IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2010-100-000026
[2011] NZWHT AUCKLAND 20

BETWEEN	LUCY NORMA STANLEY and MELANIE JANE STANLEY as Trustees of the LUCY STANLEY FAMILY TRUST Claimants
AND	NORTH SHORE CITY COUNCIL First Respondent
AND	LLOYD REX BANTON AND WOLFGANG JOHN WHITE Second Respondents
AND	ROSS BARRY JONES Third Respondent (Removed)
AND	DARREN MCDONALD Fourth Respondent
AND	PATRICK COLIN FARRELL (Not served) Fifth Respondent
AND	JASON K WARD Sixth Respondent
AND	TREVOR WEBSTER Seventh Respondent (Removed)
AND	ALUMINIUM CITY (PENROSE) LIMITED Eighth Respondent

Hearing: 8, 9 and 10 February 2011

Appearances: N Keall, for the claimants
F Divich, for the first respondent
M Taylor, for the second respondent
G Kohler, for the third respondent
Fourth respondent – self represented
Sixth respondent – no appearance
M Perkins, for the seventh respondent

Decision: 31 March 2011

FINAL DETERMINATION
Adjudicator: P A McConnell

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INTRODUCTION

[1] Lucy Stanley, together with her co-trustee Melanie Stanley, are the owners of a leaky home. In 1998 Ms Stanley and her then partner, Ross Jones, purchased the section on which the house was built. They engaged Jason Ward to design the house and contracted various building professionals to build the house. Among these were Lloyd Banton and John White, who were contracted on a labour-only basis to carry out the construction work. Darren McDonald was engaged to provide and install the EIFS cladding system and Trevor Webster was the roofer and installer of the apron flashings.

[2] Ms Stanley alleges that Mr Ward was negligent in his design of the dwelling and that the construction parties were negligent in the work they carried out. She also claims that the then North Shore City Council was negligent in issuing the building consent and in carrying out inspections. No Code Compliance Certificate (CCC) has been issued for the dwelling as when Ms Stanley applied for the final inspection in 2004 the Council identified 19 items that needed to be attended to before they would consider issuing a CCC.

[3] Ms Stanley has not completed the remedial work and is basing her claim on the estimated remedial cost of $250,000, general damages of $40,000 and consequential and other costs of $95,953.75.

REMOVAL OF PARTIES

[4] Claims were also filed against Trevor Webster the roofer and Ross Jones, Ms Stanley's former partner. After the written evidence had been filed Mr Webster applied to be removed as he considered there was no evidence implicating his work in the leaks to the house. Mr Webster was engaged to supply and fit the asphalt shingles and the apron flashings to the dwelling. The only work done by Mr Webster that has been implicated in the defects causing leaks is the

lack of turnout or diverters at the end of the apron flashings. Mr Webster's undisputed evidence is that he constructed the apron flashings with the appropriate turnouts but these were interfered with by a subsequent tradesman, most likely the cladding installer. Mr Webster's evidence is supported by Mr Pope, one of the claimants' experts, whose opinion was that the kick out flashings had been installed but cut away during cladding installation.

[5] The parties who attended the first morning of the hearing neither opposed Mr Webster's removal nor indicated they would be contesting the evidence provided by Mr Webster and Mr Pope. Mr McDonald, although attending the Tribunal's office on the first morning of the hearing, did not attend the hearing until the third day. He was advised that the issue of the removal of Mr Webster would be considered as a preliminary issue and that he needed to attend the beginning of the hearing if he wished to oppose that removal. He chose not to do so. I concluded that there was no evidence to support a claim against Mr Webster and he was accordingly removed as a party unopposed before the hearing commenced.

[6] At the end of the hearing the claimants withdrew their claim against Mr Jones. This was not opposed by the second respondent. Ms Divich, for Auckland Council, had been unable to get instructions from her client. She however advised that if the matter was dealt with by way of application for removal she would not oppose it. Mr Jones was accordingly removed as a party at the end of the hearing. As indicated at the time I concluded there was insufficient evidence on which I could conclude Mr Jones owed Ms Stanley a duty of care in the role he assumed in administering the construction work on behalf of himself and Ms Stanley. At the time this house was constructed Mr Jones and Ms Stanley were engaged and living together. Ms Stanley knew that Mr Jones had no qualifications or experience in building or construction related issues.

[7] The claim therefore that needs to be determined relates only to the liability of the Council, Mr Banton and Mr White as the builders, Mr McDonald as the alleged cladding installer and Mr Ward, the designer. Mr Ward did not attend the hearing or file any evidence or submissions.

BACKGROUND FACTS

[8] In 1998 Mr Jones and Ms Stanley started looking for a house to buy. They wanted it to be their family home and also provide some space for Ms Stanley to run her business as a personal trainer. They were unable to find any suitable existing properties and decided to build. They purchased the section at 62A Sunrise Avenue, Mairangi Bay and then engaged Jason Ward to design their home and prepare the relevant plans and specifications. A building consent was issued for the dwelling on 3 December 1998.

