

IN THE WEATHERTIGHT HOMES TRIBUNAL

**TRI-2009-101-000025
[2012] NZWHT AUCKLAND 39**

BETWEEN	GREGORY JOHN McDONALD Claimant
AND	TIMOTHY EDWARD PETERS First Respondent
AND	BUILDING APPROVALS AND SOLUTIONS LIMITED Second Respondent
AND	MIKE HISLOP Third Respondent
AND	NEILL BROWN Fourth Respondent
AND	CARLTON RICHARDS Fifth Respondent
AND	NELSON CITY COUNCIL (Removed) Sixth Respondent
AND	GRAEME SCOTT (Removed) Seventh Respondent
AND	PHILIP ARTHUR HILLEARD Eighth Respondent

Hearing: 1, 2 and 3 February 2012

Appearances: G Praat for the claimant
S England for the first respondent
K Beckett for the second and third respondent
N Brown fourth respondent (self represented)
P Hilleard, eighth respondent (self represented)

Decision: Monday 27 August 2012

**FINAL DETERMINATION
Adjudicator: R Pitchforth**

INDEX

Issues	4
Background	4
Amount of claim.....	7
Criticism of evidence	8
Can Mr McDonald claim for the leaking parapets and the radial cracks?	11
Are there any other leaks in the dwelling?	18
Plaster surface of south wall	20
Invasive holes.....	24
Stucco to plaster junction.....	25
Lack of fascia to cladding junction on the south wall	26
Rafter penetration.....	26
Windows.....	26
Timber deck abutment.....	27
What damages should be awarded?	27
General damages	28
Conclusion and orders.....	29
Costs	30

[1] Gregory John McDonald is the owner of a house which leaked. The house is situated in Lud Valley, Hira, close to the Richmond Ranges of Nelson, an area which experiences high annual rainfall. He initially claimed \$152,144.40 for repairs and damages but by the end of the hearing had reduced his claim to \$60,192.00. Mr McDonald said that the leaks are due to negligent construction and inspection by the various parties to this claim. Despite defects resulting in parapet leaks having previously been repaired Mr McDonald regarded much of the current damage as still arising from that fault.

[2] The first respondent Timothy Edward Peters was a trustee of the Treetop Trust, and in that capacity was the owner of the property when the house was built. He lived in the house until it was sold to Mr and Mrs McDonald.

[3] The second respondent Building Approvals and Solutions Ltd was the company contracted by Mr Peters to provide inspection and certification services to ensure compliance with the Building Code and building consent so that a code compliance certificate could be issued.

[4] Michael Charles Hislop, the third respondent, was a director of Building Approvals and Solutions Ltd and was the certified inspector responsible for issuing the code compliance certificate. He was one of two inspectors, the other being the eighth respondent Phillip Hilleard who was employed by Building Approvals as an inspector.

[5] Neill Brown, the fourth respondent, was the plasterer contracted by Mr Peters to do all plastering work on the building.

[6] Carlton James Richards, the fifth respondent, was the builder contracted to do part of the building work and supervise Mr Peters when he was providing labour. Mr Richards filed a response, sought removal and then took no further part in the proceedings.

[7] The seventh respondent Graeme Scott was the building contractor engaged by Building Approvals and Mr Hislop to replace the parapet/gable roof ends with overhanging eaves in 2004. At the commencement of the hearing Mr Scott sought removal. There was no opposition and he was consequently removed.

ISSUES

[8] The questions to be answered are:

- a) Has the dispute in relation to the leaking parapets and the radial cracks in the plaster been settled?
- b) Are there any other leaks in the dwelling?
- c) If there are leaks, are they as a result of negligent building or inspection and if so, who is responsible?
- d) What damages should be awarded?

BACKGROUND

[9] The house was owned at the time of construction by Mr Peters as a trustee of the Treetop Trust.

[10] The owners before Mr Peters were involved in a number of building projects on the site. In 1993 a building consent was issued to erect a shed and in 1994 consent was granted for a wastewater system so that it could be used as accommodation. In February 1996 building consent was obtained for a dwelling and perimeter foundations were put in place. The dwelling was never built.

[11] After Mr Peters purchased the property in 1998 he obtained consent to alter and add to the shed with the proposed dwelling to be constructed on the existing foundations. Mr Peters named himself as the builder in the building consent documentation. The house was built between January 1999 and September 1999. Although it was designed as an extension to the existing shed and carport the shed was demolished and rebuilt during the process.

[12] Mr Peters said that he was the organiser of the project. He sourced some of the materials for the job but contracted specialist trade persons to build the house. He dealt with paperwork and laboured at the direction of specialist contactors. They were:

- a) The designers Mark Fielding Residential Design and Baigent Todd Ltd.
- b) A builder, Mr Richards, contracted to supervise Mr Peters and complete the main building work on the property.
- c) Building certifiers, Building Approvals and Solutions Limited, appointed by Mr Peters to carry out inspections, issue reports and certify that the code compliance certificate could be issued. Messrs Hilleard and Hislop were the employees who carried out the inspections.
- d) Mr Brown, a plasterer.

