IN THE WEATHERTIGHT HOMES TRIBUNAL
TRI 2007-100-000038

BETWEEN	**RAYMOND MARTIN OFFORD and SUSAN MARIE OFFORD** Claimants
AND	**RAMAN RANCHHODJI PATEL** First Respondent
AND	**RITE PRICE CONSTRUCTION LIMITED** Second Respondent
AND	**AUCKLAND CITY COUNCIL** Third Respondent
AND	**RICHARD JOHN PEARSON Trading as PEARSON & ASSOCIATES ARCHITECTS** Fourth Respondent
AND	**PETER PHILLIPS SR** Fifth Respondent
AND	**R. E. ARDOUIN** (Removed) Sixth Respondent
AND	**IGOR ARAKELIAN** (Removed) Seventh Respondent
AND	**CLIVE PARKER** Eighth Respondent

DECISION
Adjudicator: S G Lockhart QC
Dated 5 December 2008

BACKGROUND

[1] The first respondent, Mr Patel, was both the sole director and the principal shareholder of the second respondent company, Rite Price Construction Limited (Rite Price) formed in May 1994. Mr Patel held 70% of the shares and the remaining 30% of shares was held by his wife.

[2] On 27 March 1995, Rite Price purchased land in John Rymer Place, Kohimarama, Auckland. According to Mr Patel, the purchase was made with the intention of building two houses, one for the occupation of himself and his wife, and the second to be sold as a "spec" house.

[3] Construction commenced on the first house early in 1996 and was completed in October 1997. Construction for the second house began shortly after in August 1998 and was completed in January 1999. However after construction of both these houses were completed, neither Mr Patel nor his wife occupied either house.

[4] Both properties were sold following completed construction. The second house, which is the subject of these proceedings, was sold in April 1999 to Raymond and Susan Offord ("Claimants").

[5] The Claimants occupied the house from April 1999. However in mid 2004 the Claimants made a decision to sell the house. The property was placed on the market and a prospective purchaser submitted an acceptable offer subject to a satisfactory pre-inspection report being obtained. When serious defects were then identified and included in the pre-purchase report, the purchase offer was withdrawn.

[6] Mr Mathew Early, a building surveyor employed by Joyce Group Ltd, was then engaged in November 2004 by the Claimants to

inspect the property and produce a preliminary report. That report confirmed that there were defects in the construction of the house.

[7] A summary of the defects identified by Mr Earley and the consequential damage were described as follows:

> The most significant defects that compromised the weathertight integrity of the external envelope of the dwelling are the absence of suitable window and door joinery flashings followed by the flat topped plastered surfaces. These defects have resulted in extensive moisture ingress and decay damage to all elevations requiring extensive framing removal during the remediation process. The other issues associated with ground levels penetrations and cracking are secondary issues and have resulted in more isolated damage (*Hampton Jones Report, 4/1/2008, 7.36*).

[8] Following receipt of Mr Early's report the Claimants filed a claim with the Weathertight Homes Resolution Service.

REMEDIAL WORK

[9] Plans for the remedial work to repair the property were then prepared by Shanahan Architects Limited, and specifications and tender documents were made advising that Mr Craig Young of Shanahan Architects Limited would oversee the project.

[10] Hybrid Residential Ltd was the successful tenderer and the remedial work was undertaken from February 2007 through to March 2008 following which the quantum of the Claimants' claim was finalised based on actual costs.

CLAIM

[11] At the conclusion of the adjudication hearing, removal orders were made in respect of the sixth respondent, Mr Ardouin, and the

seventh respondent, Mr Arakelian. As a result of such removals, the remaining respondents included:

(a) First Respondent, Mr Patel as the builder/project manager/developer;
(b) Third respondent, Auckland City Council, as the territorial authority who carried out inspections during the construction and issued the building certifications on the property;
(c) Fourth Respondent, Mr Pearson, trading as Pearson and Associates Architects, as the architect who provided the plans and specifications for the construction of the property;
(d) Fifth Respondent, Mr Phillips, as a carpenter/builder; and
(e) Eighth Respondent, Mr Parker, as the person who carried out the plastering work.

[12] On that basis, the Claimants claimed that each of the respondents was jointly and severally liable for the Claimants' loss for the following amounts:

(a) $344,958.63 being the cost of necessary remedial work and associated costs (Schedule A);
(b) Interest on the above sums at the 90 day bank bill rate plus 2% (Schedule B);
(c) General damages of $25,000.00 to each of the claimants; and
(d) Loss of amenity due to loss of deck above garage in the amount of $20,000.00

Experts' Conference

[13] In focusing on the claimed defects for the subject property,

an Experts' Conference was held on 3 October 2008, and was attended by:

(a) Mr Craig Young, the Claimants' architect;
(b) Mr Mathew Earley, the Claimants' building surveyor;
(c) Mr Neil Alvey, the WHRS assessor;
(d) Mr Phillip Grigg, engaged by Mr Patel as a building expert; and
(e) Mr Norrie Johnson, an expert assisting Mr Pearson.

[14] The experts agreed that there were five causes of damage that occurred to the Claimants' house. These five issues were as follows:

Defect 1. The balustrade walls were inadequately waterproofed and were responsible for approximately 40% of the remedial costs. These were the walls around the balconies and the garage and deck.

Defect 2. The parapet walls were inadequately waterproofed and caused 30% of the remedial costs. These parapet walls were the lower walls around the outside of the decks and the garage, which also contained the guttering.

Defect 3. The inadequate window and floor flashings caused a further 25% of the remedial costs. This resulted from there being no side or sill flashings around the aluminium windows and doors.

Defect 4. Plaster penetrations caused 2.5% of the remedial costs. The experts ascertained that in several locations the plaster had been penetrated because

it was not adequately sealed or flashed - an example of which was around the electric meter box.

Defect 5. There was inadequate ground clearance, which caused 2.5% of the remedial costs. This cause of damage was located in the south-eastern corner of the garage where water was able to wick into cladding from the ground level.

