**IN THE WEATHERTIGHT HOMES TRIBUNAL**

**TRI-2010-100-000044**
**[2011] NZWHT AUCKLAND 28**

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| BETWEEN | RALPH ERNEST KENNEDY PINNOCK, ADRIANA LUCY PINNOCK AND PETER BRUCE JACOBSON as Trustees of the PINNOCK TRUST<br>Claimant |
| AND | AUCKLAND CITY COUNCIL<br>First Respondent |
| AND | DAVID WOOD<br>Second Respondent |
| AND | ROWAN NIGEL COLE<br>Third Respondent |
| AND | ROY RAWSON<br>Fourth Respondent |
| AND | NISHAR MOHAMMED<br>Fifth Respondent |
| AND | EASTRIDGE CONSTRUCTION LIMITED<br>(Removed)<br>Sixth Respondent |
| AND | METALCRAFT INDUSTRIES LIMITED<br>Seventh Respondent |

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| Hearing: | 7-11 March and 16 March 2011 |
| Final Submissions: | 13 March to 12 April 2011 |
| Appearances: | Claimants – A L Pinnock<br>Auckland Council – P Robertson<br>David Wood – M E Sullivan and S Davies-Colley<br>Rowan Cole – D Salmon and K L J Simcock<br>Roy Rawson – self represented<br>Nishar Mohammed – no appearance |
| Decision: | 23 May 2011 |

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**FINAL DETERMINATION**
**Adjudicator: P A McConnell**

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## INTRODUCTION

[1] In 1999 Adriana and Ralph Pinnock extended their home in Parnell overlooking Hobson Bay. Before the construction work was completed there were leaks through the dining room ceiling from the new deck above. Work was done to address these leaks but further leaks appeared in 2001. An expert was then engaged to determine the cause of the leaks and to carry out remedial work. That work fixed the leaks but leaks were occurring in other locations by 2003. Dr and Mrs Pinnock then engaged Prendos to investigate the causes of the leaks and advise on appropriate repairs. They undertook some targeted repairs but by 2009 it was clear this work had not stopped the leaks. A full reclad and reroof of the property was then undertaken.

[2] After completion of the remedial work Ralph and Adriana Pinnock and Peter Jacobson (the trustees) filed a claim with the Tribunal against the Auckland Council, David Wood and Rowan Cole. Auckland Council was the territorial authority that issued the building consent, carried out inspections and issued a Code Compliance Certificate. David Wood completed the plans and specifications for building consent purposes and administered the contract during the early parts of the construction. Rowan Cole was a partner in Auckland Wide Building Services Limited, the building company engaged to undertake the alterations. On the application of Mr Cole, Nishar Mohammed and Roy Rawson were joined to this claim. Mr Rawson was Mr Cole's co-director and shareholder in Auckland Wide Building Services Limited and Nishar Mohammed was the plasterer engaged to carry out the plastering work.

[3] The trustees allege the negligence of the designer, builders, Council and plasterer in carrying out construction work and inspections have caused loss and they are seeking from them the sum of $572,102.19 for the cost of remedial work, less an adjustment for betterment, together with costs of earlier repairs, consequential

and general damages. All of the respondents who have participated in the hearing of this claim denied that they were negligent. They claim they carried out their respective work in accordance with good design, building or inspection practices of the time. They further submit that the claim against them is limitation barred due to the discovery of leaks and subsequent action taken in 2001. In addition they submit that Dr and Mrs Pinnock were contributorily negligent as a result of the role they had in the construction process and that they failed to mitigate their loss.

**THE ISSUES**

[4] The issues I therefore need to decide are:

- Does a leaky deck make a leaky house? In other words when did the cause of action arise and is the claim limitation barred under section 4 of the Limitation Act 1950?
- Why does the home leak?
- Was Mr Wood negligent in designing the alterations or administering the contract?
- Was the Council negligent in issuing the building consent, carrying out inspections and issuing the Code Compliance Certificate? If so, was any negligence causative of loss?
- What were the respective roles of Mr Cole and Mr Rawson? Do they owe the claimants a duty of care and if so, has either of them breached that duty of care?
- Did Mr Mohammed owe the claimants a duty of care and if so, has he breached that duty of care?
- Were Dr and Mrs Pinnock contributorily negligent?
- Did the trustees fail to mitigate their loss?
- What is the appropriate scope and cost of the remedial work?

- Are there other damages that should be awarded?
- What contribution should each of the liable parties pay?

**BACKGROUND**

[5] In February 1992 Dr and Mrs Pinnock purchased a two bedroom, single storey, stucco house in Tohunga Crescent, Parnell. After unsuccessfully trying to sell the property in 1999 they decided to renovate and extend the existing dwelling by increasing their living space, adding a study, a new internal garage and a guest bedroom and bathroom.

[6] They initially engaged Richard Lamborne to design the additions. David Wood, the second respondent, was subsequently engaged to complete the design work and to obtain resource and building consent. Mr Wood was also engaged to administer the contract during the early stages of construction.

[7] On 3 June 1999 Dr and Mrs Pinnock took over administration from Mr Wood but indicated they would continue to engage him on an hourly basis to carry out what inspections might be necessary. Mr Wood was not in fact engaged to carry out any further inspections. On 28 June 1999 Mr Wood wrote to Mr and Mrs Pinnock expressing his concerns about the proposed change in cladding material and effectively terminating his services. He had no further involvement with the construction.

[8] Auckland Wide Builders Limited (AWB) was engaged on a full contract to carry out the construction work. The agreed contract price was $207,853. The two directors and shareholders of AWB were Rowan Cole, the third respondent, and Roy Rawson the fourth respondent. All of the subcontractors were engaged by AWB.

[9] The alterations included raising the existing property, building a double garage at street level with a guest bedroom above and also

adding a third level to the dwelling which was to become Dr Pinnock's study. Off that study area a large balcony was constructed extending over the downstairs dining room. The northern and north western parts of the existing property were left unchanged but the eastern elevation of the existing house was reclad. The concrete block work of the new garage was also plastered to tie in with the rest of the property.

[10] The consented plans provided that the additions to the dwelling would be clad with Insulclad. Partway through construction however, that was changed to a stucco cladding installed over hardibacker. I accept the change of cladding material was made on the suggestion of Mr Cole. While Mr Cole's evidence was he always thought the property was going to be stucco clad, for reasons that follow later in this determination, I consider Mrs Pinnock's recollection of events is more reliable.

[11] Various problems arose during the construction but, other than some leaks, these problems have little relevance to the matters that need to be determined in this claim. They did however contribute to the breakdown of the relationship between Mr Cole and Dr and Mrs Pinnock which led to the contract with AWB ending when Mr Cole left site on or before 19 October 1999.

[12] Mr Cole and Dr and Mrs Pinnock do not agree on where construction had got to by the time Mr Cole left site. The paper record of payments, correspondence, council inspections and notes of telephone conversation however provide a reasonably complete picture. The work that was outstanding at 19 October 1999 was mainly internal decorations and minor finishing work. The final plastering and painting bills had been submitted for payment in September 1999. In addition someone from AWB, most likely Mr Cole, called for a final council inspection on 11 October 1999. At that point AWB must have considered the work to be largely complete.

AWB also rendered its practical completion invoice on 11 October 1999.

[13] The paper record shows that the Council and Mrs Pinnock believed the final inspection was premature. Work recorded as being outstanding as at 12 October 1999 included sealing to the western wall, driveway access to be completed, landscaping, internal finishing such as floor coverings, handrail to the front steps, leaks in the gutter on one corner, some electrical finishing and repainting some scratched areas. In addition the clearance from the stairwell leading from the laundry to the garage was less than the minimum height and needed to be rectified.

[14] Mrs Pinnock engaged Mr Chandler to inspect the state of the incomplete work and there was an arbitration between AWB and the Pinnocks with a decision issued on 10 December 1999. Dr and Mrs Pinnock then engaged Eastridge Construction Limited to complete the work that was required for the Code Compliance Certificate (CCC) to be issued. This included rectifying the stairwell clearance, installing timber and metal capping on the balustrades of both decks, and also locating and rectifying the causes of the leaks through the dining room ceiling. The total cost of the work was under $10,000 and the CCC was issued on 20 February 2001.

[15] Although the work done by Eastridge initially stopped the leaks into the light fitting in the dining room ceiling there were further leaks into the dining room ceiling by 2001. In August 2001 Dr and Mrs Pinnock engaged Water Leak Solutions Ltd (WLS) to investigate the cause of water still leaking through the dining room ceiling. WLS recommended modifying the internal drain so that it flowed onto the roof and blocking the existing internal downpipe. This work was done for a total cost of $2,278. WLS's report also identified other issues that could be contributing to water ingress. Its advice was that these issues should be monitored to ensure no further work was required. The remedial work undertaken by WLS appeared to

address the leaks from the deck into the dining room ceiling and the further monitoring recommended disclosed no further leaks.

[16] On 23 January 2003 the property was transferred from Dr and Mrs Pinnock to the Pinnock Trust. Dr and Mrs Pinnock continued to be the registered owners together with Peter Jacobson, the third trustee.

[17] In 2003 leaks occurred in other parts of the property. WLS was called in again and they recommended that Dr and Mrs Pinnock engage Prendos to inspect the whole house and to advise on weathertightness issues. Mark Williams of Prendos inspected the area above the dining room ceiling and found no leaks. He concluded that the problem had been effectively repaired. Prendos however identified a number of other issues which contributed to the dwelling leaking.

[18] In 2004 Prendos recommended a complete reclad with a ventilated cavity system. Mark Williams advised the Pinnocks that a more conservative approach could be adopted by carrying out targeted repairs and monitoring the property for further signs of water ingress.

[19] Dr and Mrs Pinnock subsequently engaged Malone Contracting Limited to carry out targeted repairs on the areas identified in the Prendos reports as well as ongoing maintenance. Mr Malone also recommended that the house be painted with an Equus paint that was being marketed as an answer to weathertightness issues.

[20] Unfortunately the work carried out by Malone Contracting did not rectify the issues and in early 2008 Dr and Mrs Pinnock noticed further signs of water ingress. At that stage they discovered that

Malone Contracting Limited had gone into liquidation and they needed to look for another builder.

[21] A claim was lodged with the Department of Building and Housing in August 2008. The Pinnocks received the assessor's report in February 2009 which recommended a full reclad over a cavity. They subsequently engaged Joseph McCambridge of MC2 architects to design and administer the remedial work. John (Jack) Fordyce was engaged as the senior builder to carry out the work.

## IS THE CLAIM LIMITATION BARRED UNDER S4 OF THE LIMITATION ACT 1950?

[22] There is no dispute that leaks occurred before the alteration work was completed in 1999. At that stage there were some leaks through the dining room ceiling into the light fitting. Mr Cole and Mr Rawson were unable to identify the cause of the leaks but Eastridge Construction considered they were most likely caused by the handrail fixings. Some minor remedial work was carried out which appeared to rectify the problem. Further leaks however occurred in 2001 when the Pinnocks engaged WLS to identify and rectify the causes of the leaks.

