IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2011-100-000049
[2013] NZWHT AUCKLAND 14

BETWEEN	GEORGE-HUCH FIFITAILA KORIA AND ELIZABETH SISAVAI'I LAVA Claimants
AND	STEPHEN DAVID JOHNSON First Respondent (Removed)
AND	ROB WOODGER LIMITED (Struck off) Second Respondent (Removed)
AND	ROBERT CHARLES WOODGER Third Respondent
AND	NICHOLAS PETER SIMMONS Fourth Respondent (Removed)
AND	MARK HARDY Fifth Respondent
AND	TAYLOR FASCIA (AUCKLAND) LIMITED Sixth Respondent

Hearing:	26 and 27 March and 4 April 2013
Closing Submissions:	4 April 2013
Appearances:	Mr A J Steele and Ms E Kemp for the Claimants Robert C Woodger, Third Respondent Mr J Holland for the Fifth Respondent
Decision:	16 May 2013

FINAL DETERMINATION
Adjudicator: R M Carter

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[1] George Koria and Elizabeth Lava purchased their house at 5 Nottingham Place, Browns Bay, Auckland, on 13 November 2001 from the original owners. It turned out to be a leaky home. They now seek the sum of $290,087.59 in damages, including $ 259,984.38 to carry out repairs.

[2] The house was built in the first half of 1999 by Maxbuild Limited, which held the G J Gardner franchise for the North Shore. Stephen Johnson was the owner and sole director of Maxbuild. The third respondent Mark Hardy was engaged by Maxbuild as supervisor in February 1999. He began work after the concrete slab foundation of the house had been laid and the framework to first floor level erected. The fifth respondent Robert Woodger was the government approved certifier and owner of Rob Woodger Limited. Employees of Mr Woodger's company inspected the property and he issued a code compliance certificate.

[3] Mr Koria and Ms Lava allege that Mr Hardy and Mr Woodger each breached the duty of care they owed them by failing to identify the defects in the building as it was being built and when it was completed. Mr Hardy and Mr Woodger deny that they were negligent. Mr Hardy asserts that as a new and junior employee he did not owe a duty of care to the claimants. Mr Woodger acknowledges that as the certifier, he owed a duty of care but he asserts that he carried out his responsibilities properly.

[4] Therefore the issues I need to decide are:

- What are the defects that have resulted in damage?
- What is the scope and cost of the remedial work required?
- What was the extent of the duty of care owed by Mr Woodger and has Mr Woodger breached the duty of care owed?
- What was Mr Hardy's role at Maxbuild and in the construction of the dwelling? In particular did it result in his owing a duty of care and if so has he breached the duty of care owed?

EVIDENTIAL ISSUES

[5] Mr Hardy's counsel Mr Holland questioned whether Stuart Wilson, the expert engaged by the claimants, was able to give evidence about what

was done in 1999, as he did not come to New Zealand until 2004. Mr Wilson said he has an in depth knowledge of the standards that applied in 1999 from the numerous investigations he has made on houses built during that period, and by reading documents. These included a retrospective BRANZ document published in 2002 which contained recommendations about the kind of cladding being used, and manufacturers' technical literature. Mr Woodger questioned whether Mr Wilson was objective, given that he was being paid by one of the parties. It is inevitable that an expert is paid by one of the parties, and I accept that Mr Wilson abides by the High Court Code of Conduct for Experts and the Code of Conduct for Expert Witnesses in the Chair's Directions, including the requirement for objectivity by all experts.

[6] Mr Steele submitted that Mr Woodger could give evidence about what he did, but that he could not give expert evidence because, as a party, he would be deeply conflicted and unable to be objective. Mr Woodger submitted that he has expertise from his long experience as a Council inspector and private certifier. I accept that Mr Woodger is able to give evidence about technical matters but not opinion evidence as an independent expert.

WHAT ARE THE DEFECTS THAT HAVE RESULTED IN DAMAGE?

[7] The main defects resulting in moisture ingress and decay identified by Mr Wilson are:

a) Poorly formed and constructed roof to wall junctions.
b) Poorly formed and constructed window and door joinery, installed contrary to the manufacturer's recommendations.
c) Poorly formed and constructed cladding clearances including a lack of capillary break between the timber frame and foundation wall and a lack of sufficient support to the timber frame.
d) Inadequately sealed penetrations through the cladding including piped services, fascia and fixings.
e) Poorly installed EIFS wall cladding including fascia and gutter installation and decorative mouldings.

[8] These defects are reflected in the assessor Mr Buswell's addendum report of 23 February 2012. He listed the defects as door and window joinery installed with inadequate flashings, incorrectly installed EIFS cladding, lack of support to the base plate and insufficient ground clearances, incorrectly installed roof to wall junctions, and unsealed penetrations through the cladding.

[9] There was no dispute about the main defects. Therefore I accept Mr Wilson's evidence as to what they were. Mr Wilson also identified some problems with the roof which are likely to cause damage.