[15] In regard to the costs claimed by the Claimants, the Experts agreed, and it was also accepted by all the respondents at the conclusion of the hearing, to the following amounts:

(a)	Remedial costs agreed to at the Experts' Conference but not including the Claimants' claim for painting	$278,863.38
(b)	Agreed amount for painting (50% of $9,884.25)	$4,942.12
(c)	Building consultants and architects fees	$31,274.01
(d)	Consequential costs (spreadsheet 18 October 2008 less $3,500 deduction for carpet insurance payment)	$13,101.14
(e)	Accommodation	$6,500.00
(f)	Filing fee	$400.00

[16] The Tribunal however has no authority to award costs and expenses of adjudications except in the circumstances set out in s91(1) of the Weathertight Homes Resolution Services Act 2006. Accordingly it has no jurisdiction to award the filing fee of $400.00 in this case.

[17] The Tribunal on 28 November 2008, requested counsel for the claimants to advise the Tribunal of the total interest that would be paid by the claimants up to and including 5 December 2008, being the date on which the decision of the Tribunal would be released. In answer to that request the following email was received on that same day:

> "The total interest to 5 December 2008, on the basis agreed by all parties, is therefore $43,104.77.
>
> From that should be deducted interest of $565.27 for half the cost of the painting ($4,942.12) from 27 July 2007.
>
> The net interest figure is therefore $42,539.50."

[18] The Tribunal accepts that figure as an accurate amount paid by the Claimants in interest and therefore finds that the Claimants are entitled to claim that amount.

[19] Prior to the conclusion of the adjudication hearing, all parties acknowledged that there were only two outstanding quantum issues for the Tribunal to consider as all other matters relating to quantum had been resolved. The two matters requiring resolution related to the claim by the Claimants for general damages. Those matters were firstly for the personal loss of enjoyment of life and secondly for compensation for the amenity loss of the outside deck.

[20] Both matters have now been determined. The Tribunal therefore makes the following decisions:

(a) *Loss of amenity value for loss of deck*

[21] When the remedial work was being considered, a decision had to be made as to whether the deck, which had been water damaged should be reinstated or whether the deck should be closed. It was a comparatively large deck and according to Mr Offord it covered an area of approximately 15m². Mr Offord agreed that the deck was "not frequently" used. Instead Mr Offord stated that the major use for this deck was to have a place to secure the family dog when they were away from the house.

[22] A decision was made to build a pitched roof to be placed over the area of the deck to ensure that there was less risk in the future for any further water damage. It appears from the evidence that the decking was utilised sparingly but it certainly did have some useful purposes. Taking all matters into consideration the Tribunal considers that an award of $6,000 is an appropriate compensation to the Claimants in regards to the loss of amenity for this deck.

(b) General Damages

[23] The Claimants have each claimed $25,000 in general damages for the loss of enjoyment of life that arose from the necessity of shifting away from their home when the property was undergoing remedial work. The Claimants' claim that the shift from their home has caused general upset to their lives and they both suffered considerable anxiety over the repairs to their home. There can be no doubt that both Claimants were under considerable stress for a lengthy period while their house was undergoing extensive repairs and they were justified in re-locating to a renting property while that was being done.

[24] The Tribunal has considered a number of awards that have been made to Claimants in similar situations and as a result the

Tribunal has determined that the appropriate amount to award the Claimants for general damages is $10,000.00 each – i.e. a total of $20,000.00.

[25] The Tribunal accepts the findings made by the experts as being an accurate account of the causes of damage to the Claimants' property. The Tribunal's decision and subsequent orders are therefore based on those findings.

[26] Taking into account the amount claimed by the Claimants as well as the findings mentioned above, this Tribunal holds that the Claimants are entitled to receive a total amount of $403,220.15 calculated as follows:

• Remedial Costs	$278,863.38
• Agreed amount for painting	$4,942.12
• Building Consultants and Architects Fees	$31,274.01
• Consequential Costs	$13,101.14
• Accommodation	$6,500.00
• Interest	$42,539.50
• General damages	$20,000.00 *($10,000 each)*
• Loss of amenity of deck	$6,000.00
Total	$403,220.15

POSITION OF MR PATEL, FIRST RESPONDENT

Mr Patel's Liability in Tort

[27] Mr Patel acknowledges that he undertook the role of project manager in the building of the subject dwelling, as he was responsible for undertaking the following tasks:

(a) he applied for and was granted the building permit;

(b) called for inspections by the Auckland City Council;

(c) entered into a contract with many of the labourers and arranged for materials to be delivered in his own personal name as opposed to using the name of the second respondent company;

(d) he had previous experience as a project manager;

(e) he was on the site early each day and stayed on site for most of the day;

(f) he was involved in the overall control of the construction of the house;

(g) he was regularly involved in giving directions to the contractors and explaining the work that he wanted done;

(h) he physically carried out some of the work himself, such as the cladding up the hardibacker; and

(i) he did not employ an architect or a project manager or a construction manager to oversee the construction of the house.

[28] Taking those facts into consideration, the Tribunal is satisfied that Mr Patel's role as the project manager is well-founded as his actions in overseeing all aspects of the construction clearly fit the description of a project manager – see *Gray & Ors v Lay & Ors*, [11 March 2005] WHRS, DBH 00027, 22.1-22.7.

Was Mr Patel also the Developer?

[29] It was accepted by all parties that Rite Price was a company which built both houses. However it was further contended by the Claimants that Mr Patel was a second developer in respect of the Claimants' house, personally (see amended statement of claim, 28 August 2008, pp 21(b)).

[30] This is because in addition to Mr Patel's involvement as a project manager (see para 22 above), Mr Patel also:

(a) held an architectural qualification;
(b) selected and approved the contractors and the supplies of materials;
(c) made alterations or authorised changes from the architect's drawings or plans;
(d) no other individual or individuals were employed as developers;
(e) together with his wife, were the only persons who would gain financially if a profit was obtained.

