IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2010-100-000099
[2011] NZWHT AUCKLAND 46

BETWEEN	**DAVID GEORGE AND KAREN JEAN STRICKLAND** Claimants
AND	**ANDRE JARGEN GAENSICKE** First Respondent
AND	**IAN SHARPLIN** Second Respondent
AND	**AUCKLAND COUNCIL** Third Respondent
AND	**SHINGLE & SHAKE ROOFING LIMITED** Fourth Respondent
AND	**KEVIN GRANT BURROWS** Fifth Respondent
AND	**ROGER JAMES FRANKS** **Sixth Respondent**
AND	**KARL ROLAND GAENSICKE** Seventh Respondent
AND	**DAVID PIKE** **(Removed)** Eighth Respondent
AND	**BRIAN DOUGLAS MCINNARNEY** **(Removed)** Ninth Respondent
AND	**FRANCIS MCNABNEYAND WILLIAM MCNABNEY** **(Removed)** Tenth Respondents

Hearing:	25-28 July 2011
Closing Submissions:	15 August 2011
Appearances:	Claimants – Tania Wood and Eryn Tompkins First Respondent – self represented Second Respondent – Ken Nicholson Third Respondent – David Heaney QC and Kate Dillon Fourth Respondent – Paul Grimshaw and David Powell Fifth Respondent – self represented Sixth Respondent – Don MacRae Seventh Respondent – self represented
Decision:	16 September 2011

FINAL DETERMINATION
Adjudicator: P A McConnell

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INTRODUCTION

[1] In February 2006 David and Karen Strickland purchased a lifestyle property in rural Kaukapakapa which they thought would be their dream house. Unfortunately within four months of moving in they experienced leaks. Despite applying sealant around windows and cracks leaks have continued to occur around the joinery, through the walls and around internal gutters. Mr and Mrs Strickland sought appropriate expert advice as to how to remedy the problems with their home. They have been advised that the house should be demolished and rebuilt.

[2] Mr and Mrs Strickland claim the cost of the rebuild of $892,200 together with $15,000 consequential damages and $25,000 general damages from the following parties:

- Andre Gaensicke who was the owner and builder of the house.
- Karl Gaensicke, his brother who assisted Andre with the building and plastering.
- Ian Sharplin, the architectural designer engaged to draw the plans and who completed the “as built” drawings.
- Auckland Council as the successor to the assets and liabilities of the Rodney District Council, the territorial authority who issued the building consent, carried out the inspections and issued the Code Compliance Certificate.
- Shingle and Shake Roofing Limited who constructed the shingle roof areas and also laid the final layer of butynol on other areas of the roof.
- Kevin Burrows, an engineer who did the engineering design for the dwelling and issued a producer statement near the end of construction.
- Roger Franks, the director of Thermalite Limited, the company that supplied the blocks used to construct the

property and who issued letters in relation to the adequacy of the block work.

MATERIAL FACTS

[3] In September 2000 Andre Gaensicke (Andre) and his wife purchased a block of land in Downer Access Road with the intention of building a home on the property to live in. At that time Andre was a plasterer by trade. He contracted Ian Sharplin to prepare plans for building consent and also engaged Kevin Burrows to prepare the engineering design work required for consent. A building consent was issued on 14 November 2000. Andre then commenced building the house with the assistance of his brother Karl and other family members as well as specialist contractors who were engaged to complete various aspects of the construction work.

[4] The consented designs were for a dwelling clad with Hebel panels and with Hebel lintels over the windows. The design was changed during construction. The Hebel panels and lintels were replaced with Thermalite blocks and macrocarpa lintels and changes were made to the design of the mezzanine floors, roof height in some locations and spacing of joists. During a failed pre-line check in May 2001 and a recheck in July 2001 the Council inspector noted some of the changes to the plans and requested further documentation. The paper records suggest little was done about this until construction was almost complete. At that stage either the Council or Andre approached Mr Burrows for certification that the dwelling was still structurally in accordance with his engineering design intent in light of the number of variations.

[5] Mr Burrows had no site involvement during the construction of the block work and accordingly sought assurances that it had been completed appropriately. On the basis of a letter provided by Thermalite-block Limited, signed by Mr Franks, Mr Burrows completed his calculations and concluded that the bracing design he

had prepared was not compromised by the variations. He accordingly completed a producer statement that the building complied with B1 Structural issues.

[6] The Council also requested Andre to provide working plans and he in turn contacted Mr Sharplin. Mr Sharplin had not visited the site during construction and had not been consulted in relation to any of the design changes. Mr Sharplin contacted the Council officer involved with the job and advised that in these circumstances he could not provide working drawings but could only provide "as built" drawings. As this appeared to be acceptable to the Council, Andre instructed Mr Sharplin to provide the "as built" drawings. Mr Sharplin completed four pages of "as built" drawings and submitted them to the Council. The first three pages clearly had stamped on them that they were "as built" drawings, the fourth page did not have "as built" appearing on the document but was labelled "page 4 of 4".

[7] Further inspections were carried out and statements obtained from both Shingle and Shake Roofing Limited and Mr Franks in relation to aspects of the construction. An amended consent was issued and the Code Compliance Certificate was issued on 5 December 2001. While Andre and his family had intended to live in the property cost overruns meant they could not afford to do so. They accordingly sold at a loss.

[8] Mr and Mrs Strickland first saw the property in 2005 and visited it on three separate occasions before putting in an offer. On one of those occasions they discussed the cracking they had seen around the property with the real estate agent. The agent advised that the vendors were getting a building report done to identify whether there were any significant problems with the house. Mr and Mrs Strickland then made an offer conditional on being satisfied with the building report and also on the sale of their property. The report concluded that the property was in generally good condition. While it noted some minor cracking the report stated that it was "not of

concern" and "only a cosmetic issue" and recommended sealing the cracks. Mr and Mrs Strickland were satisfied with the report as it appeared that all that was necessary was to silicone any cracking that occurred to ensure the blocks were well sealed. They made the contract unconditional on the sale of their existing property and moved in early February 2006.

[9] Mr and Mrs Strickland first noticed leaks to the eastern elevation of the house at the end of May 2006 when there were drips inside the house during periods of heavy rain. They immediately purchased silicone sealant and Mr Strickland went around all the joinery and external cracks sealing any possible sources of water ingress. However new leaks started in other areas and elevations and old leaks kept reoccurring.

[10] In May 2006 Mr and Mrs Strickland also arranged for skylights to be installed in the property. A roofer who came to install the second skylight raised concerns about the way in which the roof had been built. He suggested they get further specialist advice as he considered that there were construction defects with their property. Mr and Mrs Strickland subsequently engaged an architect and an engineer to investigate the issues and in October 2006 they lodged a claim with the WHRS. The assessor recommended remedial work to the joinery, roofing and gutters and block work. Other experts the claimants consulted recommended demolishing and rebuilding the house.

THE ISSUES

[11] The issues I need to decide are:

- Why does the house leak?
- Does Andre Gaensicke owe a duty of care as a developer or builder, and if so, has he breached that duty of care?

- Did Ian Sharplin breach any duty of care owed in completing the ‘as built’ drawings?
- Was the Council negligent in carrying out its inspections and issuing the Code Compliance Certificate?
- Was Shingle and Shake Roofing Limited negligent when laying the butynol when vents had not been installed?
- Was Mr Burrows negligent when issuing a producer statement confirming the property complied with B1 of the Code when he had not inspected it during construction? If so, is there a causative link between his negligence and the claimants’ loss?
- Did Roger Franks owe the claimants a duty of care when issuing the statements in relation to the construction of the Thermalite blocks?
- Does Karl Gaensicke owe the claimants a duty of care and if so did he breach that duty of care?
- What is the appropriate remedial scope? In particular, does the house need to be demolished and rebuilt?
- What is the appropriate level of damages to award? In particular, should remedial costs be based on a rebuild, the construction cost of an alternative home, or loss of value?
- Were the claimants contributorily negligent?
- What contribution should each of the liable respondents pay?

WHY DOES THE HOUSE LEAK?

[12] The dwelling is predominantly single-storey with two mezzanine floors off the main living area. The walls are reinforced Thermalite autoclaved aerated concrete block and are finished with a plaster coating on the exterior and interior. The walls are supported by continuous steel reinforced concrete foundations and ground bearing slabs. The roof is relatively complex in its design with three mono-pitched sections clad with asphalt shingles over plywood and

lower pitched and flat sections clad with butyl rubber membrane. The roofs drain to a mixture of external gutters and butyl lined internal gutters.

[13] The joinery is refurbished timber joinery and the units are recessed. There are exposed macrocarpa timber lintels over all windows and doors some of which provide support to the openings.

[14] An experts' conference was convened in advance of the hearing. While all the experts agreed the property leaked, and agreed on some of the causes of water ingress, they did not agree on which were the key causes of water ingress nor did they agree on the appropriate remedial scope. At the hearing the experts gave evidence primarily in two panels. The first panel consisting of building experts, Stuart Wilson, engaged by the claimants, Geoffrey Bayley, engaged by the Council, Desmond Cowperthwaite, engaged by Shingle and Shake, Alan Light the assessor and Friedrich Koch, engaged by Mr Franks. Mr Koch was the only expert who has any significant experience in constructing buildings with an aerated concrete block similar to what was used with this dwelling.

