IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2011-100-000018
[2012] NZWHT AUCKLAND 34

BETWEEN	**SLAVE TOMOV, LILJANA TOMOVA AND DAVENPORTS WEST TRUSTEE COMPANY (NO 1) LIMITED** Claimants
AND	**AUCKLAND COUNCIL** First Respondent
AND	**MODERN HOMES DEVELOPMENT LIMITED** Second Respondent
AND	**ANDREW THOMAS** Third Respondent
AND	**PBS DISTRIBUTORS LIMITED** Fourth Respondent
AND	**GEORGE MAREVICH** Fifth Respondent
AND	**ROOF IMPROVEMENTS LIMITED** **(Removed)** Sixth Respondent
AND	**BARRY WALSH** Seventh Respondent
AND	**JAMES MCLEAN** Eighth Respondent

Hearing: 2, 3 and 14 May 2012.
Final submissions received 22 May 2012.

Appearances: Mr T Rainey and Ms E Hayes, for the Claimants
Ms F Divich for Auckland Council First Respondent
Mr P Grimshaw, for Modern Homes Development Limited Second Respondent
Mr Andrew Thomas, Third Respondent - self represented
Mr Barry Walsh, Seventh Respondent - self represented
Mr James McLean, Eighth Respondent - self represented
Fourth and Fifth Respondent - no appearance

Decision: 13 August 2012

FINAL DETERMINATION
Adjudicator: P J Andrew

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INTRODUCTION

[1] The claimants are the owners of a large, leaky-home in Te Atatu, Auckland and seek damages of approximately $530,000 for the full cost of repairs. A re-clad of the entire house is required because of substantial moisture ingress.

[2] The house was constructed in 2003 using the Eterpan/VentClad cladding system. The fibre cement board sheets were installed over a ventilated cavity which was somewhat unusual at that time. One of the principal issues in this case is whether a less extensive scope of repairs is required given that the original construction was not the conventional face-sealed cladding system but rather, included a cavity.

[3] Each of the remaining seven respondents contests liability.

THE RESPONDENT PARTIES

[4] The Auckland Council, the first respondent, is the successor to the liabilities of the Waitakere City Council, which issued an amended building consent and carried out inspections of the house during construction. It also issued a code compliance certificate.

[5] Modern Homes Development Limited, the second respondent, was the developer of the property. It does not dispute the role it played.

[6] Mr Andrew Thomas, the third respondent, was the plasterer responsible for applying the external texture coating to the house. He also applied both the parapet moulding and the mid-floor bands.

[7] PBS Distributors Limited ("PBS"), the fourth respondent, is alleged to have been the distributor of the Eterpan/VentClad cladding used in the construction of the house.

[8] Mr George Marevich, the fifth respondent is alleged to have been the employee of PBS Distributors Limited who came on site during construction and instructed the builders in the use of the Eterpan/VentClad cladding.

[9] Mr Barry Walsh, the seventh respondent was the director and shareholder of Walsh Construction Limited which was a labour only builder contracted by Modern Homes Development Limited to carry out the carpentry and associated building work on site.

[10] Mr James McLean, the eighth respondent, is alleged to have been contracted by Modern Homes Development Limited to supervise and co-ordinate construction of the house. It is said that he carried out the functions generally associated with a "project manager."

THE ISSUES

[11] The key issues I must determine are;

a) The scope of the remedial works required in undertaking a re-clad. In essence, is the scope proposed by Mr Alvey, expert witness for the claimants, (and accepted by the assessor, Mr Firth) the relevant required scope or is it the lesser scope proposed by Mr Gillingham, expert witness for the Council?
b) The costs of undertaking the relevant scope of works- there is a modest difference between the experts on this issue.
c) Should the claimants be awarded more than $25,000 general damages?
d) In respect of each of the respondent parties, did the respondents breach their duty of care, and was that breach causative of one or more of the defects which have contributed to the need for a re-clad?

e) Contributory negligence and failure to mitigate.

f) What orders for contribution should the Tribunal make pursuant to s 72(2) of the Weathertight Homes Resolution Services Act 2006?

MATERIAL FACTS

[12] The claimants' house was one of two houses built under the same building consent in 2003. The house was described in the consent documentation as Unit B.

[13] The house has a shallow pitched roof covered in long run steel with internal gutters behind parapet walls. The main walls are covered with fibre cement cladding, namely Eterpan/VentClad cladding, over a 20mm cavity. The decks to the front, left and right hand elevations are covered in ceramic tiles and bounded by plaster-clad and steel balustrades.

[14] The applicant for the building consent was Modern Homes Development Limited. Its principal was Ms Wei Wei Zhang. The building consent was issued by the then Waitakere City Council on 2 September 2002 in reliance on a building certificate issued by Approved Building Certifiers Limited ("ABC"). ABC was, at that time, a private building certifier approved by the Building Industry Authority ("BIA").

[15] It was originally intended that ABC would carry out all of the relevant building inspections and issue a code compliance certificate ("CCC") for the property. However, on 4 December 2002 the BIA restricted ABC's ability to certify compliance; it was not authorised to certify compliance with code provision E2 (External Moisture) unless the means of compliance was to utilise E2/AS1.

[16] In May 2003, ABC wrote to the Waitakere City Council and notified that it would not be carrying out the external cladding

inspections on the claimants' house. Thereafter the Waitakere City Council took over the inspection of the external cladding for the purposes of certifying compliance with clause E2 and issuing a final CCC.

[17] On 26 May 2003, the Council drafted an amendment to the terms of the building consent to reflect a change in the cladding system that was different from the system approved in the original building consent. The amendment was granted for the Eterpan/VentClad cladding. The amendment was granted despite the fact that there was no formal application. However, the Council was supplied with the technical information relevant to the VentClad cladding system. It was not a condition of the amended building consent that the manufacturers of the Eterpan/VentClad system provide a producer statement for the cladding system.

[18] The Council subsequently carried out inspections in relation to the cladding and other aspects of construction. Inspections took place on the following dates; 5 June 2003, 30 June 2003, 7 November 2003 and a final inspection (pass) on 3 December 2003. On 4 December 2003 the Council issued its final CCC.

