

IN THE WEATHERTIGHT HOMES TRIBUNAL

**TRI-2008-100-000023
[2011] NZWHT AUCKLAND 19**

BETWEEN	OVERVIEW TRUSTEE LIMITED AS TRUSTEE OF THE CARRIGAFOYLE TRUST Claimant
AND	GILBERT EDMOND ANTON COOK AND MARK SIMON HORNABROOK AS TRUSTEES OF THE C C TRUST (<u>Removed</u>) First Respondent
AND	GILBERT EDMOND ANTON COOK (<u>Removed</u>) Second Respondent
AND	AUCKLAND COUNCIL Third Respondent
AND	FEARON HAY ARCHITECTS LIMITED Fourth Respondent
AND	ARCHITECTURAL WINDOW SOLUTIONS LIMITED Fifth Respondent
AND	SHAY O'BRIEN Sixth Respondent
AND	AXEL INSTALLATIONS LIMITED (IN LIQUIDATION) (<u>Removed</u>) Seventh Respondent
AND	CHRISTOPHER GIL COOK Eighth Respondent

Appearances: Mr T Rainey for the claimant
Mr P Robertson for the third respondent
Mr Dennett for the fourth respondent
Mr Wood for the fifth respondent
Mr Herbert for the sixth respondent

Witnesses: Mr F Wiemann, WHRS Assessor
Mr P O'Connor and Mr D Medricky for the claimant
Mr J Wade, Mr N Summers and Mr S Flay for the third respondent
Mr K Clarke and Mr J Fearon for the fourth respondent
Mr M Wood and Mr T Dean for the fifth respondent
Mr S O'Brien, Mr P O'Sullivan and Mr M Weston for the sixth
respondent

Decision: 25 March 2011

FINAL DETERMINATION
Adjudicator: R Pitchforth

CONTENTS

BACKGROUND	4
THE PARTIES	4
THE CLAIM	4
CONSTRUCTION AND PURCHASE HISTORY	5
THE ISSUES	7
ASSESSOR'S REPORT	8
COSTS OF REPAIRS	9
EXPERTS' MEETING.....	9
HAVE DEFECTS WITH THE JOINERY OR ITS INSTALLATION CAUSED LEAKS? 9	
Leak at Pivot Doors.....	10
<i>The water test</i>	12
<i>Discussion</i>	16
Skylight	17
Kitchen Window	18
<i>Hood flashing</i>	18
<i>Discussion</i>	19
<i>Jamb flashing</i>	20
<i>Discussion</i>	21
DID THE MASONRY COATING OR ITS APPLICATION CAUSE LEAKS?.....	21
<i>Discussion</i>	24
<i>Entrance through roof</i>	24
<i>Entrance though walls</i>	25
Conclusion	29
ROOFING DEFECTS	29
Parapets.....	29
<i>Council responsibility for parapets</i>	31
Roof Vents	34
Roof	34
STEEL COLUMNS	35
HAVE DEFICIENCIES IN THE PLANS AND SPECIFICATIONS CAUSED LEAKS?36	
Architect's Defence	37
DID THE COUNCIL BREACH ITS DUTY OF CARE?	38
Consent.....	38
Inspections.....	38
Code Compliance Certificate	39
PROCEDURAL ISSUES	40
Procedural history	41
SUMMARY & RESULTS	44
CONCLUSION AND ORDERS.....	45

BACKGROUND

[1] This case relates to a concrete masonry house at 9 Ring Terrace, St Mary's Bay, Auckland, which the claimant purchased from a developer. The claimant found leaks shortly after it was purchased and so has made this claim.

THE PARTIES

[2] The owner of 9 Ring Terrace is the Carrigafoyle Trust (Carrigafoyle). Carrigafoyle appointed Overview Trustee Limited as its trustee under a deed of trust. Patrick O'Connor is a company director of Overview Trustee Limited and was authorised to take all steps on behalf of Carrigafoyle. Eight different respondents have been included in this claim during the course of the proceedings. After the removal of some of these parties the claim proceeded against:

- the third respondent, the Auckland Council which had assumed responsibility for the former Auckland City Council. (the Council);
- the fourth respondent, Architectural Windows Solutions Limited (Windows);
- the fifth respondent, Fearon Hay Architects Ltd (Fearon) which drew the original plans and specifications;
- the sixth respondent, Seamus O'Brien, the plasterer; and
- the eighth respondent, Christopher Gil Cook, the developer. Mr Cook took no part in the proceedings.

THE CLAIM

[3] The quantum of the claim as set out in the final claim documents was \$276,365.02. By the time of the final submissions the claim was modified to a total of \$268,522.38:

- a) Plaster waterproofing system - \$ 167,729.29

- b) Kitchen window - \$4,624.53
- c) Skylight - \$3,642.17
- d) Parapets and fascia and resultant internal damage - \$33,329.56
- e) Roof vents - \$480.00
- f) Pivot doors - \$24,003.82
- g) Steel columns - \$2,043.42
- h) Flat roof - \$32,669.59

CONSTRUCTION AND PURCHASE HISTORY

[4] The owner of the property in 2006 was Lhasa Limited, (Lhasa). Christopher Cook was the sole employee of Lhasa. In 2003 Lhasa contracted Fearon to prepare plans and specifications for the construction of residential units on the property including 9 Ring Terrace. In August 2003 Fearon applied to the Council for an amendment to an existing building consent to construct the dwelling in accordance with the plans and specifications. The Council issued Lhasa with the building consent in November 2003.

[5] Between November 2003 and 2 October 2006 Lhasa constructed the building with Mr Cook as project manager and supervisor of the construction.

[6] Windows was contracted to manufacture, supply and install the aluminium joinery for the dwelling. Mr O'Brien contracted to apply an external waterproofing system.

[7] The first agreement to purchase 9 Ring Terrace from the CC Trust (Mr Cook's trust) was through another of Mr O'Connor's companies, Admiralty Lodge Investments Limited or its nominee. That agreement was dated 17 July 2006. By a second undated agreement Admiralty's Whitianga property was to be sold to RIL Limited or Nominee, a company controlled by Mr Cook.

[8] The first agreement was in the standard Auckland Law Society format and contained extra clauses listing chattels, a tenancy to the CC

Trust, an agreement to pay to Admiralty liquidated damages until settlement if it was delayed beyond nine weeks and a requirement for contemporaneous settlement of the other contract. There was a clause concerning a valuation and a limitation of the liability of the trustees of the CC Trust.

[9] These property swap contracts did not proceed and Overview Trustee Limited as trustee of the Carrigafoyle Trust entered into a new undated agreement to purchase the property for \$4,100,000. Mr O'Connor said that the new agreement was to have been on the same terms as the previous one, but the extra clauses were varied. The balance due was to be paid on settlement on 6 October 2006 or as otherwise agreed. Mr O'Connor said that the purchase was also conditional on the vendor obtaining a Code Compliance Certificate (CCC) for the property. There is no written evidence of this but the vendors did obtain the CCC in January 2007.

[10] There is no indication that the claimant obtained any undertaking from the Council or that it was relying on the Council to inspect the work or issue a CCC before purchasing the property. The decision to settle was based on the valuation report dated 10 May 2006, and a practical completion certificate dated 29 September 2006, from Seagar & Associates.

[11] The transaction was settled on 13 October 2006. There was disagreement concerning the amount due and the extent of the completion of the property. The agreement to settle on 13 October 2006 was on the basis that the vendors would provide a letter from the Council confirming the building had passed final inspection for the CCC it would issue in due course. At settlement there was further dispute about incomplete work and \$150,000.00 was retained. Mr O'Connor thought money was to be retained pending satisfactory completion. The evidence showed that the solicitors agreed that the claimant would retain \$150,000 for chattels and incomplete building work. On settlement the claimant's solicitor undertook to pay \$50,000 for the chattels when supplied and \$100,000 for cabinet making work when completed. The solicitors were in dispute regarding the terms of the undertaking but in any event the claimant's solicitor's released the funds in January 2007.

[12] Mr O'Connor thought that if the money had been retained it would have covered the cost of remedial work. He said he thought that the solicitor had 'stuffed up'. The solicitor was not a party to this claim and so the dispute is outside the ambit of this proceeding.