[15] The second panel of experts included three engineers namely John Scarry, engaged by the claimants, Brian Jones, engaged by Mr Burrows, and Voytek Wieczorek, who had been engaged by the assessor, Alan Light, to complete a report on the engineering issues with the dwelling. Mr Burrows also gave evidence of engineering and structural issues but not as part of the panel.

[16] Ms Wood, for the claimants, submitted that where there was a conflict between the experts I should prefer the evidence of Mr Scarry because he had spent over 100 hours on this claim. The number of hours spent however cannot be the primary consideration when deciding whether an expert's opinion has been established. I note that Mr Scarry advised that he had spent approximately six

hours on site which was not substantially longer than some of the other experts. I am satisfied that the majority, if not all the experts, have spent sufficient time both on site and in considering the documentation and reports to be in a position to come to an informed opinion.

[17] The claimants submit that there are serious structural defects with this dwelling which have resulted in cracks causing leaks. They argue the only way these issues can be appropriately addressed is by demolishing and rebuilding the dwelling. All the respondents, and their experts, accept that the dwelling leaks. They however argue that the leaks are not primarily caused by, nor have they compromised, the structural integrity of the building so as to make remedial work uneconomic or inappropriate.

[18] Due to the design and materials used in the construction of the dwelling there is potentially a direct correlation between structural defects and causes of leaks. Structural defects have the potential to cause cracks through the block work and therefore result in leaks. In addition it is alleged that some of the defects that have caused leaks have also compromised the structural integrity of the dwelling. In particular Mr Scarry argues that the deficiencies in the installation and grouting of the rods, the lack of mortar between the Thermalite blocks and the failure to install control joints have not only resulted in cracking but also resulted in the dwelling being structurally unsound.

[19] The difficulty faced by all the experts is that the construction of the dwelling is such that some of the usual methods of investigative testing are not possible. Causes of cracking and water ingress therefore, in part, rest on assumptions made from the limited testing that could be carried out together with visual inspections. The only invasive testing carried out was the cutting of approximately 26 cored investigation holes cut into the block work.

Macrocarpa Lintels

[20] The original consented plans for the property called for Hebel lintels to be installed. These provided structural support to the head of the larger openings. The Hebel lintels were substituted with exposed macrocarpa timber lintels which have been installed with limited protection from external moisture. All of the experts, with the exception of Mr Light, agreed that macrocarpa was not a suitable timber for the external face of the lintels in this house. The engineering experts in particular agreed that the use of macrocarpa lintels was incompatible with the surrounding block work. While they had different opinions as to the structural implications of this incompatibility, they all agreed the incompatibility combined with inadequate sealant has resulted in leaks.

[21] The use of macrocarpa lintels in this property has resulted in sagging to some of the lintels around the dwelling which in turn has caused or exacerbated cracks. There are vertical cracks formed directly above the centre of some of the lintels which in some cases extend through the full depth of the block work to the interior of the dwelling and provide paths for moisture entry to the interior living space. Movement caused by thermal expansion and contraction and the sagging of the lintels have also caused gaps, through which daylight can be seen, between the lintels and the block work. There is also evidence of decay to the exterior face of the lintels.

[22] I conclude that the substitution of the macrocarpa lintels for the Hebel lintels is in itself a defect which has caused water ingress. In addition the inadequate sealing and installation method of the lintels has caused water ingress. I do not accept Mr Bayley's evidence that the Holdfast sealant was appropriate for use as a method for sealing the macrocarpa lintels. While Holdfast could be used in exposed situations, I accept Mr Wilson's evidence that it could not deal with the expected shrinkage and expansion of the timber in this dwelling. It was therefore not appropriate to rely on

Holdfast sealant to provide a weathertight joint given the amount of movement that could have been expected from the use of two such incompatible materials as the macrocarpa lintels and the light weight aerated concrete blocks. In any event as Mr Bayley rightly points out the use of these blocks was an alternative solution and the Code is performance based. It is clear from the issues with this property that the junctions between the lintels and the block work have not performed adequately and this has directly resulted in water ingress and damage to the dwelling.

Thermalite Block Work

[23] The claimants' experts have identified five major defects in the Thermalite block work which they consider have caused or contributed to the cracking and water ingress. These are:

- incomplete and inadequate mortar application;
- lack of control joints;
- anchorage of walls;
- inappropriate and inadequate bracing;
- roof and block wall connections.

Inadequate Mortar Application

[24] There are two types of mortar used in the block work. Firstly an adhesive mortar used between the blocks which I will refer to as adhesive. Secondly the mortar or grouting that should have been used to fill in gaps between the blocks prior to applying the plaster which in this decision I will refer to as mortar. All the experts accepted that the technical literature provided for a complete coverage of the adhesive between the blocks. They also accepted that in some locations there was evidence that there had not been a complete cover. The experts however disagreed on the extent of the problem and whether it had any implications for the weathertightness

or structural integrity of the dwelling, particularly when considered separately to the issue of inadequately formed control joints.

[25] Mr Scarry did a statistical extrapolation of the extent to which adhesive was missing based on an examination of the cored investigation holes. His evidence was that approximately one third of the mortar was missing from the 26 cored holes he examined. He said that with 17 of the cores the mortar was acceptable but in nine there were complete voids. He then extrapolated this across the whole dwelling and provided a mark-up of what this would mean in terms of the missing adhesive. This extrapolation however can only have validity if the samples used were selected and spaced throughout the property so as to constitute a statistically valid sample. There is no evidence that this was the case. To the contrary, as is normal, the cores were cut in areas which were known to be problematic. In addition several of the cut outs were done in a vertical line along what was the builder's attempt to create a control joint. In these locations adhesive and mortar was omitted intentionally in an attempt to form a control joint. Other cut outs were done where there were voids around the anchor rods. Both of these issues will be considered in relation to other defects.

[26] Therefore while I accept that there has not been a complete coating of adhesive or mortar to all of the blocks, the claimants have not established that the extent of the problem is as great as Mr Scarry suggests. I do not consider that replicating the deficiencies observed from the cored holes across the entire building is appropriate given the selected testing that was done.

[27] Mr Koch advised that although a complete covering of adhesive was ideal in practice it was rarely, if ever, achieved. His evidence is that the adhesive was very strong, even if applied very thinly, and that there were often areas around corners and rods where grouting and filling is required prior to the finishing plaster. His view was that although there were deficiencies in the application of

the adhesive on this property it was adequate and would not have resulted in any weathertight or structural deficiencies if sufficient grouting and adequate plaster had been applied on the completion of the block work together with better constructed control joints.

[28] On this issue I prefer Mr Koch's evidence. He was the only expert who had any experience in using this type of block work in construction. Ms Wood, on behalf of the claimants, submitted that the photographs of the house prior to plastering, produced by Karl partway through the hearing, clearly showed the deficiencies in the block work. The photos show gaps between the blocks but I do not accept that they show a lack of adhesive so as to make the blocks unstable. The gaps that were shown were the type that should have been filled with mortar prior to the plastering. The evidence suggests that either the mortar was not adequately applied at the time or that subsequent water ingress has resulted in the mortar eroding away.

[29] I accept that lack of mortar and inadequate preparation prior to plastering has contributed to cracking and water ingress issues. The only evidence that there has been any movement in the blocks themselves caused by lack of adhesive or mortar is that of Mr Scarry. He considers the southern walls to the living and kitchen areas has moved outwards and a gap has opened up between the stairway and the wall causing a significant horizontal crack that will allow the ingress of external moisture.

[30] Most of the other experts' dispute there has been any movement or, if it does exist, that it was caused by inadequate mortar application. Some of the experts suggest that if there is movement it is caused by the fill issues that were identified in earlier engineering reports obtained by the claimants as well as the Maynard Marks report. These raised doubts about the quality of the foundation construction or fill at the garage end of the property. The claimants, in opposing Mr Burrows' removal, filed a statement by Mr Wilson attaching a report by Riley Consultants. That report

suggested the movement in the structure was a result of the foundations for the building having in part been placed on unstable fill. Engineer John Syme, who reviewed that report, also considered the ground conditions had caused movement. If there has been any movement in the blocks themselves in the location identified by Mr Scarry the claimants have failed to establish that this was caused by any deficiencies in the mortaring and application of adhesive of the blocks. They withdrew all claims in relation to the foundations and fill prior to the hearing.

[31] I therefore conclude that the claimants have not established that inadequate adhesive between the blocks has been a significant issue or cause of water ingress or structural instability. I however accept that failure to provide inadequate or insufficient mortar and grouting to the gaps between the block work before plastering has contributed to water ingress. The claimants however have not proved that this compromised the structural integrity of the dwelling to the extent that a rebuild is necessary.

Lack of Control Joints

[32] The claimants' experts identified an absence of control joints in the walls of the dwelling as being a cause of water ingress. I am however satisfied that control joints were installed but the joints that were installed were not adequately finished. While appropriate gaps were left between the blocks in various locations to provide for a control break these were not meshed and plastered appropriately. In particular the control joints do not have the required ties or dowels and are not covered by weather-resistant flashings or mouldings to the outside face of the dwelling. As the control joints run through the blocks from the exterior to the interior inadequate construction of the control joints has resulted in cracking to both the interior and exterior plaster and a pathway for water to enter.

