IN THE WEATHERTIGHT HOMES TRIBUNAL
TRI 2007-100-000041

BETWEEN	**RICHARD TABRAM and HAYLEY TABRAM** Claimants
AND	**ARRAN SLATER and MICHELLE SLATER** First Respondent
AND	**OJO LIMITED** Second Respondent
AND	**BRUCE TINDALE** (Removed) Third Respondent
AND	**MINERAL PLASTER TECHNOLOGIES LIMITED** Fourth Respondent

Hearing:	23, 24, 25 February 2009; 5, 11 March 2009
Appearances:	T.J. Rainey and A. Parlane for the claimants E.J. Taia for the first respondents A. Maclean for the second and fourth respondents
Decision:	17 April 2009

FINAL DETERMINATION
Adjudicator: S Pezaro

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BACKGROUND

[1] The claimants, Richard and Hayley Tabram ("Tabrams"), claim for damages arising from weathertightness defects in the property at 89 Pacific Parade, Army Bay, Whangaparaoa. Their claim is for the cost of remedial works and damages from Arran and Michelle Slater, the first respondents ("Slaters") and Ojo Limited ("Ojo"), the second respondent. The Slaters claim against Ojo and the fourth respondent, Mineral Plaster Technologies Limited ("MPTL"). The claimants make no claim against MPTL.

[2] The timeline relevant to this claim is as follows:

- February 2001- Arran Slater applied to the Rodney District Council ("the Council") for building consent.
- 21 June 2001 – Building consent issued by the Council.
- June 2001 to May 2004 – The period of construction. During this time Approved Building Certifiers Limited

("ABC") carried out inspections and issued a building certificate for the work confirming that it met the requirements of the Building Code.

- 18 May 2004 – the Council issued a Code Compliance Certificate.
- 12 August 2005 – The Slaters entered into an agreement with the Tabrams for sale and purchase of the dwelling.
- 20 November 2005 – Sale and purchase settled.
- About April and/or May 2006 - the Tabrams discovered water ingress and cracking in the dwelling.
- 28 August 2006 - Claim filed with the Weathertight Homes Resolution Service.
- 2 November 2006 – WHRS assessor's report completed

THE CLAIMS

[3] The Tabrams' claim in contract and tort against the first respondents. The grounds are:

(a) That the Slaters breached their vendor warranties under Clause 6.2(5) of the contract for sale and purchase in respect of the building works.

(b) That the Slaters were the head contractor/builders of the house and that Mr Slater exercised control over the construction of the house in such a manner as to attract a non-delegable duty of care in the nature of that imposed on residential property developers.[1]

Against Ojo, the Tabrams and the Slaters claim that:

(c) as the designer of the dwelling, Ojo breached its duty to exercise reasonable skill and care in preparing plans

[1] *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA).

and specifications for the dwelling and that deficiencies in the design are a cause of the weathertightness defects in the house.

[4] The Slaters claim that the fourth respondent, MPTL, negligently issued a workmanship guarantee for the plaster cladding.

THE ISSUES

[5] The issues that I have addressed in determining these claims are:

(a) The damage to the dwelling – causes; the extent of remedial work required; the cost of repair; betterment
(b) The claimants' amendment to the pleadings
(c) Whether the first respondents breached their vendor warranties
(d) Whether the first respondents owed a duty of care to the claimants and if so, whether there was a breach of that duty
(e) The effect of the Buy Smart Report on the claim by the Tabrams
(f) Contributory negligence
(g) The designs by Ojo - were they of the required standard and, if not, the link between the design and the relevant defects
(h) Whether the producer statement was negligently issued by MPTL and, if so, whether MPTL has any liability to the Slaters
(i) General damages
(j) Costs

Damage to the dwelling

Damage to the dwelling – cause

[6] An experts' conference was convened on 13 February 2009. The conference was attended by Neil Alvey, the claimants' expert: Simon Bragg, builder; James Morrison, the first respondents' expert on the design and weathertightness defects; Matthew Carran, the first respondents' expert on the cost of remedial work; and Clint Smith, the second respondent's expert on defects and repair costs. The WHRS assessor, David Lovell, now resides overseas and therefore was not called to give evidence in these proceedings.

[7] The experts' conference produced an agreed leaks list[2] which identified the location of damage to the dwelling and each of the defects causing the damage. There was agreement that the external wall on each elevation was damaged.

[8] The experts attributed a percentage to each defect, representing the extent to which that defect contributed to the damage as a whole. The experts also agreed that:[3]

a. A cost balancing exercise is required (amongst other things) to determine the best way to repair a building. This is not a straight forward decision.
b. There is no dispute that the whole of the north elevation and the decks on that elevation had to be replaced and repaired.
c. A cavity system was not required at the time of construction. A cavity on its own would not have prevented water ingress.
d. There was inadequate fall to the deck but this did not cause any actual existing damage (there is an issue on this matter in relation to likely future damage).

[2] Schedule of leaks – experts' conference, 13 February 2009.
[3] Ibid.

Damage to the dwelling

[9] Although the experts agree that each wall was damaged there is a dispute as to whether the claimants needed to totally reclad the dwelling. The first and second respondents argue that only a partial reclad was necessary.

[10] The two questions relevant to determining whether a total reclad was required are:

(a) Did the extent of the damage to the dwelling necessitate a total reclad?
(b) Was a total reclad necessary to satisfy the Council requirements?

Damage to the dwelling – the extent of the damage

[11] As recorded, the experts' conference agreed that there was damage on all external walls.[4] The causes of damage to the walls were identified as:

(a) insufficient cladding to ground clearance allowing moisture to wick up and the total damage to the elevations (11%).
(b) unsealed penetrations and fixings directly into the cladding (3%).

[12] A total of 14% of the damage was therefore attributed to the external walls. However, the experts did not agree that a total reclad was required. I have considered whether the evidence indicates that a partial reclad would have been likely to adequately remedy the existing damage and prevent future likely damage.

[4] Ibid.

[13] Mr Lovell's report ("the Lovell report") is relevant to this issue as it is the only report prepared before the remedial work started. The Lovell report was completed on 2 November 2006 under the Weathertight Homes Resolution Services Act 2002. The technical aspect of the report has not been challenged.

