distinction. Such a distinction does not accord with the practice of the building industry, the expectations of the community, or the statutory obligations incumbent on all those people.

[67] Courts and tribunals have consistently held that builders, whether as head-contractors or labour-only contractors, of domestic dwellings owe the owners and subsequent owners of those dwellings a duty of care.[9]

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[8] [22 December 2008] HC Auckland, CIV 2006-404-003535, Duffy J.

[9] *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234; *Dicks v Hobson Swann Construction Limited*; *Bowen v Paramount Builders (Hamilton) Limited* [1977] 2 NZLR 394, *Byron Avenue* n 6 above, *Heng & Anor v Walshaw & Ors* [30 January 2008] WHRS 00734, Adjudicator John Green.

[68] While I accept that Mr Boyd and Mr Halliday were contracted on a labour-only basis and had no responsibility for the supervision of other workers, they are not necessarily in a significantly different position than other builders engaged to do construction work on dwellings who have been found to owe a duty of care. Mr Kohler submitted that their inexperience and lack of knowledge and expertise mitigated against finding that they owed a duty of care. I do not however accept this submission.

[69] Whilst much was made of Mr Boyd and Mr Halliday's lack of experience, both had completed some formal training and Mr Boyd had been building since 1992 and Mr Halliday since 1994. In addition, they had gone into partnership as builders and held themselves out as having the necessary skills to undertake construction work on dwellings. Whilst they worked under the general supervision of Mr Jensen, they were contracted on a fixed rate contract to complete the majority, if not all, of the carpentry work involved in the construction of this house. Accordingly I would conclude there is no legal basis on which Mr Boyd and Mr Halliday can escape liability on the basis that they do not owe the claimants a duty of care.

Did Mr Boyd and Mr Halliday Breach the Duty of Care Owed to the Claimants?

[70] There is little dispute that the lack of adequate flashing and sealing of the joinery was a major cause of the dwelling leaking. While Mr Boyd and Mr Halliday accept they installed the windows without head flashings, in the case of the curved windows, and without any sealant or in-seal behind the windows, they submit that they are not responsible for the inadequate flashing and sealing of the windows. They submit that it is Mr Hay and Mr Jensen who were responsible for this work.

[71] A number of factors were advanced by Mr Kohler to support the submission that Mr Boyd and Mr Halliday were not negligent. Firstly, he submitted it was inaccurate to describe them as builders as it was Mr Jensen who was the builder and not them. Secondly, he noted that they had not been told to put silicone behind the windows and had not been given silicone to install. It was further suggested that the James Hardie manual does not mandate a sealant or in-seal being provided behind the windows but it was an option or an alternative. In addition, the curved windows failed because of lack of flashings and the plans had not provided for flashings. Furthermore when Mr Halliday queried the lack of flashings, he was advised by Mr Hay that they were not necessary. Mr Kohler also submits that when Mr Boyd and Mr Halliday's experience and actual involvement was put to Mr Morrison, he withdrew his allegations of their responsibility for the defects.

[72] In the submissions made on behalf of Mr Boyd and Mr Halliday and in his questioning of witnesses, Mr Kohler placed a significant amount of emphasis on what he considered to be the ambiguity or permissiveness in the James Hardie technical literature. His submission was that it provided options rather than mandated a silicone or sealant behind the windows. The difficulties however with this submission is that Mr Boyd and Mr Halliday did not see the James Hardie literature nor did they attempt to follow it at the time. They frankly admitted that they had never seen the James Hardie manual until the time of the mediation. I would further suggest that Mr Kohler was reading and interpreting the material more from the viewpoint of a lawyer rather than an experienced builder.

[73] I accept that Mr Boyd and Mr Halliday worked under the general supervision of Mr Jensen and that Mr Jensen or his company provided the materials. However, I do not accept Mr Jensen's failure to provide any sealant or specifically direct them to apply sealant behind the windows absolves them from responsibility. They were contracted, even though on a labour-only basis, to fulfil a task which

was to carry out the carpentry work including the installation of the windows. Mr Kohler submitted that they were not experienced builders and this was known to Mr Jensen and he was their supervisor. However I would note that Mr Boyd at the time of this construction had been working as a builder for five years and Mr Halliday for three years. As already stated, they have set themselves up in partnership as builders and accepted the contract to build the house on this basis. Given the contract basis on which they were engaged, it is unreasonable for them to suggest that they had no personal responsibility for their work as they worked under the supervision of Mr Jensen.

