IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2009-100-000106
[2010] NZWHT AUCKLAND 29

BETWEEN	CHONG HUNG MOK and SHUI HA HO Claimants
AND	BLAKE BOYD First Respondent (Nicola Boyd removed)
AND	CRAIG TIBBITS Second Respondent
AND	ALAN BOLDERSON Third Respondent
AND	MICHAEL GREGORY MAY Fourth Respondent

Hearing:	31 August 2010, 1 and 3 September 2010
Appearances:	J Tam and R Potter for the claimants Blake Boyd, First Respondent in person G J Kohler for the Second Respondent C Dunne for the Third Respondent B M Stewart (3 September 2010 only) for the Fourth Respondent; Michael May in person (31 August and 1 September 2010)
Decision:	8 October 2010

FINAL DETERMINATION
Adjudicator: S Pezaro

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INTRODUCTION

[1] Chong Hung Mok and Shui Ha Ho own the property at 2/55 Clovelly Road, Bucklands Beach, Manukau City which they purchased in 1999 from Blake Boyd and Nicola Boyd. In 2005 the claimants discovered water damage and leaks and in 2006 they lodged a claim with the Weathertight Homes Resolution Service.

[2] The WHRS assessor concluded that the home required extensive remedial work. The claimants now claim that the Blake Boyd, Craig Tibbits, Alan Bolderson and Michael May are each liable for the full cost of the remedial work, consequential losses and damages.

[3] Mr Boyd applied for the Building Consent and was involved in the construction. The claimants allege that he was responsible for supervising the construction. Mr Tibbits was a builder engaged to carry out some of the construction work. Mr Bolderson was the pre-purchase inspector who prepared a report for the claimants. Mr May was the director of the company that quoted for the plastering work and arranged sub-contractors.

THE ISSUES

[4] The issues that I need to address are:

- What are the defects that caused the leaks?
- What are the appropriate remedial costs and damages?
- Did Blake Boyd owe the claimants a duty of care as developer or project manager?
- If he did owe a duty of care, did Blake Boyd breach that duty?
- Did Craig Tibbits breach any duty he owed to the claimants and if so, is he liable for contribution to any other respondent?

- Was Mr Bolderson negligent in carrying out the pre-purchase inspection or preparing his report and/or did he breach Section 9 of the Fair Trading Act 1986?
- Did the claimants contribute to their loss by failing to carry out maintenance or repairs?

MATERIAL FACTS

[5] Blake Boyd and Nicola Boyd purchased the section on which the house is built on 5 September 1996. On 21 November 1996 Mr Boyd applied for a building consent based on plans prepared by Cooke Hitchcock Sargisson Limited.

[6] A private building certifier, Approved Certifiers Limited, approved the plans and specifications and carried out the building inspections. Construction began around 1 November 1997 when the foundations were laid and the Code Compliance Certificate was issued on 8 May 1998. The Boyds moved into the dwelling in March 1998 and the property was transferred to their family trust on 10 June 1998. Mr Ho and Ms Mok ("the claimants") signed the agreement for sale and purchase on 9 July 1999 which was subject, in accordance with Clauses 17 and 20, to the claimants being satisfied with the contents of a LIM report and a building report. The claimants then required the Boyds to repair certain defects based on items identified in the pre-purchase report. Although the claimants' solicitor confirmed on 16 July 1999 that the agreement was unconditional, settlement was subsequently delayed due to an issue with the external stairs which were not on the application for Building Consent. The agreement was settled and the property transferred to the claimants on 18 October 1999.

[7] In July 2005 the claimants noticed damp carpet and later that year they discovered leaks in the house following heavy rain. They made an insurance claim which was accepted and minor repairs

were carried out on the flat roof in March 2006. In April 2006 the claimants applied to the WHRS for an assessor's report and David Medricky, the assessor, issued his first report in September 2006.

[8] In 2007 Mr Mok suffered a stroke which significantly affected him. A medical certificate confirmed that he was unable to attend the hearing or give evidence. As a result of the stroke, Mr Mok was no longer able to practice as a chartered accountant and his business was closed. In her brief Ms Ho stated that she spent most of 2007 closing Mr Mok's business and arranging treatment for him and had little time to attend to the leaky building issue. At the end of 2007 Ms Ho said that she approached the respondents to discuss settlement but was advised by the Boyds' lawyer that they would not mediate. Ms Ho then applied for an addendum report which was issued on 7 April 2008. Mr Medricky recommended a complete reclad in his addendum report.

[9] The claimants then sought tenders for the remedial work and engaged Dibley and Associates Limited to prepare the scope of works and supervise the repairs. Nick Dibley, the claimants' expert, accepted Mr Medricky's recommendation that a full reclad was required. The building consent for the remedial work was lodged on 29 October 2008 and on 1 December 2008 the claimants wrote to the respondents advising them that they would be held liable for the remedial costs.

THE CLAIMS AGAINST EACH RESPONDENT

[10] When the claimants filed their claim in the Tribunal on 18 December 2009 they were represented by a lay representative, Allison Livingstone of Lighthouse NZ Limited (Lighthouse), a firm offering guidance and support to leaky home owners. Although the claimants originally claimed in tort against each of the respondents the claims were amended at different stages during the proceedings.

The claim against the first respondent, Blake Boyd

[11] Mr Boyd was personally involved in the construction, engaged all contractors and arranged the building inspections. The original claim against him and Nicola Boyd was in tort however on 19 May 2010, in opposition to the application for removal of Nicola Boyd, the claimants amended their pleading and claimed that, in addition to the claim in tort, Mr and Mrs Boyd had breached clause 6.1(9) of the agreement for sale and purchase.

[12] However the agreement was signed on 9 July 1999 and the application for a WHRS report was filed on 4 April 2006, more than six years after the cause of action arose. Therefore I determined that any claim in contract was statute barred by section 4(1)(a) of the Limitation Act 1950 which requires that a claim in contract shall not be brought after the expiration of 6 years from the date on which the cause of action accrued. I concluded that there was no tenable claim in tort against Ms Boyd and therefore granted her application for removal on 23 June 2010.

[13] On 26 July 2010 Hayden Tate Limited, the law firm now representing the claimants, filed the first amended statement of claim ("the claim"). The claimants alleged that Mr Boyd acted as developer and/or project manager and/or head contractor during the construction of the house and did not pursue the contractual claim against Mr Boyd. The claim in tort against Mr Boyd is therefore the only claim to be determined.

