IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2009-101-000012
[2010] NZWHT AUCKLAND 39

BETWEEN	DAVID LINDSAY CAMERON, BRENDA MURIEL CAMERON and GEOFFREY HEWIT MYLES as Trustees of the NORMAC TRUST Claimants
AND	DAVID LAWRENCE STEVENSON First Respondent
AND	CHRISTOPHER JOHN CHOTE Second Respondent
AND	BMW PLUMBING LIMITED Third Respondent
AND	CARTER HOLT HARVEY LIMITED (Removed) Fourth Respondent
AND	BRIAN MUSSON (Removed) Fifth Respondent

Hearing:	22-23 November 2010
Final Submissions:	3 December 2010
Appearances:	Stuart Robertson & Anita Lee First Respondents – self represented Second Respondents – self represented Roger Phillip for BMW Plumbing Limited
Decision:	21 December 2010

FINAL DETERMINATION
Adjudicator: P A McConnell

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INTRODUCTION

[1] David and Brenda Cameron together with Geoffrey Myles are the owners of a property at 130 Whakapirau Road, Maraekakaho. It has been Mr and Mrs Cameron's family home since it was built in 2000. In July 2004 Mr and Mrs Cameron became aware of leaks around the stairwell area of the dwelling. They filed a claim with the Weathertight Homes Resolution Service and an adjudication hearing was held in relation to the defects associated with those leaks in May 2006.

[2] When undertaking the remedial work Mr and Mrs Cameron became aware that the water ingress and subsequent damage was much wider than they had previously believed. They filed a further application with the Weathertight Homes Resolution Service and a further report was prepared. The assessor concluded that there were widespread defects in the construction that had caused leaks and damage to the cladding and framing requiring a complete reclad.

[3] The claimants allege that David Stevenson, Christopher Chote and BMW Plumbing Limited are responsible for the defects and resulting damage. Mr Stevenson was the builder contracted to build the property. Mr Chote was the director of the plastering company and applied the stucco plaster to the dwelling. BMW Plumbing Limited was the plumber subcontracted to carry out drainage and plumbing work during construction.

MATERIAL FACTS AND BACKGROUND

[4] Mr and Mrs Cameron purchased the land on which the property was located in 1995. Building consent was granted by the Council in December 1999 for a dwelling to be built on the land. At around the same time Mr and Mrs Cameron entered into a contract with Mr Stevenson trading as David L. Stevenson Building Contractors for Mr Stevenson to build the home that had been

designed by Mr Musson. This was a full building contract with Mr Stevenson responsible for the construction work and the engagement of the majority of the subcontractors.

[5] Construction took place between February and July 2000. Chote Contracting Limited was contracted by Mr Stevenson to carry out the stucco plastering work. That company is no longer in existence. Christopher Chote was a director of that company. He accepts he personally carried out some of the plastering work and supervised the plastering.

[6] BMW Plumbing Limited (BMW) was contracted by Mr Stevenson to carry out the plumbing work including the supply and installation of the hot and cold water supply, wastes, storage tank and installation of the hot water cylinder exhaust venting pipes.

[7] The dwelling is a large two storey house and is situated in a high wind zone. The dwelling was constructed with a cavity and framing including both treated and untreated timber. External walls were "stucco" solid plaster installed over a rigid fibre-cement sheet backing thought to be hardibacker. The face fixed aluminium external joinery included windows and ranch slider doors. There is an upstairs balcony off the master bedroom.

[8] The house was all but completed by July 2000 and the Camerons moved in on 28 July 2000. The property was subsequently transferred from Mr and Mrs Cameron to the claimant trust on 13 March 2002. Mr Myles at that stage became a joint owner in his capacity as a professional trustee.

[9] In July 2004 Mr and Mrs Cameron noticed a musty smell in a cupboard under the stairs. After trying to get the matter resolved they applied to the Weathertight Homes Resolution Service (WHRS) for an assessor's report. The assessor's investigation at that time was largely confined to the area around the stairwell although he

noted that there were other aspects of the design and construction that he considered to be risk areas that warranted further attention by the owners.

[10] The claimants bought a claim against Mr Stevenson, Mr Chote, BMW Plumbing Limited, Mr Garry Brown and the Hastings District Council in the WHRS. They settled with the Council in May 2006 and went to an adjudication hearing in June 2006 for the balance of the costs for the repairs around the stairwell and nearby window area. Orders were made against Mr Stevenson and BMW only.

[11] Following the adjudication the Camerons engaged Graham Linwood of Graham Linwood Architects Limited as their remedial architect and project manager. In May 2007 remedial work commenced in the stairwell area. During the course of those repairs it became apparent that there were additional areas of damage caused by other leaks and further defects. Mr and Mrs Cameron filed a further application with the WHRS and a second assessor's report was completed on 30 July 2007.

[12] The claimants then chose to complete the remedial work before filing their claim with the Tribunal. Remedial work commenced in October 2007 and was largely completed towards the end of 2008. Further causes of water ingress continued to be discovered throughout the remedial process and additional leaks were again discovered after the completion of remedial work which necessitated yet further work.

