IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI 2009-100-000053
[2010] NZWHT AUCKLAND 10

BETWEEN	**CHARLES and HELEN MARIE ROOS** Claimants
AND	**THOMAS GANG WANG** First Respondent
AND	**FU HAO CONSTRUCTION LIMITED** Second Respondent
AND	**ADRIAN ROSS KIFF** Third Respondent
AND	**BAYS HOUSE INSPECTION SERVICES LIMITED** Fourth Respondent

Hearing:	2 February 2010
Final Submissions received:	26 February 2010
Appearances:	Ms L Gerrard, Counsel for the Claimants. Mr A Kiff, Third Respondent, self represented. Bays House Inspection Services Limited, Fourth Respondent, self represented.
Decision:	30 March 2010

FINAL DETERMINATION
Adjudicator: P J Andrew

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INTRODUCTION

[1] The claimants, Mr and Mrs Roos, purchased a near brand-new home in December 2004 for $660,000.00. At that time there was increasing public awareness about the issue of leaky homes. Concerned not to purchase a leaky home themselves, the Roos commissioned a builder's report, commonly known as a pre-purchase report, from the fourth respondent, Bays House Inspection Services Limited ("BHIS"). The agreement for sale and purchase was made subject to a satisfactory builder's report.

[2] An inspection was then carried out and a report produced by Mr Barnes of BHIS. Mr Barnes was a registered master builder and Council approved inspector. Mr Barnes concluded that the house was structurally sound and generally in a very good condition. No weathertight defects or major problems were identified. The report contained a number of disclaimers and exclusion clauses seeking to negate and limit liability for any errors in the assessment. The Roos, acting in reliance on the report, settled the agreement for sale and purchase and took possession of their new home.

[3] In 2005-2006 the Roos discovered that their house was leaking. A claim was filed with WHRS and the assessor's report concluded that the house had major weathertight defects requiring significant repairs. The house has since been repaired by way of a full reclad.

[4] In these proceedings, the Roos seek to recover the costs of repairs and other losses totalling $300,531.55, from BHIS. They contend that BHIS breached legal obligations to them to take reasonable care in inspecting and reporting on the state of their house and that the report produced was misleading, contrary to section 9 of the Fair Trading Act 1986.

[5] The Roos also seek to recover damages from Mr Adrian Kiff, the third respondent and former director of Futureproof Industries Limited. That company is said to have supplied and installed the faulty cladding that caused water ingress to the house. It is claimed by the Roos that Mr Kiff is personally liable for erroneous producer statements and warranties and a failure to provide for adequate processes and procedures in relation to the installation of the cladding.

[6] Mr Kiff is the only respondent party that the claimants have been able to locate and serve, who, so it is alleged, had direct involvement in the original construction of the house. The Roos have not been able to pursue their claims against the first and second respondents, the developer and the builder.

THE ISSUES

[7] The critical issues the Tribunal must determine are:

a) Did BHIS breach its legal obligations to the claimants to take reasonable care in its assessment and report on the state of the Roos' house?
b) Do the disclaimer and exclusion clauses in the report produced by BHIS, limit or negate any liability that that company might have?
c) Was the report produced misleading and contrary to section 9 of the Fair Trading Act 1986?
d) What is the measure of damages the Roos can recover from BHIS?
e) In relation to Mr Kiff, the critical issue is whether the claimants have established that Mr Kiff personally owed and breached duties of care to them in relation to the producer statement, the warranty and/or the installation of the cladding.

THE MATERIAL FACTS

[8] The Roos' house was built in 2002 in a relatively large and new subdivision in Albany. The house is two-storey and was originally constructed with direct fixed Harditex texture coated fibre-cement sheet.

[9] The plans and specifications submitted in support of the application for building consent were inadequate, with no reference to manufacturer's requirements for flashing in relation to the Harditex cladding and no detail specified in respect of the Harditex finishing.

[10] During the course of construction, a material guarantee and warranty dated 31 July 2002 ("the material guarantee") was issued in the name of Future Industries Limited, stating that "all products conform to manufacturer's specifications and are warranted for a period of ten years" [on specified terms]. On 1 August 2002 a producer statement was issued in the name of Mr Adrian Kiff, of Futureproof Industries Limited, stating that Futureproof had installed the cladding, a BRANZ approved system, in accordance with the specifications. The claimants allege that both the material guarantee and the producer statement were signed by Mr Kiff. Mr Kiff says that he did not sign either of the documents and has no responsibility for them. He has suggested that the signatures, purporting to be his, may have been a forgery.

[11] The original cladding was installed in a defective manner and the installers failed to observe the Harditex technical information specifications and requirements, in particular the requirements in relation to the horizontal control joint.

[12] In October 2002, Mr and Mrs Rennie became the registered proprietors of the property. They subsequently sold it to the Roos in 2004.

[13] When they began looking to buy a house in 2004, the Roos became aware of other people who had experienced problems with leaky homes. At the time, the Weathertight Homes Resolution Services Act 2002, creating the first specialist Tribunal, had been in force for approximately two years and in August 2004, the Building Act 2004, intended in part to address leaky home issues, was enacted. By that time, namely late 2004, there had been significant developments within the building industry in relation to weathertight problems, including media releases and public information released by both the Building Industry Authority and the Auckland City Council.

[14] In commissioning the builder's report from BHIS, the Roos were principally concerned with weathertight issues. A clause, drafted by the claimants' lawyer, was inserted into the agreement for sale and purchase and provided that the agreement was "conditional upon the purchaser being satisfied with a report on the structural integrity of the property to be obtained from an inspector of purchases". The agreement was also conditional upon a LIM report.

[15] Mr Barnes, who was recommended to the Roos by the real estate agent (i.e. the agent for the vendors), has been in the building industry for over 30 years. In 2004 he had been a registered master builder for approximately 8 years. The Roos and Mr Barnes agreed that BHIS would produce a report, based on a visual inspection only, for a cost of $400.00 plus GST. BHIS sent to the Roos an invoice dated 3 December 2004 for $450.00 payable upon receipt of the report.