[9] Mr Jones worked for Placemakers and was able to source materials at a good rate and find reputable trades people through his contacts at Placemakers. Ms Stanley and Mr Jones accordingly decided that they would engage a series of contractors, some on a labour-only basis, to build the house. LOJO Construction, being a partnership between Mr Banton and Mr White, was engaged to carry out the building work. This included setting out the job for the earth cuts and footings, construction of the footings, construction of the timber framing, wrapping the building with building paper, installation of the windows and internal fit out. They were not involved in the cladding or plastering of the property. While they tacked the head flashings for the joinery into place the still and jamb flashings were a proprietary system that came with the cladding and so was not part of their job.

[10] While there was a dispute as to the exact nature of the contract I accept it was a labour-only contract. All the subcontractors were engaged by Mr Jones or Ms Stanley and were paid directly by

them. In addition I accept Mr Banton's evidence that the contract amount did not cover supervision. Mr Banton may have offered to help Mr Jones with some general advice and assistance but I am satisfied that the agreement he had with Mr Jones and Ms Stanley did not include supervision of the other trades and contractors on site.

[11] Mr Jones engaged Mr McDonald to supply and install the EIFS cladding system. Mr McDonald engaged subcontractors to carry out this work. The liquid applied membrane was installed by Patrick Farrell. While he was named as a respondent he was unable to be located or served with the proceedings.

[12] There were some key differences between the house as built and the house as drawn in the consented plans. The most significant differences related to the deck area. Originally one of the decks was designed without any step down but this was changed during the course of its construction at the suggestion of Mr Banton. In addition, at the request of Ms Stanley, a solid balustrade was installed to part of the deck whereas the original plans had metal railings. The guttering system drawn on the side of the deck was also not built as per the design.

[13] The Council issued a building consent for the project and carried out inspections through to the post line inspection on 8 June 1999. During the course of the inspections it was noted that there had been some changes to the plans and new drawings may need to be provided.

[14] Mr Jones and Ms Stanley moved into the property in 1999 prior to the completion of the building work. In 2001 Mr Jones and Ms Stanley separated and the property was transferred into the sole name of Ms Stanley. At that time Mr Jones gave Ms Stanley a list of the work that still needed to be completed before the CCC could be

issued. Due to financial constraints Ms Stanley did not attend to all of the items on the list nor did she apply for a final inspection until 2004. At that inspection the inspector noticed 19 separate items that would need to be addressed before a CCC could be issued. A copy of the field memorandum setting out these items was given to Ms Stanley. The Council also says that Ms Stanley was given a letter advising her that she needed to apply for a weathertightness inspection. A weathertightness inspection was carried out by Mr Stone on 6 September 2005.

[15] Ms Stanley denies receiving the letter requiring the weathertightness inspection or calling for it. I however conclude that it is more likely than not that she was given the letter and that she was the person who booked the inspection. No other reasonable explanation can be given as to how an appointment was made for Mr Stone to carry out this inspection unless it had been made by Ms Stanley. As this all happened over six years ago and as Ms Stanley has had a particularly stressful time over the last few years it is not unexpected that she may have forgotten these events.

[16] While some of the items on the 2004 field memorandum were attended to not all have been addressed. No further final inspection was called for and no CCC has been issued for this property.

ISSUES

[17] The issues I therefore need to decide are:

- Why does the house leak? In particular, what are the defects which have caused water ingress?
- What is the appropriate scope and cost of remedial work? What other damages should be awarded?
- Was the Council negligent in issuing the building consent and carrying out inspections?

- Was Jason Ward, the designer, negligent and if so, was his negligence causative of loss?
- Did Mr Banton and Mr White breach any duty of care in carrying out the construction work?
- Does Mr McDonald owe the claimants a duty of care and, if so, did any breach of that duty of care cause or contribute to the claimants' loss?

WHY DOES THE HOUSE LEAK?

[18] Geoffrey Pope and Patrick O'Hagan, the claimants' experts, Ray Howarth, the assessor, Noel Flay, the Council's expert, and Alan Light, Mr Banton and Mr White's expert, gave their evidence concurrently on the defects that have caused leaks. Prior to the hearing an experts' conference had also been convened in which all of the experts agreed that the primary causes of the leaks and subsequent damage were the flashing junction at the bottom corner of the windows, balcony issues and the junction of the head and jamb flashing on one of the curved windows. Less significant causes of leaks related to the apron flashings, bi-fold doors and the stair stringer. Ground clearance issues were also identified as an area of future likely damage by the assessor.

Joinery Installation

[19] All of the experts agreed there was water ingress at the junction of the jamb and sill flashings on some of the windows. This was caused by inadequate sill flashings combined with insufficient sealant. The sill and jamb flashings were a proprietary system that were supplied and fitted by the cladding installers. Mr Howarth was of the view that this was an issue on all or almost all of the downstairs windows. I accept his evidence.

[20] The other cause of water ingress with the joinery was at the junction of the jamb and head flashing on the curved window on the

north elevation. The head flashing had no stop ends and no diverter had been fitted. Mr Banton advised that he or his workers had installed the windows but only tacked the head flashings in place as he was aware the sill and jamb flashings were a proprietary system that would be fitted by the cladding installer. He therefore left the completion of the head flashing to the cladding installer. His evidence was that it was the cladding installer's responsibility to create or install the turnout/diverter when completing the rest of the flashings and installing the cladding. Sufficient length had been left on the head flashings for a turnout to be created. On the curved window in the north elevation this had been cut short by the cladding installer.