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

[10] The proposed repairs are set out in detail in the claim and include the total re-clad of the property with weatherboards. Before the hearing, Mr Woodger listed various items of betterment, which he said were improperly included in the claim. Mr Koria and Ms Lava, on the advice of Mr Wilson, agreed to a number of these, and at the hearing Mr Wilson made two further concessions in response to matters Mr Woodger raised. One was a deduction for the cost of testing, which would be met by the government as part of the Financial Assistance Package (FAP). Mr Woodger and Mr Wilson also agreed that a sum should be deducted in relation to drainage at the back of the house. As a result of these deductions, in summary the claim is now:

Remedial repair costs	$259,984.38
Pre remedial costs	$41,900.24
Consequential costs	$18,834.00
General damages	$25,000.00
Interest	$5,150.22
Claim total	**$350,868.84**
Adjustment for FAP contribution (being 25% of the WHRS estimate of repair costs appended to the	-$60,781.25

assessor's addendum report)	
Claim total with FAP adjustment	**$290,087.59**

[11] Mr Woodger also stated that the pergola, which was part of the original construction, had been removed by the original owners and was reinstated at the request of the claimants when they purchased the house. He questioned why a cost for its removal should be included in the claim. Mr Wilson and Mr Buswell advised that it needed to be removed for the re-cladding to take place. That was part of the remediation process. I find that the fact that the pergola was taken down by the original owners then put back up at Mr Koria and Ms Lava's request is not relevant, and that the cost of taking it down to carry out the repairs and putting it up again can be included in the quantum.

[12] Mr Woodger also stated that territorial authorities would allow remediation to be effected by the application of an EIFS cladding face-fixed to the framing. Mr Wilson replied that while in theory that could be done, his firm would not do it. He was supported by Mr Buswell, who said partial re-cladding by that method had been tried on houses in earlier years but had not been successful. I find that remediation with a cavity is the safe and appropriate course.

[13] Mr Woodger did not pursue assertions that ground clearances had been reduced by gardens built up around the base of the house after it was built. Mr Wilson said that wicking of moisture up into the house as a result of the gardens was not a significant issue. No other objections were made to the adjusted quantum, and Mr Buswell indicated it was likely to be reasonable. Accordingly I accept that the adjusted amount claimed as set out above is reasonable and justified.

WHAT WAS THE EXTENT OF THE DUTY OF CARE OWED BY MR WOODGER?

[14] It became clear at the hearing that Mr Woodger, rather than his company, was the private certifier approved under the Building Act 1991. In an official list, he was the tenth private certifier approved by the Building Industry Authority (BIA). The claim against Mr Woodger is that he breached

his duty of care because his inspections were inadequate and that this caused or contributed towards the claimants' loss.

[15] Mr Woodger accepts that he owed a duty of care, but he asserts that he discharged that duty and was not in breach of it. Mr Woodger argued that it was reasonable for him as a certifier to employ suitably qualified people to carry out inspections. His business grew more quickly than expected and he needed employees to help him carry out his duties. He was entitled to rely on their expertise. The BIA was aware that he and other certifiers were engaging employees to conduct the inspections and the BIA acquiesced in their doing so.

[16] Mr Woodger was supported in his submission by Ian Wallace, a well qualified building consultant. Mr Wallace was employed by Auckland City Council in 1999. Mr Wallace stated that with the introduction of the Building Act 1991 and code compliance certificates (CCCs), it was his responsibility to sign and issue CCCs on behalf of the Council, but he relied on the Council inspectors to undertake the site inspections. As far as Mr Wallace is aware this was similar to the way most large metropolitan councils throughout New Zealand operated at the time.

[17] Mr Woodger also pointed to letters addressed to him from the BIA dated 8 September 1998, 4 August 2000 and 18 October 2002. These letters accompanied reviews of Mr Woodger's activities as a building certifier. The covering letters dated 2000 and 2002 recorded that the accompanying reviews showed that Mr Woodger was achieving a very high standard of work which he could be proud of.

[18] Mr Steele submitted that the Building Act 1991 imposed a non-delegable duty of care on certified inspectors, and that Mr Woodger could not escape liability arising from any inadequacies in inspections by relying on the fact that they were carried out by employees and contractors. Further, Mr Steele submitted, it was Mr Woodger who arranged the inspection regime that his company's employees carried out.

[19] The difficulty with Mr Woodger's approach in this respect is that, as the approved private certifier, he personally stood in the same position as a territorial authority. His ability to rely on his company's employees who carried out the inspections was no greater than a council's ability to rely on

its inspectors. Like the councils, Mr Woodger's duty of care extended to work undertaken on his behalf.

[20] Mr Woodger's personal duty of care in tort flowed directly from his statutory duty under the Building Act 1991. The Act stated that councils and certifiers must satisfy themselves on reasonable grounds that a building complied with the Building Code. This included a duty of care in the conduct of inspections and the issue of certificates, including final CCC's. The Act stated that where a producer statement was obtained from a product supplier or installer, the producer statement provided a reasonable basis for the council or certifier to be satisfied as to compliance.