[16] Mr Barnes' report, consisting of 15 pages, addressing both the exterior and the interior, followed the visual inspection carried out on 3 December 2004. In relation to the cladding the report noted:

> *"**Cladding**:*
> *The cladding is Harditex with a sprayed finish. This looks all intact and the paintwork is in good condition. However, there is some slight bulging in the joints on some of the sheets at the rear of the house to the right of the pergoda. This is due to minor movement and expansion and contraction of the joints and is cosmetic only.*
> *In the internal corner beside the chimney there is a vertical crack and this is also due to minor movement and the expansion and contraction of the joint but it does require some maintenance."*

[17] The general summary of the report stated:

> *"**General Summary**:*
> *This house is structurally sound and is generally in very good condition relative to the age of the house.*
> *There are no major issues requiring attention. However, two areas need minor maintenance, these being the crack in the exterior cladding on the internal corner beside the chimney and the swelling in the joints at the rear of the house next to the pergoda."*

[18] At the conclusion of the report Mr Barnes indicated that he was available and happy to discuss the report and provide further assistance should that be required.

[19] At page 15 of the report there are seven clauses (a-g) listed under the heading "Disclaimer". Attached to this determination as

Appendix A is a copy of the Disclaimers. They are examined in greater detail below.

[20] In reliance on the report produced, the Roos declared that one of the conditions of the purchase of the property (i.e. that related to a satisfactory report about structural integrity) had been fulfilled and on 22 March 2005 they became the registered proprietors of the property.

[21] In July 2005 and on different occasions throughout 2005 and 2006, the Roos observed a number of leaks to the head of the lounge ranch slider. Following some maintenance work in early 2007 they filed an application with WHRS in March 2007. In his report dated 6 June 2007, the assessor identified the following significant weathertight defects, which were either causing or likely to cause water ingress:

a) The horizontal joint at mid-floor ends and external corners was not sealed.
b) The sealant along the top of the horizontal band was failing.
c) The ground levels were insufficient and did not comply with the Building Code.
d) The pipes and meter box were not sealed, allowing moisture ingress.
e) The flat tops to the column plinth to the south elevation had allowed water to enter the tops of the plinths by gravity.

[22] In August 2007, the Roos engaged O'Hagan Building Consultants Limited to reclad and repair the house as the assessor had recommended. The building consent took some ten months for local authority to process. The failure during construction to seal the ends and external corner of the horizontal jointer, and the defects with the horizontal bend (i.e. the two principal defects identified by Mr O'Hagan and Mr Alvey) meant that a full reclad was required.

[23] The remedial works were completed in February 2009 for a total cost of $221,743.84. The Roos remained living in the house during the four month period the repairs were carried out.

LIABILITY OF ADRIAN ROSS KIFF

[24] The claimants have sued Mr Kiff for negligent misstatement in relation to both the producer statement dated 1 August 2002 and the material guarantee dated 31 July 2002. They also contend that Mr Kiff owed and breached a duty of care to them by failing to put in place adequate systems to ensure that the texture coating work was completed to an appropriate standard. At the conclusion of the hearing, it became apparent that the claim of a failure to put in place an adequate system and/or quality control measures was the principal claim being made against Mr Kiff.

[25] The claimants argue, in reliance on authorities such as *Body Corporate 199348 v Nielsen*[1] and *Chapman v Western Bay of Plenty District Council,*[2] that Mr Kiff was personally responsible for the absence of quality control measures. They also contend that it was Mr Kiff, one of only two directors with a 50% shareholding, who personally exercised real control over the operations of Futureproof Limited, including the installation of cladding by subcontractors provided by Futureproof to the developer.

[26] The claimants say that the evidence establishes that quality control measures were virtually absent with producer statements often signed by "office ladies" and the method of selecting and then supervising subcontractors to install the cladding, wholly inadequate. In relation to the producer statement and material guarantee, the claimants have submitted that the onus is on Mr Kiff to prove forgery (if that is what he is alleging).

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[1] HC Auckland CIV-2004-404-3989, 3 December 2008.
[2] WHT TRI-2008-101-100, 11 November 2009.

[27] In essence Mr Kiff denies that he owed the claimants any duty of care at all. He said that he never visited the site during the time of construction, and had no involvement at all with the installation of the cladding on the Roos' house. His evidence was that he was principally a sales person for a company supplying and manufacturing texture coating and that it was not his personal responsibility to select or supervise subcontractors engaged to install the cladding on the Roos' house. To the best of his recollection, Mr Kiff says that the cladding was installed by Gateway Builders (accredited fixers under the James Hardie banner), a company wholly separate and unrelated to Futureproof Limited. Mr Kiff denies that he signed either the producer statement or the material guarantee.

[28] As part of his closing submission, Mr Kiff filed a statement from Ms Linda Morrell, a forensic document examination and handwriting expert. Mr Kiff submits that the evidence from this expert calls into doubt whether the signature on either the producer statement or the material guarantee are in fact his. In relation to the producer statement, Mr Kiff has pointed out that it refers to a "styroplast insulated wall system" when in fact the cladding system applied to the Roos' house was a Harditex acrylic coated system, a wholly different product.

(a) Principal Claim of Negligence

[29] While the evidence establishes that Futureproof Industries Limited supplied the harditex acrylic coating system used on the Roos' house, and that it was applied in a defective way by persons under subcontract from that company, it is critical to focus on the evidence that relates to the personal role played by Mr Kiff. He is the party sued, not the company, Futureproof Industries Limited.