[21] The majority of the experts, including Mr O'Hagan one of the claimants' experts, accepted that the window installation work done by Mr Banton and LOJO's employees was in accordance with the standard practice at the time this house was built. I accept therefore that this defect is also one for which the cladding installers are primarily responsible.

[22] There was also evidence that the bi-fold doors into the lounge have failed. There has been water ingress and subsequent damage caused by a failure of the mitre on these doors. This has been a minor contributing issue to the damage. The experts were in agreement that the mitre failure was unlikely to have been the responsibility of any of the parties to this claim.

Roof Apron Flashings

[23] All the experts agreed that the lack of a diverter or turnout to the roof apron flashings was a minor and secondary cause of damage. This on its own would not necessitate a reclad and could easily be remedied by targeted repairs. The undisputed evidence of Mr Webster was that the appropriate turnout had been installed but these had been subsequently cut off by the cladding installer. Mr

Pope, one of the claimants' experts was also of the opinion that a kick-out flashing had been installed which had been cut off during cladding installation. This minor defect would therefore appear to be the responsibility of the cladding installer.

Balcony Issues

[24] All of the experts' agreed there were several deficiencies in relation to the construction of the balconies which caused leaks. These related to the parapet rails, the flat tops, the junction of the deck to the balustrade, the junction to the deck of the house, the cladding to tile junction and no flashing at the balcony edge to the cedar fascia. Mr Howarth, Mr Flay and Mr Pope were all of the view that damage caused by the balcony defects combined to be significant. Mr Light was however not convinced that the damage was as significant as the other experts considered.

[25] The parapet tops had been built flat with no fall. This at the very least raised the risk of water penetration. The experts however were of the agreement that at the time this dwelling was built flat tops to balustrades were common practice. While detailing for parapets required a slope the experts agreed that sloped tops to balustrades were at the time the exception rather than the rule.

[26] Changes to the deck were made from what was on the consented plans. The plans provided for a railing balustrade to be fitted around the perimeter of the deck. At the request of Ms Stanley this was changed to a solid balustrade to part of the deck to provide some privacy. In addition the gutter detail on sheet 7 of the balcony details showed the gutter being fixed directly over the EIFS cladding. This was contrary to the Rockcote July 1997 brochure and was considered by the experts to be inappropriate. This detail was however not followed and the gutter was not fixed to the EIFS cladding.

[27] The plans also included a detail which showed the interior floor to be lower than the exterior deck floor on one of the balconies with no weatherproofing details. Again this was not how the dwelling was built. Evidence was given during the course of the hearing that Mr Banton had considered this to be inappropriate and had arranged for the designer to reconsider this issue and new details were provided.

[28] The experts also agreed that the top fixed railing to the balustrades, without adequate sealing or waterproofing had led to water ingress. Mr Light considered that the installation met the requirements at the time but the other experts were of the view that the Fosroc technical literature required sealant and flashings. Mr O'Hagan's view was that sealant had not been applied in accordance with the manufacturer's instructions.

[29] All the experts were of the opinion that there were issues with both the junction of the deck of the balustrades and the junction of the deck to the house. The issues with the junction of the deck to the balustrade were where the solid balustrade had been completed. The deficiency here related mainly to the Liquid Applied Membrane (LAM) installation and failure to follow the Equus specifications. There were also cracks to the junction of the concrete pillars as no allowance had been made for movement. Control joints were lacking, no flashing installed and no consideration as to how the details would work. Any deficiencies in this regard were with the work of the cladding installer.

[30] There was some dispute as to who had constructed the solid balustrades to the deck. From the evidence I am satisfied that one of LOJO's employees completed the timber framing. I accept Mr Jones evidence that this work was done by Stuart, one of the workers on site. I also accept that it was done under the contract with LOJO and

not as a private job. Mr Jones has kept detailed records of all payments made and there is no additional payment made to Stuart.

[31] While there is evidence that Stuart did the framing and fixed the building paper there is no direct evidence as to who fixed the harditex to the inside of the balustrade. As the cladding installer was responsible for cladding the exterior of the balustrade it would appear to be more likely that it was the cladding installer that also installed the harditex cladding to the inner side of the balustrade as well as the EIFS to the outer side. There is no evidence that this work was completed by or on behalf of LOJO. It does not appear on the sheet of extras and Mr Banton and Mr White's clear evidence is that this is not the way they would have built it if they had done the work.

[32] All the experts were in agreement that workmanship issues in the installation of the liquid applied membrane have been causative of leaks. All the experts, other than Mr Light, believe this was primarily an issue to do with the lack of upstand. Mr Light's view was that there could have been ruptures or leaks in the membrane around the deck perimeter. Initially there was a suggestion that the doors to the deck may have been inappropriately fitted prior to the application of the LAM. Mr Jones however gave evidence that the waterproofer had come through and done the first part of the waterproofing before the doors were installed and the cladding put on. He subsequently finished the work after the cladding was completed. I conclude that leaks and subsequent damage has resulted from either workmanship issues in the application of the LAM or deterioration of the LAM which would also most likely be a result of application deficiencies. The LAM deficiencies were the most significant issues with the deck to house junction.