The claim against the second respondent, Craig Tibbits

[14] The second respondent, Mr Tibbits had a limited role in the building work on a labour-only basis. The claim against him is that he owed a duty of care which he breached by failing to properly supervise employees and sub-contractors.

The claim against the third respondent, Alan Bolderson

[15] Alan Bolderson, was the director of House Inspections Limited (struck off), and the person who carried out the pre-purchase inspection (the Bolderson report) for the claimants on 13 July 1999. The claim against Mr Bolderson is for negligent misstatement and breach of the Fair Trading Act 1986 arising from the pre-purchase report.

[16] In their written closing submissions counsel for the claimants argued that Mr Bolderson could not adduce evidence of the discussion that he had with Mr Mok about his report because it breached the parole evidence rule.[1] The parole evidence rule applies to claims in contract. For the reasons given at paragraph [8] above, any claim in contract against Mr Bolderson is time-barred and, even if this was not the case, no claim in contract was pleaded against Mr Bolderson.

The claim against the fourth respondent, Mike May

[17] Michael May was the director of May Plastering Limited (in liquidation). This company provided a written quote on 3 December 1997 addressed to Blake Boyd for plastering work and then arranged for subcontractors to carry out the work. The claim against Mr May is that as the plasterer he owed the claimants a duty to exercise reasonable skill and care and that he failed to do so.

Withdrawal of the claims against Mr Tibbits and Mr May

[18] Mr Tam and Mr Potter appeared as counsel for the claimants although Ms Livingstone was also present and made the opening submissions. The transcript of her opening is reproduced below as it is relevant to the claimants' subsequent withdrawal of their claims against Mr Tibbits and Mr May:

[1] Claimants' closing submissions at [40-43].

Ms Livingston: Just a brief introduction. Mrs Ho Shui Ha is to give evidence today but not her husband, Mok Chong Hung, who following his stroke is medically unfit to do so. Our claim against Mr Boyd is that he was the developer, project manager or the head contractor for the construction of the claimants' home at 55A Clovelly Road. It was Mr Boyd who selected and engaged the contractors. It was Mr Boyd who elected to save costs by paying those contractors in cash and seeking cash prices for materials and utilising his trade accounts. It was Mr Boyd who chose not to engage a project manager or head contractor to manage the project. Whether ...[*this sentence not able to be transcribed in full*] the lack of proper supervision and sequencing of work the construction is vulnerable and risks associated with poor workmanship defective or incomplete work are likely to result in the final construction being compromised and below an acceptable standard. There is no evidence that anybody other than Mr Boyd had control over the construction of Clovelly Road. Mr Boyd's involvement meets the definition of a developer as such he owed a non-delegable duty of care. In all the circumstances Mr Boyd as either developer, project manager and/or head contractor failed to ensure the house was properly constructed and built to comply with the Building Code.

Mr Tibbits worked on site for separate periods. He denies being the builder. Mr Boyd and Mr Tibbits agree as to the extent of his involvement on site.

Mr Bolderson inspected the property and prepared the pre-purchase inspection report that the claimants relied on when making their decision to purchase the property. This was to their detriment.

Mr Boyd has identified Mr May as the plasterer and directs plastering defects to Mr May.

[19] Counsel for the claimants did not cross-examine Mr Tibbits or Mr May nor did they question any of Mr Tibbits' witnesses. However, it was not until the hearing had ended and closing submissions were being delivered, that counsel advised that the claimants withdrew their claim against Mr Tibbits and Mr May.

WHAT ARE THE DEFECTS THAT CAUSED THE LEAKS ?

The expert evidence

[20] David Medricky, the Tribunal's assessor, and Nick Dibley, the claimants' expert, gave evidence of the defects in the dwelling that caused leaks. Mr Medricky is a registered building surveyor with experience as a building inspector for a territorial authority. Mr Dibley is a registered architect and was a registered building surveyor from 2003-2007. Mr Boyd did not call any expert evidence. Mr Tibbits' expert, Andrew Gray, is a qualified builder and an NZBIS Registered Building Surveyor and Certified Weathertightness Surveyor however he did not carry out a site survey of the claimants' dwelling. Mr Gray gave evidence on whether the payments made to Mr Tibbits were consistent with the work that Mr Tibbits says he performed, the time Mr Tibbits says he spent on site and whether any of the work carried out by Mr Tibbits impacted on the alleged defects and damage as identified by Mr Dibley and in the statement of claim.

[21] Mr Duffy was engaged by the fourth respondent, Alan Bolderson, to give evidence on whether Mr Bolderson's report was of a reasonably competent standard of care and the amount claimed for repairs. Mr Duffy has a Bachelor of Engineering and describes himself as a construction and building consultant. At hearing I heard the evidence of Mr Medricky, Mr Dibley and Mr Gray concurrently however I instructed Mr Gray before he was empanelled that his role as an expert was restricted to commenting on the extent of the work carried out by Mr Tibbits and whether that work was causative of defects. Mr Medricky confirmed that as the WHRS assessor, it was not within his brief to comment on the pre-purchase report prepared by Mr Bolderson.

The causes of water ingress

[22] Mr Dibley and Mr Medricky were generally in agreement with the defects as recorded in Mr Dibley's defects list. Mr Dibley confirmed that he had discussed with the claimants the option of Dibley Associates Limited carrying out further investigation and that he advised them that this was not required as he had confidence in Mr Medricky's addendum report. Both experts recommended a complete reclad although Mr Medricky had recommended targeted reports in the first report which he had issued in September 2006. However in his addendum report Mr Medricky concluded that a full reclad was required and Mr Dibley adopted this recommendation. The dwelling has been reclad with weatherboards and the single storey south elevation and lower floor of the east elevation have been clad with XpressClad. This is relevant to the question of betterment.

[23] Mr Medricky's evidence was that water entered the joinery due to inadequately designed and installed flashing systems. Mr Dibley said that the defects arising from the joinery affected all elevations. Mr Medricky also noted the non-compliant minimum ground level and the cladding embedded onto the decks, cracks in the cladding and a failure to install the cladding in accordance with the standards required. At the time of his investigations Mr Medricky was not able to confirm whether or not the cladding had control joints without destructive testing. However Mr Dibley observed during the remedial work that there were none.