[13] Mr Hilleard conducted the initial inspections and Mr Hislop became involved for the first time at the end of March 1999. At that time Mr Hilleard was concerned about the lack of flashing around the window and door openings. Mr Hislop supported Mr Hilleard on visits until the project was back on track.

[14] During construction Messrs Peters and Richards made changes from the consented plans without notifying the inspectors. They demolished the existing shed, changed window details and added gable parapet projections above the roofline. Building Solutions dealt with these issues as they arose. Mr Hislop helped with drawings to show how these items could be made compliant.¹

[15] Mr Brown the plasterer worked on the site between March and May 1999. He had no other involvement with the property until these

¹ Common Bundle of Documents, Document 43.

proceedings. Mr Brown prepared the exterior for a cement based plaster matrix and applied the plaster. Mr Hislop was concerned about the quality of the first plaster layup as it was unprotected from direct exposure to the elements and generally dry atmosphere causing rapid drying of the matrix. Mr Hislop said at the time that the plaster matrix required continuous moisture assisted by draping shade material over the plaster matrix for up to five days after application to allow slow curing to increase strength and reduce shrinkage which results in fine cracking. This had not happened. To deal with this Mr Hislop approved a solution which required the addition of Chevacrly Admix and glass reinforced fibres being added to the final surface layup.

[16] Mr Hislop said that Mr Peters was in residence at the time of the final inspection on 30 August 1999. Mr Hilleard inspected the building and reported it as satisfactory. A code compliance certificate was issued on 7 September 1999 relating to the building, including the foul water system reticulation to the septic tank but not the effluent disposal system which was a council inspection matter. A full final code compliance certificate for consent 980815 has not been issued by the Council.

[17] The house was purchased by the claimant and his then wife Justine McDonald under an agreement for sale and purchase dated 21 December 1999 with a settlement of 28 January 2000. Mrs McDonald was also referred to in the evidence and documents as Justine Dando.

[18] Mr McDonald said that he understood that the house was new as it had only recently received its code compliance certificate. He took confidence from the fact that it had been inspected only months before. Mr McDonald said that he obtained a LIM report and plans but failed to note that the house had parapets rather than the roof shown on the plans.

[19] Mr Peters said that at the time of sale the house the coating was not complete in that two top coats of paint were still to be applied. Without the paint the exterior plaster was not weathertight. There was minor cracking in

the plaster finish. There was a dispute between Mr Peters and Mr McDonald as to whether Mr McDonald was told about the need to fill cracks and paint the house.

[20] The claimants who originally sought the assessor's report in 2004 were Gregory John McDonald and Justine McDonald. Justine McDonald is no longer a party. In 2006 Mr Peters unsuccessfully attempted to negotiate a settlement with Mr and Mrs McDonald.

[21] In August 2007 Mr McDonald's solicitor advised that the house and claim had been transferred to Mr McDonald as part of a matrimonial settlement and that he was proceeding with the WHRS claim. He sought an addendum report which was supplied in October 2007. The current application for adjudication was made in May 2009. The parties and the assessor attended at the property on 21 July 2011 to carry out further tests and the assessor completed a further report.

AMOUNT OF CLAIM

[22] The claimant sought compensation for a number of consequential items. The list was trimmed at the hearing. The claimant originally sought \$151,548.56 but that was reduced to \$ 60,192.03 as follows:

Claim as assessed adjusted 3% based on inflation since calculation made	\$ 34,065.19
Temporary accommodation \$250 x 14 days	\$ 3,500.00
Kennel for dog for 2 weeks at \$105	\$ 210.00
Remove and re-hang curtains (50% x \$1,150.00)	\$ 575.00
Cleaning on completion (50% x \$2,162.00)	\$ 1,081.00
Grant Hunt Consulting	\$ 1,148.34
Exterior plaster work and painting	\$ 4,612.50
Sub total	\$ 45,192.03
General damages for stress	\$15,000.00
Total	\$ 60,192.03

CRITICISM OF EVIDENCE

[23] Mr McDonald criticised the expert evidence on behalf of the second and third respondents. He acknowledged Mr Hislop's expertise but said that I should discount his views as he was a party and he was not impartial and objective in relation to technical matters. He also said much of Mr Hislop's evidence was hearsay.

[24] Mr Hislop is entitled to advocate a view as to the meaning of technical reports and evidence, just as Mr McDonald has done in his turn. The weight is a matter for the Tribunal. The Tribunal, although not bound by the rules of evidence in the course of its inquisitorial duties nevertheless assesses the weight of the evidence before it. Similarly, it is for the Tribunal to make any inferences from the evidence or lack of evidence.

[25] Mr McDonald also criticised Mr Langham's status as an expert for the second and third respondents on the grounds that he had previous knowledge of a dispute in relation to the same property over the question of compensation for the cost of fixing the septic tank system. Mr Hislop wrote to Mr Langham in his role as a council officer in October 2003 in relation to the

amendment of the building consent addition to incorporate the removal of the parapets and replacement with a conventional roof. As Mr Langham did not mention Mr Hislop's report or his earlier involvement in the building Mr McDonald submits he was in breach of his role as an expert witness. He also argued that the evidence was flawed as it was not objective. For instance he used a Building Approval and Solutions report as part of his background material which failed to apportion any blame to Mr Hislop. However, when viewed in the context that Mr Hislop had taken responsibility for the parapet leaks the fact that he did not reiterate the blame for that matter is not controversial. I do not consider that Mr Langham's background and involvement disclose any disqualifying factors.

