IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2008-100-000091
[2010] NZWHT AUCKLAND 33

BETWEEN	JOSEPH CHEE and MARGARET CHEE Claimants
AND	STAREAST INVESTMENT LIMITED First Respondent
AND	MANUKAU CITY COUNCIL Second Respondent
AND	PATRICK HUNG Third Respondent
AND	T.Q. CONSTRUCTION LIMITED Fourth Respondent
AND	BRIAN CHARLES TAYLOR Fifth Respondent
AND	SPOUTING AND STEEL ROOFING WORLD LIMITED Sixth Respondent
AND	RAYMOND PHILLIP BROCKLISS Seventh Respondent
AND	CSR BUILDING PRODUCTS (NZ) LIMITED Eighth Respondent

Hearing:	13, 14 and 15 September 2010
Last Date for Submissions:	5 October 2010
Appearances:	Claimants – self represented Manukau City Council – David Heaney and Fiona McGregor-Tate Patrick Hung – represented by David Wilson Brian Charles Taylor – represented by William Endean Spouting and Steel Roofing World Ltd – no appearance Raymond Brockliss – Shanaye McLaughlan CSR Building Products Ltd – Howard Thompson
Decision:	1 November 2010

FINAL DETERMINATION
Adjudicator: P A McConnell

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INTRODUCTION

[1] In October 2001 Joseph and Margaret Chee arrived in Auckland to look for a home as they intended to immigrate to New Zealand. They put an offer in for a new home in Bucklands Beach Road, and subsequently settled the purchase in December 2001. The house has been the Chee's family home since 2002 when they returned to live in New Zealand. Within months of moving in there were leaks in the bathroom area and in August 2003 there were further leaks into the living area from the upstairs deck. Several attempts were made to repair these leaks with some partial success. Since 2007 however additional leaks have occurred and widespread cracking has appeared in the external cladding.

[2] Mr and Mrs Chee have concluded that the only appropriate way to address the issues with their home is to undertake a complete re-clad. They are accordingly seeking these costs together with consequential costs and general damages against the Manukau City Council, Patrick Hung, Brian Taylor, Spouting and Steel Roofing World Limited, Raymond Brockliss and CSR Building Products Limited. Stareast Investments Limited and TQ Construction Limited were also named as parties but both those companies were struck off the companies register during the course of the adjudication.

[3] Manukau City Council was the territorial authority that issued the building consent, inspected the building work during construction and issued a Code Compliance Certificate. Patrick Hung is the director of Stareast Investments Limited the developer of the property. Brian Taylor's company TQ Construction Limited was the company engaged on a labour-only contract to carry out the building work and Raymond Brockliss' company, Excel Coatings Limited, was contracted to complete the texture coating including the installation of the polystyrene band. Spouting and Steel Roofing World Limited supplied and installed the fascias and CSR Building Products Limited

was contracted to supply and install the roofing and associated flashings. It subcontracted the installation work to a third party.

THE ISSUES

[4] This is not a claim where there are clear and accepted defects that have caused damage. While there have been ongoing leaks and increasing cracking in the cladding there is little evidence of damage. There are relatively few high moisture readings and, other than around the deck and a small area by the garage, there is little conclusive evidence of decay to the framing or other building elements. In general the evidence tends to establish that the dwelling was built more or less in accordance with the technical literature, plans and specifications and yet there is growing evidence that the cladding in particular is failing. Therefore while the claimants' decision to reclad the building may be reasonable, one of the key issues I need to determine is whether any of the respondents named in this claim are responsible for the full amount of the remedial work claimed.

[5] Three of the respondents have been named in their capacity as directors of companies one of which was the developer, the other the builder, and the third the plasterer or texture coater.

[6] The issues I therefore need to decide are:

- What are the defects that have caused damage?
- What is the remedial work required to address the defects?
- Can directors of companies involved in construction owe a duty of care to subsequent owners?
- The responsibility, if any, of Mr Hung;
- The responsibility, if any, of Mr Taylor;
- The responsibility, if any, of Mr Brockliss;
- The responsibility, if any, of the Council;

- The responsibility, if any, of Spouting and Steel Roofing World Limited (Spouting Steel);
- The responsibility, if any, of CSR Building Products Limited (Monier);
- What is the appropriate level of damages to be awarded against any of the liable parties?
- What contribution should each of the liable parties pay?

BACKGROUND FACTS

[7] In July 2000 Mr Hung, through one of his companies, agreed to buy a property at 131 Bucklands Beach Road, with settlement to take place in October 2000. His intention was to do up and sell the existing house on the land and also build a new house to sell. Prior to settlement he arranged for plans to be drawn and also obtained a building consent for the construction of the new home which is the subject of this claim. Building consent was issued in October 2000.

[8] On 6 October 2000 Stareast Investments Limited (Stareast) was incorporated and it became the owner of the property upon settlement. Stareast was incorporated to carry out the development at Bucklands Beach Road and other potential development projects. The directors of the company were Mr Hung and his wife. The company had no employees other than Mr Hung and he was the personal face of the company. He was the one who ran the company and was the person who at all times acted on behalf of Stareast. Stareast was a party to the initial adjudication but has been struck off as a company since that time.

[9] Stareast contracted with TQ Construction Limited (TQ), Excel Coatings Limited (Excel), Spouting Steel, Monier and a number of other subcontractors to carry out the construction work of the property. The contract with TQ was a labour-only contract and did not include supervision. Mr Hung however alleges that TQ was

engaged to co-ordinate the sub-trades. I do not however accept that TQ ever agreed to have any further role in the construction of this dwelling than to carry out the construction work it was contracted to do. The work undertaken by TQ included the installation of the cladding and the windows. Mr Taylor personally carried out some of this work.

[10] Excel through its employees applied the texture coating to the property. Mr Brockliss was a director of Excel. His undisputed evidence is that the only work he carried out was an initial inspection of the cladding prior to the texture coating and the installation of the polystyrene band.

[11] Monier was contracted to provide and install the roofing materials. It subcontracted the installation work to one of its subcontractors.

[12] The house was built between October 2000 and June 2001 with the Code Compliance Certificate issuing on 26 June 2001. Mr and Mrs Chee entered into an agreement to purchase 131B from Stareast in November 2001 with settlement taking place later that month.

[13] From August 2002 through until 2007 Mr and Mrs Chee experienced a series of leaks in the bathroom and called Mr Hung to arrange to have these fixed. These leaks were not weathertightness related. However in August 2003 there were leaks into the downstairs living room from the upstairs deck. Despite attempts to carry out remedial work leaks in this area have continued from time to time since then. When the leaks re-surfaced again in 2007 the claimants applied for an assessor's report. After receiving the initial report new leaks were discovered in bedroom 2 and since then additional leaks have occurred in at least two of the bedrooms and also the garage. While one or two cladding cracks were apparent at

the time of the first assessor's report more widespread cracking has occurred since then.

PROCEDURAL ISSUES

[14] This claim was originally heard in the Tribunal in June 2009. An appeal was filed against the determination and the High Court referred the matter back to the Tribunal to be reheard. A case conference was convened to set a timetable for the re-hearing and the parties agreed that even if a new adjudicator was assigned not all evidence would need to be reheard. It was accepted that the audio recording and transcript of the first Tribunal hearing could be relied on for some witnesses if there were no further questions parties wished to put to those witnesses.

[15] In reaching my decision on this claim I have therefore had the benefit of both the audio recording and transcript of the earlier hearing, the evidence filed at that hearing and also the new evidence produced for the current hearing. By agreement some of the witnesses who gave evidence at the first hearing did not need to re-appear at the current hearing. All parties however gave evidence and the experts all gave evidence on a panel. They were questioned on a number of issues in relation to the defects and evidence of damage, the remedial scope and the remedial costs. Mr Chee sought to summons five further witnesses to give evidence at the hearing. Four summonses were issued but one was unable to be served. The summons for the fifth witness, the designer, was not issued as she was unable to be located. It was thought she might be residing in England.

[16] All parties had the opportunity to make both written and oral closing submissions on 15 September 2010. The claimants then sought to file further submissions on 20 September 2010 which were accepted. They then instructed Raineylaw who sought leave to file further legal submissions. The Tribunal agreed to accept further

legal submissions but I have given little weight to the factual and evidential submissions filed by Mr Rainey. Mr Rainey did not attend either hearing where evidence was given and some of the factual submissions he made are incorrect or based on a misinterpretation caused by statements made being taken out of context.

WHAT ARE THE DEFECTS THAT CAUSED THE LEAKS?

[17] The Tribunal had the benefit of the evidence of five experienced weathertightness experts. Philip Browne, the assessor, Clint Smith, the claimants' expert, Alan Light, Mr Taylor's expert, Geoff Bailey, the Council's expert, and Simon Paykel, Monier's expert. They all filed reports or briefs and they gave their evidence in a panel. Initially there appeared to be little agreement on the defects in this property. On further questioning however it became apparent that the perceived differences arose primarily from a lack of evidence that damage had resulted from several of the alleged defects. The experts accepted their opinions on some issues were based on an assumption or conjecture and not on any actual evidence. This is particularly the case in relation to future likely damage.

