

**IN THE WEATHERTIGHT HOMES TRIBUNAL**

**TRI-2009-100-000052  
[2010] NZWHT AUCKLAND 11**

**BETWEEN**                      **PAUL AND PAULINE FOLWELL**  
   **as TRUSTEES OF THE PAUL**  
   **AND PAULINE FOLWELL**  
   **FAMILY TRUST**  
   Claimants

**AND**                                **NC DEVELOPERS LIMITED**  
   First Respondent

**AND**                                **NORTH SHORE CITY COUNCIL**  
   Second Respondent

**AND**                                **NIGEL ENGLAND**  
   Third Respondent

Hearing:                      Tuesday 2 March 2010

Final Submissions  
received:                      Friday 5 March 2010

Appearances:                Mr David Watson, WHRS Assessor  
   Mr Paul Folwell, a trustee of the claimant Trust and self  
   representing the Trust.  
   Mr Shane Brannigan, witness for the claimants.  
   Mr Ian Beattie, a representative for the first and third  
   respondents  
   Mr Nigel England, witness for the first respondent and the third  
   respondent  
   Ms Susan Thodey and Mr Michael Cavanaugh, counsel for the  
   second respondent  
   Mr Noel Flay, a Council officer and witness for the second  
   respondent

Amended Decision:    9 April 2010

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**FINAL AMENDED DETERMINATION**  
(Amendments made to paras [112]-[115]  
Pursuant to s92(2), WHRS Act 2006)  
**Adjudicator: K D Kilgour**

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## **INTRODUCTION**

[1] This leaky building claim concerns extensions (a bedroom and an ensuite bathroom) to an established home at 22 Salamanca Road, Sunnynook, North Shore City.

[2] The original home is approximately 40 years old and the extension, the subject of this claim, was added to the home between September 2000 and January 2001. The extension build was completed in January 2001 when the territorial authority, North Shore City Council, issued the Code Compliance Certificate on 21 January 2001.

[3] This claim commenced when filed with the Department of Building and Housing under the Weathertight Homes Resolution Services Act 2006 (the Act) on 19 September 2008.

[4] The first and third respondents built the extension and the second respondent was the certifying territorial authority under the Building Act 2001.

## **ISSUES**

[5] The primary issues for my determination are:

- What are the defects that caused the leaks?
- Did the claimant Trust suffer any loss as a consequence of the leaks?
- The liability of NC Developers Limited and Nigel England?
- The liability of the North Shore City Council – In particular, should the Council have detected any of the

defects during inspection and was it negligent in issuing the Code Compliance Certificate?

- What are the appropriate costs to rectify the defects?
- Are the claimants entitled to claim consequential and general damages in their final closing submissions?
- Were the claimants contributorily negligent?
- Have the first and third respondents advanced evidence sufficient to enable the Tribunal to decline the claim in terms of section 118(1) of the Act?
- Are the first and third respondents entitled to costs?
- What contribution should each of the liable respondents pay?

## **MATERIAL FACTS**

[6] Claimants, Mr Paul Folwell and Ms Pauline Folwell, are the trustees of the Paul and Pauline Folwell Family Trust created by deed of trust dated 16 March 1999. The Trust owns the house to which the small 7m<sup>2</sup> extension was added. When the Trust was established, and at the time of construction of the extension, there was a third trustee, Mr David John Bridgman, who retired on 16 April 2009.

[7] Mr Paul Folwell and Ms Pauline Folwell are the remaining trustees. They were the settlors of the Trust and are also beneficiaries of the Trust.

[8] At the time of construction, Mr Paul Folwell was the financial controller and corporate accountant of a property development company, Mercury Construction Limited (now struck off the Company Register). That company often engaged TSE Architectural Group for its architectural drafting work. The claimants allowed Mr Paul Folwell to undertake and control the organising of the extension work. He

engaged TSE Architectural Group to draw up plans for the extensions principally for obtaining the necessary territorial authority building permit. The third respondent was often contracted by Mercury Construction Limited for its building work and the third respondent indicated that he contracted all such work through his company NC Developers Limited of which he is sole director and shareholder. It was that connection which caused Mr Folwell to approach Mr Nigel England to undertake the building work necessary for the planned extensions to the claimants' home.

[9] The claimant Trust allowed Mr Paul Folwell, without legal representation, to represent it and to prosecute its claim. The claimants allege the entire external wall, the length of the extension, suffered water ingress damage from installation of joinery and the cladding and corner junctions.

[10] The application for adjudication was completed by Mr Folwell and alleged claims against NC Developers Limited (company no. 877843), as first respondent, and North Shore City Council as second respondent.

[11] The third respondent, Nigel England, the sole director and shareholder of the first respondent, was joined to the proceeding upon application from the second respondent.

### **DID THE CLAIMANT TRUST SUFFER ANY RECOVERABLE LOSS?**

[12] Mr Folwell, in an endeavour to reduce cost and to avail the trust of supplier trade discounts caused the first respondent to render its invoices to Mr Folwell's then employer (the property development company). That company paid the first respondent's invoices. Under questioning at the hearing, Mr Folwell mentioned that the

claimant trust did not have a bank account and that Mr Folwell caused his then employer to purchase through its building supplier connections the necessary materials for the extension and that he, Mr Folwell, refunded the employer for such expenditure.

[13] Ms Thodey challenged the claimants' claim at this point in the hearing on the ground that the trust had suffered no recoverable loss – that is, Mr Folwell was not able to demonstrate that the claimant trust had suffered a recoverable loss. Lord Millett in *Alfred McAlpine Construction Ltd v Panatown Ltd*<sup>1</sup> stated at pp 580:

“It is impossible on any logical basis to justify the recovery of compensatory damages by a person who has not suffered the loss in respect of which they are awarded unless he is accountable for them to the person who has.”

[14] This issue needs early determination. That is, whether the claimant trust on the balance of probabilities has paid the remedial costs and thereby suffered a recoverable loss enabling the Trust to bring this claim.