[30] The fundamental difficulty for the claimants in establishing any personal liability by Mr Kiff, is the lack of sufficiently reliable evidence as to what role he played in relation to the Roos' house. I accept that the evidence does establish that the company's quality control measures were generally inadequate when the company signed off producer statements and that when Futureproof Industries did provide subcontractors to the developers for the installation of cladding, that Futureproof Industries Limited itself had no real quality control measures. I note however, that there is no real evidence as to what arrangements (if any), were in place for quality control measures by cladding installers, as between Futureproof Industries Limited, Gateway Construction Limited and the developer, Mr Thomas Gang Wang. I have a very incomplete picture as to which particular parties were directly involved and responsible for the defective installation of the cladding and importantly, what role Mr Kiff played in relation to the cladding installation on this house.

[31] There is also insufficient evidence as to the extent to which Mr Kiff assumed or exercised any degree of control over inadequate company quality control measures (or a complete lack of them as alleged) which is said to have led to defective installation of the cladding. The claimants submit that I should infer personal responsibility by Mr Kiff from the totality of the evidence. They rely amongst other things on Mr Kiff's acknowledgement that his co-director, Mr Hall, a former TV presenter, had no industry experience at all and the fact that Mr Kiff's business card contained inside a Futureproof Industries Limited brochure, was left with the original owners of the Roos' property and then passed on to the Roos with the sale of the house to them. However, none of these factors or any combination of them, provide a sufficiently reliable evidential foundation for me safely and properly to conclude that Mr Kiff had direct and personal responsibility for defective quality control measures which led directly to the defective installation of the cladding.

[32] The cases relied upon by the claimants namely *Nielsen*[3] and *Chapman*[4] can readily be distinguished. In both cases there was clear and reliable evidence to establish the particular role that the director played personally. In *Body Corporate 183523 v Tony Tay & Associates Limited (Tony Tay),*[5] Priestley J described the role of the director in *Nielsen* in the following terms:

> "[152] Similarly, Heath J in *Nielsen*...held that a director was personally exposed in the situation where he had primary responsibility for supervising construction work, which supervision extended to co-ordinating subtrades and ensuring work was carried out in accordance with the plans and specificaitons. The director would attend the site for at least one or two hours per day in builder's clothes and gave daily instructions to the site manager. He would also attend the site or speak by telephone where any significant problems on the site arose. This direct involvement of the director was in contrast to his brother and co-director who played no role at all other than identifing suitable land for the development and who was certainly not involved in site supervision."

[33] In the *Tony Tay* case itself, despite clear findings of a lack of systems of control, supervision and quality checks by the company, the claim against Mr Tay failed because of a lack of proof that he was personally involved in site and building supervision or architectural and design detail. A similar lack of evidence is apparent in this case.

[34] The claimants have of course been handicapped in their ability to prove their case against Mr Kiff because the only direct evidence of any involvement by Mr Kiff at all came from Mr Kiff himself. While I found the evidence of Mr Kiff at times to be unreliable and self serving, there is no real independent evidence or legitimate basis for me to infer, that despite his denial of the critical allegations, the claimants have established that he was personally liable to them.

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[3] See n1 above.
[4] See n2 above (see paragraph 169 for discussion about the particular role performed by Mr Clarke, the director).
[5] HC Auckland CIV-2004-404-4824, 30 March 2009.

[35] Due to the lack of sufficiently reliable evidence, I conclude that the claimants have failed to establish any personal assumption of responsibility by Mr Kiff for any of the acts or omissions of negligence alleged and on this basis alone all causes of action against him must be dismissed.

(b) Negligent Misstatement

[36] The primary test of liability for negligent misstatement has always been whether the defendant assumed responsibility for his or her words and whether the other party relied on the statement (see *Attorney-General v Carter*)[6]. In *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd,*[7] the Court of Appeal held that the conventional two stage test of negligence is to be applied in every case. In the case of negligent misstatement the proximity inquiry (i.e. the first step) will generally focus on the "interdependent concepts" of assumption of responsibility by a person with a special skill and forseeable and reasonable reliance by the plaintiff. The particular ingredients that must be established are set out in paragaphs 119-122 of the *Tony Tay*[8] decision.

[37] For reasons which follow, I conclude that the claimants have failed to establish any relevant duty of care that Mr Kiff owed them and which might form the basis of a claim of negligent misstatement. In essence the claimants have failed to discharge the burden of proof incumbent on them to prove that Mr Kiff assumed responsibility for the producer statement and/or warranty and critically, that they relied upon those statements.

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[6] [2003] 2 NZLR 160.
[7] [2005] 1 NZLR 324.
[8] See n 5 above.

No assumption of responsibility

[38] Mr Kiff denies of course that he ever signed either the producer statement or the material guarantee and warranty and says that he had never seen those documents prior to these proceedings. He argues, in effect, that the statements are not his and he never assumed any responsibility for them.

[39] Ms Linda Morrell, the forensic document examination and handwriting expert, has compared the signatures of Mr Kiff and his passport and other documents submitted by his lawyer, with those in the producer statement and material guarantee. Her conclusion, somewhat ambiguous, is as follows:

> "Whilst the evidence tends to point away from these two signatures being genuine [i.e. the producer statement and material warranty] I cannot totally discount the fact that one or both could be genuine with the writer introducing features so as to deny later. Accordingly at this stage of my examinations and comparison I am unable to determine which scenario is more likely."

[40] At the hearing, I asked to see Mr Kiff's driver's licence and his credit card. To the layman's eye, his signatures on both those documents looked very much like the signatures on the producer statement and on the material guarantee. However, I accept the need for caution and that the issue of comparing signatures is usually a matter for forensic experts. On the basis of all the evidence before me, I conclude that the plaintiffs have failed to discharge the burden on them to establish that the producer statement and the material guarantee are the statements of Mr Kiff. Further uncertainty is created by the absence of any evidence as to why the producer statement says that a "styroplast insulated wall system" cladding was used rather than the Harditex which was actually installed. To conclude that this was

simply the result of lax or inefficient procedures, would in the circumstances, be speculation.