[14] Between 2001 and 2004, when this property was constructed, there was no requirement for a cavity system. Mr Lovell set out two schemes for repair in his report. The first scheme was for repairs to meet the Building Code and standards applicable at the time of the construction while the second scheme reflected the requirements of the Building Act at the time that the report was produced. The two options were set out in paragraph 6.3 as follows:

> **6.3. Repairs**
>
> The work needed to make the dwellinghouse watertight and repair the damage is as follows:
>
> I have set out two repair schemes based on the following scenarios:
>
> (a) Repairs to meet the Building Code and Standards applicable at the time of construction.
>
> (b) Repairs to meet the Building Code and Standards applicable at the time of writing the report. I have assumed that Building Consent will be required.
>
> a) Replace cladding, framing, and linings in line with Beagle Consultancy's report to all the decks, main walls that are attached to the decks including the ground floor gym, garage walls together with associated timbers linings and fittings mainly on the northern elevation including kitchen ceiling and will also include areas on the west and east that are affected under the 1 m remediation rule. Replace the columns at the front and timber sarking at mid storey level.
>
> b) As above but repaired and re-clad on a drained and ventilated cavity system to include the whole house and to reflect alterations to roofs, openings and fittings.
>
> **6.4. Cost**
>
> The estimated cost of that work based on the scenarios above are as follows:

a) $168,750 Incl GST. Drained and ventilated option an additional $18,570 Incl GST.

b) $269,330 Incl GST

Note: There is a costing based on inspection at this time. It is advisable to obtain more than one quote before doing repairs.

[15] There is agreement that, at the time that the repairs were carried out, the remedial work was required to meet the standards of the 2004 Building Act. The respondents have not argued that inserting a cavity was unnecessary. However, there has been extensive argument on the question of whether all elevations required recladding.

[16] Simon Bragg prepared the claimant's leaks list prior to mediation, attended the experts' conference and gave evidence on the defects. Mr Bragg is the managing director of Bragg Builders Limited. This company was engaged by Jennian Homes to carry out the remedial work on the basis of a total reclad. For this reason Mr Bragg had a financial interest in the work and it was appropriate that he did not give evidence as an expert. Mr Bragg was not involved in assessing the damage or the extent of the remedial work and therefore his evidence is of little relevance.

[17] Robin Bailey gave evidence for the claimants as a director and franchise holder, with his wife Annette Bailey, of Jennian Homes Rodney Limited ("Jennian Homes"), the company that carried out the remedial work. Mr Bailey stated that he and Ms Bailey are responsible for project management of residential building contracts entered into by their company.

[18] In evidence, Mr Bailey said that the possibility of targeted repairs was not considered. Mr Bailey stated that he had no previous experience with remediation of leaky homes and that all his work had been on new homes or alterations. He stated that this was the first project of this nature. Mr Bailey said that he relied on the Lovell

report to identify the defects and did not make any further assessment of the extent of the damage or the work required. However, Mr Bailey also said that he had not read this report page by page and that the assessment of the work required was made by himself, Annette Bailey and a draftsperson. He stated that in his opinion, the Council would not have accepted anything but a total reclad. Mr Bailey's lack of knowledge and expertise in the area of weathertightness and his financial interest in the extent of the remedial work mean that I give little weight to his evidence.

[19] Jennian Homes engaged Mr Alvey to prepare a report on the extent of the damage to the external timber framing. Mr Bailey said that the timber damage report was required by the Council as a condition of the building consent. Mr Alvey stated that he is a director of Weathertight Processing Limited, a company which carries out the processing of building consent applications in respect of remedial works and recladding proposals for the North Shore City Council. In his statement dated 23 December 2008, Mr Alvey said that his instructions were to provide:

(a) An assessment of the extent of damage to the external timber framing;
(b) A determination of the extent of timber framing replacement based on moisture content testing of the timber framing and visual examination including soundness testing:
(c) A determination of the extent of treatment to the existing framing left in-situ.

[20] Mr Alvey stated in evidence that he was not involved in the decision to fully reclad the dwelling. He said that decision was made before he became involved in the remediation. Although Mr Alvey visited the site before the remediation work began, he did so for the purpose of a pre-construction remediation meeting. He said that he walked around the property and noted the various defects that the assessor had noted.

[21] Mr Alvey gave reply evidence on the extent of the damage and areas where moisture content levels exceeded 18% and the issue of betterment. In both his statement dated 23 December 2008 and his statement in reply dated 19 February 2009, Mr Alvey sets out his qualifications and experience relevant to the evidence that he gives.

[22] I am satisfied that Mr Alvey is qualified to give expert evidence on the extent of the remedial work required and that his analysis of the damage when the cladding had been removed and the moisture content level tests that he carried out, formed a sound basis for the evidence that he gave at the hearing. In addition, although Mr Alvey was not involved in the assessment of the extent of the area that needed to be reclad, he was the only expert involved in these proceedings who was on site during the remedial work and saw the extent of the damage. Further, Mr Alvey was initially retained by Jennian Homes as a remediation specialist. For this reason, although Mr Alvey now gives evidence as the claimants' expert, I am satisfied that he acted independently at the time that he prepared his initial report for Jennian Homes. For these reasons I place significant weight on Mr Alvey's evidence.

[23] Mr Alvey's firm view was that option 6.3 (b) in the Lovell report, a total reclad, was necessary to address all likely future causes of water ingress and to meet the requirements of the Building Code. Although Mr Alvey admitted to making an error in one of his elevation drawings which showed the moisture content (identified as exhibit D with his reply statement) this error does not alter the fact that he recorded a moisture content exceeding 18% on each elevation. There is no contradictory evidence. As stated, all the experts who gave an opinion on the extent of the defects agreed that there was damage to each elevation on the external walls.

[24] Mr Alvey explained that the significance of the 18% moisture content level was that the timber analysis suggested that the existing framing was untreated, with the result that the 18% limit applied. If the timber framing had been treated, a moisture content of 20% would have been acceptable. Although Mr Alvey acknowledged in evidence that he had not taken precise moisture readings, his is the only evidence of moisture content besides the Lovell report.

Damage to the dwelling – the Council requirements

[25] While it is the case, as Mr Maclean submits[5], that the question of whether targeted repairs were necessary was not put to the Council, the issue that I have to determine is whether it was reasonable for the claimants to elect to carry out a full reclad of the dwelling. This determination requires an assessment of whether it was more likely than not that the Council would have approved targeted repairs.

[26] It was Mr Alvey's opinion that, had a proposal for targeted repairs being submitted to the Council, the Council would have required a remedial works proposal which would have in turn required comprehensive invasive and destructive testing to the areas of cladding which were to remain. Mr Alvey stated:

> "Bearing in mind that it's a 3 storey dwelling, in order to be able to carry out that remedial works proposal, scaffolding would have to be erected to comply with OSH regulations. So therefore the cost of that report would not be insignificant. It would also have meant that the original design of the dwelling would of required to remain so it would also have meant that the risk matrix score would have exceeded 20.
>
> So therefore it follows that specific weathertightness peer review would have been required under the Building Code. That peer review would have required the comprehensive examination analysis at every junction and it

[5] At paragraph 52 of his closing submissions.

