

IN THE WEATHERTIGHT HOMES TRIBUNAL

**TRI-2011-100-000020
[2012] NZWHT AUCKLAND 8**

BETWEEN JILL FRANCES ROBINSON,
ANTHONY PHILLIP SELWYN
ROBINSON AND GEOFFREY
ALEXANDER HAMILTON as
Trustees of the ROBINSON
FAMILY TRUST
Claimant

AND AUCKLAND COUNCIL
First Respondent

AND K & L CONSTRUCTION
LIMITED (Company no.
1028876) (non-trading and
about to be removed from the
Register – claim discontinued)
Second Respondent

AND LI YI TANG (Undischarged
bankrupt – claim discontinued)
Third Respondent

AND XIN LIU (not served - claim
discontinued)
Fourth Respondent

AND KAM SING CHAN
Fifth Respondent

AND PHILLIP ING BUILDING
LIMITED (Company no.
860836)
Sixth Respondent

AND PHILLIP ING
Seventh Respondent

AND COLIN EWAN HOLMES
(settled - claim discontinued)
Eighth Respondent

Hearing: 26 January 2012

Closing
Submissions: 2 February 2012

Counsel

Appearances: Mathew Taylor and Robbie Bryant for the Claimants
Sarah Macky for the First Respondent
Mr Kam Chan and Mr Phillip Ing, self represented

Decision: 22nd February 2012

FINAL DETERMINATION
Adjudicator: K D Kilgour

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[1] This claim concerns defective construction of a townhouse situated at 829 Manukau Road, Royal Oak, Auckland. The townhouse was built together with two adjoining townhouses between January 2002 and May 2003.

[2] During the planning, consent and building phases the land was owned by the fourth respondent, Xin Liu and his brother-in law, the fifth respondent, Kam Chan. The development of the three townhouses was controlled by Ms Li Tang, the former wife of Mr Liu and the sister-in law of Kam Chan. The three townhouses were built by Phillip Ing and his building company, Phillip Ing Building Limited.

[3] Colin Holmes, the eighth respondent was engaged by Ms Tang to prepare consent drawings solely. The claimants, Anthony Robinson and Jill Robinson settled their claim against Mr Holmes prior to the hearing and the Council agreed liability and quantum with Mr and Mrs Robinson before the hearing.

[4] Mr and Mrs Robinson purchased the rear townhouse, 289C Manukau Road, in July 2003 as an investment property.

[5] The Robinsons detected moisture ingress problems in March 2009 during a tenant inspection. They lodged their claim with the Department of Building and Housing on 16 October 2009 and Frank Wiemann, the WHRS assessor, reported it as a leaky home on 15 January 2010.

[6] The Robinsons engaged Kaizon Limited and Neil Alvey, to assist with the remedial design and works. The remedial contract was put to tender and the lowest tenderer completed work in January 2012.

[7] Mr Wiemann and Mr Alvey agreed on the primary building defects which generated the need to reclad the townhouse and stated that they were essentially workmanship issues.

[8] The Robinsons seek damages from the Council, the property owner Kam Chan and the builder, Phillip Ing, and Phillip Ing Building Limited.

[9] The Council is pursuing cross-claims against Phillip Ing Building Limited and Phillip Ing for they were engaged to carry out the building work and all of the remedial work resulted from defective building work.

ISSUES

[10] The issues for determination by the Tribunal are:

- What are the defects that have caused damage?
- Was the Council negligent in its building inspection and certification processes?
- Was Kam Chan a developer and as such did he owe a non-delegable duty to the claimants?
- Were Phillip Ing Building Limited and Phillip Ing negligent and if so was this negligence causative of damage?
- What was the appropriate repair cost?
- What contribution should each of the liable respondents pay?

BACKGROUND TO CLAIM

[11] Li Yi Tang, commonly known as Louisa was adjudicated bankrupt on 11 January 2011 under her own debtors petition¹ and yet she participated throughout the proceedings and was summoned to the hearing to be questioned. Her evidence was scant, and her

answer to many questions and enquiries was she “could not remember”. Neither was Louisa able to produce any documents of relevance because she said a house fire some years back destroyed all her documents.

[12] Nevertheless she did admit that she was at the time of the building of the townhouse in the business of property development and that she operated her property development through the second respondent, K & L Construction Limited. She was the sole director and shareholder of that company. However, it has not traded for some years she said and is in the process of being struck off the Register.