[15] An adjournment was caused at this juncture in the hearing to enable Mr Folwell to obtain the claimant trust minute book and trust documentation to establish that there was a genuine and properly documented debt owed by the trust to Mr Folwell consequent upon Mr Folwell paying the remedial costs to remedy the leaks in the extension, the subject of the claim.

[16] The trust minute book and trust records, whilst lacking in many significant respects did contain two trustee minutes: one dated 30 April 2009 and the other 10 August 2009 sufficiently recording that Mr and Mrs Paul Folwell have paid the sum of \$52,962.06 for the repairs to the extension and that the Paul and Pauline Folwell Family Trust owes this debt to Mr and Mrs Folwell. Because of the paucity

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<sup>1</sup> [2001] 1 AC 518.

of trust records, particularly relevant trust records, and certainly trust records which should have been disclosed by Mr Folwell but weren't during the discovery process in this proceeding, counsel for the second respondent and Mr Beattie for the first and third respondents challenged the authenticity and genuineness of the claimants' exhibits A and B (the two trustee minutes mentioned above). No cogent evidence was forthcoming or adduced by the respondents to prove their challenge to the authenticity of such minutes. I accordingly conclude that Mr Folwell has demonstrated to the satisfaction of the Tribunal that there is a recorded debt due by the trustees to Mr and Mrs Folwell justifying the trust's claim for compensatory damages for the loss suffered by the trust.

#### **WHAT ARE THE DEFECTS THAT CAUSED THE LEAKS?**

[17] The sole building expert in this claim was the WHRS assessor, Mr David Watson whose assessor's report of 15 December 2008 was clear as to what damage had been caused to the building extensions. When he undertook his site visit the cladding was partially removed and he said the visible damage was obvious and severe. He took moisture readings just to confirm what he said was clearly obvious. The external wall of the extension was decayed and he could see it had been so damaged for some time.

[18] In his report Mr Watson explained that the extensions leaked because it had an ineffective fibre cement weatherboard cladding system where the window flashings, corner flashings and building wrap were clearly defective. Mr Watson therefore found that as a result there was substantial evidence of water ingress along the entire length of the exterior wall causing substantial damage to the timber framing (described as wall length A).

[19] Mr Watson explained at the hearing that in his considered opinion the initial design was to create a bathroom with natural light. This was achieved by what he described as a roof window. It was this roof window which dictated the design for the rest of the extension. Mr Watson opined that the roof window design was “a bad accident waiting to happen.” It created very difficult junction details to construct.

[20] Mr Watson mentioned that in his view the builder did not properly understand the importance of the junctions. Different materials were joining one another; the window head flashing was tying into the cladding and then close by the membrane terminating caused difficult junctions. The roof window introduced a complex waterproofing detail and Mr England should have gone back to the designer for clarification as to how to build such a complex design. He mentioned that the extension drawings lacked detail for the complex fixture of the roof window; but nevertheless opined that such drawings were adequate and usual for the time.

[21] He said the roof of the extension was a fully adhered waterproof membrane which captured the rainwater causing it to drop over the head flashings. His reasoning mentioned that the head flashings for the roof window and for the bedroom window were therefore critical. Mr Watson did not find any defect at all in the fully adhered roof membrane along the length of the main wall. Mr Watson checked inside the building to ascertain whether there was any moisture ingress appearing in the ceiling. Mr Watson’s evidence was precise that there was no water coming through the roof and more specifically, there was absolutely no water entering through the fully sealed membrane roof.

[22] Mr Watson’s further view was that the barge board at the top of the wall was shorter than the boards below and so presented a different angle which caused a gap allowing water ingress. A gap

sufficient to allow water to ingress was also created by the head flashing entering under the top cladding board. Furthermore, inadequate flashing fixings allowed water ingress and there was clear evidence of water ingress around the roof window and bedroom window flashings.

[23] Mr Watson also deposed that whilst water did enter around the roof window, water entered very much through every other point of entry along the length of the external wall – the wall end junctions, the corner flashings, the gap created under the shortened top barge board and the bedroom window. Mr Watson said the sloping roof captured water and drained it over the length of the wall, in particular the head flashings. It was therefore easy to see that because the water was not adequately expelled the probability was water ingressed through the head flashing gaps, the corner flashings and the gap created by the smaller top cladding board.

[24] The second respondent's witness was Mr Noel Flay, an employee of the North Shore City Council. He is a qualified carpenter and has worked as a building inspector for a territorial authority. He has been in business as a building consultant but is presently engaged in inspecting monolithic clad buildings for compliance with the Building Code.

[25] After reviewing Mr Watson's report, the Council documents and those provided by the claimants, Mr Flay opined that the most likely causes of moisture ingress were inadequacies with the flashing of the roof to window junction and inadequate waterproofing of the roof to wall junction behind the spouting. Mr Watson's view in response however was that if that were the case there would have been water ingress evident in the ceiling of the extension and he found none. In this regard, I prefer the evidence of Mr Watson because of the lack of evidence of water entry in the extension's ceiling.

[26] The first and third respondents through their representative, Mr Beattie, purported to dispute every aspect of Mr Watson's evidence. Mr Beattie submitted that the water ingress was due to defective butynol rubber membrane to the roof and water entered from under the first row of roofing tiles. Such a submission however was not supported by any expert evidence. As mentioned at [21], Mr Watson found no evidence of moisture ingress in the extension ceiling, which is where such leaks would have manifested. I therefore reject Mr Beattie's suggestion.

[27] The third respondent, Mr England gave evidence for the first and third respondents. I found Mr England's evidence credible, honestly presented and helpful. He deposed that he did all the timber and carpentry work for the extensions – including framing up the roof, laying the ply sheet cladding before the membrane application, piling the foundations, framing the floor and installing the cladding, the corner junctions and flashings, installing the bedroom window, window scribes and the scribes to the roof window. Mr England however was adamant that he did not manufacture or install the roof window.

