IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2009-100-000059
[2011] NZWHT AUCKLAND 31

BETWEEN	OWEN IVOR MAUL PILBROW and JOAN GWENDOLINE PILBROW as Trustees of the PILBROW FAMILY TRUST Claimant
AND	HUGH CHARLES MOORHEAD and BARBARA MARY MOORHEAD First Respondents
AND	CRAVEN BUILDERS LIMITED Second Respondent
AND	EUROPLAST FINISHES LIMITED Third Respondent
AND	LANCE CLARK Fourth Respondent
AND	DAVID TAYLOR Fifth Respondent
AND	GIANNI MARCHESON Sixth Respondent
AND	VAUGHAN CRAVEN Seventh Respondent

Hearing:	30 and 31 March 2011
Final Submissions:	20 April 2011
Appearances:	Mr A K Hough, counsel for claimants First Respondents – self represented Mr K Catran, counsel for second and seventh respondents Third Respondent – self represented Fourth Respondent – self represented Fifth Respondent – self represented Sixth Respondent – self represented
Decision:	27 June 2011

FINAL DETERMINATION
Adjudicator: P J Andrew

CONTENTS

INTRODUCTION

[1] The claimants are the owners of a leaky home in Kulim Road, Tauranga. It was one of two townhouses constructed in 2002 using an external insulating finishing system (EFIS) cladding known as Fosroc. The remedial works, involving a total reclad, are now complete and cost approximately $264,000.

[2] Each of the seven respondents are parties said to have been directly involved in the construction or design of the house. The claimants sue each of the seven respondents in negligence contending that each is liable, to varying degrees, for multiple defects in construction that have either caused damage or would have caused likely future damage.

[3] The causes of the leaks, the subject of the claim, and the liability of each of the respondents for the defects said to have caused the leaks are very much in dispute. The respondents also challenge the quantum.

[4] The total amount of damages claimed, which includes $50,000 general damages, is $322,640.

THE PARTIES

The Claimants

[5] The claimants, Mr and Mrs Pilbrow, a retired couple are, together with M J Toner Trustee Company Limited, the trustees of the Pilbrow Family Trust and the owners of the property at 53 Kulim Avenue. It is the Pilbrow's family home.

First Respondents – Mr and Mrs Moorhead

[6] Mr Moorhead, the first respondent, accepts that he was the developer of the property. He and his wife purchased the land with the intention of building the two townhouses and then selling them for a profit. Mr Moorhead arranged for the construction of the dwelling and engaged the builder, the designer and the other relevant subtrades.

[7] While Mr Moorhead was self represented, I find that his concession that he was the developer was one that was properly made.

[8] Mrs Moorhead, whose name was originally on the title and together with Mr Moorhead, was one of the vendors who sold the property to the claimants, played no role at all in the construction or design of the house.

[9] The consequences of the different role played by Mrs Moorhead are considered below in relation to the issue of liability.

Second and Seventh Respondents – Craven Builders Limited and Mr Vaughan Craven

[10] Mr Vaughan Craven, and his company, Craven Builders Limited (CBL), were engaged by Mr Moorhead on a labour-only basis to install all the timber framing, the building paper, the windows, the barge/fascia areas and the harditex cladding at the chimney, fire wall and barge areas.

Third and Sixth Respondents – Europlast Finishes Limited and Mr G Marcheson

[11] Europlast Finishes Limited was engaged by Mr Moorhead to install the Fosroc cladding system. Mr Marcheson is the director and

shareholder of Europlast Finishes Limited and it is alleged that he personally applied and/or supervised the installation of the Fosroc system and texturing.

Fourth Respondent – Lance Clark

[12] Mr Moorhead engaged Aztech Design Limited to design both townhouses. Mr Lance Clark, the fourth respondent, worked for Aztech Design Limited at that time. It is alleged that Mr Clark was personally responsible for both preparing the original drawings and an amended deck detail (during the consent process). In relation to the amended deck detail it is said that he failed to integrate the amended design with the original design to ensure it was feasible.

Fifth Respondent – Mr D Taylor

[13] Mr Taylor was one of a number of persons responsible for the installation of the butynol membrane to the deck.

THE ISSUES

[14] The principal issues the Tribunal must determine are:

a) What were the principal defects in construction or design that enabled water penetration or would likely in future have enabled water penetration?
b) What is the liability, if any, of each of the respondents for the defects established?
c) Were the repair costs reasonable or was there an element of betterment?
d) Was there contributory fault by the claimants such that the amount of damage should be reduced?
e) Can general damages be awarded on a individual basis or can they only be awarded per unit/dwelling?

f) What orders for apportionment should the Tribunal make pursuant to section 72 of the Act?

[15] Counsel for the first and seventh respondents, Mr Catran, has helpfully proposed a six step test for determining the liability of his clients. I propose to adopt that test for determining the liability of each of the respondents.

[16] To establish liability, the claimants have to prove all of the following matters:

a) That the respondents did the work in question ("Evidence Requirement 1").
b) The work done was defective ("Evidence Requirement 2").
c) The defect arose because of a breach of proper building standards applying at the time ("Evidence Requirement 3").
d) The defect caused the leak ("Evidence Requirement 4").
e) The leak caused damage to the building which required remediation ("Evidence Requirement 5").
f) The remediation carried out was reasonable ("Evidence Requirement 6").

[17] The test is to be applied of course in the context of the statutory scheme of the Weathertight Homes Resolution Services Act 2006. The question of what is a defect and what constitutes damage must be construed having regard to the definition of deficiency in section 2 of the Act.

> "**Deficiency**, in relation to a building, means any aspect of its design, construction, or alteration, or materials used in its construction or alteration, that has enabled (**or, as the case requires, is likely in future to enable**) water to penetrate it."

[18] The words I have highlighted above make it clear that the Tribunal can entertain claims based not just on extant leaks but defects that are likely in future to enable the penetration of water. This is also apparent from section 50(1)(e) of the Act which provides that a claim can be brought for deficiencies (based on an eligible claim) that are likely in future to enable the penetration of water into the building concerned.

[19] In his original report completed before the remedial works were commenced, the WHRS Assessor identified a number of specific areas of likely future damage.

[20] The definition of deficiency in section 2 recognises that there can be more than one defect associated with a particular item or element of construction. So for example, a deck may have a number of defects associated with it, each of which contributes to water ingress.

[21] In approaching the issue of liability it is important to recall that where, as in this case, a number of persons through their negligence are said to have caused loss to the claimants, the claimants have the right to choose whether to sue one, two or more of those persons. And because each respondent sued is potentially currently liable *in solidum* for all the damage caused, recovery of the total amount of the loss can be sought by the claimants from any one of them. That is because the whole basis of the law of civil liability is that quantification is determined not by the degree of the respondents fault but by the extent of the injury to the claimants.[1]

THE FACTS

[22] In 1999 Mr Moorhead engaged Aztech Design Limited to do some drawings for the proposed construction of two townhouses in

[1] *Findley Family Trust v Auckland City Council & Slater* HC Auckland CIV-2009-404-4697, 16 September 2010, Ellis J at para [46].

Kulim Avenue. On 24 March 2000 Mr Craven provided Mr Moorhead with a labour-only quotation in relation to the construction of the two townhouses. On 17 May 2002 a building consent for construction of both houses was issued by Bay Building Certifiers Limited (BBC).

[23] During the processing of the building consent BBC raised the issue of how a 1.5 degree fall on the deck was to be achieved with "dining below". In response to that query, Mr Lance Clark prepared an amended deck detail.

[24] The two townhouses were constructed at the same time with inspections carried out by BBC during the period May 2002 to June 2003. In July 2002 Mr and Mrs Moorhead took ownership of the two titles of land at 51 and 53 Kulim Avenue.

[25] The house, the subject of the claim, is two storied. There are parapet walls extending above the roof levels on some elevations with membrane lined boxed gutters behind. The external walls consisted of an untreated and conventional light-timber frame construction. The deck, on the north elevation, was of similar timber frame construction with matching Fosroc cladding to enclose balustrade walls. Waterproofing membrane was provided over the deck area with tiled covering. Steel pipe handrails were also installed.

[26] The Fosroc cladding system is a direct fixed system of monolithic style. Discrete portions of the cladding, including chimney, fire wall and barge junctions, were constructed with harditex. The wall between the two houses is of course a fire wall.

[27] On 20 September 2002 Europlast Finishes Limited (Europlast) issued a coating compliance form confirming that the polyclad flashings had been installed to specifications. A Code Compliance Certificate was issued by BBC on 11 September 2003.

A warranty in respect of both townhouses was issued by Fosroc on 13 October 2003. Europlast subsequently provided a 15 year guarantee (undated) to Mr Pilbrow.

[28] The house had been marketed as a “Californian Holiday” and the purchase price was $545,000.

[29] The claimants purchased the property from Mr and Mrs Moorhead in June 2003. The sale and purchase agreement (which is dated 20 April 2003) contained warranties by the vendor, including the warranty that the relevant building works were carried out in accordance with the building consent, that a Code Compliance Certificate had issued and that all obligations imposed under the Building Act 1991 were fully complied with (clause 6.2.5).