[13] Louisa’s status has halted the claim against her and the claimants discontinued their claim against K & L Construction Limited because, whilst that company was clearly once a property development company; the only evidence of the involvement of the company is its name on an application for resource consent to subdivide the land.

[14] Louisa and her estranged husband acquired ownership of the property in the spring of 1999. She mentioned that she had separated from her husband, the fourth respondent, Xin Liu sometime during or after the development (she was not able to be more precise) and was unable to tell us the whereabouts of her former husband. She said she has not been in contact with him for some time. Kam Chan was also unable to advise the whereabouts of Mr Liu. The claim was discontinued against Mr Liu for he has not been served.

[15] Louisa mentioned after acquiring ownership of the property they moved the old home from the land and then decided to go about developing the land with the construction of three townhouses for

¹ Insolvency Estate No. 847058.

various family members. Louisa and Kam Chan explained at the hearing that the front unit was to be built for a relative of Mr Liu, the middle unit for Louisa's mother, Louisa's sister and Kam Chan (Louisa's sister being Kam Chan's wife) and the rear unit for Louisa.

[16] The property was transferred from Mr Liu and Louisa to Mr Liu and Kam Chan in 2001, although the reason for this was not given by Louisa or Kam Chan. The property was mortgaged to the ASB Bank in August 2001 presumably to finance the development of three townhouses and during the ownership by Mr Liu and Kam Chan resource consent to subdivide was applied for and obtained, subdivision into three allotments occurred and the building of three townhouses were completed.

[17] Louisa mentioned that she engaged Mr Ing and his company to build the three townhouses after first engaging the eighth respondent to draft the plans sufficient for building consent purposes. Louisa mentioned that she had engaged Mr Ing on previous building developments.

[18] Louisa stated that she sourced and ordered all the necessary building materials and paid the suppliers. Mr Ing and his building company were engaged on a labour-only basis as were the other trades, however, Louisa and Mr Ing were unable to recall any of their names.

[19] Building consent was issued by Auckland City Council in January 2002 and Mr Ing and his building company constructed the three townhouses between January 2002 and May 2003. The final building inspection was undertaken on 6 June 2003 and the Code Compliance Certificate was issued on 11 June 2003. All three townhouses were transferred by Mr Liu and Kam Chan again, for some unexplained reason, to three family members on 13 June 2003.

[20] Shortly after the Robinsons purchased from these family members they noticed a leak in the skylight in the kitchen ceiling. After some difficulty in contacting Louisa and having her make arrangements to rectify the problem Louisa engaged AAA Home Check Limited which identified the problem as being caused by an incorrect installation of the skylight and had the installation rectified and the problem repaired. The skylight issue was a discrete and isolated defect which the subsequent experts did not find to be a material defect causative of damage.

[21] In March 2009 when Mrs Robinson undertook a tenant inspection of the townhouse. She was advised of a water ingress problem near the ranch slider doors leading to the balcony. In May 2009 the Robinsons engaged a builder to further investigate and repair the balcony/ranch slider door problem. After removal of an area of cladding it was discovered that the problem was much larger than first thought. Further enquiries caused the Robinsons to make an application to the Department of Building and Housing for an assessor's report. In November 2010 Robinsons engaged Kaizon Limited for a remedial design and to manage remedial work. Kaizon obtained building consent in July 2011 and negotiated a remedial contract by tender, accepting the lowest offer. Remedial work was completed at the end of January 2012 at the cost of \$209,979.77.

WHAT ARE THE DEFECTS THAT HAVE CAUSED DAMAGE?

[22] Mr Wiemann stated that the primary defects causing damage to the townhouse, which were all essentially building and workmanship related, were:

- lack of ground clearance and level difference causing water uptake and damage;
- window and door to wall junctions inadequately installed;

- cladding cracking, texture coating flaking possibly because of lack of vertical control joints;
- membrane roof, in adequate edge detail and lack of fall;
- lack of fall on the balcony with inadequate outlets, lack of cladding clearance and flat plastered balustrade tops and balustrade walls; and
- inter-storey control joints trim defective.²

[23] Mr Wiemann said that to repair the townhouse it would need to be reclad with a drained and vented cavity, and areas of framing and roofing would need to be replaced.

[24] The principal of Kaizon, Neil Alvey, filed an extensive brief of evidence which was reiterated and elaborated on at the hearing. Mr Wiemann agreed with Mr Alvey's findings stating that Mr Alvey had the benefit of greater invasive testing, was involved with the remediation and was able to observe the more extensive damage found once the cladding had been removed. Mr Alvey's findings are clearly and adequately summarised in his leak list³ which Mr Wiemann agreed with.