[13] Mr and Mrs Cameron then filed a claim with the Tribunal against David Stevenson, Christopher Chote, BMW and Carter Holt Harvey Limited (Carters). The claim against Carters was in relation to alleged deficiencies with the roof which caused leaks and subsequent damage. Carters settled the claim in relation to the roof

with the claimants during the course of the adjudication. The costs associated with replacing the roof and repairing damages resulting from leaks in the roof have been deducted from the quantum being claimed. The claim against Carters was withdrawn and it was removed as a party without opposition from any of the respondents.

[14] During the course of the Tribunal proceedings BMW applied to join the Hastings District Council. Its application was supported by the other respondents. Both the Council and the claimants opposed the joinder application. The claimants advised that a condition of the earlier settlement agreement with the Council was that they would indemnify the Council against any further claims brought against it by any party in relation to the property. The claimants offered to reduce the amount they would be claiming against the other parties by an amount equivalent to the contribution that the Council would have been ordered to pay if it had been a party.

[15] The Tribunal accepted that this was a flexible and cost effective way of dealing with the respondents' cross-claim or claim for contribution against the Council. While accepting that there are some challenges in determining the Council's liability when it was not a party, the proposal by the claimants was unlikely to prejudice any of the respondents as they would not be asked to assume the Council share of liability nor would any of the respondents' potential liability be increased as a result of the Council not being a party.

ISSUES

[16] The issues I need to decide are:

- What are the defects that caused the leaks?
- Is David Stevenson liable for the defects and resulting damage?

- Does Christopher Chote owe the claimants a duty of care? If so, has he breached that duty of care resulting in damage and loss to the claimants?
- Is BMW Plumbing Limited liable for any of the damage?
- What deduction should be made to reflect the Council's liability?
- What are the appropriate costs to rectify the defects for which any of the respondents are liable?
- What contribution should each of the liable respondents pay?

WHAT ARE THE DEFECTS THAT HAVE CAUSED THE LEAKS?

[17] Christopher Phayer, the assessor, and Graham Linwood, the claimants' expert, gave their evidence concurrently on the defects to the dwelling and the subsequent damage. They agreed that the dwelling was a leaky home and that a total reclad was necessary. None of the respondents have challenged this evidence. Mr Linwood included a number of additional defects in paragraph 15.17 of his brief under the heading "Deviations from the Drawings and Specifications". During the course of the hearing however Mr Linwood and Mr Phayer agreed that the majority of these were structural and not implicated in weathertightness. The only defect in dispute was the lack of truss support which will be dealt with later in this decision. The claimants withdrew the parts of the claim that related to the structural defects and reduced the remedial quantum sought by the costs incurred to remedy those defects. After this concession was made, Mr Linwood and Mr Phayer were largely in agreement on what the defects were that caused the leaks.

Aluminium Joinery and Flashings

[18] Mr Phayer and Mr Linwood agreed that inadequate jamb flashings and joints between the aluminium joinery and stucco cladding had failed which led to moisture being drawn into the house.

This caused moulding and rotting to the untreated framing. In their opinion the window flashings were not built as detailed on the drawings nor were they compliant with then current good practice. On the evidence presented I am satisfied that workmanship in relation to the installation of the windows and the jamb flashings has been a significant cause of water ingress and damage.

[19] Mr Chote and Mr Stevenson submitted that the problem with the windows was that the windows installed were appropriate for medium wind zones rather than very high wind zones in which this property is located. The experts accepted however that while the windows may not have been appropriate for the wind zone, this was not a significant contributing cause to the damage they observed. This is because any leaks associated with medium wind zone windows being installed in high wind zone areas were normally around the rubber seals, often causing water to spurt into the interior of the home rather than the type of leaks evident from the damage in this property.

[20] I accept the windows were not appropriate for the wind zone. However there is insufficient evidence to establish that this was a cause of leaks causing damage. The damage that necessitated the remedial works has been caused by workmanship issues with the installation of the windows and not the type of glass or window installed.

Ground Clearances

[21] The experts agreed that the ground clearance levels were less than required by the Building Code. Inadequate clearances between the stucco cladding and ground levels resulted in moisture being able to wick through the absorbent plaster material. The worst damage resulting from this defect was adjacent to the front entry and guest bedroom where brick terraces had been constructed. Evidence was given during the course of the hearing that these brick

terraces had been installed by Mr Stevenson or contractors engaged by him. Mr Stevenson attempted to introduce new evidence on this issue in his closing submissions. I have given no weight to this evidence.

[22] The experts' evidence on the contribution of ground clearances to the leaks and damage was not significantly challenged by any of the respondents. Based on the evidence presented I am satisfied that inadequate clearances between the stucco cladding and adjacent ground levels have contributed to the dwelling leaking. I am also satisfied that the ground levels were less than what is required by the Building Code and were not in accordance with good building practices at the time this house was built.