[41] The claimants have submitted that the report of Ms Morrell confirms that the signatures on the producer statement and material guarantee and warranty "could be" those of Mr Kiff. That is correct so far as it goes. However, the test the claimants must meet is not "could be" but rather the civil standard of proof, namely the balance of probabilities. The claimants are also incorrect to contend that it is Mr Kiff's responsibility to prove forgery. On the contrary, the claimants carry the burden of proof (i.e. that the documents were those of Mr Kiff) and have failed to discharge it in this case.

No Reliance

[42] Mr Roos gave evidence that he "probably saw" the producer statement and material warranty and guarantee in the Council file which he went through prior to purchasing the property. However, at that time he did not know that either of these documents were of any significance or importance. Mr Roos was looking primarily for the Code Compliance Certificate, the document he believed to be the critical one. There is no evidence that Mrs Roos examined the Council file or that if she did, she had a different understanding from that of her husband.

[43] In these circumstances, the claimants cannot be said to have relied upon the producer statement and/or material guarantee and warranty to their detriment (even if these were the statements of Mr Kiff) – and on this basis as well, the claim for negligent misstatement must be dismissed. Furthermore, I am not aware of any case law that suggests that the law should deem reliance by a subsequent purchaser on a producer statement and can see no principled basis for so concluding. I doubt whether it is reasonably foreseeable that a subsequent purchaser would rely on a producer statement relating to a

particular element of construction, particularly where a Code Compliance Certificate had been issued, as in the present case. Producer statements, which were defined in section 2 of the Building Act 1991, are documents directed to the territorial authorities. The claim against Mr Kiff fails at the first hurdle of proximity.

Removal Applications

[44] During the course of the proceedings, Mr Kiff made two applications for removal. The first was refused in Procedural Order No. 2 dated 29 October 2009. A second application received by the Tribunal on 26 January 2010 was discussed at the pre-adjudication telephone conference on Friday 30 January 2010. Mr Kiff was advised at that conference that the second application for removal would not be granted and that any evidence and information filed in support of it, would be considered at the substantive hearing as part of his defence to the claim.

[45] I reject the submission made by Mr Kiff in his closing submissions that he should have been removed as a party to the proceedings, prior to the adjudication hearing itself. There was an arguable case that Mr Kiff was liable to the claimants and it was appropriate and reasonable for the claimants to have the opportunity to test the evidence.

[46] The approach adopted by the Tribunal is consistent with the recent High Court decisions *Fenton v Building Code Consultants Limited*[9] and *Auckland City Council v Unit Owners in Stonemason Apartment 27 Falcon Street, Parnell.*[10]

[9] HC Auckland CIV-2009-404-6348, 15 March 2010, Cooper J.
[10] HC Auckland CIV-2009-404-3118, 11 December 2009, Andrews J.

LIABILITY OF BAYS HOUSE INSPECTION SERVICES LIMITED

[47] I analyse the broad issue of the liability of BHIS, the fourth respondent, in terms of the four key issues identified at paragraph 7 above. The three underlining causes of action are breach of contract, the tort of negligence and breach of section 9 of the Fair Trading Act 1986.

[48] On the basis of the evidence presented, I have no difficulty in concluding that BHIS owed concurrent duties in contract and tort to the claimants, to exercise reasonable skill and care in the inspection and assessment of the structural integrity of their house. The Roos sought from Mr Barnes, an expert recommended to them, a specialist assessment and report on the structural integrity of the house, with a view to then determining, on an informed basis, whether to complete the purchase. This was the agreed basis for the expert assessment being commissioned.

[49] In these circumstances, there is a proper basis for concluding that there is to be implied into the contract between the claimants and BHIS, as a term of the contract, that BHIS would exercise reasonable skill and care in its report and assessment on the issue of structural integrity. A concurrent duty of care to exercise the same degree of care was owed in tort – and in the circumstances where both parties clearly anticipated that the Roos would, as indeed they did, rely on the report. For reasons discussed below, the disclaimers/exclusions in the report of December 2004 are no impediment to the imposition of a duty of care in tort (cf *McKinlay Hendry Limited v Kings Wharf Holdings Limited*).[11]

[11] CA81-04, 9 December 2005, Glazebrook, Robertson & Rodney Hansen JJ.

[50] The more critical issue and the matter very much in dispute is whether or not BHIS breached its duties to take reasonable care.

(a) Was Bays House Inspection Services Limited negligent?

[51] The claimants acknowledge that the inspection and report they commissioned from BHIS was to be a visual assessment only and not a full weathertight report involving invasive moisture testing. However, they say that they commissioned the report specifically to address weathertight issues and that the positive report they received on the state of the house, gave them no indication that they should seek further testing or a more in-depth report on the question of structural integrity.

[52] The claimants rely upon the expert evidence of both Mr O'Hagan, and Mr Alvey, the assessor, to establish that BHIS was negligent in concluding that the house was structurally sound. Both witnesses have considerable industry experience, including having worked as pre-purchase inspectors. In essence these experts were of the opinion that the assessment and report of BHIS, albeit a visual assessment only, was demonstrably wrong with warning signs about weathertight defects obvious to the naked eye at the time of inspection. Both witnesses said that these concerns should have been reported on and led to a fundamentally different conclusion about structural integrity.

[53] Mr O'Hagan produced in evidence (Appendix A to his brief of evidence) a list of the principal defects in the construction of the house that caused water ingress. Mr Alvey agreed with Mr O'Hagan's list and his assessment of whether the defects listed should be categorised as either primary or secondary. Both witnesses were of the view that the following defects ought to have been identified by Mr Barnes in 2004 and caused him to question the structural integrity of the house:

- Defect 2 - A failure of sealant along the top of the horizontal band (and described as one of the two primary defects);
- Defect 3 - Insufficient ground clearances;
- Defect 4 - No sealing of the pipes and meter box; and
- Defect 5 – Lack of sealant on the top of the plinth.