[25] Mr Alvey further stated that the majority of the defects were workmanship issues caused by the builder and cladding installer. There was no disagreement with experts' findings, the scope of remedial works or the remedial costs.

[26] I find that the material defects causative of damage to the townhouse are properly summarised in Mr Alvey's leak list, that the proper course of remediation to make the townhouse code compliant was a full reclad with a ventilated cavity in accordance with the scope of works prepared by Kaizon.

² WHRS assessor's report, 15 January 2010 at [15].

³ Mr Alvey's brief of evidence at 107-108; Leaks List attached at Annexure 1.

WAS THE COUNCIL NEGLIGENT IN ITS INSPECTION AND CERTIFICATION PROCESSES?

[27] The Robinsons' claim that Council owed them, as subsequent buyers of the townhouse, a duty of care to exercise all reasonable care in the discharge of its statutory powers, functions and duties including:

- i. not to issue a building consent unless it was satisfied that the plans were in accordance with the Building Act 1991;
- ii. having a system of inspections in place to ensure that the properties were built in accordance with the building consent and the Building Act 1991;
- iii. to carry out the inspections in accordance with that inspection system; and
- iv. to issue a Code Compliance Certificate in relation to the completed building works once it was satisfied on reasonable grounds that the building had been constructed in accordance with the building consent and the Building Act 1991.

[28] There were two final inspections one undertaken on 28 May 2003 and the next on 6 June 2003 and the Council issued its Code Compliance Certificate on 11 June 2003. Ms Macky conceded in her closing submissions that when Mr Ing requested a Code Compliance Certificate be issued (28 May 2003) that all of the construction work at the three townhouses was completed because Council issued its certificate shortly thereafter.⁴

[29] I heard evidence from Malcolm McCluskey, the Council claims manager responsible for dealing with this claim, that at the time of admitting the claim his view was that the Council had a likely

⁴ Closing submissions of First Respondent at [43].

exposure for its inspection processes and the issue of the Compliance Certificate.

[30] I was not presented with evidence from any expert qualified to give evidence about reasonable Council inspection process and practices at the time of construction (2002-2003). Mr Wiemann gave his opinion on what a prudent Council officer ought to have detected at the inspection stages but was careful to state that he had never worked for a territorial local authority and was reluctant to criticise the Council for its inspection processes for any defects in the building work that could not be seen at the final inspection. On the other hand Ms Macky submitted that Mr Alvey went too far in concluding that the Council was liable for defects that could not be seen at the final inspection. His evidence was clearly set down in his leaks list. When questioned at the hearing, Mr Alvey did accept that he could not be certain whether or not aspects of the construction were available to be seen by a Council inspector at the pre-line inspections.

[31] Ms Macky submitted that if I find that the Council's inspection processes did fall below the reasonable standard of care when inspecting then that liability can only extend to the defects visible at the final inspection which a reasonable Council officer ought to have detected in 2002/2003.

[32] The statutory background to these claims is now well understood. Section 7 of the Building Act 1991 requires that all building work for residential properties is required to comply with the Building Code. As the townhouse was constructed in 2002 and 2003 the Building Act 1991 was applicable. Section 32 of the Act requires building work to be done in accordance with the building consent and section 43 states that the Council shall only issue the Code Compliance Certificate when satisfied that the building work complies with the Building Code.

[33] A territorial authority can be liable to owners and subsequent purchasers of residential properties for defects caused or not prevented by its building inspector's negligence.⁵

[34] The High Court decision of *Body Corporate 188529 v North Shore City Council (Sunset Terraces)*⁶, which was upheld on appeal by the Supreme Court, clarified that the duty of a local authority was to take reasonable care in performing its inspection work during construction and to ensure compliance with the building consent issued and to only certify when reasonably satisfied that there is compliance with the Building Code.

[35] It is generally understood that the standards by which the conduct of a Council should be measured are set out in *Askin v Knox*⁷ where the Court concluded that a council officer's conduct would be judged against the knowledge and practice at the time the negligent act or omission took place. This was reinforced by Stevens J in *Hartley v Balemi*.⁸

[36] In determining whether the Council has failed to meet the standard of care expected it is only necessary to concentrate on the cladding defects for they alone have generated the need to reclad fully the townhouse.

