IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2006-004-003535

BETWEEN	BODY CORPORATE 185960 First Plaintiff
	K J GAITELY AND OTHERS Second Plaintiff
AND	NORTH SHORE CITY COUNCIL First Defendant
	R J DREW Second Defendant
	B GAILER Third Defendant
	CELESTAR PROPERTY DEVELOPMENTS LIMITED First Third Party
	G L NORRISH Second Third Party
	S CAMPBELL Third Third Party
	I DRIVER Fourth Third Party
	HIBISCUS ROOFING COMPANY LIMITED Fifth Third Party

Hearing: 6-10, 13-15, 17, 20-21 October and 17-18 November 2008

Appearances: M C Josephson, G D R Shand and D M Brown for the Plaintiffs
D J Heaney and F L McGregor for the First Defendant
No Appearance of or for the Second Defendant
Third Defendant (with S Gailer as McKenzie Friend) in Person
No Appearance of or for the First, Second, Third and
Fourth Third Parties
C M Brick (previously granted leave to withdraw on 06 10 08) for the
Fifth Third Party

Judgment: 22 December 2008

JUDGMENT OF DUFFY J

This judgment was delivered by Justice Duffy on 22 December 2008 at 3.15 pm, pursuant to r 540(4) of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors: Grimshaw and Co P O Box 6646 Auckland 1001 for the Plaintiffs
Heaney and Co P O Box 105391 Auckland 1001 for the First Defendant
B K Gailer (Third Defendant) 51 Awanohi Road R D 2 Albany 0792

Copy To: Jones Fee P O Box 1801 Auckland 1001 for the Fifth Third Party

[1] These proceedings concern a residential development comprising ten dwellings that suffer from what has come to be known as leaky building syndrome. The dwellings, which are located at 6 Exmouth Road, Northcote, are referred to collectively as Kilham Mews.

[2] The first plaintiff is the body corporate, which sues in respect of the common property at Kilham Mews. The second plaintiffs are the owners of the units; they sue individually in respect of the damage to their respective dwellings.

[3] The proceedings were commenced against a number of defendants. By the time the trial commenced, only the first defendant, the local territorial authority, and the third defendant, Brian Gailer, were actively defending the proceedings. In the course of the trial, the first defendant settled with the plaintiffs. This left Mr Gailer, who was representing himself, as the only live defendant.

[4] The plaintiffs allege that Mr Gailer is tortiously liable for damage resulting from the dwellings suffering from leaky building syndrome damage. His alleged liability arises in two ways. First, as a developer of Kilham Mews and secondly, as the project manager of the development.

[5] Apart from the plaintiffs' claims, the first defendant has a claim in contribution against the third defendant. This claim is still being pursued. After the settlement, the first defendant's legal representation changed and since then it has the same counsel as the plaintiffs.

[6] The first defendant had also issued third party notices against Celestar Property Developments Limited, Glenn Norrish, Shane Campbell and Isaac Driver. Due to issues arising regarding service of those notices, any determination on them will be dealt with in a separate judgment.

[7] Mr Gailer has a claim in contribution against the first defendant. He has also issued third party notices against Celestar Property Developments Limited, Glenn Norrish, Shane Campbell and Isaac Driver. These claims remain live.

Damage from leaky building syndrome

[8] Kilham Mews was built between August 1997 and March 1998. At this time the Building Act 1991 regulated the construction of buildings. The Act provided a lightly regulated performance-based regime that differed markedly from the prescriptive regimes contained in earlier legislation regulating building. A failing of the performance-based regime has been that during its time, poor construction in some buildings was not detected at the time of their construction and, consequently, they received code of compliance certificates from the local territorial authority responsible for issuing building consents for them. Purchasers bought them thinking they were acquiring code compliant buildings, which were, therefore, well constructed. Some of these buildings are now known to suffer from leaky building syndrome. Recognition of this failing, as well as the need to fix it, can be found in the form of the current legislation, the Building Act 2004, which shows a shift back to the imposition of well regulated prescriptive controls on building.

[9] Leaky building syndrome is usually found in buildings constructed of a cladding known as Harditex, which is a material that only came into common use in the 1990s. At Kilham Mews the ground floor levels of seven of the dwellings were constructed of this material. As will be explained later, the Harditex cladding at Kilham Mews demonstrates the usual weather-tight failures associated with this form of cladding.

[10] However, the greater part of the cladding at Kilham Mews was constructed of cedar rusticated weatherboards. Timber weatherboards, both rusticated and overlapping, have long been used as a cladding material in New Zealand dwellings. The February 1997 the Building Research Association of New Zealand (BRANZ) publication "Good Timber Cladding and Practice" states that "timber claddings have been used on buildings for centuries and are still a popular form of construction in New Zealand today". The publication describes one of the main advantages of the system as being a "long history of successful performance". Timber cladding is not usually associated with leaky building syndrome. The common expectation of most persons familiar with New Zealand dwellings would be that local builders are sufficiently knowledgeable about the use of timber cladding to be able to use this

method of construction effectively to build a weather-tight building. That is not, however, what happened at Kilham Mews; with this method of construction as well there were weather-tight failures.

[11] There are numerous weather-tight failures at Kilham Mews. Three categories of failure commonly occur. They involve the weatherboard cladding; the Harditex cladding; and the junctions of the cladding with the aluminium joinery. There are other more individual failures that arise from how specific parts of each dwelling have been constructed. I will deal with each in turn.

Weatherboard cladding

[12] The cedar rusticated weatherboards leaked significantly in more than one area. Extensive water ingress was apparent at the external corners of the dwellings, some internal corners and around the junctions between the aluminium joinery and the weatherboard cladding. This was due to the methods of construction that were used.

[13] At the time Kilham Mews was built, tried and true methods for the application of timber weatherboard cladding were documented in a 1980 publication called "Carpentry in New Zealand" (which was known colloquially as the "bible of building information in New Zealand" or as the "apprentices' bible"), as well as in the February 1997 BRANZ publication "Good Timber Cladding and Practice". None of the recommended methods in either publication were used for Kilham Mews.

[14] The rusticated cedar weatherboards used at Kilham Mews have a profile which includes a scalloped recess of approximately 25mm. Where the rusticated weatherboards ended at the buildings' external corners, a timber corner moulding fitted over the corner and extended it by no more than 12mm. Because of the scalloped recess in the weatherboards' profile, this moulding did not sit flush against the entire weatherboard. The scalloped recesses left an opening that, unless covered, created an opportunity for moisture to enter. In the case of units 1 to 4, where the corner moulding overlaid the scalloped recess of the rusticated weatherboard, the recesses were filled with a wooden plug cut to fit the 12mm overlap. The plugs were

surrounded by and held in place with nothing more than silicone sealant. The evidence was that over time these wooden plugs would fall out due to movement of the timber weatherboards. In the case of units 5 to 10, there was no evidence of wooden plugs having been used. Consequently, for these units, from the outset the scallop shaped recesses of the weatherboards were open for water to enter. None of the experts who gave evidence on timber cladding systems considered the method of covering external corners adopted at Kilham Mews to be a suitable system for maintaining a weather-tight building.

[15] The publication "Carpentry in New Zealand" describes various methods of finishing the external corners of timber weatherboard clad buildings. The systems described in it that have some resemblance to those used at Kilham Mews are the use of coverboards and scribers or coverboards and plugs. Coverboards are lengths of timber measuring between 75mm and 100mm that are nailed to each end of an external corner so that their ends butt into each other. Scribers are narrow lengths of timber that are cut to a shape that allows them to be married to the shape of the weatherboards' profile when fitted up against the coverboards. The other recommended system of coverboards and wooden plugs relies on wooden plugs to fill the scalloped recesses of the rusticated weatherboards. The wooden plug system as recommended in "Carpentry in New Zealand" uses wooden plugs about 20mm in length which are driven into the aperture created by the scalloped recess of a rusticated weatherboard about 1.5mm below the surface. The plugs are then nailed into place with nails that are also driven through the coverboards. The aperture is then filled with putty. This method precludes any significant movement of the plugs, including their ejection through timber movement. The width of the coverboards coupled with the nailing into place of either the scribers or the wooden plugs (depending on which was used) ensured that the external corners were weather-tight and remained so, despite possible timber movement.

