Diminution in Value
Not proven

IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2007-100-00030

UNDER the Weathertight Homes Resolution Services Act 2006

IN THE MATTER of an Adjudication

BETWEEN	**NEIL EUAN MANUEL, MARGARET MARY MANUEL AND THE PUBLIC TRUST as Trustees for the N & M MANUEL FAMILY TRUST**	
	Claimant	
AND	**WAITAKERE CITY COUNCIL**	
	First Respondent	
AND	**BRIAN ELLIOT**	
	Second Respondent	
AND	**REX W LITTLE AND ASSOCIATES**	
	Third Respondent	
AND	**PLYTECH INTERNATIONAL LTD**	
	Fourth Respondent (Removed)	
AND	**TERRY MCKEOWN**	
	Fifth Respondent	
AND	**GRAHAM LOMAX**	
	Sixth Respondent	

AND	**SPOUTING STEEL ROOFING WORLD LTD** Seventh Respondent
AND	**HARVEY BRENT O'LOUGHLIN** Eighth Respondent
AND	**DAVID SINGER** Ninth Respondent (Removed)
AND	**MICHAEL WESSELDINE** Tenth Respondent
AND	**DAVID MCDONALD** Eleventh Respondent (Removed)

Dates of Hearing: 3,5-7,10-12,17 December 2007, 13,14,22 February 2008

Appearances: L Ponniah Counsel for Claimants
P Robertson Counsel for First Respondent
M Keall Counsel for Second Respondent
P Napier Counsel for Fourth Respondent
M Wesseldine for Tenth Respondent (self-represented)
G Lomax for Sixth Respondent (self-represented)

Date of Decision: Thursday 28 February 2008

FINAL DETERMINATION

Adjudicator S G Lockhart QC

INTRODUCTION

[1] The adjudication hearing of this claim commenced on 3 December 2007. It was estimated to last five days. The evidence finally concluded on 17 December 2007 after 8 actual hearing days. Counsel were to file written final submissions - some by 23 January 2008 and the others by 1 February 2008. The hearing was adjourned to recommence on 13 and 14 February 2008 to allow all counsel to make oral submissions. The filings of written submissions were protracted and the last was received on 12 February - 11 days late. In the end the final oral submission concluded on 22 February 2008.

[2] This long extension of the timetable created a problem because counsel for the claimants announced on 13 February 2008 that not only had the claimants sold the subject property on 10 December 2007 but settlement was scheduled to complete the sale on 29 February 2008.

[3] The settlement had to proceed on 29 February 2008 as the purchasers had rejected the claimants' request to extend the settlement date.

[4] This meant that the adjudicator had until 28 February 2008, i.e. a weekend and four working days to complete a decision in which there were now 1,056 pages of evidence, 186 pages of submissions, and six folders of briefs of evidence to be considered.

[5] This summary of dates is recorded to emphasise that as a result of only having six days to complete a judgement those interested in the decision may be disappointed by the brief mention (if any) of the submissions made by the various parties.

[6] All parties were aware at the conclusion of the evidence on 22 February 2008 that the Claimants had to complete settlement of the sale

of their house on 29 February 2008. Because of that settlement all parties requested that an adjudication decision had to be delivered by 28 February 2008. All parties were therefore aware that although all matters presented during the hearing would be considered by the adjudicator in reaching a decision, due to the urgency required, all matters on which this decision is based may not be referred to in this written decision.

BACKGROUND

[7] Neil and Margaret Manuel purchased a section at 189 Carter Road, Oratia on 28 March 1998. They subsequently engaged Mr Rex Little, an architect, to prepare plans and specifications for a dwelling to be built on the section. On 11 May 1999 a building consent application was lodged with the Waitakere City Council (Council) together with plans and specifications.

[8] A building consent was issued on 4 June 1999. Meanwhile at the suggestion of Mr Little, cost quotations from three builders were obtained and on 20 June 1999 Mr and Mrs Manuel accepted a quote given by Mr Brian Elliott. Construction of the dwelling commenced on 25 June 1999 with a completion date scheduled for 8 October 1999. Eventually Mr and Mrs Manuel moved into the dwelling on 9 December 1999. A Code Compliance Certificate (CCC) was issued by the Council on 26 January 2000.

[9] A final payment to the builder, Mr Elliott, had been withheld which led to proceedings being issued in the Waitakere District Court against Mr and Mrs Manuel. In respect of this litigation both parties engaged building experts - Mr Michael Wesseldine of Belgravia Building Consultants Ltd for Mr and Mrs Manuel, and Mr David McDonald of Advance Building Inspections Ltd for Mr Elliott. The Court appointed a senior construction disputes consultant, Mr AMR Deane, to inspect the building and to provide to the Court a detailed report which was completed and made

available to the Court and the parties on 17 August 2001. This claim was settled by the parties on 18 September 2001 by a final payment being made to Mr Elliott.