[33] I accept that if this were the only defect the deficiencies in the control joints could be addressed by targeted repairs. As the gap has been created but not finished and weather proofed adequately this could be addressed without demolishing the house. I do not consider failure to install control joints compromises the structural integrity of the dwelling. The inadequate construction of control joints has however caused or contributed to leaks and needs to be addressed as part of any remedial scope.

Inappropriate and Inadequate Bracing/ Anchorage of Walls

[34] The bracing design for this dwelling was based on the Hebel literature that was originally specified. The Thermalite system does not provide details for wall bracing. Initially the claimants' expert thought the number of steel rods in the wall was inadequate. Further investigations however established that 56 rods were installed. While the claimants still submit 56 rods are inadequate all the other experts considered the number of rods installed were adequate. There is only one area where it has been established there were no rods. This is the part wall in which the door leading out to the roof from one of the mezzanine floors is located. While there is no evidence of rods being installed in that wall there is also no evidence that failure to install rods in this area has caused or contributed to leaks or that the wall needed to be braced due to the "in plane" forces. Mr Scarry's main concern in relation to the missing rods in this area relates to the fixing of the roof which I will consider later. Other than this one location the claimants' experts' evidence as to where rods are missing is not clear.

[35] The anchor rods extend from the base of the cladding through to the roof and provide bracing for the walls. In Mr Scarry's opinion the poor design and construction of the anchor rods were a major contributing factor to the structural issues with this dwelling and also contributed to weathertightness issues. Mr Scarry criticised both the way the rods were installed at the base and also the way the

nuts were fixed, or not fixed to the top of the rods. The anchor and bracing rods in the property have been installed into a chase within the block work. Mr Scarry and Mr Wilson consider the rods did not provide sufficient support at the base of the walls partly due to the way the rods were fixed and also because of the incorporation of the damp-proof course (DPC) material. Mr Scarry's opinion is that the way in which the rods have been installed has resulted in voids in the block work leading to stress concentrations resulting in cracking.

[36] Mr Koch however advised that there were two acceptable methods of installing vertical rods. One of those methods was adopted with this property which was grinding out a vertical slot or rebate, inserting the rod and connecting it to the top and bottom. With this method however it is necessary to grout the vertical slot after the rods are installed and prior to the plaster finish. Mr Scarry considered that the technical literature only provided for the rods to be chased or rebated into the back of the blocks and not to the exterior face of the blocks. Other experts however did not consider this was an issue provided the rebate was properly grouted and weatherproofed.

[37] All the experts accept the grouting around the rods was inadequate and has left voids around some of the rods. This has provided a channel for water to egress through the building and caused leaks to the interior. It is also resulted in some corrosion to the rods themselves and cracking. The engineering experts agreed that the inadequate grouting together with other issues with the rods resulted in the need to install new rods. Mr Jones and Mr Wieczorek agreed that the method outlined by Mr Scarry was one method of doing this but did not accept that it was the only way this defect could be remedied.

Roof and block wall connections

[38] Mr Scarry also considered the roof was not appropriately fixed to the walls. He considers this defect is putting pressure on the walls below resulting in cracking. Both Mr Scarry and Mr Wilson gave evidence on the deficiencies of the bolting system used at the top of the rods. They noticed a missing bolt and at least one other that could be lifted off. One rod had been bent over rather than being bolted. Mr Scarry concluded that because of the incompatibility between the type of anchor rods (D12 reinforcing bar) and reid nuts used, none of the anchor rods were appropriately fixed to the top plate and the roof would blow off in extreme wind conditions.

[39] At the end of the second day of the hearing Karl and Andre Gaensicke asked if they could take away the reinforcing bar and reid nut, that the claimants had produced as evidence, so they could demonstrate how they had fixed the reid nuts to the anchor rods. This was agreed and the following morning they demonstrated how a secure fixing had been achieved.

[40] When being questioned by Mr Burrows, Mr Scarry acknowledged that given the roof dimensions on this dwelling only one or two secure bolts were needed to secure the roof to address normal uplift and conditions. While I accept that there is evidence that some of the nuts have become detached from the rods it is speculative to suggest that the roof is not adequately secured. There are at least 56 rods going up through the top plate which, in part, hold the roof in place. There is insufficient evidence to establish that there are not a sufficient number of nuts in place to hold the roof on in extreme wind conditions.

Other roofing defects

[41] There is a double layer of ply and butyl over the rubber roof to the eastern section of the dwelling containing the bedrooms and garage. An initial layer of ply was laid over timber faming with an

over-layer of butyl rubber membrane. Due to the inadequacies of this roof a second layer of 12mm plywood and a further layer of butyl rubber was installed over the top of the initial layer. The second layer of butyl was laid by Shingle and Shake as was the single layer butyl roof installed over the entry area to the southern elevation. The roof drains via a central internal gutter to an external rainwater head and downpipe. There have been various repairs to the gutter membrane to prevent moisture ingress as the original membrane failed causing soft rot to the framing and leaks into the living room. A metal flashing was subsequently installed.

[42] Mr Wilson submits that the failure to install ventilation in the butyl roof areas has caused leaks as it resulted in a build-up of moisture in the ceiling cavity particularly over the living areas. This has, he alleges, caused the popping and corroding of fixings and premature deterioration of the butyl. Most of the other experts accepted that there was premature deterioration of the butyl caused by the popping of the inappropriate screw fixings but did not accept that there was damage as a result of a lack of ventilation.

[43] Mr Cowperthwaite acknowledged that roof ventilation was required by the butynol manufacturer's technical literature. However his view is that this ventilation was not to ventilate moisture from the ceiling space or roof cavity but to allow release of any moisture trapped within the plywood. Such ventilation therefore is designed to stop moisture being trapped between the plywood and the butyl membrane, not to vent the roof cavity.

[44] I accept that the one-way ventilation outlets were not installed in the butyl roof areas as required by the technical literature. However the claimants have failed to establish that failure to install these outlets has led to water ingress. I accept Mr Cowperthwaite's evidence that the purpose of these outlets was to release moisture trapped within the plywood rather than to ventilate the roof space. While moisture build-up above the living spaces may have caused

some degradation to the roof this has not been a result of a lack of roof ventilation. I however accept that the butyl rubber roof areas do need to be replaced due to the use of inappropriate fixings in the substrate.

Joinery

[45] All the experts agreed there are leaks around the joinery. The plans provided for aluminium windows however the units installed were recycled timber units and they were installed with reliance on sealant to weatherproof the junctions between the joinery and the plaster coating, in which the units are embedded. As a result a number of cracks have developed around the timber joinery which provide clear paths for moisture ingress. In addition the timber window sill to the dining room area is in direct contact with the uncoated Thermalite block resulting in the timber being permanently wet which has caused decay. The joinery in the southern mezzanine area has also been installed without any casement and this has also caused cracks and water ingress.

[46] The experts agreed the joinery needed to be replaced as part of the remedial scope. The wooden joinery installed is incompatible with the blocks, for similar reasons as have been discussed when considering the lintels, and sealant could not be expected to make it code complaint given the expected rates of shrinkage and expansion. The claimants did not however consider this to be a primary defect as all relevant experts agreed that window defects could be remedied by removing and replacing the joinery.

Plastering

[47] Although not identified as a significant cause of leaks by the claimants most other experts were of the view that inadequate plastering was a major problem with this dwelling. Mr Koch in particular considered this to be the main cause of cracking. Properly mixed and applied plaster is critical to the performance of the

Thermalite blocks. As the blocks are absorbent any moisture that penetrates through the plaster is absorbed into the blocks resulting in cracking to the external and internal plaster coating. Mr Koch's opinion was that the plaster was too thin and was therefore not sufficiently strong to withstand the forces created by the block work and adhesive expanding and contracting at differing rates. This has, in his opinion, resulted in the majority of the cracking that is so widespread around the house.

[48] I accept a significant cause of cracking to this dwelling is because of inadequacies in the plaster finish combined with the failure to prepare the substrate properly in relation to grouting and control joints. The combination of these defects caused the majority of the minor cracking around the dwelling and is a significant cause of water entering into and through the block work to the interior of the dwelling.

Penetrations

[49] The cylindrical entrance foyer has exposed timber rafters cantilevered out from the walls. These rafters penetrate the Thermalite blocks and plaster and are reliant on the bond with the plaster coating to ensure weathertightness. The junctions are however prone to cracking due to differential movement and therefore relying on such a bond was inappropriate and has resulted in moisture entry. The reverse fall of the rafters has also allowed moisture to track back to the external wall and enter at the junction between the timber and plaster coating. The internal wall to the dwelling below the rafter area is damp and mouldy.

Lack of maintenance

[50] Mr Bayley considered lack of maintenance was a key issue causing weathertightness. There is little evidence to support this conclusion and it was not progressed by any of the respondents in

closing submissions. Mr Strickland gave unchallenged evidence on the work he has done around the property in an attempt to seal cracks and reduce leaks. None of the experts criticised the work he did. The only other step the Stricklands could have taken to address the issue was to completely re-plaster the house. This goes well beyond ongoing maintenance and would also not have addressed some of the underlying issues referred to above.