[24] There was some discussion between Mr Medricky and Mr Dibley as to the cause of water pooling on the roof at the junction between the bay window and the main roof. In Mr Dibley's opinion the ponding occurred over a defect which caused more water ingress than would have been caused by water ponding alone. Mr Dibley identified the defects causing leaks in this area at paragraph 3.5.2 of his report. The primary defects were a defective membrane detail at

the junction of the roofs and the construction of the roof with an inadequate slope causing ponding of the water.

[25] Mr Dibley and Mr Medricky agreed that the requirement at the time in terms of roof slope was that the roof was 'to shed water' and that although BRANZ recommended a 1.5 degree slope there was no specific requirement in the Building Code for a particular degree of slope. Mr Medricky stated that even if sealant had been added as recommended by Mr Bolderson, it would have only limited water entry temporarily and eventually would have broken down.

[26] In summary there was no challenge to the causes of defects as identified by Mr Medricky and Mr Dibley or to Mr Dibley's apportionment of repair costs to defects. No alternative costings were produced by any party and there was no dispute with the costs claimed other than in relation to betterment.

Betterment

[27] Mr Medricky, Mr Dibley, Mr Gray and Mr Duffy gave their evidence on betterment concurrently. Although Mr Boyd raised the question of betterment in his response to the claim, he did not produce any evidence in support of his claim of betterment. Mr Duffy raised several issues in relation to betterment in his brief at paragraphs 36-42 and I asked the experts to comment on these issues. Some issues were eliminated by Mr Duffy immediately as he stated that he had based his brief on Mr Dibley's September 2009 brief whereas Mr Dibley's second brief dated 19 July 2010 had removed some items of betterment from the claim. In his second brief Mr Dibley deducted the cost of the masonry fence wall and the new external staircase as well as those other items recorded as betterment in the finalised Summary of Claim dated 31 August 2010.

[28] After some discussion Mr Duffy removed his objection to all items in his brief at paragraph 37(a) – (h). Mr Duffy accepted that

the deck was built in accordance with the original plans and there was no element of betterment and that the cost of the paving has been deducted by the claimants.

[29] In evidence Mr Duffy accepted that the redesign of the roof to create an overhang was a good solution and did not amount to betterment. While he expressed some reservation on the basis that it improved the character of the house, Mr Duffy accepted that additional flashing would have been required if there was no extension to the eaves. On this basis I am satisfied that the roof extension did not amount to betterment.

[30] Mr Duffy also accepted that the windows above the garage needed to be replaced and withdrew his opinion that this was betterment. At hearing Mr Duffy confirmed that it was now his opinion that a full reclad was required. As far as cost was concerned, Mr Duffy's opinion was that there was probably not a lot of difference in cost between recladding the property with monolithic cladding compared with the weatherboard and XpressClad used.

[31] Mr Dunne said that he did not accept Mr Duffy's evidence because he had no instructions to do so,[2] however the role of the Tribunal is to evaluate the expert evidence called for the parties. I found Mr Duffy's evidence considered and well reasoned. The fact that he was willing to reconsider his opinion in light of the evidence of the other experts, some of which he had not seen prior to hearing, is consistent with his obligations to the Tribunal as an expert.

[32] For these reasons I accept the evidence of Mr Medricky, Mr Dibley and Mr Duffy that a full reclad was required to remediate the defects and that there is no betterment arising from the recladding.

[2] Audio record of hearing 31 August 2010 at 4.44p.m.

The cost of painting

[33] As far as the claim for exterior and interior painting is concerned, the claimants have applied a formula for repainting used by Mr Dean, an adjudicator under the Weathertight Homes Resolution Services Act 2002, whereby betterment is reduced on the basis that there is a saving when painting a surface which has previously been painted compared with applying an original paint coat. The formula applied by Mr Dean would allow the claimant to recover 55% of the total cost of the exterior and interior painting.

[34] In this case the original cladding has been replaced with pre-primed weatherboards and there is no evidence that the cost of painting these weatherboards was more than the cost of repainting the original cladding. Therefore I am not satisfied that the formula used by Mr Dean should be applied in this case. It is accepted that the house had not been painted either inside or outside for approximately 11 years. Further the High Court in *Byron Avenue*[3] accepted that the exterior should be repainted every 8 years which is consistent with the evidence of Mr Medricky that the exterior painting on this dwelling had gone beyond its weatherproof ability which he put at 7-8 years. Mr Dibley's evidence was that if the paintwork was looked after, the maximum life would be 10 years. The evidence indicates that the exterior was not well maintained and I conclude that the exterior paint was well past its reasonable life expectancy. Therefore the claimants are not entitled to any recovery for exterior painting, as they would have had to carry out painting of the exterior in any event.

[35] Mr Dibley's evidence was that the interior should be repainted every 10-15 years. He said that the frequency of interior painting depended on the number of people living in the property and it was not an unreasonable expectation for interior paint to last 10

[3] *O'Hagan v Body Corporate 189855* [2010] NZCA 65.

years. However he stated that only 10-15% of the interior needed repainting as a result of the remedial work. According to Mr Dibley most of the interior was wallpapered originally however it was not possible to match the wallpaper. When the repairs were carried out the house was 11 years old and therefore I find that, even if all the interior repainting was justified, the interior decor had exceeded its life expectancy. Any award for painting the interior would therefore amount to betterment.

[36] For these reasons the claim for interior and exterior painting of $15,769.67 is declined and deducted from the amount claimed for repairs. The 31 August 2010 Summary of Claim, which is the schedule of costs, claimed the painting costs were included in Progress Payment 5 approved by Mr Dibley on 19 August 2009. I have therefore made a deduction of interest for the amount claimed on payment from this date. The amount deducted from the interest sum claimed is therefore $853.49.

GENERAL DAMAGES

[37] In his closing submissions Mr Boyd challenged the claim for general damages. Mr Boyd argued that the claimants had some six years with no weathertight issues and that they experienced a shorter period of stress and anxiety than other claimants who had been awarded $25,000 each. Further Mr Boyd said that while he was sympathetic to Mr Mok's stroke there was no evidence to show that it occurred as a direct result of a leaky home.