In relation to the other primary defect, namely Defect 1, an absence of sealant on the horizontal jointer at mid floor ends and external corners, Messrs O'Hagan and Alvey agreed that while such defect would not have been noticed during a visual only inspection, the bulging of the joints, which was observed, should have alerted Mr Barnes to weathertight issues and not simply have been regarded as cosmetic (at least without further testing).

[54] Mr Barnes, who presented as a sincere witness concerned at the claimants' plight, denied that he had been negligent in any way and addressed each of the defects Mr O'Hagan and Mr Alvey claim that he should have identified. Mr Barnes described the house as being "like a palace" with no cracking in the cladding at all (except of a very limited kind around the chimney) and emphasised the limited nature of the inspection and assessment, namely a visual assessment only. Mr Barnes further argued that it was entirely reasonable for him to conclude that the bulging in the joints was due to minor movement caused by normal expansion and contraction.

[55] In my view, the evidence clearly establishes that BHIS did not carry out its assessment and report on the Roos' house with reasonable skill and care. BHIS should not have concluded that the Roos' house was structurally sound and "generally in very good condition". Similarly it should not have concluded that the cladding issue was "cosmetic only". In reaching these conclusions, I find that BHIS was negligent. My reasons for these findings are as follows:

a) Mr Barnes was a registered master builder and building inspector with considerable experience. He was commissioned by the Roos specifically to address weathertight issues. The report of December 2004 makes this clear (see paragraph d at page 15).

b) At the time of the inspection and the report, namely December 2004, there was a heightened and reasonably widespread understanding amongst the building industry at least, about leaky home syndrome. This should have alerted a pre-purchase inspector such as BHIS to the need for careful inspection and/or assessment of monolithically clad homes (see exhibit B produced by Mr O'Hagan, being his list of the various developments/publications available in December 2004 on leaky home syndrome).[12] Mr Barnes himself admitted that he was well aware of leaky home issues. The date, the method of construction and the fact that this house was part of a large, new property development, should have put BHIS on notice to take particular care in addressing weathertight issues.

c) The evidence of both Mr O'Hagan and Mr Alvey was compelling. In particular I accept that Defect 2, one of the primary defects, should have been picked up by BHIS upon inspection. I also accept that the other primary defect, namely defect 1, albeit concealed and not reasonably visible at the time, should, because of the bulging, have alerted BHIS to the possibility of weathertight issues and/or the need for further testing. Mr Alvey's own assessment, as the assessor, began with a visual-only assessment of the house, and he immediately became concerned at what he observed.

[12] In *Body Corporate 188529 v North Shore City Council* (*Sunset Terraces*) [2010] NZCA 64 at para [144](b), William Young P observed that by approximately 2004, there was "widespread recognition of the leaky building problem."

d) Mr Barnes said that he was “devasted” and shocked subsequently to learn (i.e. as a result of the O’Hagan and Alvey assessments) that the bottom plates, normally lifted above floor level by concrete nib walls, were in fact un-nibbed. He was equally shocked to discover that the plinth was not (as he had assumed, based on previous experience) constructed from concrete. While I accept that these two particular defects were concealed, I find that overall BHIS was too ready to make assumptions about the quality of the building without making or at least recommending further investigations. In December 2004, a more questioning and cautious approach was required.

e) The BHIS report, describing the house as “structurally sound” and “generally in very good condition relative to the age of the house” (i.e. it was only two years old) was a very positive one. The assessment was fundamentally incorrect. While the weathertight issues would likely have become more pronounced and obvious at the time Mr Alvey and Mr O’Hagan became involved, warning signs were visible in December 2004 and should have been reported on.

f) While the house may have looked “like a palace” and had been recently constructed, this does not excuse BHIS for its faulty assessment. The Roos knew enough to know that despite the house being relatively new and appearing to be in a pristine condition, it should nevertheless be checked for weathertight issues. Even though the report was a visual one only, Mr Barnes ought at the very least to have concluded that further testing was required or that the house should have been subject to a full weathertight report. He did neither.

g) I reject Mr Barnes’ criticism of the Roos, namely that they should have gone to the Institute of Surveyors and engaged a weathertight consultant, and that later on, when

the house first leaked, they should immediately have contacted him. The Roos acted reasonably and appropriately throughout.

h) I am not prepared to place any real weight on the note from the ESP Company Limited dated 18 February 2010 and attached to the closing submission of Mr Barnes. That evidence has not been tested. In any event the point made that the bulging to the joints was due to normal expansion and contraction, was rejected by Mr O'Hagan and Mr Alvey. No such assumption should have been made and I prefer their evidence. It is also important to note that the Roos, like any prudent purchaser, were not only interested in whether the house was actually leaking but whether there was latent structural defects which would cause leaking in the future. The problem with latent/concealed defects, often a key issue with leaky homes, was relatively well known in December 2004 at least amongst the building industry.

[56] Mr Barnes claimed that he never had any opportunity to inspect the house following the discovery of the defects by Mr Alvey and before the repairs were carried out. He says that he therefore had no opportunity independently to verify or audit what the defects were and whether the repairs (or the extent of them) were necessary. While the claimants did write to other parties, including Mr Kiff, at the time the repairs were carried out and advised them of that fact, BHIS was not included.

[57] It is unfortunate that Mr Barnes was denied this opportunity. However, I accept at the time of the repairs, when the claimants did write to other parties, they were focussed on parties with direct involvement in the construction, most notably the builder and developer. The omission to include BHIS was an innocent one. In any event, whatever disadvantage BHIS may have experienced, I can see

no reason to doubt the reliability or veracity of the evidence of Messrs O'Hagan and Alvey.

[58] I therefore conclude that BHIS breached its obligations to the Roos to exercise reasonable skill and care in its assessment and report on their house. The next critical issue is whether the disclaimer/exclusion clauses attached to the report either negate or limit any liability that might ensue from the breach of those obligations.