[19] In May 2005, the claimants, as directors of MT Business Services Limited, entered into a Sale and Purchase Agreement for the property for $700,000. The agreement was conditional on the directors obtaining a satisfactory LIM report and a satisfactory building report.

[20] In a report dated 27 May 2005, the New Zealand House Inspection Company issued a written building inspection report to the claimants. The report did not cause the claimants any concerns except in relation to the minor issue of the adhesion of the butyl rubber membrane (defect 1) which is not part of this claim. On 23 June 2005, the property was transferred to MT Business Services Limited.

[21] In August 2008 and before the defects with the property were discovered, the property was transferred to the claimants as trustees of the Tomov Slmm Trust.

[22] In early 2010, Slave Tomov and Liljana Tomova discovered that there was water leaking into the wall/ceiling junction in the lounge of the dwelling. This was directly below the rainwater outlet on the deck. Mr Tomov contacted Modern Homes Development Limited which arranged for the defect to be repaired and a row of tiles replaced on the deck directly above the lounge wall/ceiling junctions. The repairs were un-consented and not completed to a satisfactory standard. Modern Homes Development Limited paid some of the repair costs.

[23] On 1 July 2010, the claimants filed their claim with DBH. In his report of 9 September 2010, the assessor, Mr Firth recommended a full re-clad.

THE DEFECTS

[24] There was an experts' conference prior to the adjudication which resulted in an agreed leaks list. I also heard evidence on the issue of defects at the hearing from the assessor, Mr Firth, Mr Alvey and Mr Gillingham, expert witnesses for the Council.

[25] The experts were in agreement that the house has the following defects that have caused moisture ingress;

a) Defect 1-The Butyl rubber membranes are not adequately dressed into the outlet opening, leaving the timber frame exposed or balustrade walls.
b) Defect 2a -The deck balustrades walls have an inadequate fall to the top surface.

c) Defect 2b- The water membrane to the deck balustrade cladding is not installed down the vertical face of the balustrade.
d) Defect 2c- No waterproof membrane installed below the textured coating on the south east elevation chimney.
e) Defect 3a- No stop-ends window flashings installed to the window head flashings.
f) Defect 3b- The junctions between joinery jambs and cladding are not adequately sealed.
g) Defect 4b- The vertical control joints are not installed over a double stud.
h) Defects 5- The cladding junctions at external corners are incorrectly formed.
i) Defect 6- The polystyrene inter-storey band is not textured coated.
j) Defect 7- The two sections of the "h" mould to the inter-storey control joint are not adequately joined or sealed.

[26] The experts all agreed that the remedial work required to rectify the defects and damage to the house would require a building consent and given that the defects affect all elevations of the house, that this will require a re-clad of the entire house. The real dispute between the experts was the scope of work that is required in undertaking the re-clad of the property and not whether there is a need for a re-clad, as a consequence of the defects.

[27] I reject the contention of Mr McLean, that the polystyrene band was cosmetic only and that it matters not whether it was hard coated. The experts on the construction defects did not accept Mr McLean's contention. I prefer the unanimous view of the independent expert witnesses on this issue.

[28] The claimants have therefore established that each of the above defects (a-j) are defects in construction that have caused moisture ingress.

ISSUE- SCOPE OF THE REMEDIAL WORKS

[29] As indicated above, there was a difference in opinion between the experts on the scope of works that will be required in undertaking the re-clad.

[30] Both the assessor, Mr Firth and Mr Alvey, agreed that the re-clad would require removal of the exterior cladding including the battens and building wrap, checking all timber framing for damage, removing all of the windows, taking up all of the decks and re-instating those building elements.

[31] Mr Gillingham, for the Council contended for a lesser scope which would involve removing the cladding and battens but leaving the windows and building wrap in place as well as leaving the decks as they are and patching any damage to the upstands of the deck.

[32] There is a significant difference in costs between the two approaches.

[33] Mr Rainey submitted that the lesser scope of Mr Gillingham was not reasonable when measured against the standards referred to in the High Court in *Body Corporate 185960 v North Shore City Council* (Kilham Mews).[1] In that case, Duffy J held:

> .....Moreover, it is by no means that a building consent for anything other than a full re-clad could be obtainable. Since the amendment to Schedule 1 of the Building Act 2004, any repair or replacement work, which is beyond maintenance and which arises from a failure of a building to satisfy the provisions of the building code for durability (for example a failure to comply with the external

[1] *Body Corporate 185960 v North Shore City Council (Kilham Mews)* HC Auckland, CIV-2006-004-3535, 22 December 2008.

> moisture requirements of the building code), now requires a building consent. Work which requires a building consent must conform to the current building code. This has requirements which were not in place in 1997 and which the building work at Kilham Mews currently does not satisfy.
>
> It may well be the case that legally a building consent could not be obtained to do targeted repairs and that nothing less than a full re-cladding, which complies with current requirements, would suffice. None of the experts could be sure of this. However, it is unnecessary to resolve this legal question as the evidence of the plaintiffs' expert witnesses satisfies me that the only sensible way to resolve the leaky buildings problems at Kilham Mews is for there to be a full external re-cladding of the buildings.

[34] On this issue of the scope of repairs, I prefer the evidence of Messrs Alvey and Firth over that of Mr Gillingham. In my view, given the nature and extent of the defects and the lack of quality control during the construction process, the sensible and reasonable approach is to adopt the more expansive scope of repairs that Messrs Alvey and Firth advocate. The approach of Mr Gillingham is in my view too speculative.

[35] My reasons for preferring the evidence of Messrs Alvey and Firth are as follows:

a) Both Messrs Alvey and Firth undertook investigative work at the property. Mr Gillingham did not. Mr Gillingham carried out two visual inspections only and accepted that this limited work would not be sufficient for his employer, Alexander & Co, to make its own assessment of the required repairs.

b) Mr Gillingham accepted that Alexander & Co had not undertaken repairs to a house on the lesser basis that he was suggesting.

c) It was common ground that the repairs would require a building consent. Mr Firth, who had prior experience as a builder inspector with the Auckland City Council was of the view that the Council would not grant a building consent for the lesser scope of repairs. That was also the view of Mr Alvey who emphasised the difficulty of getting a consultant to sign off on the lesser scope.

d) The defects associated with the decks have given rise to high moisture content readings and timber deterioration. I accept the explanation of Messrs Alvey and Firth as to why it would not be possible to repair the deck upstands without taking up the whole of the deck and replacing the waterproof membrane.