[38] However from the time of discovery of the leaks in 2005 until this adjudication the claimants have had some five years of stress and uncertainty and have been required to move out of their home while the repairs had been carried out.

[39] The decision of the High Court in *Findlay Family Trust*[4] confirms that, in accordance with the decision of the Court of Appeal in *Byron Avenue* the usual award per unit for occupiers is $25,000. I am not satisfied that there is any justification for reducing what has been awarded by the Courts as the maximum bench mark for an award of general damages to claimants in similar situations and I therefore award these claimants the sum of $25,000.

[40] There was no challenge to the claim for consequential costs of $14,408.27. This amount is therefore awarded in addition to the sum claimed for remedial costs which is calculated as follows:

Remedial costs	$229,611.43
Less claim for painting	$15,769.67
Total	**$213,841.76**

[41] The claim for interest was not disputed and therefore interest is awarded based on the amount of $213,841.63 for remedial costs.

SUMMARY IN RELATION TO QUANTUM

[42] I am satisfied that the quantum in this claim is proven to the amount of $268,994.62 calculated as follows:

Amount claimed		229,611.43
Less painting		15,769.67
		$213,841.76
Consequential loss		14,408.27
Interest to date of hearing	16,598.08	
Less interest on painting	853.49	
(calculated at 5.24% 377 days 19 Aug 2009 – 31 Aug 2010)		
		15,744.59
General damages		25,000.00

[4] *Findlay & Anor as Trustees of the Lee Findlay Family v Auckland City Council* HC Auckland, CIV-2009-404-6497, 16 September 2010, Ellis J, at [92].

TOTAL	**$268,994.62**

DID BLAKE BOYD OWE THE CLAIMANTS A DUTY OF CARE AS DEVELOER, PROJECT MANAGER OR HEAD CONTRACTOR?

Was Blake Boyd the developer?

[43] The claimants allege that Mr Boyd was personally responsible for the construction of the house either as developer, head contractor or project manager. Mr Boyd denies that he is or has ever been a developer. He claims that he acted as a private individual who wanted a new home for his family and that he organised people whom he believed to be experienced professionals to plan and construct the house. Mr Boyd states that he was not acting in trade and that he did not build the house with the intention of on-selling it to make a profit.

[44] Mr Boyd argues that the house at 2/55 Clovelly Road was to be his family's home however they realised that it was too small when they had a second child. Mr Boyd denied the allegation put to him by Mr Kohler that the property was transferred to the Boyds' family trust prior to sale to avoid the guarantees in the sale and purchase agreement.

[45] It is Mr Boyd's evidence that he was a qualified boat builder who was in full time employment at the time of construction. He submits that therefore he was in the same position as the Townes who built a home and sold it to the claimants in another claim in this Tribunal.[5] The Townes were not found to be developers however as the Townes engaged a building company on a full contract to carry out the construction. That case can therefore be distinguished from the present one.

[5] *Johnston v Abide Homes Ltd* WHT TRI-2008-100-101 11 August 2009, S Pezaro.

[46] Mr Boyd further argues that he does not meet the definition of a "residential property developer" set out at section 7 of the Building Act 2004:

> "A person who, in trade, does any of the following things in relation to a household unit for the purpose of selling the household unit:
> (a) Builds the household unit; or
> (b) Arranges for the household unit to be built; or
> (c) Acquires the household unit from a person who built it or arranged for it to be built."

[47] The above definition is helpful but not conclusive. In *Body Corporate 188273 v Leuschke Group Architects Ltd,*[6] Harrison J observed that the word 'developer' is not a term of art and it is the function carried out by the person or entity that gives rise to the reasons for imposing a duty of care on the developer. Harrison J described the developer as:

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

[48] In *Body Corporate No 199348 v Nielsen*[7] at para [67] Heath J following Harrison J in *Leuschke,* concluded that it is the particular function that gives rise to the policy reason for imposing a duty of care on the developer. Whether someone is called a site manager, project manager or developer does not matter. The function is more relevant than the label. The following factors are relevant:

[6] HC Auckland, CIV-404-404-2003, 28 September 2007, Harrison J.
[7] HC Auckland, CIV-2004-404-3989, 3 December 2008, Heath J.

i. Mr Boyd identified himself as the builder on the building consent for 2/55 Clovelly Road.

ii. For ten years between 1998 and 2008 Mr Boyd described himself on the electoral role as a builder. He changed his address during this time but not his primary occupation.

iii. Mr Boyd selected and engaged the architect and all trades involved in the construction.

iv. The defects identified by the experts arising from the changes to the deck, the cladding around the kitchen window, the substitution of the flat deck membrane and the addition of the external stairs all resulted from decisions that Mr Boyd made to vary the plans. These decisions were made by Mr Boyd alone and he did not seek advice from the architect.

v. According to Mr Boyd, Mr Tibbits was on site for the maximum of 5 weeks therefore no one other than Mr Boyd was on site for the entire period of the construction.

vi. Mr Boyd worked on the house over the Christmas/New Year period.

vii. Mr Boyd arranged all inspections, including the pre-line inspection on 8 January 1998.

viii. Although Mr Boyd says that all materials were paid through his personal account, the invoices were addressed to Town and Country Construction, Mr Boyd's trading name. However on 2 February 1998 the Boyds established Town and Country Construction Limited, a company which Mr Boyd said "is under contract to builders and construction companies and whose main business activity is concrete foundations and floors".[8]

ix. Mr Boyd cannot point to any other person who was the project manager or site supervisor. He accepted in his closing submissions that:

[8] Affidavit of Blake Boyd sworn 14 May 2010 at [12]

> "As there was no project manager and no need to have a project manager at the time, these tasks [of arranging subcontractors] fell on me as there was no one else that could do them".

[49] Mr Boyd was the owner of the property and controlled the entire construction process from the design to the final inspection. The only factor that could be interpreted as supporting Mr Boyd's submission that he was not the developer is that he and his family lived in the home. Mr Boyd argued that they sold because they realised the home was too small however the fact that the Boyds moved into the house before it was finished, lived in the house for less than a year and put it on the market shortly after the CCC was issued tend to suggest that they constructed the house for sale rather than as their family home.

