IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2009-100-000105
[2011] NZWHT AUCKLAND 32

BETWEEN	HONG ZHONG AND RUN ZHONG Claimants
AND	AUCKLAND COUNCIL First Respondent
AND	ROSE MARY MCLAUGHLAN Second Respondent
AND	YA WEI LI Third Respondent
AND	STANLEY CHEN Fourth Respondent
AND	ORIENT BUILDERS LIMITED Fifth Respondent
AND	LU ZHENG Sixth Respondent
AND	HBRC LIMITED Seventh Respondent

Hearing: 29, 30 and 31 March 2011

Closing Submissions: 6 April 2011

Appearances: T Rainey and E Hayes, for the claimants
D Heaney SC and C Goode, for the first respondent
R McLaughlan, second respondent - self represented
Y Wei Li, third respondent – no appearance
S Chen, fourth respondent – self represented
Orient Builders Limited, fifth respondent – self represented
L Zheng, sixth respondent – self represented
R Tosh and D Greig, for the seventh respondent

Decision: 1 July 2011

FINAL DETERMINATION
Adjudicator: S Pezaro

CONTENTS

BACKGROUND

[1] Ya Wei Li, the third respondent, purchased the section at 51 Mt Taylor Drive, Glendowie and entered into a contract with Stanley Chen, the fourth respondent, whereby Mr Chen prepared plans, drawings and specifications for the construction of the claimants' dwelling and one on the adjacent section, 49 Mt Taylor Drive. Mr Chen filed the application for building consent with the Auckland City Council. After the consent was issued, Ms Li engaged A1 Building Suppliers Limited ("A1") as the private certifier to carry out the inspections of the building work and issue the Code Compliance Certificate ("CCC"). The second respondent, Rose McLaughlan, was the licenced certifier and the sole director of A1.

[2] Orient Builders Limited, the fifth respondent, was contracted by Ms Li to construct the claimants' dwelling and the one at 49 Mt Taylor Drive. Lu Zheng, a director of Orient Builders Limited, was the person who managed and carried out the construction.

[3] Ms Li entered into an agreement for sale and purchase with Mr Shi Da Zhong and Ms Yu E Ye and/or nominee. Mr Zhong and Ms Ye nominated the claimants, their children, to purchase the property and the purchase settled the same day. At that time Run (Steve) Zhong was at school and relied on his sister Hong (Rainbow) Zhong to attend to property matters.[1] The claimants' dwelling is two-storey, predominantly Harditex texture coated cladding, on a sloping section with a double garage at the rear basement level. Several aspects of the construction differ from the consented plans.

[4] The following chronology is relevant:

28 May 2001	Ya Wei Li purchases section.
24 July 2001	Application for building consent

[1] Brief of Evidence of Hong Zhong, 30 August 2010.

	filed.
10 August 2001	Building consent issued by Auckland Council.
August 2001 to June 2002	Period of construction.
26 June 2002	Unconditional agreement for sale and purchase signed.
27 June 2002	Orient Builders Limited issued a 5 year guarantee for the construction of the dwelling.
28 June 2002	Claimants settle purchase.
15 July 2002	Code Compliance Certificate issued by Rose McLaughlan as director of A1 Building Certifiers Limited.
4 September 2002	Master Build Services Limited issued a 5 year guarantee.

Discovery of damage

[5] About six months after settlement Ms Zhong noticed that water was leaking through the bathroom window of the master bedroom.[2] She called Mr Zheng who came and carried out repairs. About two years later the same leak recurred and Mr Zheng again returned to fix it. Over the next four or so years there were further water leaks which Mr Zheng returned to fix.

[6] In 2009, after the Master Build Guarantee had expired, the garage door collapsed. Ms Zhong arranged for a specialist repairer to inspect the door who reported that the timber supports holding the garage door were wet and rotten. The claimants engaged Metro Building Solutions Limited to inspect and carry out testing of their house and in May 2009 they applied to the Department of Building and Housing for a WHRS Assessor's report.

[2] Ibid.

THE CLAIM AGAINST EACH PARTY

[7] The claim against the Council is that it breached its duty of care to the claimants by issuing the building consent when it could not have been satisfied on reasonable grounds that the proposed building work would meet the provisions of the Building Code. In particular it is claimed that the plans and specifications created confusion because the plans specified Insulclad while the specifications referred to Harditex. It is also claimed that the plans lacked sufficient detail of joinery, chimney flashings, the deck balustrade and parapet, roof and handrail installation, and that no horizontal or vertical control joints were shown in the plans.

[8] On 28 March 2011, the day before the hearing, the claimants amended their claim against the Council and Rose McLaughlan to plead that the Council breached its duty of care by allowing Ms McLaughlan to carry out the inspections required under the Building Consent. The claimants alleged that the Council knew or should have known that Ms McLaughlan was operating outside the terms of her licence as she was not authorised to inspect or issue a Code Compliance Certificate for building work which fell outside of E2/AS1.

[9] The claimants claim that Ms McLaughlan breached her duty of care by operating outside of her licence and by failing to ensure through the required inspections that the work complied with the building consent and the provisions of the Building Code. In particular it is claimed that Ms McLaughlan and the inspectors engaged by A1 failed to identify defects which were present that should have been identified by a reasonably skilled and prudent building inspector.

[10] The claim against the third respondent, Ya Wei Li, is that as the developer she owed a non-delegable duty of care to the claimants to ensure that the building work was carried out with reasonable care and skill. At the start of these proceedings there were difficulties serving Ms Li. When she was served she complied with orders for discovery and applied for removal.

After her removal application was declined she did not file any response to the claim or appear to give evidence at the hearing, despite a witness summons being issued.

[11] The claim against Stanley Chen is that as the designer of the dwelling he failed to provide sufficient detail in his plans and created confusion by specifying Insulclad in the plans and providing specifications which referred to Harditex.

[12] It is claimed that Orient Builders Limited and Lu Zheng failed to meet the standard of a reasonably skilled and prudent builder and that Mr Zheng failed to adequately carry out and supervise the construction.

[13] The claim against HBRC Limited (formerly Hibiscus Roofing Company Limited), the seventh respondent, is that as the roof installer it failed to correctly form the apron flashings to provide kick-outs or diverters.

ISSUES

[14] The issues that I need to decide are:

- What defects are causative of weathertightness issues?
- What damage was caused by the apron flashings?
- Liability for the apron flashing defects?
- The extent and cost of the remedial work required as a result of apron flashing defects.
- What is the appropriate measure of the loss suffered by the claimants?
- Did the plans and specifications meet the required standard?
- The liability of Auckland Council and Mr Chen for any defects in the plans or specifications.
- Does Ms McLaughlan owe the claimants a duty of care? If so, has she breached that duty either by the manner in which the inspections were carried out and the Code Compliance

Certificate was issued and/or by operating outside of the terms of her licence.

- Did the Auckland Council have a duty to ensure that where inspections are carried out by a private certifier that private certifier was appropriately licenced and if so, whether the Council was in breach of that duty.
- Did the claimants rely on the Code Compliance Certificate?
- The liability of Ya Wei Li for any construction defects.
- The liability of Orient Builders Limited and Lu Zheng for construction defects.