[23] Mr Salmon submits that the claim is limitation barred as a result of the 2001 leaks and the report obtained from WLS dated 20 September 2001. He submits by this date leaks were discovered, an expert engaged, and a report completed which identified the remedial work that needed to be undertaken and loss occurred. He submits that this argument is founded on first principles from both the Limitation Act 1950 and *Invercargill City Council v Hamlin*[1]. He submitted that *Hamlin* clarified the nature of the loss in a defective building case as not physical damage but economic loss. Once there is loss in market value as a result of leaks, the cause of action

[1] *Invercargill City Council v Hamlin* [1996] 1 NZLR 513.

accrues and any further leaks or damage may form further particulars but not a new cause of action.

[24] He therefore submits that the claim that was filed with the Department of Building and Housing in August 2008 was based on the same cause of action that accrued in 2001, that is economic loss as a result of leaks. He further relied on *Pullar v The Queen*[2] where the Court of Appeal concluded at paragraph 19:

> "It is not necessary, in order for time to start running, to be able to pin point with precision the exact cause of every defect. Indeed, that would frequently mean time will not start running until the remedial work was underway. That would in turn mean that the building owner could not sue the builder in advance of the repair work as no cause of action would have by then been accrued. This was not and never has been the law. What one is concerned to ascertain is when economic loss occurred: when was the market value of the building affected?"

[25] The trustees however submit that a leaky deck does not make a leaky house and that the cause of action that accrued in 2001 could, at most, only have been in relation to the deck leaks. They say that until 2003 they believed the leaks were confined to leaks through the dining room ceiling from the deck above. They submit that the cause of action, underpinning this claim, did not accrue until at least the time they commissioned the Prendos report in 2003. It was not until that time that they were aware of the nature of the problem and realised that they had a leaky house and not just a series of leaks through a deck.

[26] The evidence suggests that the leaks discovered in 2001 were repaired. None of the experts in this claim were able to establish that any defects in relation to the upstairs deck were causative of water ingress and the damage that forms the basis of this claim. Mr Williams in the 2003 Prendos report refers to old stains on the timber but no sign of any leaks in the cavity over the

[2] [2007] NZCA 389.

dining room. Mr McCambridge and Mr Fordyce also said that there was no sign of leaks or damage resulting either from the work done by WLS in 2001 or from any of the possible risk areas (outlined in that report) that the Pinnocks were advised to monitor.

[27] The trustees therefore submit that there is no evidence that in 2001 there was any damage to be discovered apart from that caused by the leaks resulting from the faulty deck drain. Given the relatively low level of knowledge of leaky buildings in 2001 they submit that the fact they had a leaky deck drain causing leaks into the room below could not reasonably have put them on notice that they had a leaky home. They acknowledge that they met the cost of repairs of approximately $2,000, however submit that in 2001 the economic loss that resulted from the discovery of the isolated deck leaks was not sufficient to start the limitation clock running on a leaky home claim.

[28] The claimants rely on the Court of Appeal decision in *Sunset Terraces* and *Byron Avenue* appeals[3], *Cameron & Ors v Stevenson & Ors*[4] (*Normac)* and *Burns & Ors v Argon Construction Limited*[5] *(Burns)*. In *Burns* Asher J concluded that the claim was not limitation barred even though the claimants had obtained a Prendos report and carried out significant repairs outside the six year limitation period. He concluded that the limited damage identified in 1997 was largely repaired and the 2004 damage was far more serious and involved the discovery of new and substantial causes of economic loss not previously identified.

[29] In the *Normac* case limited and isolated damage had been the subject of an earlier adjudication. Potter J considered that, as the earlier report and adjudication had only identified damage that could have been repaired at a relatively modest cost, the value of the

[3] *North Shore City Council v Body Corporate 188529 & Ors* CA673-2008, 22 March 2010 *Byron Avenue* [2010] NZCA 65.
[4] HC Napier CIV-2009-441-437, 5 November 2009.

property would only have depreciated moderately. She concluded that discovery of new and distinct damage and new defects could give rise to a new cause of action.

[30] The Court of Appeal in *Byron Avenue* also considered the issue of when a cause of action accrued to owners in the light of *Hamlin*. In considering the situation of Ms Clarke the President noted that:

> "Ms Clarke was aware that there had been problems. But she believed that the repair she had paid for and seen performed had rectified the problem. There is no basis to believe that she and her co-trustee had any inkling of the underlying problem."
>
> [48] Since she had reason to believe that the work had rectified the problem there is no basis for claiming the trustees had acted unreasonably in not making enquiry with the Council, whose recent knowledge of the conditions of what had been her apartment could scarcely be expected to exceed hers.

[31] Mr Salmon submitted that both the *Burns* and *Normac* decisions were distinguishable on the basis that they were appeals from removal orders. He submitted that removal decisions operate in an appropriately cautious procedural context. He also submitted that they involved an apparent focus on pre-Hamlin authorities and even if they were not distinguishable should not be followed. He further submitted that if this claim survived the limitation defence it would redefine limitation law.

[32] The cases relied on by the claimants suggest that the discovery of confined and localised damage does not necessarily mean the cause of action has accrued for much greater and widespread damage or loss. Asher J in particular concluded that a new cause of action could have arisen as a result of new and distinct damage and because of the discovery of new defects.

[5] HC Auckland CIV-2008-404-7316, 18 May 2009.

[33] Neither *Hamlin* nor *Pullar* specifically deal with such a situation. In *Pullar* the work identified outside the limitation period included leaking windows, plaster and paint work damage and wall delamination. The damage was widespread and the extent of the remedial work reasonably clearly identified. In *Hamlin* the house had minor defects since construction in 1972. It was not until 1989 that an engineer's report was commissioned which concluded the foundations were faulty and needed to be replaced. The Judge found that whilst cracks and minor defects had appeared over the years a reasonably prudent homeowner would not have suspected the foundations, or discovered the cause of the trouble until 1989. It was that decision that was ultimately upheld by the Privy Council.

[34] In the present case there were isolated and localised leaks in one area of the home. A report was commissioned in relation to that area only. Neither *Hamlin* nor *Pullar* definitively conclude that the cause of action for every claim of faulty construction resulting in leaks accrues when one leak has become so obvious that a homeowner has called in an expert to investigate that leak. In 2001 Dr and Mrs Pinnock knew they had a leak, most likely caused by a faulty deck drain, but they could not reasonably have known they had a leaky home. I do not accept the submission of the various respondents that the WLS report effectively put the Pinnocks on notice that they had a leaky home. All that report said was that there were other vulnerable elements in relation to the construction of the deck that should be monitored. It did not put the Pinnocks on notice that there could be construction defects with the whole house.

[35] It is not uncommon with leaky home claims to find that isolated leaks have occurred from the time construction was completed, or even before the completion of construction as in this claim. Where homeowners are cautious they will call back the builder or engage a suitably qualified trades person to investigate the causes of the leaks and to suggest remedial work. To conclude that

the cause of action accrues at this time when a homeowner could not reasonably have known that they had a leaky home, rather than a home with one or two more isolated leaks, would result in paradoxical and unsatisfactory outcomes in many cases.

[36] Any economic loss suffered by the claimants as a result of the 2001 leak was limited to the cost of repairs. I found Mr Buckley's evidence on the effect limited leaks on the sale price in 2001 to be more persuasive than that of Mr Gamby. Given the limited understanding of leaky home matters by experts at the time, let alone average purchasers, I do not consider there would have been any devaluation in the property price beyond the remedial costs. In other words the claimants' loss was limited to the value of the remedial work required to fix the leaks in the deck. The claimants' loss was not the depreciation in the market value of the house by reason of the house being a leaky home. This loss did not occur until 2003 at the earliest.

[37] This is not a situation where Dr and Mrs Pinnock postponed the start of the limitation period by shutting their eyes to the obvious. As soon as problems occurred they got appropriately qualified people to come and advise them and remedy the defects. I do not consider the WLS report put them on notice of wider or greater problems with their property other than the leaks from the deck into the dining room ceiling in 2001. The letters written by Mr Jacobsen to AWB's liquidator are not as definitive as Mr Salmon submits in terms of establishing the extent and seriousness of the 1999 to 2001 leaks. Mr Jacobsen when questioned on this acknowledged he used hyperbole when communicating with the liquidators.

[38] The underlying principle from *Hamlin* is that a "cause of action accrues when, but not before, all the elements necessary to support the plaintiff's claim are in existence". When the problem manifesting itself is isolated in one area, such as the deck leaks as in this claim, it cannot be concluded that all the elements necessary to

support the claimant's claim are in existence. It is only once the owners ought reasonably to have known that they had a leaky home, or that the market value of the house is depreciated by reason of it being a leaky home, that the cause of action accrues.

[39] I therefore conclude that the claimants' claim is not limitation barred as the cause of action being pursued in the Tribunal did not accrue until 2003.

**The position in relation to the deck**

[40] Any cause of action in relation to the upstairs' deck however accrued by 2001. By that time the leak from the deck had been discovered, a report was completed which identified remedial work to be undertaken and loss had occurred. The claim in relation to the upstairs deck is accordingly limitation barred under s 4 of the Limitation Act 1950. The claimants have however withdrawn any claim in relation to the balustrades and there is no evidence of any further leaks causing damage from that deck. While there are defects alleged in relation to the deck there is no evidence that they have contributed to the leaks. The rebuild of the deck was not required to remedy the leaks arising from the other defects and therefore the cost of the rebuild could not be successfully claimed against the respondents.

**WHY DOES THE HOUSE LEAK?**

[41] Alan Light, the assessor, Jack Fordyce, the trustees' remedial builder, Joe McCambridge, the trustees' remedial architect, Phil Grigg, Mr Wood's expert, Dianne Johnson, the expert engaged by Mr Cole, and Neil Summers, the expert engaged by the Council, attended an experts' conference. They also gave their evidence concurrently at the hearing. James Morrison, Peter Jordan and Nicholas Batchelor were engaged to give evidence for the trustees and Stephen Hubbock gave evidence for the Council. All are

considered experts but did not attend the experts' conference as they were not primarily giving evidence on the causes of leaks. Mr Batchelor did however join the panel of experts for part of the time

[42] The experts engaged by the respondents were at a disadvantage in that they had not been engaged until after the remedial work was completed. Other than the trustees' experts Mr Light was the only expert who had inspected the property prior to the remedial work. He however did not revisit the property while the remedial work was being done.

