IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2009-100-000015
[2011] NZWHT AUCKLAND 15

BETWEEN	LESLIE RAYMOND HOLT, LINLEY FRANCES HOLT and BRIAN JOHN ROSE as Trustees of the KAHALA TRUST Claimant
AND	AUCKLAND COUNCIL First Respondent
AND	DAVID MORGAN O'BRIEN Second Respondent
AND	R & R CONSTRUCTION Third Respondent
AND	RAYMOND WILLEM OSSTERBEEK Fourth Respondent
AND	DVK ROOFING AND WATERPROOFING CO LIMITED Fifth Respondent
AND	IGOR ARAKELIAN Sixth Respondent
AND	SHARP DECORATING SERVICES LIMITED Seventh Respondent
AND	PAUL WILLIAM SHARP (Removed) Eighth Respondent
AND	TRILINE SPOUTING SYSTEMS LIMITED (In Liquidation) Ninth Respondent
AND	SKELLERUP INDUSTRIES LIMITED (Removed) Tenth Respondent

Hearing: 1 February 2011

Appearances: L Herzog for the fifth and sixth respondents .
D Heaney and B Martelli for the first respondent and all other parties.

Decision: 11 March 2011

FINAL DETERMINATION
Adjudicator: P A McConnell

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INTRODUCTION

[1] Leslie Holt, the claimant, is the owner of the formerly leaky home. In August 2007 he filed a claim with the Weathertight Homes Resolution Service and on 23 February 2009 he filed an application for adjudication with Weathertight Homes Tribunal. The claim was for the estimated remedial costs of $204,544 together with general damages and consequential costs. The claim went to mediation on 16 September 2010 and an agreement was reached between Mr Holt and all of the respondents other than DVK Roofing and Waterproofing Co Limited (DVK) and Igor Arakelian.

[2] Under the terms of the settlement agreement all settling parties agreed that the Council would engage Heaney & Co to pursue the claim against the DVK and Mr Arakelian on behalf of all the settling parties and attempt to obtain judgement for all parties for their losses and costs in connection with the claim. The original

settlement agreement was subsequently renegotiated varying the contribution between the settling parties. This type of renegotiation was also provided for in the original agreement.

[3] The claim proceeded to a formal proof hearing against Mr Arakelian and DVK, and orders were made against them. Mr Arakelian and DVK appealed that decision on the basis that they had not been served with the proceedings. The parties agreed to set aside the original order and bring the claim against DVK and Mr Arakelian back before the Tribunal to be reheard.

[4] Heaney & Co on behalf of the settling parties subsequently filed an amended claim against Mr Arakelian and DVK for the balance between the amount paid by the settling parties and the amount claimed. They also filed a claim for contribution up to $161,125 being the amount paid by the settling parties. Between the time the rehearing was granted and the claim was reheard the majority of the remedial work was completed. The actual cost of the remedial work carried out to date is less than the amount paid by the settling respondents. Prior to the hearing the claim against Mr Arakelian and DVK was accordingly reduced to a claim for contribution for up to $161,125 by the settling parties. The claim for any amount over and above the amount paid by the settling parties was withdrawn.

[5] In addition the amount each of the settling respondents is seeking by way of contribution has changed during the course of the claim as the initial settlement agreement was renegotiated. It has however been abundantly clear since July 2010, when the amended claim was filed, that the claim included a claim for contribution of up to $161,125 under section 9 of the Law Reform Act. The changes made to the claim therefore did not prejudicially affect DVK or Mr Arakelian in defending the claim against them.

[6] The settling parties submit that the primary defects in relation to the dwelling at 35B Rarangi Road, St Heliers resulted from poor

workmanship in installing the waterproofing membrane. This work was, they submitted, carried out by DVK or its contractors and was directed or supervised by Mr Arakelian. Therefore they submit that DVK and Mr Arakelian's contribution should reimburse the settling respondents for the majority of the amount they paid in settlement.