[16] The methods of external corner construction recommended by the BRANZ "Good Timber Cladding Practice" were similar to those recommended by "Carpentry in New Zealand" but, in addition, BRANZ recommended the use of metal back flashings on all external corner systems. One of the BRANZ methods used the same corner moulding and wooden plugs as were used at Kilham Mews but with 65mm x 65mm galvanised metal flashing placed behind the timber

weatherboards and corner moulding. The addition of the metal back flashing had the effect of channelling any water that did gain entry behind the cladding and corner moulding away from the timber components of the building.

[17] At Kilham Mews the combination of certain factors made the construction of the external corners inadequate. First, the absence of 65m x 65m metal back flashings meant there was nothing to channel away any moisture that penetrated the cladding. Secondly, the corner mouldings with the narrow overlap of 12mm on each side of the corner meant the coverage was far less than would have been achieved by the use of 75mm to 100mm coverboards. Given the natural tendency of timber to move, the corner mould left far less room to accommodate this movement. Photographs of an external corner of unit 7 at Kilham Mews show the corner mould has moved out from the corner with the ends of the rusticated weatherboards exposed to the elements. Thirdly, the use of wooden plugs to fill the scalloped recess was not as effective as the plug system recommended in "Carpentry in New Zealand". This is because the plugs were being inserted into a recess that was covered by no more than the 12mm overlap of the corner moulding, which in turn governed the length of the plug and limited it to something that could not extend beyond the 12mm coverage. Hence, the plug was shorter in length than the plug that could be used in conjunction with a 75mm to 100mm coverboard. Furthermore, at Kilham Mews the plugs were kept in place by nothing more than silicone sealant, as compared to the other system in which the plugs with the coverboard were nailed into place and then the aperture created by the scalloped recess was filled with putty. When the two systems are compared, the room for timber movement with the consequential ejection of the plugs in the Kilham Mews system is readily apparent. Most of the experts agreed that the eventual ejection of the plugs, which would leave the corner apertures of the scalloped recesses exposed to the weather, was predictable. Finally, in the case of units 5 to 10, the failure to use plugs from the outset meant that those external corners were exposed in this way from the beginning.

[18] The result was that the buildings' components in the area of the external corners were exposed to prolonged dampness and moisture. The expert evidence was that moisture damage associated with leaky building syndrome was to be found in those parts of the buildings. This damage included rotting and decayed timber

framing that had lost its structural integrity, moisture damage to the interior plaster board linings and the presence of fungi and other organisms that are deleterious to an occupant's health.

[19] The extent of the damage to the external corners and adjacent areas goes to show that the method of construction used for the external corners of the buildings at Kilham Mews was poor. In the case of units 5 to 10 this poor method of construction was exacerbated by the failure to finish it properly. I consider the problems this method of construction posed would from the outset have been predictable by and obvious to any sensible person who took the time to look at how the external corners were being constructed and to think about what the result might be. Once the construction was completed some of the potential problems would have been masked (the absence of metal back flashings would be more difficult to detect by then). But the failure to use any wooden plugs at all on the external corners of units 5 to 10 would still have been obvious. However, Mr Gailer has not pleaded any affirmative defences against the plaintiffs. Thus questions of contributory negligence do not arise.

[20] Some of the internal corners of the buildings at Kilham Mews were also constructed in a way that did not meet the recommendations of either "Carpentry in New Zealand" or the BRANZ Timber Cladding publication. As with the external corners, no metal back flashings were used. The BRANZ publication recommends metal back flashing for internal corners. Common methods for constructing internal corners include scribing weatherboard to weatherboard, butting boards into a fillet or stop, or scribing boards and adding a corner trim. These methods achieve a close fit between the meeting of the weatherboards, which ensures they are weather-tight. The profile of rusticated weatherboards is not flush due to the scalloped recess. This means that one of the recommended methods for constructing internal corners has to be used otherwise the scalloped recess will become an entry point for moisture. At Kilham Mews some internal corner weatherboards were simply butted directly together which meant the scalloped recesses of those boards enabled moisture to penetrate behind the weatherboards and damage the timber framing. The failure to use metal back flashings for any internal corners, coupled with the failure to use recommended construction methods for some of the internal corners, has contributed

to the buildings' weather-tight failures. I consider that these defects would have been apparent at the time the buildings were being constructed.

Junctions of weatherboard cladding with aluminium joinery

[21] At Kilham Mews the junctions between the weatherboard cladding and the aluminium windows were not weather-tight. There was extensive moisture penetration which had damaged the timber framing and the interior plaster board linings. The method of construction used here did not include jamb or sill flashings. Where the rusticated weatherboards met the aluminium window jambs, there was only the window jamb, with a 10mm flange overlaying the weatherboards. As with the buildings' external corners, wooden plugs together with silicone sealant were placed in the scalloped recesses of the weatherboards. For much the same reasons as with the external corners of the building, moisture was able to penetrate where the cladding met the windows.

[22] The plaintiffs' expert witnesses expressed the opinion that the construction method of the cladding junctions with the aluminium joinery was responsible for the junctions not being weather-tight. This was in regard to both the weatherboard cladding and the Harditex cladding. Kevin Clark, an expert called by Mr Gailer, gave a qualified view that water had entered around the joinery of the windows at Kilham Mews causing damage; the way the window joinery had been installed had not prevented water ingress at Kilham Mews; and the joints between the cladding and the joinery were not as waterproof as the cladding itself.

[23] "Carpentry in New Zealand" states that when installing joinery, metal flashings are to be used to prevent water penetration except where protection is given by eaves. There were no eaves at Kilham Mews. The publication contains "section at jamb" diagrams which show either a fairly broad wooden facing and scriber covering the junction, or weatherboards butting up to the jamb with metal flashing running from some distance behind the weatherboards (a broader distance than the coverage given by the facing and scriber system) and into a groove cut into the jamb. The BRANZ guide recommends that side flashings should wrap around the end of the cladding, extend into the internal side of the cladding past the window facing and be trimmed before the scribers or plugs are fitted.

[24] At Kilham Mews the absence of any metal jamb flashings, as well as the absence of broad wooden facings and scribers to cover the junctions, made them vulnerable to moisture penetration. With the weatherboard cladding, the only material to prevent moisture entry between the junctions was the wooden plugs and silicone sealant that lay under the 10mm flange of the aluminium joinery. Given the natural amount of movement that can occur in timber framed buildings with wooden cladding, there was little, if any, built in redundancy to accommodate any such movement. In addition, there was evidence from one of the plaintiffs' expert witnesses, Alan Bolderson of the Weathertight Homes Resolution Service, that the nature of the fitting and sealing of the wooden plugs was suspect. When he examined the buildings at Kilham Mews in 2005 for the purpose of preparing a report for the Weathertight Homes Resolution Service, he found large gaps around some of the plugs, which had allowed moisture to enter the buildings' structure.

[25] The water entry around the junctions of the weatherboard cladding and joinery was serious and caused damage to the timber framing and the internal plaster board linings in much the same way as occurred through the water damage with the external and internal corners. I consider that at the time the buildings were being constructed, the likelihood of weather-tight failures occurring at the junctions of the weatherboard cladding and the joinery was something that would have been foreseeable to any sensible person. The use of wooden plugs bedded in silicone which lie under a 10mm aluminium window flange does not suggest a good long term defence against moisture penetration.

The Harditex cladding

[26] All the expert witnesses, including Mr Gailer's expert, Kevin Clarke, agreed that the Harditex cladding was not installed correctly. Harditex is a lightweight monolithic cladding. All units except 1, 6 and 10 have Harditex cladding. The failings included no relief joints in the cladding; no solid blocking behind cladding joints; inadequate overhang of cladding to the concrete floor; inadequate capillary gap between cladding and concrete floor overhang; no drip edge to cladding; and inadequate weatherproofing between junction of cedar weatherboards and Harditex cladding. Mr Clarke accepted that the defects of the Harditex cladding and associated works required the existing cladding for the ground floor of the units to be

removed and that part of the building re-clad using a drained and ventilated drained cavity construction. This remedial work necessitated removing the decking, installation of flashings to the deck framing support, and the removal and reinstatement of wing walls.

[27] Apart from the three categories of common defects, there were other defects as well. These included: inadequate flashing/sealing at roof to wall junctions (including the roof to carport junction for unit 1which is the only common property that has suffered damage); inadequate clearance from the finished concrete slab level and adjoining paved/unpaved surfaces; inadequate flashing/sealing to cladding penetrations; the decks on all units that had decks had inadequate spacing between the decking boards and the wall cladding for drainage; no flashings between the deck screens and adjoining cladding; inadequately sealed screen capping; insufficient clearance between the base of the cladding to the deck screen and the decking surface. These defects had also allowed excessive and unacceptable moisture penetration.