[13] Mr O'Connor's evidence, which was supported by some of the respondents, was that Mr Cook had cash-flow problems during construction. Many of the respondents had not been paid in full and in some cases had not completed their contracts due to non payment. Mr Cook's personal undertaking to complete repairs was not honoured.

[14] This was a major investment by an experienced property manager. The claimant purchased the property for resale. Apart from a brief time when occupation by Mr O'Connor was contemplated, it was always intended to resell it. It was temporarily furnished by a contractor to assist sale but the process stopped when Mr O'Connor recognised it as a leaky home. It was occupied for a time by Mr Cook and later by a caretaker but was empty for about two years and currently remains empty.

[15] Following the issuing of the CCC the claimant noted deficiencies in the roof, concrete and masonry walls and window joinery which have all allegedly produced a loss being the cost of remedial works. Mr O'Connor said that nothing had been done to remedy the defects as he did not want to compromise the evidence which was to be put before this Tribunal.

THE ISSUES

[16] While a number of different issues were raised in the claim documents and at the hearing, the only issues that were progressed in any meaningful way related to the causes of the leaks and the liability of the different parties. The issues I need to decide are:

- Have defects with the joinery or its installation caused leaks?
- Did the masonry coating or its application cause leaks?

- What are the roofing defects and have they caused leaks?
- Have deficiencies with the plans and specifications caused leaks?
- Did the Council breach its duty of care?

ASSESSOR'S REPORT

[17] The assessor, Frank Wiemann, undertook an inspection at the request of the Department of Building and Housing which he completed on 23 April 2009. In his report he identified leaks in the curved plastered concrete block walls to the stairs, the plastered concrete block walls on each of the faces, at the folding doors, at the kitchen window, at the skylight to the master bedroom and ensuite, at the fibre cement roof edges where the nails had popped and with the steel columns.

[18] Damage alleged to be caused by the leaks was efflorescence, plaster cracking, flaking, mould growth, swelling and deterioration of inbuilt furniture. There was no damage noted at the folding pivoting doors but the assessor was of the view that it was likely to cause damage in the future. At the kitchen window there was swelling and cracking of the internal plasterboard lining and paint flaking off. The damage at the skylight in the master bedroom and ensuite was swelling and cracking of the internal plasterboard lining and paint flaking off. On the east and west elevations, there was cracking, mould growth on the fibre cement and undue moisture content in the timber framing. The steel columns at the north and south aspects had paint peeling off and corrosion to steel.

[19] The assessor was of the view that in the future leaking is likely to occur:

- at the fibre cement clad roof edge where there is cracking visible at junctions to the east and west;
- at the folding doors where water enters;

- at the roof vents where they are not capable of withstanding the wind load and allow rainwater to reach the ceiling insulation and plasterboard ceiling lining; and
- and the flashing joints on the roof, several of which were broken and allow water entry.

Future damage to the fibre cement, framing, carpets, furniture, wall, substrate, and the growth of mould were all likely.

COSTS OF REPAIRS

[20] The claimant's expert provided some figures for costs of remediation. However, at the hearing he relied on the assessor's quantity surveying schedule but sought an increase of the GST component to take the recent increase into account.

EXPERTS' MEETING

[21] At the hearing I asked all the experts present to meet and to advise the hearing as to what matters they agreed and what matters they disagreed and why there was a disagreement.

[22] The experts were Frank Wiemann, the assessor, David Medricky, for the claimant's, Neil Summers for the Council, Kevin Clarke for Fearon, Philip O'Sullivan and Mike Weston, who were engaged by Mr O'Brien, and Tony Dean for Windows. Mr Dean agreed to keep notes at the meeting and produce minutes.

HAVE DEFECTS WITH THE JOINERY OR ITS INSTALLATION CAUSED LEAKS?

[23] The claimant alleges that the window joinery is non-compliant with the requirements of the Building Code both as to its design and installation. It says that defects allow water penetration into the interior of the dwelling. At

the hearing it made two claims in relation to windows, namely leaking pivot doors and a leak above the kitchen window.

Leak at Pivot Doors

[24] The claimant alleges that the pivot doors leak and are defective both in design and construction. The claimant acknowledged that the experts differed on whether the moisture ingress was something that the homeowner should simply have put up with by mopping it up if and when it occurs or whether it is reasonable to expect they will keep the water out. It says the issue is whether or not this is in contravention of E2 in the Building Code.

[25] Mr O'Connor said the main time water came into the house was when there was a wind from the north. As he had never lived in the house he did not see it when it leaked, he only saw puddles after it had rained. A caretaker noted about six occasions when it entered the building. He reported that it flooded at least four or five feet into the house inside the pivot doors on a couple of occasions. Mr O'Connor said that the black tiles have stained as it was not mopped up straight away because no-one was living at the property.

[26] Mr O'Connor's view was that the terrace to inside floor level difference of less than 50 mm the drain and the 'hairy stuff' down the sides of the doors to stop the weather are inadequate. He said that Fearon, Windows and Mr Cook should have ensured that moisture ingress through the pivot doors would not occur. Mr O'Connor acknowledged that there was no producer statement. He had not asked for one. He had assumed that his advisers would obtain one.

[27] The first issue to be determined is whether the pivot doors leak. If they do, then the cause of the leak can be considered and any consequent damage evaluated to determine whether there is any evidence of negligence. If there is damage as a result of leaks which have been the result of a breach of a duty of care then there may be a remedy available.

[28] In his report (15.2.5) the assessor referred to a lack of clearance to ground, inadequate choice of door seals and the inhibiting of the closing of the doors due to unstable construction. He said that water entry through the doors was confirmed, (15.4.2 and summary). This was a reference to water ponding on the stone surface of the floor which had been noted during the investigation for the eligibility report, (12.3.1.1. (iv)). There was no water damage, (15.3.5) though there may be in the future, (summary). It was suggested that the accumulation of water on the floor could cause water uptake into a carpet, furniture etc, (15.4.2, 15.5.2.). He did not recommend repairs to stop the current leaks, (15.6.1). In relation to future damage the assessor recommended removing the doors and existing drainage channel and replacing them with new glass doors with adequate structural strength and seal design to withstand the wind conditions on site and installing a new drainage channel providing adequate level difference to the interior, (15.6.3.2). He assessed the cost of replacing the aluminium frames and seals at \$23,482.00, (15.7.3 (ii)). The quantity surveyor's costings provided by the assessor were for \$15,000.00 (Kwanto p 8).

[29] Mr Medricky's report made no mention of leaks through the pivot doors. He said :

66 There are significant issues with the weathertightness of the current aluminium joinery which includes the roof lights. Several of those issues relate to design choice made during the course of construction, but inevitable as matters (sic) which mean that the current aluminium joinery does not comply with the requirements of Clause E2 of the Building Code.

67 The repairs necessary to fix the issues with the joinery in the building are currently under review with the joinery supplier to provide appropriate long term solutions

68 The cost of implementing these works is approximately \$25,000 including GST.

[30] Although Mr Medricky assessed the cost of repair at \$25,000 he gave no other detail so it is not possible to ascertain from his report how much is allocated to each joinery issue. In relation to the doors it is not clear

whether this is to remedy the ceiling clearance issue, (which is not a weathertight problem) or a sill, jamb and drainage issue, or both.

The water test

[31] Mr Medricky and Mr O'Connor gave evidence of a hose test undertaken for a number of the experts. Mr O'Connor¹ said that when he turned a hose full on the doors, they would leak through the sides and underneath. If he squirted straight at the middle water would come through the middle. When the hose was played on the doors where they meet the concrete walls there was water ingress of 250 to 350 or perhaps up to 600 mm and the puddle was 250 x 700 mm. The photograph of this was not produced in evidence. This indicated the amount of water that would enter in a storm situation, is unacceptable and a breach of the Building Code.

[32] Mr O'Sullivan, however, said that the hose test was not a relevant test but there is a test, NZS 4211, relating to pressure tests. Mr Dean referred to the Window Association test which says that the most reliable test for a window or door weathertightness is exposure to the natural weather conditions on-site. Specialised testing equipment should simulate real weather conditions. Hosing is not appropriate as most joinery is not designed for pressurised jets of water. Mr O'Connor accepted that the Building Code did not allow for testing by hose, but had relied on the experts who asked for the test.