[30] In May 2005 there was a very severe storm that caused flooding throughout the region. During the storm, the Pilbrow’s had a leak through the garage ceiling. In February 2007 Mr Pilbrow noticed cracking through the plaster to the exterior of the dwelling. In September 2007 Mr Pilbrow noticed that some of the ceramic tiles along the drainage channel on the north wall deck had become loose. A salesman at the Tile Warehouse advised him at that stage that the adhesive used to bed the tiles onto the butynol deck surface was not the recommended type.

[31] In 2008 the Pilbrow’s noticed a water stain on the ceiling in the centre of the family room beneath the tile deck above. Mr Pilbrow contacted Mr Moorhead who went and removed some of the tiles from the deck. Mr Moorhead then arranged the for contractors to remove the deck tiles. When the tiles were taken off some of the butynol had come loose at the joints. Mr Moorhead then returned to the premises with some duct tape to seal up some of the joints that had lifted and Mr Pilbrow applied the tape. Mr Pilbrow then placed a blue tarpaulin over the deck and put some river stones on top to keep

it in place. The deck remained in that state until the first round of repairs were commenced in March 2010.

[32] Subsequent attempts by the Pilbrow's to resolve the deck issues with Mr Moorhead were unsuccessful.

[33] In December 2008 the claimants lodged a claim with the WHRS. The WHRS assessor's report was issued on 10 March 2009. In his report the assessor concluded that the house was a leaky building as defined in the Act. He concluded that leaking had occurred at the deck due to inadequate slope of the butyl rubber membrane and that "a possible secondary cause may be the use of incorrect tile adhesive". The assessor further concluded that leaking had occurred at the balustrade due to inadequate sealing of the brackets to the cladding. He recommended the cladding on the north elevation be replaced over a cavity and that the deck and balustrades be reframed and made good. In his estimated remedial cost a provision was made for likely future damage.

[34] On the basis of the assessor's report the claimants obtained quotes and then had the deck and north wall repaired for a total cost of approximately $50,948. The new deck was a complete new design and the north wall was reclad with cellcrete and plaster. A Code Compliance Certificate was issued for the deck and north wall repairs by the Tauranga City Council on 10 May 2010.

[35] Having completed the initial repairs, the claimants obtained an independent building report on the remaining elevations. In April 2010 BDC Limited recommended essential repairs to the remaining three elevations. The BDC report prepared by Mr Stephen Ford, a registered building surveyor, referred to "the numerous weathertightness risks and water entry which could further decay timbers...".

[36] The claimants engaged Mr Rex Moyle of Construct Limited to advise on timber replacement and to provide assistance with documenting the repairs. The remedial works to the remaining three elevations were also reclad with cellcrete and carried out by NGU, the same company that had repaired the deck and north elevations. These repairs costs totalled $219,807.59. The Code Compliance Certificate for these repairs was issued on 27 January 2011.

DEFECTS IN CONSTRUCTION AND DESIGN

[37] The principal expert witness for the claimants was Mr Rex Moyle, a very experienced building consultant. He is a past President of the Master Builders Association (Tauranga branch) and has particular expertise in assessing and diagnosing leaky building issues.

[38] In his written brief of evidence Mr Moyle identified more than 25 defects in construction and design, said to have contributed to water penetration and damage. In closing submissions, counsel for the claimants focussed on six principal defects that were discussed at the hearing. These include:

a) Lack of internal corner flashings to Harditex at fire wall and barge areas;
b) Lack of adequate falls to deck, roof and gutter areas;
c) Lack of adequate slope to balustrade/parapet tops;
d) Building wrap poorly fitted;
e) Joinery not adequately weatherproofed;
f) Saddle flashing that trapped water.

[39] It is not unusual in this jurisdiction for there to be multiple defects in construction or design that have contributed to water ingress. However, the sensible and orthodox approach is to focus on the principal or significant defects. I interpret the claimants' closing submission as supporting that approach.

[40] As submitted by the claimants, three independent experts carried out a full assessment of the dwelling. This included the WHRS assessor, Mr Ford from BDC and Mr Moyle. The assessor concluded that the deck and north wall ought to be reclad/repaired. Messrs Ford and Moyle both concluded that the remainder of the dwelling required a reclad and replacement of damage to timber framing.

[41] Although he was available to give evidence at the hearing the assessor did not do so. None of the parties sought to question him despite having the opportunity to do so. The remedial works and the very comprehensive report of Mr Moyle (which was based upon observations made before and during the remedial works) were carried out subsequent to the assessor's report. The assessor's report was nevertheless included in the common bundle of documents and thus part of the evidence available to the Tribunal. Various parties have referred to it in their submissions.

[42] Mr Moyle was an impressive witness. He presented his evidence in a balanced and measured manner. I generally preferred his evidence to that of the experts called by Mr Craven and Craven Builders Limited (CBL) (i.e. Messrs Fisken, Lochhead and Hamilton). None of those witnesses carried out as comprehensive an assessment as Mr Moyle did – and, with the exception of Mr Hamilton, the respondents experts witnesses were not truly independent but in my view inclined at times unduly to favour Mr Craven and CBL. The evidence of those respondent expert witnesses is considered in greater detail below and in relation to the issue of the liability of Mr Craven and CBL.

[43] The identification of defects in construction and design is a separate issue from determining whether a particular party is liable for the defects identified – and the extent to which any breach of a duty of care caused damage.

Principal Defect 1 - Lack of internal corner flashings to harditex at fire wall and barge areas

[44] Harditex was used on the party wall between 51 and 53 Kulim Avenue and at the barge areas. The party wall, being a fire wall could not be clad in EIFS (which is not fire resistant). Where Harditex sheets met with the EIFS cladding at corner junctions no internal corner flashing was used.

[45] I accept the evidence of Mr Moyle that if the internal corner flashings had been installed, any water that may have entered from above the junctions would have been prevented from entering the framing. I also accept his evidence that extensive leaks and damage have resulted from the omission of corner flashings and that this was a principal defect in construction. Likewise I accept his evidence that the lack of corner flashings would, taken in isolation, have necessitated a total reclad of the dwelling. Mr Hamilton, an expert witness for Mr Craven, was also generally in agreement with that particular proposition (see paragraph [99] below where I have quoted from Mr Hamilton's evidence).

[46] Mr Craven and CBL criticise Mr Moyle's evidence in relation to the barge/facia junctions (his original defect 15) and contend that his evidence changed significantly during the development of the evidence. They say that Mr Moyle initially emphasised the penetration of the EFIS cladding by barges and facia and the non-sealing of the Harditex. They argue that his reply evidence retreated significantly from these aspects and turned instead to the absence of internal flashing behind the Harditex and the internal hardies/EFIS junction. However, I reject any suggestion that the shift in emphasis in Mr Moyle's evidence somehow taints his creditability or the integrity of his evidence. When confronted with credible evidence by the respondents Mr Moyle responsibly modified his position.

Principal Defect 2 - Lack of adequate falls to the deck gutter and roof areas

[47] The claimants contend that there was a lack of adequate falls to the deck, gutter and roof areas of the dwelling. It is said that this led to water ponding and the penetration of water to the framing underneath. Mr Moyle explained that ponding contributes to water ingress in two ways:

- It has the ability to accelerate the deterioration of the butynol itself; and
- It can also have an effect on the butynol join where it has been glued down.

[48] The expert witnesses for Mr Craven and CBL directly challenge Mr Moyle on this point. They contended that the ponding of water on butyl does not cause leaks. Their view is that the membrane is impervious and quite capable of holding up for long periods.

[49] I prefer and accept the evidence of Mr Moyle on this issue. Mr Fisken, a key witness for Mr Craven and CBL on the issue of adequacy of falls, gave somewhat contradictory and less persuasive evidence. Mr Moyle's view is also supported by the assessor who concluded that leaking has occurred to the deck "due to inadequate slope of the butyl rubber membrane". There is further support for Mr Moyle's position (albeit qualified) from the expert evidence of Mr Pittams, being evidence filed by Mr Taylor, the fifth respondent. Mr Pittams found that there was water ingress to the ceiling below the deck and that under this ingress point there was no signs of damage or holes to the butynol. Mr Pittams also concluded the water ingress would most likely have come from a lap join which was on the upside of the deck slope.

[50] In my view the lack of falls to the deck, gutter and roof areas falls within the definition of deficiency in section 2 of the Act. The lack of fall has or would likely (i.e. if the repairs have not been done) in the future have enabled water penetration.

[51] Having said that, I also find, on the evidence, that there were other material defects associated with the deck which either enabled or would have enabled the penetration of water. There is unchallenged expert evidence that the wrong adhesive was used in the laying of the deck tiles and that this compromised, or would have compromised, weathertight integrity. The laying of these tiles on a butynol membrane was itself a practice that created weathertight risk. That is because tiles hold water for long periods and prevent it from draining away. The use of the wrong adhesive exacerbated that risk and on the evidence I find that the membrane was also rendered defective because of this. I note that the assessor concluded that a possible secondary cause of leaking at the deck was the use of incorrect tile adhesive.

[52] At the hearing the butyl membrane was produced as an exhibit. It has some 80 gashes in it. Mr Catran has correctly described the membrane as “massively damaged by the abuse it has been subjected to”. On the evidence I am of the view that the gashes would most likely have been caused by angle grinders when Mr Moorhead’s workman were grinding up the grout to lift tiles after Mr Moorhead had returned to the property at Mr Pilbrow’s request.