DEFECTS

Evidence of Defects

[15] The WHRS assessor, Philip Crowe, is the only expert who has carried out extensive invasive testing on the dwelling. Neil Alvey, the claimants' expert on defects and the scope of remedial works, conducted an inspection of the property and took moisture readings. He identified 11 key leak locations which were similar to those identified by Mr Crowe.[3] After the experts' conference Mr Alvey carried out destructive investigation on a small area around three recessed windows which the experts believed were installed in Insulclad. His investigation demonstrated that these windows were set in Harditex with polystyrene over the Harditex and fibre cement sheet laid over the polystyrene to pack out the wall.[4]

[16] The Auckland Council instructed Clint Smith to provide an expert opinion on whether the plans and specifications submitted for the building consent were misleading and in particular:

- whether the plans and specifications met the standard of the day;

[3] Brief of Evidence of Neil Alvey, 29 March 2011, at [50],
[4] Transcript 30 March 2011 at 43.

- whether a competent builder could have built a code compliant Insulclad property from the plans and specifications; and
- whether Mr Smith agreed with any of the allegations against the Council set out in the brief of evidence of Neil Alvey dated 30 August 2010.

[17] Mr Smith did not carry out any investigation at the property. He accepted the list of 11 key defects identified by Mr Alvey and that Mr Alvey broadly followed the issues raised by the assessor.

[18] HBRC instructed Dr Kelvin Walls as an expert witness and called evidence from Desmond Cowperthwaite, a director of HBRC. Although Dr Walls does not define the scope of his report, the focus is on the roofing work. Mr Crowe and Mr Alvey were the only experts at the conference who were instructed to comment on all potential causes of weathertightness defects. Neither Ms McLaughlan nor Mr Zheng instructed an expert or called any other witnesses.

Agreed defects

[19] At the experts' conference the experts agreed that Mr Alvey's leaks list provided a comprehensive overview but acknowledged that his list is based on Mr Crowe's invasive testing. The experts agreed and I accept their evidence that the following defects caused water ingress resulting in widespread damage necessitating a full re-clad:

a) Windows - were not installed in accordance with the Harditex manual and have either failed or are likely to fail.
b) Chimney - the chimney top lacked the required slope and some form of membrane or metal capping.
c) Junction of deck balustrade to wall (east and south) - the flat top balustrade was not in accordance with the Harditex manual.

d) The gutter wall junctions -the gutter/fasica system was incorrectly installed prior to the application of the cladding. The experts agreed that this work was not done by the roofer.
e) Ground levels (south and west) - did not comply with the Harditex manual.
f) Base of walls (deck/south) - not constructed in accordance with the Harditex manual and insufficient clearance between the cladding and the deck surface.
g) The mid-floor polybands (south and west elevation) - no horizontal inter-storey control joint was allowed at certain locations; the flat top polystyrene band has failed or will fail. Cracking in some areas is allowing water ingress.
h) The top of the parapets - not constructed in accordance with the Harditex manual.
i) The top fixed handrail - on the deck balustrades on the east and south elevations caused moisture ingress.

[20] Mr Alvey stated that the lack of kick-outs to the apron flashings was the principal cause of damage on the east elevation, on the main wall plane of the south elevation and on the areas that he marked with cross-hatching on the west elevation. Mr Alvey's opinion was that, in addition to the apron flashings, the parapets, before they were capped, were the other significant cause of failure. In addition to these two defects Mr Alvey said that the other causes of failure were "not insignificant".[5] Mr Crowe reported that there was no building paper or damp membrane under or over the texture coated Harditex parapet capping.[6]

Liability of HBRC

The damage caused by the apron flashings

[20] Other than whether the plans caused weathertightness defects, the only disagreement between the experts at the conference was the

[5] Ibid, at 34.
[6] WHRS Report, photograph 55.

requirements for installation of the apron flashings and the amount of any damage caused. The claimants accept that HBRC did not install the gutter/fascia system and can only be liable for any damage caused by the kick-outs or diverter flashings. The experts agreed that the defects arising from the incorrectly installed gutter/fascia system were not the roofer's responsibility and were caused by sequencing issues.

[21] HBRC submits that, if it is found liable for any damage caused by the installation of the apron flashings, any damage is discrete and could have been addressed by targeted repairs if there had been no other defects. In particular HBRC argues that, as the experts agreed that there was no defect caused by the apron flashings on the north elevation, it should not be liable for the full cost of a reclad.

[22] On 28 March 2011, the day prior to hearing, HBRC filed the Supplementary Brief of Evidence of Dr Walls and the Brief of Evidence of Geoffrey Bayley addressing quantum. These briefs address information Mr Crowe tabled at the experts' conference on the location of apron flashings and timber damage, and the scope of works required to repair damage caused by leaks from the apron flashings. Mr Bayley stated that he had been instructed during the week prior to the hearing to provide his opinion on:

a) the reasonableness of the total repair cost;
b) the reasonableness of the consequential losses; and
c) the cost of repairing damage likely to be caused in the event that an apron flashing at the dwelling has leaked.

[23] Mr Bayley was asked to provide a cost estimate for the targeted repair of defective apron flashings and decayed framing timber, replacing existing materials on a "like-for-like" basis in accordance with Dr Walls' opinion on the appropriate repair method, if the damage to the dwelling was confined to the one or more apron flashing defects for which HBRC is

alleged to have been responsible.[7] Mr Bayley estimated the cost of repairing the damage caused by each flashing as $4,000. The basis for this calculation is set out in "Exhibit C" to Mr Bayley's brief.

[24] I had some difficulty in getting Dr Walls to clarify his opinion on the extent of the damage caused by the lack of kick out flashings[8] however it appears that Dr Walls' opinion is that if any damage was caused by the apron flashings such damage was confined to discrete isolated areas in a vertical strip below the flashings.[9] Dr Walls concluded that targeted repairs were all that was required to repair this damage and said that it is highly unlikely that such a leak could give rise to the need to re-clad the entire building. He concluded that any need to re-clad the dwelling has not been caused or contributed to by the alleged defects in the apron flashings and that, as the building requires re-cladding due to other building defects, it is inevitable that the apron flashings will need to be redone. He therefore concluded that the need to repair any defects caused by the apron flashings will not increase the repair costs attributable to other defects.

[25] At the experts' conference Mr Crowe produced six photographs in addition to those in his report.[10] These photographs showed a lack of apron flashing diverters to direct water into the guttering. The photographs illustrate two types of installation of apron flashings which Mr Crowe labelled as type A and type B. His photographs show apron flashings defects on the west, south and east elevations. Mr Crowe also produced a diagram of each elevation showing the areas of timber decay that he thought were due to these incorrectly installed apron flashings. On each diagram Mr Crowe marked the location of each apron flashing and identified whether they were type A or type B. He did not identify any apron flashings on the north elevation.

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[7] Brief of Evidence of Geoffrey Robert Bayley, 28 March 2011 at [24].
[8] Transcript 30 March 2011, at 21, 22, and 23.
[9] Supplementary Brief of Dr Walls, 29 March 2011 at [17].
[10] Additional information tabled at Experts' Conference, 14 March 2011, at 7-10.

[26] Mr Alvey agreed with Mr Crowe on the identification of the type and location of roof apron flashings but thought the damage from the apron flashings was more extensive than Mr Crowe indicated. In response to Dr Walls' supplementary brief of evidence, Mr Alvey marked Mr Crowe's drawings with cross-hatching to show what he considered were the minimum repairs required in order to repair damage from the apron flashings in isolation.[11]

[27] On the east elevation Mr Alvey marked, in addition to the damage identified by Mr Crowe, the area on both sides of the chimney and between the chimney and the greenhouse window. Mr Alvey stated that the failure to appropriately waterproof the flat top chimney is the primary source of water ingress to the whole chimney area but that a secondary cause was the two type A flashings either side of the chimney at the top of the ground floor level.