[33] Mr Clarke, in response to Mr Rainey, said that the doors permitted the entry of moisture where they were exposed to the high pressure hosing. It was a severe and unapproved test. If the house was subjected to that amount of rain it would be a frightening storm. The experts found there were leaks at sill level, which was not surprising. All pivot doors are unable to keep that sort of weather out. Having hosed the house with hundreds of litres of water at high pressure less than a litre of water got in. It was a small amount of water and one would expect that amount of water would be delivered by north-easterly storms once or twice a year. The water ingress is

¹ Day 1, 10.50 am.

onto slate so there is no possibility of damage to the building. This is what B2 deals with. It is not possible to damage the existing set up. The doors are difficult to operate, something that the owner must have known when he inspected the house as they must have always been difficult.

[34] Replying to a question as to whether the real test is not the volume of water but the wind pressure differential which drives the water, Mr Clarke said the reality is that pivot doors will not always prevent water ingress by the sill. Mr Rainey asked if the design of the doors is a matter between Fearon and Windows. Mr Clarke replied that Fearon could have told the owner that it was difficult to make the pivot doors waterproof.

[35] Mr Robertson asked Mr Clarke how often it leaked. He was only able to speculate based on similar houses but a house facing the sea will get water in the windows on a few occasions a year. In response to Windows, Mr Clarke thought that the window would never face a storm as severe as the hose test. Major storms occur once or twice a year. He thought that the slate stains may be as a result of failure to mop. Some experts have seen the slate stains and some have not. The doors have been operational since early 2006 and have been exposed to natural forces since that time. There is no evidence of damage to the building.

[36] Mr Medricky thought that door leaks were both a design issue, as the doors needed a permanent flashing or rebate, and a construction issue.

[37] Mr Wiemann agreed that it was a problem with the design of the house as the doors were unstable and he could not close them properly. This was a defect of design but he considered it would depend whether it was the window designer or Fearon who was responsible for the design; he did not know. The windows may have been fabricated at the lower end of performance range.

[38] When considering the Building Code Mr Wiemann said that it only relates to water penetration which causes undue damage. In this case moisture goes onto the tiles inside. Even if the tiles are not damaged he believed it is probably a breach of the code.

[39] Mr Fearon's evidence was that, as far as he could recall there were discussions about pivot doors but he could not remember the discussions in detail. Mr Cook was interested in the concept. The owner obtained building consent after discussion as to detailing.

[40] The experts agreed that the pivot doors have leaks around the pivot points. There was a difference of opinion as to whether this contravenes the Building Code. Mr Flay's evidence was that there was no code requirement to inspect doors in domestic dwellings. If the doors are to be completely replaced with sliding doors it would cost approximately \$15,000.00.

[41] Mr Summers was convinced by the discussion that the doors were inappropriate for the situation, but it was a decision made by the developer not the others involved in the building. He agreed that water should not be coming through. There was no evidence of damage apart perhaps for some stains on the tile. This would not have shown if it had been mopped up. Remedial action on the doors would be to install new seals and perhaps a sill member. The top construction tolerances are almost impossible to meet but that is a separate issue as there is no weathertightness failure at the top. The doors could be dismantled on site and could be made to fit. Mr Summers declined to agree that the Fearon had failed to design the property properly; it was a workmanship issue. Windblown moisture can enter the doors under certain conditions. This could be remedied by replacing the brush strips with mohair seals and adding a continuous sill member at terrace level.

[42] Mr Dean did not believe the doors contravened the wording of the Building Code. They admit water into the building but the extent of damage or potential damage is such that it does not contravene the Code. There is a problem with double action pivot doors as they are big doors working in and out. The slight drop in the ceiling means that they hit it on opening. The desire by the client to have a threshold free floor, inside outside look, nothing sticking up to trip up on and a north facing door means that moisture will be blown under the door. There is a drain on the outside but this does not catch

the water that runs down the door. If there is a breach it could be fixed with a drain on the inside. Mr Dean thought a better solution would be single action doors with a sill stop to prevent windblown water entering the building but it may not look as good.

[43] Fearon only did the drawings produced. Mr Rainey asked if the design was the responsibility of Windows. Mr Dean said that Fearon, on the instructions of the developer, had provided a difficult window design which may have been possible to implement and the contractor went along with it.

[44] Mr Wiemann saw a sign of a stain; he was not sure that it was damage so concluded there was likely future damage.

[45] To Mr Wood, Mr Summers said he did not mean that there was a deficiency in the making of the joinery but that it is impossible to achieve the tolerances in aluminium joinery that were needed for the top clearance.

[46] The assessor provided for replacement doors but there is no information as to whether they would be double action pivot doors and how drainage would be introduced. Mr Medricky has not made mention of this in his report. When asked about the remedial work of installing additional draining and jamb flashings or installation of doors of a different type Mr Medricky had no preference for replacement or repair- it would depend on the financial situation and compliance with the Building Code. Mr Rainey suggested this could be done for \$15,000. 00. Mr Medricky thought that was on the high side and thought \$11,000.00 was closer.

[47] A further difficulty with the doors is that as the house has settled, the clearances at the top of the doors have become inadequate. This is not a weathertightness issue but may well lead the claimant to replace the doors with sliding doors.

Discussion

[48] Pivot doors were chosen by Mr Cook as a special architectural feature. There was a balance between aesthetics, weathertightness and the ability to open and close the doors easily.

[49] Fearon specified pivot doors but did not specify that they should be flush with the ceiling. If they had been installed as specified there would have been clearance. This would not have affected the water ingress at the base which was always likely. Mr Cook asked Windows' to supply the doors with a brush seal.

[50] The doors have been on site since 2006 and the only resultant water ingress is in occasional puddles under the doors. By their very nature, pivot doors are designed to provide indoor/outdoor living with little or no change of floor levels between the inside and outside surfaces. As Windows submit, it is the situation in which they are installed which is the important factor. Pivot doors rely on the supporting structural detail for weatherproofing. Mr Cook chose pivot doors over those with sills and other weatherproofing features. The stone flooring is similar both inside and outside. There is a drain and small step to preserve this indoor/outside living flow, (see Photographs 40, 41, assessor's report).

[51] In extreme weather conditions water ingress is possible. Mr Clarke's evidence was that a storm of a magnitude to cause water ingress through the doors would only occur once or twice a year.

[52] The style of door used and the surrounding detail were known to the claimant upon purchase. There is not the same level of security against moisture as offered by a larger step, windows with more framing or an inside drain to catch water that has run down the outside of the windows. However, the use of stone for surfaces that are likely to become damp means that there will be no damage from water unless there is no maintenance or furnishings are left near the door during a stronger than average storm. The developer, Mr Cook, and the claimant clearly preferred the lifestyle design

choice visible during construction, to the more practical but less aesthetic approach.

[53] The evidence of Mr Dean was that water ingress could be prevented by altering the doors to single action enabling them to be closed against head, jamb and sill seals. Such a solution would change the nature of the doors and the aesthetics.

[54] There is no evidence that the pivot doors have not performed as one would expect of a door with no jamb. There is also no evidence of damage as water on stone did not affect the building. There is accordingly no loss resulting from this alleged defect.

[55] The claimant said that a producer statement was issued and the Council relied on it. The claimant was unable to produce the document and Windows denied it was issued. There was no proof that this document ever existed or influenced anyone. Mr Flay's evidence was that the Council was not obliged to inspect doors such as this in domestic buildings.

[56] I accept that the builder was not negligent in choosing an indoor/outdoor flow and deciding to install pivot doors. The doors were not installed or designed negligently. The claimant's agent, an experienced property purchaser, was not concerned when inspecting the building whilst it was under construction. There is no damage from the little water that has entered the building during severe storms.

[57] The claim is not made out and fails.

Skylight

[58] The claimant acknowledged that the skylight over the master bedroom has now been fixed by Windows and is no longer a significant issue.

Kitchen Window

[59] The claimant says that the causes of the leaks at the kitchen window are first the hood flashing installed over the top of the aluminium joinery unit and second the lack of an aluminium section at the end of the sliding window which was required by the detail shown in the plans prepared by Fearon at sheet (4) 07 detail 11.