[74] They were contracted as builders to carry out building work and therefore must be judged by the standards of a reasonably competent builder. I accept they had no supervisory responsibility and can not be judged for anything other than the work they did and for which they were responsible. In determining whether Mr Boyd and Mr Halliday breached their duty of care, the test is what the builder is reasonably expected to know and not necessarily what the builder actually knows. Before proceeding with the construction work they were contracted to do, they should have ensured they had access to the appropriate plans, specifications and technical material. They did not do this, as they agreed that all they had was the plans.

[75] The reason advanced by Mr Boyd and Mr Halliday for not placing silicone behind the windows was that they were not given silicone and were not told that they had to do it. I do not accept this in itself absolves them from responsibility for inadequately sealing the windows. The installation fell below what was required of reasonably competent builders at the time. I therefore conclude that they were negligent in failing to install the joinery without sealant being placed behind the window flanges.

[76] I however accept that the major cause of leaking in relation to the curved windows was the lack of head flashing rather than the lack of sealant behind the flanges. I accept Mr Boyd and Mr Halliday's evidence that when they queried this issue they were advised by Mr Hay, whom they understood to be an expert in the harditex system, that it was not required and he would be responsible for sealing and waterproofing of these windows. Whilst I do not consider this negates their responsibility completely, it is a significant factor to take into account when assessing apportionment and contribution between the respondents.

[77] Mr Morrison, the claimants' expert, agreed that Mr Boyd and Mr Halliday had no liability for defects given their involvement as portrayed by Mr Kohler. I accept Mr Morrison's evidence as significant but not conclusive. The experience and involvement of Mr Boyd and Mr Halliday I conclude was greater than what Mr Kohler outlined in questioning Mr Morrison. In addition, Mr Morrison's views as to liability are not definitive as liability issues involve consideration of both legal and technical issues.

[78] In summary I conclude that Mr Boyd and Mr Halliday owed the claimants a duty to exercise reasonable skill and care in carrying out the building work they were contracted to do on the dwelling. I further find that Messrs Boyd and Halliday breached their duties by failing to properly install and weatherproof the windows at the dwelling. I also conclude they were negligent in carrying out the carpentry or construction work they were contracted to do without consulting the appropriate technical literature which formed part of the plans and specifications for the construction of the dwelling.

[79] The inadequacies with the sealing of the windows has resulted in damage to all elevations. Messrs Boyd and Halliday have therefore contributed to defects that have necessitated the full recladding of the house and they are accordingly jointly and severally liable for the full amount as set out in paragraph [98] below.

IS MR HAY RESPONSIBLE FOR THE DEFECTS?

[80] Nigel Hay did not attend the Tribunal hearing or any of the case conferences. He did however file the following written submissions and documentation:

- Response in relation to second amended statement of claim received 2 April 2009.
- Letter to case manager dated 5 May 2009.
- Response and application for removal dated 28 May 2009.
- Response dated 1 June 2009.
- Response to brief of evidence of Trevor Anthony Jones dated 1 June 2009.
- Submissions dated 10 June 2009.

[81] In summary, Mr Hay acknowledges that his company, Exterior Plaster Walls Limited, did have the texture coating contract for the claimants' property. He further acknowledged that he carried out the work on behalf of the company. He submits this was done professionally and appropriately and the reason why the jointing system cracked was because harditex is a bad building system and/or because the harditex board was not correctly installed by the builders. He states that the fixing of the harditex was not part of his job description and any defects in the cladding job was not his responsibility. He denies being an expert on fixing harditex. He further denies that he had any responsibility for the lack of installation of head flashings and he denies that he gave any advice about the flashing of windows to the builders.

[82] Mr Hay however did not attend the hearing to give his evidence under oath or to be questioned in relation to the matters he raised. I take these matters into account in assessing the weight given to Mr Hay's statements and submissions.

[83] At the hearing, Mr Jensen stated that he had contracted Mr Hay because of his expertise in the harditex system. He went on to say that he engaged Mr Hay to check the cladding once it had been installed to ensure it was ready for the next stage of the system. Mr Jensen advised Mr Hay noted some irregularity, which Mr Jensen arranged to have corrected. Mr Hay then completed the texture coating work. Mr Jensen also stated that he did not use Mr Hay again because he was unhappy with the work done.