[10] On 24 June 2003 the dwelling owned by Mr and Mrs Manuel was transferred to the N & M Family Trust - the trustees being both Mr and Mrs Manuel and the Public Trustee. According to Mr and Mrs Manuel, following a severe storm in either late November or early December 2003 was the first indication to them that a water intrusion problem existed in the dwelling. The firm of Watkins Plumbing Services Ltd were engaged and repair work was performed which proved to be unsuccessful.

[11] On 17 March 2004 the present Claimant Trust lodged a claim under the provisions of the Weathertight Homes Resolution Services Act 2002. The claimants on 17 January 2005 were advised that their claim was eligible and that their claim could proceed to mediation.

[12] Mr Sean Marshall of Prendos Ltd was then engaged and instructed to inspect the dwelling and an invasive investigation was performed on 12 April 2005. As a result of the findings a building consent application was lodged on 14 July 2005 resulting in a building consent being issued by the Council on 17 August 2005 for the re-cladding of the house. Tenders were then obtained and on 9 September 2005 the claimants signed a building contract with Hybrid Residential Limited.

[13] In October 2005 the remedial work commenced and was completed in April 2006. A report was issued by Prendos on 24 January 2006 and a producer statement, sent to the Council on 2 June 2006 resulted in a CCC being issued. The claimants then endeavoured to have their claim finalised and two mediation meetings were held - the first on 26 June 2006 and the last on 17 October 2007. Neither mediation was successful and the adjudication procedure then commenced beginning on

3 December 2007, and continued until 17 December when the evidence concluded.

[14] Written submissions were received from all parties commencing on 25 January 2008 and the last written submission was received on 12 February 2008. The hearing of oral submissions was held on 13 and 14 February 2008 and finally completed on 22 February 2008.

CLAIMANTS' KNOWLEDGE OF BUILDING DEFECTS

[15] On 18 May 2000 the Tenth Respondent, Mr Wesseldine, who had been employed by Mr Manuel (one of the claimants) provided a written report which included the following comments:

15A	Roof Flashings	• By and large it is considered that these flashings have been poorly installed. • In some of the hip and valley positions, the width of the flashings and their seating within the corrugated profile of the roofing is unacceptable.
16A	Finishing of Timber Cladding	• It is considered that the scribing of the timber cladding to the roof outside the dining room window has resulted in an unacceptable gap of 65mm between the roof and the underside of the timber. • This is too large a gap and there is a potential for leakage.

[16] Although these issues were estimated to be able to be repaired at a cost of approximately $100, Mr Manuel's attention had been drawn to possible problems with both the roof flashings and also the "potential for

leakage" because of a too large and unacceptable gap of 65mm between the roof and the underside of the timber.

[17] Subsequently when the builder Mr Elliot issued proceedings in the Waitakere District Court against Mr and Mrs Manuel claiming payment for unpaid work, the defendants Mr and Mrs Manuel filed a statement of defence on 26 October 2000 alleging faulty workmanship on behalf of Mr Elliot:

> "Roof Flashings
>
> (i) The roof flashings were poorly installed. In some of the hip and valley positions, the width of the flashings and their seating within the corrugated profile of the roofing is of an unacceptable standard.
>
> (ii) Some areas of the roof flashings are lifting.
>
> (iii) The roof has been cut short of the wall at the corner on the north side over the entry/bathroom area.
>
> Finishing of Timber Cladding
>
> (i) The scribing of the timber cladding to the roof outside the dining room window resulted in an unacceptable gap of 65m between the roof and the underside of the timber".

This was in accordance with Mr Wesseldine's report dated 18 May 2000.

[18] However, 11 months later on 11 September 2001 the defendants Mr and Mrs Manuel in a subsequent amended statement of claim made considerable additional and important allegations against the builder Mr Elliot as follows:

> Flashing above front entry
>
> (i) There is a flashing missing above the front entry causing leakage *(emphasis added).*

Top end of soffit lining

(i) The top ends of the colour steel soffit lining should have been slightly bent upwards to prevent wind driven water leaking from the top end *(emphasis added)*.

(ii) One of the sheets of the soffit lining has been cut short and a short extension piece has been slipped in over the ends of the main sheet. The overlap has already caused some localised rusting.

(iii) The soffit lining has been fixed through the ribs rather than the troughs as they were supposed to be, causing water to run down the ribs (rather than the troughs) when it is being used as a water collecting soffit lining *(emphasis added)*.

Cedar Battens over Z flashing

50x25mm cedar cover batten over the Z flashing at the horizontal joint between the plywood cladding has not been installed.

Window leaks *(emphasis added)*.

There is a fault with the windows allowing water ingress *(emphasis added)*.

[19] An inference can been drawn from that pleading that at the very least Mr and Mrs Manuel knew in September 2001 that their house had some problems with water ingress.

[20] It is submitted by both the First and Second respondents that the claimants, Mr and Mrs Manuel, had actual knowledge that the house owned by them had leaking problems or at the very least they had knowledge that damage was reasonably discoverable. In June 2003 in full knowledge that the house they owned had suffered some water invasion damage and after consulting with the Public Trustee transferred the property to the N & M Manuel Family Trust (Trust).