[28] Mr Alvey agreed with Mr Crowe that the damage caused on the south elevation by the two type B flashings at ground floor level would, as a minimum, require a reclad of the area indicated by Mr Crowe but that damage may extend to the east walls. On the west elevation Mr Alvey agreed with Mr Crowe that the damage caused by the type B flashing necessitated a re-clad of the hatched area. Mr Alvey and Mr Smith agreed that no damage was caused to the northern elevation by the apron flashings. Mr Smith generally agreed with Mr Alvey but thought that Mr Alvey may have underestimated the area that needs to be re-clad as a result of the apron flashings. He said that the need to repair damage on the right of the west elevation around the garage meant that the return around the south elevation would also need to be re-clad.

[29] Dr Walls disagreed that the damage identified on the south elevation to the left of the garage could be solely attributed to a lack of kick out flashing. He was of the opinion that the cladding to ground level was also a

[11] CB: Tab 46.

cause of damage in this area. Dr Walls did accept that water coming in from the apron flashings is a contributing cause of actual moisture ingress that there are multiple causes of moisture ingress throughout the building and that there is a need to re-clad as a result of all of them in combination.[12] I prefer the evidence of Mr Crowe to that of Dr Walls on the damage caused by the apron flashings as Mr Crowe's evidence is based on invasive testing and none of the other experts concur with Dr Walls.

Liability for the apron flashing defects

[30] The panel of experts was asked to give their opinion on whether the apron flashings were formed correctly, the stage of construction when kick-outs should have been formed and the trade responsible. All experts agreed that the apron flashings were required to be installed with sufficient length to enable a diverter to be crafted. Mr Crow, Mr Alvey and Mr Smith agreed that it was the roofer's responsibility to ensure that a diverter or kick-out extension was created at the end of the apron flashing when the roof was put on. Mr Alvey and Mr Smith agreed that the apron flashings were cut short with insufficient length to create any kick-out.

[31] Dr Walls disagreed. Dr Walls' opinion was that the roofer needed to install the apron flashings with an allowance[13] for a diverter but suggested that the cladding installer had to modify the flashing to suit the type of cladding.[14] Dr Walls accepted that in this case the diverter flashing did not appear to be installed before the cladding was installed.[15] While the experts agreed that diverters are now supplied as separate components, they agreed that such components were not available when the claimants' dwelling was built.

[12] Transcript 30 March 2011 at 51.
[13] Ibid, at 4.
[14] Ibid, at 27.
[15] Ibid, at 28.

[32] Even if I accept Dr Walls' evidence that the cladding installer should have created a diverter flashing or kick out, the evidence is that HBRC installed the apron flashings without sufficient length for a diverter to be created and without any other provision for diverting water into the gutter. I therefore conclude that the roofer failed to install the apron flashings so that a diverter or kick-out could be formed.

[33] In the opinion of Mr Crowe kick out flashings were "one of those things that often got missed".[16] However he said that the purpose of the roof is to take the water that falls on it and put it into the gutter, and that the builder often relied on the roofer for this work.[17] Mr Alvey said that, based on assessments he has done of leaky buildings there were a number of houses built with kick-outs and a number without.[18] In his view, as BRANZ Bulletin 305 published 1993 referred to kick-outs on apron flashings, it should have been good trade practice at the time.

[34] Mr Smith referred to a BRANZ article published in 1998 by Steve Alexander about kick-out flashings and said, from his experience in the building industry during 1999/2000, that kick-out flashings were becoming more important and he was using them at this stage.[19] His opinion was that in 2001/2002 when the claimants' dwelling was constructed there was knowledge in the building industry of using kick-out flashings. The report of the experts' conference recorded that the BRANZ Texture-coated Fibre Cement Good Practice Guide April 2001 showed a photograph of the end of an apron flashing without a diverter with a caption stating that a "kick-out apron flashing would have prevented water entering the wall below".

[35] In Dr Walls' opinion the way in which the apron flashings on this house were constructed was standard practice for the time. He said that

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[16] Ibid, at 6.
[17] Ibid.
[18] Ibid.
[19] Ibid, at 7.

there was a lack of 'the necessary team work'.[20] I accept the opinion of the majority of the experts that the apron flashings were not installed according to the practice and standards of the time.

[36] It is submitted for HBRC that the evidence demonstrates that it was industry practice at the time for the final shaping of the apron flashing ends to be carried out by the cladding installer rather than the roofer and that if the kick outs were not formed it did not amount to a breach of duty by HBRC. However, as Dr Walls confirmed that there should be an end to the apron flashing that is available to be crafted in the final form by the cladding installer, I do not accept this submission. Mr Tosh suggested that even if the apron flashings had been cut short by HBRC it was the responsibility of Orient Builders and/or Mr Zheng to rectify the situation because they could have called HBRC back to site to install an additional length to the existing apron flashing. I accept that Mr Zheng and Orient Builders were responsible for coordinating the work on site and ensuring that it was carried out to the required standard however their duty did not diminish the duty of care owed by HBRC to install the apron flashings correctly.

[37] Mr Smith said that if there was an expectation that a flashing was going to be slid in underneath the existing apron flashing to form a diverter the apron flashing should have been left open whereas it was turned down. Dr Walls suggestion that the cladder should have fitted an extension to the apron flashing is therefore not consistent with the way in which the roofer left the apron flashing.

[38] Mr Tosh further submits that at the time of installing the roof, the roofing contractor does not know what material will be used for the cladding and that the cladding system impacted upon the shape and form of the apron flashings. However as the apron flashings were cut short, it was impossible for kick-out flashings to be formed no matter which cladding system was used. Further, if Mr Tosh's submission is correct, a prudent

[20] Ibid.

roofer should not install the roof and flashings until he has established the type of cladding system.

[39] Mr Tosh relied on the decision in *Joseph Chee & Anor v Stareast Investments Limited & Ors*[21] for his submission that diverters were not required at the time. I do not accept that *Chee* provides such authority as *Chee* was decided on the evidence before the Tribunal in those proceedings and the Tribunal concluded that there was no evidence that failure to install diverter flashings fell below the required standard.[22] The decision in each case must be made on the evidence adduced in those proceedings.

[40] The evidence before me suggests that not all dwellings were constructed with kick-outs at the time however I am satisfied, on the basis of the opinions of Mr Crowe, Mr Alvey and Mr Smith, that it was good practice to do so. In addition to the roofer, the head contractor or project manager had some responsibility to ensure that adequate provision was made for diverters before the cladding was installed. However, I find that the major responsibility for correctly installing the apron flashings and diverters lay with HBRC because, as the roofer, it had the expertise to know what was required. I conclude that kick-outs or diverters were required at the time the claimants' dwelling was constructed and that it was the responsibility of the installer of the apron flashings to leave sufficient length for a diverter to be formed. The apron flashings were cut short by HBRC and no diverter was formed or installed. For these reasons I find that HBRC Limited breached its duty of care to the claimants and is liable for the resulting damage.

