IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2011-100-000083
[2012] NZWHT AUCKLAND 36

BETWEEN	**NICHOLA JOAN TURNER AND TRACEY ANN MACLEOD** Claimants
AND	**AUCKLAND COUNCIL** First Respondent
AND	**NICOLA TRESSIDER** Second Respondent
AND	**SIMON GUINNESS** Third Respondent
AND	**CAPSTONE PROFESSIONAL SERVICES LIMITED** Fourth Respondent
AND	**RICHARD DONALDSON** Fifth Respondent
AND	**BARFOOT AND THOMPSON LIMITED** **(Removed)** Sixth Respondent
AND	**NORMAN LLOYD** **(Removed)** Seventh Respondent

Hearing: 10, 14, 15,16,28,31 May 2012

Appearances: Ms A Thorn, for the claimants
Ms J Knight for the first respondent
Mr D Wilson for the third respondent
Mr M Edwards for the fourth respondent
Mr S Robertson and Ms J Hanning for the fifth respondent

Decision: 22 August 2012

FINAL DETERMINATION
Adjudicator: M Roche

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BACKGROUND

[1] In November 2001, Nichola Turner and Tracey MacLeod agreed to purchase a house in Mount Eden that was under construction. The vendor was Nicola Tressider who now resides in the United Kingdom. Ms Tressider is not a party to these proceedings as she was unable to be served.

[2] The sale and purchase agreement was conditional on the completion of the house and the issue by the Council of a code compliance certificate. This certificate was issued on 21 March 2002 and Ms Turner and Ms MacLeod settled their purchase on 3 May 2002.

[3] Some years later they noticed some dampness in the house and some cracking to its cladding. The problem continued and in mid 2009 Ms MacLeod and Ms Turner arranged for moisture detection probes to be installed around the house. They were advised that the probe data indicated the house was a "leaky home."

[4] In August 2009 they had the house treated with a product called RotStop which injected boron into the house's timber framing.

[5] In October 2009, Ms Turner and Ms MacLeod applied to the Weathertight Homes Resolutions Services for an assessor's report. This report recommended extensive repairs and attributed some of the cracking in the cladding to the RotStop treatment.

[6] The claimants have brought a range of claims against the various respondents. They have claimed that Council officers were negligent in issuing the building consent, in conducting inspections while the house was being built and in issuing the code compliance certificate. The Council has conceded its liability.

[7] Simon Guinness is an architectural draftsman. Ms Tressider engaged him to assist in the design of the house and in particular to amend the plans she had drawn up to the point where they were sufficient for a building consent to be issued. The claimants claim that Mr Guinness was negligent in carrying out his design and that, deficiencies in the plans he contributed to led to the house being constructed with defects. They also claim that his reference to himself on the plans as "Simon Guinness Architectural" was a representation that he was an architect and that this representation breached s 9 of the Fair Trading Act 1986 and led to loss by the claimants.

[8] Capstone Developments Limited (now Capstone Professional Services Ltd) was named as the builder on the building consent application form. An employee of Capstone, Richard Donaldson, was in charge of Capstone's work on site and signed the completion of building certificate in respect of the house. The claimants claim that both Capstone and Mr Donaldson owed them a duty of care arising from their roles in the construction and that they are liable for the defects that were created during construction.

[9] The Council claims that the claimants caused their own loss in respect of the damage allegedly caused by the RotStop treatment and say that the respondents are not liable for this damage.

ISSUES

[10] The issues that I need to address are:

I. What are the defects causing leaks and damages?
II. Did the RotStop treatment cause damage?
III. What is the extent of the Council's liability for the claimants' loss?

IV. Did Mr Guinness breach s 9 of the Fair Trading Act 1986 by referring to himself as “Simon Guinness Architectural?”

V. Was Mr Guinness negligent, and if so, was his negligence causative of loss?

VI. What was the role of Capstone?

VII. What was the role of Mr Donaldson?

VIII. Did Capstone and/or Mr Donaldson breach a duty of care owed to the claimants and if so, was this causative of loss?

IX. Were the claimants negligent in having the RotStop treatment carried out?

X. What is the appropriate remedial scope?

XI. What is the quantum of the claimant’s loss?

XII. What proportion of the claim are the various liable respondents responsible for and what, if any, proportion of the remedial costs are the claimants responsible for?

WHAT ARE THE DEFECTS CAUSING LEAKS AND DAMAGE?

[11] The Department of Building and Housing assessor, Philip Crow, the claimant’s expert, Mark Hazlehurst, and the Council’s expert, Simon Paykel gave their evidence concurrently on the defects that allowed moisture ingress. Ian Holyoake, gave evidence concurrently with the defects experts when the subject of RotStop was discussed. Mr Holyoake is the director of the New Zealand Home Treatment Company which manufactures RotStop.

[12] The experts agreed on a list of principal defects at an experts’ conference convened prior to the hearing. There was a difference between Mr Crow and Mr Paykel on the one hand and Mr Hazlehurst on the other about the roofs which will be discussed later.

There was also some disagreement about whether RotStop has caused damage.

[13] The defects which were not the subject of dispute were as follows:

Apron flashings and metal fascia junctions

[14] The location of this defect is at the ends of the parapets where they meet the ends of the flat roofs on the east and west elevations. The experts agreed that this defect was caused by a combination of incorrect sequencing, poor workmanship and the concealing of defects.

[15] The defect has been created by the placement of the metal fascia extending past the line of the apron flashing. The cladding has then been slid up behind leaving a hole. Also left is an area behind the fascia that could not be texture coated and waterproofed. Mr Paykel gave evidence that the Harditex cladding should have been installed prior to the fascia. He attributed responsibility to the Harditex installer who should have either had the fascia removed before putting the Harditex in place or requested the roofer to return to remediate the flashing to protect the junction. I accept this evidence.

[16] The defect resulted in decay to the framing below and adjoining return walls and led to the need to re-clad the affected walls.

Parapets – lack of fall and waterproofing

[17] The parapets consist of timber framing covered with Harditex cladding. They were constructed with no slope on their top surface which meant that surface water pools rather than running off. The

relevant technical literature (the Harditex technical information) specified that these surfaces should have a 5 degree slope.

[18] In addition, membrane which should have been installed over the top and down 200mm on each side of the parapet, was omitted.

[19] The experts agreed that this defect resulted in decay to the framing below the parapets and to the adjoining return walls and caused the need for the full re-clad of affected walls.

Balcony membrane intersection with balcony cladding

[20] At the hearing this defect was described by the experts as the failure of the membrane applicator to allow for the membrane on the balcony to extend past the face of the cladding. This is compounded by the application of Harditex which effectively seals the membrane in and, by leaving a hole, creates an entry point for moisture. In addition, Harditex was installed over the drip edge creating an inadequate weatherproofing detail at the outer edge. Responsibility for this defect was attributed to both the membrane applicator and the cladding installer.

[21] The damage attributed to this defect by the experts was decay in upper level floor framing.

Lower roofs

[22] The lower roofs are timber framed flat roofs covered with long run coloured steel. They have been constructed at less than the two degree pitch specified on the plans. Mr Hazlehurst gave evidence that their pitch was between 1.2 and 1.8 degrees while the requirement at the time was for a minimum of three degrees and is now four degrees.

[23] Mr Hazlehurst considered that the low pitch and the lack of a turndown at the end of the roof constituted a defect. This is because the lower the pitch, the more likely water is to run back underneath the roof. He was of the view that as the roof at its present pitch is not Code compliant, it will be a source of future likely damage, and should be replaced with a re-pitched roof.

[24] There was some discussion in the evidence as to whether damage had been caused by the low pitch of the roof. Mr Crow agreed that water on the garage wall below the roof was attributable to the runback under the flat roof. However he disagreed with Mr Hazlehurst as to the cause. He did not attribute the problem to the pitch of the roof. Rather, he considered that the cause was the combination of the lack of turndown on the roof edge and the placement of gutter guard "hedgehogs". These are improperly installed in some places and have caused a build up of leaves and debris at the end of the roofs which led to water ponding and accentuating runback.

[25] The view of Mr Crow and Mr Paykel was that the remedy to the flat roof problem would be to turn down the edge. Mr Crow described this as a "half hour job." Mr Paykel gave evidence that there are specialised tools to carry out this task and that damage in carrying out the turndown exercise anticipated by Mr Hazlehurst would not occur. He also disagreed with Mr Hazlehurst that a building consent would be required for the turndown exercise. His evidence was that although the current roof pitch is less than is required, because the Building Code is performance based it would not breach the Code to retain the original roof with a turndown as this roof would meet the performance requirements of the Code.