[26] I had no difficulty in accepting Mr Langham as a witness despite his involvement in council work. The issue of the septic tank was not an issue in relation to this claim and there was nothing in his work as a council officer which indicated that he would not be impartial when asked some years later for his expert opinion on a matter which had only involved the Council peripherally.

[27] Mr McDonald criticised Mr Langham for modifying his view, in the experts' conference, that the only source of water penetration was the plaster parapets which were removed in 2004 and that the only problem was the poor condition of the paint system. He criticised Mr Langham for not knowing what paint system had been used during repainting in December 2007 to January 2008 or that the exterior plaster had been sealed and painted only 18 months before Mr Langham's testing in July 2011.

[28] Expert conferences are used by the Tribunal to ensure that technical differences are fully debated between the experts. It is often the case that one expert will have information, not necessarily in their brief, which, when disclosed, persuades other experts to modify their opinion. If this was a ground of criticism experts would never agree to either meet or review the evidence in an impartial and critical way.

[29] Having considered his evidence as a whole I accept that Mr Langham qualifies as an independent expert. I have taken his evidence into account. Even if other expert evidence was preferred that does not reflect on his professional standing.

[30] Mr McDonald also impugned the credibility of other witnesses and parties and they in return suggested that Mr McDonald was not being open with the Tribunal. As credibility of the parties is not a key factor in determining most of the relevant issues I do not need to deal in any significant detail with the allegations made other than that relating to some invoices produced by Mr McDonald. Mr McDonald was questioned in relation to an invoice from Static Contracting Limited which was part of the claim. He explained that the company was run by Mark and Les Macklin who performed various duties associated with sub-contractual matters within the building trade. Mr McDonald said that he had not paid the full amount charged and was indebted to the company. He agreed under cross examination that the invoice was created as he needed it for the claim. The amount claimed was based on possible costs. There were no receipts as all work was done for cash. The house painting was also a cash job.

[31] Under cross examination Mr McDonald also agreed that there was no company called Static Contracting Limited and accepted that a company called Static Limited had been incorporated since 11 April 2006. He also agreed that he was the sole director and shareholder and that the GST number used in the Static Contracting Limited invoice was allocated to Static Limited.

[32] It also emerged that Mr McDonald was involved in a number of construction companies undertaking various types of work including plastering and leaky home repairs. This contrasted with his assertions that he did not know about plaster, filling plaster cracks or the need for painting to retain a waterproof surface.

CAN MR MCDONALD CLAIM FOR THE LEAKING PARAPETS AND THE RADIAL CRACKS?

[33] In October 2003 Mr McDonald commenced construction of an extension on the east elevation of the house. During construction he found damage from leaks in the existing building through the stucco cladding on the horizontal section of the parapet. He contacted Mr Hislop who inspected the dwelling and found that there were cracks in the exterior stucco and that the paint system applied had deteriorated to the point that it did not provide protection to the stucco matrix. Mr Hislop told Mr McDonald to seal the cracks and paint the exterior surface and to cover it straight away, with tarpaulins if necessary. Mr McDonald took no protective measures and the eastern wall was left open and uncovered for at least a year.

[34] The first, second and third respondents agreed that there had been water entry over the gables due to the absence of a flashing system in or over the gable parapets. Their view was that defect was remedied in 2004 and a consequential dispute had been settled. They said the settlement also included cracks in the stucco and any subsequent water penetration through the stucco is from lack of maintenance, not the defective building work. They said there is no remaining damage due to the result of water entry through the parapets. Mr McDonald attributes current leaks to the parapet defects and denies that there was a full and final settlement.

[35] When Mr Hislop was initially approached about the issue with the parapets he recommended they be repaired by making them permanently waterproof by installing a flashing system. Mr McDonald rejected this suggestion as he wanted the house returned to the original plan by changing the parapets to a roof. Mr McDonald also wanted the cladding to be replaced to match the new addition. Mr Hislop declined to repair the cladding on the grounds that it did not need replacement and that the cracks were the same as those which Mr McDonald knew about but did not repair in October 2003.

[36] Various inspections and negotiations took place and on 17 February 2004 Mr Hislop noted the details of an agreement reached that day between the McDonalds and the second and third respondents.² The agreement provided that Mr Hislop was to apply to the Council for consent to replace the parapets with eaves and also that Mr and Mrs McDonald agreed “not to pursue any punitive action in respect of the radial cracks in the stucco cladding” and to complete any repairs to the stucco cladding at the junction between the stucco and the remedial work on completion of the remedial work.

[37] Mr Peters however requested an independent assessment before he accepted the agreement so the completion of the agreement was delayed. There was a breakdown in the relationship between the McDonalds and Mr Hislop over these issues and the delay.

[38] Mr Hislop was finally able to confirm the acceptance of the agreement in a letter dated 7 May 2004 to the McDonalds, with copies to Mr Peters and Richards. The last sentence of that letter stated:

The parties understand that on completion of the above-described work it is agreed that a full and final settlement of the dispute relating to water entry is at a conclusion.