Hood flashing

[60] The assessor made no separate finding in relation to the hood flashing. Mr Medricky gave evidence of his inspection of the hood flashing but said he relied upon the assessor's scope of works for remedial work and costs. He did not mention the hood flashing as needing repair.

[61] The experts agreed that the leak above the kitchen window, (assessors photographs 33,34, 35,36 and 37 and Prendos photographs 1.3 and 1.4 and Flay Photograph p 10), has been caused by an unsealed hood flashing over the head of the window which was not constructed in accordance with the consent of drawings. The drawings p 33/70 Sheet (4)05B Detail 2 require *0.7 BMT purpose made folded colour steel flashing beyond cut chase & sealed into block wall.*

[62] The hood flashing over the kitchen window has been chased into the upper level blockwork and moisture has entered the kitchen at the northwest corner. There is visible damage to the linings. The wider ceiling damage can only have come from above and, as Mr O'Connor said in evidence, is related to the roof or parapet problems.

[63] The section detail shows the flashing with sealant embedded at the top where it is chased into the wall. Mr Medricky peeled back the flashing to find that there was no sealant. He did not agree that this was destructive testing but if he had broken a seal he would have recommended repairs. Mr Medricky said he had taken photographs but was not asked to bring them. The claimant said that the Council should have identified this as a fault.

[64] The Council evidence was that this could only have been done during inspection by destructive testing. There was no way of showing the sealant was absent without that destructive testing.

[65] The assessor noted that the flashing was not constructed as required by the plans but was constructed in a superior manner. This was agreed to by the other experts.

[66] The claimant argued that the change should have generated an application for consent. In response, the Council submitted that improvements such as this are not the sort of change that affects the consent. The 'as built' flashing is superior as there is greater fall across the top and it continues up the wall providing more protection.

Discussion

[67] I accept that not destructively testing for sealant was acceptable practice at the time of inspection. There was no reason for the inspector not to accept that the flashing was properly installed. There was nothing in its appearance to alert the inspector to the defect. Accordingly there was no negligence in the inspection of this flashing. It was not proven that a new consent should have been sought or would not have been given.

[68] No flashing installer has been identified. There was no evidence as to who was responsible for this work. It is not shown that Windows did this work. The installer is not a party so any responsibility falls on the developer, Mr Cook. Remedial work on the flashing is necessary.

[69] The assessor's costings were \$1955.00 including the \$300.00 for the jamb flashing discussed below (see p 6 Kwanto, Item 25). The amount claimed for this is therefore \$1655.00 plus GST. Mr Cook is liable for this amount.

Jamb flashing

[70] There is no jamb flashing on the window. The original evidence of a leak was that Mr O'Connor saw water on the floor. Later he said that he had been there when water came through though, as the drip came from the top, it was hard to tell if it was from the door or coming from the ceiling, which is the same height as the ranch slider. It may have come from the hood flashing.

[71] The assessor also saw evidence of water on the floor and concluded that it was the result of water damage from the ceiling. (Note to photograph 36, assessors report) Mr Medricky said that the detail on p 35/71 Sheet (4)07B detail 11(1) 02.2 was not constructed as drawn. Mr Summers thought the drawing may have been through the head flashing. It is possible that a separate strip was intended though it is not clear from the detail. Others thought that all it showed was an interlocker, which no one at the hearing was able to say was present or not. Mr Clarke said it is normal to have a brush and a rain screen so it is a small fix. There was no damage but the experts agreed that if it was leaking and could be fixed with a jamb flashing. It was a small matter. If there was a closing strip, it would have wobbled around. It was never installed. It was not relevant to the damage in Photograph 34 which relates to problems with the hood flashing.

[72] Mr Fearon, the architect, said that the plan showed an interlocker to create the weather seal without any further weathering detail. He was not able to tell from the photograph whether what was constructed was what was drawn.

[73] The assessor said that there was no evidence of leak damage but there was a likely future leak which could be prevented by the installation of the jamb flashing, (15.6.1 (ii)). The Kwanto quantity surveyor's estimate of the cost for supplying and installing a proprietary flashing along the opening jamb side is \$300.00.

[74] The door has been constructed with a weather seal. The experts agreed that no water was entering at the jamb due to the omitted flashing. There was no damage caused to the tiled floor.

Discussion

[75] The evidence shows that if the jamb flashing is missing, the decision not to install it was made by Mr Cook.

[76] There was no evidence of a leak or damage to the floor. The ceiling damage comes from above. There is therefore no liability on any of the parties for this sum. It may be prudent for the claimant to install a strip; the cost of the remedial work is \$300.00.

DID THE MASONRY COATING OR ITS APPLICATION CAUSE LEAKS?

[77] The house was designed by Fearon to have a stucco coating. During the course of construction this was changed to the Xypex Waterproofing System, (Xypex). This was an alternative solution to achieving compliance with the Building Code. The Xypex system relies on a chemical reaction with the use of a catalyst to produce a non-soluble crystalline formation within the pores and capillary tracks of the concrete, preventing ingress of moisture.

[78] The claimant said that the Xypex system is radically different from the originally proposed plaster system. The technical data sheet does not refer to concrete masonry block construction. The system has been used as the primary means of waterproofing on only two or three similar houses as a means of achieving compliance with E2 of the Building Code when used in conjunction with masonry block work construction. The New Zealand distributor would not issue a producer statement for the use of the product as a means of waterproofing concrete masonry block work. The claimant asserts Mr Cook and the architects were negligent in choosing the Xypex system and Mr Cook personally applied a seal coat to the exterior of the building which was incompatible with the waterproofing material used.

[79] The claimant submitted that there is no basis on which the Xypex system will meet the requirements of Clause E 2 of the Building Code is therefore defective and should be replaced.

[80] The claimant says it is significant that when Mr Cook contracted with Seamus O'Brien to apply the Xypex system., the quotation clearly excludes responsibility for mortar hairline cracks,

[81] The experts discussed the lack of surface coating on the plaster walls mentioned by the assessor. The experts agreed that although there were cracks shown in photograph 25 there was no evidence of a leak. Efflorescence on the inside of the stairwell was caused by a failure of the flashing as shown in photograph 26. It was agreed that this was a skylight leak and needed a localised repair. There was no evidence of a leak at the inter-story crack shown in photographs 31 and 32. The crack appeared to be caused by some form of structural settlement and is more aesthetic. It should probably have been a control joint but this is not claimed. The crack showing in the assessor's photographs 29 and 30 has no accompanying evidence of a leak.

[82] The experts agreed that there is moisture inside the wardrobe as shown in photographs 72 and 75 and it was agreed that this was a result of a leak. Sources may be the pipe penetration shown in photographs 3 and 4 for the roof overflow, flashing shown in photographs 48 and 49 where there is probably a leaking corner joint and water vapour trapped behind the Meltica board inside the wardrobe on the back wall.

[83] The experts noted that when liquid has been found to be migrating to the inside of the block work there has always been an evident construction defect. There has been no evidence of any moisture penetration that has been caused solely as a result of a failure of the coating system.

[84] The claimant submitted that, based on Mr Weston's evidence, if the Xypex system was functioning properly there would be no ability for free water to permeate through the block work to the internal face of the building.

The claimant submits that the water is not condensation as was suggested by some witnesses. The claimant referred to the photographs which it said showed free water permeating through the mortar lines and running down the face of the blockwork: this should not be possible if the Xypex system worked.

[85] The evidence of failure that I am invited to rely on is moisture permeating through the block work on the inside of the dwelling which has been coated with Xypex. The claimant referred to the efflorescence which can be seen in the photographs which, according to Mr Medricky, only appears on masonry in the presence of free water moving through the concrete and evaporating on the surface leaving behind the white salt deposit which can be seen in the photographs. Salts that appear as the white powder cannot be brought through by water vapour, only by free water and again Mr Medricky said this supports the claimant's conclusion that the Xypex system has failed.

[86] The claimant also referred to the testing of the moisture content and absorption of water by the block work which is detailed in the assessors report.