Wall to Roof and Spouting Junctions

[23] There were areas of uncoated stucco behind ends of spouting and fascia boards which allowed water ingress through absorption. Whilst the evidence of damage in these areas was low, the experts' opinion was that they have contributed in a secondary way to moisture ingress.

[24] In other areas the plaster was carried down to the apron flashings meaning that any moisture in the plaster was unable to egress allowing water on the roof to wick up into the plaster and then into the framing via the hardibacker cladding. Fascia boards were also buried in the plaster surface allowing moisture to track directly into the untreated timber framing.

Balcony and Deck

[25] There were a number of deficiencies with the deck area which had the potential to cause moisture ingress. No saddle flashings were installed where the balcony walls abutted the main wall frame. This allowed moisture to penetrate into the untreated

timber frame. In addition the metal railing above the balcony wall was embedded into the timber framing and plastered around without being sealed. No cap flashing was applied to the top of the balcony wall and this allowed water to enter into the frame. However despite these deficiencies the invasive testing results carried out by the assessor proved acceptable and there was little evidence of damage. I accordingly conclude that any deficiencies with the deck have not contributed significantly to the leaks and damage to this building. At most they come into the category of future likely damage.

Unsealed Penetrations

[26] The evidence presented established that no attention had been paid to sealing or weatherproofing the penetrations in the plaster at points such as extraction fans, meter boards and pipes. The area where there was the most significant damage as a result of this deficiency however was in relation to the gas fittings which was covered by the previous adjudication.

Relief Pipe from the Hot Water Cylinder

[27] This property had two relief pipes from hot water cylinders penetrating through and above the roof line. The stays on one of these relief pipes had become loose and subsequent movement created an opening at roof level allowing water to ingress. This resulted in damage to the gib board ceiling below. The remedial costs for repairing the damage associated with this defect amount to $6,250.37. This included providing additional support to prevent movement in the very high wind situation in which this house is located.

[28] Mr Phayer considered that the issues with the relief pipe were largely a maintenance issue. Mr Linwood however considered that the relief pipe had not been adequately supported when

installed. This issue will be considered in more detail when considering the liability of BMW.

Lack of Truss Support

[29] Mr Phayer and Mr Linwood agreed that the structural support beam in the lounge was not built as designed. This beam also supported the outset roof area in the lounge. When the first floor wall framing to the lounge was formed, the hardibacker was fixed over the trusses, nailed through the hardibacker to the plate fixed into the steel beam and rested on a ceiling batten. The hardibacker was broken away and packers were installed within the steel beam and bolted in place.

[30] While accepting this potential deficiency, Mr Phayer's opinion was that, although the building may not be perfect it was performing and there was little evidence pointing to future failure. Mr Linwood was however of the opinion that the manner in which the trusses were supported was inadequate and would inevitably lead to movement which would compromise the integrity of the cladding. The costs incurred to rectify this problem were approximately $750.00 and none of the respondents disputed that this defect was weathertightness related. I therefore conclude that the lack of truss support, if not rectified, was likely to result in movement in the building which could cause cracking to the dwelling.

Delays in Painting the Exterior of the Property

[31] Mr Chote and Mr Stevenson submitted that delays in painting the exterior of the property were the major cause of water ingress. Exterior painting was not part of Mr Stevenson's contract and was completed by Mr and Mrs Cameron or someone else they contracted. Mr Phayer accepted that exterior painting was an integral part of the stucco cladding system and is required to achieve weathertightness. He however did not consider the period of delay in

painting to be out of the ordinary in this case. In addition neither Mr Phayer nor Mr Linwood considered there was any evidence that moisture ingress through delays in painting caused damage to this dwelling. In their opinion the damage was isolated to areas around other defects. They said that if delay in painting had contributed to moisture ingress they would have expected to have seen more widespread and randomised signs of moisture ingress and damage. This was not apparent when the cladding was removed during the remedial work.

[32] I accordingly conclude there is no evidence that delays in painting resulted in water ingress causing damage. Nor is there likely to be any future damage as a result of this alleged defect.

Use of Untreated Timber for Framing

[33] The consented plans for this dwelling provided for treated timber to be used in framing. This was substituted for untreated timber. Untreated timber was accepted as a framing material at the time this house was built. Mr Stevenson's evidence is that when he quoted for the job he provided costings based on untreated timber. This was the contract accepted by Mr and Mrs Cameron. Mr Cameron advised he was not aware at the time that this change had been made.

[34] The use of untreated timber has not caused moisture ingress to this property. At most it may have resulted in more damage to the timber framing than would have been the case if treated timber had been used. The use of untreated timber therefore has not caused or contributed to leaks. In any event the contract between Mr and Mrs Cameron and Mr Stevenson provided for untreated timber.

Deficiencies in the Plastering

[35] Mr Linwood submitted that there were deficiencies in the way the plaster work was carried out. He referred to one photograph which showed that the mesh was against the hardibacker rather than being in the middle of the plaster. Mr Chote denied this was the case and said that the mesh he used was specifically designed not to do that.