[33] There were also LAM deficiencies in the junction with the deck to the balcony which have caused water ingress. Mr Pope noted that applying the LAM on the outside of the harditex sheeting

was unusual. The majority of the experts were of the view that the top fixed handrail was also a significant issue in these locations. While Mr Light's subsequent tests were unable to find any areas of water penetration round the top fixed handrails the investigations carried out by Mr Pope and Mr Howarth clearly point to water ingress from the top of the balustrade.

[34] The experts also agreed that there was leaking at the balcony to the cedar fascia junction on both decks. There was no clear agreement as to the causes for these leaks. A copper flashing had been installed in this area but its purpose appeared to be more decorative in nature than functional. The majority of the experts were of the view that if the decks had been built in accordance with the plans, and without the solid balustrade and wing walls, there would not have been leaks in this area. There was also some consensus that the Fosroc details have not been followed in terms of the cladding and plastering in these areas. The experts also agreed that a more effective application of the LAM in this area could have addressed the leaks in this area.

[35] I am satisfied there are leaks in the balcony to cedar fascia junctions as a result of poor detailing and inadequate flashing or other weatherproofing.

Other Defects

[36] Mr Howarth in his report noted some issues with the stair stringer. He noted decay requiring replacement of the bottom plate of the wall framing. This was a minor issue and could have been caused by issues with the deck above rather than with the stair stringer itself.

[37] There were also some future likely damage issues identified by Mr Howarth from penetrations not being effectively sealed and also ground clearance issues with the cladding being embedded in

the paving by the garage and entry. There is little evidence that these issues have caused current damage.

Conclusion

[38] I conclude that the main causes of water ingress that have resulted in damage are from inadequate sealing of the junctions between the jamb and sill flashings on the window and issues to do with the balcony. The major balcony issues relate to the deck to house and deck to balustrade junctions and are primarily as a result of LAM application deficiencies. Leaks have also been caused by inadequate clearances between the cladding and the tiles, the installation of the balustrade rails, the balustrades being constructed with flat tops and the failure to waterproof the junction between the columns and the deck. The other major defect in the area of the deck is the inadequate waterproofing at the balcony edge to the cedar fascia on both decks.

WHAT IS THE APPROPRIATE SCOPE AND COST OF THE REMEDIAL WORK?

[39] All the experts, other than Mr Light accepted a full reclad was required. Mr Light's reservations related to the lack of evidence of damage on some elevations. Based on the widespread failure of the sill and jamb flashing junctions, as detailed by Mr Howarth, in conjunction with the failures around the decks I am satisfied that a full reclad is both necessary and appropriate.

[40] The claimants' expert, Geoffrey Pope and the Council's expert, James White, were the only witnesses who gave detailed evidence on costs other than the costs provided in the assessor's report. The amended costs estimated for the remedial work was largely accepted by the Council with the exception that the Council submitted a deduction should be made for the difference between the cost of weatherboards and a like-for-like cladding as well as to the

cost of supervision of the remedial work. Mr White submitted that the difference in the cost between a like-for-like cladding and weatherboards was $87,493. Mr Pope calculated the difference at $44,336. While Ms Stanley accepted that the cost of weatherboards was more expensive than a like-for-like cladding she believes she is entitled to reclad with weatherboards and is seeking the full costs of the alternative cladding material.

[41] I however accept that cladding with weatherboards in this case is betterment and that the damages awarded for remedial work should be reduced by the difference between the cost of weatherboards and the cost of a similar replacement cladding to what the property was built with. While I accept Ms Stanley's desire not to clad with a similar material she together with Mr Jones were the people who chose the initial cladding material. While she can choose to reclad with a more expensive material the additional cost is not something she can successfully claim from any of the liable parties.

[42] Mr Pope's costs assessment for the difference between the weatherboards and the like-for-like cladding of $44,336 is accepted and accordingly the estimated cost of repairs, exclusive of Council fees and other specialists' costs, is established to the sum of $206,843. In relation to professional fees and supervision the only other dispute related to the supervision of the repair work. The claimants however conceded in closing submissions the $15,000 amount estimated by the Council's expert, was an appropriate cost of supervision. The claimants have accordingly established their claim in relation to remedial work to the amount of $241,602 which is calculated as follows:

Estimated cost of repairs	$206,843
Cost of attempted repairs to date	$6,467
Plans for repair work	$6,550
Council fees	$6,742
Supervision of remedial work	$15,000
TOTAL	**$241,602**

Consequential Damages

[43] In addition to the remedial costs the claimants are also seeking loss of rent of $38,250, costs of alternative accommodation while repairs are undertaken of $12,000, moving costs of $5,545 and the cost of applying for an assessor's report and the Tribunal application fee. There is no dispute with any of these claims other than the moving costs and the costs of applying to the Tribunal. The Tribunal application fee of $400 is costs of proceedings. Costs can only be provided for limited cases. If the claimants consider they have a legitimate claim for costs against any of the parties after receiving this determination a timetable will be set for any cost applications.