[36] In conclusion, I find that the scope of repairs required to repair the house is that contended for by Messrs Alvey and Firth. Quantum will therefore be assessed on that basis.

ISSUE- QUANTUM

The Cost of Implementing the Scope of Repairs

[37] The differences in the two relevant costings from the experts on quantum narrowed significantly during the hearing. I am grateful in this regard for the professionalism of Messrs White and Henry.

[38] Mr Hill, who was engaged by DBH to provide costing to the assessor, also gave evidence on quantum. Mr Hill was not, however involved in the final stages of the hearing when Mr White and Mr Henry further narrowed the differences. This was because I decided that further costs should not be incurred by the Tribunal or DBH.

[39] By the end of the hearing, Mr White, the claimants' expert contended that the cost of carrying out the Alvey/Firth scope of repairs would be $446,713.10 (this included a deduction for the cost

of repair of defect 1 (the scupper outlets) of $4,207.90. The deduction of this figure is not in dispute). Mr Henry, the expert witness for the Council contended that the Alvey/Firth scope would cost $424,658. The difference between the two experts is thus approximately $22,000.

[40] The differences all related to what Mr Henry described as "below the line items." This includes:

a) Preliminary and general items relating to the rate of scaffolding hire. Mr White used a higher rate than Mr Henry because of the impact, according to Mr White, of the demand arising out of the Christchurch earthquake.
b) The cost of a remediation specialist. Mr White made a greater allowance based on his historical analysis of actual repair costs.
c) Allowance for an engineer and timber analysis.

[41] I find that the claimants have established that the figure contended for by Mr White, namely $446,713.10 is a fair and reasonable sum and should be accepted by the Tribunal as the recoverable quantum. The claimants' house is a large one and the defects in construction are extensive and widespread. The house had a market value in 2006 of $810,000. The figures at issue are of course estimates only and in resolving this issue there is an inevitable degree of judgement involved rather than any exact science.

[42] I was impressed with the particular care that Mr White took to identify as precisely as possible what the actual costs might be. I accept his figure of $446,713.10. That figure is referred to throughout the remainder of this judgement as the "full cost of repairs."

Consequential Damages

[43] The claimants also seek costs of $35,338 for consequential losses, including alternative accommodation ($27,612) and the cost of moving and storing their belongings for the duration of the repairs ($7,726).

[44] There was no challenge by any of the respondents to these figures. I accept that the amount claimed is fair and reasonable and recoverable from the liable respondents.

General Damages

[45] The claimants seek $50,000 general damages for the distress and inconvenience caused by the discovery of defects and damage to their home. They say they have suffered significant stress and difficulties affecting the whole family and that an award of $50,000 is, in the circumstances, a fair and reasonable figure.

[46] The law is clear that general damages can be awarded in favour of trustees of a trust.[2] I also accept the claimants' evidence that they have suffered significant stress and difficulties following the discovery that their home was leaky.

[47] General damages are to be assessed on a per unit basis.[3] The figure of $25,000 is a "general guide" and "rule of thumb" to guide the courts and Tribunal in what is ultimately, a matter of discretion.

[48] The claimants both presented as sincere and credible witnesses. I have no doubt that they have suffered real stress as a result of their experience. That is regrettably, not uncommon. In my view, the claimants have not established that this is an exceptional case where a departure from the general guideline figure of $25,000

[2] *Findlay v Auckland City Council* HC Auckland, CIV-2009-404-6497, 16 September 2010.

might be justified. I find that the claimants should be awarded $25,000 general damages.

THE LIABILITY OF THE AUCKLAND COUNCIL

[49] During closing submissions, Ms Divich for the Council accepted that her client did not seriously contest its liability to the claimants. Rather, the focus of the Council's defence was on the issue of contribution from the other respondents pursuant to s 72(2) of the Weathertight Homes Services Resolution Act 2006.

[50] In the course of the evidence it became clear that at the time of the cladding inspection on 5 June 2003, that there was no texture coating covering the cladding substrate. This meant that it was no longer tenable for the Council to argue that critical defects in construction were not visible at that time and therefore it could not reasonably be held responsible for them. The evidence of Mr Flay, who gave evidence for the Council on the issue of its liability, had proceeded on the assumption that by the time the building inspector carried out the cladding inspection on 5 June 2003, the cladding was on and the texture coating had already begun. That factual assumption was proven to be incorrect.

[51] Mr Flay's evidence was further based on the factual predicate that the Council relied on the producer statement issued by PBS dated 11 September 2003. In its original defence the Council had contended that because VentClad was a new product in the market, the Council could not have been familiar with all aspects of its installation and detailing. Therefore, it placed additional reliance on the manufacturer by way of a producer statement.

[52] By the conclusion of the hearing, and particularly in light of the evidence as to the sequence of construction, the disputed issue of whether the Council did in fact rely on the producer statement had

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[3] *Cao v Auckland City Council* HC Auckland, CIV-2010-404-7093, 18 May 2012; *O'Hagan v*

become of relatively little significance to the issue of the Council's liability for the full cost of repairs. Even if the Council did receive and rely upon the manufacturer's producer statement that could not excuse the Council from liability for the negligent inspections that were carried out at an earlier stage of the construction process when it had the opportunity to observe the defects. As Mr Flay accepted in cross examination, it was clearly intended that the Council would inspect the cladding to satisfy itself that it had been installed in accordance with the technical literature and Building Code. However, the issue of whether the Council received and relied on the producer statement from PBS is relevant to the Council's cross claim against PBS and for that reason I address this issue below.