[36] While there was one photograph that suggested that the mesh had been inappropriately placed there was no evidence that any defects with the application of the plaster resulted in damage or water ingress. There is no evidence of random or widespread cracking. In addition there is no evidence of water ingress in areas other than the defects referred to earlier. I am therefore not satisfied that there were any deficiencies in the application of the plaster itself that contributed to the dwelling leaking.

Summary and Conclusions as to Defects

[37] The primary defect that has contributed to water ingress and damage is the inadequate installation of the windows and associated flashings. This issue on its own is likely to have necessitated a full reclad of the building. The absence of ground clearances has also significantly contributed to the damage and need for remedial work.

[38] There were also deficiencies in the plastering at the roof to wall junctions, construction of the deck and lack of sealing or flashing around penetrations that have either contributed to a lesser extent to water ingress or are likely to cause damage in the future. Localised and limited damage has also resulted from the loosening of stays on one relief pipe.

IS DAVID STEVENSON LIABLE FOR THE DEFECTS AND RESULTING DAMAGE?

[39] Mr Stevenson accepts that the contract he had with Mr and Mrs Cameron was a full building contract. He was responsible for engaging, co-ordinating and supervising the subcontractors. At the time this property was built Mr Stevenson was not trading under a company but was operating as a sole trader.

[40] While he advises he did not personally carry out much of the building work, he accepts that it was either he or his employees who completed the carpentry work on the dwelling including installing the windows and the hardibacker cladding. It was also Mr Stevenson who contracted most of the sub-contractors.

[41] I conclude, and this is not specifically disputed by Mr Stevenson, that he was the builder, head contractor and project manager for the construction for the Camerons' home. It has been well established that a builder, head contractor and project manager owes a duty of care to homeowners to exercise reasonable skill and care in undertaking building work.[1]

[42] I accordingly accept that Mr Stevenson owes the claimants a duty of care. The issue therefore is whether he breached the duty of care owed. The two primary defects with this house were the incorrectly installed windows and the ground clearances. Mr Stevenson accepts he or his employees installed the windows. I have already concluded that the windows and associated flashings were not installed in accordance with the consented plans and they were not compliant with then current good building practice. I also

[1] *Bowen v Paramount Builders (Hamilton) Limited* [1977] 1 NZLR 394 (CA); *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA); *Morton v Douglas Homes Limited* [1984] 2 NZLR 548 (HC); *Dicks v Hobson Swan Construction Limited & Ors* [2008] 3 NZLR 479 (HC).

accept that the lack of ground clearances were the responsibility of Mr Stevenson. It was work done by him or his employees that resulted in ground levels being compromised. The issues with the roof wall and spouting junctions were primarily sequencing issues and therefore are defects for which Mr Stevenson had some responsibility as the head contractor and project manager. Mr Stevenson and his employees were also responsible for the construction of the deck and the structural support beam in the lounge.

[43] Mr Stevenson was also responsible for ensuring the dwelling was built in accordance with the Building Code and the consented plans. The ground levels were completed in such a way they neither complied with the Building Code nor were not in accordance with accepted building practice at the time.

[44] I accordingly conclude that Mr Stevenson was negligent in the manner in which he both built the dwelling and managed the building process. In particular he was negligent in the manner in which the joinery was installed and in constructing the house with insufficient ground clearances. I further accept that these issues also amount to a breach of the contract Mr Stevenson had with Mr and Mrs Cameron.

[45] Mr Stevenson submits that the Council is liable for these defects and that the role of the Council in inspecting the dwelling absolves him from liability. While these issues may be taken into account in terms of contribution, the role of the Council can never be a complete defence by a construction party if that party undertook negligent building work. The Council is not a clerk of works and while failure on its part may lead to it being liable, any liability it may have is not a defence to any claim against Mr Stevenson.

[46] I therefore conclude that work undertaken or supervised by Mr Stevenson contributed to defects that necessitated a full reclad of

the dwelling. He is accordingly liable for the full amount of the established claim.

DOES CHRISTOPHER CHOTE OWE THE CLAIMANTS A DUTY OF CARE? IF SO, HAS HE BREACHED THAT DUTY OF CARE RESULTING IN DAMAGE AND LOSS TO THE CLAIMANTS?

[47] Mr Chote was the director of Chote Contracting Limited the company that was contracted by Mr Stevenson to carry out the stucco plastering work on the dwelling. Mr Chote accepts he personally carried out a good deal of the stucco work and supervised the installation of the stucco. He however submits that the work done was not negligent because it was in accordance with the practice of the time. He says that there was no evidence of any water ingress as a result of any stucco work. He further submits that the installation of the hardibacker and windows was signed off by the Hastings District Council and he was entitled to rely on that inspection. He also submits that the work done by Chote Contracting was inspected by Hastings District Council and passed as acceptable. In any event he submits that even if there were deficiencies in the plastering work it would be his company that was liable and not him personally.