[87] The claimant says I should rely on Mr Wiemann's and Mr Medricky's evidence. Despite the other expert evidence they still believed that the failure of the coating system contributed to some of the leaks. I should discount the experts who formed the opinion that there is no evidence of leaks. The claimant invited me to disregard other evidence relating to the Xypex system as I should not be satisfied that the Xypex system is working or will continue to work for the 15 year minimum durability period required by the Building Code. I should also ignore Mr Weston's evidence because the supplier of Xypex would not issue a producer statement or warranty and the applicator has not done so either. I should prefer the evidence that the system is failing. They submit that although where there is evidence of actual moisture ingress into the building that moisture is associated with other defects which all experts agree exist does not prevent me coming to the view that the coating system has failed. The conclusion I am invited to draw is that the

Xypex system is defective and should therefore be replaced with an appropriate coating.

[88] Mr O'Connor's evidence was that nothing by way of cracks in the walls or the state of the plastering was noted in earlier inspections but on 7 November 2006 there was another inspection. A typed note was made and then on 20 December 2006 further notes were made on the same document. There were plastering issues on 7 November and on 20 December there were matters still not done.

Discussion

[89] The first question to consider is whether the walls leak. This requires a consideration as to whether water is entering the walls, and if so, from where.

[90] All experts agree that water is entering the wall cavities from the top through the roof and associated defects. Experts disagree as to whether water is entering the walls from the exterior and travelling through the concrete to the interior. Only in this second situation can the quality of the coating system be relevant. It will then be open to me to consider whether there has been any negligence and which party may be responsible.

Entrance through roof

[91] Mr Medricky detailed sources of leaks in the roof:

- Parapet flashings permit water entry;
- joints in the substrate have moved cracking the membrane and allowing water entry;
- overflow pipes penetrate the exterior walls but are not sealed permitting water to enter;
- roof ventilators penetrate through the membrane roof and through the ventilator caps where they have blown off;

- the upper roof light leaks into the ensuite ceiling and the master bedroom ceiling and a glazed roof light on the garage is faulty; and,
- water has penetrated the walls below and is emerging as efflorescence.

[92] The dwelling was constructed using a hotblock system. Hotblocks have concrete exteriors and polystyrene interiors. There is a concrete link between the exterior face and the interior face only where there is mortar and no polystyrene.

[93] Water entering the walls from above would be held in by the Xypex system. Over time it would work its way through the wall and evaporate leaving salts or efflorescence from the concrete. The leaks in the roof are consistent with the observations made by the experts.

[94] I find that water has entered the wall cavity from the roof above and is being expelled from the wall as water vapour leaving efflorescence. This is not due to any fault in the Xypex system.

Entrance though walls

[95] The statement of claim alleged a breach of a duty of care in the application of the Xypex properly and secondly that there was a breach of warranties implied in the contract in relation to the application of the coating.

[96] At the hearing Mr Rainey introduced a new proposition that the other parties had not understood was pleaded, namely that the Xypex was an inappropriate system to use on the building². The claimant submitted that was something which should have been apparent to Mr O'Brien, given the knowledge held by him. Mr O'Brien objected to this new cause of action as an allegation without notice.

² Day 1 4.01 pm

[97] Mr Medricky found four to six locations where there were cracks of more than 4 mm, (Assessor's photographs 24 and 25). Mr Wiemann found the widest crack was an internal crack near the fireplace which would not have any influence on water ingress and was not measured. Mr Medricky could not point to any more cracks.

[98] Mr Rainey said Mr O'Brien knew about this problem as in the quotation he said that he took no responsibility for mortar hairline cracks and there was no allowance for waterproofing behind window frames. He said, given the cracks visible when the product was applied, it was not appropriate to use Xypex as weatherproofing as it could not have complied with the Building Code.

[99] The experts said that although there were cracks there was still no evidence of moisture travelling from the outside to the interior. If there are cracks with no leaks the Xypex system is working. After 4 years it still works (see photographs 31 and 32, large crack with no moisture inside). This reflects the properties of the Xypex system itself.

[100] Mr O'Sullivan, in response to Mr Rainey, agreed that there is no acceptable solution affirming Xypex; it is an alternative solution. Such an alternative should be the subject of an application to the Council. He did not agree that the Council's file showed no evidence relating to Xypex. Both a paint and a Xypex system were referred to. The specifications were generic and referred to a bagged plaster system as well as Xypex. This is conflicting information. Xypex was used. If the house had been painted there would have been leaks. There were fewer leaks with Xypex. He could not find liquid which he would have found in a paint system. Cracking is inherent in block buildings but this one is well designed. There is always a problem in choosing a coating.

[101] Mr Medricky drew a number of inferences to show that moisture enters through the wall from the exterior to the interior. He was critical of the quality of the block work and inferred that inadequacies exposed in the basement would be found in all external walls. The defects he identified

were that the joints were not tooled, exceeded the width limitations and had numerous gaps with no mortar present. Mr Medricky said there are numerous horizontal and vertical cracks in the plastered block work ranging from 0.3 mm to about 4 mm. He said that, as Xypex technical information only deals with cracks up to 0.4 mm, one can conclude that water will be able to enter wider cracks. He would have similar concerns with plaster if there were wider cracks.

[102] In relation to paint, Mr Medricky, like Fearon's experts, considered that he could rely on technical literature from the manufacturer. He made it clear that he felt he could not rely on the Xypex literature or the effectiveness of the chemistry.

[103] Mr Medricky did not indicate why he considered the coating applicator is responsible for wider cracks in the masonry or why the applicator has a responsibility beyond applying the coating system properly.

[104] Mr Medricky was critical of the quality of plastering as in places it is 'drummy', weak and porous. He said that it is possible that plaster is being 'blown off' by the efflorescence forming between the plaster layer and the outer surface of the blocks. He concluded that the plaster may have been incorrectly mixed, applied or cured, or that surfaces were not clean before the plaster was applied. He referred to BRANZ Bulletin 268 which says "the source of efflorescence forming salts is nearly always in the mortar or concrete building elements even though it appears on the masonry work."

[105] The assessor tested the block work with water on the surface and concluded that Xypex was absent or not repelling the moisture. However, as Mr Summers pointed out, the nature of the Xypex system is to spread the moisture over the surface area. The block work remains water repellent. The scientific explanation for this was given by Mr Weston. Mr Summers also referred to the manufacturer's technical literature.

[106] The evidence showed that the outer plaster coatings have no weatherproofing effect. The coating is designed to provide an aesthetically

pleasing covering reflecting the true nature of the construction. This can cause a 'grinning' or shadowing effect which can be enhanced or reduced as required by increasing or reducing the thickness of the outer coatings.

[107] If the technical information had been available to the assessor he may well have carried out different tests and come to a different conclusion. He did not know that the building had not been plastered in the ordinary way.

[108] Most of the experts accepted Mr Weston's opinion that the system had been correctly applied. He believed it was a brush on 1 to 1.5 mm coat which produced a catalytic reaction in the blockwork and was very difficult to get wrong. The 4 mm crack is still able to self heal to a considerable depth in the blockwork. The catalytic reaction covers the sides of the larger cracks.

[109] Cracks have appeared while the claimant has owned the house. The experts considered the cracks normal but requiring maintenance. The Xypex system may well have provided protection by chemically reacting to water in the cracks. Mr O'Brien had quoted to do the repair work but was never contracted to do so.

[110] Mr Medricky thought that the defects in the masonry may be beyond the Xypex system to cope with. He accepted that this was not an application problem. Mr Wiemann, the assessor, said that he had doubts about the coating because he found widespread increased levels of moisture in the exterior walls and signs of moisture ingress in certain areas. There were inconsistent results for the tests of the outside walls. The answers from Mr Weston were helpful but Mr Wiemann still was not totally convinced that he could exclude entry of moisture from the outside. He did agree that in all cases they found leaks which related to other issues other than a leak through the walls. He agreed that he could not rule out that Xypex was not allowing water in but cannot show that there is water ingress. He said there was some inconsistency. Mr Medricky agreed with him.

Conclusion

[111] Neither the assessor nor Mr Medricky has demonstrated moisture ingress through the blockwork other than at specific junctions between other materials and/or the crack locations. The other experts were of the view that, without the Xypex, the dwelling would be leaking to a considerable extent.

