IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2009-100-000088
[2010] NZWHT AUCKLAND 38

BETWEEN	LYNETTE IDA DE MALMANCHE, MONICA CONSTANCE LENS and REDMOND TRUSTEES NO. 9 LIMITED as trustees of the LYNETTE DE MALMANCHE TRUST Claimants
AND	AUCKLAND COUNCIL successor to the AUCKLAND CITY COUNCIL First Respondent
AND	ROBERT CLARKE BICKERTON Second Respondent (Withdrawn)
AND	PETER LEONARD LOWE Third Respondent
AND	BRENT WILSON Fourth Respondent
AND	ANTE ARCHITECTS LIMITED Fifth Respondent
AND	BUILDING SENSE LIMITED Sixth Respondent
AND	DEREK TALEI SIAKIA Seventh Respondent

Hearing days:	27, 28 and 29 July 2010 30 August 2010
Appearances:	Ms L Black for the claimants Mr P Robertson for the first respondent Third respondent Mr Lowe - self represented Mr J Maio representing the fourth respondent Mr D MacRae for the fifth respondent Mr C Lucas for the sixth respondent
Final written submissions received:	16 September 2010
Date of decision:	14 December 2010

FINAL DETERMINATION
Adjudicator: R M Carter

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INTRODUCTION

[1] This is a claim by the owner of a leaky home and her co-trustees against the Auckland City Council and the two persons alleged to be responsible for building it. They are Mr Lowe, the third respondent, and Mr Wilson, the fourth respondent. Ante Architects Limited, the fifth respondent, drew the consent drawings, and the sixth respondent Building Sense Limited is the successor to the company alleged to have been the roofer. Mr Siakia, the seventh respondent, who lives in Western Australia, was the plasterer. Mr Bickerton, who owned the development company, died in January 2010 without leaving a personal estate and so the claimants have discontinued their claim against him as second respondent.

[2] The property is a stand-alone townhouse in Meadowbank, Auckland. Ms de Malmanche purchased the property off the plans. It was built in the period August 2000 to February 2001. Ms de Malmanche transferred the house to a family trust in 2004. It turned out to be a leaky home. The claimants engaged Mr Pat O'Hagan to supervise the repairs, which were completed in May 2010. In their second amended statement of claim dated 10 June 2010, the claimants sought $238,454.21 from the respondents including:

- The cost of carrying out remedial work, $206,970.01 (net of betterment items),
- Interest on finance to pay for the remedial work, (calculated on actual invoice costs to 29 July 2010), $4,642.41,
- Consequential losses, $1,841.79,
- General damages for distress, inconvenience and anxiety, $25,000.00.

ISSUES

[3] The issues I have to decide in this adjudication are:

- What defects caused water ingress and damage and what repairs were required?
- What is the appropriate remedial scope?
- Is the Auckland Council liable for the claimants' losses?
- Did the claimants rely on the Council?
- Was the third respondent, Mr Lowe, the project manager and if so, was he negligent in that role and is he liable?
- Was the fourth respondent, Mr Wilson, the builder and if so, was he negligent and liable?
- Was the fifth respondent, Ante Architects Limited, negligent and liable?

- Was Building Sense Limited the roofing contractor and if so, was it negligent and liable?
- Was Mr Siakia, the plasterer, negligent and liable?
- If liability is proven, what is the reasonable cost of repairs and how much of the cost of repairs is compensable?
- What other damages claimed are proven?
- Was there contributory negligence on the claimants' part?
- Should there be an apportionment of the damages payable between those respondents who may be liable and, if so, what percentage of the damages should each of the liable parties bear?

BACKGROUND

[4] In 2000 Ms de Malmanche began looking for a home and in September she saw an advertisement for eight new townhouses being built at Tipene Place. She signed a sale and purchase agreement for the house to be built at 10A Tipene Place.

[5] The townhouses were being built on land sloping down from the end of Tipene Place, which itself is a cul de sac. The houses were to be situated on either side of the sloping driveway and along the bottom of the development, which is T-shaped. The property Ms de Malmanche purchased was the first on the left, near the top. At the time she signed the sale and purchase agreement, a show home had been built at the bottom of the development and 10B was being built, just below the site for 10A.

[6] The Auckland City Council issued a Code Compliance Certificate on 27 February 2001 and Ms de Malmanche settled the purchase on 2 March 2001. In August 2004 Ms de Malmanche transferred the house to the trustees of the Lynette de Malmanche Trust, the claimants in this claim.

[7] The house itself lies at the end of a very short driveway leading to the garage (off the main driveway of the subdivision). The garage door and its surroundings form part of the east end of the house. The rest of the east wall is at the other end of and above the garage. There is a long front north wall, being the north side of the garage, the entrance way, the dining area and the living room, with bedrooms above. The west wall is at the end of the lounge, and the main bedroom is situated at the south west corner towards the back. There is a pagola and tiled area at that end of the building. The south wall forms the back of the house. It faces and is close to a bank cut into the ground to form the flat area on which the house was built. Aspects of each of the elevations were discussed at the hearing.

[8] Ms De Malmanche had trouble with a large bay window on the north side which leaked in June 2005 and again in April 2007. Following a repair, there were further problems with the bay window in August 2008. Ms De Malmanche was advised to contact Drybuild Infrared Solutions Limited. Drybuild provided a report in October 2008. As a result of Drybuild's report, the trustees applied to the Department of Building and Housing for an assessor's report in December 2008. Mr Paul Probett, the WHRS assessor, issued his report on 15 January 2009, stating that the house was leaky and eligible for the Weathertight Homes Resolution Service adjudication process.

[9] Ms de Malmanche researched various issues concerning leaky homes and then engaged O'Hagan Building Consultants Limited to manage and supervise repairs. She arranged for plans to be drawn up and applied for building consent for the repairs. The Council issued the consent and the claimants applied to the Weathertight Homes Tribunal for adjudication in October 2009. Coset Construction Limited, the lowest of three tenderers, carried out

the remediation work, beginning in November 2009 and finishing in May 2010.

WHAT DEFECTS WERE THERE IN THE CONSTRUCTION?

Assessor's report

[10] The defects in construction are set out in the report of the assessor, Mr Probett, dated 15 January 2009. Because of the importance of his report, I reproduce some of his findings below. Mr Probett found widespread defects in the construction of the property. Mr Probett recorded that on the east elevation, the most notable defect was the cracking of the taped joints between fibrecement sheets. He found that 30% to 40% of the jointing had failed. Cracking patterns indicated that some sheeting had not been fitted as per the James Hardie Harditex manual operative at the time of construction.

[11] Specific deviations included:

- lack of control joints which are required every 5.4 metres;
- the requirement for sheets not to be joined within 200mm of window and door openings had not been observed in a number of locations;
- in some places cladding had been taken to the ground when the requirement is for it to be finished well above the finished ground level;
- the use of cladding horizontally, though that was limited to the top of the pergola columns;
- the use of an inter-story H section PVC jointer that had been sealed was at variance with the manual's requirements for the formation of horizontal joints;

- some horizontal joints had simply been taped and plastered and while this practice was acceptable in James Hardie's manuals in the latter 1990's, it was phased out by the early 2000's; and

- regarding window head clearances, the manual requires clearances between ends of the cladding and the head flashing projection to retain a drainage path. In most cases cladding had been sealed to the head flashings. In places that were later shown to be areas with high moisture levels in the framing, popping of the heads of galvanised clouts was often evident. The general standard of cladding work was average.

[12] Mr Probett also concluded that the seals between jambs and cladding were poorly done, little attention had been paid to ensuring the integrity of the drainage path at points where a sill overlapped the cladding, and the cladding was taken down to and sealed against head flashings (as above).

[13] The cladding for the entry and rear columns was taken to the tile level, meaning water could travel laterally across the tiles and wick or be driven under the bottom edge of fibre cement sheet or be trapped in enclosed timber components. Mr Probett wrote that where such timber is treated with something less than CCA type preservatives, decay is virtually inevitable.

[14] Ground levels were compromised in only isolated areas mostly around the garage entry and paved areas along the deck to the north and west. In places such as the corner of the lounge closest to the bedroom (at the west end), cladding had been taken to tile level indicating substantially less than the usual 150mm minimum finished floor to paved area top surface (required under NZS 3604). Likewise, on either side of the garage door the cladding and paved ground came close to full contact. Most sheet claddings deteriorate

in such conditions with the cladding losing strength and becoming brittle, or the development of fungal decay of the timber fibres used as reinforcing, Mr Probett wrote.

[15] As regards the roofing elements, Mr Probett observed that there were not many direct links to specific leaks. In two areas associated with kick-out points, where gutters terminated against walls, there were higher than usual moisture readings. A cracked tile near the garage door would feed water running down the roof directly onto the roof underlay. There was likely to be moisture behind the wall below this point. Mr Probett also noted that the roofing underlay was not supported at its ends with anti-ponding boards and in the area where a check was made, underlay had sagged. Accumulated debris sitting on the underlay and discoloration suggested ponding did occur. When the paper ages, or at lap points, water can enter and either drain onto soffits, or where soffits have minimal width, water will drain directly onto the ceiling insulation and gib, or even straight onto framing.

[16] Mr Probett recorded that gables had been finished in two ways: using gable tiles and plastered edges to tiles. Beneath the plastered edge of gables, a batten had been fitted to protect the top edged of the fibrecement sheet. The design did not provide comprehensive protection to an exposed area. The popping noted at the bottom edge of the gable was a strong indication that at least periodically, water was draining down the gable framing and the wetting and drying from that resulted in popping of fixings.

