IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI 2010-100-000112
[2012] NZWHT AUCKLAND 43

BETWEEN	ROGER JERZY AND SAMANTHA KAY ZAGORSKI Claimant
AND	WILKINSON BUILDING AND CONSTRUCTION LIMITED First Respondent
AND	ALLIED HOUSE INSPECTIONS LIMITED Second Respondent
AND	AUCKLAND COUNCIL Third Respondent
AND	RICHARD ANDREW JOHN WILKINSON Fourth Respondent
AND	CATHERINE WILKINSON Fifth Respondent
AND	TIMOTHY JOHN BURCHER Sixth Respondent
AND	HITEX BUILDING SYSTEMS LIMITED Seventh Respondent
AND	IAN CONRAD HOLYOAKE Eighth Respondent

Decision: 21 September 2012

FINAL DETERMINATION
Dealing with Quantum
Adjudicator: P A McConnell and M A Roche

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INTRODUCTION

[1] This determination deals with the amount of damages that should be awarded to Mr and Mrs Zagorski and the contribution that each of the liable respondents should pay. In February 2012 we issued a decision on liability but adjourned the issues of remedial scope and quantum to allow Mr and Mrs Zagorski to obtain further expert advice. On 24 August 2012, we issued a decision in which we concluded that the appropriate remedial scope was for the dwelling to be reclad.

[2] Evidence in relation to the appropriate award of damages for the reclad of the dwelling was given at the initial hearing. Parties had accordingly agreed that if we concluded a reclad was necessary there would be no need for further evidence to be given in relation to the quantum. Our 24 August 2012 decision however provided a timetable for submissions to be filed, particularly on the issue of contribution, given the significance of Mr Holyoake's clear and unequivocal evidence at the 31 July 2012 hearing, to our conclusions on remedial scope.

[3] The issues still to be determined are:

- What is the likely cost of the remedial work?
- What other damages should be awarded?
- Should damages be assessed on the basis of loss of value or the cost of remedial work?
- Are all liable respondents liable for the full amount of the established damages?
- Should the contractual claims take precedence over the claims in tort?
- What contribution should each of the liable parties pay?

WHAT IS THE LIKELY AND REASONABLE COST OF THE REMEDIAL WORK REQUIRED?

[4] At the expert's conference convened on 11 October 2011 the quantum experts, other than Mr Bayley, agreed that $385,337 was a reasonable estimate for the cost based on the dwelling being fully reclad. Mr Angell, Mr Maiden and Mr Smith confirmed at hearing that they still considered this amount the appropriate cost if a reclad was required. Mr Bayley however considers that further deductions should be made from this amount.

[5] Other than some minor differences on various line items Mr Bayley's dispute with the costs were in four key areas, namely:

- The cost of replacing the northern deck and balustrade.
- The percentage and cost allowed for timber replacement.
- The square metre rate for installing new EIFS cladding.
- The appropriate rates for P&G, margins and professional fees.

The deck

[6] Mr Bayley's view is that as the leaks occurred at the junction of the deck and the cladding there is no need to replace the actual deck. Mr Maiden however considers that the deck membrane will be damaged in the process of remedying the junctions and therefore the deck membrane would need to be replaced. Mr Angell also agreed that it would be very difficult to replace the joint and framing without damaging the membrane and Mr Smith concurred. We therefore accept that it would be more likely than not that the membrane would need to be replaced as a consequence of the other work that is required around the deck. Accordingly we conclude it is reasonable

for the northern deck replacement costs to be part of the remedial costs.

Timber replacement

[7] Mr Bayley thought Mr Angell's assessment of 70 per cent of the timber needing replacement was too high. Mr Angell however confirmed that his costs were based on the need to replace 70 per cent of the timber in the confirmed damaged areas only and 15 per cent in the rest of the house. The only difference therefore between Mr Bayley and the other experts is whether 70 per cent of timber replacement was likely to be required in the confirmed damage areas. While Mr Bayley still considered Mr Angell's estimates to be high, we consider a 70 per cent allowance in confirmed damaged areas and 15 for the rest of the dwelling is reasonable.