[53] While it is undoubtedly legitimate to enquire whether the gashes were a significant cause of water ingress and damage, I find on the facts of this case the gashes cannot be said to be an operative cause of the claimant’s loss. The membrane was damaged (i.e. the gashes created) as part of a failed or incomplete attempt to fix a watertight problem. The deck and membrane already had to be replaced for other reasons and in this regard I accept the

evidence of Mr Pilbrow that he experienced leaks before the tiles were lifted. Mr Pilbrow placed a tarpaulin over the deck once the tiles were removed and this in effect marked the beginning of the remedial works. There is no evidence that the gashes led to increased levels of damage. In any event, even if I am wrong in this conclusion, the gashes to the membrane are not of any real relevance to the critical issues of liability.

Principal Defect 3 - Lack of adequate slope to balustrade/parapet tops

[54] I accept the evidence of Mr Moyle that there was a lack of an adequate slope to the balustrade and parapet tops. The deck balustrades were penetrated by top fixed handrails that relied on sealant only to prevent water ingress.

[55] Mr Moyle gave evidence that the lack of adequate slope to balustrades and parapet tops allowed water to penetrate and damage the framing and that this damage was widespread across the entire house. I accept the submissions of the claimants that the evidence establishes that this defect on its own would have necessitated a full reclad.

Principal Defect 4 - Building wrap poorly fitted

[56] Mr Moyle contended the building wrap had gaps, was insufficiently lapped in places and was put behind instead of over the head flashings. This has the consequence of directing water into the framing rather than onto the flashing and to the outside of the cladding system.

[57] Mr Hamilton, expert witness for Mr Craven and CBL, accepted that the building wrap ought to have been installed over the head flashings.

[58] Mr Catran on behalf of Mr Craven and CBL contends that placing building wrap behind the head flashings was standard and acceptable practice and does not amount to a defect in construction. It is argued that building wrap was not an impermeable membrane intended to keep water out but rather, it was a vapour barrier. It is further submitted that where sheet cladding was fixed hard against the paper and framing there was little prospect, and no intention, that water run down the side of the wall (whether inside or outside the paper). The concern at the time was not that water should have an escape route if it entered the cladding. It is argued that the whole philosophy at the time was that water should not enter the cladding.

[59] I accept the argument that the building wrap was not an impermeable membrane but was a vapour barrier. However, I find the evidence of Mr Moyle to be persuasive on this issue (Mr Moyle accepted the vapour barrier point) and, as noted, it is supported to some extent by the evidence of Mr Hamilton. The incorrect installation of the wrap enabled or would have enabled penetration of water. I also accept Mr Moyle's evidence that damage resulted from the poorly installed wrap.

[60] While Mr Moyle gave evidence that some damage resulted from this defect, the extent of the damage has not been established.

Principal Defect 5 - Joinery inadequately waterproofed

[61] The cladding adjacent to the sills and to the heads of the windows was sealed hard against the joinery with no gaps left for drainage. Also, the PVC moulding fitted around the windows were insufficiently sealed together and had separated in places. These problems allowed water ingress and prevented water from exiting the joinery, leading to framing damage. It was Mr Moyle's evidence that the sills were sealed up during their original installation.

[62] Again, I accept the evidence of Mr Moyle on this issue. I also accept his evidence that extensive leaks and damage resulted from these joinery defects.

Principal Defect 6 - Saddle flashings that trap water

[63] Where parapets/balustrades met the main walls of the dwelling, there were defective saddle flashings that were:

a) flat and held water; and
b) trapped under the cladding system with no drainage exit.

[64] Again I accept the evidence of Mr Moyle that extensive leaks and damage resulted from the defective saddle flashings.

SUMMARY OF PRINCIPAL DEFECTS

[65] In summary, I find the claimants have established the following principal defects in construction and or design which are properly to be characterised as deficiencies in terms of Section 2 of the Act:

a) lack of internal corner flashings to Harditex at the fire wall and barge areas;
b) lack of adequate falls to deck roof and gutter areas;
c) lack of adequate slope to balustrade/parapet tops;
d) building wrap poorly fitted;
e) joinery not adequately waterproofed; and
f) saddle flashings that trapped water.

[66] There are in addition a number of other defects (generally of a less significant nature) and which have application only to particular respondents. These additional defects are considered below in relation to the issue of the liability of particular respondents.

THE LIABILITY OF MR AND MRS MOORHEAD

[67] The roles performed by Mr and Mrs Moorhead in relation to the development of the Kulim Road property were separate and distinct. Because of this, I will deal with them separately.

Mr Hugh Moorhead

(a) Liability as a developer

[68] As a developer, Mr Moorhead owed non-delegable duties of care to the claimants. I am satisfied on the evidence that Mr Moorhead breached those duties of care to the claimants and that he is liable for the principal building defects identified above and the entire quantum of the claim. I accept the submission of the claimants that there was uncontested expert evidence that the dwelling as originally built did not comply with the Building Code clauses E2 and B2 and it required a complete reclad to address the defects and damage. For reasons given below with respect to the individual parties directly responsible for the particular principal defects, I conclude that there was a breach of the relevant standards of care and that these breaches caused substantial damage requiring a full reclad.

[69] Mr Moorhead submits that he should not be held responsible for the errors or omissions of others. He claims that he relied substantially on various trades-people for their expertise that they "purported" to bring to the project. However, as a developer he is responsible on a non-delegable basis for the defects in construction. Whether Mr Moorhead is entitled to a contribution from some of the other respondents under section 72 of the Act is considered below in relation to the issue of apportionment of liability.

[70] Mr Moorhead cannot in any event credibly claim that he relied solely upon the expertise of others. Mr Moorhead was actively

and personally involved with the construction of the dwelling after Mr Craven had completed his role of erecting the framing and associated tasks. Mr Moorhead was directly personally responsible for the laying of the tiles with the incorrect adhesive. Furthermore, he was also directly responsible for a lack of overall project management. As Mr Catran submitted, this house was built during a period where a number of inexperienced parties without formal trade training undertook developments as part of the property boom and on a "labour-only" basis. That was the case here where Mr Moorhead was not trade trained. He undertook the development as a labour-only project. Labour-only arrangements can give rise to problems at the "intersection" of trades. This means that there is no one party (other than the developer) overseeing trades and ensuring that their work fitted together. In this case there were separate contractors dealing with the framing, butyl, the roofing, the roof drainage, cladding and the plastering and painting. It is notable that a number of the principal defects I have found arise at these "trade intersections". Mr Moorhead who chose to undertake the development in this way must take significant responsibility for these shortcomings.

[71] At paragraph [53] above I concluded that the gashes to the deck membrane were not an operative cause of the claimant's loss. If I am wrong on that issue (i.e. that the gashes were in fact an operative cause of loss) then this is a further defect for which Mr Moorhead is responsible. Mr Moorhead assumed responsibility to Mr Pilbrow for fixing the problems with the deck and engaged the contractors to remove the deck tiles. Having said that, however, this further defect (if it is an operative cause of loss) does not in itself affect my conclusion that Mr Moorhead is liable for the full recoverable quantum. It would simply provide a further reason for finding that he is liable. It is for this reason that I concluded above that the question of whether the membrane gashes were a deficiency causing loss does not really affect liability.

[72] By way of further defence Mr Moorhead contends that on every occasion he received a phone call from Mr Pilbrow following the sale of the property to him, he responded to the phone call to the level necessary at that time. This included attending at the Kulim Street property to address Mr Pilbrow's concerns. Mr Moorhead maintains that at no time did he ignore or refuse to take action in relation to any calls to Mr Pilbrow. Mr Moorhead complains that when tiles on the deck above the dining room became loose he did not receive any phone calls from Mr Pilbrow about this. Mr Pilbrow then went ahead and lifted and reaffixed some of those tiles. Mr Moorhead says that he was not given any opportunity to respond or to take remedial action. On this basis Mr Moorhead submits that Mr Pilbrow has "voided" any warranty associated with those tiles and the decks. He further submits that the prospect of Mr Pilbrow's interference with the tiles contributing to the subsequent leak can never be obviated.

[73] While I can understand Mr Moorhead's concern, there is no basis in law for finding that these circumstances (even if true) mean that the claimants have somehow voided the warranty so that it no longer applies to Mr Moorhead. The law does not recognise any such principle. The question of whether damages should be reduced because of any contributory fault by Mr Pilbrow (a separate issue) is addressed below.

(b) Breach of Contract

[74] Both Mr and Mrs Moorhead warranted when selling the property to the claimants that where they had done works on the property requiring a building consent, all obligations imposed under the Building Act 1991 were fully complied with (clause 6.2(5)(d) of the agreement for sale and purchase).

[75] Section 7 of the Building Act 1991 states that all building works shall comply with the Building Code. I have already noted that there was uncontested evidence that there were substantial breaches of the Code requiring a complete reclad. In my view Mr Moorhead breached the warranties in the agreement for sale and purchase and is thus also liable to the claimants in contract.

[76] The question of the quantum of damages is considered below.

Mrs Barbara Mary Moorhead

[77] While Mrs Moorhead was on the title, and together with Mr Moorhead one of the vendors who sold it to the claimants, I accept Mr Moorhead's evidence that she, Mrs Moorhead, played no role at all in relation to the construction or design of the house or the approval and marketing process. The project from start to finish was essentially run and operated by Mr Moorhead.