The extent and cost of the remedial work required due to apron flashing defects

[41] I am satisfied that there is no damage caused by the apron flashings on the north elevation. I therefore now determine whether HBRC's liability

[21] *Joseph Chee & Anor v Stareast Investments Limited & Ors* WHT TRI-2008-100-91, 1 November 2010.
[22] Ibid at 131.

should be calculated on the basis that the damage caused by the apron flashing defects is divisible from the damage caused by the other defects. In *Chee v Stareast Investment Ltd*[23] the High Court reviewed the principles applicable when two or more tortfeasors inflict different damage. Each is liable only for the distinct damage which each has caused and it is a question of fact whether the damage can be regarded as indivisible or whether a rateable division can be made.[24]

[42] On 31 March 2011 when the experts as to quantum were empanelled[25] the claimants sought to produce a document prepared by their expert on quantum.[26] Mr White said that he was instructed after the conclusion of the second day of hearing on 30 March 2011 to prepare an estimate, based on those areas identified by Mr Alvey as being damaged by defective apron flashings.[27] The areas which he marked green and called 'Smith' were the areas that Mr Rainey and Mr Alvey told him were areas that Mr Smith said needed repair as a result of apron flashings. The difference between Mr White's document and Mr Alvey's is that Mr White's drawings show an area of damage caused by apron flashings on the north elevation.

[43] I decline to accept this evidence of Mr White because the scope of the work on which he based his estimate was communicated to him by Mr Alvey and Mr Rainey outside of the hearing and did not come in as evidence. Mr Alvey was examined on this issue at the hearing and his evidence was that there was no apparent damage on the north elevation that was caused by apron flashings. The question of whether the south, west and east elevations could have been repaired without the north elevation being affected, if the only defect had been the apron flashing, was not put to the experts. The only extensive investigation carried out was that done by Mr Crowe. While it was Mr Alvey's evidence that remedial work may expose

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[23] *Chee v Stareast Investment Ltd* HC Auckland, CIV-2010-404-7804, 2 June 2011,
[24] Ibid, at 34.
[25] James White for the claimant, Geoff Bayley for the seventh respondent and the assessor, Phillip Crowe.
[26] CB:Document 51.
[27] Ibid, at 46.

further damage linked to the apron flashings on the north elevation, I do not accept that this is probable. For these reasons I conclude that the liability of HBRC is limited to the costs arising from the damage on the west, south and east elevations.

[44] Mr Rainey submits that the loss arising from the various defects in this dwelling is not divisible and therefore HBRC is jointly and severally liable for the entire cost of re-clad. It is submitted that the agreement from the experts' conference that all the defects in this house had contributed to the need for a complete re-clad supports this conclusion but that if this submission is not accepted, the evidence of Mr White on the cost of a partial re-clad should be accepted.[28] The submission for the Council is that HBRC must be liable for the total cost of a re-clad because it would not be possible to get a building consent to repair only those areas damaged as a result of the apron flashing defects. Mr Smith did not address this issue in his brief.

[45] While I accept that there are a number of defects agreed by the experts which have contributed to the need for a full re-clad, I find that the north elevation would not have required re-cladding if the defects caused by the apron flashings were the only defects in this dwelling. I therefore find that the liability of HBRC is limited to 75% of the total sum awarded to the claimants. However, if the liable parties wish to make submissions on the actual cost of repairs to the north elevation, which will then be deducted from the total cost of remedial works of $471,395.80, I will consider any such submissions filed by 15 July 2011.

QUANTUM

[46] Evidence on quantum was given by Mr Crowe, Mr White for the claimant and Mr Bayley for HBRC. Mr Crowe estimated the cost of repairs at $414,432 including GST in his report issued 17 August 2009. Mr Crowe is experienced as a quantity surveyor and estimator and he prepared his estimate by checking dimensions on site and calculating remedial costs

[28] Ibid, at [51].

according to the actual quantities required.[29] Mr White prepared his costings on the basis of the scope of works prepared by Mr Alvey and he estimated repair costs at $461,149. The difference between these two estimates is approximately 10%.

[47] Mr Bayley's estimate of the remedial works is $319,170 inclusive of GST. Mr Bayley said that he was instructed the week before the hearing and that he did not go on site before he prepared his estimate and that the only time he went to the site was for the site inspection prior to the hearing.[30] He based his calculations on the original drawings and not on the dimensions of the dwelling as built. He prepared his estimate on the basis of face-fixed cladding whereas he accepted in evidence that a cavity would be required.[31] In the spreadsheet filed with his brief Mr Bayley gave his reasons for the difference between his estimate and that of Mr Crowe and Mr White. The spreadsheet referred to 'Sacramento' rates and although Mr Bayley said that he had not used the Sacramento rates and his reference to Sacramento was an aberration,[32] the rates he applied are substantially lower than those of Mr Crowe and Mr White. Mr Crow commented on the time since the Sacramento rates were applied and Mr White said that rates applied to a multi-unit development like Sacramento bear no resemblance to a single dwelling rate.

[48] Mr Crowe said that there were hardly any areas where he would agree with Mr Bayley's estimate.[33] Mr Crowe explained that the construction was complicated because there were "ins and outs" rather than flat planes on each elevation. He said that this factor meant that it was not possible to accurately estimate replacement costs from the plans alone. For instance Mr Crowe said that, whereas Mr Bayley had allowed 200mm for parapets, some were up to a metre deep and Mr Bayley made no allowance for repair

[29] Transcript 31 March 2011, at 90.
[30] Ibid, at 102.
[31] Ibid, at 108.
[32] Ibid, at 105
[33] Ibid, at 89.

to the chimney which was larger than indicated on the plans.[34] I conclude that the evidence of Mr Bayley is not as credible as that of Mr Crowe and Mr White as Mr Bayley did not base his estimate on the need to install a cavity or on the actual dimensions of the dwelling which vary from the plans.

[49] Mr Crowe acknowledged that his estimate was prepared 18 months before Mr White's and that Mr White's rate for timber replacement was reasonable which was why their estimates were within 10% of each other.[35] Mr Crowe explained that he had reconsidered some areas of difference between their estimates. Whereas Mr Crowe initially felt that it was not necessary to remove the kitchen units and some bathroom fittings for which Mr White allowed $9,000 he now accepted that this cost could be incurred. Mr Crowe did not allow for tiling the deck on the upstairs balcony as he found no fault in that area however he accepted that the Council may require that area to be repaired which would cost another $8-9,000. Mr Crowe also said that he had not allowed for the concrete plinth under the garage wall that Mr White had costed on instructions from Mr Alvey. Mr Crowe accepted Mr White's estimated cost of $3000 was reasonable for that item.

[50] The difference between Mr Crowe's estimate and Mr White's was $46,717. Mr Crowe's concessions amount to approximately $23,529 inclusive of GST and bring his estimate of repair costs within $25,000 or 5% of Mr White's costing. Given this minimal difference, I conclude that the costs claimed by the claimants for the remedial work are reasonable and justified and award the sum of $471,395.80.

Consequential Losses

[51] In addition to the actual cost of repairs the claimants claim the following consequential losses:[36]

[34] Ibid, at 90.
[35] Ibid, at 91.
[36] Claimants' opening statement, 29 March 2011, at 8-9.

The costs of packing and removing the contents of the claimants' home	$3,296
The cost of storage of contents	$4,465
The cost of alternative accommodation	$46,125
Total	$53,886

[52] The cost of packing and removing the contents of the claimants' home is proven and reasonable however the costs for storage and accommodation are claimed on the basis of a 9 month or 41 week repair period[37] whereas the estimate by Kwanto of repair costs assumes a 4 month repair period. In closing Mr Rainey submitted that Mr White gave evidence on Day 3 of the hearing that the remedial works would take 6 months to complete and Mr Crow concurred. The transcript records that Mr White said when he commented on the rates that he applied: "If I was asked to review it I would probably suggest that rather than a four month contract this is likely to be six months*".*[38] I can see no record in the transcript of any comment by Mr Crow on the length of time required for repairs nor was this issue explored further.