EIFS cost

[8] Mr Bayley considered that the square metre rate for replacement of EIFS should be $105.00 per square metre rather than $150.00. He said that he had confirmed with Specialised Consultant Products just before the hearing that the $105.00 a square metre rate was applicable. No one gave evidence on the square metre rate of Hitex which was the cladding used.

[9] We consider the $150.00 per square metre rate allowed for in the estimated costings is reasonably standard. While we accept that one supplier may have provided a figure of $105.00 per square metre it is far from clear whether any adjustments would need to be made for the particular design of the dwelling or for the additional components that may be required.

Margins and professional fees

[10] Mr Bayley submits that the amount added for margins should be four per cent rather than the eight per cent allowed for by the other experts. Mr Bayley considered that the residential market was particularly competitive and that some builders had accepted a two per cent margin for residential work. While there may be some examples of a four per cent margin being charged, this is relatively rare in residential dwellings particularly for remedial work. Given the evidence of the other experts, and with reference to the numerous remediation costings considered by the tribunal, we consider that few reputable builders with experience in remediating leaky homes would take on this job with a four per cent margin. This is a house that has been reclad once and still leaks. We accordingly conclude that an 8 per cent margin is reasonable. For similar reasons we also consider the P&G sum of eight per cent and the professional fees of 15 per cent are reasonable for this job.

[11] We accordingly accept that the estimated costs as agreed by Mr Angell, Mr Maiden and Mr Smith of $385,337.00 have been established as the likely cost of recladding the dwelling.

WHAT OTHER DAMAGES SHOULD BE AWARDED?

[12] In addition to the estimated costs of the remedial work the claimants seek:

- General damages of $35,000.
- Stigma of $115,000.
- Loss of rental for the remedial period for 26 weeks at $950 a week; $24,700.
- Interest.
- Costs.

General Damages

[13] The claimants have applied for general damages of $35,000. *Sunset Terraces* and *Byron Avenue* Court[1] of Appeal decisions establish that the appropriate measure depends on individual circumstances. However, for owner occupiers the usual award will be in the vicinity of $25,000. White J in *Coughlan v Abernethy* [2] confirmed that standard rates are for general guidance and for the purpose of reducing cost and facilitating consistency. Some flexibility is required in appropriate cases to reflect the particular circumstances and grounds upon which general damages are sought.

[14] The Council submitted that as this was no longer the Zagorskis' home, general damages should be assessed with a starting point of $15,000 being the usual award for non-owner occupied properties. While we accept the home is now tenanted we consider the guidelines for owner occupied homes are the appropriate criteria to apply in the circumstances of this case. The stress and inconvenience suffered by Mr and Mrs Zagorski being unable to sell their home when shifting to Australia has been considerable. It does not equate to the situation claimants find themselves in when an investment property is found to be leaking.

[15] We do not however consider that an award for damages of $35,000 is warranted. We accept that the Zagorskis' son, Max, had a number of health related issues while living in the property but we are not satisfied that this was caused by the dwelling being a leaky home. In this regard we note that Mr Zagorski had the property tested before they rented it out, and those tests did not detect any

[1] *North Shore City Council v Body Corporate 188529 (Sunset Terraces)* [2010] NZCA 64, [2010] NZLR 486 (CA) *O'Hagan v Body Corporate 189855 (Byron Avenue)* [2010] NZCA 65, [2010] 3 NZLR 486.

[2] *Coughlan v Abernethy* HC Auckland, CIV-2009-004-2374, 20 October 2010.

issues which would raise health concerns. We accordingly conclude that an appropriate award for general damages is $25,000.

Stigma

[16] The claimants are seeking $115,000 for stigma. Both of the valuers who gave evidence for the claimants accepted that there is a drop in value or stigma attached to all monolithically clad homes even if they do not leak. They also accepted that the stigma attached to a remediated home was less than that attached to a monolithically clad home that had not been remediated even if there was no evidence of leaks.