[17] Inside the house Mr Probett found the paint work on the walls and ceilings had become discoloured on the east side in isolated places, often coupled with popping of gib fixings and deterioration of taped joints. The scope of the deterioration was relatively limited. Mr Probett wrote that these comments applied generally to the south and west elevations inside, though there were no noticeable issues affecting the internal linings. On the north elevation water had

intruded above the bay window in the dining area. This had resulted in popping of nail heads used to fix the jamb liners. In addition water staining was noted at the lower corners of the window frame opening, affecting the jamb liner, adjacent trim and hard floor coverings.

[18] Mr Probett's findings of defects in construction were made before the remediation of the house supervised by Mr O'Hagan's company, when the underlying damage from water ingress was uncovered. However, I note that even before then, Mr Probett found these defects many of which were the result of failures to observe building standards required at the time the townhouse was built. Mr Probett adopted a careful and measured approach at the hearing which in my view enhances the reliability of his findings in his report and I have placed considerable weight on it for that reason.

Agreement from expert's conference

[19] Mr Patrick O'Hagan, building surveyor, engaged by the claimants, Mr Simon Paykel, building surveyor engaged by the Auckland City Council, Mr Neil Dickensen, building consultant engaged by the fourth respondent Mr Wilson and Mr Probett, the assessor, took part in an experts' conference held on 21 July. Mr Gregory Dayman, architect, who was engaged by the fifth respondent, Ante Architects Limited, provided a brief of evidence but he did not remain for the whole of the experts' conference, and he did not give evidence at the hearing. Mr O'Hagan, Mr Paykel, Mr Dickensen and Mr Probett signed the agreement.

[20] The agreement reached at the experts' conference which is set out below recorded those matters on which the experts did agree. However there were differences of opinion amongst the experts about how serious some of the defects were and which defects had caused damage, and whether in some cases the standards of the time were in fact breached and who, if anyone, should be held

responsible or liable for the damage. However those differences do not in my view diminish the seriousness of the defects in the townhouse and the numerous departures from correct building standards in its construction.

[21] The eight defects in the construction listed and agreed by the experts were:

i. A lack of ground clearance including at three structural posts.
ii. No roof lead apron flashings on the upper north-west corner and the south wall at rear of the garage.
iii. Lack of barge tile or under-flashing at the gable end above the garage (east upper wall).
iv. Joinery.
v. Sheet set out – three locations.
vi. Control jointing: three vertical control joints missing on east and north and south of garage.
vii. Sheet joint cracking on north, east and west elevations.
viii. Three pergola posts were unprotected at the top.

WHICH OF THE DEFECTS CAUSED WATER INGRESS AND DAMAGE AND WHAT REPAIRS WERE REQUIRED?

[22] The resulting damage and repairs required as a result of the eight defects were recorded in the experts' agreement as follows. (The eight defects are listed again below followed by the damage and repairs required in each case.)

> (1) A lack of ground clearance including three structural posts.
>
> The agreement recorded that there were cladding clearance issues at three structural posts and at the framing at the left side of the front door. Mr O'Hagan maintained that (the lack of) ground clearance contributed to moisture ingress at the left side of the bay window.

The repairs required were full replacements of the three posts and a concrete nib and a re-clad at the left hand side of the front door, and, in Mr O'Hagan's view, the left side of the bay window.

(2) No roof lead apron flashings.

The agreement recorded that the damage due to this defect was on south wall at the rear of the garage and the west elevation above the internal corner of the living room.

The repairs required were the replacement 1.2m to the left and right of the bottom plate, four timber studs and the cladding of the southern wall. On the western elevation at the upper level it would be necessary to remove the soffit lining at bedroom 2 and the boundary joists, and fully re-clad the upper level western elevation of bedroom 2.

(3) Gable end above the garage – lack of barge tile or under-flashing.

This gave rise to the need for a full re-clad of the upper level eastern elevation including the front door structure post.

(4) Joinery.

At the bay window there was damage at both ends of the head flashing. There was damage on the east elevation at windows 14 and 15, and on the west elevation at the bedroom 2 window. Mr Paykel stated that windows 14 and 15 were only potential leaks due to roof defects above (i.e. defect 3).

The repairs required were a re-clad of the upper level east and west, and the bay window needed to be reframed and replaced. Mr Paykel stated that re-use of the bay window would have sufficed.

(5) Sheet set-out at three locations.

There was no damage. Mr O'Hagan considered that "locations where cracks were visible could have occurred in other locations".

(6) Control jointing; three vertical control joints were missing on the east and north and south garage elevations.

> The missing control joints contributed to the sheet joint cracking but there was no timber damage. (Mr Paykel wrote a letter about this following the experts' conference – see below.)
>
> (7) Sheet joint cracking on the north, east and west elevations.
>
> There was no timber damage.
>
> The repairs required because of defects 6 and 7 were a full re-clad of the north, east and west elevations. Mr Dickenson stated that replacement of the jointing systems solely was required.
>
> (8) Three pergola posts were unprotected at the top.
>
> These were allowing moisture to penetrate and there was a lack of cladding clearance with timber sitting on the ground. Mr Paykel stated the posts were isolated from the building envelope. They required full replacement.
>
> Mr Dickenson maintained his opinion that targeted repairs would suffice to remediate this dwelling. Mr Probett, Mr O'Hagan and Mr Paykel all agreed that as a result of the agreed defects listed, a full re-clad was necessary to remediate the defects and resulting damage.

Mr Robertson's submissions

[23] In his opening submissions, counsel for the Auckland City Council, Mr Robertson, referred to the eight defects identified by the experts. He said that there must be a connection whereby a defect caused damage, and that a breach of the Building Code etc does not cause damage in itself. Not all defects gave rise to damage. Referring to defects 5, 6 and 7 in the experts' list, and to paragraph 15.2.1 of the assessor's report, Mr Robertson stated that there were a number of reasons why there were cracks in the cladding, some of which could not be explained.

[24] He further submitted that the question was whether there were defects that should have been detected in the course of 12 inspections from 18 August 2000 to 21 February 2001 (the slab floor

inspection was on 30 October). At the time the house was built a Council inspector could not have seen and would not have been required to have seen the defects that caused damage. Mr Robertson submitted it was open to the Council to issue the Code Compliance Certificate in February 2001.

[25] While there may be some validity in these arguments, the claims against the Council can only be finally determined by considering each of the established defects in relation to the duty of care owed by the Council to the claimants. I now do so. The remedial costs are considered later in this determination.

A lack of ground clearance including at three structural posts

[26] Mr O'Hagan stated that damage to the cladding caused by lack of ground clearance was more widespread than Mr Paykel acknowledged. In that respect Mr O'Hagan noted that the step-down from the concrete pad on which the house stood to the surrounding concrete was too shallow. This is also stated in Mr Probett's report. Mr Probett noted that the drop from the finished floor to the top surface of the paved area was substantially less than the usual 150mm minimum. In other words, the whole house was built too low to the concrete pad on which it stood.

[27] In addition to the agreed damage at the three structural posts from this cause, Mr O'Hagan gave evidence that he and his employees found underlying damage at other areas from the lack of ground clearance. The damage found is set out in four diagrams, one for each elevation, appended to his witness statement showing areas of timber replacement. Mr O'Hagan also described the damage in his written reply to Mr Hubbuck's evidence, as follows. (Most of Mr Hubbuck's evidence, concerning a council inspector's actions, is referred to in the next section.)

[28] Mr O'Hagan stated that the lack of ground clearance caused decay in the bottom plate and on the following elevations was responsible for the listed areas of cladding needing to be removed and the building re-clad: north elevation - garage wall, around front door and outside lounge; west elevation - total ground floor; east elevation - front of garage and between front door and bay window; south elevation - bedroom one wall; also the three structural posts and three pergola posts. Mr O'Hagan wrote that in addition to decayed timber framing, the water ingress caused by the lack of ground clearance had caused sheet joints to crack and texture coating to flake off.

[29] I accept the experts' agreement that there was damage from the lack of ground clearance at the three structural posts and I also accept Mr O'Hagan's evidence that there was damage from this cause in the other locations he listed. The exception is on the south wall, near the west corner, where a flashing above is the more likely cause of damage - Mr Robertson submitted that by the end of the evidence Mr O'Hagan and Mr Probett had agreed that the damage in Mr O'Hagan's diagram on the south wall at that corner was caused by the flashing above and was not related to ground clearance.

<u>No roof lead apron flashings on the upper north-west corner and the south wall at rear of the garage</u>

[30] There was no dispute that significant damage had occurred in these two areas, at first floor level and behind the garage, because diverters or kick-outs were not installed at gutter ends where they abutted the cladding. There was conflicting evidence about whether kick-outs or similar mechanical devices should have been installed and insisted upon by the Council. However, I accept the damage as proven.

Lack of barge tile or under-flashing at the gable end above the garage (east upper wall)

[31] There was widespread damage to the upper east wall from this cause, which I accept as proven, but again there was conflicting evidence as to whether the Council breached its duty of care.

Joinery

[32] In his leaks list prepared for the experts' conference, Mr Probett noted inadequate sealing between the joinery and cladding giving rise to localised damage and the need for widespread works to repair it but particularly on the east, north and west elevations. Mr O'Hagan found a window installed upside down on the rear south wall with the drain holes at the top.

[33] Mr Paykel however stated that (actual) damage due to inadequate window installation was limited to two windows, on the east and west elevations (as well as the large bay window at the front). On the east elevation there would be damage anyway from water flowing down inside the cladding because of the lack of under-flashing at the gable end (as above).

[34] Mr Probett stated that the leaks at the large bay window on the east wall were caused by defective flashings. (It had been suggested that this was due to the panes being wrongly installed or put back.) Mr Probett also stated in his report that the use of a horizontal joint above the bay window was not in accordance with the manual.

[35] Concerning the flashing of the bay window, Mr Hubbuck stated in his evidence that visually the horizontal control joint appeared to be installed in accordance with the James Hardie 1998 guide. It would have been preferable if the H mould had been

installed so as to allow an overlap continuing under the head flashing, Mr Hubbuck stated. The builder had stopped the H mould slightly short of the head flashing.