[78] The critical issue is whether or not in these circumstances, Mrs Moorhead can properly be considered to be a developer.

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

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

[80] A helpful definition of a developer can also be found in *Body Corporate 188273 v Leuschke Group Architects Limited:*[2]

> [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. (emphasis added)

[81] In my view the claimants have failed to establish that Mrs Moorhead was a developer. There is no evidence that she had any power at all or did in fact exercise any power and make important decisions about the development. The claim against her that she was a developer and owed a non delegable duty of care to the claimants is thus dismissed.

[82] By contrast, the claim against Mrs Mary Moorhead for breach of contract, namely for the breach of vendor warranties in the agreement for sale and purchase (clause 6.2(5)(d)) is made out. I am bound to follow the recent High Court decision *Ellison v Scott*[3] where it was held that vendors were jointly and severally liable in relation to contractual promises under an identical clause 6.2(5) and for breach of any contractual obligation.

[83] The breach of contract by both Mr and Mrs Moorhead caused all of the remedial works. Mrs Moorhead is also thus liable for the full quantum. The calculation of quantum is addressed below.

[2] [2007] NZCPR 914 (HC) Harrison J.
[3] HC Auckland CIV-2009-470-1153, 19 August 2010, Potter J.

THE LIABILITY OF CRAVEN BUILDERS LIMITED AND MR CRAVEN

[84] The claimants allege that Mr Craven and CBL breached duties of care owed to them by failing to perform the building works with reasonable skill and care. In particular it is contended that the work Mr Craven and CBL performed fell below that of the reasonable and prudent builder in that day:

a) installed the Harditex cladding at the fire wall and barge areas without the required flashings;
b) built a deck, gutter and roof areas without adequate falls to shed water;
c) built the parapet and balustrade walls without adequate slope on the tops;
d) lapped the building paper behind the head flashings instead of over them; and
e) failed to install adequate backing nogs behind the butyl up stands to the small gutters on the east wall and the small roof on the west elevation.

[85] Mr Craven and CBL deny each of these allegations and contend that that claimants have failed to establish the necessary elements of fault and/or causation. As already noted Mr Catran has referred to six evidential requirements that the claimants must establish.

[86] In relation to the issue of the relevant standard of care, Mr Catran submits that when allegations are made of inadequate “trade practice” very great care must be taken to ensure that the practice is measured against what was accepted or required at the time, as established by evidence. He cautions against the use of hindsight wisdom. Mr Catran also notes that this house was built at a time of major systemic changes throughout the building industry and

involving new materials, new construction methods, new building styles and an extremely steep learning curve for all industry participants. He contends that of particular significance were:

a) a change in monolithic cladding using face-fixed sheet materials protected against water entry entirely by coating systems, usually the paint film;
b) increasingly complex designs, multiple roofs, roof/wall junctions, numerous and decks and balconies and an absence of eaves or window protection; and
c) the change to "chemical free" timber framing – i.e. completely untreated wood.

[87] Mr Catran argues that these systems became so complex that they were virtually impossible to build outside a laboratory and, unless built perfectly, would fail. He also cautions against finding what at the time was regarded as a recommended practice being converted into a mandatory requirement.

[88] Mr Hough for the claimants contends that there is no evidence that this dwelling was impossible to build outside a laboratory and that the dwelling here, built in 2002/2003 was after leaky building issues had become public and after the Government had set up the first Weathertight Homes Resolution Service under the 2002 Act. He also argues that blaming systemic error does not promote good building practice: it amounts to an argument that the building work was too hard to do correctly so that the system should be blamed and the poor workmanship of individuals that actually performed building work be marginalised or ignored.

[89] There is some force in the submission of Mr Catran and I accept the need for caution in using hindsight wisdom. However, systemic failure cannot excuse negligent building or design practices that have caused water ingress leading to damage, although it may

be part of the context in determining whether the relevant standard of care has been breached and whether causation is established. In enacting the 2006 Act, Parliament was obviously aware of wide spread systemic failures as identified for example in the Hunn Report, but nevertheless set up this Tribunal to hear claims based on common law and statutory causes of action and remedies (albeit with some specific statutory variations including those set out in section 50). I also note the observations of the High Court in *Body Corporate 188529 v North Shore City Council (Sunset Terraces):*[4]

> *The degree of knowledge of weathertight issues in 1997 was minimal compared to what it is today --- However, the need to weatherproof a building is a basic tenant of building.*

[90] This house was of course built in 2002, the year the first Weathertight Homes Resolution Service was established.

[91] On the evidence in this case I do not accept that it was impossible to have built this house so as to make it weathertight. The expert evidence of both Mr Moyle and the assessor clearly suggests otherwise.

[92] I now turn to consider the particular defects the claimants say that Mr Cravan and CBL are liable for. In assessing the issue of the standard of care I will apply the orthodox jurisprudence, which is as follows:

a) The standard of care is fixed by reference to that which would be required of a prudent and reasonable person in the particular circumstances at the time of construction.[5]
b) Evidence of common practice in an industry or of accepted professional standards may be helpful and important in determining whether a respondent has been

[4] [2003] 3 NZLR 479 at [391].
[5] *Myers v Elliot* [1975] 1 NZLR 643.

negligent but is not decisive. Ultimately the question of negligence is for the Court.[6]

c) In determining general practice, evidence of expert witnesses should be directed to what a skilled and experienced practitioner would have done, not what the particular witness would have done.[7]

Principal Defect 1 – Lack of internal corner flashings

[93] Mr Craven and CBL accept that it was Mr Craven who installed the Harditex which formed the junctions with EIFS cladding. All of the witnesses accepted that a corner flashing could only have been installed by the person installing the Harditex (evidence requirement 1 is thus made out). However, it is contended by Mr Craven that these junctions did not require a flashing, that what was built was accepted practice and that minimal leaking and/or damage resulted from these areas (i.e. evidence requirements 2, 3, 4 and 5 have not, it is submitted, been made out).

[94] The Harditex manual required a flashing behind the Harditex sheets at corner junctions. However, the Harditex manual was silent in relation to junctions between Harditex and other types of cladding. By contrast, the specifications for the other product, Fosroc EIFS did not require flashings in internal corners. Under the Fosroc system the corner would simply be mesh taped on the exterior surface and sealed by the texture coat plasterer applicator. Mr Catran also points out that the plans in this case had no details at all of these junctions. It is argued that it was common practice for other claddings to be butted against Harditex without flashings, and simply to rely on the exterior coating system and silicone to make the junctions waterproofed, as the Fosroc system did.

---

[6] *McLaren Maycroft & Co v Fletcher Development Co Limited* [1973] 2 NZLR 100,108: see also Stephen Todd (Ed) *the Law of Torts in New Zealand* (5th edition Brookers Wellington 2009 at 386).

[7] *Bindon v Bishop* [2003] 2 NZLR 136 at [17].

[95] In my view, Mr Craven and CBL were negligent in failing to install a corner flashing and that this omission caused substantial damage to the claimants' house. I agree with and accept the evidence of Mr Moyle that a reasonably prudent installer of the Harditex (in this case Mr Craven and CBL) would have installed internal corner flashings. Junctions are known to be vulnerable water ingress points and a prudent builder would have apprehended the need to proceed with caution, particularly by the year 2002. The lack of detail in the plans (which were themselves defective) is no excuse. It was incumbent on Mr Craven and CBL to install the flashings or to take the matter up with Mr Moorhead and or the designer to ensure that the correct details were provided. This was not done.

[96] I draw support for these findings from the technical literature predating the construction of this house which recommended the use of a flashing at any junction between EIFS cladding and other types of cladding:

a) The BRANZ fibre-cement cladding guide clause 4.24 discusses the requirement for a corner flashing and clause 4.25, refers to figures 15-20, all of which the depict flashing between the fibre-cement and other cladding types.
b) The BRANZ EIFS guide clause 5.6.2 states that junctions must be detailed carefully to prevent water entry through the joints. It refers to figures 15-22, all of which depict flashing between the EIFS and other cladding types.

[97] Mr Craven gave evidence that the accepted method of building the corner junctions was to mesh over the joint between the Harditex and EIFS cladding, and not bother with the corner flashing. However, Mr Craven's principal building expert witness, Mr Hamilton, accepted that the mesh corner joint would be prone to cracking due to thermal differential between the two different cladding types.

[98] Mr Catren submits that if the Harditex manual required a flashing but the Fosroc manual did not, it is not self evident that one regime should be preferred over the other. That may be so, but whether something is self evident is not the definitive test to be applied. I have already noted the recommendations in the relevant technical literature. A prudent builder would have known that a flashing was required.