[31] Moreover during construction a decision was made, without further consultation with the architect to change the plans prepared by him and to replace the timber capping on the balustrade walls and instead apply plaster. Mr Patel was also involved in the decision and the ordering of the pre-cut timber. According to the fifth respondent, Mr Phillips, those changes were the result of a decision made by Mr Patel. There is also evidence that Mr Patel was involved with decisions relating to the landscaping and directed where the lawn should be laid.

[32] Mr Patel takes issue with the contention that he was a developer personally and maintains that it is not supported by the evidence. Mr Satherley, Counsel for Mr Patel, submitted that if it is accepted that Rite Price was the developer that means that the developer is a corporate entity, and therefore to what extent is the Tribunal entitled to look behind it and say: 'yes you were a director of that entity but you're also personally liable?'

> **MR SATHERLEY:**… Rite Price Construction Limited developed the Offord's property but the contention is that as well as Rite Price Construction Limited there's a second developer, that is Mr Patel,

> personally and that's the contention of the claimants that I take issue with and I say is not supported by the authorities at all.
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> **ADJUDICATOR**: Do you say that he wasn't the developer at all?
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> **MR SATHERLEY**: He was a project – well, if we accept as the claimants have, that Rite Price Construction was a developer, we have a corporate entity that is the developer. The question is to what extent is a court entitled to look behind it and say, well yes you were a director of that entity but you're also personally liable. (*Closing submissions, p 22, lines 1-12*).

[33] Mr Satherley relied on the Court of Appeal's decision in *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517 in which the claimants sued both a "one-person company" and also Mr Trevor Ivory personally as he had given advice to the claimants to use a particular herbicide. It was held on appeal that Mr Ivory should not have been held personally liable. The Court of Appeal held:

> An officer or servant of a company, no matter his status in the company, might in the course of activities on behalf of the company come under a personal duty to a third party, breach of which might entail personal liability. The test as to whether liability had been incurred was whether there had been an assumption of a duty of care, actual or imputed. Liability depended on the facts, on the degree of implicit assumption of personal responsibility and balancing of policy considerations. (*page 517*).

[34] Recently however, the Court of Appeal in *Body Corporate 202254 v Taylor* [2008] NZCA 317 at para [41] approved the decision in *Morton v Douglas Homes Limited* [1994] 2 NZLR 548 (HC) which established that during the construction of a building, if a director assumed control or actively became involved for a particular part of the construction, then that rendered the director liable as a developer.

[35] Also relevant is the decision of Harrison J in *Body Corporate 188273 v Leuschke Group Architects Ltd (2007)* NZLPR 914 which stated that:

> [52] The starting point is that a director of a corporate entity may assume a personal responsibility to third parties for his acts or omissions while performing that office. That is because an individual who commits all the elements of a tort or other cause of action will be held directly liable for the consequences, whether solely or concurrently with his principal according to the rule of attribution and irrespective of whether or not he was acting as a director or pursuant to any other agency. The status of director does not carry any special immunities from personal liability.
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> …
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> [55] As is well known, the existence of a duty in a claim of negligence simpliciter in any particular circumstances is determined by a two stage enquiry, focusing first on the concept of proximity and then expanding into a wider policy analysis. The element of assumption of personal responsibility is now central to the proximity enquiry: Rolls Royce New Zealand Ltd v Carter Hold Harvey Ltd [2005] 1NZLR 324(CA) at [97-100]. That concept has been expressly identified as the appropriate test for determining a director's personal liability; and is often satisfied 'where the director or employee exercises particular control or control over a particular operation or activity' (Trevor Ivory at 527)."

[36] To reinforce that point, Stevens J in *Hartley v Balemi & Ors* (29 March 2007, CIV 2006-404-2589, Auckland HC) stated:

> [92] However, personal involvement does not necessarily have to mean that physical work needs to have been undertaken by the director – that is just one potential manifestation of actual control over the building process. Personal involvement and the degree of control I also include, as in Morton itself, administering the construction of the building. Therefore, the test to be applied in examining whether the director of an incorporate builder owes a duty of care to a subsequent purchaser must, in part, examine the question of whether, and if so how, the director has taken actual control over the process of any particular part thereof. Direct personal

involvement may lead to the existence of a duty of care and hence liability, should that duty of care be breached.

….

[95] The adjudicator found that he personally assumed the liability, because he was closely involved in all aspects of the building process: applying for building consent, selecting the subcontractors and suppliers, negotiating the scope of the subcontractors' work as well as their prices, authorising changes from the architect's plans, organising and managing the building work on the site most days. Relevantly, Mr Balemi was personally involved in decisions that led directly to the leaking damage the house suffered, such as the decision to install the sill flashings in a way that subsequently caused significant damage through leaks.

[37] As held by Harrison J in *Body Corporate 188273 v Leuschke Group Architects* (2007) NZCPR 914:

[31] The word "developer" is not a term of art or a label of ready identification like a local authority, builder, architect or engineer, whose functions are well understood and settled within the hierarchy of involvement. It is a loose description, applied to the legal entity which by virtue of its ownership of the property and control of the consent, design, construction, approval and marketing process qualifies for the imposition of liability in appropriate circumstances.

[32] The developer, and I accept there can be more than one, is the party sitting at the centre of and 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 demands that the developer owes actionable duties to owners of the buildings it develops.

[38] To hold Mr Patel liable as a developer it is not necessary to find that he actually undertook to complete or carry out personally any particular work. Although in respect of this particular property there is evidence that he was personally involved in assisting with the nailing up of the hardibacker.

[39] The Tribunal is satisfied that the first respondent, Mr Patel, undertook a major part in the selecting of subcontractors and overseeing of their work, and was also instrumental in making changes to the plans prepared by the architects, and was present most days in managing site work. Accordingly, it is held that not only was he the project manager but he was also, together with Rite Price Construction Limited, a developer of the property.

Contracts Enforcement Act 1956 Claim

[40] On behalf of the Claimants it was also alleged that because Mr Patel signed the sale and purchase agreement as a vendor, he was therefore bound by the vendor warranties under that agreement.