> would also, in my opinion, have imposed higher building standards such as the introduction of a rigid air barrier behind the cavity.
>
> So, bearing in mind the costs that would have been incurred to go down the targeted repair approach, compared to the cost saved in keeping discrete areas of cladding in place, even if that would have been sanctioned by the TA, which I very much doubt, would have probably exceeded the amount of cladding that remained there anyway."

[27] Mr Alvey's opinion was that the requirement for a risk matrix assessment, introduced into the Building Code in June 2005, meant that the Council would have been unlikely to accept a targeted repair. The risk matrix requires the Council to carry out a weathertightness risk analysis establishing or estimating the appropriate risk severity score for each risk factor. In the case of the Tabrams' property, the high wind zone, the number of levels, the complexity of the design, and the enclosed decks all increased the severity of the risk.

[28] Barry Gill gave further evidence for the Tabrams that a partial reclad would not have been acceptable to the Council. At the time that the Tabrams' repairs were under way, Mr Gill was employed by the Council as a Technical Advisor, dealing specifically with weathertight issues.[6] In his brief Mr Gill stated that he was involved with the site monitoring of the remedial works on the Tabrams' property and it was evident when the cladding was removed that a number of high risk junctions had failed and decayed timber was present. In his opinion a Code Compliance Certificate would not have been issued if a targeted repair had been undertaken.

[29] Under examination by Mr Maclean, Mr Gill said that it would have been difficult to propose targeted repairs that the Council would accept. While this statement amounts to a concession that the Council might have accepted a proposal for targeted repairs, the experts' conference agreed that this involved a cost balancing exercise.

[30] Evidence in support of a targeted repair approach was given by Mr Morrison and Mr Smith however under cross examination both witnesses conceded that a targeted repair was unlikely to satisfy the Council. Mr Morrison, for the Slaters, stated that he could not dispute Mr Alvey's evidence on this issue and accepted that it may be the requirement of the Council to require a full reclad. He agreed that it was the exception not to fully reclad.

[31] Mr Smith accepted that targeted repairs were now the exception rather than the norm. Neither Mr Smith nor Mr Morrison had inspected the damage although the claim was filed with the Tribunal in 2007, before consent had been obtained for the repair work. The first and second respondents were given an opportunity to inspect but elected not to instruct their experts to do so. As a result these respondents now have a limited basis on which to challenge the decision to proceed with a full reclad.

[32] For these reasons I prefer the evidence of Mr Alvey and Mr Gill to that of Mr Morrison and Mr Smith. I do not accept the submissions made by Mr Taia that only three elevations required recladding. Nor do I accept the submissions of Mr Maclean that Mr Smith's oral evidence supported a conclusion that a total reclad was unnecessary. Mr Smith gave evidence that he would have needed to carry out an investigation to determine the extent of the repairs required; that he accepted Mr Alvey's evidence that timber replacement was required on each elevation, that he accepted that Mr Alvey was competent and well qualified to make an assessment and that Mr Alvey was in a better position than him to comment on the scope of repairs.

[33] I therefore find that the Council was unlikely to issue consent for a targeted repair and that it was reasonable for the Tabrams to

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[6] Brief of Barry Gill dated 19 February 2009.

repair on the basis of a full reclad. Even if targeted repairs had been advisable, I accept the evidence of Mr Alvey that a partial reclad would be unlikely to reduce the cost of remedial work.

The damage – the basis for calculating the cost of repair

[34] Mr Taia submits that contractual damages should either not be awarded, or calculated with reference to the cost of complying with the standards in force at the time of construction. For the second proposition, Mr Taia relies on *Ford v Ryan*[7], where MacKenzie J considered that to calculate damages based upon the cost of meeting current standards, as opposed to those in force at the time that the contract was entered into, effectively converts cl 6.2(5)(d) into a warranty of quality.[8] However, the measure of contractual damages is the amount required to put the claimants in the position they would have been in had the breach not occurred. The alleged breach by the Slaters occurred at the date the contract was signed, therefore the claimants' position is determined at that date, not the date of construction. In the Tabrams' case the cost of repairs is the cost of meeting the requirements of the Building Act 2004 which was in force at the date of breach.

Damages – the reasonable cost of repair

[35] Mr Alvey and Mr Smith accepted that Mr Lovell made an error in interpreting the costings by Ortus Limited and agreed that the two figures at page 16, paragraph 6.4 of the Lovell report should be added together to give a total cost of $456,650.

[36] Although not raised during the hearing, it appears that this total of $456,650 does not allow for the fact that the amount of $18,750, which was provided in paragraph 6.4(a) as the cost of a drained and ventilated cavity, must have been included in the sum of

[7] (2007) 8 NZCPR 945 (HC).
[8] Ibid [48].

$269,330 provided in paragraph 6.4(b) as Mr Lovell stated that option (b) included a drained and ventilated cavity system. If I am correct the total cost that Mr Lovell should have specified based on the Ortus costings is $438,080. However, the difference between my calculation and the total discussed during the hearing is immaterial because the sum of $375,731.29 claimed by the Tabrams is less than the lower of the two figures.

[37] Mr Bailey said that Jennian Homes provided the estimate of $269,330.00 including GST for the cost of a full reclad with a drained and ventilated cavity system on the basis of Mr Lovell's estimate, repeating his error.

[38] Mr Carran was instructed to provide evidence on behalf of the Slaters on the reasonable cost of carrying out the remedial work. In his brief, Mr Carran described his estimate of $214,991 as Nett Trade Value excluding GST. This estimate represents the cost to the builder of the work and not the price that would be paid by a person in the position of the claimants. Mr Carran's estimate is incomplete as it does not provide a basis for determining the reasonable cost to the Tabrams of the required repairs. Mr Carran agreed in his brief to comply with the Code of Conduct for Expert Witnesses and therefore had an obligation to qualify his evidence by stating clearly that it was incomplete for the purpose for which it was given.[9] His failure to do so is regrettable.

[39] Under cross-examination by Mr Rainey, Mr Carran reviewed his estimate by including those costs which James White of Kwanto Limited identified[10] as necessary components of the remedial cost to the Tabrams. Mr Carran stated that, if these costs were added to his estimate, in his opinion the reasonable cost of remedial work

[9] Code of Conduct for Expert Witnesses (Schedule 4, High Court Rules) para 4.
[10] Reply statement of James White dated 18 February 2009.

would be approximately $380,993.[11] Mr Smith also agreed that the cost of repairs based on a full reclad would be about $381,000.

[40] Therefore I am satisfied that, bar deductions for any betterment, the remedial costs incurred by the Tabrams were fair and reasonable for the work carried out.