[37] Mr Taylor submits that the evidence establishes that the Council ought to have detected the majority of defects during the course of inspections and the failure to do so renders it liable for the loss suffered by the claimants. I accept the evidence of Mr Alvey and Mr Wiemann that the Council should have detected defects 1A, 1B,

⁵ *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC); *Bowen v Paramount Builders (Hamilton) Limited* [1977] 1 NZLR 394 (CA).

⁶ *Body Corporate 188529 v North Shore City Council*, HC Auckland, CIV-2004-404-3230 (*Sunset Terraces*) at [220] – [221].

⁷ *Askin v Knox* [1989] 1 NZLR 248.

⁸ *Hartley v Balemi* HC Auckland, CIV-2006-404-2589, 29 March 2007.

2, 10 and 12A. Defects 1A, 1B & 2 would have been clearly observable from the ground by the Council officer.

[38] I accept Mr Alvey's evidence, which Ms Macky also accepted in her closing submissions,⁹ that defects 8, 10, and 12A of themselves generated the requirement for a full re-clad of the townhouse.

[39] In accepting the experts' evidence that Council should have observed at the final inspection defects 1A, 1B and 2, Mr Wiemann and Mr Alvey stated that these defects would have been clearly observable by a council officer from ground level.

[40] I accept Mr Alvey's evidence that defect 4 should have been detected at the pre-line inspection stage, despite the fact that Mr Wiemann disagreed because there was nothing on the Council file as to how Council satisfied itself that the PVC corner angles on all elevations complied with the building consent and Building Code.

[41] Mr Alvey said the Council should have detected defect 6 at the pre-line inspection stage and Mr Wiemann agreed if the texture coating was not on at that stage of construction.

[42] Both experts agreed that defect 7 should have been detected by Council at its final inspections.

[43] Mr Alvey submitted defect 9 should have been observable by Council at the pre-line inspection. Mr Wiemann suggested that it was probably not observable. Again, however, there is no material on the Council file as to how the Council satisfied itself that the external joinery installation was code compliant, thus I prefer Mr Alvey's opinion.

⁹ Closing submissions of the First Respondent at [49].

[44] Mr Wiemann disagreed with Mr Alvey's submission that defect 12B should have been observable by Council at its final inspection. I prefer the plausible explanation of Mr Alvey, for, although he agrees he has no knowledge of when the paving around the townhouse was completed, it was most likely completed by the final inspection stage because the concrete gully was hard up against the wall cladding at that point.

[45] In any event there was sufficient consensus amongst the experts as to the cladding defects which should have been observable during final inspections but which were not and in themselves necessitated the need for a full reclad. Whilst I accept Ms Macky's evidence that these primary defects were the result of poor workmanship, the Council's failure at the inspection process was a significant causative factor for the loss the Robinsons have suffered. For the reasons stated above, I find the Council to be in breach of its duty to take reasonable care in the performance of its regulatory functions in inspecting the townhouse to ensure compliance and in issuing the Certificate of Code Compliance.

[46] Accordingly the Council's breach amounted to negligence and caused the Robinsons losses. The Council is jointly and severally liable for the full amount of the established claim.

THE CLAIM AGAINST KAM CHAN

[47] The Robinsons and the Council claim that Kam Chan was one of the developers of the three townhouses and thereby owed the claimants a non-delegable duty of care to ensure that due skill and care is exercised in the construction and design of the dwellings.

[48] Kam Chan was joint owner of the entire construction site for the entire period of the development. His evidence was that he visited the building site during construction either once a day or if not then every few days. Kam Chan says that although the three

townhouses were all being built at the same time his focus was only upon the middle one which he was intending to live in with his wife and mother-in-law. He said that some time in 2001 Ms Tang told her sister, Kam Chan's wife, that she was planning to build three terrace houses and that the front and rear houses were taken by relatives of Mr Liu but that the middle townhouse was available. He said that he and his wife and mother-in-law took occupation of the middle townhouse in June 2003 but that he was not the developer although he was linked in a development with Ms Tang in 2000 at 511 Manukau Road, Epsom.

[49] Clearly Kam Chan's site visits during construction would have enabled him to observe construction on each of the townhouses for they were built at the same time.

[50] Kam Chan said that he was not aware that he was a registered proprietor of the land prior to and during the building of the townhouses. He said that he did not sign any documentation relating to the purchase or the sale of the three townhouses nor did he sign any documents mortgaging the property in August 2001 to the ASB Bank.