[18] In order to reach a decision on the defects that have caused damage, it is therefore necessary to go through each of the defects as alleged and determine whether the construction was carried out in accordance with the Building Code and the consented plans and in accordance with good building practices of the day. I also need to determine whether there is any evidence that any of the alleged deficiencies have resulted in leaks causing damage or the likelihood of damage in the future. It may also be necessary to determine what loss the claimants have suffered as a result of any established defects.

Failure to Install Batons

[19] Mr Chee submitted that the design of the house specified the use of cavity batons to ensure that the Harditex cladding was spaced away from the timber frame. All of the experts agreed that batons were shown on some of the plans. The general view of the experts was that these were not cavity batons as they only appeared on the upper level. In addition the way in which they were drawn meant they would not have worked as cavity batons.

[20] Mr Samuel Arulanthan, the Council officer who was involved in processing the building consent was summoned by Mr Chee to give evidence. He said that when approving the plans the batons would not have been considered to be cavity batons. He considered their purpose was aesthetic only to pack out the top of the cladding to provide a flat surface. They were not an integral part of the plans and the Council could not have required them to be installed.

[21] I am satisfied based on the evidence presented that the batons as drawn were not intended to be cavity batons and were to act simply as a packer. In any event there is no evidence that the lack of these batons has caused loss. Mr Smith's view was that if a cavity had been installed it may have reduced damage caused by other defects. However there is no evidence of damage caused by other defects that would have been reduced by the batons as drawn. In addition at the time this house was constructed a cavity was not a requirement and there is no evidence that damage has resulted from the failure to install batons.

[22] Mr Chee submitted that as the batons were drawn on the plans it was unlawful and negligent not to install them as the building work had to be carried out strictly in accordance with the plans. The evidence of the building inspectors was that the batons were considered to be aesthetic rather than functional, they were not required for building consent and therefore Council could not have insisted on them being included. Whilst it is technically arguable that

there should have been an amended consent, the installation of cavity batons would not have been required by the Council in any event. Therefore I do not consider parties were negligent in failing to get such an amended consent. In any event there is insufficient evidence to conclude that any damage flows as a result of this alleged defect.

Vertical Control Joints

[23] Mr Chee submitted that the cladding installation was not carried out in accordance with the technical requirements of the manufacturer due to the failure to install proper functioning vertical control joints. In initial briefs filed there was some suggestion that no control joints had been installed but further investigation established that control joints were installed. The experts at the second hearing agreed that vertical control joints had been installed and that the work had been done correctly by the builder but there were issues with the work done by the plasterer. Mr Brockliss's evidence was that the joints had been filled with flexible paste but that it appeared that in some instances Excel had failed to comply with the technical specifications for raking out and sealing the joints.

[24] At the experts' conference the experts concluded that there was no current damage resulting from deficiencies in the vertical control joints. At most they concluded there could be an issue of future likely damage on the rear elevation only. In order for future likely damage to be established there would need to be evidence that defects in the installation of the control joints are likely to result in future leaks, or are likely to contribute to the cracking to the cladding. At the hearing the experts' view was that there was no evidence that any deficiencies in the vertical control joints caused cracking, although they could not rule it out. They also agreed that whilst there was some cracking around the control joints there was no evidence of moisture getting in. The cracking map as drawn by Mr Smith does not show significant cladding caused by the control joints. There is

also no evidence that leaks are currently occurring around the control joints nor that they are likely to cause leaks in the future.

[25] In addition to the allegation regarding vertical control joints there was also an allegation that the jointing of sheets had not been done correctly. At the first hearing some of the experts considered the edges of some sheets were not bevelled. The samples available at the second hearing were examined by all the experts who agreed that they did have bevelled edges. There was also an allegation that there were issues with the layout of sheets. One of the experts however pointed to conflicting information in the Hardies material as to the appropriate location of sheet joins. On the one hand while the material recommended that sheets not be joined within 200cm of a window, it recommended positioning control joints at windows.

[26] I accept that the map of current cracking shows some cracking occurring in the location of the sheet joints. At the second hearing however none of the experts concluded that incorrect layout of the sheets caused cracking. The most they were prepared to say is that it was possible.

[27] After the experts' joint site visit Mr Browne suggested some further testing could be done to try and establish the cause of the cracks associated with sheet joins. His opinion however was that there was only a fifty percent chance that the further testing would provide an answer. On this basis the Tribunal advised it would not pay for this testing to be done but advised it would accept the evidence if any other party was willing to pay for the tests to be carried out. None of the parties chose to proceed with any further tests.

[28] On the basis of the evidence currently available I am not satisfied there were departures from the technical specifications in relation to the layout of sheets that have been causative of leaks or cracking. I am however satisfied that there are issues with the way

some of the vertical control joints were formed by the plasterer. It has not however been established that this has caused leaks or has resulted in any significant cracking.

Decks

[29] At the experts' conference all experts agreed that there was damage to the balustrades and deck caused primarily by the manner in which the handrails had been installed. At the hearing they also agreed there was leaking from the deck outlet. Mr Browne was of the view that lack of cladding clearances also compromised the integrity of the cladding on the balustrades. He had not destructively tested the cladding in the area of those junctions as his other investigations had established the cladding needed to be replaced in this area.

[30] The defects with the deck have caused water ingress and consequent damage to the ceiling and walls of the room below. The experts also agreed that there is advanced decay to the balustrade and associated cladding but there is no evidence of damage to the joists. Mr Smith and Mr Browne were of the opinion that the joists will need to be replaced as the deck was built with insufficient fall. They however agreed with the other experts that any lack of fall was not in itself contributing to leaking or damage. This may be due to the butynol membrane having been taken up behind the cladding.

[31] All experts were of the opinion that if the defects with the deck were the only issues with the house then they could appropriately be remedied by targeted repairs and would not require a complete re-clad. Mr Browne in his first two reports costed this work at $40,000.00 and in his third report at $44,330.00. Mr Bayley's calculation for this work is only $25,300.00 largely because he has not included costs for replacing the deck joists. I am however satisfied that the scope of work supporting Mr Browne's costs is appropriate and most likely will be required by the Council in order to

obtain a building permit to repair the decks. I therefore conclude that the damage that has occurred as a consequence of defects with the installation of the deck is $45,315 after adjusting Mr Browne's figures for a GST rate of 15%.

Windows

[32] All experts agreed there was some evidence of damage caused by deficiencies in the installation of the curved window on the east elevation. The evidence of damage is slightly elevated moisture readings in this location. None of the experts however disagreed with the proposition that the way this window was flashed was standard for the time.

[33] The experts further agreed that the other windows had not been installed strictly in accordance with the manufacturer's specifications. In particular the building paper was installed behind the head flashing instead of over the head flashing. Whilst originally there was some concern about inadequate seals, testing on at least one of the windows showed that seals had been installed in accordance with the manufacturer's specifications.

[34] There is however little evidence of leaks and no evidence of damage as a result of any departures in installing the windows other than the curved window. Mr Smith gave evidence of being called to the property after heavy rain and seeing a puddle of water on the floor beside the garage window and also wet carpet beside the living room window. He was unable to ascertain the cause of the water ingress. Mr Browne, the only expert who had carried out destructive and investigate testing, concluded that whilst he found a number of defects with window installation, there was no evidence of water ingress apart from around the curved window. Moisture readings were not high in any of the cut outs done around windows and there was no other evidence of decay.

[35] Mr Chee referred the experts to Dr Wakeling's reports as suggesting evidence of damage. Dr Wakeling had carried out an analysis to determine the extent of decay and other microbiological activity of the sample sent to him by Mr Browne. With some of the window samples Dr Wakeling found fungal hyphae but no evidence of decay. He did however say that fungal hyphae could have been a result of moisture ingress.

[36] I accept that Mr Chee considers the evidence he gave of puddles of water on the garage floor and wet carpets beside the living room window during the period of heavy rain is evidence of water ingress caused by defects in the installation of the windows. However his expert Mr Smith who visited the property at the time was unable to provide an explanation of how the water got in. The view of the majority of experts is that this type of water ingress would be very unusual from a window leak. In addition this appears to have been a one-off occasion as no further incident of such water ingress had been referred to. Mr Chee has been aware since the experts conference in May 2009 that the experts' view was that there was no evidence of damage as a result of alleged window defects other than with the curved window. He has had several months to carry out further testing or to document further occasions of water ingress and has not done so.

[37] Whilst I accept there is evidence of water on the floor beside two windows after a heavy rain event, this is not evidence of window leaks caused by defects in the installation of the windows. There are several other equally plausible explanations as to how this leak occurred. For example one of the experts suggested it could have resulted from a window being left open. In addition reference was made to possible mitre leaks.