[99] I also accept the evidence of Mr Moyle that this defect, namely lack of internal corner flashings, caused significant water ingress and that in itself, this required a full reclad of the house. To some extent the evidence of Mr Moyle on these issues is supported by the evidence of Mr Hamilton. This is apparent from the following exchange during cross-examination by Mr Hough:

> *Hough* *Do you accept that if a corner flashing was installed that this would have deflected water from above.*
>
> *Hamilton* *Depending on how it was done.*
>
> *Hough* *If it was done correctly it would stop water from above.*
>
> *Hamilton* *Yes.*
>
> *Hough* *There were at least 6 of these barge wall junctions around the house, you would accept that?*
>
> *Hamilton* *Yes.*
>
> *Hough* *And water has got in at all of those locations?*
>
> *Hamilton* *I cannot definitely state that myself.*
>
> *Hough* *Are you in a position to contradict Mr Moyle's evidence of what he found?*
>
> *Hamilton* *No.*
>
> *Hough* *And so taking those 6 junctions, the evidence of Mr Moyle which you've said you cannot contradict,*

the significant water ingress occurred, that is a full re-clad in and of itself, isn't it?

Hamilton *In general terms if the report found moisture problems in the building frame then a number of areas around the building, yes, a re-clad would be justifiable.*

[100] As Mr Hough has submitted, liability has been imposed in similar cases.[8]

[101] In summary I find that Mr Craven and CBL are liable for primary defect 1. They owed and breached duties of care to the claimants causing substantial damage requiring a full reclad. All the relevant evidential requirements have been met. The question of quantum of damages is considered below.

Principal Defect 2 – Inadequate fall to roof, deck and gutters

[102] It is clear from the evidence that the deck did in some places have a fall, albeit not the required 1.5 degrees as noted on the plans. It is also not contested that Mr Craven and CBL were the parties responsible for erecting the framing that formed the substrate to the deck and box gutters.

[103] Mr Catran argues that the fall created by Mr Craven was in fact sufficient to create run off and that "the primitive design amendment" proposed by the designer was unbuildable. In his evidence Mr Craven claimed that he raised the design problem about the lack of fall with the developer, Mr Moorhead and claims that he was told by Mr Moorhead that he should just continue to do his best because the alternative suggested was unacceptable. As part of his defence Mr Craven relies upon the High Court decision *Auckland City Council v Grgicevic*[9] where it was held that where a tradesman had raised an issue with the developer about the way a project had

[8] See for example *Body Corporate 185960 v North Shore City Council & Ors,* HC Auckland , CIV-2006-004-3535, 22 December 2008, Duffy J.
[9] HC Auckland CIV-2007-404-6712, 17 December 2010, Brewer J.

been designed and was instructed to continue anyway, the tradesman had discharged any duty of care owed. In his evidence, Mr Moorhead denied that he had ever given such a "cavalier" instruction to Mr Craven. Mr Moorhead said that Mr Craven was either lying or mistaken in alleging otherwise.

[104] On this particular factual dispute I prefer the evidence of Mr Moorhead. Mr Moorhead presented as a frank and straight forward witness who candidly and properly acknowledged that he was the developer. He made a genuine and contentious attempt to try and assist Mr Pilbrow when Mr Pilbrow rang him about the deck leaking although I accept that the relationship ultimately soured. By contrast, Mr Craven's evidence was not persuasive on this point and I reject his evidence that Mr Moorhead gave the direction as alleged. The defence based on the *Grgicevic* decision is not made out. Mr Craven, who was after all the expert, did not squarely raise the issue of lack of falls with Mr Moorhead as he should have done.

[105] I acknowledge that Mr Craven was faced with a defective design and this created difficulties for him. However, he went ahead and erected the framing that was in breach of the building code and plans. As Mr Moyle said, to some extent Mr Craven put himself in this difficult situation. He was in charge of the framing work, yet he did not make allowance for building adequate fall of the deck at the time the lower floor was framed up.

[106] In my view Mr Craven and CBL were negligent in constructing the deck, roof and gutters without adequate falls. The 1993 BRANZ Housing Building Guide provided:

> (a) Decks, particularly those which have rooms below, must be constructed to prevent the entry of water into the space below --- successful waterproofed decks are --- laid to a minimum fall of 3 degrees; and

> (b) Membrane roofs should have the minimum slope of 3 degrees to effectively drain water off the roof surface. No roof should be constructed without a slope because the water does not drain away properly and ponds instead, which can accelerate the deterioration of the roof cladding and increase the risk of leaks occurring.

[107] In his report the assessor, (who measured the deck slope in six places yielding an average slope of 0.2%) referred to the E2/AS1 acceptable solution and BRANZ Membrane Roofing Tiling and Good Practice Guides both of which recommended a minimum roof pitch of 1.5 degrees.

[108] I reject the submission made by Mr Catran that it was acceptable and not negligent for Mr Craven and CBL to have simply relied on the manufacturer's specifications, namely the 2002 Skellerup manual which did not require a slope to decks using butyl. The manual makes it clear that it is "always" preferable to have a required fall in a deck. I also note that the BRANZ appraisal for the Skellerup Roofing Manual System provided that the minimum recommended slope for 'flat' roofs is 3 degrees.

[109] I also reject the contention that a fall of 1.5 degrees was not mandatory. In this case a certifying authority queried how a minimum slope of 1.5 degrees was to be achieved with dining below and as a result the plans were amended to show a 1 degree fall. At the very least a fall of 1.5 degrees should have been achieved. I have of coursed referred to the BRANZ Housing Guide which recommended a fall of 3 degrees.

[110] In summary, I find that Mr Craven and CBL are also liable for principal defect 2. Each of the relevant evidential requirements are made out and substantial damage resulted from their negligence. I accept also Mr Moyle's evidence that lack of adequate falls in isolation would have required remedial works (re clad) to the north

east and west elevation and that this total is approximately 75% of the remedial costs.

Principal Defect 3 – Flat top balustrades and parapets

[111] The claimants contend that the lack of slope to the balustrades and parapets was the responsibility of Mr Craven and CBL because the framing of the balustrade and parapets should have had an angled timber fillet prior to the cladding being installed.

[112] Mr Craven and CBL argue that the plans did not provide for this and in fact showed no fall at all for the parapets. Their defence is that the provision of a fillet to create a slope was for the cladding installer, so that his polystyrene top fillet would integrate with an overlap of the face cladding of the balcony or parapets.

[113] Again, I prefer and accept the evidence of Mr Moyle on this issue. I conclude that Mr Craven and CBL failed to meet the requisite standard of care by erecting the balustrade and parapet substrate without a timber fillet so to create a slope. The Fosroc details depict a slope form using a timber fillet and the consented plans also depicted a slope timber fillet.

[114] It may be, as Mr Catran submits, that Mr Marcheson also has some responsibility for the flat tops to the balustrades and parapets. However, that does not mean that Mr Craven and CBL have no liability for this defect.

[115] It is true, as Mr Catran submits, that the experts were unanimous that the surface to the parapet was a principal source of water entry due to cracking, chipping and inadequate protection. Again, however, that does not absolve Mr Craven or CBL of the responsibility to have formed a slope using a timber fillet which I find based on the evidence of Mr Moyle was a deficiency that caused water ingress.

[116] I find Mr Craven and CBL also liable for primary defect 3. On this basis they are also liable for the full remedial costs.

Principal Defect 4 – Building wrap not over head flashings

[117] Mr Craven and CBL accept that they installed the building wrap. However, it is argued that placing building wrap behind the head flashing was standard and accepted practice. They deny any breach of a duty of care.

[118] Mr Craven's evidence was that Council officers required building wrap to be wrapped around the inside of all four sides of the window framing. This is apparently still done now. Further arguments made by Mr Catran have already been addressed above.

[119] I do not accept Mr Craven's evidence. Both Mr Moyle and Mr Hamilton, a very experienced building inspector, were of the view that the building wrap ought to be installed over the head flashings. This evidence is supported by the technical literature including the Fosroc technical detail 13A and the EIFS guide clause 5.10.2 and figures 31, 34, and 35. Based on all of this evidence I conclude that there was a failure to meet the relevant standard of care.

[120] While there was water penetration there is no real evidence as to the extent of damage caused or that would likely have been caused by this defect. However, that is of little practical consequence in this case.

[121] Mr Craven and CBL are also liable for principal defect 4. The relevant evidential requirements (with the exception of establishing the extent of damage) have been satisfied.

Nogging at butyl upstands

[122] The claimants contend, based on the evidence of Mr Moyle, that there were inadequate noggs behind butyl upstands around gutters, which allowed the butyl to sag and water to overflow the top of the butyl and the framing, causing damage. Mr Moyle's evidence was that 150mm noggs should have been placed there.

[123] The designer's specifications required noggs generally to be either 75 x 50mm or 100 x 50mm. Mr Craven's evidence was that common practice was 100 x 50mm. Mr Lochhead's evidence was that at the time there was not much emphasis on total support for butyl upstands. It was believed that butyl held its vertical form sufficiently between studs at 600 centres.

[124] Mr Hamilton and Mr Fisken gave evidence that the butyl upstands were approximately 250-300mm, much higher than the often recommended 150mm. This was confirmed by Mr Taylor. The Skellerup manual only required 100mm.

[125] Mr Catran submits that the photographs generally showed the butyl standing up and not sagging even where there was limited support behind it. He also argues that with the over-size outlets water would have flown out of the gutter long before it overtopped the butyl. In summary he argues that there is no direct evidence of slumping or failure.

[126] I accept the submissions of Mr Catran on this point. The claimants have failed to establish that Mr Craven and/or CBL installed inadequate noggs and that these caused or would have likely caused water ingress.