(b) The Effect of the Disclaimer/Exclusion Clauses

[59] Disclaimer (a) in the report of BHIS of December 2004 makes it clear that the report was a "visual one" only, not extending to any concealed items. That the report is so limited is also apparent from disclaimer clause (f). However, disclaimer (a) provides no defence to BHIS. I have already concluded that even though it was agreed that the assessment and report were to be visual only, there was a failure to exercise reasonable skill and care. What is apparent from the disclaimer clauses is that what was agreed to between the parties was an assessment and report, albeit visual only, that specifically addressed weathertight issues.

[60] Disclaimer (f) purports to exclude liability for not just items that may be concealed but "for any other condition or problem not identified in the inspection report". Disclaimer (g) purports to limit any liability that might arise (despite clauses (a)-(f) above), "in its aggregate to the amount of the fee charged by BHIS for the report". In this case, such limit was $450.00 (including GST), a miniscule figure compared to the amount the claimants contend that BHIS is liable for.

[61] There was no formal written contract between the Roos and BHIS and the Roos never signed any document consenting to the disclaimers/exclusion clauses in the report. In the circumstances the critical issue to determine is whether the disclaimers and, in particular

disclaimers (f) and (g), are to be incorporated into the contract between the Roos and BHIS, as a term.

[62] The following legal principles are relevant:

a) The courts will assess the totality of the evidence to determine:

i. Whether any document containing an exemption clause is incorporated into the contract as a term; and

ii. To endeavour to give effect to the reasonable expectations and intentions of the parties as expressed by the contract.[13]

b) A contract, whether oral or written, can refer to and incorporate written documents without attaching the document to the contract itself. However, before such document can be incorporated, there needs to be unequivocal evidence as to the terms that were offered and accepted by the parties to the contract at issue. In *Nalder and Biddle Limited (Nelson) v C and F Fishing Limited*,[14] the Court of Appeal held that the question of whether a particular contract incorporates a further written document is to be determined by applying the normal principles of offer and acceptance. That is, an application of the strict requirement that the parties' offer and acceptance are on exactly the same terms (see also Burrows Finn Todd *Law of Contract in New Zealand*[15] at para 7.2.1.

c) A document will be incorporated into the contract if the party who is said to be bound "knew that it was intended to be of contractual effect", "received it with reasonable notice that it contained conditions" or "if it is obvious to a reasonable person that it must have been intended to have

[13] See Ian Bassett *Contract Law in New Zealand: Lawyers' Handbook*, (Southern Cross Publishing, Auckland, 2007), at p 40.
[14] [2007] 1 NZLR 721.
[15] (3rd edition, LexisNexis NZ, Wellington, 2007).

> contractual effect, as where the document is of a kind that generally contains contractual terms" (see Burrows Finn and Todd (supra) at para 7.2.2). However, adequate notice must be received before the contract is made. A term cannot be incorporated into a previously concluded contract by subsequent notice.[16]

[63] In applying these principles for this case, I find that the disclaimers (f) and (g) were neither a term of the contract nor are they to be incorporated into the contract between the Roos and BHIS, so as to exclude or limit liability. These disclaimer clauses cannot therefore be relied upon by BHIS as a defence of any kind.

[64] The report dated December 2004, in which these particular disclaimers are to be found, was the product or result of a contract that had earlier been concluded between the parties. Disclaimers (f) and (g) not previously agreed to, cannot therefore be incorporated into a previously concluded contract by subsequent notice.

[65] The contract in this case was in large part an oral one, with the parties concluding it at the time of the inspection and before the report was produced. This is confirmed by the invoice dated 3 December 2004 being despatched before the report was produced. The Roos never agreed to the disclaimer clauses either in writing or otherwise. Furthermore, there is no evidence to suggest that such clauses, could be said to be customary or standard terms ordinarily found in contracts of this kind.

[66] The evidence of Mr Roos was that apart from the issue of a visual-only inspection, there was no discussion of any kind about any other disclaimer or exclusion, at the time that they commissioned the report and assessment from BHIS. The first time that the Roos

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[16] See *Olley v Marlborough Court Limited* [1941] 1 KB 532; see also Burrows Finn and Todd (supra) page 912 para 7.2.2.

became aware of these disclaimers were when they received the report from Mr Barnes at a later date. Mr Barnes said in evidence that his normal practice was generally to raise and discuss the disclaimer clauses (or at least the substance of them) at the time he agreed with the client on the scope of the commissions. However, he cannot recall whether he did so in this case.

[67] In applying the normal principles of offer and acceptance, I find that the offeree, the Roos, did not unreservedly assent to the precise terms (i.e. disclaimers (f) and (g)) proposed by BHIS, as the offeror. Accordingly, the disclaimers do not limit the liability of BHIS for the damages claimed in this case by the claimants.

[68] In any event, and even if I am wrong in my assessment on the effect of the disclaimer/exclusion clauses, BHIS cannot, on the basis of such clauses, escape liability for breach of the Fair Trading Act 1986. I address this matter further below.

(c) Measure of Damages for Breach of Obligations

[69] I have no difficulty in concluding that the failure of BHIS to exercise reasonable skill and care caused the claimants to suffer loss. The evidence is very clear, namely that the Roos would not have bought the house and incurred the costs they have in repairing it, had BHIS acted with reasonable care and skill and alerted them to weathertight issues. While the failure of BHIS was not the sole cause of their loss, it was clearly a dominant or an effective one.

[70] There is little New Zealand authority on the more critical issue of the appropriate measure of damages for a negligent building report by a property surveyor. In *Contract Law in New Zealand:* Lawyers' Handbook,[17] reference is made to the leading English case, namely

[17] See n 13 above at page 136.

Watts v Morrow.[18] In that case it was held that damages are to be assessed as the differential between the price paid and the correct market value taking account of the defects. What is not recoverable is the cost of cure of the defects in the property, negligently omitted in the survey.

