IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2009-100-000076
[2011] NZWHT AUCKLAND 16

BETWEEN	JANICE LINLEY PHILPOTT Claimant
AND	PAUL GREGORY ZDERICH (Removed) First Respondent
AND	TRUDI MAREE MCRAE (Removed) Second Respondent
AND	MICHAEL JONES Third Respondent
AND	DAVID IAN RYAN and DAVID JAMES FERRIS Fourth Respondents
AND	IAN CHARLES BUTT and BUTT DESIGN LIMITED (Struck Off) (Removed) Fifth Respondents
AND	WHANGAREI DISTRICT COUNCIL (Removed) Sixth Respondent
AND	TIM BOWMAN T/A BOWMAN ROOFING (Removed) Seventh Respondent
AND	WATCO PLUMBING LIMITED (Discontinued) Eighth Respondent

Hearing: 22 and 23 November 2010; and 13, 14, 15 and 20 December 2010.

Appearances: Mr J Browne for the claimants
Mr M Jones, third respondent – self represented
Mr W Peters, for the fourth respondents

Decision: 21 March 2011

FINAL DETERMINATION
Adjudicator: P J Andrew

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INTRODUCTION

[1] The claimant, Ms Philpott, is the owner of a leaky home in Whangarei. The house has substantial timber decay and requires a full reclad. It was built in 1996 by Mr Michael Jones, the third respondent. He was also the project manager who engaged the subtrades involved in construction. Ms Philpott purchased the house in 1999 and in 2003 discovered it was leaking.

[2] The exterior cladding of the house is an exterior finish and insulation system, known as Insulclad. There are five gable end walls extending up above the roof line to form parapets. The primary defects in construction that have caused the major leaks are the inadequately designed and constructed parapet and fascia junctions.

Problems with flashings in this area were known at the time of construction and brought, then, to the attention of Mr Jones.

[3] The primary defects are located in what experts describe as a transition area – i.e. there are generally a number of trades with responsibility for achieving weathertight construction in such location. This can include the designer, the roofer, the builder and the cladding installer.

[4] In addition to the primary defects, the claimant alleges that there are secondary defects causing water ingress, which were discovered after the assessor's original report. These defects are said to relate to the installation of the cladding around the windows ("the window component issue"). In particular, the width of sealant, used in 1996 as a flashing, is inadequate to accommodate movement between the cladding and the windows.

[5] The only remaining respondents to this proceeding are now Mr Jones, and the fourth respondents, Mr David Ryan and Mr David Ferris. It is alleged that Messrs Ryan and Ferris, both company directors, personally installed the Insulclad cladding system and that both are personally responsible for the primary and the secondary defects.

[6] Ms Philpott sues all three remaining respondents in negligence, contending that each are jointly and severally liable for the full costs of a reclad and associated losses. The total amount of damages claimed is $376,590.

[7] One of the key challenges the Tribunal faces in determining this claim is that the events at issue took place more than 14 years ago. Further difficulties arise from the fact that no evidence was given by the designer, the roofer, or the Council building inspector, all

of whom may have had some direct personal knowledge of the construction process.

[8] The critical issues the Tribunal must determine are:

a) Whether Mr Jones, the builder and project manager, breached duties of care to the claimant and, if so, what is the quantum of damages;

b) Whether Mr Ryan or Mr Ferris personally owed duties of care to the claimant and if so, did they breach those duties. In particular, did the fact that Mr Ryan, who told Mr Jones about issues associated with the primary defects in 1996, discharge any duty of care that he owed to the claimant.

FACTUAL BACKGROUND

[9] The fourth respondents, Mr Ryan and Mr Ferris, have been in business together for over 20 years. Their business is plastering and cladding installation. In 1988 the company D I Ryan and D J Ferris Limited was incorporated. The two directors of that company were Mr Ryan and Mr Ferris.

[10] In 1996, Mr Jones bought and subdivided the land at Highfield Way. He then built the house at number 65. The building consent, obtained by Mr Jones, was issued on 27 August 1996.

[11] Mr Jones was also the head-contractor and the person with overall charge of the project. He negotiated all the contracts with the subtrades. He contacted Mr Ryan and Mr Ferris to arrange for the installation of the Insulclad cladding. The cladding work was completed in late 1996. At that time, the fourth respondents' primary area of work was installation of Insulclad exterior coatings.

[12] Insulclad is an exterior coating made of polystyrene attached to the framing of the house. The polystyrene is covered with mesh which is then the subject of a plaster coating. A key component of the system is the acrylic paint applied to the plaster coating.

[13] The question of whether Mr Jones contracted with the company, D I Ryan and D J Ferris Limited, and the role played by Mr Ryan and Mr Ferris in the installation of the Insulclad system, are matters in dispute. These issues are analysed later in this decision.

[14] In 1997 Mr Jones sold the house to the first and second respondents. They were removed as parties to the proceedings by Procedural Order No 6 dated 24 February 2010. On 31 August 1999 a Code Compliance Certificate was issued by the Whangarei District Council, the sixth respondent. The Whangarei District Council was also removed as a party to the proceedings by Procedural Order No 6.