[44] The Council accepts the claimants' removal costs are reasonable except for the additional amount calculated for the removal of Ms Stanley's gym and business equipment. It submits that the business is run through a company and these losses are attributable to the business and not to the claimants personally. The costs of removing and storing Ms Stanley's gym equipment are a direct consequence of the remedial work that will be required. They are costs that Ms Stanley is likely to incur even if the gym equipment is owned by her company as the company could seek reimbursement from the claimant trust. I therefore allow the removal costs as estimated.

General Damages

[45] The Court of Appeal in *Byron Avenue* confirmed that the availability of general damages in leaky building cases was generally in the vicinity of $25,000 for owner-occupiers.[1] White J in *Coughlan & Ors v Abernathay & Ors* confirmed that standard rates are for general guidance and for the purpose of reducing costs and facilitating consistency.[2] Some flexibility is required in appropriate cases to reflect the particular circumstances and grounds upon which general damages are sought.

[46] Ms Stanley submits in this case it is appropriate that general damages of $40,000 be awarded due to the existence of several aggravating features. These include that she has borrowed heavily against the house in order to buy Mr Jones' share before leaks were discovered. She has also faced the predicament for a long time very much alone without the emotional or financial support of a spouse, partner or parents. Whilst I appreciate the difficult position Ms Stanley has been in, I do not consider these factors make her claim more deserving of a higher award of general damages than most other claimants. I note that all the owner-occupied claimants in *Byron Avenue* were single people. In addition the delay between the time Ms Stanley first knew she had a leaky home and her progressing this claim are matters for which she is largely responsible. I accept that financial pressure has contributed to this problem but note that there was a delay of approximately 18 months between obtaining an assessor's report and applying for adjudication.

[47] I accordingly conclude that the usual award for damages should be followed in this case and general damages is set at $25,000.

[1] *Body Corporate 189855 & Ors v North Shore City Council & Ors* (*Byron Avenue*) [2010] NZCA 65.
[2] HC Auckland CIV-2009-004-2374, 20 October 2010.

Conclusion as to Quantum

[48] The claim has been established to the amount of $332,897 which is calculated as follows:

Remedial work	$241,602
Loss of rent	$38,250
Alternative accommodation	$12,000
Moving costs	$5,545
Assessor report	$500
General damages	$25,000
TOTAL	**$332,897**

[49] Whilst the Tribunal has a discretion to award interest I do not consider this as an appropriate case to exercise such a discretion. The quantum of the remedial work is based on estimates and apart from some expert expenses and the cost of the assessor's report there has been no expenditure to date.

WAS THE COUNCIL NEGLIGENT IN ISSUING THE BUILDING CONSENT AND CARRYING OUT INSPECTIONS?

[50] The Council accepts it owes the claimants a duty of care in issuing a building consent and when inspecting the building work during the construction. It however submits that the claimants have failed to establish that the Council did not exercise due care and skill when issuing the building consent and carrying out the building inspections. It notes that the final inspection failed and no CCC was issued.

Building Consent Process

[51] The claimants submit that the Council was negligent in approving inadequate plans and specifications for the building work. They say that the Council could not have been satisfied that a

dwelling built in accordance with the plans and specifications was likely to meet the provisions of B2 and E2 of the Building Code or of section 7 of the Building Act. In relation to this allegation the claim is confined to one item namely the bedroom gutter being direct fixed to the EIFS cladding.

[52] The Council does not dispute this was a design deficiency. It however submits that there is no causative link between this deficiency and the dwelling leaking as this design item was not followed. The claimants however submit that there is a causative link because the plan was inadequate and therefore the builder had to redesign the entire balustrade fascia edge which has caused leaks.

[53] There are two problems with this submission. Firstly, the balustrade fascia junction is not a direct replacement of the defective design. More importantly however there is no evidence that any redesign or building work caused by omitting the direct fixed gutter has caused leaks. The majority of experts are of the view that it was the inclusion of the solid balustrade wall that had created the problems with the leaking at the balcony to fascia junction. They consider that if the house had been built in accordance with the plans with only a metal balustrade there would not have been leaks in this area.

[54] The final design related complaint by the claimants was that there were alterations during the course of construction that were not approved by the Council. The Council did however identify that construction was proceeding other than in accordance with the plans and noted the requirement for amended consent or plans during some of its inspections.

[55] In summary, therefore while there were some deficiencies with the plans, any defective design work was not followed. The dwelling was built with a stepdown for the deck and more particularly the gutter was not fixed directly over the EIFS cladding in the way

shown in the plans. There is accordingly no evidence that any defect in the plans has led to or caused water ingress.

Inspection Regime

[56] A further claim against the Council is that it was negligent in carrying out its inspections as it failed to exercise all reasonable care in carrying out its statutory powers, functions and duties. In particular it is alleged that the Council failed to establish and maintain a system of inspections capable of ensuring that the building work complied with the building consent and the Building Code. The claimants also allege that the Council failed to undertake all necessary inspections and in particular did not inspect particular elements of the construction process at the appropriate time.