Remedying the damage

[28] The weather-tight failures at Kilham Mews were so numerous and the damage caused by them so extensive that all experts called by the plaintiffs considered the buildings to suffer from leaky building syndrome and that the only remedy was for them to be fully re-clad. Mr Clarke, who was Mr Gailer's expert, accepted that in those areas where Harditex cladding had been used, a full re-clad was required. However, Mr Clarke considered that the weatherboard cladding could be remedied with targeted repairs. He was a lone voice in this regard.

[29] There are different causes of moisture entry involving the weatherboard cladding. When they are all taken into account, it becomes obvious that the various points of moisture entry are extensive. The entry points are to be found at the buildings' corners, both external and internal, and the junctions between weatherboard cladding and aluminium joinery. The damage that has already been caused to the timber framing is such that in order to remedy the damage to the timber framing, the existing cladding has to be removed. To remedy the moisture ingress around the external corners, internal corners and the junctions between the

weatherboard cladding and aluminium joinery, metal flashings need to be installed and better construction methods need to be adopted. For example, on units 5 and 6, which have already been re-clad with new weatherboards, in addition to the use of metal flashings, the external corners were covered with timber coverboards and scribers and the junctions between the windows and cladding were covered with timber scribers. To do this for the remaining units would require the removal of most of the existing weatherboard cladding.

[30] It is difficult to see how widespread remedial work could be carried out without fully re-cladding the buildings. I accept the evidence of the plaintiffs' experts that the damage is too widespread to permit targeted repairs to be effectively carried out. Moreover, it is by no means clear that a building consent for anything other than a full re-clad could be obtainable. Since the amendment to Schedule 1 of the Building Act 2004, any repair or replacement work, which is beyond maintenance and which arises from a failure of a building to satisfy the provisions of the building code for durability (for example a failure to comply with the external moisture requirements of the building code), now requires a building consent. Work which requires a building consent must conform to the current building code. This has requirements which were not in place in 1997 and which the building work at Kilham Mews currently does not satisfy.

[31] It may well be the case that legally a building consent could not be obtained to do targeted repairs and that nothing less than a full re-cladding, which complies with current requirements, would suffice. None of the experts could be sure of this. However, it is unnecessary to resolve this legal question as the evidence of the plaintiffs' expert witnesses satisfies me that the only sensible way to resolve the leaky building problems at Kilham Mews is for there to be a full external re-cladding of the buildings. I do not accept Mr Clarke's view that some targeted repairs are possible and a full re-clad of the buildings' entirety is not necessary. I fail to see how the remedial work required to make the buildings weather-tight could be carried out without a full re-clad. There will also need to be ancillary work, including repairs to roof and cladding junctions and the other remedial work the plaintiffs have identified in their evidence. For the same reasons, I also find that the re-cladding of units 5 and 6 was an appropriate and reasonable way of fixing the defective construction of those units.

Liability principles

[32] A building consent was given for the development at Kilham Mews and on its completion a code of compliance certificate was issued. However, it is by no means clear that the building construction methods used at Kilham Mews conform to the legal requirements of the day.

[33] Section 48 of the Building Act 1991 provided for the making of regulations, to be called the Building Code. Section 7 of that Act provided that all building work had to comply with the code. The Building Code was contained in the Building Regulations 1992.

> **B2.1**
>
> *The objective of this provision is to ensure that a building will throughout its life continue to satisfy the other objectives of this code.*
>
> **FUNCTIONAL REQUIREMENT**
>
> **B2.2.2**
>
> *Building materials, components and construction methods shall be sufficiently durable to ensure that the building, without reconstruction or major renovation, satisfies the other functional requirements of this code throughout the life of the building.*
>
> **PERFORMANCE**
>
> **B2.3**
>
> From the time a code compliance certificate is issued building elements shall with only normal maintenance continue to satisfy the performances of this code for the lesser of; the specified intended life of the building, if any, or:
>
> (a) For the structure, including building elements such as floors and walls which provide structural stability: the life of the building being not less than 50 years.
>
> ...
>
> (d) For linings, renewable protective coatings, fittings and other building elements to which there is ready access: 5 years.

And to ensure protection against the entry of water, the Code provided:

> **E2.1**
>
> *The objective of this provision is to safeguard people from illness or injury which could result from external moisture entering the building.*

> **FUNCTIONAL REQUIREMENT**
>
> **E2.2**
>
> *Buildings should be constructed to provide adequate resistance to penetration by, and the accumulation of, moisture from the outside.*
>
> **PERFORMANCE**
>
> ...
>
> **E2.3.2**
>
> *Roofs and exterior walls shall prevent the penetration of water that could cause undue dampness, or damage to building elements.*

[34] The buildings at Kilham Mews were completed in 1998. By 2005, some seven years after their construction, the level of moisture ingress was such that the buildings were found to have leaky building syndrome. This is to such an extent that the only sensible and practical remedy is to repair the damaged timber framing, fix the roofing defects and re-clad all the external walls. It is hard to see how buildings with defects of this magnitude could, nonetheless, be considered to comply with the Building Code. Furthermore, the construction methods used at Kilham Mews meant that the weather-tight defects that have occurred were always going to occur; it was simply a matter of when they occurred. Despite the issue of a code of compliance certificate for Kilham Mews, I think the better view is that from the outset the buildings did not comply with the fundamental obligations that B2 and E2 of the Building Code imposed on buildings.

[35] Before the first defendant settled with the plaintiffs, its defence was concentrated on whether or not certain construction methods at Kilham Mews were within the scope of what were known as acceptable solutions under the Building Code. This is because, under the Building Act 1991, any method of construction that came within the definition of an acceptable solution under the Building Code qualified for the issue of a consent and, on the job's completion, a code of compliance certificate. A local authority was obliged to respond in this way to anything that came within the meaning of an acceptable solution. Consequently, in any litigation concerning the weather-tight failures of a building, if a local authority could establish that the construction methods were in accordance with the

Building Code's acceptable solutions, the local authority was absolved from being found to be at fault in any way.

[36] However, the scope of the tortious liability of those in the business of developing residential building projects is different from that of a local authority. Their liability is founded in the common law duties the tort of negligence imposes on developers and subcontractors such as project managers. Those duties include: a duty to exercise reasonable skill and care to achieve a sound building (*Mt Albert Borough Council v Johnson* [1979] 1 NZLR 234; *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 2 NZLR 394) and a concomitant duty not to carelessly create a defective dwelling (*Dicks v Hobson Swan Construction Ltd (In Liquidation)* HC AK CIV 2004-404-1065 22 December 2006, Baragwanath J).

[37] *Bowen* and *Johnson* were cases involving building foundations and building work being carried out on land of marginal stability or landfill that had been improperly compacted. The principles of tortious liability to be derived from those cases have subsequently been applied quite properly by this Court in negligence claims arising from buildings suffering from leaky building syndrome: *Dicks*; *Body Corporate 188529 and Ors v North Shore City Council and Ors* HC AK CIV-2004-404-3230 30 April 2008, Heath J; *Body Corporate 189855 and Ors v North Shore City Council and Ors* HC AK CIV-23005-404-005561 25 July 2008, Venning J. I see no reason to depart from the approaches adopted in those cases.

[38] In *Johnson* the Court of Appeal left open the question of whether the same liability would attach to an individual landowner who has a home constructed for himself. However, when it comes to commercial developers, it matters not whether their role in the construction process has been active or passive. The duties the law imposes on developers of residential building projects cannot be delegated (*Mt Albert Borough Council v Johnson* at [240]). Thus, they cannot avoid those duties through establishing they merely played a passive role in the construction process. Furthermore, such duties are imposed irrespective of any specific reliance being placed on the developers (*Dicks* at [48]). The policy reasons for this approach are first, the recognised lack of opportunity to inspect certain structural or hidden items of a dwelling once it has been erected. Secondly, the long standing recognition that in New Zealand home buyers tend to rely on the local authorities' inspection

process and the issuing of code of compliance certificates as opposed to obtaining a pre-purchase inspection report. That such general reliance can give rise to a duty of care was affirmed in *Invercargill City Council v Hamlin* and applied in *Dicks* at [48] to extend *a fortiori* to head contractors and actual builders. To the extent that a developer may be distinct from a head contractor, I consider the reasoning in *Dicks* would see this principle apply to developers as well.