[17] It would be unrealistic to conclude that there would be no diminution of value for a leaky home that has been repaired. The difficulty claimants face with stigma claims is however twofold. Firstly, evidence suggests that all monolithically clad homes may attract a stigma or reduction in value because of the cladding material itself regardless of whether they leak. It is the claimants who have in this case chosen to buy, or in other cases chosen to build properties, which are monolithically clad.

[18] The second problem facing claimants is one of proof of actual loss. There are a number of factors that affect the purchase price or value of properties. In a rising market, or where there is a shortage of homes, an appropriately remediated formerly leaky home may attract very little, if any, stigma or reduction in value. However, in a depressed market this factor may have more relevance and mean a lower price could be obtained. Until such time as the claimants sell their property at a loss it is difficult to establish loss and therefore very difficult to conclude that there is any loss due to stigma.

[19] The level of stigma still attached to a remediated home will also vary depending on the cladding material used in the reclad. Recladding in weatherboards for example can reduce any potential stigma. None of the valuers were able to point to any evidence to suggest that additional stigma would be attached to this home due to the fact that the initial reclad is now leaking. There is accordingly no evidence to suggest that there is any greater stigma attached to the dwelling than when the Zagorski's purchased it.

[20] We accordingly conclude that the claimants have failed to establish any diminution in value of their property due to the home being a leaky home that is greater than the stigma attached to all monolithically clad homes and greater than the stigma attached to it when Mr and Mrs Zagorski bought it. This part of their claim is therefore dismissed.

Loss of rental

[21] The claimants were seeking loss of rent for 26 weeks at $950 a week. Mr and Mrs Zagorski gave evidence that they were now renting out the property for $875 a week. They estimate that the remedial work will take 26 weeks and are now seeking $22,750 for loss of rent. No respondent appears to have disputed this amount.

Interest

[22] The claimants sought interest on the amount being awarded. While the Tribunal has the discretion to award interest we do not consider this is an appropriate case to exercise such a discretion. The quantum for 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 except for the costs in progressing the claim through the Tribunal.

Costs

[23] The claimants also seek their legal and expert's costs in resolving this claim. Section 91 of the Act limits the Tribunal's jurisdiction to award costs to situations where costs have been incurred unnecessarily either by bad faith or allegations or objections that are without substantial merit. It would be premature to find that either of these criteria had been established at this point. A timetable is set out at the end of this determination to deal with any costs application under s 91 of the Act.

Conclusion as to quantum

[24] The claim has been established to the amount of $433,087 which is calculated as follows:

Remedial Work	$385,337
Loss of Rent	$22,750
General Damages	$25,000
Total	$433,087

SHOULD DAMAGES BE ASSESSED ON THE LOSS OF VALUE OR THE LIKELY COST OF THE REMEDIAL WORK?

[25] The Council argues that as Mr and Mrs Zagorski are no longer living in the property and intend to sell it once it is remediated damages should be assessed on loss of value rather than the cost of the remedial work. Mr Robertson submits the Council's valuer has assessed the loss of value to be $360,000 which is less than the cost of the remedial work.

[26] Legal authorities support the proposition that a successful claimant is not entitled to more than the value of the most appropriate

remedy for the damage or loss caused. When assessing loss the Tribunal should not apply a fixed rule as there is no prima facie rule as to whether diminution of value or the cost to reinstate or restore defects is the most appropriate measure of loss. Each case must be judged on its own mixture of facts both as they affect the claimants and the other parties.[3] The Tribunal should also select the measure of damages which is best calculated to fairly compensate the claimants for the harm done while at the same time being reasonable as between the claimants and the other parties.

[27] Three valuers gave evidence at the hearing, Robert Yarnton and Howard Morley for the claimants and Michael Gamby for the Council. Mr Gamby valued the property in its existing condition at $490,000 and in an undamaged condition at $850,000. Mr Morley however valued the property in an undamaged condition as $940,000 and Mr Yarnton at $925,000. Mr Morley's valuation had been prepared when the Zagorski's were considering selling the property and before they discovered it was a leaky home.