[57] The Council carried out 7 inspections during construction and submits that the system of inspections it had in place was in accordance with reasonable practice at the time. In particular it submits that it was not standard practice at the time to carry out specific joinery flashings inspections with EIFS cladding, or LAM application inspections, as it relied on certificates from the approved applicators. The defects with this house it submits were picked up on the final inspection or alternatively certificates were requested. The Council notes the failed final inspection recorded 19 items that needed to be addressed before a CCC could be issued and these included certificates from the cladding installer and the LAM applicator.

[58] The standards by which the conduct of a Council officer should be measured are set out in *Askin v Knox*[3] where Cook J concluded that a Council officer's conduct will be judged against the knowledge and practice at the time at which the negligent act or

[3] [1989] 1 NZLR 248.

omission was said to take place. This was also reinforced in *Hartley v Balemi*[4] which states:

> [71] It is an objective standard of care owed by those involved in building a house. Therefore, the Court must examine what the reasonable builder, council inspector, architect or plasterer would have done. This is to be judged at the time when the work was done, i.e. in the particular circumstances of the case...
>
> [72] In order to breach that duty of care, the house must be shown to contain defects caused by the respondent(s). These must be proved to the usual civil standard, the balance of probabilities. Relative to a claim under the WHRS Act, it must be established by the claimant owner that the building is one into which water has penetrated as a result of any aspect of the design, construction or alteration of the building, or the materials used in its construction or alteration. This qualifies the building as a "leaky building" under the definition of s5. The claimant owner must also establish that the leaky building has suffered damage as a consequence of it being a leaky building. Proof of such damage then provides the adjudicator with jurisdiction to determine issues of liability (if any) of other parties to the claim and remedies in relation to such liability...

[59] The Court of Appeal in *Byron Avenue*[5] accepted that the Council owed a duty of care in its inspection even before the final inspection issuing a Code Compliance Certificate. It stated:

> [59] I consider that the Hamlin principle imposes on councils in respect of residential apartments a duty of reasonable care when inspecting work that is going to be covered up and so becomes impossible to inspect without destruction of at least part of the fabric of the building, even before issuing a code compliance certificate (or advice serving the same function). The effect of carelessness in the inspection phase was to lock in a defective condition which was not reasonably detectable by purchasers. They were entitled to rely on due performance by the Council of its inspection function, whether performed by itself or by an expert.

[4] HC Auckland, CIV-2006-404-2589, 29 March 2007, Stevens J.
[5] [2010] NZCA 65.

[60] The obligation on the Council is to take all reasonable steps to ensure that the building work is being carried out in accordance with the consent and the Building Code. It is not an absolute obligation to ensure the work has been done to that standard as the Council does not fulfil the function of a clerk of works.

[61] One area of dispute between the Claimants and the Council is whether it was reasonable for the Council to rely on producer statements or certification from licensed applications in relation to the installation of the LAM and the cladding or whether it should have inspected these items prior to them being covered up by other building work.

[62] One of the primary defects with this property was the joinery installation, in particular, deficiencies in the construction of the flashings. I accept that the Council did not undertake an inspection of the flashings prior to the work being covered up by other building elements but intended to rely on an installation certificate from the licensed applicator. The provision of such a certificate was one of the grounds on which the final inspection failed. Queries over the flashings were also noted in the subsequent weathertightness report.

[63] Mr Keall on behalf of the claimants submitted that such vulnerable building elements should have been inspected at the time. However, that submission is being made with today's knowledge being imposed back on builders and inspectors in 1999. In 1999 when the majority of inspections were carried out there was not the same knowledge of the vulnerability of various junctions and building elements. Mr Flay, the only expert appropriately qualified to give evidence on the practices of Councils, stated that with proprietary systems installed by licensed applicators the Council relied on producer statements which they requested at the final inspection. His evidence was that building inspectors in 1999 frequently did not carry out specific joinery flashing inspections with EIFS cladding but

relied on certificates from the approved applicators. In any event, the Council submits that these items were left to the final inspection and they were identified in either the failed final inspection or by Mr Stone when he undertook the weathertightness inspection.

[64] Relying on certificates from installers was in accordance with the reasonable practices of the day. There was no evidence produced on which I could conclude that such a practice fell below the reasonable standards of the day when considering the knowledge and practice of the time.

[65] Various issues regarding the balcony have also resulted in damage. The Council in its failed inspection requested a waterproofing certificate for the decks. For similar reasons as outlined in relation to the cladding system I conclude that the Council was not negligent in failing to detect any deficiencies with the application of the LAM. The evidence also established that flat top balustrades were in accordance with the general practice of the time. In addition it is likely that the metal rail was not installed until after the 1999 inspections.

[66] The final balcony issue is with the junction of the deck to the balustrades. In relation to this issue there is little reliable evidence of exactly where construction was at the time of the 1999 inspections. In any event I accept that it was reasonable for the Council to leave inspection of these items to the final inspection.

[67] The issue with the roof apron flashings was picked up in the weathertightness inspection. The typed report had a cross beside kick outs. The evidence is that the roof apron flashings were originally installed with stop-ends but these were subsequently cut off by the cladding installer. It is not known exactly when this was done. It is possible that the Council passed the flashings prior to them being tampered with. In any event they were subsequently picked up

so there is no evidence on which I could conclude the Council was negligent in relation to this defect. The Council also picked up the lack of sealing to penetrations in the final inspection in items 2 and 4. It also picked up in item 5 the ground level issues.