[26] Having heard the evidence of the three experts on this point I consider that the damage to the garage wall observed by Mr Crow is properly attributed to the lack of turndown and the misplaced

hedgehogs on the flat roof rather than its pitch. I also accept the evidence of Mr Paykel and Mr Crow that the removal of the hedgehogs and the turndown would be the appropriate way to repair the defect and I do not accept that the lower roofs require replacement.

Upper roofs

[27] Although the upper roofs are not defective they were the topic of discussion and disagreement between the experts at the hearing. This was because the present roofs have minimal eaves. When the walls are re-clad it will be necessary to install a 20mm drained cavity. This will have the effect of bringing the house walls closer to the present roof edge.

[28] Mr Paykel's opinion is that the appropriate solution would be to install a flashing behind a new timber fascia which will extend over the new walls and to attach new spouting to the fascia. A drawing of this proposed detail was in his brief. This was sourced from the DBH Guide to Remediation Design. He gave evidence that this proposed detail was not risky or complex and that its use was widespread. He also gave evidence that the proposed detail has previously been accepted by the Council. Mr Paykel's position was supported by Mr Crow.

[29] Mr Hazlehurst believes that the appropriate remedy is to replace the present roof with one that has an eaves extension. He criticises the detail proposed by Mr Paykel and considers that it is risky and complex and that because it will not provide the 50mm minimum overhang required by E2/AS1[1], it is an alternative solution which requires the approval of the Building Consent Authority. He also considered it would be difficult to access and maintain.

[1] The compliance document for clause E2 (external moisture) of the Building Code.

[30] Considerable time at the hearing was spent exploring the conflicting views of the experts about the proposed remedial solutions for the upper roof. I am not persuaded that the proposed detail is risky given the evidence that it is included in the DBH Guide to Remediation Design and, that its use is widespread. It follows that I do not accept the proposal for the claimants that the present roof be replaced with one with an eaves extension. I do not consider that it is reasonable for the respondents to incur the costs of providing the claimants with a new and differently designed roof when a more economical, viable remedial option is available. I conclude that the remedial option recommended by Mr Paykel is viable and decline to include the replacement of the roof within the remedial scope.

Secondary defects

[31] A number of secondary defects were agreed upon at the expert's conference. These were insufficient cladding/ground clearance at certain locations, the direct fixed fence and gate post to cladding and other unsealed penetrations, the exterior box seat and the joinery units.

Joinery

[32] Although the face fixed joinery was identified as a defect by the experts no resulting damage was identified. It is therefore unnecessary to consider this defect further.

Cladding/ground clearance

[33] Insufficient clearance has been allowed for between the cladding and paved ground surfaces around the garage and the main entrance way. The experts described this as a secondary defect and identified the damage as some decay to bottom plates. This defect can be remedied by the installation of a nib wall which removes the need to lower the ground levels.

Control joints

[34] Lack of control joints in the cladding was identified as a secondary defect by the experts. When empanelled at the hearing there were some references by experts to cracks that could be attributed to the lack of control joints. However at the experts' conference the experts agreed that no damage was attributable to this.

Exterior box seat

[35] This is a box seat that has been constructed from cladding material and that is attached to the wall on the northern elevation. It is horizontal, was constructed without waterproofing, encloses an unventilated area and has an unwaterproofed junction with the outside wall. In his brief Mr Paykel stated that the seat has contributed to the trapping of moisture ingress from the defective parapets located above leading to damage to the wall framing behind it. However, as this elevation already requires a full reclad because of the primary defects, the seat itself has not resulted in any loss to the claimants.

Did the RotStop treatment cause damage?

[36] An issue at the hearing was whether the RotStop treatment carried out by the claimants caused damage to the cladding by creating cracks and, if so, the extent of that damage.

[37] In his report, Mr Crow had attributed a significant proportion of the cracks to the use of RotStop over a number of elevations. This is because RotStop causes timber to swell which can cause cracking to cladding attached to it. The RotStop contract makes reference to and excludes the rectification of cracking to cladding or internal linings that maybe be caused through timber movement due to the RotStop process. In their evidence, both Mr Holyoake and Mr

Hazlehurst said that RotStop related cracking was rare and when it did occur was usually lesser than the number and spread of cracks attributed to RotStop by Mr Crow.

[38] At the hearing Mr Crow resiled from the position he had taken in his report. He had reconsidered and now concluded that some of the cracking he had thought had been caused by RotStop was in fact caused by other factors. In his evidence Mr Crow stated that the damage he now attributed to RotStop was limited to cracks on the eastern elevation above the flat roof. The reason he attributed this damage to RotStop was because, unlike cracking in other locations, there was no explanation for this cracking other than RotStop.

[39] Mr Crow's view was supported by Mr Paykel who stated that the vertical cracking on the eastern elevation was more extreme than anywhere else in the building and agreed that the cracking on this elevation was caused by RotStop.

[40] Mr Holyoake had joined the expert's panel when RotStop was discussed. He had brought to the hearing blown up versions of photographs included in the common bundle which were taken by the RotStop applicator prior to the application of RotStop. The purpose of the photographs was to record the state of the cladding prior to RotStop treatment so that pre-existing damage would not be attributed to RotStop.

[41] The only elevation Mr Holyoake did not have these photographs of was the eastern elevation which was the only elevation which the experts agreed had been damaged by RotStop. Mr Holyoake gave evidence that there were un-photographable micro cracks in the eastern elevation prior to the application of RotStop and that the eastern elevation was difficult to photograph. He denied that the cracks in this elevation could be attributed to RotStop.

[42] Having heard the evidence of the three experts and Mr Holyoake on this matter I accept that in the absence of alternative explanation for the cracks on the upper eastern elevation, they can be attributed to the RotStop treatment. Were a complete reclad not required this damage would have caused the need to reclad the upper eastern elevation. The quantum experts gave evidence about the proportion of the remedial costs that could be attributed to the need to re-clad the upper eastern elevation. This evidence will be considered in the quantum section of this decision.

Bathroom leak

[43] Although not a defect as such it is appropriate to discuss the bathroom leak and the damage attributed to it at this point as it was the subject of discussion by the expert panel at the hearing.

[44] In his brief, Mr Paykel stated that cracking on the south-west elevation had been caused by internal shower leaks which would have also caused decay damage to the wall and floor framing. These leaks were documented in the claimants' discovery documents and referred to in their briefs. The experts agreed that given that there are no other sources of damage at this location, the damage should be attributed entirely to the bathroom leak or to the bathroom repair work. The quantum experts were accordingly asked to isolate the percentage of the remedial costs that could be attributed to the bathroom. Their evidence is discussed later in the decision.

[45] Damage caused by internal leaks falls outside the Tribunal's jurisdiction which is limited to damage caused by external leaks. The respondents' view was that the proportion of remedial cost that can be attributed to the bathroom leak should be deducted from the remedial costs that can be claimed from the respondents.

WHAT IS THE EXTENT OF THE LIABILITY OF THE COUNCIL?

[46] In her opening submissions Ms Knight stated that the Council accepted that the house required a full re-clad as the result of defects; that the Council accepted that it did not identify a sufficient number of construction defects during its inspections and that the Council was liable to contribute to the costs of fully recladding the house.

[47] Mr Light was the claimants' expert on council practice. In his brief he reviewed the inspections that were carried out and identified the defects that would have been apparent during those inspections and which should have been observed. These included the defects that were identified by the experts. Mr Light was not cross examined on this aspect of his brief. I find that the Council breached the duty of care it owed to the claimants in respect of its inspections. The Council is liable for the full cost of the established claim.

DID MR GUINNESS BREACH SECTION 9 OF THE FAIR TRADING ACT 1986 BY REFERRING TO HIMSELF AS "SIMON GUINNESS ARCHITECTURAL?"

[48] The claimants claim that Mr Guinness breached s 9 of the Fair Trading Act 1986 by referring to himself as "Simon Guinness Architectural." They say that by using this name he was representing himself to be an architect and in doing so breached section 53 of the Architects Act 1963 which makes it an offence for a person who is not an architect to use the word architect in connection with their name or business or any written words which would reasonably cause any person to believe that they are an architect.

[49] Mr Guinness is an architectural draftsman and not an architect. He denies the allegation that he breached the Fair Trading

Act and in his response to the claim stated that he believed the general public in New Zealand are well aware of the difference between a registered architect and an architectural draftsman.

[50] In her written statement, Ms McLeod stated that prior to settling their purchase of the house, she and Ms Turner obtained a copy of the plans and because the plans were stamped "Simon Guinness Architectural" they formed the impression that the house would be well built and well designed. At the hearing she gave evidence that she thought the house was architecturally designed.