[7] Mr Arakelian denies any personal involvement in the waterproofing work at the dwelling. He further denied that his company, DVK had been negligent in the installing the butynol membrane. That installation work he alleges was carried out by independent contractors engaged by DVK.

THE ISSUES

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

- Why did the house leak?
- Does DVK owe the claimants a duty of care? If so, has it breached that duty of care?
- What involvement, if any, did Mr Arakelian have in the waterproofing work? In particular, does he owe the claimants a duty of care? And if so, did any breach of that duty of care contribute to the dwelling leaking and the claimants loss?
- What is the appropriate quantum of the claim?
- What contribution should each of the liable / settling parties pay?
- Are any of the settling respondents precluded from successfully seeking a contribution due to either the terms of settlement agreement or the fact that part or all of that party's share was met by their insurer?

WHY DID THE HOUSE LEAK?

[9] Richard Maiden, the claimants' expert, and Warren Nevill, the Assessor, gave their evidence concurrently on the defects that have caused water ingress. Mr Arakelian also subsequently gave

evidence on this issue as well as personally questioning both Mr Maiden and Mr Nevill on their evidence. Mr Maiden concluded that water had infiltrated the block walls due to a lack of adequate cover by the waterproofing membrane. He was also was of the opinion that the butynol rubber membrane was not bonded properly at various joints and this caused water ingress to the roof structure and consequent timber decay. Lap adhesion issues were evident in the area of the ensuite and in other locations.

[10] Mr Neville said that when he completed his investigation in 2007 there were a couple of instances of lap failure. He understands further deterioration has taken place since that time. However, Mr Nevill was of the opinion that the more serious issues arose where the membrane from the roof folded down on the gutter on one plain onto the upstand from another plain.

[11] Both Mr Nevill and Mr Maiden agreed there are a number of issues with the deck. The upstands of butynol were flapping out in front of the plaster. There was also a lack of integrity where the butynol that is taken up the upstand and across the top of the concrete bock upstand meets the concrete block pillars at either end (photos 47 & 48 in the assessor's report). The membrane has been installed with a reliance placed on the butynol membrane to achieve watertightness in that area rather than a capping flashing. There was however a gap in the butynol where moisture was getting in and causing damage. Had there been no other defects those issues would in themselves cause damage.

[12] Mr Maiden and Mr Nevill did not accept Mr Arakelian's assertion that the lack of saddle flashings was an issue at the time the dwelling was built. This was because they were not common at that time and the dwelling was not designed to have saddle flashings. Therefore they considered the membrane installer was required to ensure weathertightness by using upstands at various junctions. The junctions between the waterproofing membrane and the block work were in their opinion poorly formed and this resulted in water

infiltrating deck areas at the junction of the membrane and column upstand.

[13] Both Mr Nevill and Mr Maiden also agreed that the membrane installer had not complied with the requirements for 150mm upstand. In areas where there was a proper upstand there were no particular issues with water ingress. However, where the upstand was 45mm or less heavy windblown rain could be pushed up behind and cause damage to interior of the building.

[14] Mr Maiden and Mr Nevill also considered that the way the membrane was installed so that it was left loose at the ends and cut off was deficient and caused water ingress. It should have been adhered to the face of the wall and of drip edge should also have been created.

[15] Mr Nevill and Mr Maiden also agreed that there were major leak areas above the ensuite where the inbuilt gutter had a downpipe and no scupper. In their opinion there was a leak because the method of attachment of the membrane to the downpipe lacking integrity. A small gap, or pinhole was created where the butynol needed to be both folded down and up at corners. This was particularly evident in the area where a patch had been put. There was a major area of decay below that site.

[16] Mr Arakelian's view was that the major damage was caused by the plastic tongue of the plywood substrate protruding into the membrane and stretching it. At the time of his inspection Mr Nevill accepted that this was an area of future likely damage only as there were no areas where the membrane had been pierced or significantly compromised because of this potential defect. No damage had resulted from this issue at the time of his inspection. I accept that this particular defect was not a responsibility of the waterproofer. However, there is no evidence that this defect was causative of leaks or damage to the property.