[53] In his brief Mr White confirmed that he had supervised the staff member who prepared the Kwanto report and that he checked her work and in evidence he confirmed his brief as accurate.[39] In the absence of any explanation for this departure from his brief I prefer his brief on the length of the remediation period. For these reasons I have calculated consequential losses on the basis of a 4 month or 17.3 week period in accordance with the Kwanto report.

[54] The claimants have provided two quotes for storage of $385 and $495 per month including GST. On the basis of the lower quote the cost of storage for 4 months is $1540.00. The claim for the cost of alternative accommodation is supported by three quotes for rental accommodation for

[37] Claimants' schedule of consequential losses and expenses, 5 August 2010.
[38] Transcript 31 March 2011, at 94.
[39] Ibid, at 99.

$1000, $1100 and $1200 per week. The claim is based on rental of $1125 however I am not satisfied that there is any reason not to base this estimate on the lowest quote. The claimants are therefore entitled to $17,300 for the cost of alternative accommodation.

[55] The sum awarded for the cost of moving, storage and rental accommodation is therefore $22,136 calculated as follows:

The costs of packing and removing the contents of the claimants' home	$3,296
The cost of storage of contents	$1,540
The cost of alternative accommodation	$17,300
Total	$22,136

[56] In addition the claimants claim the following costs incurred in investigating the defects and damage:

Metro Building Solutions Limited	$7,000.00
Kaizon Limited	$13,954.27
Prendos Limited	$1,000.00
Total	$21,954.27

[57] I am satisfied that the cost of the report by Metro Building Solutions Limited for an investigation is reasonable and a direct consequence of the weathertightness defects. However the valuation provided by Prendos in August 2010 appeared to be for the purpose of justifying the claim for repair costs and therefore is a cost of these proceedings as is the cost claimed for the Kaizon Limited report and Mr Alvey's brief of evidence. The amount awarded for the cost of investigating damage is therefore reduced to $7,000.

General damages

[58] The claimants seek general damages of $25,000. This has not been contested and on the basis of the claimants' evidence I am satisfied that

such an award is consistent with the damages awarded in cases of this type.[40] The claim is proved to the amount of $525,531.80, calculated as follows:

Remedial costs	$471,395.80
Consequential costs	$22,136.00
Cost of investigation of damage	$7,000.00
General damages	$25,000.00
Total	$525,531.80

DID THE PLANS AND SPECIFICATIONS MEET THE REQUIRED STANDARD?

[59] The two issues that need to be determined in relation to the plans are whether they created confusion as to the type of cladding required and whether they contained sufficient detail.

[60] The plans specified Insulclad whereas the specifications provide that *"*exterior wall claddings shall be harditax (sic) on building paper, to be installed in strict accordance with the manufacturer's specifications*"*. The Building Consent issued by the Council referred to an unrelated stucco system.

[61] The claimants rely on Mr Alvey's evidence that a reasonably competent officer processing the application for building consent would not have granted the consent until the cladding type was clarified and all details whether generic or specific were supplied.[41] In Mr Alvey's opinion because Insulclad and Harditex are alternative solutions it is imperative that the relevant manufacturer's technical information is strictly adhered to.[42] Mr Alvey stated that the consent condition should have referenced the

[40] *O'Hagan v Body Corporate 189855 (Byron Avenue)* [2010] NZCA 65; [290] 3 NZLR 445 at [153]; *Cao & Anor v Auckland City Council,* HC Auckland, CIV-2010-404-007093, 17 May 2011.
[41] Brief of Evidence of Neil Alvey, 30 August 2010, at [70].
[42] Ibid, at [69].

inspection regime required for the selected cladding rather than the stucco three-coat plaster system referred to in the consent. He also said that the application for consent should have required a producer statement for the cladding installation to be issued by the installer.[43]

[62] Mr Rainey submits that as the Council failed to call any evidence from the Council officer on the practice and procedures at the time in relation to approvals of alternative solutions, the Tribunal can draw an adverse inference that the processing was not in accordance with standard practice. I am satisfied from the evidence of David Barr that the Council made all reasonable efforts to locate the processing officer and was unable to do so. Further, it is likely that the documentary record which has been produced by the Council is more reliable than the memory of someone who processed many such similar applications ten years ago.

[63] Mr Chen accepted under examination by Mr Rainey that he prepared the specifications which contained the reference to Harditex but said that he intended the house to be built using Insulclad. He submits that if there is any discrepancy between plans and specifications the plans should take precedence. Mr Chen submits that he intended the house to be built in Insulclad and as he specified Insulclad in the plans he was entitled to rely on the details in the Insulclad specifications which were readily available to builders. However he said that the plans were suitable for either Harditex or Insulclad provided the relevant specifications were followed as both systems were lightweight but said that the single reference in the specifications to 'harditax' was a mistake. He intended the specifications to be generic as he knew the Insulclad specifications were readily available.[44] Mr Chen said that if the plans had been followed and the Insulclad cladding system installed by a licenced applicator, any defects alleged to have arisen from a lack of detail in the plans should not have occurred.

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[43] Ibid, at [71].
[44] Record of hearing, 29 March 2011, at 4.19pm.

[64] He also said that if there was any confusion Ms Li or Mr Zheng should have asked him for clarification. Mr Chen said that Ms Li was aware that Insulclad was a high quality product which required specialist application but that in order to save costs she chose to have the building clad in Harditex. Mr Chen said that he was not consulted on any changes after the plans were submitted for consent.[45]

[65] In his witness statement dated 16 February 2011, Mr Smith was of the opinion that because the plans specified Insulclad which required installation by licenced applicators trained to install this product, the dwelling would not have had the defects which are apparent if it had been constructed in Insulclad. Mr Smith concluded that it was reasonable therefore for the Council to approve the consent on the basis that the house would comply with the Building Code.

[66] However Mr Smith said that in order to assess whether an alternative solution would comply with the Building Code, a Council officer needed to have reference to the technical information that supported that alternative solution.[46] He accepted that, if the technical information was not provided, it should have been requested by the Council.

> MR RAINEY: The evidence of Mr Chen was that he didn't supply the Harditex technical information or the Insulclad technical information with the application. If that's correct, then the receiving officer should have rejected the application, shouldn't he?
>
> MR SMITH: If that's correct I would have thought that they would have asked for further information.[47]

[67] However, Mr Smith subsequently said in evidence that the practice of the day was that there was no need to have those details on the plans if the manufacturer's recommendations were easily available to the contractor.

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[45] Ibid.
[46] Transcript 29 March 2011, at 22.
[47] Ibid at 22.

Mr Smith accepted that when the detail of what was required to comply with NZS3604 was not in the plans and specifications, those details should have been provided to the territorial authority.[48]

[68] Mr Rainey submits that as the plans and specifications were ambiguous, Mr Smith's evidence that they were adequate in 2001 should not be accepted. He further submits that this case can be distinguished from *Body Corporate 188529 & Ors v North Shore City Council (Sunset Terraces)*[49] on which the Council relies because in *Sunset Terraces* the evidence of a Council officer was that in 1996 the Council had minimal knowledge of weathertightness issues was unchallenged. In this case Mr Rainey argues that the evidence, in particular the Council's application for building consent form, demonstrates that by 2001 the Council was aware of the relevant weathertightness issues.

Did the plans cause confusion?

[69] The application for building consent was lodged on 24 July 2001. The quote provided by Orient Builders Limited to Ms Li is dated 6 August 2001, before the building consent was issued on 10 August 2001. Mr Zheng said that when he provided the quote he saw copies of the plans that were similar to those approved by the Council but did not have the Council stamp on them.[50] He said that Ms Li instructed him to use Harditex and he was not confused as to what cladding was intended.[51] The discrepancy between the plans and specifications therefore did not cause confusion for the builder as to the cladding type intended.