Summary and Conclusion on Defects

[51] A combination of several defects contributed to water ingress and damage to this dwelling. These include:

- The use of macrocarpa lintels was incompatible with the other building materials and they were inadequately sealed.
- Deficiencies in the installation of the block work including inadequate mortar application and inadequate installation and grouting of the rods. In addition the control joints were not properly formed.
- Inappropriate reliance on sealant around the wooden joinery.
- Inadequacies with the plastering.

[52] In addition to these defects there has been localised damage as a result of penetrations from the rafters cantilevered out from the walls and also inappropriate fixings in the roof substrate.

THE LIABILITY OF ANDRE GAENSICKE (Andre)

[53] The claimants allege that Andre owed them a duty of care as developer, builder and head contractor. I accept Andre's evidence that he built this house to live in rather than developing it to sell for a profit. In these circumstances he does not fit within the accepted definition of a developer. The undisputed evidence however is that

Andre was the builder of the property and made all key decisions in relation to the construction and engaged the subcontractors. He was the person who decided to depart so significantly from the consented plans. In particular he decided to use macrocarpa lintels and wooden joinery and also made key decisions in relation to the construction of the control joints. Andre, helped by family members, laid the block work, including installing the rods and lintels and plastered the property. He also carried out some of the roofing work.

[54] It is well established that builders and plasterers engaged in the construction of homes owe homeowners a duty of care. Andre, by his own admission, was the person primarily responsible for all areas of construction which have caused the leaks. There is therefore clear evidence that he breached the duty of care he owed the claimants. He is therefore jointly liable for the full amount of the established claim.

LIABILITY OF IAN SHARPLIN

[55] The claim against Mr Sharplin is in relation to his completion of the four pages of "as built" plans that was submitted to the Council in October 2001. The claimants are not alleging the "as built" drawings were not a correct depiction of what was actually built, but say that he had a duty to advise the Council and Andre that the "as built" design was not code compliant. In order to be successful in their claim against Mr Sharplin, the claimants will accordingly have to establish three things. Firstly that Mr Sharplin did not raise any concerns with the Council or with Andre in relation to the design changes. Secondly that in failing to do so Mr Sharplin fell below the standards of a reasonably competent architectural designer and thirdly that there is a causative link between his failure to warn the Council or Andre of any deficiencies and the claimants' loss.

[56] Mr Sharplin's largely undisputed evidence is that he was approached by Andre in October 2001 after the house was largely

complete and shown a letter from the Council asking for working plans. Mr Sharplin advised Andre that was an impossible request as construction was all but complete. Mr Sharplin then contacted the Council officer, whom he knew, and the result of that discussion was that the Council agreed that working drawings were not an option but that they would accept "as built" drawings in their place. Mr Sharplin made it clear at that time that he had not been involved during construction and had no involvement in the departures that were made so all that he would be able to provide ware diagrams of what he was able to see as to what was built.

[57] Mr Sharplin understood that this would be the first stage in the process and the Council would then assess the "as built" plans to determine whether they complied with the Code before issuing an amended consent. Mr Sharplin says he expressed concerns to Andre about the departures and about the changes that had been made. Given the length of time that has passed since 2001 no witness had a clear recollection of details of the relevant conversations. I am however am satisfied that Mr Sharplin informed Andre of the problems he saw with the house.

[58] I now turn to the issue of whether Mr Sharplin had an obligation to either advise in writing, or indicate on the plans, that the design recorded in the "as built" plans was deficient. The only witness who gave evidence on the standard of designers in relation to completing "as built" plans was Norrie Johnson. Mr Johnson is a registered architect and principal of Architects Process Consultants, an architectural practice specialising in assisting and advising other architects on conditions of contract and other contract documentation matters. Mr Johnson's evidence is that "as built" plans are prepared to show what was constructed. He stated that the obligation of an architect in completing those drawings was to record the aspects of the construction as it was built even if it was obvious that what had been constructed would not be found to comply with the Building Code. His evidence was that a designer in completing "as built"

plans was not under an obligation to do anything further than to indicate that they were “as built”. His view was that this was also the first stage of a process and that the Council on receipt of the “as built” plans would then make an assessment as to whether they were Code compliant.

[59] This point was also accepted by Mr Hubbuck when giving evidence on behalf of the Council. He agreed that the submitting of the plans was the first stage of the process for amended consent and that the Council would then need to make a decision as to whether the house had met the requirements of the Code based on the “as built” drawings.

[60] I accordingly conclude that Mr Sharplin gave adequate and sufficient information to the Council as to his concerns with this dwelling. He made it clear that all he was able to provide were drawings depicting what had been built. The documentary record shows that after Mr Sharplin submitted the “as built” drawings Mr Sligo, a Council engineer, wrote to him regarding the lintel detail. Mr Sharplin’s evidence is that he told Mr Sligo that this was not his design and he would pass the request onto Mr Franks. Mr Sligo then followed up this issue with Mr Franks.

[61] No one alleged that these drawings were an inaccurate reflection of the “as built” state of the property. I therefore conclude that Mr Sharplin did not fall below the standards of a competent architectural designer or breached any duty of care he owed the claimants by failing to provide a written record of deficiencies in the dwelling as built.

[62] Even if I did conclude Mr Sharplin had a duty to provide further information or written advice that in his opinion the “as built” drawings were not Code compliant, it is difficult to see a causative link between this failure and any loss by the claimants. The Council’s own evidence was that Mr Sharplin’s “as built” drawings were the first

step in the process and that they were required to determine whether they met the Code before issuing an amended building consent. The claim against Mr Sharplin is therefore dismissed.

WAS THE COUNCIL NEGLIGENT IN CARRYING OUT INSPECTIONS, ISSUING THE AMENDED CONSENTS AND THE CODE COMPLIANCE CERTIFICATE?

[63] The claimants say the Council failed in the exercise of its statutory function in relation to the inspection of the building work and the issuing of the CCC. Compliance with the Code for this house depended on an alternative solution and the claimants submit that the Council should not have been reasonably satisfied that the house as built would comply with the Code.

[64] The Council accepts it owes Mr and Mrs Strickland a duty of care but submits that it acted prudently and reasonably in carrying out its inspection process and issuing a CCC for the dwelling at 51 Downer Access Road. It says it was entitled to rely on producer statements issued by the various parties including Mr Burrows, Mr Franks and Putz Techic NZ Limited. It notes that it carried out 10 inspections during construction and submits that the system of inspections it had in place was in accordance with reasonable practice at the time.

[65] The standards by which the conduct of a Council should be measured are set out in *Askin v Knox*[1] where Cook P concluded that a Council officer's conduct will be judged against the knowledge and practice at the time at which the negligent act or omission was said to take place. This was also reinforced in *Hartley v Balemi*[2] which states:

> [71] It is an objective standard of care owed by those involved in building a house. Therefore, the Court must examine what the reasonable

[1] [1989] 1 NZLR 248.

> builder, council inspector, architect or plasterer would have done. This is to be judged at the time when the work was done, i.e. in the particular circumstances of the case...
>
> [72] In order to breach that duty of care, the house must be shown to contain defects caused by the respondent(s). These must be proved to the usual civil standard, the balance of probabilities. Relative to a claim under the WHRS Act, it must be established by the claimant owner that the building is one into which water has penetrated as a result of any aspect of the design, construction or alteration of the building, or the materials used in its construction or alteration. This qualifies the building as a "leaky building" under the definition of s5. The claimant owner must also establish that the leaky building has suffered damage as a consequence of it being a leaky building. Proof of such damage then provides the adjudicator with jurisdiction to determine issues of liability (if any) of other parties to the claim and remedies in relation to such liability...

[66] The Court of Appeal in *Byron Avenue*[3] accepted that the Council owed a duty of care in its inspection even before the final inspection and issuing a Code Compliance Certificate. It stated:

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

[67] The obligation on the Council is to take all reasonable steps to ensure that the building work is being carried out in accordance with the consent and the Building Code. It is not an absolute obligation to ensure the work has been done to that standard as the Council does not fulfil the function of a clerk of works.

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[2] HC Auckland, CIV-2006-404-2589, 29 March 2007, Stevens J.

[68] I do not accept the Council's argument that it could reasonably have been satisfied from the as-built drawings and the producer statements provided by the various entities involved in construction that the house as-built would comply with the Code. Mr Hubbuck acknowledged that the producer statements it obtained, with the possible exception of the Putz Technic statement, related to B1 issues only. They did not address B2 and E2. The Putz Technic producer statement related only to the materials and not to the application of the plaster finish.

[69] In particular I do not consider that the Council could have been satisfied that the change to macrocarpa lintels and timber joinery would have satisfied B2 and E2 of the Code. The combination of the macrocarpa materials and Thermalite blocks were incompatible and would inevitably lead to weathertightness issues. The Council was negligent in issuing an amended building consent for this dwelling, in passing the final inspection and issuing the CCC. Mr Hubbuck again accepted that when Mr Sharplin provided the as-built plans that was only the first stage in the Council's assessment as to whether the dwelling as-built could comply with the plans. In addition to the four pages of plans provided by Mr Sharplin the Council also accepted a number of other "as built" drawings which were most likely completed by Andre.