[17] As a result of his testing Mr Nevill also concluded that another defect in the deck was either a hole in the membrane under the tiles of the deck or delamination of a junction. Mr Nevill was unable to find the location of the hole as that would have required more significant deconstruction of the deck. Mr Maiden considered that an angle fillet should have been placed in the 90 degree corner between horizontal and vertical structures to prevent a 90 degree angle being formed with the membrane where it rose up the walls. Mr Nevill agreed that an angle fillet was good practice at the time this deck was constructed. Failure to install such a fillet could put additional stress on the membrane and could cause failure.

[18] Mr Maiden and Mr Nevill also agreed a tear in the butynol rubber membrane had resulted in water ingress causing damage. In Mr Maiden's opinion this was more likely to be caused during the laying of the membrane as it would be almost impossible to tear the membrane after installation. Mr Maiden considered it to be a tear and not a cut. Mr Nevill's view was also that it did not appear to have the clean edge of a cut but he could not be sure given the passage of time since the work was done.

[19] Both Mr Maiden and Mr Nevill were of the opinion that although there may have been other causes of damage to the house the failures of the waterproofing membrane was the most substantial causes of damage. Neither Mr Nevill nor Mr Maiden were able to identify any other specific work done by other construction parties that caused leaks. Mr Nevill did not consider the plastering or other construction issues caused any significant damage. While the dwelling was structurally compromised by the leaks that occurred structural or other building defects did not cause the leaks.

[20] I accept both Mr Nevill and Mr Maiden's opinion that the key issues that have caused damage to the property arose from the waterproofing membrane. In particular there are deficiencies in the installation of membrane in the areas around the perimeter, the sumps and the upstands of the decks, and the chimney which have

caused leaks. I further accept that the installation work did not comply with the good practice of the time. The defects with this property were therefore primarily related to poor workmanship by the membrane installers.

DOES DVK OWE THE CLAIMANTS A DUTY OF CARE?

[21] DVK was contracted by David O'Brien to provide and install the butynol membrane to the deck and roof areas to the dwelling. DVK supplied the materials and engaged its subcontractors to carry out the installation work. Two of DVK's contractors gave evidence at the hearing. While both worked on other units in the complex neither worked on Mr Holt's house. They contracted only to DVK and DVK supplied all materials and allocated them to jobs. They were paid direct by DVK and DVK also paid for them to attend annual courses.

[22] The first issue to be addressed is whether DVK, the licensed butynol installer, engaged to install the butynol membrane and whether they owe the claimants a duty of care? In *Body Corporate 189855 & Ors v North Shore City Council & Ors* (*Byron Avenue*),[1] the Court concluded that the a plasterer sub-contractor owed a duty of care to subsequent owners. In reaching this decision, Venning J stated:

> For the sake of completeness I confirm that I accept a tradesman such as a plasterer working on site owes a duty of care to the owner and to the subsequent owners, just as a builder does.

[23] In *Body Corporate 185960 v North Shore City Council,*[2] Duffy J observed that:

> 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.

[1] HC Auckland, CIV 2005-404-05561, 25 July 2008 at [296].

> 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.

[24] In more recent claims involving leaky residential dwellings the terms "builder" or "contractor", (as used in leading cases such as *Bowen*),[3] have been given a wider meaning to include most specialists or qualified trades people involved in the building or construction of a dwelling house 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 that delivers up dwelling houses in New Zealand can create an artificial distinction. Such a distinction does not accord with the practice of the building industry, the expectations of the community, or the statutory obligations incumbent on all those people.

[25] I accept that the role DVK was engaged to carry out was a task in the construction process where the law expects a certain standard of care. I accordingly conclude that DVK owes the claimants a duty of care. As the contractor engaged to carry out the work I do not consider it particularly relevant as to whether it was DVK's employees or subcontractors that actually installed the butynol. The subcontractors were not engaged by the other building parties but were engaged by DVK and any supervision or control of the work was the responsibility of DVK.