AMENDMENT TO PLEADINGS

Amendment to the pleadings - background

[41] At the hearing of replies Mr Taia objected to the claimants' amendment to their pleadings in their opening submissions. Mr Taia correctly identified the change from the statement of claim that relied on clause 6.2(5)(d) of the agreement for sale and purchase (7th edition) to reliance in the opening submissions on paragraphs (b) and (d) of clause 6.2(5).

[42] The relevant clauses are as follows:

> **6.0 Vendor's warranties and undertakings**
>
> 6.2 The vendor warrants and undertakes that at the giving and taking of possession:
>
> (5) Where the vendor has done or caused or permitted to be done on the property any works for which a permit or building consent was required by law:
>
> (a) ……
>
> (b) the works were completed in compliance with that permit or consent; and
>
> (c) ……
>
> (d) all obligations imposed under the Building Act 1991 and/or the Building Act 2004 (together "the Building Act") were fully discharged.

[43] Mr Rainey did not apply to amend the pleadings and offered no explanation for the amendment when this issue was raised by Mr

[11] First respondents' Exhibit 3.

Taia. Mr Rainey submitted that clause 6.2(5)(d) encompassed clause 6.2(5)(b) and therefore the amendment to the submissions was of no import.

Amendment to the pleadings – the issues

[44] Although the Tribunal is not bound by the High Court Rules it is acknowledged that such Rules provide a procedural guideline. Rule 7.77 requires leave to be granted for a claim to be amended after filing when a new cause of action is added. Where no new cause of action is introduced, the amendment can be made with notice. The situation arising in this Tribunal is unusual in that the amendment was not brought to my attention or that of counsel for the respondents before or during the hearing and was raised only at the reply hearing.

[45] The test for whether an amendment to a claim should be allowed is set out in *Elders Pastoral Ltd v Marr*[12] . The Court of Appeal confirmed a three stage test requiring the applicant to show that a late amendment to a claim is in the interests of justice, will not significantly prejudice the defendants, and will not lead to significant delay.

[46] The first question is whether the amendment introduces a new cause of action or alters the effect of the statement of claim as pleaded. In *Ford v Ryan* MacKenzie J considered the ambit of Clause 6.2(5)(d) and, in particular, whether this clause applied to all building work, including that for which consent was not required.

[47] MacKenzie J held that the warranty in Clause 6.2(5) is activated by the vendor doing or causing to be done works for which a permit or consent is required. Once this requirement has been met, Clause 6.2(5)(d) is not restricted to works for which a permit or consent is required but includes all building work. Paragraph 58 of

[12] (1987) 2 PRNZ 383 (CA).

Mr Taia's closing submissions seems to support this finding. He notes that:

> "… the REI-ADLS (8th ed, 2006) form does not contain an equivalent to Clause 6.2(5)(d) as it was considered that the warranty as drafted in the 7th edition of the form was too wide and that the vendor warranties in paras (a), (b) and (c) were as far as the vendor's liabilities should be taken."[13]

[48] For these reasons, I am satisfied that the meaning of Clause 6.2(5)(d) is broader than, and inclusive of, the work referred to in Clause 6.2(5)(b). Therefore the amendment does not introduce a new cause of action.

[49] The amendment would have the potential to delay the proceedings only if the hearing was reconvened for further evidence in respect of the amendment. That is not an application that has been made and given my finding above a resumed hearing could not be justified. The amendment cannot cause any prejudice to the respondents as it does not introduce a new cause of action. It is therefore unlikely that there is any additional evidence that the Slaters could produce in defence of the claim arising from Clause 6.2(5).

Amendment to the pleadings - Conclusion

[50] For these reasons, while I accept that the amendment at the closing stage of the proceedings by counsel for the Tabrams was inappropriate, I am therefore satisfied that no prejudice arises from allowing the amendment to stand.

[13] ADLS Seminar Paper on the 8th edition of the form at para 59.

CLAIM IN CONTRACT

Claim in contract – vendor warranties

[51] The Tabrams claim that the Slaters are in breach of the warranties under clause 6.2(5)(b) and (d) of the agreement for sale and purchase ("the agreement").

[52] Mr Taia submitted that the Slaters do not consider that they have breached their vendor warranties as they did all they could to comply with the requirements of the Building Act and had met their obligations under that Act at the time of settlement.

[53] However, Mr Slater accepted in cross-examination that he did not carry out the construction in accordance with those plans and specifications that were prepared by Ojo and granted a building consent by the Council. In particular Mr Slater accepted that he:

- changed the materials specified and the plans without consultation with Ojo
- did not use the recommended cladding or an approved applicator, substituting the Insulclad system specified by Ojo for the Putztechnic plaster system
- did not provide Mr Tindale with the plans, specifications or building consent documentation
- constructed the roof and altered the roof designs
- built the deck and parapets flat despite the plans requiring a slope
- designed the handrails on the deck and either installed them or arranged for their installation

[54] As a result, at the date of settlement, the building work had not been completed in accordance with the requirements of the consented plans and specifications and the Slaters were in breach of

their warranties under clause 6.2(5)(b) and (d). Each of the alterations that Mr Slater accepted that he made was identified by the experts as a cause of water damage.[14] I now consider whether the Slaters are liable to the Tabrams for damages in contract.

Claim in contract – defence of waiver

[55] The Slaters raise the defences of waiver and contributory negligence. Mr Taia submits that by proceeding with the purchase, despite the defects identified in the Buy Smart report, the Tabrams unconditionally waived their right to rely on the vendor warranties. Mr Rainey argues that the Slaters cannot rely on the defence of waiver because the combined effect of clauses 8.7(6) and 1.2 of the sale and purchase agreement is that any such waiver must be in writing and on notice and no such notice was given.

[56] Mr Taia submits that the faxed advice from the claimants' solicitor that the agreement was unconditional amounted to written notice of waiver. However, any waiver of rights requires an unambiguous representation[15] and I do not accept that the confirmation of settlement by Mr Worker operated as a waiver of actionable rights under the vendor warranties. Even if I were wrong in reaching this conclusion, for reasons which follow, any such waiver would have been founded on misrepresentations by Mr Slater about the cladding.

[57] I am not required to consider the second limb of the waiver defence set out by Mr Taia however I do so to make it clear that this defence had no potential for success. Mr Taia submitted that when the Tabrams confirmed the purchase, the Slaters altered their position by incurring the costs associated with preparing the settlement statement. As a result, Mr Taia argued, it is now inequitable or unconscionable to allow the Tabrams to rely on the

[14] Report of experts' conference dated 13 February 2009.
[15] *Neylon v Dickens* [1978] 2 NZLR 35 at 38 (PC).

vendor warranties. I conclude that this submission is unsustainable because the costs of the settlement were far outweighed by the benefit that the Slaters received from the proceeds of the sale.