[84] As already stated, Mr Halliday stated that he specifically discussed the flashing of the curved windows with Mr Hay as he was concerned by the lack of head flashings. His evidence was that Mr Hay advised him that this was not necessary as he would silicone around the windows and plaster coat on top. Mr Halliday's evidence was that Mr Hay advised this would give a better waterproofing finish than a flashing.

[85] I accept the evidence of Mr Jensen and Mr Halliday and conclude that Mr Hay or his company were engaged not only to do the texture coating and plastering work but also to check the installation of the cladding prior to the texture coating. In any event, it is generally the responsibility of the plasterer to ensure that the substrate has been installed correctly before they commence their work. As already stated, I accept that it was Mr Hay who gave directions to Mr Halliday in relation to the sealing system for the curved windows. In *Byron Avenue*, Venning J concluded that a trades person such as a plasterer working on site owes a duty of care to the owner and to the subsequent owners just as a builder does. I accordingly accept the plasterer owed the claimants a duty of care.

[86] Mr Hay argues that it was his company that was the plasterer and not him. Even if it were established that it was Mr Hay's company that was contracted to do the work, it is clear Mr Hay was the person involved who actually carried out. I am satisfied that he personally was negligent and that it is now well established that a director of a company who either carries out defective work or is in control or supervises that defective work, can have personal liability.[10]

[87] I further conclude that there is evidence of negligence on behalf of Mr Hay both in terms of not noticing the inadequacies in the installation of the cladding and in relation to the application of the plaster itself. In addition, Mr Hay was negligent in that he applied silicone to the edge of the windows and the head curved windows knowing they had not otherwise been sealed and this was contrary to the James Hardie technical information which as a specialist applicator he must have been aware. He was also negligent in relation to the advice he gave regarding the head flashings to the curved windows and the application of silicone to those windows.

[88] The defects for which I have found Mr Hay to be liable appear on most, if not all, elevations of the property. The claimants are therefore entitled to a judgment against Mr Hay for the full amount of quantum proved.

WHAT IS THE QUANTUM THE RESPONDENTS SHOULD PAY

[89] At the beginning of the hearing, the claimants were claiming $424,685.50 calculated as follows:

Remedial work including waterproofing repairs	$407,348.58
Project management	$48,184.76
Consequential losses	$6,823.20

[10] *Dicks v Hobson* n 3 above and *Byron Avenue* n 6 above.

Interest	$32,328.97
General damages	$30,000.00
Sub total	$524,685.50
Less partial settlement	$100,000.00
Total	$424,685.50

[90] After several concessions made during the adjudication, the costs being claimed for remedial work, interest and consequential losses were reduced to $367,518.34. This amount excluded the waterproofing repairs and the claim for general damages and did not take into account the partial settlement of $100,000.00. Of the $367,518.34 claimed there was only a significant dispute with two items being $1,355.37 claimed for straightening the framing and a plumbing invoice of $1,245.94. Mr Ewen, the Council's expert as to quantum, considered that both of these accounts were unrelated to the weathertightness issues of the property.

[91] Mr Hunter, on behalf of the claimants, however advised that the straightening of the frame was required to achieve the end result. He noted that the frame affects the cladding and therefore affects the waterproofing and it needed to be repaired so that the new cladding would be waterproof. In relation to the pipe relocation, Mr Hunter stated that the drain needed to be relocated so that the remedial work could be effected. There was no other way to do this without moving the pipe.

[92] Based on the evidence given by Mr Hunter, I accept that both the straightening of the frame and the relocation of the pipe are appropriately part of the remedial costs which can be claimed. I accordingly conclude that the amount of $367,518.34 has been established as the cost of the remedial work, project management and consequential losses.

[93] The most significant dispute was in relation to the proposed costs for additional work to be done on waterproofing repairs to the

block wall. As I have found that no party in this claim has any liability for those defects, it is unnecessary to resolve that dispute. For the sake of completeness I conclude that the claimants have failed to establish the quantum for waterproofing repairs against any of the respondents against whom orders were sought.

General Damages

[94] Mrs McGregor seeks general damages of $30,000.00 to compensate her for the stress, anxiety and loss of amenities caused by the defects, leaks and repairs. It is noted that she lived in the property while the remedial work was carried out, and so she dealt with significant inconvenience and disruption throughout this period.

[95] Counsel for the claimants referred to various cases in which general damages of $22,500.00 to $25,000.00 had been awarded. They however submit that taking into account the length of time Mrs McGregor has had to deal with the leaky building problems including the failed repairs in 2001 and also living through the complete reclad in 2008, $30,000.00 would be appropriate.