[38] With the exception of the curved window there is no evidence of moisture ingress as a result of deficiencies in the window installation. Mr Browne was also of the view that further testing

would not have provided any further evidence. There is some evidence to support the view that some of the window mitres might be leaking. Even if this is the case however it is unlikely that it would be the responsibility of any parties to this claim. The window manufacturer is not a party and any defects with the mitres would not reasonably have been able to be detected by any of the parties involved in installing or inspecting the windows.

[39] I accordingly conclude that the only evidence of water ingress that has been established due to window installation relates to the flashing of the curved window. There were no specific details at the time this house was built as to how such curved windows should be flashed. In addition the experts agree that the way this window was installed was standard for the time. Whilst there are some deficiencies with the installation of other windows there is insufficient evidence to establish this has caused damage to the dwelling. The incorrect placement of the building paper would not cause water ingress as such but might mean that any water that did get in was not adequately diverted away from the building structure. There is also insufficient evidence to establish the windows and associated building elements will not perform in accordance with the Building Code or their life expectancy because of the way the windows were installed.

[40] No itemised costing has been provided for the repair costs for the curved window. The experts however assessed it to be between two and five percent of the total remedial costs. After analysing the line by line figures that relate to the curved window in the total costings and the percentages allocated to this defect by the experts I conclude the costs to repair the curved window on its own would be approximately $10,000.00.

Horizontal Control Joints

[41] The experts agree that the horizontal control joint was basically installed correctly but there is an issue with the junction between the polystyrene band, control joints and the fascias and lower roof areas. The junctions are an issue where the work of several contractors came together at one intersection, particularly the plasterer, the contractor who installed the flashings and the contractor who installed the fascias. The polystyrene band placed over the control joint was also installed lower than was recommended. Whilst there is evidence of high moisture in the polystyrene band itself there is no evidence of any moisture getting in behind the band through the control joint or into the building structure. The evidence is that the cladding behind the band was dry. The high moisture readings in the assessor's report relate to the polystyrene band itself which is neither unexpected nor evidence of damage.

[42] At the junctions between the polystyrene band and gutter and fascias there was no evidence of decay in the sample sent to be tested although fungal hyphae were present. Mr Smith's evidence was that there were several of issues in these areas and it was difficult to say whether moisture was a result of the polystyrene band but that probably contributed to it. One of the issues noted by Mr Browne is that there was no sealing of the band at the junctions which allowed water to get in at that point. One higher moisture reading of 23% was taken from a cut out at one of these junctions by the master bedroom floor joist at the south end of the building. Dr Wakeling found some fungal hyphae but no decay. He did not recommend replacement of any timber.

[43] In conclusion, whilst the polystyrene band was installed lower than recommended there is no evidence that this has caused any damage. In addition the experts all agreed that the horizontal joint itself had been installed correctly and there was no damage or water

ingress as a result. The only issue therefore is with the intersection of the polystyrene band and the gutters and fascias, which I determine as primarily being a sequencing issue.

[44] The assessor in his first two reports estimated the cost of repairs for this combined with the vertical control joints to be $7,200.00. In the third report these costs had increased to $69,000.00 but they were calculated as a proportion of a total re-clad. I accordingly assess the cost of remedying both the vertical and horizontal control joint issues to be $7,200.00 or $7,360.00 with GST at 15%. Approximately 40% of this sum relates to the horizontal control joint junctions. Therefore I assess the costs of remedying the junction issue to be $2,944.00 and the vertical control joints to be $4,416.00.

Roof

[45] In addition to the issue with the junctions of the lower roof areas and polystyrene band there are three main issues in relation to the roof, namely:

- A split in the lead flashing in two locations
- Defects in the installation of the valley trays
- Issues with the junctions between the roof and the cladding

[46] In addition there was an allegation that lack of anti-ponding boards at the base of the roof to support the building paper was a defect. On the evidence presented I am not satisfied that this was a requirement for this building. In any event there is no evidence this has caused damage.

[47] All the experts agree that the lead flashing had been mechanically damaged and that this had resulted in water ingress and damage. There was no evidence of how it happened although a

number of suggestions were made during the course of the adjudication. I however agree with Mr Smith and Mr Paykel's comments that how it happened and who caused it is unknown. On that basis I conclude there is no evidence on which I could find that the roofer, or any other person or contractor involved in the construction is responsible for the splits in the lead flashing. In addition there is insufficient evidence for me to determine when this damage occurred and whether it was present at the time of the final inspection. It is possible the splits may have been caused by a tool being dropped by anyone on the roof either during construction or after the dwelling was built.

[48] The second alleged defect is that the valley gutters have been nailed down almost flat and have been squashed which has resulted in water overflowing the trays onto the ceiling space and directly inside the internal walls. There is evidence of historic staining to the carpet in bedrooms 2 and 3 and also in the roof cavity. The conclusion that the staining to the floor and carpet in bedrooms 2 and 3 was a result of the valley trays overflowing is to some extent a matter of conjecture as there is no evidence of moisture or staining on the walls.

[49] Mr Paykel suggested the staining was from a one-off event. There is no evidence to establish whether this was an isolated event or that water ingress occurred on a few different occasions. It is reasonable to conclude however that it has not happened regularly and appears to be historic as there is no evidence of recent water ingress as a result of deficiencies in the valley. When the Tribunal questioned Mr Chee on this issue he said he had not noticed whether the carpets in these areas had been damp since the time of the last hearing. As Mr Chee has been assiduous in terms of checking the exterior of the property for cracking and other signs of damage I conclude it is likely that if there have been more recent leaks in this area Mr Chee would have detected them.

[50] The evidence is that on one or more occasions water ingress has occurred, most likely due to the valley tray overflowing. Mr Paykel submitted the overflow could have been caused by the failure to regularly clear the valley trays rather than any defects in their installation. I conclude it has most likely been a mixture of both.

[51] The claimants accept that this defect is appropriately remedied in isolation to any cladding defects. This was also the conclusion of Mr Paykel, Mr Browne and Mr Smith at the experts' conference. I agree as there is no evidence that this defect impacts on the integrity of the cladding or other building elements.

[52] The claimants submit that the valley trays can be repaired separately for $10,150.00. I, together with Monier's counsel, have some difficulty in understanding where that figure comes from. The claimants' quantum expert, Mark Dawson included $18,390.00 for roof modifications but this was for more than just the valley trays. Mr Smith and Mr Browne have not provided the cost for the valley tray issue on its own.

[53] Mr Bayley provided an itemised costing for roof repairs but his costs were on the assumption that there was damage to the interior walls and flooring. He referred to his costs as being conservative as they were based on the possibility that damage might be found once work started. There is no evidence to support that assumption. Other than some historic staining there is no evidence of other damage. The moisture readings on the walls were low and there is little to suggest walls and lining will need to be replaced. While some redecoration may be required the property is now 9 years old and so internal decoration is at or near the end of its normal life expectancy.

[54] Putting aside the disputed amounts for the internal repairs the amount Mr Bayley has calculated to repair the valley trays is

$1,766.00 and Mr Dawson at $1,900.00 for the actual construction work, rubbish removal and protection but not including P&G (10%), overhead margins (10%), contingencies, GST and an allowance for scaffolding, professional and consent fees. I accept Mr Dawson's figure of $1,900 and once allowance is made for the excluded items I calculate the cost of repairing the valley trays on their own would be no more than $5,000.00

[55] The third alleged defect with the roof relates to inadequacies in the waterproofing of the junctions between the roof and the cladding. This was identified at the experts' conference and the experts agreed this was caused by a lack of co-ordination of trades. The cladding was installed before the fascias and gutters, which in turn were installed before the cladding was plastered. Responsibility for ensuring waterproofing in this area fell on the project manager and/or the plasterers who followed the roofers. There are no elevated moisture readings in these locations and even those experts who considered this to be a defect considered that its contribution to the damage or future likely damage to this dwelling was minor. The only cost the assessor has allocated to this area appears to relate more to the inclusion of diverter flashings at a cost of $1,800.00. There are no other specific costs calculated for this work.

Ground Levels

[56] The experts agreed at the conference that there was a lack of clearance between the cladding and the ground levels at the front east elevation by the garage. All the experts other than Mr Light agreed there was damage. Mr Light's view was that an 18% moisture reading does not amount to damage. Some of the experts consider the lack of ground clearances on the other side of the garage will result in damage in the future. There was general agreement that this defect could be remedied by targeted repairs. Some experts thought that installing a concrete nib on both sides of

the garage door and re-cladding the area was appropriate however Mr Smith considered the whole face required re-cladding.

[57] I am satisfied on the evidence presented that there is one area where some minor but localised damage has been caused by lack of clearance between cladding and ground levels and another where damage is likely to occur. I am also satisfied that had this been the only defect it could have been remedied by a targeted and localised repair. Mr Browne estimated the cost of remedying the ground clearances issues to be $6,100 in his third report, Mr Bailey at $4,200, Mr Dawson $5,910 exclusive of margins, contingencies and GST and Mr Light has suggested a drying skirt at a cost of $8,900.00. I prefer Mr Browne's evidence of costs and therefore conclude the cost of targeted repairs to address ground clearance issues to be $6,100.00 or $6,235.00 allowing for the increase in GST.