[39] When presented with the letter of 7 May 2004, Mr McDonald added the words “with regards to parapet modification” and then both McDonalds signed the letter.

[40] Mr Hislop instructed a builder, Mr Scott, to carry out the work and applied to the Council to amend the existing consent for the extension to include the reconstruction of the parapet structures. Mr McDonald said at the hearing that he would have expected Mr Hislop to deal with the consent issue separately. Mr Hislop said that the letter was written as it was faster and cheaper to combine the work than obtain a separate consent. The letter was

² Common Bundle of Documents, Document 6.

addressed to the McDonalds so they knew of the arrangement when it was made.

[41] Mr McDonald speculated that the letter was written to avoid disclosure by Mr Hislop of the fact that he should never have issued a code compliance certificate in 1999. I, however, accept that as Mr Hislop had accepted the need for the work and taken responsibility for it he was entitled to manage costs. This was no more than ensuring that the agreed work was properly consented to.

[42] Mr Scott started work on 28 June 2004. Mr McDonald told Mr Hislop on 8 July 2004 that he was concerned about the quality of work undertaken by Mr Scott.³ His evidence for this was that Mr Scott had bumped the SKY dish and it was misaligned. It was alleged that Mr Scott had damaged both the original roof and the new roof on the extension and there was rusting debris on the roof.

[43] Mr Hislop inspected the work on 9 July 2004 and was entirely satisfied with the work being done on the respondents' behalf. There were no workmanship issues in his notes or in the Council inspection notes. On that visit Mrs McDonald advised that contrary to the agreement Mr McDonald would not be undertaking the repair work to the stucco when the builder's work was complete.

[44] The McDonalds arranged for an inspection by Grant Hunt Building Consultants and John Douglas, Building Surveyor on 19 July 2004. At that stage the work was nearly complete. All that remained to be done was the replacement of the new ridge and the installation of the guttering. After that inspection Mr McDonald said Mr Hislop was asked by Mr Douglas to instruct Mr Scott to cease work. Mr Hislop has no recollection of that instruction. Mr Hislop noted that Mr Douglas made no comment in either his 20 July letter or 17 August report on the standard of remedial work.

³ Common Bundle of Documents, Document 11.

[45] Mr Scott appeared for work the next day, 20 July 2004. The McDonalds called Mr Hislop to deal with the situation. Mr Hislop was told that the McDonalds no longer had faith in the builder or Mr Hislop and that they intended to sue Mr Hislop for the cost of remediation including the uncompleted work and the work that Mr McDonald had previously agreed to do. Mr McDonald refused to allow them to finish the almost complete work under the agreement. Mr Hislop and Mr Scott could not understand how the minor damage could require the replacement of all roofing materials including the new materials installed. There were large areas of the original roof that were not touched. Mr McDonald refused to allow an inspection of the alleged damage.

[46] Relationships between the McDonalds and Mr Hislop deteriorated further and litigation was threatened. Mr Hislop paid the claimant for the cost of removal of the debris and the SKY aerial adjustment

[47] Messrs Dando, a roofer and builder (Mrs McDonald's brother and father respectively) who had been working on the eastern addition were asked by the McDonalds to replace the roof and do other repairs. Messrs Dando and Hislop met at the site on 26 July 2004. They discussed the cleaning of the roof, damage to the existing roof and completion of the installation of the ridge. They agreed that Mr Dando would clean the roof, install the ridge caps and install some additional fastenings to complete all waterproofing issues. The gutters were left incomplete. Mr McDonald was responsible for completing the plaster work.

[48] On 28 July 2004 Mr Dando faxed Mr Hislop with a quotation to replace every component of the original roof including the undamaged skylight and chimney flashing and the carport roof which had not been subject to any remedial work. The quotation also included replacement underlay which was not likely to be necessary. The replacement roof included part of the eastern sector which had suffered no damage as a result of Mr Scott's work.

[49] Mr Hislop told the claimant on 29 July 2004 that he had advised his insurers and wanted further quotes.⁴ He also said that it would be unfortunate to litigate while negotiations were proceeding. He advised that the ridge and gutters were ready for delivery to the site. Mr McDonald refused to accept delivery of the materials and would not agree to anyone other than Mr Dando doing the work and that Mr Hislop should pay the full amount without an allowance for betterment for the undamaged part of the roof.

[50] On 13 August 2004 John Douglas of Grant Hunt Building Consultants carried out further destructive tests to obtain moisture content readings. The report⁵ was taken to Mr Hislop on 23 August 2004 to seek an admission of liability. Mr Hislop indicated it was in the hands of his insurers, Lumleys.

[51] The McDonalds negotiated with Lumleys, Mr Hislop's insurers, who sent an assessor followed by two roofing companies which quoted for repairs. Mr McDonald refused to sign the indemnity release and insurance settlement form for roof repairs. He wanted Mr Dando to do the work and was in dispute with the insurer over the difference between Mr Dando's price and the insurer's quote.

[52] Lumley General Insurance (N.Z) Ltd took over the negotiations on behalf of the first three respondents and on 9 November 2004 it wrote to the McDonalds:

Further to our numerous recent telephone discussions and correspondence we enclose 2 cheques totalling the sum of \$13,890.37.