[41] The claimants relied on the Contracts Enforcement Act 1956 which provided that a contract for the sale of land is enforceable if:

> The contract or some memorandum or note thereof is in writing and is signed by the party to be charged herewith or by some other person lawfully authorised by him. (*see page 8 of the closing submissions for Claimants dated 23 October 2008*).

[42] Mr Patel had signed the agreement for sale and purchase and below his signature he immediately added the words:

> "*as duly authorised agent for Rite Price Construction Limited"*

[43] In support of this particular allegation the Claimants relied on the decision in *Doughty-Pratt Group Limited v Perry Castle* [1995] 2 NZLR398, CA (pp 401, line 4 – 40, pp 403, line 7 – pp 404, line 9). The Court of Appeal held that the words "*signed on behalf of Associated Sharebrokers Ltd in the presence of*" which had been signed by the directors and who were also guarantors and had initialled, but not signed, the guarantee clause were held to be liable.

[44] Counsel for Mr Patel strongly opposed the allegation made against his client and referred to two decisions of the Court of Appeal in *Vuletic v Contributory Mortgage Nominees Ltd* (CA 250/05) and *Trotter v Avonmore Holdings Limited* (2005) 8 NZBLC 101, p 646.

[45] During the making of final submissions the Tribunal raised the issue that there may exist a problem in relying on the provisions contained in the Contracts Enforcement Act 1956 as that statute has been repealed. This was drawn to the attention of counsel who indicated that further submissions may be filed. No further submissions on this issue have been filed and as the Tribunal has held that the first respondent was liable both as a developer and a project manager of the building, the Tribunal does not need to rule on this issue. It does appear however that any similar claim would need to have been brought under the Property Law Act 2007.

[46] The Tribunal, after considering all the evidence, concludes that Mr Patel is jointly and severally liable for 100% of the total amount of $403,220.15 as it has been established that it had involvement in and must therefore have responsibility for the damages and consequential costs caused by each of the five defects set out in para [14] above.

[47] In regards to Mr Patel's apportionment or contribution for each of the five defects listed at para [14] above, the Tribunal allocates the following percentage liabilities:

Defect	% of Total cause of Damage	% of First Respondent's Liability for that Defect	% of Total Liability
1	40	40	16
2	30	50	15
3	25	64	16
4	2.5	60	1.5
5	2.5	60	1.5
Total			50

[48] The first respondent's apportionment is therefore assessed at 50% of the total amount of the claimants' claim. That amount being $201,610.07.

THE POSITION OF THE AUCKLAND CITY COUNCIL, THIRD RESPONDENT

[49] After the Council issued a building permit, construction work commenced and the Council proceeded to carry out inspections on the house. Eight different inspections were carried out between October 1998 and January 1999. On 22 December 1998, although the property had obtained a "pass", it was subsequently cancelled and a Code Compliance Certificate was finally issued on 3 February 1999.

[50] The Claimants submitted that the Council was liable due to the decision firstly in *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 and then in respect of the Privy Council decision reported in [1996] 1 NZLR 513. The Claimants also drew reference to a recent decision of Heath J in *Body Corporate 188529 v North Shore City Council & Ors* (*Sunset Case*) 30 April 2008, CIV 2004-404-3230.

[51] In the *Sunset Case*, Heath J defined the duty of a territorial authority as follows:

> [220] In my judgment, a territorial authority owes a duty of care to anyone who acquires a unit, the intended use of which has been disclosed as residential in the plans and specifications submitted with the building consent application or is known to the Council to be for that end purpose. The duty is to take reasonable care in performing the three regulatory functions in issue: deciding whether to grant or refuse a building consent application, inspecting the premises to ensure compliance with the building consent issued and certification of compliance with the Code. The existence of such a duty reflects the need to balance a homeowner's moral claim for compensation for avoidable harm against the Council's moral claim to be protected from an "undue burden" of legal responsibility. Put in that way, the duty takes account of the changed statutory framework and avoids tying the duty to the practices of a bygone era.
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> …
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> [221] The obligation of the Council can be no higher than expressed in the statute itself: namely, to be satisfied on reasonable grounds that a building consent should issue; to take reasonable steps in carrying out inspections and to be satisfied on reasonable grounds that code compliance should be certified.

[52] The Claimants allege that of the areas of defects identified by the experts in their conference agreement, the Council was liable in respect of the water ingress in the following areas:

- Inadequately waterproofed flat topped balustrade walls;
- Inadequately waterproofed flat topped parapet walls, and no flashing to garage door;
- Inadequate window/door flashings to monolithic areas;
- Penetrations where solid plaster was not adequately sealed and/or flashed e.g. inadequate flashed electric meter box; and

- Inadequate ground clearance in the south-eastern corner of garage.

[53] In regards to the balustrade walls, the Tribunal accepts the evidence given by the assessor, Mr Alvey, that water was able to enter the flat topped balustrade leading to consequential moisture causing eventual damage to the framing. The resultant damage occurred not only to the balcony, garage and deck balustrades, but also to bedrooms 1 and 3.

[54] As for the parapets, Mr Alvey's opinion was that the fact these were flat topped and were without adequate cover flashings, allowed for water to enter near the top of the parapet. The butynol was taken off the top plate to provide an underlying waterproof membrane to the roof and deck areas. As a result the water was able to enter the flat topped parapet with consequential damage to the top of the parapet.

[55] In respect of the window flashings, Mr Alvey stated that there was an absence of sill trays to windows which would have led to inadequate deflection of water at the sills. He also stated that there were no jamb flashings or stop ends to the head flashings, which in his opinion would cause "ineffective moisture management at window openings".

[56] In respect of the garage door no head flashing had been installed.

[57] Some of the defects referred to above may have been difficult to inspect. But all the experts were of the opinion that the defects would have been apparent when the Council carried out its inspections.