[21] The fact that the BIA told Mr Woodger that he could be proud of his work is not directly relevant to the question of whether or not his certification that this house complied with the Building Code was reasonable. Mr Woodger's statutory duty under the Building Act 1991 is wide and is analogous to a territorial authority's duty under the same legislation.

[22] In 1989 in *Askin v Knox*[1] Cooke P addressed the standards by which the conduct of a council officer should be measured. He concluded that a council officer's conduct will be judged against the knowledge and practice at the time the negligent act or omission was said to take place. Mr Woodger's defence to the claim against him was based on his general assertion that his inspections (being those carried out on his behalf) were conducted in accordance with the practices at the time.

[23] Mr Steele on behalf of the claimants submitted that (earlier, in 1973) in *McLaren Maycroft & Co v Fletcher Development Co Ltd*[2] the Court of Appeal addressed 'common practice' in the building context. Richmond J stated that the court is not necessarily bound by such evidence. It must retain its own freedom to conclude that the general practice of a particular profession falls below the standard required by law. In *Dicks v Hobson Swan Construction Ltd*[3] and *Te Mata Properties Ltd v Hastings District*

[1] *Askin v Knox* [1989] 1 NZLR 248 (CA).
[2] *McLaren Maycroft & Co v Fletcher Development Co Ltd* [1973] 2 NZLR 100 (CA).
[3] *Dicks v Hobson Swan Construction Ltd* (in liquidation) (2006) 7 NZCPR 881(HC).

Council,[4] to which Mr Steele also referred, the courts stated that a council is under an obligation during building work to perform such inspections as will enable it to issue an accurate CCC. In *Byron Avenue*[5] the Court of Appeal stated that the Council owed a reasonable duty of care, before the final inspection and the issue of a CCC, to inspect work that was going to be covered up. The effect of carelessness in the inspection phase was to lock in a defective condition that purchasers could not detect.

[24] So while a council inspector or a private certifier's duty is a reasonable one, the knowledge and practices at the time are not determinative in defining their duty of care. In effect this was decided in *Dicks*[6] where the court stated that systemically low standards suggested systemic failure by councils to perform their obligations, and it is reflected in adjudicator Pezaro's statement in *Zhong v Auckland Council*[7] that the certifier's duty extended to carrying out inspections with an appropriate degree of skill and care.

HAS MR WOODGER BREACHED THE DUTY OF CARE OWED, CAUSING OR CONTRIBUTING TO THE CLAIMANTS' LOSS?

[25] The exterior of the house was clad with Hitex EIFS cladding. There were producer statements on the Council file for this house in relation to engineering and structural design work but there were none for the work carried out by the subcontractors responsible for the defective work, particularly the cladding installer. Mr Woodger stated that in many cases such producer statements were not being provided in 1999. He said they were increasingly sought and provided in later years. I find that no such producer statements were provided for this house by the cladding installer. That being the case, it was incumbent upon Mr Woodger as the certifier to satisfy himself on reasonable grounds by other means that the cladding in particular was properly installed.

[26] I accept that a council or private certifier was not required to fulfil the role of a clerk of works, or to be on site all the time. However in this case Mr Woodger stated that his employees did not carry out an inspection

[4] *Te Mata Properties Ltd v Hastings District Council* [2008] NZCA 446, [2009] 1 NZLR 460.
[5] *O'Hagan v Body Corporate 189855* [2010] NZCA 65, [2010] 3 NZLR 486.
[6] Above n3.
[7] *Zhong v Auckland Council* [2011] NZWHT Auckland 32, 1 July 2011.

of the cladding at all. This was because the cladding was a proprietary system, with trained applicators and the installer's own on site supervisor. Mr Wilson agreed that it was not common practice among councils and certifiers to undertake cladding inspections at that time. However he did not see how, in the absence of a producer statement, or inspection, the statutory obligation, for a certifier to be satisfied that work complied with the Building Code, could be met. Mr Woodger also said inspectors were not expected to climb up onto roofs to carry out inspections or beyond two or three metres to inspect the tops of the walls, for safety reasons.

[27] As set out above, it is now established at law, in *Dicks*[8] and other cases, that councils and certifiers were obliged to take sufficient steps to fulfil their statutory requirements. Accordingly, as Mr Woodger was not relying on a producer statement, he should have ensured that there was at least a cladding inspection.

[28] The key question however is whether the defects in construction could and should have been picked up in inspections.

Defect A: poorly formed and constructed roof to wall junctions

[29] Mr Wilson stated that apron flashings had been poorly installed and terminated behind the Hitex wall cladding, with no means of directing water away from the roof to wall junction; there were a number of gaps between the cladding and flashings; and the metal gutter had been embedded in the plaster and texture coating of the EIFS cladding. Mr Woodger said the apron flashings Mr Wilson was referring to were also called kick out flashings. He stated that the installation of such flashings, to direct the water away, was not common practice at the time. Mr Wilson pointed out that, with this particular cladding system, the manufacturer Hitex Plastering Limited provided a detail for 'stop end to turn water out 45mm into gutter' in its technical specifications current at the time.