[26] I also accept that there is tenable evidence that DVK breached its duty of care. The expert opinion overwhelmingly supports the proposition that the workmanship in the laying of the butynol membrane on the deck and roof areas has been causative of leaks. There is clear evidence that the appropriate guidelines set out

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[2] HC Auckland, CIV 2006-404-003535, 22 December 2008 at [105].
[3] *Bowen v Paramount Builders (Hamilton) Limited* [1977] 2 NZLR 394; *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234; *Dicks v Hobson Swann Construction Limited*; *Byron Avenue* n 6 above, *Heng & Anor v Walshaw & Ors* [30 January 2008] WHRS 00734, Adjudicator John Green; and *Boyd v McGregor* HC Auckland CIV-2009-404-5332, 17 February 2010, Williams J.

by Skellerup at the time this dwelling was constructed were not complied with. For reasons which are set out more fully in the following section I also accept Mr Ossterbeek and Mr O'Brien's evidence that they were instructed by DVK or Mr Arakelian that the butynol could be left hanging loose over the edges of the parapet and that it did not need to be fixed to the outside face of the buildings. I also accept that Mr Arakelian advised Mr Ossterbeek and Mr O'Brien that it was acceptable for the parapet cap installer to trim the butynol as required. This advice was clearly negligent. In addition it was negligent of the installers not to properly seal the butynol membrane to the edge of the block work or create a drip edge.

[27] I further accept that deficiencies in the laying of the butynol membrane were a significant and primary cause of the damage to this property that necessitated the remedial work. While there is insufficient evidence to conclude that the hole in the membrane in the deck was caused by DVK or its installers the defects for which they were responsible have contributed to the damage requiring the full extent of the remedial work.

[28] DVK is accordingly jointly and severally liable to the claimants for the full amount of the established claim.

THE ROLE OF IGOR ARAKELIAN

[29] Mr Ossterbeek and Mr Holt both gave evidence that they had a meeting onsite with Mr Arakelian prior to the butynol membrane being laid. During that meeting they got up onto the roof to look at the work that was to be done so that Mr Arakelian could check the substrate was acceptable. Mr O'Brien explained to Mr Arakelian that metal parapet caps would be installed around the entire perimeter of the roof. Mr Arakelian's advice was that although he would normally fix the butynol to the outside face of the building in this job it was appropriate to leave the butynol hanging loose over the edge and that the parapet cap installer should trim the butynol as required. This is apparently what was subsequently done.

[30] Mr Arakelian does not recall such a meeting and denies it took place. I however accept the evidence of Mr O'Brien and Mr Ossterbeek on this issue. They have a clear recollection of some aspects of the meeting. Such a meeting is consistent with Mr Arakelian's subsequent involvement with this dwelling and it makes sense that such a meeting would take place. It is not surprising that Mr Arakelian may have forgotten such a meeting as he has no doubt been involved in hundreds of jobs since this dwelling was built.

[31] I accept that the advice given by Mr Arakelian fell below the standards of the advice that should have been given by a reasonably competent butynol membrane installer. This advice was carried out by the subsequent trades and has directly contributed to the water ingress. There is, however, insufficient evidence on which I could conclude that Mr Arakelian supervised or controlled the work while it was being done. While there is evidence he attended the site neither Mr Ossterbeek nor Mr O'Brien were able to give definitive evidence of what his role was when he was on site.

[32] I conclude that it has been established that Mr Arakelian approved the substrate, gave negligent advice as to how the membrane should be laid and occasionally attended site. The issue therefore to be decided is whether this is sufficient for Mr Arakelian to be personally liable or whether liability rests solely with DVK, the company that was engaged to supply and install the membrane.