LIABILITY OF EUROPLAST FINISHES LIMITED AND MR GIANNI MARCHESON

[127] The claimants allege that both Europlast Finishes Limited (Europlast) and Mr Marcheson owed duties of care to the claimants for the defective installation of the cladding. In relation to Mr Marcheson it is contended that he personally carried out defective work and/or was responsible for supervising and controlling the defective work of his cladding contractors.

[128] The claimants further allege that both Mr Marcheson and Europlast breached their duties of care to the claimants. They say that the work of Europlast and Mr Marcheson fell below that of a reasonable and prudent cladder/texture in that they:

a) formed the tops of parapets and balustrade with insufficient falls;
b) failed to flash penetrations to the cladding;
c) sealed the cladding to the window joinery and did not leave a drainage gap;
d) failed to properly seal the PVC mouldings around the windows; and
e) installed the cladding over the saddle flashings without leaving a drainage gap.

[129] Mr Marcheson, who also represented his company, Europlast, put forward a wide ranging defence, denying that either he or Europlast has any responsibility at all for any of the defects. In summary his defence is:

a) He personally did not owe the claimants a duty of care because he did not carry out any of the work himself or supervise or control the work of the cladding contractors.

His foreman was in charge of the contractors and his role was simply that of a director of Europlast.

b) Europlast and the relevant contractors engaged by it acted with reasonable skill and care and there is no evidence that any of the work they performed has caused damage. The contractors followed the plans and the work was signed off by the building inspector.

c) Any defects associated with the cladding installation are a result of poor design and systemic problems with the Building Code and inferior untreated timber. Mr Marcheson acted professionally at all times by providing information to Mr Pilbrow about the Fosroc System. He says that he always acted professionally.

d) It was Mr Pilbrow, the claimant, who sealed the cladding to the joinery at the sill location. Any damage resulting from the absence of the drainage gap is thus the responsibility of Mr Pilbrow.

[130] In my view both Mr Marcheson and Europlast owed duties of care to the claimants. In evidence Mr Marcheson accepted that he was on site every day and that he checked the work of the subcontractors. He also personally filled out and signed the coating compliance form having satisfied himself that the windows and flashings had been sealed to specifications. I conclude that Mr Marcheson was actively involved personally with the installation of the cladding and exercised significant control over the process. He was very much a "hands-on" supervisor and the fact that he was also the director of Europlast provides no defence to the claim against him personally.[10]

[131] I also find that both Mr Marcheson and Europlast breached their duties of care to the claimants and in the manner contended. Their negligence has also necessitated all of the repairs. All six

[10] See *Body Corporate 202254 v Taylor* [2009] 2 NZLR 17; and *Chee v Stareast Investments Limited* HC Auckland CIV-2009-404-5255, 1 April 2010, Wylie J.

evidential requirements in relation to Mr Marcheson and Europlast are established. Both Mr Marcheson and Europlast are thus liable for the full amount of the quantum. The calculation of the quantum is addressed below.

[132] I reject much of the evidence given by Mr Marcheson. He did not present as a reliable witness often making extravagant and unfounded claims against other parties. I prefer and accept the evidence given by Mr Moyle, an independent expert.

[133] I now turn to consider the particular defects for which Mr Marcheson and Europlast are liable.

Principal Defect 3 – Lack of adequate slope to balustrades/parapet tops

[134] I have already concluded that this was a deficiency in terms of section 2. I also accept the evidence of Mr Moyle that the construction of the balustrade/parapets in this manner breached the Building Code and contemporaneous technical literature, and resulted in leaks and damages. This was responsibility of Mr Marcheson and Europlast.

[135] Neither Mr Marcheson nor Europlast can escape liability for this defect by contending that it was the responsibility of Mr Craven or CBL when forming the substrate before the cladding was installed. It is the responsibility of the plasterer to ensure that the substrate has been installed correctly before he commences his work.[11]

Penetrations to the Cladding

[136] I accept the evidence of Mr Moyle that penetrations through the cladding were not flashed and that they were reliant on sealant.

[11] See McGregor v Jensen & Ors TRI-2008-100-94, 24 July 2009, P A McConnell at para [85].

This too breached the Building Code and contemporaneous technical literature and resulted in leaks and damages.

Principal Defect 5 – Joinery inadequately waterproofed

[137] I again accept the evidence of Mr Moyle that the sealing of the cladding against the joinery with no gaps left for drainage breached the Building Code and contemporaneous technical literature and resulted in leaks and damage.

[138] I reject the evidence given by Mr Marcheson that Mr Pilbrow sealed the cladding to the joinery at the sill location. Mr Pilbrow accepts that he painted over cracks in the cladding using the membrane paint and denies the particular allegations made by Mr Marcheson. I clearly prefer the evidence of Mr Pilbrow, a careful and responsible witness. On the evidence I am satisfied that the defect was the responsibility of Mr Marcheson and Europlast.

Joints of PDC mouldings insufficiently sealed together

[139] I accept the evidence of Mr Moyle that some joints to the PVC mouldings around the windows were insufficiently sealed together and that this breached the Building Code and contemporaneous technical literature, again resulting in leaks and damage. This was the responsibility of Mr Marcheson and Europlast.

Principal Defect 6 – Saddle flashings that trapped water

[140] I have already held that this was a deficiency in terms of section 2 and that extensive leaks and damage resulted. I also accept the evidence of Mr Moyle that the defect breached the Building Code and contemporaneous technical literature. This was again the responsibility of Mr Marcheson and Europlast.

LIABILITY OF MR LANCE CLARK, THE FOURTH RESPONDENT

[141] The claimants allege that Mr Clark, the fourth respondent, was involved with both the original design of the dwelling and the preparation of an amended deck detail and that when carrying out this work he owed the claimants a duty of care to do so with reasonable skill and care.[12]

[142] It is contended that Mr Clark's work fell below that of a reasonable and prudent draft person/designer in that his plans:

a) lacked a sufficient water management design to the gutters on the eastern elevation and the entry roof area;
b) failed to show the correct slope of the parapets to the gutters and roof areas;
c) lacked an adequate flashing system for the junction between the two separate houses (block wall);
d) lacked an adequate detail of the step-down from internal area to deck surfaces;
e) depicted handrails that penetrated the balustrades on the decks; and
f) depicted a deck detail showing 1.5 degree fall that was impossible to build.

[143] Mr Clark denies responsibility for any of the defects alleged. His principal defence is that he had no involvement with the original design of the dwelling and that his role was limited to a review of the existing deck design during the building consent application process. He contends that the original plans were drawn up in 1997 by Amaghi Design Associates. Although he was employed by Amaghi at the time as a draftsperson, he says he had no input at all into the original design or construction drawings. He also contends that he was never engaged by Mr Moorhead at any stage to fully review the

[12] *Bowen v Paramount Builders Limited (Hamilton) Limited* [1997] 1 NZLR 394.

existing plans, details, construction methods except for the deck and as specifically requested by BBC.

[144] In relation to the amended deck detail, Mr Clark contends that he did not breach any duty of care to the claimants because:

a) A deck fall detail showing 1.5 degrees fall was an acceptable solution approved by BBC, the building certifiers, who granted the consent on that basis. Furthermore, a Code Compliance Certificate was subsequently issued. No attempt was ever made to contact Mr Clark to suggest that the design was impracticable to construct and he thus had no opportunity to provide an alternative solution.
b) The existing step-down from the interior to exterior step surface was the result of construction methods used and not in any way connected with the design. In any event, a CCC was issued.
c) The adjoining house at 53 Kulim Avenue was constructed at the same time in the same manner by the same builders and subcontractors and there is no evidence or problems with that dwelling.

[145] While there were some suggestions in the evidence that Mr Clark may have had some direct involvement with the original plans and designs, I find the claimants have failed to establish to the requisite standard of the balance of probabilities, that Mr Clark owed a duty of care in relation to those original plans and drawings. I must proceed to determine Mr Clark's liability on the basis that his personal involvement was confined to a review of the existing deck design during the building consent application process.

[146] In relation to the amended deck detail, I accept the evidence of Mr Moyle and the claimants that Mr Clark was negligent in

depicting a deck detail showing a 1.5 degree fall that was virtually impossible to build, depicting handrails from the amended plans that penetrated the balustrades on the deck and providing an amended plan that lacked adequate detail of the step-down from the internal area to the deck surface. These defects are all deficiencies in terms of section 2. These facts caused or would have caused leaks and damage and breached the Building Code. In preparing the amended deck detail Mr Clark did not, as he accepted in evidence, try to integrate the amended deck design with the rest of the design to see if it was feasible. This was a fundamental reason why the deck detail of 1.5 degrees could not be achieved.

[147] The fact that BBC approved the amended design and ultimately issued a Code Compliance Certificate does not provide Mr Clark with a defence. In *Voli v Inglewood Shar Council 1962*[13] it was held that the fact that the design has to be submitted for approval by a territorial authority or equivalent does not absolve the designer from liability.

[148] In relation to the question of damages, the claimants have not established that the particular defects for which Mr Clark is responsible would have required a complete reclad. On the evidence I find that Mr Clark is liable only for the temporary repairs and maintenance as carried out in relation to the deck and for the repairs to deck and north wall. The question of the calculation of the quantum of damages for which Mr Clark is liable, is addressed below.