Lack of Inseal

[58] Mr Chee also alleges there was a defect in that there was failure to seal the Harditex board at ground level with an inseal as required by the technical literature at the time. Whilst the experts agreed that this was contrary to the technical literature they did not consider there was any damage as a result of this alleged defect. The consensus of current opinion is that an inseal could create more problems than it would solve as it would prevent any water that did get inside the cladding escaping at the bottom. This is accordingly not a defect that has caused damage or contributed to the need for a re-clad.

Cracking

[59] There are an increasing number of cracks occurring in the cladding. Mr Browne's evidence was that when he did his first inspection there was only one or two cracks, by the time of the

second inspection in 2008 there were several more cracks and at his last visit there were 15 vertical cracks. Since that time Mr Chee's evidence is that more cracks have appeared. All the experts agree that there is an issue with the dwelling cracking but they also agreed that there was no evidence to date that these cracks had caused damage to the other building elements. This was partly due to the care Mr Chee takes to carry out maintenance and seal cracks as they appeared.

[60] The experts were unable to provide a clear opinion as to what had caused the cracking. When being questioned by Mr Chee, Mr Browne said that the sheet layout and wrong construction of control joints could contribute to cracking however, he was unable to determine the causes of the cracks in this property. He accepts some of the cracks are associated with the sheet joins but could not establish that defects in the joining of the sheets was a likely cause of the cracking.

[61] The increased cracking to the cladding was the most significant issue for Mr Browne and Mr Smith in deciding that a re-clad of this dwelling was required. In his first two reports Mr Browne recommended targeted repairs. The thing that changed his mind between the second and third reports was the increasing cracking to the cladding. Mr Chee submitted that defects with the vertical control joints and sheet lay out was the main or significant cause of the cracking. Whilst the experts agreed that there was some cracking around the sheet joins they were unable to conclude that any deficiencies in the installation of the Harditex was a significant contributing factor to the dwelling cracking.

[62] The most plausible explanation was given by Mr Browne when he referred to the combination of a low quality cladding material directly fixed to untreated timber. As the use of Harditex directly fixed to untreated timber was an approved method of construction at the time this house was built, none of the parties to

this claim could be found liable for any damage that has resulted from such a construction method.

Conclusion on Defects

[63] I conclude that deficiencies in the construction of the deck, ground clearance issues, splits in the apron flashings, squashed valley trays and junctions of the polystyrene band and other building elements have resulted in leaks. There are also some deficiencies in the way the plasterer completed the vertical control joints but there is little evidence of damage or leaks as a result. Leaking has also been established around the curved window but while there are some issues with the installation of the other windows, any deficiencies have not been the cause of water ingress. There is also evidence of increasing cracking to the cladding but no evidence upon which I could conclude the cracking was caused by defects in the design or construction of the dwelling.

WHAT IS THE REMEDIAL WORK REQUIRED TO ADDRESS THE DEFECTS?

[64] One of the significant issues with this claim is whether or not a complete re-clad is the appropriate remedial scope or whether the defects could be remedied by targeted repairs. By the time of the second hearing only two of the five experts were of the opinion that this property required a full re-clad. Mr Browne's was only marginally in favour of the re-clad and when asked why he believed the property needed to be re-clad he stated it was because of the "quality of the product on the walls, the untreated timber framing, the cracking, and the combination of defects". He also said that the risk matrix was another reason.

[65] Mr Smith's explanation as to why this dwelling needed a re-clad is that he did not believe the cladding system was going to

perform for the life expectancy required to under the Building Code. In addition if targeted repairs were proposed he did not know how they would be undertaken on a targeted basis. Mr Smith accepted that there were some very specific defects that had been discussed but he believed there had been systemic failure in Harditex being directly fixed on untreated timber and that it was not going to continue to perform for its life expectancy.

[66] Mr and Mrs Chee's decision to reclad the dwelling is a reasonable one given the increased cracking to the cladding. This claim is however somewhat unusual as although a re-clad may be reasonable this does not necessarily mean that the respondents, either individually or in combination, are responsible or liable for the costs of a total re-clad. In deciding whether or not any of the respondents are liable for the costs of the re-clad it will be necessary to look at the reasons why the dwelling needs to be re-clad and also whether there is a causative link between any negligence on behalf of any of the respondents.

[67] The claim against all remaining respondents is in tort. Therefore in order to find any liability on the part of any of the respondents three things need to be established. Firstly the party must be found to owe the claimants a duty of care. Secondly that party needs to have breached that duty of care, and thirdly the claimants need to establish they have suffered loss as a consequence the breach. All of the remaining respondents submit that even if they do owe a duty of care, and it is concluded that they have breached that duty of care, any breach has not been causative of the need for a re-clad of this dwelling.

[68] The issue therefore is not so much whether the property needs to be re-clad but whether the necessity for the re-clad has been caused by the negligence of any or all of the respondents. In other words is there a causative link between breaches of duty on the

part of any of the respondents and the full amount of the remedial work claimed by Mr and Mrs Chee.

CAN DIRECTORS OF COMPANIES INVOLVED IN CONSTRUCTION OWE A DUTY OF CARE TO SUBSEQUENT OWNERS?

[69] Mr Hung alleges that he was only ever acting as the director of Stareast Investment Limited, the developer of this property. Mr Brockliss and Mr Taylor also submit that it was their companies that were contracted to carry out the work on this dwelling. The effect of incorporation of a company is that the acts of its directors are usually identified with the company and do not necessarily give rise to personal liability.[1] However as noted by Wylie J in this claim's appeal decision[2] the concept of limited liability whilst relevant is not decisive. In particular limited liability is not intended to provide company directors with a general immunity from tortious liability.

[70] In *Morton v Douglas Homes Ltd*[3] Hardie Boys J concluded that where a company director has personal control over a building operation he or she can be held personally liable. This is an indicator of whether or not his or her personal carelessness is likely to have caused damage to a third party. In *Dicks v Hobson Swan Construction Ltd (in liq),*[4] Baragwanath J concluded that as Mr McDonald actually performed the construction of the house he was personally responsible for the defects which resulted in the dwelling leaking and therefore personally owed Mrs Dicks a duty of care.

[71] In *Hartley v Balemi,*[5] Stevens J concluded that personal involvement does not necessarily mean the physical work needs to

[1] *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517 (CA).
[2] *Chee v Stareast Investment Ltd* HC Auckland CIV-2009-404-5255, 1 April 2010.
[3] [1984] 2 NZLR 548 (HC).
[4] (2006) 7 NZCPR 881 (HC), Baragwanath J.
[5] HC Auckland CIV-2006-404-2589, 29 March 2007.

be undertaken by a director but may include administering the construction of the building.

[72] In order for Mr Hung, Mr Taylor and Mr Brockliss to have any liability Mr and Mrs Chee need to establish that each of them owed them a duty of care. They have to show that each of them acted in a way so as to breach that duty of care and that the damage done was a sufficiently proximate consequence of the breach so as not to be too remote.

[73] In determining whether Messrs Hung, Taylor and Brockliss owed the claimants a duty of care I must bear in mind the presumption against an imposition of personal responsibility where the director was simply acting on behalf of the company. I need to determine whether each of these directors either carried out or controlled construction work implicated as the causes of the leaks. This requires a careful analysis of the factual matrix or the roles undertaken by Messrs Hung, Taylor and Brockliss.

RESPONSIBILITY OF MR HUNG

[74] Mr Hung was a shareholder and director of Stareast. He accepts Stareast was the developer of this dwelling and submits he was only ever acting in his capacity as director of Stareast. The claim against Mr Hung however is that either he personally was a developer or that the extent of control he had over the project and his direct personal acts or omissions give rise to personal liability as either project manager or controller of the construction of the house.

[75] There is no dispute of the background regarding Mr Hung's involvement. The only shareholders and directors of Stareast were Mr Hung and his wife. Mr Hung said whatever actions the company did were done through him. He was the human face of Stareast and

he was the person who made decisions and undertook any acts or omissions on behalf of the company.

[76] It was Mr Hung who decided to buy the property, do up the existing house on it and build a new house which is the subject of this claim. This was all done before Stareast was even formed. It was Mr Hung who arranged to have a building consent issued for the construction. Mr Hung accepts that he was the person who, on behalf of the company, entered into agreements with all the contractors to carry out the construction of the property. He accepted at this hearing that the contract he had with TQ was a labour-only contract and not a build and supervise contract.

[77] There is some dispute between Mr Hung and the other construction parties as to the extent of Mr Hung's involvement on site. My conclusion is that Mr Hung tried to minimise the extent of his involvement on site and I prefer the evidence of Mr Taylor and Mr Brockliss in their recollection of Mr Hung's role. From their evidence it is clear that Mr Hung took a particular interest in work that was going on and he was on site regularly inspecting what was being done. I further accept he was the one who directed Mr Taylor that batons were not to be included in the property. I also accept Mr Brockliss' recollection that it was Mr Hung who specifically instructed him to install the polystyrene band lower than Mr Brockliss believed it should be.