[33] The effect of incorporation of a company is the acts of its directors are usually identified with the company and do not give rise to personal liability. However, the courts have for some time determined that while the concept of limited liability is relevant it is not decisive. Wylie J in *Chee v Stareast Investment Limited Anor,*[4] concluded that limited liability is not intended to provide company directors with a general immunity from tortious liability.

[4] HC Auckland, CIV-2009-404-5255, 1 April 2010.

[34] In *Morton v Douglas Homes Ltd,*[5] 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),*[6] 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.

[35] In *Hartley v Balemi,*[7] Stevens J concluded that personal involvement does not necessarily mean the physical work needs to be undertaken by a director but may include administering the construction of the building.

[36] The Court of Appeal in *Body Corporate 202254 v Taylor*[8] has also more recently considered director liability and analysed the reasoning in *Trevor Ivory Limited v Anderson.*[9] It held that the assumption of responsibility tests promoted in that case was not an element of every tort. Chambers J expressly preferred an "elements of the tort" approach and noted that assumption of responsibility is not an element of the tort of negligence. Rather what needs to be established in relation to Mr Arakelian is whether the elements of the tort of negligence are made out against him. In doing this I must bear in mind the presumption against the imposition of personal responsibility where the director was simply acting on behalf of the company.

[37] In *Hartley v Balemi*, Stevens J observed:

[5] [1984] 2 NZLR 548 (HC).
[6] (2006) 7 NZCPR 881 (HC), Baragwanath J.
[7] HC Auckland CIV-2006-404-2589, 29 March 2007.
[8] [2009] 2 NZLR 17 (CA).
[9] [1992] 2 NZLR 517 (CA).

> Therefore the test to be applied in examining whether the director of an incorporated builder owes a duty of care to a subsequent purchaser must, in part, examine the question of whether, and if so how the director has taken actual control over the process and of any particular part thereof. Direct personal involvement may lead to the existence of a duty of care and hence liability should that duty of care be breached.

[38] On the evidence before me I have concluded that Mr Arakelian took control over two parts of the building process. Firstly, he approved the substrate for the laying of the membrane and secondly, he also approved and directed the way in which the membrane should be left loose on the outside of the parapet walls and subsequently cut back, if necessary by the cap installer. Mr Arakelian was directly and personally involved in these elements and I conclude this gives rise to an existence of a duty of care.

[39] Even Mr Arakelian in his own evidence stated that a significant cause of the leaks were a result of the membrane being cut short over the block work. As Mr Arakelian was the person who advised Mr O'Brien and Mr Ossterbeek that this was appropriate for this job it is also reasonable to assume that Mr Arakelian also advised his contractors that that was the way the job was to be carried out.

[40] I accordingly conclude that Mr Arakelian did owe a duty of care. The negligence established relates to his directions in relation to the way the membrane was left short on the outer-side of the parapet and subsequently cut back. Both of the experts and Mr Arakelian agree that this has resulted in water ingress and subsequent damage. Other workmanship defects with the installation of the membrane are not however the responsibility of Mr Arakelian. There is no evidence that he controlled or directed the balance of the work or that he had any personal involvement in the work. While there was a passing reference to Mr Arakelian referring to the plywood substrate as being inadequate there is no real evidence to establish that this has caused damage.

WHAT IS THE APPROPRIATE QUANTUM OF THE CLAIM

[41] Mr Heaney, on behalf of the settling respondents, submitted that the actual remedial costs were largely irrelevant. He submitted that if a party settles a claim reasonably they are entitled to recover on the basis of that reasonable settlement even if the actual costs turn out to be less. At the time the settlement agreement was reached the estimated remedial costs for the property amounted to $204,000. Mr Maiden and Mr Nevill's opinion was that this amount was not excessive. Mr Maiden, if anything, thought it was conservative. In addition to the actual remedial costs, the Council and the other parties were facing claims for general damages and consequential costs bringing the total claim to somewhere near $300,000.