[53] During closing submissions, Ms Divich for the Council also accepted that the Council had no explanation as to why Defect 7 i.e. the two sections of the "h" mould to the inter-storey control joint were not adequately joined or sealed, was not observed or picked up by the building inspector during one of the inspections. Defect 7 was regarded by the experts as a primary defect requiring a full re-clad to the affected elevations.

[54] I find that the claimants have established that the Council breached its duty of care to them by failing to exercise reasonable care and skill in carrying out its inspection role. It breached the standard of care identified by the High Court in *Dicks v Hobson Swan Construction Limited* (in liquidation)[4] and *Sunset Terraces.*[5] The claimants have also established that the Council did not have reasonable grounds to satisfy itself that the house would comply with the requirements of the Building Code. The CCC should never have been issued.

Body Corporate 189855 [2010] NZCA 65; [2010] 3 NZLR 486.

[4] *Dicks v Hobson Swan Construction Limited* (in liquidation) (2006) 7 NZCPR 881 (HC).

[5] *Body Corporate 188529 v North Shore City Council (Sunset Terraces)* [2008] 3 NZLR 479 (HC).

[55] The evidence further establishes that the Auckland Council is liable for the following defects in construction, namely defects 2(a) and 2(b), 3 (a), 4(a), 4(b) and 5, 6, 7. Having regard to the agreed statement of the expert witnesses, I find that the Council is liable for the full cost of repairs, together with the consequential losses and general damages.

Did the Council Receive and Rely on the PBS Producer Statement?

[56] The Council concedes there was no copy of the PBS producer statement dated 11 September 2003 on its file. Ms Divich submitted that the Council likely received it but later misplaced it. In support of this submission, the Council relies on the Council inspection record field sheet.

[57] The Council file did contain two copies of the document received from Mr Thomas dated 19 August 2003. The Council inspection record field sheet records that on 29 August 2003 the Council received a "plastering certificate" and that on 19 September 2003 it received a "cladding certificate." The Council records further record that on 18 September 2003 the Council was sent a copy of the document from Mr Thomas dated 19 August 2003, by the private certifier, ABC. The fax from ABC is dated as received from the Council on 18 September 2003 and states:

> Wei Wei Zhang from Modern Homes needs confirmation that the attached PS would be adequate to cover the monolithic cladding for 48 Waimanu Bay Drive........

[58] The attached document, being the document signed by Mr Thomas dated 19 August 2003, was subsequently endorsed with a building consent number (20022485) and signed as "okay" on 22 September 2003. There is no evidence that the Council declined to accept this document or requested any other document from the developer or ABC.

[59] The Council carried out final building inspections on 7 November 2003 and 3 December 2003. A CCC was issued on 4 December 2003.

[60] Ms Divich submits that the dates in the field sheet tie in with the dates of the respective certificates. She also refers to the fact that the Council had requested the manufacturer's certificate directly from those on the construction site when present on 5 June 2003. It was not requested through the private building certifier who may also have requested various producer statements.

[61] Mr Rainey for the claimants submits that on the evidence the Council cannot establish that it relied on and received the producer statement from PBS. The submissions of Mr Rainey were made in the context of seeking to refute the evidence of Mr Flay and any potential Council submission that it acted reasonably in relying on the producer statement.

[62] For the purposes of its cross claims in negligent misstatement and breach of s 9 of the Fair Trading Act 1986, the Council carries the burden of proof of establishing, on the balance of probabilities, that it received and relied on the PBS producer statement. On this particular issue and essentially for the reasons advanced by Mr Rainey, I find the evidence to be equivocal and that the Council has not established to the requisite standard that it did receive and rely on the PBS producer statement.

[63] The PBS producer statement was the only relevant document missing from the Council file and the Council did have a legal duty to retain all relevant building records. [6] The Council did not call evidence from anyone at the Council to say that it had received the documents. The dates of the various documents are of

[6] Section 27 of the Building Act 1991.

limited assistance. It is not clear which document the field sheet entry of 19 September 2003 ("cladding certificate received") was referring to. That entry, on 19 September 2003 may well be a reference to the fax and attachment received from ABC on the previous day, namely 18 September 2003 and not the PBS producer statement dated 11 September 2003. The Council has not discharged the burden of proof.

[64] The remainder of the claims and cross claims against PBS, including the contention that it is vicariously liable for the negligence of its employee, Mr George Marevich, are addressed below.

THE LIABILITY OF MODERN HOMES DEVELOPMENT LIMITED

[65] Modern Homes Development Limited did not play an active role during the hearing. It did not present opening or closing submissions. Mr Grimshaw appeared briefly at the commencement of the adjudication and then excused himself for the remainder of the hearing.

[66] The director of Modern Homes Development Limited, Ms Wei Wei Zhang gave evidence at an interlocutory hearing on 20 December 2011. This followed the issue of a witness summons sought by the Council. As a result of the witness summons hearing, Mr James McLean, the eighth respondent was joined to the proceedings. Apart from the evidence of Ms Wei Wei Zhang, no other evidence was given on behalf of Modern Homes Development Limited.

[67] In an interim response dated 13 October 2011, Modern Homes Development Limited accepted that it was the developer of the claimants' property and that it owed the claimants a non-delegable duty of care to ensure that proper skill and care was exercised in the construction of the house. That concession was a

responsible one and undoubtedly correct.[7] For reasons which follow I find that Modern Homes Development Limited breached its duty of care causing loss to the claimants. Modern Homes Development Limited is responsible, on a non-delegable basis for the negligence of the other respondents that I address below.

[68] I find that Modern Homes Development Limited is liable for the full cost of the repairs together with consequential losses and general damages.

THE LIABILITY OF MR ANDREW THOMAS, THE THIRD RESPONDENT

[69] Mr Thomas gave evidence but elected not to present closing submissions. He did not attend the hearing on 14 May 2012 when the closing submissions were presented.

[70] Mr Thomas accepted that he was contracted by Modern Homes Development Limited to plaster the house and that his work included sealing the joints in the cladding (which was installed by the builders), plastering the cladding and sticking the polystyrene band on the building. As Mr Rainey for the claimants submitted, there is no doubt that he owed the claimants a duty of care. The critical issue is whether Mr Thomas breached that duty- i.e. was he in fact negligent?