[21] The Trust is an entity created and controlled by Mr and Mrs Manuel (Manuels) who own the property on behalf of their family. The Trust was settled on 24 June 2003 by the Manuels who are the trustees together with the Public Trust. Mr and Mrs Manuel hold the power of appointment, and they and other family members are discretionary beneficiaries under the Claimant Trust.

[22] Mr and Mrs Manuel sold by deed their property to the Trust on 24 June 2003 - the purchase price being $510,000, which was then the rating valuation of the property. It is noted however that the property was not formally transferred to the Trust until 8 June 2004 by which date, as stated by Mr Manuel in his evidence, "a particularly bad NE storm had caused water in some quantity to penetrate into our home on or about December 2003". According to Mr Manuel's evidence it was that occurrence which led to the decision to initiate a formal claim with the Weathertight Homes Resolution Services.

[23] The ownership of the property having passed from Mr and Mrs Manuel to the Trust resulted in that Trust becoming the claimant when proceedings were issued, as Mr and Mrs Manuel no longer had any ownership rights in the property. Neither can Mr or Mrs Manuel now make a claim as section 4 of the Limitation Act 1950 provides that actions founded either on contract or tort cannot be brought after the expiration of six years from the date on which the action accrued - in this case September 2007.

[24] The present proceedings were issued by the claimants, the N & M Manuel Family Trust, and as a result the knowledge held by Mr and Mrs Manuel that the property had damage caused by leaking water, consequently extended to their Trust. Thus the Trust by purchasing the property acquired a house known by it to be water damaged by leaks.

[25] That knowledge does not prevent the Trust in proceeding with a claim. But it does affect the assessment of any award made to it after taking into consideration the risk that the Trust took in purchasing a leaking property before remedial work had been performed.

[26] Having regard to the risk known to the claimants, it is held that an appropriate reduction of 25% must apply to any award payable to the claimants.

ABUSE OF PROCESS

[27] Consideration was initially raised as to whether the settlement that occurred on 27 September 2001 between the Plaintiff (Mr Elliot now the second respondent) and the Defendants (Mr and Mrs Manuel) constituted a finding of *res judicata*. However, as the hearing progressed it was understood that Mr Keall, counsel for the Second Respondent did not pursue that argument. The Tribunal agreed with that approach.

[28] Mr Keall instead presented an argument based on an abuse of process relying on the following facts:

(a) The defects said to be the primary causes of the weathertightness issues in this present proceeding were at issue in the District Court proceedings or could with reasonable diligence have been raised in the Manuels' counterclaim in that proceeding.

(b) The District Court proceedings were settled on 17 September 2001 between the Second Respondent and the Manuels on the basis, inter alia, that the Second Respondent's claim against the Manuels was reduced from $21,519.60 to $5,000.00 and the Manuels withdrew their counterclaim.

(c) The settlement monies were paid to the Second Respondent and both the claim and counterclaim were then discontinued in accordance with the terms of settlement.

(d) The property was sold by the Manuels to the claimant Trust on 24 June 2003 and transferred to the Trust on 8 June 2004.

(e) The claimant Trust was not a party to the settlement of the District Court proceedings but is closely connected with the Manuels.

[29] The application of a plea of abuse of process has developed from earlier decisions of res judicata and/or issue estoppel and in New Zealand it now applies in situations not only regarding issues determined in earlier proceedings between the same parties but also extending to issues that could have, with reasonable diligence been raised at the time.

See (1) *Henderson v Henderson [1843]3 HARE 100 at 115*

(2) *Johnson v Gore Wood & Co [2002]2 AC 1 at 31*

[30] This approach has been affirmed by the Supreme Court of New Zealand in the decision of *Chamberlains v Lai [2006] NZSC 70* – at para 63 when stating:

> "In New Zealand abuse of process has been recognised as an independent duty of the court to prevent abuse, not limited to fixed categories. In *New Zealand Social Credit Political League Inc v O'Brien* a claim was struck out as abuse of process even though the defendant was not a party to the previous litigation brought by the plaintiff. His conduct had been in issue in the earlier proceedings and the claim for "malicious civil proceedings" was "no more than the first defamation suit in a different garb".

[31] In the Waitakere District Court the counterclaim by the Manuels raised issues relating to defective building work from which weathertightness problems had or had the potential to cause damage.

These factors must have been taken into account by both parties when considering and reaching the settlement that was obtained. In the end result the proceedings were settled by a payment of $5,000 from the Manuels to Mr Elliot, the Second Respondent.

[32] In reaching that settlement the building issues raised by the Manuels in their counterclaim to Mr Elliot's claim for unpaid work, must have included a consideration of the Manuels' allegation of faulty workmanship as thus the same issues are identical to the same issues now claimed before this Tribunal as they were in the pleadings in the Waitakere District Court.

[33] Mr Keall submitted that there had occurred an abuse of process due to the identity of the parties being the same in both sets of proceedings, i.e. in the Waitakere District Court and before this Tribunal and that there were some identical issues claimed by the Manuels and then subsequently by the claimant Trust.

[34] This Tribunal is of the opinion that due to the apparent and extremely important role played by both the Manuels in the control of the Trust, both the Manuels and the Trust can be held to be analogous to each other.