[51] Neither the claimants nor Mr Guinness have provided any authority on whether the use of the word "Architectural" in the trading name of a person who is not an architect has been held to breach either the Architects Act or the Fair Trading Act. It is noted however that Heath J discussed the distinction between architects, architectural designers and draftpersons in *Sunset Terraces*. His observations included the fact of the existence of a professional body for architectural designers; Architectural Designers New Zealand Inc.[2] This supports the proposition that the word "architectural" can be used quite properly by designers who are not registered architects.

[52] The house was not advertised as being architecturally designed but rather, "designed with style and flair." It is not established that section 9 of the Fair Trading Act was breached in the manner alleged by the claimants and it is not accepted that the claimants were induced by a reasonably held belief that the house had been designed by an architect in entering the contract to purchase the property.

[53] Mr Light and Mr Denby were expert witnesses on the issue of the adequacy of the plans. Mr Light gave evidence that a council

[2] *Body Corporate 188529 v North Shore City Council (Sunset Terraces)* HC Auckland, CIV 2004-404-3230, 30 April 2008 at [509]-[512].

processing officer would know that an architectural draftsman would not have further input into the construction process as opposed to architects who sometimes carry on and supervise construction. This observation sheds little light on the claim against Mr Guinness as it is not established that the trade name "Simon Guinness Architectural" would cause a council officer to believe that Mr Guinness was an architect rather than an architectural draftsman. Also, as it is often the case that architects have no further involvement in construction, I do not accept that it would be reasonable for a council officer to assume further involvement (and assistance) without more information.

[54] No misrepresentation on the part of Mr Guinness is established. Furthermore, no loss arising from the alleged misrepresentation is established.

WAS MR GUINNESS NEGLIGENT IN PREPARING THE PLANS, AND IF SO, WAS HIS NEGLIGENCE CAUSATIVE OF LOSS?

[55] Mr Guinness gave evidence of how he came to be involved with the plans for the claimants' house. In his written and oral evidence he explained that he was contacted by Ms Tressider in 1999 and asked to assist with some plans she had prepared for a town house. It was agreed that he would take her drawings and get them into a form where they would be sufficient to obtain a building consent.

[56] Mr Guinness's work for Ms Tressider was sporadic. He would do some work on the plans and then not hear from Ms Tressider for a long time. His last involvement was in July 2001 when she asked him to add a balcony. He drew this and the plans were then referred by Ms Tressider to a structural engineer. He did not see the plans again after this. He was not informed by Ms Tressider when the plans were submitted to the Council. Ms

Tressider listed him as a co-designer (with her) on the Council's documents. This was done without his permission or knowledge.

[57] Mr Guinness commented that every page of the plans in the common bundle had been altered in some way since he last had possession of them. Some of the drawings had extra shading or hatching or notes. The box seat which has proved to be a secondary defect was not on the plans and was added after he last saw them.

[58] The claimants allege that there was a sufficient relationship of proximity between them and Mr Guinness to warrant an imposition of a duty of care. In his response to the claim he has denied this. The evidence establishes that Mr Guinness was not the sole designer of the house. Rather, he contributed to the design that was initiated by Ms Tressider and finalised and submitted to the Council, without reference to him. Despite this, I accept that he owed a duty of care to the claimants in respect of the parts of the design that he contributed. He would be responsible if mistakes on his part led to the house being constructed with defects that allowed water ingress and caused damage.

[59] The claim against Mr Guinness is that the plans and specifications he provided were insufficient to allow him to be satisfied on reasonable grounds that the building work would comply with Clauses B2 and E2 of the Building Code.

[60] The claimants have specified the particulars of their negligence claim against Mr Guinness. These particulars consist of a list of omissions and failures in respect of the plans. Most of these were discussed in the evidence of Mr Guinness and in the expert's panel comprising of Mr Light and Mr Denby. Mr Light was the claimant's expert witness in relation to the sufficiency of the plans and other issues relating to Council liability. Mr Light is a registered building surveyor and a certified weathertightness inspector.

Between 2001 and 2003 he was employed as a Building Officer by North Shore City Council where his duties included assessing building consent applications. Mr Denby is a registered architect and was the expert witness for Mr Guinness.

[61] The majority of the claimants' complaints concern omissions. However a number of specific errors have been alleged and I will deal with them first. The first is that Mr Guinness failed to consider the impact of a flat roof under trees shedding leaves. Mr Guinness's response was that this is a maintenance issue. In his brief Mr Light expressed the view that normal maintenance requirements should have been specified. He also gave evidence that a steeper slope to the roof would have alleviated leaf build up.

[62] In her evidence Ms Macelod said that she was familiar with normal maintenance requirements and the need to remove leaves from roof gutters and that she attended to this. The absence of a maintenance schedule in the plans has not led to a lack of maintenance on the part of the claimants. Mr Guinness was not asked by Ms Tressider to specify maintenance requirements. The Council did not request any such specification when Ms Tressider submitted the plans. Given the limited and intermittent brief given to Mr Guinness by Ms Tressider and his lack of control over the plans including their submission to Council without reference to him, I am not satisfied that even were this an error that had caused damage, that Mr Guinness could be held responsible. In any case, the expert evidence was that a primary cause of the leaf build up was the misplaced hedgehog gutter guards. The link between the alleged error or omission and any damage is remote.

[63] The second error attributed to Mr Guinness and allegedly linked to damage was that the flat roofs were designed to be pitched at two degrees when the minimum requirement at the time was for a three degree slope. The view of Mr Paykel and Mr Crow which I

have accepted is that the pitch of the flat roofs is not a source of damage. In any case, the plans were not followed in this regard and the roofs were constructed at a different and lesser pitch than that specified by Mr Guinness.

[64] The next error concerns the treatment level of the timber. It is alleged that Mr Guinness failed to specify the appropriate timber framing and failed to specify H3 timber framing behind Harditex which was an absorbent cladding. Mr Guinness gave evidence that the plans specified the use of treated No 1. Radiata Pine to H1 which he said was appropriate because Harditex is not an absorbent cladding if it is painted.

[65] The timber samples taken by the assessor, Mr Crow during his investigation were found to be saturated with boron due to the RotStop treatment. Mr Paykel stated in his brief that it was highly likely that the house had been constructed with untreated timber. Mr Hazlehurst also stated in his brief that untreated timber was used to construct the dwelling. He states that Moisture Detection Company data gathered before the RotStop treatment in June 2009 indicated a lack of treatment to the timber. At the hearing, the experts were equivocal as to whether under-treated or untreated timber had been used in the construction. It is not established that Mr Guinness's direction that H1 treated timber be used was followed. It appears from the evidence more likely that untreated timber was used.

[66] Mr Guinness has disputed the allegation that H3 timber should have been specified. It is unnecessary to resolve this issue because his direction about treatment was not followed and there is no causative link between the treatment level specified by Mr Guinness and the damage caused by the use of untreated timber.

[67] The third alleged error is a claimed failure to design any provision for surface water from the deck running off and discharging

over the lower wall creating a risk to weathertightness. In his response, Mr Guinness stated that the horizontal surface of the small sheltered deck did not require this and that the plan was submitted by Ms Tressider before he could consider this detail (he had stated earlier that the plans were not referred back to him after the engineer's input).

[68] The problem with the balcony that was identified as a primary defect on the north elevation by the experts concerned the intersection between the balcony membrane with the balcony cladding rather than a lack of provision for runoff. I find that it is not established that the claimed error or omission is attributable to Mr Guinness who was not given to the opportunity to review the plans after engineering input. It is also not established that this alleged error has led to damage. It is relevant to note that Mr Guinness was not the sole designer of the house but rather contributed to the design that was created and managed by Ms Tressider.

[69] Before considering the balance of allegations in respect of the plans I note the criticism made of Mr Guinness regarding his lack of familiarity with acceptable and alternative solutions. This sits with Ms Thorn's comment that although no damage is attributable to the failure to specify the flashing details on the plans this omission is 'relevant to the complete picture as to whether these plans are adequate'. Although the plans may have deficiencies the enquiry is not about the 'complete picture'. Rather it is whether there is a causative link between defects created which caused damage and errors and omissions in the design work carried out by Mr Guinness.

[70] I turn now to the balance of the criticism of the plans worked on by Mr Guinness. A number of these concern the omission of details. Mr Guinness supplied a generic specification with the plans. His evidence was that details that were not specified in the plans

were to be found in the specification and in the Harditex technical literature and that all three were to be read together.