[70] Given the substantive departure from the consented plans and the fact that the dwelling as-built had a number of at best risky, and at worst non-compliant, elements the Council should not have issued amended consents nor should it have issued the Code Compliance Certificate. In addition the Council identified issues with the property as early as May 2001 when an inspection failed. It did not issue a stop work notice but allowed the construction to continue so that risky elements in construction and poor workmanship issues were unable to be seen by a visual inspection. They did not enforce

[3] O'Hagan V Body Corporate 189855 [2010] NZCA 65.

their requirement for further information and documentation until the house was all but complete. They then requested, and accepted, documentation from Mr Burrows and Mr Sharplin knowing that they had not inspected the house during construction but were relying on information provided by Andre and others involved in construction. In these circumstances I do not accept the Council acted reasonably or prudently.

[71] I accordingly conclude that the Council is negligent and that they are jointly and severally liable for the full amount of the established claim.

WAS SHINGLE AND SHAKE ROOFING LIMITED (SSRL) NEGLIGENT?

[72] The claim against SSRL relates to the butyl clad eastern roof section of the house only. It centres around the alleged failure by SSRL to identify the lack of ventilation in the substrate prior to the installation of the butyl. SSRL does not dispute that it owed the claimants a duty of care. It however denies it breached any duty of care or that if it did there is no causative link between the breach and the loss suffered by the claimants.

[73] In paragraphs [41] to [44] I have concluded that the technical literature required ventilation to be installed in the substrate prior to the installation of the butyl roof. I have however also concluded that failure to provide ventilation has not been causative of any damage in this property. Therefore even if I were to find SSRL breached its duty of care in failing to ensure appropriate ventilation had been installed prior to laying the butyl in the eastern area of the roof there is no causative link between this breach and the claimants' loss. The claim against SSRL therefore fails.

WAS MR BURROWS NEGLIGENT WHEN INSPECTING THE PROPERTY AND ISSUING THE PRODUCER STATEMENT?

[74] Mr Burrows was the engineer engaged to complete the engineering design for the building consent plans. He was not engaged to undertake onsite supervision during construction and did not visit the site from after the completion of the foundation work until August 2001 when the house was largely complete. At that stage the Council requested Mr Burrows to consider whether the changes made from the plans were in accordance with his design intent and in accordance with B1 of the New Zealand Building Code. As Mr Burrows had no input into the design changes nor had he been asked to undertake any construction observations during construction he sought assurances that the block work had been constructed with the appropriate rods. Upon receiving that advice he amended his calculations taking into account what was built. He then issued a PS1 that concluded the variations were in accordance with B1 of the Code as to structure and also signed and stamped drawing number 4 of the as-built plans prepared by Mr Sharplin.

[75] The claim against Mr Burrows relates primarily to this issuing of the PS1 and the endorsement of the as-built plans and in relation to his actions leading up to completing that documentation. The claimants allege that Mr Burrows was negligent in certifying the house when he was not able to inspect during construction. They submit the details certified were non-compliant and therefore he was also negligent in issuing the PS1 and signing-off the as-built plans. Mr Burrows however submits that the Council knew he had not been involved on site when he issued his PS1 and that they were also aware he was relying on the information provided by Thermalite. He further submits he was not negligent as he was certifying B1 structural issues only and not B2 or E2. His calculations, based on the information he had, confirmed that the house when built was structurally sound. While Mr Burrows accepts that there are

weathertightness issues with the house he does not accept they are caused by, or have resulted in, the house being structurally unsound.

[76] I accept that Mr Burrows as the engineering designer owed the claimants a duty of care, the issue is whether Mr Burrows breached the duty of care owed and if so whether there is a causative link between any such breach and the claimants' loss. In this regard I note that the claimants were not aware of the producer statement when purchasing the property. In other words the claimants have not established, nor are they alleging, that they relied on the producer statement. I am also satisfied that when Mr Burrows issued the PS1 and endorsed the as-built plans, the Council was aware that he had not been on site during the construction work and was in part relying on the information provided by others. Both Mr Sharplin and Mr Burrows advised that they had discussions with the Council officers when undertaking the work. They advised that they informed the Council officers of the position they were in. The submission that the Council knew this is supported by the fact that after Mr Burrows provided his PS1, Mr Sligo sought further confirmation from Thermalite in relation to the tie down rods.

[77] As the Council knew of Mr Burrow's limited inspections it is difficult to see how there can be any causative link between the claimants' loss and any negligence on the part of Mr Burrows in completing the documentation when he had not inspected the house during construction. I also do not accept that the information contained in the PS1 itself as to inspections undertaken was misleading or inaccurate in the circumstances. Mr Burrows explained that the phrase "periodic reviews of the work appropriate to the engagement" was standard wordings for these forms and would not have misled the Council at the time. There is in fact no evidence that the Council was misled by it or that they interpreted it in the way suggested by Ms Wood.

[78] The issue therefore remains as to whether Mr Burrows was negligent in issuing the PS1 and endorsing the plans. The claimants allege that Mr Burrows could not, and should not have been satisfied that the house was B1 compliant in that he was negligent in providing the producer statement because he could not have been satisfied in relation to the lintels, the block work or the fixing of the top plate.

[79] In relation to the lintels Mr Burrows says that in determining whether they were structurally adequate he based his calculations on the inner face of the lintels only. For the purposes of his calculations he considered the outer face lintels to be part of the cladding. His calculations confirmed that the inner beam alone could be considered to be the structural beam and was sufficiently strong and stiff to provide support to the AAC blocks above. In other words his calculations established that the inner face of the lintel on its own could perform its function under B1 of the Code despite being a soft wood. He notes there is nothing in the Building Code preventing the use of soft wood and although the materials may have been incompatible and resulted in leaks this has not meant the house is structurally unsound.

[80] While I agree the use of macrocarpa was incompatible with the blocks and has caused leaks I have not concluded that this has resulted in the dwelling being structurally unsound. There is a clear dispute between the experts on this issue and on the basis of the evidence presented the claimants have not established that the house is structurally unsound because of the use of macrocarpa lintels. Even if durability needed to be taken into account there is in fact no evidence of any lack of durability or decay to the inner face of the lintels on which Mr Burrows based his calculations. It is only the external face of the lintels that need to be replaced for durability reasons. According to Mr Burrow's calculations this could be done without compromising the structural integrity of the dwelling.

[81] In relation to the block work there are two primary allegations in relation to Mr Burrow's work, apart from the fixing of the top plate, namely the lack of mortar or adhesive and the inadequate installation of the reinforcing rods. I have already concluded that the claimants have failed to establish that lack of adhesive has been causative of leaks. I am also satisfied that, apart from one relatively small wall area out from the mezzanine floors, reinforcing rods were installed. The problem with the reinforcing rods was failure to grout around the rods. As already noted Mr Burrows was reliant on the information provided by Thermalite and Mr Gaensicke in relation to this work. In any event I am not satisfied that deficiencies in these areas have resulted in the dwelling not complying with B1 structural issues.

[82] This then leaves the issue of the fixing of the top plate. Again, apart from the one location out from the mezzanine floor I have concluded that the claimants have failed to establish that the roof has not been adequately fixed. In any event Mr Burrows was relying on information provided by others before completing his calculations and issuing the PS1.

[83] Even if I were to conclude that Mr Burrows had been negligent in carrying out his calculations in issuing the PS1 and other documents provided to the Council any causative link between that negligence and the claimants' loss is somewhat tenuous for the reasons already given. In particular this was not Mr Burrows' work nor was it his design. In addition the Council was aware of the limitations of Mr Burrows' involvement when accepting and assessing his producer statement. If the claimants are basing their claim on the content of the producer statement to establish negligence then I consider that they need to establish reliance on that producer statement before Mr Burrows can be found liable. There was no reliance by them on Mr Burrows' producer statement or on the inspections or calculations he did.

[84] The only causative link between the claimants' loss and Mr Burrow's work is that it could be argued that the Council relied on Mr Burrows' calculations and documentation in issuing the Code Compliance Certificate. However, as already concluded, the Council was aware of the limited involvement Mr Burrows had on site and also of the fact that he was relying on statements from Thermalite and Mr Gaensicke when issuing his documentation. No act or omission on the part of Mr Burrows was an operative cause of the claimants' loss. The claim against Mr Burrows accordingly fails.

DID ROGER FRANKS OWE THE CLAIMANTS A DUTY OF CARE? IF SO HAS HE BREACHED THAT DUTY OF CARE?

[85] In their particulars of claim dated 31 August 2010 the claimants allege that Mr Franks owed them a duty of care as he personally inspected the installation and construction of the Thermalite blocks and provided a completion sign-off certifying that they had been installed in accordance with the Thermalite literature. Mr Franks accepts that his company, Thermalite Block Limited (Thermalite), supplied the blocks and that he, on behalf of the company wrote a letter for the claimants and a facsimile to the Council confirming the construction had been carried out in accordance with the manual. The letter was written on 10 May 2001 after the block work had been installed but prior to it being grouted and plastered.