[112] The evidence showed that there was no random leaking. The evidence was that the Xypex system was superior to the proposed waterproofing system. It was an alternative solution. It has since become an accredited solution. In either situation, the Council did not then require producer statements from the painter or applicator.

[113] I am satisfied that the evidence established that the Xypex system does not leak. There is no proof that the choice, application or the subsequent acceptance of the product by the Council has caused any damage. There is no separate evidence of the walls being compromised. Once the repairs to the roof and other construction defects have been made good and the cracks repaired there should be no further problem. Any claim relating to the exterior coating or interior coating and lining of the walls is therefore declined.

ROOFING DEFECTS

[114] The claimant alleges a number of roof defects. They are in relation to parapet flashings, roof vents, and the roof itself.

[115] The experts said that the roof vents do not show visible signs of damage yet. They need to be screwed back in place. This is a minimal issue.

Parapets

[116] On the parapets the flashings have been welded so as to form a rigid join. There is inadequate provision for movement from thermal expansion

and contraction. The welds have failed allowing moisture to enter the structure of the building at the corners.

[117] There has been no under-flashing or over-flashing fitted between joints in the sections of the parapet cappings. No attempt has been made to seal the existing joints. Water has been driven by wind pressure and has entered the structure of the building.

[118] Nails have been put through the parapet cappings at the corners. The joints between the flashings at the corners have been soldered. One nail has subsequently come free and the solder has cracked.

[119] The experts agreed that the parapet flashings are faulty and there has been substantial moisture ingress as a result of defects in the present state of the parapets. As a consequence the fibre cement sheet cladding has been damaged, is a source of leaks and should be replaced. This was the only repair the assessor recommended to stop current leaks. The leak in bedroom 3 is probably a parapet flashing fault. Photograph 47 of the assessors report is typical of the sort of flashing faults. It was agreed by all experts that parapet flashings are generally faulty and need to be repaired and re-fixed.

[120] Invasive testing was required to show that the junctions had not been properly sealed. The corner junctions of the cappings had been soldered rather than riveted and sealed. Solder has cracked as a result of thermal movement. The joins where the parapets meet are not waterproof. Experts disagreed as to whether there should be flashing over the top of the junction or an independent under-flashing.

[121] There was no evidence that the nails and solder were part of the original construction. It was inconsistent with the otherwise tidy method of construction. Mr Flay, a council expert on inspection matters, said that the use of solder is 'not heard of' and the nails and solder were probably part of an attempted repair. Mr Flay did not expect inspectors to make a closer inspection on a building of this type after the scaffolding was removed.

[122] There was no evidence of when the soldering was done. The claimant's expert, Mr Medricky, who identified the cracks in the solder and the nails as sources of leaks, could only say that the solder was on top of the nail. He could not say when this work was done. Three witnesses were of the view that it looked like an owner instigated repair. Mr O'Connor said that he had not instigated any repairs. Mr Cook is the only other possible repairer. There was no other evidence.

[123] I consider that these items should have been properly constructed and repaired under the supervision by the builder and developer. No roofer has been identified as a party. Mr Cook is therefore liable for this defect.

[124] The claimant sought only to replace the parapet cap flashings for \$12,109.72 including GST (\$10,764.52 net). It is not clear how this sum was arrived at. In the assessor's report the work is provided for twice, once as a repair to the places where leaks were found and secondly as a preventative measure for future leaks. The cost of the parapets in each of these is \$7,830.00 and \$2,790.00 respectively, amounting to \$10,620.00.

[125] I agree with the assessor that the fibre cement fascia should be repaired as well. Accordingly, I assess the sum of \$20,225.00 plus GST as the proper amount for fully repairing this defect including the proper installation of the parapet flashings.

Council responsibility for parapets

[126] The claimant alleged that the Council failed to inspect the parapets and consequently as a result of negligence is liable to contribute to the repair. The claimant said that the Council bears the onus of proof that their checks were adequate or that they had an appropriate producer statement.

[127] The Council, in reply, relied on the statement of Heath J in *Sunset Terraces Body Corporate 188529 v North Shore City Council* CIV-2004-404-3230, HC Auckland, 30 April 2008, Heath J. at [183]:

In carrying out its inspection role, it is plain that the Council ought not to be regarded as a Clerk of Works or as a project manager.¹⁴³ Even before the Building Act was passed, the Council's duty to third parties was "to exercise reasonable care, not an absolute duty to ensure compliance".¹⁴⁴ The Council's role is to provide an appropriate degree of oversight for public policy reasons. Its performance must be judged against the standards of the day and knowledge of the quality (or otherwise) of particular products used in the construction process. It does not take on any responsibility for ensuring, in fact, that all completed work complies with the Code.

143 For example, *Riddell v Porteous* [1999] 1 NZLR 1 (CA) at 12-13 and *Sloper v W H Murray Ltd* (High Court, Dunedin, A31/85, 22 November 1988, Hardie Boys J) at 36 144 *Craig v East Coast Bays City Council* [1986] 1 NZLR 99 (CA) at 107, per Tompkins J, with whom Cooke P and Richardson J agreed. See also *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548 (HC) at 600.

[128] In *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548,601, Hardie Boys J said at 601:-

There can be no criticism of the Council up until the time Mr Smith's report was presented to it. Its filing system was thorough, so that the nature of the ground was immediately known, and it acted most properly in calling for an engineer's report. Most of the professional witnesses however contended that although the report was sufficient to indicate a method of piling, it was insufficient as to piling specification, and that the Council should have required further detail in that respect. On the other hand, Mr Ian Smith and Mr Kennedy took the view that the method proposed was sufficiently well known for a reasonably competent builder to be able to implement it, particularly if as the Council was entitled to assume, Mr Fred Smith was on hand to provide such information and advice as might prove necessary during the course of the work. Mr Fred Smith expected the Council to call for further design material from him before granting the permit, commenting that had he thought it would not, he would at the outset have provided for the support of structures such as the terraces, the sewers, the drains and the garages. He thought that certainly in the case of No 29 Cutts Road the need for specification detail was obviated by the fact that he was to be on site himself.

In the end, neither Mr Weston, who argued this part of the case for his clients, nor Mr Maling pursued this point, and I accordingly discuss it no further, ***save to make the comment that the Council cannot be required to spell out every detail of commonly employed procedures but must be entitled to assume that a builder and his contractors are familiar with and will apply the normal skills and techniques of their respective crafts. It is not the local authority's duty to instruct a tradesman in his own work. Different considerations of course apply to complex or unusually difficult projects.*** But rather than base this part of their case against the Council on this particular complaint, the plaintiffs instead argued that the Council ought to have made it a condition of the permit that Mr Smith observe the piling work and certify its due execution. (In engineering parlance, "observation", or periodic inspection and checking, is to be distinguished from "supervision", which means almost continuous attendance on the job.) (Emphasis added).

[129] I accept the *obiter* in italics is a proper explanation of the Council's role. In either case, it has not been shown that, at the time of inspection, the construction would have appeared to a competent inspector, without invasive investigation, to be defective.

[130] The evidence from the assessor was that he had slid his knife into the slots between the lengths or the parapets and found that some had not been sealed. The Council evidence was that an inspector would not undertake tests which would compromise the integrity of seals which should be in place.

[131] As the Council is neither the clerk of works nor supervisor and is not required to undertake destructive testing when inspecting for compliance, I find that there was no negligence in relation to the approval of the construction of the parapets.

[132] The Council having no liability, Mr Cook is therefore solely responsible for the cost of remediation of the parapets.

Roof Vents

[133] The claimant said that the vents to the roof and the flat sections of the roof have not been properly screwed down. This is a workmanship issue which needs to be corrected. The claimant says this is a minor issue.

[134] Further leaks through the vents would have been prevented by prompt maintenance. Failure to do this was a failure to mitigate. There was no cost provided by the assessor or the claimant. Mr Summers estimated the cost at \$470.00. I award \$470 to be reduced by 50% on the basis that the claimant could have dealt with this issue promptly as maintenance. There is no evidence that these vents did not appear to be screwed down when the Council inspected them. Mr Cook is therefore to pay \$235.00 plus GST.