[15] Ms Philpott purchased the house from the first and second respondents by agreement dated 1 September 1999.

[16] In March 2000 Ms Philpott had a porch added over the dining room door to give shelter over the doorway during rain. Mr Malcolm Dobbs, the builder, contracted by Ms Philpott, engaged Mr Dave Ryan to carry out the necessary plastering work.

[17] At about this time Mr Ryan told Ms Philpott that at the time of construction of the house in 1996, he had told Mr Jones that there were problems with the flashings around the parapets and that they had never been finished or properly installed. Mr Ryan also told Ms Philpott that the paint originally applied to the exterior finish of the house was not the correct paint that should have been used.

[18] As a result of this conversation, Ms Philpott arranged for remedial flashings to be installed and for the exterior of the house to be painted. Hamilton Plumbing Limited installed the remedial flashings in about April 2000.

[19] In 2003, Ms Philpott engaged Guyco Construction Limited (Guyco) to repair an internal leak in the upstairs bathroom. Mr Ryan was contracted by Guyco to carry out some related plastering work.

[20] At this time, Ms Philpott discovered some rotten carpet downstairs. She asked Guyco to investigate and this led to the filing of the claim with the WHRS (November 2003). This was the first time that Ms Philpott became aware that she had a leaky home. A 2m to 2.5m part of the wall (extending from the ground to the roof height) was replaced by Guyco. Guyco was not instructed to investigate more generally or to write a report.

[21] On 1 December 2003, the company D & D Texture Craft Limited was incorporated. Mr Ryan and Mr Ferris are the two directors of that company. The company D I Ryan and D J Ferris Limited was placed in liquidation in June 2005.

[22] In 2005 the claimant attempted unsuccessfully to have her claim referred to mediation.

[23] The assessor, Mr Hadley, completed his original report on 29 November 2004. An addendum report was issued on 25 November 2008.

DEFECTS AND DAMAGE

[24] Independent expert evidence was given by the assessor and Mr O'Sullivan of Prendos New Zealand Limited, a witness for the claimant. The differences between the assessor's original report and the addendum report are attributable to both a change in the

legislation and further investigation conducted by the assessor following Mr O'Sullivan's report.

[25] All parties accept that there has been significant water ingress and damage. It is also generally accepted that one of the primary causes of water ingress has been problems with the flashings in the parapet- fascia junction area. However, in relation to other significant defects identified by the assessor and Mr O'Sullivan, the respondents, to varying degrees, have challenged and sought to put to proof, the opinions of the two experts. This has been an evolving process, with the effect that some of the criticisms and challenges made by the respondents were not put to the assessor or Mr O'Sullivan in cross-examination.

[26] In my view, the evidence of the assessor and Mr O'Sullivan is to be preferred and accepted as the reliable assessment of the key defect in construction and damage caused to Ms Philpott's house. In contrast to the somewhat self-serving evidence of Mr Ryan and Mr Jones in particular, the assessor and Mr O'Sullivan are independent experts who gave evidence in a balanced and objective manner.

[27] The significant defects in construction that have led to water ingress, as identified by the assessor and Mr O'Sullivan, can be summarised as follows:

a) Inadequate and non-standard construction of the cladding -fascia board junctions at the gable end of the parapets. In particular the texture coating of the cladding has butted up to the timber fascia board contrary to the Insulclad data sheet which requires plaster to be forced up behind the barge board 30mm minimum. The fascia board details also had the top edge exposed where they projected past the apron flashing.

b) The cladding/roof junction was inadequately constructed. The join relied on sealant which has failed. The transition point on the apron flashing where it changes from an upstand (from behind the cladding) to a turn down (over the cladding) is a weak point and contributing factor to the water entry at this detail.

c) The plaster coating has not been taken behind the end of the spouting (spouting had been fixed before the cladding) and provided an entry for water into the framing.

d) The handrail has been fixed into the flat balcony top wall, allowing water ingress and damage.

e) The soffit on the western wall has not been constructed in accordance with the Insulclad instructions.

f) The junction between the butyl rubber roof and the cladding has relied on sealant with inadequate width and has therefore failed.

g) A variety of minor matters such as lack of height separation between the cladding and the ground at the side of the garage door and around the front entry, and the embedment of the cladding into bare ground.

[28] In relation to the window component issue (i.e lack of width of sealant between the aluminium joinery and cladding) which the assessor described as a secondary defect, Mr Ryan and Mr Ferris called evidence from Mr Knol, business manager of Plaster Systems Limited. That company manufactured the Insulclad system.

[29] Mr Knol, together with Mr Ryan and Mr Ferris conducted some tests on the windows of the house, with a view to determining

whether it was the windows themselves, rather than the lack of sealant around them, that was the source of leaking in areas around the windows.

[30] The Tribunal did not find Mr Knol's evidence at all helpful and is not prepared to give it any weight or significance. Mr Knol cannot possibly be considered an independent expert witness as contemplated by the High Court Rules and in particular the Code of Conduct set out in schedule 4 to those rules.