[71] It is alleged that Mr Guinness failed to provide details for joinery, flashings or cladding installation. The joinery details were provided on the plans and the details for flashings and cladding installation were provided in the specification or technical literature. In any case, no damage has been associated with the joinery and flashings.

[72] It is alleged that Mr Guinness failed to provide details for structural connections, roof junctions or weathertightness details. In particular that the cross sections (in his drawings) did not show window details, parapet construction or deck details. Mr Guinness's response to this allegation is that where details were not specified on the plans, any competent builder was sufficiently able to construct the house in compliance with the Building Code by using good building practice and technical information readily available.

[73] There was some discussion in the evidence of Mr Guinness, Mr Light and Mr Denby about the practices in place at the time with respect to the level of detail provided on building plans. Mr Light gave evidence that around the year 2000 and 2001, awareness of the importance of good detailing was increasing. He noted as significant that in December 2000, the E2AS1 solution was amended to include a clause to the effect that although s 11 of NZS 3604 lists acceptable wall claddings, this does not give full information on fixing substrate and weatherproofing of joints and junctions which need to be submitted as part of the building consent system.

[74] Mr Light was critical of the reliance by Mr Guinness on the details provided for in the James Hardie Manual because they provided various options. His view was these detail options were insufficient to construct a design that had a degree of complexity.

[75] Mr Guinness's evidence was that Ms Tressider wanted only the minimum reworking of her design sufficient to get a building consent as she wanted the project to be as cheap as possible. Mr Denby gave evidence that at the time clients would often try and minimise fees by having designers provide the minimum amount of detail required. His evidence was that the drawings done by Mr Guinness are fairly typical of the type of "consent only" documents that were commonly asked for by cost-conscious clients in the 1990s and early 2000s.

[76] The situation in this case is similar to that considered by Heath J in *Body Corporate 188529 v North Shore City Council (Sunset Terraces)*[3] in that the designs are indicative of the 'budget-driven' nature of the project. In that case Heath J commented that the specifications submitted with the design to the Council were poorly prepared and had not been updated to meet the needs of the requirements of the Building Act 1991. Heath J held however that despite the faults in the plans and specifications, he was satisfied that the dwellings could have been constructed in accordance with the Building Code from the plans and specifications.

[77] Heath J held that it was appropriate to assume that builders would refer to manufacturer's specifications and that the deficiencies in the plans were not so fundamental in relation to the material causes of damage that any of them could have caused the serious loss that resulted to the owners. He commented in particular that inadequacies and absences in respect of detail on the plans demonstrating how the tops of the wing and parapet walls that were to be waterproofed are fully answered by the reasons he gave for rejecting the allegation that the Council was negligent to grant a building consent. This was because in exercising its building consent

[3] Above n 2.

function the Council was entitled to assume that the building work would be carried out by competent builders and trades people.[4]

[78] The finding of Heath J in *Sunset* was upheld in the Court of Appeal. Baragwanath J agreed that although there were flaws in the plans and specifications, a reasonable builder would have access to manufacturer's specifications and would be able to achieve a workmanlike result. He observed that no purpose would be served by requiring a designer to incur cost not reasonably necessary for the task.[5]

[79] In this regard, I note the observation of Adjudicator Green in *Carter v Tulip Holdings* [6] that:

> If construction details for building work are omitted from plans and specifications and the building work undertaken subsequently fails to meet the mandatory performance criteria prescribed in the New Zealand Building Code, then it follows that the person who undertook that work in the absence of the prescribed detail, is prima facie, the designer of that detail and will be liable in the event of any failure. It seems quite clear to me that that person had two choices, either to ask the principal or the architect for the necessary detail, or to design that aspect of the building work, and if the latter option is chosen then that person should have no complaint as against the architect and neither will a subsequent owner.

[80] The comment of Adjudicator Green accords with the evidence of Mr Denby that where details are not shown on either the plans or the manufacturer's specification, builders are responsible for either designing the details themselves or seeking a design of the details from the person who prepared the plans. There is no

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[4] Above n 2 at [252]-[253].
[5] *North Shore City Council v Body Corporate 188529 (Sunset Terraces)* [2010] NZCA 64, [2010] NZLR 486 at [121].
[6] *Carter v Tulip Holdings* WHRS, DBH 692, 30 June 2006 at [107].

evidence that anyone sought such a design from Mr Guinness in response to omissions on the plans.

[81] I find that the claimants have failed to establish that the design work carried out by Mr Guinness was not undertaken with reasonable care, skill and diligence by reference to the general practice of the day. It is not established that the alleged errors in the plans are made out or have caused damage. There are certainly omissions of details in the plans. I accept however that there was sufficient guidance in the specification and manufacturer's literature for the house to have been built in a workmanlike manner and that defects attributed to work that was carried out in the absence of prescribed detail cannot be the responsibility of Mr Guinness.

[82] It is also relevant to consider the role of Ms Tressider. She worked on the plans and listed herself as a designer in the building consent application. The evidence about her involvement with the construction of the house given by Ms Turner, Ms Macleod and Mr Donaldson suggests that she played a hands-on role and project managed the build. As project manager, she would have been the person who would be logically consulted about omissions in the plans and is also responsible for the decision to limit the brief of Mr Guinness and not to further consult him during construction. He cannot be held responsible for this.

[83] There are accordingly no material losses suffered by the claimants caused by deficiencies in the work undertaken by Mr Guinness. The claim against him is dismissed.

WHAT WAS THE ROLE OF CAPSTONE? WHAT WAS THE ROLE OF MR DONALDSON?

[84] David Sutherland, the sole director of Capstone, gave evidence at the hearing. He is a long time friend of Mr Donaldson who was the best man at his wedding. He is a trustee of the trust that holds a mortgage over Mr Donaldson's home. Mr Sutherland described himself as an entrepreneur and has various business interests. He said that when Capstone was incorporated, Mr Donaldson was a builder with four or five years experience on the minimum wage and that he had previously worked as a cabinet maker and a boat builder. Mr Sutherland started Capstone and made Mr Donaldson a shareholder in it to help him get on in life.

[85] Mr Donaldson's title at Capstone was "projects manager" with responsibilities that included pricing construction projects and managing their financial performance, managing the progress of construction projects, client relationships, hiring suitable personnel and liaising with suppliers. Mr Sutherland said that no one at Capstone was responsible for the quality of Capstone's building work.

[86] The role of Capstone and Mr Donaldson was in dispute at the hearing. The claimants alleged that Capstone and Mr Donaldson were primarily responsible for the construction of the house. They have alleged that Capstone was the head contractor/ site supervisor/ project manager/ builder/ site foreman in respect of the construction and that Mr Donaldson personally undertook the role of head contractor/site supervisor/project manager/ builder/site foreman.

[87] Capstone and Mr Donaldson deny this. They have said that Ms Tressider was the project manager and that she engaged and

paid the sub-trades herself. This was unlike other jobs undertaken by Capstone, where they would usually organise sub-contractors.

[88] Capstone and Mr Donaldson claim that they had a very limited written contract with Ms Tressider to construct the structural shell of the house on a labour-only basis. This work included erecting the pre-nailed framing, installing the Harditex cladding sheets, and installing the joinery. Mr Donaldson agreed in his brief of evidence that he also had involvement with "minor finishing issues." At the hearing Mr Donaldson agreed that Capstone would have also installed the balcony substrate, and hung the internal doors.

[89] No copy of the contract between Capstone and Ms Tressider is available. The only evidence about its terms is the recollection of Mr Sutherland and Mr Donaldson.

[90] Mr Donaldson said his responsibilities on the Dexter Ave site were to ensure the work done by Capstone employees was progressing and to attend to the financial administration of the project. He did not instruct or supervise the Capstone employees who were more experienced builders than he was. Neither did he monitor the work of any subcontractors. Mr Donaldson denied being responsible for directing and controlling the sequencing of work.

[91] Mr Donaldson and Mr Sutherland both gave evidence that at the time the Dexter Avenue house was being built, Capstone was also engaged in larger projects on the North Shore and West Auckland and that Mr Donaldson divided his time between the three.

[92] The claimants and the Council have disputed that the contract was limited in the way claimed. Ms Turner and Ms MacLeod gave evidence of their dealings with Mr Donaldson on a number of occasions prior to the completion of construction and after they took possession of the house. Their recollections suggest that the role of Mr Donaldson and Capstone was more extensive than that of a

labour-only builder responsible only for the construction of the building shell.

