

**IN THE WEATHERTIGHT HOMES TRIBUNAL**

**TRI-2009-101- 000048  
[2010] NZWHT WELLINGTON 24**

BETWEEN VIVIENNE SMITHERAM AND  
BERNARD MCBRIDE  
Claimants

AND PETER HANNS TRADING AS HANNS  
BUILDERS & JOINERS  
First Respondent

AND ROGER WALKER ARCHITECTS LTD  
Second Respondent

AND WELLINGTON CITY COUNCIL  
Third Respondent

AND DION BARETA  
(Removed)  
Fourth Respondent

AND K ROAD NO 1 LIMITED  
Fifth Respondent

AND STOANZ LIMITED  
(Removed)  
Sixth Respondent

AND HANNAH PAPADOPOULOS  
Seventh Respondent

Hearing: 10-12 February 2010

Appearances: M Sherwood-King & M Gilkison for the claimants  
P Hanns the first respondent  
C Corry & R Walker for the second respondent  
D Heaney & S Macky for the third respondent  
H Papadopoulos, the seventh respondent

Decision: 22 September 2010

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**AMENDED FINAL DETERMINATION**  
**Adjudicator: R Pitchforth**

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## **INTRODUCTION**

[1] This case concerns an architecturally designed building containing two dwellings which leaked; 63 Austin Street and 105 Pirie Street. They were constructed as one project and the claims were combined for the purposes of the hearing process. This decision concerns 105 Pirie Street.

[2] Vivienne Ruth Smitheram and Bernard Andrew McBride (Smitheram) are the owners of 105 Pirie Street, Mount Victoria, Wellington and claimants against the respondents for their leaky homes.

[3] Peter Hanns trading as Hanns Builders and Joiners was the builder engaged to build the dwelling. Roger Walker Limited (now Roger Walker Architects Limited) (Walker) was the designer and is alleged to have supervised the construction. The Wellington City Council (the Council) is the territorial authority responsible for issuing the building consent, carrying out inspections and issuing the Code Compliance Certificate. K Road No 1 Limited (K Road) supplied and installed the cladding. Hannah Papadopoulos was a former owner of the site and trustee of the Papadopoulos Family Trust.

## **ISSUES**

[4] The claim raised the following issues:-

- What defects caused the leaks?
- Is the claim limitation barred?
- Who is liable for defects and damage?
- What is the appropriate level of damages?
- What contribution should each of the liable parties pay?

## **BACKGROUND**

[5] In 1997 Mrs Papadopoulos was the owner-occupier of 65 Austin Street in Wellington. Mrs Papadopoulos discussed with a real estate agent

the possibility of developing 65 Austin Street. It was suggested that it could be subdivided into two units. In March 1998, in preparation for the development, Mrs Papadopoulos and a lawyer Mical Treadwell created the Papadopoulos Family Trust for the purpose of building two dwellings on the Austin Street property's front garden.

[6] Mrs Papadopoulos then discussed the project with Roger Walker, an architect, who gave her some advice. She said that as a result of discussions Mr Walker's company, Walker, produced plans and costings and on behalf of the trust submitted the plans for building consent, called for tenders, chose a builder, dealt with subtrades, supervised the project, arranged the Council inspections and ensured the completion of the project so that the retention moneys could be released.

[7] Mrs Papadopoulos had expected that the project would be profitable and that she would either occupy one of the flats or would have enough money to do up her house. The project was very expensive and she realised before construction that she was unlikely to make a profit. She then lost interest in the process and took no further part in it.

[8] The family trust, through its trustee, Mr Treadwell continued with the project to construct the units.

[9] In February 1998 Walker, on instructions from the Papadopoulos Family Trust, produced plans and specifications for two new houses.

[10] On 23 June 1998 Mr Hanns successfully tendered for and entered into a contract for construction of the two new houses. This process was managed by Walker.

[11] All parties accepted that the terms of the building contract, which was not in a separate written form, were based on the plans and specifications, which were produced as part of the assessor's report.

[12] It was alleged by the claimant and Walker that the express or implied terms of the contract required that the construction and completion of all works shown as specified would be carried out in a thorough and tradesmanlike manner and in accordance with the Building Act 1991, the Building Regulations 1992, the New Zealand Building Code Handbook 1992 and all relevant Acts and Regulations pertaining thereto and the New Zealand standards and present-day good trade practices.

[13] The Council issued Building Consent No. 39887 in respect of the building on 26 March 1998. Between March 1998 and February 1999 Mr Hanns constructed the two new houses on the site. Between August 1998 and June 1999 the Council's staff conducted a series of inspections. On 26 February 1999 the Council issued Code Compliance Certificate No. 1 pursuant to section 43 (2) of the Building Act 1991 in respect of the work under Building Consent SR39887.

[14] During the course of construction documentation was addressed to the family trust, sometimes care of Roger Walker Limited, and forwarded to the trust's solicitors for payment. There were also discussions between the trust and the purchasers in relation to variations in the building works and later discussions in relation to faults and requisitions. The purchasers dealt with Walker direct and Walker advised the solicitor trustee of the requests that were made. There were difficulties as after two years the purchaser of this house in the building still would not release money related to variations and remedial work.

### **Purchase and Discovery of Leaks**

[15] In March 1999 the property was purchased by Mark Robert Bodt from the trust. The claimants Vivienne Ruth Smitheram and Bernard Andrew McBride purchased the property from him on 5 September 2006. In December 2007 the claimants put the property on the market. About July 2008 a conditional sale of the property fell through. The claimants became aware of a council notice on the LIM for their property relating to

weathertightness issues. The notice properly related to the neighbouring property.

[16] About 5 August 2008 the claimants lodged a claim application with the Department of Building and Housing. On 19 December 2008 the WHRS published a report on the property.

### **WHAT ARE THE DEFECTS THAT CAUSED THE LEAKS?**

[17] The Tribunal convened an experts' conference on 2 February 2010 which was chaired by Adjudicator Ruthe. The experts in attendance were the assessor Don Baker, Dr Garrett Butt the Council's expert and Dianne Johnson and Thomas Wutzler, the claimant's experts. All the experts had access to the assessors' and experts' reports for the whole building. The experts all agreed to the damage schedules for both buildings which are referred to in this determination.

### **Joinery**

[18] The experts as recorded in the conference report agreed:-

- Item 5.1 opening sashes: the wind blows rain around the opening sashes on the East and West elevations. There are no closing seals fitted or face fitted hinges. This is a breach of NZS4211 and E2. The parties responsible are the builder, window manufacturer, and the Council.
- Item 5.2 corrosion: there is corrosion and damage from previous repairs on all elevations. This is a breach of B2. Those responsible are the window manufacturer, designer, builder, glazier and council. The experts suspected that the coating is insufficient. The council expert did not agree that it had any liability for this defect.

- Lack of glazing beads: there were no glazing beads in all windows. The putty is not preventing moisture penetration around the glazing. This is a breach of the NZS4232/ NZS4223 and E2. The parties responsible are the designer, builder, glazier and council. The council expert did not agree that it had any liability for those defects.

[19] Mr Baker, the assessor, found that the steel windows showed signs of corrosion and attempted repairs. He also found cracks had developed between the window sill and jamb wall junctions. Opening sashes are fitted without closing seals, hinges were face fitted. There are no glazing beads and glazing was installed with putty.

[20] When discussing the cause of leaks Mr Baker said that water is entering around the window jamb and sill junctions where small cracks have developed between the sealants that show signs of degradation and the wall cladding. A smear of sealant has been applied between the window frames and the cladding rather than a bead of sealant. Sealants were not painted to give protection from UV rays which would result in premature failure. Water is also entering where texture coating has fallen off due to lack of adhesion of the coating system to the PVC flashings and thermal movement.

[21] The significance of minor cracking is likely to go unnoticed by many homeowners. Destructive investigations and the use of dye applied to the window jamb junction showed how water has entered. Mr Baker commented that such defects are difficult to identify and maintain under normal maintenance as even the smallest of cracks allows water to ingress. PVC sills and jamb flashings were poorly installed. Mr Baker reported that visual evidence also showed no sealant was applied between these two flashings. The constructed detail is unlikely to have complied with any manufacturer's technical manual applicable at the time of construction. The polystyrene sheet joint made under the windows in line with the window jamb/sill junction provides a ready path for water to migrate down to the bottom plate and boundary joist framing.

[22] Water is entering, said Mr Baker, between the glass and the putty at a number of locations; at times this moisture is laden with salt deposits which if not washed regularly will cause corrosion in steel. Small drain holes have become effective as the corrosion increases. The absence of closing seals fitted around opening sashes allow wind driven rain to enter. In Mr Baker's view the building location prevents the use of steel windows of this profile and use in residential construction.

[23] When discussing the purpose of the holes Dr Butt said that in commercial buildings the glass would have been held in by metal clips which would have blocked the holes and ensured that the glass was pressed firmly against the frame.

[24] Ms Johnson reviewed the building consent documents and inspected the site. She found that the windows and double doors were typically fabricated from steel and glazed with clear glass as specified. She agreed with the other experts and assessors that the window sashes have been poorly installed and sealed.

[25] She also agreed with the other experts and assessors that the steel windows had corroded and there is deterioration of the surface finish which has exposed the steel to premature failure. The corrosion is not only on the outer face of the frames and hinges, but also on the inside face where water is holding between frame and glass.

[26] Like the other witnesses, Ms Johnson did not have extensive experience of steel joinery due to the fact that it is almost exclusively used on commercial rather than residential properties. Typically, with steel windows and doors, proprietary steel glazing beads are used which match the profile of the steel window. Fireproofing putty can be used but, as has occurred at the subject property, the putty cracks with differential movement and weathering. Ms Johnson agreed that the moisture was passing behind the putty but in front of the glass contributing to premature deterioration of the



frames and/or penetrating into the interior of the wall around the perimeter of the glass.

[27] Ms Johnson noted that there were no labels on any of the doors or windows to show that the units had been properly specified or manufactured to meet the wind zones and fire rating specified for the units or the glazing compliance with the requirements of the Building Code for window performance.

[28] The Wellington City Council property files in the assessor's report referred to a certificate from Wellington Glass and Mirror Ltd stating the glazing complies with NZDS 4223. NZS 4223 is the Glazing Standard. This is a different standard to NZS4232 which is the standard for fire resistant glazing systems. There is no indication of the fire rating of the glass in the fire rated windows or the type of putty that was used for any of the glazed units.

