IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2009-100-000060
[2011] NZWHT AUCKLAND 21

BETWEEN	CHUN HEE RYANG Claimant
AND	AUCKLAND COUNCIL (FORMERLY NORTH SHORE CITY COUNCIL) First Respondent
AND	DAVID LEE Second Respondent
AND	THEOTESTO REYES Third Respondent
AND	PLASTER DEVELOPMENTS LIMITED Fourth Respondent
AND	PATON ROOFING SERVICES LIMITED Fifth Respondent
AND	WISE & ASSOCIATES LIMITED Sixth Respondent
AND	RUSSELL MATTHEWS Seventh Respondent

Hearing:	1, 2 and 3 February 2011
Closing Written Submissions:	21 February 2011
Closing Oral Submissions:	25 February 2011
Counsel Appearances:	Ms J McTavish Butler and Ms M Strauss, for the claimant Ms F Divich, for the first respondent Mr M Cole, sole director and shareholder of fourth respondent (lay representative) Mr E St John and Mr I Razak, for the fifth respondent Mr D Mitchell, for the sixth and seventh respondents
Decision:	5 April 2011

FINAL DETERMINATION
Adjudicator: K D Kilgour

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INTRODUCTION

[1] This claim concerns the defective construction of a home situated at 36 Gold Street, Albany, Auckland. The home was built in 2003 and purchased by the claimant, Mrs Chun Hee Ryang, in January 2008. Mrs Ryang discovered water ingress to her home in May 2008.

[2] After receiving some building advice, Mrs Ryang applied under the Weathertight Homes Resolution Services Act 2006 on 28 November 2008. On 12 May 2009 the WHRS assessor, Mr Frank Wiemann, reported that the dwelling is a leaky building as defined by the Act.

[3] Mrs Ryang cannot afford to repair her home. She has proceeded with this claim based on the evidence of Mr Wiemann. She claims the estimated remedial costs set out in Appendix L of his report.

[4] Mrs Ryang seeks damages from Council; the head contractor and builder, Mr David Lee; the draftsman who drew the plans for the home, Mr Theotesto Reyes; the company responsible for plastering and cladding, Plaster Developments Limited; and the company responsible for installing the butynol rubber membrane, Paton Roofing Services Limited.

[5] The Council is pursuing cross-claims against the sixth and seventh respondents, Wise & Associates Limited, and its employee, Mr Russell Matthews. Wise and Associates Limited was commissioned by the vendor who sold to Mrs Ryang to prepare a building performance report for that vendor in May 2007.

ISSUES

[6] The issues for determination by the Tribunal are:

- What has caused damage to the home?
- What is the appropriate repair option?
- What is the reasonable cost of such repairs?
- Should the following claims succeed?
  - The claim against the Council?
  - The claim against the builder?
  - The claim against the draftsman?
  - The claim against the plasterer/cladder?
  - The claim against the butynol membrane applicator?
  - The Council's cross-claim against the building surveyor /reporter?

FACTUAL BACKGROUND

[7] On 7 January 2003 the North Shore City Council (now the Auckland Council) received an application for building consent for a house at 36 Gold Street, Albany. Mr Reyes, the third respondent, was listed as the designer and the owner's representative. Mr Shi Zhang was listed as the owner although he was never registered as the proprietor of the property.

[8] The Council issued its building consent on 24 January 2003 and the home was built between February 2003 and November 2003. On 11 February 2003 Mr Feng Xue Zhang was registered as the first proprietor of the home. Between 1 February 2003 and 20 June 2003, the Council carried out building inspections during construction and it undertook its final inspection on 6 November 2003. The Council issued a Code Compliance Certificate on 19 November 2003.

[9] The home is a three-storey building at the top end of a driveway off Gold Street overlooking the Albany valley. The home has a deck at three sides around the master bedroom and another deck accessible from a nursery. There is a flat roof over the top floor and flat roofs and deck areas over parts of level 1. Sloping roofs clad with concrete tiles are installed towards the north above the lounge and over the garage. The building is exposed to very high winds. The exterior walls are clad in an EIFS cladding directly fixed without a cavity. The flat or near flat roofs at levels 3 and 2 and over the entrance are clad in butynol rubber.

[10] Mrs Ryang and her husband are Korean. They have lived in New Zealand for ten years although they were absent from New Zealand between 2004 and 2007 for lengthy periods. They have purchased a number of properties in Korea.

[11] In late 2007 Mrs Ryang decided that they should purchase a home in New Zealand for themselves and their children. Mrs Ryang saw a photograph of the home on the cover of a local Korean magazine and liked the look of the property.

[12] The then vendor of the property engaged Barfoot & Thompson to sell the home and its agent, Mr Tony Yoo, introduced Mrs Ryang to the home. Mrs Ryang liked the home because it was spacious, it had seven bedrooms and the backyard was nicely landscaped. It was located on a quiet road which pleased her, and was close to shops and facilities in Albany.

[13] On 27 December 2007 Ms Ryang signed a written agreement to buy the home and the finance condition was satisfied on 8 January 2008 when the purchase was declared unconditional. Settlement and possession took place on 29 January 2008.

[14] In May 2008 Mrs Ryang and her family discovered signs of moisture ingress and decay in the home for the first time. Mrs Ryang first contacted the vendor's real estate agent Mr Tony Yoo who introduced her to the home. He told her the home was in good condition but to approach a neighbouring builder, which she did. That builder after visiting the home, expressed concern and suggested that Mrs Ryang get a proper home inspection done.

[15] On 10 October 2008 Mrs Ryang obtained an inspection report from Auckland Home Check Limited which identified numerous moisture ingress issues with the home. On 28 November 2008 Mrs Ryang lodged an application with the Department of Building and Housing for a Weathertight Homes Resolution Service assessor's report and the assessor Mr Wiemann reported on 12 May 2009 identifying defects in the construction.

[16] In his report Mr Wiemann listed the following weathertight risk factors from his initial observations:

- very high wind exposure requiring specific design;
- three-storeys;
- flat roofs;
- tiled roofs without roof underlay;
- decks over habitable spaces;
- complex junctions between decks, walls and flat roof areas; and
- lack of roof overhang in most areas.

What has caused damage to the home?

[17] The WHRS assessor, Mr Wiemann, reported on 12 May 2009 that the home leaked on all elevations principally due to inadequate joints of parapet cap flashings and balustrade posts fixed through the top of parapets. His invasive testing and investigation

discovered deterioration of the cladding and the framing on all elevations. Mr Wiemann's report prescribed an extensive remedial scope of works and stated that the current damage required removal of the cladding and the damaged timber and the recladding of the home on a drained and vented cavity.

[18] Trevor Jones, the Council's expert, Tony Nesbit, Paton Roofing Services Limited's expert, and Frank Wiemann attended an experts conference prior to the hearing. They, together with Clint Smith, gave their evidence concurrently at the hearing on the defects that have caused leaks. Mr Smith was engaged shortly before the hearing by Paton. While he did not visit the home to see first-hand the installation of the waterproofing membrane, his evidence was of benefit to the Tribunal because of his general expertise and specifically his expertise with EIFS cladding.

[19] The experts agreed that the main area of water ingress was around the perimeter of the building. Water was getting into this home from the top of the parapets and other exterior perimeters of the flat roof areas and the decks. This has resulted in severe damage to the timber framing and cladding which the experts agreed necessitated the home being reclad.

[20] The causes of water ingress in these areas was due to inadequate jointing of the cap flashings on the parapets, cap flashings having fixings through membrane with no full membrane protection to the top of the parapet beneath the metal cap flashings, and the handrails and the balustrades fixed through the covered parapets and breaching the membrane.

[21] The experts also identified a number of other construction defects that contributed in a minor way to the leaks and subsequent damage. The experts agreed that these could have been fixed by

targeted repairs if it were not for the principal defects outlined above. The minor and localised defects included:

- The butynol rubber membrane incorrectly cut and folded over the plywood over the entrance canopy.
- Embedding of the fascia board into the timber framing and polystyrene cladding.
- Short apron flashings.
- Insufficient lap coverage of the lead flashing over the roof tiles where water damage was detected to the interior ceiling lining. There has been no observed damage to the timber framing from this defect.
- No roof underlay under the concrete tiles.
- The junction between the steel fascia and the concrete tiles where significant framing damage was observed in one location by Mr Wiemann.[1]

What is the appropriate repair option?