[28] Mr England also stated that he only learned from Mr Folwell during this proceeding that the shower was finished as a tiled shower. Mr England said in his experience this should have involved a different foundation construction. In his view, the flooring and shower foundations needed greater support for the tiled substrate. Mr England stated that had he known from Mr Folwell that the Trust was to change its earlier design to a tiled shower, he would have suggested a very different construction for a tiled shower, such as significant changes to the foundations for the floor of the shower.

[29] Mr Folwell however deposed that Mr England was well aware of the change to the original drawings and the intention to create a

tiled shower box. Mr Folwell's testimony was that Mr England must have installed it and that he would have constructed the framing for the sloping of the floor shower box because no other builder was engaged to complete this work. Mr Folwell misunderstood Mr England's testimony. Mr England did not dispute that he constructed the foundations as shown on the consented plans but said that had he known the ensuite bathroom was to be a tiled shower, he would have suggested to Mr Folwell that he would need to make foundation changes to the shower floor.

[30] I did not find Mr Folwell's evidence entirely credible. Throughout this proceeding he has not been able to recall with any precision the trades he engaged on the extension and had some difficulty in recalling significant information concerning the remedial work undertaken only 12-18 months ago. Yet, he says he clearly recalled engaging Mr England and requiring him to undertake overall management and supervision of the extension. To further illustrate my difficulty with the credibility of some of Mr Folwell's testimony, Mr Folwell told this Tribunal in evidence that the Trust did not have an Inland Revenue Department number as it was not a trading trust; nor had the Trust filed a tax return. However in the afternoon of the hearing, Mr Folwell produced the Trust's documents showing that the Trust does have an Inland Revenue Department number and that an income trust tax return was filed as recently as April 2007. As mentioned above, these documents were not disclosed by Mr Folwell during the discovery process but should have been.

[31] I find that Mr Folwell's testimony was at significant times problematic to the point that little weight is given to his evidence. Mr England's testimony on the other hand was unequivocal and straightforward. I therefore accept the evidence of Mr England, particularly his assertion that he did not install the roof window and was unaware of Mr Folwell's intention to tile the shower box.

[32] Both Mr Watson and Mr Flay identified water leaks due to the shower area. It is accepted that Mr Folwell had caused completion of the tiled shower fit out. Mr England was not involved in the tiling of the shower box. Mr Watson described these leaks as plumbing leaks. In his assessment of remedial costs Mr Watson therefore excluded the costs of remedying and restructuring the shower box.

[33] I determine that the plumbing fault described by Mr Watson and Mr Flay was directly attributable to the construction of the shower. As the claimants designed and completed or caused the completion of the shower with a tiled construction, the entire remedial cost for the ensuite bathroom including the floor foundations, flooring, the extra pile necessary (according to Mr Branaghan's evidence), and the shower wall adjacent to the exterior wall, is a cost properly attributable to the Trust solely. I therefore do not allow this part of the claim.

[34] Mr Watson stated that excluding the roof window which he said definitely did cause damage, all other points of water ingress along the wall would alone have caused a full reclad of the building extension. Therefore in his report Mr Watson recommended that the wall length be demolished and rebuilt. Mr Flay for the second respondent agreed with the required repairs and the remedial work suggested by Mr Watson. The first and third respondents disagreed but failed to produce any expert evidence suggesting an alternative remedial solution. I therefore accept the remedial work suggested by Mr Watson.

## **THE APPROPRIATE COSTS TO RECTIFY THE DEFECTS**

[35] The WHRS assessor estimated in his report that the remedial repairs costs, excluding internal work for the bathroom/bedroom, would total \$36,077.00 (including GST). On

behalf of the claimant Trust, Mr Folwell said that repairs were completed by mid-2009 and that the actual sums expended by the Trust in repairing the leaks to the extension totalled \$47,343.51, excluding repairs to the ensuite bathroom but including remediating the bathroom shower box adjacent to the external wall. Added to that sum are the local authority charges of \$2,183.61 and interest for loss of use of monies of \$2,037.07.

[36] Mr Flay mentioned that there were several items of expenditure in the claimants' claim regarding the bathroom refurbishment which were not required amounting to \$7,851.71 thereby reducing the claim to \$44,212.42. Mr Flay then made a further reduction of 5% for betterment suggesting the claim should be no more than \$42,001.80.

[37] The first and third respondents through Mr Beattie disputed every aspect of the claim and Mr England said that had the claimants asked him to undertake the remedial work then he would have and for a much reduced cost than that now claimed. The first and third respondents produced no expert evidence other than that of Mr England refuting the quantum of the claim.

### **Bathroom Refurbishment**

[38] I find the evidence of Mr Flay dealing with the quantum of the claim credible and particularly reasonable. However for the reasons outlined at [33] above, I determine that the entire remedial cost for the "plumbing fault", the bathroom rebuild and the internal fit out, should not be at all part of this claim. I have therefore deducted from the claimants' sum of \$47,343.51, \$5,121.03 which from the claimants' evidence of expenditure I determine relates solely to the shower rebuild.

[39] I have made no deduction from the electrician and plumbing expenditure for I have been unable to differentiate which applies to the exterior and which to the interior.

### **Council Costs**

[40] I determine that the Council costs were properly expended of \$2,183.61.

### **Consultancy/Architectural/Supervisory Costs**

[41] Mr Flay also mentioned in his evidence that the consultancy/architectural/supervisory costs seemed excessive. Mr Flay mentioned that, from his experience with local authority residential building regulatory work, such costs should be no more than 10-12%, as this was a small 7m<sup>2</sup> extension. I agree.

[42] When owners are faced with the problem of having remedial work undertaken to repair leaky buildings, it is common for the owner to want to have the remedial work clearly specified and properly supervised by a professional consultant or building surveyor. I am satisfied that the consultancy/architectural/supervisory costs are a reasonable and proper cost that needs to be considered as part of the total cost of having the remedial work done. Nevertheless such costs need to be reasonable and proportionate to the work undertaken.