[36] I prefer Mr Probett's evidence about the cause of the leaks at the large bay window, because of his expertise. While there was a widespread failure to install and seal the joinery correctly, including incorrect flashings and sealing, I have concluded that damage was caused, or contributed to, in only the three locations.

Sheet set out - three locations

[37] Even though the experts' agreement recorded that there was no damage from this defect, Mr O'Hagan's concern noted in the report ('cracks visible could have occurred in other locations') appears to reflect the assessor's report that the sheet set-out was not in accordance with the manual.

[38] In his response to Mr Hubbuck's evidence, Mr O'Hagan stated that Fig 12 on page 10 of the James Hardie July 1998 manual specifically shows that unless they are control joints, sheets should not be joined under the corner of openings. He stated that this requirement was breached under windows 2, 5, 8, 10, 14 and 15.

Control jointing: three vertical control joints missing on east and north and south of garage, and sheet joint cracking on north, east and west elevations

[39] Following the experts' conference, Mr Paykel wrote to the Tribunal on 22 July 2010 stating that he felt that items 6 and 7 could be misinterpreted from his opinion. He stated that in his opinion the lack of vertical control joints was not the cause of the sheet cracking. There were no vertical control joints on the southern elevation which was 8.4 metres long and there were no visible cracks, so the cracks had been caused by other defects. Vertical control joints were only

required, according to the manufacturer's specifications, on walls whose length exceeded 5.4 metres. The cracking to the sheets was extreme and had occurred even on elevations where the walls are less than 5.4 metres and cannot be linked to the absence of control joints. The cracking had been caused by a systemic failure of the Harditex system. The damage was to the east, west and north elevations and the minimum repair required the re-cladding of these elevations. In his oral evidence Mr Paykel reiterated his view that there was a systemic failure of the cladding and that the cracking in it could not be attributed to the lack of control joints.

[40] Mr O'Hagan replied to Mr Paykel's letter on 23 July. He stated that the manufacturer required control joints at 5.4 metres and, as manufacturer, must have a reason for this requirement. He stated this requirement was not met on this house. Manufacturers design the product for all applications and locations. They would recognise that the performance requirement for north and south facing walls will be different but have only put one requirement in their technical literature to cover the worst situation. Mr O'Hagan noted that the long south wall is not subject to the same external conditions as the shorter west wall under stress, so he disagreed that that wall could be given as a reason to discount the lack of control joints as a contributor to cracking.

[41] Concerning cracking on walls less than 5.4 metres, Mr O'Hagan stated that Mr Paykel was ignoring other possible causes of cracking such as poor application and curing of the joint compound, incorrect application of the reinforcing tape, possible faults with the compound itself and stopping the sheets when wet.

[42] Mr O'Hagan stated the shorter west wall of the garage was a gable end wall. The gable area had no insulation and the rear of the sheet was subject to heat build up which would have increased stress on the joints. For those reasons he considered the lack of

control joints on the walls where they were required must have been a contributory cause of cracking. He noted that Mr Paykel's opinion, expressed at the meeting, was not agreed by the experts. In his oral evidence Mr O'Hagan emphasised that the lack of control joints did contribute to the cladding failure, which was of itself damage in his view.

[43] Mr Hubbuck stated that there are a number of reasons cracking can occur including the (inadequate) preparation of the sheets before the coating is applied, their moisture content, the mixing of the coating itself and jointing issues. The performance of the paint is also an issue as paint applied too thinly will allow excessive moisture to enter the wall.

[44] In his report Mr Probett stated in relation to the failed cladding that some taped joints between the sheets had failed and cracked, especially on the sides exposed to sunlight. This compromises the integrity of the coating and allows water to enter. Mr Probett stated it is impossible to be dogmatic about what caused the cracking but the following are often implicated: lack of adequate control joints, poor joint preparation and use of smooth paints as a joint primer, coupled with a lack of key coat to PVC mouldings, and cladding being tight fixed to head flashings. The use of taped horizontal joints and the positioning of some vertical joints close to window or door corners were all contrary to the guidelines current at the time.

[45] In his leaks list he prepared for the experts' conference, Mr Probett stated the failed cladding was systemic and that water intrusion had given rise to damage to the cladding and that there needed to be a re-clad and partial frame replacement.

[46] Having regard to the evidence overall, I have concluded that it is more likely than not that the failure to install the cladding in

accordance with the James Hardie manual, which Mr Probett described and Mr O'Hagan listed in his letter of 23 July, did contribute to the serious and widespread cladding failure and cracking. Even with the reservations Mr Paykel expressed, I accept that agreement was reached that the lack of control joints was a contributory cause. I have concluded that this cladding damage, which was associated with water ingress including in the cracks and at the joints, was the most serious consequence, but not the only consequence, of the defects Mr Probett described and that, as with the other defects and damage, there is potential liability as a result.

Three pergola posts were unprotected at the top

[47] Mr Paykel stated that these posts were not part of the main building, implying that they were of less importance than the three structural posts or that they could not be covered by the adjudication. The WHRS Act 2006 states that 'dwellinghouse' includes a gate, garage, shed or other structure that is an integral part of the building. These posts were integral to the townhouse so should be regarded no differently than the structural posts in that respect. I accept that there was damage to them from the faulty construction at the top involving the horizontal use of Harditex and, at the bottom, through a lack of ground clearance (as I have already noted).

WHAT IS THE APPROPRIATE REMEDIAL SCOPE?

[48] Apart from Mr Dickensen, who considered that replacement of the jointing systems solely was required, all the experts agreed that a full re-clad was required. Mr Dickenson also stated that a video recording taken by Mr Maio, Mr Wilson's representative, showed that the damage to the framing underneath was limited. Mr O'Hagan held a contrary opinion, based on the damaged timber he saw and on photographs that were taken during the remediation.

[49] I accept the majority opinion that a re-clad was necessary first because the cracking in the cladding on east, north and west elevations was widespread. Also Mr Probett stated that water had penetrated the cladding itself. This is shown in a thermal image of the left and central walls of the garage in his report where blue areas indicate moisture at vertical cracking or horizontal clamping joints. These blue areas spread beyond or behind the joints themselves. For those reasons replacement of the jointing systems alone would have left damaged sheets in place. The damaged timber framing also needed to be uncovered and replaced.

[50] Further I accept Mr Probett's view that a full re-clad was justified because the number of walls requiring re-cladding due to cladding failure equated to well over 50% of wall area. When walls with suspect joinery were added and they were below roof areas with ponding board issues, the balance of low risk cladding became quite small.

IS THE AUCKLAND COUNCIL LIABLE FOR THE CLAIMANTS' LOSSES?

[51] In his judgment *Dicks v Hobson Swan Construction Ltd,*[1] Baragwanath J held that it was the task of the Council to establish and enforce a system that would give effect to the Building Code. Because of the critical importance of seals as the substitute for cavities and flashings (in that case) it should have done so in a manner that ensured that seals were present.

[52] Similarly, in *Body Corporate 188529 v North Shore City Council*[2] Heath J held that a reasonable council ought to have prepared an inspection regime that would have enabled it to determine on reasonable grounds that all relevant aspects of the

[1] *Dicks v Hobson Swan Construction Ltd (in liq)* (2005) 7 NZCPR 881 (HC).
[2] *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479 (HC).

Code had been complied with. The Court held that the council does not have the function of a clerk of works and even with an adequate inspection regime it will only have limited opportunities to inspect the work as it progresses.

Mr Hubbuck's evidence, Mr O'Hagan's reply, and the Tribunal's further findings

[53] Mr Hubbuck, the Building Compliance Manager of the Rodney District Council, gave evidence about the practice of council inspectors in 2000/2001. Mr Hubbuck stated that if the only issue in respect of ground clearances (defect 1) was the cladding being low near the garage doors, he would not expect a reasonably prudent council officer in 1999/2000 to take action in this part of the house provided the cladding was not in contact with the concrete. This was because the concrete ramp would ensure that water flowed away from the wall and this was at the time thought to be appropriate. Mr Hubbuck stated that he also understood that near the entrance there was another area where the cladding was in close contact with the ground.

[54] Referring to the patio, where the pergola support column was in contact with the tiled patio, he stated that the question was whether the patio and tiles were in place at the time of inspection. If they were in place, then the construction in the relevant photograph should not have been passed.

[55] Mr O'Hagan stated that the lack of ground clearance arising from the relationship of the concrete pad for the north deck to the main house floor slab, resulted in water ingress and damage to the framing of the northern west elevation. This was shown in a photograph appended to his witness statement. He stated that the lack of ground clearance would have been visible during seven inspections. They were for the slab floor on 30/10/00; pre-line

building on 7/12/00; insulation on 8/12/00; post line on 13/12/00; bracing on 10/01/10; final check on 9/02/01; and final recheck on 21/02/01. Mr O'Hagan stated the tiles were only 10mm thick and their installation would not have materially changed the ground clearance on the northwest patio. He listed the affected areas of the bottom plate and cladding on all four elevations, referred to earlier in this decision.

[56] As I have stated above, with one exception where a flashing was the cause at the south west corner, I accept that damage arose through a lack of ground clearance in all the locations Mr O'Hagan reported. I consider that the number of areas the experts were able to agree upon as being affected by lack of ground clearance understated the actual number of affected areas. I accept Mr O'Hagan's view that these defects would have been visible to a council inspector, well before the inspections were complete. Mr Hubbuck acknowledged that was possible in one area. Mr Robertson conceded that the lack of ground clearance at the patio end would have been visible to the inspector at the final check. I conclude that the Council was negligent in not insisting that the cladding was sufficiently clear of the exterior surface in those locations in paragraph 28 above.