[86] Mr Franks denies he personally owes the claimants a duty of care, but if he does, he submits that the claimants have failed to establish any breach of duty that has been causative of loss.

[87] The evidence given at the hearing established that Mr Franks and Thermalite's only role in the construction of this property up until early May 2011 was to provide and deliver the blocks. During the course of construction Mr Franks delivered blocks and adhesive to the property on approximately three occasions and no doubt out of

interest had a look at what was going. Neither Thermalite nor Mr Franks were engaged in any other capacity prior to the completion of the installation of the block work and in particular they were not engaged to give advice on, inspect or supervise construction. Whilst Andre stated during the course of the hearing that he had asked for some general advice from Mr Franks and visited another property Mr Franks was either working on, or providing blocks to, he did not state that Mr Franks was supervising or giving him on site instructions during the construction of the Downer Road property. I therefore conclude that there is nothing that Mr Franks did prior to May 2001 that would give rise to a duty of care.

[88] In May 2001 Andre phoned Mr Franks to advise him that the Council needed confirmation that the rods were in place and there were control joints in the block work. At that time Mr Franks visited the property and undertook an inspection in order to produce the letter dated 10 May 2001. At the time Mr Franks inspected the property the block work was completed, the rods and gaps left for control joints were visible but grouting and plastering was not complete. Mr Franks then provided a letter on Thermalite letterhead which stated:

> "This is to certify construction of the above job was carried out in accordance with existing building practices as laid down in the Thermalite Construction Manual.
>
> To the best of our knowledge all the requirements of the engineering design had been met.
>
> This document in no way purports to be a guarantee and is issued solely for the purposes of general workmanship covering aspects of construction and details required to satisfy the engineer's producer statement."

[89] Mr Franks had no further involvement with this property until November 2001 when he was contacted by Mr Sharplin. He then sent a facsimile to Mr Sligo of the Council which stated:

> "Thermalite block has at different stages of the construction carried out on site inspections. Four inspections were timed to coincide with the important stages of the building work that involved the walls and any associated connections.
> The third visit was to inspect the tie down rods prior to the Council's inspection and also before any grouting of the rods started.
> I can therefore confirm the rods as per the engineering requirements are continuous from slab to top of wall with particular attention to detail to sides of all wide door and window openings. Accordingly we issued upon final inspection on completion of the wall construction a completion sign-off. This was done prior to plastering."

[90] While no doubt motivated from a desire to be helpful, it was remiss of Mr Franks to provide misleading information on Thermalite's role in the construction process by stating that he had undertaken four inspections timed to coincide with the important stages of the building work when he had done no such thing. However that in itself does not establish either that he owed a duty of care, or that if he did owe a duty of care there was any reliance by the claimants on the advice he gave. In any event the rods were installed generally in accordance with the information provided by Mr Franks.

[91] Effectively the only role Mr Franks had in this construction, other than being the director of the company that supplied the blocks, was that he authored two documents which have been taken to be producer statements. Lang J in *Pacific Independent Insurance Ltd v Webber*[4] considered the issue of whether subsequent purchasers were owed a duty by the director of a company that supplied coating

[4] *Pacific Independent Insurance Ltd v Webber* HC Auckland, CIV-2009-404-4168, 24 November 2010.

powder and who signed a producer statement. He considered that there was no basis to conclude that the director foresaw, or ought to have foreseen, that subsequent purchasers might reasonably place reliance upon the producer statement. He stated:

> [41] The absence of any contractual relationship between the plaintiff and Mr Kathagen and the fact that the inspection and producer statement did not create the damage to the dwelling are also important factors in the present case. Territorial authorities are not in a contractual relationship with the original or subsequent owners of a dwelling, and they are not responsible for creating physical defects in a building. That has not prevented the courts from imposing a duty of care upon them, because the community has an expectation that they will carry out their statutory functions to a particular standard. They are required to be satisfied on reasonable grounds that a building consent should issue, they must take reasonable steps in carrying out inspections and they must be satisfied on reasonable grounds that code compliance should be certified: *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479 (HC) at [221].
>
> [42] That duty extends to intending purchasers of the property. Successive owners have "no rational choice" but to make decisions on the basis that territorial authorities have properly inspected building work that is ultimately hidden from view when the dwelling is completed: *North Shore City Council v Body Corporate 188529* [2010] 3 NZLR 486 (CA) at [77].
>
> [43] The community does not rely in the same way upon the issuer of a producer statement. The person to whom the statement is addressed may rely upon it for a particular purpose, and the Council may rely upon it in deciding whether to issue a code compliance certificate. That is not a factor in the present case, because the Council has never issued a code compliance certificate in respect of the plaintiff's dwelling. The community at large, however, does not rely upon the issuer of a producer statement in the same way that it is forced to rely upon a territorial authority to carry out its statutory functions.

> [44] For these reasons I do not consider that the relationship between the plaintiff and Mr Kathagen is sufficiently proximate that a duty of care can arise.

[92] There is no evidence that Mr and Mrs Strickland either knew of or relied on either of the statements provided by Thermalite and signed by Mr Franks. Mr Franks had no other role in the construction or inspection of the property that would give rise to a duty of care. In these circumstances I conclude that Mr Franks does not owe the claimants a duty of care.

[93] In any event, other than misrepresenting his inspections of the property, the claimants have failed to establish that the information contained in the two communications was either wrong or has any connection with the defects that have caused leaks. The key issue in the Thermalite completion sign-off letter was in relation to B1 structural issues for the engineer and related to whether the tie down rods had been installed. I have concluded that the claimants have failed to establish that there were any deficiencies in the installation of the rods that have been causative of leaks other than the failure to adequately grout the voids.

[94] The claimants submit that at the time of Mr Franks' May visit he would have seen the gaps or voids between the blocks and should have been aware of the problems with the lack of adhesive. The other experts were however of the opinion that these voids could appropriately have been filled with mortar prior to the plastering.

[95] I accept the submissions made on behalf of Mr Franks that in these circumstances the Thermalite completion document can only reasonably be considered a general statement confirming the elements of the block work had been completed which is all that it was requested to provide. There is nothing to establish that this statement was in fact incorrect as at the time, the grouting work had not been done and the observable aspects of the block work were

constructed generally in accordance with the literature and accepted practice at the time.

[96] In addition the claimants have failed to establish that there was an assumption of personal responsibility on behalf of Mr Franks. The only evidence the claimants rely on in their claim against him is the advice in the completion document and the November facsimile both issued by Thermalite Block. It is clear from cases such as *Trevor Ivory Limited v Anderson*[5] and the more recent decision of *North Shore City Council v Wightman &*[6] that in order for a director or an employee to be personally liable for negligent misstatement the claimants need to establish the director or employee assumed personal responsibility when giving that advice. Both documents signed by Mr Franks were written on behalf of the company and there is nothing to suggest that Mr Franks was assuming personal responsibility.

[97] In summary therefore Mr Franks did not personally undertake, supervise or control any of the building work. His company supplied blocks which he delivered to the site. He undertook one inspection in order to issue a statement which has been taken to be a producer statement. He also wrote a later facsimile to the Council. There is no evidence that the claimants relied on those statements nor is there any evidence of a personal assumption of liability on the part of Mr Franks. Furthermore, for similar reasons given when considering Mr Burrows' liability, the claimants have not established that there were in fact deficiencies in the block work certified in the statements.

[98] The claimants claim against Mr Franks fails. Some of the barriers to the claimants claim against Mr Franks would not necessarily be barriers to any cross-claim by the Council. The

[5] *Trevor Ivory Limited v Anderson* [1992] 2 NZLR 517 (CA).
[6] *North Shore City Council v Wightman & Ors* HC Auckland, CIV-2010-404-3942, 30 November 2010.

Council has however made no cross-claim against Mr Franks in either their response or in closing submissions.

DOES MR KARL GAENSICKE (KARL) OWE THE CLAIMANTS A DUTY OF CARE?

[99] The claimants allege that Karl assisted his brother Andre in the installation of Thermalite blocks, installing the rods, plastering, timber work, and other construction tasks. Karl confirmed at the hearing that at the time this property was built he was a qualified plasterer and that he assisted his brother with the construction work and the plastering of the property. His evidence, which is largely supported by Andre, is that it was Andre who made any key decisions in relation to departing from plans and deciding not to mesh prior to plastering.

[100] The claimants submit that all they need to establish is that Karl was involved in the construction work in order for him to owe a duty of care and that if the construction work was performed negligently he breached that duty of care. This submission however goes beyond established legal principles and precedent.

[101] It is well settled law in New Zealand that a builder owes a duty of care to any person whose property they should reasonably expect to be affected by their work. The builder's duty is to take care to prevent damage to the property. The duty is expressed as one owed by the builder to any person whom he or she might reasonably foresee to be likely to suffer loss due to a hidden defect arising from negligent building work. The fact that a builder owes a duty of care however does not mean that everyone involved in the building work or in the construction of houses owes subsequent owners a duty of care.

[102] The relevant question to ask when deciding whether a duty of care exists is whether, in the light of all the circumstances, it is just

and reasonable that such a duty be imposed. There are two broad fields of enquiry, the first being a degree of proximity or relationship between the parties, the second is whether there are any wider policy considerations to negate, restrict or strengthen the existence of a duty. The proximity enquiry is concerned with the nature of the relationship between the parties and is more than a simple question of forseeability.