Presentation of these cheques by you constitutes full and final settlement of all claims against Building Approvals and Solutions Ltd and/or Mike Hislop in connection with or arising

⁴ Common Bundle of Documents, Document 15.

⁵ Common Bundle of Documents, Document 18.

out of damage to your roof caused by contractors in or about June or July 2004. Presentation of these cheques also constitutes full and final settlement of any claims and/or issues in relation to the plasterwork and flashings to the gables

Lumley will accept no further claims in relation to or connected with these issues and any further claims that you might make will be strongly defended. If you do not accept these terms then we suggest that you return the cheques to us and take whatever steps you think are necessary to recover your losses.

[53] The cheques were banked by the McDonalds and used to pay their contractors. The first, second and third respondents all say that this payment was in full and final settlement.

[54] Mr McDonald said that he did not accept the banked cheques were in full settlement of both the parapet dispute and consequent roof claim. He said that Messrs Peters and Hislop were at variance as to the scope of the settlement and that Mr Peters did not authorise settlement on the issues confined to the parapet modification as he did not know that the McDonalds had made the addition to the agreement. Mr McDonald however accepted in evidence was that he knew that Mr Hislop was acting for the company, himself and Mr Peters.

[55] At this stage two parapet related disputes had been dealt with. The original dispute relating to the parapets was settled on the terms set out in the agreement between the McDonalds and the first, second and third respondents. Those respondents' obligations ceased when they had completed their part of the bargain.

[56] A roofing dispute arose regarding the quality of the remedial work to remove the parapets and replace them with a roof. Mr Scott carried out this work on contract to Mr Hislop and Building Approvals who were managing the work on behalf of the three respondents under the settlement agreement

for the parapet dispute. When this dispute was settled the obligations of the three respondents under the first dispute were also met.

[57] I find that the original dispute in relation to the parapets and cladding was settled on the terms agreed by the parties. The consequential dispute relating to the workmanship of those repairs was also settled when the insurance cheques were accepted.

[58] Mr McDonald said that despite these settlements and the work done in relation to them there were still leaks due to lack of plastering and possible moisture entry through the cracks.

[59] The settlement agreement included the responsibility of the McDonalds for the plastering to the soffits and maintenance of the radial cracks. I find, based on the assessor's report and other evidence, that if there is any moisture as a result of the parapet repairs and the subsequent roofing repairs they are as a result of the McDonalds' failure to complete the plasterwork and seal the cracks and maintain the plaster wall.

[60] For the above reasons I find that the dispute in relation to the leaking parapets and any consequences has been settled and there is no liability by any respondent for the work covered by that settlement agreement. The settlement included the cracks in the plasterwork. In any event, if there are any new leaks or damage in relation to these areas they are as a result of work of either the work done by Mr McDonald and Messrs Dando, or work they failed to do and not caused by the original construction parties.

[61] For the same reasons I also dismiss the claim by Mr McDonald for the costs of the inspections by Grant Hunt Building Consultants (Mr Douglas). The account is dated 30 August 2004 and predates the settlement in relation to those issues. The report deals exclusively with the remedial work and in particular the roof and relates to the matters settled between the parties.

ARE THERE ANY OTHER LEAKS IN THE DWELLING?

[62] Mr McDonald listed a series of defects which he claimed allowed water ingress. He was also concerned about internal moisture readings. However the experts, Mr Langham and the assessor, both say there is no moisture issue within the dwelling. There is also no evidence of damage to the substrate or the framing. This is partly because the building is constructed with plywood treated to an H3 level and the framing is made of moisture resistant timbers including Lawson Cyprus and Douglas Fir.

[63] In the 2011 report the assessor indicated that the only high internal reading was explicable as splashing from the bath. Invasive testing showed no variation between previously opened areas and others, so the assessor's drill holes were probably not leaking. Other readings were consistent with the original testing.

[64] The assessor agreed at the hearing that:

- a) There had been a big reduction in moisture levels.
- b) The removal of the parapets and replacement with a roof had a significant effect.
- c) Large parts of the building were now dry including the north side except for the deck/stucco junction.
- d) The kitchen windows were now very dry.
- e) No timber framing needs replacement.
- f) No plywood needs renewal.

[65] The assessor was concerned that although there was no timber decay or rot there may be the remains of fungal growth. The experts were also concerned about the junction of the timber rafter to the stucco at the southwest corner of the building. There was no evidence that water has penetrated past the plaster at this point.

[66] The experts had been concerned that there may be water penetration in the area around the kitchen window and at the timber to stucco

junction of the deck timber at the lower point of the wall and the south study/bathroom wall. After the site visit and at the hearing the experts agreed that water is not penetrating through the window sills and that a waterproof membrane system has been applied to the sills. The experts disagree as to whether this arrangement should be called a flashing.

[67] The experts could not tell if moisture is entering any other part of the building through the plaster, but failure to maintain the plaster allowing water entry will promote subsequent cracking and degradation.