[39] The common law duties, if breach is proved and the breach is causative of damage, are sufficient in themselves to fix liability on a developer. It is no answer to a proved breach of those duties, which is causative of damage, that the acts and omissions responsible for the damage were compliant with the Building Code: *Body Corporate No 189855 v North Shore City Council*.

Causation

[40] I have found that the Kilham Mews buildings conform neither to the common law standards required of buildings nor to the Building Code's requirements. I have also found that the buildings' failure to conform to those standards has resulted in the buildings suffering substantial damage from leaky building syndrome.

[41] There is no doubt that one of the causes of the leaky building syndrome from which the buildings at Kilham Mews suffer was a failure on the part of the developer to ensure the buildings were weather-tight and sound. In this regard the developer has breached the non-delegable duty of care the law imposes on developers to exercise reasonable skill and care to build a sound building. Here both the applicable legislation and the common law required the construction of dwellings that were sufficiently weather-tight. This did not happen due to the poor construction methods adopted at Kilham Mews. Furthermore, at the time Kilham Mews was constructed there were known methods of construction that would have resulted in the buildings being weather-tight. As originally constructed, none of the dwellings at Kilham Mews met this requirement. Had the developer of Kilham Mews exercised reasonable skill and care in the buildings' construction, the weather-tight failures would have been avoided. The developer's carelessness and failure in this regard are a cause of the weather-tight failures at Kilham Mews. The

next step is to determine if Mr Gailer can be said to be one of the developers of Kilham Mews.

Mr Gailer as developer

[42] I now turn to consider whether or not Mr Gailer is liable for the breach of duties that have caused the damage at Kilham Mews. Mr Gailer's defence was that he was not legally or factually responsible in any way for the weather-tight failures and resulting damage at Kilham Mews. In this regard he contended that the sole developer of Kilham Mews was a limited liability company known as Kilham Mews Limited. He also contended that the building construction methods used at Kilham Mews satisfied the Building Act requirements of the day and that any fault lay with the Building Act and Building Industry Association which had allowed for poor methods of construction to be carried out. I have already found that the buildings did not meet the applicable Building Act requirements.

[43] A helpful definition of a developer can be found in *Body Corporate No 188273 and Anor v Leuschke Group Architects Ltd and Ors* HC AK CIV-2004-404-002003 28 September 2007 at [32] in which Harrison J said:

> The developer, and I accept there can be more than one, is the party sitting at the centre of and directing the project, invariably for its own financial benefit. It is the entity which decides on and engages the builder and any professional advisors. It is responsible for the implementation and completion of the development process.

I propose to examine Mr Gailer's role in the light of Harrison J's definition.

[44] A key piece of evidence in determining whether Mr Gailer was a developer is the joint venture agreement between Kilham Mews Limited, Mr Gailer and a group of individuals referred to collectively in the joint venture agreement as the trustees of the Ohawini Trust. Throughout this judgment I will refer to them as the Ohawini trustees. They are not parties to this litigation.

[45] The joint venture agreement was executed in July 1997. The signatories to the agreement are Mr Gailer, the trustees of the Ohawini trust and Kilham Mews Limited. The recital to the joint venture agreement recorded that Mr Gailer had

entered into a contract for the purchase of a property at 6 Exmouth Street, Northcote. This is the property on which the dwellings at Kilham Mews were built. The sale and purchase agreement had named Mr Gailer or his nominee as purchaser. The recital went on to record that Mr Gailer and the Ohawini trustees had agreed to form a joint venture to acquire 6 Exmouth Street with the intention of constructing and selling residential buildings on the property.

[46] In the recital Mr Gailer was described as being responsible for the management of the construction programme, and Kilham Mews Limited was described as the "vehicle which was to hold the participants' interest upon trust for their respective interests". Under clause 1, which sets out the definitions of terms used in the joint venture agreement, the participants were defined as "Gailer" and "Ohawini". The joint venture was defined as the joint venture between the participants under the agreement. Kilham Mews Limited, although a signatory to the joint venture agreement, was not included within the definition of "participant".

[47] Since Mr Gailer contends that the sole developer of Kilham Mews was Kilham Mews Limited, it is necessary to consider the company's role under the joint venture agreement as well as that of Mr Gailer. In that regard it is important to note that the joint venture agreement provided in clause 4.5 that Kilham Mews Limited was to hold the property being developed on a bare trust for the participants in the joint venture. This means the first step is to consider what is a bare trust and what is the role of a bare trustee.

Bare trusts and bare trustees

[48] A comprehensive discussion of these concepts is to be found in *Burns v Steel* [2006] 1 NZLR 559. That case was about whether or not trustees appointed under a trust created by a will held shares in a company upon a bare trust. At [41] Randerson J referred to the definition of "bare trustee" in 48 *Halsbury's Laws of England* (4th ed) at para 650:

> "**650. Meaning of 'bare trustee'.** A bare trustee is a person who holds property in trust for the absolute benefit and at the absolute disposal of other persons who are of full age and sui juris in respect of it, and who has himself no present beneficial interest in it and no duties to perform in respect of it except to convey or transfer it to persons entitled to hold it, and he is bound to convey or transfer the property accordingly when required to do so."

[49] At [42] the Judge noted that the same definitions were to be found in *The Laws of New Zealand* (vol 29, at para 120) and in *Lewin on Trusts* (17th ed, 2000, para 1–21). As Randerson J considered that the interest in the shares was not absolutely vested in the trustees, this meant that in terms of the *Halsbury* definition of "bare trustees", the trustees could not be treated as bare trustees. Rather than leave matters there, the Judge went on to adopt an alternative approach which he described as "more helpful in this context", namely, to consider whether the trustees had active rather than merely passive duties. As part of this consideration, the Judge examined a number of authorities from other jurisdictions in which the concept of a bare trust was discussed.

[50] The first was *Herdegen v Federal Commissioner of Taxation* (1988) 84 ALR 271. In that judgment Gummow J at pp 281 and following referred to the historic distinction between active and passive trusts first drawn in 16th century decisions and then proceeded to provide a modern formulation of these concepts:

> "Today the usually accepted meaning of 'bare' trust is a trust under which the trustee or trustees hold property without any interest therein, other than that existing by reason of the office and the legal title as trustee, and without any duty or further duty to perform, except to convey it upon demand to the beneficiary or beneficiaries or as directed by them, for example, on sale to a third party. The beneficiary may of course hold the equitable interest upon a sub-trust for others or himself and others: see *Halsbury's Laws of England*, 4th ed, vol 48, 'Trusts', para 938. The term is usually used in relation to trusts created by express declaration. But it has been said that the assignor under an agreement for value for assignment of so-called 'future' property becomes, on acquisition of the title to the property, trustee of that property for the assignee (*Palette Shoes Pty Ltd v Krohn* (1937) 58 CLR 1 at 27) and this trust would answer the description of a bare trust. Also, the term 'bare trust' may be used fairly to describe the position occupied by a person holding the title to property under a resulting trust flowing from the provision by the beneficiary of the purchase money for the property."

[51] At [44] Randerson J then referred to a passage in *Herdegen* in which Gummow J had cited from Professor Waters' work *Law of Trusts in Canada* (2nd ed, 1984), p 27:

> "It is of course true that so long as a trustee holds property on trust he always retains his legal duties, namely, to exercise reasonable care over the property, either by maintaining it or by investing it; he cannot divest himself of these duties. The reference, however, is to duties which the settlor has enumerated. For example, the settlor may have required that the beneficiary be maintained until he reaches the age of majority, when he is entitled to call for capital and income. The trustee is then bare or naked of these active duties decreed by the settlor. If the trustee possesses his legal duties only for the purpose of guarding the property, prior to conveyance to the beneficiary, these duties are said to be passive."

[52] At [46] Randerson J referred to *Corumo Holdings Pty Ltd v C Itoh Ltd* (1991) 24 NSWLR 370 in which Meagher JA held in the context of the Companies (New South Wales) Code then in force that a reference in the Code to a "bare trust" must be related to situations where a trustee is "no more than a nominee or cipher, in a commonsense commercial view". In saying this, Meagher JA also acknowledged, at 398, that as a matter of strict logic, "almost no situation can be postulated where a trustee cannot in some circumstances have active duties to perform". That said, Meagher JA went on to express the view that he considered too narrow the submission by the applicants that the phrase "bare trustee" should be confined to situations where the trustee was immediately bound to transfer the share to his beneficiary.