[51] Mr Taylor and Ms Macky submitted that Kam Chan must be mistaken in his recollection that he signed no documents for it is impossible for title to be transferred without appropriate documentation being completed by a registered proprietor and mortgagor. I agree with this submission.

[52] Kam Chan was not able to provide any satisfactory explanation for why he was named on the title without his knowledge. His explanation that "he cannot recall..." is not credible. The only reasonable conclusion I can reach based on hearing Kam Chan is that he was unable to recall signing the relevant documents,

obtaining ownership, mortgaging, and for sale of the three townhouses.

[53] I accept that Ms Tang was the principal behind the development and made most of the critical decisions regarding the subdivision, choosing the design and the building trades. Kam Chan stated that his involvement was limited to selecting the internal paint colour with the property he presently owns. However as a joint registered proprietor of the three new townhouses I can only reasonably conclude that he stood to benefit from the development. His visits to site also point to a more significant involvement than selecting internal paint colours.

[54] The analysis of who fits the category of a developer and who owes a non-delegable duty of care is clearly established in the Court of Appeal decision of *Mt Albert Borough Council v Johnson*:¹⁰

In the instant type of case a development company acquires land, subdivides it, and has homes built on the lots for sale to members of the general public. The company's interest is primarily a business one. That purpose has buildings put up which are intended to house people for many years and it makes extensive and abiding decisions in the landscape.

[55] This decision is clear authority that the developer's duty to see that proper care and skill are exercised in the building of the houses cannot be avoided by delegation. There are two essential considerations giving rise to the non-delegable duty of care explained by Doogue AJ in *Body Corporate 187820 v Auckland City Council*.¹¹ They are:

¹⁰ *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 235 at 240.

¹¹ *Body Corporate 187820 v Auckland City Council* HC Auckland, CIV-2004-404-6508, 26 September 2005; *Body Corporate 188273 v Leuschke Group Architects Limited* HC Auckland, CIV-2004-404-2003, 28 September 2007.

- a) direct involvement or control of the building process – in this claim Kam Chan whilst not having central involvement or control of the building had direct involvement by ownership of the land which I find supplies the required degree of proximity to meet such criteria; and
- b) that the developer constructs the homes for other people for financial benefit.

[56] Upon hearing the evidence presented I am satisfied that Kam Chan acquired and subdivided the land and once the townhouses were built transferred ownership to third parties, albeit family members for the financial benefit of Mr Liu, and Kam Chan, the property owner.

[57] I accept Ms Macky's submission that the fact that Kam Chan states that he may have chosen to focus only on the progress of construction of the middle townhouse provides him with no defence. The duty of care imposed on a developer cannot be delegated. The fact that Ms Tang was also a developer and that she more actively managed the development process makes no difference as the law states that there can be more than one developer.¹²

[58] I am satisfied that Kam Chan, by virtue of his ownership of the land, had control (albeit jointly) of the subdivision and building processes which qualifies him for the imposition of liability. Kam Chan's ownership of the land which he allowed to be extensively changed by subdivision and building makes him jointly responsible for the implementation and completion of the development process.

[59] Based on these authorities, Kam Chan was a joint developer who enabled construction of the claimants' townhouse. Although he himself may not have undertaken any act or omission that directly led

¹² *Body Corporate 188273 v Leuschke Group Architects Limited* HC Auckland, CIV-2004-404-2003, 28 September 2007

to the claimant's loss, as a developer he owed a non-delegable duty of care to ensure that due skill and care was exercised in the construction and design of the townhouse. Whilst the building task was delegated to Mr Ing and his building company, the duty of care could not be. As such I find that Kam Chan is jointly and severally liable to the Robinsons for the full amount of the established claim.

CLAIM AGAINST PHILLIP ING BUILDING LIMITED AND PHILLIP ING

[60] Phillip Ing Building Limited was the building company engaged by Ms Tang on a labour-only basis to undertake the building work. Mr Ing is the sole shareholder and director and his evidence was that he was the principal builder who personally undertook the building work. His company engaged several labourers to assist with construction at different stages. Ms Tang and Mr Ing agreed that the work carried out by Phillip Ing Building Limited and Phillip Ing was accurately reflected in the quotation from Phillip Ing.¹³ This included installation of the Harditex and joinery.

[61] The Council inspections booking records show that Phillip Ing was the contact person for the building inspectors for each Council inspection. His mobile telephone number is today the same as that detailed in the Council's records. He also completed the 'advice of completion of building work' form.