[93] Ms Turner gave evidence that she visited the house on a number of occasions between November 2001 and March 2002 while it was under construction. She said that Mr Donaldson introduced himself to her and Ms Macleod as 'the builder' when they first met, that he was almost always present when she visited the house during working hours, and that he was their point of contact regarding progress with the home.

[94] In her brief, Ms Turner gave details about meetings and conversations she had had with Mr Donaldson concerning the house. These were after Christmas when she and Ms MacLeod discussed the height of the plaster seat and ground lines in relation to landscaping with him and Ms Tressider. She recalled that Mr Donaldson was working on this seating when she arrived which is why its height was discussed. On another occasion, she and Ms MacLeod mentioned a water mark on the house to Mr Donaldson who agreed to check the spouting for leaks. At a pre-settlement meeting in February 2002 Mr Donaldson advised Ms Turner that he would fix an untidy edge to a ledge beneath the balcony.

[95] At a later inspection the claimants noted that an internal staircase had the wrong type of balustrade capping. They had previously been asked by Mr Donaldson to specify the type they had wanted. Mr Donaldson had the capping changed at their request. He also telephoned them to let them know about the timing of the laying of the carpet. Ms Turner complained to Mr Donaldson about the unevenness of paving stones. Ms Macleod gave evidence that she recalled seeing Mr Donaldson re-laying these some time later.

[96] The claimants and the Council also rely on items of documentary evidence which allegedly show that the contract, and

the role of Mr Donaldson, was more extensive than what is now claimed.

[97] The first relevant document is the Council inspection booking sheet. This shows that Mr Donaldson booked a series of inspections between September 2001 and 18 March 2002. As the code compliance certificate was issued on 21 March 2002, the booking sheet shows that Mr Donaldson had a continuing involvement with the building project until the completion of the construction.

[98] The claimants and Council also rely on the Advice of Completion of Building Work form which was signed by Mr Donaldson as 'projects manager' on 18 March 2002. It was suggested that his signing of the document was inconsistent with the claim that Capstone was a labour-only builder whose role was limited to providing a structural shell. Mr Donaldson claimed that this was necessary for Capstone to receive their final payment under the contract. However, it is unclear why the completion of the building would be a condition of final payment if the contract was merely for the construction of a structural shell on a labour-only basis.

[99] Also relied upon by the Council and claimants were items in the 'settlement correspondence' which is a series of letters from the claimants to Ms Tressider, and from their respective solicitors to each other, around the time the sale and purchase agreement settled.

[100] One letter refers to conversations between the claimants and Mr Donaldson regarding marks in a door surround, the height of the plastered garden seat, the slope of the garden path and the internal balustrade capping. Another refers to conversations between Ms Turner and Mr Donaldson about the plumbing in of a super-tub system which is recorded to be a 'change made directly with Richard'. A letter to the claimants' solicitor from Ms Tressider's

solicitor encloses a written response from Ms Tressider recording two discussions with ‘Richard’ about various items.

[101] Also relied on is the invoice dated 18 January 2002 from Capstone to Ms Turner for the installation of bi-fold doors in an upstairs bedroom. The claimants had asked Mr Donaldson to make this alteration to the plans prior to the completion of the house. The inference the date of invoice gives rise to is that Mr Donaldson was present on site when the house was close to completion.

[102] In his brief, Mr Donaldson said he did not recall the meetings described by Ms Turner, that he may have called the claimants out of politeness to let them know about the carpets and that with respect to the internal balustrades, he was instructed by Ms Tressider to give the claimants what they wanted. He said that when the relationship between the claimants and Ms Tressider broke down, he became the middleman between them. He did not recall laying paving stones and commented that this was not something he would normally do.

[103] Mr Donaldson said that he visited Dexter Ave on two separate occasions between May 2002 and 2007 to attend to issues that had arisen with the house. On the first occasion he re-nailed some popped nails on the roof. On the second occasion he looked at a damp water patch for the claimants and told them that they should install a cowling or a raincover to the external vent. On this occasion he had his family in the car as he had called in to the claimants’ house on his way home from a visit to the hospital.

[104] Mr Donaldson said he did not have any obligation to assist the claimants with their house but felt sorry for them because he was aware that Ms Tressider had left New Zealand.

[105] The final evidence that must be considered in assessing the ambit of the role played by Mr Donaldson/Capstone was Mr Sutherland’s denial that he was able to recall the identity of the five

Capstone employees who would have also worked on the construction site, and Mr Donaldson's disclosure in his evidence that he deliberately withheld the names of these employees during these proceedings.

[106] Mr Sutherland gave evidence that he was responsible for the paperwork related to the payment of wages and deduction of PAYE tax for the five Capstone employees. Mr Donaldson knows the names of these Capstone employees. Mr Sutherland and Mr Donaldson were jointly represented for much of this proceeding. Considering the above, I reject Mr Sutherland's evidence that he had no knowledge of the names of the Capstone employees on site.

[107] Mr Donaldson claimed that the reason he concealed the names of the other Capstone building employees was to spare them the ordeal of becoming involved in Tribunal proceedings. However by doing so he has ensured that no corroboration or contradiction of the limited role he claims to have played is available.

DID CAPSTONE OR MR DONALDSON BREACH A DUTY OF CARE OWED TO THE CLAIMANTS AND IF SO, WAS THIS CAUSATIVE OF LOSS?

[108] The role of Capstone and Mr Donaldson was greater than Mr Donaldson and Mr Sutherland have claimed. The documentary evidence and the recollections of the claimants are inconsistent with the claim that there was a labour-only contract to construct a structural shell. Where there is a conflict between the evidence of the claimants and that of Mr Donaldson, I prefer the claimants' evidence. Ms McLeod and Ms Turner were credible witnesses. Mr Sutherland and Mr Donaldson were evasive at times. I accept Ms MacLeod's evidence that she observed Mr Donaldson straightening out mislaid pavers and Ms Turner's evidence that she observed Mr Donaldson working on the exterior seat.

[109] I accept that Ms Tressider co-ordinated the building project and that she did so in order to cut costs. I accept that she arranged subcontractors herself and also performed some work herself such as landscaping. The evidence of Mr Sutherland and Mr Donaldson that she limited her contract with Capstone in order to save cost fits with the evidence that Ms Tressider was operating in a "DIY" manner and assuming more responsibility for the construction than might normally be the case.

[110] I accept that Dexter Avenue was not the only building project Capstone/Donaldson were carrying out at the relevant time and that although Mr Donaldson's attendance was greater than he has attempted to portray, he was absent attending to other projects from time to time.

Liability Finding - Capstone

[111] It is well settled law in New Zealand that a builder owes a duty of care to future purchasers of buildings they construct.[7] The builder's duty is to take care to prevent damage to the property. The duty is expressed as one owed by the builder to any person whom he or she might reasonably foresee to be likely to suffer loss due to a hidden defect arising from negligent building work.

[112] I find that Capstone owed a duty of care to the claimants in respect of the building work carried out by Capstone employees on the Dexter Avenue site.

[113] Mr Donaldson confirmed that Capstone was responsible for the erection of the framing and the installation of the Harditex cladding. There are three significant defects associated with this.

[7] *Dicks v Hobson Swan Construction Ltd (in Liquidation)* (2006) 7 NZCPR 881 (HC).

[114] The experts attributed responsibility for the defect at the apron flashing/metal fascia junctions to the Harditex installer who created the defect by sliding Harditex behind the metal fascia leaving a hole in an area that could not be texture coated and waterproofed and that allowed moisture ingress that led to damage. Capstone is responsible for this defect.

[115] I find that Capstone is responsible for the construction of the parapets without a slope. There was some suggestion in the evidence that Capstone was not responsible for this. It was claimed that the framing put up by Capstone was pre-nailed and the absence of a slope was the responsibility of the framers and also the plasterer who could have remedied the lack of slope by inserting a polystyrene wedge. I do not accept this. Capstone employees constructed the parapets. Mr Donaldson's evidence was that these employees were experienced builders that did not require supervision. The Capstone employees who erected the framing and placed Harditex on the parapet surface should have ensured that the slope required by Harditex technical literature was created.

[116] Capstone is also partially responsible for the balcony membrane intersection with balcony cladding defects which the experts agreed was the joint responsibility of the membrane applicator and the Harditex installer.

[117] I find that in creating these defects, Capstone breached the duty of care it owed the claimants as builder. It is immaterial that the contract was limited in the manner claimed. Capstone is liable for its own work. The defects for which Capstone is liable were described as primary defects by the experts. The first two caused the need to fully re-clad the affected walls. The third caused the need for the re-clad of part of the northern wall.