[149] I also reject Mr Clark's submission that there were or are no problems with the adjoining townhouse (said to have been built at the same time by the same parties with the same materials). I have heard no real evidence on that issue (apart from some cursory

[13] [1963] 110 CLR 75.

observations) and am in no position to know what the real state of that adjoining house is.

LIABILITY OF MR DAVID TAYLOR, THE FIFTH RESPONDENT

[150] The claimants contend that Mr Taylor installed the butyl to the deck, to the gutters and roof areas, and that in doing so he owed and breached duties of care to them. In particular it is alleged that Mr Taylor's work fell below that of a reasonable and prudent membrane applicator in that he:

a) Installed the butyl membranes on defective substrates that lacked adequate falls or solid backing (noggs).
b) Failed to install corner fillets on the deck prior to installing the membrane; and
c) Installed the butyl apron flashings without diverter kick outs.

[151] Mr Taylor denies any liability to the claimants. He contends that his role was a limited one, namely confined to the laying of the butyl rubber to the deck and the butyl apron flashings to the concrete roof tile/ parapet wall junction. Mr Taylor further denies that the deck substrate was defective. He says that he accepted the substrate with a positive fall of 0.5 degrees, knowing, he claims, that the deck would be waterproofed no matter what the fall was. He contends that the substrate was built within the design constraints available and following discussions and decisions made by the builder, the designer, the developer and BBC Limited and that BBC ultimately approved the work that he did.

[152] Mr Taylor also contends:

a) Any installation of tiles by affixing them to the membrane by adhesive causes water entrapment and affects positive drainage no matter whether one builds a deck at

0.5 degrees or 2.5 degrees. It is for this reason that tiling directly over butyl membranes has never been recommended; and

b) The nogging was not defective and in fact Mr Taylor actually built the butyl upstand higher than required and chose to leave the excess there which was advantageous to waterproofing.

[153] Mr Taylor has raised further defences relating to technical building issues but it is unnecessary for me to deal with these.

[154] I find that the claimants have failed to establish, to the requisite standard, namely the balance of probabilities, that Mr Taylor owed and breached duties of care to them. Mr Taylor, who presented as a sincere and straightforward witness gave evidence that he was one of a number of individual contractors responsible for the installation of the butyl membrane. His particular role was confined to installing the deck membrane to the front edge of the deck only and he had no involvement with the flat roof or boxed gutters. The head contractor, Taylor Roofing Limited, was not his company.

[155] While in some cases a membrane applicator may well have a duty to satisfy himself before applying the membrane that the substrate has an adequate fall, I am not satisfied that on the evidence of this case, the claimants have proved that such a duty was owed. Mr Taylor's role was a limited one and in applying the membrane to the front edge of the deck he understood the question of the deck fall had already been discussed and addressed by Mr Moorhead, Mr Craven and BBC Limited. Given that understanding and limited role, I do not accept that he was required to raise the issue again or to refuse to do the work. In the circumstances whatever limited duty he might have owed, was not in my view breached.

[156] In relation to the issue of the noggs, I have already concluded that the claimants have failed to establish that the alleged defect was a deficiency in terms of section 2.

[157] Given Mr Taylor's limited role, I find that the claimants have also failed to establish that he either owed and/or breached the duties of care in relation to the lack of corner fillets and the installation of the apron flashings. The apron flashings relate to a transition area and on the evidence I am left with considerable uncertainty as to what Mr Taylor, particularly given his limited role, was actually required to do.

[158] The claim against Mr Taylor has not been made out and is dismissed.

QUANTUM

[159] The claimants have sought a total of $322,640.51 in damages. The total figure is calculated as follows:

Temporary repairs/maintenance	$6,388.31
Deck/north wall repairs	$50,948.76
Remaining elevation repairs	$206,805.87
General damages	$50,000
Interest	$8,497.57 (and continuing until date of payment at $37.39 per day)
TOTAL	**$322,640.51**

[160] I have already concluded that a complete reclad of the dwelling was required to remediate the defects. I thus reject the submission made by a number of the respondents that targeted

repairs only would have sufficed. While the Assessor reached that conclusion (i.e. targeted repairs plus maintenance) he did not have all the information and evidence available to Mr Moyle, who was on site during the remedial works and closely observed them. Again, I prefer and accept the evidence of Mr Moyle. In assessing whether a complete reclad was required regard is to be had not just to existing leaks but also to likely future damage. I also note that Mr Ford recommended the removal of all external wall claddings to expose framing timber for full inspection. This was based on his conclusion that there were "numerous weathertightness risks and water entry which could further decay timbers."

[161] A number of the respondents have challenged the quantum sought by the claimants. It is contended:

a) Items claimed under the heading of temporary repairs/maintenance in the above box are all items of normal required maintenance for houses of this type and age (the exception may be the tarpaulin).
b) The use of cellcrete in the reclad (a more expensive product) amounts to betterment.
c) The degree of timber replacement (based on Mr Moyle's advice) was excessive and unnecessary. The Beagle Consultancy Limited analysis confirmed that in numerous cases there was no need for timber replacement.
d) The amount claimed for managerial and supervision of the remedial works is excessive. Mr Moyle whose role was to advise on timber replacement and the collecting of evidence charged $20,000.00. Likewise the margin of 10% for NGU, the company that actually carried out the remedial works, was excessive.
e) The claimants claim for interest includes interest paid to the bank on the loan raised to fund the remedial work. This is 'double dipping' and invalid.

[162] I will now address each of these matters in turn.

[163] I reject the submission that the sum of $6,388.31 claimed under the heading temporary repairs/maintenance is essentially normal maintenance that should not be recoverable. As Mr Hough submits the cost claimed are predominately for a membrane paint to cover cracks and the sealing coat to cover the cracks in the defective cladding. I agree with Mr Hough that these items are not what could be considered "normal maintenance". The work carried out in relation to this head of claim is in reality the beginning of the problems that arose because of weathertight defects with this house. In my view the costs are reasonable and recoverable.

Betterment

[164] The leading statement of New Zealand Law on the issue of betterment is that of Justice Fisher J which states:[14]

> The logical middle ground is to make a deduction for betterment but only after an allowance to the plaintiff for any disadvantages associated with the involuntary nature of any additional investment. Where the substitute item is more valuable or efficient than the original, or will have a longer life, any deduction for betterment will need to be tempered with recognition of the added costs to the plaintiff of treating himself to be at luxury...

[165] Mr Pilbrow's evidence was that he followed the recommendations of the remedial builders in choosing the cellcrete cladding material and that he was assured by the builder's comments that it was a stronger and more durable cladding material. The evidence was also that cellcrete was about $170.00 per square metre compared with $140.00 per square metre for similar polystyrene based cladding (i.e. similar to the Fosroc original). As Mr

[14] *J & B Caldwell Limited v Logan House Retirement Home Limited* [1999] 2 NZLR 99 at page [9] to [10].

Hough submits the difference of $30.00 per square metre for a 202 square metre dwelling is not large.

[166] In the circumstances and after making the necessary allowance to the claimants for the disadvantages associated with the involuntary nature of having to re clad their dwelling, I am of the view that the respondents have failed to prove that the claimants have in fact benefited as a result of the reinstatement with cellcrete.[15] I thus reject the contention that a deduction should be made for the use of cellcrete as opposed to a polystyrene based cladding.

[167] Mr Moyle gave evidence that the overall repair costs were reasonable and Mr Hamilton accepted that the overall costs were not unusual for a dwelling of this size. There was no evidence from an independent quantity surveyor that the repair costs were unreasonable.

Timber Replacement

[168] I accept that Mr Moyle, for good reason, adopted a cautious approach in making decisions and recommendations on the issue of timber replacement.

[169] I reject the contention that there was excessive timber replacement. The criticism from Mr Craven and his expert witnesses was based on the erroneous assumption that the sum was $64,655.90 was for timber replacement. As Mr Short explained, taken in isolation, the estimated timber replacement costs were only $3,387 plus GST (timber only, no hardware, labour and associated costs).

[15] Law of Torts in New Zealand, 5th edition Todd page (11234) and the case cited ,J & B Caldwell Limited v Logan House Retirement Limited [1999] 2 NZLR 99.

Management and Supervision Costs

[170] It is necessary in this case to make a deduction from the sum of $20,000.00 for Mr Moyle's costs which are also claimed by the claimants.

[171] Part of Mr Moyle's role (and the basis upon which he charged for his services) was to gather evidence for the claim brought by the claimants. In this jurisdiction expert witnesses expenses are generally not recoverable.

[172] I gained the clear impression that the gathering of evidence was a significant part of Mr Moyle's role. In the circumstances I find that the sum of $8,000 should be deducted from the figure of $20,000. This means that the sum of only $12,000 is recoverable for Mr Moyle's services.

[173] I reject the contention of the 10% margin for NGU was excessive. Such margin was reasonable.

CONTRIBUTORY NEGLIGENCE

[174] A number of the respondents contend that a deduction should be made from the quantum because of contributory negligence by the claimants. It is contended that the claimant, Mr Pilbrow, was negligent in the following way:

a) Mr Pilbrow found problems with the tiles and knew that the wrong adhesive had been used, but did not have the membrane checked for damage and simply re-glued tiles himself- not a job for a handy man. That it is said, was negligent, especially as Mr Pilbrow now makes much of the fact that the deck was over a living area.
b) Although he knew the wrong adhesive had been used, Mr Pilbrow did nothing to check or remediate the rest of the

tiles on the deck, but just left them, for over a year until they leaked as well. If the deck had been remediated properly when the problem was first found, there would not have been a leak.

c) Mr Pilbrow was equally slow in undertaking remediation work to the only other leak he found, the cut in the butyl box gutter. This was also left for months.

d) When he failed to get any adequate response from Mr Moorhead, Mr Pilbrow let the problems drift on for month before taking alternative steps to remedy defects he was concerned about.