[30] Mr Woodger questioned whether this technical Hitex information was current at the time early in 1999. He stated that the one-page Hitex specification sheet attached to the building consent application was less detailed, and he pointed out that the information Mr Wilson relied on appeared to be a combination of two versions. Mr Wilson stated that the

[8] Above n3.

technical specifications had been provided to him by Hitex as having applied from 1996. For that reason I accept that they were in force at the time this house was built in 1999.

[31] The shortcomings Mr Wilson described under Defect A largely related to the application of the cladding and plaster and the absence of flashings. Mr Wilson stated that Defect A was clearly visible at the time of his inspection and therefore should have been identified at the time of the final inspection. Mr Woodger did not directly challenge this assertion. In response to questions from Mr Holland, Mr Wilson agreed that the Hitex cladding was installed after the roof, and that the cladding installer should have gone back to the builder or roofer and asked for the roof to wall junctions to be fixed, before the cladding was installed. Even so, because of the specific direction in the technical information, I find that Mr Woodger was negligent in not identifying Defect A before he issued the CCC.

Defect B: poorly formed and constructed window and door joinery

[32] The joinery was installed contrary to the manufacturer's recommendations. Mr Wilson stated that this was clearly visible at the time of his inspection and should have been identified by the certifier at the time of pre-line and final inspections. Polystyrene decorative bands had been installed around the window and door joinery. At the heads, the bands had been installed hard down onto the window flashing, blocking the designed drainage channel which allows water to be directed to the face of the external cladding. Testing showed the head flashings did not meet the minimum overhang specified by the cladding manufacturer.

[33] The junctions between the joinery units and the polystyrene moulds had been left unsealed. Sill flashings had not been installed to the window joinery and the base of the window joinery had been left unsealed. However the drainage channel at the base had been blocked by the polystyrene bands.

[34] Mr Woodger did not agree that the defects in the installation of the windows would have been visible at the time of his inspections. He also stated pre-line inspections were carried out inside the building. Further, Mr Woodger stated that there was a note that 'Hitex recommend the use of sill

trays on all windows' in the technical specifications, but it was not a requirement. He stated that the relevant diagram did not show a sill flashing.

[35] Mr Wilson said that the specifications were ambiguous and that while the drawn detail did not show a sill flashing, they were recommended. He acknowledged that they were not mandatory. However he stated that there were other aspects to that particular detail such as the requirement for a gap at the head flashing and sealant to the jambs of the joinery units which were not followed either. The head flashings were sealed closed and should not have been. The jambs at the side of the windows did not have sealant which was required. That would have allowed moisture to enter. Mr Wilson stated that the gap at the bottom is to allow water that may have got in to drain back out again.

[36] I accept that some of the window defects would have been difficult for an inspector to identify unless he was on site when the windows were being installed, for example the lack of sufficient extension of the head flashings. However I accept that the fitting of the polystyrene decorative bands around the windows, which blocked water egress at the head and sill of each, would have been visible. Such bands were not uncommon at the time, but I accept that their effect should have been understood by the certifier.

Defect C: poorly formed and constructed cladding clearances

[37] Mr Wilson stated that this defect related primarily to the construction of the frame in relation to the concrete slab. He said that the frame should overhang the slab by six mm. This provides a capillary gap, when the cladding is attached to the frame, between the base of the cladding and the concrete slab. He stated that in this case the timber frame had been set back from the edge of the concrete slab and the cladding had been installed down and over the edge of the slab in a stepped fashion. This meant that water that entered the building accumulated at the base of the framing, rather than draining away to the outside. This defect may have arisen because of the way the slab was laid. It would have been visible at the final and recheck inspections. Mr Wilson stated that the base detail is fundamental to the performance of the cladding system and the inclusion of

a six mm gap with the bottom plate is a basic requirement of construction and covered off by NZS 3604.

[38] In response Mr Woodger stated that he was disappointed that this was not picked up. He agreed with Mr Hardy's view that it could have been seen if an inspector had got down on his hands and knees and looked up.

[39] However Mr Woodger stated that the step back of 30mm that Mr Wilson alleged occurred only in selected places. It was not something that occurred all around the building. That appears to be the case in photographs to which Mr Wilson referred. In discussing the foundation and its relationship to the framing, Mr Woodger questioned whether NZS 3604: 1999, on which Mr Wilson relied, was available in February 1999. Mr Wilson stated that NZS 3604:1990 had been progressively updated and he was sure that it included the requirement for the framing to extend just beyond the slab.