[22] Mr Wiemann is the only expert who has undertaken invasive testing of the home. His report stated that the remedial work required to repair current damage was:

- redesign of some areas to achieve weathertightness;
- removal of cladding and damaged timber;
- recladding on a drained and ventilated cavity;
- removal of the deck and roof surfaces and the timber support structure and the reinstallation of the support structure and deck and roof surfaces, including parapet flashings and balustrades where applicable;
- removal of tiles;
- removal of damaged timber and plaster board;

[1] See Assessor's report at photos 65 to 68.

- installation of roof underlay, tiles, barge boards and new internal linings; and
- a full reclad of the home.

[23] The parties experts agreed with Mr Wiemann that the home requires a full reclad.

[24] I determine that the appropriate repair option for the above reasons is a full reclad in accordance with the scope of works set out in Mr Wiemann's report.

What is the reasonable cost of such repairs?

Estimate of repairs

[25] Ms McTavish Butler, counsel for Mrs Ryang, submitted that in leaky home cases, the measure of damages is the cost of repairs when repairing the damage is reasonable.[2] I agree with that submission.

[26] Mrs Ryang could not afford to repair the home before the hearing. She has proceeded on the estimate of repair costs provided in Mr Wiemann's report. Mr Wiemann engaged a quantity surveyor, Mr James White of Kwanto Limited, to complete an estimate of remedial costs from a scope of works designed by Mr Wiemann. Mr White estimated remedial costs on 12 May 2009 at $430,342.00.[3] This increased after 1 October 2010 with the increase in GST to $439,904.51.

[27] Shortly before the hearing, Ms McTavish-Butler submitted two quotes obtained from remedial builders which they had prepared based on Mr Wiemann's scope of works. At the hearing Ms McTavish-Butler wished to proceed on the basis of a Reconstruct

[2] *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 at [526] to [540].
[3] Appendix L – Estimate of Cost Schedule WHRS Report.

Limited quote of $454,411.91. However, Reconstruct Limited was not available to be questioned about its quote and I decided that the claimant could proceed only on the initial Kwanto Limited estimate of $439,904.51.

[28] The only challenge to this estimate was from the quantity surveyor engaged by the Council, Mr John Ewen. Mr Ewen, adopting the same scope of works, analysed Kwanto's remedial costs estimate prepared by Mr White. Mr Ewen deducted $24,501.37 including GST from the building work and $38,494.30 including GST for betterment, resulting in an estimate to remediate the home of $376,908.81.

[29] I heard evidence from Mr White and Mr Ewen at the hearing together. Having considered their evidence, I have decided to reject Mr Ewen's adjustments to the building works.[4] I do so principally because Mr White satisfied me that the adjustments sought by Mr Ewen were for necessary remedial works within the agreed scope of works and are now a remedial requirement of Council. He also satisfied me that his estimates were based on actual costs data gathered regularly from the industry by Kwanto Limited. I accept Mr White's evidence concerning the need to replace timber joists to the flat roof, his estimate of the cost of the new flat roof membrane and his allowance for the removal of wall thermal insulation. I accept that the rigid air barrier lining is within the agreed scope of works and will be a Council requirement for remedial consent. I also accept Mr White's estimates of consultant fees for the design and for the remediation specialist, which are in line with current costs.

[30] However, I agree with some of the deductions Mr Ewen has made for betterment. Both experts agreed that a betterment deduction would need to be made for the external painting (it was

[4] Mr J G Ewen's brief of evidence dated 10 November 2010 at paragraphs 20-21 and the betterment at paragraphs 24-25.

last painted six years ago and so is shortly due for a new paint), some deductions for scaffolding and an adjustment for the carpet on the basis that it was nearing replacement. I agree with deductions he has made in paragraphs 24(a), (b), (d), (e) and part of (c) of his brief of evidence dated 10 November 2010. I do not accept the amount of $6,244.83 he estimated for painting of the internally repaired surfaces. Such painting, Mr White stated, is a necessary part of the repair. I agree. This cost is for painting the internal walls which will require repainting as a result of the external wall recladding. Accordingly I determine that there should be a deduction for betterment of $32,249.47 (Mr Ewen's betterment total of $38,494.30 less $6,244.83). For these reasons, I determine that a reasonable estimate of the remedial cost for this home is $407,655.04, inclusive of GST.

Claim against the Council

[31] The claim alleged by Mrs Ryang against the first respondent, the Auckland Council is in negligence and relates to the Council's inspection of the building work during construction and in issuing a Code Compliance Certificate.

[32] Mrs Ryang alleges that the Council owes a duty of care to homeowners for economic loss arising out of defects caused by the Council's negligence in the course of the building process. She says the Council owed her a duty of care in issuing the building consent (though this limb of the claim was withdrawn by Mrs McTavish-Butler at the commencement of the hearing), inspecting the building work during construction and in issuing a Code Compliance Certificate.

[33] The Council's inspections were carried out by Council officers pursuant to sections 76 of the Building Act 1991. That section defines inspections as, amongst other matters:

> [The] taking of all reasonable steps to ensure –
> (a) That any building work being done is in accordance with a building consent;

[34] Council officers inspected building work between 1 February 2002 and 6 November 2003 (which was the second re-check final building inspection). They conducted 19 site visits. Building consent records show 12 took place throughout the critical build stage. There were a number of re-checks by Council officers. Mr G H Stone gave evidence for the Council as he was one of the building inspectors who undertook a number of inspections at this house. The Council also called evidence from Mr S Hubbuck, another experienced Council officer, who gave evidence on the approach of a reasonably competent building inspector at the time of undertaking inspections with this home. Mr Stone indicated that a number of the re-checks were due to Council concerns over workmanship issues. The Council inspection notes are comprehensive and include a producer statement that the cladding was compliant and a number of product and application "guarantees" which the Council accepted as producer statements.

[35] Mrs Ryang engaged Mr R W Cartwright, a former Council building inspector, who gave evidence stating that the Council failed to identify critical building deficiencies throughout its inspection regime, and that the Council should not have issued the Code Compliance Certificate based on its inspections because the defects were readily identifiable at the inspection stage.

[36] The law is clear. A local authority can be liable to owners and subsequent purchasers of residential properties for defects caused or not prevented by its building inspector's negligence: *Invercargill City Council v Hamlin;*[5] *Bowen v Paramount Builders*

[5] [1996] 1 NZLR 513 at 526-40.

(Hamilton) Limited;[6] *Mt Albert Borough Council v Johnson;*[7] *Stieller v Porirua City Council;*[8] *Body Corporate 188529 & Ors v North Shore City Council & Ors (No 3) (Sunset Terraces);*[9] and *Body Corporate 1889855 & Ors v North Shore City Council & Ors (Byron Avenue).*

[37] In *Sunset Terraces*, Heath J defined the duty of a local authority as follows:[10]

> [220] In my judgment, a territorial authority owes a duty of care to anyone who acquires a unit, the intended use of which has been disclosed as residential in the plans and specifications submitted with the building consent application or is known to the Council to be for that end purpose. The duty is to take reasonable care in performing the three regulatory functions in issue: deciding whether to grant or refuse a building consent application, inspecting the premises to ensure compliance with the building consent issued and certification of compliance with the Code. The existence of such duty reflects the need to balance a homeowner's moral claim for compensation for avoidable harm against the Council's moral claim to be protected from an "undue burden" of legal responsibility. Put in that way, the duty takes account of the changed statutory framework and avoids tying the duty to the practices of a bygone era.
>
> [221] The obligation of the Council can be no higher than expressed in the statute itself: namely, to be satisfied on reasonable grounds that a building consent should issue; to take reasonable steps in carrying out inspections and to be satisfied on reasonable grounds that code compliance should be certified.

[6] [1997] 1 NZLR 394.
[7] [1979] 2 NZLR 230 (CA).
[8] [1983] NZLR 628.
[9] *Body Corporate 188529 & Ors v North Shore City Council & Ors* (*Sunset Terraces*) HC Auckland CIV-2004-404-3230 at paras [220] and [221].
[10] Ibid at [220]-[221].