[118] Mr Paykel was the only expert that attributed percentages of remedial costs to particular defects. In his brief he estimated that the apron flashing/metal fascia junctions defect gave rise to 60 percent of the re-cladding work, that the parapet defect gave rise to 80 percent of the re-cladding work and that the balcony membrane/cladding intersection gave rise to 10 percent.

[119] Considering the above, I find that Capstone is liable for the full cost of the remedial work required.

Liability Finding - Mr Donaldson

[120] I have accepted that the role of Capstone and Mr Donaldson was greater than that claimed by Mr Donaldson and Mr Sutherland. Rather than departing after the framing, Harditex and joinery was in place, Mr Donaldson was present on site from time to time until the completion of the entire project. He attended to some finishing details and attended meetings.

[121] The Council have submitted that Mr Donaldson was a project manager and that he therefore owed the claimants a duty of care in accordance with the principle in *Kilham Mews*[8] to ensure the house complied with the Building Code, building consent, plans and specifications.

[122] A job title is not conclusive although it can indicate the experience, skill and assumption of responsibility of a particular respondent. In *Lake v Bacic,* [9] Asher J found that although Mr Lake was called the site manager he was responsible for organisational matters and not building workmanship in which he had no experience and skill. It was found he did not owe a duty of care to future purchasers.

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[8] *Body Corporate 185960 v North Shore City Council (Kilham Mews)* HC Auckland, CIV-2006-004-3535, 22 December 2008.

[9] *Lake v Bacic,* HC Auckland CIV-2009-004-1625, 1 April 2010 at [33]-[35].

[123] In finding whether Mr Donaldson personally owed a duty of care it is necessary to examine what the evidence establishes that his role actually was and what he actually did. Not everyone involved in some way with the construction of a house will owe subsequent home-owners a duty of care.[10]

[124] Ms Knight has submitted that the picture established in evidence is of Mr Donaldson fulfilling a hands-on, on-site role and performing tasks typically performed by a project manager. The submissions go on to say that whether or not he actually checked the quality of the work being carried out, he was the most senior Capstone person there and knew Ms Tressider was not capable of acting as site supervisor. Therefore whether deliberately or unconsciously, he stepped into the site supervision role.

[125] Mr Donaldson was observed by the claimants working on the box seat which had been associated with damage. There is no other evidence linking him to the personal creation of defects. He has denied personally erecting the framing and installing the Harditex cladding. He has also denied responsibility for checking the quality of this work by the other Capstone employees who were more experienced builders than him. He says that he attended to the progress of Capstones work and attended to some finishing details.

[126] I find that it is not established that Mr Donaldson was responsible for supervising the quality, as opposed to the progress of the work of the Capstone employees on site.

[127] Neither is there any evidence that Mr Donaldson had a supervisory role making him responsible for the defects created by others. I do not accept that Capstone was responsible for monitoring the quality of the work of subcontractors engaged by Ms Tressider. I

[10] *Auckland City Council* v *Grgicevich,* HC Auckland, CIV-2007-404-6712, 17 December 2010 at [72]-[75].

do not accept that such a role could be unconsciously assumed in the manner suggested.

[128] Ms Knight has submitted that because Mr Donaldson withheld the identities of the Capstone workers on site he should not be given the benefit of any doubt created about his role by the lack of corroboration from them. I agree and have also considered whether I can properly infer from this lacuna in the evidence that Mr Donaldson had a supervisory role or personally constructed the parapets with defects or applied the Harditex in a negligent manner. I have concluded that I cannot.

[129] Mr Donaldson's evidence, which I accept, was that he was relatively inexperienced as a builder compared to the other Capstone employees. I accept that it was not his role to supervise the other Capstone builders as he was not qualified to do this. He gave evidence that he had no particular knowledge of the relevant New Zealand Standards or any familiarity with the Harditex literature and that this was because he was not installing the product himself. His role and the role of Capstone may have been greater than he has conceded. However it is not proven on the evidence that he either created or supervised the creation of defects. It is not established on the evidence that he had a role that gave rise to a liability in tort to the claimants. It is therefore not established that Mr Donaldson owed or breached a duty of care to the claimants.

[130] I have noted that Mr Donaldson was observed working on the outdoor seat which has been established as a secondary defect. Although this seat has been associated with damage, the experts at the conference agreed that the wall it adjoins already requires re-cladding. In addition the experts commented that the seat, which creates an enclosed unventilated area, should have been detached from the dwelling. The defect has been caused primarily by a design

error on the part of Ms Tressider. There is no evidence it was built contrary to her design.

WERE THE CLAIMANTS NEGLIGENT IN HAVING THE ROTSTOP TREATMENT CARRIED OUT?

[131] The application of RotStop by the claimants has given rise to a number of legal and factual issues. These include whether its cost can be claimed as a consequential loss and whether the claimants should bear the cost of the proportion of the damage that can be attributed to its use.

[132] The Council has raised the use of RotStop as an affirmative defence. It claims that the proportion of the damage attributed to RotStop should be borne by the claimants. The Council has claimed that the claimants were aware prior to implementing RotStop that it would likely cause the timber framing to swell and create cracks in the cladding. The damage that arose therefore was caused by the claimants and they should be liable for it.

[133] In the circumstances it is necessary to establish contributory negligence on the part of the claimants before a proportion of the re-clad costs can be attributed to them. Alternatively, the claimants could have a proportion of the damage attributed to them if the use of RotStop had increased the remedial scope or cost.

[134] Ms Knight submitted that the decision by the claimants to use RotStop was not reasonable. This is because RotStop is merely a timber preservative treatment. It does not stop leaks or repair damage. Its cost ($24,000) was disproportionate to the cost saving achieved by reducing the level of timber replacement which, at best was 10 per cent or approximately $2000 (as suggested by Mr Hazlehurst) and at worst was zero (as suggested by Mr Crow). Ms

Knight submits that this indicates a lack of informed cost benefit analysis.

[135] It is acknowledged that Mr Holyoake suggested in his evidence that the use of RotStop resulted in greater savings and that but for the RotStop "this house would almost be written off by now." The weight that can be given to this evidence is reduced by the fact that Mr Holyoake has a business interest in the RotStop product. His evidence is also weighed against that of three experts, including the claimants' expert that the savings were at a maximum, $2000.

[136] The Council also raised the issue that RotStop constituted unauthorised building work. Ms Knight submitted that it would be abhorrent to ask the Council to recompense the claimants for undertaking work which is now known to be illegal. Ms Knight relied on a Department of Building and Housing determination (2011/116) issued in December 2011 which concluded that the application of RotStop is building work requiring a building consent. Ms Knight accepted that the claimants were unaware at the time that RotStop was unauthorised building work.

[137] The claimants gave evidence about the circumstances surrounding their decision to use RotStop. They had discovered leaks in their home in 2009 around the time that Ms Turner had been made redundant from her work and had also been diagnosed with multiple sclerosis. They were concerned about the health effects on Ms Turner arising from living in a leaky home but lacked the funds to remediate the property. Ms MacLeod carried out research on the internet and the decision to proceed with RotStop was made following the installation of moisture detection probes and a lengthy (two hour) meeting with Mr Holyoake.

[138] At the hearing the claimants both confirmed that they understood that RotStop would not fix the leaks to their house or

prevent further visible signs of damp and would only preserve timber. Ms Turner gave evidence that she understood that RotStop could cause existing cracks to expand but that she did not understand that its use could lead to new cracks. Both Ms Turner and Ms MacLeod emphasised their concern about Ms Turner's health. Ms MacLeod was also concerned that if they did not take steps to mitigate their damage, this could have legal consequences later on.

[139] The claimants deny that they were negligent in using RotStop. It is their position that the use of RotStop was a prudent attempt to mitigate their damage and that they should not be penalised for taking reasonable steps in good faith to mitigate their loss, even where those attempts have failed. They claim that the cost of RotStop should be recoverable on the basis that its application was an act reasonably done with the view of minimising possible future damage.[11]

[140] Section 3 of the Contributory Negligence Act 1947 provides:

> Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.

[141] Section 3 allows for the apportionment of damage where there is fault on both sides.[12] In assessing whether a plaintiff is at fault, the standard is that of the reasonable person although the person's own general characteristics must be considered.[13]

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[11] *Kennedy Grant on Construction Law* (2nd ed, Lexis Nexis, Wellington, 2012) para [3.89].
[12] Stephen Todd (ed) *The Law of Torts in New Zealand* (5th ed, Brookers, Wellington, 2009) at [21.2.02]; *Hartley v Balemi* HC Auckland, CIV 2006-404-2589, 29 March 2007 at [101].
[13] *O'Hagan v Body Corporate 189885* (Byron Avenue) [2010] NZCA 65; [2010] 3 NZLR 486 at [79].