[40] In the one page of Hitex technical data to which Mr Woodger referred, under Ground Line Clearances, the edge of the framing is shown sitting flush on the edge of the slab, with the building paper and Hitex falling below the level of the slab. These are also shown in the specifications on which Mr Wilson relied, overlapping down the outside of the slab down to 50mm minimum. While the diagrams showed the edge of the framing sitting flush on the slab, rather than sitting six mm over the edge of it, even this was not followed. The framework was sitting inside the slab in places and this should have been picked up during inspections or inspections should have identified that the cladding was not overlapping down the outside of the slab.

Defect D: inadequately sealed penetrations through the cladding

[41] Mr Wilson stated these defects were clearly visible. The way the penetrations had been weatherproofed should have been identified by the certifier as being contrary to good weathertight practice and likely to fail to comply with the Code. The risk of future moisture entry should have been identified at final inspection.

[42] Mr Woodger stated that it was common practice at that time to put sealant where the pipes came through the cladding. He said that there are now more effective forms of flashing.

[43] He also said that as part of its maintenance, the building needed to be inspected at regular intervals, monthly. If one had seen that there was no sealant at the penetrations or that it had fallen out, the sealant could have been replaced.

[44] Mr Wilson pointed out that in the Hitex technical specifications, there is a diagram providing for sealant and the flashing of penetrations. He agreed with Mr Woodger that this was a high maintenance system, not low maintenance, but he said that maintenance would not necessarily have sealed the penetrations that were not watertight in the first place. Even though penetrations were commonly sealed and not flashed at the time, because flashings were not installed as well as sealant at the penetrations, as required in the Hitex specifications, I find that this too was negligent.

Defect E: poorly installed EIFS external wall cladding including fascia and gutter installation

[45] Mr Wilson stated these defects were clearly visible at the time of his inspection and therefore would have been visible at the time the certifier's final inspection. The metal fascias had been buried in the plaster coating system at the roof wall junctions, and the gutters buried in the plaster coating system leading to cracking of the plaster adjacent to the gutters. The metal gutters and fascias had been installed before the application of the final plaster coat. The metal fascias had been formed without a natural drip edge allowing water to run off the fascia and onto and behind the plaster coating. The EIFS wall cladding has been poorly installed with inappropriate fixings, and notched to accommodate the step back between the face of the foundation wall and the face of the timber frame (in Defect C above). The cladding had also been installed hard onto the face of the foundation wall.

[46] Mr Wilson stated that the defects ought to have been identified by the certifier during the construction of the dwelling and at the pre-line inspection. Failure to detect these issues enabled works to proceed and be

completed with significant weathertightness defects constructed into the dwelling. I accept Mr Wilson's evidence in these respects and accordingly I find that Mr Woodger did not ensure that the inspections were carried out with the degree of skill and care required.

[47] Mr Wilson also stated that the consent drawings had a 100mm soffit/overhang which had been omitted. This was a further shortcoming in the certification of this house.

[48] Mr Koria and Ms Lava had been advised in a pre-purchase report that the house was low maintenance. They were advised in 2007 to have the spouting inspected every year and cleared out as necessary. They did so, but took no other steps. Mr Woodger submitted that they failed to maintain the house properly and that this was likely to have given rise to damage. While Mr Wilson agreed with Mr Woodger that the exterior cladding was not low maintenance, he stated that maintenance would not have rectified the defects. There is no persuasive evidence that a lack of maintenance caused or contributed to the defects and for that reason I do not accept that failure to maintain caused or significantly contributed to the leaks and damage. The claimants acted in accordance with the information they were given.

[49] Mr Wilson attributed various percentages of the total repair costs to each of the five main defects, if each was to be taken separately. He said these were somewhat theoretical estimates. Mr Woodger said that each percentage was high. I accept Mr Wilson's evidence that Mr Woodger failed in his responsibility before and during the issue of the CCC for this building in relation to the five defects listed. I find Mr Woodger contributed to all of the claimants' losses and accordingly he is liable for the whole of the costs of repair and the other amounts claimed.

WHAT WAS MR HARDY'S ROLE AT MAXBUILD AND IN THE CONSTRUCTION OF THIS DWELLING?

[50] Mr Hardy was engaged by Maxbuild Limited, the G J Gardner franchisee for the North Shore, from 15 February 1999 as a supervisor. The contract between Mr Hardy and Maxbuild stated that at all times Mr Hardy would be an independent contractor and not deemed an employee or agent for any purpose. He would pay his own taxes and ACC levies.

[51] The agreement stated that Mr Hardy's services were:

a) Successfully bringing about the complete construction of each house.
b) Liaising between clients and the company throughout construction.
c) Liaising with subcontractors and suppliers on site.
d) Training and maintaining high health and safety standards.
e) Scheduling suppliers and subcontractors.
f) Completing required inspection reports.
g) Ensuring building standards are adhered to.
h) Ensuring health and safety standards are adhered to on site.
i) Ensuring construction of each home is within the scheduled time frame.
j) Monitoring the workmanship of subcontractors.
k) The franchisee requires the contractor to have all paper work, contracts, specifications, requests for quotations, authorities to proceed, signed by the franchisee's clients, with finance approval, before the contractor is eligible for payment of commission.
l) The franchisee requires the contractor to provide the franchisee with all diary details and supervisor reports, which remain the property of the franchisee.
m) The contractor will also provide any other services associated with and/or necessary to complete the above services.