[38] Mrs Ryang alleges in her claim that the Council breached its obligations owed to her by not identifying a number of the defects present in the home during its inspection process and by issuing a Code Compliance Certificate in November 2003 when reasonable grounds did not then exist for it to be satisfied that the building work complied with the Building Code.

[39] Mr Cartwright, Mr Stone and Mr Hubbuck all have relevant experience and gave helpful evidence on local authority building inspection practices from their own extensive experience. I formed the view that Mr Cartwright tended towards a higher standard than that practised by or expected of local authorities at the time of construction. He also identified omissions by the Council in detecting defective workmanship which expert evidence at the hearing established were not causative of water ingress and damage to the home. Mr Cartwright gave evidence that the Council should have identified the flat parapet surface during the course of its inspections. The flatness of the parapet was not identified by the experts as a defect and indeed, the evidence from the experts was that the flat top had not led to moisture ingress and it was perfectly acceptable to build flat top parapets at the time this home was constructed.

[40] Ms Divich accepted that the Council owes Mrs Ryang a duty of care as a subsequent purchaser. Ms Divich's submission however was that Mrs Ryang has not proven breach of the Council's duty of care.

[41] Ms Divich referred me to the decision of Stevens J in *Hartley v Balemi & Ors*[11] which summarises the approach I must adopt when examining the standards of the Council inspector:

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

[11] HC Auckland CIV 2006-404-2589, 29 March 2007 at [71] – [72].

> reasonable builder, Council inspector, architect or plasterer would have done. This is to be judged at the time the work was done, i.e., in the particular circumstances of the case in the overall assessment, as was said in *Fardon v Harcourt – Rivington* (1993) 146LT391; [1932] ALLERREP81 (HL) at 83, what amounts to negligence is a question of fact in each case.
>
> [72] In order to breach that duty of care, the house must shown to contain defects caused by the respondent(s). This must be proved to the usual civil standard, the balance of probabilities. Relative to a claim under the WHRS Act, it must be established by the claimant owner that the building is one into which water has penetrated as a result of any aspect of the design, construction or alteration of the building, or the materials used in its construction or alteration. This qualifies the building as a "leaky building" under the definition in section 5. The claimant owner must also establish that the leaky building has suffered damage as a consequence of it being a leaky building. Proof of such damage then provides the adjudicator with jurisdiction to determine issues of liability (if any) of other parties to the claim and remedies in relation to any such liability; see section 29(1).

[42] The references are to WHRS Act 2002 but Ms Divich submitted the 2006 Act is to the same effect. Because of the nature of the claim which is in negligence, proof of damage is essential Ms Divich says. I agree with those submissions.

[43] The defects expert's evidence was that the defects in this home's perimeter (in the parapets and balustrades) require it to be reclad. Ms Divich accepts that inadequate joining of the parapet cap flashings and the cap flashings having fixings through the membrane, with no full membrane protection to the top of the parapet beneath the metal cap flashings, are, in combination, a defect which has caused water ingress. This in turn has caused damage to the home. It is this defect, coupled with the balustrade handrail fixings, which has necessitated the need to reclad the home.

[44] The Council accepts that perimeter defects were defective workmanship. The Council however says the rivet fixing through the cap flashings and the membrane and the substandard jointing of the metal cap joints and flashings would not have been visible to a Council officer without removing the caps to inspect.

[45] Mr Stone however conceded that the Council undertook two roof inspections and that it requisitioned for parapet cap flashings to be properly secured and riveted to the parapet. It then failed to check this matter at completion.[12]

[46] Mr Jones observed that no one knows exactly what was in place with the cap flashings and the parapets at the time of the Council inspection. He stated that it appeared to him very likely that the capping of the parapets had been removed and refitted at some stage after the original construction.

[47] That was not the view of Mr Wiemann whose evidence was that there were a few reasons why there could be indentations and creases to the parapet cap flashings. These suggested that someone had stood on the cap flashings or the cap flashings had been fitted so tightly that thermal movement has caused creases.

[48] I prefer the evidence of Mr Wiemann for it is consistent with poor workmanship and the defects experts were unanimous in their view that the parapet construction and capping was poor.

[49] Parapet cap flashings were noted as needing to be secured. Mr Stone gave evidence that he recalled seeing the top fixings to the parapets during his roof inspection. Mr Stone passed the cap flashings as appropriately constructed when they were clearly constructed contrary to the consented plans, and he said in evidence to Ms McTavish-Butler that the cap flashings were incorrectly riveted

[12] See Council inspection sheet no. 47690, Item 14 Doc 543, Agreed Bundle.

and it was clearly observable that the method of riveting would have penetrated the underlying membrane.[13] This was a significant defect which Mr Stone conceded had been identified on the final inspection field memorandum, was not rectified and yet was approved as completed on the re-check inspection.

[50] Despite the fact that numerous inspections and re-checks were carried out, the Council did not identify the significant perimeter defects. Mr Hubbuck stated that the number of inspections by the Council, five of which were re-checks, was a large number of inspections for a standalone dwelling. The number of re-checks indicates that the Council had serious concerns about the standard of workmanship but its inspections still failed to detect the primary defects that caused damage to this home.

[51] In her submissions Ms Divich accepted that the balustrade fixings through the covered parapets (inadequate installation of parapet flashings) and the deck handrails fixed through the membrane were defects causative of current or future water ingress. The plywood underlay was exhibiting signs of moisture ingress. I am satisfied by the evidence that this too is a primary defect which should have been observed and requisitioned by the Council during its inspections.

[52] Ms Divich also conceded that the embedding of the fascia board into the polystyrene cladding is a defect. It is an isolated defect capable of a targeted repair. Mr Jones's evidence was that it was a relatively narrow issue and it could be repaired in isolation if it was the only defect. Soft rot to the timber framing in this localised area will be remedied as a consequence of a full reclad necessitated by the primary defects above mentioned.

[13] Hampton Jones report – photos 406, 407, 409 and 410.

[53] Two other defects which the Council missed during its inspections were that there was no roof underlay under the concrete tiles and the junction between the steel fascia and the concrete tiles was allowing moisture entry. Under cross-examination by Ms McTavish-Butler, Mr Stone conceded that the consented drawings required roof underlay and that this requirement was not checked by Council inspections.

[54] In addition the Council failed to requisition for the short apron flashings and the insufficient lap coverage of the lead flashings over the tiles. There is water damage to the interior. Mr Jones said that an extension to the lead flashings would be sufficient to remedy this problem. The damage suffered would not of itself require a full reclad. Again, this defect will be remedied with a full reclad.

[55] On the other hand, none of the following have been proven to have caused damage: proprietary sill flashings, cracked cladding, insufficient ground clearance, inadequate cladding junction to the roof and the embedding of facia board into cladding. I accept Mr Hubbuck's evidence that at the cladding inspection, the Council would not have been able to ascertain the finish of this construction feature. They are not omissions by the Council at its inspections. Plaster Systems Limited provided the Council with a producer statement for the cladding itself and the Council was entitled to rely on that producer statement.

[56] Nonetheless, I conclude that the Council is liable for the defects that a reasonable Council officer, judged according to standards of the day, should have observed. In this respect Mr Stone's evidence was that the Council failed to identify that parapet capping finish was different from the consented drawings, the parapet cap fixings, the lack of roof underlay to the tiled roof required in the consented drawings, the inadequate apron flashings, and the handrail and balustrade fixings.

[57] There are two primary areas where the Council's inspections fell short of the standards of the day (which was 2003 when local authorities had become much more aware of weathertightness).[14] These shortcomings have contributed to the significant water entry and the need for recladding of the home, namely:

- parapet capping fixings; and
- handrail and balustrade fixing through the cladding capping.

These are primary causes of water entry to this property.

[58] I conclude that the Council was negligent in failing to ensure that the finish to the parapets and handrail balustrade fixings complied with the Building Code and in failing to institute a regime that was capable of identifying these defects. I conclude that the Council's inspections did not identify these primary weathertightness issues. The experts were unanimous that this home requires a full reclad as a consequence of these two primary defects. Because of their importance the inspection regime should have established that that these key elements were properly identified. The Council was negligent in failing to do this, in that it failed to identify defective construction at final inspection and is liable for the damage caused by such defects.

[59] I accept the Council's evidence that these primary defects were the result of poor workmanship. However, the Council's failure at the inspection process was a significant causative factor in the loss Mrs Ryang has suffered.