[43] The experts engaged by the respondents were therefore reliant on the photographs and reports provided by the claimants' remedial builder, and architect and the assessor. Unfortunately the photographic record of what was seen when the cladding was removed is incomplete. However this does not mean that the clear evidence of Mr Fordyce and Mr McCambridge of what they observed during the remedial work should be discounted. Their evidence as to the extent of damage caused by water ingress was supported by Mr Bachelor. While Mr Bachelor was not engaged to carry out an assessment of the causes of leaks he has the necessary expertise to form an opinion on some of the issues in dispute. As he was on site removing wet and rotten framing he was in as good a position, if not better, to form an opinion on the location and causes of leaks as Ms Johnson, Mr Summers, or Mr Grigg.

[44] From the claimants' perspective it is unfortunate that their experts were unable to determine the causes of water ingress in some key areas. Mr Fordyce and Mr McCambridge provided some generalised conclusions in their written briefs as to the causes of leaks to parts of the eastern elevation that were reclad during the 1999 work and also the further leaks into the dining room ceiling. In particular Mr Fordyce stated that water entered the plaster through the cladding along the whole of the east elevation. In his brief he did

not say how or why. When questioned further on this at the hearing Mr Fordyce and Mr McCambridge said they were unable to determine the cause of the water ingress in this area. As the remedial work was completed, prior to the claim being filed with the Tribunal, this was not a case where the Tribunal, in its investigative role, could direct the assessor, or any other expert, to carry out more testing to determine the causes of the leaks.

[45] While not questioning that Mr Fordyce and Mr McCambridge have appropriate expertise, there is a potential for conflict between their roles in the remediation of the property and as independent experts. In addition they are not experienced remedial experts. While this does not mean their evidence should be discounted it is a relevant consideration in determining some of the conflicting evidence. I however accept the evidence of Mr Bachelor, Mr Fordyce and Mr McCambridge that there was widespread damage to the framing and the bottom plate caused by water ingress. I further accept that some of the old framing needed to be replaced due to damage caused as much by water as borer infestation.

[46] There is no dispute that the house leaks and the experts all accepted that it did not comply with the performance based requirements of the Building Code. However it is less clear whether the leaks were a result of defects caused by poor design or workmanship, or by any of the trades involved in the construction of the property.

[47] The experts who attended the experts' conference agreed that water was entering the dwelling at several roof to wall junctions, as detailed on elevation plans attached to their report. It has been established that there had been moisture ingress at several of these junctions and it has tracked behind the cladding with gravity and capillary action. As a result moisture has accessed the framing leading to decay to the vertical and horizontal timbers.

[48] Mr Fordyce and Mr McCambridge considered there were additional defects that contributed to the leaks but no agreement was reached on these by the experts at the conference. The respondents in their questioning of witnesses and in submissions have suggested that the established defects are those agreed at the experts' conference. The report from the conference however makes it clear that there was no agreement on a number of defects that both Mr Fordyce and Mr McCambridge outlined in their reports or briefs and that were included in Mr McCambridge's defects schedule. These additional defects are therefore still live issues.

**Inadequate cover to junction of fascia and barge board**

[49] The experts accepted that the fascia barge board junctions were complicated and that in some locations there was inadequate cover to the junction of the fascia and barge board. This was caused by the fascia being installed prior to plastering with insufficient gap for the plasterer to push the plaster up behind the fascia to ensure weathertightness. This was primarily an issue at the top right junction of the southern elevation (labelled A) and also location G on the north west elevation. Once the work was completed this was not a defect that would have been readily able to be identified by way of a visual inspection.

**Apron flashing details**

[50] The experts also largely accepted that there was water entry at locations M1 and M2 (junctions on the south west elevations), N (junction on the south elevation above the right hand side of the garage) and G resulting from apron flashing failure. The apron flashing terminated short of the gutter and sealant was used to flash the adjacent Hardibacker and plaster.

[51] In relation to M1 I accept the evidence of the majority of the experts that there was nothing about the look of this junction that

would have caused any significant concern at the time it was built. Mr Light expressed the view that we now know that for such junctions to work they needed to have been constructed perfectly but the standard required of builders, plasterers and building inspectors is not however perfection. He described it as high risk. This detail has failed due primarily to failure of the sealant.

[52] The detailing at location M2 was different to M1. Mr Light described it as an "ugly detail". He had carried out dye testing at location M2 which established that there was water entry though a pinhead sized hole in the plaster which was unable to be detected from a visual inspection. Some of the experts considered that this was a flawed detail as cracking was likely to occur between the fascia and the stucco because water sat on top rather than flowing down the face of the wall. They said it had the hallmarks of poorly applied plaster. Other experts considered that when built this detail would have been acceptable and those involved in construction could reasonably have relied on sealant to provide weatherproofing.

[53] Mr Jordan however noted that the 1998 version of E2AS1 provided that the use of sealant was only appropriate where it was not directly exposed to sunlight or weather and was easy to access and replace (reference 3.2.1). His opinion was that the use of sealant as a method of waterproofing was therefore not appropriate on many of the roof to wall junctions.

[54] I accept Mr Robertson's submissions that diverters and 'kick out' flashings were neither common nor required at the time. However unlike the situation in *Byron Avenue* this is not a case where the junctions were waterproofed by way of a membrane. In this property several junctions were reliant on sealant and that sealant has failed. Reliance on sealant for some of roof/wall/gutter junctions on this property was not in accordance with E2AS1 as they

were exposed to sunlight and weather and were not easy to access and replace given the nature of the site and the height of the building.

[55] I conclude that there have been apron flashing failures at the locations referred to above that have caused water ingress. The cause of the failure is a result of inadequate flashings or other weatherproofing, over-reliance on sealant and in some locations poor quality plastering.

**Gutters embedded into the cladding**

[56] Location N is shown in the assessor's photograph 85 and the defect alleged here is that the spouting has been embedded in the plaster and there was also a lack of paint to the plaster. The experts accepted that embedding the gutter or spouting in the plaster and failing to paint the plaster are defects and contrary to good building practice. However there was some debate as to whether the photograph showed an embedded gutter and unpainted plaster.

[57] Mr Fordyce in his evidence stated that in several areas the gutters were embedded in the cladding without end plates and this allowed water to discharge into the wall cavity. I accept Mr Fordyce's evidence as it was based on what he had seen on site. It is accordingly more reliable that someone endeavouring to determine the construction details from a photograph. In addition it is supported by Mr Light who identified this as an issue in his report. In paragraph 15.6 of Mr Light's report he notes that remedial work to stop current leaks was required as gutters were buried in plaster and some plaster was unprotected in these areas.

**Inadequate flashing and waterproofing to joins between the old and the new**

[58] Mr McCambridge in his defects list states that the new first floor addition was constructed over the existing single-storey dwelling

without flashing or control joints between the levels. In his opinion this has resulted in extensive cracking in the plaster enabling water ingress. As a consequence the original framing became saturated and the wall plate and timber framing required replacing. This was primarily an issue on the western elevation and also a possibly contributing factor on other elevations.

[59] Mr Malone attempted some repairs by installing some mesh over the junction between the old and the new on the western elevation. This work has failed. The Council therefore submits that the Tribunal is not in a position to determine how the old to new plaster was flashed during the course of the 1999 construction work. In addition it submits that there is insufficient evidence to determine whether any damage from this alleged defect is a result of the initial construction or the failed remedial work. The experts engaged by the respondents also suggested that the damage in this area could have been caused by water ingress from the higher up risky junctions and not by deficiencies in the waterproofing of the old to new junctions.

[60] The exterior wall junctions between the old and the new should have been constructed with some type of flashing to ensure weathertightness. Mr Cole accepted this was good building practice in giving his evidence. While there have been attempted repairs I am satisfied that adequate flashings were not installed in 1999. Mr Fordyce and Mr McCambridge found no flashing installed in the junctions between the old and the new even in areas where no repairs had been attempted. The fact that Mr Malone did some work on the old to new junction on the western elevation suggests this area was failing by 2003-04. Mr Malone's targeted repair is probably more accurately called a failed patch-up job.

[61] I conclude that it has been established that flashings were not installed between the junctions of the old and new during the 1999 alternations and this is a defect. Whilst not necessarily being a

primary cause of damage it has contributed to the water ingress that has caused damage.

**Gable roof construction**

[62] The claimants allege that the construction of a gable roof rather than a hip roof on the southern elevation is a defect. The evidence established that the original design provided for a gable roof. This design failed to get resource consent because of height restrictions. Mr Wood amended the drawings to provide for a hip roof. However a gable roof was built. Whilst this may have been contrary to the consented plans, it has not been the cause of water ingress. There is no evidence or even allegation that the construction of the gable roof had weathertightness implications. The only relevance of this issue is that the claimants submit they were required to rebuild this area in order to get consent for the remedial work. I will deal with this issue in more detail when considering quantum.

**Lack of roof overhang**

[63] Mr McCambridge submits that the lack of a roof overhang has contributed to water ingress causing damage. Effectively his allegation is that it was a defect to build the house without eaves. Lack of eaves is not a defect as there was no specific requirement for them. The most that could be said is that the provision of eaves would have provided better protection for the risky roof to fascia and gutter junctions which have already been discussed. While we now know that lack of eaves is a risk factor in itself, the construction, design or inspection parties cannot be found to be negligent because they have designed built or approved a dwelling that had no eaves.

**Lack of fall to decks and inadequate step down**

[64] The claimants submit that the deck was drawn and built without an adequate fall and also with an insufficient step down between the interior floor level and the exterior deck level. The experts in general agreed that the deck should have been built with a fall but there was no requirement at the time the additions were done requiring a minimum separation height between the interior floor level and the exterior deck level.

[65] There is however no evidence that there has been any water ingress as a result of either a lack of fall or inadequate threshold. The most Mr McCambridge could say in relation to any resulting water ingress was that it may have been a contributing factor to the dining room ceiling leaks. He had however been unable to determine the cause of these leaks. Therefore, whilst the lack of fall may be considered to be a defect, it has not been established it was causative of leaks.

**Failure to install saddle flashings to junctions between decks and exterior cladding**

[66] Mr Cambridge submits that the failure to install saddle flashings between the junctions of the balustrade walls to the dwelling is a defect. The primary area where they submit this has caused damage is to the framing below the balustrade. The claim in relation to the balustrade was however withdrawn. The experts agreed there were no saddle flashings but noted that this was not a requirement at the time. Mr Hubbuck advised that the requirement for saddle flashings was not introduced until the revision of E2AS1 in 2005. Prior to that time there was no requirement for such flashings and they were not generally installed.

[67] Failure to install saddle flashings therefore is not a defect. In any event there is no evidence this has caused damage to this

property. Once again the most Mr McCambridge is able to say is that it might have contributed to the leaks in the dining room ceiling. He was however unable to say what the cause of these leaks were.