[57] As regards apron flashings (defect 2), where water had entered the walls, Mr Hubbuck stated that in 2000 there was no specific detail giving guidelines as to how to complete the end of an apron flashing. There was certainly no specific requirement for a kick-out/diverter. Instead inspectors expected that sealant would be applied to the termination point of the apron flashing to the cladding at the end. The acceptable solution was substantially revised in July 2005 to include the forming of kick-out/diverters. In 1999/2000 he would not expect a council inspector to take action if the roofer had not installed a kick-out/diverter.

[58] Mr O'Hagan referred to an article in the September/October 1998 Build Magazine by Steve Alexander as an example of the information available and knowledge within the industry before this dwelling was built. He acknowledged that the installation of kick-out flashings was not a regulatory requirement but Mr O'Hagan asserted that their installation was accepted as good trade practice by late 2000 when this house was built. He listed other publications that reinforced the need for the installation of kick-out flashings as good trade practice, namely the February 1993 BRANZ Bulletin 305 "Domestic Flashing Installation" and the November 1994 BRANZ Bulletin 326 "Cladding Buildings on Exposed Sites" which stated on page 6: "...a flashing must divert water away from any point where it could enter the structure." An October 2000 BRANZ seminar on weathertight buildings was well attended by council inspection staff. A kick out was on the handout given to those persons who attended.

[59] Mr O'Hagan's opinion was that in late 2000 a reasonably competent building inspector would have checked to see that a kick-out flashing had been installed as good trade practice. By late 2000 it was well known within the industry that the lack of kick-outs was resulting in cladding failures. This was well before manufacturers included kick-outs in their technical literature.

[60] Mr Probett broadly agreed with Mr Hubbuck's views as to what council inspectors undertook in the way of inspection at this time.

[61] While the Council might have been expected by the end of 2000 and the beginning of 2001 to have become aware of the need for kick-outs or diverters in these two locations, and insisted upon them, I do not find that the Council was negligent in not doing so as diverters or kick-outs were not mandatory.

[62] Concerning the gable end above the garage (defect 3), Mr Hubbuck noted that Mr Probett had explained that no barge tiles had been installed. Instead a fibre cement sheet had been placed under the edges of the end tiles. Mr Probett had referred to a diagram provided by Monier which confirmed that provided a metal tray is installed, it is appropriate to finish the tiles this way. Mr Hubbuck stated that the detail here looked similar to the Monier details, if the optional timber fillet was fitted and the barge board left off. In 1999/2000 a reasonably prudent council officer looking up at the verge of the roof would have passed it as looking visually acceptable. A council officer would have been entitled to rely on the skill of the tradesperson.

[63] Mr O'Hagan responded that during the bracing inspection on 10 January 2001 the scaffold was in place and to check the nailing of the Harditex bracing sheets the Council inspector would have had to climb up onto it. On the eastern elevation he would have been alongside the gable end of the roof. The flashing if installed would have been visible during this inspection. Mr Dickensen also stated that the scaffolding would have been in place. In this case I accept that a reasonable inspector would have been able to see whether or not the Z flashing had been installed and would have checked that aspect in his inspection.

[64] Concerning three windows without the required overhang of the head flashing past the jamb, and one window installed upside down with the drain holes at the top (defect 4), Mr Hubbuck stated that a council officer would be looking for a projection of at least 30mm, and the officer would be concerned if a window was not installed that way. An officer who saw a problem in one or two isolated occasions might well take the view that removing the whole window was excessive, given that it was difficult if not impossible to retro-fit a head flashing without removing the whole window and completely refitting it. On balance a reasonably prudent officer in

1999/2000 should have taken action. In his oral evidence, Mr Hubbuck said an inspector might take the view that the east window was protected by the soffit above.

[65] Mr Hubbuck stated that the drain holes in the window that was installed upside down on the south wall would likely have been hidden from view by the head flashing. Concerning the large bay window on the north wall, the inspector would only have seen the window as installed with the texture coating in place and any sealant or flashing overlap would not be visible. This is an instance where there needs to be some reliance on the skill of the builder, Mr Hubbuck stated.

[66] On balance I conclude that the Council failed in its duty of care in respect of these windows. Given Mr Probett's criticism of the joinery installation generally which he viewed before the remediation, and Mr Hubbuck's own mixed evidence, I consider the Council likewise should have been alert to these defects, including the defective flashing on the bay window.

[67] Concerning the Harditex sheet set-out (defect 5), Mr Huubuck stated he understood that the sheets around the windows had been cut in line with the jambs. He understood it was an issue on only a couple of windows. As the sheet was used as a bracing element, the inspector would have checked the fixing of the Harditex before the application of the texture coating. The sheets will be fixed before the inspector gets a chance to fail the fixing of the sheets. The council officer needs to take a view whether the small number of sheets fitted contrary to the recommendations of James Hardie should be viewed so seriously that the builder should be required to remove them and fix fresh sheets. If the problem was widespread Mr Hubbuck wrote that he would expect a building inspector to take a hard line; but if the problem was isolated to one or two windows, as Mr Hubbuck understood was the case here, then the inspector was likely to make a judgment as to the elevation's exposure to the sun.

South facing elevations are not exposed to solar heat and thermal expansion is less of an issue causing cracking.

[68] If it was an isolated problem the officer would be aware that in accordance with the recommendations of James Hardie, the cladding had to be regularly inspected with any cracks being fixed by the homeowner. The cladding was expected to crack at some point over its lifetime, so any additional cracking would be dealt with as normal maintenance. In 1999/2000 he would expect the inspector to take action if the problem was widespread but where it was isolated, he would be likely to make a judgment call dependent on the extent of the deviation from the specifications and exposure to expansion and contraction.

[69] Concerning the sheet joints, Mr O'Hagan advised that control joints are different in appearance from joints to be stopped and due to the importance the manufacturer puts on the control joints, a competent council inspector would know the difference. He stated that the Harditex manual requires joints to be recessed on both edges and the council inspector looking at the sheets prior to stopping should have required any joints with a square edge to be recessed or be told that it was to be a control joint.

[70] Concerning control joints and sheet cracking (defects 6 and 7), Mr Hubbuck stated that the council officer would have seen the texture coating freshly applied and painted and looking very tidy. Any failure would have taken place later.

[71] Mr Hubbuck and Mr O'Hagan gave extensive additional written evidence about the characteristics of joints and control joints and their appearance in the context of the Council's requirements and obligations at the time. Generally Mr Hubbuck's evidence was that the Council appeared to have acted reasonably in the particular circumstances.

[72] In her submissions Ms Black submitted that, based on the High Court's judgments in *Dicks* and *Sunset Terraces* (as *Body Corporate 188529* came to be known), it was incumbent upon the Council to devise a system of inspection that would ensure that the property complied with the Building Code.

[73] Mr Hubbuck's evidence as to what he would have expected a council inspector to have observed and what steps one would have taken in 1999/2000, was based on his experience. But of course, apart from the inspection record, what decisions the actual inspector actually took are unknown.

[74] However I agree with Ms Black's submission concerning Mr Hubbuck's evidence. Mr Hubbuck's evidence as to what an inspector at that time would have seen or not seen and approved or not approved was introduced to show that on the whole the Council acted responsibly. But in my view Mr Hubbuck's and the experts' evidence taken as a whole shows that, even taking into account that the amount of time the Council could spend on site was limited, its system for inspecting those aspects of the construction that were essential to ensure that it would be weathertight were inadequate, and that it had not established, and so was not enforcing, a system that would give effect to the Building Code.

[75] I have reached that conclusion bearing in mind that 1999/2000 was at least five or six years after these construction methods had come into use, as the articles Mr O'Hagan introduced demonstrate. Mr Probett stated in his written comment on Mr Hubbuck's evidence that he was not of the opinion that council officers were generally concerned with the positions or even the existence of control joints and he never recalled council inspectors commenting on issues while he was building.

[76] In summary I do not find that the Council was negligent in not requiring kick-outs or diverters at two locations, or in allowing the three pergola tops to be constructed inappropriately. In such a particular matter as that I accept Mr Hubbuck's approach. But I find that the lack of ground clearance, the lack of a Z flashing at the gable end above the garage, the inadequate installation of three windows and the bay window, and the incorrect installation of the cladding all caused or contributed to damage and that the Council was negligent in allowing these defects to be passed. I also find that the Council was negligent in issuing its certificate that the house was compliant with the Building Code in those respects. I have concluded that a substantial portion of the repairs including the need to construct nibs to provide a sufficient gap between the exterior of the house and ground surface at some locations, to replace damaged framing timber, and to re-clad the property was the result of a breach of duty on the Council's part.

DID THE CLAIMANTS RELY ON THE COUNCIL?

[77] Mr Robertson submitted that because Ms Malmanche signed an unconditional sale and purchase agreement for the property there was no cause of action because she did not rely on the Code of Compliance Certificate. Ms de Malmanche responded that she instructed her solicitors to wait until the Code of Compliance Certificate had been issued by the Council before settling the purchase in early March 2000. I accept Ms de Malmanche's evidence that she relied on the Council's Certificate, even though she was contractually obliged to settle. The Council had no interest in the contractual arrangements between Ms de Malmanche and the vendor, and was not a party to the contract. Also the property was later transferred to the claimant trustees and it was an established fact that the Code Compliance Certificate had been issued long before that transfer. For these reasons I reject the Council's argument that there was no reliance by the claimants on the Council and no duty of care arose.

[78] I have found that the Council was negligent in issuing the Code of Compliance Certificate and I determine that the concurrent claim against the Council for negligent misstatement should also succeed.

WAS THE THIRD RESPONDENT MR LOWE THE PROJECT MANAGER AND IF SO, WAS HE NEGLIGENT AND IS HE LIABLE?