[29] Ms Johnson undertook a destructive investigation. She found that there was no sealant applied vertically. Ms Johnson found a PVC horizontal head flashing with the jamb extended behind it. There was a PVC vertical jamb flashing and a horizontal sill flashing. These components did not meet. The gaps between were filled with (unspecified) products. There was no drip edge of the front face of the rebated window openings.

[30] Ms Johnson found that moisture was entering between the proprietary components at sill level and tracking down the structure causing damage at locations where it was trapped, such as at the trimmer stud where there was an adjacent fixing, and at the inter-storey level where it was trapped between the fibre cement substrate to the terrace waterproofing membrane and the boundary joist. Ms Johnson's observations were consistent with those extensively recorded by the assessor.

[31] There were fixed panel glazing window units which extend over more than one storey. These units are typically installed across the full width of

recesses in the wall lines. The vertical junctions of steel window units and the adjacent EIFS cladding appeared to be reliant on the use of sealant.

[32] Walker said steel window putty was used or specified and that all work was in accordance with the manufacturer's specifications. Walker was not responsible for supervision of the installation of the steel windows. Further, the glazier provided a producer a statement on 10 February 1999 and therefore Walker submits that it is not responsible for the glazing of the windows.

[33] It further argued the inadequate performance of doors and windows was preventable by regular maintenance and was the responsibility of the owner. The high moisture content is not the result of leaks. As the causes of damage had not been ascertained Walker denied any liability.

[34] Mr Walker did not accept the criticism of the use of steel windows saying they should be reinstalled during remediation if it is necessary to remove them at all.

[35] According to Walker the entry of water between the putty and the exterior of the glass is a maintenance matter. Any holes in the sill ought to be covered with putty. Holes in the sill are standard in steel windows of this type. Closing seals are not needed in steel windows because the water drains outwards.

[36] Walker also said that recessed windows did not require flashings under the Equus cladding system and therefore failing to provide for them was not negligent. The joinery units were installed in accordance with the Equus cladding system details applying in 1998. It therefore does not accept that the windows were improperly fitted with unsuitable sill flashings.

[37] In final submissions Walker said that if the windows had been weatherproofed as required by the scope of works the sill trays would have

been unnecessary or redundant. If they were needed then the manufacturers should have supplied them.

[38] Dr Butt's expert evidence was that the water ingress from the holes in the window frames would never have been found by a building inspector unless he was on site at installation. No reasonable Council officer would have detected the holes in the sills of the joinery which has been a significant cause of moisture ingress into the property. These holes would only be known to the manufacturer, the window purchaser and the installer.

### **Finding as to joinery**

[39] It is clear that water enters the building behind the EIFS cladding as it drains through the holes in the sill. The novel use of steel windows in the design and the way these windows were installed in these walls, in accordance with the design, led to an inevitable outcome, leaks.

[40] Each of the experts referred to a number of holes on the bottom sill of the windows. Each of them considered that water was likely to go down these holes. Each referred to the corrosion and the water damage beneath the sills. At some stage someone has laid wooden beads or batons along the sill and surrounded that with putty. The experts agreed that water was flowing behind the putty but in front of the glazing and through the sill holes.

[41] I find that the steel windows installed were unsuitable for the proposed building. It was unlikely that they would ever have proved watertight. They were never manufactured for use in this way. In prescribing and specifying these windows Walker was negligent. Mr Hanns, who was instructed to install these windows, could not have installed them in a way which would prevent leaks. This is a design fault.

[42] The Council could not be expected to have found the holes in the sill unless it was present during the installation and puttying of the window frames. There is no evidence to show that they were present.

[43] The sole responsibility for the choosing and giving of instructions for the installation of the leaking window frames is that of Walker. Walker, which was supervising the construction, did not supervise the installation. Each of these acts or omissions was negligent.

[44] The damage as a result of the leaks from the windows is sufficient to justify the installation of new windows and the recladding repairs required to make this house watertight.

[45] Walker is liable for the cost of this work.

### **Joinery and Cladding Junctions**

[46] The joinery detailing junctions were found by the assessors to leak because the flashings installed were not correctly installed and not adequate, providing gaps in the upstand. There is no sealant of the sill and jamb transitions. Undue reliance was placed on ineffective sealant, plaster and sill tiles.

[47] The joinery and cladding junctions were the responsibility of the supervising architect, Mr Hanns, and the EIFS cladding contractor. Council inspectors should have observed this defect and had it corrected. I find Mr Hanns, Walker, K Road and Council negligent in this matter.

[48] The damage from the poor installation of the joinery and cladding junctions has resulted in the same or similar damage to that caused by the installation of the wrong windows. Either fault is the cause of enough damage to justify the remediation proposed. It is not possible to differentiate the damage from the widows and the damage from the poor installation and cladding junctions. I have already concluded that Walker is solely responsible for the cost of replacing the windows. I apportion the value of the damage equally between those causes.

[49] Accordingly, Walker, Mr Hanns, K Road and the Council are responsible for this damage.

## **EIFS Cladding**

[50] The assessor found that the external cladding terminated below the tiled surfaces on the terraces. When cut-outs were made moisture damage was found due to either water tracking from above and being trapped by the framing or surface water that had wicked up by capillary movement. The experts agreed, as recording in the report from the experts' conference, that:

### **Component 1: EIFS cladding**

- Item 1.1 lack of ground clearance. It was agreed that there was a lack of ground clearance as the cladding was below the paved surface on the north and west terraces and the balcony. This was in breach of E2 to E1. The parties responsible for the breach were the builder, the cladding installer, the supervisor and the council.
- Item 1.2 bottom sheet detail. It was agreed that the bottom sheet details which were flush with the block wall on the west, south and east were in breach of the specific design, the manufacturer's details and E2. Those responsible were the builder, the cladding installer, supervisor and the council.
- Item 1.3 flat top to balustrade wall. This is on the west balcony and is in breach of the specific design, the manufacturers' details and E2. Those responsible are the designer, the builder, the cladding installer, the supervisor and the council.
- Item 1.4 flashings. There are no under flashings or scriber at the junction with the roof tiles; there is texture coating only. This occurs on the north and south elevations at the gable ends. These are breach of the specific design, the manufacturer's details and E2. Those responsible are the designer, builder, cladding installer and supervisor.

- Item 1.5 window flashings. There is no flashing at the junction of the double height windows and the EIFS and inter-storey sill wall and window. This occurs on both the north and south elevations with an inter-storey sill on the south-west corner with the balcony. This is in breach of E2. Those responsible are the cladding installer, supervisor and council.
- Item 1.6: delamination. There has been delamination of plaster from the proprietary corner moulds. This occurs around the exterior corner of the window openings at all elevations. This is in breach of the specific design, the manufacturer's details and E2. The party responsible is the cladding installer but there was no proven damage from this defect.
- Item 1.7 unprotected polystyrene sheets. There are unprotected polystyrene sheets on the west balcony east elevation. These are in breach of specific design, the manufacturer's details and E2. The cladding installer is responsible but there was no proven damage from this defect.

### **Item 2 penetration through EIFS cladding**

- Item 2.1 window flashing. There is no head flashing at the window opening and there are cracks in the plaster finish adjacent to the sill and jambs at all elevations. This is in breach of the manufacturer's details and E2. Those responsible are the builder, window installer, cladding installer, supervisor and council.
- Item 2.2 sill flashing. The sill flashing is short of and unsealed at the jamb junction. This is on the north, west and east elevations of the framing and flooring. This is in breach of the manufacturer's details and E2. The person responsible is the cladding installer.
- Item 2.3 lack of sill flashing. Sill flashings have not always been installed leading to decay in the framing and flooring on the

west. This is in breach of the manufacturer's details and E2. This was the responsibility of the cladding installer.

- Item 2.4 balcony rails. The balcony rails have been top mounted on the west balcony causing decay to the framing. This is a breach of the manufacturers' details and E2. This breach is the responsibility of the designer, builder, cladding installer, supervisor and council.

### **Claimants' Evidence**

[51] There is no detail in the building consent documents that show the junctions of the external wall cladding at the terrace levels. Consent document Sheets 14, 17 and 18 clearly show that the designer recognised the need to provide an upstand for a waterproofing material but there also needed to be bottom of cladding clearance.

[52] The building has been built with the cladding installed over the timber frame and the foundation wall. There is no capillary break between the polystyrene sheets, no flashing at the change cladding substrate and no opportunity for moisture to drain from behind the cladding at the change of the cladding substrate.

[53] The assessor documented the variance in installation with the building consent documents and good trade practice.

### ***Walker's evidence and submissions***

[54] Walker said that the Equus system was recommended by BIA and BRANZ and was local authority approved in 1998. Walker said that the Equus cladding system has since been discredited. (No evidence of the discrediting of the system was provided.) At the time of installation the cladding had a ten-year guarantee. Failure of the cladding system is a responsibility of the manufacturer not Walker. The EIFS was installed in

accordance with the manufacturer's requirements and therefore Walker was not responsible. It was not involved in the supervision of the installation of the cladding system.

***Finding as to EIFS Cladding***

[55] There is no doubt that faults with the cladding have caused leaks. Whatever the design, the installation is inadequate. If the 'as designed' cladding was not to be used, Walker should have specified what should have been used. The project was not adequately supervised or these matters would have been noted. There is no evidence that Mr Hanns was expected to manage the construction process in a way that the faults outlined by the experts did not occur. The inspection by the Council officers failed to note matters which were obvious to the assessors and experts.

[56] The bulk of these problems are the fault of the cladding installer K Road though the others had a significant involvement. Walker, Mr Hanns, K Road and the Council are responsible for these faults which also caused the damage outlined above.