[68] The assessor and Mr Langham agreed the only remaining areas of damage or possible damage were:

- a) Plaster surface to south wall.
- b) The lack of a fascia to cladding junction on the south wall.
The assessor thought that it was easy to fix.
- c) The rafter penetration on the southwest corner. The experts however agreed that moisture readings in that area were very low and had remained low so that there was no evidence of water ingress or likely water ingress.
- d) The failure to leave a gap at the deck/stucco junction under the kitchen window on the north face.

[69] The experts views on the plaster surface are set out below but they quantified the approximate cost to repair the other three items as being:

Horizontal stucco to plaster junction on south wall	\$ 402.46
Penetration of veranda rafter	\$ 500.00
Deck to stucco junction under kitchen window	<u>\$2,000.00</u>
Total repair cost	\$2,902.46

Plaster surface of south wall

[70] By the end of the hearing the plaster surface claim was confined to the south wall and reduced to \$23,927.13. There were disputes as to the weathertightness of the wall, the reasons for any leak and the extent of remediation required. There was much debate on the consequences of the defective plastering of the parapets which is now irrelevant following the earlier remediation and settlement of the issue. The claimant submitted that, as all agreed the work needed to be done, causation, i.e. negligent construction, could be assumed and the only issue was apportionment.

[71] The experts agreed that the south wall was in poor condition and should be removed. The extent of the removal was not agreed as the assessor thought that the wall should be replaced to the south side of the French doors on the western wall and Mr Langham saw no need to replace plaster where it was agreed there was no water ingress so did not agree to any part of the western wall being replaced.

[72] However the experts did agree that any elevated moisture readings in relation to the south wall are likely to be caused by water entry (and possible past water entry) through cracks in the plaster and the generally poor condition of the plaster on that wall. There was some disagreement as to whether the moisture could in the future enter at the top of that wall at the stucco to fascia board junction which the experts would prefer to see flashed with a Z flashing.

[73] Mr Peters submitted that the respondents were not responsible for the water ingress of repairs as current ingress issues on the south wall have been caused by:

- a) Residual issues resulting from water entry from the parapets (particularly radial cracking covered by the settlement between the parties); or

- b) Water entry at the top of the relevant wall due to the McDonalds' failure to repair the stucco in those areas after completion of the roof alterations ; or
- c) The McDonalds' ongoing failure to maintain the building.

[74] I accept these submissions for the following reasons.

[75] When the assessor inspected the dwelling in 2004. He did not comment on the plaster or consider it to be causal of moisture ingress. He reported:

There are areas of cladding on the south elevation where the top of the wall framing and plywood substrate is exposed to weather because of poorly installed flashings.....The exposed areas shown in the photos are as a result of the parapet walls being removed above the roofline and the plaster cut back to the roof framing line but not reinstated or appropriate flashings installed.

[76] Any damage to the south wall noted in the first inspection was a result of Mr McDonald's unfinished work which he agreed to do as part of the parapet settlement. There was no identification of the plastering or coating as a cause of the damage and the assessor did not conclude there was any inadequacy of the original construction work.

[77] In 2007 the assessor returned to the property and checked the cut out locations on the south elevations. In relation to the plastering of the south wall he observed that a corner post was plastered over directly without proper backing material and lack of flashings at floor level and the plaster was damaged. The framing was generally at normal moisture levels and there was no further damage since the 2004 inspection. There were high moisture levels at the bottom plate level within the plywood and damaged building paper. The timber was in sound condition and there was no apparent fungal growth or decay present. There was no further obvious damage. He attributed the leaks to the holes in the plaster.

[78] In the 2007 report the assessor also noted that there were areas of cladding on the south elevation where the top of the wall framing and plywood substrate is exposed to weather because of poorly installed flashings. The exposed areas were as the result of the parapet walls being removed above the roofline and the plaster cut back to the roof framing line but not reinstated or appropriate flashings installed i.e. the work that Mr McDonald had left undone. The damage was isolated to the ingress points and the bottom plate at the southwest corner. The timber was wet and moisture was trapped between the plaster and framing causing damage to the framing. The damage was fungal growth which was referred to Plantwise for an expert report.

[79] I accept the assessor's finding that the damage to 2007 was as a result of Mr McDonald's failure to complete the plastering work after the parapet repairs. This is not the fault of the respondents.

[80] The assessor visited again in July 2011. Despite neglect, the 2011 testing of the cladding confirmed that there were no locations showing any signs of moisture getting into the inside of the dwelling. He recorded that he found high moisture readings obtained along the south elevation of the study and bathroom. He thought that the moisture was penetrating the plaster at the top edge of the plaster at the unprotected horizontal join between the timber fascia and plaster wall cladding. He considered that the south wall was very damp.

[81] In his email report of 1 August 2011 the assessor referred to the analysis of the samples. He remained of the opinion that the cladding should be removed as part of the remedial work as set out in his 2007 report. The 2007 report refers to the repair of damage to framing and cladding. In the 2011 email report the assessor said that the requirement for timber framing replacement is unlikely. The assessor noted that the exposed areas resulting in damage were as a result of the parapet walls being removed

above the roofline and the plaster cut back to the roof framing line but not reinstated or appropriate flashings installed.

[82] Mr Brown said he was present when the cut out area below the study window was tested in 2011. It had originally had a moisture reading of 86.9 but in 2011 it was 19.2. It appeared to Mr Brown that the assessor was surprised how much drying had taken place over the whole house.