[50] Based on all the evidence before me I conclude that Mr Boyd was the developer and therefore he owes a non-delegable duty to any intended owner of the home to supervise the construction of the dwelling.[9]

Was Blake Boyd the project manager?

[51] Even if Mr Boyd was not the developer, for the following reasons I find that Mr Boyd performed the role of the project manager and owed a duty to the claimants on that basis. In reaching this conclusion I have given significant weight to the evidence of Mr Tibbits and his witnesses and the responses given by Mr Boyd under cross-examination by Mr Kohler.

[52] Kelvin Andrew, is now a retired builder living in the UK and filed an affidavit in support of Mr Tibbits. Parties were given an opportunity prior to the hearing to request that Mr Andrew give evidence by telephone. As no such request was made I admitted Mr

[9] *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA).

Andrew's affidavit.[10] Mr Andrew confirmed that he was employed by Mr Boyd for one month only to assist with the erection of the framing. Mr Andrew deposed that while he was on site neither he nor Mr Tibbits was involved with the installation of joinery or the construction of the deck.

[53] The affidavit evidence of Mr Tibbits' witness, Paul Davies, is that in December 1997 he was employed by Mr Boyd as a general labourer during University holidays. Mr Davies stated that Mr Boyd arrived on site daily between 7.30am and 10.30am with a McDonalds breakfast for the workers and that although Mr Boyd was not on site full time, he supervised all aspects of construction. Mr Davies states that when he left the site prior to Christmas the joinery had not been installed. In mid-January 1998 Mr Davies returned to assist Mr Tibbits for four days, helping to fix gib linings on the first floor of the property. Mr Davies stated that when he returned to the site the exterior plastering was nearly completed and the aluminium joinery was fully installed. The deck had been closed in and the balustrades erected. Mr Davies attended the hearing to give evidence however neither Mr Boyd nor any of the other parties questioned him.

[54] Dean Meale also attended the hearing to give evidence for Mr Tibbits but neither Mr Boyd nor any of the other parties questioned him. Mr Meale said that he was a sales/trade manager employed by Placemakers in Pakuranga when in mid-November 1997 Mr Boyd asked him if he knew of any carpenters to erect the framing for his home at 55 Clovelly Road. Mr Meale stated that Mr Boyd told him that he needed to get someone on a short term basis for Christmas to get his roof on so that he could work on the property through the Christmas break. Mr Meale's evidence therefore supports Mr Tibbits' claim that Mr Boyd carried out substantial work on the property in his absence, during the Christmas break.

[10] See *Chee v Stareast Investment Ltd* HC Auckland, CIV-2009-404-5255, 1 April 2010, Wylie J, at [80].

[55] Mr Tibbits' expert, Andrew Gray, analysed the time that Mr Tibbits said that he spent on site and reconciled this time with the date of delivery of materials as shown on the invoices produced by Mr Boyd.

[56] Mr Boyd did not challenge Mr Gray's evidence and although in cross-examination Mr Boyd stated that he did not accept the evidence of Mr Tibbits or his witnesses, he did not cross-examine any of Mr Tibbits' witnesses. Mr Boyd disputed the amount of time that Mr Tibbits says he was on site and claimed that certain invoices support his claim that Mr Tibbits was on site when the joinery was installed. However the invoices that Mr Boyd relied on are not for the joinery and there are no invoices showing when the joinery was delivered. I therefore accept the unchallenged evidence of Mr Tibbits' witnesses, and the evidence of Mr Tibbits, that the joinery was installed during the summer break. It is also relevant that this evidence is consistent with Mr Boyd arranging a pre-line inspection on 8 January 1998.

[57] Mr Boyd states that he paid Mr Tibbits $20 an hour although Mr Tibbits evidence is that he was paid $22 however there is no dispute with Mr Tibbits evidence that he was paid $3282 in total. Under cross-examination by Mr Kohler Mr Boyd refused to give a direct answer when asked whether the rate at which Mr Boyd was paid included a margin for supervising other builders:

> Mr Kohler: Let's just take Mr Tibbits and Mr Andrew being paid $20 on your evidence, per hour, $22 on his. There's no margin in that for Mr Tibbits for supervision of and responsibility of other people, is there?
>
> Mr Boyd: I paid him $20 an hour. I paid him to build the house.
>
> Mr Kohler: No, no. You know what I am getting to...
>
> Mr Boyd: I paid him $20 to build the house.

> Mr Kohler: ...margin. There's no margin in that that recognises Mr Tibbits supervising Mr Andrew or anything of that nature, is there?
>
> Mr Boyd: It's a labour only building.
>
> Adjudicator: Mr Boyd, you need to answer the question.
>
> Mr Boyd: Just yes or no? What if I don't know? It's up to him. I don't know.
>
> Adjudicator: That's your answer but you need to actually answer the question that Mr Kohler is putting to you.
>
> Mr Kohler: There's no margin for responsibility in that amount, is there?
>
> Mr Boyd: I don't know.

[58] There is no evidence that Mr Boyd intended to pay Mr Tibbits to oversee the work of the other hammer hands and builders who worked with him. The fact that Mr Boyd paid the other builders directly and that their evidence was that he instructed them is a further indication that Mr Tibbits has no responsibility for project management or supervision. I conclude that Mr Boyd was the project manager as well as the developer during the construction of the dwelling. I now consider whether Mr Boyd breached the duty of care that he owed to the claimants.

Did Mr Boyd breach the duty of care that he owed?

[59] Mr Medricky stated at paragraph 5.4.8 of his addendum report that the weathertightness defects in the building were a result of defective construction practices, inadequate design details and specifications and building consent documentation, failure to carry out the work on site in accordance with parts of the approved building consent, non-compliance with some acceptable solutions, and the use of alternative materials without complying with the specifications for their use.

[60] Mr Medricky said that water entered the deck structure due to the balcony wall construction which had no sealing on the top of the solid balustrade and relied on paint for weatherproofing. Water ingress was also caused by the gate at the top of the landing which penetrated the cladding. The changes in the construction from a timber balustrade to a plaster balustrade and the addition of an exterior landing and stairs were changes to the plans made by Mr Boyd.[11]

[61] In closing Mr Boyd said that the house could have been built more cheaply but that as a result of media attention about leaky homes the architect suggested that the house have a cavity system. Mr Boyd arranged for the window company to supply head, side and sill flashings for the windows to help avoid water ingress. Mr Boyd submitted that he relied on competent tradesmen who could interpret the plans and make all necessary decisions in relation to the manner in which their work was carried out.[12] Mr Boyd further claimed that he relied on the roofer to properly construct the roof and apply the membrane to the flat roof and that he relied on the building inspections to identify any deficiencies with the work.