[70] Irrespective of the fact that the consented plans referred to Insulclad, Ms Li instructed Mr Zheng to use predominantly Harditex cladding. This is consistent with the contract between Ms Li and Orient Builders Limited which

[48] Ibid, at 68.
[49] *Body Corporate 188529 & Ors v North Shore City Council (Sunset Terraces),* HC Auckland, CIV-2004-404-3230, 30 April 2008.
[50] Record of hearing, 29 March 2011 at 4.40pm.
[51] Ibid.

provided that the builder could not make changes unless instructed by Ms Li. I conclude that Ms Li issued these instructions which Mr Zheng accepted without varying the plans or the terms of the Building Consent. Therefore, while the Council was negligent in issuing the consent with the reference to a stucco system when the requirements of that system bore no relation to the application for building consent or the specifications, as the plans were not followed there is no evidence that any discrepancy between the plans and specifications caused any defects or loss. This cause of action against Mr Chen and the Council therefore fails.

Did the plans contain sufficient detail?

[71] The Council's statutory obligation was to consider the application for building consent and to grant a consent if it was:[52]

> [5]satisfied on reasonable grounds that the provisions of the Building Code would be met if the building work was properly completed in accordance with the plans and specifications submitted with the application.

[72] In *Sunset Terraces* the High Court described the Council's function as being predictive in nature as the Council was entitled to assume that the construction work would be undertaken in accordance with the building consent.[53] Heath J concluded that greater leeway should be given to decision makers who are required to predict what might happen as opposed to those who determine with the benefit of hindsight what did in fact happen.[54]

[73] The application for building consent form required the following documents to be filed with the application: "the drawings, specifications, and other documents according to which the building is to be constructed to comply with the Building Code, with supporting documents, if any."[55]

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[52] Building Act 1991 s 34(3).
[53] *Sunset Terraces,* above n 49, at [252].
[54] Ibid.
[55] CBD: p465.

[74] Mr Alvey's opinion is that even if the type of cladding was clear and the correct specifications for that cladding were provided, the plans lacked sufficient detail to instruct the contractors on site.[56] In evidence Mr Alvey said that the plans lacked sufficient detail of the termination of the chimney, the roof to cladding junctions and, in respect of Harditex, the deck clearances.[57] In his brief he also identified the lack of detail of joinery installation, apron flashings and control joints as being causative of defects.

[75] Mr Heaney questioned whether Mr Alvey was qualified to comment on the building practices of the time as he was not in New Zealand then.[58] Mr Alvey stated that he had personally carried out over 300 assessments of leaky homes in various capacities and that his company carried out in excess of 700 assessments. He stated that probably a quarter of those assessments were carried out on properties constructed within 12 months of the date of construction of 51 Mt Taylor Drive. Mr Alvey said that as a result he believed he had sufficient knowledge to comment on the common practice at the relevant time. I accept that Mr Alvey is qualified to give an expert opinion on what constituted common practice in the building industry in 2001/2 when this dwelling was constructed.

[76] Mr Smith's evidence was that the documentation relevant to designers at the time was NZS3604:1999 clause 19.2.4 which set out the requirement for a building consent application. In Mr Smith's opinion the plans submitted by Mr Chen met this requirement. According to Mr Smith, the technical specifications were either available to the licenced applicator (Insulclad) or readily available through building material suppliers (Harditex). However, Mr Smith also accepted that this information should have been required if not provided therefore the fact that the technical information was readily available does not diminish the Council's responsibility to ensure that

[56] Brief of Evidence of Neil Alvey, above n 3, at [73].
[57] Transcript, 30 March 2011, at 78.
[58] .Ibid, at 6.

the technical information was provided with the application, as required by its building consent application.[59]

[77] Mr Chen said that the detail required for the chimney flashing was the same as the detail he provided in the plans for the parapets and that this detail is also covered in the Insulclad specifications. In his brief Mr Chen stated that it was common for the chimney cap to be supplied and installed by a roofer or fire place supplier in order to allow the colour of the roof and the cap to match especially when metal roofing was used for the main part of the property. Mr Chen relied on the quote from Hibiscus Roofing to Orient Builders for a chimney cap. This quote was based on the plans but was not accepted by the builder. The experts agreed that the chimney top should have had a slope and some form of membrane or metal capping.[60] I conclude that the Hibiscus quote demonstrates that it was sufficiently clear from the plans that a cap or flashing for the chimney was required and that if the Insulclad specifications had been followed it would have been logical to treat the chimney as a parapet with the required slope. The detail in the plans was not followed for the parapets and therefore I conclude that there is no causative link between the plans and water ingress to the parapets or chimney area.

[78] Mr Chen said that he also relied on the Insulclad specifications for the detail of the joinery installation and cladding to ground clearance. The experts concluded that most of the windows were in Harditex but had not been installed in accordance with the Harditex manual. The evidence of Mr Smith was that the Harditex manual was readily available and that there was a good chance that if the house was built exactly to the Harditex manual it might have worked.[61] Mr Alvey's view was that even if Harditex was used there was insufficient detail in the plans to ensure that the dwelling complied with the Building Code. However given the extent to which the actual construction varied from the plans I am not satisfied that the lack of detail

[59] Ibid, at 53.
[60] Experts' Conference Report, 25 March 2011.
[61] Transcript, 30 March 2011, at 77.

was causative of defects. I therefore find that there is no link between the plans and defects in the joinery installation.

[79] As far as the details required for the apron flashing and roof to cladding junctions the report of the experts' conference indicates that, other than Mr Alvey, the experts believed that the plans were adequate and were not causative of the defects in these aspects of the construction. Mr Crowe identified several variations that had been made from the consented plans, in addition to the change in cladding, including the deck balustrade which is solid and clad with Harditex rather than open, the lack of horizontal joints, and the deck off the master bedroom which is enclosed.[62]

[80] In *Scandle v Far North District Council*[63] the High Court was required to consider whether negligence by a council was causative of loss. Justice Duffy followed the two stage inquiry applied by the Court of Appeal in *ACC v Ambros.*[64] The first step is a factual assessment to determine whether the loss would have arisen without the defendant's conduct and the second step considers causation in the legal sense. This inquiry requires an assessment of the scope of liability for the conduct and an investigation into whether the conduct constituting a factual cause is a substantial and material cause of the loss. It is not enough that the conduct merely creates the opportunity for the loss to occur.[65]

LIABILITY OF AUCKLAND COUNCIL AND STANLEY CHEN FOR THE PLANS

[81] I am satisfied that the plans were sufficiently detailed for a competent builder using Insulclad to construct the dwelling to the standard required by the Building Code and that the plans and specifications prepared by Stanley Chen did not cause any confusion as to the type of cladding

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[62] WHRS report at [4.3].
[63] *Scandle v Far North District Council* HC Whangarei, CIV-2008-488-203, 30 July 2010.
[64] *ACC v Ambros* [2007] NZCA 304, [2008] 1 NZLR 340.
[65] *Scandle v Far North Disctict Council,* above n 63, at [37]-[40].

required. However, the Council's application for building consent required the Insulclad technical specifications to be provided with the application for consent therefore Mr Chen was negligent in providing generic specifications and the Council was negligent in failing to require the correct specifications. The first stage of the *Ambros* test is satisfied however for the reasons that follow I conclude that it was not the negligence of Mr Chen or the Council that caused the weathertightness defects.