[52] The agreement stated that Maxbuild would review the terms and conditions of the agreement at the completion of a trial period of three months. Mr Hardy was required to maintain at his own expense an after-hours telephone and a motor vehicle and to attend production meetings weekly.

[53] Schedule A to the contract stated that the payments would be on a monthly basis, on receipt of a GST invoice, of $3,666.67, and that there would be construction performance payments of $450.00 plus GST per dwelling when a completion certificate had been issued and all works on the handover sheet had been completed and signed off by the client. The bonus payments would require the construction time to be 12 weeks or

under for a single level, and 15 weeks or under for a two storey dwelling. Day one would commence from the date of issue of the local authority building permits.

[54] There was a great deal of evidence and argument at the hearing as to the true nature of Mr Hardy's arrangements with Maxbuild. Mr Hardy's counsel stated that he was an employee because he was working on a reduced wage compared with his hourly rate when he was a labour only builder, he worked set hours Monday to Friday, his petrol was reimbursed by Maxbuild, and his cell phone was in fact provided and paid for by Maxbuild. Mr Holland pointed out that Mr Hardy even drove to collect extra building materials that were needed from the supplier. Gayle Tripp, who was engaged to supervise the interior finishing of the houses, supported Mr Hardy in that they worked under the direction of Mr Johnson, the owner of Maxbuild.

[55] In a submission before Mr Hardy was joined to the proceedings, Mr Holland referred to a judgment of the Supreme Court[9] in 2004 in which the Court stated that all the circumstances have to be taken into account when deciding whether a person was employed as a contractor or an employee, and that the documentation is not definitive. However that case involved interpretation of the Employment Relations Act 2002. The ERA repealed the Employment Contracts Act 1991 which was still in force at the time of this contract in 1999. I do not propose to explore the interpretation of contracts under the 1991 legislation. While Mr Hardy's actual relationship with Maxbuild did have some of the characteristics of a contract of service, i.e. of employment, I decide that he was engaged and worked under a contract for services. I find that Mr Hardy was a senior member of staff, not a junior employee, albeit working in his probationary period when this house was built.

[56] However, as Mr Steele submitted, the claim does not hinge on this distinction because it is possible for an employee to have a duty of care as stated in *Morton v Douglas Homes Limited*,[10] referred to in the next section of this decision.

[9] *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721.
[10] *Morton v Douglas Homes Limited* [1984] 2 NZLR 548 (HC).

[57] In an affidavit filed and in his oral evidence Mr Johnson emphasised Mr Hardy's role in supervising the construction process and downplayed his own role. In his affidavit he described Mr Hardy as the building site supervisor and at the hearing as the construction supervisor. His title in the contract is supervisor. I do not agree with Mr Steele's submission that Mr Hardy sought to push all the responsibility onto Mr Johnson. Mr Hardy acknowledged, albeit reluctantly, that he was responsible for building standards 'as part of the team'. My impression was that Mr Johnson sought to push all responsibility onto Mr Hardy, when it appears that they shared responsibility for building standards. Mr Johnson, not Mr Hardy, signed the certifier's inspection reports. Mr Hardy was to ensure that obvious omissions were put right and relatively minor defects were rectified before the next stage or before an inspection took place, and he was to draw serious issues to Mr Johnson's attention.

[58] Mr Holland submitted that Mr Johnson was dishonest in his evidence, and it was Mr Johnson not Mr Hardy who was 'calling the shots' and thereby ultimately responsible for standards. Mr Holland emphasised that when, at the end of the construction period of this house, the bottom of a car's body scraped on the concrete when it went from the driveway into the garage - it appears that this may have been caused by the slab having been incorrectly laid - it was Mr Johnson, not Mr Hardy, who engaged an engineer to deal with the problem. Mr Johnson's intervention about the driveway was consistent with the evidence overall that Mr Hardy dealt with day to day matters and Mr Johnson, as the owner of the building company, had a trouble-shooting role that also involved standards.

[59] There was also argument as to whether or not Mr Johnson had promised to train Mr Hardy and that this house was built in the training period. I find that Mr Johnson did promise training or supervision in relation to G J Gardner system that Mr Hardy was not familiar with but wished to learn. Mr Hardy worked under Maxbuild's general directions, but he was not receiving training in building.

[60] Mr Hardy's role with Maxbuild was principally to bring the buildings to completion within the contracted timeframes. The company emphasised to its clients its commitment to build homes quickly within those timeframes.

[61] Mr Hardy ensured that subcontractors arrived on site ready to work and that the relevant building materials, which had already been ordered, were delivered on site, when both were required, subcontractor after subcontractor, in an efficient sequence for all houses. Mr Hardy was provided with an order book so that he could order the extra materials needed to complete work, for example to get ready for inspections.