[71] The claimants allege that Mr Thomas was responsible for two defects in construction and in this regard breached duties of care to them:

(a) The control joints; and
(b) The inter-storey band.

[72] Mr Thomas contended that he was not responsible for the substrate over which he plastered. He referred to correspondence

[7] *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA).

that he sent to Waitakere City Council dated 19 August 2003 in which he made it very clear that the plaster workmanship which he guaranteed did not cover any work performed by others, and in particular those who fixed and inspected the fibre cement cladding which he plastered.[8]

[73] In relation to the issue of the method of construction of the inter-storey band, Mr Thomas explained that he initially objected to the installation of the band because it was not meshed and it would not be possible to texture coat over it. Mr Thomas said that he made this objection clear to Mr McLean who was present on site at that time. However, Mr McLean instructed Mr Thomas to install the band, despite the initial objections, because, according to Mr Thomas, Mr McLean had already bought them at a relatively cheap price. Mr Thomas did subsequently install the band but refused to issue any guarantee in respect of the work involved, because of his concerns. [9]

[74] Mr Thomas queried why the painter had not been joined to the proceedings. He explained that plastering in New Zealand is not intended to be waterproof but rather, the system relies on the exterior paint for that purpose. He did not texture coat the band because he was advised that the painter would put sand into the paint. Mr McLean made that decision.

[75] I have some sympathy for the position of Mr Thomas. He specifically made his concerns clear to Mr McLean and was careful to exclude aspects of the work from his guarantee. However, as Mr Rainey submits, the law is clear that a contractor cannot contract out of their duty of care to a subsequent owner of the house.[10] In this case, Mr Thomas took on the task of texture coating of what he must

8 Common bundle of documents Volume 2, Tab 18 at 195, 196.
9 Common bundle of documents Volume 2, Tab 18 at 194.
10 *Bowen v Paramount Builders (Hamilton) Limited* [1977] 1 NZLR 394 (CA).

have known was an inadequate substrate. Furthermore, he specifically took on the task of attaching the band even though he knew that the way it was attached was defective.

[76] I find that Mr Thomas has acted in breach of the duty of care owed to the claimants. He failed to act with reasonable care and skill and is responsible for damage caused by defects in construction relating to the inadequate substrate, control joints and inter-storey band. This includes defects 3(b), 4(a), 5, 6, and 7. As Mr Alvey, makes clear in his evidence, texture coating applicators are expected to be critical of inferior substrate work due to its direct determinative effect on their coating works.

[77] The defects that Mr Thomas is responsible for have given rise to the need for a full re-clad. He is thus jointly and severally liable for the full cost of repairs, together with consequential losses and general damages.

[78] The question of contribution is addressed below.

LIABILITY OF PBS DISTRIBUTORS LIMITED

The Claim against PBS

[79] It is alleged that PBS Distributors Limited, the fourth respondent, supplied the Eterpan cladding installed on the claimants' house and that through its employee, Mr George Marevich, the fifth respondent, oversaw the installation of the cladding during the construction process. This is of course an allegation of vicarious liability.

[80] It is further alleged that on 11 September 2003 PBS provided a producer statement certifying that the Eterpan cladding had been installed in accordance with the manufacturer's installation details and that it met the durability and external moisture performance criteria of the Building Code. It is contended that PBS owed a duty of

care to the claimants when inspecting the installation of the cladding and issuing the producer statement. It is said that PBS breached its duty of care by:

a) Failing to observe the incorrect cladding installation.
b) Failing to require the correction of the incorrectly installed cladding.
c) Failing to carry out adequate inspections.
d) Providing inadequate producer statements.
e) Failing to warn the developer, builder, Council or certifier of the incorrectly installed cladding.

The Role of PBS in the Proceedings

[81] PBS was joined to the proceedings by Procedural Order 2 dated 6 July 2011. However, it has never played any active role throughout the whole process. It has never filed any discoverable documents and did not attend any of the procedural conferences or the adjudication hearing. Prior to the adjudication hearing, its managing director, Mr Greg Howard advised the case officer that no one from the company would be attending the hearing.

[82] Subsequent to the hearing and the presentation of closing submissions, PBS filed a document signed by Mr Greg Howard seeking to explain both why it did not take part in the Tribunal process and that it had no liability to the claimants or any other parties. The document is essentially untested evidence and legal submissions. The document is undated but was received by the Tribunal on Monday 28 May 2012.

[83] The Tribunal has decided that it will **not** formally accept or have any regard to the evidence and submissions filed by Mr Howard as contained in his document received on 28 May 2012. If I were to do so, I would have to reopen the case and reconvene the hearing for the testing of the evidence. In the circumstances, this would

impose an unfair burden and costs on the claimants and the other respondents.

[84] PBS had known about these proceedings, including the adjudication dates, for some considerable time. It made a conscious decision not to attend the hearing. The allegations made by Mr Howard about the role of counsel for the other respondents are misguided. At no stage prior to the adjudication did PBS seek to be removed from the proceedings, despite having the opportunity to do so. The Tribunal is not a pleadings-based jurisdiction and it was open to PBS to simply file an email providing reasons as to why it should be removed. For the Tribunal now to receive evidence and submissions at this very late stage would in effect be to undermine the Tribunal's own processes.

[85] The purpose of the Weathertight Homes Resolution Services Act 2006 is to provide owners of dwelling-houses that are leaky buildings with access to speedy, flexible and cost-effective procedures for assessment and resolution of claims relating to those buildings. It would be contrary to that express purpose for the Tribunal to re-open the hearing and to hear evidence from PBS.

[86] Under s 98 of the Evidence Act 2006, a party may not offer further evidence after closing a party's case, except with the permission of the Judge. While the Tribunal is not bound by the Evidence Act 2006, that section does provide some guidance as to how the Tribunal should proceed with a case like this. In the circumstances, I can see no valid reason to re-open the hearing and to hear further evidence.