[57] In relation to damage as a result of penetration of the EIFS cladding I assess the responsibilities as follows:-

|                         |     |
|-------------------------|-----|
| Architect as architect  | 10% |
| Architect as supervisor | 10% |
| Builder                 | 10% |
| Council inspection      | 10% |
| Cladding installer      | 60% |

**LAM Membrane on Ply Substrate**

[58] The experts recorded in their report:



#### **Component 4 – LAM membrane**

- Item 4.1 inter-storey sill: There is no slope, no flashing and no drip edge on the upper inter-storey sill on the north and south sides. There are cracks at the junction of dissimilar materials. There are cracks and decay underneath. This is a breach of E2. The parties responsible are the designer, builder, LAM installer, supervisor and the Council.
- Item 4.2 balcony roof: The balcony roof slopes towards the EIFS clad balustrade on the west elevation. This is a breach of the manufacturer's details and E2. The parties responsible are the designer, builder, supervisor and council.
- Item 4.3 flat roof internal gutter: There is no slope, no drip edge and there is LAM damage on the flat roof and internal gutter on the north elevation. There is decay to the substrate. This is a breach of E2. The parties responsible are the designer, builder, LAM installer, supervisor and council. The council commented that the condition of the LAM and the membrane is not an inspectable item.

#### **Claimant's evidence**

[59] The assessor noted damage to the LAM on the flat roof/internal gutter between the two sections of tiled roof. He found high moisture in the ceiling joists. There was visible decay to the ply substrate and mould growth within the ceiling cavity.

[60] Stormwater removal from this section of roof which acts as an internal gutter is not efficient as there is no fall to the outlet on the north elevation. The stormwater collection system is complicated with metal spouting at two levels and stormwater collection on the flat roof feeding into the lower spouting.

[61] The building consent documents and drawing sheet 07 show a fall of 100 mm in minimum in each direction. This has not been achieved. The ply substrate at the north elevation is not been fully protected by the LAM which extends over the lower spouting. There is no drip edge to prevent stormwater from tracking under the ply and into the structure.

[62] Parapet caps at either side of the roof are flat and on the north elevation have not been mechanically fixed. When lifted it revealed that the top plate is not covered by the building wrap and is moisture stained.

[63] There is moisture penetration through the LAM on the flat roof. The LAM is incomplete at the north end.

[64] The west balcony has a ply substrate, LAM and tile finish. The balcony forms the roof of the living room. The internal gutter at the balcony is incomplete at the outer edge of the ply substrate and the transition through the balustrade towards the rain head. There is no drip edge and moisture is not prevented from tracking into, under or between the ply in the adjacent cladding.

[65] Stormwater is able to pond against the bottom of the cladding at the gable end. There is minimal bottom of the sheet clearance between the bottom of the EIFS cladding and the LAM. No protective UPVC shoe could be found protecting the bottom of polystyrene sheet. The framing showed visible signs of decay. The LAM upturn is of insufficient height to prevent moisture wicking up behind the cladding and causing damage the structure.

[66] Construction documents at Sheet 14 03 show the junction of the flat and sloping roofs. There is no detail for the gable junction. It was constructed in variance to the detail 03 though no particular weathertight issues have been identified at this variation.

[67] There is moisture penetration through and over the LAM on the flat roof.

[68] The Council submitted that the condition of the LAM in the membrane was not something that could reasonably be inspected.

[69] Walker said the LAM waterproof membranes were installed in accordance with the manufacturer's specifications so it is not liable for LAM leakages.

*Finding as to LAM Membrane on Ply Substrate*

[70] There are two issues with the LAM membrane on the ply substrate. The first is insufficient slope and the lack of mechanical aids to removing water such as drip edges and flashing. The second is the consequent ponding against the junction with the wall and in one instance the application of the LAM to plasterboard, an inappropriate material.

[71] There is no current decay that can be ascribed to this fault but it will need to be properly rebuilt to avoid future damage.

**Inter-storey Sill**

[72] The assessor showed that the inter-storey sill has not been constructed as designed. Dye testing of the junction of the inter-storey sill and the central double storey window showed that moisture is able to penetrate at the side of the sill and track down the structure. Destructive testing showed moisture tracking lines down the corner timber framing and high moisture build up in the framing causing rot.

*Finding as to Inter-Storey Sill*

[73] The inter-storey sill has not been installed with the fall and flashing shown on the building consent documents or in accordance with good trade practice. The junction of dissimilar materials is failed and moisture has passed behind external envelope. It has tracked down structure. The lack of

bottom sheet clearance below has compromised drainage and drying from behind the cladding.

[74] The leak exacerbates the damage that is already there. It will be repaired as part of any remediation.

### **Weatherboard Junctions**

[75] The sealing of the drainage plane at the weatherboard/EIFS junctions has blocked moisture from penetrating the laps in the weatherboard and tracking down the building wrap to drain to the exterior. This has resulted in the build-up of moisture in the wall cavity and the onset of decay in the adjacent framing.

[76] The experts' views on weatherboards were:-

- Item 3 components: weatherboards: Item 3.1 drainage plane. The drainage plane is sealed at the junction of dissimilar materials. This is at the upper inter-storey junction with the LAM. There are signs of cracks and decay on the north and south sides. This is in breach of E2. Those responsible are the builder, cladding installer and supervisor.

[77] I consider this damage only marginally exacerbates the situation caused by the major defects rather than being damage with separate consequences.

### **Chimneys**

[78] The experts found that there is no under flashing at the junction of the chimney junction with the roof. This is a breach of E2. Those responsible are the designer, builder, roof tile/flashings installer and architect.

[79] The damage to the roof and in the walls below will be repaired when other damage is dealt with.

### **Roof Tiles**

[80] The experts agreed that there were no flashings or scribes on the junction with the roof tiles. The roof tiles were attached only to the texture coating on the north and south elevation gable ends. This was a breach of specific design, manufacturer's details and E2.

[81] There is a lack of flashing at the junction of the roof tiles on the chimney and the timber barge board.

[82] Cut outs in the internal lining of both the master bedrooms below the chimney show moisture track lines below the chimney, high moisture readings in the framing and moisture damage in the master bedroom wall framing of both houses. It is likely that water entry is at the upper tile/barge board level where there is no flashing or possibly at the poorly folded and lapped lead flashing at the junction of the roof tiles and bottom of the chimney wall cladding.

[83] The parties responsible were the designer, builder, cladding installer and supervisor.

### **Barge Board Junctions**

[84] There is a lack of flashing at the junction of the underside of the roof tiles at the top of the EIFS wall cladding on the gable ends and cracking of the texture coating adjacent to the underside of the roof tiles.

[85] The design for the junction is shown in the building consent documents sheet 14 detail 04 as *a silicone seal to junction of roof tile and plaster.*

[86] The building has been constructed with the edge tile laid with a narrow overhang over the top of the EIFS wall cladding. The junction appears to be reliant on plaster, or in some cases the tile pointing overspill, to prevent moisture entry between the two building components. No sealant was visible at the junctions. There is cracking of the plaster coating at the top of the wall.

[87] As part of the investigation for the building a concrete tile was lifted from the sloping roof and was found to be a *Monier* roofing product. The barge tile which is designed for this situation was not used. Standard *Monier* recommended installation details show either the use of a fascia board and flashings or the use of gable end cover tiles. Reliance on the use of sealant, if in fact it has been used at all, on an inaccessible three-storey wall in a high wind zone is a potential hazard. It should be the subject of specific design which would ideally have included information on the sealant product to be used to adhere to both concrete and polystyrene and the backing rod requirements. There is no information relating to this in the building consent documents.

[88] The responsibility for this damage lies with Walker, Mr Hanns and K Road.

### **Timber Treatment**

[89] Assessors' laboratory reports show that most timber had not been treated with preservative. Other laboratory tests for boron, copper and tin were negative establishing that the timber specified, *Boric treated number 1 Radiata pine or Douglas fir* was not used. This is a breach which is in variance with the specified product. The parties responsible are the builder and the supervisor.

[90] The level of timber treatment has no effect on weathertightness. However, it does increase the extent of damage and the likelihood of having to remove decayed timber when remediating. Any increase in cost incurred

in replacing more framing that would otherwise be expected are therefore the responsibility of Mr Hanns and Walker.

## **Maintenance**

[91] There is a lack of maintenance throughout the building but there is no evidence that the lack of maintenance contributed to the cause of the leaks.

## **Miscellaneous Faults**

[92] The master bedroom roof leaks. Damage to the liquid membrane is consistent with an impact following the installation of the new membrane. This is not a construction fault.

[93] Balcony leak damage was caused by poorly designed and fitted timber handrails where supporting brackets have been top fixed through the balustrade wall. Water is able to ingress by means of capillary action and gravity around the fixing brackets where small cracks develop that are difficult to identify or maintain. The absence of any slope on the top of the walls allows water to pond on top of the wall. Destructive investigations confirm the absence of any damp proof membrane under the EIFS cladding. Moisture is transported to the bottom plate line of the wall where floor tiles terminate above the exterior cladding preventing any water from discharging from behind the cladding. In effect the water is being trapped behind the cladding wall.

[94] Water entering between the top of the balustrade wall and the window is discharged at ground level. This was evidenced by a dye test. The junction is inadequately flashed and the u section frame of the window which butts the wall has been filled with sealant.

[95] There is leaking between the sill detail between the cladding and weather boards. Water is entering at those locations. There is an absence of an overhang and drip edge allowing the water to enter behind the cladding

where unobstructed moisture paths allow water to migrate down to framing timbers below.

[96] There was evidence of water ingress at the junction between the weatherboard and cladding.

[97] The finished paving levels are above the external cladding system termination points. Such details allow moisture to enter by means of capillary action and prevent drainage.

[98] All of the above faults have contributed to the damage but the work required to repair the causes of damage already discussed would be similar. Further distribution of blame would not change the overall costs of repair to the various respondents.

### **Conclusion on defects**

[99] The major defects that caused the leaks were:

- the wrongly specified windows with holes that leaked behind the cladding
- the poor junction between the windows and the cladding
- the poor junctions between other critical building elements
- The poor application of the Equus system

[100] There were also other less significant defects as outlined above. The defects in relating to the windows and cladding junctions however alone would be sufficient to justify the remedial work. All of the faults have also contributed to water penetrating into the fabric of the dwelling which has caused decay. I therefore find that the house leaks and that the damage outlined in the assessor's and experts' reports has been proved. As a result the decayed materials as well as the leaking components need to be replaced.



## IS THE CLAIM LIMITATION BARRED?

[101] The Council and Walker argued that because there were builder's maintenance repairs to windows at Pirie Street in May 2001 the building was a leaky building at that stage.

[102] As part of the teething problems of construction there were difficulties with the windows. There was retention by the trust to cover such matters. Mr Hanns said the windows were resealed and there was further plastering. All parties involved believed that the problem was solved.