[62] Mr Ing stated that he is a full time builder and had been building since 1997 and is still building. He said that he had experience with Harditex product and built some ten homes with Harditex cladding before building the Robinsons' townhouse. He also stated that he was fully aware of the James Hardie technical installation literature before the building at 829 Manukau Road.

¹³ Document 0276 Phillip Ing Building Limited quotation to Louisa Lui.

[63] I am satisfied that Phillip Ing carried out the cladding work and the installation of the external joinery. Mr Ing, in answers to questions from Mr Taylor, confirmed that he knew that the corner joints of the “H” mould needed to be sealed and that he thought that flat tops to the Harditex balustrades were acceptable. After extensive questioning by Mr Taylor, Mr Ing accepted that the way he constructed the balustrade had resulted in the cladding piercing the waterproof membrane installed beneath the Harditex cladding on the balustrade.

[64] After considering all the evidence I am satisfied that Phillip Ing and Phillip Ing Building Limited were jointly responsible for all of the cladding and joinery defects found by Mr Wiemann and Mr Alvey. Mr Alvey’s and Mr Wiemann’s evidence was that Phillip Ing and his building company were responsible for defects listed in Mr Alvey’s leaks list as 1(a), 4, 5(a), 5(b), 6, 7, 8, 9, 10, 11, 12(a), 12(b), and 14.

[65] Ms Macky submitted that in *Bowen v Paramount Builders (Hamilton) Limited*¹⁴ the Court of Appeal held that “contractors, architects and engineers are all subject to a duty to use reasonable care to prevent damage to persons whom they should reasonably expect to be affected by their work”. I agree with that submission.

[66] In *Body Corporate 202254 v Taylor*¹⁵ Chambers J stated:

[125] The law in New Zealand is clear that if a builder carelessly constructs a residential building and thereby causes damage, the owners of the residential building can sue the builder in negligence...

...

[128] In short, there is nothing in principle preventing a builder owing a duty of care to subsequent owners of the building. Of course, in the present case, Mr Taylor did not “build” the villas on his own. Others would have helped. But that did not prevent Mr

¹⁴ *Bowen v Paramount Builders (Hamilton) Limited* [1977] 1 NZLR 394.

¹⁵ *Body Corporate 202254 v Taylor* [2008] NZCA 317.

Taylor being liable in negligence. It is enough if **his** conduct “is a contributory cause; [it does not need to be] in some sense a main or primary cause”.

[67] The situation is no different where the builder involved is a labour-only builder such as Mr Ing and Phillip Ing Building Limited. Support for this proposition is readily found in the cases of *Riddell v Porteous*¹⁶ and *Boyd v McGregor*,¹⁷ where the courts rejected the submission that a builder who is engaged on a labour-only basis somehow has diminished responsibility for his defective building work.

[68] Based on these authorities, I accept that the law in New Zealand is clear that if a builder (whether on a full contract or labour-only) carelessly constructs a residential building and thereby causes damage, the owners whether original or subsequent purchasers of that home can sue the builder in negligence.

[69] The evidence clearly establishes that Phillip Ing and Phillip Ing Building Limited have not carried out the installation of the Harditex cladding in a manner that complied with the Building Code, the plans or specifications or the manufacturer’s technical literature. Furthermore, it is established that Phillip Ing personally carried out the building work which is alleged to be defective in relation to the cladding work which of itself has necessitated a full reclad of the Robinson’s townhouse.

[70] In *Dicks v Hobson Swan Construction Limited (in Liquidation)* Baragwanath J stated:¹⁸

The point can be argued either way. While in New Zealand and appellate Court may choose to take a different approach *Morton v Douglas Homes* has stood for two decades. It cannot be said that the

¹⁶ *Riddell v Porteous* [1999] 1 NZLR 1.

¹⁷ *Boyd v McGregor* HC Auckland, CIV-2009-404-5332, 17 February 2010.

¹⁸ *Dicks v Hobson Swan Construction Limited (in Liquidation)*, HC Auckland, CIV-2004-404-1065, 22 December 2006 at [62]-[63].

decision is so lacking in principle that litigants should be subjected to inconsistent judgments of first instance. I have therefore decided to following *Morton v Douglas Homes* on the present point it applies a fortiori: Mr McDonald did not merely direct but actually performed the construction of the house and is personally responsible to the omissions of the seals. His carelessness is, on *Morton v Douglas Homes* analysis, a breach of a duty of care owed by him to Mrs Dicks. He is therefore personally a tortfeasor (as well as having his conduct attributed to *Hobson Swan* as its tort).