[42] If this claim had gone to hearing, based on the estimated remedial costs and other information that was then available at or around the time of settlement, it is more likely than not that the Tribunal would have ordered the respondents to pay something well in excess of the $161,125 for which they settled. I accordingly conclude that the parties who settled the claim did so reasonably and the amount they agreed to pay was reasonable.

[43] Mr Herzog, however, submitted that the actual costs of the remedial work have amounted to just under $120,000. In his submissions he queried some of the line items but called no evidence on this issue nor did he question the experts or Mr Holt in relation to the reasonableness of the actual costs incurred.

[44] Both Mr Holt and Mr Maiden also said in evidence that not all the remedial work had been completed. Again this is unchallenged evidence.

[45] Mr Holt also gave evidence on the impact that owning a leaky home has had on him and the stress and difficulties he has

faced throughout the process of carrying out remedial work to date. On the basis of the evidence provided general damages in the vicinity of $25,000 would not be unreasonable. In addition Mr Holt incurred costs such as interest and alternative accommodation, while the remedial work was carried out.

[46] On the evidence presented I conclude that the total cost of the remedial work currently undertaken plus the work that is still to be done, general damages and other consequential costs, would amount to more than the settlement sum of $161,125. Therefore even on that basis the amount for which the settling respondents are seeking contribution is reasonable.

[47] I accordingly conclude that DVK and Mr Arakelian are jointly and severally liable together with the other settling respondents to the claimants for the amount of $161,125.

WHAT CONTRIBUTION SHOULD EACH OF THE LIABLE AND SETTLING PARTIES PAY?

[48] 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.

[49] 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.

[50] 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…

[51] 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.

[52] In summary the settling respondents' claim for contribution is based on the premise that the work done by DVK, some of which was directed by Mr Arakelian was defective and contributed to the claimants' loss. I have concluded that the primary causes of leaks relate to the waterproofing work. While DVK is not liable for all the waterproofing defects there is also no negligence on the part of any other party in relation to those issues. Mr Maiden and Mr Nevill were unable to point to any other work that was within the responsibility of the other construction parties which has caused loss.

[53] Mr Arakelian has submitted that there were some construction items that have caused loss. These allegations were not supported by the independent experts nor were they supported by the evidence. In particular his allegation that the damage was caused by the plastic tongue protruding into the membrane was not supported by Mr Nevill. In addition the lack of saddle flashings is not a deficiency as they were not common place at the time this house was built and the plans did not provide for them. Furthermore the comments made by Mr Arakelian as to potential painting and other defects causing leaks were at best speculative.

[54] The three settling parties who are seeking contribution of the Auckland Council, Raymond Oosterbeek, the builder and David O'Brien, the developer. There is no evidence of negligence on the part of either Mr Oosterbeek or Mr O'Brien. The building work has not been implicated in the causes of leaks. While Mr O'Brien has a non-delegable duty of care there is no evidence that has been produced to establish that he personally was negligent in his role as

a developer. The Council has acknowledged it should accept some liability and has submitted its contribution should be set at 15%. I accept this concession is reasonable. It is well established practice that the parties who carry out defective work should have more responsibility than those who inspect them. In addition not all of the waterproofing deficiencies with this property would have been able to be noticed by a reasonably competent inspector. I accordingly conclude that the Council's contribution should be 15%.

[55] I further accept that DVK should pay a greater contribution than Mr Arakelian. Mr Arakelian was only personally involved in one area or defect that has resulted damage. I accordingly assess his contribution at 15% and DVK's at 70%.

DEFENCES RAISED

[56] DVK and Mr Arakelian did not raise any affirmative defences in the responses they filed prior to the hearing. Their half page final response dated 3 September 2010 denied any personal involvement by Mr Arakelian and any negligence on the part of DVK. In closing submissions Mr Herzog, counsel for DVK and Mr Arakelian, adopted a somewhat scattergun approach raising a large number of issues in defence to the claim. He provided no legal authorities for any of the defences raised other than a repeated assertion that his submissions were "basic trite insurance law that did not need any authority".