Claim in contract –defence of contributory negligence

[58] Mr Rainey accepts that where acts or omissions amounting to a breach of contract also give rise to a claim in tort a reduction of damages for contributory negligence may be possible. However, he argues that in the circumstances of this claim, where the claim in contract is founded on an alleged breach of a contractual warranty, and the breach did not occur as a result of negligence, there can be no defence of contributory negligence.

[59] Mr Rainey relies on the decision of the High Court in *Ford v Ryan* where a contractual claim arose under cl 6.2(5) of the same edition of the REINZ/ADLS sale and purchase agreement.[16] In *Ford v Ryan* MacKenzie J held that: "Contributory negligence is available only when the claim is or may be based in negligence".[17] In the Tabrams' case the claim in tort arises from acts or omissions that occurred *prior* to the formation of the contract. The cause of action in contract arose *subsequently*, at the date when possession passed. Therefore, although the Tabrams have two causes of action against the Slaters, the claims did not arise concurrently and there is nothing to suggest that the contractual breach was a result of negligence. For these reasons I find that there is no defence of contributory negligence available to the Slaters against the claim in contract.

[16] Above n 7, [4].
[17] Ibid [26].

CLAIM IN TORT

Claim in tort - do the first respondents owe a duty of care to the claimants?

[60] Although the Tabrams' claim in contract has succeeded, I have proceeded to determine their claim in tort as it is this claim which gives rise to the Tabrams' claim for general damages. In addition, the issues arising in this claim are also relevant to the claims against Ojo and MPTL.

[61] The Tabrams claim that, as a result of the control that Mr Slater exercised over the construction, it is reasonable to impose a non-delegable duty of care on the Slaters. Mr Taia submits that in order to be found to be acting as a developer, a party must have direct control of and involvement in the building process and be constructing dwellings for other people for profit.[18] Mr Taia cited[19] the decision of Harrison J in *Leuschke Group Architects*[20] in support of his submission that a finding that a party must financially benefit from the construction to justify a finding that a non-delegable duty of care is owed. However the extract cited does not, in my opinion, support that interpretation. The emphasis in the decision by Harrison J is on the degree of control and decision making power that is exercised, giving rise to an actionable duty of care. The question of profit is incidental.

[62] In addition to making the decisions relating to the change of plans and materials, recorded at paragraph 53 above, Mr Slater accepted that he organised all the contractors who worked on the house and gave them instructions and undertook remedial work on the roof when it failed. In making those decisions and exercising

[18] *Body Corporate No 187820 v Auckland City Council* (2005) 6 NZCPR 536 (HC) (Trimac Case).
[19] Closing submissions paragraph 10.
[20] *Body Corporate 188273 v Leuschke Group Architects Ltd* (2007) 8 NZCPR 914 (HC).

such a degree of control over the construction I find that Mr Slater acted as head-contractor/builder or project manager. He therefore attracts a non-delegable duty of care to the Tabrams as subsequent purchasers and is liable for the negligent creation of any hidden defect which should be reasonably foreseeable as a likely cause of damage to third parties.[21]

Claim in tort - did the Slaters breach their duty of care?

[63] The experts agree that certain defects in the cladding led to water ingress, in particular the insufficient cladding to ground clearance (defect 1 in the experts' schedule) and incorrect fixing of handrails to the cladding(defect 2).[22]

[64] Ojo specified the Insulclad cladding in response to queries raised by the certifier about the fixing of the handrails. Mr Smith gave evidence that it was not possible to buy an Insulclad manual without being a licensed applicator of that system. He said that the licensing system required training and mentoring and that the manual would have dealt with details issues arising from the wind zone. Given Mr Smith's qualifications and experience, I accept that use of this system would have addressed details not provided for in Ojo's plans.

[65] I find that by altering or failing to follow the plans and relevant specifications, substituting materials, and failing to consult with Ojo about these changes, the Slaters, as head contractor/project managers, breached their duty of care to the Tabrams as subsequent owners.

[21] *Bowen & Anor v Paramount Builders (Hamilton) Ltd & Anor* [1977] 1 NZLR 394, 406 (CA).
[22] Schedule of leaks - experts' conference, 13 February 2009.

Claim in tort – defences

[66] The duty of care does not extend to those who purchase with actual knowledge of the defect(s), or in circumstances where the purchaser ought to have used their opportunity of inspection to discover the defect.[23] In his submissions for Ojo, Mr Maclean argues that the defects in the dwelling were not hidden but were patent because they were revealed by the Buy Smart Report. Therefore, he submits, the chain of causation is broken.

[67] However, a person who owes a duty of care:[24]

> "…cannot shelter behind a reasonable expectation of intermediate inspection unless the expectation was strong enough to justify him in regarding the contemplated inspection as an adequate safeguard to persons who might otherwise suffer harm."

THE EFFECT OF THE BUY SMART REPORT

The effect of the Buy Smart Report – Legal Issues

[68] The Buy Smart Report has three possible effects:

(a) The report severs the causal connection between the Tabrams' loss and any negligence of the respondents on the basis that the Tabrams assumed the risk of the leaking building with full knowledge;
(b) The Tabrams' decision to purchase despite the report amounts to contributory negligence;
(c) The report is of no effect.

[23] *Bowen*, above n 21, 413.
[24] *Jull v Wilson and Horton & Anor* [1968] NZLR 88, 97 per Richmond J.

[69] If a plaintiff acts with such disregard to their own interests that their conduct is the sole cause of the damage which they suffered, there may be a break in the chain of causation.[25] In *Sunset Terraces*[26], Heath J found that negotiating an abated purchase price constituted an intervening act, breaking the chain of causation in a claim against the territorial authority.

The effect of the Buy Smart Report - background

[70] On 12 August 2005, the Tabrams entered into an agreement for the sale and purchase of the property from the Slaters. The terms of the agreement were those in the standard Real Estate Institute of New Zealand Auckland District Law Society (7th edition – 3 July 1999). There were two additional conditions to the report, contained in clauses 14 and 15. Clause 14 provided that:

> **Building Inspection Report**
>
> This Agreement is conditional on the Purchasers satisfaction in all respects to a Building Inspection Report by a Qualified Builder on the dwelling within 5 working days from the date of this Agreement. The Purchaser will within 2 working days of receiving the Building Inspection Report give written notice of any reason/s for disapproval, and the Vendor shall have two (2) working days, after receiving such notice, to accept (in writing) responsibility for remedying any such reason/s prior to settlement. If the Vendor does not accept responsibility as aforesaid then this Agreement will be voidable at the option of either party.