**Inadequately south-facing external internal window**

[68] There is a window in the southern elevation which is effectively an external window on both sides. From the road it appears to be a normal window but in fact is also an exterior window on the deck side. No flashings were installed on the internal or deck face of this feature window which has the potential of causing water ingress. While the other experts accept there were problems with the way this window was constructed, they submit there is no evidence that it has caused damage as it is protected by a roof area. This, at most, is an issue of likely future damage.

**No flashing installed at base of re-plastered east elevation**

[69] During the 1999 alterations the original 25mm plaster finish on the eastern elevation of the existing house was removed and replaced by hardibacker on building paper with an 18mm plaster finish. Mr McCambridge submits that there was no flashing installed at the base of the new plaster and that this contributed to cracks and water ingress to the base plate. The experts however were generally of the opinion that the finishing detail as shown in the photographs of this elevation was in accordance with a standard detail promoted in the Good Stucco Guide. This was accepted by Mr Jordan, one of the claimants' witnesses.

[70] On the evidence presented I am satisfied that the detail as constructed did comply with the standard construction practices at the time. In addition there is no evidence establishing water ingress as a result of this alleged deficiency.

**Summary and conclusion**

[71] The main defects which have contributed to water ingress are:

- Inadequate cover to junction of fascia and barge boards;
- Inadequate installation of, or failure to inadequately waterproof around, apron flashings;
- Gutters embedded into cladding; and
- Failure to install flashings at junctions between old and new.

[72] While a number of other defects were alleged, either the alleged deficiency was in accordance with good construction practices at the time or there is no evidence that they have contributed to water ingress causing damage.

**Balustrades**

[73] Mr McCambridge and Mr Fordyce in their briefs outlined a number of defects in relation to the deck balustrades. The claimants however withdrew any claims in relation to the balustrades at the beginning of the hearing. Other than Mr Fordyce's evidence that the framing of the balustrades was wet there is little evidence that any of the alleged defects with the balustrades or the decks were causative of water ingress to the house. I further note that the parapet caps were installed by Eastridge after the contract with AWB was terminated. There is however no evidence to establish that the fixing of the balustrade caps caused leaks.

**THE CLAIM AGAINST THE DESIGNER DAVID WOOD**

[74] The trustees submit that David Wood owed them a duty to exercise all reasonable care in the discharge of his duties relating to the design of the dwelling and his administration role during the initial stages of the construction work. They claim Mr Wood was negligent

in providing plans that failed to provide proper weathertightness detail in relation to several features. Such negligence they submit contributed to the leaks identified by the experts. Mr Wood accepts he owed the claimants a duty of care but submits that the design was of an acceptable standard and did not cause the leaks.

[75] The specific allegations made against Mr Wood can be summarised as:

a) The plans did not expressly state that they were only applicable to an Insulcad dwelling
b) Mr Wood did not inform the Council, the builder or the owners that amended plans were required when the claimants decided to change from Insulclad to stucco.
c) The plans were deficient in that they failed to specify flashings, diverters or control joints for difficult and high risk junctions

[76] There is no real dispute as to Mr Wood's involvement in the project. He was contracted to provide design work for the dwelling and also had an administration role up until early June 2009. While there is an almost complete paper record of the construction process this unfortunately did not include a copy of the consented plans. The Council copy has been lost and a full set of the plans kept on site is no longer available.

[77] However, the plans that are available establish that the consented plans stipulated that the dwelling was to be clad in Insulcad. I reject the trustees' submission that Mr Wood had a duty to be more specific than this in relation to the cladding material. The reference to Insulclad appeared where it was necessary and relevant and it was clear to the builder and the council that the plans were for an Insulcad clad house.

[78] The trustees further allege that when Mrs Pinnock informed Mr Wood of the proposed change in cladding material he had a duty to inform her, the Council and the builder that the substitution of plaster for Insulclad required amended plans. Dr and Mrs Pinnock did not consult Mr Wood before they decided to change the cladding material. They informed him by facsimile that the change had been made. By that stage Mr Wood was no longer engaged in an administration role. The most any of the design experts could say is with the benefit of hindsight it might have been prudent for Mr Wood to have advised of the need for changes to the design documentation. This falls well short of establishing he either had a duty to do so or that he breached any duty he owed to the claimants. The evidence suggests that the builder and Council were aware that amended plans were required in these circumstances. As Mr Wood had been removed from his administration role and was not consulted before Dr and Mrs Pinnock decided to the change the cladding I do not accept he had a duty to advise them that amended plans were required. He could reasonably have assumed that the builders would have advised them of this requirement.

[79] In relation to the alleged design deficiencies Mr Wood submits that the weathertightness defects were not caused by design defects but by deviation by the builder from the consented plans and specifications. In particular the cladding was changed from Insulclad, which is an EIFS cladding system, to a stucco plaster finish. Mr Wood submits that the details the claimants say were missing from his plans were included in Plaster System's technical literature referred to in the plans. Those details also provided a process for obtaining further details if required.

[80] It is well established that the standard of care required of an architect in discharging his or her duties is the reasonable care, skill

and diligence of an ordinarily competent and skilled architect.[6] The scope of duty and liability of an architect does not extend to providing each and every detail necessary for the proper and complete construction of a dwelling in any set of plans and specifications prepared for a dwelling house. I accept Mr Grigg's evidence that Mr Wood's drawings were generally more specific than many done in the 1999-2000 period and that at that time architects were not expected to provide the degree of detail suggested by the claimants.

[81] In *Body Corporate 188529 v North Shore City Council*[7] *(Sunset Terraces*), Heath J concluded that an architect or designer is entitled to assume that a competent builder would refer to manufacture's specifications or established literature for construction where there was insufficient detail in the plans. In that case, even though the plans were skeletal in nature, did not contain references or detail relating to manufacturer specifications and the specifications were poorly prepared and contained outdated references, the Court was satisfied that the dwelling could have been constructed in accordance with the Building Code. Heath J stated:

> [545] *"I am satisfied, for the same reasons given in respect of the Council's obligations in relation to the grant of building consents that the dwellings could have been constructed in accordance with the Building Code from the plans and specifications. That would have required builders to refer to known manufacturer's specifications. I have held that to be an appropriate assumption for Council officials to make. The same tolerance ought also to be given to the designer. In other respects, the deficiencies in the plans were not so fundamental, in relation to either of the two material causes of damage, that any of them could have caused the serious loss that resulted to the owners.*
>
> *[546] In particular, the allegation in relation to inadequate waterproofing detail for the decks and the absence of any detail in the plans demonstrating how the tops of the wing and the parapet walls were to be*

[6] *Eckersley v Binnie & Partners* [1955-1995] P.N.L.R 348 and *Saif Ali v Sydney Mitchell & Co* [1978] 3 or E R 1003.
[7] [30 April 2008] HC Auckland, CIV 2004-404-3230, Heath J.

> *waterproofed are answered fully by the reasons given for rejecting the negligence claim against the Council based on its decision to grant a building consent."*

[82] Heath J in considering the Council's liability in relation to the issue of building consent concluded that the Council in issuing a building consent was entitled to assume that the developer or owner would engage competent builders and trades people to carry out the work. The same assumption can also reasonably be made by the designer. Heath J's decision was upheld by the Court of Appeal. That court concluded that Councils, in issuing building consents, and designers in preparing the plans, were entitled to assume that a reasonably competent builder would have access to and rely on the manufacturer's specifications and that this documentation did not need to be replicated by the designer in the plans.[8]

[83] The claimants submitted that there was a greater need for details for this job due to the complexity of the design and the site. I accept the site posed some practical challenges for both design and construction. The trustees have however failed to establish that any site issues necessitated greater detail in the design of the dwelling. Other than possibly the issue to do with the junctions of the old and the new the design itself was not significantly more complex than most other architecturally designed homes. While the sea spray or wind zones may have relevance to materials used they did not require more detailed design work.

[84] The key defects which caused damage for which it was alleged the designer was negligent are the failure to detail flashings for the junctions between the old and the new and the failure to provide details for the high risk wall to roof junctions. I accept Mr Wood and Mr Grigg's evidence that there were relevant details in the Insulclad material that could have been used. If there was further

[8] *North Shore City Council v Body Corporate 188529 & Ors* CA673-2008, 22 March 2010 (*Sunset Terraces*).

design work required then the Insulclad manual required the builder to consult with Plaster Systems for a specific design for the job.

[85] Mr McCambridge made a number of other criticisms of the plans. Some of these, such as the suggestion that the plans should have included details of the sequence of the work, go beyond what was accepted as good practice of the time. There is no evidence that other alleged defects, such as the height of the deck balustrade and lack of fall to the deck, have caused leaks.

[86] Mr Morrison in his criticism of the plans and his evidence on what was missing makes no reference to the Insulclad technical literature. While the plans did not have the Insulclad manual attached this was not common at the time and I do not accept that Mr Wood was negligent in failing to provide it. In any event there can be no causative link between this failure and the defects because the cladding material was changed. The change in cladding material meant different options or details for the relevant junctions were required. There is accordingly no causative link between the alleged deficiencies in the plans and causes of leaks.

[87] In addition I accept on the basis of the evidence provided that a reasonably competent builder would have known to install flashings behind the plaster at the junctions between the old and the new. This point was acknowledged by Mr Cole. In this regard, I also agree with Adjudicator Green in *Carter v Tulip Holdings*[9] when he concluded:

> [10] ....*"If construction details for building work are omitted from plans and specifications and the building work undertaken subsequently fails to meet the mandatory performance criteria prescribed in the New Zealand Building Code, then it follows that the person who undertook that work in the absence of the prescribed detail, is prima facie, the designer of that detail and will be liable in the event of any failure. It seems quite clear to*

[9] (30 June 2006) WHRS, DBH 00692, Adjudicator J Green.

*me that that person had two choices, either to ask the principal or the architect for the necessary detail, or to design that aspect of the building work, and if the latter option is chosen then that person should have no complaint as against the architect and neither will a subsequent owner."*

[88] The claimants in their closing submissions have included in their criticism of the work or Mr Wood a number of other issues not specifically canvassed at the hearing. They appear to be suggesting that Mr Wood had the responsibility to prove that he exercised care and skill in all the work he did and that he failed to prove this. It is however the claimant trustees who have the responsibility to prove that Mr Wood did not exercise the appropriate skill and care, not for Mr Wood to prove that he did. The trustees have failed to do this and they have also failed to establish any causative link between the alleged shortcomings of Mr Wood and the leaks or their loss. For example the trustees say there is no evidence confirming Mr Wood checked to ensure the builder had the correct set of plans. However there is no evidence that Mr Wood gave incorrect plans to the builder or that, if he did, failure to have a correct set contributed to the causes of the leaks.