[35] It was contended by Mr Keall that because of the abuse of process this Tribunal should order a reduction in the claim as formulated by the claimant Trust.

[36] That submission is accepted by the Tribunal. As the Tribunal is satisfied that the allegation of abuse of process has been established. Taking all matters into account a reduction of 15% is made in respect of the quantum of the claimants' claim.

THE AWARD FOR THE CLAIMANTS' CLAIM FOR DAMAGES AND EXPENSES

[37] Remedial Work

Remedial Work by Hybrid Residential Limited under supervision of Prendos as agreed at Experts' Conference.	$140,000
Interest on ANZ loan for remedial work and expenses to 1 March.	$48,112.58
Prendos Costs for supervision of remedial work.	$49,136.85
Cost associated with obtaining consents from Waitakere City Council.	$3,242.12
Various incidental costs as set out in paragraph 9.4 p.3 of second amended particulars of claim dated 16 December 2007. NB. The mediation fee on 29 March 2004 of $200 and the adjudication fee on 13 July 2004 of $200 are non-recoverable and have been deducted.	$8,723.94
General Damages Both Mr and Mrs Manuel were denied occupation rights from their home and suffered distress and loss of enjoyment of life and so are awarded $8,000 each.	$16,000

CLAIMS DENIED

[38] The claimants' claim for pain and suffering and diminution of the value of the house are declined for the following reasons:

Pain and Suffering: The claim is brought by the claimant Trust and that entity cannot claim for pain and suffering.

Loss of Enjoyment of Life and Distress: This claim can be distinguished from the pain and suffering claim because Mr and Mrs Manuel had an occupational right to live and enjoy the property which was denied to them on occasions whilst their home was being repaired. Consequently Mr and Mrs Manuel are entitled to compensation for loss of enjoyment of life and distress.

DIMINUTION OF VALUE OF HOME

[39] The property owned by the claimants has been sold for the sum of $741,000. Settlement is to occur tomorrow. The claimants are claiming $100,000 for diminution of the value of their home. A valuation was made by Prendos on 23 August 2005 of $725,000 prior to the remedial work being completed. Bristow Barbour Walker gave a further valuation of $840,000 after the remedial work had been completed and after a CCC had been issued. Despite the property being offered for sale by a number of Real Estate agents the property did not sell for 10 months and on what is now regularly described as a 'falling' market. A Q.V valuation was given in September 2007 for $828,000 but there is no evidence that in assessing that figure any inspection of the property was carried out.

[40] In the end result the Tribunal is left with conflicting evidence. But in selling their property for $741,000 the claimants have achieved an appropriate sale price.

[41] The Tribunal is not satisfied after considering all the evidence relative to the issue that the claimants have suffered a diminution of value of the home, now that it has had remedial work completed.

[42] Accordingly the claim by the claimants for loss due to a diminution of the value of the house is declined.

LIABILITY OF RESPONDENTS

The First Respondent, Waitakere City Council

[43] The claimants allege that the Waitakere City Council as the territorial authority had the responsibility for issuing Building Consents, the CCC and the carrying out of inspections. In discharging those duties it is claimed that the Council failed (inter alia) to notice deficiencies in plans, compliance with the Building Code, failed to organise inspections by skilled and trained inspectors, and failed to determine the correct wind loading and zone for the building.

[44] It was contended on behalf of the First Respondent that it discharged its duties in accordance with the standard requirements in 1998-1999. The judgement in *Dicks v Hobson Swan Construction Ltd (in liq) & Ors [2006] 7 NZCPR 88* explains the standard requirements to be exercised by a territorial body, such as the Waitakere City Council. It was held in that case that the Council was liable for breaching its duty to exercise reasonable skill and care to ensure that the building work complied with the Building Code.

[45] The Council had argued that it should not be responsible for the damage because it was not the general practice for local councils to check for seals during their inspections. But the Court rejected that argument in stating that it was the task of the Council to establish and

enforce a system that would give effect to the Building Code. The Court concluded that the Council was required to have in place a system of inspections that checked for the presence of seals, and by not having such a system, the Council abdicated its statutory obligation under the Building Act 1991.

[46] Applying the decision of the High Court in *Dicks,* the Tribunal is of the opinion that the First Respondent failed to apply the standard required to comply with its statutory obligation under the Building Act 1991 - in particular the delegation of different individuals not only to perform the inspections required but also to make what appears to be the final step in issuing a CCC.

[47] Accordingly the Tribunal holds that the Waitakere City Council did breach its duty of care it owed to the claimants.

The Second Respondent, Mr Brian Elliot, Builder

[48] The claimants allege that the Second Respondent owed them a duty in tort and breached its duty to construct a sound building – (*Bowen v Paramount Builders (Hamilton) Ltd [1977] 1 NZLR 394 (CA)).*

[49] The Second Respondent was the builder and also the main contractor or who supervised the construction of the house. The claimants have pleaded that the building when completed had the following defects with the result that the requirements of the Building Act and Code were not complied with:

(a) Did not provide a kick out *or other flashing detail* to the end of the roof apron flashings to ensure water was directed into gutters and not behind the cladding.