[43] The architect/drafting and supervisory expenditure by the claimants in relation to their remedial work in the vicinity of \$15,298.00 is excessive and disproportionate to the size of the work involved. I therefore make a further reduction of \$7,000.00 (a combination of architectural and draughting costs) to the amount claimed for such costs.

## **Interest**

[44] I determine that interest in the amount of \$2,037.07 is properly claimed and at the rate permitted by clause 16(1) of Part 2 of Schedule 3 of the Act. However, a reduction would need to be made due to the amounts attributable solely to the internal remedial works. As a result, I reduce the interest claim attributable to the internal costs by \$430.93. Accordingly the claimants are entitled to claim \$1,606.00 for interest on the remedial works.

## **Betterment**

[45] Mr Flay suggested that there was an element of betterment of some 5% thereby suggesting that the claim should be at best, \$42,001.80.

[46] I have accepted the second respondent's evidence that there is betterment.

## **Are the Claimants entitled to make a claim for General Damages after the Hearing and in Closing Submissions?**

[47] The claimants' original claim totalled \$57,285.37. This original quantum was subsequently reduced to an amended total of \$52,064.19 after withdrawing from their claim the sum of \$4,000 for consequential and general damages, as well as litigation costs such as filing fees with the Department of Building and Housing and this Tribunal. However Mr Folwell in his closing written submissions sought to reinstate his claim for general damages, quoting *La Grouw v Cairns*<sup>2</sup> as his authority. This decision does not support the contention that damages can be awarded for mental distress to occupiers who are beneficiaries and not owners.

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<sup>2</sup>[2004] 5 NZCPR 434 (HC), O'Regan J.

[48] The claimant trust is a genuine inter vivos family Trust. Mr and Mrs Folwell are not parties to this claim in their own right but solely as trustees. The purpose of a Trust is to create a legal persona quite distinct from the person who is the beneficiary. The intention then is to ensure the beneficiary is not the owner. In *The Contradictors v Attorney-General*<sup>3</sup> the Court gave a clear indication of the necessity to treat trustees and beneficiaries as having different interests. But, more relevantly the decision in *La Grouw* (supra) advanced by Mr Folwell does not support a claimant amending and increasing its claim in closing submissions filed with the Tribunal after the hearing.

[49] Mr Folwell did not make any submissions in support of his claim nor advance any evidence of stress and anxiety at the hearing or in his closing submissions received after the hearing. I determine that the claimants cannot unilaterally amend their claim and seek general damages in closing submissions filed with the Tribunal after the adjudication hearing. The claim for general damages is therefore declined.

### Summary of Quantum

[50] I accordingly determine that the quantum allowed for the claim should be \$39,012.09 made up of:

Claimants' expenditure	\$47,343.51
Less my deductions	\$12,121.03
<b>SubTotal</b>	<b>\$35,222.48</b>
Plus: local authority costs	\$2,183.61
Interest	\$1,606.00
<b>TOTAL</b>	<b>\$39,012.09</b>

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<sup>3</sup> [2001] 3 NZLR 301.

## **RESPONSIBILITY OF FIRST AND THIRD RESPONDENTS – NC DEVELOPERS AND MR ENGLAND**

[51] The claimants' claims against NC Developers Limited and Mr England are in negligence.

[52] Against Mr England, the claimants allege that, as the person Mr Folwell dealt with on behalf of the trustees, Mr England had complete control of the build. He was the face of the build. The claimants stated it was Mr England who called for the necessary building materials and according to Mr Folwell, sequenced the subtrades as well.

[53] At the preliminary case conference NC Developers Limited was represented by legal counsel. Once Mr England was joined to the proceedings that legal counsel's engagement was terminated. Mr England for the first and third respondents then engaged Mr Ian Beattie, a building surveyor, to represent them.

[54] In response to the claimants' claims Mr Beattie submitted that Mr England was a labour-only contractor employed by NC Developers Limited. With this submission Mr Beattie stated that "the labour-only" appellation in some way reduces or removes their liability. The reasoning for this submission was because Mr England was contracted to carry out the relevant work through his building company, and that as such he therefore did not owe and should not owe a duty of care to the claimant Trust.

[55] Mr Beattie also submitted that NC Developers Limited did not owe a duty of care to the claimant Trust as its contract was not with the claimants but with Mercury Construction Limited. That submission has little relevance as the claim against NC Developers Limited was not in contract, but solely in tort.

[56] Negligence is reasonably straightforward - it is understood simply as a lack of proper care and attention or carelessness. The law imposing liability for negligence requires that the respondent must owe the claimant a duty of care. Proof must then be given that the respondent failed to exercise a reasonable standard of care and that this failure was a material cause of the damage the claimant suffered.

### **Responsibility as Contractor and Labour-Only Contractor**

[57] At para 15.2 of the Assessor's Report, Mr Watson concluded that the house extensions leaked as a result of an ineffective fibre cement weatherboard cladding system where the window flashings, corner flashings and building wrap were clearly defective.

[58] Mr England attended the preliminary conference for this claim on 11 August 2009 on behalf of NC Developers Limited. There he informed the Tribunal that his company was engaged by Mr Folwell to assemble the framing, install and apply the outside cladding and junctions, install the external joinery, such as windows and complete the outside envelope for the building extension. Mr England by his own admission was the person who undertook this work.

[59] In New Zealand, the law is well established that builders owe a duty of care to people whom they should reasonably expect to be affected by their work. Builders can therefore be liable if dwellings leak due to being constructed in a negligent, defective or unworkmanlike manner. In *Bowen v Paramount Builders (Hamilton) Ltd*<sup>4</sup> at pp 417-418 and *Body Corporate 202254 v Taylor (Siena Villas)*,<sup>5</sup> Chambers J summarised the law as being clear that if a

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<sup>4</sup> [1977] 1 NZLR 394 (CA).