[89] The defects with this property were not the result of any design deficiencies but primarily relate to departures from the consented plans or workmanship issues. I accept that the dwelling could have been built weathertight by a competent builder from the plans and specifications if the builder had referred to known manufacturer specifications and other details referred to in the plans. If details in relation to specific junctions were lacking then the manufacturer's specifications provided a process for obtaining further details.

[90] In conclusion I therefore accept Mr Wood owed a duty of care to the claimants but the claimant trustees have failed to establish that the plans and specifications prepared by Mr Wood were not prepared with the reasonable care, skill and diligence of an

ordinary competent architect by reference to the general practice of the day. In addition they have failed to establish that he breached any duty of care owed by failing to administer the contract appropriately, when he did have that role, or by failing to advise Dr and Mrs Pinnock that amended plans were required with the change of cladding material.

[91] The claim against David Wood is accordingly dismissed.

**WAS THE COUNCIL NEGLIGENT?**

[92] The trustees allege that the Council was negligent in the issuing of the building consent, carrying out the inspections and in the issue of the CCC. The Council accepts that it owes the claimants a duty of care but denies it has breached that duty of care in relation to any of the three stages of its involvement.

**Building consent process**

[93] The trustees allege that the Council was negligent in approving inadequate plans and specifications for the building work. They say that given the complexity of the additions and the location of the property the Council could not have been satisfied that a dwelling built in accordance with the plans and specifications was likely to meet the provisions of B2 and E2 of the Building Code or of section 7 of the Building Act.

[94] The Council on the other hand submits that there were reasonable grounds on which it could be satisfied that the provisions of the Code could be met if the building work was completed in accordance with the plans and specifications as well as the technical literature referenced in those plans. That technical literature they submit contained many of the details the trustees say were missing from the plans. In any event there is no causative link between the alleged deficiencies and the damage given the fact that not only was

the cladding material changed but there was work done outside the consent issued.

[95] The Court of Appeal in *Sunset Terraces* [10] upheld Heath J's decision in finding that Councils in issuing building consents did not need to ensure manufacturers' specifications were attached to the consent documentations as they were entitled to assume that reasonably competent builders would have access to and refer to this information. Heath J concluded it was reasonable for the Council to assume, in issuing building consents, that the work could be carried out in a manner that complied with the Code.[11] He stated:

> "[399]…To make that prediction, it is necessary for a Council officer to assume the developer will engage competent builders or trades and that their work will be properly co-ordinated. If that assumption were not made, it would be impossible for the Council to conclude that the threshold for granting a consent had been reached. ...

[96] I have already concluded that the defects with this property are largely workmanship issues. The Council cannot be liable for issuing a building consent where the defects have arisen through failure by the builder or other contractors on site to follow the consented plans or to carry out their work in a competent and workmanlike manner.

[97] In my view, for the reasons outlined when considering the liability of Mr Wood, the Council had reasonable grounds on which it could be satisfied that the provisions of the Code could be met if the building work was completed in accordance with the plans and specifications and technical literature. I accordingly conclude that the claimants have not proved negligence, at the building consent stage, on the part of the Council.

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[10] *North Shore City Council v Body Corporate 188529 & Ors* CA673-2008, 22 March 2010
[11] *Body Corporate 188529 v North Shore City Council* (No 3) (*Sunset Terraces*) [2008] 3 NZLR 479 (*Sunset Terraces*) Heath J.

**Inspection regime**

[98] The trustees further allege the Council was negligent in carrying out its inspections as it failed to exercise all reasonable care in carrying out its statutory powers, functions and duties. In particular it is alleged that the Council either failed to carry out its inspections adequately or alternatively failed to establish and maintain a system of inspections capable of ensuring that the building work complied with the building consent and the Building Code.

[99] The trustees in their closing submissions criticise the Council for relying on the evidence of Mr Hubbuck and not calling any evidence from the officers responsible for approving plans and carrying out inspections. Given the length of time since the alternations were completed, and the number of inspections council officers are involved in, it is unlikely that any of the officers involved in the consent and inspection process would have any memory of the work they did on this property. Therefore even if they had been called their evidence would not have added to the documentary record of inspections that formed part of the hearing documents.

[100] The trustees further submit that the Council was negligent in either failing to detect that the cladding material was changed or failing to require an amended consent when noticing the change. It is clear from the inspection record that Council officers did notice the change in cladding material as it changed its inspection regime to reflect the change from Insulclad to stucco plaster. The Council accepted that in these circumstances it should have required an amended consent. No causative link however has been established between the failure to provide amended consent documentation and the leaks that have caused damage.

[101] The Council carried out 18 inspections during construction and submits that the system of inspections it had in place was in accordance with reasonable practice at the time. It further submits

that the alleged defects were either not capable of being detected by a reasonably competent inspector, or were not causative of damage.

[102] The standards by which the conduct of a Council officer should be measured were considered in *Askin v Knox*[12] where Cook J concluded that a Council officer's conduct will be judged against the knowledge and practice at the time at which the negligent act or omission was said to take place. This was also reinforced in *Hartley v Balemi*[13] which states:

> [71] It is an objective standard of care owed by those involved in building a house. Therefore, the Court must examine what the reasonable builder, council inspector, architect or plasterer would have done. This is to be judged at the time when the work was done, i.e. in the particular circumstances of the case...

[103] The Court of Appeal in *Byron Avenue*[14] when considering an appropriate inspection regime concluded:

> [59] I consider that the Hamlin principle imposes on councils in respect of residential apartments a duty of reasonable care when inspecting work that is going to be covered up and so becomes impossible to inspect without destruction of at least part of the fabric of the building, even before issuing a code compliance certificate (or advice serving the same function). The effect of carelessness in the inspection phase was to lock in a defective condition which was not reasonably detectable by purchasers. They were entitled to rely on due performance by the Council of its inspection function, whether performed by itself or by an expert.

[104] It is now generally accepted that the adequacy of the Council's inspections needs to be considered in light of accepted building practices of the day provided those practices enabled it to

[12] [1989] 1 NZLR 248.
[13] HC Auckland, CIV-2006-404-2589, 29 March 2007, Stevens J.
[14] [2010] NZCA 65.

determine whether the Code had been complied with. Heath J in *Sunset Terraces*[15] stated that:

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

[105] And at paragraph 409,

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

[106] The obligation on a council therefore is to take all reasonable steps to ensure that the building work is being carried out in accordance with the consent and the Building Code. It is however not an absolute obligation to ensure the work has been done to that standard as the Council does not fulfil the function of a clerk of works. In determining whether the Council met this duty it is appropriate to consider each area of defect as established in paragraphs 41 to 72.

[107] The fact that there was an inadequate cover to some of the junctions between the fascia and barge boards was primarily a workmanship and sequencing issue. I do not consider it could reasonably have been detected by a Council officer unless they had been actually on site when the plastering was carried out. Negligence has not been established against the Council for this defect.

[15] Ibid.

[108] Gutters being bedded into the cladding were however matters that should have been seen during one of the inspections and certainly would have been visible at the time of the final inspection. I accept the Council is negligent in failing to detect this defect. I also accept that the Council should not have been satisfied that sealant was an adequate method of waterproofing some of the more complex and hard to access junctions between roofs and walls and other building elements. The junction described as M2 in particular which Mr Light described as an ugly detail should have raised some concerns at the time.

[109] I also accept that the Council was negligent in not detecting the inadequacy of the flashing and waterproofing at the junctions between the old and the new. Whilst this would not have been detected by the time the stucco plaster had been applied given the change of cladding material the Council inspector should reasonably have ensured that he either inspected this area during a pre-stucco inspection or obtained documentation to confirm that adequate flashings had been installed. He was negligent in failing to do so.

[110] In their closing submissions the trustees refer to a list of defects in Mr Fordyce's brief of evidence that he found on removing the cladding. While accepting these defects were not weathertightness related they submit they are relevant in determining the quality of the inspections. Any non-weathertightness defects can however have little relevance to this particular claim as the Tribunal has no jurisdiction to deal with any non-weathertightness related defects. In addition there is no evidence of any link between these defects and the damage or loss suffered by the claimants.

[111] The Council submitted that the defects for which it might be potentially liable could have been remedied by way of targeted repairs if they had been the only defects. They presented some skeletal costs for an alternative scope of works based on this assessment. However the defects for which the Council is liable

contributed to the need for a complete reclad. I accordingly conclude they are jointly and severally liable with the other responsible parties for the full amount of the established claim.

**WHAT WERE THE RESPECTIVE ROLES OF MR COLE AND MR RAWSON?**

[112] Mr Cole and Mr Rawson were the two directors of AWB, the company contracted to carry out the construction work. Both accept they had some involvement with the construction work but they each submit the other was the project manager or site manager in charge of the job. Both attempted to minimise their own role and exaggerate the role of their co-director. Both Mr Rawson's and Mr Cole's recollection of some key aspects of this job was unreliable. This is not surprising given the length of time that has elapsed since the work was done and the fact that they have been involved in the construction of numerous houses over the years. Their confidence in the accuracy of their recollection of some events was however misplaced given these factors and also given the fact that their recollection was inconsistent with the documentary record that still exists.

[113] Mr Cole's evidence was clearly unreliable in relation to three key issues. First his evidence as to the progress of the construction work in mid October 1999 when he left site, secondly AWB's role in the re-plastering of the east elevation of the existing dwelling and thirdly the circumstances and timing of the decision to change from Insulclad to stucco cladding.

[114] Mr Cole said the scaffolding was still up and the plastering and painting was not completed when he left site in mid October 1999. This cannot have been the case as there is a progress payment account dated 7 September 1999 which states "plaster complete and decks complete". It was recorded as having been paid on 24 September 1999 by cheque 175292. While it was conceivably

possible, as suggested by Mr Cole, that Mr Rawson may have submitted this account before the work was actually finished I do not accept Mrs Pinnock would have paid the account before completion of the work. In addition the A & S Engineering account which stated "Handrails manufactured, powder coated Karaka and installed" was rendered to AWB on 22 September 1999. Mr Cole acknowledged that the handrails would not be installed until after the plastering was completed. The practical completion invoice from AWB was dated 11 October 1999. The documentary record also shows that ABW, most likely Mr Cole himself, called for a final inspection on 11 October 1999. When questioned at the hearing Mr Cole said he would not have done this unless work was completed.

[115] Mr Cole was also adamant that re-plastering the eastern elevation of the existing dwelling was not part of the AWB contract and had not been done while he was on site. It is however clear that this was a negotiated extra to AWB's contract. A quotation for this work is dated 14 July 1999 and there is a reply facsimile from Mrs Pinnock to Mr Cole dated 23 July 1999 asking him to go ahead with this work. The $4,433.64 quoted also forms part of the additional items listed on the 11 October 1999 practical completion payment account. I accept Mrs Pinnock's evidence that this work was completed at the suggestion of Mr Cole who recommended it for aesthetic reasons.