(b) Did not *ensure weathertightness and/or* install any form of *sealant or* flashing *to* joinery jambs *or sills or other exterior wall penetrations or other air leakage paths.*

(c) Did not correctly install a flashing to a roof pipe penetration to ensure water did not enter the *dwelling.*

(d) *Did not construct the dwelling to ensure wind-driven moisture did not enter the dwelling and/or alternatively to ensure suitable management of moisture behind the cladding and joinery, given the very high wind or Specific Design wind conditions.*

(e) Did not provide concrete nibs or some other form of construction to ensure appropriate bottom plate / external ground clearances were achieved.

(f) *Inadequate construction of the roof to ensure water collection and dispersal of water was suitable for a very high or specific design wind conditions.*

(g) Did not construct the house using H1 timber framing as contracted. Untreated radiata pine was used.

[50] Additional allegations were also made that there was a failure to ensure wind-driven moisture did not enter the dwelling, a failure to ensure that the plywood cladding was properly sealed at nail holes and to ensure the plywood cladding sheets were not only adequately fixed but also lapped or taped.

[51] The Second Respondent denies that he breached any duty of care owed to the claimants or that any such breach was causative of loss

and relies on the statement in the *Dicks* case stating that a builder's duty is "a duty to exercise reasonable care to achieve a sound building".

[52] The Second Respondent denied actually physically undertaking any of the building work which is now the subject of criticism. But the Second Respondent accepts that he was the person who entered into the building contract with the claimant, and the person who took the responsibility of organising the sub-contractors. Thus the Second Respondent had to ensure that the sub-contractors completed their contracted duties adequately.

[53] The Court of Appeal in *Bowen* held that builders were "subject to a duty to use reasonable care to prevent damage to persons whom they should reasonably expect to be affected by their work". That duty applied to the Second Respondent to make sure that the sub-contractors also discharged that duty.

[54] After considering all the evidence adduced at the hearing and taking into account the principles of law, which are applicable to the Second Respondent, the Tribunal is satisfied that there were breaches of duty by him.

The Third Respondent, Rex W Little and Associates

[55] The Third Respondent, became a party to this litigation on the application of the claimant. The Third Respondent had been engaged as an architect / designer in respect of the claimants' building.

[56] In the particulars of the claim filed by the claimant and in the following amended particulars of the claim a number of allegations were made against the Third Respondent alleging negligence by it. During the complete hearing of the claim certain important issues emerged particularly in respect of the changes that were made to the plans

prepared by the Third Respondent, which were submitted to and approved by the Waitakere City Council.

[57] The following departures were made to the Third Respondents' plans without his knowledge and without any reference to him:

(i) Tanalised framing which had been specified by the Third Respondent was changed to untreated timber, which was prone to rapid decay.

(ii) Nulook Aluminium joinery had been specified by the Third Respondent as previous experience established that it was satisfactory in exposed conditions. Instead other joinery was substituted.

(iii) The joinery specified by the Third Respondent would have provided a sealant which was important to prevent any leakage at the joinery.

(iv) The Third Respondent accepts no liability for the alleged failure of the cladding and asserts that if the coating specified by the Third Respondent on its drawings had been applied by the builder no problems would have occurred.

(v) Glazing thickness was specified by the Third Respondent for 6mm thick glass but 5mm glass was substituted without reference to the Third Respondent.

(vi) The Third Respondent recommended to the claimants that Mr Little be retained as a supervisor of the construction but that proposal was declined by Mr Manuel who explained that Mr Little already knew that he had already had experience in overseeing the construction of a house.

[58] Wind Zoning

This was the sole issue referred to by the claimants in their closing submissions. The allegation made against the Third Respondent is that the wind zone requirements were wrongly calculated and should have been a 'specific design wind zone'. The evidence produced at the hearing

by witnesses from the Council and by Sullivan Hall, (Chartered Engineers) that the correct wind zone at the time of the building was built was "high/very high wind zone". The evidence produced at the adjudication was that the design prepared by the Third Respondent met the requirements for a 'very high wind zone' for a site in an exposed position and also satisfied the Council, the requirements of the NZ Building Code and the NZ Building Standards :NZ 3604.

[59] Taking into account all the evidence adduced at the adjudication on the issue relating to the plans prepared and drawn by the Third Respondent, the Tribunal determines that no breach of duty to the claimants occurred by the Third Respondent as it or neither a breach of contract occurred nor was it negligent.

The Fifth Respondent, Terry McKeown, Roofer

[60] The Fifth Respondent although being served with the proceedings and being advised if the adjudication date, has never attended the hearing. In addition the Fifth Respondent was advised when the adjudication adjourned on 17 December 2007 that he could file submissions if he so wished despite not attending the hearing.

[61] The claimants make the following allegations against the Fifth Respondent:

(a) The Fifth Respondent, Terry McKeown was the roofing contractor responsible for the supply and construction of the roof for the claimants' dwelling.