[31] Mr Knol's brief contains no reference to schedule 4 (as required by the Chair's Directions) and he accepted that he has never previously conducted similar tests on windows to ascertain whether they leak or not. Mr Knol's background is essentially in sales, marketing and business administration and he has no relevant technical experience or qualification. The test he was involved in with the windows of this house was actually carried out by Mr Ryan and Mr Ferris with Mr Knol observing. It would be quite wrong for me to give any weight to this evidence and I disregard it.

[32] While the Tribunal is not bound by the Evidence Act 2006, sections of that Act relating to expert evidence do provide some helpful guidance to this case. Section 25 provides that an opinion by an expert is admissible if the fact-finder is likely to obtain substantial help from the opinion in ascertaining any fact or consequence. Section 26 provides that in civil proceedings experts are to conduct themselves in accordance with the applicable rules of Court.

[33] On the window component issue I conclude that the claimant has established that an insufficient width of sealant between the window joinery and the cladding is also a defect in construction, albeit a secondary defect.

[34] I accept the submission from Mr Peters that the window component issue is to some extent inconsequential because of the nature and extent of the damage caused by the primary defects which were generally at locations above the windows. On their own, the primary defects require a full reclad.

LIABILITY OF MR JONES

[35] The claimant alleges that Mr Jones, the builder and head contractor, has overall responsibility for her loss arising from defective construction. It is contended that Mr Jones was a "developer and project manager" and owed non-delegable duties of care to the claimant. Counsel for the claimant, Mr Brown, refers to the orthodox authorities *Mt Albert Borough Council v Johnson*[1] and *Bowan v Paramount Builders (Hamilton) Limited*[2] for the proposition that a builder of a house owes a duty to exercise reasonable skill and care to achieve a sound building.

[36] The claimant further argues that Mr Jones, as a project manager, and person in overall charge and control, expressly accepted responsibility in 1996 for attending to the problems with a lack of flashings in and around the gable end of the parapets – and that he breached duties of care owed to her by failing to rectify the problems identified and brought to his attention.

[37] Mr Jones denies that he breached any duty of care owed to the claimant. He argues that at all times he acted in accordance with the standards of the day and very much relied on the expertise of other parties involved in construction. These parties were carefully selected by him based on their good name and reputation. Mr Jones cannot recall whether the problems with the flashings in and around the parapets were brought to his attention in 1996. He claims that both the designer and the roofer were responsible for ensuring

[1] [1971] 1 NZLR 234.
[2] [1977] 2 NZLR 394.

weathertightness construction in those areas and he relied upon them to achieve that.

[38] Mr Jones notes that the Council granted a Code Compliance Certificate in 1999 and that the final inspection on 31 August 1999 specifically approved and ticked off barge flashing, roof penetration flashings, and spouting fixings in relation to the roof.

[39] Mr Jones contends that in his role as a carpenter/builder, he installed the fascia boards correctly with the correct gap for the plaster to be able to be forced up behind (as per the Insulclad instructions).

[40] Mr Jones accepts that he was the builder and the person in overall charge of the project for the construction of the house. He was the person who selected all the subtrades and entered into contracts with them. This included commissioning plans from Butt Design Limited. Mr Jones was the applicant for the building consent and the person who dealt directly with the Council. He personally erected the framing, built the roof structure and installed the staircase. I accept the submission of the claimant that he was the face of the build and was at the time of construction a builder with considerable experience in the trade.

[41] I reject the evidence given by Mr Jones that he installed the fasica boards correctly with the correct gap for the plaster to be able to be filled up behind (as per the Insulclad instructions). I prefer the expert evidence of the assessor and Mr O'Sullivan that the Insulclad instructions could not be followed because of the way the fascia had been installed. Mr Jones had direct personal responsibility for this problem.

[42] I find that the evidence clearly establishes that Mr Jones owed and breached duties of care to the claimant, Ms Philpott, in

failing to construct a waterproof house. The party with principal responsibility for the primary defects, being a lack of flashings in and around the parapet fascia junctions, is Mr Jones. As the person in overall charge, it was incumbent on him to ensure that the sequencing of the work carried out by the various subtrades was coordinated to ensure that adequate and proper flashings were installed. Mr Jones cannot avoid liability for those defects by saying that he relied on the expertise of others, including the roofer and designer. Furthermore, the fact that the Council approved the work does not absolve him from liability.

[43] One of the key reasons for concluding that Mr Jones is liable for these primary defects, is my finding that problems with flashings in or around the parapet-fascia junction area were specifically brought to Mr Jones' attention by Mr Ryan in 1996, and that Mr Jones failed to address these problems. Again, as the person in overall charge it was incumbent on Mr Jones to take action to remedy the problems identified. In failing to do so, he was acting in breach of his duties to the claimant.