[175] I find that the allegations of contributory negligence are misguided. Mr Pilbrow, who presented as a careful and prudent person, was clearly faced with a difficult situation and in my view acted reasonably in the circumstances. Although he has some building experience himself, he is not an expert and it would be wrong to impose obligations on him as if he were such an expert. The conduct of Mr Pilbrow did not fall below the standard reasonably to be expected of a person of ordinary prudence.[16]

GENERAL DAMAGES

[176] The claimants have sought the sum of $50,000 by way of general damages. The respondents contend that general damages can only be awarded on a per dwelling and not on a per individual basis. The claimants dispute that proposition.

[177] There is a regrettable degree of uncertainty on this issue in some of the jurisprudence. Ellis J concluded in *Findlay Family Trust*[17] that *Byron Avenue*[18] confirmed that the guideline for awarding

[16] *Lee Findlay v Auckland City Council* HC Auckland CIV 2009-404-6497 Ellis J 16 September 2010
[17] *Lee Findlay v Auckland City Council* at n16 above.
[18] *O'Hagan v Body Corporate* 189855 [2010] NZCA 65.

general damages in leaky building cases is $25,000 per dwelling for owner-occupiers.

[178] It is clear that both Mr and Mrs Pilbrow, an elderly retired couple, have suffered significant stress and anxiety as a result of their leaky home. They brought the house in 2002 believing it was a wonderful home for their retirement. In her evidence Mrs Pilbrow has explained the difficulties of living in the house while it was under repair. She and Mr Pilbrow had to get up very early in order to prepare for the workmen arriving. Mrs Pilbrow also explained that instead of her and her husband enjoying their retirement they had to obtain mortgage finance to meet the costs of the repairs.

[179] In my view the claimants should be awarded the sum of $25,000 as general damages.

INTEREST

[180] The Act provides for interest to be awarded at the rate of the 90-day bill rate plus 2%. In determining the issue of interest the Tribunal has a very wide discretion.

[181] The claimants have provided a breakdown of interest calculations. While I have made a minor adjustment to the figure (i.e. total remedial works) upon which those interest calculations are based, the claim made by the claimants is well within the range of any reasonable exercise of discretion. Alternative methods of calculating interest, even with a lower 90-day bill rate, would produce a very similar award of interest.

[182] I find that that interst of $8,497.57 should be awarded up until 31 March 2011 and thereafter at $37.39 per day until date of payment.

[183] The total figure for the award of interest up until 20 June 2011 is therefore $11,900.06.

SUMMARY IN RELATION TO QUANTUM

[184] The claimants have established the claim to the amount of $293,043.02, which is calculated as follows:

Temporary repairs/maintenance	$6,388.31
Deck/north wall repairs	$50,948.76
Remaining elevation repairs	$198,805.89 (i.e. $206,805.87 minus $8,000)
General damages	$25,000
Interest	$11,900.06 (up until 20 June 2011 and thereafter at $37.39 per day)
TOTAL	**$293,043.02**

[185] Mr and Mrs Moorhead, Mr Craven, CBL and Europlast and Mr Marcheson are all jointly and severally liable for the total sum of $293,043.02.

[186] Mr Clark is liable for the temporary repairs, maintenance and the repairs to the deck/north wall together with a proportion of general damages and interest. In my view that proportion should be approximately 25% so that he is liable for $6,250 by way of general damages and $2975 in interest. Mr Clark's total liability therefore is as follows:

Temporary repairs/maintenance	$6,388.31
Deck/north wall repairs	$50,948.76
Proportion of general damage	$6,250.00

Proportion of interest	$2,975.00
TOTAL	**$60,812.07**

WHAT CONTRIBUTION SHOULD EACH OF THE LIABLE PARTIES PAY?

[187] Section 72(2) of the Weathertight Homes Resolution Services Act 2006 provides that the Tribunal can determine any liability of any respondent to 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.

[188] 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.

[189] Section 17(2) of the Law Reform Act 1936 sets out the approach to be taken.

[190] Ellis J in *Findlay*[19] stated that apportionment is not a mathematical exercise but a matter or judgment, proportion and balance.

[191] In dealing with the issue of contribution I have decided to deal separately with the repairs to the deck and north wall from those to the remaining elevations. Mr Clark is of course liable only in relation to the temporary repairs/maintenance and deck/north wall repairs.

[19] *Lee Findlay v Auckland City Council* at n16 above.

(a) Temporary repairs/maintenance and deck/north wall repairs – Total cost $60,812.07

[192] Each of the liable respondents directly contributed to the defects associated with the deck and north wall. While Mr Moorhead relied upon the expertise of the other respondents, he was responsible for the incorrect tile adhesive and the lack of overall project management. He took on the risk of the development and intended to profit from it. He engaged the subtrades on a labour-only basis.

[193] Mr Clark's design was clearly defective and while this created difficulties for Mr Craven and CBL, Mr Craven went ahead and erected the subtrates that was inconsistent with the plans and in breach of the Building Code. Mr Marcheson and Europlast also created defects in and around the decks and north wall area e.g. principal defect 3.

[194] For the temporary repairs/maintenance and deck/north wall repairs, I accordingly set the contributions as follows:

a) Mr and Mrs Moorhead – 40%
b) Mr Craven and Craven Builders Limited – 20%
c) Mr Clark – 20%
d) Mr Marcheson and Europlast Finishes Limited – 20%

(b) Remaining elevation repairs – Total cost (including proportion of interest and general damages) $232,230.95

[195] Having regard to the respective roles of the respondents, the nature of the defects, and the manner in which Mr Moorhead chose to carry on this development, I set the contributions for the total repair costs, for the remaining elevations, as follows:

a) Mr and Mrs Moorhead – 50%
b) Mr Craven and Craven Builders Limited – 25%
c) Mr Marcheson and Europlast Finishes Limited – 25%

CONCLUSION AND ORDERS

[196] The claim by Mr and Mrs Pilbrow, the claimants, is proven to the extent of $293,043.02. For reasons set out in this determination I make the following orders:

a) Mr Hugh Charles Moorhead and Mrs Barbara Mary Moorhead, the first respondents, are to pay the claimants the sum of $293,043.02 forthwith. Mr and Mrs Moorhead are entitled to recover a contribution of up to $152,639.72 from the other liable respondents, for any amount paid in excess of $140,403.30.

b) Craven Builders Limited, the second respondent, is ordered to pay the claimants the sum of $293,043.02 forthwith. Craven Builders Limited is entitled to recover a contribution of up to $222,823.24 from the other liable respondents for any amount paid in excess of $70,219.78.

c) Europlast Finishes Limited, the third respondent, is ordered to pay the claimants the sum of $293,043.02 forthwith. Europlast Finishes Limited is entitled to recover a contribution of up to $222,823.24 from the other liable respondents for any amount paid in excess of $70,219.78.

d) Mr Lance Clark, the fourth respondent, is ordered to pay the claimants the sum of $60,812.07 forthwith. Mr Lance Clark is entitled to recover a contribution of up to

$48,649.66 from the other liable respondents, for any amount paid in excess of $12,162.41.

e) The claim against Mr David Taylor, the fifth respondent, is dismissed.

f) Mr Marcheson, the sixth respondent, is ordered to pay the claimants the sum of $293,043.02 forthwith. Mr Marcheson is entitled to recover a contribution of up to $222,823.24 from the other liable respondents for any amount paid in excess of $70,219.78.

g) Mr Vaughan Craven, the seventh respondent is ordered to pay the claimants the sum of $293,043.02 forthwith. Mr Vaughan Craven is entitled to recover a contribution of up to $222,823.24 from the other liable respondents for any amount paid in excess of $70,219.78.

[197] To summarise the decision, if the liable respondent parties meet their obligations under this determination, this will result in the following payments being made by the liable respondents to this claim.

Liable Respondent	**Temporary Repairs and Deck and North Wall Repairs – Total $60,812.07**	**Remaining elevation repairs – Total $232,230.95**	**Total Payment of liable Respondent**
Mr Hugh Charles Moorhead and Mrs Barbara Mary Moorhead, First Respondents	$24,324.83 (40%)	$116,115.47 (50%)	$140,403.30
Craven Builders Limited, Second Respondent and Mr Vaughen Craven, Seventh Respondent	$12,162.41 (20%)	$58,057.37 (25%)	$70,219.78
Mr Lance Clark, Fourth Respondent	$12,162.41 (20%)	-	$12,162.41

Europlast Finishes Limited, Third Respondent, and Mr Marcheson, Sixth Respondent	$12,162.41 (20%)	$58,057.37 (25%)	$70,219.78

[198] If any of the parties listed above fail to pay their apportionment, this determination may be enforced against any of them up to the total amount they are ordered to pay in paragraph [197] above.

DATED this 27th day of June 2011

_____

P J Andrew

Tribunal Member