[103] As a first premise the council say that the extensive works covered the same problems which are now apparent. The leaks were known at the time of the completion of the building or shortly thereafter and at least when those responsible for its construction returned to the site. They rely on Mr Hanns' evidence for this.

[104] Based on this evidence the Council argue that the principles in *Pullar*<sup>1</sup> apply where Chambers J said:-

[19] With respect, the judge applied the wrong test. It is not necessary, in order for time to start running, to be able to pinpoint with precision the exact cause of every defect. Indeed, that would frequently mean time could not start running until the remedial work was under way! That would in turn mean that the building owner could not sue the builder in advance of the repair work as no cause of action would have by then accrued. That is not and never has been the law...

[105] The Council concluded that the claim is therefore time barred.

[106] There is no evidence that the damage was manifest at that time<sup>2</sup> as there is no proof of any damage at that time. The first proof of damage was that provided by the assessor.

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<sup>1</sup> *Pullar v R (acting by and through the Secretary for Education)* [2007] NZCA 389.

[107] None of the parties were aware, when they believed that the windows were repaired, that there were leakages through holes below the windows. Indeed the Council have argued that it would not have been reasonable for their inspectors to know about the holes. To expect the occupiers to know about them is therefore unreasonable.

[108] As a second premise the council rely on *Invercargill City Council v Hamlin*<sup>3</sup> for the proposition that the cause of action accrues when cracks become so bad, or defects so obvious that any reasonable homeowner would call in an expert. The Council argue that Mr Bodt, the first owner of Pirie Street called in an expert in July 2000 and therefore the test was met at that stage.

[109] It appears that the Council regarded recalling Walker, Mr Hanns and K Road to the site to correct building completion problems as being the same as calling in an expert. Referring a problem to those who created it is not the same as calling in an expert because things have reached the level required to meet the *Hamlin* test.

[110] Dr Butt, the Council's expert, said the repairs should have included cutting around the windows which may have revealed a leak from further up. He could only speculate as to whether any damage would have been discovered if the cladding adjacent to the windows had been removed at that time.

[111] I accept the second premise but without both premises being true the argument cannot be valid. This was not known to be a leaky building in 2001. Accordingly limitation time does not run from that date.

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<sup>2</sup> Test in *Pullar*, *ibid* [13].

<sup>3</sup> [1996] 1 NZLR 513 (PC), at 526.

### **Limitation Issues regarding the Architect, Walker**

[112] The limitation date for Pirie Street is 5 August 1998. The submission in relation to Pirie Street is that Walker did not do any work after May 1998. For the reasons set out in this decision I find that it supervised the work after that date.

[113] Walker also submitted that design and supervision are separate tasks and that the claim in relation to design is limitation barred. While Walker accepted in closing submissions that there was design work done up to May 1998, it claimed that they were not matters related to design which affected weathertightness. They related to internal matters, electrical design and gates as set out above in relation to the documents.

[114] It is difficult to accept that in a design project the planning for weathertightness stops while other design work carries on. I take the view that this was one project and Walker was involved throughout. Accordingly, as there is evidence of work within the appropriate time period, the claims are not statute-barred.

[115] There is accordingly no validity to the submission that the claim is limitation barred.

### **IS WALKER LIABLE FOR THE DEFECTS AND DAMAGE?**

[116] Walker disputed the existence of leaks. It said that the moisture generated from the habitation of the dwellings through cooking, heating and even breathing cannot find its way to the outside air and is trapped behind an impervious cladding such as the EIFS system. This creates dampness inside the building. Houses clad in this manner cannot breathe. The architect therefore does not accept that dampness has arisen from leaks from a defective external fabric. If there are major leaks which occurred over a long

period they are the responsibility of the owner who, in each case, has failed to carry out maintenance.

[117] The evidence of leaks is overwhelming. I reject the submission.

[118] Walker submits that although the design issues were identified as culpable by the experts, it was not always responsible for design matters. It can only be responsible for those design matters that were actually built. In particular Walker points to faults in the EIFS cladding system which were not designed by it as the major cause of leaks. This matter has already been dealt with.

[119] Walker says that the following matters were not built as designed:-

- Lack of ground clearance. Walker says it did not draw this detail but used the detail from the Equus manual. The drawn gap was not created.
- The flat top to balustrade wall design was not followed. In any event Walker should not be liable for following the manufacturer's design.
- There was no under flashing or scribe at the junction with the texture coating. Walker says it specified silicone seal but plaster was used instead and accordingly its design was not followed.

[120] Walker says there is no damage caused by design where there is no flashing at the double height windows and inter-storey sill and wall. The drip edge is an alternative to flashing.

[121] Walker submits that it had designed the balcony roof and the flat roof with sufficient slope but this was not constructed. These matters are all a matter of supervision. Walker did not supervise to the extent that these items were wrongly built. That was negligent.

[122] Walker says that damage from top mounted rails on the balcony was not reasonably foreseeable having regard to the use of flexible sealants. The detail complied with BIA and BRANZ requirements. It was a method approved by the council. It was supposed to have worked but did not.

[123] It is for the architect to consider the information received and use it only if he was satisfied that the building would be watertight if it was constructed in this way. It was not and therefore Walker is responsible.

[124] All of these issues are additional causes of the same damage which is dealt with elsewhere in this decision.

[125] Walker says it was commissioned to prepare the building consent and plans and specifications for the two townhouse project. It applied for and obtained building consent SR39887 in March 1998 as agent for the owner, the Papadopoulos Family Trust. Walker said it was not engaged to and did not supervise the project and was not engaged in any work after the obtaining of the building consent in March 1998.

[126] Walker did agree that during the project it had certified progress payments as they fell due as agreed under the building contract. It also admitted that at the start Mrs Papadopoulos had asked Mr Walker to keep an eye on the work, but this did not amount to an expectation of supervision as under the building contract it was for the builder to supervise the contract works.

[127] The claimant and the Council said that the evidence indicated that Walker had supervised the work.

[128] On 18 March 2009 Mrs Papadopoulos had given evidence by way of affidavit detailing Mr Walker's interaction with the engineer on 4 March 1998. She also provided evidence that Walker and Mr Hanns were involved in the

arrangement of insurance on 16 June 1998 and Walker dealt with variations on 17 February 1999.

[129] Evidence was produced showing that Walker had issued payment certificates numbered 1 to 8 dated from 6 August 1998 through to 11 March 1999 and payment variation certificates numbered 1 – 8 dated from 6 August 1998 to 11 March 1999.

[130] Walker issued 56 architect's directions between 30 June 1998 and 28 April 1999 and 27 directions or variations dated from 10 July 1998 to 26 February 1999. These directions and variations range from the trivial to the significant and clearly indicate that Walker was involved in the construction throughout.

[131] Walker said these documents only show that the purchasers sought a large number of changes and that none of the changes were related to the installation of the windows and cladding. It agreed that it spent further time on kitchen layout, bathroom doors, internal window decoration, cupboards, changed electrical layout, drawers, gates, a letterbox and so on but this was not supervision.

[132] Mary Daish, an employee of Walker, agreed in evidence that she would not approve a progress claim if she and Mr Walker were not satisfied that the work complied with the Building Code. She said that if there were any problems with the progress certificates she would discuss it with Mr Walker and he would visit the site. Ms Daish said that if she saw defective work she would draw it to Mr Walker's attention. Ms Daish was the first port of call for the project and she would follow up with Mr Walker if necessary. Mr Walker did not disagree with this evidence when asked about it in cross examination.

[133] Similarly, Mr Hanns said that he was in regular contact with Walker whenever there was a problem. Walker's staff were on site at various stages of construction. Mr Hanns understood that Walker was supervising the

contract. Walker says that some of the redesign work was charged to Mr Bodt (a purchaser) who paid for some items.

[134] These events show that Walker was involved with this building during the time of construction. Some changes in design were made. Supervision should have included checking that the building was built as designed and that the contractors were being paid for work which was in conformity with the design. To say that Walker relied on contractors as experts is not enough.

[135] If, as Walker suggests, the extent of supervision was to respond to requests of potential owners and payments to contractors it was insufficient. The trust, Mr Hanns and the Council all thought that it was supervising based on observed activity. It was fully involved in all discussions. Given the level of Walker's involvement all other parties accepted that Walker was responsible for ensuring completion in accordance with the plans and the preparation of the units so that they could be sold. Walker received the code compliance certificate for the buildings in February 1999 following its practical completion certificate dated 26 February 1999.

[136] The documentation clearly shows that Walker was involved throughout the project. The evidence also clearly shows that whatever Mr Walker now believes, in fact his company supervised the construction of these two units. I accordingly find that Walker designed the building and supervised the contract.

[137] Walker submitted its liability is limited to the extent of any proven failure to identify faults causing leaks that should have been identified by competent design, specification and supervision. Even if I find, (as I have) that Walker supervised the work it says there is no proof of physical damage as a result. It says that the loss can only be economic. There can only be liability if there is an assumption of responsibility to the claimant and a reliance by the claimant on that supervision. Walker says that the claimants did not rely on any architectural inspection.

[138] Walker says that the reference to inspection is supported by *Sunset Terraces*<sup>4</sup>. Reference was also made to *Smith v Eric S Bush (A Firm)*<sup>5</sup> in relation to valuations and *Boyd Knight v Purdue*<sup>6</sup> and *The Law of Torts in New Zealand*.<sup>7</sup>

[139] Walker in this case relies on the finding at [553] of *Sunset Terraces* which relates to the liability of an architect in regards to a practical completion certificate. However it is noted that the High Court's finding that the architect was not liable for the issue of the practical completion certificate was reversed on appeal.<sup>8</sup>

[140] *Smith v Eric Bush* was a case considering a duty to take care under the Unfair Contract Terms Act 1977 (UK). It was held that the valuer owed the mortgage applicants a duty of care even if the mortgage applicants had agreed that the information was confidential and solely for the benefit of the lender.

[141] In *Boyd Knight v Purdue* the pleadings and trial were run on one basis and only in closing addresses did counsel raise the second issue, reliance, considered by the Court of Appeal. It was held that as there had been no evidence of reliance on the negligent statements and certificate there was no liability. These cases are not helpful to Walker.

[142] As the Council submitted, the duty of care of an architect is set out in *Bowen v Paramount Builders (Hamilton) Ltd*<sup>9</sup> where Richmond P said at p 406:

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<sup>4</sup> *Body Corporate 188529 v North Shore City Council* HC Auckland, CIV-2004-404-3230, 30 April 2008, Heath J, at [553].