[44] The evidence that establishes that problems with the flashings were brought to Mr Jones' attention in 1996, is as follows:

a) Mr Gates, former employee of D & D Texturecraft, recalls a conversation in 1996 between Mr Dave Ryan and Mr Jones (a heated discussion) about problems with flashings. In his statement (exhibit G) dated 17 November 2010 Mr Gates states that Mr Ryan insisted that the flashings at the end of the parapets be rectified before they would continue working on the job but that they were told to continue with their work. Mr Gates also notes that the "contractor, the Council and the occupant" were informed of the unfinished flashings.

b) In his affidavit of 17 November 2010, Mr Gates states that "for years afterwards David Ryan would use Highfield Way as an example of a job where things had gone wrong".

c) Ms Philpott gave evidence that she was told by Mr Ryan in 2000 that he had raised the issue of lack of flashings with Mr Jones at the time of construction – and that because they still had not been finished properly, remedial work needed to be carried out.

d) Mr Ryan recalls having a conversation with Ms Philpott in 2000 about the issue and also recalls having a discussion with Mr Gates about problems with flashings in 1996.

e) In a fax to Mr Ian Butt dated 5 September 2005 (page 169 of the bundle) Mr Ferris specifically recorded that "during the start of cladding process possible problem areas regarding weatherproofing were made apparent to Mr Jones". Mr Ferris further noted - "our above concerns were noted by builder, but due to lack of time and wet weather, Mike [Jones] instructed us to continue and finish cladding, and he would make good areas after cladding complete".

[45] It is not credible for Mr Jones to claim that he discharged his responsibilities in accordance with the standards of 1996. The flashings were clearly faulty at that time but despite being told about them he took no action.

[46] Shortly after Mr Ryan raised with Mr Jones the issue of the problems with flashings, Mr Jones spent ten days in hospital suffering from viral meningitis. To his credit, Mr Jones did not seek to rely on his illness as an excuse for any shortcomings on his behalf.

He accepts that at all times he was in overall charge of the project. While Mr Jones' brother also worked on site, he was never in charge of the project.

[47] I also find that Mr Jones had principal responsibility for the following defects, and in failing to ensure a sound construction, he again breached duties of care to the claimant:

a) The inadequate construction of the cladding – roof junction and a failure to take the plaster coating behind the end of the spouting. I accept the evidence of the assessor and Mr O'Sullivan that the project manager/head contractor has a responsibility to ensure the correct sequencing of work by the subtrades to ensure weathertight construction in these areas.

b) The failure of the junction between the butynol rubber roof and the cladding. This is again a failure in a transition area where the person in overall charge of the project should take care and ensure that the work of the subtrades is coordinated to ensure that weathertightness is secured.

c) Inadequate ground clearances. Mr Jones had direct personal responsibility for these defects.

[48] The evidence does not establish that Mr Jones breached duties of care in relation to problems with the handrail and a failure to ensure that the soffit was built in accordance with the Insulclad instructions (see defects listed at paragraph 27(d) and (e) above).

[49] I also accept that Mr Jones is not personally liable for the window component issues. That was a matter wholly within the

expertise of the cladding installers and Mr Jones was entitled to rely on their expertise.

[50] It follows from my finding that Mr Jones is liable for the primary defects, that he is liable to pay to the claimant remedial costs for a full reclad of the house. The uncontested evidence of the assessor was that the primary defects themselves mean that a full reclad is required. The question of quantum (i.e. how much Mr Jones must pay) is addressed below.

[51] I reject the submission and claim made on behalf of Ms Philpott that Mr Jones was a developer and as such owed non-delegable duties of care. The term "developer"[3] and whether a party is a developer or not, is a fact specific inquiry. Here Mr Jones built his own home with the intention in living in it. He did live in it for a short while and then moved to the Bay of Islands when a new opportunity presented itself. I accept that this move was for a genuine reason. He may have made a profit on the sale, but in the circumstances, the evidence does not establish that he was a developer.

[52] In the circumstances of this case, my finding that Mr Jones was not a developer is of little consequence. As already indicated, he is liable to pay to the claimants the reasonable cost of a full reclad of the house.

LIABILITY OF THE FOURTH RESPONDENTS, MR RYAN AND MR FERRIS

[53] The claimant alleges that the contract for the installation of the Insulclad system was entered into between Mr Jones on the one hand, and Mr Ryan and Mr Ferris on the other. She also contends that both Mr Ryan and Mr Ferris personally carried out work on the

[3] *Body Corporate 188273 v Leuschke Group Architects Limited* HC Auckland CIV-2004-404-2003, 28 September 2007, Harrison J at paragraph [31].

house, including the installation of the polystyrene and the plastering, and that both are responsible for the primary and secondary defects.

[54] The claimant further alleges that Mr Ryan and Mr Ferris owed and breached duties of care to her by their failure as managers properly to oversee and control the defective work of their employees.

[55] In defending these claims, Mr Ryan and Mr Ferris argue that it was not them but their now liquidated and struck off company, DI Ryan and DJ Ferris Limited, which contracted for and carried out the cladding work. They contend, therefore, that if the work was deficient and caused loss then it would be the company that is liable. They further argue they were only ever directors of the company and personally did not carry out any of the cladding work or otherwise assume any responsibility for any of the defects in construction.

[56] There are thus two principal issues to be addressed:

a) Whether the contract was between Mr Jones on the one hand and Messrs Ryan and Ferris trading as D & D Texturecraft on the other, or whether it was between Mr Jones and DI Ryan and DJ Ferris Limited trading as D&D Texturecraft; and

b) If the answer to (a) above is that the contract was entered into by the company, whether the work done and the degree of control exercised by Mr Ryan and Mr Ferris was such that they personally owe a duty of care to the claimant.