[53] After a thorough review of other authorities on bare trusts, Randerson J concluded at [62] that:

> Although consideration of whether the trustees are "bare trustees" may be helpful in some contexts, there is a risk of becoming overly concerned with nomenclature to the point where the nature of the duties and discretions of the trustees may be obscured. Where the expression "bare trustee" is used in statute, the Courts are of course obliged to give some meaning to it. But in the absence of a statutory reference of this kind, the real task is to ascertain the nature and extent of the trustees' obligations and discretions by reference to the terms of the instrument establishing the trust, assessed in the context of all the relevant surrounding circumstances and the obligations imposed on trustees by the general law or by statute.

[54] In the context of the facts in *Burns v Steel*, this required consideration to be given to the deceased's presumed intentions by reference to the terms of the will, assessed in the context of the company's constitution and the obligations at law of trustees and executors. When this was done, it led to Randerson J finding at [64] that he was satisfied that:

> … the trustees are not mere ciphers… they have active duties and discretions both as executors and trustees. As executors, the defendants are obliged to get in the assets of the deceased, pay the expenses and distribute the residue in accordance with the terms of the will. And, as trustees, they have the fundamental obligation to adhere to the terms of the trust and to act in the best interests of the beneficiaries.

[55] The testator in *Burns v Steel* had not enumerated any specific duty, other than the basic obligation at law to give effect to the will by implementing the gift of shares. Nonetheless, Randerson J concluded that the trustees' duties were more than

confined to simply transferring the shares to the plaintiff and guarding the property in the interim. This was because of certain pre-emption provisions in the company's constitution. Randerson J considered that the testator must be taken to have known of the pre-emption provisions of the company's constitution and the trustees' duties must be defined accordingly. At [66] and [67] he concluded:

> In ordinary circumstances, it would have been a straightforward matter to have taken a transfer of the shares and then distributed them to the plaintiff in accordance with cl 3 of the will. But the existence of the preemption provisions of the company's constitution make it impossible to follow that simple course, a fact of which the deceased must be taken to have been aware in making the gift of shares to the plaintiff. The trustees will be obliged to take at least some, and possibly all, of the steps outlined in Mr Wylie's submissions … . These are not merely mechanical matters but require the careful exercise of judgment and discretion. The trustees must hold the shares and, in order to fulfil their duty, undertake the preemption process in the best interests of the plaintiff as beneficiary.
>
> In the absence of any absolute entitlement by the plaintiff to the shares in specie, the trustees must exercise their own discretion in a conscientious manner. It is for them to decide when it is appropriate to issue a transfer notice and the amount which should be nominated for the value of the shares. It is also a matter for them to proceed with any other steps inherent in the preemption process, including participation in any arbitration as to the fair value of the shares and deciding whether to revoke the transfer notice if the price fixed as the fair value is less than the figure nominated in the notice.

For the reasons outlined in [66] and [67] of the judgment, Randerson J found that the trustees in *Burns v Steel* were not bare trustees.

[56] I propose to adopt the same approach as Randerson J and to apply the principles to be derived from his reasoning to the circumstances of the present case. I need to discern, therefore, the intentions, as expressed in the joint venture agreement, that led to Kilham Mews Limited holding the property on trust. I also need to consider the role Kilham Mews Limited was to carry out as trustee and whether that was a passive or an active role. Of relevance here is whether the company's role included the exercise of judgment and discretion or whether it was limited to mechanical matters only.

[57] Whilst I agree with Randerson J that nomenclature is not decisive, I note that clause 4.5 uses the words "bare trust". This suggests that the parties saw a need to

expressly identify the trust as a bare trust, which in turn is consistent with it being no more than a bare trust.

The respective roles of Kilham Mews Limited and Mr Gailer under the joint venture agreement

[58] I now turn to consider the role of Kilham Mews Limited as trustee of the property. At the same time I will consider other aspects of the company's role under the joint venture agreement, as well as Mr Gailer's role.

[59] Clause D of the recital described the company as the "vehicle to hold the participants' interests upon trust for their respective interests". The participants were Mr Gailer on the one part and Ohawini Trustees on the other (clause 2). It is notable that Kilham Mews Limited was not included in the definition of "participant".

[60] Clause 3 provided for the establishment and scope of the joint venture. Under it the participants agreed that the joint venture would carry on business as an unincorporated joint venture. Clause 3.3 outlined the scope of the joint venture as being the joint ownership and control by the participants of the property, the carrying out of the project and the subsequent sale of the properties after completion of the project. The impression to be gained from clause 3 is that the joint venturers (that is the participants) were the developers of Kilham Mews.

[61] Clause 4 of the joint venture agreement is an important clause. It governed the ownership of the property, the structure of the joint venture and the relationships of the participants. Clause 4.5 provided that Kilham Mews Limited would hold the properties upon bare trust for the participants as provided in clause 4.7. Apart from the declaration of trust under which Kilham Mews Limited was to hold the property on a bare trust for the participants, the company had no other role allotted to it under this clause.

[62] Under clause 4.7 the company acknowledged and agreed it would enter into a formal deed of trust in order for it to have all necessary powers for it to undertake and complete the project. Those powers included express powers to mortgage the property, grant debentures over the property, sell the project and "all other powers

necessary". But no such deed was ever executed. The presence of this expressed provision would suggest that without a formal deed empowering the company in the manner set out in clause 4.7, it could not of its own volition choose to undertake such actions.

[63] Under clause 4.10 each participant agreed to perform his or their part and responsibilities under the agreement, including their best endeavours to ensure the objectives of the joint venture were achieved. It is notable that Kilham Mews Limited (as a non-participant) was exempt from having to perform the obligations this sub-clause imposed. This is consistent with the participants having the active role in the joint venture and the company having no more than a passive role of holding the legal ownership of the property. Similarly, under clause 4.11 the joint venture remained alive until the property was sold or the interest of one participant was sold to the other. Kilham Mews Limited had no control over the joint venture's duration.

[64] Under clause 5, which dealt with finance, the parties (which must include Kilham Mews Limited) agreed to use all reasonable endeavours to obtain finance. However, this was made subject to both participants first approving the terms and conditions of any borrowing. The company was not included in this proviso, which is again consistent with it having a passive role and the participants being the persons actively involved in pursuit of the joint venture's purpose.

[65] Responsibility for taking the preliminary steps to commence the development, including the obtaining of building consents, was placed on Mr Gailer rather than on the company (clause 6.3).

[66] Clause 7 dealt with the management and construction of the development. Significantly, there is nothing in any of the parts or sub-parts of this clause that imposed authority or responsibility on Kilham Mews Limited to undertake any of the matters dealt with under this heading. Primary responsibility for management and construction of the project was placed on Mr Gailer, with the Ohawini trustees having the right to be consulted on substantial matters. Under clauses 7.1 and 7.5 express obligations were placed on Mr Gailer which are consistent with him having an active role in the development. Under clause 7.1 Mr Gailer was appointed

manager of the project and he was to carry out and perform the daily management and control of the joint venture business. Under clause 7.2 Mr Gailer was to be paid a development retainer of $1,000 per week for his management of the project. His responsibilities included, but were not limited to the following functions:

a) Arranging for floor plans, specifications and working drawings for the development for submission to and approval of the joint venture;

b) Obtaining building consents in respect of construction work;

c) Arranging the sale of the completed project;

d) The financial administration for the joint venture and payment of all accounts due in respect of the construction work and receipt of funds owing to the joint venture.

[67] It is significant that these subclauses contemplated Mr Gailer being the person who would enter into contracts for the design, construction and selling of the property, with the proviso that he was not to enter into any such substantive contracts without first obtaining written approval from the Ohawini trustees. No room was left for Kilham Mews Limited to take any active role in or to exercise any authority relating to the management and construction of the development. Clause 7.3 required the participants to share information relating to the joint venture, and to do everything to ensure it was conducted to their mutual advantage. Kilham Mews Limited was exempt from this benefit. Under clause 7.4 Mr Gailer was required to keep separate and detailed accounts of all his actions and things done in relation to the development. This clause is consistent with Mr Gailer having the active role in progressing the development.