[62] Mr Boyd claims that Mr Tibbits installed all the windows and external doors and, at hearing suggested that Mr Tibbits also installed the battens. In relation to the kitchen window, Mr Boyd says that he relied on the architect to design it and on the window manufacturer to produce the window to the required specifications. However, the evidence of Mr Medricky and Mr Dibley was that the defects that led to water ingress around the kitchen window on the east elevation were caused by the change from the cedar soffit specified in the plans to plaster cladding.

[11] Audio record of hearing on 1 September 2010
[12] Closing submissions of Blake Boyd

[63] Mr Dibley's evidence was that the following responsibilities were those of a project manager:[13]

a) Approving the work carried out by subcontractors;
b) Co-ordination details and programming of the work;
c) Control of the work to ensure the work is carried out and conditions conducive to inadequate standard of workmanship.

[64] Mr Dibley identified in his remediation schedule those defects which were attributable to the role of the builder/project manager. The defects which fall into this category caused the majority of the damage and necessitated a complete reclad, that is the installation of the joinery, the construction of the deck and balustrade and the failure to ensure that the cladding was properly installed. All these defects were caused by Mr Boyd either changing the plans or failing to adequately supervise the construction.

[65] For these reasons I find that Mr Boyd breached his duty of care as developer and/or project manager and is liable to the claimants for the cost of remedial repairs, consequential losses and general damages.

THE LIABILITY OF CRAIG TIBBITS

[66] The claimants claim against Mr Tibbits is set out at paragraphs 48 and 49 of the claim. While no formal cross-claim has been made against Mr Tibbits, if he is found to have any liability the Tribunal has jurisdiction to apportion liability between respondents.

[67] As Mr Kohler submitted in opening, the pleadings against Mr Tibbits bore no relation to the facts of this case and appear to be "borrowed" from other pleadings. The claim pleaded against Mr Tibbits is that:

[13] Brief of Nick Dibley at [6.5]

a) He failed to realise that the plans were deficient and/or to correct the plans;
b) He constructed the house in a manner that suffered from defects and created the probability of water ingress;
c) He failed to take reasonable care in the supervision of other contractors;
d) He caused, permitted or allowed departures from the plans in relation to the cedar cladding and the soffit above the garage door and in the manner in which the plaster was applied;
e) He failed to ensure appropriate sequencing of the work carried out by his employees and agents and subcontractors;
f) He failed to notice or rectify the defects in the course of construction.

[68] Mr Boyd always accepted that Mr Tibbits was a labour-only builder and the only factual dispute between them has been whether or not Mr Tibbits installed the joinery, although at hearing Mr Boyd extended this allegation to include the battens.

[69] It was accepted by Mr Tibbits that as a labour-only builder he owed a duty of care to the claimants. Although the claimants withdrew their claim against Mr Tibbits, I am required to consider whether he is liable for contribution to any other respondent who may be found liable to the claimants.

[70] I have concluded that Mr Boyd installed the joinery over the Christmas holiday period before Mr Tibbits returned to the site to carry out some interior lining work. I prefer the evidence of Mr Tibbits and his witnesses to that of Mr Boyd as far as the extent of the work carried out by Mr Tibbits and am not satisfied that he installed the battens.

[71] The only possible liability Mr Tibbits could have therefore is for the slope of the roof framing which he accepts he constructed. The experts agreed that the only requirement at the time of construction was for the roof to shed water and there was no requirement for a particular slope.

[72] None of the experts attributed any of the defects directly to the framing work carried out by Mr Tibbits. I am not satisfied that a labour-only builder engaged to carry out limited aspects of the construction could reasonably be expected to set the slope of the roof. This was a decision for the project manager, in this case Mr Boyd, who had a responsibility to ensure that the framing was properly constructed.

[73] In summary there is no evidence that any work carried out by Mr Tibbits was causative of weathertightness defects or caused any loss to the claimants. For these reasons Mr Tibbits has no liability.

THE LIABILITY OF ALAN BOLDERSON

The claim against Mr Bolderson

[74] Mr Bolderson accepted that, as the director of House Inspections Limited and the person who carried out the inspection of the claimants' property, he owed a duty of care to the claimants to prepare the report with reasonable care and skill.

[75] The claimants allege that Mr Bolderson breached his duty of care by failing to notice the defects listed in paragraph [58] of the claim and that "*the house had been constructed to a high standard and/or was sound and well appointed*".[14] These words are not used in Mr Bolderson's report. The only statements in the report that approximate the words used in the claim against Mr Bolderson are made in relation to the exterior cladding and in the report summary.

[14] First amended statement of claim dated 19 July 2010 at [51].

What Mr Bolderson actually recorded in his report was that "*the exterior cladding appears generally sound*" and in the summary that "*this house appears generally sound and well presented. It is also well appointed. The items in this report are generally minor but do require attention in parts. There is also some unfinished work*."

[76] I have considered the two causes of action pleaded against Mr Bolderson of negligent misstatement and breach of section 9 of the Fair Trading Act 1986. Section 9 provides that:

> **9 Misleading and deceptive conduct generally**
>
> No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

[77] Under section 9 of the Fair Trading Act, the question of whether the report was misleading is addressed in three steps:

- Whether the conduct was capable of being misleading;
- Whether the plaintiffs were in fact misled by that conduct;
- Whether it was reasonable for the plaintiffs to have been misled by that conduct.

[78] The three step test is an objective one.[15] Therefore the test is not whether the claimants were misled but whether, if they were, it was reasonable for them to be misled by the report. In order to establish that Mr Bolderson was negligent or that his report was capable of being misleading, the claimants are required to prove that this report failed to meet the standard reasonably expected of such reports at the time.

The purpose of the report

[79] Mr Bolderson said that his inspection was for the purpose of a condition report. The Code Compliance Certificate inspections

[15] *AMP Finance NZ Ltd v Heaven* (1998) 6 NZBLC 102,414.

had been carried out only one year prior to his report and, as those inspections were compliance inspections, he said that he conducted his inspection in the context of an inspection on a relatively new home.