[28] Mr Robertson submits that we should accept Mr Gamby's valuation and reject those of Mr Yarnton and Mr Morley because of the age of Mr Morley's valuation, size discrepancies and valuation methodology. We do not consider the age of the valuation, given the current state of the Auckland real estate market, or the other factors mentioned by Mr Robertson are sufficient justification to reject both Mr Yarnton and Mr Morley's opinions. If their figures are accepted then the loss in value would be greater than the cost of repairs. Even on Mr Gamby's figures the difference between the established remedial costs and loss of value is relatively insignificant.

[3] *Dynes v Warren & Mahoney* HC Christchurch, A252/84, 18 December 1987, and *Warren & Mahoney v Dynes* CA 49/88, 26 October 1988; *Bell v Hughes* HC Hamilton, A110/80, 10 October 1984,.

[29] Assessing damages based on loss of value is just as likely to result in an assessment greater than the remedial costs than one less than the remedial costs. We therefore conclude damages calculated on the basis of estimated remedial costs is in the circumstances of this case the most appropriate way to assess loss.

ARE ALL LIABLE RESPONDENTS LIABLE FOR THE FULL AMOUNT OF ESTABLISHED DAMAGES?

[30] Mr McDonald submits that Mr Holyoake's refusal to provide a warranty for a partial reclad has changed the whole thrust of the repairs from localised to a full reclad. He submits this should be seen either as a contribution issue or as something that has broken the chain of causation in terms of loss.

[31] The Council also submits that Mr Holyoake should bear responsibility for the costs of the repairs in excess of what was required on a targeted basis given his "inexplicable and unwarranted refusal to countenance repairs on a localised basis." Alternatively the Council submits that this should be taken into account when assessing contribution. While we accept that from the other respondent's points of view the increase in potential liability may be unfair, we do not consider Mr Holyoake's stance is sufficient to break the chain of causation. Mr Holyoake's evidence that he would not be willing to give a warranty or provide a producer statement for remedial work, that was as extensive as the majority of experts considered appropriate, may have been a tipping point but was not the only factor in determining that a reclad was required. We however consider it appropriate to take this into account when determining contribution.

[32] Therefore given the findings of our two previous determinations, we conclude that all liable respondents are jointly and severally liable for the full amount of the established claim. The

relative contribution each party had to the claimants' loss, and the damages awarded, will be taken into account when determining contribution.

[33] Mr Holyoake appears to be submitting that both his and Hitex's liability should be reduced because either the warranty was not invoked or because there was a prior settlement between the parties. In making these submissions Mr Holyoake is once again attempting to introduce new evidence both in relation to the warranty and an alleged settlement. Included in the new evidence is a transcript of what took place at a meeting at the property which he alleges resulted in a settlement agreement. Mr Holyoake did not give any evidence at the hearing on any earlier settlement nor was this raised as a potential defence until now. Furthermore Mr Holyoake did not produce a copy of the recording or transcript of the meeting at or before either hearing, nor were witnesses questioned on this alleged settlement. We accordingly are not allowing this evidence to be produced at this late stage.

[34] Even if we were to accept the transcript it does not support Mr Holyoake's submission. The transcript makes it clear there was no agreement reached at the meeting on 20 May 2010.

[35] Mr Holyoake in his further submissions dated 4 September 2012, is also once again trying to revisit issues which have already been decided by the Tribunal. His submission relates more to scope and liability than quantum. We decline to revisit issues which have already been covered in earlier final determinations.

SHOULD THE CONTRACTUAL CLAIMS TAKE PRECEDENCE OVER THE CLAIMS IN TORT?

[36] Contribution between contract breakers and tortfeasors was recently considered by the Supreme Court in *Marlborough District*

Council v Altimarloch Joint Venture Ltd [4] where a contract breaker and a tortfeasor were both liable for damages. The majority required the contract breaker to pay damages first, effectively indemnifying the tortfeasor from its liability. The majority also found that the contract breaker had no right to contribution from the tortfeasor.

[37] Mr Robertson has submitted that the dicta in *Altimarloch* is that where a claimant is successful both against a contracting party and against parties in tort, the claimant should exhaust its contractual remedies first because the measure of tortious loss is the short-fall once those contractual rights have been exercised. As the Wilkinsons have been found liable in contract for the full amount of the established damages, acceptance of Mr Robertson's submission would result in all the remaining respondents being indemnified by the Wilkinsons.