[83] Mr Hislop agreed with the assessor that the moisture seen in the early years was from the parapet leaks but had evaporated as can be seen in the moisture readings in the second report. Mr Hislop said that there is no evidence that the building has ever suffered leaks at the other locations referred to. The readings were safe despite the severe weather conditions.

[84] Mr Hislop's view was that water had accessed the substrate through a series of significant cracks in the stucco cladding as well as the unrepaired gap at the top of the cladding after the parapets were replaced. These entry points were obvious and should have been dealt with as maintenance. They are visible in all photographs. Mr McDonald has significant knowledge from his trade experience relating to external plaster systems and should have dealt with them. The paint system aged rapidly and offered no resistance to the passage of moisture allowing the matrix to absorb moisture to the point of saturation. (It also allowed rapid evaporation drying the house quickly).

[85] Mr Hislop told Mr McDonald of the poor state of the paintwork and cracks in the plaster when he saw the house in July 2003. Mr McDonald said that he did no maintenance or repairs until January 2008.

[86] Mr Hilleard noted that when Mr McDonald had completed the maintenance coatings the moisture content dropped significantly. The assessor made no comment in his 2005 report concerning the cement plaster cladding or the state of the paint finish on that cladding.

[87] Mr Hislop said that the Building Code requires the external cladding system to have a durability of not less than 15 years. Twelve of those years have now passed, nine without any repair or maintenance. It is still in sound condition despite the presence of moisture, as is the structure and substrate. There is no reason to expect that it will not perform for the next four years and longer with maintenance.

[88] Both the east and west ends of the south wall (study/bathroom) and the kitchen window were previously parapet wall ends where it is common ground that moisture entered in the past. I have already found that any damage resulting from the parapets was covered by the settlement agreement which included an agreement not to make any claim in respect of the radial cracks in the stucco cladding around the perimeter of the dwelling.

[89] Even if there are any current leaks through cracks in the plaster, since the settlement of the parapet dispute, these cracks are the responsibility of Mr McDonald. Any water entry through the gaps in the plaster that Mr McDonald agreed to complete under the parapet settlement is also his responsibility. In addition the evidence showed that the building was not properly maintained for long periods.

[90] There is no evidence that there are general cladding leaks not associated with either the parapets, the repairs which Mr McDonald should have made to the flashing area, or a lack of maintenance. In other words there is no evidence that the water ingress is as a result of the original work of the builder or associated trades. I therefore decline the general claim for cladding repairs on the south wall.

Invasive holes

[91] Mr Hislop noted that the stucco south wall cladding has been damaged at eight sites as a result of invasive testing. The sites were found by the assessor to be waterproof. The membrane coating on the stucco cladding is a considerable improvement on the pre 2008 situation but is

incapable of providing the necessary waterproofing protection to the stucco cladding. Seasonal plaster movement has resulted in the cracks referred to in the Beagle Report.⁶

[92] Mr Hislop accepted that he was responsible for the two invasive testing holes created by Mr Langham. The claimant referred to these as being outstanding issues in submissions. They were not costed but Mr Hislop has previously agreed to have the work done and to pay for it. Mr Hislop confirmed that this was still his position and that the claimant only had to make the arrangement. The claimant has indicated that this wall is to be replaced. I accept that replacing like for like including coatings would cost in the region of \$5,000. This will deal with the inspection hole issue. Most of the work will also represent betterment in that a wall near the end of its rated life will be renewed. It will also be painted. Taking these amounts into account I find that the value of the repairs of the wall in relation to the two inspection holes for which Mr Hislop is responsible to be minor. I assess the repair value for the holes at \$200.

[93] Other invasive test holes were made on behalf of the claimant for which he has responsibility.

Stucco to plaster junction

[94] During the July 2011 inspection when these locations were looked at the parties expected significantly higher readings particularly with the adverse weather conditions preceding the inspection. Such readings were not found and Mr Hislop questioned the assessor's view that there are leaks between the plaster and timber.

[95] Mr Hislop said that all openings, penetrations and abutments associated with the cement plaster finish perform adequately and in compliance with the Code except for the timber deck below the east wall of

⁶ Beagle Report of 11 October 2011 and the assessor's email, Agreed Bundle of Documents, Document 46.

the kitchen. Mr Hislop and his company opposed the \$500 claim for the flashing of the barge on the grounds there was no evidence of a leak or a leak caused by the building process. The assessor's early report showed a reading of 24.8 which was related to the leaking parapet. Subsequently the readings dropped to 17.5.⁷

[96] The second assessor's report shows that apart from the bottom plate under the south wall window moisture readings are normal and there is no mould or fungal growth and no damage has occurred.

Lack of fascia to cladding junction on the south wall

[97] On the basis that the assessor has not found leaks and the respondent's evidence has not been challenged on the stucco junction I find that the south wall is not leaking as a result of negligent construction of the junction and therefore this ground of claim fails.

Rafter Penetration

[98] The penetration of the rafter is not a current source of water ingress and there is no reason to assume that this will change. As there is no leak there the claim is denied.