[71] In England, it appears to be standard practice for purchasers to obtain a building report from a property surveyor. In the text, Andrew Burrows *Remedies for Torts and Breach of Contract*,[19] the issue of the appropriate measure of damages is discussed at p28 in the following terms:

> "*It follows that if in reliance on the survey the purchaser goes ahead and buys the house and it transpires that the survey was made in breach of contract, because the surveyor did not report reasonably discoverable defects, the aim of damages will be to put the claimant into as good a position as if reasonable care had been used in making the survey and report; they are not aimed at putting the claimant into any (other) warranted position. There are two possible positions the claimant may argue that he would have been in if reasonable care had been used in making the survey and report. Either he would not have brought the house at all or he would have bought it, but for less than he paid. Applying the former, the claimants basic loss will be the purchase price paid minus the house's actual value. Applying the latter, the basic loss will be the same if one assumes that the claimant would have paid the actual value of the house.* ***Alternatively, the Court might take the cost of repairs as a convenient starting point for the deduction in price the purchaser would actually have made from the purchase price if he had known of the defects."***

[18] [1991] 4 AU ER 937.
[19] (3rd ed, Oxford University, 2004).

[72] In this case I am satisfied that the claimants, as they submit, are entitled to recover the costs of repairs. The vexed issue that seems to have led to litigation in the UK, namely the appropriate measure when the cost of repairs/cure exceeds the difference in value approach, does not arise in this case. In any event, the approach of the Court of Appeal in the recent decisions of *Sunset Terraces*[20] and *Byron Avenue*,[21] tends to suggest that in New Zealand the cost of repairs should ordinarily be the measure.

[73] Both Messrs O'Hagan and Alvey are experienced pre-purchase inspectors. Both gave evidence that had they identified weathertight defects in the Roos' house in December 2004 (and which they say ought to have been identified) they would have sought to persuade the Roos not to purchase. If the claimants had insisted on purchasing, both witnesses would have recommended that the Roos seek a substantial discount from the market price of $660,000.00.

[74] Mr O'Hagan said that as a very rough guide, his practice is to recommend (where purchasers reject the advice not to buy) that the purchaser pay the land value only. In December 2004 the land value of the Roos' house was $145,000.00. Another approach, which Mr Alvey also outlined, was to recommend to a purchaser that the price that should be paid would be to take the market price and deduct from it the cost of repairs. The general formula used to determine the cost of repairs when applied to the Roos' house, would have led to the following calculation:

> *Value=225m (floor area) x 1.25m (wall area) x $800 (per metre repair costs) = $225,000*

[20] See n 12 above.
[21] *Body Corporate No 189855 v North Shore City Council* (*Byron Avenue*) [2010] NZCA 65.

[75] In this case both approaches, namely paying land value only or applying the formula for deducting repair costs, give rise to an amount in excess of the actual repair costs claimed by Mr and Mrs Roos.

[76] In conclusion on the ultimate question of liability for the first two causes of actions, I find that BHIS is concurrently liable in both contract and tort to the claimants for the full costs of repairs to their house. Before dealing with the question of quantum and general damages, I turn to consider the third cause of action, namely breach of section 9 of the Fair Trading Act 1986.

(d) Section 9 of The Fair Trading Act 1986

[77] There is no real doubt that BHIS was engaged in trade for the purposes of section 2 of the Fair Trading Act 1986. The real matter in dispute is whether the representations made by BHIS in its report of December 2004 were misleading, contrary to section 9, which reads:

> "No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive"

[78] In a very recent case, *Red Eagle Corporation Limited v Ellis*,[22] the Supreme Court held that section 9 is directed to promoting fair dealing and trade by proscribing conduct which, examined objectively, is deceptive or misleading in the particular circumstances. The Court further observed that conduct towards a sophisticated businessman may be less likely to be objectively regarded as capable of misleading or deceiving such a person than similar conduct directed towards a consumer. There must be an assessment of the circumstances in which the conduct occurred and the person likely to be affected by it.

[22] [2010] NZSC 20.

[79] In *AMP v Heaven,*[23] the Court of Appeal held that the question of whether there was a breach of section 9 should be addressed in three steps: whether the conduct was capable of being misleading; whether the plaintiffs were in fact misled by that conduct; and, whether it was reasonable for the plaintiffs to have been misled by that conduct. The three step test is an objective one.

[80] In my view, the representations contained in the BHIS report of December 2004 and in particular the statement that "the house is structurally sound and is generally in very good condition" and that the bulging in the cladding was "cosmetic only" constitute misleading conduct, contrary to section 9. Such representations were not just incorrect, but on an objective reading, lead the reader into serious error. The representations necessarily implied that there was a proper basis for making what was a positive assessment. For reasons given above, there was no such proper basis (see *Body Corporate 202254 v Taylor*).[24] It was misleading not to have at least alerted the Roos to the fact that there were warning signs suggesting possible weathertight problems and in failing to recommend or suggest further testing to obtain a more informed and comprehensive view.

[81] It is also clear, for reasons already given, that the Roos were in fact misled by the representations made and that it was reasonable for them to have been misled by such representations (see *AMP v Heaven*).

[82] Whatever the precise contractual effect of the disclaimer/exclusion clauses, they cannot be relied upon by BHIS so as to exclude any liability for breach of section 9. Clauses which seek to exclude liability under the Fair Trading Act are generally found to be

[23] [1998] 6 NZBLC 102,414.
[24] [2008] NZCA 317 at [50].

ineffective. In *Smythe v Bayleys Real Estate Ltd*,[25] Thomas J held that disclaimer clauses could not exclude the operation of the Fair Trading Act as such an outcome would be inconsistent with the legislative purpose of consumer protection. It was held that the requirements of the Fair Trading Act are mandatory and seek to protect the consumer from unfair trading. A similar approach has been adopted in Australia (see *Petera TTY Limited v EAJ PTY Limited,*[26] where Wilcox J found an exclusion clause does not operate to exclude an action under section 52 of the Australian Trade Practices Act; see also *Body Corporate 202254 v Taylor* (supra) at para 78 where the Court held that consumer protection considerations are best served by a broad approach to liability).