[38] The assertion that *Altimarloch* requires contract breakers to pay damages first without contribution from tortfeasors overlooks two aspects of the decision. These are first, the qualification that fairness in the particular case required the contract breaker to pay first.[5] Secondly, the reason the tortfeasor was not required to contribute in *Altimarloch* was because of the absence of a common legal burden between the respondents. The majority held that the nature of the liabilities and of the resulting damage attributed to the tortfeasor and contract breaker were too different to be apportioned and that the tortfeasor could not be required to contribute to a loss of a character for which it had no liability.

[39] Applying these two aspects of *Altimarloch* to the present case, we see no reason why fairness requires the Wilkinsons to pay damages first. We consider that the Council is highly culpable for the

[4] *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11 [2012] 2 NZLR 726.
[5] Above n 4 at [72]-[73], Blanchard J.

damage to the house and its failure to comply with the Building Code. In *Altimarloch,* had there been no contract, the Council would not have had any liability. In this case, whether a contract containing a vendor warranty existed or not, the Council would still have been in breach of its duty of care to the owners of the house.

[40] Similarly, Hitex and Mr Holyoake are highly culpable. They were involved in the creation of defects that have led to damage. The refusal by Mr Holyoake to warranty the targeted repairs agreed to by the experts has significantly increased the quantum of damages. There is no principled reason why the Wilkinsons should pay these increased damages ahead of Mr Holyoake and Hitex.

[41] Further, we consider the respondents in this case to be subject to a common legal burden. Although the origins of their liabilities are different, all are liable to the same extent for the same damage. The fact that the liability of the Wilkinsons and the other respondents arises from different legal sources is not determinative.[6]

[42] As Tipping J noted in *Altimarloch*, a conventional indicator of common legal burden is when satisfaction of the obligation by the obligee discharges, as a matter of law, other obligees.[7] Applying this test, which has been adopted in a number of jurisdictions[8], the respondents in this case are under a common legal burden which is a pre-requisite for equitable contribution.

[43] We determine therefore that contribution between all the respondents is permissible and equitable and we proceed to consider their relative contributions based on their levels of culpability.

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6 *BP Petroleum Development Ltd v Esso Petroleum Co Ltd* [1987] SLT 345 at (OH)348.
7 Above n 4 at [132].
8 See *Burke v LFOT* [2002] HCA 17 (2002) 209 CLR 282 at [46]; *Royal Brompton Hospital NHS Trust v Hammond* [2002] UKHL 14, [2002] 2 AU ER 801.

WHAT CONTRIBUTION SHOULD THE LIABLE PARTIES PAY?

[44] We have earlier found that Mr and Mrs Wilkinson are liable in contract and that Wilkinson Building and Construction Limited, Allied House Inspections Limited, Mr Wilkinson, Hitex Building Systems Limited and Mr Holyoake have breached the duty of care they each owed to the claimants and are therefore liable in tort.

[45] 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.

[46] 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. 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…

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

[48] We have already concluded that contribution between all the respondents, including those liable in contract, is permissible.

[49] Both under the Law Reform Act and when considering equitable contribution the contribution assessed against each party is in general terms what is fair and equitable having regard to the extent of each party's responsibility for the damage. In *Mt Albert Borough Council v Johnson*[9] the Court of Appeal considered the whole history between the negligence and the damage is relevant.

[50] The courts have generally eschewed a mathematical approach and acknowledged that precision in apportionment is not often possible. Instead the Tribunal should stand back to see where the justice of the case requires an overall contribution to be fixed having regard to the level of responsibility and blameworthiness of each of the liable respondents.

[51] The parties primarily responsible for the defective work are Hitex and Mr Holyoake. Not only did they carry out or direct the impugned work but the Council and Mr Wilkinson relied on their expertise and advice. The CCC was also in part issued in reliance on the documents deemed to be a producer statement provided by Hitex and Mr Holyoake. Even without Mr Holyoake's refusal to consider the remedial scope as proposed by the majority of experts his and his company's combined contribution would have been more than 60 per cent and significantly greater than any other party to this claim.