[48] In order for Mr Chote to have any liability the claimants need to establish that he owed them a duty of care and that he acted in a way so as to breach that duty of care. In addition the damage or loss claimed must be a sufficiently proximate consequence of the breach and not too remote. There are two issues that need to be considered when determining whether Mr Chote owes a duty of care. Firstly the issue of whether a plasterer subcontractor owes a duty of care to home owners and subsequent home owners. The second issue is whether Mr Chote personally owes the claimants a duty of care or whether any duty is owed by his company only.

[49] In *Body Corporate 189855 & Ors v North Shore City Council & Ors* (*Byron Avenue*), the Court concluded that the plasterer did owe a duty of care to subsequent owners. The plasterer in that case was a subcontractor. In reaching this decision, Venning J stated:[2]

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

[50] In *Body Corporate 185960 v North Shore City Council,* Duffy J observed that:[3]

> The principle to be derived from *Bowen v Paramount Builders* will apply to anyone having a task in the construction process (either as contractor or subcontractor) where the law expects a certain standard of care from those who carry out such tasks. Such persons find themselves under a legal duty not to breach the expected standard of care. This duty is owed to anyone who might reasonably be foreseen to be likely to suffer damage.

[51] In more recent claims involving leaky residential dwellings the terms "builder" or "contractor", (as used in leading cases such as *Bowen*),[4] have been given a wider meaning to include most specialists or qualified trades people involved in the building or construction of a dwelling house or multi-unit complex. Given the nature of contracts in residential dwelling construction, attempts to differentiate between the respective roles of these persons in the contractual chain that delivers up dwelling houses in New Zealand can create an artificial distinction. Such a distinction does not accord with the practice of the building industry, the expectations of the

[2] HC Auckland, CIV 2005-404-05561, 25 July 2008 at [296].
[3] HC Auckland, CIV 2006-404-003535, 22 December 2008 at [105].
[4] *Bowen v Paramount Builders (Hamilton) Limited* [1977] 2 NZLR 394; *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234; *Dicks v Hobson Swann Construction Limited*; *Byron Avenue* n 6 above, *Heng & Anor v Walshaw & Ors* [30 January 2008] WHRS 00734, Adjudicator John Green.

community, or the statutory obligations incumbent on all those people.

[52] I accept that Mr Chote's company was contracted to carry out the plastering and was not responsible for installation of flashings or other building work or the supervision of other builders. However, its position is no different from any other qualified tradesman contracted to do construction work that has been found to owe a duty of care. I accordingly conclude that Chote Contracting Limited did owe the claimants a duty of care. The issue now is whether Mr Chote personally owes a duty of care.

[53] In *Morton v Douglas Homes Ltd*[5] Hardie Boys J concluded that where a company director has personal control over a building operation he or she can be held personally liable. This is an indicator of whether or not his or her personal carelessness is likely to have caused damage to a third party. In *Dicks v Hobson Swan Construction Ltd (in liq),*[6] Baragwanath J concluded that as Mr McDonald actually performed the construction of the house he was personally responsible for the defects which resulted in the dwelling leaking and therefore personally owed Mrs Dicks a duty of care.

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

[55] In determining whether Mr Chote personally owes the claimants a duty of care I must bear in mind the presumption against an imposition of personal responsibility where the director was simply acting on behalf of the company. I therefore need to determine

[5] *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548 (HC).
[6] *Dicks v Hobson Swan Construction Ltd (in liq)* (2006) 7 NZCPR 881 (HC).
[7] *Hartley v Balemi* HC Auckland CIV-2006-404-2589, 29 March 2007.

whether Mr Chote either carried out or controlled construction work implicated in the causes of leaks.

[56] Mr Chote accepts he carried out the stucco plastering work and that he personally supervised installation by others employed by his company. Therefore if there are deficiencies in the plastering work that have caused leaks he is personally responsible for those defects.

[57] The allegation against Mr Chote is primarily that he failed to ensure the adequacy of the substrate before applying the stucco plaster. Neither Mr Chote nor his company were responsible for installing the flashings around the window areas and accordingly he is not the person primarily responsible for this defect. Mr Chote stated at the hearing that shortly after commencing the stucco plastering he was advised that the Council had identified problems with the window flashings. Work accordingly had to be stopped until the flashings were replaced. He did not resume plastering until after some of the flashings had been replaced and rechecked and passed by the Council.

[58] The claimants did not challenge this evidence during the hearing but, somewhat irregularly, attempted to do so in closing submissions by way of quoting from evidence given in the previous adjudication. Even if I were to accept this late challenge the difference in the evidence is not significant, the only real difference being that at the first hearing Mr Chote said he did not know who approved the flashings. In both hearings Mr Chote was clear that there had been problems with the flashings but they had been changed and approved. In these circumstances it was not unreasonable for Mr Chote to proceed with the plastering without further checks around these areas.

[59] In addition no evidence was given as to whether the deficiencies in the flashings would have been apparent once the

hardibacker was installed. The claimants have accordingly failed to establish any negligence on Mr Chote's part in relation to the joinery deficiencies.