[116] Mr Cole's memory that the cladding was always intended to be stucco is both inconsistent with the documentary record and the evidence of Mr Wood and Dr and Mrs Pinnock. His evidence in this regard is not credible and again I prefer Mrs Pinnock's evidence that the change came about at Mr Cole's suggestion.

[117] Mr Rawson's evidence was also unreliable on certain issues. He could not recall attending the arbitration when the record of that makes it clear he was there. In addition he could not recall attending site on other occasions where there is reliable evidence that he was

on site. His involvement in the construction was much greater than he recalled.

[118] I found in general Dr and Mrs Pinnocks' recollection of events to be more reliable and more consistent with the documentary record. Dr Pinnock in particular fully accepted that his memory was fragmentary but was able to give clear and plausible reasons as to why he remembered certain events and not others.

[119] Dr and Mrs Pinnock remained living on site while the alteration work was going on. Their recollection is that Mr Cole was on site each day and they understood his role to be one of site foreman or onsite project manager. Their involvement with Mr Rawson was primarily at the time the contract was negotiated and also towards the end when their relationship with Mr Cole had broken down. It was Mr Cole they dealt with on a day-to-day issues with any communication with Mr Rawson generally being by way of fax or phone.

[120] The record of Council inspections is consistent with Dr and Mrs Pinnock's evidence of Mr Cole's role on site. It is Mr Cole's name and phone number that appears beside the majority of the Council inspections. In general it is the person who called for the inspection whose name and number is recorded beside the relevant entry. This seems to the situation with this dwelling as other names and phone numbers appear beside some of the entries. It is reasonable therefore to assume that it was Mr Cole who called for the inspections with his name and phone number beside them.

[121] The documentary and other evidence before the Tribunal points to both Mr Rawson and Mr Cole being significantly involved in various parts of the project. Mr Rawson was primarily responsible for finalising the terms of the contract, the pricing of the job and any variations to the contract. He was also responsible for issuing the progress payment requests and for negotiating and entering into

agreements with the sub contractors. He also assisted on site with heavy work when Mr Cole required assistance. Mr Cole however was primarily responsible for the building work that was carried out on site. While he may not have been the person who engaged the subcontractors he had the role of site foreman. He was on site on a daily basis carrying out and supervising the construction work undertaken by AWB's employees or contract builders.

[122] While Mr Cole's role may not have extended to the supervision of specialist and experienced subcontractors engaged by AWB, he was responsible for sequencing the work and general onsite supervision. Mr Cole acknowledged in cross examination that he inspected the work being done. When he was asked whether he would have been up on ladder checking the work himself his answer was "Absolutely". He further stated that if he has seen any deficiencies he would have got the work redone and that if there was a problem with one of the sub-trades work that was visibly obvious he would tell them to fix it.

[123] In summary therefore I conclude that Mr Rawson's role was as the higher level project manager negotiating contracts, liaising with owners and dealing with the sub contractors on a contractual level. He also assisted on site from time to time when required but not on a regular basis. Mr Cole's role was more hands on doing the construction work and coordinating the onsite construction of the alterations. He called for building inspections and was responsible for sequencing and coordination of the work on site.

**DO MR RAWSON AND MR COLE OWE THE CLAIMANTS A DUTY OF CARE?**

[124] The effect of incorporation of a company is that the acts of its directors are usually identified with the company and do not give rise to personal liability. However, the courts have for some time determined that while the concept of limited liability is relevant it is

not decisive. Wylie J in *Chee v Stareast Investment Limited Anor,*[16] concluded that limited liability is not intended to provide company directors with a general immunity from tortious liability.

[125] In *Morton v Douglas Homes Ltd,*[17] Hardie Boys J concluded that where a company director has personal control over a building operation he or she can be held personally liable. This is an indicator of whether or not his or her personal carelessness is likely to have caused damage to a third party. In *Dicks v Hobson Swan Construction Ltd (in liq),*[18] Baragwanath J concluded that as Mr McDonald actually performed the construction of the house he was personally responsible for the defects which resulted in the dwelling leaking and therefore personally owed Mrs Dicks a duty of care.

[126] In *Hartley v Balemi,*[19] Stevens J concluded that personal involvement does not necessarily mean the physical work needs to be undertaken by a director but may include administering the construction of the building. The Court of Appeal in *Body Corporate 202254 v Taylor*[20] has also more recently considered director liability and analysed the reasoning in *Trevor Ivory Limited v Anderson.*[21] It held that the assumption of responsibility test promoted in that case was not an element of every tort. Chambers J expressly preferred an "elements of the tort" approach and noted that assumption of responsibility is not an element of the tort of negligence.

[127] If an element of torts approach is adopted in this case what needs to be considered in relation to Mr Cole and Mr Rawson is whether the elements of the tort of negligence are made out against them. In *Hartley v Balemi*, Stevens J observed:

[16] HC Auckland, CIV-2009-404-5255, 1 April 2010.
[17] [1984] 2 NZLR 548 (HC).
[18] (2006) 7 NZCPR 881 (HC), Baragwanath J.
[19] HC Auckland CIV-2006-404-2589, 29 March 2007.
[20] [2009] 2 NZLR 17 (CA).
[21] [1992] 2 NZLR 517 (CA).

> Therefore the test to be applied in examining whether the director of an incorporated 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 and 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.

**Roy Rawson**

[128] The role undertaken by Mr Rawson in the construction work is one that could potentially give rise to a duty of care. However there is no evidence that any of the work done by Mr Rawson has a causative link to the trustees' loss. In other words there is no causative link between any of his actions or omissions and the defects in this property that resulted in leaks. While there is evidence of workmanship issues onsite there is no evidence that the subcontractors Mr Rawson was responsible for engaging were not in general competent nor is there any evidence that he was remiss or negligent in the way he went about contractual negotiations either with the Pinnocks or with any subcontractors.

[129] I therefore conclude that while it is arguable that Mr Rawson personally owed a duty of care there is no evidence that he breached any duty of care owed. The claim against him is accordingly dismissed.

**Rowan Cole**

[130] I have concluded that Mr Cole effectively had the role of site foreman. He undertook building work and supervised the construction work on this property. I accept the submissions by Mr Salmon that Mr Cole was not liable for work done by other specialist contractors on site. He was entitled to rely on their expertise in carrying out the work such as plastering and roofing. Mr Cole however owes a duty of care in relation to the actual construction work he carried out and in relation to his general supervisory role.

[131] While some of the defects relate to workmanship issues by other specialists subcontractors there are two significant defects for which I conclude Mr Cole does have some responsibility. These are the failure to install flashings between the old and the new and the deficiencies in the installation of the barge boards and fascias. Mr Cole accepted when questioned that flashing should have been installed at the junctions between the old and the new, most likely on top of the hardibacker. It would either have been Mr Cole's job to do this or to ensure it was done before the stucco plaster was applied.

[132] The work Mr Cole did also contributed to the inadequate cover to the junction of fascia and barge boards. This defect was either caused by work being incorrectly sequenced or the fascia boards being installed with an insufficient gap for the plaster to be pushed up behind it to ensure weathertightness. Mr Cole should also have noticed that the gutters were embedded in the plaster and ensured this work was rectified prior to calling for the final inspection and rendering the final account.

[133] I therefore conclude that Mr Cole owes the trustees a duty of care and that he breached that duty of care in relation to at least two of the main defects. He is accordingly jointly and severally liable with the other responsible parties for the full amount of the established claim.

**DOES NISHMAR MOHAMMED OWE THE TRUSTEES A DUTY OF CARE? IF SO HAS HE BREACHED THE DUTY OF CARE OWED?**

[134] Mr Mohammed was the plasterer engaged to carry out the stucco plastering work. Although he was served with notice of the proceedings he chose not to take any part. The first issue to be addressed is whether Mr Mohammed owed the claimants a duty of care. In *Byron Avenue*[22] the High Court concluded that that a

[22] HC Auckland, CIV 2005-404-05561, 25 July 2008 at [296].

plasterer sub-contractor owed a duty of care to subsequent owners. In reaching this decision, Venning J stated:

> For the sake of completeness I confirm that I accept a tradesman such as a plasterer working on site owes a duty of care to the owner and to the subsequent owners, just as a builder does.

[135] In *Body Corporate 185960 v North Shore City Council,*[23] Duffy J observed that:

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

[136] In more recent claims involving leaky residential dwellings the terms "builder" or "contractor", (as used in leading cases such as *Bowen*[24]), have been given a wider meaning to include most specialists or qualified trades people involved in the building or construction of a dwelling house or multi-unit complexes. Given the nature of contracts in residential dwelling construction, attempts to differentiate between the respective roles of these persons in the contractual chain that delivers up dwelling houses in New Zealand can create an artificial distinction. Such a distinction does not accord with the practice of the building industry, the expectations of the community, or the statutory obligations incumbent on all those people.

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[23] HC Auckland, CIV 2006-404-003535, 22 December 2008 at [105].

[24] *Bowen v Paramount Builders (Hamilton) Limited* [1977] 2 NZLR 394; *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234; *Dicks v Hobson Swann Construction Limited*; *Byron Avenue* n 6 above, *Heng & Anor v Walshaw & Ors* [30 January 2008] WHRS 00734, Adjudicator John Green; and *Boyd v McGregor* HC Auckland CIV-2009-404-5332, 17 February 2010, Williams J.

[137] I accept that the role Mr Mohammed was engaged to carry out was a task in the construction process where the law expects a certain standard of care. I accordingly conclude that as the plasterer responsible for the stucco plastering he owes the claimants a duty of care. The issue therefore is whether he breached that duty of care.

[138] Deficiencies with the plastering work contributed to some of the defects. Mr Mohammed should have ensured the plaster was sufficiently pushed up behind the fascia and should also have ensured the gutters were not embedded in the plaster. In addition a plasterer has a responsibility to ensure the substrate is adequate before commencing plastering work. He should not have applied plaster to the junctions between the old and the new without ensuring these junctions were adequately flashed.

[139] I accordingly conclude that Mr Mohammed was negligent and that his negligence caused or contributed to the claimants loss. He is accordingly liable together with the other responsible parties for the full amount of the established claim.

**WERE THE CLAIMANTS CONTRIBUTORILY NEGLIGENT?**

[140] Awards of damages can be reduced due to contributory negligence where there is a failure on the part of the claimants to take reasonable care to protect their own interests. Section 3 of the Contributory Negligence Act 1947 allows for apportionment of responsibility for damage where there is fault on both sides or fault on the part of the claimant and other parties. Fault is defined by s2 of the Contributory Negligence Act as meaning:

> "Negligence, breach of statutory duty, or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence."