[68] Clause 8, which dealt with defaults, contained a provision whereby in the case of a default a participant could require the sale of the defaulting participant's interest in the property or alternatively the sale of the property. Clause 8.5 set out how the sale was to be achieved in that event. Kilham Mews Limited had no role to play in the exercise of the default provisions in clause 8. This is also consistent with it having a passive role and with the participants having the active role.

[69] Clause 9.4 recognised that the decisions of the board of directors of Kilham Mews Limited would be binding on the participants in respect of all matters relating to the business of the joint venture which, under the provisions of the agreement or otherwise, were placed under the jurisdiction of Kilham Mews Limited. However, apart from clause 10, which is discussed later, there was nothing in the provisions of the joint venture agreement that expressed the matters to be under the company's jurisdiction; nor was that done elsewhere.

[70] Under clause 9.5 Kilham Mews Limited was bound not to carry out any business other than that arising out of its obligations as trustee for the joint venture. This is also consistent with the company existing for no purpose other than that of being a bare trustee of the participants' interest in the property.

[71] Clause 10 provided for bank accounts. These were to be established and maintained by Kilham Mews Limited on behalf of the joint venture. Although the accounts were to be in the name of the company, they were to be the joint property of the participants. This is consistent with the company being a bare trustee. It is interesting that in clause 10, for the one and only time in the joint venture agreement, the company appears to have some authority available to it. Clause 10 provided that it was for the company to determine the purpose of each account and who was authorised to use it. All receipts and payments relating to the joint venture were to be channelled through the bank accounts unless otherwise determined by the company. The company also had the authority to determine how any surplus funds held by the joint venture during its lifetime were to be dealt with.

[72] The limited discretionary authority clause 10 gave to the company could be a factor against it being a bare trustee. However, when seen in the context of the joint venture agreement as a whole, its influence becomes illusory. Clause 10 recognised the bank accounts were not the property of the company. The ultimate treatment of the funds in the bank account on the conclusion of the joint venture was determined by clause 13.2 and not by the company. If a participant wanted to exit the joint venture, there were provisions in the joint venture agreement to deal with this and, under these provisions, a departing participant would have his/their interest valued in a way which included any surplus funds then sitting in the company's bank accounts. Furthermore, clause 7.1(d) vested Mr Gailer with responsibility for the financial

administration of the joint venture, which included the construction and development of Kilham Mews; that being the part of the scope of the joint venture under clause 3.3. Under clause 7.1(d) Mr Gailer was made responsible for payment of all accounts due and receipt of funds owing. The authority given to Kilham Mews Limited under clause 10 to determine the purpose of the bank accounts and who could operate them could not override the more express authority clause 7.1(d) gave to Mr Gailer. He was clearly the person under the joint venture agreement with control of the purse strings. Despite any impression clause 10 might give that Kilham Mews Limited had some discretionary authority available to it, any effect that could have on the company's perceived role is more apparent than real.

[73] Clause 11, which related to accounts and audits, gave the participants authority to determine the form of the accounts and audits of both the joint venture and the company. Here again the company had a passive role.

[74] The sale of the completed buildings is provided for in clause 12 of the joint venture agreement. The mechanistic formula set out therein leaves no room for the exercise of any discretionary authority by Kilham Mews Limited as to matters relating to the sale of the building. It is notable that under clause 12 Kilham Mews Limited had no authority over how, when or at what prices the developed properties were sold. The company had no role whatsoever in determining anything in relation to the sale price or manner of sale of the properties. Under clause 12 it was agreed that the intention of the parties (rather than the participants) was to sell the property once it has been developed or prior to the completion. However, it was for the participants to determine a schedule of proposed sale prices for the proposed buildings. When built, the buildings were to be sold at the scheduled sale prices or such higher sale prices as were attainable with the agreement of the participants. If the participants could not agree on the sale prices, they were to be determined by arbitration. Kilham Mews Limited had no authority to resolve any impasse between the participants. The absence of any active role for Kilham Mews Limited was consistent with the company being no more than a bare trustee. The authority clause 12 gave to the participants is consistent with them having the active role in the development.

[75] Clause 13 dealt with the proceeds of the sale of the building. It provided a comprehensive formula for dealing with the proceeds of sale. The formula left nothing to the discretionary authority of Kilham Mews Limited.

[76] Under clause 14, which dealt with insurance of the buildings to be constructed, any excess costs on reinstatement following any damage to the buildings were to be borne by the participants. Apart from having the insurance in its name, the company had no further role under this clause.

[77] Under clause 15 all rental and other insurance received from the development was for the account of the joint venture and was to be dealt with as provided in clause 15. Once again the company had no authority.

[78] My interpretation of the terms of the joint venture agreement is that under it, Kilham Mews Limited was no more than a bare trustee that passively held the legal ownership of the property until such time as the participants directed it to convey the legal titles to the property to a third party. There is nothing in the joint venture agreement to suggest that Kilham Mews Limited had or was intended to have an active role in the development at Kilham Mews. The company had no authority to exercise any judgment or discretion in relation to the development. Its role was limited to purely mechanical matters expressly provided for in the joint venture agreement.

[79] I consider that Kilham Mews Limited fits the description of a bare trustee given by Professor Waters in his work *Law of Trusts in Canada* at p 27: "bare or naked of active duties decreed by the settlor". The company's role under the joint venture agreement was limited to that of a trustee who possessed legal duties only for the purpose of guarding the property prior to its conveyance to third parties as provided for in clause 12 of the joint venture. As a bare trustee, it can be described as no more than the participants' "nominee or cipher in a common sense commercial view": see *Corumo Holdings Pty Ltd*.

[80] It follows that I do not accept Mr Gailer's contention that Kilham Mews Limited was the sole developer of Kilham Mews. As a bare trustee, the company had a very limited role in the development.

[81] Even if the presence of its very limited authority under clause 10 of the joint venture agreement is sufficient to take it outside the role of a bare trustee, nonetheless, its role under the joint venture agreement was so circumscribed that it could never be seen as the sole developer of Kilham Mews. The company simply did not have the necessary legal authority under the joint venture agreement to be able solely to carry out the role of developer of the building project. Furthermore, the terms of the joint venture agreement precluded the company from deriving such authority from elsewhere. Although ordinarily a limited liability company has the powers of a natural person when it comes to the carrying out of a commercial enterprise, clause 9.5 of the joint venture agreement expressly constrained Kilham Mews Limited from carrying on any business other than that of trustee for the joint venture.

[82] It seems clear to me that under the joint venture agreement, the construction and management of the building project was undertaken by its participants, with Mr Gailer having the primary responsibility for this role. The sale of the buildings developed by the project was entirely under the participants' control. The only persons who had sufficient authority to achieve the joint venture's purpose were Mr Gailer and the Ohawini trustees.

[83] Mr Gailer contended that, consistent with his view that he was not the developer, he was never to have any personal liability for the development. His view does not fit with my interpretation of the joint venture agreement. There is nothing in that agreement to suggest it was created for the purpose of distancing the participants from the development and any legal liability that might attach to its developer.

[84] The Kilham Mews joint venture agreement is entirely different from the joint venture agreement in *Body Corporate No 188273 v Leuschke Group Architects Ltd*. That case also involved a multi-unit residential development that suffers from leaky building syndrome. In that case Harrison J found that one of the defendants, Mark Cooper, could not be liable in his personal capacity as a developer. At [33] Harrison J set out the terms of the joint venture agreement relied upon by the plaintiff to prove that Mr Cooper owed a duty personally as developer. The relevant provisions in the joint venture agreement were:

> Colin Leuschke (CL) through his company, Bouffant Holdings Ltd, has a contract on Lots 14 and 16, Rendall Place, Newton …
>
> Bouffant Holdings Ltd shall nominate, in accordance with the contract, Colmark Developments Ltd, owned jointly by CL and the Cooper Trading Trust (CTT), to carry out the obligations of the contract and develop the project. (emphasis added)
>
> In the event that either party ceases to exist, or dies, the shares in Colmark Developments Ltd shall be automatically transferred to the remaining party, with all deposits and advances by shareholders/directors being refunded. The survivor shall be the sole beneficiary of profits or losses. The following points form the general basis of the agreement by CL and CTT.
>
> 1. A limited liability company, Colmark Developments Ltd, shall be formed to develop the property owned equally by CL and CTT (or their respective entities). (emphasis added)
>
> 2. All costs for the company's establishment and development of the project shall be borne equally by the company (sic) except for the costs of preparing architectural drawings (by CL) and management of the development by Mark Cooper (MC).
>
> 3. CL shall at no cost to the company [undertake architectural work].
>
> 4. MC shall at no cost to the company:
>   - Manage the development generally.
>   - Oversee and monitor the construction process.
>   - Oversee sales and settlement process.
>
> 5. A bank account shall be formed immediately and each party shall deposit $2,500 which is to be used for sundry expenses. Two signatories shall be required.
>
> 6. Upon signing of this agreement MC shall reimburse CL for 50% of any deposits paid under the sale and purchase agreement.
>
> 7. Upon completion of the development both CL and MC shall be entitled to take their share of the profits as shareholders' salaries, and the company can be disposed of by winding up.
>
> 8. If at any time the company cannot perform or carry out its financial commitments, the directors shall advance the necessary funds personally, in equal proportions.
>
> 9. The directors will be required to personally guarantee borrowings from the institutions made to the company to complete the development.