[63] I therefore hold that Mr McDonald is personally liable to Mrs Dicks in tort...

[71] Phillip Ing Building Limited was contracted to undertake building work on the townhouse and thereby owed a duty of care to the Robinsons in carrying out that work. Phillip Ing carried out the significant aspects of the building work which caused the defects which has caused water ingress and the resulting damage requiring remediation involving the full reclad of the townhouse. As these defects have caused the Robinsons loss I conclude that Phillip Ing Building Limited and Phillip Ing personally are each jointly and severally liable for the full amount of the established claim.

APPROPRIATE REPAIR COSTS

[72] Paul Love gave evidence for the Robinsons on the remedial costs. Mr Love is a senior building surveyor employed by Kaizon Limited. His evidence on the process adopted for remediating the townhouse and the associated costs were not challenged by the respondents nor did any respondent question Mr Love at the hearing. Mr Wiemann had read Mr Love's evidence and he too is experienced in diagnosing and repairing leaky buildings. As he said he was comfortable with Kaizon Limited's remediation scope of works, tendering process management of the remediation and costing.

[73] The finalised claim presented by Mr Love at the hearing can be summarised as follows:

Costs incurred	Amount
Remedial building costs	\$209,979.00
Remedial design fees and project management fees	\$55,330.00
Auckland Council fees	\$3,428.00
Loss of rental on townhouse to 18 July 2011	\$23,033.00
Loss of rental during remedial works	\$13,330.00
Previous remedial work expenses	\$3,435.00
Department of Building and Housing Application	\$500.00
Interest on borrowings	\$5,288.00
Total costs	\$314,871.00

[74] I am satisfied that the appropriate claim for damages is proven to the sum of \$314,871.00.

GENERAL DAMAGES

[75] The Robinsons each provided evidence of the stress and anxiety they have both incurred from owning and managing a leaky home investment. Mr Taylor submits that they are entitled to an award of \$15,000 for general damages as a result of such stress and anxiety.

[76] General damages are awarded to claimants in leaky home cases to compensate for stress, inconvenience and the suffering caused from their leaky home.

[77] The Court of Appeal's decision in *Byron Avenue*¹⁹ confirmed the availability of general damages in leaky building cases and held that in general the usual award was \$15,000 for non-occupiers of a leaky home.

[78] I am satisfied from Mr and Mrs Robinson's evidence that the stress and anxiety of owning a leaky home justifies an award of

¹⁹ *O'Hagan v Body Corporate 189855* [2010] NZCA 65 (*Byron Avenue*).

general damages and I accordingly determine that the claimants are entitled to general damages of \$15,000.

CONTRIBUTION

[79] I have found the first, fifth, sixth and seventh respondents have breached the duty of care each owed to Mr and Mrs Robinson. Auckland Council, Kam Chan, Phillip Ing Building Limited and Phillip Ing each is a tortfeasor and is liable to the Robinsons for the losses suffered to the extent outlined in this determination.

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

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

[82] As a result of the breaches referred to earlier in this determination, Auckland Council, Kam Chan, Phillip Ing Building Limited and Phillip Ing are jointly and severally liable for the entire amount of the claim. This means that the four respondents are concurrent tortfeasors and therefore each is entitled to a contribution towards the amount they are liable for from the other, according to the relevant responsibilities of the parties for the same damage as determined by the Tribunal.

SUMMARY OF THE RESPONDENTS' LIABILITIES

[83] In making an apportionment I must have regard both to the causative potency of the respondents' conduct and to the relevant blameworthiness of the parties.

[84] Ms Macky submitted that in the event that liability is established the Council's liability should be restricted to 15% of the losses claimed and certainly not above 20%. She submitted that primary responsibility must lie with the developer and building party. I accept such submission and indeed it is supported by a number of authorities.²⁰ Ms Macky referred me to the Supreme Court decision in *Sunset Terraces* in support of her suggestion that the Council's liability should be restricted to 15% of the losses claimed. It was submitted that decision clearly establishes that the more appropriate outcome would be for the apportionment of liability amongst the building parties to reflect the lower liability of the Council for the acts and omissions of the developer and building parties are more causally potent having been the creators of the defects.

[85] The authorities clearly confirm Ms Macky's submissions that there are very limited situations where the developer and builders combined responsibility will be less than 80%.