Windows

[99] By the time that the hearing had finished the claim was confined to a claim to re-clad the kitchen corner due to the defect in the window sill.

[100] The only evidence of water penetration producing dampness near the window was from wicking due to the deck penetration below the kitchen window. All the parties agree that there is no moisture entering at the

⁷ Assessor's addendum report, 18 January 2008; Mr Langham's report (Document 57, Building Inspections Ltd Report), 14 September 2009 at [14.5].

windows. I therefore find that there is no leak, defect or damage from the window flashings and this claim fails.

Timber deck abutment

[101] Mr Hislop and Building Approvals acknowledged that stucco cladding abutting the timber decking on the north face is a defect and the final inspection carried out on 30 August 1999 should have identified the problem. This defect acts as a wick and is sometimes the source of the moisture at the kitchen window. They accepted the experts' estimate of \$2,000.00 for the cost of remediation.

WHAT DAMAGES SHOULD BE AWARDED?

[102] I have dismissed the claim for the south wall repair of \$23,972.13 for the reasons set out above.

[103] The claim for re-cladding of the kitchen corner from the bedroom corner to the east side of the 45 degree dining wall as a result of leaks at the kitchen window was \$8,601.00. As there is no leak at this point this claim is also declined.

[104] The repair of the barge capping or flashing to the penetrating rafter of the west elevation veranda was estimated to be \$402.46 including GST. The experts disagreed as to the entry of water at this point but all agreed that a Z flashing would resolve any problems and is to be preferred. However, this item is not proved to be leaking as a result of any negligent work by any of the respondents and accordingly is not allowed.

[105] As the claims for the majority of the proposed remedial work have not been allowed the application of a building consent fee, drawings and detailing and specifications totalling \$3,611.00 is also declined. There is unlikely to be any need for consent for the work for which Mr Hislop has accepted responsibility.

[106] There is no evidence that the repair to the deck requires the premises to be vacated. The amount claimed for alternative accommodation is therefore also declined.

[107] In addition to the remediation assessed by the assessor the claimant sought \$4,612.50 for labour and materials for silicone sealing of cracks, two coats of limelock and application of Dulux to the exterior of the house by Static Contracting Limited. The validity of this invoice was questioned at the hearing. The work may not have been done and the invoice has not been paid. In view of Mr McDonald's concessions that he manufactured the invoice I give it no weight. As there is no evidence that this work is required as a result of the negligence of the respondents involved during the original construction this claim is denied.

General damages

[108] Mr McDonald claimed \$15,000.00 by way of general damages for stress. He said that he and Mrs McDonald were stressed due to the water entry, the protracted negotiations with Messrs Peters and Hislop, and the stress of dealing with Mr Scott's repairs. They were factors which resulted in the break-up of the marriage. There was stress involved in these proceedings.

[109] The successful part of the claim is very small and was not contested. Mrs McDonald's distress is not relevant as she is not a party. Mr McDonald has claimed for litigation stress during the dispute process and the respondents have detailed their similar stress. Such damages are not claimable.⁸

⁸ *Rowlands v Collow* [1992] 1 NZLR 178 (HC), *Bloxham v Robinson* (1996) 5 NZBLC 104, 225 (CA) CA198/94, 18 June 1996, *Bronlund v Thames Coromandel District Council*, CA 190/98 26 August 1999 at [58].

[110] Looking at all the evidence and the circumstances leading to the claimed stress, namely the claimant's continual delays, long gaps between the various steps and the claimant's lack of engagement in negotiations I consider that most of the stress is as a result of his continuing delays in bringing this matter to a conclusion. The history of this matter as set out in the preliminary orders indicates that the delays have occurred as the claimants refused to take steps to settle the claims or allow the respondents to gather evidence. The claimant could have dealt with this matter many years ago and come to a settlement over the issues which were admitted.

[111] I consider there should be no award for stress.

CONCLUSION AND ORDERS

[112] For the reasons set out in this determination I conclude:

- i. The claim against Mr Peters is dismissed as he has not been shown to be responsible for any damage as a result of negligence apart from the parapet issue which was settled.
- ii. The claim against Neill Brown is dismissed as there is no evidence of negligence on his part.
- iii. No negligence has been established on the part of Carlton Richards and the claim against him is dismissed.
- iv. There is no was no evidence of negligence on the part of Philip Hilleard and the claim against him is dismissed.
- v. Mr Hislop and Building Approvals are liable for one stucco to timber joint and the repair to two inspection holes. Mr Hislop and his company have always accepted responsibility for these items. Mr Hislop is to make the repairs or, if for any reason that is not possible or is not completed within two months of this

decision, he is to pay the claimant \$200.00 for the cost of repairs to the south wall and \$2,000 for the deck to stucco repair.

COSTS

[113] All parties have indicated that there are outstanding matters of costs. The following is the timetable for dealing with any applications for costs:

- Parties to file applications or confirmation they are pursuing earlier applications by 14 September 2012.
- Parties from whom costs are being sought are to file any opposition together with supporting submissions by 28 September 2012.
- The party applying for costs will have until 5 October 2012 to file a reply.
- A decision will then be made on the papers.

DATED this 27th day of August 2012.

Roger Pitchforth
Tribunal Member