[71] Clause 15 provided that the Tabrams' agreement was conditional upon a prior agreement not being confirmed. In other words the Tabrams had a backup agreement. The Buy Smart Report was obtained by the prior prospective purchaser, Mrs Ishiguro. Coincidentally she had instructed Tony Edward, a lawyer in the same firm, and Hunt Edward Worker, that acted for the Tabrams.

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[25] *Bowen*, above n 21, 412 and 413.

[26] *Body Corporate No. 188529 v North Shore City Council (No. 3)* [2008] 3 NZLR 479 (HC).

[72] On 15 August 2009 Mr Edward advised the Slaters' solicitors that:

> Our client has obtained a Building report on the property. The report highlights significant moisture problems in the living area, bathroom and in the bedroom wardrobes. Moisture tests taken to gibboard lining showed moisture at 100% with skirting lines swollen. The report concludes that the dwelling is of a "higher risk construction" and it would be "naive to think that no further water problems will occur".
>
> Accordingly the building report is not approved and we are instructed to give notice that the contract is at an end.

[73] The Tabrams paid Buy Smart $112.50 to use Mrs Ishiguro's report for their own purposes. On the suggestion of the real estate agent, the Tabrams met Mr Slater to discuss the report. They took a friend, Sean Wood to the meeting and Mr Tabram, Mr Slater and Mr Wood discussed the contents of the report. There is a dispute about the contents of this discussion.

[74] Following the meeting the Tabrams then instructed Richard Worker, their solicitor, to notify the Slaters' solicitor that the agreement was unconditional. No reduction in price was negotiated. Mr Worker, made a file note on 15 August 2005 recording that he had an extensive talk with Hayley Tabram who wanted to make the contract unconditional. Mr Worker recorded that:

> "I accordingly explained to Hayley that there was no advantage in making the contract unconditional as they had time to get a LIM report, but Hayley advised there was a code of compliance she did not wish to obtain a LIM report and her friend the project manager said the building inspection was in order.
>
> Accordingly, I have made the contract unconditional upon Hayley's instructions."

The Buy Smart Report – the relevant factors

[75] The relevant factors in determining the effect of the Buy Smart Report are:

(a) The level of general knowledge about leaky buildings in August 2005
(b) The information contained in the report
(c) The comments made by Mr Slater about the report.
(d) The documents produced by Mr Slater when the report was discussed
(e) The options available to the Tabrams when they received the report

The level of general knowledge about leaky buildings in 2005

[76] In *Byron Ave*[27] Venning J observed at paragraph 334 that "… by November 2003 there had been a good deal of publicity around the issue [of leaky buildings]". Venning J noted two articles which were published in 2003, shortly before the Tabrams arrived in New Zealand. By August 2005, when the Tabrams purchased Pacific Parade, they had been in New Zealand for over two years. Media publicity about leaky buildings was likely to be more extensive and the Weathertight Homes Resolution Service had been established.

The information contained in the Buy Smart Report

[77] By 2005 it was common practice to provide in a sale and purchase agreement for a pre-purchase inspection of property, as evidenced by the inclusion in the Tabrams' agreement and that of Mrs Ishiguro, of a standard clause to that effect.

[78] The Buy Smart Report was extensive. It included photographs of areas with defects and moisture readings had been

recorded with a non-invasive moisture meter. The report writer concluded by identifying weathertightness issues of continuing concern and referred to

> "…the fact the BIA along with BRANZ and the newly introduced DBH have all documented areas of "at risk" detail, all of which are evident with current structure. Overall we feel it would be naive of us to think no further water problems will occur and see dwelling as a higher risk construction".

The documents produced by Mr Slater when the report was discussed

[79] In evidence Mr Slater told Mr Rainey that when he met Mr Tabram and Mr Wood he showed them a folder with three documents in it. These documents were the Code Compliance Certificate, the workmanship guarantee signed by Bruce Tindale and the producer statement provided by MPTL. Mr Slater said that he assured Mr Tabram and Mr Wood that the cladding was installed properly and had guarantees. Mr Maclean submits that there was no reasonable basis for the Slaters to rely on the workmanship guarantee or the producer statement. Mr Rainey submits that the evidence given at hearing shows that these documents were fraudulently obtained and are demonstrably false.

[80] As recorded, Mr Slater substituted the Insulclad system specified by Ojo for the Putztechnic plaster system and arranged for Bruce Tindale, a cousin of Michelle Slater, to install the cladding. The Slaters purchased the cladding materials through Joe Paul, who stated that he has known Arran and Michelle Slater and their extended families for many years and that he had employed Bruce Tindale for several years in the mid-1990s.[28]

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[27] *Body Corporate No 189855 & Ors v North Shore City Council & Ors* (25 July 2008) HC, Auckland, CIV 2005-404-005561.
[28] Statement of Joe Paul sworn 4 December 2008.

[81] Mr Slater did not ask Mr Tindale for a workmanship guarantee until some two years after the work was completed. By this time Putztechnic had gone into liquidation although Mr Slater says that he was not aware of this fact.

[82] Mr Tindale stated in evidence that Mr Slater asked him to get the workmanship guarantee from Joe Paul and that he signed the blank document, knowing that it was not correct that an MPTL licensed contractor had installed the cladding. Mr Paul confirmed that he provided the producer statement to MPTL but was equivocal about whether he knew that MPTL had not supplied the plaster system and had not inspected the work. Mr Paul's evidence was that he did not know how Mr Tindale obtained the blank workmanship guarantee.

[83] Mr Slater knew that the plaster system had not been supplied by MPTL because he purchased a different system. He therefore must have known that the producer statement was false. It was not reasonable, therefore, for Mr Slater to believe that Mr Tindale was authorised to sign a workmanship guarantee certifying that a plaster system, other than the one that Mr Slater had purchased, had been correctly installed. Regardless of the degree of knowledge that Mr Tindale and Mr Paul had about the supply and installation of the plaster system, I am satisfied that Mr Slater knew when he obtained the workmanship guarantee and the producer statement that both documents were false.

<u>The comments made by Mr Slater about the Buy Smart Report</u>

[84] Mr Tabram and Mr Wood gave evidence of their discussion with Mr Slater about the Buy Smart Report. Mr Tabram said that, although he understood that the report was not good, after talking to Mr Slater he thought the issues raised were maintenance issues as Mr Slater "…had a sensible answer to each area". Mr Wood said that he had heard of leaky buildings and knew they were a New

Zealand problem. He said that Mr Slater assured him that all problems had been corrected and that everything was satisfactory.

[85] Under cross-examination by Mr Rainey, Mr Slater said that he had received the report before the meeting and gone over the concerns in the report. Mr Slater said that he did not accept that the report was accurate or fair because he did not believe the house leaked, although it was accurate in stating that there was no cavity.