[82] The dwelling was not constructed using Insulclad and the decision to replace Insulclad with Harditex was not notified to Mr Chen or the Council. Once the decision to use Harditex was made, the developer and builder should have asked Mr Chen to make any required variations to the plans, notified the Council and followed the Harditex specifications and technical literature. Mr Zheng said that Mr Chen was consulted on the change from Insulclad to Harditex however Mr Chen denies this occurred and there is no documentary evidence to support Mr Zheng's assertion. In addition, Mr Zheng's evidence is that he knew that Ms Li wanted to use Harditex when he issued his quote. This quote was issued after the plans were submitted to the Council but prior to the issue of the Building Consent and there is no evidence of any amendment to the plans. Therefore I do not accept that Mr Chen was consulted about the change of cladding. I find that Ms Li and Mr Zheng failed to ensure that the plans were amended to account for the change of cladding and their negligence is a substantial and material cause of the claimants' loss.

THE LIABILITY OF ROSE MCLAUGHLAN

[83] In her response filed on 2 August 2010 Ms McLaughlan denied liability on the ground that she did not personally carry out the inspections which were undertaken by her company A1 Building Certifiers Limited. She does not accept that the defects should have been identified by a reasonably careful building inspector or that her employees failed to carry out the inspections with sufficient skill and submits that A1 Building Certifiers was entitled to rely on producer statements. Other than the BIA documentation

relating to her certification which she produced at the hearing, Ms McLaughlan did not file any response or evidence after the amended claim was filed.

The terms of the licence held by Ms McLaughlan

[84] Ms McLaughlan accepts that as the building certifier she owed a duty of care to the claimants.[66] She also accepts that her certification was limited in respect of E2 to certifying compliance with AS1 only. However she submits if a proprietary system had a current BRANZ appraisal certificate, that certificate could be used to establish compliance with B1, B2 and E2 of the Building Code and that both Harditex and Insulclad fell into this category. Further, she says that in three technical reviews issued in 1997, 1999 and 2001 the BIA approved her to work outside of the scope of her certification.[67]

[85] Ms McLaughlan produced the reviews she referred to. In particular the review for the 1 December 2000 to 30 November 2001 period recorded that Ms McLaughlan's company had issued 1100 building certificates and 712 Code Compliance Certificates. At paragraph 4.2 it is recorded that Ms McLaughlan received specific approval from the BIA for projects outside her scope of approval. At paragraph 5.2 the review describes a home with plaster cladding that had been inspected by her company. The earlier reviews reported similar inspections carried out by Ms McLaughlan. I accept therefore that either Ms McLaughlan was approved by the BIA to work outside the scope of her licence or she was entitled to believe that on the basis of these reviews she had such approval.

Liability of the Council

[86] I do not accept that the Council had any responsibility to look behind the certificate issued to Ms McLaughlan. It was the BIA that was responsible for issuing certifiers with their certificate and in accordance with the decision

[66] Rose McLaughlan's closing submissions, 3 April 2011, at 2.
[67] Ibid, at 5.

in *McNamara v Auckland City Council*[68] a territorial authority has no responsibility to guarantee the certificate of a private certifier. Even if the Council did have a duty to inquire, I consider that the Council would have been entitled to draw the conclusion from the BIA reviews that the BIA had approved Ms McLaughlan to operate as a certifier outside of the scope of her licence. Further, in order to demonstrate that it was the nature of Ms McLaughlan's certificate, rather than the quality of the inspections that was causative of defects, the claimants would need to prove that a certifier with the appropriate licence would have carried out the inspections to a higher standard. No evidence has been adduced on this point.

The standard of the inspections carried out by A1 Building Certifiers

[87] The most significant failures in the inspections are the failure to detect the variation from the cladding system specified in the plans and to ensure that the Harditex cladding complied with the requirements of the manufacturer and the Building Code. I do not accept that it was reasonable for A1 Building Certifiers Limited or Ms McLaughlan to rely on the producer statements to assess the type of cladding and its installation requirements rather than what was obvious from an inspection. A further difficulty with this submission is that the exterior cladding inspection was carried out on 30 January 2002 and the producer statement for the cladding was not issued until 28 March 2002 by Mr Zheng.[69] Similarly the deck waterproof inspection is signed off on 18 January 2002 although the producer statement for the membrane to the deck is dated 28 March 2002. The chimney flashing inspection is signed as complete on 18 January 2002 when no flashings were installed on the chimney.

[88] Although Ms McLaughlan submitted that no evidence has been presented by the claimants against which to measure the standard of the inspections, this is not correct. The evidence of Mr Alvey and Mr Smith is that the inspections failed to identify the majority of the defects and that

[68] *McNamara v Auckland City Council* [2010] 3 NZLR 848 (CA) at [25].
[69] CBD: at 495.

these defects should have been apparent to a reasonably diligent building inspector. Mr Smith's evidence was that although an inspector would not be expected to climb onto the roof there was enough apron flashing detail on the building to alert an inspector and "raise a question or two about how they were formed".[70] I am satisfied on the basis of this evidence that the inspectors engaged by A1 Building Services Limited should have detected those defects which led to water ingress, particularly the apron flashings and the lack of slope on the balustrade which would have been obvious to an inspector.[71]

[89] I conclude that the inspections were not carried out with the appropriate skill and care and that this negligence is a direct cause of the claimants' loss.

Personal liability of Rose McLaughlan

[90] The certification issued by the BIA was issued to Ms McLaughlan in her own name.[72] In closing, Ms McLaughlan accepted that the role of a building certifier was equivalent to that of a territorial authority carrying out inspections and issuing Code Compliance Certificates and that she owed a duty of care to the claimants.[73] She submitted however that she did not breach that duty and that in order to prove any breach occurred the claimants would need to prove that:

- she operated outside her scope of approval;
- the company policies, processes and systems were flawed and that she could not reasonably rely on them;
- the competence of her staff were such that she could not rely on their judgment;
- the audits highlighted deficiencies that she chose to ignore; or

[70] Transcript, 30 March 2011 at 76.
[71] Brief of Evidence of Neil Alvey, above n 3, at 53.
[72] CBD: Tab 45.
[73] Closing Submissions of Rose McLaughlan, 3 April 2011, at 13.

- her staff in this instance had not followed the company's policies, processes and systems that she was relying on.

[91] A person licenced as a private certifier must personally attract the same liability as a Territorial Authority even when they conduct their business through a company. It cannot have been intended when private certifiers were established under the Building Act 1991 that a private certifier could avoid liability by operating through a limited liability company when liability for the same inspections would otherwise have fallen to a territorial authority. Even if it were accepted that the company was the certifier, Ms McLaughlan was the person holding the certification and the BIA reviews of the company make it clear that the nature and scope of the company's work was determined by the manner in which Ms McLaughlan performed her role as the licencee. I therefore conclude that Ms McLaughlan assumed personal responsibility for the standard of the inspections.

[92] The claimants did not inspect the Council file or obtain a LIM before the unconditional agreement was signed.[74] Ms Zhong said that although she added a term to the agreement for sale and purchase which enabled the claimants to consult their solicitor, this condition was removed when they accepted the advice of the real estate agent that the 5 year Master Build Guarantee was more important.[75]

[93] The CCC was not issued until after the claimants settled the purchase. Ms McLaughlan did not raise lack of reliance or contributory negligence in her defence, however as she was unrepresented I have considered whether these defences assist her. The Court of Appeal in *Byron Avenue*[76] considered whether purchasers who entered into an unconditional agreement without inspecting the Council files, contributed to their own loss if an inspection would have revealed difficulties with the LIM. The Court accepted that the principle of general reliance does not require a

[74] Evidence of Rainbow Zhong, 29 March 2011, at 2.22p.m.
[75] Brief of Evidence of Rainbow Zhong, 30 August 2010.
[76] *Byron Avenue* [2010] NZCA 65.

purchaser to know or believe that a CCC has been issued, and it concluded that whether a finding of contributory negligence and reduction in damages is appropriate will depend on the circumstances and what would have been revealed by any enquiry. In the case before me all building inspections were passed therefore, even if the claimants had obtained a LIM or made their agreement conditional on the issuing of the CCC, they would not have been on notice of likely defects. I conclude that the failure of the claimants to inspect the Council file is not causative of any loss and Ms McLaughlan could not have proved contributory negligence. The claim against her therefore succeeds.