Who was the contract between?

[57] There are real difficulties in determining the issue of the parties to the contract for the installation of Insulclad system, given

that it was concluded in 1996 (now nearly 15 years ago) and the limited documentary evidence available paints a somewhat confused and inconsistent picture.

[58] The claimant argues that the key document is the quotation dated 24 July 1996. The quotation is addressed to "Mike Jones" and is from "D & D Texturecraft". The claimant further argues that the interpretation she advances is reinforced by the advertising feature from the 13 April 1996 edition of the *Northern Advocate.* That document refers to Mr Ryan and Mr Ferris going "into partnership" and refers to the two gentlemen as "partners". It is accepted by the claimant that the article does also refer to "company" in a couple of places although no company name is ever given.

[59] In his closing submissions, Mr Brown, on behalf of Ms Philpott, has referred to further evidence, including the testimony of Mr Jones and a failure to comply with section 25 of the Companies Act 1993, in support of the argument that Mr Ryan and Mr Ferris were in a partnership and thus liable for the defective work carried out by their business.

[60] I have carefully reviewed the evidence but am not persuaded that the contract for the installation of the cladding was entered into between Mr Jones on the one hand, and Mr Ryan and Mr Ferris as a partnership, on the other. The company of which both Ryan and Ferris were directors, namely D I Ryan and D J Ferris Limited, was incorporated in 1988 and was clearly in existence and operational during time of construction. It seems to me that it is more likely than not that Mr Ryan and Mr Ferris would use the company (with the benefits of limited liability) as the legal vehicle for carrying out their plastering and cladding installation business.

[61] In my view the absence of the word "limited" from the quotation and other documents does not assist the claimant with her argument. It was not uncommon, and is still the case today, that

many non-legal people are perhaps not always as careful as they ought to be in making clear that a business is carried out by a company. In any event the *Northern Advocate* article does refer to there being a company (when discussing the business of Mr Ryan and Mr Ferris) and the same GST number appears on both the quotation and the company's GST invoice (exhibit M). While on their own none of these factors are decisive, the overall evidence tends to suggest that it was the company that was providing the quotation. The claimant has failed to put forward any plausible explanation as to why Mr Ryan and Mr Ferris would not use their company as their business vehicle which in the circumstances seems to have been the logical and orthodox approach for them to have taken.

[62] As to the evidence of Mr Jones, his testimony on this point cannot be considered decisive or particularly persuasive. I doubt that Mr Jones ever specifically turned his mind to the question of whether he was contracting with the company of Mr Ferris and Mr Ryan or Mr Ferris and Mr Ryan in partnership.

[63] For all these reasons, I conclude that the claimant has not established (as alleged) that the contract for the installation of the cladding was, on the one hand, between Mr Jones and, on the other hand, with Mr Ferris and Mr Ryan in partnership. The contract was with the company. It is thus necessary to address the second issue of whether despite the contract being with the company, Mr Ferris and Mr Ryan are nevertheless personally responsible for defects in construction having owed and breached a duty of care to the claimant.

[64] I shall address the liability of Mr Ryan and Mr Ferris separately. Before doing so, it is necessary to refer briefly to the relevant legal principles and tests for determining whether a director personally owes a duty of care.

Can directors of companies involved in construction owe a duty of care to subsequent owners?

[65] The jurisprudence on the issue of the personal liability of directors has a troubled history. However, in a number of recent cases the courts have confirmed that limited liability is not intended to provide company directors with general immunity from tortious liability.[4]

[66] The legal position is now as set out by Professor Watts in his book "Directors' Powers and Duties":[5]

> Where the relevant tort, or other wrong, does not turn on there being an express or implied undertaking that has been broken by the defendant, then the agent (or indeed any person) will be liable if he or she commits the acts constituting the wrong, with the required mental state, if any. It will not matter that the agent committed the acts thinking he or she was doing so in the principal's interests. In some circumstances the principal will also be liable for the actions, but vicariously.

[67] After referring to two House of Lords decisions – *Williams v Natural Life Health Foods Limited* [1998] 1 WLR 830 (HL) and *Standard Chartered Bank v Pakistan Shipping Corp* (*Nos2 and 4*) [2003] 1 AC 959 (HL) – which emphasised that directors are in no better position than any other principal, the learned author continued:[6]

> Subsequently, the reasoning of these two decisions of the House of Lords on the position of directors has been followed by the New Zealand Court of Appeal in *Body Corporate 202254 v Taylor*. In this case, a strike-out action relating to liability for a leaky building, the Court rejected the notion adopted by Cooke P and Hardie Boys

[4] *Body Corporate 202254 v Taylor* [2009] 2 NZLR 17 and *Chee v Stareast Investments Limited* HC Auckland CIV-2009-404-5255, 1 April 2010, Wyllie J.

[5] LexisNexis 2009 at paragraph 13.3.2 which is headed "*Directors have no special status in contract, tort, or equity* at page 357.

[6] At page 359.

> J in *Trevor Ivory* that the status of director could in itself immunise the director from personal liability in tort. In this respect, the reasoning in *Trevor Ivory* can be taken to be overruled.