Roof

[135] The claimant says that there is no current evidence of moisture ingress through the flat roof. The experts agreed. The claimant is however concerned that the roof may not remain durable and as a consequence watertight. It has performed properly for seven years of its expected 15 year lifetime. The experts all agreed that the membrane has not failed. It was not the membrane specified by Fearon.

[136] The claimant's main concern relates to maintenance issues. There are recommended cleaning procedures. The warranty required that the maintenance requirements must be performed at regular intervals to ensure that the coating system will continue to provide the service for which it is intended. The maintenance requirements, which the claimant said apply to both decks and roofs, include weekly sweeps or vacuuming, monthly cleaning to remove all of grease drippings and avoiding the use of strong solvents. The claimant says that maintenance is beyond that which a reasonable homeowner would undertake and makes the membrane unsuitable for use as a durable membrane. It is a source of future potential damage. The claimant asks for it to be replaced.

[137] Mr Summers, in answer to Mr Rainey, said the roof had been there for six years and there were no leaks despite the maintenance requirements not being met. He liked the fact that in the producer statement it stated that the roof would not leak even if there was ponding. When asked if the acceptable solution in the Building Code 2.1.2 covered the application of the membrane to the roof for B2, he did not think it did. If normal maintenance has to be in accordance with the acceptable solution then weekly sweeping is probably not reasonable.

[138] Mr Flay's evidence in relation to the Council approach to inspecting such items was to look at the Building Code durability section B2 with information on verification methods and then the intended use of the building which includes normal maintenance (p vii). Mr Flay then looked at 'acceptable solutions' which are not mandatory but complying provisions of the Building Code 1.0.1 and the requirement for normal maintenance in 2.1.3 which includes following the manufacturer's maintenance recommendations. The Council has to accept the manufacturer's instructions as being reasonable. He was of the view that the Council had properly applied the requirements to the dwelling when carrying out the inspections.

[139] The claimant appears to have misread the instructions. If the roof is not being used as a deck and therefore not subject to heavy wear, litter and grease stains, it is sufficient to sweep it monthly. This is not an unreasonable maintenance requirement.

[140] The roof membrane is performing despite there being no maintenance for some years. With maintenance it should continue to perform for the balance of its designed life. As there was no proof of leaks, negligence or future likelihood of leaks the claim relating to the membrane is dismissed.

STEEL COLUMNS

[141] The steel columns have been damaged by moisture. The specifications required the columns to be galvanised. The steel columns are

not galvanised and experts could not agree whether this was a breach of the Building Code.

[142] The claimant submits that the columns form part of the structure and that they have to have adequate protection from damage by rust. The specification has not been complied with.

[143] There was no evidence that water had entered the house through the columns and accordingly this is not a leak or weathertightness issue. The claimants should deal with this as a maintenance issue by regular painting and recoating.

[144] The claim is therefore denied.

HAVE DEFICIENCIES IN THE PLANS AND SPECIFICATIONS CAUSED LEAKS?

[145] Fearon was contracted by Mr Cook on behalf of the CC Trust to provide plans and specifications for properties at 9 and 11 Ring Terrace for use in an application for building consent. Fearon was engaged to provide consultation on an 'as needed' basis. The project was managed by Mr Cook. The contract was set out in a letter to Mr Cook dated 14 May 2002.

[146] The claimant alleged that Fearon had been negligent in designing the building and supervising its construction. It listed over a dozen instances of negligent failure which were not claimed as defects leading to leaks.

[147] The remaining allegations are that Fearon failed to

- provide any or adequate details for stucco cladding,
- act on the advice of Windows in respect of drawings,
- properly design the pivot doors,

- ensure that the design would meet the Building Code as it breached B1.1, B 2.2, E 2.2, E 2.3.2, and
- have regard to BRANZ Bulletin 365.

This alleged negligence has caused the damage and the claimant seeks the cost of remedial work for the waterproofing system and the pivot doors.

[148] Mr Medricky's evidence of negligence in design leading to leaks was that the membrane roof was at a slope which is less than the minimum specified in E2/As1. He did not explain why this was a design fault as it had not been constructed as required by the plans.

[149] In the course of the hearing other alleged sources of leaks were said to be the result of Fearon's negligence. Those items, which I have already found not to be leaks or the subject of future likely damage, cannot form the basis of a viable claim and are not further considered.

Architect's Defence

[150] Fearon's evidence was that it was not engaged to provide observation or to provide professional services during the construction phase other than attendance upon intermittent and problem specific issues. Fearon says that it had no control over workmanship issues.

[151] Fearon referred to the claimant's closing submissions (at paragraph [55]) which concede that if the property had been built in accordance with the plans and specifications submitted to the Council the claimants would have owned a house which would have complied with the code.

[152] The claimant has not shown that Fearon was involved outside its contract, or that it was negligent in relation to the doors and coating. Accordingly, there being no negligence and no consequential leaks the claims against Fearon must fail.

DID THE COUNCIL BREACH ITS DUTY OF CARE?

[153] The claimant alleged that the Council owed it a duty of care in issuing the building consent, inspecting the work and issuing the Code Compliance Certificate.

[154] The negligent acts alleged were:

- issuing a building consent when there were insufficient grounds for it to be satisfied that the proposed building work would comply with the Building Code;
- conducting inspections that were insufficient in number and thoroughness to enable the Council to be satisfied on reasonable grounds that the building work complied with the requirements of the building consent and the Building Code;
- failing to identify in the course of the inspections all the defects itemised by the claimants; and
- failing to identify that the building would not meet the performance requirements of the Code and that it issuing the Code Compliance Certificate when a prudent local authority would not have done so.

Consent

[155] I have already found that the plans were sufficient for the construction of the dwelling. Accordingly, the Council was not negligent in approving the plans as part of the consent process.

Inspections

[156] The inspections were carried out. There was no evidence of insufficient inspections. The only question was whether any defect should have been detected.

[157] I have already dealt with the plastering, the pivot doors, the flashing over the kitchen window and the absence of jamb flashing. In each of these matters there is no proven negligence of the Council. The only defects proven relate to the roof. I accept Mr Flay's evidence that he would not have expected a closer inspection of the roof after the removal of the scaffolding. He would not have expected a building inspector to insert a knife under the flashings to test the seal or the presence of the seal.

[158] There is no reliable evidence of any inadequate inspection in relation to any of the items complained of.

Code Compliance Certificate

[159] The Code Compliance Certificate was issued after the sale and purchase was complete. As at the date of settlement the Council had not been asked for a certificate. Accordingly, it was not relied upon by the claimant. Council relies on *Burns & Ors v Argon Construction (Future Holdings)*, CIV-2008-404-7316, 18 May 2009, Asher J at [71]:

Another matter that arises is the cause of action relating to the Code Compliance Certificate on 25 July 2001. This was a matter emphasised by Mr Herzog. The issue of the Code Compliance Certificate could not in itself have caused any loss. The trustees were already owners and remained owners. The defects were already defects and remained defects. However, they might have cost less to fix in 2001 than in 2004, and that could be a head of loss. This was not considered by the Tribunal. Further, if the Council had carried out the 2001 inspections properly, it was likely in the report to have drawn attention to the defects, which could have prompted the Holdings Trust to file its application in that year, within 6 years from 1997.

[160] As at the date of settlement the claimant would have owned the house with any defects. If the Council had refused to issue a Code Compliance Certificate and instead, as the claimant submitted it should have, issued a notice rectify the defects, the claimant would not have been in any different position from that in which it now finds itself.

[161] The plans being satisfactory, there being no negligence in the inspections and there being no reliance on the CCC the claim against the Auckland City Council is dismissed.

PROCEDURAL ISSUES

[162] This matter has been procedurally fraught and the commencement of the hearing was no exception.

[163] Mr Rainey³ was concerned at the start of the hearing that there were documents circulated not seen before the hearing. He accepted that although he was not prejudiced by the late provision of briefs he was prejudiced by deliberate contravention of the Tribunal's orders by Mr O'Brien regarding documents. Documents were never disclosed despite the orders of the Tribunal. In particular there was evidence of a subcontract to a Mr Hetherington. The claimant would have tried to join Hetherington if these documents had been disclosed and this has prejudiced the claimant. Mr Rainey submitted that Mr O'Brien should have been forced to continue without the benefit of those documents.