[60] I therefore conclude that the Council is jointly and severally liable for 100% of the total damages as set out in paragraphs [30] above and [144] below.

[14] Venning J considered that by 2003 the leaky building problem was common knowledge; *Byron Avenue*, above n 11.

Claim against the builder

[61] The alleged builder is Mr David Lee. He was served with documents for this proceeding on 2 December 2009 at 11.00am. Mr Lee signed for the documents which were served on him. He has not participated in the proceedings.

[62] Mr Stone, the Council's inspector during construction, gave evidence that Mr Lee was the builder and the contact person during construction. The Council's inspection sheets confirm this.

[63] Mr Gilmore, the sole shareholder and director of Paton Roofing Services Limited, confirmed in his brief of evidence that Mr Lee was the builder. He said he contracted directly with Mr Lee.

[64] Mr Mark Coles, the sole director and shareholder of Plaster Developments Limited, gave evidence that, although this was the first home that he worked on for Mr Lee, he subsequently worked on six or more other homes for him. Mr Coles' evidence is that Mr Lee was the developer, head contractor and builder of this home. Mr Coles stated that Mr Lee was in charge of sequencing the subtrades and organising and supervising the gang of carpenters Mr Lee engaged. Mr Coles said that Mr Lee always had eight to ten carpenters on site during the time of Mr Cole's involvement. He stated that Mr Lee himself was frequently on the building site. Mr Lee was in charge of building a number of homes in the street about the same time. The transcript of the hearing shows the following:

> **Adjudicator**: Who engaged Plaster Developments Ltd to do the cladding on this house?
> **Mr Cole**: Mr David Lee.
> **Adjudicator**: And can you recall meeting Mr David Lee and conferring with him regarding this job?
> **Mr Cole**: I do. I remember meeting him on site in which polystyrene was on going over a price he was very concerned

as he wanted his project to move on and wanted to see how it could be changed back to the *design*.

Ms Divich: Was Mr Lee onsite when you were onsite?
Mr Cole: Mr Lee frequented the site several times a day because he has many workers, up to 9 or 10 a day, who could hardly speak English so he had to interpret everything.

Ms Divich: What was he doing when he was onsite? Was he supervising work or telling them what to do; what was he doing?
Mr Cole: He had an incredible input, he was the developer, organising his men to do the work.

Mr St John: Do you know if Mr Lee was the developer, the builder or organising this for somebody else?
Mr Cole: I would say he is all three, Euro-Asian Developments I think he was, I believe...I think he is the director of that company.
Mr St John: Yes
Mr Cole: And he was also onsite, he had workers; I don't know if he had them working contract or wages but he had them working solely for him and he had the input of telling us how much he was going to pay us and also what work needed to be done.
Mr St John: You know the phrase the head-contractor, the person who organises all the subbies and the such like?
Mr Cole: Yes.
Mr St John: Is that how you would characterise Mr Lee?
Mr Cole: Yes it would.
Mr St John: Can you recall how he paid you? Whether it was it on a personal cheque, cash or a company cheque?
Mr Cole: I can't recall it may have been a cheque.
Mr St John: Was it he who was responsible for sequencing the works?
Mr Cole: He was.
Mr St John: He told you when to arrive onsite? Or he told you when they would be ready for you is probably the better way of putting it?
Mr Cole: Correct.

> **Mr St John**: And you personally observed him directing tradesmen onsite?
> **Mr Cole**: Most definitely.

[65] I am satisfied from the Council property file and inspection sheets, and the evidence of Mr Stone, Mr Gilmore and Mr Coles that Mr David Lee was the builder and the contractor responsible for engaging and sequencing the subtrades. Mr Lee owed Mrs Ryang a duty of care in tort to exercise reasonable care to achieve a sound building, as the builder and manager of the entire building project.

[66] Mr Lee project managed the building of this house. "Project manager" is but a job title; liability arises when the project manager has a role which encompasses responsibility to ensure proper construction. Brewer J stated in *Auckland City Council v Grgicevich,*[15] that as a matter of policy those who exercise responsibility for the construction of residential buildings do owe a duty of care to the eventual owners for that responsibility. I am also entitled to infer that he was responsible from his failure to participate in this proceeding.[16] I have concluded from the evidence Mr Lee's relationship as project manager with the purchasers and subsequent owners of this home is sufficiently proximate that a duty of care does arise.[17]

[67] Weathertightness is inherently part of competently constructed buildings.[18] Those who undertake building work are required to achieve weathertightness in their role as builder.[19]

[68] I am satisfied Mr Lee was in charge of sequencing the subtrades. Mr Smith and Mr Jones stated that it is the responsibility

[15] HC Auckland CIV-2007-404-006712, 17 December 2010.
[16] s75 WHRS Act 2006.
[17] *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC); and *Auckland City Council v Grgicevich* HC Auckland, CIV 2007-404-6712, 17 December 2010.
[18] *Boyd v McGregor* HC Auckland CIV-2009-404-005332, 17 February 2010.
[19] *Mt Albert Borough Council v Johnson,* above n 7.

of the builder/project manager to ensure that the timing of the contractors onsite was undertaken correctly. Mr Wiemann, and especially Mr Jones and Mr Smith, stated that the primary reasons for the leaks to the parapets are the inadequate junctions between the metal caps and the fixing through the parapet caps. While no one at the hearing was able to advise who constructed and capped the parapets, all the experts agreed that it was a careless job and that it was unlikely to be the work of a metal roofing contractor, for the home had no metal roof. They also said it would not usually be undertaken by a tile roofing contractor. They said that most likely this work was performed by the builder.

[69] I am satisfied from the experts that the main roof parapet problems relate to poor parapet installation and I accept the evidence of Mr Smith that the builder with overall control of building a home should properly address the sequencing issues such as the timing of the membrane application, the cladding installation, the fixing of the deck balustrades, the waterproofing and capping of the parapets, and the fixing of the guttering.

[70] The evidence of Mr Jones, and especially Mr Smith and Mr Nesbit, is that the builder responsible for the building site should have adequately dealt with all sequencing issues. Mr Smith said the site controller (who I am satisfied was Mr David Lee) is responsible for such matters.

[71] In summary, Mr David Lee had overall involvement in and control of the building of this home. Mr Lee project managed the build and owed the claimant a duty of care to discharge his responsibility as project manager in a way that would ensure construction to the standards of a reasonable and careful person in his position, so as to prevent loss to subsequent owners. Mr Lee's building management was not competent. All the experts expressed the opinion that the house exhibited poor workmanship. The house

was not constructed weathertight. It was not code compliant. For those reasons Mrs Ryang succeeds in her claim against Mr David Lee because he failed to ensure proper standards of workmanship in breach of his duty of care to her which has caused widespread damage and loss resulting in the need for the home to be fully reclad.

[72] I find that Mr Lee is jointly and severally liable to Mrs Ryang for the full amount of the established claim.

Claim against the draftsman

[73] Mrs Ryang alleges that the third respondent, Mr Reyes, was the designer of the home and drew plans for its construction. Mrs Ryang claims that the drawings had insufficient detail to allow proper and effective construction. It was alleged that there was inadequate detailing to the decks, flat roofs and cladding. Because the home leaks in these areas, Mrs Ryang alleges that Mr Reyes has breached his duty to her and is liable for the damages she now seeks.

[74] In his response filed on 7 May 2010, Mr Reyes admitted that he contracted with the developer to design the home and drew the plans and applied for the building consent. Mr Reyes' response said he had no liability to Mrs Ryang because the Council checked the plans and issued the building consent. Mr Reyes did not participate in the hearing.

[75] Ms McTavish-Butler quite correctly submitted that designers are: [20]

> Subject to a tortious duty to use reasonable care to prevent damage to persons to whom they should reasonably expect to be affected by their work...; and
> It is no defence that the plans were accepted by Council...

[20] *Blair & Co Limited v Queenstown Lakes District Council* [2010] 3 NZLR 17 at [3].

[76] Mrs Ryang relies on the expert evidence of the assessor, Mr Wiemann, as to the lack of detail in the plans. Mr Wiemann's report stated that the plans were inadequately detailed, specifically regarding the decks, flat roofs and cladding. [21] He confirmed this at the hearing. He conceded that significant aspects of the home were not built in accordance with the consented plans.[22] Even so, in Mr Wiemann's view the home could not have been built weathertight because of insufficient detailing in the plans.