[142] The test for assessing the existence and extent of contributory negligence was clarified by Ellis J in *Findlay and Sanelin v Auckland City Council*.[14] After considering case law on the standard of care expected of plaintiffs in terms of protecting themselves from harm, she determined three questions to be answered. In the context of this case these questions are:

> (a) What if anything did the claimants do that contributed to their loss?
> (b) To what degree were those actions or inactions a departure from the standard of behaviour expected from an ordinary prudent person in their position (with their particular characteristics)?
> (c) What was the causal potency of those actions or inactions to the damage suffered? In other words, to what extent did their actions or inactions contribute to the damage?

[143] With regards to the first question, the claimants contributed to their damage by using RotStop which I have found to be the cause of cracking on the upper eastern elevation. However, given that the primary defects necessitate a full re-clad it is questionable whether the use of RotStop has caused loss as opposed to damage.

[144] The second question is, to what degree did the claimants actions depart from those of an ordinary prudent person in their position? It was established at the hearing that the cost of RotStop was disproportionate to the savings (if any) it achieved. Its use does not appear to have been financially prudent although no evidence was before the Tribunal about the claimants' understanding of the cost of the timber they were attempting to save versus the cost of the product. Although RotStop may not have been a wise use of the claimants' funds I do not consider that this of itself constitutes a

[14] *Findlay v Auckland City Council* HC Auckland, CIV-2009-404-6497, 16 September 2010 [59]-[64].

departure from the standard of behaviour of an ordinary prudent person. It is more appropriate to consider whether using RotStop knowing that it could exacerbate cracking was such a departure.

[145] There is no evidence that the claimants should have appreciated that RotStop would or could cause significant cracking to their house. There is also no evidence that, at the time, they should or could have appreciated that the application of RotStop constituted building work for which consent was required. They believed that they were preserving the timber framing of the house and that this would be beneficial for Ms Turner's health. In all the circumstances, I do not consider that the decision to use RotStop was a departure from the standard of behaviour accepted from an ordinary prudent person. It follows that I do not find that contributory negligence was established.

[146] Although I do not find contributory negligence is made out I do not consider that the cost of RotStop can be claimed by the claimants as a reasonable cost of mitigating their damage. Both the claimants agreed that the RotStop was not intended to fix the defects or prevent further water damage to the property. Its only purpose was to preserve timber. Given the completely disproportionate cost of the treatment to the cost of the timber saved, I do not consider that the application of RotStop was a reasonable step to mitigate loss. It was unauthorised building work (although the claimants cannot be criticised for not knowing this), it did not result in measurable savings and its use was not the result of an informed cost-benefit analysis. I do not accept that its cost is a consequential loss that can properly be claimed in these proceedings.

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

[147] The experts agreed that the house requires a full re-clad. The only dispute as to scope related to the roofs. I have resolved this issue earlier in this decision and decline to allow for the replacement of the roofs within the remedial scope.

[148] A panel of three experts on quantum appeared at the hearing. These were the assessor, Mr Crow, Mr Ewen for the Council and Mr Johnson for the claimants. The experts were in broad agreement with some differences. Their estimates as to the cost of the building work excluding roof replacement, GST and contingency are as follows:

Mr Crow	$220,298.00
Mr Ewen	$214,527.00
Mr Johnson	$ 221,629.00

[149] The differences between Mr Johnson's figure and Mr Ewen's figure were caused by their different views on the appropriate deduction for the cost of painting and scaffolding and for the reduction in consultant fees given the exclusion of the roofs from the remedial scope. Mr Johnson was of the view that the exclusion of the roofs from the project would not significantly reduce the consultant's fees while Mr Ewen was of the view that the reduction in design costs and project length would result in a reduction of $4,800.00.

[150] I accept Mr Johnson's estimate of the building costs which does not allow a discount for consultant's fees relating to the exclusion of the roof. There was a lack of certainty around this

evidence and I have determined that Mr Johnson's estimate is not excessive or unreasonable.

Contingency

[151] Mr Crow and Mr Ewen gave evidence that the appropriate figure for contingency was 10 per cent while Mr Johnson gave evidence that 15 per cent was the appropriate figure. Mr Johnson considered 15 per cent fairly reflected the inherent risk in the project given that a remedial design had not been completed, tenders and quotes had not been received and the extent of decay could not be known until the cladding was removed. He referred to a number of projects where a 15 per cent contingency had been used.

[152] Mr Crow gave reasons for supporting the 10 per cent figure. These were that the remediation was a well researched project and that because of the analysis that had already been done, a higher contingency figure was not necessary. He commented that the fact that RotStop had been used meant that further timber damage was unlikely to have occurred since his inspection of the property.

[153] Mr Ewen was also of the view that the remediation was reasonably well researched and that the setting of 10 per cent as the figure for contingency reflected the appropriate risk level.

[154] Having considered the evidence of all three experts, I am persuaded that 10 per cent is the appropriate figure for contingency. I do not accept that this project is unusual or that it gives rise to any particular complexities that are difficult to predict. I accept Mr Ewen's view that a medium risk categorisation represented by a 10 percent contingency allowance is appropriate.

[155] I find that the appropriate figure for building costs is $280,360.69 calculated as follows:

Building costs to rectify defects	$221,629.00
Contingency at 10%	$22,162.90
GST	$36,568.79
Total Building Costs	$280,360.69

Consequential losses

[156] The consequential losses claimed can be divided into actual costs and estimated costs. I will deal with the actual costs first.

Moisture detection company probes and roof sensors

[157] These were installed by the claimants in 2009 and 2010 respectively. I accept the submission of the Council that the costs of these are not claimable as they are not a cost of remediation.

RotStop Treatment

[158] I have already dealt with the claim for the cost of this treatment. It is disallowed.

Samford Architect and LIM site surveyors

[159] These costs were incurred in connection with a (now abandoned) proposal to carry out targeted repairs which was not pursued because the Council declined consent. They were incurred in the absence of any enquiry with the Council about the feasibility of the targeted repair proposal. In cross examination Ms MacLeod said that had she appreciated that there was a chance that the proposal would not have been accepted, she would not have incurred the costs. In the circumstances I find that these costs were not reasonably incurred and I decline to allow them. Similarly the pre-lodgement meeting fee related to the abandoned proposal for targeted repairs is disallowed.

WHRS Assessor's Report Fee

[160] The Council has submitted that this is a cost of litigation and is not recoverable. In *Hall v Auckland Council*[15] adjudicator Pezaro held that this fee was not a cost of the proceedings but rather a requirement for determining eligibility. I accept her view and award the report fees of $500.00.

Fees paid to Kwanto Limited and Alan Light Investigation

[161] In the claimants' closing submissions it is submitted that these fees were incurred in order to consider whether the WHRS estimate of cost to fix was reasonable and to consider whether the scope set out in the WHRS assessor's report was reasonable. It is also submitted that Mr Light was engaged to separately advise about the replacement of eaves and roofing.

[162] The Council opposes the allowance of these fees as consequential loss on the basis that they are litigation costs that are not recoverable or a cost of remedial works which is already adequately provided for the consultant's fees portion of the repair costs. I accept the Council's submission and disallow this expense.

Davies timber prop for garage

[163] $213 is claimed for the cost of a timber prop for the garage. The claimants were required to install this following the publication of the assessor's report to address structural concerns caused by moisture ingress. This expense is allowed.

Scott Commercial Invoice

[164] $535.86 is claimed for work carried out by Scott Commercial in April 2009. The invoice that supports this claim describes the work as racking out and resealing silicon around a gas cover box and a

[15] *Hall v Auckland Council* [2012] NZWHT Auckland 6.

spouting corner and re-concreting the base of the right hand side of the house. I consider that these repairs represent routine maintenance and disallow this expense.

Estimated Expenses

[165] The estimated costs that are claimed relate to the need of the claimants to obtain rental accommodation and to place their belongings in storage during remediation. They have also claimed kennel fees due to the difficulty in obtaining fenced accommodation and renting with a dog.

[166] There was some dispute between the claimants on one hand and the Council on the other as to the appropriate estimated repair period. Both Mr Paykel and Mr Johnson gave evidence that the likely duration of the repair work was four to four and a half months. Mr Johnson's evidence was that a one to two week lag period should be added to either end of this. The Council submits that 20 weeks is the appropriate duration to base estimated consequential costs upon. The claimants have claimed a 24 week period. I determine that a 22 week period is the appropriate estimated duration.