[58] Heath J in the *Sunset Case* held that:

> [447] Waterproofing of a building is a critical issue with which the Code deals…. If waterproofing of the decks and the tops of the inter tenancy and parapet walls could not be adequately checked in any other fashion, a pre-coating inspection was necessary.
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> …
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> [449] The Council's obligation was to establish *its* inspection regime and to advise the developer of the stages at which its inspectors wanted to be present to ensure proper code compliance. The obligation would then pass to the developer to advise the inspectors before each phase began and, if advice were not given, the developer could not have complained if the inspectors had required the work to be deconstructed and repeated; particularly, for example, if there were no other means of determining whether (by sampling or otherwise) waterproofing had been carried out to the required standard.

[59] It is acknowledged by Ms Divich, counsel for the Auckland City Council, that the Council owed a duty to the Claimants to exercise reasonable skill and care when carrying out inspections of the work during the construction period and also when issuing the Code Compliance Certificate.

[60] However, counsel for the Auckland City Council, both in her written and oral submissions attempted to overcome liability in respect of the window flashings relying on the evidence of those experts who acknowledged that there was evidence that there was a sealant on a window and that that sealant can be used as a flashing. On the basis that there was sealant on one flashing it was contended on behalf of the Council that the inspector who carried out the inspection might have been justified in approving the window flashings.

[61] No evidence was however called by the Council. As a result there is no evidence before the Tribunal to support the suggestion that the inspection of the windows were carried out.

[62] Moreover, in opposition to the Council's submissions, the window installation did not comply with the Good Stucco Practice Guide at para 3.7.1 providing that:

> **3.7 Flashings, Trim and Metal Components**
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> 3.7.1 The provision of proper flashings around openings in the cladding is essential, with windows having both head and sill flashings (see Figs 4 and 5). Head flashings must project horizontally at least 30mm beyond each side of the opening to ensure that water dispersed from each end does not enter any possible gap between the cladding and window or door jamb. Examples of suitable side flashings to openings are shown in Figs 6,7,8 and 9.

[63] In addition the James Hardie Technical Literature (at p697-682) contains information relating to window installation which was not complied with and because the windows were not watertight, they did not comply with the E2 standard. Nor did the window installation comply with standard E2/AS1 which requires that the sealant must be "easy to access and replace". (see para 3.1.1 d (ii) of the BIA Approval Documents E2 : External Moisture).

[64] Both Mr Alvey and Mr Early, the expert acting on behalf of the Claimants, referred to photographs they had taken which demonstrated that there were a number of windows that had no sealant on them.

[65] The Tribunal, after considering all the evidence, concludes that the Auckland City Council is jointly and severally liable for 100% of the total amount of $403,220.15 as it has been established that it had involvement in and must therefore have responsibility for the damages and consequential costs caused by each of the five defects set out in para [14] above.

[66] In regards to the Auckland City Council's liability for each of the five defects listed at para [14] above, the Tribunal allocates the following percentage liabilities:

Defect	% of Total cause of Damage	% of Third Respondent's Liability for that Defect	% of Total Liability
1	40	22.5	9
2	30	30	9
3	25	8	2
4	2.5	40	1
5	2.5	40	1
Total			22%

[67] The third respondent's apportionment is therefore assessed at 22% of the total amount of the claimants' claim. That amount being $88,708.43.

THE POSITION OF MR PEARSON, FOURTH RESPONDENT

[68] The first respondent, Mr Patel, successfully joined the fourth respondent, Mr Pearson, alleging that he failed to provide adequate working drawings of a reasonable standard.

[69] On the final day of hearing (3 November 2008) counsel for Mr Patel agreed that the claim was confined as to the issue of whether or not Mr Pearson's design for the balustrade (item 1 in the agreed defects list) had been negligently drawn by the architect.

[70] As acknowledged by counsel for Mr Pearson, the issues to be determined by the Tribunal in regards to the liability of Mr Pearson are:

(a) Did Mr Pearson, as the architect for this project, breach the duty he owed to the Claimants in relation to the design of the balustrade?
(b) If so, did such a breach cause damage and the quantum that followed?

(c) If (a) and (b) are established, what sum of contribution should Mr Pearson be liable to Mr Patel for?

[71] The claim against Mr Pearson arises in respect of the balustrade. It is alleged that Mr Pearson did not provide sufficient detail relating to waterproofing. The plans prepared by him indicated where the balustrade was to be positioned and the materials that were to be used - that is, construction was to be a metal pipe frame with hardiflex cladding, and the capping was to be treated H3 timber.

[72] The actual construction that eventuated did not follow the drawings of the balustrade provided by Mr Pearson in a number of respects.

[73] That point is consistent with regard to the relationship between Mr Pearson and Mr Patel. In giving instructions to Mr Pearson in respect of the plans to be drawn, Mr Patel made it clear that he only sought minimum details in respect of the drawings and the specifications, as he did not want the costs of the plans to be expensive.

[74] During these proceedings, Mr Patel acknowledged that he had undergone training as an architect and that he had approximately 18 years of experience as a draftsman. Consequently Mr Patel should have been aware that the drawings lacked detail and that if he needed further details he should contact Mr Pearson. Mr Patel however stated that he made no additional request of Mr Pearson. Nor did he have any contact with him after the construction of the property commenced.

[75] It must also be noted that the plans and details provided by Mr Pearson were prepared between 1996-1997. During the adjudication hearing, information was provided pointing out that the

details which allegedly should have been provided in the plans were not commonly supplied by competent architects of that period.

[76] The problem with the balustrade was that there was a lack of any slope. Mr Phillips, the fifth respondent, was the builder and in his prepared brief of evidence referred to the construction of the parapets and balustrade:

> "66. The parapets and balustrade walls were timber framed construction covered and hardibacker. They were drawn on the plans with no slope or capping.
>
> 67. I built them as they were drawn."

[77] The issue is whether the architect, Mr Pearson should have drawn Mr Patel's attention to the fact that the working drawings did not provide details regarding the need for a sloped timber capping in the balustrade and that the requirement of a slope had to be addressed.