[78] Mr Hung's answer to a number of questions asked at the hearing was that he did not have the technical ability to project manage or supevise the work. I find this answer less than convincing since Mr Hung obviously considered he had the skill and experience to be the sole active director of two construction companies who undertook projects without engaging a site manager or builder to supervise subcontractors. All but the first of the construction projects undertaken by his companies used a series of labour-only

contractors and no-one else was tasked with the responsibility of coordinating or supervising the various contractors involved in the construction. Mr Hung was also vague about his other work involvements at the time of this construction. The impression I gained was that the majority of Mr Hung's time was taken up with the work of his development companies.

[79] In *Body Corporate 188273 v Leuschke Group Architects Ltd:*[6]

> "[32] The developer, and I accept there can be more than one, is the party sitting at the centre of and directing the project, invariably for its own financial benefit. It is the entity which decides on and engages the builder and any professional advisers. It is responsible for the implementation and completion of the development process. It has the power to make all important decisions. Policy demands that the developer owes actionable duties to owners of the buildings it develops."

[80] Harrison J also observed that the word developer is not a "term of art or a label for ready identification", unlike a local authority builder, architect or engineer. He regarded the term as "a loose description, applied to the legal entity which by virtue of its ownership of the property and control of the consent, design, construction, approval and marketing process qualifies for the imposition of liability in appropriate circumstances". Whether someone is called a site manager, project manager or a developer does not matter. The duty is attached to the function in the development process and not the description of a person.

[81] Mr Hung was the face of the company and he was the person who was in control of the consent, design, construction, approval and the marketing process for the property. He was the person sitting in the centre of and directing the project for his own financial benefit. He decided to engage TQ on a labour-only contract. He was also responsible, although the contractual

relationship was with his company, for selecting and contracting the other subcontractors involved in the construction. He was responsible for the implementation and completion of the construction process and had the power to make all important decisions.

[82] I accordingly conclude that Mr Hung was a developer together with his company and that due to his role in the construction he personally owes Mr and Mrs Chee a non-delegable duty of care.

[83] Even if I am wrong in my conclusion that Mr Hung was a developer he was clearly the project manager. In either capacity I conclude he owes Mr and Mrs Chee a duty of care although the scope of that duty may be more limited if he was only the project manager. I accept that Mr Hung relied on the experts he contracted to do the work on the property. In particular he was entitled to rely on the expertise of TQ, Spouting Steel and, Monier together with Mr Taylor and Mr Brockliss in relation to the construction work they carried out. Liability of the other respondents for any defective work they did would not be negated by the role Mr Hung had in the construction. However that does not mean Mr Hung does not owe the claimants a duty of care in relation to his role.

[84] I therefore need to determine whether Mr Hung breached the duty of care he owed and if so whether any breaches have caused or contributed to the claimants' loss. The experts' view was that the main cause of the issues with the roof junctions and the junctions between the polystyrene band and lower roof areas is due to poor sequencing of the order the work was done. This is the direct responsibility of Mr Hung. To a lesser extent sequencing issues or the overlapping responsibilities of the various contractors involved in the deck have contributed to the damage to the deck. It was Mr

[6] HC Auckland, CIV-404-404-2003, 28 September 2007, Harrison J.

Hung who determined the sequence of events and engaged each contractor separately.

[85] I also accept Mr Brockliss's evidence that it was Mr Hung that requested him to install the polystyrene band lower than was recommended. Mr Hung must also have some responsibility for the ground clearance issues as he engaged the concrete layer and did not ensure appropriate ground clearances were maintained. The only area of damage for which I could conclude that Mr Hung has little direct responsibility is the squashed valley trays but as a developer he owes a non-delegable duty of care. I accordingly conclude that he is jointly and severally liable for the full amount of the claim as established.

RESPONSIBILITY OF BRIAN CHARLES TAYLOR

[86] Mr Taylor was the director of TQ Construction Limited, the company contracted by Stareast on a labour-only basis to carry out the building work on the property. TQ was struck off the Companies Register in 2009. At the time this dwelling was built TQ employed two other competent carpenters who were capable of carrying out work for the company. It also had a number of other construction jobs occurring at the same time. Mr Taylor's own evidence however is that he spent approximately 60% of his time on site while TQ was involved in building the Chees' home. He personally carried out building work whilst on site including the installation of cladding and joinery. Mr Taylor submits that he does not owe the claimants a duty of care firstly because TQ was the company that was contracted by Stareast and not himself personally. Secondly, he submits that as a labour-only builder neither he nor TQ would necessarily owe a duty of care.

[87] Mr Taylor submitted that Potter J in *Body Corporate 114424 v Glossop Chan Partnership Architect Ltd*[7] concluded that subcontractors do not owe subsequent owners a duty of care. However in the more recent case of *Boyd v McGregor*[8] Hugh Williams J concluded that builders of domestic dwellings, whether as head-contractors or labour-only contractors, owe the owners and subsequent owners of those dwellings a duty of care. In addition courts in recent times have generally concluded that other appropriately qualified subcontractors, such as plasterers and cladding installers involved in residential construction, owe subsequent homeowners a duty of care. In *Body Corporate 185960 v North Shore City Council (Kilhem Mews),*[9] Duffy J observed that:

> [105] "The principle to be derived from *Bowen v Paramount Builders* will apply to anyone having a task in the construction process (either as contractor or subcontractor) where the law expects a certain standard of care from those who carry out such tasks. Such persons find themselves under a legal duty not to breach the expected standard of care. This duty is owed to anyone who might reasonably be foreseen to be likely to suffer damage."

[88] In more recent claims involving leaky residential dwellings the terms "builder" or "contractor" as used in leading cases such as *Bowen*[10] have been given wide meaning to include most specialists or qualified tradespeople involved in the building or construction of a dwellinghouse or multi-unit complex. Given the nature of contracts in residential dwelling construction, attempts to differentiate between the respective roles of these persons in the contractual chain of construction for dwellinghouses in New Zealand can create an artificial distinction. Such a distinction does not accord with the

[7] HC Auckland, CP612-93, 22 September 1997.
[8] HC Auckland, CIV-2009-404-5332, 17 February 2010.
[9] HC Auckland, CIV 2006-004-3535, 22 December 2008, Duffy J.
[10] *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394; *Heng v Walshaw* WHRS, DBH 734, 30 January 2008, Adjudicator Green; *Body Corporate 189855 v North Shore City Council (Byron Ave)* HC Auckland, CIV-2005-404-5561, 25 July 2008, Venning J; *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234; *Dicks,* above n4.

practice of the building industry, the expectations of the community, or the statutory obligations incumbent on all those people.

[89] I am satisfied therefore that TQ as the labour-only builder owed Mr and Mrs Chee a duty of care. Its position is no different to that of Mr Boyd and Mr Halliday in *Boyd v McGregor* referred to above. The issue therefore is whether Mr Taylor personally owed a duty of care and if so whether he breached that duty of care.

[90] Mr Taylor accepts that he undertook some of the building work in this dwelling. Whilst he may not have been supervising the other builders when he was not on site he spent 60% of his time at this site and during that time he both personally undertook building work and also performed some supervisory function. It was suggested that Mr Taylor's situation was different from that of Mr McDonald in the *Dicks* decision referred to earlier as Hobson Swan Construction Limited was a one-man band whereas TQ employed at least two other builders. Such a distinction is artificial and does not go to the heart of the reason why Mr McDonald was found to be personally liable. His liability was based more on the fact that he personally undertook defective work which resulted in the building leaking than the fact his company was a "one man band".

[91] In this case Mr Taylor accepts he personally undertook some of the building work. I accordingly conclude that Mr Taylor owes a duty of care for the work he did. The issue therefore is whether Mr Taylor breached any duty of care and whether any of that work he did fell below the standard of a reasonable builder at the time. If so I need to determine what loss was caused by Mr Taylor's negligence.

[92] I accept the submissions made on behalf of Mr Taylor that the scope of any duty owed, and whether he was negligent or not, depends on the scope of his involvement and the functions he carried out. I accept that TQ was not contracted to provide

supervision. Mr Hung alleges that TQ was also contracted to co-ordinate the different trades. Even if I were to accept this submission I do not believe it would extend any duty of care owed beyond the actual building work that was carried out by Mr Taylor. At most it would involve liaising with the other subcontractors needed to be on site to carry out work around the building work.

[93] Neither Mr Taylor, nor his company, were contracted to supervise any of the other contractors or carry out any quality control function in relation to their work. In addition I accept neither Mr Taylor nor TQ were responsible for setting the work schedule or order in which the work of the various subtrades was done.

[94] The relevant building work done by Mr Taylor included the installation of the cladding and the windows as well as construction of the deck. The alleged defects in relation to his work therefore relate primarily to control joints, construction of the deck, junctions between the cladding and other building elements and the ground levels. During the course of the hearing it was accepted by all the experts that the builders would have no responsibility for the ground level issues around the garage. The concreting work was carried out after they left site and therefore there is no breach of duty on the part of Mr Taylor in relation to this work. The experts also accepted that the building work in relation to the vertical control joints was done correctly. In addition the only allegation regarding the horizontal joint is the positioning of the polystyrene band and its junction with other building elements. This is not work for which Mr Taylor was responsible. Accordingly no breach of duty in relation to either horizontal or vertical control joints has been established against Mr Taylor.