(b) The Fifth Respondent carried out roofing work or caused or permitted work to be done on the claimants' dwelling for which a permit or Building Consent was required by law and was obliged to ensure the work was completed in

compliance with the Consent and all obligations under the Building Act 1991.

(c) In breach of that duty the roofing works carried out by the Fifth Respondent contained defects and did not comply with the requirements of the Building Act or the Building Code.

(d) As a result, such works required repairs and the claimant has suffered loss and damage.

[62] The particulars of the breach of duty by the fifth respondent are as follows:

(a) Inadequate design for water collection from the roof;
(b) Inadequate construction of the roof to ensure water collection and dispersal;
(c) Poorly installed apron and/ or roof flashings;
(d) Poorly sealed roof pipe penetrations;
(e) Incorrect use of sealant over flashing junctions with roof;
(f) Flashing installed with no kick out to divert water into gutter;
(g) Failure to protect the barge detail;
(h) General failure to ensure roof that was installed was suitable for the very high wind conditions in which the house was situated.

And as a result of the breach of duty:

(a) The claimants' dwelling contains the defects as set out in this claim;
(b) Water entered the dwelling causing damage;
(c) The claimants' dwelling requires repair work;
(d) The claimant has suffered the loss as pleaded;
(e) The claimant has been put to inconvenience, pain and suffering and loss;

(f) Such loss and damage is a reasonable consequence of the fifth respondent's breach of duty.

[63] On 10 October 2007 after being served with the proceedings the Fifth Respondent sent a written letter to the Tribunal which read as follows:

> "I am the fifth respondent named herein and as at mid 1999 I was employed as an independent contractor to Spouting and Steel Roofing World Limited as confirmed by my accountants in an email attached hereto and marked "A". I found purchasers for their roofing system including supply and fixing, and received a commission in respect thereof.
>
> In mid 1999 I attended at 189 Carter Road, Oratia and had a discussion with Brian Elliott a builder as a result of which I looked at the plans of a house being built thereon and supplied a written quote as is attached hereto and marked "B". During my discussions with the builder the quote was filled in, in three columns, a plan was drawn on the right-hand front page such a plan taken off the main plan supplied by the builder.
>
> The contract had previously been over printed with the Spouting & Roofing profiles thereon and it was a matter for the builder to choose what he wanted in that regard.
>
> The quote was forwarded to the builder Brian Elliott with the attached letter marked "C". The quote when returned by the builder was given to the contractors Spouting & Steel Roofing World Limited. The letter named the supervisor of the job, Mr David Singer, together with his phone number.
>
> This was the start and finish of my involvement. I took no further part in the process of the construction of the roof or any other involvement thereafter.
>
> I was included in these proceedings as a result of a letter that the builder wrote to the claimant wrongly stating that I was the roofing contractor. Attached hereto and marked "D" is a copy of that letter.
>
> The contract sets out quite clearly who the customer is, who the supplier of the materials is, the price therefore and certain other terms and conditions. It indicates also who will be forwarding the invoices and who will be supplying the materials. I was never paid by the builder and never forwarded him an invoice. My payment came by way of commission from Spouting and Steel Roofing World Limited. The director of which is Harvey Brett O'Loughlin, the eighth (sic) respondent herein. The supervisor on the job was David Singer, also included herein.
>
> I understand that the claimants alleged that I had breached certain obligations to them and have made a claim against me. I believe the evidence I have set out herein indicates that I had no duty of care or responsibility beyond the work that I carried out which was to quote the roof and put the builder in touch with the supplier of the roof.
>
> None of my actions, I believe, ended up causing the claimant any loss whatsoever and as stated earlier believe I have been wrongly included.
>
> I have attended via my solicitor various mediations at much cost to myself and received and complied with all directions merely to assist the process. I have not

involved myself in the need to obtain expert assistance as I believe my involvement outlined about clearly states my position."

Dated: 26-10-07

[64] The Seventh Respondent, Spouting Steel Roofing World Ltd, and the Eighth Respondent, Mr HB O'Loughlin, were joined as parties on the application of the Fifth Respondent, Mr McKeown on 27 September 2007.

[65] Subsequently the Tribunal received a letter dated 14 November from Mr H R O'Loughlin, the Eighth Respondent.

"I summarise my position re this claim in respect to the seventh respondent Spouting & Steel Roofing World Ltd:

1. Terry McKeown – Roofing Consultant quoted this job. Refer copy of his quotation enclosed.
2. Terry McKeown, as an Independent Contractor organised work schedules in conjunction with the builder.
3. Further the quotation mentions Roof Edge protection, a product that our company did not have available. One would assume that Terry McKeown would have organised this.
4. Dave Singer, who was at that time employed by Spouting & Steel Roofing World Ltd, happened to be the supervisor for the area concerned. I believe that on jobs quoted and organised by Terry McKeown he would not have had a hands on applications."

[66] It should be noted that both the Seventh Respondent, Mr H R O'Loughlin, and the Eighth Respondent, Spouting & Steel Roofing World Ltd have not attended any hearing of this claim and Mr Singer gave evidence at the adjudication hearing on 3 December 2007. An application by Mr Singer for removal was agreed to by all respondents on 14 December 2007.