<sup>5</sup> [1989] 2 All ER 514 (HL).

<sup>6</sup> [1999] 2 NZLR 278 (CA).

<sup>7</sup> Stephen Todd (ed) *The Law of Torts in New Zealand* (4<sup>th</sup> ed, Brookers, Wellington, 2005) at 5.8.02 and 5.8.05(1).

<sup>8</sup> *North Shore City Council v Body Corporate 188529* [2010] NZCA 64, [122] ff.

<sup>9</sup> [1977] 1 NZLR 394 (CA).



Quite clearly English law has now developed to the point where contractors, architects and engineers are all subject to a duty to use reasonable care to prevent damage to persons whom they should reasonably expect to be affected by their work.

[143] At p 422 - 423 Cooke J said:

An objection of a more doctrinal nature is that the loss is economic and that only contract should give a remedy. As to the first branch of this objection, (p 423) the loss in the instant case is not purely economic. The building has undergone some damage and deterioration, the damages claimed being merely the measure. In any event it is clear from *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465; [1963] 2 All ER 575, *Mutual Life and Citizens' Assurance Co Ltd v Evatt* [1971] AC 793; [1971] 1 All ER 150 and other cases that negligent advice in breach of a duty of care may be actionable though the loss be purely economic; and more generally the House of Lords has at least left open the door to recovery in negligence for purely economic loss: see the speeches in *Moorgate Mercantile Co Ltd v Twitchings*; [1976] 3 WLR 66, 73, 75, 79, 87, 93; [1976] 2 All ER 641, 648, 649-650, 653, 660, 666...

[144] Similarly, in *Body Corporate No. 189855 v North Shore City Council*<sup>10</sup> Venning J found that the architect who was involved with the design work and on site during construction owed the claimants as subsequent purchasers a duty of care and had breached that duty causing loss. It could not blame intervening actors if it was primarily responsible.

[230]In the present case the plaintiffs' loss was caused by a combination of factors that had led to the construction of 45 Byron Avenue with the original defects. The first factor was the defective design in relation to the windows, floor levels and wing walls. Mr Smythe, the architect is responsible for that. Next, the Council's negligence when carrying out its inspections of the construction process contributed to the plaintiffs' loss.

[145] Walker's submissions do not succeed. Walker owed a duty of care to both the subsequent owners and the Council.

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<sup>10</sup> HC Auckland, CIV-2005-404-5561, 25 July 2008.

[146] For the reasons outlined earlier I also conclude Walker breached that duty of care and is responsible for the following defects, namely: the window joinery, the joinery and cladding junctions, the EIFS cladding, and the other lesser faults outlined above. I accordingly find that Walker is jointly and severally liable to the claimants.

### **IS PETER HANNS LIABLE FOR THE DEFECTS AND DAMAGE?**

[147] Peter Hanns, the builder, represented himself at the hearing. Mr Roy Hanns appeared for part of the hearing to assist Mr Peter Hanns with quantity surveying issues.

[148] Mr Hanns admitted that he had constructed both dwellings and had undertaken the work that was complained of. He said that he entered into the contract with the Hannah Papadopoulos Family Trust and he was supervised progressively by Roger Walker the architect who approved all work and certified all payments. The contract was not produced but was agreed by all parties to be in the terms set out above.

[149] In summary Mr Hanns denied that he had ever been negligent and accordingly denied any liability for damages for the work on either property. He said:

- The work was carried out strictly in accordance with the building contract and particularly in accordance with clause 1.4 of the specifications which provided he did nothing in 1998 which would, at that time, be regarded by his peers as careless or negligent.
- He followed the plans and specifications and was supervised by an architect and employed qualified staff and subcontractors.
- The failures were not as the result of his negligence but due to inappropriate systems being specified or failures in materials.
- Any mistakes made during construction were not able to be detected by normal supervision.

- The holes in the windows were a major cause of problems. I accept this and agree that he had no control over this issue.
- He was never advised of any defective or non-complying works nor were there any special retention that he knew of in respect of his work.
- The amounts claimed as heavily inflated and that the quantity surveyor had overestimated the pricing of items claimed.
- There was no clerk of works employed on the site despite the Council's assertion to the contrary.

[150] Mr Hanns also submitted that the work was inspected progressively by the Council inspectors and approved as being in accordance with the Building Act and the building consent. He pointed to a number of completion certificates which were provided at the time. They were:-

- A producer's statement PS2-design Review issued by the structural engineer Peter Blades dated 9 February 1999.
- A certification that the requirements of the Building Regulations 1992 had been complied with issued by Capital Consultants dated 10 February 1999.
- A Code Compliance Certificate issued by the Wellington City Council dated 26th of February 1999.
- A Certificate of Practical Completion issued by Roger Walker, the architect, dated 28th of February 1999.

[151] I accept these certificates were issued. However certificates such as the engineers and fire reports were either correct or unrelated to the defects causing damage. They are not certificates that Mr Hanns can rely on to reduce his liability for defective construction work in which he was involved.

[152] Courts and tribunals have consistently held that builders, whether as head-contractors or labour-only contractors, of domestic dwellings owe the

owners and subsequent owners of those dwellings a duty of care<sup>11</sup>. Mr Hanns has breached that duty of care by failing to ensure the dwelling was properly constructed.

[153] The experts' opinion was that Mr Hanns was responsible for a number of errors which were the result of negligence. I accept Mr Hanns failed to meet the standard required of a competent builder in relation to the window joinery, the joinery and cladding junctions, the EIFS cladding, and the other lesser faults outlined above.

[154] As a result the dwelling leaks. I accordingly find that Mr Hanns is jointly and severally liable to the claimants.

## **THE COUNCIL'S LIABILITY**

### **Documentation**

[155] The Council filed a response in relation to the Austin Street property in December 2008. The Council filed no response in relation to the Pirie Street property until late in the afternoon on the eve of the hearing. That document was a combined defence covering both buildings.

[156] The other parties objected to the reception of the defence and particularly the defence to the claim for Pirie Street by the Tribunal and sought to have it excluded.

[157] Mr Heaney, SC, counsel for the Council, said that as the Tribunal procedure was informal and not based on court rules there was no difficulty in receiving the defence late. He further said that if the effect of the Council not filing a defence was to accept the allegations in the application and statement of claim as true, the claimants should be put to an election as to which of the causes of action were to be pursued. The claimants declined to accept this invitation.

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<sup>11</sup> Boyd v McGregor HC Auckland, CIV-2009-404-5332, 17 February 2010, H Williams J.

[158] In the event the response, although late, did not create any surprises for the other parties. If it had, it may have been proper and in the interests of natural justice to adjourn the hearing.

[159] Lest it be thought that there is no sanction for ignoring the orders of the Tribunal it should be noted that filing a document such as a response at or shortly before the hearing may result in a successful application for costs by a party put to the extra expense of dealing with late information.

### **Council Consent and Inspection Regime**

[160] The claimants say that as there were neither the necessary producer statements nor the inspection records which would have justified the issuing of the code compliance certificate the issuing of the code compliance certificate can only have been negligent.

[161] The Council accepted it owed the claimants a duty of care but denied negligence and liability for defects in the construction of the dwelling. The Council said that it is not a clerk of works and relied on *Sunset Terraces*<sup>12</sup>. It denied that it had a duty of care to supervise the construction of the dwelling so that it was properly built and watertight.

[162] The Council said that it also relied on those involved in carrying out the actual construction work, the involvement of an architect in construction, the use of a proprietary cladding system, producer statements provided by the engineer, glazier and the inspections of an independent registered clerk of works, Capital Consultants, who were building certifiers.

[163] Accordingly the Council says it did not fall below a reasonable standard of care when issuing the building consent, carrying out inspections

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<sup>12</sup> *Body Corporate 188529 v North Shore City Council* HC Auckland, CIV-2004-404-3230, 30 April 2008, Heath J, at [183].

and then issuing the interim code compliance certificate and final code compliance certificate for the property.

[164] Two long serving Council staff members Mr Drysdale-Smith and Mr George Skimming gave evidence of the processes of the Council at the time in relation to building consents. They particularly discussed matters which were alleged to have been poorly managed. They said that although the building was not always built as designed the Council trusted those involved to comply with the building code requirements.

[165] The claimants said that the external membranes to the roofs and decks and the external cladding were alternative solutions but the documentation did not reflect that. Neither Mr Walker for the architect nor the Council as the local authority appear to have taken steps to satisfy themselves or to be satisfied by others that the building would meet the performance requirements of the Building Code.

[166] To explain the lack of warranties for the alternative EIFS cladding system, the LAM waterproofing, the producer statements for the windows and the paucity of notes Mr Drysdale-Smith, said that in those days the Council staff worked with the building trades on what he described as a 'certain amount of faith'. In his opinion the Council inspection regime was adequate.

[167] The Council, in reliance on the professionals, seems to have limited its own inspections. For instance, there is no indication that either the inter-storey sills – LAM on plywood substrate - or the EIFS system, having been built differently to the manufacturers' instructions and good trade practice were noted. (The significant variation from the standards was agreed by all the experts).

[168] Mr Skimming did not recall dealing with the buildings which are the subject of this dispute. His knowledge of these buildings was based on information received. Mr Skimming had access to the Council documents

and said that the code compliance certificate was issued because the Council received and relied upon producer statements from the engineer, the glazier and an independent registered clerk of works, David Walker.

[169] Mr Drysdale-Smith, did not specifically recall these two properties so his information also came from the Council's file. He said that he carried out a number of planning, drainage and building inspections of the properties. He also issued the interim code compliance certificate and the final code compliance certificate. Other Council inspectors had made other inspections. He issued the interim and final code compliance certificates to the architect, Roger Walker Limited, on 26 February 1999. He said that the issuing of these certificates was essentially an administrative function. An officer such as himself when evaluating whether or not the Council had reasonable grounds to conclude that the building complied with the building code, took into account the experience of the people involved in the construction such as Peter Hanns the builder, the architects, a registered clerk of works, an engineer, any producer statements from any of the parties involved, the regulations and standards in force at the time of construction, and building industry knowledge at the time.