[86] Mr Slater said that when he met with Mr Tabram and Mr Wood to discuss the report, he took Mr Tabram and Mr Wood to each area of the dwelling where the report identified a problem. Mr Slater confirmed that he assured Mr Tabram and Mr Wood that there was no problem with each area and that the house was built properly to the standards of the time.

[87] Mr Taia submits that Mr Slater held an honest and reasonable belief that there were no major defects. Even if it was not reasonable for Mr Slater to hold such a belief, in evidence he accepted that it was reasonable for Mr Tabram to do so. Therefore Mr Taia's submission that the Tabrams were negligent to the extent that they assumed the complete risk of the purchase must fail as this submission is clearly inconsistent with Mr Slater's evidence.

[88] The Slaters' fraudulent misrepresentation of the producer statement and workmanship guarantee, the assurances given by Mr Slater, and his evidence that it was a reasonable belief for Mr Tabram to be reassured by his comments lead me to conclude that, even though the Buy Smart Report was remarkably accurate, the Tabrams failure to give greater consideration to it is not the sole cause of their loss. The Buy Smart Report therefore does not defeat the Tabrams' claim in tort.

The options available to the Tabrams following the Buy Smart Report

[89] The Tabrams submit that they acted as reasonable purchasers. However, whether or not the Tabrams acted reasonably must be determined objectively by considering what steps the prudent purchaser in their situation would have taken. A person who does not act as a reasonably prudent person would do under the circumstances to protect him or her self from foreseeable harm is guilty of contributory negligence.[29]

[90] In addition to cancellation, the Tabrams had the options of seeking further advice or requiring the Slaters to remedy some or all of the defects. Taking into account the relevant factors set out in paragraph 75 above, I am not satisfied that, even with the assurances from Mr Slater, the prudent purchaser in the position of the Tabrams would have purchased without at least seeking further expert advice. The Tabrams must have been aware that Mr Slater was not giving them independent advice and it would have been prudent to contact either the writer of the Buy Smart Report or other people with greater expertise than Mr Wood. There is nothing to suggest that they attempted to take either of these options.

[91] To some extent, the Tabrams set aside good judgment in favour of securing this property and meeting the needs of their family due to arrive from the United Kingdom. I accept that the real estate market at the time created pressure on prospective purchasers to settle or risk missing out on their intended purchase. However for the reasons given, I find that the Tabrams' negligently contributed to their loss.

[29] *Jones v Livox Quarries Ltd* [1952] 2 QB 608 (CA) at 615.

The Buy Smart Report –the level of contributory negligence

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

> **3 Apportionment of liability in case of contributory negligence**
>
> (1) 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:

[93] In determining the level of contributory negligence in his decision in *Byron Avenue*, Venning J applied a two-part test based on the issues identified as relevant in *Gilbert v Shanahan*[30] - causal potency and relative blameworthiness.[31]

[94] Venning J found there had been a level of contributory negligence by several claimants. In all cases he applied a reduction of 25% on the basis of contributory negligence.

[95] The situation of the Tabrams is similar to that of Ms Clark and the trustees of the Clark Family Trust in *Byron Avenue*. Venning J found that the trustees of the Clark Trust purchased with knowledge of a report identifying defects and the remedial work required. The trustees were also aware that the Council had refused to issue a Code Compliance Certificate and made no further enquiries before proceeding with the purchase. Venning J found that these trustees acted with disregard for the interests of the trust by failing to take any

[30] [1998] 3 NZLR 528.
[31] Above n 27, [43].

steps at all to enquire into or to protect their position when they knew that the building had defects.[32]

[96] The Clark Trust purchased in 2004. In 2005 the Tabrams could be expected to have a greater awareness than the Clark trustees of the leaky building issues. The Tabrams had a report that clearly identified areas of significant concern and the benefit of Clause 14 in the agreement. In setting the level of contributory negligence to be apportioned to the Tabrams, I am bound by the decision of Venning J which set 25% as an appropriate level of contribution for a claimant who purchased with knowledge. I therefore set the level of contributory negligence in this case at 25%.

THE DESIGNS BY OJO

[97] Owen McKinnon is a director and shareholder of Ojo and the person who prepared the designs for the Slaters. Mr McKinnon designed four houses for the Slaters before designing the one at Pacific Parade.

[98] It is accepted for Ojo that a designer has a duty to use reasonable care and skill to prevent damage to persons whom they should reasonably expect to be affected by their work.[33] The question is whether Ojo breached this duty either by failing to provide adequate plans or providing incorrect details in the plans.

[99] For the Tabrams Mr Rainey submits that the design defects referred to at paragraph 111 of his closing submissions have a causative link to the weathertightness defects.

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[32] *Byron Avenue*, above n 27, [349].

[33] Closing submissions on behalf of second respondent, para 15.

[100] Norman Williams gave evidence for the claimants as an expert in design. I am satisfied that Mr Williams is qualified to give evidence on the standard of the designs by Ojo. Mr Williams said that in his opinion Exhibit "F" attached to Mr MacKinnon's statement dated 30 January 2009 was the critical drawing. Exhibit "F" is the detail for the handrail cap drawn by Mr MacKinnon and specifies a 1:10 slope for the parapet capping. Mr Williams said that the slope in "F" was inadequate and that "F" was followed rather than the Insulclad specifications. However, Mr Williams acknowledged that he relied on the Lovell report for this conclusion as he had not inspected the dwelling and had no first hand knowledge of the extent to which Ojo's plans had been followed.

[101] Mr Williams agreed that it was reasonable for a designer to assume that a builder was competent and also said that a designer should be able to rely on familiarity with his work. The Slaters had used Ojo for four previous houses and it was reasonable for Mr MacKinnon to assume that Mr Slater would contact him if he had any questions about Ojo's design.

[102] The Slaters rely for their claim against Ojo on the evidence of Mr Morrison who stated that the lack of documentation was a major factor contributing to water ingress. However, Mr Morrison also stated that he had not inspected and did not know how the dwelling was built. The weight that can be given to the evidence of Mr Williams and Mr Morrison is limited by their lack of inspection of the original construction and remedial work.

[103] The question of the liability of a designer was considered by Heath J in *Sunset Terraces*. In *Sunset Terraces* the work of the designer largely ended at building consent.[34] In Ojo's case there was no involvement after consent was granted.

[34] *Sunset Terraces*, above n 26, [517].

[104] In *Sunset Terraces* the claims against the designer alleged a lack of detail on how parapets were to be waterproofed, and an absence of any detail for junctions of materials including flashings. These claims were dismissed as Heath J was satisfied that the dwellings could have been constructed in accordance with the Building Code from the plans and specifications by builders who were aware of the manufacturers' specifications.