[167] The claimants have claimed rent of $700 per week. This is the median rent figure for a four bedroom house in a DBH market rental table handed up during the hearing by Ms Knight. The claimants' house has four bedrooms and a study. I accept that the sum of $15,400 for rental accommodation ($700 per week at 22 weeks) should be awarded. I do not accept that if rental accommodation of an equivalent size is obtained that the storage costs will necessarily be incurred. Ms Thorn conceded this at the hearing and I disallow the claim for storage costs.

[168] I also accept the kennel fees claimed and award $3,542 ($161 per week at 22 weeks). There is a tight rental market in inner Auckland and regardless of whether fenced property can be found, it

is likely that the claimants' dog will need to be kennelled as many landlords prefer to rent to tenants without animals. I also note that although the claimants have two dogs they have only claimed kennelling costs in respect of one of them which is reasonable given that the second dog was acquired after these proceedings were contemplated.

[169] I also accept the claimed packing and moving costs which like the kennel fees are supported by documents in the common bundle. These are $3,996 and were not challenged by any respondent. I also accept that $400 claimed for cleaning is reasonable.

[170] I find that the claim for consequential losses is established to the amount of $24,051 which is calculated as follows:

WHRS assessor's report fee	$500
Rent	$15,400
Kennel fees	$3,542
Packing and moving costs	$3,996
Cleaning	$400
Timber prop	$213
TOTAL	**$24,051**

GENERAL DAMAGES

[171] The claimants have claimed $25,000 for general damages. The Court of Appeal in Byron Avenue have confirmed that the availability of general damages in leaky building cases was generally in the vicinity of $25,000 for owner occupiers.[16] In their briefs and evidence, both Ms Turner and Ms MacLeod described the anxiety and stress they have experienced as a result of finding themselves

[16] *Body Corporate 189855 v North Shore City Council (Byron Avenue)* [2010] NZCA 65.

the owners of a leaky home. They will need to endure the disruption of moving while their house is remediated. I accept that the usual award for damages should be followed in this case and general damages are set at $25,000.

Deduction for settlement funds received

[172] Prior to the hearing, the claimants settled their claim against the sixth respondent Barfoot & Thompson, and the seventh respondent, Norman Lloyd. Pursuant to this settlement, the claimants were paid $30,000 and withdrew their claims against those respondents. The settlement agreement recorded that 'the sum of $30,000 was paid towards the claimant's legal fees and/or expert fees relating to the mediation and/or RotStop costs.' Counsel for the sixth and seventh respondent subsequently advised the Tribunal that this wording had been used at the request of the claimants.

[173] In Procedural Order 8, I determined that the settlement funds received were to be set off against any award of damages that I find the claimants are entitled to from other respondents. I noted that the terms of settlement were a matter of private contract between the claimants and the sixth and seventh respondents but that this contract did not bind the Tribunal. As the settlement of the claim was made in the context of a claim before the Tribunal and within the Tribunal's jurisdiction I held that settlement funds received for a claim before the Tribunal cannot be applied to expenses outside the jurisdiction of the Tribunal.

[174] I noted that the case of *Banque Kayser Ullman SA v Skandia (UK) Insurance Co Limited (No 2)*[17] relied on by Ms Thorn was not applicable because it related to a costs jurisdiction completely different to that of the Tribunal where, unless there is a finding of bad

[17] *Banque Kayser Ullman SA v Skandia (UK) Insurance Co Limited (No 2)* [1988] 2 ALL ER 880.

faith or allegations without substantial merit are made, the parties to adjudication must meet their own costs and expenses.

[175] Ms Thorn attempted to revisit the issue of the application of the settlement funds at the hearing. However, she relied on the same argument and the same case law considered in Procedural Order 8 and I am not persuaded to depart from my earlier decision. Accordingly, the sum of $30,000 being the settlement sum received is deducted from the established claim.

Deduction for bathroom leak and RotStop damage on upper eastern elevation

[176] The Council's quantum expert calculated that the area of cladding affected by the bathroom leak was 6.8 per cent of the total cladding area and represented $15,499.83 of the total remedial cost. In her submissions at para [4.5], Ms Knight calculated this cost adding and adjusting for the contractor's margin being 10 percent resulting in a total of $15,920.42. It was submitted that this sum should be deducted from the overall repair costs. I accept that Ms Knight's calculation is correct.

[177] It is common ground that damage caused by an internal leak falls outside the jurisdiction of the Tribunal. The difficulty I have in respect of the proposed deduction for the bathroom leak is that a full re-clad of the house is already necessitated by the primary defects which have allowed moisture ingress that has led to damage. The submissions of the respondents are silent as to the legal basis for a deduction of the proportion of the re-cladding costs that are attributable to the bathroom leak. Given that it is already necessary to re-clad the house, the bathroom leak cannot of itself be said to have caused any additional damage.

[178] A similar point can be made in respect of the proportion of the damages that are attributable to the use of RotStop. I have not found the claimants to have been contributorily negligent which would have provided a basis for apportioning the damage linked to RotStop to them. There is no suggestion that targeted repairs would have been viable had the limited proportion of the cladding where cracks are attributed to RotStop (upper eastern elevation) remained uncracked. The building is cracked on all other elevations and has primary defects which have necessitated a re-clad. Without contributory negligence having been made out, there is no legal basis for apportioning this part of the damage to the claimants.

[179] I find that no deduction can be made for the proportion of the costs that can be proportionately attributed to the bathroom leak and the use of RotStop because the house, in any case, required a full re-clad.

Claim for Stigma

[180] The claimants claimed $82,000 for the lost value to their property caused by stigma. The stigma claim was effectively abandoned at the hearing. No evidence was led regarding this claim and no reference was made to it in Ms Thorn's submissions. This part of the claim is dismissed.

Claim for Interest

[181] Interest was claimed in respect of various expenditure claimed as consequential losses. I have disallowed this expenditure with the exception of the WHRS report fee. The claim for interest is declined.

CONCLUSION AS TO QUANTUM

[182] The claim has been established to the amount of $299,411.69 which is calculated as follows:

Remedial Work	$280,360.69
Consequential Damages	$24,051
General Damages	$25,000
Deduction for Settlement sum	$30,000
TOTAL	$299,411.69

WHAT CONTRIBUTION SHOULD EACH OF THE LIABLE PARTIES PAY?

[183] 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.

[184] 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.

[185] 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…

[186] Section 17(2) of the Law Reform Act 1937 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.

[187] Two of the respondents are liable for the full amount of the established claim. These are Auckland Council and Capstone. The Council has accepted that the house needs to be fully re-clad as a result of defects and has not disputed its liability. Capstone has been found liable for the full amount of the established claim.

[188] I find that Capstone should bear the greatest apportionment because it was responsible for the creation of significant defects which necessitated a re-clad. The Capstone director and employee that appeared at the hearing (Mr Sutherland and Mr Donaldson) gave evidence to the effect that no one was responsible for ensuring the quality of the work carried out by Capstone employees. I conclude that the contribution of Capstone should be set at 80 per cent.

[189] This leaves a 20 per cent contribution on the part of the Council which failed to properly carry out its inspections and in doing so breached the duty of care it owed to the claimants.

CONCLUSION AND ORDERS

[190] The claim by Nichola Joan Turner and Tracey Ann MacLeod is proven to the extent of $299,411.69. For the reasons set out in this determination I make the following orders:

i. Auckland Council is to pay Nichola Turner and Tracey MacLeod the sum of $299,411.69 forthwith. Auckland Council is entitled to recover a contribution from Capstone for any amount paid in excess of $59,882.34.
ii. Capstone is ordered to pay Nichola Joan Turner and Tracey Ann MacLeod the sum of $299,411.69 forthwith.

iii. Capstone is entitled to recover a contribution of up to $59,882.34 from Auckland Council for any amount paid in excess of $239,529.35.

iv. The claim against Simon Guinness and Richard Donaldson is dismissed.

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

Auckland Council	$59,882.34
Capstone Professional Services Limited	$239,529.35

[192] If either of the parties listed above fail to pay its apportionment, this determination may be enforced against either of them up to the total amount that they are ordered to pay in para [190] above.

TIMETABLE FOR COSTS APPLICATIONS

[193] The issues of costs was raised at the hearing and in relation to various interlocutory applications made in these proceedings. I direct that any application for costs should be filed by 5 September 2012. Any opposition is to be filed by 19 September 2012 and any reply to be filed by 26 September 2012. Determination of any costs application will be made on the papers.

DATED this 22nd day of August 2012

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M A Roche

Tribunal Member