Ms de Malmanche's evidence

[79] Ms de Malmanche's evidence was that whenever she telephoned Mr Bickerton on any building matters, he would generally refer her to Mr Lowe and that she dealt with Mr Lowe, as well as Mr Wilson, on building matters. She dealt with Mr Lowe about her request for a particular pergola post at the west end of the house to be eliminated from the construction, the implementation of a change in the plans for a sliding door to be installed rather than a window at that end and a credit arising from a change in the specified flooring. Ms de Malmanche said that Mr Lowe pointed out to her areas where the surface of the inside walls would be improved before they were painted. Mr Lowe said he could not remember that.

Mr Lowe's evidence

[80] Mr Lowe was a director of Lonestar Builders & Contractors Ltd, a company now struck off. Mr Lowe said in his evidence that his wife who was also a director did nothing for the company, that he carried out his tasks as the company's employee and that he was, in effect, protected from liability by the company. Mr Lowe said he visited the site to check on claims by subcontractors before progress payments were authorised and that he made site visits for that purpose.

[81] Mr Lowe denied that he was the builder or project manager. Mr Lowe said the project manager was Mr Bickerton (the director of the development company). He said that Mr Bickerton was also able to engage subcontractors under the arrangements between his company and Lonestar, and that he did so for some of the work including the foundations (which were excluded in Lonestar's contract).

[82] Mr Lowe stated that he appointed particular people to take responsibility for the quality of the building work. He could not state who those persons were. Later in his evidence Mr Lowe said he had some awareness of the manufacturer's requirement for Harditex to be installed with control joints and adequate ground clearances, but he did not know the details.

Decision on the claim against Mr Lowe

[83] Mr Lowe's company had the building contract for the development and engaged the subcontractors to carry out the job. Mr Lowe acknowledged that he was his company's only employee, and it is clear that Mr Lowe himself carried out all of the company's duties under the contract, to the extent they were carried out. It was not suggested that anyone else did so.

[84] Mr Lowe said in evidence (somewhat contradictorily if he believed he, or his company, was not responsible for building standards) that he appointed people to take responsibility for the quality of the construction, meaning presumably that he delegated that responsibility on behalf of his company.

[85] This was contrary to what Mr Wilson indicated in his evidence when he agreed with my suggestion that no one person who worked on the site for 10A was explicitly made responsible. I accept Mr Wilson's evidence in that respect. Mr Wilson said he worked for Mr Lowe for many years. The reality was that even though

Mr Wilson was a contractor, Mr Lowe was Mr Wilson's boss, and that Mr Lowe had overall responsibility, which he delegated to Mr Wilson in a general way when Mr Wilson was on site.

[86] Mr Lowe sought to give the impression that it was not his personal responsibility to know and that he did not need to know the details of the James Hardie Harditex requirements and to see that they were being implemented. He said he knew about the clearance and joining requirements in general terms. In the Tribunal's view this was carelessness on Mr Lowe's part. His personal responsibilities went well beyond his duties merely as a company director and were such that he had overall responsibility for the quality of the construction. I do not accept that Mr Bickerton fulfilled that role.

[87] In a moment of candour towards the end of his evidence when discussing the installation of flashings at the two roof levels on the east elevation, Mr Lowe said: "I can't recall if we left the lower (garage) roof off before we did the clad". Those are not the words of a person who was merely checking to see that jobs had been done so that they could be certified for payment. They were the words of a person central to decision making, the decision maker in fact, about when and how the jobs were carried out and with the authority to make such decisions.

[88] Ms de Malmanche's evidence, which was credible, contradicted Mr Lowe's about his role in the construction. I prefer Ms de Malmanche's evidence to Mr Lowe's. I accept that her impression and understanding that Mr Lowe was in charge of the construction was correct. I do not believe Mr Lowe's evidence that he was not personally in overall control of the building work as project manager. When he gave his evidence Mr Lowe's demeanour was at times casual, almost reckless, and it was as if he did not care whether I believed him or not. While a witness's demeanour is not conclusive in the deciding the witness's credibility, in Mr Lowe's case I have concluded that his casual demeanour simply reflected the inaccuracy

or incompleteness of his evidence. I prefer Ms de Malmanche's evidence which was reliable though not exaggerated.

[89] In a recent judgment of the High Court *North Shore City Council v Wightman & Ors*[3] Mackenzie J considered the cases of *Trevor Ivory Limited v Anderson*[4] and *Morton v Douglas Homes Limited.*[5] Mackenzie J noted that in *Morton v Douglas Homes* the plaintiff alleged negligence by a director in the construction of a building. The case involved physical damage due to the subsidence of the foundations. In *Morton v Douglas Homes* Hardie Boys J considered that a director is as liable for his own torts (civil wrongs) as any other servant or agent, and that his liability would arise not by reason of his office of director, but by reason of a relationship of proximity existing between him and the plaintiff. Hardie Boys J held:[6]

> The relevance of the degree of control which a director has over the operations of the company is that it provides a test of whether or not his personal carelessness may be likely to cause damage to a third party, so that he becomes subject to a duty of care. It is not the fact that he is a director that creates the control, but rather that the fact of control, however derived, may create the duty. There is therefore no essential difference in this respect between a director and a general manager or indeed a more humble employee of the company. Each is under a duty of care, both to those with whom he deals on the company's behalf and to those with whom the company deals in so far as that dealing is subject to his control.

[90] Mackenzie J stated that an essential distinction between those two cases is that *Trevor Ivory* is a case in which the existence of a duty of care is dependent on the assumption by the tortfeasor of responsibility, while *Morton* is a case in which the duty of care was

[3] *North Shore City Council v Wightman & Ors* HC Auckland, CIV-2010-404-003942, 30 November 2010.
[4] *Trevor Ivory Limited v Anderson* [1992] 2 NZLR 517 (CA).
[5] *Morton v Douglas Homes Limited* [1984] 2 NZLR 548 (HC).
[6] At [596] per Hardie Boys J.

not dependent on any special relationship, or assumption of responsibility on the part of the person sought to be held liable.

[91] In *Body Corporate 183523 v Tony Tay & Associates Ltd*[7] the Court held:[8]

> Although all those cases [*Drillien, Hartley, Nielsen, Kilham Mews, Byron Ave*] revolve around their individual facts, as a general rule directors facing claims in respect of leaky buildings will be exposed in situations where the companies are one person or single venture companies or in situations where there are factual findings that the director was personally involved in site and building supervision or architectural or design detail...

[92] I have found as a matter of fact that Mr Lowe was involved in building supervision. In the light of those judgments, that means that even though he was a director of a company, he became personally responsible and liable, not because he was a director, or an employee, but through his involvement which was effectively that of project manager. Further, there is evidence that Mr Lowe was careless in that capacity. By his own admission he did not have sufficient knowledge of the requirements of the James Hardie manual and while he said he appointed a person who was to be responsible for building quality, he was unable to remember who that person was.

[93] In *Body Corporate 185960 & Ors v North Shore City Council & Ors ('Kilham Mews'),*[9] Duffy J endorsed the view of Adjudicator Dean that project managers must carry the burden of responsibility for not taking adequate steps to ensure that those under them achieved the required standards. Duffy J stated that was a sensible

[7] *Body Corporate 183523 v Tony Tay & Associates Ltd* HC Auckland, CIV-2004-404-4824, 30 March 2009.
[8] At [156] per Priestley J.
[9] *Body Corporate 185960 & Ors v North Shore City Council &Ors ('Kilham Mews')* HC. Auckland, CIV-2006-404-3535, 22 December 2008.

approach and that if someone is charged with the responsibility for managing a residential project, the likelihood of careless workmanship and defective construction resulting from poor and careless management would be reasonably foreseeable to that person.

[94] In summary, I have concluded that Mr Lowe was the project manager with the personal overall responsibility and accordingly he owed a duty of care to purchasers to ensure the building was built without defects which would allow water to enter and damage the building. I conclude that Mr Lowe breached that duty to the claimants by not ensuring, either personally or by delegation when he was not on site, that the house was built in accordance with the Building Code. I find that that Mr Lowe was negligent in his failure and that his level of responsibility was such that he should be held severally and jointly with the council liable for the damage I have described and attributed to it above, and for the damages awarded below.

[95] Concerning the lack of ground clearance, Mr Lowe stated that the laying of the foundation slab was not included in Lonestar's contract but was the subject of another contract let by Mr Bickerton's company. In my view that does not diminsh Mr Lowe's responsibility to see that steps were taken to ensure the cladding (and other elements) were installed correctly.

WAS THE FOURTH RESPONDENT, MR WILSON, THE BUILDER AND IF SO, WAS HE NEGLIGENT AND LIABLE?

<u>Ms de Malmanche, Mrs Sylvia Eleanor Drew and Mr Paul Joseph Neazor's evidence</u>

[96] Mr Malmanche gave evidence that she was very interested in and committed to her new home and visited the site often during the summer when it was being built. She gave evidence that she visited

often after work and sometimes at lunch time and before work. She was on site practically every day. Ms de Malmanche stated that in her opinion Mr Wilson was the builder of the house. He was there practically every time when she visited.

[97] Mr Malmanche's neighbour, Mrs Drew, also gave very credible evidence that she could see Mr Wilson working on site. Mr Neazor who occupied a home at the bottom of the subdivision also recalled seeing Mr Wilson on site. The claimants have also pointed out that Mr Lowe gave Mr Wilson's name and mobile phone number as a contact while Mr Lowe was away.

Mr Wilson's evidence and submissions

[98] Mr Wilson stated that he was absent from the site because he went on a school trip with his children between 6 and 11 December 2000 and from 11 December he was directed by Mr Lowe to go to a property in Grafton and from 19 December until Christmas that year he worked at a hairdresser's in Benson Road, again at Mr Lowe's direction. Mr Wilson acknowledged that he would have seen the lack of ground clearance at least near the front door.