[67] The Fifth Respondent, Terry McKeown by letter dated 13 February 2008 made a request to be removed from the proceedings on the grounds that he obtained a signed quotation from the Second Respondent to supply and install the roof on the house being built by the Second Respondent for the claimants but he had not been involved in the construction of the roof on the building.

[68] That application for removal was circulated to all parties and objections to the Fifth Respondent's removal application were filed in writing by both the Second Respondent and the Tenth Respondent. After receipt of those two objections the Fifth Respondent was informed by the issue of Procedural Order No.16 that his application for removal was declined.

[69] The Fifth Respondent sent a further letter to the Tribunal which was received on 25 February 2008 advising that he had not been employed to install the roofing and that the work would have been completed under the supervision of the Ninth Respondent, David Singer who had already been removed from the proceedings.

[70] On 25 February 2008 the Tribunal received a further letter from the Fifth Respondent, Mr McKeown, advising that he was travelling to Australia on 25 February 2008 and would be returning on 8 March 2008.

[71] The Tribunal is confronted with conflicting evidence on the important issue as to who installed the roof and supervised that work. According to the evidence before the Tribunal there is no doubt that the Second Respondent and the Fifth Respondent signed the contract document and the Second Respondent has given evidence that the Fifth Respondent was involved with the construction of the roof. Further there is a statement from the Eighth Respondent, Mr O'Loughlin that the installation of the roof was organised by the Fifth Respondent, Mr McKeown.

[72] Having regard to all the evidence received to date by the Tribunal, it is held that the Fifth Respondent is liable for any failures that led to leakage damage caused by the negligent construction of the roof.

The Sixth Respondent, Mr Lomax, the Builder Sub-contractor

[73] The Sixth Respondent was a sub-contractor engaged by the Second Respondent. The Sixth Respondent was named by the claimants as the builder of the claimants' house who worked under the guidance of the Second Respondent.

[74] The claimants allege against the Sixth Respondent:

(a) The Sixth Respondent Graham Lomax was one of the carpenters engaged by the builder who carried out the physical building work in respect of the claimants' dwelling.
(b) The Sixth Respondent owed a duty to exercise reasonable skill and care in the construction of the dwelling.
(c) The Sixth Respondent had a responsibility to ensure that all work carried out by him or caused or permitted to be done in respect of the construction of the dwelling for which a permit or Building Consent was required by law, was completed in compliance with the Consent and all obligations under the Building Act 1991.
(d) In breach of the duty the works carried out by the Sixth Respondent in respect of construction of the dwelling contained defects and did not comply with the requirements of the Building Act or the Building Code. As a result such works required repair and the claimant has suffered loss and damage.
(e) Such loss and damage is a reasonable consequence of the Sixth Respondents' breach of duty.
(f) As a result of the breach of duty by the Sixth Respondent:
    (i) The claimants' dwelling contained the defects *and water has penetrated the dwelling causing damage*;
    (ii) The claimants' dwelling required repair work as set out in this claim.

[75] The evidence before the Tribunal which in general terms was accepted by the Sixth Respondent, was that he had been responsible for the window joinery which was installed by him and which subsequently was the cause of water intrusion. The problem with the windows appears to have been caused by the architect's plans being changed without notice to him so that different joinery without seals was supplied to the Sixth Respondent to install.

[76] It cannot be denied that the house which is now the subject of the claimants' claim when completed had some defects for which the Sixth Respondent must be ultimately responsible.

The Tenth Respondent, Mr Michael Wesseldine, Advisor

[77] The Tenth Respondent joined the proceedings on the application of the First Respondent and in Procedural Order No 3 an order was made joining Mr Wesseldine as a party.

[78] The Tenth Respondent is a qualified civil engineer. He was contacted by the claimant in February 2000 and was engaged to assist Mr Manuel resolve a cost dispute with the builder. The Tenth Respondent inspected the property with Mr Manuel on 11 March 2000. Mr Manuel supplied to the Tenth Respondent an instruction letter containing a list of all matters he wished the Tenth Respondent to comment upon.

[79] During the inspection Mr Manuel also raised two additional matters which were subsequently listed as 15A and 16A in the written report supplied by the Tenth Respondent. According to the Tenth Respondent and it was not disputed by the claimant, Mr Manuel was very careful to ensure that the inspection carried out by the Tenth Respondent was limited to the costs brief as prescribed by the instruction letter.

[80] At the date the inspection was carried out the property had been occupied by Mr and Mrs Manuel for about four months and a CCC had been issued by the Council two months earlier. According to the Tenth Respondent not only did the brief that was given to him not include an inspection of the property for weathertightness nor was any discussion held relating to the overall condition or the fitness of the dwelling in terms of its construction.

[81] Following the completion of the inspection report apart from resolving a minor dispute with Mr Manuel regarding the cost of the inspection the Tenth Respondent connection with the claimants' property concluded after an approximate two-hour inspection visit. The Tenth Respondent never returned to the property after 11 March 2000.