[80] The claimants accept that the inspection and the report they commissioned was a visual assessment and did not involve invasive testing. Mr Dibley agreed with Mr Duffy that the purpose of a pre-purchase inspection was to provide an assurance that the property was in reasonable condition and of a suitable standard for the time. I have therefore considered the standard of Mr Bolderson's report in light of that purpose.

[81] Mr Bolderson stated that after he carried out his inspection he wrote the report immediately, then he sat in his van and went through the report with Mr Mok. Mr Bolderson said that he discussed each item with Mr Mok, not just those which he had marked with an asterisk. In particular he explained to Mr Mok the fine cracking on the exterior cladding was very common and explained the possible reasons and the importance of carrying out maintenance and painting.

The standard of the report

[82] In his brief Mr Dibley identified those defects that he thought would have been visible at the time of Mr Bolderson's report. He produced samples of press cuttings from BRANZ and the New Zealand Herald from 1991 through to 1998. Mr Dibley expressed the opinion at paragraph 6.7 that "*it is further assumed that the standard of inspection which could be expected at the time included an awareness both in industry standards published by, amongst others, BRANZ, and wider publication in the building and national press regarding reported defects in stucco cladding and decay consequent to defects*".

[83] Mr Tam submitted in closing that a reasonably prudent, skilled and informed building inspector ought to have been aware of the BRANZ publications and stucco good practice guides and submitted that:

> "there is no or insufficient evidence to show that reasonably prudent members of the pre-purchase inspectors community would not have picked up on those aspects of defective construction at the time. In this regard, Mr Duffy's expert opinion is at odds with Mr Dibley's expert opinion."[16]

[84] Mr Tam misunderstands where the burden of proof lies. The onus is on the claimants to prove their claim and in order to succeed they are required to show that Mr Bolderson's report failed to meet the standard at the time.

[85] The only evidence called in support of the claimants' claim against Mr Bolderson was from Mr Dibley. Mr Dibley was not asked whether Mr Bolderson's report met the standard of the time nor was he asked for his opinion on the level of detail in the report or whether failing to identify the defects which Mr Dibley believed were visible meant that Mr Bolderson failed to meet the standard of inspection at the time.

[86] Even if these questions had been put to Mr Dibley, I do not accept that he demonstrated that he was qualified to give expert evidence on the standard of Mr Bolderson's report. Mr Dibley worked in New Zealand for six months in 1992, then left and did not return to until 2002. Mr Dibley was not in New Zealand at the relevant time and, significantly, he stated that he had never carried out a pre-purchase inspection.

[87] For these reasons, although Mr Dibley is qualified as an expert in relation to the causes of defects and scope of remedial

[16] See paragraph [59] of the claimants' closing submissions.

work, I do not accept that he is qualified to give expert evidence on the standard of pre-purchase inspections in 1999.

[88] Counsel for the claimants correctly identified the general principle applicable to the liability and negligence of professionals which is that the standard of conduct must conform to that which ought to be attained by persons holding themselves out as possessing the relevant skills. Professionals must exhibit the care reasonably expected of skilled and informed members of their respective professions, judged at the time the work was done, which in Mr Bolderson's case is 1999. The standard of care expected of persons in trade or business is determined in a similar fashion.[17]

[89] As Mr Tam submitted, the evidence of an expert witness should be directed to the general practice of a particular profession and not what the particular witness would have done. This submission accords with the High Court Rules for expert witnesses and the Chair's Directions for expert evidence. However Mr Tam then suggested that, even if it is proved that, at the time of Mr Bolderson's report, every other pre-purchase inspector would have produced a similar report, the Tribunal is still entitled to conclude that the practice of the day was unreasonable and find for the claimants.

[90] Mr Tam relied for this submission on the decision of the High Court in *Dicks v Hobson Swan*[18] where even though it was accepted that the territorial authority carried out its obligations to the standard of the time, it was nevertheless held liable for failing to have an adequate regime in place for carrying out its statutory obligations. Mr Tam submitted that the decision in *Dicks* is applicable to pre-purchase inspectors because "...*common bad practice is still bad practice and the Courts must be vigilant that such practice does not go unchecked*." However *Dicks* was concerned with the performance

[17] Stephen Todd (ed) *The Law of Torts in New Zealand* (5th ed, Brookers, Wellington, 2009) at [370].
[18] (2006) 7 NZCPR 881 (HC).

of statutory obligations by a territorial authority and therefore can be distinguished from this case which concerns the standard that can reasonably be expected of a pre-purchase inspection. I therefore approach the question of Mr Bolderson's liability by evaluating his report against the evidence before me of the standard of such reports at the time.

[91] Mr Tam extensively questioned Mr Dibley and Mr Duffy on what defects they believed were apparent at the time that Mr Bolderson carried out his inspection, he did not however establish the standard of care for pre-purchase inspections at the relevant time. I do not accept that Mr Tam's closing submissions (at paragraphs 56 to 59) are an accurate reflection of the evidence adduced at hearing.

[92] There was no evidence to support Mr Tam's submission (at paragraph 57) that "*it is clear from industry standards and awareness in 1999 that the (above) aspects of defective construction are known or ought to have been known by Mr Bolderson if he had kept himself up to date with current developments and building issues and good building standards*". The only evidence adduced for the claimants on the question of the standard of the Bolderson report was that of Mr Dibley.

[93] In determining the standard of Mr Bolderson's report, it is relevant that:

a) before the Court of Appeal in the *Attorney-General v North Shore City Council*[19] the Council accepted that in 1998 to 2000 it was not aware of weathertightness risks and that its checklists did not reflect such risks.
b) the Hunn report which led to the introduction of the Weatheright Homes Resolution Services Act 2002 was not issued until 2002.

[19] [2010] NZCA 324.

c) In the decision of this Tribunal in *Roos*[20] issued 30 March 2010 Adjudicator Andrew found that by 2004 there was a heightened and reasonably widespread understanding of weathertightness issues.

[94] There is no evidence before me to suggest that in 1999 pre-purchase inspectors, or the building industry generally, had the level of understanding of weathertightness issues suggested by Mr Tam.