<sup>5</sup> [2009] 2 NZLR 17 (CA) at [215].

builder carelessly constructed a residential building thereby causing damage, the owner of the building could sue the builder in negligence. Moreover, this Tribunal is bound by the authorities of *Mount Albert Borough Council v Johnson*<sup>6</sup> and *Bowen* which state the construction practices of engaging a number of specialist trades on a labour-only basis do not preclude builders from owing a duty of care. This is because once windows are installed, defective flashings are covered up and corner flashings installed at wall ends, the property owner is vulnerable in being unable to detect any lack of weathertightness that might result. This relative vulnerability of a residential property owner influenced the decision of the Court in *Boyd v McGregor*.<sup>7</sup>

[60] Functionally, the first and third respondents undertook the building work, and therefore according to case authorities, it is fair and reasonable to impose a duty of care on them. The weathertightness of a residential building is so inherently part of competent building that those who undertake building work (whether labour-only or sub-contracted) are required to achieve weathertightness as a most necessary component. They should therefore be held liable if their work fails that fundamental function.

[61] In terms of sequencing the various trades during construction, building practices in New Zealand have changed over the decades and the current practice of engaging a number of “labour-only” subcontractors is common. This often leads however to inadequate project management whereby no person takes overall responsibility for such projects. Even with this small build, such fragmentation of tasks and responsibilities contributed to the water ingress defects in the present case. However, the Tribunal finds that although Mr England may well have indicated to Mr Folwell when the subtrades/other trades were required, he did not engage or supervise

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<sup>6</sup> [1979] 2 NZLR 234 (CA).

<sup>7</sup> HC Auckland CIV-2009-404-5332, 17 February 2010, Williams J.

them. As a result, I find that Mr England had no involvement and indeed assumed no responsibility for the sequencing of the various trades.

[62] Nevertheless, the Tribunal accepts that there is sufficient evidence to find that the first and third respondents' building work fell below the standard expected of competent builders. I determine therefore that the first and third respondents owed the claimants a duty of care and that there is sufficient evidence that they failed to exercise a reasonable standard of care. Such a failure was a material cause of the damage suffered by the claimant trust and accordingly I find that the first respondent, NC Developers Limited and the third respondent, Mr Nigel England (jointly and severally) are liable in negligence for the full amount of the claim set down in paragraph [50] above.

[63] It is important in these claims to properly raise not just the technical issues but also the legal issues. However in most instances, Mr Beattie's submissions purported to give technical building evidence (which as the respondents' advocate he could not give) rather than raise legal defences to the claim. Had Mr Beattie been engaged by the first and third respondents as their expert in these proceedings, he would have been entitled to advance such evidence. However as their representative, Mr Beattie was therefore restricted to making submissions based on the available evidence.

### **Responsibility of Mr England as Director**

[64] Where directors commission tortious conduct, they are liable for having procured the wrong. In such instances limited liability, which is the main object of incorporation for a one-man company, has no protective effect for a director. The claim here is the tort of carelessly creating a defective extension to a home.

[65] I accept Mr England's denial that he had supervisory or project management roles as alleged by Mr Folwell. Nevertheless on the face of the facts alleged by the claimants Mr England, as the sole director and shareholder of NC Developers Limited, was intimately involved in the project and by his own admission he did the carpentry and building work. He had overall control and personal involvement with the first respondent, his company. I discount Mr Beattie's argument that the lack of supervision (from a foreman/overall site supervisor) and the lack of detail on the plans exculpated Mr England.

[66] In my view on the principles established in *Morton v Douglas Homes Ltd*,<sup>8</sup> *Dicks v Hobson Swan Construction Ltd (in liq)*,<sup>9</sup> *Hartley v Balemi*,<sup>10</sup> *Body Corporate 188273 v Leuschke Group Architects Ltd*,<sup>11</sup> and *Body Corporate No 199348 v Nielsen*,<sup>12</sup> Mr Nigel England is as liable under the *Mount Albert v Johnson* principle as a joint tortfeasor with the first respondent, NC Developers Limited.

## **RESPONSIBILITY OF SECOND RESPONDENT – NORTH SHORE CITY COUNCIL**

[67] The claimants alleged in their application for adjudication that the second respondent was responsible for issuing the building consent, failed to notice deficiencies in the plans and specifications when issuing the building consent, failed to carry out a proper inspection process during construction and issued a Code Compliance Certificate when it should not have.

[68] The second respondent through its counsel responded to the claim by denying that the territorial authority owed a duty of care to

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<sup>8</sup> [1984] 2 NZLR 548.

<sup>9</sup> (2006) 7 NZCPR 881 (HC), Baragwanath J.

<sup>10</sup> HC Auckland, CIV-2006-404-2589, 29 March 2007, Stevens J.

<sup>11</sup> (2007) 8 NZCPR 914 (HC), Harrison J.

<sup>12</sup> HC Auckland, CIV-2004-404-3989, 3 December 2008, Heath J.

the claimants. The second respondent submits that it met the standard of care required when inspecting the relevant building extension works and that whilst the Council has a power to inspect the building work, it does not have a duty to inspect in terms of the Building Act.

[69] The Council agreed it is entirely reliant upon the owner at appropriate times during construction to arrange for such inspections to be carried out and if the Council is not called at those appropriate times then aspects of construction work may not be visible to a Council inspector. Therefore it submits that as the Council is not a clerk of works, its role does not consist of overseeing every single aspect of construction. Furthermore the Council's issuing of a Code Compliance Certificate is not a guarantee or warranty.

### **Issue of Building Consent**

[70] The plans and the building extensions clearly show that there were no soffits, no eaves or overhang and that there were risk factors. Furthermore the complexity of the design to achieve natural light into the bathroom by means of the roof window, was a complex design with difficult waterproofing complexity. Both should have been recognised at the permit stage, if not at the inspection stage, by the second respondent.