[62] Mr Hardy worked under pressure as he was responsible for supervising and co-ordinating the construction of around 20 houses from the time council approval was issued, including arrangements for the laying of the slab and the associated trades at that time, until the outside of each house was complete.

[63] Arrangements for the construction of the house at 5 Nottingham Place were made towards the end of 1998, before Mr Hardy joined the company in mid February 1999. There were 27 entries in Mr Hardy's diary relating to the construction of this house. Of these entries, about 15 were site visits. The other entries related to phone calls Mr Hardy made in relation to the property, to contractors or others. There was no evidence that his role in the construction of this property was different from his role generally, apart from the fact that construction had commenced on this and some other houses before he began to work for Maxbuild.

[64] Summarising this section, bringing a house to completion on time was Mr Hardy's principal function. He ensured that construction work by successive subcontractors went ahead efficiently including by liaising with them on site. Mr Hardy also had some responsibility for building standards. Mr Hardy acknowledged that, as a member of the team, he had such a responsibility. Mr Hardy shared this responsibility with others. Mr Johnson inspected all the houses before the certifier's final inspection. Mr Hardy was not expected to liaise between clients and the company throughout construction - that was also part of Mr Johnson's role.

DID MR HARDY'S ROLE RESULT IN HIS OWING A DUTY OF CARE AND IF SO HAS HE BREACHED THE DUTY OF CARE OWED?

[65] Whether Mr Hardy had a duty of care to downstream purchasers such as Mr Koria and Mrs Lava in tort, and the extent of such a duty, are not necessarily the same matters as his obligations under his contract with Maxbuild. Mr Hardy's potential duty in tort is also different from Maxbuild's contractual obligations under its building contracts with purchasers.

[66] It is settled law in New Zealand that a builder owes a duty of care to any person whose property a builder should reasonably expect to be affected by the builder's work. However the fact that a builder owes a duty of care does not mean that everyone involved in the building work or in the construction of houses owes subsequent owners a duty of care.

[67] Justice Hugh Williams in *Boyd v McGregor*[11] stated that there were three principles to consider in determining whether parties involved in construction owed a duty of care. These were:

a) The existence or otherwise of a duty of care in New Zealand has evolved over time and even now is not fixed but a potent factor in the decision is the assumption of responsibility to original buyers.
b) That purchasers other than original purchasers from the developers have a more difficult task in demonstrating they are owed a duty of care by those developers and others who worked on the building.
c) The functionality or the assumption of responsibility has always been an important feature and may be seen to have gained greater importance over time.[12]

[68] Justice Williams referred to the Court of Appeal judgment in *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd*[13] which stated:

> [99] Assumption of responsibility for a statement or a task does not usually entail a voluntary assumption of legal responsibility to a plaintiff, except in cases where the defendant is found to have undertaken to exercise reasonable care in circumstances which are analogous to, but short of, contract, and it is foreseeable that

[11] *Boyd v McGregor* HC Auckland, CIV-2009-404-5332, 17 February 2010.
[12] Above n11 at [59].
[13] *Rolls Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA).

> the plaintiff will rely on that undertaking. If that is the case then, subject to any countervailing policy factors, a duty of care will arise. In other cases, the law will deem the defendant to have assumed responsibility where it is fair, just and reasonable to do so: *Attorney-General v Carter*, at pp168-169 (paras [23] – [27]). Whether it is fair, just and reasonable to deem an assumption of responsibility and then a duty of care will depend on a combination of factors, including the assumption of responsibility for the task, any vulnerability of the plaintiff, any special skill of the defendant, the need for deterrence and promotion of professional standards, lack of alternative means of protection and so on – that is, essentially the matters discussed above at paras [58]-[65]. ....Wider policy factors will also need to be taken into account.
>
> [100] Finally, we note that assumption of responsibility for the task cannot be sufficient in itself, at least insofar as the negligent construction cases are concerned.

[69] The relevant question to ask when deciding whether a duty of care exists is whether, in the light of all the circumstances, it is just and reasonable that such a duty be imposed. There are two aspects to consider. The first aspect involves whether foreseeability is established and then the degree of proximity (closeness) or the relationship between the parties should be considered. The second aspect is whether there are any wider policy considerations to negate, restrict or strengthen the existence of a duty.[14]

[70] In *Morton v Douglas Homes,*[15] to which Mr Steele referred, Hardie Boys J stated that the relevance of the degree of control which a director has over the operations of the company is that it provides a test of whether or not his personal carelessness may be likely to cause damage to a third party, so that he becomes subject to a duty of care. While in *Morton* Hardie Boys J was discussing a director's potential liability, he stated that a director, a general manager or a more humble employee is under a duty of care to those he deals with on the company's behalf and to those the company deals with in so far as that dealing is subject to his control. Mr

[14] Above n13, and *North Shore City Council v Attorney General* [2012] NZSC 49, [2012] 3 NZLR 341.
[15] Above n10.