[60] Mr Chote is however responsible for the deficiencies in the stucco application around the roof to wall junctions. He should have been aware that failing to coat or apply stucco behind the ends of the spouting and fascia boards would compromise the weathertightness of the building and allow water ingress. Furthermore carrying the plaster down to apron flashings was not compliant with good practice at the time and has meant that any moisture that did enter has been unable to egress. This defect has also allowed water to wick up into the plaster and then into the framing.

[61] I therefore conclude that Mr Chote was negligent but only in relation to the failure to apply stucco in some areas around the roof to wall junctions and in carrying plaster down to the apron flashings. These are not primary defects but only more minor ones contributing to the damage caused. If they had been the only defects they could have been remedied by targeted repairs.

[62] The claimants in their amended statement of claim were not seeking a specific sum against Mr Chote. In their opening submissions they were seeking $55,066.23 being the value of the replacement plaster together with a contribution to the total remedial costs and the other costs and damages claimed. In closing submissions the claimants submitted that a quantum of 50% of the adjusted established claim was being sought against Mr Chote.

[63] While no evidence has been presented on what the costs would be to rectify specific defects I conclude that the $55,066.23 sought in opening submissions together with the appropriate percentage of consequential and general damages is the amount for which Mr Chote is jointly and severally liable. The costs of rectifying any defects for which Mr Chote was responsible would not have

amounted to more than the actual costs of plastering the home. His more limited contribution to the issues of this house will also be taken into account when considering contribution.

IS BMW PLUMBING LIMITED LIABLE FOR ANY OF THE DAMAGE?

[64] The claim against BMW is in its capacity as the subcontractor engaged by Mr Stevenson to undertake the plumbing work to the property. Up until the time of the hearing the specific allegations against BMW were in relation to the inadequate support to the relief pipe, the supply and installation of roof flashings, the defective copper pipe weld to the bathroom water supply and the incorrect sewer pipe level and entry to the house. During the course of the hearing the latter two claims were withdrawn as they were not weathertightness related. The claim in relation to the supply and installation of roof flashings was not progressed. There is no direct evidence that BMW was responsible for the supply or installation of the roof flashings. Mr Barton's evidence, which I accept, is that this was not part of the contract between Mr Stevenson and BMW and was not work BMW undertook. Mr Stevenson's evidence was that it was the roofer who installed the flashings.

[65] The claim against BMW is therefore limited to one of inadequate support to one of the relief pipes from one of the hot water cylinders. The amount being claimed against BMW is the direct costs associated with carrying out repairs to damage from this defect of $6,250.37 plus GST together with an appropriate proportion of the other proven costs.

[66] Mr Linwood and Mr Phayer both agreed there had been water ingress as a result of the relief pipe stays loosening on one of the pipes. Mr Linwood's view was that the stays were inadequate for the wind condition and therefore the installer was negligent. In Mr

Phayer's opinion this was more a maintenance issue and he did not consider the work done by BMW was deficient or causative of loss.

[67] Mr Linwood said that he understood the stays to the relief pipe had been made from number 8 wire and that this was not adequate. When questioned by the Tribunal as to what would have been adequate for the conditions, he advised he was not an expert in the area and could not give a definitive opinion. He however thought it called for something more substantial. Mr Linwood however agreed with Mr Phayer that there were no minimum or standard requirements for fixing stays to relief pipes either at the time this dwelling was built or currently.

[68] Mr Barrett's evidence was that the relief pipe was stayed with stay wire. I accept his evidence that stay wire was used and not number 8 wire. He said that this was the normal and accepted practice of the time. The only other alternative would have been to install solid mechanical stays which were rarely used on residential dwellings. The reason for this is that most homeowners considered them to be unsightly and preferred the less visible stay wire.

[69] It is also relevant to note that there were two hot water cylinders with separate relief pipes on this dwelling both of which have been fixed in the same way. The other relief pipe has remained secure. In Mr Barrett's opinion this is evidence that the method of installation was adequate and any problems that occurred were not as a result of BMW's negligence. The claimants submitted that the pipe that did become loose appears to have been higher and longer than the other pipe and therefore may have needed more secure fixing.

[70] After considering all the evidence I agree with Mr Phayer that this issue is more a maintenance issue. There is insufficient evidence on which I could conclude that the work done by BMW fell

short of good building practices at the time. Mr Linwood acknowledged he was not an expert in the area and could not give expert evidence on this point. Mr Barrett who is a qualified and experienced plumber gave credible evidence that this was the standard and accepted method of a fixing hot water cylinder relief pipes in high wind areas. This evidence was supported by Mr Phayer.

[71] The claim against BMW accordingly fails.

WHAT DEDUCTION SHOULD BE MADE TO REFLECT THE COUNCIL'S LIABILITY?

[72] The claimants have agreed to reduce the amount awarded by the contribution the Council would have been ordered to pay if it had been a party. I therefore need to determine what that contribution would have been.

[73] It is accepted that a local authority owes a homeowner a duty of care in issuing the building consent, inspecting the building work during the construction and in issuing a CCC.[8] The respondents claim that the Council failed to exercise due care and skill when inspecting the building work in that it failed to inspect with sufficient thoroughness to identify the established defects and that this failure amounted to negligence and caused the claimants loss. They submit that this is a complete defence to any claims against them. The claimants however submit that the appropriate contribution of the Council in relation to this property should be no more than 20% of the amount established.