[103] Justice Hugh Williams in *Boyd v McGregor*[7] stated that there were three principles to consider in determining whether parties involved in construction owed a duty of care. These were:

a) The existence of a duty of care has evolved over time and is not fixed but a potent factor in the decision is an assumption of responsibility to original buyers.
b) Purchasers other than original purchasers from the developers have a more difficult task in demonstrating they owed a duty of care by those working on the construction of the building.
c) "The functionality or the assumption of responsibility has always been an important factor and may be seen to have gained greater importance over time."[8]

[104] He referred to the Court of Appeal in *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd*[9] which stated:

> [99] Assumption of responsibility for a statement or a task does not usually entail a voluntary assumption of legal responsibility to a plaintiff, except in cases where the defendant is found to have undertaken to exercise reasonable care in circumstances which are analogous to, but short of, contract, and it is foreseeable that the plaintiff will rely on that undertaking. If that is the case then, subject to any countervailing policy factors, a duty of care will arise.

[7] *Boyd v McGregor* HC Auckland, CIV-2009-404-5332, 17 February 2010.
[8] Ibid [59].
[9] *Rolls Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324,349 paras [99] to [100].

> In other cases, the law will deem the defendant to have assumed responsibility where it is fair, just and reasonable to do so: *Attorney-General v Carter*, at pp168-169 (paras [23] – [27]). Whether it is fair, just and reasonable to deem an assumption of responsibility and then a duty of care will depend on a combination of factors, including the assumption of responsibility for the task, any vulnerability of the plaintiff, any special skill of the defendant, the need for deterrence and promotion of professional standards, lack of alternative means of protection and so on – that is, essentially the matters discussed above at paras [58]-[65]. Wider policy factors will also need to be taken into account.
>
> [100] Finally, we note that assumption of responsibility for the task cannot be sufficient in itself, at least insofar as the negligent construction cases are concerned.

[105] Karl was not the builder of the house in the sense that he was not the person responsible for its construction. He was also not a labour-only contractor engaged as a specialist tradesman to take responsibility for some aspect of the construction such as Mr Boyd or Mr Halliday were in the *Boyd* case. Karl was not a qualified builder or block layer, although he was a plasterer. Karl and Andre's evidence is that Andre was the person in charge and the person who made the key construction decisions. The functionality of Karl's role in construction militates against a finding that he owed a duty of care, as does the fact that he was not the person primarily responsible for the aspect of the construction work, but worked under the direction of the builder. There is no evidence that he took responsibility for the work. In addition I note that Mr and Mrs Strickland were subsequent purchasers.

[106] The enquiry into proximity concerns how close the nexus is between any negligence and any loss and the degree of harm. It goes to whether it would be proportionate to impose on the defendant of duty to avoid the risk or to meet the loss.[10] The fact that

[10] Ibid see also *Northern Clinic Medical and Surgical Centre Ltd v Kingston & Ors* HC Auckland CIV-2006-404-968, 3 December 2008.

the claimants are subsequent purchasers and that Karl was not an independent contractor but someone assisting his brother, the builder of the property, both point away from proximity. Public policy considerations also tend to negate the imposition of a duty if the person engaged in construction work is a hammer hand, labourer or employee under the direction and control of the builder, head contractor, or a qualified subcontractor. The reason for this is that there is unlikely to be any assumption of responsibility by labourers, employees, hammer hands or others assisting in the construction work.

[107] After considering the proximity issues, public policy and assumption of responsibility I conclude that Karl does not owe the claimants a duty of care for the construction work he did under the direction of Andre. The claim against Karl Gaensicke accordingly fails.

DOES THE HOUSE NEED TO BE DEMOLISHED OR CAN IT BE REMEDIATED?

[108] The claimants are claiming the costs of rebuilding the house for two reasons. Firstly the remedial costs are likely to exceed the cost of a rebuild and secondly the belief that the house is structurally unsound. Mr Scarry and Mr Wilson were both of the opinion that the house needed to be demolished and rebuilt. Mr Jones accepted the macrocarpa lintels needed to be replaced, or at least covered, new rods installed, targeted remedial work carried out to cracks in the blocks, and then the blocks meshed and re-plastered. Both he and Mr Koch did not consider it was either necessary or more cost-effective to demolish and rebuild.

[109] Mr Light was also of the view that the property could be repaired rather than rebuilt. He accepted that his estimated costs did not cover all the defects and that the costs associated to address some additional issues which also need to be included. Mr Bayley

provided some figures as to the cost of remedial work and also a rebuild option. He however acknowledged his proposed scope did not include a number of items he accepted would need to be done. In particular they did not include replacing the windows, and addressing the issues with the bracing rods. I also consider his estimate for replacement of the lintels is inadequate as they are insufficient to cover replacement and installation costs.

[110] Alternatively Mr Bayley suggested that the remedial costs should be based on replacing the existing home with a Jennian home. I do not however accept this is an appropriate comparison. Firstly the Jennian home proposed was approximately 10% smaller than the existing home, without even taking into account the mezzanine floor areas of approximately 30 square metres. Secondly it is not a like for like comparison as there are significant differences between a group home and the dwelling that the Stricklands thought they had purchased.

[111] The claimants did not provide figures for remedial work but they relied on their experts' assessment that it was more cost-effective to rebuild. The claimants have however failed to establish that the house is so structurally unsound it needs to be demolished and rebuilt. In particular the claimants have not established that the inadequacy of the adhesive is something that requires substantial remedial work or that it compromises the structural integrity with this dwelling. I also accept the evidence of Mr Jones, Mr Burrows and Mr Koch that the deficiencies with the anchor rods and lintels can be remedied without a rebuild. However I accept that remedial work may be expensive and may not be cost-effective. In addition there are potentially other structural issues that do not form part of this claim that the claimants may need to address.

[112] The remedial work required to address weathertightness issues includes replacing the rods, joinery and lintels, installing appropriate control joints, re-mortaring any gaps and voids in the

blocks and re-plastering over mesh. The scope is reasonably extensive and is likely to be well in excess of any of the remedial costs proposed. Given the costs that have been provided I consider it is unlikely that the remedial work could be carried out for anything less than $400,000 and it could be significantly more than that.

LOSS

[113] The claimants are seeking the rebuild costs of $892,200 not including approximately $153,000 being the cost of the foundations and other matters which they acknowledge are not claimable against any the respondents. The Council argues that rebuilding the existing property as proposed by the claimants is not economic. The estimate of the remedial costs they say well exceeds the value of the property once the house has been remediated or rebuilt.

[114] Mr Bates, the valuer called by the Council gave valuation evidence on the property as well as other properties for sale in the area. Mr Bate's evidence was based on orthodox valuation principles and he estimated the value of the property in an unaffected state as being $750,000. Of this amount he considered the value of the dwelling and associated chattels as if there were no defects as being $375,000. He estimated the land value to be $300,000 and the value of other improvements such as the landscaping, driveway, fences and garaging to be $75,000.

[115] Mr Bates also provided details of other properties currently on the market in Kaukapakapa including one located at 28 Downer Access Road. That property at the time of the hearing was on the market for $865,000. The house is a similar size to the Stricklands' home although their land size is larger. 28 Downer Access Road also has a large barn and workshop, part of that has been divided into accommodation currently rented out at $400 per week. In the valuer's assessment 28 Downer Road was clearly superior overall.

[116] The claimants did not call any valuation evidence but Mrs Strickland gave evidence in relation to whether other properties for sale were in her opinion comparable. She did not agree with Mr Bates that it was appropriate to compare their property to 28 Downer Access Road as the land area was smaller, they did not consider the house to be architecturally designed and they were not satisfied that the garaging space was equivalent to what they had with their current property.

[117] The only valuation evidence before the Tribunal is that the property, without defects, would be worth $750,000. The total rebuild cost, as proposed by the claimants, is over $1,000,000. It would not be economic to spend this amount when the finished house plus land is likely to only be worth approximately $750,000. Even if the value of the land was increased to reflect the worth the claimants attribute to it, the value of the house was increased as it would be a new house, and an allowance made for the affect of the current flat housing market in the area, the property rebuilt is still likely to be worth less than $850,000. In addition the rebuild is based on the proposition that Mr and Mrs Strickland would need to pay over $150,000 of the rebuild costs to cover amounts not covered in their claim. This would mean that the total costs for rebuilding the property would be between $1,100,000 and $1,200,000 but the property including land, when the rebuild is complete is unlikely to be worth more than $850,000.

[118] The claimants submit an award based on diminution of value would under-compensate them and accordingly run counter to the basic principles of compensation for damages. In particular they submit that they have an attachment to the property and that it offers more to them than any other of the other properties referred to by the valuer. They wish to rebuild the house on the same land although they acknowledge that they are unlikely to be able to afford to do so even if they are completely successful with their claim. Mrs

Strickland accepted that they did not have the additional $150,000 required to rebuild.

[119] They however claim they are entitled to be put in a position they would have been in if the tort had not been committed.