[52] In the circumstances of this case however, due to Mr Holyoake's refusal to provide a warranty or producer statement, we consider it is fair and equitable to increase both his and his company's contribution. We set it at a combined total of 73 per cent .

[53] The liability in tort of Mr Wilkinson and his company was in relation to the balustrade capping, buried fascias and ground

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

clearances. Even in these areas we found that Mr Wilkinson consulted with Mr Holyoake and followed his advice. We accordingly set their contribution at 10 per cent. Mr and Mrs Wilkinson have also been found liable in contract for breach of the warranty under the agreement for sale and purchase. The contractual liability however is primarily in relation to the deck only. We therefore consider that their contribution should be assessed at five per cent.

[54] We have previously found that the Council was negligent in failing to detect the same issues for which Mr Wilkinson and his company have been found liable. We also noted that in relation to the ground clearances the Council, like Mr Wilkinson, relied on the advice of Hitex and Mr Holyoake. We accordingly conclude that the Council's contribution should be the same as that of Mr Wilkinson and his company which is 10 per cent

[55] Allied House Inspection on the other hand is not responsible for the defective workmanship. Its only liability relates to failure to advise the claimants to get the moisture probes read before confirming the contract. This is only likely to have disclosed problems in the area of the deck. We accordingly set its contribution at two per cent.

CONCLUSION AND ORDERS

[56] The claim by Roger and Samantha Zagorski is proven to the extent of $433,087. For the reasons set out in this and earlier determinations we make the following orders:

i. Wilkinson Building and Construction Ltd and Richard Andrew John Wilkinson as builders are ordered to pay Roger and Samantha Zagorski the sum of $433,087 forthwith. They are entitled to recover a contribution of up

to $389,778.50 from the other liable parties for any amount paid in excess of $43,308.50.

ii. Richard Andrew John Wilkinson and Catherine Wilkinson are liable in contract and are ordered to pay Roger and Samantha Zagorski the sum of $433,087 forthwith. They are entitled to recover a contribution of up to $411,433 from the other liable parties for any amount paid in excess of $21,654.

iii. Allied House Inspections Limited is ordered to pay Roger and Samantha Zagorski the sum of $433,087 forthwith. Allied House Inspections Limited is entitled to recover a contribution of up to $424,425 from the other liable parties for any amount paid in excess of $8,662.

iv. Auckland Council is ordered to pay the sum of $433,087 forthwith. Auckland Council is entitled to recover a contribution of up to $389,778.50 from the other liable respondents for any amount paid in excess of $43,308.50.

v. Hitex Building Systems Limited and Ian Conrad Holyoake are ordered to pay Roger and Samantha Zagorski the sum of $433,087 forthwith. Hitex Building Systems Limited and Ian Conrad Holyoake are entitled to recover a contribution of up to $116,933 from the other liable parties for any amount paid in excess of $316,154.

[57] To summarise the decision, if the respondents meet their obligations under this determination, this will result in the following payments being made by the respondents to the claimants:

Wilkinson Building & Construction Limited & Mr Wilkinson	$ 43,308.50
Mr & Mrs Wilkinson	$ 21,654.00
Auckland Council	$ 43,308.50
Allied House Inspections	$ 8,662.00
Ian Conrad Holyoake & Hitex Building Systems Ltd	$ 316,154.00
	$ 433,087.00

[58] If any of the respondents fail to pay their apportionment, the claimants can enforce this determination against any respondent up to the total amounts they are ordered to pay in paragraph [56] respectively.

[59] The following is the timetable for dealing with any applications for costs under s 91 of the Act:

- Any application for costs to be filed by 5 October 2012.
- The party/s against whom costs are sought are to file any submissions in opposition by 19 October 2012.
- The applicants for costs will have until 30 October to reply.
- A decision will then be made on the papers.

DATED this 21st day of September 2012

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M A Roche	P A McConnell
Tribunal Member	Tribunal Chair