[57] Mr Herzog raised four concerns in relation to aspects of the settlement agreement. The first was that the Council could not pursue the unpaid balance of the amount Mr O'Brien initially agreed to pay under the settlement agreement. Under the express terms of the contract a settling party who paid the share of another settling agreement was entitled to bring a claim and be reimbursed for that payment against the non paying party. Mr Herzog submitted therefore that I should not take into consideration the additional amounts paid by Mr Ossterbeek and the Council as they provided for their own mechanism between themselves to regulate any default

under the agreement. His submission was that the Council's recourse was to proceed to enforce the order or the settlement agreement against Mr O'Brien.

[58] There are two problems with this submission. Firstly, there is clear evidence that the settlement agreement was renegotiated to provide for different contributions from the various parties. The ability to renegotiate the payments in this way was also provided for in the original settlement agreement. In addition the claim for contribution has been filed by Heaney & Co on behalf of all of the settling respondents and not just the Council. Whilst the contribution each of the settling parties paid, and is accordingly seeking, has changed the basis of the claim has been clear since July 2010. From that time it has been very clear that the claim included a claim for contribution under section 9 of the Law Reform Act by all the settling respondents for up to $161,125.00.

[59] The second issue raised by Mr Herzog was that Mr Ossterbeek was precluded from seeking a contribution as it was his insurer that paid most or all of his contribution. Mr Herzog could produce no authority for this submission. I do not consider the fact that Mr Ossterbeek's insurer paid the settling amount precludes either Mr Ossterbeek, or his insurer through him, from seeking a contribution from DVK or Mr Arakelian. The fact the money was paid by an insurer is irrelevant as an insured can always proceed on subrogated rights. The insurer does not have to be a party to an action if there is subrogated recovery.

[60] The third issue raised by Mr Herzog was that there was no evidential basis to support the additional amounts paid by Mr Ossterbeek or the Council. He therefore submitted the additional payments made to cover the unpaid share of Mr O'Brien's contribution should not be taken into account in deciding the contribution to be paid to the settling parties.

[61] I do not however accept this submission. Mr Barr gave evidence as to why the agreement was renegotiated and it was also

referred to by other witnesses. Even if there was a need to provide reasons for the changes made in order for the parties to claim contribution I accept adequate reasons have been given.

[62] I also do not accept Mr Herzog's final submission that it would be contrary to public policy to allow the Council to seek a contribution for the additional amount paid as the consideration given by Mr O'Brien was an agreement to give evidence against DVK and Mr Arakelian. The agreement to provide documents, evidence and their own witnesses was part of the initial settlement agreement. The specific wording of that agreement was as follows:

> Each party will co-operate with providing documents and their own witnesses to assist Heaney & Co at the costs of the parties themselves. For the sake of clarity each party will at their own cost make experts and witnesses available who were present at the mediation of this claim..

[63] Giving evidence was something Mr O'Brien had agreed to do from the time of the initial settlement and was not something additional he agreed to do in exchange for Mr Ossterbeek and the Council picking up some of the amount he originally agreed to pay.

CONCLUSION AND ORDERS

[64] The claim against DVK Roofing and Waterproofing and Co Limited and Igor Arakelian is proven to the extent of $161,125. They are jointly and severally liable with the other settling respondents for this amount. For the reasons set out in this determination I make the following orders:

i. DVK Roofing and Waterproofing Co Limited is to pay the Auckland Council, on behalf of the settling respondents, a contribution of $112,787 forthwith being 70% of the amount for which it is jointly and severally liable.

ii. Igor Arakelian is to pay the Auckland Council, on behalf of the settling respondents, a contribution of $24,018.75 forthwith being 15% of the amount for which he is jointly and severally liable.

iii. The Auckland Council's contribution is set at $24,018.75 being 15% of the amount for which it is jointly and severally liable.

DATED this 11th day of March 2011

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P A McConnell

Tribunal Chair