[95] Mr Taylor was involved in the installation of the curved window which has been implicated in the causes of water ingress. All the experts at the second hearing accepted that the way this

window was built was standard for the time this house was constructed. There is accordingly no evidence on which I could conclude that the work Mr Taylor did in installing the curved window fell below the standard of a reasonably competent builder at the time this house was built. In those circumstances the claimants have failed to establish that Mr Taylor was negligent or breached any duty of care he owed them in the way he installed the curved window. While there are some deficiencies in the installation of the other windows there is insufficient evidence that this had been causative of any loss. The claim against Mr Taylor in relation to window installation accordingly fails.

[96] The experts also agreed that the problem with the junctions between the roof and the cladding was a result of the lack of co-ordination of trades. It was primarily as a result of deficiencies in the waterproofing or plastering of the cladding due to timing of work. I have already concluded that Mr Taylor was not responsible for supervising or co-ordinating the subcontractors. In the circumstances of this case therefore I conclude that it has not been established that there has been any breach of duty on the part of Mr Taylor in relation to the cladding and roof junctions. The builder was only involved in installing the Harditex. He did not install the roof or the plaster.

[97] However Mr Taylor was involved in the construction of the deck. The main issue with the deck was with the installation of the metal balustrades and the deficiencies with the outlet. It is likely that neither of these matters were primarily the responsibility of the builder although Mr Taylor is responsible for the lack of clearances between the decking and the tiles, the lack of slope on the top of the balustrade and the lack of fall. I accept Mr Browne's evidence that the deck clearance has contributed to the leaks from the deck and the resulting damage. On that basis I conclude that Mr Taylor has breached the duty of care owed to the claimants in relation to the construction of the deck only. I have already concluded that if this

had been the only defect then it could have been remedied by a targeted repair.

[98] I therefore conclude that Mr Taylor is liable for the costs of the remedial work in relation to the deck only. He was not responsible for the defects with the roof and in addition, for reasons outlined earlier in this decision, he is not responsible for any defects with the control joints or the ground clearances.

RESPONSIBILITY OF MR BROCKLISS

[99] Mr Brockliss' company Excel Coatings Limited (Excel) was contracted by Mr Hung to carry out the plastering of the exterior cladding. It also installed the polystyrene band. Mr Brockliss was a director of Excel and it is alleged that he personally carried out or supervised the work performed by his company. At the hearing Mr Brockliss gave undisputed evidence that at the time this property was constructed Excel had several other jobs in progress and employed approximately ten employees. He said the work on Mr and Mrs Chee's house was carried out by two competent Excel employees one of whom was assigned to supervise the work. Mr Brockliss' involvement was in checking the cladding prior to plastering work starting to ensure the substrate was ready for texturing and also in installing the polystyrene band. Mr Brockliss accepts that he visited the site most days during the week while Excel was working on site. This was not to check the work being done but to deliver products and to ensure that the workers had what was required.

[100] For the reasons given when discussing whether TQ and Mr Taylor owed a duty of care I accept that Excel owed the claimants a duty of care for the work it was engaged to do. I also conclude that Mr Brockliss personally owes the claimants a duty of care but only in relation to the work he personally performed or controlled. This was limited to checking the cladding prior to texturing and the installation

of the band. Mr Brockliss accordingly does not owe a duty of care for any defects in relation to the junctions with the roof or defects with the vertical control joints. There is no evidence that Mr Brockliss either undertook this work or controlled or supervised it. It was his company that was contracted to do that work and it was undertaken and supervised by other employees of Excel.

[101] Any claim against Mr Brockliss based on alleged deficiencies with the roof junctions and the vertical control joints must fail. In reaching this conclusion I repeat the experts' evidence that there was no problem with the building or construction work in relation to the control joints. The only allegations relate to the plastering. In addition I have concluded that there is insufficient evidence that the layout sheets was defective or that this contributed to the damage or the dwelling leaking.

[102] Mr Brockliss however accepted that he personally installed the polystyrene band and therefore he owes a duty of care in relation to that work. The issue therefore is whether any work he did fell below the standards of a competent plasterer at the time this house was built. I have already accepted that the band was installed lower than was recommended but that no damage has resulted from this. In any event I accept Mr Brockliss' evidence that the band was largely decorative and that Mr Hung specifically directed him to install the band in the position where it was.

[103] The other allegation in relation to the horizontal band is with the junctions of the band and the apron flashings and the lower roofs. The positioning and method of installation of the band itself is not as significant a problem with these junctions as the subsequent plastering and finishing work. It appears to be largely a sequencing issue. Mr Brockliss was only involved in installing the actual band not in the subsequent plastering and finishing around these junctions. Any defect arises from the failure to weatherproof these junctions

adequately either by the plasterer or other tradespeople who followed.

[104] In conclusion I accept the evidence that some of the work undertaken by Excel was negligent. In particular there were deficiencies in the way the vertical control joints were finished and it may also have some responsibility for the lack of waterproofing around the junctions of the horizontal control joints, polystyrene band and lower roof areas. Mr Brockliss was not involved in the work that has been implicated in the established defects. Therefore while I accept that Mr Brockliss owes Mr and Mrs Chee a duty of care it is only in relation to the fixing of the polystyrene band. There is insufficient evidence that he has breached any duty of care owed, and even if there was the work done by Mr Brockliss has not been causative of leaks or damage. The claim against Mr Brockliss accordingly fails.

RESPONSIBILITY OF THE COUNCIL

[105] The claim against the Council is that it was negligent in the processing of the building consent application, carrying out inspections during construction and in issuing the code compliance certificate. In particular it is alleged that it was negligent in failing to identify the weathertightness defects both in the plans and during the inspections undertaken.

[106] The claimants allege that there were inadequacies in the design of the dwelling and that the drawings and specifications, on which the consent was based, did not contain sufficient details to ensure defects did not occur during construction. In processing the building consent application, the claimants allege the Council should have been mindful of the issues that these inadequacies raised. The Council therefore breached the duty of care it owed the claimants in approving the building consent application.

[107] The Council accepts that it owes the claimants a duty of care but denies it has breached that duty of care. It submits that the Council only needed to act reasonably and that it cannot be treated as a "clerk of works".

Building Consent Process

[108] In relation to its duty in issuing building consents the Council referred to *Sunset Terraces.*[11] In that case Heath J concluded it was reasonable for the Council to assume, in issuing building consents, that the work could be carried out in a manner that complied with the Code. He stated:

> "[399]…To make that prediction, it is necessary for a Council officer to assume the developer will engage competent builders or trades and that their work will be properly co-ordinated. If that assumption were not made, it would be impossible for the Council to conclude that the threshold for granting a consent had been reached. ...
>
> [403] In my view, it was open for the Council to be satisfied, on reasonable grounds, that the lack of detail was unimportant. I infer that the relevant Council official dealing with this issue at the time concluded that the waterproofing detail was adequately disclosed in the James Hardie technical information and had reasonable grounds to be satisfied that a competent tradesperson, following that detail, would have completed the work in accordance with the Code."

[109] With the possible exception of the curved window the defects with this property did not arise from deficiencies in the plans. The Council cannot be liable for issuing a building consent where the defects have arisen through the failure of approved building practices or through the failure of the builder or other contractors on site to follow good building practice. It also cannot be held responsible for approving plans for a house to be clad with Harditex directly fixed to untreated timber framing when those methods of construction were

[11] *Body Corporate 188529 v North Shore City Council* (No 3) (*Sunset Terraces*) [2008] 3 NZLR 479 (*Sunset Terraces*) Heath J.

approved at the time or construction. It also was not negligent in failing to require cavity batons to be installed when they were not required at the time.

[110] In my view, the Council in this case had reasonable grounds, in all respects other than the curved windows, on which it could be satisfied that the provisions of the Code could be met if the building work was completed in accordance with the plans and technical literature. The plans however did not show adequate flashing details for the curved windows nor were they detailed in the technical information. The James Hardie manual provides no detailing for curved windows and no other specifications were provided.

[111] I therefore conclude that the Council did not have reasonable grounds on which it could be satisfied that the provisions of the Code could be met in relation to the installation of the curved window. The lack of detailing for curved windows was in part causative of the claimants' loss. I accordingly conclude that the claimants have established negligence on the part of the Council at the building consent stage in relation to the curved window only.

[112] While there may have been other omissions in the plans they were either not critical to the defects that have been established as having caused leaks or were aspects of the plan/design where a Council officer could reasonably assume a competent builder or tradesperson would carry out even if not detailed in the plans.

Inspections and Issuing of the Code Compliance Certificate

[113] The claim that the Council failed to exercise due care and skill when inspecting the building work is based on the failure to inspect with sufficient care. It is further alleged that this failure amounted to negligence and caused the claimants' loss.