[78] In *Heng v Walshaw & Ors* [30 January 2008], WHT, DBH 00734 it was held that an architect has a duty, even if he is working on a limited retainer basis, to give a warning in relation to insufficient detail:

> [T]he duty of care owed by an architect to an owner and to subsequent owners extends to producing amended documentation or warning the owner and/or others involved in the construction process that the plans provided are insufficiently detailed….. notwithstanding that the architect may be engaged on a limited retainer (*Hedley Byrne*, *Bowen* and *Brian Geaney & Anor v Close Constructions Pty Ltd*)

[79] In the Tribunal's opinion, Mr Pearson failed to provide working drawings that met the reasonable minimum standards by providing plans that depicted a flat timber capping and then omitting to fully advise Mr Patel that more detail would be needed in order for

waterproofing to be achieved. Thus if Mr Pearson had provided directions regarding the construction of the balustrade it is probable that some of the leak problems would have been avoided.

[80] As a result it is held that due to the failure of Mr Pearson to either include additional information, or alternatively, to draw attention to Mr Patel that further drawings were necessary, damage has resulted to the property.

[81] The Tribunal, after considering all the evidence, concludes that Mr Pearson is jointly and severally liable for 40% of the total amount of $403,220.15, which amounts to $161,288.06. This is because it has been established that Mr Pearson had involvement in and must therefore have responsibility for the damages and consequential costs caused by Defect 1 set out in para [14] above.

[82] In regards to Mr Pearson's liability for each of the five defects listed at para [14] above, the Tribunal allocates the following percentage liabilities:

Defect	% of Total cause of Damage	% of Fourth Respondent's Liability for that Defect	% of Total Liability
1	40	17.5	7
2	30	10	0
3	25	0	0
4	2.5	0	0
5	2.5	0	0
Total			7%

[83] As a consequence of finding Mr Pearson liable for his negligent work, the extent of his negligence is comparatively minor and is assessed by the Tribunal at 7% of the total amount of the claimants' claim $28,225.41.

THE POSITION OF MR PHILLIPS, FIFTH RESPONDENT

[84] The Claimants allege that Mr Phillips, the fifth respondent, owed them a duty to exercise reasonable care to ensure that the house was constructed without defects and that Mr Phillips breached that duty of care. The Claimants acknowledged in their final submissions that after listing the liability for each respondent in respect of the areas of defect identified at the Experts' Conference and at which agreement was reached, that the position of Mr Phillips is less certain than the other respondents in each category and the Claimants were therefore content to leave the question of Mr Phillips' liability to be addressed by the other parties (see Claimants final submissions 23 October 2008 p19).

[85] Mr Phillips undertook to carry out carpentry work on the property as a "labour-only" contractor. He was employed by Mr Patel at the rate of $20.00 per hour and was assisted by his son on a "labour-only" basis at $16.00 per hour. However it must be noted that no written agreement was ever made between Mr Patel and Mr Phillips in relation to that work.

[86] The evidence before the Tribunal establishes that the first respondent was involved from the beginning of the construction work including the preparation of the section on which the property was to be built. The first respondent was on the site each day throughout the building procedure and any queries by the fifth respondent were referred to the first respondent.

[87] Moreover Mr Phillips was neither a master builder nor a registered builder. Prior to being involved in the building of the subject dwelling, Mr Phillips had mainly been involved in repairing properties, carrying out alterations, and undertaking maintenance repairs.

[88] In his evidence, Mr Phillips did accept that he was responsible for a greater part of the construction of the dwelling, which included the framing and the installation of the windows.

[89] In the *Sunset Case*, Heath J referred to and approved Richmond P's statement in the Court of Appeal decision in *Bowen & Anor v Paramount Builders (Hamilton) Ltd & Anor* [1997] 1 NZLR 394 at 407, stating that:

> "[A] builder who agreed to build a house in a manner which he knows or ought to know will prove a source of danger to third parties cannot say, in answer to a claim by third parties, that he did all that the owner of the land required him to do."

[90] There are two areas in which the Tribunal is of the opinion that Mr Phillips was negligent. The first of these is in respect of the flat topped balustrade walls. Even though it is accepted that Mr Phillips had little experience in the construction of a house, he should have been aware of the potential problems likely to occur with a flat topped balustrade and at the very least raised this issue with Mr Patel.

[91] The second issue is in respect of the installation of the hardibacker. Mr Phillips acknowledged that he had no previous experience with the installation of the hardibacker. He did however have some assistance from Mr Patel in installing the hardibacker but Mr Phillips was involved with the construction of the house to a very large degree and he should have taken steps to make his own investigations as to the correct method of the installing of hardibacker.

[92] The Tribunal, after considering all the evidence, concludes that Mr Phillips is jointly and severally liable for 70% of the total amount of $403,220.15, which amounts to $282,254.10. This is because it has been established that Mr Phillips had involvement in and must therefore have responsibility for the damages and

consequential costs caused by Defects 1 and 2 set out in para [14] above.

[93] In regards to Mr Phillips' liability for each of the five defects listed at para [14] above, the Tribunal allocates the following percentage liabilities:

Defect	% of Total cause of Damage	% of Fifth Respondent's Liability for that Defect	% of Total Liability
1	40	10	4
2	30	10	3
3	25	0	0
4	2.5	0	0
5	2.5	0	0
Total			7%

[94] As a consequence of finding Mr Phillips liable for his negligent work, the extent of his negligence is comparatively minor and is assessed by the Tribunal at 7% of the total amount of the claimants' claim being $28,225.41.

THE POSITION OF MR PARKER, EIGHTH RESPONDENT

[95] The Claimants in their final submissions emphasised that the plasterer who finished the flat topped balustrade and the parapet walls did so in a manner that did not comply with E2 and that resulted in leaks which caused substantial damage (Claimants' final submissions 23 October 2008, p18, para 16(1)). It was also alleged that Mr Parker must also share a substantial portion of responsibility for the wall defects.

[96] The Experts' Conference identified five separate areas of defect, of which three areas - i.e. the balustrades, the parapets and the window and flashings installations, were all at least partially the responsibility of Mr Parker.