[68] In summary, therefore, I conclude that the claimants have failed to establish any negligence on the part of the Council in carrying out inspections or in failing to establish a regime capable of identifying whether there was compliance with the Code. All of the defects were either noted in the final failed inspection or installation certificates or producer statements were required to cover those areas of construction. I do not consider that the Council was negligent in relying on installer certificates for the waterproofing membrane or the EIFS cladding system at the time this property was contracted.

[69] Mr Keall, for the claimants, further submitted that the Council was patently negligent in failing to provide a copy, or notify the claimants, of the weathertightness issues notified in Mr Stone's weathertightness inspection report. I accept it may have been prudent for the Council to have provided Ms Stanley with more information at this time. However, there is no causative link between any alleged failure to advise Ms Stanley of the outcome of the weathertightness report and the loss she has suffered. Mr Stone's weathertightness report was never completed and it was not sent to the CCC committee. One of the reasons for this may have been that the Council was waiting for Ms Stanley to provide further documentation and information in relation to the 19 matters noted on the final inspection. As Ms Stanley had been unable to rectify or comply with all those matters it is unlikely that Ms Stanley would be in any different position today if she had been provided with the incomplete report or if that report had been completed. There is accordingly no causative link between any alleged dereliction of duty by the Council in 2004 and the loss suffered by the claimants.

[70] The claim against the Council is therefore dismissed.

JASON WARD'S LIABILITY

[71] Jason Ward was the designer of the property. Although he was served with the proceedings he took no part in the hearing and filed no evidence or submissions. The claimants allege the plans were deficient in two key respects. Firstly the balcony floor level was drawn higher than the internal floor level of the lounge and secondly the bedroom gutter was drawn as being direct fixed to the fascia. The dwelling as built however did not incorporate either of these two deficiencies. Mr Banton advised that prior to construction of the deck he or Mr Jones contacted the designer and the deck levels were reconfigured so that a step down was incorporated. The direct fix gutter was also not followed as set out in more detail in paragraphs 52 - 55.

[72] I accept there were shortcomings and deficiencies in the plans. However in order to establish a breach of the duty of care there must be a causative link between the deficient work and either the claimants' loss or the defects causing damage. There is no causative link with this dwelling between the deficiencies in the plans and the leaks or the loss. The claim against Mr Ward is therefore dismissed.

DID MR BANTON AND MR WHITE BREACH ANY DUTY OF CARE IN CARRYING OUT THE CONSTRUCTION WORK?

[73] Mr Banton and Mr White were contracted as labour-only builders to carry out various parts of the construction work. It is now reasonably well established that labour-only builders owe homeowners a duty of care.[6] The scope of the duty owed and whether or not Mr Banton and Mr White were negligent depends on

[6] *Boyd v McGregor* HC Auckland CIV-2009-404-5332, 17 February 2010.

the scope of their involvement, and the functions and tasks they carried out. Mr Banton and Mr White were contracted to set the job out for earth cuts and footings, construct the footings and timber framing of the property, wrap the building with building paper, install the aluminium joinery and some internal building work and fit out. In order to determine whether Mr Banton and Mr White breached any duty of care owed it is necessary to consider the defects that have caused leaks and determine what responsibility, if any, they have for each defect.

Joinery Installation

[74] While Mr Banton and Mr White installed the windows they did not install the sill and jamb flashings. These were installed by the cladding installer. Mr Banton and Mr White therefore have no liability for any deficiencies in the installation of the jamb and sill flashing. The only defective flashing in which they had any involvement was the head flashing for one of the curved windows. I accept their evidence that they only tacked the flashing in place expecting the cladder to complete installation and install the required turn out diverter. The experts who were involved in building work in New Zealand at the time this house was built agreed that this was accepted or standard practice.

[75] Accordingly, I conclude that there is no evidence that the work done by Mr Banton and Mr White in installing the windows was defective. In addition there is no causative link between any work done by Mr Banton and Mr White in installing the windows and the leaks to the dwelling.

Roof Apron Flashings

[76] Mr Banton and Mr White were not involved in the installation of the flashings. In addition it was not alleged that they were the

subsequent trade involved in cutting or tampering with the flashings. They accordingly have no responsibility for this defect.

Balcony Issues

[77] Mr White and Mr Banton similarly had no responsibility for the installation of the LAM. In addition it was accepted that they were not responsible for the fixing of the metal handrail.

[78] Mr White and Mr Banton were however responsible for constructing the deck framings, and I accept that one of their employees also constructed the frame for the solid parts of the balustrade and wrapped it in building paper. I have already concluded that it was more likely than not that it was the cladder who installed the harditex on the inside of the balustrade. Mr Banton accepted that the parapet tops had been constructed flat with no fall. His evidence was that the cladding installer would create that fall. Mr Light who is an experienced cladding installer, accepted that this was sometimes done. In any event the experts accepted that flat balustrade tops were standard practice for the time this dwelling was built.