[99] Mr Maio's final submission on Mr Wilson's behalf was that he was a subcontractor to Lonestar and one of many builders who worked at the complex. The works that he completed on site did not involve the roofing or cladding, and they were the issues for which the claimant has claimed a loss. Finally he submitted that he was not a site supervisor or project manager. However in his oral evidence, Mr Wilson did acknowledge that he is a qualified tradesperson and had worked for Mr Lowe for many years. He said he was not in charge at this site but did co-ordinate contractors and Council inspectors coming onto the site.

Decision on the claim against Mr Wilson

[100] The essential issue with the claim against Mr Wilson was not whether he was the main on site builder of the house - he clearly was - but whether it has been proven that he was responsible for the defects which gave rise to damage.

[101] The claimants have questioned the truth of Mr Wilson's saying that (as well as being away on two other occasions) he went on a school trip in December 2000 when it was not in his written evidence. However I accept Mr Wilson's evidence in that respect. It is quite possible that he only recently remembered about the school trip after he had prepared his written response. I also accept there would have been other subcontractors on site. Nonetheless it is impossible to escape the conclusion that Mr Wilson was the subcontractor most engaged on the building works at 10A on a day-to-day basis.

[102] The claimants submit that the evidence shows that there were two builders who had the role of managing the site. They assert that Mr Wilson had the day-to-day management role, sequencing and supervising Lonestar's subcontractors, and that he was Peter Lowe's trusted man on site. They assert that Peter Lowe had overall control of the site. He engaged and paid Lonestar's contractors and sequenced and inspected the work. Mr Robertson has submitted that one can reasonably infer that Mr Lowe's 'trusted man' was Mr Wilson, but the fact remains that Mr Lowe did not say who that trusted man was.

[103] As I have indicated, the issue with Mr Wilson is whether he has been proven responsible for water entry and damage. The evidence indicates that Mr Wislon was a labour only building contractor and as such, he was responsible only for the work he undertook. In my view there is insufficient evidence to show that Mr Wilson was responsible for the impugned work, that the work he

undertook was defective and caused or contributed to the leaks and damage, or that he was responsible for the supervision of others.

[104] Mr Wilson said he did not apply the cladding or roofing and there was no evidence that he did. In his final submissions on Mr Wilson's behalf, Mr Maio stated that it is uncontested that cladding and joinery were installed after 7 December 2000 (the pre-line inspection) and before 10 January 2001 (the bracing inspection). Indeed for some of that time Mr Wilson was away. Mr Wilson reluctantly conceded in cross examination that he would have seen the cladding at ground level at the main entrance as he went in and out, and on the terrace. It was submitted that he should have drawn that defect to Mr Lowe's attention but he did not do so. However I do not accept that in the circumstances of this case it has been proven that Mr Wilson was under such a duty.

[105] Overall I have concluded that, as the claimants allege, Mr Wilson was often on site and that as a labour only contractor, he owed the claimants, as subsequent purchasers, a duty of care for his own work. But for the reasons above, I am not persuaded that the claimants have proven in the particular circumstances of this case that Mr Wilson breached his duty of care and so the claim against Mr Wilson is dismissed.

WAS THE FIFTH RESPONDENT ANTE ARCHITECTS LIMITED NEGLIGENT AND LIABLE AS ARCHITECT?

[106] The claimants asserted that Ante Architects Limited owed the claimants a duty to ensure that its plans and specifications were prepared, and that the supervision of the construction was conducted, with reasonable care and skill. The claimants alleged that the plans and specifications were inadequate. In particular, there were no details supplied for ground clearance, for finishing gable and roofing junctions, and for control joints or horizontal joint options. As a result of these breaches, the claimants suffered losses.

[107] The claimants also alleged that Ante Architects Limited failed to provide weathertightness details for the installation of Harditex on the tops of the pergola columns in the plans and specifications. The absence of details for the tops of those columns could not be remedied by reference to the James Hardie 1988 Guide. The sheet was used as a roof on the pergola columns, contrary to the manual.

[108] Finally the claimants alleged that Ante Architects Limited failed to supervise and inspect the construction properly. The agreement between Lonestar and Whitcliffe Homes Limited, the developer, showed that Ante Archtects Limited's involvement was not limited to the preparation of building and consent documents and that Ante Architects Limited administered, monitored and observed the construction. The claimants stated that the Court has accepted that those approving payments need to confirm that the work they are certifying has been completed appropriately.[10] Ms Black submitted the Tribunal can infer that Ante Architects Limited had a role of monitoring and observing the construction and the duty to do so with due care and skill.

[109] In response Mr MacRae submitted that Mr O'Hagan was the only expert who had adduced any evidence against the architect. He referred to the decisions of the courts requiring that in negligence cases, reference must be made to the general practice of the profession at the time, and that generally such evidence must be provided by a representative or representative body of the profession. He submitted that Mr O'Hagan, who is a registered building surveyor, was not qualified to give evidence on what a reasonably competent architect should have included in plans in 1999.

[10] *Rowlands v Collow* [1992] NZLR 178 at 195 (HC).

[110] Mr MacRae submitted that no evidence was introduced that Ante Architects Limited monitored, observed or inspected the construction work. He submitted that the documents Ms Black referred to related to the administration of the contract and it cannot be inferred from them that the architect monitored or inspected the construction work.

Decision on the claim against Ante Architects Limited

[111] In *North Shore City Council v Body Corporate 188529 & Ors (Sunset Terraces),*[11] the Court of Appeal upheld Heath J's conclusion that councils in issuing building consents, and designers in preparing the plans, were entitled to assume that a reasonable builder would have access to and rely on the manufacturer's specifications, and that this documentation did not need to be replicated by the designer in the plans.

[112] I recognise that the architect did owe a duty of care to the claimants as purchasers. However, I am not satisfied that there is sufficient evidence of a breach of that duty by Ante Architects Limited. While Mr O'Hagan is a building surveyor with wide experience, and I have accepted his and the other experts' evidence as to what a council inspector would have required, there is no evidence from an architect that the consent drawings were deficient. That would have been necessary for the claim to succeed in respect of the allegation that there were insufficient details in the plans, and so that allegation fails.

[113] Also I do not accept the claimants' submission that the contractual documentation for the project is evidence of, let alone proves, that the architect was involved in the observation and inspection of the building works. As Mr MacRae submitted, there is

[11] *North Shore City Council v Body Corporate 188529 (Sunset Terraces)* [2010] 3 NZLR 486 (CA).

no evidence of that. Nor do I accept that the documents required Ante Architects Limited to be involved in such inspections (whether it was or not). While I have held that Mr Lowe's involvement and responsibilities went well beyond checking that particular pieces of work had been carried out properly so that payments could be released by the architect, I accept that that was Mr Lowe's responsibility. There is no evidence of an expectation that the architect would be on the site of this job.

[114] Finally, concerning the architect's alleged failure to provide details in the plans as to how the tops of pergola columns were to be built, those details not being available in the James Hardie technical manual, I have accepted the experts' evidence that the flat tops of the pergola columns were a cause of water ingress and damage. However, even this ground in the claim against the architect fails in my view as there is an insufficiently close causal link between the architect's drawings and the damage to the finished columns. There is no suggestion that the decision to use Harditex horizontally, which was contrary to the manual, to finish the tops of the pergola columns was the architect's decision. Ante Architects Limited was too remote from this defective element of the construction and the resulting damage to attribute responsibility to them when the fault for not seeking out an appropriate solution lies elsewhere.

[115] Overall I find that the claim for negligence against the architect has not been established.

WAS THE SIXTH RESPONDENT, BUILDING SENSE LIMITED, THE ROOFING CONTRACTOR AND IF SO, WAS IT NEGLIGENT AND LIABLE?

<u>The claim against Building Sense Limited</u>

[116] Building Sense Limited is the successor company to ABT Holdings Limited, formerly known as Auckland Brick & Tile Limited,

following an amalgamation under the Companies Act on 1 October 2009. Until the amalgamation, ABT Holdings Limited had been dormant and had not traded since 2001, and its documents had been destroyed.

[117] The reason why Auckland Brick & Tile Limited's name came to light as the roofing contractor was because Mr Maio, representing Mr Wilson, obtained and produced a copy of a guarantee dated 25 February 2001. The guarantee is signed by Mr Ian Goldstone as a director of Auckland Brick & Tile Limited and is addressed to Lonestar Construction in respect of Unit 1 at 5/10 Tipene Place. It is headed 'Kaimai Tile – Charcoal Colour installed September 2000'. That is a product guarantee whereby Better Building Products Limited, the tile manufacturer, guaranteed the concrete tiles for 50 years. There is also an installation guarantee whereby Auckland Brick & Tile, the installers, guaranteed their workmanship for a period of three years from the date of installation.

[118] The amended statement of claim stated that the sixth respondent was contracted to supply and install the roof and owed the claimants a duty of care to ensure that it was installed with reasonable skill and care, and in particular to ensure that all flashings were installed correctly. The claimants alleged that one of the terms of engagement was that it installed the roof including the installation of flashings to a proper and workmanlike standard. In breach of that duty, the roof was installed with defects, which caused or contributed to damage. As a result the claimants suffered loss.

Mr Nicholas John Collins' and Mr Ian Goldstone's evidence

[119] Mr Collins, a director of Building Sense Limited, was the only common director of ABT Holdings Limited and its successor Building Sense Limited. Mr Collins stated that his role with Auckland Brick & Tile Limited was an administrative one.

[120] The Tribunal also provided the opportunity for Mr Goldstone, a former director of ABT Holdings Limited, to give evidence and he did so on 30 August. In his evidence, Mr Goldstone said he could remember the development but not the particular property. Mr Goldstone accepted that the signature on the photocopy of the guarantee was his and he also accepted that Auckland Brick & Tile was the roofing contractor. He said Auckland Brick & Tile did not actually install roofs itself but engaged sub-contractors to do so.