[71] Mr Watson did depose that there was lack of detail on the plans in respect of the junctions created by the roof window to achieve watertightness. Nevertheless he did concede that the plans were of the standard and contained usual detail of the time. Mr Flay deposed the plans were of sufficient detail for consent purposes and so too did Mr England.

[72] In *Body Corporate 188529 v North Shore City Council (Sunset Terraces)*<sup>13</sup> the High Court decided that a territorial authority has no liability in respect of issuing building consents for plans notwithstanding their lack of detail. This was confirmed by the Court of Appeal on appeal.<sup>14</sup>

[73] The claim against North Shore City Council for approving the plans must therefore fail.

### **Inspections**

[74] In respect of the local authority's inspection processes, sections 43(3) and 76 of the Building Act 1991 impose a duty on local authorities to ensure that not only are inspections of residential builds carried out but also that residences are built in accordance with the Building Regulations. Notwithstanding that however, it has been recognised that Councils are not in a position of a clerk of works or project manager. The decision in *Mount Albert Borough Council v Johnson* (supra) clearly recognises that Councils are not on site all day and every day and as such are not able to view every aspect of the construction work. As a result, the local authority conduct will be measured against that of a reasonable local authority officer carrying out the relevant tasks. This principle has been confirmed by the Court of Appeal *Sunset Terraces*<sup>15</sup> and *Byron Avenue*.<sup>16</sup>

[75] It is also clearly apparent from recent Court of Appeal and High Court decisions that the local authority may also be liable if defects were not detected due to its failure to establish a capable

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<sup>13</sup> *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479 (HC), Heath J.

<sup>14</sup> [2010] NZCA 64.

<sup>15</sup> *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479 (HC), Heath J confirmed in its appeal decision in *North Shore City Council v Body Corporate 188529* [2010] NZCA 64.

<sup>16</sup> *Body Corporate No. 189855 v North Shore City Council (Byron Ave)* HC Auckland CIV-2005-404-5561, 25 July 2008, Venning J confirmed in its appeal decision in *O'Hagan v Body Corporate 189855* [2010] NZCA 65.

inspection regime for identifying critical waterproofing issues. The High Court decisions in *Dicks*, *Sunset Terraces* and *Byron Avenue* state that the local authority's inspection regime must be sufficiently robust to ensure compliance with the Building Regulations.

[76] As mentioned earlier, the second respondent submitted that the Council's inspection processes during this extension work did not fall below the standard of care required of Councils. Furthermore, Mr Flay deposed that the second respondent was audited by the Building Industry Authority (BIA) in 2001 and the BIA concluded that the second respondent's inspectors had a very clear idea of what was necessary.

[77] However it seems to me from the evidence of Mr Watson that the second respondent failed to carry out adequate and satisfactory building inspections because the defects opined by Mr Watson should have been observed when inspections were carried out and the faults ordered to be corrected.

[78] I therefore find that, in respect of the second respondent's inspection regime, certain aspects failed to detect significant water ingress defects identified by Mr Watson, and despite the local authority's failure to notice the defects, it still issued a Code Compliance Certificate. By doing so, the North Shore City Council was negligent.

[79] Based on these findings, the Tribunal accordingly determines that the North Shore City Council failed to carry out adequate and satisfactory building inspections and its insufficiently robust inspection regime failed to detect significant water ingress problems. The Tribunal therefore finds the errors of the North Shore City Council were causative of the significant defects experienced by the claimants and therefore concludes that the second respondent is liable for the full amount of the established claim.

## CONTRIBUTORY NEGLIGENCE OF THE CLAIMANTS

[80] The second respondent, North Shore City Council, relied upon section 3 of the Contributory Negligence Act 1947 as one of its defences to the claim and says that the claimants contributed to their losses by failing to give sufficient attention to what was actually done by each of the contractors the trustees engaged – that is, the trustees failed to instruct the head-contractor to project manage or site supervise the work properly and that the trustees are liable for this failure. Ms Thodey and Mr Cavanaugh pointed to *Riddell v Porteous*<sup>17</sup> at pp 13 as authority for this proposition:

“... [L]iability may attach where the owner engages the services of several contractors to do distinct portions of work... [and who] takes such a course and fails to give sufficient attention to what is actually done by each of the contractors is not the ‘creator’ of a contractor’s poor workmanship, though possibly guilty of contributory negligence. The respective responsibilities for defects in the work may then have to be adjusted between the plaintiff owner and the defendant...”

[81] Stevens J in *Hartley v Balemi* (supra) stated that contributory negligence involves an objective test:

“[138] As summarised at [104] – [106] earlier, the question of fault is to be determined objectively and requires the claimant (in relation to his or her own safety) to exercise such precautions as would someone of ordinary prudence. This requires the application of the test of reasonable foreseeability in relation to which the personal equation is eliminated.”

[82] It is therefore important to take into account the relevant circumstances in determining whether the claimants were in fact the head-contractors for the work that was undertaken and whether they are therefore contributorily negligent as a result.

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<sup>17</sup> [1999] 1 NZLR 1 (CA).

[83] It can be argued that by engaging tradesmen on a labour-only basis without engaging someone to supervise their building work, the claimant Trust assumed responsibility associated with project managers. That is the submission of the second respondent and that is the submission which I agree with. Upon that interpretation, Duffy J stated in *Body Corporate 185960 v North Shore City Council (Kilham Mews)*:<sup>18</sup>

“[106] ...In *Shepherd & Ors v Lay & Ors* (unreported) WHT claim 939, 11 March 2005, Adjudicator Dean found that project managers must carry the burden of responsibility for not taking adequate steps to ensure that those under them achieved the required standards. This seems to me to be a sensible approach. If someone is charged with responsibility for managing the residential building project, the likelihood of careless workmanship and defective construction resulting from poor and careless management would be reasonably foreseeable to that person.”