[86] In *Sunset Terraces* the Council's apportionment was 15% and the Council was not held to be negligent for the issue of the building consent. The territorial authority's apportionment was 20% in *Mt Albert Borough Council v Johnson* and in *Dick v Hobson Swan Construction* but in these cases the issue of the building consent was found to be negligent. Here, the claimants have discontinued their claim against Council for issue of the building consent. In my view the principal wrongdoers were the builders. There is no legal

²⁰ *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA); *Morton v Douglas Homes* [1984] 2 NZLR 548; *Dicks v Hobson Swan Construction Limited (in Liquidation)* HC Auckland, CIV-2004-404-1065, 22 December 2006; *Scott v Parsen* HC Auckland, CP776/90, 19 September 1994.

justification for Mr Ing's response that they relied on the Council's inspector to point out building faults. The Council's function was supervisory. The Council should be entitled to a significant contribution from the developer and builder. The builder was the primary party responsible for carrying out construction and ensuring that the townhouses were built in a watertight manner.²¹

[87] Upon considering the evidence, and based on the principles outlined above, I accept Ms Macky's submission that the combined responsibility of the developer and the builder must sit at a level above 80%. I find that the first respondent, the Auckland Council, is entitled to a contribution of 85% from the fifth, sixth and the seventh respondents towards the amount that the Council has been found jointly liable for.

[88] I find that the sixth and seventh respondents, who as builders are primarily responsible for the defects outlined in paragraphs [22]-[24] and causative of the damage are entitled to a contribution from the fifth respondent, Kam Chan, towards the amount that Phillip Ing Building Limited and Phillip Ing have been found jointly liable for. Whilst Ms Tang and Kam Chan's evidence was scant at best, and not credible in parts, I am satisfied that as land owner Kam Chan had overall control, albeit jointly, of the building site, and as such he owed a non-delegable duty to the claimants. Due to the complexity of the construction project, as a developer Kam Chan was required to ensure adequate project management. The building company was contracted on a labour only basis and such did not have responsibility for the management. Kam Chan's failure to secure project management directly led to the claimant's loss. As a result of his negligence I set Kam Chan's level of responsibility at 20%

[89] To summarise the respondents' contributions:

²¹ *Body Corporate 106361 v Auckland City Council*.

- The Auckland Council - 15%.
- Phillip Ing Building and Phillip Ing jointly- 65%.
- Kam Chan - 20%.

CONCLUSION AND ORDERS

[90] The full amount of the established claim is to be reduced by \$5,000 being the sum received by the Robinsons in their settlement with the eighth respondent, Colin Holmes.

[91] The claim by Anthony and Jill Robinson and Geoffrey Hamilton (as trustees of the Robinson Family Trust) is proven to the extent of \$324,871.00

Total costs	\$314,871.00
General damages	\$15,000.00
Sub-total	\$329,871.00
<i>Less settlement with C Holmes</i>	<i>\$5,000.00</i>
Claimants' award	\$324,871.00 (inclusive of GST)

[92] The Auckland Council, Kam Sing Chan, Phillip Ing Building Limited and Phillip Ing are all jointly and severally liable to the Robinsons for this amount.

[93] For the reasons set out in the determination I make the following orders:

- a) Auckland Council is to pay the claimants the sum of \$324,871 forthwith. Auckland Council is entitled to recover a contribution of up to \$276,140.35 from Phillip Ing Building Limited, Phillip Ing and Kam Chan jointly.

b) Phillip Ing Building Limited and Phillip Ing jointly are to pay the claimants the sum of \$324,871 forthwith. They are entitled to recover a contribution of up to \$48,730.65 from the Auckland Council and \$64, 974.20 from Kam Chan.

c) Kam Chan is to pay the claimants the sum of \$324,871 forthwith. Kam Chan is entitled to recover a contribution of up to \$48,730.65 from the Auckland Council and \$211,166.15 from Mr Phillip Ing and Phillip Ing Building Limited.

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

First respondent, Auckland Council	\$48,730.65
Fifth respondent, Kam Chan	\$64,974.20
Sixth & seventh respondent, Phillip Ing Building Ltd and Phillip Ing jointly	\$211,166.15

[95] If any of the parties listed above fails to pay his or its apportionment, then this determination may be enforced against any of them up to the total amount they are ordered to pay in paragraph [91] above.

DATED this 22nd day of February 2012

K D Kilgour
Tribunal Member