[170] Mr Drysdale-Smith said, from looking at the Council's file, that he had sufficient information taking into account the expertise of those involved, the producer statements received from the engineer, the glazier and the producer statement from David Walker, the registered clerk of works and the Council's own inspections to issue the certificates. In doing that he relied upon the fact that Roger Walker Architects Ltd was involved.

[171] When he issued code compliance certificates he would assume that, as recorded in the Building Act, regular maintenance would be carried out to maintain that code compliance in future years.

[172] The Council said that this showed that there was no negligence by the Council in relation to its involvement with these two buildings.

## Clerk of Works

[173] The Council alleged that David Walker as registered clerk of works was involved in respect of the requirements of the Building Regulations 1992, at least in respect of one unit. The Council relied entirely on correspondence and a report from Mr David Walker (who was not called to give evidence). Accordingly, the Council says that it has a complete defence in relation to Austin St.

[174] The claimants and Mr Hanns dispute the allegation that David Walker was a clerk of works and deny this is the logical conclusion from the Council files. The file shows that on 10 March 1998 Terry Brooks on behalf of the Wellington City Council advised Walker that the processing of the building consent had been suspended pending receipt of further information. The request was:-

'[P]lease provide a full fire report on the proposed two new townhouses, showing how the proposal has been designed to comply with requirements of C2, C3 and C4 of the New Zealand building code'....

[175] On 23 March 1998 Capital Consultants filed their fire report setting out the various measures requested by the Council.

[176] On the face of the document there was a note *'Have had the report peer reviewed by Andrew Caldwell, WCC'* followed by some initials and the date 24/3/98. On 25 March 1998 a fax from the Council, signed Terry, asked for further information. On the same day Mr Brooks sent a fax message to Walker advising of progress on the fire report.

[177] On 18 May 1998 Mr Brooks, on behalf the Council, wrote to Walker saying:

'Thank you for your phone call on Friday 15<sup>th</sup> May regarding the fire report prepared by Capital Consultants for the above mentioned consent. The Fire Report



has been revisited by myself and another building officer who agreed that the approved and issued consent is in compliance NZ Building Code’.

[178] On 24 July 1998 David Walker issued a certificate under the Building Act 1991, section 46(4) (a) and (b) being an application for the Wellington City Council to issue a certificate pursuant to section 224(1) of the Resource Management Act 1991 in relation to 65 Austin Street. The certificate covered both the units.

[179] In that certificate Mr D Walker said that he had carried out a detailed examination of the plans and specifications and was satisfied on reasonable grounds that the requirements of the Building Act 1991 and the Building Regulations 1992 had been observed in design and layout. He was further satisfied that the provisions of the Building Code for means of escape from fire, protection and other property access facilities for the use of people with disability would be fully complied with in terms of the building consent issued in respect of the above proposal.

[180] On 16 October 1998 David Walker wrote to Walker acknowledging a revised copy of the boundaries for the development which now provided for open yard space of 2.5 m on the east boundary of Unit No. 2. He said:

“A recalculation of the allowable area of unprotected openings on this elevation shows that 50% of this wall needs no fire rating. In calculating where this unrated area should be located, the part of the wall which will poses the least threat to adjoining property is the top floor of this apartment and this wall can be left unrated at the top floor level. I am forwarding a spare copy of this letter for you to send to the City Council so that they can have this on their records. I trust this information will assist you to complete the work.”

[181] On 10 February 1999 Mr David Walker provided a producer statement saying an interim code compliance was being applied for to allow a unit title to be processed.

“As an independent registered clerk of works and a Life Member of the Building Officials Institute of New Zealand, and having professional liability insurance for

\$300,000, I certify the requirements the Building Regulations 1992 have been complied with in respect of the above unit.”

[182] This document was attached to the evidence of Ms Johnson. Ms Johnson had labelled the document ‘Fire Producer statement’ in her evidence. Mr Heaney cross-examined her closely as to whether or not this was intended to deceive the Tribunal and hide the fact that Mr Walker was the clerk of works for the whole project.

[183] Mr Hanns gave evidence that there was no clerk of works and that he only saw Mr David Walker on site once after he had received pre-clad clearance for the south wall from the Council’s building inspector.

[184] Mr Hanns had no other interaction with David Walker who was engaged by Walker as a fire consultant. His certificate related only to 63 Austin Street where the south wall on the boundary was fire rated in accordance with calculations and details advised by him to Walker and the Council.

[185] Mr Roger Walker said that Walker had not employed a clerk of works for this contract. Having perused the documents in relation to this issue it is clear that Mr David Walker was instructed only in relation to fire issues for Austin St. The correspondence shows that the Council officers clearly understood that Mr David Walker's role related to fire ratings only.

[186] There is no evidence that Mr Walker was the clerk of works for the whole project. I find that there was no clerk of works involved in this building project. Accordingly the Tribunal was not misled by Ms Johnson. It follows that if the Council did rely on Mr Walker's producer statement in creating the code compliance certificates for all aspects of both units it was negligent.

## **Finding as to Council's Liability**

[187] The Council submits that many of the issues with the dwelling would not have been identified as defects at the time of construction. In particular it submits that a Council officer should be judged against the conduct of other Council officers and against the knowledge and practice at the time at which the negligent act or omission was said to take place.

[188] I accept that the adequacy of the Council's inspections needs to be considered in light of accepted building practices of the day. The High Court in recent cases has set out the responsibility on territorial authorities in carrying out inspections. Heath J in *Sunset Terraces* states that:

"[450....[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."

[189] And at paragraph 409:

"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."

[190] In *Dicks v Hobson Swan Construction Limited* (in liquidation),<sup>13</sup> the court did not accept that what it considered to be systemically low standards of inspections absolved the Council from liability. In holding the Council liable at the organisational level for not ensuring an adequate inspection regime, Baragwanath J concluded:

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<sup>13</sup> (2006) 7 NZCPR 881 per Baragwanath J (HC) at para [116].

“[116]...It was the task of the Council to establish and enforce a system that would give effect to the building code. Because of the crucial importance of seals as the substitute for cavities and flashings it should have done so in a manner that ensured that seals were present.”

[191] In *Sunset Terraces* in the Court of Appeal<sup>14</sup> Baragwanath J said :-

[77] At bottom, the Council is seeking to escape liability for failing to carry out the duties imposed on it by Parliament, for which it was empowered to charge such fees as were required to enable it to do so, when successive owners had no rational choice but to make decisions on the basis that it had properly inspected (or had inspected) the work which was covered up by the construction process. This has had the predictable consequence that the work would be performed shoddily in defiance of the Building Code, with an overall injurious effect on the consumers: the owners and occupiers. There is in my opinion no policy reason that would justify relieving the Council of consequential liability.

This is a similar case.

[192] These authorities establish that the Council is not only liable for defects that a reasonable Council officer, judged according to the standards of the day, should have observed. It can also be liable if defects were not detected due to the Council's failure to establish a regime capable of identifying whether there was compliance with significant aspects of the Code. I will therefore be applying this test in determining whether the Council has any liability.

[193] Applying this test to the defects in this building the Council inspectors should have noted the inadequacy of the joinery and cladding junctions, the inadequacies of the EIFS cladding, the variation from the design of the inter-storey sill, the weatherboard junction, lack of flashing on the chimney, lack of flashing on the roof tiles and barge board junctions and the other defects outlined above.

[194] The Council should have detected these faults during its inspections and was negligent in not doing so. Its negligence has contributed to the claimants' loss.

[195] There are clearly areas of damage where it is not reasonable to have expected the Council to have noticed. Given however the extent of the damage that has been caused by the defects that should have been detected by the Council and the fact that they occur on all elevations, I conclude that the Council has contributed to defects that necessitated the full recladding of the house.

[196] The Council submitted that there had been a lack of maintenance. I have already accepted the evidence that this has had no effect on the leaks.

#### **K ROAD NO 1 LIMITED**

[197] K Rd No 1 Limited was the fifth respondent. It took part in some of the preliminary meetings but took no part in the hearing.

[198] A party's failure to act does not affect the Tribunal's powers to determine the claim. Section 74 of the Act provides that the Tribunal's powers to determine a claim are not affected by:

- (a) The failure of a respondent to serve a response on the claimant under section 66; or
- (b) The failure of any party to:
  - (i) make a submission or comment within the time allowed; or
  - (ii) give specified information within the time allowed; or
  - (iii) attend, or participate in, a conference of parties called by the Tribunal; or
  - (iv) do any other thing the Tribunal asks for or directs.

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<sup>14</sup> *Sunset Terraces* [2010] NZCA 64.

[199] Moreover section 75 of the Act provides that the Tribunal may draw inferences from a party's failure to act and determine the claim based on the available information:

If any failure of the kind referred to in section 74 above occurs in adjudication proceedings, the Tribunal may-

- (a) draw from the failure any reasonable inferences it thinks fit;
- (b) determine the claim concerned on the basis of information available to it; and
- (c) give any weight it thinks fit to information that-
  - (i) it asked for, or directed to be provided; but
  - (ii) was provided later than requested or directed.

[200] Based on the information before the Tribunal accordingly finds that K Road No 1 Limited is liable for the faulty cladding and the faulty joinery and cladding junctions. These faults were sufficient to justify the remedial work claimed for. K Road No 1 Limited is therefore jointly and severally liable for the cost of remediation.

### **WAS MRS PAPADOPOULOS A DEVELOPER?**

[201] The Council alleges that Mrs Papadopoulos was a developer as she owned the property, arranged to have two townhouses built on the property and sold them before construction commenced. It relies on *Mt Albert Borough Council v Johnson* [1979] 2 NZLR CA 234 which described a company which acquired land, subdivided it, had homes built on it and sold them to the general public as a developer. Such developers have a non delegable duty of care to the purchasers of the flats.

[202] The Council's claim against Mrs Papadopoulos is in relation to her role prior to the transfer of the property to the trust not as trustee of the Papadopoulos Family Trust. Even if I were to accept that Mrs Papadopoulos was a developer there is no evidence linking the work she did prior to the transfer to the Family Trust which has been causative of the leaks and subsequent damage. No party has raised the role of the Family Trust as a

developer and the claim against Mrs Papadopoulos was not in relation to her role as trustee of that trust. The claim against her is accordingly dismissed.

[203] The trust relied entirely on its professional advisers led by Walker. It took no part in the detailed work of the development other than to hire Walker and take its advice as to the appointment of the builder. It relied on Walker to supervise the project. Its interactions with Walker were on this basis.