[77] However, Mr Cartwright conceded that a reasonable builder could have built a weathertight home from the consented plans. Mr Jones, while accepting that the plans had some design flaws, stated that the home was not built strictly in accordance with the consented drawings and, in any event, the plans showed sufficient detail to enable a competent builder to build a weathertight home. Mr Jones said that a competent builder, where necessary, would refer to the relevant manufacturer's installation literature.

[78] The evidence regarding the designer's involvement shows that the plans were solely drawn for consent purposes. There was no evidence that the designer was involved in either supervision of the building or the building process itself.

[79] I am satisfied from the evidence of Mr Jones, who is an experienced surveyor, and Mr Cartwright, who is an experienced builder and former building inspector, that the drawings were sufficient to allow a competent builder to complete a weathertight home satisfactorily.

[80] The Court of Appeal in *Sunset Terraces* upheld Heath J's conclusions that designers in preparing plans are entitled to assume that a reasonable builder would have access to and rely on

[21] See paragraph 16 page 56.
[22] See paragraph 9.6 at page 12.

manufacturers' specifications and that this documentation did not need to be repeated by the designer in the plans.[23] In addressing those issues, he described the differences between architects, architectural designers and draftspersons.[24] Heath J listed the absence of details with the drawings in that case and described the plans as skeletal in nature and was critical of the specifications.[25] Despite the inherent faults, Heath J concluded, for the same reasons he gave in respect of the Council's obligations in relation to granting building consents, that the dwellings in *Sunset Terraces* could have been constructed in accordance with the Building Code from the plans and specifications.[26] That would have required the builders to refer to known manufacturers' requirements and specifications. He held that it was reasonable for Council officers to assume builders would refer to such material and that was an appropriate assumption for Council officers to make. He held that the same tolerance ought also to be given to the designer. He held that the designer did owe a duty of care to the owners beyond his contractual obligations but found no material losses were caused by any alleged deficiencies.[27]

[81] Having regard to those principles and findings, I have concluded that Mr Wiemann, who is an architect, has applied a standard to the consented drawings higher than the duty of care set by the Court. I prefer the evidence of Mr Jones and Mr Cartwright in this regard and I determine that Mr Reyes met that standard.

[82] Ms McTavish-Butler at the commencement of the hearing withdrew Mrs Ryang's claim against the Council for issuing the building consent but continued with the claim against Mr Reyes. Mr St John submitted that at the same time the claim against the designer should also have been withdrawn, because of Heath J's

[23] *North Shore City Council v Body Corporate 188529* [2010] NZLR 486 (CA).
[24] *Body Corporate 188529 & Ors v North Shore City Council & Ors* HC Auckland CIV-2004-404-3230 at para [492] to [538].
[25] *Blair & Co Limited v Queenstown Lakes District Council,* above n 19, at [540].
[26] *Blair & Co Limited v Queenstown Lakes District Council,* above n 19, at [545].
[27] *Blair & Co Limited v Queenstown Lakes District Council,* above n 19, at [547].

view that the same tolerance afforded the Council ought to be given to the designer.[28] In any event for the reasons set out above, I determine that the claim against the designer, Mr T Reyes, fails.

Claim against the plasterer/cladder

[83] Mrs Ryang claimed that Plaster Developments Limited breached its duty of care to her. She claimed that when the cladding was installed and the plastering applied to her home, Plaster Developments Limited breached that duty of care in that its building work was not carried out in accordance with the Building Code and good trade practice. Mrs Ryang alleged in her amended statement of claim that there are cracks in the cladding at several locations, that the cladding had been installed hard onto the membrane surface over the upstand at the flat roof and deck junctions above level 2, and that, on the east elevation, at the circular column supporting the roof over the entrance way the cladding was taken down onto the ground without any clearance, thereby allowing moisture ingress. Mrs Ryang relied on Mr Wiemann for her expert evidence.

[84] The experts' conference identified three cladding defects. The experts accepted that each was an isolated matter which could be repaired in isolation and none was causative of the need to reclad this home.

[85] The first cladding installation defect identified by Mr Wiemann and Mr Jones was to the front entrance supporting the canopy.[29] It was described as insufficient ground clearance and an inadequate cladding junction to the roof beam. Mr Wiemann and Mr Jones agreed that while there was a high moisture content in the timber column supporting the canopy, this was a minor item overall and if the timber frame of the column had been treated with preservative, then there was no significant problem. Whether the

[28] *Blair & Co Limited v Queenstown Lakes District Council,* above n 19, at [545].

timber frame was treated or not was unknown, although the consented drawings required the timber for the frame to be H4 treated.

[86] Mr Smith is an expert for EIFS cladding, the Plaster Systems Limited proprietary cladding system. Mr Smith did not agree with Mr Jones' evidence that taking the cladding down to ground clearance at this column was not good trade practice. Further there is no evidence that this alleged defect caused any damage.

[87] Mr Wiemann did not undertake destructive testing to establish the type of timber where there was a moisture content reading of 18.4%. I agree with Mr Smith's view that this is not a very high reading. The timber beam from which the reading was taken was (according to the consented drawings) required to be treated, and Mr Hubbuck's commented that the timber beam is likely to have been CCA treated. Mr Smith stated that because of preservative salts contained in treated timber, the moisture reading can be elevated.

[88] The second defect related to the proprietary sill flashings. Mr Jones and Mr Wiemann stated that these flashings were likely to have allowed water ingress although neither was entirely clear about this. Mr Wiemann could not state whether the sill flashings were installed properly but he did state that the sill flashings were in place. This defect was solely to the corner window on the east side.[30] Only two windows were tested by Mr Wiemann but both showed timber damage.

[89] Mr Mark Coles, the sole director and shareholder of Plaster Developments Limited represented the company at the hearing. He gave evidence that when he was first engaged by Mr Lee to arrange

[29] See photo 14 of the Assessor's report.
[30] See photo 89 Assessor's report.

the cladding of this home, the PutzTechnik cladding system was partly installed and had been requisitioned by the Council as non-conforming. This caused Mr Lee to return to the consented drawings which required an EIFS Plaster Systems Limited cladding. Plaster Developments Limited was a licensed operator for Plaster Systems Limited. It was engaged by Mr Lee and arranged the completion of the cladding and the application of the plaster finish.

[90] The polystyrene backing to the PutzTechnik system had already been installed at the time Plaster Developments Limited was engaged. This polystyrene, while slightly different from the Plaster Systems EIFS cladding, remained in place and Mr Coles' company engaged contractors to complete the compliant cladding system on top of the polystyrene already installed. The fitted polystyrene did mean there had to be cutting around the window joinery in order to install or retro-fit the Plaster Systems Limited flashings and the corner soakings. While Mr Jones and Mr Wiemann had some doubt as to whether such retro-fitting was good trade practice, Mr Smith gave evidence that it was a proper installation. Indeed Mr Smith was involved in writing the EIFS installation material permitting such retro-fitting.

[91] Mr Stone, who was a Council officer, gave evidence that at the time of his inspection during construction the builder told him that he intended to apply the "PutzTechnik solution 300" cladding. The building plans stated the cladding was to be Insulclad EIFS cladding. Mr Stone told the builder that the proposed PutzTechnik cladding was not approved cladding. Mr Stone mentioned that, following his inspection on 28 April 2003, he spoke to his supervisor at the Council, Mr De Silva, who confirmed that PutzTechnik cladding was not an approved cladding system and as a result of this Mr Lee reverted to the Insulclad Plaster Sytems Limited EIFS system.

[92] The experts were unable to conclusively state that the retro-fitting of the sill flashings to the two windows was the cause of water ingress at these two locations. The corner window mitre joint showed a break and, according to the experts, it was a probable water ingress location causing damage to the framing timber beneath the window.

[93] Mr Coles' company did not install the joinery. The experts were also of the view that framing timber around the two windows could have been damaged by water ingress from above. Mr Jones and Mr Wiemann were not at all clear that water was ingressing as a consequence of the retro-fitting of the sill flashing. This defect is not proven.