[141] For fault to be established the conduct must fall below the standard to be expected of a person of ordinary prudence. Contributory negligence does not depend so much on a breach of duty but on a person's carelessness in looking after his or her own safety. A person may be contributorily negligent if they ought reasonably to have foreseen that, if they did not act as a reasonably prudent person, they might be hurt themselves. The reasonable foreseeability of the risk of harm by a claimant is a prerequisite to a finding of contributory negligence. Any negligence or fault must be causative and operative.

[142] The respondents submit that Dr and Mrs Pinnock were negligent in dismissing Mr Wood the architect from his administration roll. They have the burden of proving contributory negligence. Mr Salmon submits that a vacuum was left when Mrs Pinnock took over Mr Wood's administration duties and that she was also remiss in dismissing AWB before completion. Mr Robertson submits that the Pinnocks were in a similar position to Mr Findlay in *Findlay and Sandelin v Auckland City Council* [25]. In that case the High Court concluded that Mr Findlay was contributorily negligent in failing to appoint a project manager and that this increased the probability he would suffer loss.

[143] I do not accept the present situation is analogous to that in *Findlay.* Mr Findlay entered into a labour only contract with the builders and he directly engaged all other sub-contractors. Although he did not have the skills or time to project manager he did not engage any other appropriately qualified person to do so. Unlike Mr Findlay, Dr and Mrs Pinnock had a full build and supervise contract with AWB. AWB was responsible for contracting any of the other trades as well as supervising the construction work and arranging the sequencing of trades. They were entitled to rely on AWB to project

[25] *Findlay v Sanderson* HC AK CIV-2009-404-6497, 16 September 2010

manage and supervise the construction work. Mr Wood was not appointed as a project manager but in an administration role.

[144] Mr Summers, at the hearing gave evidence that having an architect in an administration role was the exception rather than the norm at the time the alterations were carried out. He further stated that even today architects are only involved in five per cent of residential construction jobs. There are no cases that I am aware of where home owners have been found to be contributorily negligent by failing to engage an architect to administer a contract where they have a full contract with the builders. The administrative role Mr Wood initially had was largely to ensure the work had been completed so that money could be released from the bank and progress payments made.

[145] I do not consider that Dr and Mrs Pinnock would have been considered careless in looking after their own interests if they had not appointed Mr Wood to initially administer the contract. The fact he was appointed and then removed does not significantly change the situation. Even if I were to accept that Dr and Mrs Pinnock were remiss when they dismissed Mr Wood there is insufficient evidence to conclude that there is a causal link between their actions and the loss they have suffered. Apart from the change from the hip to the gable roof, which is not weathertightness related, there is insufficient evidence on which I could conclude that Mr Wood in his administration role would have noticed the defects which have caused leaks as part of his monitoring role.

[146] Similarly there is little evidence that the dismissal of AWB or the work undertaken by Eastridge contributed to the defects that have caused leaks that form part of this claim. All the established deficient work was completed by the time AWB left site. Mr Cole accepted that before calling for a final inspection he would have undertaken checks and gone through his mental “tag list”. Mr

Salmon submitted Mr Cole was not in a position to carry out the final checks as he had been removed from site before work was completed. I do not accept this submission given the fact that AWB had called for a final inspection more than a week before Mr Cole left site.

[147] One of the reasons behind the dismissal of AWB was its delay in finishing the outstanding work. Eastridge was subsequently contracted to complete this work. There is little, if any, evidence that the work Eastridge did was causative of leaks. To the contrary they seem to have remedied some of the outstanding work left undone by AWB. Eastridge's brief was to attend to the outstanding requirements in order for the work to obtain a CCC. I do not consider that either Eastridge or Dr and Mrs Pinnock can be criticised for not extending the scope of work to include checking all the work done by AWB. The balance of the work had been passed by the Council inspectors and there was no reason at that time for Dr and Mrs Pinnock to question the quality of the workmanship of AWB and its contractors other than in the isolated areas which had been identified by the Council.

[148] The respondents have accordingly failed to establish contributory negligence on the part of Dr and Mrs Pinnock.

**DID THE CLAIMANTS FAIL TO MITIGATE THEIR LOSS?**

[149] The respondents have all submitted that the trustees have failed to mitigate their loss. The legal position regarding claimants' obligation to mitigate is clear. They must take all reasonable steps to mitigate their loss and cannot recover any losses that should have been avoided.[26] The claimants therefore cannot succeed in full, in any claim in tort if they could reasonably have avoided the loss.

[26] *British Westinghouse v Underground Electric Railways Co of London* [1912] AC 673 (HL), [689]; and *Sullivan v Darkin* [1986] 1 NZLR 214, [217] – [218] (CA). *White v Rodney District Council* HC AK CIV-2009-404-2735, 19 November 2009

[150] The onus is on the respondents to prove that the claimants failed to mitigate their loss. It is therefore the respondents in this claim who must establish what steps the trustees should have taken that and how those steps would have reduced the damage[27]. The test is one of reasonableness in the circumstances as they appeared at the time. The duty to take reasonable steps should not be assessed applying hindsight and does not impose a high standard of reasonableness on the claimants[28].

[151] Mr Robertson submits that the claimants failed to mitigate their loss by removing Mr Wood, then dismissing ABW and appointment Mr Chandler and then Eastridge to complete the work. For similar reasons to those outlined when considering contributory negligence I conclude that the respondents did not fail to mitigate their loss by doing this. The respondents also submit that the claimants filed to mitigate their loss by not maintaining the property and also by engaging a number of different builders and specialists in a piecemeal fashion between 2001 and 2009.

[152] With the exception of build up of debris in some of the hard to reach gutters the evidence establishes that the property has been reasonably well maintained since the alterations were completed. Regular maintenance has been carried out and when problems arose the trustees engaged specialists to investigate the causes and/or carry out the required repairs. Mr Malone was also engaged to carry out ongoing maintenance after the Prendos reports concluded it was a leaky home. The respondents have accordingly failed to establish that the trustees did not mitigate their loss by failing to maintain the property.

[153] However the costs being claimed are not only for the 2009 work but also for failed repairs and remedial attempts. The respondents submit that the trustees failed to mitigate their loss by

[27] *Geest plc v Lansiquot* [2002] 1 Wlr 3111 at [13]-[14].
[28] *Banc de Portugal v Waterlow & Sons Limited* [1932] AC 452.

carrying out repairs in an ad hoc fashion and by not carrying out the full repairs recommended by Prendos back in 2004. In those circumstances they claim the cost of the Prendos reports and the costs incurred in relation to Mr Malone's work cannot be recoverable as the claimants did not act reasonably when failing to follow Prendos's advice.

[154] In response the trustees say that carrying out targeted repairs on the known issues together with a wait and see approach was reasonable at the time. While not in the written report this was an option they discussed with Prendos.

[155] Given the knowledge at the time I do not consider a targeted repair approach was unreasonable. Initially the only signs of leaks were through the dining room ceiling from the deck above. Leaks from skylights, roofs and decks above rooms have been recurring issues with dwellings even before the onset of the leaky home crisis. In 2001 knowledge of leaky homes was relatively low and the steps taken by Dr and Mrs Pinnock at that time were reasonable. They called in WLS, a leaks detection specialist, to determine the causes of those leaks. They then followed the recommendations provided which appeared to address the issues. When further leaks occurred they again called in WLS who in turn recommended Prendos. The trustees then contracted Prendos to carry out further investigations.

[156] While Dr and Mrs Pinnock did not at that time undertake a full reclad, as recommended in the Prendos report, I accept they were advised that Prendos always recommended a reclad but that other options were viable. The damage at that stage was not thought to be wide spread. While some of the targeted repairs were successful in specific locations they did not address the fundamental deficiencies with the complex junctions. Whilst the painting carried out may have resulted in increased damage the experts at the hearing accepted it was a reasonable step to take at the time. It has only more recently been established that the Equus paint can trap in

the moisture that has already penetrated the plaster cladding rather than reducing water ingress.

[157] In addition even if the targeted repair approach was unreasonable, the respondents have not established how failing to undertake a reclad at an earlier stage would have reduced the damages sought by anything more than the amount spent on failed targeted repairs. In particular they have produced no evidence that the costs of a full reclad have increased significantly in the intervening period.

[158] I therefore conclude that the respondents have failed to establish that the trustees have not acted reasonably in trying to mitigate their loss. It was not unreasonable for the trustees to carry out targeted repairs in 2004 and 2005. In addition the respondents have failed to establish that any steps the trustees should have taken, which they have not, would have reduced the damage. There is however some merit in the respondents' submission that some of the costs sought for earlier experts' reports and attempted repairs should not be successfully claimed against them. I will deal with these submissions when determining the appropriate amount of damages to award.

## WHAT WAS THE APPROPRIATE SCOPE AND COST OF REMEDIAL WORK?

[159] By the end of the hearing none of the respondents specifically disputed the necessity for complete reclad. They did however dispute the some of the costs sought. In particular the cost of re-roofing, the cost of changing the gable roof to a hip and also some of the cladding and painting costs. The Council in particular also considered some of the other remedial costs to be excessive and disputed some of the consequential and associated costs.

[160] At the commencement of the hearing the trustees confirmed they were seeking $329,392 for the remedial building work exclusive of architects fees of $32,124 and other professional fees. During the course of the hearing they deducted from this the sum of $6,970 for the re-tanking work and $12,000 for the costs of reconstructing the balcony. This reduced the remedial building work being claimed to $310,422.

[161] The Council was the only party who called detailed evidence rebutting the quantum claimed or specifically disputed some of the specific items claimed. The main disputes were in relation to the four areas outlined in paragraph [159] above.

**Roofing and Spouting**

[162] Mr White, the Council's quantum expert, considered $39,481 should be deducted from the cost of the remedial work for betterment items in relation to the roof and spouting. Mr McCambridge acknowledged $10,000 of the roofing work was betterment. The Council submitted that the costs incurred in changing the gable roof on the south elevation were not weathertightness related and therefore were not claimable. Mr McCambridge's opinion however was that the trustees would not be able to get a building consent without addressing the non-compliant roof and therefore this was reasonably part of the remedial costs.

[163] The Council also disputed the need to re-roof the property. Mr Robertson submitted that this was primarily a matter of claimant choice as the reroofing was carried out in order for eaves to be incorporated into the design. The evidence however establishes that the existing roof would need to have been enlarged to accommodate the cavity that needed to be incorporated when carrying out the remedial work. Mr Summers gave evidence of ways this could be achieved without a complete re-roof. He stated that he personally

had experience with this type of work and it could be done robustly and cost-effectively.

[164] While a reroof may have been a good option for both practical and aesthetic reasons I accept the Council's argument that the remedial work could have been completed more cost effectively without reroofing the property. I also accept that the change from a hip roof to a gable roof was not related to weathertightness issues. The amount by which roofing costs should be reduced due to betterment or claimant choice should therefore be increased to $21,000 which is an additional $11,000 from that conceded by the trustees. I note that this amount, as well as the following deductions made, is a rounded estimate after an assessment of the information currently before the Tribunal. To calculate the exact costs of the amounts by which the claim should be reduced would require more detailed evidence from the quantum experts. This would most likely result in the parties incurring additional costs in excess of the amounts being deducted. In those circumstances I conclude it is more appropriate to determine the amount of any deductions on an estimate calculated on the basis of the information currently before the Tribunal.