[105] The Tribunal is bound by *Sunset Terraces.* There is no legal basis for the argument that reference to technical specifications, such as Ojo's reference to the Insulclad manual, is not an acceptable practice for a designer or that a notation recording a requirement to comply with specifications is insufficient.

[106] The experts agreed that the defects in the deck areas, including the top fixed handrails, the inadequate pitch to the balustrade walls and insufficient clearance of deck tiles to cladding accounted for 65% of the damage.[35]

[107] Mr Slater gave evidence that he built the parapets and deck flat and designed and installed the aluminium handrails. He said that all departures from design were his responsibility. There is no basis therefore for attributing liability for defects in these areas to Ojo. Given the changes that Mr Slater made to other areas of the dwelling including the roof, and his decision to substitute materials, in particular the cladding system, I am not satisfied that any of the other causes of damage identified by the experts can be attributed to Ojo. I therefore dismiss the claims by the Tabrams and the Slaters against Ojo.

[35] Report of experts' conference dated 13 February 2009.

THE SLATERS' CLAIM AGAINST MINERAL PLASTER TECHNOLOGY LIMITED

[108] I have found that Mr Slater knew that the producer statement obtained from MPTL was false. On the basis of the evidence given by Mr Paul[36], I am satisfied that Mr Kathagen, who signed the producer statement on behalf of MPTL, was not aware that the information in the statement presented to him for signing was false.

[109] The Slaters claim against MPTL therefore fails.

BETTERMENT

[110] At the conclusion of the hearing, the sum claimed was reduced to $375,731.29. Five areas of alleged betterment had not been resolved - the roof, the aluminium joinery on the deck area, the stone cladding on the pillars, painting and carpet.

[111] As far as the roof is concerned, all experts agreed that there was damage to the roof and that the roof had been poorly repaired and continued to leak. The evidence of Mr Alvey and Mr Bailey was that the Council would not issue a building consent for a roof without eaves. However Mr Smith described the roof as an optional change as he said that it had not been proved that all areas of the roof leaked. I prefer the evidence of Mr Alvey and Mr Gill on this issue and therefore find that the replacement of the roof was necessary and did not constitute betterment.

[112] Regarding the aluminium joinery, I accept the evidence of Mr Alvey that the claimants were unable to obtain a building consent without deleting the deck and substituting doors with windows. I

[36] See above n 28.

therefore find that the aluminium joinery in this area did not constitute betterment.

[113] The Tabrams claim that the stone cladding on the pillars which cost $4,125.00 including labour was cheaper than any alternative cladding. There is no evidence that this was the case as no quotes for other products were provided. The evidence of Mr Smith is that the stone finish cost more than the standard cladding that was used on the rest of the property. Mr Smith estimated the reasonable cost for re-cladding these posts at $1,540 with the result that a deduction of $2,585.00 should be made for betterment.[37] I accept that Mr Smith is qualified to provide this estimate and in the absence of any other evidence of probable costs I find that a deduction of this sum is fair and reasonable.

[114] The Tabrams painted the interior of the property shortly after they purchased. The interior paint work was therefore approximately 2 years old when the remedial work was carried out. On the basis that interior paintwork lasts approximately five years, I have deducted 40%. The total claimed for interior painting is $8,575.00; a deduction of 40% is $3,430.00 which leaves a balance of $5,145.00.

[115] The balance of $2,500.00 of the sum claimed for painting is for the exterior paint. The only expert evidence addressing betterment in this area was from Mr Smith. His opinion was that the exterior paint should generally be expected to last 10 years. As it was 6 years old when the cladding was replaced I have deducted 40% ($1,000) from the sum claimed leaving a balance of $1,500.00.

[116] The total deductions for betterment are therefore $7,015.00. The sum awarded for the cost of remedial works is therefore calculated as follows:

Costs incurred	$375,731.29

[37] Brief of evidence of Clint Smith dated 29 January 2009.

Less deduction for betterment:	$7,015.00
Remedial works	$368,716.29

INTEREST

[117] The Tabrams claim interest of $18,207.33 on the two loans they took out to cover the cost of repairs. Loan 1 was for a total of $300,000 drawn on 16 July 2008 of which $197,065.43 was attributed to repair costs.[38] Loan 2 was a revolving credit facility. Document 7 in the claimants' bundle of documents shows that on Loan 2 a total of $178,666.36 was drawn down between 1 August 2008 and 8 January 2009. The total borrowed for repairs was $375,731.79.

[118] The Tribunal has the power to award interest at a rate not exceeding the 90-day bill rate plus 2% pursuant to Clause 16, Part 2 of Schedule 3 of the Act. At 3 April 2009 the 90 day rate was 3.31% therefore I have awarded interest at the rate of 5.31%. Interest is calculated from the date on which each portion of the two loans was drawn down to 17 April 2009, being the date of this determination. The allowance of $7,015.00 for betterment has been deducted from the amount of $10,000 drawn on 8 January 2009. Interest payable is calculated as follows:

16 July 2008	$197.065.43	5.31% for 275 days	$7883.96
15 August 2008	$130,558.50	5.31% for 245 days	$4653.42
10 October 2008	$38,107.86	5.31% for 189 days	$1047.79
8 January 2009	$2985.00	5.31% for 96 days	$41.68
Total interest:			**$13,626.85**

GENERAL DAMAGES

[119] The Tabrams claim general damages of $25,000 or $12,500 each. They are entitled to such damages for the distress, anxiety

and inconvenience that they have suffered. The High Court has recently awarded general damages of $25,000 per occupier to plaintiffs in leaky building claims.[39] On this basis, the damages claimed by the Tabrams are modest and I award the sum claimed.

SUMMARY

[120] For the reasons given, the sum awarded to the Tabrams is calculated as follows:

Damages in contract	$368,716.29
Interest	$13,626.85
General damages	$25,000.00
Total:	**$407,343.14**

ORDERS

[121] Arran Slater and Michelle Julie Slater to pay Richard Tabram and Hayley Carole Tabram the sum of $407,343.14 immediately.

[122] The claims against Ojo Limited are dismissed.

[123] The claim against Mineral Plaster Technologies Limited is dismissed.

COSTS

[124] The Slaters' claim for costs is dismissed as their claim did not succeed.

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[38] Claimants' closing submissions, Appendix 2.
[39] *Body Corporate 183523 and Ors v Tony Tay & Associates Limited and Ors* (30 March 2009), HC, Auckland CIV 2004-404-4824 per Priestley J; *Body Corporate 191608 and Ors v North Shore City Council and Ors* (19 February 2009), HC, Auckland CIV 2008-404-002358 per Asher J.

[125] The Tribunal has limited jurisdiction under s 91 of the Act to award costs. Any party intending to file an application for costs is to do so by 1 May 2009.

Dated this 17th day of April 2009

S. Pezaro
Tribunal Member