[96] Mr Kohler queried the jurisdiction of the Tribunal to award damages to a trustee where the claimant is a Trust. The Council accepted in the circumstances of this case that general damages could be awarded to Mrs McGregor only but submitted that the maximum the Tribunal should consider would be $22,500.00 being the amount awarded to Mrs Dicks in the *Dicks* case. They however noted that this was only after what was portrayed as a harrowing ordeal for Mrs Dicks.

[97] There is a legitimate claim for general damages on the part of Mrs McGregor as she is an owner in her personal capacity together with Mr Smith and Mr Phillips as executors of her late husband's estate. I conclude that the appropriate level of general damages in this case is $25,000.00.

Conclusion as to Quantum

[98] I conclude that the Trust has established its claim to the extent $292,518.34 which is calculated as follows:

Re-cladding work (less $100,000.00 settlement)	$230,518.39
Consequential losses	$4,840.94
Interest	$32,159.01
General damages	$25,000.00
Total	$292,518.34

[99] I have found the third, eighth, ninth and tenth respondents all breached their duty of care they each owed to the claimants. They have all been found liable for the full amount of the claim of $292,518.34. Each of these respondents is a joint tortfeasor.

WHAT CONTRIBUTION SHOULD EACH OF THE LIABLE PARTIES PAY?

[100] Section 92(2) of the Weathertight Homes Resolution Services Act 2006, 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.

[101] 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.

[102] 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…

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

[104] It is established that the parties undertaking work should have a greater responsibility than the Council certifying the work. However, in this case, the parties or individuals primarily responsible for some of the defective work are not parties to this claim, either because they have not been identified, they are no longer in existence or have gone bankrupt.

[105] Of the parties to this claim, Mr Hay is attributed the greatest responsibility for the defective work. He inspected the cladding prior to plastering, he inadequately sealed the windows and gave specific advice to Mr Boyd and Mr Halliday that head flashings were not required. I accordingly assess his contribution should be set at 60%.

[106] Mr Boyd and Mr Halliday's responsibility relates to the installation of the windows only. They were not involved in installing the cladding which was estimated at contributing between 30-50% to the remedial costs. The apportionment attributable to Mr Boyd and Mr Halliday is also appropriately reduced by the actions and advice of Mr Hay who they reasonably considered to be an expert in harditex. I assess their joint contribution to be 20% or 10% each. The apportionment of the Council is set at 20%.

CONCLUSION AND ORDERS

[107] The claim by Joan McGregor, David Graham Smith and John Phillips is proven to the extent of $292,518.34. For the reasons set out in this determination, I make the following orders:

I. The Auckland City Council is to pay Joan McGregor, David Graham Smith and John Phillips the sum of $292,518.34 forthwith. The Auckland City Council is entitled to recover a contribution of up to $234,014.68 from John Edward Boyd, Stephen Matthew Halliday and Nigel Hay for any amount paid in excess of $58,503.66.

II. John Edward Boyd is ordered to pay Joan McGregor, David Graham Smith and John Phillips the sum of $292,518.34 forthwith. John Edward Boyd is entitled to recover a contribution of up to $263,266.50 from the Auckland City Council, Stephen Matthew Halliday and Nigel Hay for any amount paid in excess of $29,251.84.

III. Stephen Matthew Halliday is ordered to pay Joan McGregor, David Graham Smith and John Phillips the sum of $292,518.34 forthwith. Stephen Matthew Halliday is entitled to recover a contribution of up to $263,266.50 from the Auckland City Council, John Edward Boyd and Nigel Hay for any amount paid in excess of $29,251.84.

IV. Nigel Hay is ordered to pay Joan McGregor, David Graham Smith and John Phillips the sum of $292,518.34 forthwith. Nigel Hay is entitled to recover a contribution of up to $117,007.34 from the Auckland City Council, John Edward Boyd and Stephen Matthew Halliday for any amount paid in excess of $175,511.00.

[108] To summarise the decision, if the four respondents meet their obligations under this determination, this will result in the following payments being made by the respondents to the claimants:

Third Respondent - Auckland City Council	$58,503.66
Eighth Respondent – John Edward Boyd	$29,251.84
Ninth Respondent – Stephen Matthew Halliday	$29,251.84
Tenth Respondent – Nigel Hay	$175,511.00

[109] 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 paragraph [107] above.

DATED this 24th day of July 2009

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P A McConnell
Tribunal Member