[68] Summing up the recent developments in the law, Professor Watts states:[7]

> Putting that difficulty aside, the general result of *Williams v Natural Life* and *Standard Chartered Bank* is that we are thrown back on the simple principle that where the elements of a private law cause of action are established against a director, he or she will be liable and vice versa. They gain no special immunity, nor special vulnerability merely by virtue of their office.

[69] The courts have repeatedly emphasised the importance of examining the factual matrix in each case before determining whether a director is personally liable.[8] The factual matrix is critical in assessing whether the "elements of the tort" of negligence have been established.[9]

LIABILITY OF MR RYAN

[70] As Mr Brown candidly and correctly acknowledges, the claimant has been subject to a "profound information asymmetry". Being a subsequent purchaser, she has no personal knowledge of how the construction progressed and who did what. Her case against Mr Ryan is very much reliant on the evidence of Mr Gates, a former employee of Mr Ryan and Mr Ferris. She also argues, with reference to the wider background (including the documentary record) that Mr Ryan and Mr Ferris made all the managerial decisions and that it is implausible that they would have had no oversight on the installation of the cladding to her house.

[7] At page 360.
[8] See n 4 (*Chee v Stareast*) above.
[9] See n 4 (*Body Corporate 202254 v Taylor*) above.

[71] The events in question occurred nearly 15 years ago. The critical issue I must determine in relation to Mr Ryan is whether there is sufficiently reliable and probative evidence establishing what Mr Ryan did or did not do in relation to the claimants' house. The related question of whether Mr Ryan breached any duty of care (if one is established) falls to be determined on the basis of my findings as to his particular acts or omissions.

[72] Mr Gates gave evidence that both Mr Ryan and Mr Ferris worked on site and that both were plastering. As a general rule, Mr Ryan tendered to do more plastering and Mr Ferris dealt with the installation of the polystyrene. Mr Gates said that in 1996 he was not qualified or competent to perform either of those tasks but worked as the employee/assistant. Mr Gates accepted that his recollection of what happened in 1996 might be faulty given the long passage of time since the events had occurred.

[73] It was originally anticipated that Mr Gates would give evidence on behalf of Mr Ryan and Mr Ferris, rather than for the claimant, as has ultimately turned out. Mr Gates said that he was initially minded to assist his former employer because they always did their utmost to ensure that jobs were finished in the correct manner and that they insisted on "details which are now mandatory for compliance years before this was required".

[74] There were two versions of a statement by Mr Gates produced in evidence, which had been prepared with the involvement of the former lawyer of Messrs Ryan and Ferris. Mr Gates claimed that he was put under pressure to change his statement and that this had led to a falling out with Ryan and Ferris. He was subpoenaed to give evidence at the request of the claimant.

[75] In his evidence, Mr Ryan said that he had no personal involvement at all in the installation of the cladding. He claimed that

in 1996 the company had a large staff and that a number of these, including Mr Gates, were competent to and did in fact carry out the tasks of plastering and installing polystyrene. Mr Ryan said that he had a reliable staff and that he and Mr Ferris were very busy at that time. They did not need to exercise much managerial oversight or supervision.

[76] I found the evidence of Mr Ryan to be unhelpful and often lacking credibility. His evidence was self serving and his answers to a number of questions were evasive. I gained the impression that he could recall far more about what happened in 1996, than he was prepared to admit. I accept that the various criticisms made of his testimony in the claimant's closing submissions have some merit. This includes the fact that his defence was to some extent an evolving and changing one.

[77] On the other hand, the evidence of Mr Gates, a genuine and sincere witness, was far more reliable and plausible. Having said that, however, Mr Gates' evidence needs to be considered in the context of the overall evidence and importantly, having regard to the significant lapse of time since these events occurred. The factual matrix is all important and for the Tribunal to impose and find what would be a significant liability, there must be reliable and probative evidence of the elements of the tort, particularly a duty of care.

[78] Against the evidence of Mr Gates it is also necessary to consider the testimony of Mr Ferris. Mr Ferris, who was generally a more reliable and credible witness than Mr Ryan, said that Mr Gates ran and oversaw the job at the claimant's house. Mr Ferris said that neither he or Mr Ryan were personally involved with the installation of the cladding.

[79] As part of this confused picture there is also the evidence of Mr Jones to consider. In Procedural Order No. 3 dated 17 December

2009 Mr Jones is recorded as having advised the Tribunal that the fourth respondents "David Ryan and David Ferris, installed the insul cladding". However, at the hearing Mr Jones stated that he could not recall who from D & D was on site.

[80] Viewed overall, the evidence on the issue of Mr Ryan's liability is unsatisfactory and ultimately inconclusive on the critical question of what he did or did not do in relation to the defective installation of the cladding system. There is an irreconcilable conflict of evidence, an incomplete and rather unhelpful documentary record, and the witness the claimant is substantially reliant upon (Mr Gates) accepts that in recalling events 14-15 years ago, his recollection may be faulty. Mr Gates has been in dispute with Mr Ryan and Mr Ferris over this case and understandably has been concerned not to expose himself to any personal liability for defective work.