[85] At [34] Harrison J found that the intention shared by Messrs Cooper and Leuschke when they signed the agreement was plain. They would form Colmark Developments Limited to carry out the development. That company was to be the developer. Later, at [39], Harrison J found:

> I am satisfied that, upon its incorporation, Colmark [Developments Limited] became the entity which assumed legal responsibility for and controlled all aspects of the development … Colmark settled the purchase of the property (taking over Mr Leuschke's personal obligations) and became registered proprietor; obtained resource consent in its name; applied for and obtained the building consent; carried out the tender process, contracted with MacRennie to build the apartments, and paid the company for its contractual services; borrowed monies from Westpac to fund the development; deposited the title plan; and completed the sale of all 18 units. Colmark was the developer of the Rendall Terrace project.

[86] When the position of Colmark is contrasted with Kilham Mews Limited, it is clear to me that, unlike Kilham Mews Limited, Colmark had full legal and beneficial ownership of the property; it had full authority to advance the development and it controlled all aspects of the development. This is different from the role of Kilham Mews Limited. Apart from legal ownership of the property, the company cannot be said to have assumed legal responsibility and control of all aspects of the development at Kilham Mews. Unlike Colmark, which had full legal authority to carry out the development, Kilham Mews Limited could not on its own have done all that was required to carry out the development under the joint venture. The company was subject to the direction of the joint venture participants. Its role under the joint venture agreement was narrow and tightly constrained.

[87] In *Pyne Gould Guiness Ltd v Montgomery Watson (NZ) Ltd* [2001] NZAR 789 the Court of Appeal said, at [29], that a proper approach to take to interpreting a contract was to consider the words of the contract, ascertain their natural and ordinary meaning in the context of the document as a whole and then to use the factual background to cross-check whether some other or modified meaning was intended. Having considered the words of the joint venture agreement, I now propose to use the factual background to cross-check the meaning at which I have arrived. When considering the factual matrix, I should look for a construction that accords with business common sense (*Pyne Gould Guiness* at [23]) and I should seek to ascertain the meaning the contract would convey to a reasonable person having all the admissible background knowledge available to the parties in the situation they were in at the time of the contract: *Jowada Holdings Limited v Cullen Investments Limited and Pacific Retail Group* CA248/02 5 June 2003 at [33].

[88] Kilham Mews is a residential property development. The legal principle that holds developers of such projects to owe a non-delegable duty of care to the

purchasers and subsequent purchasers of the development is long established. Persons wanting to engage in residential property development without exposing themselves to potential litigation risk can resort to legal mechanisms that will achieve the appropriate distance and disconnection. Anyone in Mr Gailer's position who wanted to avoid being a developer of Kilham Mews, with all the consequential legal liabilities that entailed, could have done so using the various legal mechanisms available to achieve that result. For example, in *Body Corporate No 188289 v Leuschke Group Architects* Harrison J found (at [38]) that:

> Messrs Cooper and Leuschke were entitled to form Colmark to undertake the Rendall Terrace development. Its defining characteristic was its legal personality separate from its shareholders. Its legitimacy is not diminished by virtue of its intended function of isolating or protecting Messrs Leuschke and Cooper from personal liability. That intention is not to be confused with the separate question of whether or not, when performing duties as a director or employee, a shareholder assumes a direct personal responsibility to third parties, to which I will come later.

[89] It would have been a simple matter to provide Kilham Mews Limited with all the necessary legal authority to carry out the development at Kilham Mews such that there could be no doubt that the company was the developer. A joint venture agreement such as was used in *Body Corporate No 188289 v Leuschke Group Architects* could have been used. Alternatively, there was no need to use a joint venture agreement at all. Mr Gailer had purchased the property on terms which allowed him to appoint a nominee. The property could have been conveyed to Kilham Mews Limited as Mr Gailer's nominee, without the addition of a trust.

[90] If Kilham Mews Limited had acquired full legal and beneficial ownership of the property, it, as a limited liability company, would have had all the necessary legal powers to carry out the development. Any control Mr Gailer and the Ohawini trustees wanted to exert over the development could have been done through their role as shareholders and directors of the company. Whilst as directors of the company they would have been bound to act in the company's interest, there is nothing to suggest their personal interests could not coincide with the company's interest.

[91] There was no legal need for the joint venture agreement to restrict the company's role to that of bare trustee or, if not bare trustee, simply of a trustee

holding legal ownership of the property with the active advancement of the development being designated to the participants. There is no legal reason why the various roles given to the participants under the joint venture agreement could not have been given to Kilham Mews Limited. The availability of clear legal mechanisms for persons to isolate or protect themselves from personal liability is a factor which causes me to conclude that had this been the intent of the participants to the Kilham Mews joint venture, they would have organised their affairs in that way. That they chose not to do so, but instead chose to enter into the form of arrangement set out in the joint venture agreement suggests they had a different intent from that of Messrs Leuschke and Cooper.

[92] The view I have reached on the parties' intended meaning results from the objective analysis I have made of the joint venture agreement when looked at in its entirety and against the factual matrix. But, it is not for the Court to take into account what the parties say they intended the contract to mean or what they say they thought it meant. Consequently, views Mr Gailer expressed during the trial on his understanding of the agreement's terms have not been taken into account. As was recognised in *Pyne Gould Guiness Ltd* at [17]:

> The law excludes from the admissible background the previous negotiations of the parties and *their declarations of subjective intent.* (emphasis added)

[93] In *Wholesale Distributors Ltd v Gibbons Holdings Ltd* (2007) 5 NZ ConvC 194,493 (SC), the majority held that subsequent conduct could be taken into account when interpreting contractual terms. Tipping J emphasised, however, the limits of subsequent conduct as an interpretative aid to the parties' intention. Shared conduct that suggested a particular meaning, or conduct that suggested a shared interpretation, would be relevant, but conduct that showed different subjective intentions would not:

> [60] … The focus must still be on objective conduct rather than expressions of subjective intention or understanding. But if the parties have together conducted themselves in the performance of their contract in a way that is relevant to the meaning of the disputed provision, the court should be able to take that into account.
>
> [63] Even if the meaning suggested by the post-contract conduct is not the most immediately obvious objective meaning, the parties' shared conduct will be helpful in identifying what they themselves intended the words to mean. That, after all, must be the ultimate determinant. If the court

> can be confident from their subsequent conduct what both parties intended their words to mean, and the words are capable of bearing that meaning, it would be inappropriate to presume that they meant something else.

[94] Similarly, Anderson J held at [73]:

> A party seeking to rely on post-contract conduct would have to show conduct on the part of all the contracting parties in order to demonstrate a shared and not merely an individually held meaning.

[95] The post-contract conduct of Kilham Mews Limited and of Mr Gailer is consistent with my understanding of the joint venture agreement. The evidence of this conduct reveals that Celestar Properties Limited (the builder responsible for constructing units 5 to 10 under a labour only contract) contracted directly with Mr Gailer. The written contract is between Celestar Properties Limited and Merceder Homes, which is a trading name used by Mr Gailer. The labour only contract for the construction of units 1 to 4 was between S and D Builders (which appears to be the trading name of a builder, Shane Campbell) and Brian Gailer of Merceder Homes. The bulk of the invoices for work done or goods supplied for the buildings' construction were made out to either Mr Gailer or one of his trading names, those being Merceder Homes and B and S Construction, or mis-spelt variations of those names. This is consistent with clause 7.1 which was premised on Mr Gailer being the one responsible for contracting with others to advance the project. The plans for the buildings at Kilham Mews were addressed to Brian Gailer of Merceder Homes. McGuigan Syme, the consulting engineers for the project, addressed their producer statement to Merceder Homes, which is consistent with them seeing Mr Gailer as the person with whom they had contracted.