Discussion

[121] The allegations against Building Sense Limited (Auckland Brick & Tile Limited) concerned the absence of flashings which had enabled water to enter on the northwest, south and eastern elevations. Evidence was given that it would be the roofer's job to install the flashings but Mr Collins' and Mr Goldstone's evidence was that Auckland Brick & Tile supplied and installed roofs only and that at that time other contractors were installing the flashings. However Ms Black pointed to a price that appears to include the installation of flashings. That is in the claimants' favour.

[122] In his closing submissions on behalf of Building Sense Limited, Mr Lucas stated that on the basis of the guarantee, Building Sense Limited had adopted the position that it may have installed the roof on the property in question. However, at the hearing the discrepancy between the dates in the guarantee and the dates of the Council's inspections was identified and he stated that the sixth respondent now did not accept that it fitted the roof at all. The discrepancy in dates relates to the words "installed September 2000" on the guarantee and the fact that the floor slab inspection was not until October 2000.

Decision on the claim against Building Sense Limited

[123] In my view there is too much doubt about the role of Auckland Brick & Tile for the Tribunal to find the claim against it

proven to the balance of probabilities. This is because the original of the guarantee has never been produced but, more fundamentally, as Mr Collins has pointed out, the guarantee has an installation date that is well before the roof went on and it is therefore incorrect. This raises doubt as to whether Auckland Brick & Tile did contract to install the roof on Unit A. Further, even if it was the subcontractor, I accept Mr Collins' and Mr Goldstone's evidence that the company's practice was to contract for the installation of roofs only, not flashings.

[124] I acknowledge that claimants can have difficulty gathering sufficient evidence to prove their claims because of the kind of changes that have taken place with this respondent company over time. But there is insufficient evidence for me to conclude that Auckland Brick & Tile Limited/Building Sense Limited installed or contracted to install the roof or the flashings. Accordingly the claim against the sixth respondent is dismissed.

WAS THE SEVENTH MR SIAKIA THE PLASTERER NEGLIGENT AND LIABLE?

[125] There is no doubt that Mr Siakia was the plasterer as Mr Lowe gave evidence that, like the window supplier, Mr Siakia was one of the contractors he regularly engaged over the course of many years.

[126] The claimants alleged that Mr Siakia owed them a duty of care to ensure the plaster and the plaster claddings were installed with reasonable care and skill and in accordance with the Building Act and Code. The claimants alleged the plaster cladding was installed with defects and damage. However, there was no evidence that Mr Siakia installed the cladding, as distinct from the plaster, and in closing submissions the allegations against him were changed to

state that Mr Siakia was negligent in applying the texture coating to the cladding, not the cladding itself.

[127] The claimants acknowledged that while the texture coating did not itself fail, they referred to Mr O'Hagan's view that cracking of the joints or elsewhere in the cladding could have multiple causes, including the absence of control joints. Mr O'Hagan's view was that Mr Siakia should not have accepted this substrate as suitable for jointing and coating because it would have been obvious to him that the Harditex sheets had been installed incorrectly contrary to the James Hardie manual; that where the control joints were required, they were absent; and that installation of a narrow strip of cladding above the bay window on the north elevation was contrary to the recommendation in the James Hardie manual.

[128] The claimants submitted that the courts have held that tradesmen, such as a plasterer working on site, have a duty of care to the owner and the subsequent owners, just as a builder does.

[129] The claimants submitted that Mr Siakia had a duty to reject the Harditex sheets installed contrary to the James Hardie manual, and that by applying the jointing and coating to the sheets, he accepted the defective installation and became responsible for it. They submitted that the defective cladding allowed water to enter and this caused damage to the structure of timber and widespread cracking in the cladding.

[130] Mr Robertson also submitted that by applying the jointing and coating to the sheets, Mr Siakia accepted the defective installation of the sheets and became responsible for it.

[131] In that respect, at the end of his evidence, when replying to a question from Mr Maio, Mr Hubbuck stated that any trade is responsible to make sure that the substrate that he is applying to is

suitable for the purpose. Mr Probett was critical of the way the sheets were joined. Mr Siakia would have seen that.

[132] Also at the hearing Mr Paykel showed a photograph of cladding after it had been removed from the house in the course of the repairs. The photograph showed that the plaster had been unsuccessfully applied to the webbing strips covering the joints of the cladding sheets. This indicated defective application along those trips. However, I am not making my decision on that ground as it is not a sufficiently proven cause of damage.

[133] Mr Siakia did not participate in the adjudication proceedings in any way. He has not complied with the Tribunal's directions or filed a response to the allegations against him. Pursuant to section 75 of the WHRS Act 2006 the Tribunal is entitled to draw an adverse inference from his non-compliance with the Tribunal's directions.

[134] I do not rely on that provision alone because the claim against Mr Siakia has been proven to the required standard, that is, to the balance of probabilities, based on Mr O'Hagan's, Mr Hubbuck's, Mr Paykel's and Mr Probett's evidence. While I do not know under what particular circumstances Mr Siakia applied the plaster, I accept that he was under a duty to decline to apply the plaster to the defectively installed cladding and that by failing to do so, he contributed to the damage that resulted. Because he did not decline to apply the plaster but went ahead and plastered the whole house, Mr Siakia contributed to the need for a full re-clad. Accordingly he becomes jointly and severally liable for the cost of it and the associated damages awarded below.

[135] For these reasons the claim against Mr Siakia is successful.

IF LIABILITY IS PROVEN, WHAT IS THE REASONABLE COST OF REPAIRS AND HOW MUCH OF THE COST OF REPAIRS IS COMPENSABLE?

[136] The cost of the repairs was not considered at the experts' conference and was dealt with at the hearing. I have accepted that a full re-clad was necessary and so the key issues are whether or not the claimants have proven the cost of those repairs to be reasonable, whether the Council, Mr Lowe and Mr Siakia should be held liable for those costs and how much of the repair cost was betterment.

[137] I observe that the claimants were entitled to choose repairs which resulted in some improvement to the property, but they can only recover by way of damages the sum that reasonably needed to be expended to make good their loss. (It is accepted that when the house was repaired the new plans and the Council's enhanced requirements to ensure the house is weathertight, will of necessity involve some 'improvement', but that necessary improvement is not regarded as betterment).

[138] The claimants stated that the cost of the remedial work of $222,770.59 included Council fees, project management costs, design costs, engineering services, and building contracted costs. The claimants acknowledged that there should be a deduction for betterment of $15,800.58 leaving the net cost of the remedial work in their claim at $206.970.01. Mr Paykel, however, in his brief of evidence calculated the betterment figure at $45,892.00.

[139] At the resumed hearing on 30 August, Mr O'Hagan provided a revised betterment schedule. After hearing Mr Paykel's evidence Mr O'Hagan now stated that the correct betterment figure was $17,634.00. (He now accepted there should be a deduction for insulation of $1,834.) This leaves an amended net amount for remedial costs of $205,136.59.

[140] In her final submissions on behalf of the claimants, Ms Black submitted that Mr Paykel appeared to have acknowledged at the hearing that his betterment figure was too high following Mr O'Hagan's evidence about the costs of the changed cladding, the need to install posts in the support columns and to replace the bay window. She submitted that, given the tender process, $204,042 now claimed was a reasonable figure. That figure of $204,042 net for repair costs is lower than the $205,136.59 figure net of betterment above, but as $204,042 is the figure now claimed, I do not alter it.

[141] Mr Paykel also asserted that the repairs could have been done more cheaply. In letter to Mr Robertson on 20 August 2010, based on an earlier email, Mr Paykel's set out figures for the cost of repairs in a defined number of locations. This approach appears to have been associated with Mr Robertson's argument that the Council should not be held liable for the cost of a full re-clad.

[142] Mr Paykel stated that for defect 1, the three structural posts, the cost should be $18,337, 15.5% of the total cost to re-clad; for defect 2, apron roof flashing west and south elevations, the cost should be $17,220, 15%; for defect 3, lack of Z flashing east elevation, the cost should be $10,250, 9%; for defect 4, joinery defects, the cost should be $5,000, 4%; and for defect 8, three pergola posts, the cost should be $5,674, 5% of the total cost to reclad. In the earlier email Mr Paykel stated that the cost of repair for defects 5-7 would be 100% of re-clad costs. Mr O'Hagan then allocated costs to each defect in response to Mr Paykel's figures, but based on net claim costs of $204,042.00.

[143] Mr Paykel also stated that Coset Construction Limited, the successful tenderer, did not complete the remediation schedule so that with the changes in the contract, it would not have been possible to have quantified the exact amount for each task. Mr Paykel pointed out that the assessor's quantity surveyor estimated remedial costs at

$144,980. Mr Paykel also noted that actual cladding costs per metre square that Mr O'Hagan used in his allocations, $1,189, compared unfavourably with his own estimate. In his final submissions on behalf of the Council, Mr Robertson suggested the two figures given by Mr Paykel and Mr O'Hagan for each defect or area should be averaged.

[144] However I do not consider that is a realistic approach or the correct approach legally. There has been no direct evidence that the amounts claimed - $4,270.65 for Council fees, $22,095.00 for project management, $7,402.00 for design costs, $2,025.01 for engineering services or indeed the balance being $168,249.34 for repair contractor claims net of betterment - were, of themselves, unreasonable. I prefer Mr O'Hagan's evidence that these were reasonable costs. I do so because of his long practical experience, and because these were actual costs, not estimates. I also note that the estimate in the assessor's report was prepared in July 2008, and I am entitled to take note of the fact that such estimates are frequently lower than actual costs of repair turn out to be. For those reasons I consider the cost of repairs was reasonable and the cost of $204,042.00 net of betterment is accepted.