[95] It was Mr Duffy's evidence that the report was of a suitable standard at the time that it was delivered. He described the claimants' dwelling as 'an anomaly' as it had a cavity which was not common in 1997/1998. He said that it was not until November 2003 that Auckland City Council required cavities in construction and the early cavity systems were generally wrongly installed. In Mr Duffy's opinion there was no reason for Mr Bolderson to believe that the building had a cavity as it was not well known at the time and not possible to detect with a visual inspection although Mr Bolderson did note the cavity by the deck area was not open draining.

[96] In answer to a question from me on the level of detail in Mr Bolderson's report, Mr Duffy replied that, compared with others he had seen, Mr Bolderson's report was more thorough. He described many of the reports of the time as "tick box" reports. Mr Duffy said that the biggest problem he could see with the Bolderson report was that the language used may have been challenging for a lay person. In this case Mr Duffy observed that this issue appeared to have been overcome by Mr Bolderson explaining the report to Mr Mok.

[97] For the reasons given, I attribute more weight to Mr Duffy's evidence on the standard of pre-purchase inspections in 1999 than to the evidence of Mr Dibley. I therefore accept the evidence of Mr Duffy that the report issued by Mr Bolderson met the required

[20] *Roos v Wang* [2010] NZWHT AUCKLAND 10 Adjudicator Andrew.

standard and was produced with reasonable skill and care. I therefore find that there was no negligent misstatement by Mr Bolderson nor am I satisfied that there was any aspect of his report which was misleading.

[98] The claim against Mr Bolderson is therefore dismissed.

THE LIABILITY OF MICHAEL MAY

[99] As noted above, it was not until closing submissions were made on their behalf that the claimants withdrew their claim against Mr May. Until the conclusion of the hearing they claimed that Mr May owed them a duty of care and that he or his employees or agents were negligent in failing to ensure that the plaster coating was properly applied and by causing the defects listed in paragraph 67 of the claim.

[100] Mr May denied the claim and in his brief of evidence filed 5 August 2010 he stated that:

a) May Plastering Limited had provided a quote directly to Blake Boyd but that he had contracted out the plastering work to another company.
b) he denied ever meeting Mr Boyd or being on the site or taking any responsibility for supervising the work.

[101] Despite his denial of liability the claimants did not cross-examine Mr May. In evidence Mr Boyd said the only plasterer that he had seen on site was a young man with an accent, either Irish or Scottish, and there was no evidence that Mr May had ever been on site.

[102] Mr Stewart, counsel for Mr May, correctly set out the relevant law in relation to personal liability of directors in his closing submissions for Mr May. There is no basis for a finding that Mr May was personally liable to the claimants. He did not exercise any

control over the way in which the plastering work was done nor did he have any responsibility for supervising those who carried out the work.

[103] There was never any basis for a claim against Mr May and for these reasons this claim is dismissed.

ARE THE CLAIMANTS LIABLE FOR CONTRIBUTORY NEGLIGENCE AS A RESULT OF ANY FAILURE TO MITIGATE THEIR LOSS

[104] Mr Boyd submitted that the claimants caused or contributed to their loss by failing to make sufficient enquiries prior to purchasing the property. Both Mr Boyd and Mr Bolderson claimed that the claimants failed to carry out any or any adequate building maintenance since they bought the property and that this failure added to the cost of any repairs.

[105] The only maintenance carried out according to Ms Ho was sealing some cracks in early 2007. She said that they were planning to wash the house but did not do so as they realised it needed repair.

[106] Mr Duffy also was of the opinion that the owners had undertaken very limited or no maintenance because of the extent of mould he observed during the site inspection on the cladding, the blocked deck outlet and the blocked gutters. In Mr Duffy's opinion the lack of maintenance contributed to the problems.

[107] The duty of claimants to mitigate in claims of this type was considered by the High Court in *White v Rodney District Council*.[21] The principle of mitigation is that entitlement to compensation for pecuniary loss flowing from the breach is qualified by a duty on the claimant to take all reasonable steps to mitigate the loss flowing from the breach. The claimant may not claim any part of the damage as a

[21] HC Auckland, CIV-2009-404-001880, 19 November 2009, Woodhouse J.

result of his or her own failure.[22] Woodhouse J concluded that the onus is on the defendant to establish what reasonable steps could and should have been taken by the plaintiff and that these steps were not taken. The onus is also on the defendant to demonstrate how any steps to mitigate would have reduced the damage.[23] It is not sufficient for a defendant to demonstrate that it would have cost less to carry out repairs at an earlier date:

> The defendant must also show that any delay in carrying out the repairs has increased the amount of damage.[24]

[108] It may be reasonable for a plaintiff to postpone repair work because of refusal by another party to accept liability. Although I accept that the Boyds made an offer to the claimants to settle, before the claim was filed in the Tribunal, the claimants were not bound to accept that offer which was made outside of the WHRS process. The onus is not on the claimants to demonstrate that what they did after discovery of the defects was reasonable, the onus is on the respondents. It is necessary to assess all the evidence in relation to the claimants' circumstances and the reasons for them taking certain steps. Even if it is established that a failure to repair or maintain has increased damage, it is not enough simply to demonstrate that repairs would have cost less if done earlier. The relevant question is whether there is a material increase in damage and whether the cost associated with any increase can be quantified.[25]

[109] Even though I accept that the claimants did not carry out the repairs recommended in Mr Medricky's first report until after they had sought a second report and do not appear to have carried out regular maintenance on the property there is no evidence that any damage has quantifiably increased as a direct result of this failure by the

[22] Ibid at paragraph [25] *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673 at 689 (HL).
[23] *White* (HC) above note 19 at [26].
[24] *White* (HC) above note 19 at [31].
[25] *White* (HC) above note 19 at [57].

claimants. For these reasons there is no deduction and I find that contributory negligence has not been proven on the part of the claimants.

CONCLUSION AND ORDERS

[110] The claim by Chong Hung Mok and Shui Ha Ho is proven to the extent of $268,994.62.

[111] Blake William Boyd is liable to pay the claimants $268,994.62 immediately.

[112] The claims against Craig Tibbits, Alan Bolderson and Michael Gregory May are dismissed.

[113] Any application for costs is to be filed by 20 October 2010 and any opposition by 4 November 2010.

DATED this 8th day of October 2010

S. Pezaro
Tribunal Member