**Painting**

[165] Mr White deducted the full amount of the painting costs as being betterment. It was however established that the property had been repainted in 2004-2005. The paint therefore had approximately five years remaining in its normal life expectancy. The 50% painting cost reduction allowed by Mr McCambridge is therefore reasonable and no further amount should be deducted for betterment in relation to the painting.

**Cladding**

[166] Mr White submitted that a further $18,941.38 should be deducted from the remedial costs for betterment in relation to the exterior cladding cost. In particular he did not consider it was necessary to reclad the concrete block garage with cedar weatherboards. He also disputed the cost of some of the timber replacement as he understood it was the result of borer infestation rather than water damage and he also had some concerns in relation to the RAB board. I am satisfied appropriate deductions have been made by Mr McCambridge for the cost of timber replacement as a result of borer infestation. I am also satisfied that the RAB board was necessary and cost effective considering that Dr and Mrs Pinnock remained living in the property while the remedial work was carried out.

[167] I however accept that there is an element of betterment in relation to the recladding of the garage. If the property had been reclad in stucco there would have been no need to reclad the garage. The necessity for the garage recladding was due to a different exterior cladding material being used. This is an issue of claimant choice rather than something required to carry out the remedial work. For similar reasons I accept the total costs of recladding the old part of the eastern elevation should not be at the expense of any of the respondents. The claimants have failed to establish the causes of water ingress or damage in this location and whether it was as a result of the 1999 alterations. A further $9,000 is therefore deducted from the remedial costs for betterment in relation to cladding.

**Excessive Costs**

[168] The Council submitted that additional costs have been incurred by the way the contract had been managed as a cost plus job together with the fact that Mr McCambridge was relatively inexperienced with remedial projects involving leaky homes. It noted

no tendering process had been carried out and nor had there been a confined scope of work completed prior to the work commencing. Mr White considers the job could have been completed more cost efficiently if it had been managed differently and that the work done exceeded what was reasonably required to achieve a Weathertight home.

[169] I accept Mr White's opinion that costs may have been lower if the job had been managed differently. Given the fact that there have been a number of attempts at targeted repairs which have not worked it is understandable that the trustees would want to ensure a high quality and comprehensive end result. As a result there have been some costs incurred which should not legitimately be passed on to any of the liable respondents. I however accept that some of the amounts Mr White has identified as excessive costs were caused when more damage was exposed than anticipated once the cladding was removed. I therefore conclude there should be a further $6,000 deduction for excessive costs over and above that already allowed by Mr McCambridge. In reaching this conclusion I would note that I am not questioning the integrity of either Mr McCambridge or Mr Fordyce nor do I suggest that their direct costs are excessive.

**Remedial building work summary**

[170] The additional deductions for building costs total $26,000 reducing the established amount of the remedial work to $284,422 exclusive of the architects and other professional fees.

**Architect's Fees**

[171] As a result of the concessions made during the hearing, and the additional deductions made above, a proportionate reduction also needs to be made to the architect's fees. I calculate this further adjustment to be $2,698 in addition to that already conceded. Architects fees of $29,426 have accordingly been established.

**Other Professional Fees**

[172] The claimants are also seeking the following amounts for professional fees in relation to the remedial work:

| | |
|---|---|
| ACC fees | 7,213.00 |
| Blakey Scott | 2,640.00 |
| Cove Kinloch | 4,083.00 |
| Day Consultants | 3,434.00 |
| **TOTAL** | **17,370.00** |

[173] Initially the Council submitted that these amounts should be reduced to take into account the amounts deducted for betterment and non-weathertightness expenses. However in closing submissions the Council accepted that the fees in relation to the planner, Cove Kinloch, and the engineers were either claimable or they were not. The planner's fee was the only one of these fees specifically disputed as the Council's expert had seen no evidence that it was required because of weathertightness issues. I am satisfied from the information now provided that this was a necessary expense in order to get consent for the remedial work to proceed. All the above amounts are accordingly allowed in full.

**Targeted Remedial Work & Reports**

[174] The claimants are also seeking the following amounts for failed remedial work and earlier reports:

| | |
|---|---|
| Drybuild Report | 3,459.38 |
| Prendos Limited report | 5,942.70 |
| Malone Contracting(including Equus paint) | 52,841.63 |
| Drainlayer | 901.56 |
| Electrician | 402.15 |
| **TOTAL** | **63,547.42** |

[175] I make no award for the Prendos costs and the Drybuild reports. The Prendos report recommendations were not followed and there is no evidence that this report or the Drybuild report was obtained in order to carry out the current remedial work. Included in the Malone Contracting amount is $23,576 being the cost of repainting the property in 2005. This amount is more appropriately categorised as maintenance rather than targeted repairs. It is also appropriate to deduct a further 25% off the balance of $29,265 paid to Malone contracting as some of the other work it did is also more appropriately described as ongoing maintenance rather than targeted repairs or remedial work. This was acknowledged by Dr Pinnock in his evidence. The cost of the drain layer and the electrician are however related to targeted repairs. I accordingly award $23,251 for earlier repairs calculated as follows:

| | |
|---|---|
| Drybuild Report | Nil |
| Prendos Limited report | nil |
| Malone Contracting | 21,948.00 |
| Drainlayer | 901.00 |
| Electrician | 402.00 |
| **TOTAL** | **23,251.00** |

**Consequential Costs**

[176] The consequential costs being claimed by the claimants, excluding interest are:

| | |
|---|---|
| Quotable value | 650.00 |
| Kiwi alarms | 87.00 |
| Westpac fees | 591.00 |
| Storage fees | 636.00 |
| WHRS report | 500.00 |
| **TOTAL** | **2,464.00** |

[177] The only amount claimed in relation to consequential costs that was disputed by any of the respondents was the amount for storage fees. I am however satisfied that Dr and Mrs Pinnock were required to put some of their belongings into storage while the remedial work was carried out. I therefore conclude that all of the consequential costs claimed were reasonable and have been established.

**General damages**

[178] The trustees have also applied for general damages of $50,000 or $25,000 each for Dr and Mrs Pinnock. Whilst there has been some debate as to whether damages should be awarded on a per dwelling or per owner basis Ellis J concluded in *Findlay Family Trust*[29] that the *Byron Avenue*[30] appeal confirmed the a guideline for awarding general damages in leaky building cases was $25,000 per dwelling for owner occupiers. Dr and Mrs Pinnock have both suffered considerable stress and financial difficulty as a result of having a leaky home. They have also suffered significant inconvenience by living in the property while the remedial work was being carried out. I accordingly accept that it is appropriate to award general damages of $25,000.

**Interest**

[179] The trustees are seeking interest on the bank loans to fund repairs. The Act provides for interest to be awarded at the rate of the 90 day bill rate plus 2%. In the circumstances of this case it is appropriate that interest is awarded from the payment of the third progress claim to Marin contractors which was most likely at the end of July 2009.

[29] *Findlay & Anor as Trustees of the Lee Findlay Family Trust v Auckland City Council* HC Auckland, CIV-2009-404-6497, 16 September 2010.
[30] *O'Hagan v Body Corporate 189855* [2010] NZCA 65.

[180] The established costs, exclusive of general damages, are $356,933. The 90 day bill rate plus 2% is 4.68% which means interest accrues at $45.76 a day. There are 661 days between 1 August 2009 and 23 May 2011. Interest of $30,247 is therefore awarded.

**Summary in relation to Quantum**

[181] The claimants have established the claim to the amount of $412,180 which is calculated as follows:

| | |
|---|---|
| Remedial building costs | 284,422.00 |
| Architects fees adjusted | 29,426.00 |
| Other professional fees | 17,370.00 |
| Earlier repairs and reports | 23,251.00 |
| Consequential damages | 2,464.00 |
| Interest | 30,247.00 |
| General damages | 25,000.00 |
| **TOTAL** | **412,180.00** |

## WHAT CONTRIBUTION SHOULD EACH OF THE LIABLE PARTIES PAY?

[182] 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.

[183] 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.

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

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

[185] Section 17(2) of the Law Reform Act 1936 sets out the approach to be taken. It provides that the contribution recoverable shall be what is fair taking into account the relevant responsibilities of the parties for the damage. One of the difficulties in assessing contributions in this claim is that, as like many other claims, AWB and some of the sub-trades responsible for the defects are not parties to this claim because they no longer exist or cannot be identified.

[186] Ellis J in *Findlay*[31] stated that apportionment is not a mathematical exercise but a matter or judgment, proportion and balance. Mr Mohammed and Mr Cole are the building parties responsible for parts of the defective work. Mr Cole was also the person on site who was primarily responsible for the coordination and supervision of the construction work. He should therefore be responsible for a greater contribution than Mr Mohammed who only carried out the plastering work. The Council is only liable in relation to some of the defects.

[187] I accordingly set the Council's contribution at 18%, Mr Mohammed's at 38% and that of Mr Cole at 44%.

## CONCLUSION AND ORDERS

[188] The claim by Ralph Ernest Kennedy Pinnock, Adriana Lucy Pinnock and Peter Bruce Jacobson is proven to the extent of $412,180. Auckland Council, Rowan Nigel Cole and Nishar

[31] See n29 above.

Mohammed are all jointly and severally liable for this amount. For the reasons set out in this determination I make the following orders:

i. Auckland Council is to pay the claimants the sum of $412,180 forthwith. Auckland Council is entitled to recover a contribution of up to $337,988 from Rowan Nigel Cole and Nishar Mohammed for any amount paid in excess of $74,192.

ii. Rowan Nigel Cole is ordered to pay the claimants the sum of $412,180 forthwith. Rowan Nigel Cole is entitled to recover a contribution of up to $230,820 from the Auckland Council and Nishar Mohammed for any amount paid in excess of $181,360.

iii. Nishar Mohammed is ordered to pay the claimants the sum of $412,180 forthwith. Nishar Mohammed is entitled to recover a contribution of up to $255,552 from the Auckland Council and Rowan Nigel Cole for any amount paid in excess of $156,628

iv. The claim against Roy Rawson and David Wood is dismissed.

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

| | |
|---|---|
| First Respondent, Auckland Council | $74,192.00 |
| Third Respondent, Rowan Nigel Cole | $181,360.00 |
| Fifth Respondent, Nishar Mohammed | $156,628.00 |

[190] If any of the parties listed above fails 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 188 above.

**DATED** this 23rd day of May 2011

_____

P A McConnell
Tribunal Chair