[82] Considering all the evidence that has been adduced to the Tribunal cannot find any evidence upon which to base a finding of a breach of duty by the Tenth Respondent and accordingly no order is issued against that party.

[83] To summarise the position therefore, I determine that the Claimants have suffered loss and damage as a result of their dwelling being a leaky building in the amount of $169,074.88 calculated as follows:

Total awards for damages and expenses:	265,215.49
Less 25% for previous leak knowledge prior to transfer to Trust:	66,303.87
	$198,911.62

Less 15% for Abuse of Process:	29,836.74
Total damages:	**$ 169,074.88**

[84] That total amount of damages to which the Claimants would be entitled to in these circumstances shall be apportioned as follows:

Party	R1	R2	R3	R5	R6	R10
Percentage Liability of total amount of damages	100	100	Nil	100	100	Nil
Percentage contribution to total damages (s17 of the Law Reform Act 1936)	25	40	Nil	25	10	Nil

CONTRIBUTION

[85] The Tribunal has found that the First, Second, Fifth and Sixth Respondents breached the duty of care that each owed to the claimants. Each of the First, Second, Fifth and Sixth Respondents, is a tortfeasor or wrongdoer, and is liable to the Claimants in tort for their losses to the extent outlined in this decision.

[86] 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.

[87] The basis of recovery of contribution provided for in s17(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 for the same damage, whether as a joint tortfeasor or otherwise...

[88] The approach to be taken in assessing a claim for contribution is provided in section 17(2) of the Law Reform Act 1936. In essence, it provides that the amount of contribution recoverable shall be such as may be found by the Court to be just and equitable having regard to the relevant responsibilities of the parties for the damage.

[89] I am satisfied that primacy for the damage to the Claimants' dwelling rests with the Second Respondent. It was Mr Elliot's responsibility to carry out, or to ensure that the building works were carried out in accordance with the building code and the building consent. It is a condition of every building consent that the building work is to be undertaken in accordance with the plans and specifications so as to comply with the building code, and that was Mr Elliot's role.

[90] It was Mr McKeown's responsibility to carry out the roofing work in accordance with the building consent and the building code, and observance of that requirement was his primary responsibility.

[91] Mr Lomax was also involved in the building work but only as a sub-contractor to Mr Elliot. His area of involvement in the construction was significantly less than that of Mr Elliot.

[92] The Council's role was essentially supervisory and to that extent I consider that their responsibilities should be less than that of Mr Elliott. However in my view in the circumstances of the

present case, their particular failures in respect of inspecting or observing, and approving the works, serves to increase their culpability for the failures.

[93] Whilst the First, Second, Fifth and Sixth Respondents are liable for the entire amount of the $169,074.88 each of the respondents, as concurrent tortfeasors, are entitled to a contribution toward that amount from each of the respondents found liable according to the relevant responsibilities of the parties for the same damage as determined by the Tribunal.

CONCLUSION AND ORDERS

[94] For the reasons set out in this determination, the Tribunal makes the following orders:

(1) The First, Second, Fifth and Sixth Respondents are all in breach of the duty they each owed to the claimants and are jointly and severally liable to pay the Claimants the sum of $169,074.88.

(2) The claim against the Third Respondent, Rex W Little Associates fails and I make no order against it.

(3) The claim against the Tenth Respondent, Michael Wesseldine, fails and I make no order against him.

(4) As a result of the breaches referred to in (1) above, the First Second, Fifth and Sixth Respondents are concurrent tortfeasors, and each is entitled to a contribution toward the

amount that they are all liable for in loss and damages to the Claimants.

(5) In the event that the First Respondent pays the claimants the sum of $169,074.88, it is entitled to a contribution from the Second, Fifth and Sixth Respondents of up to $126,806.16 i.e. 75% in respect of the amounts each respondent has been found jointly liable for breach of the duty of care.

(6) In the event that the Second Respondent pays the Claimants the sum of $169,074.88, he is entitled to a contribution from the First, Fifth and Sixth Respondents of up to $101,444.92 i.e. 60% in respect of the amounts which each have been found jointly liable for breach of the duty of care.

(7) In the event that the Fifth Respondent pays the Claimants the sum of $169,074.88, he is entitled to a contribution from the First, Second and Sixth Respondents of up to $126,806.16 i.e. 75% in respect of the amounts which each have been found jointly liable for breach of the duty of care.

(8) In the event that the Sixth Respondent pays the Claimants the sum of $169,074.88, he is entitled to a contribution from the First, Second and Fifth Respondents of up to $152,167.39 i.e. 90% in respect of the amounts which each have been found jointly liable for breach of the duty of care.

(9) To summarise the position therefore, if all respondents meet their obligations under this determination, this will result in the following payments being made by the respondents to the Claimants:

First Respondent:	$ 42,268.72
Second Respondent:	$ 67,629.96
Fifth Respondent:	$ 42,268.72
Sixth Respondent:	$ 16,907.48
Total amount of this determination	$169,074.88

Dated this 28th day of February 2008

S G Lockhart QC

Adjudicator