[204] It seems clear that Mrs Papadopoulos was involved in these matters only as a passive trustee of the family trust. It is clear that once the trust had appointed an architect it took professional advice from Walker and the contractors which Walker arranged.

[205] There is no evidence that Mrs Papadopoulos was personally involved as the owner or in any other role in the construction in either of the properties other than as trustee.

[206] No party raised the issue as to the role of the trust as developer and it was not a party.

[207] If Mrs Papadopoulos was a party in her role as a trustee, a matter not addressed by any other party, then the trust may have had a non delegable duty of care. However, as among the respondents, it having relied on the professional expertise of the respondents, the trust's apportionment for liability would be 0%

[208] Accordingly Mrs Papadopoulos has no personal responsibility for what followed. The claim against her personally is hereby dismissed.

[209] The trust as developer relied entirely on professional advisers. There was no negligence. If it had been a party it would be entitled to be indemnified by the other respondents.

## **WHAT IS THE APPROPRIATE LEVEL OF DAMAGES?**

### **Remedial Costs**

[210] Mr Wutzler prepared a scope of works which provided detail for remediating the building and replacing defective components. This scope of works was generally accepted but some remediation requirements were disputed.

[211] Respondents disputed the replacing of the spouting, downpipes, rainwater heads and scuppers. They thought that they could be reused. The claimants conceded that replacements should be replacing the current materials which are galvanised steel rather than the recommended copper.

[212] The Council disputed that the bathroom lining would have to be removed when replacing the cladding and timber framing behind it. Dr Butt said it would not be necessary to remove the internal cladding and fittings of bathrooms which are on external walls. He had not inspected these walls. It is unrealistic to expect the internal linings to remain undisturbed while the external wall to which they are attached is removed. The work should remain in the schedule.

[213] There was debate concerning whether soffits needed to be removed to allow for the cavity to be incorporated with new cladding system and for the repair of damaged timbers. I find that they will need to be removed for proper inspection during repair. The estimates should remain on the schedule.

[214] The Council disputed whether all the tiles need to be removed and reinstated on battens as opposed to reaffixing tiles only where leaks are shown to have occurred. Dr Butt agreed that he had not been on the roof, carried out destructive testing, taken moisture readings or inspected the upper stories other than from the ground. He said that he would have to make further tests to verify the assessors' reports.



[215] I find that the need to check and replace decayed timber and adjusting the tiles to accommodate the new cavity are sufficient grounds for making provision for the removal and proper placement of the tiles.

### **Cost Estimates**

[216] During the course of the hearing Mr Hanns opposed some items in the schedule and pointed out arithmetical errors. There was considerable discussion between the experts in relation to the schedule of works and the costs and the items which could properly be charged and the proper rates. (At one stage, counsel for the Council and his witness worked together on the figures from the witness box).

[217] Whilst the parties did not necessarily admit liability there was general agreement that the property needs to be reclad, the framing repaired, and items, such as windows, need to be replaced.

[218] It also became clear that demolishing the building containing the two dwellings was not a practical possibility. New buildings would not be given building consent to cover the land in the same way. The only way of retaining the size of each of the dwelling houses is to repair the overall building.

[219] Parties had further opportunities to work on the figures and I take the claimants revised schedules as a starting point in considering the amount of damage. There were two options calculated. The following figures are based on the first option chosen by the claimant.

[220] The Council disputed the rates submitted by the claimant's witness. It also sought deductions for items which it said were not inspectable. The schedule prepared by the claimants is reproduced below with the Council's figures alongside.

[221] The schedule for Pirie Street is:-.

| <b>105 Pirie St</b>                         |                     | <b>Council Estimates</b> |              |
|---|---------------------|--------------------------|--------------|
| <b>General</b>                              |                     |                          |              |
| Internal protection                         | \$3,390.00          |                          |              |
| Disruption to existing                      | \$4,300.00          |                          |              |
| Western elevation                           | \$60,193.00         |                          |              |
| South elevation                             | \$56,618.00         |                          |              |
| Eastern elevation                           | \$27,580.00         |                          |              |
| Northern elevation                          | \$53,597.00         |                          |              |
| Roof  | \$15,209.00         |                          |              |
| <b>Subtotal</b>                             | <b>\$220,887.00</b> | Claim basis              | \$217,187.00 |
|   |                     | Non claimable            | -\$46,994.00 |
| Painting betterment                         | -\$3,160.50         |                          |              |
| <b>Sub total</b>                            | <b>\$217,726.50</b> |                          | \$170,193.00 |
| Preliminary and general 3%                  | \$6,531.80          |                          | \$5,105.79   |
| <b>Sub total</b>                            | <b>\$224,258.30</b> |                          | \$175,298.79 |
| Preliminary and general Measured            |                     |                          | \$65,750.00  |
| On site project management and site foreman | \$45,000.00         |                          |              |
| Allow mobile phone costs                    | \$3,000.00          |                          |              |
| On site office/lunchroom                    | \$3,300.00          |                          |              |
| Dry storage container                       | \$2,400.00          |                          |              |
| Phone. Fax, broadband                       | \$750.00            |                          |              |
| Portable toilets and cleaning               | \$3,600.00          |                          |              |
| Ongoing site cleaning including bin hire    | \$6,400.00          |                          |              |
| Final site tidy                             | \$1,300.00          |                          |              |
| Less scaffolding                            | -\$3,030.00         |                          |              |
|   | \$62,720.00         | \$62,720.00              |              |
| <b>Sub total</b>                            | <b>\$286,978.30</b> |                          | \$241,048.79 |
| Overheads and margin 12%                    | \$34,437.40         |                          |              |
| <b>Sub total</b>                            | <b>\$321,415.69</b> |                          |              |
| Contingency 10%                             | \$32,141.57         | 10%                      | \$24,104.88  |
| <b>Sub total</b>                            | <b>\$353,557.26</b> |                          | \$265,153.67 |
| Building consent application                | \$4,000.00          |                          | \$4,000.00   |
| Detailed plans and specifications           | \$25,000.00         |                          | \$25,000.00  |
| Tender and contract documentation           | \$2,000.00          |                          | \$2,000.00   |
| temporary encroachment licence              | \$2,000.00          |                          | \$2,000.00   |
| Continuing encroachment licence             | \$3,000.00          |                          | \$3,000.00   |
| Remediation specialist                      | \$32,000.00         |                          | \$32,000.00  |

|                                     |                    |                    |              |
|-------------------------------------|--------------------|--------------------|--------------|
| Fire report                         |                    | \$1,500.00         | \$1,500.00   |
| Structural engineering calculations |                    | \$2,500.00         | \$2,500.00   |
| Property boundary survey            |                    | \$1,500.00         | \$1,500.00   |
| Microscopic timber analysis         |                    | \$2,000.00         | \$2,000.00   |
| <b>Sub total</b>                    | <b>\$75,500.00</b> | <b>\$75,500.00</b> |              |
| Total                               | \$429,057.26       |                    | \$340,653.67 |
| GST                                 | \$53,632.16        |                    | \$42,581.71  |
| Total                               | \$482,689.42       |                    | \$383,235.38 |

## Adjustments

[222] It was conceded that the builder's margin in Wellington is usually 10%. I adjust the claim accordingly.

[223] The Council contended that some of the costs were not claimable. It is not always easy to follow the Council's schedules. I take as a basis for their submissions their Schedule 6A produced towards the end of the hearing. Even then, the references in the schedule are to both options provided by the claimants' quantity surveyor. I will take into account only those items referring to the claimants' first options on which the claim was based.

[224] The major item opposed by the Council was the removal and replacement of the windows.

[225] The windows were not suitable for the buildings as constructed. It was a major source of leaks. They must be replaced. There are no grounds for excluding that item.

[226] However, I have already found that the cost of the replacement joinery is to be borne by Walker. The other damage relating to the surrounding areas is the responsibility of all the respondents as indicated above. The balance of the costs relating to the installation is to be shared as set out below.

[227] The Council sought a reduction in the provision for scaffolding. I agree that it is unlikely that it will be needed for the full period of time. The Council conceded 14 weeks. I accept that as a more realistic level. The amount is accordingly adjusted in the schedule below.

[228] The Council disputed the costs relating to internal joinery such as bathrooms. In each case the removal of the external cladding and the adjacent windows is likely to damage the internal joinery which is attached to the wall. Wall linings are unlikely to survive the removal of the external wall and framing for repair without either removal and storage or replacement. I allow the claim to include internal joinery items as a consequence of the leaks.

[229] The Council opposed the painting of some items. There was an adjustment for painting in the revised claim. I do not consider any further reduction for internal painting reasonable. There was nothing to show that the paint would have in other circumstances have been replaced. The sole cause of the replacement is the repairs to the damage caused by the leaks. Accordingly the balance of the paint claim is reasonable.

[230] Mr Hanns challenged the need for a power cable, main switchboard and insulation. Mr Wutzler said that on many occasions the cost of removing, keeping and returning components after reconstruction is often in excess of the cost of replacement. This is the situation here.

[231] Mr Hanns challenged the need for a remediation specialist. The claim is for 120 hours of remediation specialist at \$250 per hour. The rate of remuneration was the subject of some investigation. All parties came to accept that this was the going rate in Wellington. However, Mr Hanns objected to the time to be spent on site. There is a separate sum of \$45,000 for site management including a project manager. (This is in addition to the claim for about \$43,500 for overheads).

[232] It became clear during the hearing that there were limited numbers of professionals able to supervise remediation. Mr Wutzler and Mr Butt were both identified as two of the three operating in Wellington. I find that it is reasonable that a remediation specialist be available during remediation. The management fees for the site should include the remediation specialist. The separate fee is declined.

[233] Preliminary and general costs for Pirie Street amounted to \$65,750.00. This is in contrast to a claim for the same item of \$14,000.00 for Austin Street. I adjust the claim to an equivalent amount.

[234] Mr Hanns objected to items 8-22 in the estimates for Pirie Street. These included the cost of site establishment including \$3,000 for cell phone usage on each site. I agree that the inclusion of this overhead as a chargeable item should be deducted. Mr Hanns objected to the provision of a lunch room costing \$3,300. This provision seems excessive and is declined. Mr Hanns objected to the cost of dry storage containers at \$2,400. Both properties have garages, one of which is unused. If the owners are away from the site during construction those garages can be used. The claim is declined.