[114] The Council submits that some of the key issues with this dwelling could not be considered to be defects at the time of construction. With other alleged defects it submits that there is no evidence they have caused damage, could reasonably have been detected by a Council inspector or are causative of the need for a re-clad. In particular it submits that a Council officer should be judged against the conduct of other Council officers and against the knowledge and practice at the time at which the negligent act/omission was said to have taken place.

[115] I accept that the adequacy of the Council's inspections needs to be considered in light of accepted building practices of the day but there are other relevant considerations. The High Court in recent cases has set out the responsibility on territorial authorities in carrying out inspections. Heath J in *Sunset Terraces*[12] states that:

> "[450….[A] reasonable Council ought to have prepared an inspection regime that would have enabled it to determine on reasonable grounds that all relevant aspects of the Code had been complied with. In the absence of a regime capable of identifying waterproofing issues involving the wing and parapet walls and the decks, the Council was negligent."

[116] And at paragraph 409,

> "The Council's inspection processes are required in order for the Council (when acting as a certifier) to determine whether building work is being carried out in accordance with the consent. The Council's obligation is to take all reasonable steps to ensure that is done. It is not an absolute obligation to ensure the work has been done to that standard."

[117] In *Dicks*[13] the court did not accept that what it considered to be systemically low standards of inspections absolved the Council from liability. In holding the Council liable at the organisational level

[12] Ibid.
[13] See n4 above.

for not ensuring an adequate inspection regime, Baragwanath J concluded:

> "[116]…It was the task of the Council to establish and enforce a system that would give effect to the Building Code. Because of the crucial importance of seals as the substitute for cavities and flashings it should have done so in a manner that ensured that seals were present."

[118] These authorities establish that the Council is not only liable for defects that a reasonable Council officer, judged according to the standards of the day, should have observed. It can also be liable if defects were not detected due to the Council's failure to establish a regime capable of identifying whether there was compliance with significant aspects of the Code. I will therefore be applying these tests in determining whether the Council has any liability. In doing so, it is appropriate to consider each area of defect as established in paragraphs 17 to 63.

[119] The inadequate ground clearances by the garage should have been detected by Council inspectors. There is evidence that the driveway was laid before the final inspection and the Council was negligent in failing to notice this issue. Whilst some of the issues with the deck would not have been able to be seen by a council inspection the Council was negligent in failing to notice the clearance issues with the deck. Whilst there has been work done to the deck since the original construction, I am satisfied that clearance issues were not affected by that work. I also accept that as this deck was also a roof, the details for roof parapets or balustrades should have been followed and the Council inspector should have noticed that the flat top to the balustrade was non-complaint. I accept the deck level issues have not changed as a result of work done since construction.

[120] I also accept that the Council should have noticed the problem with the fixing of the handrail. I do not accept the Council's submission that the damage was due to one unsealed screw. It should have been clear to the Council inspectors at the time that the

method of installation of the handrail was problematic and they should have made further inquiries as to the adequacy of waterproofing given the susceptibility of any membrane being punctured by the handrail fixings.

[121] Any deficiencies with the vertical control joints relate to the failure of Excel to rake out and seal the joints. This is not a defect which a council officer could reasonably have been expected to detect even with a very good regime in place that was capable of identifying whether there was compliance with significant aspects of the Code. The Council therefore was not negligent in failing to identify any deficiencies in the installation of the vertical joints.

[122] The Council submits that its officers could not reasonably have been expected to notice any deficiencies with the roof as Council officers do not carry ladders or get up on roofs. I might be prepared to accept this explanation if there was evidence they were relying on producer statements from the roofers and others involved in the roof construction. The issue with the valley trays and also with the junctions could have been seen from a close visual inspection so the Council is liable for these defects. It is not however liable for the splits in the flashing as there is insufficient evidence on which I can determine that these were apparent at the time.

[123] The Council was accordingly negligent in failing to detect the defects in relation to the deck, the valley trays and the junction of the bands. It is accordingly liable for the remedial costs in relation to those items.

RESPONSIBILITY OF SPOUTING AND STEEL ROOFING WORLD LTD

[124] Spouting Steel was contracted to supply and install the fascias. It has taken no part in this adjudication other than sending an occasional email and facsimile. It did not attend the hearing.

[125] The only defects that relate to the work done by Spouting Steel relate to the issues with the junctions of the cladding and the roof and also the junctions with the polystyrene band. These were primarily a sequencing issue. It also appears that Spouting Steel was not the last trade that worked on these areas. There is accordingly little reliable evidence upon which I could conclude that the work done by Spouting Steel was causative of leaks. The claim against Spouting Steel is accordingly dismissed.

RESPONSIBILITY OF CSR BUILDING PRODUCTS (NZ)

[126] Monier was contracted by Stareast to provide and install the roof including the valley trays and flashings. It accepts that it owes the claimants a duty of care but submits it discharged its duty by engaging a suitably qualified and experienced subcontractor to do the work. Whilst the materials were supplied by Monier there is no allegation that the material and components supplied by Monier were not of an acceptable quality.

[127] I do not accept the submission that the scope of Monier's duty is limited in the way it suggests. The fact Monier engaged a subcontractor rather than an employee to carry out the work does not reduce the scope of the duty of care owed to the claimants. If the roofing work was defective then Monier has breached its duty of care. The issue therefore is whether there have been any defects in the installation of the roof which have been causative of the claimants' loss.

[128] The claimants' allegations in relation to the roofing work relate to:

- Splits in the apron flashings;
- Squashed valley trays;
- Lack of waterproofing at high risk junctions between the roof and the cladding; and

- Poor detailing and lack of weathertightness at high risk junctions between lower roof areas and polystyrene band.

[129] I have already concluded that there is insufficient evidence to establish the two splits in the flashing were caused by the roof contractor. No breach has accordingly been established in relation to split apron flashings.

[130] The squashing of the valley trays however is the responsibility of the roofer and I accept that the roofer breached the duty of care owed to the claimants in this regard. The claimants accept in their further submissions filed on 24 September that the valley tray claim is for a separate and distinct loss and not a cause of the re-clad. I have concluded at para [54] above that the cost of fixing this defect amounts to $5,000.00

[131] Monier submits that the third alleged roofing defect, if it is in fact found to be a defect, is not the responsibility of the roofer. At the time this dwelling was built diverters were not required and their use was not widespread. There is no evidence on which I could conclude that failure to install diverter flashings fell below the standard expected of a reasonably competent roofer at the time this house was built.

[132] I have earlier concluded that the problems with the junctions both at upper roof level and lower roof level result from poor coordination of the trades as no-one was tasked with the weatherproofing. The experts considered these issues were the responsibility of the project manager and possibly the last trades involved. This was not the roofer as the lead flashings were installed after the cladding but before the plastering. In these circumstances the claimants have failed to establish the roofer is responsible for these defects. In any event Mr and Mrs Chee have failed to establish that there is any damage resulting from this alleged defect.

[133] I accordingly conclude that the claim against Monier has been established in relation to the squashed valley trays only.

QUANTUM

[134] The claimants have established negligence on the part of one or more of the respondents in relation to ground clearances, the deck, the valley trays and the junctions of the horizontal control joints and lower roof areas and the curved window. The experts however agreed that these defects on their own could be remedied by targeted repairs. The claimants allege that deficiencies with the vertical control joints and failure to include batons were significant contributing factors in the need for a re-clad. The evidence of the experts did not support Mr and Mrs Chee's submissions on the significance of these issues.

[135] Mr Browne and Mr Smith considered that the lack of integrity in the cladding system resulted in the need for the re-clad. However, they could point to no direct evidence to establish that any deficiencies in the construction of the control joints had caused the cracking. In addition whilst cracking appears to be associated with sheet joints they could not provide a clear opinion as to the cause of the cracking.

[136] Mr Chee submitted that if the cladding needed to be replaced then workmanship failures in its installation was the only possible explanation. He has however been unable to establish this and there is no proof that workmanship failures in the installation or plastering of the cladding have caused the cladding to fail. The components of the system of Harditex directly fixed to untreated timber were all approved at the time of construction. None of the respondents in this claim can therefore be considered to have breached any duty of care owed in building the dwelling using the construction of products and building systems. They can not have

any liability for the failure of the system if this is not related to the defects for which they have been found liable.

[137] Mr and Mrs Chee have pointed to a number of defects for which they believe the respondents are responsible. Apart from the ground levels, the junctions, the deck, the curved window and the valley trays however there is no evidence that any of these have caused damage, or resulted in the need for a re-clad, or are the responsibility of any of the parties named in this claim. The evidence of damage caused by water ingress to this dwelling is in some isolated areas only. The deck is the area where the most damage has been detected but all the experts agree this does necessitate a re-clad. There is also damage as a result of the splits in the apron flashing but there is no evidence on which I could conclude any of the respondents have any liability for this damage.