[94] The third alleged cladding defect was cracking to the cladding. This was highlighted at the experts' conference by Mr Wiemann and Mr Jones. Both accepted that there was not a great deal of cracking in the cladding. Insulclad homes are not seen as exhibiting significant cladding cracking problems. For an Insulclad home to exhibit cracking there needs to be some other underlying problem, the experts advised.

[95] At the hearing, there was much discussion about whether this home required horizontal control joints. The experts concluded it did not. Horizontal control joints are needed for Insulclad homes of more than two storeys. The Insulclad technical literature requires control joints to be installed every 20 metres horizontally for walls exceeding two storeys vertically. Mr Stone and Mr Wiemann accepted that there is no wall area that exceeds that height with this home. In the opinions of Mr Jones and Mr Wiemann, lack of control joints is not a cause of damage to this home.

[96] One further alleged cladding defect discussed at the experts' conference was the embedding of the fascia board into the

polystyrene cladding. It was probable that a back flashing was not installed by the builder. Mr Jones and Mr Wiemann both said this was a localised defect. It has caused some framing damage but solely at the entrance canopy on the east side.[31] Mr Wiemann found early soft rot to the timber framing in this localised area. Both experts agreed that it could be repaired in isolation.

[97] I am satisfied from what I heard from the experts that Plaster Developments Limited did play some part in causing this defect. However it appears to have been a consequence of a lack of sequencing between the builder, the flashing installer (probably the builder) and the plastering finisher. Mr Coles' evidence is that the fascias were installed and the polystyrene was later erected around it when his company became involved. His company's role was to have its subcontractors complete the plastering and seal around the fascia installation passing through the plaster. Thus Plaster Developments Limited was the last trade involved in constructing this building element and has some responsibility for this defect, although the evidence was inconclusive as to how causative it was. There was insufficient material before me pointing to any substantial causation by Plaster Developments Limited.

[98] This was a relatively minor issue and there was no connection between it and the material cause of Mrs Ryang's loss.[32] Mr Jones and Mr Wiemann both stated that this was a localised defect and while it had caused framing damage, it could be repaired in isolation.

[99] If this was the only defect to the home then I am satisfied that the damage would not have been particularly significant and the matter could be remedied by a targeted repair. Mrs Ryang did not call any evidence as to the cost of repairing these discrete items of

[31] See photos 92 and 93 of the Assessor's report.
[32] *Body Corporate 188529 & Ors v North Shore City Council & Ors* (*Sunset Terraces*) see above n9 at paras [232], [233], [234] and [236].

damage. I am not able to put a dollar value on this work, for there was no evidence of how much this would cost.

[100] For the above reasons the claim against Plaster Developments Limited does not succeed.

Claim against the butynol membrane applicator

[101] Mrs Ryang's allegations against Paton Roofing Services Limited (Paton) included that the butynol rubber membrane did not adhere to the substrate at the junction between the substrate and the parapet wall, that water was ponding at areas of the roof, that there was bubbling and delaminating of membrane edges, that the tiled roof over the lounge was constructed with a gap between the upper tiles and the lead flashing, and that the parapets were inadequately installed.

[102] Paton's response to the claim was that it had only been engaged by Mr Lee, the second respondent, to apply the initial/first layer of butynol rubber membrane to the flat upper roof and deck substrates. Paton did not install the parapets, the parapet flashings, the lead flashings or the tiled roof. At the start of the hearing, Mrs Ryang withdrew her claims against Paton regarding the parapet and tiled roof installation.

[103] Mrs Ryang's allegations against Paton relied upon the WHRS assessor Mr Wiemann's evidence impugning the adequacy of the installation of the butynol rubber membrane. At the experts' conference, Mr Wiemann and Mr Jones were of the view that the butynol rubber membrane was inadequately installed to the outer edge of the deck on level 1 and that the membrane was incorrectly cut and folded over the plywood at the entrance canopy. However, by the end of the hearing Mr Wiemann had revised his opinion, as had Mr Jones.

[104] Paton's evidence was presented by its director Mr Philip Gilmore. Mr Gilmore stated that Paton is in the business of installing metal roofing as well as butynol membrane roofing. It does not engage in installing balustrades, cladding or bricklaying. It has been in business for some 35 years. This particular job was the first that Paton undertook for Mr Lee. Paton is an agent for Ardex New Zealand Limited, a significant supplier of rubber membrane. Mr Gilmore said that Paton sources the butynol rubber roofing membrane from Ardex and then engages subcontractors to install it. Paton priced and quoted the job for Mr Lee, and once engaged by Mr Lee subcontracted the application of the membrane to Verne Patten Waterproofing Limited.

[105] Mr Gilmore's evidence was that Paton was responsible for the supply and installation (albeit by a subcontractor) of the butynol rubber membrane except for the second layer of butynol rubber membrane laid over a tiled surface on the eastern no.2 deck.

[106] Mr Gilmore and Mr Nesbit visited the property before the hearing and before submitting their respective briefs of evidence, to view the works that were undertaken by Paton. Mr Gilmore and Mr Nesbit did not visit the building site during construction. Mr Smith did not visit the site

[107] I am satisfied from the evidence of Mr Gilmore that whilst Paton was engaged and responsible for the laying of the initial layer of the butynol rubber membrane, it was not responsible for the overlay of the butynol rubber membrane applied to the tiled surface of the wooden deck (the eastern No.2 deck). Mr Nesbit's evidence was that on that eastern deck, a layer of butynol rubber membrane had been glued on top of an existing deck surface but it was not of the standard of Paton's usual work. It is unclear as to why this further membrane had been installed. I am satisfied that it was not

work undertaken by Paton and that it was work undertaken some time after completion of the home. Although the reason for its installation is unclear, both Mr Wiemann and Mr Smith were of the view that the method used to install the second membrane may well have allowed moisture ingress.

[108] Mr Wiemann identified two areas where he was critical of the membrane installation:

i. the entry way canopy; and
ii. the deck edging.

[109] Mr Wiemann and initially Mr Jones were critical of the membrane deck edging details. Mr Smith was of the view that whilst the detailing in this area is untidy, there appears to be no moisture ingress. Photographs included in Mr Jones' brief indicate that the membrane was installed prior to the gutter installation. I accept the evidence of Mr Smith and Mr Nesbit that it is likely the gutter and the gutter guard were installed after the membrane and that it is most likely that such installation has damaged the membrane in the corner of the entry way canopy and the deck edging. I further accept the evidence of the experts that there is moisture ingress at the deck edging that is likely to be from penetrations in the membrane caused by the fixing of the balustrade base plates and not the finish of the membrane to the deck edging.

[110] Mr Cartwright's evidence was critical of the lack of fall to the flat roofs and he also gave a lengthy description of why ponding might cause moisture ingress. Mr Cartwright was unable to provide any evidence to show that moisture ingress has or is likely to have occurred because of the ponding and the lack of fall he alleged.

[111] I accept the evidence of Mr Nesbit that whilst there is evidence of large ponding on level 3 flat roof area at the south

western side, this is not causing water ingress. This is because all the membrane lapping on the butynol has seam tape installed, as specified in the butynol technical manual. Periodic ponding, Mr Nesbit stated, will not affect the butynol as the same product is used for pond and tank liners.

[112] Whilst there have been two repairs carried out on this level 3 flat roof,[33] I accept Mr Nesbit's evidence that they were not carried out according to industry standards or good trade practice. However, there is no evidence of water ingress as a consequence. I also accept Mr Gilmore's and Mr Nesbit's evidence that such repairs were not undertaken by Paton. Paton's subcontractors' invoice does not indicate it did this work and Mr Gilmore's evidence is that no work was undertaken by Paton on this property after 3 April 2003.

[113] Mrs Ryang also claims that the butynol rubber membrane did not adhere to the substrate in places. The assessor's invasive testing showed that an adhesive was used to affix the membrane to the substrate. Moisture getting to the adhesive compromises the effectiveness of the adhesive. There is no evidence that moisture has penetrated the membrane except where the membrane has been penetrated by balustrade and parapet capping fixtures. While there is evidence that moisture has crept under the membrane and contaminated the solvent based adhesive, I do not find that Paton is responsible for that, and I accept Mr Nesbit's evidence that membrane coming away from the substrate in places does not in itself lead to damage. The evidence of the experts satisfies me that the moisture beneath the membrane and in the substrate has come from the inadequate parapet capping installations.