[120] It is now well established that a successful claimant is not entitled to more than the value of the most appropriate remedy for the damage or loss caused. When assessing loss the Tribunal should not apply a fixed rule as there is no prima facie rule as to whether diminution of value or the cost to reinstate or restore defects is the most appropriate measure of loss. Each case must be judged on its own mixture of facts both as they affect the claimants and the other parties.[11] The Tribunal should also select the measure of damages which is best calculated to fairly compensate the claimants for the harm done while at the same time being reasonable as between the claimants and the other parties.

[121] Tipping J in *Dynes v Warren & Mahoney*[12] stated that one of the matters to take into account when assessing loss is the nature of the property and the claimants' relationship to it. The other parties' connection with other properties is also of some relevance as is the nature of the wrongful act and the conduct of the parties subsequent to the wrong. The practicality of whether it is possible to recreate what has been damaged or unsoundly constructed on the site as originally intended and the practicality of the proposed remedial option are also appropriate considerations. Before reinstatement or rebuild damages can be awarded I must conclude that it is reasonable to have the property reinstated.

[122] The focus of the enquiry should always be on what would fairly compensate the claimants while at the same time being

[11] *Dynes v Warren & Mahoney* HC Christchurch, A252/84, 18 December 1987, Tipping J and *Warren & Mahoney v Dynes* CA 49/88, 26 October 1988; *Bell v Hughes* HC Hamilton, A110/80, 10 October 1984, Tompkins J.
[12] HC Christchurch, A252/84, 18 December 1987

reasonable as between the respondents. In this case the dwelling is the claimants' family home and their desire is to rebuild it. The location, size and aspect of their home, the size of the land and other amenities on it are important factors in their consideration. They do not consider the alternative properties for sale in the area offer them the same amenities. While I accept there are differences in the amenities offered by the other properties for sale in the area these differences are not sufficiently different for me to conclude that they are so great that they could not appropriately be considered to be a replacement property. The claimants however submitted that if I were to consider a lesser sum than the rebuild costs then I should make an award of an intermediate sum falling between the diminution of value and the full reinstatement costs.

[123] The best evidence I have before me in relation to the claimants' loss is based on the valuation evidence. This is because I do not accept that the claimants have established that the property needs to be rebuilt and I also do not accept that the remedial costs as put forward by the respondents or the assessor would fairly compensate the claimants for the loss they have suffered. I however do not consider the diminution of value figure of $375,000 calculated by Mr Bates would adequately compensate the Stricklands. This amount would be insufficient for them to carry out the remedial work or for them to sell the property as is and purchase a replacement property. In these circumstances I consider an award of damages that would fairly compensate the claimants, and also fairly reflect the negligent actions of the liable respondents should be the balance of the costs to buy a similar replacement property less the likely amount the claimants could obtain if they sold their property as is. I am satisfied that there are other properties for sale in the location that offer a similar, although not identical, level of amenities.

[124] Given the defects with this property and the current market conditions the valuation evidence suggests that the claimants are unlikely to obtain more for their property as is than the value of the

land plus other improvements. Mr Bates assessed the value or the land plus improvements (excluding the house) to be $375,000. The most comparable property that was on the market at the time of the hearing to the claimants' property was 28 Downer Access Road that had an asking price of $860,000. If I were to deduct a value of the sale of the property as is of $375,000 from the likely cost to buy a replacement property of $850,000 this leaves an approximate balance of $475,000.

[125] I therefore conclude that in the particular circumstances of this case the measure of damages best calculated to fairly compensate the claimants while at the same time being reasonable as between the claimants and the other parties is $475,000. This amount will enable the claimants to sell their existing property and purchase another property, or carry out remedial work, or rebuild the property using a cheaper option than an exact like-for-like replacement.

Consequential Costs and General Damages

[126] The claimants have applied for general damages of $25,000. *Sunset Terraces* and *Byron Avenue* Court[13] of Appeal decisions establish that the appropriate measure depends on individual circumstances. However for owner-occupiers the usual award would be in the vicinity of $25,000. I accept that Mr and Mrs Strickland have both suffered considerable stress and difficulty as a result of having a leaky home. They also have ongoing issues they need to face in terms of the next steps in remedying the home. I accordingly accept that it is appropriate to award general damages of $25,000 as sought.

[127] Mr and Mrs Strickland also claim consequential damages of $15,000 to cover the cost of alternative accommodation and storage while the house is being rebuilt or remedial work is being carried out.

[13] *North Shore City Council v Body Corporate 188529* [2010] NZCA 64.

None of the respondents disputed the amounts claimed for consequential damages. As it is likely the claimants will either rebuild using a cheaper option or remediate the house, the claim for consequential damages is established.

[128] In written closing submissions claimants' counsel introduced a new claim for $46,373.08 being the costs incurred investigating the defects and damages which are part of the repair of process. This claim was not included in the particulars of claim filed prior to the hearing nor in opening submissions. It is inappropriate to introduce new claims in closing submissions. In addition it appears that at least some of these costs relate to their experts' involvement in preparation for mediation and hearing rather than in relation to remedial work so are unlikely to be able to award unless a claim for costs is established. The claim for $46,373.08 is accordingly not allowed.

[129] The amount therefore that has been established is $515,000 calculated as follows:

Loss of value	475,000
Consequential costs	15,000
General damages	25,000
	$515,000

WERE THE STRICKLANDS CONTRIBUTORILY NEGLIGENT? OR DID THEY FAIL TO MITIGATE THE LOSS?

[130] The Council in its response submitted that Mr and Mrs Strickland were contributorily negligent in failing to make adequate enquiries and carry out adequate inspections of the property prior to the purchase and that they failed to mitigate their loss. Neither defence was progressed in any specific way at the hearing. At the end of the Council's closing submissions Mr Heaney confirmed the council was no longer arguing failure to mitigate and also accepted

that if the claimants were contributorily negligent it would be at the lower end of the scale.

[131] Mr and Mrs Strickland denied this allegation as they obtained both a building report and a LIM. In these circumstances the Council has not discharged the onus it has to establish either that Mr and Mrs Strickland have failed to take reasonable steps. I accordingly do not accept that the amount of damages should be reduced on the basis of contributory negligence.

WHAT CONTRIBUTION SHOULD EACH OF THE LIABLE PARTIES PAY?

[132] I have found that the first and third respondents breached the duty of care they each owed to the claimants. Each of the liable respondents is a tortfeasor or wrongdoer, and is liable to the claimants in tort for their losses to the extent outlined in this decision.

[133] Section 72(2) of the Weathertight Homes Resolution Services Act 2006, provides that the Tribunal can determine any liability of any other respondent and remedies in relation to any liability determined. In addition, 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.

[134] Under section 17 of the Law Reform Act 1936 any tortfeasor is entitled to claim a contribution from any other tortfeasor in respect of the amount to which it would otherwise be liable. The basis of recovery of contribution provided for in section 17(1)(c) is as follows:

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

[135] Section 17(2) of the Law Reform Act 1936 sets out the approach to be taken. It provides that the contribution recoverable shall be what is fair taking into account the relevant responsibilities of the parties for the damage.

[136] As a result of the breaches referred to above the first and third respondents are jointly and severally liable for the entire amount of the claim. It has been well established that the parties undertaking the work should generally bear a greater responsibility than the Council. Andre Gaensicke was the builder and project manager. He is the one who either actually carried out the construction work or was responsible for its supervision and accordingly a greater apportionment should be attributed to him. With this claim however I would assess the Council's contribution to be greater than the more usual range of 15 – 25%. They should not have allowed the building work to continue after noticing such marked departures from the consented plans. They were aware that Andre was a relatively inexperienced builder building his own home. They also should not have issued the amended consent as they could not reasonably have been satisfied that the house was code complaint from the information that was available to them. In these circumstances I assess the Council's contribution to be 40%.

[137] I therefore conclude that the first respondent is entitled to a contribution of 40% from the third respondent in respect of the amount for which he has been found jointly liable. The third respondent is entitled to a contribution of 60% from the first respondent.

CONCLUSION AND ORDERS

[138] The claim by is proven to the extent of $515,000. For the reasons set out in this determination I make the following orders:

i. Andre Jargen Gaensicke is ordered to pay David and Karen Strickland the sum of $515,000 forthwith. Andre Jargen Gaensicke is entitled to recover a contribution of up to $206,000 from Auckland Council for any amount paid in excess of $309,000.

ii. Auckland Council is ordered to pay David and Karen Strickland the sum of $515,000 forthwith. Auckland Council is entitled to recover a contribution of up to $309,000 from Andre Gaensicke for any amount paid in excess of $206,000.

iii. The claims against Ian Sharplin, Shingle and Shake Roofing Limited, Kevin Grant Burrows, Roger James Franks and Karl Roland Gaensicke are dismissed.

[139] To summarise the decision, if the two respondents meet their obligations under this determination, this will result in the following payments being made by the respondents to the claimants:

Auckland Council	$206,000.00
Andre Gaensicke	$309,000.00
Total amount of this determination	$515,000.00

[140] However if the first or third respondents fail to pay their apportionment, the claimants can enforce this determination against any respondent up to the total amounts they are ordered to pay in paragraph [138] respectively.

DATED this 16th day of September 2011

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P A McConnell, Tribunal Chair