[81] In the circumstances I conclude that there is insufficient reliable and probative evidence to support a finding that Mr Ryan owed the claimant a duty of care. I am simply left with too much uncertainty as to what he did or did not do. The necessary factual matrix is incomplete.

[82] As to the allegation that Mr Ryan breached a duty of care in relation to managing, supervising and overseeing the installation of the cladding, I accept that in relation to flashings in the fascia – parapet area, he did assume personal oversight and control of this problem. My reasons for this finding are the evidence I have referred to at paragraph 44 above. Furthermore, Mr Ryan himself acknowledged that he had discussed the issue of problems with the flashings with Mr Gates in 1996.

[83] On this basis, I find that Mr Ryan did owe the claimant a duty of care, albeit confined to the particular circumstances of the flashings. However, in my view Mr Ryan did not breach any duty of

care owed. He specifically brought the problem of the flashings in the parapet-fascia area to the attention of Mr Jones. They were then told by Mr Jones to proceed with the job and that Mr Jones would attend to the problem. I conclude that in these circumstances, Mr Ryan acted in a reasonable manner and was not required to go any further. Mr Ryan, unlike Mr Jones, was not the head contractor with overall responsibility for the project.

[84] Mr Brown argues that Mr Ryan should have refused to continue with the work (having brought the problem to Mr Jones' attention) or at least insisted on a written waiver from Mr Jones. I reject that submission. While it may have been a wiser move to have acted as suggested, a failure to do so, did not in my view amount to a breach of a duty of care. In support of this finding I rely upon the recent High Court decision *Auckland City Council v Grgicevich*[10] where it was held that it would be placing too high a duty on a project manager to require him to resign if patent defects in construction were not remedied once brought to the attention of the person with the power to do so. It was held that a reasonable and prudent response to the discovery of defects for which Mr Grgicevich as project manager was not responsible was to bring them to the attention of the person who was. To go further, at that stage, would be unrealistic.

[85] Aside from the issue of problems with flashings in the parapet-fascia area, the evidence does not support a finding of a duty of care in relation to any other issues of management and oversight. While Mr Ryan may have had some general oversight in terms of managerial decisions such as hiring and firing and organising the employees, there is a lack of reliable and probative evidence that he had control and oversight over the quality of the cladding work on this house. The factual matrix is incomplete and uncertain on this point as well.

[10] HC Auckland CIV-2007-404-6712, 17 December 2010, Brewer J.

[86] For all these reasons, the claim against Mr Ryan is dismissed. The claimant has failed to establish that he owed and breached duties of care to her in the matter contended for.

THE LIABILITY OF MR FERRIS

[87] The evidence relied upon by the claimant to establish her claim against Mr Ferris, is essentially the same as that relating to Mr Ryan. For reasons given above, there is a lack of sufficiently reliable and probative evidence to establish that Mr Ferris personally owed and breached a duty of care to the claimant.

[88] As already indicated, I found the evidence of Mr Ferris, generally a very careful witness, to be more reliable and credible than that of Mr Ryan. The claim against him cannot be made out and is dismissed.

QUANTUM OF DAMAGES

[89] This issue is of course relevant only to the claimant and Mr Jones. I note also that there is no issue relating to causation. The defects have clearly caused substantial decay and damage.

[90] The evidence of both experts, the assessor and Mr O'Sullivan, was that the house requires a complete reclad.

[91] The following estimates of repair costs were before the Tribunal:

a) The assessor's addendum report (November 2009) contains a detailed breakdown of repair costs by a quantity surveyor. The estimate is $268,497 including GST.

b) Howard Harnett (July 2010); $240,000 plust GST. With the increase in GST this estimate totals $281,750.

c) John Thompson (July 2010); between $250,000 and $270,000, including GST.

d) Paul Roberts (July 2010); between $280,000 and $350,000. Mr Roberts explained during oral evidence that the large range is due to the fact that he would like some design changes (including soffits) to be added to all areas.

[92] The claimant evidence on the question of quantum as well as that filed by the assessor, was largely uncontested.

[93] The claimant seeks $275,350 for repair costs being the average of the estimates provided. To this figure there is a need to add the increase in GST. The total now being claimed is thus $281,470.

[94] I am satisfied that the claimant has established that the reasonable cost of repairs would be approximately $275,000 and that it is appropriate to make an adjustment for the recent increase in GST. I was particularly impressed by the evidence of Mr John Thompson, a very experienced builder from Whangarei. He candidly acknowledged that “to price a job of this degree is almost impossible until the existing cladding is removed for further assessment”. Having regard to the increase in GST, the figure claimed by the claimant is not far outside the range provided by Mr Thompson. I accept that the claimant’s figure of $281,470 is a reasonable and appropriate cost of repairs.