Steele submitted that in *Body Corporate 199348 v Nielsen*[16] Heath J, referring to *Morton*, held that personal responsibility may be assumed by an individual who has acted as a project manager or site manager.

[71] The question before me is therefore whether it is fair, just and reasonable that Mr Hardy is found to have a duty of care to Mr Koria and Ms Lava, bearing in mind that they are not the original purchasers.

[72] Mr Hardy's contract with Maxbuild stated that he was to ensure building standards were adhered to and that he was to monitor the workmanship of subcontractors. Mr Steele submitted that Mr Hardy was responsible for ensuring that the construction of the house or any aspects of it complied with the Building Act 1991, the Building Code, good trade practice and relevant professional standards, relying on the evidence of Mr Johnson and Peter North, Maxbuild's estimator/quantity surveyor, and the agreement.

[73] In fact Mr Hardy was not the on-site supervisor of the construction of each house, and the claimants are subsequent purchasers. On the other hand, Mr Hardy was an independent contractor, even though his independence was circumscribed. Having regard to all the legal considerations and other factors set out above, I have concluded that it is fair, just and reasonable to find that Mr Hardy did owe a duty of care to downstream purchasers such as Mr Koria and Ms Lava.

[74] Mr Steele suggested that Mr Hardy's duty might be said to mirror the certifier's. I do not accept that Mr Hardy's duty of care to Mr Koria and Ms Lava was the same as Mr Woodger's duty to them as certifier. I have concluded that Mr Hardy's was a different duty.

[75] While Mr Hardy had a responsibility to Maxbuild to monitor the work of subcontractors, he was not engaged to project manage the work of specialist subcontractors. For the claimants to succeed against Mr Hardy, they would need to show that he was employed to check such specialist contractors' work. That was not the case. Mr Hardy had no control over the application of the Hitex cladding and plaster, and he was entitled to rely on the skills of the licensed cladding applicator, or, if Hitex itself applied the

[16] *Body Corporate 199348 v Nielsen* HC Auckland, CIV-2004-404-3989, 3 December 2008.

cladding, on Hitex, to apply the cladding in accordance with that company's own technical requirements. This was a proprietary product usually applied with its own on-site supervisor. Mr Hardy had no experience of Hitex cladding and so he could not be expected to identify defects in its application while the house was being built and when it was finished. He was not responsible for it. It was also probably the first house Maxbuild as the builder built using Hitex. Mr Hardy was also entitled to rely on the roofer's specialist skills.

[76] Mr Steele has submitted that this case revolves around the failure or otherwise of Mr Hardy's scheduling skills, which are part of his responsibility, but I do not accept this submission. In respect of Defect A, poorly formed and constructed roof to wall junctions, as I have stated, Mr Wilson agreed with Mr Holland's suggestion that it was up to the Hitex applicator to draw the builder's or roofer's attention to any defects in their work during the construction process, where they would affect the efficacy of the Hitex cladding and plasterwork.

[77] In respect of Defect B, poorly installed window and door joinery, the defects involved a departure from the Hitex specifications. The same applies to defect D, inadequately sealed penetrations through the cladding.

[78] In respect of defect C, the foundation slab and the framework up to the first floor level were already laid and built when Mr Hardy started with Maxbuild. This included the unsatisfactory position of the framing on the slab. It was the cladding installer which brought the Hitex down over the 'step' caused by the framing sitting inside the edge of the slab, contrary to Hitex's own technical drawings.

[79] Defect E was poorly installed EIFS cladding including fascia and gutter installation. As stated above the metal fascias had been buried in the plaster coating system at the roof wall junctions, and the gutters were buried in the plaster coating system.

[80] While all the defects involved work where to a greater or lesser extent the cladding interfaced with other materials, defects A, B, C, and D all involved failures caused by departures from Hitex's own technical literature or in the case of Defect E, the guidelines for such cladding. These were not scheduling matters for which Mr Hardy was responsible.

[81] The onus is on the claimants to prove on the balance of probabilities that Mr Hardy was careless in the discharge of his duties and I do not accept that they have discharged that onus.

[82] For those reasons I find that there was no causative link between Mr Hardy's role and the defects and damage that has resulted from them, and I find that Mr Hardy did not contribute to the claimants' losses.

CONCLUSION

[83] I conclude that Mr Woodger was in breach of his statutory duty and as a result, his duty in tort to Mr Koria and Ms Lava in relation to this property and that he thereby contributed to their losses for the reasons I have set out. I have concluded that Mr Hardy owed Mr Koria and Ms Lava a duty of care but that he was not in breach of his duty to them and did not contribute to their losses.

ORDER

[84] I order the third respondent Robert Charles Woodger to pay the claimants George Koria and Elizabeth Lava the sum of $290,087.59.

[85] The claim against Mark Hardy is dismissed.

DATED this 16th day of May 2013

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R M Carter

Tribunal Member