[84] Mr Folwell has submitted from the beginning of this proceeding that he engaged Mr England to project-manage and site-supervise the building work. But Mr Folwell’s evidence lacked credibility. Material evidence of how the claimant trust went about the extension works, how the trustees met and minuted their decision to add the extension to the dwelling, how the trustees chose the method of construction, the design and the appointment of the trades involved, is nonexistent. Mr Folwell could not recall any of this process or how he went about engaging the party who manufactured the roof window and who he engaged as the waterproof membrane applicator. He made little or no mention of the involvement of his employer property development company and made absolutely no mention of engaging with his fellow trustees, in particular Mr Bridgman, who we were told is experienced in property development.

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<sup>18</sup> HC Auckland, CIV-2006-004-3535, 22 December 2008.

Yet he deposed that he recalled engaging Mr England to supervise and manage the extension building works.

[85] On the other hand, Mr England's evidence was clear and most credible. He mentioned what he couldn't recall, but was adamant and believable when he said that he was engaged on a labour-only basis and did not accept any head-contractor /project manager/site supervisor role; nor did he engage any of the subcontractors. I believed Mr England when he said that he did not have anything to do with the manufacture or installation of the roof window, other than fitting the roof window scribes, and that he did not purchase the building materials.

[86] On the evidence the Tribunal finds on the balance of probabilities that it was Mr Folwell's decision to employ the various subcontractors on labour-only contracts. Mr Folwell admitted in his testimony that he undertook the project with an eye on the budget while at the same time striving to achieve quality with an obvious imposing building extension. As a result, Mr Folwell engaged the use of his employer's supplier account to avail himself of the trade discounts thereby available and also did not engage a head-contractor or supervisor so that he did not have to pay the margin for such a party. He did not mention engaging the advice of his co-trustee Mr Bridgman concerning managing a building job. Mr Folwell did not engage or contemplate engaging the designer to supervise the works. Instead, he engaged all contractors directly saving supervision fees and the margins payable when the builder is hired to take over all responsibility for a project. But in failing to do so, he put himself in the position and more particularly the trust, whether knowingly or not, of having to take some responsibility for ensuring the work done by Mr England and the other contractors was done in a workmanlike manner.

[87] Mr Folwell clearly considered it prudent to engage someone to oversee the extension's construction for he engaged Mr Branaghan in that role for its remedial work. The evidence establishes quite clearly however that the claimant Trust did not organise anyone to carry out this management and supervision role when building the extension. I therefore find that Mr Folwell unilaterally elected to undertake control with the building project and consequently Mr Folwell and his fellow trustees shoulder overall responsibility for the project themselves.

[88] Whilst I accept that Mr Folwell was not the builder in the traditional sense he was in essence the head-contractor with a supervisory responsibility and a considerable amount of control over some parts of the building work. This included the work of the applicators of the roof membrane, the roofer, the plumber, the electrician and the roof window installer. Therefore, I find that Mr Folwell retained the responsibility for ensuring that the tradesmen carried out their work in accordance with the Building Code and assumed responsibility for ensuring that the work was done properly.

[89] Moreover, the decision to construct a roof window with a complex design for achieving natural light through to the bathroom/ensuite, was instigated and decided upon by Mr Folwell and his Trust. As outlined in the WHRS assessor's report and Mr Watson's evidence, the roof window was one of the contributing causes of the leaks.

[90] Mr Folwell was in control of the building extension project and thereby assumed responsibility for its management and oversight. As in *Morton v Douglas Homes Ltd* (supra), Mr Folwell's acts and omissions were directly linked to and causative of building defects. Personal involvement with the build does not necessarily mean physical building work – the degree of control, as I have found on the evidence in this claim can include personal involvement with

administering, and co-ordinating construction which is the role undertaken by Mr Folwell on behalf of the claimant trust.

[91] I find on the balance of probabilities that by contracting the trades involved and without engaging someone of competence to supervise their construction work, particularly given the complex design associated with the assembly and installation of the roof window, Mr Folwell assumed responsibility for the management of the build of the extension. This failure provided the opportunity for the building defects to occur causing some of the loss now claimed for. The Tribunal finds the above carelessness on the part of Mr Folwell was causative of the damage, in the sense that it contributed to the occurrence of the building defects leading to water ingress and the resulting damage to the extension. On that understanding then, by assuming such a role, Mr Folwell and the claimant trust are contributorily negligent for their loss.

[92] I find the claimant trust, through the actions of its trustee (Mr Folwell) at fault. Without any explicit or certainly recorded authority of the other trustees, it seems the evidence establishes that the claimant trust allowed Mr Folwell to undertake and manage construction of the extension. In this respect Mr Folwell has failed and so has contributed to the claimant trust's own loss.

[93] Causation is the decisive factor in determining whether there should be a reduced amount payable to the claimants. But in addition to the causative potency, consideration of blameworthiness is also most necessary – see *Davies v Swan Motor Co Ltd*<sup>19</sup> which was supported by the Court of Appeal in *Byron Ave.*<sup>20</sup> I therefore find that the claimant trust was contributorily negligent to the extent of 15%.

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<sup>19</sup> [1949] 2 KB 291, Denning J.

<sup>20</sup> [2010] NZCA 65.

## **WHAT CONTRIBUTION SHOULD EACH OF THE LIABLE RESPONDENTS PAY?**

[94] I have found the first, second and third respondents breached the duty of care they each owed to the claimants. Each of the liable respondents is a tortfeasor or wrongdoer, and is liable to the claimants in tort for their losses to the extent outlined in this decision.

[95] Section 72(2) of the Act, provides that the Tribunal can determine any liability of any respondent to any other respondent as well as any remedies in relation to any liability determined. In addition, section 90(1) enables the Tribunal to make any order that a court of competent jurisdiction could make in relation to a claim in accordance with the law.

[96] 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.

[97] The basis for the recovery of contribution provided for in section 17(1)(c) is as follows:

Where damage is suffered by any person as a result of a tort... any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is... liable in respect of the same damage, whether as a joint tortfeasor or otherwise...