[74] In *Body Corporate 188529 v North Shore City Council*[9] (*Sunset Terraces*), Heath J concluded the Council ought not to be

[8] *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC) at [526-40], *Bowen v Paramount Builders (Hamilton) Limited* above n 1.
[9] [2008] 3 NZLR 479.

regarded as a clerk of works or as a project manager. Its duty to third parties was to "exercise reasonable care, not an absolute duty to ensure compliance". In *Askin v Knox*[10] Cooke P concluded that a Council officer will be judged against the conduct of other Council officers. A Council officer's conduct will be judged against the knowledge and practice at the time at which the negligent act/omission was said to take place.

[75] Heath J in *Sunset Terraces* also stated that:[11]

> [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 Code had been complied with. In the absence of a regime capable of identifying waterproofing issues involving the wing and parapet walls and the decks, the Council was negligent.

[76] And at paragraph 409:[12]

> The Council's inspection processes are required in order for the Council (when acting as a certifier) to determine whether building work is being carried out in accordance with the consent. The Council's obligation is to take all reasonable steps to ensure that is done. It is not an absolute obligation to ensure the work has been done to that standard.

[77] The ground clearances are clearly issues the Council inspector should have noted. In addition the inadequacies with the window should have also been noted by a competent Council officer particularly as their attention had been drawn to the head flashings which they required to be replaced. I am satisfied therefore that if the Council had been a party to this adjudication it would have been liable for some or all of the damage. Courts have however consistently concluded that the parties undertaking the work should

[10] [1989] 1 NZLR 248
[11] *Body Corporate 188529 v North Shore City Council (Sunset Terraces)* [2008] 3 NZLR 479 (HC), Heath J at [450].
[12] See n 11 above at [409].

bear a greater responsibility than the Council. In most cases the apportion attributed to the Council has been between 15% and 25%. There are no specific circumstances in this claim which dictate a greater or lesser amount should be an appropriate contribution.

[78] I therefore conclude that 20% is the appropriate percentage to deduct from the amount awarded to reflect what would otherwise have been the Council's contribution.

WHAT ARE THE APPROPRIATE COSTS TO RECTIFY THE DEFECTS FOR WHICH ANY OF THE RESPONDENTS ARE LIABLE?

[79] The remedial work has been completed and the amount being claimed is the actual cost of the remedial work carried out less costs associated with the stairwell repairs, which were the subject of the previous adjudication, and costs associated with the roofing defects alleged against Carter Holt Harvey Limited. Various other deductions were made during the course of the hearing to remove costings associated with structural issues and non-weathertightness defects. This reduced the amount being claimed for remedial works to $483,466.

[80] None of the respondents specifically challenged the remedial costs. In addition they did not seek to question the claimants' expert on the deductions he calculated. There was no specific evidence called or submissions made by the respondents to suggest the remedial scope or remedial costs claimed were unreasonable or inappropriate.

[81] Earlier on in the progression of the claim questions were asked as to whether any of the damages sought were precluded as a result of the earlier adjudication. This issue was not however raised by any of the parties in the hearing or in briefs or reports submitted

prior to the hearing. In addition no submissions were made during or subsequent to the hearing that any part of the claim or the quantum claimed should be precluded for this reason.

[82] I am therefore satisfied that the claimants have established that the actual and reasonable costs incurred in carrying out the necessary remedial work is $483,466. The costs associated with the claim against BMW of $6,250 should be deducted from this amount as I have concluded this was not an amount expended to remedy any damage for which any of the respondents are liable. The total amount of the remedial work established is therefore $477,216. This amount includes Graham Linwood Architects Limited fees as well as the Hastings District Council consent fees.

[83] In addition to the remedial costs the claimants are seeking interest of $91,179.55 being financing costs to undertake the remedial work together with general damages totalling $30,000.00.

General Damages

[84] While there has been some debate as to whether general damages should be awarded on a per dwelling or a per owner basis Ellis J concluded in *Findlay & Anor as Trustees of the Lee Findlay Family Trust v Auckland City Council*[13] that the *Byron Avenue* appeal confirmed the availability of general damages and leaky building cases in general was in the vicinity of $25,000 per dwelling for owner occupiers. White J in *Coughlan & Ors v Abernathy & Ors*[14] confirmed that standard rates are for general guidance and for the purpose of reducing costs and facilitating consistency. Some flexibility is required in appropriate cases to reflect the particular circumstances and grounds upon which general damages are sought.

[13] HC Auckland CIV-2009-404-6497, 16 September 2010.
[14] HC Auckland CIV-2009-004-2374, 20 October 2010.

[85] In this case not only have Mr and Mrs Cameron had the normal stress and issues associated with having a leaky home they have also remained living in the home whilst remedial work was being carried out. Where such extensive work is required it is quite common for homeowners to move out and claim the cost of alternative accommodation. Rather than incur, and then in turn claim, the cost of alternative accommodation Mr and Mrs Cameron incurred considerable discomfort and inconvenience by living in their home while the work was being carried out. In these circumstances I conclude that an award of $30,000 in general damages is reasonable.