[145] I have found the Council and Mr Lowe not to be liable for the absence of a diverter at two locations. The Council and Mr Lowe are therefore not liable for the damage at the northwest location from this defect. However, they are liable for the re-clad of the west elevation and the east and north elevations, because of the cladding damage and the other defects on those elevations which caused damage.

[146] On the south elevation, the wall at the rear, the cause of the principal damage was the absence of a kick-out or diverter near the laundry door, for which the Council and Mr Lowe have not been held responsible. Also there was less cracking on this wall. However the damage to the framing near the ground at the northwest corner is the

result of an incorrect flashing which the two respondents are responsible for.

[147] Also it would not be viable to re-clad three elevations and repair the fourth with only targeted repairs. Nor would it be reasonable to expect the claimants to make up the difference between targeted repairs and a full re-clad on the south wall. The cost of this repair is another direct result of the proven negligence. For these reasons I have included the cost of repairing the fourth (south) elevation in the compensation.

[148] I conclude that neither the Council nor Mr Lowe nor Mr Siakia should be held liable for the inappropriate use of cladding horizontally at the top of the pergola columns – that was a peculiar use about which there is no real evidence.

[149] As well as questioning whether the pergola columns were part of the house, Mr Paykel was critical of the amount spent to repair them, $13,079. Mr O'Hagan replied fully to that criticism. I am not excluding some of the costs of repairing those columns because of this but because there is no evidence as to who was responsible for the way they were constructed, particularly at the top. As well as being wrongly built at the top, these columns were also in contact with the tiles at ground level and this also contributed to damage, so I have not deducted the full amount. However I do deduct $10,000.00 from the total of $204,042.00 damages for repairs because these columns are in large part excluded from my finding of liability. In total I award $194,042.00 for remediation costs.

WHAT OTHER DAMAGES ARE PROVEN?

<u>Interest on finance to pay for the remedial work</u>

[150] The claimants have claimed interest of $4,642.41 on finance to pay for the remedial work. Paragraph 16 in Part 2 of Schedule 3 of

the WHRS Act 2006 provides that the Tribunal has the discretion to make an award of interest at a rate not exceeding the 90-day bill rate plus 2%, for the whole or part of the period between the date when the cause of action arose and the date of payment.

[151] Ms Black has calculated the interest claim on actual invoice costs from 8 December 2009 to 29 July 2010. The invoices are from Coset Construction and from various smaller providers claimed under consequential losses. The claim is at the rate of 5.02%, whereas the present 90 bill rate plus 2% is 5.17%. Ms de Malmanche and her co-trustees obtained the finance to pay for the repairs from a number of sources including family sources and did not borrow all this money from a bank or finance company. Accordingly an award of interest can be made to compensate for the money used not earning interest elsewhere. In my view the amount claimed is fair and reasonable without adjustment given that it is at a lower rate than the current rate and for a limited eight month period, and the amount claimed is awarded.

Consequential losses

[152] The claimants sought consequential losses of $1,841.79. These were for costs incurred as a result of the remedial work. They were not disputed and should be allowed, except for the $500.00 fee to the Department of Building and Housing for the assessor's report. In my view that is closely associated with costs of the adjudication and is therefore excluded by section 91 of the WHRS Act. $1,341.79 is awarded accordingly.

General damages

[153] The Tribunal may award damages for mental distress under section 50(2) of the WHRS ACT 2006. In *Sunset Terraces* the Court of Appeal indicated that an award of up to $25,000.00 was

appropriate for the owner/occupier of a leaky home, including an owner who was a trustee of a family trust.

[154] Ms de Malmanche gave evidence that the experience of dealing with her leaky home and its repair had caused her a great deal of stress and had exacerbated her migraine headaches. Mr Maio put to her that she was suffering stress for other reasons but I accept Ms de Malmanche's evidence that dealing with her leaky home has been in itself the cause of a great deal of stress.

[155] However the experience she has suffered has not been in the worst category and it has not gone on for as long as some. Taking those factors into account and, even though they are not binding precedents having regard to other awards for general damages in the Courts and Tribunal, I determine that an award of $20,000.00 for general damages for mental distress and anxiety should be paid.

[156] Therefore the total amount awarded in this determination is $194,042.00 for the cost of the remedial work, $4,642.41 interest, $1,341.79 consequential losses and $20,000.00 general damages, a total of $220,026.20.

WAS THERE CONTRIBUTORY NEGLIGENCE ON THE CLAIMANTS' PART?

[157] Mr Maio, representing Mr Wilson, alleged that Ms de Malmanche failed to maintain the building adequately and that this failure contributed to the damage to the cladding. Ms de Malmanche kept a careful record of the steps she took to maintain the property. This was a much more complete record than most households keep, if they keep any record at all.

[158] This record shows that Ms de Malmanche conscientiously had the house washed practically every year, and attempts were made to fill the developing cracks, though the requirements for maintenance in the James Hardie manual were never drawn to her attention. I accept that Ms de Malmanche took reasonable steps to maintain the house. I do not accept that she was negligent or failed to maintain it or that she caused or contributed to the deterioration of the property. I reject this argument and accordingly I make no deduction for contributory negligence.

SHOULD THERE BE AN APPORTIONMENT OF THE DAMAGES AND, IF SO, WHAT PERCENTAGE OF THE DAMAGES SHOULD EACH OF THE LIABLE PARTIES BEAR?

[159] Section 72 of the WHRS Act 2006 is as follows:

> **72 Matters tribunal may determine in adjudicating claim**
>
> (1) In relation to any claim in respect of which an application has been made to the tribunal to have it adjudicated, the tribunal can determine—
>
> (a) any liability to the claimant of any of the parties; and
>
> (b) any remedies in relation to any liability determined.
>
> (2) In relation to any liability determined, the tribunal can also determine—
>
> (a) any liability of any respondent to any other respondent; and
>
> (b) remedies in relation to any liability determined.

[160] Under section 17 of the Law Reform Act 1936, any tortfeasor is entitled to claim a contribution from any other tortfeasor in respect of the amount to which it would otherwise be liable. The basis of recovery of contribution is provided in section 17(1)(c) as follows:

> **17 Proceedings against, and contribution between, joint and several tortfeasors**
>
> (1) Where damage is suffered by any person as a result of a tort...

> (c) Any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is... liable in respect of the same damage, whether as a joint tortfeasor or otherwise...

[161] In essence the section provides that the amount of contribution recoverable shall be such as the Tribunal finds to be just and equitable having regard to the relevant responsibilities of the parties for the damage. In *Findlay v Auckland City Council*[12] Ellis J stated that apportionment is not a mathematical exercise, but a matter of judgment, proportion and balance. One of the difficulties in assessing contributions in this claim as in others is that some of the persons primarily responsible for the defects are not parties because they have not been identified.

[162] The Tribunal has found the first respondent, the Auckland Council, the third respondent, Mr Lowe, and the seventh respondent, Mr Siakia jointly and severally liable for the total amount awarded. In other leaky homes cases the Courts and the Tribunal have found councils liable for a proportion of total damages of around 20%, occasionally higher and sometimes lower. Having regard to the relevant roles and responsibilities of Mr Lowe, the Auckland City Council and Mr Siakia respectively in this case I determine that 55% of the damages is to be met by Mr Lowe, 30% is to be met by the Auckland Council and 15% is to be met by Mr Siakia.

[163] I determine that the Council should be liable for 30% of the award first because entities who were primarily responsible for the impugned work were not parties to this claim and secondly because I have concluded that there were a large number of shortcomings in its inspection regime that gave rise to leaks and damage, much of which may well have been avoided if the Council's inspection regime had been robust enough to meet its obligations. While Mr Siakia was not

[12] *Findlay v Auckland City Council* HC Auckland, CIV-2009-404-6497, 16 September 2010.

under a statutory responsibility like the Council, he had a duty of care nonetheless. I have determined that he should bear a reasonable share because if he had declined to plaster over the defects at least some of them may well have been rectified. I have determined that Mr Lowe however must bear the lion's share of the damages, 55%, because he was in control of the project.

CONCLUSION AND ORDERS

[164] For the reasons I have set out above, the claim by the claimants Lynette de Malmanche, Monaca Lens and Redmond Trustees No. 9 Limited is proven the extent of $220,026.20. I make the following orders:

I. I order Peter Lowe to pay the claimants the sum of $220,026.20. Peter Lowe is entitled to recover a contribution of up to $99,011.79 from the Auckland Council and Mr Siakia for any amount Mr Lowe pays in excess of $121,014.41.

II. I order the Auckland Council to pay the claimants the sum of $220,026.20. The Auckland Council is entitled to recover a contribution of $154,018.34 from Mr Lowe and Mr Siakai for any amount the Council pays in excess of $66,007.86.

III. I order Derek Siakia to pay the claimants the sum of $220,026.20. Mr Siakia is entitled to recover from the Auckland Council and Mr Lowe a contribution of up to $187,022.27 for any amount Mr Siakia pays in excess of $ 33,003.93.

IV. To summarise and without limiting I, II and III above, if the third respondent Mr Lowe, the first respondent the Auckland Council and the seventh respondent Mr

Siakia each meet their obligations under this determination, this will result in the following payments being made by them to the claimants, and I so order:

a) Peter Leonard Lowe $ 121,014.41
b) Auckland Council $ 66,007.86
c) Derek Talei Siakia $ 33,003.93

V. If the third respondent Mr Lowe, the first respondent the Auckland Council or the seventh respondent Mr Siakia fails to pay his or its apportionment, the claimants may enforce this determination against any of them up to the total amount they are ordered to pay in orders I, II and III above.

DATED this 14th day of December 2010

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R M Carter

Tribunal Member