[79] The defects with the junction of the deck and the balustrade mainly related to workmanship with the LAM and failure to follow the Equus specifications. I do not accept Mr Keall's submissions that there is evidence of a lack of upstand to the substrate or his submission that a fillet should have been installed. The experts did not agree these issues were causative of leaks. In addition the allegation that there was poor sequencing in that the joinery was installed prior to the deck waterproofing was not supported by the evidence. Mr Jones gave clear and undisputed evidence that the waterproofing was carried out as a two-stage process. In addition Ms Stanley accepted that the residue on the joinery was from subsequent repairs and not from original construction work.

[80] While the building wrap was installed prior to the LAM, Mr Banton's evidence was that he expected the LAM applicator to tack the building paper up while he completed his work and then drop it down later. This was accepted by the majority of the experts as being reasonable. There is no evidence that this was not in accordance with good practice at the time or that it was causative of leaks.

[81] The final issue to do with the deck relates to the junction between the balcony and the cedar fascia. This area was inadequately flashed or waterproofed. While I accept that there has been leaking at the balcony to cedar fascia caused by inadequate flashing there is little evidence that this was the responsibility of the builder.

[82] During the course of the hearing the experts drew on the whiteboard a picture of this junction as built and indicated where the flashing should ideally have been installed. Given the location of the flashing it is more likely that this would have been the responsibility of the cladding installer rather than the builders. The copper flashing which the builders had some input into was one designed for aesthetic purposes and not to act as a flashing.

[83] I accordingly conclude that the claimants have failed to establish that any building work for which Mr Banton and Mr White were responsible has been implicated in the causes of leaks. The primary causes of leaks relate to workmanship issues with the LAM application, the joinery flashings and installation of the cladding. Mr Banton and Mr White did not carry out any work implicated in the leaks and they were not responsible for supervising the contractors who did the defective work.

[84] Mr Keall submitted that some of the defects related to sequencing issues and that Mr Banton and Mr White had a responsibility to discuss the work with the contractors who followed

them. I am not however satisfied that labour-only carpenters can be found to be liable for poor workmanship of other skilled trades engaged on site where those trades were not contracted by them or supervised by them. In any event there is little evidence on which I could conclude that failure to communicate with the cladding or LAM installers would have made any difference.

[85] It is an objective standard of care that the Tribunal must apply. Having examined all the evidence I conclude that the claimants have failed to establish that Mr Banton and Mr White's work, judged at the time when the work was done, was not carried out in accordance with the practices of a reasonably competent builder. There is little if any evidence that the building work which they were contracted to carry out has been causative of leaks. The claim against Lloyd Banton and John White accordingly fails.

WAS MR MCDONALD NEGLIGENT?

[86] I accept Mr Jones' evidence that Mr McDonald was contracted to provide and install the EIFS cladding system. This included the proprietary flashings that came with the cladding. Mr Jones kept detailed chronological records of all money spent on building the house. This together with his clear recollection of certain events on site established that it was Mr McDonald that was contracted to do this work and that he supervised the workmen on site.

[87] Mr McDonald chose not to take any part in the hearing other than giving evidence. I did not find his evidence persuasive. In the documents provided prior to the actual hearing he submitted that Mr Jones may have independently contracted his subcontractors to carry out this work. There is no evidence to support this. To the contrary the clear evidence is that the full amount was paid to Mr McDonald. Mr McDonald further submitted that he may have been used only as a means to get the material supplied. Again there is no

evidence to support this. Mr McDonald's evidence at hearing was inconsistent and at times contradictory. It was also contrary to the documentary records that exist.

[88] Mr Jones' evidence in comparison was clear, consistent with the documentary record and with the other evidence before the Tribunal. Unlike Mr McDonald he could recall various events that happened including getting Mr McDonald to sign a receipt for a cash payment made. I note this hand written receipt was left with Ms Stanley when she and Mr Jones separated and was included in the discovery that she produced.

[89] I am accordingly satisfied on the evidence presented that Mr McDonald was contracted to supply and install the EIFS cladding system. I have already concluded that poor workmanship with the installation of the cladding system has been causative of leaks. In particular the joinery installation defects are the responsibility of the cladding installer and it was most likely the cladding installer that cut away or removed the turn outs to the apron flashings. There are also some aspects of the cladding installer's work that has been implicated in the leaks to the balcony. I accept there are defects for which Mr McDonald is not responsible particularly in relation to the LAM. However given the extent of the damage caused by defects for which he is liable I conclude he has contributed to defects that necessitate the full recladding of the dwelling. He is accordingly liable for the full amount of the established claim.

CONCLUSION AND ORDERS

[90] The claimants have established their claim to the extent of $332,897. For the reasons set out in this determination I make the following orders:

i. Darren McDonald is ordered to pay Lucy Norma Stanley and Melanie Jane Stanley the sum of $332,897.00.

ii. The claim against Auckland Council as successor to the assets and liabilities of the North Shore City Council is dismissed as are the claims against Lloyd Rex Banton, Wolfgang John White and Jason Ward.

iii. Trevor Webster, the seventh respondent, and Ross Barry Jones, the third respondent, were both removed as parties prior to the conclusion of the adjudication.

DATED this 31st day of March 2011

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P A McConnell
Tribunal Chair