[97] C Parker Plastering was engaged by Mr Patel to carry out the plastering both to the hardibacker and the block wall. That work was completed by Mr Clive Parker, the eighth respondent, assisted by his brother, Mr Shane Parker. In Mr Patel's opinion, because the plastering work was a major part of finishing the house, he obtained references and quotes from Mr Parker and viewed the work he had done before accepting his quote.

[98] Mr Patel claimed, from some of the inquiries he made, that Mr Parker was an experienced plasterer who would be responsible for completing the horizontal tops of the stucco surfaces and would also adequately carry out the joinery installation.

[99] The fifth respondent, Mr Phillips, gave evidence in regards to the liability of Mr Parker and was cross-examined at considerable length by counsel for Mr Patel, Mr Satherley. The Tribunal was impressed with the manner in which Mr Phillips gave evidence and as a result the Tribunal formed the opinion that he was a reliable witness. In particular Mr Phillips stated that the flashing of the windows were the responsibility of the plasterer. Mr McCartney, counsel for the Claimants submitted that if Mr Phillips' evidence was accepted, then the plasterer, Mr Parker, must also "share a substantial portion of responsibility for the window defects".

[100] Mr Parker was joined as a party to these proceedings on the application by the first respondent, Mr Patel. The order for joinder was made by the Tribunal on 4 February 2008 and recorded in Procedural Order No.4.

[101] Included in Procedural Order No. 4 was an order that Mr Parker file with the Tribunal on or before 27 February 2008 all documents that were relevant to the Claimants that were either in his possession or under his control.

[102] Procedural Order No. 4 also advised Mr Parker that a mediation hearing would be held on 3 April 2008 at the offices of the Tribunal.

[103] Mr Parker was further advised in Procedural Order No. 9 dated 15 August 2008 that an adjudication hearing would be commencing on 13 October 2008 and that a brief of evidence for the adjudication should be filed by 29 September 2008.

[104] Mr Parker failed to join a telephone conference held on 8 October 2008. On 8 October 2008 a written letter was sent to him advising that the adjudication hearing would commence on Monday 13 October 2008. This letter also drew his attention to the possibility that an award of damages could be awarded against him in his continued absence from the adjudication hearing.

[105] Mr Parker did not participate at any stage throughout the adjudication process and therefore no response was made by him regarding the allegations against him. As a result no evidence was presented to the Tribunal on his behalf as to the work he had done. Consequently, the evidence given to the Tribunal of the involvement of Mr Parker has not been challenged and the Tribunal is prepared to accept without hesitation the evidence of Messrs Patel and Phillips in respect of the plastering work that was done on the property.

[106] The Tribunal, after considering all the evidence, concludes that Mr Parker is jointly and severally liable for 95% of the total amount of $403,220.15, which amounts to $383,059.14. This is because it has been established that Mr Parker had involvement in and must therefore have responsibility for the damages and consequential costs caused by Defects 1, 2 and 3 set out in para [14] above.

[107] In regards to Mr Parker's liability for each of the five defects listed at para [14] above, the Tribunal allocates the following percentage liabilities:

Defect	% of Total cause of Damage	% of Eighth Respondent's Liability for that Defect	% of Total Liability
1	40	10	4
2	30	10	3
3	25	28	7
4	2.5	0	0
5	2.5	0	0
Total			14

[108] As a consequence of finding Mr Parker liable for his negligent work, the extent of his negligence is assessed by the Tribunal at 14% of the total amount of the claimants' claim being $56,450.82.

SUMMARY OF RESPONDENTS' LIABILITY

[109] Mr Patel has responsibility for all five major causes of damage. It was Mr Patel's responsibility as the developer and the project manager to carry out and ensure that the building works of the house were carried out in accordance with the Building Consent and the Building Code.

[110] The third respondent's role was to inspect as it progressed the building work of the house and grounds. The Tribunal has held that there were failures by the third respondent in respect of inspecting and observing errors in the construction work, and then ensuring that such errors were eliminated.

[111] The fourth respondent, Mr Pearson the architect, owed a duty of care in respect of the building plans which he drew. It has been

held that his plans lacked sufficient detail in respect of the parapets and balustrade.

[112] The fifth respondent, Mr P Phillips, was a "labour-only" carpenter and his liability is limited to a very large extent as he relied on directions received from the first respondent.

[113] The eighth respondent, Mr C Parker, owed a duty of care in respect of the plastering work he carried out. The deficiencies in the plaster work was his responsibility.

[114] The following is a summary of the allocation of responsibility for each of the respondents:

Defect 1 – 40% of Total cause of Damage			
	% of Total Liability (joint and several)	**% of Respondents' apportionment for Defect 1**	**% of Total Liability**
First Respondent	100%	40	16
Third Respondent	100%	22.5	9
Fourth Respondent	100%	17.5	7
Fifth Respondent	100%	10	4
Eighth Respondent	100%	10	4

Defect 2 – 30% of Total cause of Damage			
	% of Total Liability (joint and several)	**% of Respondents' apportionment for Defect 2**	**% of Total Liability**
First Respondent	100%	50	15
Third Respondent	100%	30	9
Fourth Respondent	0	0	0
Fifth Respondent	100%	10	3
Eighth Respondent	100%	10	3

Defect 3 – 25% of Total cause of Damage			
	% of Total Liability (joint and several)	**% of Respondents' apportionment for Defect 3**	**% of Total Liability**
First Respondent	100%	64	16
Third Respondent	100%	8	2
Fourth Respondent	0	0	0
Fifth Respondent	0	0	0
Eighth Respondent	100%	28	7

Defect 4 – 2.5% of Total cause of Damage			
	% of Total Liability (joint and several)	**% of Respondents' apportionment for Defect 4**	**% of Total Liability**
First Respondent	100%	60	1.5
Third Respondent	100%	40	1
Fourth Respondent	0	0	0
Fifth Respondent	0	0	0
Eighth Respondent	0	0	0