[138] Other than those areas the only other evidence of moisture ingress causing damage are three elevated moisture readings associated with the garage clearances, curved window and one horizontal control joint junction. I am accordingly satisfied on the evidence presented that the defects for which the respondents are liable can be appropriately remedied by targeted repairs. They have not, either on their own, or in combination resulted in the need for a re-clad.

[139] Whilst one can have considerable sympathy for the situation Mr and Mrs Chee are in, they approached this second hearing knowing they had considerable hurdles to overcome in first proving that damage had resulted from a number of the alleged defects and secondly establishing a causative link between the negligence of the parties and the damages being sought. Despite this Mr and Mrs Chee have produced no new evidence to establish damage as a result of alleged defects. They have not removed any further cladding or carried out hose tests or dye tests on areas of disputed leaks, both of which would have been relatively inexpensive. In

addition they have not instructed their expert to carry out any further investigations.

[140] Before the first hearing Mr and Mrs Chee were of the view that it was the role of the Tribunal's assessor to carry out further tests and provide any further evidence that was required. They were advised that this was not the case as he had already completed three different reports detailing the three different investigations he had undertaken. Since the third report he has visited the property again and in conjunction with most of the other experts, undertaken some further testing. Mr Browne's investigations however have not established widespread damage and his view was that any further testing was unlikely to provide any further or better evidence of damage.

[141] I accept Mr and Mrs Chee are genuine in their belief that there is extensive damage to their house caused by the negligence of the parties they have named. They are also genuine in their belief that the only way their house can be repaired is by fully re-cladding it and incorporating a ventilated cavity system. They have however failed to establish that there is a causative link between any negligence on the part of any of the respondents and the damages sought. The evidence that has been presented does not establish either widespread damage to their home or that the need for the remedial work proposed has been caused by the negligence of the parties to this claim.

[142] The various experts agree that the defects, for which it has been established any of the parties to this claim are liable, could be remediated through targeted repairs. The claim for the full amount of the remedial costs accordingly fails. This is not because the proposed scope is unreasonable but because Mr and Mrs Chee have been unable to establish a causative link between the need for a re-clad and the negligent acts of the respondents. The two experts who

supported the re-clad did so primarily because of the cracking in the cladding. In their opinion the system had either failed or was unlikely to last for the length of its expected life.

[143] The claimants have provided little evidence of the cost of such repairs and the targeted repair costs that have been provided have included amounts for defects for which none of the respondents are liable. I further note that some of the costs attributed to certain items have been calculated on a percentage basis and not calculated on the basis of what it would actually cost to carry out remedial work of a particular defect or damaged area. Mrs Chee has provided little evidence of costs for targeted repairs. Mr Thompson submitted that if no evidence of costs had been presented on which I could rely then those parts of the claim should be dismissed.

[144] As the Tribunal is investigative in its approach I am entitled to rely on evidence provided by the assessor and also that provided by other parties to the claim. In terms of quantum I have adopted the costs as estimated by the assessor for the ground clearances and the deck as I consider those to be the most robust for repairing these issues on a targeted basis. For others I have examined the costs provided and assessed the costs of repairs based on the line items for those defects together with a percentage of the project costs.

[145] The costs that have been established are:

Decks	$45,315.00
Ground Clearances	$6,235.00
Valley Trays	$5,000.00
Control joints	$7,360.00
Curved window	$10,000.00
Total	$73,910.00

[146] The claimants have also applied for general damages of $50,000 or $25,000 each. Whilst there has been some debate as to

whether damages should be awarded on a per dwelling or per owner basis Ellis J concluded in *Findlay Family Trust*[14] that the *Byron Avenue* appeal[15] confirmed the availability of general damages in leaky building cases in general in the vicinity of $25,000 per dwelling for owner occupiers. Mr and Mrs Chee have both suffered considerable stress and difficulty as a result of having a leaky home. Mr Chee has had health problems and they also have the inconvenience and stress of the remedial work still to come. In the circumstances of this case I do not consider it is appropriate to award a lower level of general damages because they have not established the need for a full re-clad. I accordingly conclude that it is appropriate to award general damages of $25,000.

[147] Mr and Mrs Chee have also claimed consequential costs of $33,705.00. The majority of these are costs associated with moving out of the property while remedial work was being carried out. These costs were related to the re-clad of the property and would not need to be incurred if the remedial work was restricted to the specific work for which the respondents have been found liable. The amount for landscaping ($400) and NZ Leak and Head Loss Detection Limited ($394) have either already been incurred or are likely to be and are not significantly opposed. They have accordingly been established.

[148] Mr and Mrs Chee have also claimed the costs of $12,368.86 for Advanced Building Solutions. This however is primarily the costs Mr and Mrs Chee paid to their expert to prepare for the hearing. Such claims are in the nature of a claim for costs for which the Tribunal only has limited power to award under section 91 of the Act. I do not consider these costs have been incurred unnecessarily by either bad faith on the part of any the respondents or allegations that are without substantial merit.

[14] *Findlay & Anor as Trustees of the Lee Findlay Family Trust v Auckland City Council* HC Auckland, CIV-2009-404-6497, 16 September 2010.
[15] *O'Hagan v Body Corporate 189855* [2010] NZCA 65.

[149] Mr and Mrs Chee have accordingly established their claim to the amount of $99,673.00. This amount is calculated as follows:

Total remedial costs	$73,910.00
Consequential costs	$794.00
General Damages	$25,000.00
	$99,704.00

[150] For the reasons outlined earlier in this decision Mr Hung is liable for the full amount of the remedial costs and therefore the full amount of the established damages. Mr Taylor is liable in relation to the deck costs only of $45,315 which amounts to 61.2% of the total remedial costs. He is also liable for a similar percentage of general damages and other costs. His total liability is therefore $61,020. Monier is only liable in relation to the roofing costs of $5,000.00 which amounts to 6.8% of the total remedial costs. Its total liability is therefore $6,779. The Council is liable for $66,550 or 90% of the remedial costs. Its total liability therefore is $89,734.

WHAT CONTRIBUTION SHOULD EACH OF THE LIABLE PARTIES PAY?

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

[152] 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.

[153] The basis of recovery of contribution provided for in section 17(1)(c) is as follows:

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

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

[155] One of the difficulties in assessing contributions in this claim is that as in many other claims, some of the parties primarily responsible for the defects are not parties to this claim either because they could not be identified or because they are bankrupt, in liquidation or struck off. In addition Mr Taylor, Monier and the Council are only liable for some of the remedial costs whilst Mr Hung is liable for the full amount. Ellis J in *Findlay*[16] stated that apportionment is not a mathematical exercise but a matter for judgment, proportion and balance.

[156] After taking into account the various roles of the parties involved in the construction of the dwelling and their degree of responsibility for the defects established I calculate the apportionments that each party owes is as set out in the following table:

	% Remedial Costs	$ Total Costs	Mr Hung	Council	Mr Taylor	Monier
Valley Trays	6.8	6,779.00	339.00	339.00	-	6,101.00
Decks	61.2	61,020.00	12,204.00	12,204.00	36,612.00	-
Curved Window	13.5	13,460.00	6,730.00	6,730.00	-	-
Control Joints	10	9,970.00	9,970.00	-	-	-
Ground Clearances	8.5	8,475.00	5,085.00	3,390.00	-	-
	100	**$99,704.00**	**$34,328.00**	**$22,663.00**	**36,612.00**	**6,101.00**

[16] See n14 above.

CONCLUSION AND ORDERS

[157] The claim by Mr and Mrs Chee is proven to the extent of $99,704.00. Manukau City Council, Patrick Hung, Brian Charles Taylor and CSR Building Products (NZ) Limited are all jointly and severally liable for some or all of this amount. For the reasons set out in this determination I make the following orders:

i. Manukau City Council is to pay the claimants the sum of $89,734 forthwith. Manukau City Council is entitled to recover a contribution of up to $67,071 from any of the other respondents for any amount paid in excess of $22,663.

ii. Patrick Hung is ordered to pay the claimants the sum of $99,704 forthwith. Patrick Hung is entitled to recover a contribution of up to $65,376 from any of the other respondents for any amount paid in excess of $34,328.

iii. Brian Charles Taylor is ordered to pay the claimants the sum of $61,020 forthwith. Brian Charles Taylor is entitled to recover a contribution of up to $24,408 from the Manukau City Council and Patrick Hung for any amount paid in excess of $36,612.

iv. CSR Building Products (NZ) Limited is ordered to pay the claimants the sum of $6,779 forthwith. CSR Builidng Products (NZ) Limited is entitled to recover a contribution of up to $678 from the Manukau City Council and Patrick Hung for any amount paid above $6,101.

v. The claims against Raymond Brockliss and Spouting and Steel Roofing World Limited is dismissed.

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

Patrick Hung	$34,328
Manukau City Council	$22,663
Brian Charles Taylor	$36,612
CSR Building Products (NZ) Limited	$6,101

[159] If any of the parties listed above fails to pay his or its apportionment, this determination may be enforced against any of them up to the total amount they are ordered to pay in paragraph 157 above.

DATED this 1st day of November 2010

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P A McConnell
Tribunal Chair