[164] Mr Rainey said that the consequences of breaches by failing to disclose documents should be made very clear; you cannot rely on those documents.

[165] Mr Herbert in reply said that to have a fair hearing all issues should be raised well in advance, the parties should be able to understand what the issues are and provide documentation and evidence in preparation for the hearing. His client had a simple and obvious defence. Mr Rainey had set up an ambush by not properly pleading in the claim the argument that he then wished to put forward. The only reason why that argument was known was due to without prejudice communications. Until the Friday before the hearing the argument was not clear to his client. The claimant had created a new argument these documents were to meet that new argument. Mr Rainey had had the witness brief on time but did not take any steps to join a new party till

the hearing began. The documents filed to meet the new claim were not prejudicial and supported his client's case.

[166] Mr Rainey objected to the suggestion that it was an ambush. The claim against Mr O'Brien was based on the warranties implied into any contract by the Building Act and was a matter pleaded as early as the amended statement of claim in 2008. It was also pleaded in the August 2010 amended statement of claim. Mr O'Brien should have raised the issue then. Choosing not to disclose documents when given ample opportunity is wrong. The suggestion that there is a change to the hearing is a simple nonsense; it is patently false that there is a new claim.

Procedural history

[167] The respondents had great difficulty in ascertaining the exact nature of the case and evidence against them. Some response evidence was briefed on the basis that it may be needed to rebut allegations which were not clear.

[168] The history of the recent difficulties is as follows:

- On 9 May 2008 in Procedural Order 1 the adjudicator ordered documents to be filed by Friday 16 May 2008.
- On 12 September 2008 the claimant asked for extensions of time as it was not able to file documents in the proposed timeframe. An extension was granted and a hearing date agreed.
- On 16 October 2008 in Procedural Order 9 the Tribunal noted that the Council and other parties found that the delay in obtaining documents from the claimant prejudiced their cases.
- Mr Rainey in response referred to a number of difficulties that had arisen and stated that the claimant hoped to be able to file and serve its amended adjudication claim and supporting evidence by Friday 17 October 2008. Mr Rainey wrote that if this

left the respondents embarrassed for time to prepare for the hearing the appropriate course was to adjourn.⁴

- On 24 October 2008 at a Procedural Conference recorded in Procedural Order 10:

3. Mr Rainey said the claimants' documents, to accompany the witness statements, would be circulated to the parties shortly. (Mr Rainey advises they are being copied and will be circulated early next week).

- At a preliminary conference on 22 February 2010 it is recorded:

2. Ms Cato, counsel for the claimants, accepted that there were some potential deficiencies in the claimants' documentation. She will accordingly file with the Tribunal and serve on all other parties by 11 March 2010, the following:

- An amended statement of claim confirming quantum and defects;
- A complete copy of Mr Medricky's report; and
- Confirmation of costings sought and a breakdown of those costs supporting the amounts in the statement of claim.

- The amended statement of claim was provided on 31 August 2010. Mr Medricky's report of 15 October 2008 was updated on 25 March 2010. It referred to a Kwanto Quantity Surveyor's report which had not been filed. Nothing else ordered was provided

- In a procedural hearing to deal with an application to terminate the claim it is recorded:

5 Ms Cato submitted that Mr Medricky's original statement filed in October 2008 discharged the claimant's onus. His supplementary evidence had been filed. There was little disparity between his assessment and the WHRS assessor's assessment based on Kwanto's calculations. Progress was delayed due to the Tribunal being unprepared to order a full assessor's report in 2008.

6 The claimant has also filed a statement in accordance with the adjudicator's direction in October 2008, and did not intend to file any further evidence....

- In Procedural Order 16 dated 14 May 2010 Adjudicator Carter made a further order:

⁴⁴ P O 9 Par 4

i the claimant is to file an updated claim and its witness statements including any further expert evidence by Friday 4 June 2010.

- On 10 June 2010 Mr Carter summarised the extent of the claimants' claim and outlined the documents received. The tribunal directed the claimant to list the documents it would rely on.
- On 4 October 2010 Mr Carter recorded in Procedural order 20:-

5 The Tribunal understands that all the claimant's documents have been filed. To ensure clarity, I direct the claimant to list the statement of claim documents, witness statements and expert evidence and reports that it will rely on, at mediation and if necessary at adjudication. The Tribunal understands the documents referred to above are included, but a straightforward final list is now required together with a final statement of the dollar amount claimed. This information is to be circulated by the claimant by Monday 4 June 2001.
- Three weeks before the hearing the respondents naturally sought to understand the claim and the basis for it. The tribunal had not received any further documents so the parties assumed the bundle of documents filed were those on which the claimant relied and which the respondents could treat as the full set. It was not an agreed bundle of documents.
- Not all the documents supplied were relied on at the hearing, for instance, Mr Seagar's evidence. Some documents were missing.
- The statement of claim was not easy for the Tribunal or respondents to follow. Some allegations were irrelevant, for instance, that on purchase there had been retentions for chattels and joinery and the defects listed and alleged to result in leaks were not related closely to the repairs that were said to be necessary. The cost of remedial works included matters which were not causes of leaks, for instance, the steel posts. Some claims against parties were not based on alleged defects, for example, the claims against Fearon. The claim against Mr O'Brien was an allegation that the plaster system does not work and the remedy was about \$44,000.00 of masonry block work repairs.

- The difficulties raised by the form and content of the statement of claim were the subject of an enquiry by the Tribunal at a pre hearing conference. The claimant's counsel indicated that this was not a matter of interest and counsel was unable to explain the claim to the Tribunal and other parties due to time pressures. Accordingly, as a precaution, some parties decided to prepare further evidence as a safeguard against dealing with unspecified claims.
- The evidence of Mr O'Connor was severely edited before presentation. 24 paragraphs were altered or deleted.
- Documents, alleged to be in an agreed bundle (which was never supplied), were said to be in the claimant's bundle. Many of the references to document tabs were wrong or the documents did not exist. Much of the material was poorly sorted. Some apparent evidence was never presented.

[169] Accordingly, in the light of the history of the process, I allowed all parties to submit evidence even if it did not meet the Tribunal's timetable requirements.

[170] At the start of the hearing I said I would allow the claimant to make an application for joinder if it was needed. It would require the proper name of the proposed party and some context to show that there was a case against him. The party was variously described as Hetherington and Hindson. No application was made.

SUMMARY & RESULTS

[171] The results of the various claims are:

- a) Replacement waterproof membrane to roof. The claim is declined as the membrane does not leak.
- b) I have awarded \$20,225.00 for the repairs to the parapets and fibre cement cladding and \$235.00 for the roof vents.

- c) Joinery repairs for north facing (pivot) doors. The pivot doors do not require repair for weathertightness. The claim was declined.
- d) There was no proof of leaks in the masonry. Most of the evidence was directed towards the water sealant issue which was not proven to be a source of leaks. The claim is declined.
- e) Repairs to interior wall surfaces as a result of leaks from the kitchen window. There was no damage from leaks from the window. The hood flashing was deficient and there was some damage to the walls. Most of the damage was to the ceiling from leaks from the roof. I awarded \$1655.00 being the amount given in evidence as the cost of repair.
- f) Repairs to internal linings were part of the plastering claim which was not proved. There was no other evidence of cost of internal linings damaged by leaks in the Kwanto schedules.
- g) There was no proof of leaks arising from the steel posts and this was declined.

[172] The successful claim for repairs against Mr Cook is therefore:-

Roof and parapet repairs	\$20,225.00
Roof vents	\$235.00
Kitchen window hood flashing, kitchen wall and ceiling	\$1,655.00
All items are GST exclusive.	

[173] The total due from Mr Cook is therefore \$22,115.00 plus GST \$3,317.25, a total of \$25,432.25.

CONCLUSION AND ORDERS

[174] Christopher Gil Cook is to pay the claimants \$25,432.25 forthwith.

[175] The claims against all other parties are dismissed.

[176] Some parties indicated that they wished to apply for costs. Any applications are to be filed within 15 working days of the issue of this decision. Responses are to be filed within a further 10 working days.

DATED the 25th day of March 2011

R Pitchforth
Tribunal Member