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

[99] It has been well established that the parties undertaking the work should bear a greater responsibility than the territorial authority. I have concluded above that as a result of the breaches of the first and third respondents they are jointly and severally liable for the entire amount of the claim as they were the ones that actually carried out the construction work. In recent cases the apportionment contributed to the Council has generally been between 15-25%. There are no specific circumstances in this case which dictate that a greater or lesser amount should be awarded. Accordingly I set contribution of the second respondent, the North Shore City Council, at 20%.

[100] I therefore conclude that the first and third respondents are entitled to a contribution of 20% from the second respondent in respect of the amount for which they have been jointly found liable. The second respondent is entitled to a contribution of 80% from the first and third respondents.

## **APPLICATION TO DECLINE THE CLAIM AND CLAIM FOR COSTS FROM THE FIRST AND THIRD RESPONDENTS**

[101] The submissions filed by Mr Beattie before the hearing, his submissions in opening and again in his written closing submissions, whilst described by him as a “counter-claim” was an application to decline the claim in reliance upon section 118(1)(b)(c) of the Act, and, also a claim for costs from the claimants.

### **Application to Decline the Claim**

[102] Section 118(1) of the Act states:

**118 Mediator or tribunal may decline to deal with claim**

- (1) A mediator or the tribunal may decline to deal with a claim if, in the opinion of the mediator or the tribunal,—

- (a) the subject matter of the claim is trivial; or
- (b) the claim is frivolous or vexatious; or
- (c) the claimant is not pursuing the matter in good faith.

[103] The application to decline on behalf of the first and third respondents was made in reliance upon section 118(1)(b) and (c) of the Act. But no substantive or cogent grounds were given for the application. In fact Mr Beattie advanced no evidence at the hearing of any relevance in support of the application.

[104] The statutory provision states that the Tribunal may decline to deal with a claim if the subject matter of the claim is trivial or if the claimant is not pursuing the claim in good faith.

[105] I determined at an early stage in the hearing that the application should be dismissed. There was absolutely no basis to decline the claim in terms of section 118(1)(b)(c). The claimants' claim was not trivial and the claimants pursued their claim in good faith. The claim was eligible in terms of the Act and was supported by expert evidence defining the leaks and their causes. There was no cogent basis advanced by Mr Beattie in support of his submissions. The application by the first and third respondents therefore fails.

## **CLAIM FOR COSTS**

[106] The first and third respondents' claim for costs is governed by section 91 of the Act:

### **91 Costs of adjudication proceedings**

- (1) The tribunal may determine that costs and expenses must be met by any of the parties to the adjudication (whether those parties are or are not, on the whole, successful in the adjudication) if it considers that the party has caused those costs and expenses to be incurred unnecessarily by—

- (a) bad faith on the part of that party; or
  - (b) allegations or objections by that party that are without substantial merit.
- (2) If the tribunal does not make a determination under subsection (1), the parties to the adjudication must meet their own costs and expenses.

[107] The Tribunal has discretion to award costs in limited circumstances, and it follows in exercising its jurisdiction it should do so judiciously and not capriciously.

[108] The presumption which the first and third respondents must overcome to successfully secure an award of costs is set down in section 91(2) of the Act, namely, that the parties must meet their own costs and expenses. The presumption is only overcome if the Tribunal finds that there has been either bad faith or allegations that are without substantial merit on the part of the party concerned which has caused costs and expenses to have been incurred unnecessarily by, in this case, the first and third respondents.

[109] Again, Mr Beattie was unable to produce any evidence of bad faith on the part of the claimants and was not able to convince me that the allegations of the claimants were without substantial merit. The first and third respondents' claim for costs is therefore rejected.

## **CONCLUSION AND ORDERS**

[110] The claims by Paul and Pauline Folwell as trustees are proven to the extent of **\$39,012.09**.

[111] For the reasons set out in this determination, I have found the claimants contributorily negligent to the extent of 15% amounting therefore to **\$5,851.80** which reduces for the respondents the quantum of the proven claim to **\$33,160.29**.

[112] NC Developers Limited and Nigel England are ordered jointly to pay the claimants the sum of **\$33,160.29** forthwith. NC Developers Limited and Nigel England are entitled to recover a contribution of up to **\$6,632.06** from the North Shore City Council for an amount paid in excessive **\$26,528.23**.

[113] North Shore City Council, the second respondent, is ordered to pay the claimants the sum of **\$33,160.29** forthwith. North Shore City Council is entitled to recover a contribution of up to **\$26,528.23** from NC Developers Limited and Nigel England for any amount paid in excess of **\$6,632.06**.

[114] To summarise the decision, if all respondents meet their obligations under this determination, this will result in the following payments being made by the respondents to the claimants:

NC Developers Limited and Nigel England, jointly or severally	\$26,528.23
North Shore City Council	<u>\$6,632.06</u>
Net Amount of this Determination	<u>\$33,160.29</u>

(The claimants being contributorily negligent as to 15% of the total amount of this determination of \$39,012.09)

[115] However if the respondents fail to pay their apportionment, the claimants can enforce this determination against any respondent up to the total amounts they are ordered to pay in paragraph [118] respectively.

**DATED** this 9<sup>th</sup> day of April 2010

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K D Kilgour  
Tribunal Member

## NOTICE

The Tribunal in this determination has ordered that one or more parties is liable to make a payment to the claimant. If any of the parties who are liable to make a payment takes no steps to pay the amount ordered the claimant can take steps to enforce this determination in accordance with law. This can include making an application for enforcement through the Collections Unit of the Ministry of Justice for payment of the full amount for which the party has been found jointly liable to pay. In addition one respondent may be able to seek contribution from other respondents in accordance

with the terms of the determination.

There are various methods by which payment may be enforced. These include:

- An attachment order against income
- An order to seize and sell assets belong to the judgment debtor to pay the amounts owing
- An order seizing money from against bank accounts
- A charging order registered against a property
- Proceeding to bankrupt or wind up a party for non-payment

This statement is made as under section 92(1)(c) of the Weathertight Homes Resolution Services Act 2006.