Interest

[86] The claimants are seeking interest of $91,179.55 based on the amounts expended on the remedial work. However the spreadsheets on which this interest rate is calculated indicate that the costs on which interest is calculated exceed the amount of the remedial work being claimed. It also exceeds the amount being awarded in this determination. Paragraph 16 of the third schedule of the Weathertight Homes Resolution Services Act 2006 provides that the Tribunal may order interest at a rate not exceeding the 90 day bill rate plus 2% on the whole or any part of the money awarded. The Tribunal also has the discretion to determine the period for which interest should be awarded.

[87] In the circumstances of this claim it is appropriate to award interest on the remedial costs established at the rate of the 90 day bill rate plus 2% for the period from 1 February 2008 until the issuing of this decision. I have chosen the 1 February 2008 date as the start date for calculating interest as that is when large payments were made towards the remedial work.

[88] The amount of the remedial work is established at $477,216. The 90 day bill rate plus 2% is 5.2% which means interest accrues at

$67.98 a day. There are 1,031 days between 1 February 2008 and 21 December 2010. Interest of $70,087 is therefore awarded.

Summary in relation to Quantum

[89] The claimants have established the claim to the amount of $461,843 which is calculated as follows:

Remedial work	$477,216
General damages	$30,000
Interest	$70,087
	$577,303
Less 20% (council contribution)	$115,460
Total	$461,843

WHAT CONTRIBUTION SHOULD EACH OF THE LIABLE PARTIES PAY?

[90] I have concluded that Mr Stevenson is liable for the full amount established of $461,843. Mr Chote however is only liable for $55,066 which amounts to 11.5% of the remedial costs. 11.5% of general damages and interest amounts to $11,510. His total liability is therefore $66,576.

[91] Section 72(2) of the Weathertight Homes Resolution Services Act 2006 provides that the Tribunal can determine any liability of any respondent to any other respondent and remedies in relation to any liability determined. In addition, section 90(1) enables the Tribunal to make any order that a Court of competent jurisdiction could make in relation to a claim in accordance with the law.

[92] 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.

[93] The basis of recovery of contribution provided for in section 17(1)(c) is as follows:

> Where damage is suffered by any person as a result of a tort… any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is… liable in respect of the same damage, whether as a joint tortfeasor or otherwise…

[94] Section 17(2) sets out the approach to be taken. It provides that the contribution recoverable shall be what is fair taking into account the relevant responsibilities of the parties for the damage.

[95] One of the difficulties in assessing contributions in this claim is that some of the parties responsible for the defects are not parties to this claim either because they could not be identified or because they are bankrupt, in liquidation or struck off. Ellis J in *Findlay* stated that apportionment is not a mathematical exercise but a matter of judgment, proportion and balance.

[96] Mr Stevenson was contracted as the head builder. He had overall responsibility for the way the dwelling was constructed. Mr Chote's responsibility however only relates to plastering over inadequate substrate and some more minor issues of finishing around junctions. I therefore set his contribution to the total costs to be 10% and that of Mr Stevenson to be 90%.

CONCLUSION AND ORDERS

[97] The claim by David Lindsay Cameron, Brenda Muriel Cameron and Geoffrey Hewit Myles is proven to the extent of $461,843. David Stevenson is liable for the full amount and Christopher Chote is jointly and severally liable for $66,576 of this amount. For the reasons set out in this determination I make the following orders:

i. David Lawrence Stevenson is to pay the claimants the sum of $461,843.00 forthwith. David Lawrence Stevenson is entitled to a contribution of up to $46,184.00 from Christopher John Chote for any amount paid in excess of $415,659.00.

ii. Christopher John Chote is ordered to pay the claimants the sum of $66,576 forthwith. Christopher John Chote is entitled to recover a contribution of up to $20,392.00 from David Lawrence Stevenson for any amount paid in excess of $46,184.00.

iii. The claim against BMW Plumbing Limited is dismissed.

[98] To summarise the decision, if the two liable parties meet their obligations under this determination it would result in the following payments being made by the liable respondents to this claim:

First respondent, David Lawrence Stevenson	$415,659
Second respondent, Christopher John Chote	$46,184

[99] If either of the parties listed above fails to pay his apportionment, this determination may be enforced against any of them up to the total amount they are ordered to pay in paragraph 97 above.

COSTS

[100] The following is the timetable for filing and opposing any application for costs under s 91 of the Weathertight Homes Resolution Services Act 2006:

- Any party who wishes to apply for costs is to file an application in writing setting out grounds and full particulars of orders sought by 28 January 2011.

- The party against whom costs is sought will have until 18 February 2011 to file any opposition or submissions in reply.
- The applicant for costs will have until 4 March to file a reply to any opposition.

DATED this 21st day of December 2010

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P A McConnell

Tribunal Chair