[83] Having established that section 9 has been breached, I also find, in applying section 43 of the 1986 Act, that the misleading conduct of BHIS was an effective cause of the claimants' loss, namely the cost of repairs (see *Red Eagle Corporation Limited v Ellis* (supra) at paragraph 29).

[84] In exercising my discretion under section 43 of the 1986 Act, I order that BHIS should pay the claimants the costs of their repairs, being the loss that they have suffered as a result of the misleading conduct breaching section 9. There was no contributory fault by the Roos that might legitimately give rise to any reduction in the damages to be awarded.

QUANTUM

[85] The claimants seek from BHIS by way of damages, a total sum of $300,531.55. This is broken down as follows:

[25] (1993) 5 TCLR 454.
[26] [1985] FCA 277.

Remedial repair costs	$221,743.84
Consequential costs	$9,016.07
General damages	$50,000.00
Interest	$19,771.64
Total	**$300,531.55**

[86] The remedial repair cost of $221,743.84 and the consequential costs of $9,016.07 are based on actual figures, the repairs having been carried out and completed.

[87] The evidence of Mr O'Hagan on the question of the cost of repairs was largely uncontested. There was a very minor/negligible difference in view between Mr O'Hagan and Mr Alvey on the question of whether the repairs relating to the chimney were betterment or not.

[88] I am satisfied that the sum of $221,743.84 for repairs is a fair and reasonable figure. A full reclad was required, directed at current and future damage. I am also satisfied that the consequential costs sum of $9,016.07 is fair and reasonable.

(a) General Damages

[89] It is clear from the evidence that Mr and Mrs Roos experienced considerable stress and anxiety both in discovering that their virtually brand-new house, a family home, was leaking and having it extensively repaired. They remained living in the house under difficult conditions, whilst the repairs were carried out.

[90] A summary of the amounts of general damages awarded by the High Court in recent leaky home cases is set out in the *Tony Tay* (supra) decision.[27]

[27] See also *Byron Avenue* at n 21.

[91] I am satisfied that the claimants should each be awarded $25,000.00 by way of general damages (i.e. a total of $50,000.00).

(b) Interest

[92] The claimants seek the sum of $19,771.64 as interest. This has been calculated, according to the plaintiff's memorandum as to quantum dated 26 February 2010, on the basis of interest lost as a result of funds held in their savings account having been expended on the repairs. The claimants further submit that the sum of $19,771.64 is less than the amount that would have accrued had the 90-day bill rate plus 2% been applied (clause 16 of schedule 2 to the Weathertight Homes Resolution Services Act 2006) from April 2008 to February 2010 (on the whole sum of $230,749.91 and applying the varying 90-bill rates (plus 2%) during that whole period).

[93] I do not accept that either of the two alternative interest rate calculations put forward should be adopted.

[94] I have concluded that the claimants should be awarded the sum of $9,912.65 by way of interest. This figure is based on the current 90-day bill rate plus 2% (i.e. 4.68% for the period 30 April 2009, when remedial work was completed, until the date of this determination) and on the combined sum of the remedial repairs and consequential costs.

CONCLUSION AND ORDERS

[95] The claim against Mr Adrian Kiff, the third respondent, is dismissed. The claimants have failed to prove that Mr Kiff was personally responsible for any of the negligent acts or omissions alleged.

[96] The claim against Bays House Inspection Services Limited, the fourth respondent is proven to the extent of $290,672.56. The claimants have succeeded against Bays House Inspection Services Limited on all three causes of action, namely breach of contract, negligence and breach of section 9 of the Fair Trading Act 1986.

[97] The sum of $290,672.56 is calculated as follows:

Remedial repair costs	$221,743.84
Consequential costs	$9,016.07
General damages	$50,000.00
Interest	$9,912.65
TOTAL	**$290,672.56**

[98] Bays House Inspection Services Limited is ordered to pay forthwith to the claimants the sum of $290,672.56.

DATED this 30th day of March 2010

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P J Andrew

Tribunal Member

DISCLAIMER:

a: This property report is a visual one only of the building elements which could be seen easily, and does not include any item that is closed in or concealed including flooring, walls, ceiling, framing, plumbing and drainage, heating and ventilation, and wiring etc. Therefore we are unable to report that any such part of the structure is free from defect.

b: This property report does not include the structural, electrical, plumbing or gas piping or fitting, home heating state of the premises, as our consultants are not qualified for this but can arrange for these areas to be inspected by those people whose qualifications enable them to do so.

c: Nothing will be dismantled during the inspection and there will be no destructive testing performed. Appliances and spa/pool equipment or special features are not inspected. None of the appliances or equipment will be dismantled and no determination of their efficiency will be made.

d: The report does not purport to be a full weather tightness inspection as external moisture meter readings with a resistance meter were not undertaken. This type of meter requires drilling holes through the cladding system to test the timber more accurately.

e: Observations and comments on sub trades should not be confused with that of an expert qualified in each field. Assistance with separate reports from Qualified Master Plumbers, Registered Electricians and/or Engineers are available on request.

f: It is agreed that the Inspection Report is completed on the basis that Bays House Inspection Services Limited is not liable for any loss or damage resulting from its failure to identify any condition or problem that may be concealed at the time of the inspection or for any other condition or problem not identified in the inspection report.

g: If, contrary to the Disclaimer of Liability set out above, Bays House Inspection Services Limited is deemed to be liable for any resulting loss or damage incurred by the client following and arising from the provision of the report, then it is agreed between Bays House Inspection Services Limited and the client that such liability is limited in its aggregate to the amount of the fee charged by Bays House Inspection Services Limited for the report.