Defect 5 – 2.5% of Total cause of Damage			
	% of Total Liability (joint and several)	**% of Respondents' apportionment for Defect 5**	**% of Total Liability**
First Respondent	100%	60	1.5
Third Respondent	100%	40	1
Fourth Respondent	0	0	0
Fifth Respondent	0	0	0
Eighth Respondent	0	0	0

	Total % of Liability	Total % of Apportionment
First Respondent	100%	50%
Third Respondent	100%	22%
Fourth Respondent	40%	7%
Fifth Respondent	70%	7%
Eighth Respondent	95%	14%

TOTAL OF AWARD TO CLAIMANTS

[115] At the conclusion of the adjudication hearing it was acknowledged by the respondents that the Claimants' claim in respect of items (a) to (f) below and their quantum were not in dispute. To summarise the position therefore, I determine that in consideration of all the evidence that has been adduced to the Tribunal, the Claimants have suffered loss and damage as a result of their dwelling being a leaky building in the amount of $403,220.15:

(a) Remedial costs agreed to at the Experts' Conference but not including claim for painting $278,863.38

(b)	Agreed amount for painting (50% of $9,884.25)	$4,942.12
(c)	Building consultants and architects fees	$31,274.01
(d)	Consequential costs (spreadsheet 18 October 2008 less $3,500 deduction for carpet insurance payment)	$13,101.14
(e)	Accommodation	$6,500.00
(f)	Interest at 8.4% to 5 December 2008 being the date of the Tribunal's decision	$42,539.50

In addition the Tribunal has held that the following two items have also been awarded to the Claimants:

(g)	General damages for:	
	(1) R M Offord	$10,000.00
	(2) S M Offord	$10,000.00
(h)	Loss of Amenities (deck over garage)	$6,000.00
	Total	$403,220.15

CONTRIBUTION

[116] The Tribunal has found that the First, Third, Fourth, Fifth and Eighth Respondents breached the duty of care that each owed to the

claimants. Each of the respondents is a tortfeasor or wrongdoer, and is liable to the Claimants in tort for their losses to the extent outlined in this decision.

[117] 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, s90(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.

[118] 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.

[119] The basis of recovery of contribution provided for in s17(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 for the same damage, whether as a joint tortfeasor or otherwise…

[120] The approach to be taken in assessing a claim for contribution is provided in section 17(2) of the Law Reform Act 1936. In essence, it provides that the amount of contribution recoverable shall be such as may be found by the Court to be just and equitable having regard to the relevant responsibilities of the parties for the damage.

[121] The First and Third Respondents are liable for the entire amount of the claim i.e. $403,220.15 and the Fourth, Fifth and Eighth Respondents are liable for lesser amounts as set out in this determination. Each of the respondents, as concurrent tortfeasors, are therefore entitled to a contribution toward that amount from each of the respondents found liable according to the relevant

responsibilities of the parties for the same damage as determined by the Tribunal.

CONCLUSION AND ORDERS

[122] For the reasons set out in this determination, the Tribunal makes the following orders:

(1) The First Respondent is in breach of the duty he owed to the claimants and is therefore jointly and severally liable to pay the Claimants the sum of $403,220.15.

(2) The Third Respondent is in breach of the duty it owed to the claimants and is therefore jointly and severally liable to pay the Claimants the sum of $403,220.15.

(3) The Fourth Respondent is in breach of the duty he owed to the claimants and is therefore jointly and severally liable to pay the Claimants the sum of $161,288.06.

(4) The Fifth Respondent is in breach of the duty he owed to the claimants and is therefore jointly and severally liable to pay the Claimants the sum of $282,254.10.

(5) The Eighth Respondent is in breach of the duty he owed to the claimants and is therefore jointly and severally liable to pay the Claimants the sum of $383,059.14.

(6) As a result of the breaches referred to in (1) to (5) above, the First, Third, Fourth, Fifth and Eighth Respondents are concurrent tortfeasors, and each is entitled to a contribution toward the amount that they are all liable for in loss and damages to the Claimants.

(7) In the event that the First Respondent pays the claimants a sum between $201,610.07 and $403,220.15, he is entitled to a contribution from the Third, Fourth, Fifth and Eighth Respondents of up to $201,610.08 i.e. 50% (depending on the amount paid) in respect of the amounts each respondent has been found jointly liable for breach of the duty of care.

(8) In the event that the Third Respondent pays the Claimants a sum between $88,708.43 and $403,220.15, it is entitled to a contribution from the First, Fourth, Fifth and Eighth Respondents of up to $314,511.72 i.e. 78% (depending on the amount paid) in respect of the amounts which each have been found jointly liable for breach of the duty of care.

(9) In the event that the Fourth Respondent pays the Claimants a sum between $28,225.41 and $161,288.06, he is entitled to a contribution from the First, Third, Fifth and Eighth Respondents of up to $133,062.65 i.e. 33% (depending on the amount paid) in respect of the amounts which each have been found jointly liable for breach of the duty of care.

(10) In the event that the Fifth Respondent pays the Claimants a sum between $28,225.41 and $282,254.10, he is entitled to a contribution from the First, Third, Fourth and Eighth Respondents of up to $254,028.69 i.e. 63% (depending on the amount paid) in respect of the amounts which each have been found jointly liable for breach of the duty of care.

(11) In the event that the Eighth Respondent pays the Claimants a sum between $56,450.82 and $383,059.14, he is entitled to a contribution from the First, Third, Fourth and Fifth Respondents of up to $326,608.32 i.e. 81% (depending on the amount paid) in respect of the amounts which each have been found jointly liable for breach of the duty of care.

(12) To summarise the position therefore, if all respondents meet their obligations under this determination, this will result in the following payments being made by the respondents to the Claimants:

First Respondent:	$201,610.07
Third Respondent:	$88,708.43
Fourth Respondent:	$28,225.41
Fifth Respondent:	$28,225.41
Eighth Respondent:	$56,450.82
Total amount of this determination	$403,220.15

DATED this 5th day of December 2008

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S G Lockhart QC

Tribunal Member