[95] I am also satisfied that Ms Philipott has established the following additional costs which she is entitled to recover from Mr Jones:

A	Independent supervision of repairs (Prendos) 48 hours at $190 per hour	$9,120
B	Accommodation for motel unit 84 nights at $150 per night	$12,600
C	Taking and furniture removal (Crowne House Movers estimate	$4,600
D	Furniture storage 12 weeks at $100 per week	$1,200
E	Furniture return and unpacking (Crowne House Movers estimate	$2,400
F	Insurance (additional insurance to cover the house and contents during renovation)	$1,200
G	Landscape removal and replacement for 40 hours for $100 and $1500 for plant replacement	$5,500
	TOTAL	**$36,620**

[96] Ms Philpott has further claimed the sum of $2,500 for the independent witness (Prendos) plus accommodation. She has also sought a sum of $36,000 for a contingency for flooring; carpet tiles decking and paving etc. These claims are set out at paragraph 2 of the additional brief of evidence of Ms Philpott dated 2 August 2010.

[97] The claim for the costs associated with the independent expert witness is generally not recoverable in this jurisdiction. As to the claim for $36,000 for a contingency fee for flooring, carpet, tiles etc, the sum sought is not supported by any evidence. In my view the sum of $36,000 is too high and $10,000 would be a more reasonable figure. The building contract price will normally contain a provision for a contingency fee and the large sum of $36,000 in my

view would likely include an element of betterment. In the absence of specific evidence I conclude that a figure of $10,000 is reasonable.

[98] As to the claim for general damages, I am satisfied that Ms Philpott is entitled to an award of general damages of $20,000. It is clear from the evidence that Ms Philpott has found the whole experience with the house extremely stressful and unsettling. In her case this has been a particularly long and drawn out process.

[99] The total amount of the quantum which I find established is $348,090, broken down as follows:

Cost of repairs	$281,470
Associated expenses / costs	$46,620
General damages	$20,000
Total	**$348,090**

Failure to mitigate loss

[100] Mr Peters, on behalf of the fourth respondents, submitted that there have been significant and unreasonable delays by the claimant in having her house repaired. It is argued that Ms Philpott has failed to mitigate her losses.

[101] Having dismissed the claims against both fourth respondents, the issue of the failure to mitigate is no longer of any relevance to them. However, the arguments made by Mr Peters have been adopted by Mr Jones, who was at the hearing self-represented. It is thus necessary to address this issue.

[102] It is argued that despite the original assessor's report being completed in 2004, that the claimant did not pursue her claim in the Tribunal until five years later, namely 2009. It is further contended that having become aware of substantial problems and damage in

2004 that it was incumbent on Ms Philpott at that stage to take action to prevent further damage. However, she failed to undertake remedial works with the result that there has been a significant increase in water damage and consequential increase in the cost of repairs. The original assessor's report estimated the cost of repairs at a figure substantially less than that now claimed.

[103] The claimant rejects the contention that she failed to mitigate her losses and contends that she acted reasonably at all times. She obtained a LIM prior to purchasing the property, insisted on a CCC and took steps to address problems with the flashings when this was brought to her attention in 2000. In 2005 she attempted to get her claim to mediation but this was unsuccessful. Her financial position was devastated by her losing her job in 2003 and ultimately she had to obtain legal aid to secure the services of a lawyer.

[104] The issue of a failure to mitigate loss has been recently considered by the High Court in *White v Rodney District Council* where Woodhouse J held:[11]

> An often cited statement of the duty to mitigate damage is that of Viscount Haldane. I. C. *British Westing House v Underground Electric Railway*:
>
> > The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; this first principle is qualified by a second, which imposes on a claimant the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps.

[105] In my view, there has been no failure by the claimant to mitigate her losses. Ms Philpott, who presented as a careful and prudent person, has acted reasonably in obviously very difficult circumstances. To her credit, she was not content with the original assessor's report and commissioned a further expert, namely Mr

[11] (2009) 11 NZCPR 1 at para [25].

O'Sullivan, to report on her house. This led to the discovery of the window component defects. Had she had targeted the repairs completed in 2004 after the original assessor's report, it is likely that she would still today have a leaky home – i.e. because the window component defects had not been addressed.

[106] It is true that this litigation has taken a long time to come to a hearing and that the addendum assessor's report contains a significant increase in estimated costs over and above that provided for in the original report. However, the difference in costs is only partly attributable to inflation and a general increase in costs between 2004 and 2008. The addendum report is based upon the 2006 Act, which unlike the 2002 Act, (upon which the original assessor's report was based), allows for claims for likely future damage. The window component issue falls into this category.

[107] Given her difficult financial circumstance it is not surprising that there has been some delay by Ms Philpott in bringing on the claim for adjudication. I am also aware that conflict issues with a number of lawyers involved in this case have led to further delays. The contention that there has been a failure to mitigate loss, is rejected.

CONCLUSION AND ORDERS

[108] The claimant has established her claim against Mr Michael Jones, the third respondent. Mr Jones owed and breached duties of care to the claimant causing her significant loss. He is liable to pay to the claimant the reasonable cost of repairs together with general damages and associated losses.

[109] Mr Jones is ordered to pay to the claimant the sum of $348,090. This is broken down as follows:

Item	Amount
Cost of repairs	$281,470
Associated expenses / costs	$46,620
General damages	$20,000
Total	**$348,090**

[110] The claims against both of the fourth respondents, Mr David Ryan and Mr David Ferris, are dismissed. The claimant has failed to establish that either of them owed and breached duties of care in the manner contended.

DATED this 21st day of March 2011

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P J Andrew

Tribunal Member