THE LIABILITY OF YA WEI LI

[94] The claim against Ya Wei Li is that as developer she owed a non-delegable duty to exercise reasonable skill and care to ensure that the building work was carried out in accordance with the required standards. Ms Li owned the land and developed 51 Mt Taylor Road at the same time as 49 Mt Taylor Road. She was central to the project, making relevant decisions about the construction process, engaging contractors, and arranging for the property to be marketed and sold, presumably for her financial benefit and therefore I am satisfied that she was the developer.[77]

[95] Mr Zheng's evidence[78] was that he followed Ms Li's instructions, not the plans, and that if Ms Li asked him to change the construction from the plans he did so. He said that Ms Li requested the cladding change from Insulclad to Harditex in order to save money and that this change in her instructions was made after the plans were submitted for building consent. Mr Zheng asserted that Ms Li consulted with Mr Chen about the change from Insulclad to Harditex, however Mr Chen did not agree.

[77] *Body Corporate No 188273 & Or v Leuschke Group Architects Ltd & Ors* (2007) 8 NZCPR 914 (HC).
[78] Record of hearing, 29 March 2011 at 5.15pm.

[96] Mr Zheng also said that he agreed with Ms Li to use Insulclad only around the recessed windows.[79] However this evidence is inconsistent with manner in which Mr Zheng carried out the construction, as the investigation by Mr Alvey confirmed that Insulclad was not used around the recessed windows.[80] I therefore do not accept Mr Zheng's evidence that Ms Li consulted Mr Chen on the change of cladding.

[97] Ms Li did not engage Mr Chen as the architect to supervise the construction nor did she engage an independent project manager. She gave instructions to vary the construction from the consented plans and is therefore liable for any failures arising from this decision and from inadequate supervision. I am satisfied that Ms Li's actions were a substantial and material cause of weathertightness defects and therefore the claimants' loss.

ORIENT BUILDERS LIMITED AND LU ZHENG

[98] An interim response was filed on 19 July 2010 for Orient Builders Limited and Lu Zheng when they were represented by counsel. The response denied any negligence on the basis that the dwelling was constructed to the prevailing standards, any defects were the result of the design and that, had the Council required adequate plans and specifications, the defects and damage would have been prevented. Further it was submitted that if the inspections have been properly carried out and HBRC had carried out its work to the required standard, the defects would have been prevented or reduced. In addition Mr Zheng referred to a counter-claim for approximately $40,000 worth of work which Orient Builders had carried out for the claimant. He has not pursued this counter-claim or produced any evidence in support.

[99] Mr Zheng did not call any expert evidence nor did he contest the evidence given by the experts on what had caused the defects. Mr Zheng

[79] Ibid, at 4.42pm
[80] CBD: Tab 43.

was the person who was on site and supervising the work for Orient Builders. He arranged for the cladding to be installed and personally issued producer statements for the Harditex, the texture coating and the butynol membrane.[81] Mr Zheng's evidence was that he was always clear that the house was to be constructed in Harditex. His evidence was that when establishing the dimensions of the house he followed the plans but used the specifications which were more detailed for the construction.

[100] Orient Builders Limited and Mr Zheng made decisions not to use chimney flashing which HBRC quoted for and not to seek further instructions where there was any uncertainty about the method of construction. Mr Zheng's evidence was that he was not certain who installed the parapet flashings. The evidence of Mr Cowperthwaite is that because the parapet flashings were a different colour and were screwed with counter-sunk screws which a roofer would not use and not jointed in accordance with the usual technique used by a roofer that it is clear that HBRC did not install the parapet flashings. Further the invoice issued by HBRC states that there was no allowance for parapet capping. HBRC did supply and install parapet cappings at 49 Mt Taylor Drive, the adjacent dwelling.

[101] I conclude that Mr Zheng or Orient Builders Limited decided not to install parapet flashings on the claimants' dwelling and that this decision and the failure to properly install the Harditex were significant and material causes of the weathertightness defects.

CONCLUSION AND ORDERS

[102] The claimants have proved their claim to the extent of $525,531.80.

[103] The claims against the Auckland Council and Stanley Chen are dismissed.

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[81] Evidence of Mr Zheng, 29 March 2011 at 5.15pm.

What contribution should each of the liable parties pay?

[104] 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.

[105] 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.

[106] 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…

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

[108] I conclude that Rose McLaughlan, Ya Wei Li, Orient Builders Limited and Lu Zheng, and HBRC Limited are jointly and severally liable for 75% of this sum and Rose McLaughlan, Ya Wei Li, Orient Builders Limited and Lu Zheng are jointly and severally liable for the remaining 25%.

[109] Ms McLaughlan's liability as certifier is comparable to that of a territorial authority carrying out the same role. Ya Wei Li controlled the development but was entitled to rely on the builder to properly carry out the construction, in particular that work for which Mr Zheng provided producer statements. Orient Builders Limited and Lu Zheng jointly and severally

caused the most significant defects and loss to the claimants. The liability of HBRC Limited is for damage caused by one defect, the apron flashings, and while this defect was significant it was not the only major defect. The builder contributed to this defect and the certifier should have detected the defective apron flashings. For these reasons I have apportioned the liability of these respondents as follows:

i. Rose McLaughlan, Ya Wei Li, and Orient Builders Limited/Lu Zheng and HBRC Limited are jointly and severally liable to pay the claimants the sum of $394,148.85, being 75% of the sum of $525,531.80 in the following proportions. If any party pays more than his, or her or its share that party is entitled to recover any amount in excess of their liability from the other parties to the extent of that party's liability.

Party		**Liability**
Rose McLaughlan	15%	$59,122.33
Orient Builders Ltd/Lu Zheng	40%	$157,659.54
Ya Wei Li	25%	$98,537.21
HBRC Limited	20%	$78,829.77
	TOTAL	**$394,148.85**

ii. Rose McLaughlan, Ya Wei Li, and Orient Builders Limited/Lu Zheng are jointly and severally liable to pay the claimants the sum of $131,382.95, being 25% of the sum of $525,531.80 in the following proportions. If any party pays more than his, or her or its share that party is entitled to recover any amount in excess of their liability from the other parties to the extent of that party's liability.

Party		**Liability**
Rose McLaughlan	20%	$26,276.59
Orient Builders Ltd/Lu Zheng	50%	$65,691.48

Ya Wei Li	30%	$39,414.89
	TOTAL	**$131,382.95**

[110] To summarise this decision, if each party meets their obligation under this determination, this will result in the following payments being made to the claimants by the liable respondents to this claim:

Party	**Total Award**
Rose McLaughlan	$85,398.92
Orient Builders Ltd/Lu Zheng	$223,351.02
Ya Wei Li	$137,952.02
HBRC Limited	$78,829.77
TOTAL	**$525,531.80**

Dated this 1st day of July 2011

S. Pezaro
Tribunal Member