[87] This means that I will determine the claim against PBS on the basis of the evidence provided at the hearing, including documents contained in the common bundle of documents. The burden of proof rests on the claimants and the other parties claiming

against PBS to make out their claim. In the circumstances this is essentially a matter of formal proof.

Analysis of the Claim against PBS

[88] Ms Wei Wei Zhang gave evidence (confirming her earlier affidavit filed in support of the joinder of PBS) that PBS, trading as VentClad, was engaged by Modern Homes Development Limited to supply and oversee the installation of the Eterpan cladding. Mr Walsh, the labour only builder and seventh respondent also gave evidence confirming that Mr George Marevich, of PBS, the fifth respondent came on site and supervised the installation of the cladding. Mr Walsh refused to be involved with this process without supervision from someone who was familiar with the product. Mr Marevich performed that role. Mr Thomas had no prior experience with the Eterpan cladding which at that time was a relatively new system. In his evidence, Mr McLean referred to PBS and George Marevich as the parties responsible for the installation of the cladding. He referred to Mr Marevich personally being on site and overseeing the cladding inspection by the Waitakere City Council on 5 June 2003.

[89] The producer statement dated 11 September 2003 was issued by "George Marevich of PBS Distributors" but signed by someone else on his behalf. The producer statement is headed up "Progressive PBS Distribution Limited." Mr Marevich's business card refers to him as a sales representative for the VentClad cladding system with the same address and contact details as that at the bottom of the producer statement. In her affidavit, filed in support of the joinder application, Ms Wei Wei Zhang stated that Mr Marevich provided the installation manual, priced the material, and carried out inspections of the cladding installation on behalf of PBS.

[90] I am satisfied that the claimants have established that PBS supplied the Eterpan cladding and that it is vicariously liable for the

negligence of its employee, Mr George Marevich, in relation to his supervision of the installation process.

[91] The uncontested evidence of the experts, and in particular that of Mr Alvey, establishes that the Eterpan cladding was installed in breach of PBS VentClad technical installation details and that the producer statement should never have been issued. Mr Marevich, in undertaking inspections during the construction process should have observed defects 2(a), 3(a), 4(a), 4(b), 5, 6 and 7 but failed to do so.

[92] I find that the claimants have established that PBS breached duties of care owed to them and is thus jointly and severally liable for the full cost of the repairs, together with consequential losses and general damages.

[93] The claims against PBS in negligent misstatement and for breach of s 9 of the Fair Trading Act 1986 are dismissed. For reasons given above, it has not been established that the Council placed any reliance on the producer statement and thus one of the essential elements of these two causes of action, has not been proven. However, the dismissal of the particular claims of negligent misstatement and breach of the Fair Trading Act do not affect the liability of PBS. It remains vicariously liable for the actions of Mr Marevich.

THE LIABILITY OF MR GEORGE MAREVICH, FIFTH RESPONDENT

[94] It is alleged that Mr George Marevich owed and breached duties of care in his personal capacity and in relation to his failure to ensure that the cladding was installed correctly and in accordance with the VentClad technical literature. The same particulars of negligence as alleged against his employer PBS are brought against Mr Marevich.

[95] Mr Marevich did not give evidence or attend the adjudication hearing. He was joined to the proceedings by Procedural Order 2 dated 6 July 2011. He has never filed any documents or attended any of the procedural conferences. The claim against him is essentially one of formal proof.

[96] Having regard to the uncontested evidence of Ms Wei Wei Zhang, Mr McLean, Mr Walsh and the experts, I find that Mr Marevich, owed and breached duties of care to the claimants in the manner contended and is jointly and severally liable for the full cost of repairs.

[97] For reasons given above, (para [93]) the claims in negligent misstatement and for breach of the Fair Trading Act 1986, relating to the issue of the producer statement, are dismissed. In any event the producer statement was not signed by Mr Marevich but signed by someone on his behalf.

THE LIABILITY OF MR BARRY WALSH, THE SEVENTH RESPONDENT

[98] Mr Walsh's uncontested evidence was that he personally worked on the construction of the claimants' house up until the construction of the timber framing on the ground floor, mid floor and upper storey. He accepted that some of the employees of his company, Walsh Builders Limited, carried out the work in relation to several of the defective areas of construction.

[99] As noted above, Mr Walsh said that in respect of the external cladding, the company Walsh Builders Limited had never previously installed the VentClad cladding system and that its employees were therefore directed in the application of the cladding by Mr George Marevich of PBS.

[100] While the status of Mr Walsh as a director of the company contracted as the labour only builder does not give rise to any immunity for personal negligent act or omissions, the critical issue is whether the personal involvement of Mr Walsh in the construction was such that he both owed and breached a duty of care to the claimants.

[101] Mr Walsh was a credible witness, albeit somewhat guarded as to the role of Mr McLean. His account of his personal role in construction was uncontested. He had no personal involvement in the construction of the cladding and he was not involved with instructing employees of his company as to the application of the cladding. Likewise he did not supervise their work.

[102] The claimants have rightly accepted that on the basis of these uncontested facts, there should not be a finding of liability on the part of Mr Walsh. In closing submissions, the Council has made a similar acknowledgement. In my view, these were proper acknowledgements to make.

[103] The claim against Mr Walsh, the seventh respondent is dismissed. It has not been established that Mr Walsh breached any duty of care to the claimants causing them loss.

THE LIABILITY OF MR JAMES MCLEAN, THE EIGHTH RESPONDENT

[104] It is alleged that Mr McLean, engaged by Modern Homes Development Limited, was in overall control of the construction process and that he owed a duty of care to the claimants to ensure that the property was constructed in accordance with the Building Act 1991, the Building Code, the manufacturer's specifications and all other applicable legislations.

[105] It is further contended that Mr McLean breached the duty of care by instructing Mr Thomas, the plasterer, to install a non-meshed polystyrene inter-storey band, knowing that it would not be texture coated. He is thus said to be responsible for defect 6, which gives rise to the need for a full re-clad.