[114] Mr Nesbit, Mr Smith and Mr Jones all stated that although the roofs finished with butynol membrane have been installed at a low pitch, there is no evidence that the membrane is leaking. The

ponding was most likely to have been caused by slight settlement of the building over the years since construction. I accept Mr Smith's evidence that the Building Code Standard E2/AS1 of 1998 requires that butynol membrane roofs have a minimum of 1.5 degree pitch or that recommended by the manufacturer. Ardex, the manufacturer of this butynol membrane, allowed its use on lower pitches provided that seam tape is used to form the joints. As mentioned earlier, seam tape has been properly used when forming the joints.

[115] At the experts' conference, and initially at the hearings, Mr Wiemann and Mr Jones were critical of the way in which the butynol membrane was not brought up and over the top of the parapet. It terminated at the edge of the wall framing at the junction of the EIFS cladding, instead of covering the top edge of the cladding.

[116] I am satisfied from the experts' evidence at the hearing, that at the time of construction in 2003, it was not standard practice to have an underlying butynol membrane when using metal or EIFS parapet capping. I accept Mr Smith's evidence in this respect. The applicable BRANZ Good Practice Guide for Membrane Roofing published in November 1999 showed the membrane terminating before the top of a wall clad with a metal cap flashing. Mr Jones revised his earlier opinion on this matter. The consented plans show a membrane to the edge of the wooden framing on the parapet. This is precisely what was constructed. The consented plans do not show that the membrane was then to be taken over the top of the 40mm of Insulclad. Nor could it have seen, because the cladding was installed after the membrane had been applied.[34] While the allegations initially were that the membrane does not adequately cover the cladding, Mr Nesbit said the membrane could not cover the cladding at all because the cladding was not in place when the

[33] See WHRS Assessor's photo 9 and 10.
[34] See photo 114 of the Assessor's report page 190. This photo shows that the membrane has been turned down over the timber framing and the cladding put on top.

membrane was applied and nor was that intended method of construction.

[117] I am satisfied, having regard to the experts at the hearing, that the membrane was not adhering at places to the substrate and that some bubbling had formed but neither had anything to do with Paton's installation. Nor did it lead to any water ingress. Again, what has caused water ingress to this home are penetrations through the metal capping of the parapets, the balustrade fixings through the membrane and the poor junctions of the parapets.

[118] Counsel for Paton, Mr St John acknowledged that Paton did owe a duty of care to Mrs Ryang to install the membrane in accordance with the plans and specifications and good trade practice at the time. It did not owe a duty to ensure that the building was watertight, Mr St John submitted.

[119] Paton clearly was responsible for causing the installation of the initial butynol membrane waterproofing layer to the roof and decks. After questioning, Mr Wiemann did accept that it was not possible to link damage from water ingress to any failure of the rubber butynol membrane. It was his view however that the bubbling and delamination suggested that the membrane had failed. I am satisfied from the credible evidence of Mr Nesbit and Mr Smith that that is not so.

[120] Mr Wiemann identified leaking due to deficiencies in the flat roofing parapets and handrail installation. These are sequencing issues, Mr Jones said, and come about because the membrane was installed before the cladding and the balustrades. I accept the evidence of Mr Jones that he would expect that the person with overall control the building site, Mr Lee, would have adequately dealt with any issues arising from sequencing of the various trades. That person clearly did not take into account that the cladding would be

damaged if it was later penetrated by the fixing of the top cap flashings, because there was no flashing tape protection to cover the whole width of the parapets. Mr Jones said that Mr Lee should have realised that this junction was vulnerable.

[121] Ms McTavish-Butler attempted to discredit the evidence of Mr Nesbit and Mr Gilmore when they stated that Paton properly installed the initial membrane and had nothing to do with the second layer of membrane on the eastern no.2 deck, because neither had visited the site during construction. As mentioned earlier, I found the evidence of Mr Gilmore and Mr Nesbit credible and honestly given and I accept their evidence. There was no evidence adduced that the butynol rubber membrane had failed or was otherwise defective.

[122] Mr Wiemann noted a cut that he found to the drop edge. At most, he identified it as the cause of future likely damage. While it is not possible to know who cut the drip edge, it is a probable water entry point. I accept the evidence of Mr Nesbit and particularly Mr Smith that it was more likely that the drip edge was cut by the gutter installer.[35] I conclude that the membrane was not a substantial or material cause of Mrs Ryang's loss. From the evidence I listened to at the hearing I conclude that it did not have any real influence on the occurrence of the damage or loss in this case.[36]

[123] Mr Smith and Mr Nesbit agreed that the membrane requires replacing but solely because of the need to reclad. The reason they gave for removing and replacing the butynol rubber membrane was because the cladding had to be taken off and the home reclad to remedy the significant defects. Recladding requires removal and reinstallation of the membrane.

[35] See WHRS Assessor photo no. 16. It was apparent to Mr Smith that because the gutter and the guard have been installed after the application of the rubber butynol membrane, the membrane cut was caused by the gutter installer.
[36] *Sunset Terraces*, above n 14, at [233] – [234].

[124] I accept that the experts' evidence showed that the reasons for moisture ingress to this home were not the responsibility of Paton. Whilst there are some minor issues with the butynol rubber membrane, any moisture ingress that has occurred is not the responsibility of Paton but of subsequent trades.

[125] For the reasons set out above, Mrs Ryang's claim against Paton Roofing Services Limited fails.

Council's cross-claim against Building Surveyor and Reporter

[126] In April 2007, Mrs Ryang's vendors engaged Wise & Associates Limited to inspect the home and produce a report on its condition. Mr Russell Mathews, an employee of Wise & Associates Limited, was instructed by that company to perform a visual inspection of the home on 27 April 2007. On 30 May 2007 Mr Matthews produced a written report on his findings which was headed "Peace of Mind Report on 36 Gold Street, Albany". Mr Matthews concluded in that report that the home was in reasonable order, appeared sound and had been well maintained.

[127] The Council alleges that the report was prepared for Mrs Ryang's vendors for marketing purposes and that Mrs Ryang relied upon the report when deciding to purchase the home. The Council further alleges that Wise & Associates Limited and Mr Matthews each owed a duty of care to the claimant to produce the report with reasonable skill and care. The Council alleged that they breached that duty of care by failing to identify the defects set out in the statement of claim.

[128] Mr Mitchell, counsel for Wise & Associates Limited and Mr Matthews, submitted at the hearing that Mrs Ryang did not rely on the report when deciding to purchase the home, and that the report was produced with reasonable skill and care.

[129] Mr Matthews and the director and shareholder of Wise & Associates Limited, Mr Terrence Henshaw, confirmed that Mr Matthews was an employee. Mr Matthews offered the vendors the choice of a brief non-invasive report based on a visual walk-through inspection and a fully comprehensive written report following invasive testing. The fee charged for the visual walk-through inspection was modest. Mr Matthews stated that the vendors chose a visual non-invasive report. Mr Matthews and Mr Henshaw both stated that they were not aware that the home was to be placed on the market. Mr Matthews said that his understanding from the vendors was that they simply wanted a report about the performance of the home. He stated that it was incorrect of him to have mentioned twice in the report that it was a written pre-purchase inspection. His explanation is that his typist incorrectly used the wrong report template and he overlooked it. Mr Matthews stressed that the inspection and resulting report was simply a peace of mind report for the vendors. The report was headed up as such. I accept that evidence as honest and credible.

[130] Mr Matthews undertook moisture reading probes from the inside of the home and he stated at the hearing that in his opinion there was no evidence of any defects or water ingress.

[131] Both Mr Matthews and Mr Henshaw mentioned that the report clearly stated that it was a non-invasive report and that no invasive testing had been carried out. The general conditions stated that the report was a visual one, and only of the building elements that could be seen easily, and that the reporter was unable to report on any part of the concealed structure or whether the house was free from defects. The general conditions stated that the report did not include a structural inspection. The report began with the heading “Peace of Mind Report on 36 Gold Street, Albany”.

[132] There was a handwritten notation on the copy of the report produced at the hearing stating that a copy had been sent to Barfoot & Thompson in Albany, real estate agents. Mr Henshaw stated that he did not know that the report had gone to a real estate agent.