[235] Mr Hanns objected to the provision of phone, fax and broadband at a cost of \$750.00. This again is an overhead matter and is declined. There was a claim for the provision of toilets with regular cleaners. The empty dwellings will have toilets available for use. The claim is declined.

[236] There was a claim for site cleaning during construction. This was for \$6400. The work practices should be such that the workplace is kept tidy and not require other contracted cleaners. The claim included skip bin hire. There was not a separate amount for skip bins but I allow \$1500 for that purpose. The balance of the claim is declined.

[237] The allocation of sums to pay other experts such as an engineer and a fire expert are reasonable.

[238] Mr Hanns objected to final cleanup costs of \$1300 on completion. If the workers on site have been using facilities and there is material that needs to be removed prior to the return of the furnishings, this is a reasonable claim.

[239] Mr Hanns provided alternative calculations and schedules. There was extensive handwritten documentation in support. In the end, I did not find it possible to match the calculations in a way which would diminish the amounts and items in Mr White's estimates based on Mr Wutzler's scope of works.

[240] Based on the experts meeting, the evidence presented, and the requirements for repairs to return these buildings into a habitable weathertight state I found that the removal and resupply of all windows are to be borne by Walker.

[241] The costs of the windows to be borne by Walker, are:-

|                               |    |           |
|-------------------------------|----|-----------|
| Pirie St Windows              |    |           |
| Western elevation             | \$ | 13,750.00 |
| Southern elevation            | \$ | 14,850.00 |
| Eastern elevation             | \$ | 2,200.00  |
| Northern elevation            | \$ | 9,900.00  |
| Subtotal                      | \$ | 40,700.00 |
| Subcontractors and margin 10% | \$ | 4,070.00  |
| Subtotal                      | \$ | 44,770.00 |
| Allowance for GST             | \$ | 6,715.50  |
| Total                         | \$ | 51,485.50 |

## **CONSEQUENTIAL LOSSES**

[242] There is a claim for ancillary costs of \$16,125.00 being an estimated \$10,000 for repair to furniture and fittings, additional insurance, alternative

accommodation, storage and removal, electrical connections and the like. These amounts were not challenged.

[243] Mr McBride and Ms Smitheram also claimed general damages for distress. They gave evidence in support.

[244] The council submit that the condition of Pirie St compared with Austin St is such that it does not appear that it is likely that the moisture ingress issues have had a dramatic impact in the terms of the claimants' occupation of the property. Accordingly damages for Smitheram should be at the lower end of the scale.

[245] There are two occupants but the burden is shared. Following the Court of Appeal in *Byron Ave*<sup>15</sup> I award \$25,000 to Mr McBride and Ms Smitheram jointly as occupants of Pirie Street.

### Conclusion on Quantum

[246] The adjusted schedule is as follows.

#### 105 Pirie St Amended

| <b>General</b>                   |                     |
|----------------------------------|---------------------|
| Internal protection              | \$3,390.00          |
| Disruption to existing           | \$4,300.00          |
| Western elevation                | \$60,193.00         |
| South elevation                  | \$56,618.00         |
| Eastern elevation                | \$27,580.00         |
| Northern elevation               | \$53,597.00         |
| Roof                             | \$15,209.00         |
| <b>Subtotal</b>                  | <b>\$220,887.00</b> |
| Less windows                     | -\$40,700.00        |
| Painting betterment              | -\$3,160.50         |
| <b>Sub total</b>                 | <b>\$177,026.50</b> |
| Preliminary and general 3%       | \$5,310.80          |
| <b>Sub total</b>                 | <b>\$182,337.30</b> |
| Preliminary and general Measured |                     |

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<sup>15</sup> *Byron Ave* [23010] NZCA 65, [129]

|   |                     |                    |
|---|---------------------|--------------------|
| On site project management and site foreman |                     | \$45,000.00        |
| Allow mobile phone costs                    | 0                   |                    |
| On site office/lunchroom                    | 0                   |                    |
| Dry storage container                       | 0                   |                    |
| Phone. Fax, broadband                       | 0                   |                    |
| Portable toilets and cleaning               | 0                   |                    |
| Skip bins                                   |                     | \$1,500.00         |
| Final site tidy                             |                     | \$1,300.00         |
| Less scaffolding                            |                     | <b>-\$3,030.00</b> |
|   | \$44,770.00         | \$44,770.00        |
| <b>Sub total</b>                            | <b>\$227,107.30</b> |                    |
| Overheads and margin 10%                    | \$22,710.73         |                    |
| <b>Sub total</b>                            | <b>\$249,818.03</b> |                    |
| Contingency 10%                             | \$24,981.80         |                    |
| <b>Sub total</b>                            | <b>\$274,799.83</b> |                    |
| Building consent application                |                     | \$4,000.00         |
| Detailed plans and specifications           |                     | \$25,000.00        |
| Tender and contract documentation           |                     | \$2,000.00         |
| temporary encroachment licence              |                     | \$2,000.00         |
| Continuing encroachment licence             |                     | \$3,000.00         |
| Remediation specialist                      |                     | \$0.00             |
| Fire report                                 |                     | \$1,500.00         |
| Structural engineering calculations         |                     | \$2,500.00         |
| Property boundary survey                    |                     | \$1,500.00         |
| Microscopic timber analysis                 |                     | \$2,000.00         |
| <b>Sub total</b>                            | <b>\$43,500.00</b>  | <b>\$43,500.00</b> |
| <b>Total</b>                                | <b>\$318,299.83</b> |                    |
| Allowance for GST                           | \$47,744.97         |                    |
| <b>Total</b>                                | <b>\$366,044.80</b> |                    |
| Uncontested ancilliary costs                | \$16,125.00         |                    |
| General damages                             | \$25,000.00         |                    |
| <b>Sub total</b>                            | <b>\$407,169.80</b> |                    |
| Plus windows                                | \$ 51,485.50        |                    |
| <b>Total</b>                                | <b>\$458,655.30</b> |                    |

[247] Roger Walker Architects Limited, Peter Hanns, K Road No 1 Limited and the Wellington City Council are each jointly and severally liable for \$407,169.80 and Walker for the extra amount of \$51,485.50.

#### **WHAT CONTRIBUTION SHOULD EACH OF THE LIABLE PARTIES PAY?**



[248] Each of these respondents has asked for an indemnity from the others. 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.

[249] 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.

[250] 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...

[251] Section 17(2) of the Law Reform Act 1936 sets out the approach to be taken and it provides that the contribution recoverable shall be what is fair taking into account the relevant responsibilities of the parties for the damage.

[252] The damage to the property is as a result of the negligence of Mr Hanns, Walker, K Road and the Council. The damage from the various faults discussed is identical. Water ingress from whatever source has resulted in that damage. The allocation of responsibilities is therefore proportional taking into account the negligent actions of each of those parties.

[253] As between the parties I allocate liability as follows based on the causes of leaks set out above. Where items have resulted in similar or the same damage they are included under 'windows'. The numbers represent percentages of the total repairs with the exception of the replacement of the windows.

### Percentages for Respondents

|              | Walker | Hanns  | K Road | Council |
|--------------|--------|--------|--------|---------|
| Windows      | 11.25  | 11.25  | 11.25  | 11.25   |
| Cladding     | 9      | 6.7    | 22.6   | 6.7     |
| Roof & other | 2.5    | 2.5    | 2.5    | 2.5     |
|              | 22.75% | 20.45% | 36.35% | 20.45%  |

[254] So the amounts due based on the percentages above are:-

|                                     |              |
|-------------------------------------|--------------|
| Walker for design fault (windows)   | \$51,485.50  |
| Walker share for failed supervision | \$92,631.13  |
| <b>Sub total</b>                    | \$144,116.63 |
| Hanns share                         | 83,266.22    |
| Council share                       | \$83,266.22  |
| K Rd Share.                         | \$148,006.22 |
| <b>Total</b>                        | \$458,655.30 |

### CONCLUSION AND ORDERS

[255] The claim is proven to the extent of \$458,655.30. Peter Hanns, Roger Walker Architects Limited, the Wellington City Council and K Road No 1 Limited are all jointly and severally liable for \$407,169.80 and Roger Walker Architects Limited is liable for an additional amount of \$51,485.50 for the windows. For the reasons set out in this determination I make the following orders:

- i. The claim against Mrs Papadopoulos is dismissed.
- ii. Peter Hanns is to pay the claimants the sum of \$407,169.80 forthwith. Peter Hanns is entitled to recover a contribution from Roger Walker Architects Limited, the Wellington City Council and K Road No 1 Limited for any amount paid in excess of \$83,266.22.

- iii. Roger Walker Architects Limited is ordered to pay the claimants the sum of \$458,655.30 forthwith. Roger Walker Architects Limited is entitled to recover a contribution from Peter Hanns, the Wellington City Council and K Road No 1 Limited for any amount paid in excess of \$144,116.63.
- iv. The Wellington City Council is to pay the claimants the sum of \$407,169.80 forthwith. The Council is entitled to recover a contribution from Peter Hanns, Roger Walker Architects Limited, and K Road No 1 Limited for any amount paid in excess of \$83,266.22.
- v. K Road No 1 Limited is to pay the claimants the sum of \$407,169.80 forthwith. K Road No 1 Limited is entitled to recover a contribution from Peter Hanns, Roger Walker Architects Limited and the Wellington City Council for any amount paid in excess of \$148,006.22.

[256] To summarise the decision, if the four liable parties meet their obligations under this determination, this will result in the following payments being made by the liable respondents to this claim:

|  |              |
|--|--------------|
| First Respondent, Peter Hanns                  | \$83,266.22  |
| Second Respondent, Roger Walker Architects Ltd | \$144,116.63 |
| Third Respondent, Wellington City Council      | \$83,266.22  |
| Fifth Respondent, K Road No 1 Limited          | \$148,006.22 |

[257] This decision has been reissued to deal with clerical slips in the calculations and the consequences in the orders. The Tribunal was asked about the allowance for GST at the new rates. The Tribunal member was unaware that the practice has been to make the allowance at the higher rate if it is unlikely that the remediation can be undertaken before the rate increases. An adjustment has been made accordingly.

[258] The parties have indicated that further orders may be sought. Parties have 15 working days from the date of reissue of this decision to make submissions and a further 5 working days to reply.

**DATED** the 22nd day of September 2010.

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Roger Pitchforth  
Tribunal Member