[106] Mr McLean denies that he owed the claimants a duty of care and says that he never assumed responsibility for or control of the construction process. He says that he was a consultant engaged by Modern Homes Development Limited for design and aesthetic matters only. He did not co-ordinate any of the construction or instruct any tradesmen. It was Modern Homes Development Limited who controlled the construction process and not him. He further contends that it was the responsibility of the private certifiers from ABC Limited and the Council inspectors from the Waitakere City Council to ensure compliance with the Building Act 1991, the Building Code and the relevant technical literature.

[107] In relation to the polystyrene band, Mr McLean says that it was cosmetic only and whether it was hard coated or not was largely irrelevant. The lack of texture coating did not cause moisture ingress. Mr McLean further denies that he instructed the painter to put sand into the paint to try and accommodate the problem with lack of texture coating.

[108] Mr McLean was not an impressive witness. He sought to downplay both the extent of his knowledge about construction issues and his role in the construction of this house. I accept that he may have acquired greater knowledge of construction issues since 2003, but he spoke with considerable understanding and confidence about particular aspects of construction relating to this house. I find that the extent of his involvement in the construction process was considerable.

[109] Mr McLean explained that Ms Wei Wei Zhang had no experience or expertise with property development or construction. In reality, she was very much reliant on the experience and knowledge of Mr McLean. It makes no sense for Mr McLean to say that Modern Homes Development Limited controlled the project without any substantial input from him. Ms Wei Wei Zhang, the only employee and/or director of the company, was in no position to assert such control and, as Mr Rainey submits, it was really Mr McLean who "called the shots."

[110] Mr Thomas was a credible and sincere witness. As indicated above, I accept his account of the instructions he received from Mr McLean in relation to the polystyrene band. This evidence suggests that Mr McLean made key decisions about construction. The evidence of Ms Wei Wei Zhang and to some extent that of Mr Walsh, the builder, also supports my finding that Mr McLean played an active role in the construction process, making critical decisions and instructing trades people. Ms Wei Wei Zhang described Mr McLean as being on site "very often" and the person in charge of sequencing. Mr McLean returned to the claimants' house with Ms Wei Wei Zhang in 2010 to arrange for repairs to the deck to be carried out. This was in my view consistent with his original role of assuming responsibility together with Modern Homes Development Limited, for the construction process. While he may have been assisting Ms Wei Wei Zhang, Mr McLean himself played a significant role.

[111] For reasons given above at para [108], I also reject Mr McLean's explanation about the polystyrene band simply being cosmetic. In the unanimous view of the four experts who attended the expert's conference, the failure to texture coat the polystyrene inter-storey band (defect 6) was a primary defect giving rise to a need for a re-clad to all the effected elevations. The contrary views of Mr Flay, who did not attend the expert's conference, are not persuasive.

[112] I find that the claimants have established that Mr McLean owed them a duty of care. He played an active role in controlling the overall construction process and made critical decisions, including giving directions to some of the tradesmen. The responsibilities of someone acting in the capacity of Mr McLean on site were discussed by Heath J in *Body Corporate 199348 & Ors v Neilsen*[11] Heath J emphasised the importance of planning, to ensure that appropriate trades were on site when needed, quality control measures and timing, to ensure the correct sequencing of the construction process.

[113] I further find that Mr McLean breached the duty of care (i.e. he was negligent) in instructing Mr Thomas to install a non-meshed polystyrene band knowing that it would not be texture coated and on that basis, he is jointly and severally liable for the full cost of repairs, together with consequential losses and general damages.

[114] Even if (and contrary to my finding) Mr McLean lacked the necessary knowledge to make a competent decision in relation to the polystyrene band, than that is no grounds for defence but in fact further evidence of negligence.

[115] The question of contribution and the further defence raised by Mr McLean, namely that of contributory negligence, are addressed below.

MITIGATION AND CONTRIBUTORY NEGLIGENCE

[116] Mr McLean contends that the claimants "have a case to answer" in relation to contributory negligence. In particular he alleges that:

a) In 2005 Mr Tomov's solicitor pointed out there were cracks in the plastering that could let in water. However, some seven years later, Mr Tomov had done nothing

[11] *Body Corporate 199348 v Neilsen* HC Auckland, CIV-2004-404-3989, 3 December 2008.

about these issues. Despite having documentation since 2005 which emphasised the importance of regular maintenance, including the recoating of the property, the Tomovs have done nothing;

b) Mr Tomov did not contact the painter to touch up the building during the time it was under the warranty. Mr Tomov had received the warranty from the real estate at the time of purchase;

c) Mr Tomov removed the balustrade protectors from the balustrades that left hundreds of small screw holes open to the elements for many months until this was noticed by Modern Homes Development Limited. Subsequent to that Mr Tomov said the holes were filled by a plasterer.

[117] Section 3 of the Contributory Negligence Act 1947 allows for apportionment of responsibility for the damage where there is fault on both sides or fault on the part of the plaintiff and other parties. As in the case of negligence, the question of fault is to be determined objectively. The question is not whether the claimants conduct fell below the standard to be expected of them, but whether it fell below the standard reasonably to be expected of a person in his position.[12]

[118] In *Coughlan v Abernethy*[13] the High Court addressed the conceptual differences between the defence of contributory negligence and failure to mitigate loss. The failure to mitigate loss arises because the plaintiff is under a duty, which is not particularly onerous, to take reasonable steps to mitigate loss and thereby minimise the damages the defendant will be required to pay. Contributory negligence on the other hand, concerns identifying the plaintiff's fault contributing to the damage and then apportioning responsibility for it (by way of a percentage).

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[12] *Findlay v Auckland City Council* HC Auckland, CIV-2009-404-6497, 16 September 2010; *Hartley v Balemi* HC Auckland, CIV-2006-404-2589, 29 March 2007.
[13] *Coughlan v Abernethy* HC Auckland, CIV-2009-004-2374, 20 October 2010.

[119] Mr McLean was not a reliable witness. By contrast the claimants gave a clear and straightforward account of the challenges and difficulties they faced once they discovered they had a leaky home. I accept the explanation that Mr Tomov gave that the pre-purchase inspection report did not cause him any concern. I do not accept that the claimants have been at fault in any way or failed to take reasonable steps to mitigate their loss. Mr McLean has not established either contributory negligence or a failure to mitigate loss by the claimants. The evidence of the expert witnesses does not support his contentions. I reject the affirmative defences he has advanced.