[133] Mr Matthew said that Wise & Associates Limited's receptionist had asked him whether she could send a copy of the report to the real estate agent because the vendors had telephoned asking that a copy be sent through to Barfoot & Thompson. As an employee of Wise & Associates Limited, the receptionist imputes that knowledge to the company and as such it cannot deny knowledge that the report was copied to the vendors' real estate agent.

[134] Nevertheless, for the Council to succeed against Wise & Associates Limited the Council must establish that Mrs Ryang relied on the report when deciding to purchase the home. Otherwise there is no causal connection between the report and any loss.

[135] Mrs Ryang's evidence and that of her husband, Mr Tye Guim, was clear and unequivocal. This was the first home that Mrs Ryang had purchased in New Zealand. They had however bought a number of homes in Korea and were aware of the function of real estate agents. Mr Guim mentioned that they had a number of friends in New Zealand who were real estate agents. They knew the importance of building reports. English was clearly their second language. Barfoot & Thompson Limited's agent Mr Tony Yoo introduced Mrs Ryang and her husband to the property. He said that the property was a good bargain. He said that it was in a good area and that it was well constructed and that there was no need to get a pre-purchase report. Instead he copied Wise & Associates' report to Mrs Ryang. He assured Mrs Ryang that the property did not have any defects and that the contents of the report were correct. Mrs Ryang said that she took the agent's "word" which meant the same thing to her and husband as a "promise", that the home was in good

condition. She said that both she and her husband had total trust in Mr Yoo.

[136] I conclude from Mrs Ryang's and Mr Gium's evidence that while they were aware of the importance of building reports, and stated that they did rely upon the report to buy the home, they relied principally on the advice and the assurances of the vendor's real estate agent, Mr Tony Yoo and not the report. Mrs Ryang said that she took no legal advice before signing the purchase agreement and indeed she signed in front of Mr Yoo whom she said took her through the agreement. Mrs Ryang mentioned that she was unaware of the "leaky building" problem even though she and her husband had a number of friends in New Zealand who were real estate people. The purchase was in late 2007, early 2008 and the problem was widely known at that time. I do not find Mrs Ryang's evidence when questioned at the hearing of her lack of knowledge credible. I determine after listening to her evidence that she purchased the house not because of her reliance on the report but upon the advice and assurance from Mr Yoo and her immediate liking of the property. In my view Mr Yoo's advice broke any causal connection between Wise & Associates Limited and Mrs Ryang.

[137] Although it did not identify the clearly visible weathertightness risk factors that Mr Wiemann indentified, and was erroneously labelled as a pre-purchase report and wrongly stated that the cladding was constructed with a cavity, I determine that the cross-claim in negligence against Wise & Associates Limited fails. As a matter of policy the relationship of a building surveyor reporting in 2007 is sufficiently proximate, in spite of the reports limiting conditions, so that a duty of care could arise to subsequent owners of the property reported upon. That is because such reports were then and are now known to be "shown round" to new buyers. But I am not satisfied from the evidence of Mrs Ryang and her husband at the hearing that any significant reliance was placed by them on this

report. Instead they relied mostly upon their own judgement and especially the assurances of Mr Yoo. The causal connection between the report and Mrs Ryang's buying this house was too tenuous for a claim in negligence to succeed. In addition there was insufficient material evidence that the report has been shown to be negligent.

[138] Ms Divich informed the Tribunal during closing submissions that the Council would not be pursuing its cross-claim against Mr Matthews and it thereby withdrew such a claim.

[139] For the reasons set out above the Council's cross-claim and claim for contribution against Wise & Associates Limited must fail.

GENERAL DAMAGES

[140] Mrs Ryang seeks general damages for the stress, anxiety and inconvenience associated with her leaky home. She claims $30,000.00. Mrs Ryang and her husband, Mr Tye Guim, gave evidence of family stress, principally to their relationship, associated with their "leaky home" predicament. I determine that Mrs Ryang is entitled to general damages.

[141] Ms Divich for the Council acknowledged that if Mrs Ryang succeeds with her claim then she is entitled to an award of general damages. However she submitted that the maximum amount awarded cannot exceed $25,000.00.[37] I agree with that submission.

[142] I am satisfied from Mr and Mrs Ryang's evidence that the stress to their relationship caused by having a leaky home which Mrs Ryang experienced justifies an award near the upper limit. Her evidence of stress and anxiety emphasised the tension they caused

[37] *Findlay & Sandelin v Auckland City Council & Ors* (unreported) HC Auckland, CIV-2009-404-6497, 16 September 2010.

with her husband. I accordingly determine that Mrs Ryang is entitled to general damages of $20,000.00.

[143] In Mrs Ryang's amended statement of claim and opening submissions, she sought amounts for rental accommodation (during the remedial work) and furniture storage costs. She was unable to substantiate either claim and led no evidence in support. On the third day of the hearing the claimant withdrew her claim for consequential losses. Ms McTavish-Butler said she reserved the claimant's right to bring a claim for such losses in another forum once they can be quantified. Such losses are capable of proof in this jurisdiction and if provable should have been claimed in this proceeding. It is doubtful that managing litigation in this way is consistent with the purposes of the Act which governs this Tribunal's jurisdiction. Ms Divich objected to Mrs Ryang's counsel reservation of rights.

SUMMARY OF QUANTUM

[144] For the reasons I have set out as to quantum I determine that the quantum awarded for this claim is $427,655.04 (inclusive of GST), made up of:

Claimant's estimate of remediation costs	$439,904.51
Less deductions for betterment	$32,249.47
Sub-total	$407,655.04
General damages	$20,000.00
Total	**$427,655.04**

RESULT

[145] For the reasons set out in this determination, the Tribunal makes the following orders:

i. The first respondent, Auckland Council, breached the duty of care it owed to the claimant and is therefore jointly and severally liable to pay the claimant the sum of $427,655.04.

ii. The second respondent, Mr David Lee, is in breach of the duty of care he owed to the claimant and is therefore jointly and severally liable to pay the claimant the sum of $427,655.04.

iii. The claims against the other respondents are dismissed.

CONTRIBUTION ISSUES

[146] The Tribunal has found that the first and second respondents breached the duty of care each owed to the claimant. Each of the two respondents is a tortfeasor or wrongdoer, and is liable to the claimant in tort for her losses to the extent outlined in this determination.

[147] 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 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.

[148] The approach to be taken in assessing a claim for contribution is provided in section 17(2) of the Law Reform Act 1936. In essence, it provides that the amount of contribution recoverable be such as may be found by the Court to be just and equitable having regard to the relevant responsibilities of the parties for the damage.

[149] As a result of the breaches referred to in para [145], the first and second respondents are jointly and severally liable for the entire amount of the claim. This means that both respondents are concurrent tortfeasors and therefore each is entitled to a contribution towards the amount they are liable for from the other, according to the relevant responsibilities of the parties for the same damage as determined by the Tribunal.

SUMMARY OF THE RESPONDENTS' LIABILITIES

[150] Based on the evidence considered, I find that the first respondent, Auckland Council, is entitled to a contribution of 80% from the second respondent Mr Lee towards the amount the second respondent has been found jointly liable for. I accept Ms Divich's submission that those respondents who created the defects should bear the greater share of responsibility.

[151] The second respondent is therefore entitled to a contribution of 20% from the first respondent towards the amount the first respondent has been found jointly liable for.

CONCLUSION AND ORDERS

[152] The claimant's claim succeeds to the extent of $427,655.04. For the reasons set out in this determination I make the following orders.

[153] The Auckland Council is ordered to pay the claimant the sum of $427,655.04 forthwith. The Auckland Council is entitled to recover a contribution of up to $342,124.04 from David Lee for any amount paid in excess of $85,531.00.

[154] David Lee is ordered to pay the claimant the sum of $427,655.04 forthwith. David Lee is entitled to recover a contribution

of up to $85,531.00 from Auckland Council for any amount paid in excess of $342,124.04.

[155] To summarise, if the two respondents meet their obligations under this determination, this will result in the following payments being made to Mrs Ryang:

The first respondent	$85,531.00
The second respondent	$342,124.04
TOTAL amount of this determination	**$427,655.04**

DATED this 5th day of April 2011

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K D Kilgour
Tribunal Member