WHAT CONTRIBUTION SHOULD EACH OF THE LIABLE PARTIES PAY?

[120] Section 72(2) of the Weathertight Homes Resolution Services Act 2006 provides that the Tribunal can determine any liability to any other respondent and remedies in relation to any liability determined. In addition, section 90(1) enables the Tribunal to make any order that a court of competent jurisdiction could make in relation to a claim in accordance with the law.

[121] 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.

[122] Section 17(2) of the Law Reform Act 1936 sets out the approach to be taken. In *Findlay v Auckland City Council*[14] Ellis J held that apportionment is not a mathematical exercise but a matter of judgement, proportion and balance. Having regard to the respective roles the respondent, and the nature of the defects, I set the contributions for the total quantum figure of $507,051.10 as follows:

[14] Above n 12.

a) Modern Homes Development Limited, the second respondent- 40%
b) PBS Distributors Limited, the fourth respondent and Mr George Marevich, the fifth respondent (together)- 30%
c) The Auckland Council, the first respondent- 20%
d) Mr James McLean, the eighth respondent- 10%
e) Mr Andrew Thomas, the third respondent- 0%

[123] Modern Homes Development Limited developed the house for the purposes of sale and profit. It embarked upon a large project (involving two houses) with no experience or expertise. It should bear a substantial proportion of responsibility for the overall quantum claimed.

[124] PBS Distributors Limited is of course vicariously liable for the actions of its employee, Mr George Marevich. In the circumstances, the contribution of these two parties should be dealt with together. PBS and Mr Marevich were experts with substantial responsibility for failure to ensure that their product was installed in accordance with the relevant technical literature. Many of the other respondents, including Mr McLean and Mr Thomas, relied on them. The causative potency and relative blameworthiness of PBS and Mr Marevich is significant.

[125] While the Council has been unable to establish that it received and relied on the PBS producer statement of 11 September 2003, it is more than likely that its inspectors were aware and influenced in their decisions by the knowledge of the role on site of Mr Marevich. The Council inspector requested a manufacturer's certificate directly from those on the construction site on 5 June 2003.

[126] In accordance with the principles laid down in *Dicks*,[15] *Byron Avenue*[16] and *Kilham Mews*[17] the contribution of the Council should be assessed at 20 per cent.

[127] While Mr McLean played an important role in the construction process, the claimants have established a breach of the relevant duty of care in relation to one defect only. On this basis, Mr McLean's contribution should be assessed at 10 per cent. I also accept that Mr McLean did rely on the expertise of others and was not himself the developer.

[128] As discussed above, Mr Thomas, the third respondent was careful to limit the scope of the guarantees he provided and also specifically raised the issue of the polystyrene band with Mr McLean. However, Mr McLean effectively overruled him. Although he accepted an inadequate substrate, those inadequacies were principally the responsibility of others, rather than Mr Thomas. He also accepted the substrate on the understanding that an expert from PBS had been supervising the installation of the cladding. I find that it would be just and equitable to reduce Mr Thomas's contribution to zero. A power to award zero contribution is specifically contemplated by s 17(2) of the Law Reform Act 1936.

CONCLUSION AND ORDERS

[129] The claim by Slave Tomov, Liljana Tomov and Davenports West Trustee Company (No 1) Limited, the claimants is proven to the extent of $507,051.10. This is calculated as follows:

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[15] Above n 4.

[16] *Body Corporate 189855 Ors v North Shore City Council & Ors* HC Auckland, CIV 2005-404-5561, 25 July 2008.

[17] Above n 1.

The cost of repairs (Alvey/ Firth and quantum as assessed by Mr White)	$446,713.10
Consequential Losses	$35,338
General Damages	$25,000
Total	**$507,051.10**

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

a) The Auckland Council, the first respondent, is ordered to pay the claimants the sum of $507,051.10 forthwith. The Auckland Council is entitled to recover a contribution of up to $405,640.88 from the other liable respondents for any amount paid in excess of $101, 410.22.

b) Modern Homes Development Limited, the second respondent is ordered to pay the claimants the sum of $507,051.10 forthwith. Modern Homes Development Limited is entitled to recover a contribution of up to $304,230.66 from the other liable respondents for any amount paid in excess of $202,820.44.

c) Mr Andrew Thomas, the third respondent, is ordered to pay the claimants the sum of $507,051.10 forthwith. Mr Thomas is entitled to recover a contribution of up to $507,057.10 from the other liable parties for any amount of that sum which he pays to the claimants.

d) PBS Distributors Limited, the fourth respondent is ordered to pay the claimants the sum of $507,051.10 forthwith. PBS Distributors Limited is entitled to recover a contribution of up to $354,935.77 from the other liable

respondents for any amount paid in excess of $152, 115.33.

e) Mr George Marevich, the fifth respondent is ordered to pay the claimants the sum of $507,051.10 forthwith. Mr Marevich is entitled to recover a contribution of up to $354,935.77 from the other liable respondents for any amount paid in excess of $152,115.33.

f) The claim against Mr Barry Walsh, the seventh respondent is dismissed.

g) Mr James McLean, the eighth respondent is ordered to pay the claimants the sum of $507,051.10 forthwith. Mr McLean is entitled to recover a contribution of up to $456,345.99 from the other liable respondents for any amount paid in excess of $50,705.11.

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

Liable Respondents	**Total Payment of Liable Respondents**
Auckland Council, first respondent	$101, 410.22
Modern Homes Development Limited, second respondent	$202,820.44
Mr Andrew Thomas, third respondent	$0.00
PBS Distributors Limited, fourth respondent and Mr George Marevich, fifth respondent.	$152,115.33
Mr James McLean, eighth respondent	$50,705.11

[132] If any of the parties listed above fail to pay their apportionment, this determination may be enforced against any of them up to the total amount they are ordered to pay in para [130] above.

DATED this 13th day of August 2012

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P J Andrew

Tribunal Member