[96] This is not to say that no documents relating to the construction revealed the involvement of Kilham Mews Limited. The application for a building consent was made in the name of Kilham Mews Limited. The communications from the North Shore City Council's Development Services branch were addressed to Kilham Mews Limited. However, since Kilham Mews Limited was the registered owner on the property's Certificate of Title, there is nothing in the local authority communicating with Kilham Mews Limited that would contradict the view I have formed that Mr Gailer was a developer of the project.

[97] Mr Gailer sought to explain the evidence showing involvement of himself, through reference to his names and the trading names he used, on the basis the others were confused, or he had used his trading names as he had a business history with the persons he was dealing with. I do not accept his explanations. By personally contracting with trade suppliers for items for the Kilham Mews development, Mr Gailer was assuming legally binding contractual liabilities. This pattern of conduct is consistent with the role of Mr Gailer under the joint venture agreement and is expressly referred to in clause 7. It follows that there is nothing in the post-contractual conduct to suggest the joint venture agreement should be understood to operate differently from how I have read its terms. Nor does the post-contractual conduct support the possibility that there might have been a subsequent variation to the agreement that significantly altered the role and responsibilities of Mr Gailer and of Kilham Mews Limited such that the company became the sole developer.

[98] I find, therefore, that the joint venture agreement was entered into by a group of individuals for the purpose of developing the residential development at Kilham Mews. The clear intent of the joint venture agreement was that the participants were to have an active role and necessary discretionary authority to achieve the purpose of the joint venture, with Kilham Mews Limited having no more than a purely passive role as bare trustee of the legal ownership of the property. This may be sufficient to constitute Kilham Mews Limited a developer. Whether it does or not is not of much concern. The real concern is whether or not the role of the company as developer was such as to exclude the joint venture participants from also being developers. I cannot see how the company's role could do so.

[99] This leaves me to conclude that the developers of Kilham Mews either were, or included, an unincorporated association of natural persons. I consider that the participants in the joint venture agreement were developers of Kilham Mews. When looked at in this way, Kilham Mews Limited, although not a participant under the joint venture agreement, might still be seen as one of the developers, insofar as it had the very limited role of retaining legal ownership of the property as a bare trustee. On another view, Kilham Mews Limited would not be a developer at all and the developers would be the two participants under the joint venture agreement that carried out their respective active roles under that agreement. It is not necessary to determine which is the correct version because, under either version, Mr Gailer in his

personal capacity is one of the developers of Kilham Mews Limited. He was a participant having an active role in a joint venture which had as its purpose the development of the buildings at Kilham Mews. There is nothing in the joint venture agreement that in any way diminishes the impression I have that Mr Gailer was one of the developers of Kilham Mews. Accordingly, he cannot avoid the liability the law of negligence attaches to a developer of residential buildings for carelessly creating defective buildings.

The liability of Mr Gailer as project manager

[100] As an alternative claim against Mr Gailer, the plaintiffs allege he is liable for their loss as a result of being the project's manager. To succeed on this cause of action, the plaintiffs must establish that Mr Gailer carried out the task of the project manager and, in doing so, owed them a duty of care to ensure that the construction work was carried out with due skill and care.

[101] In *Bowen v Paramount Builders*, the Court of Appeal found that contractors, architects and engineers are all subject to a duty to use reasonable care to prevent damage to persons whom they should reasonably expect to be affected by their work. The plaintiffs contend that someone who assumes the task of managing a construction project for residential buildings owes the same duty in law as do the contractors, architects or engineers involved in those projects.

[102] In principle, I can see no reason why someone who takes on the task of managing the construction of a residential development should not incur the same liability as is imposed on contractors, architects and engineers. In this regard a project manager is no different from any other contractor or subcontractor who performs a role in the construction process that is capable of affecting the quality of the result. However, whether such liability arises in any given case will turn on the particular circumstances. An enquiry into the responsibilities attached to the particular role, as well as the actions and omissions of the person who occupied that role, will be necessary.

[103] Under the joint venture agreement Mr Gailer took on a role described as manager of the project. I equate that expression with the term project manager. In

any event, the nomenclature is not decisive; it is the role to be undertaken that will be determinative of liability.

[104] Whether Mr Gailer's role as project manager is seen as being integral to his role as developer under the joint venture agreement or a separate role does not seem to me to be relevant for the purposes of determining whether or not liability can attach to him for any careless actions or omissions in discharging his responsibilities as project manager. I have already found him to be liable as a developer by virtue of the non-delegable duty of care developers owe to purchasers and subsequent purchasers to ensure due skill and care are exercised in the carrying out of construction work. But, for the purpose of determining whether he can be found liable as a project manager under the principle in *Bowen v Paramount Builders*, it is necessary to look at his role in the development from a different perspective. This is because the liability the law imposes on contractors, architects or engineers and *a fortiori* project managers of construction projects such as Kilham Mews is different in some respects from the liability which is attached to developers of those projects.

[105] The principle to be derived from *Bowen v Paramount Builders* will apply to anyone having a task in the construction process (either as contractor or subcontractor) where the law expects a certain standard of care from those who carry out such tasks. Such persons find themselves under a legal duty not to breach the expected standard of care. This duty is owed to anyone who might reasonably be foreseen to be likely to suffer damage. It is now necessary to look at the facts relating to Mr Gailer to see how they fit with this legal principle.

[106] The principle in *Bowen* that contractors, architects and engineers are all subject to a duty to use reasonable care to prevent damage to persons whom they should reasonably expect to be affected by their work has already been recognised to extend to project managers. In *Shepherd and Ors v Lay and 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 a residential building project, the likelihood of careless workmanship and defective construction

resulting from poor and careless management would be reasonably foreseeable to that person.

[107] In *Body Corporate No 188289 v Leuschke Group Architects* Harrison J identified the cornerstone of liability as being the assumption of a degree of personal responsibility for an item of work which was subsequently proved to be defective. It follows that someone who takes on the role of project manager of a residential construction project assumes a degree of responsibility for ensuring that the work is performed with reasonable skill and care.

[108] In *Bowen* the Court of Appeal found that compliance with contractual duties could not be used as a shield against an action in negligence by a third person but that the nature of contractual duties could have considerable relevance in deciding whether the contractor/subcontractor had been negligent or not. It is, therefore, important to look at the nature of the contractual duties Mr Gailer was required to perform as project manager under the joint venture agreement, as well as to look at what, in fact, he did.

[109] Under the joint venture agreement Mr Gailer's obligations were:

> Management and construction:
>
> 7.1. Gailer is appointed manager of the project and shall carry out and perform the daily management and control of the joint venture business including (but without limitation) the following functions:
>
> a) The arranging for floor plans, specifications and working drawings for the development for submission to and approval of the joint venture;
>
> b) The obtaining of building consents in respect of construction work;
>
> c) The arranging of the sale of the completed project;
>
> d) The financial administration for the joint venture and payment of all accounts due in respect of the construction work and the receipt of funds owing to the joint venture.
>
> …
>
> 7.5 Gailer shall cause the buildings to be constructed in a good and workmanlike manner in strict accordance with the plans and specifications prepared and agreed to by the participants before construction commences and in strict accordance with any building

contract executed between Kilham as trustee for the joint venture and the construction contractor.

[110] Clause 7.1 did not impose any specific obligations relating to the construction of the dwellings at Kilham Mews. However, clause 7.5 expressly obliged Mr Gailer to ensure the dwellings were constructed in a "good and workmanlike manner". I consider the standard of workmanship this phrase implies would at least include ensuring the dwellings were weather-tight. Buildings that have been so defectively constructed that they now suffer from leaky building syndrome and will be cured by nothing short of re-cladding their external walls, as well as the other repairs I have found to be necessary, clearly do not meet the standards under clause 7.5.

[111] The construction plans did not include detailed specifications of the type of construction methods to be adopted. There was expert evidence on the importance of such specifications. I consider the absence of such specifications placed a greater burden on Mr Gailer as the project manager to ensure that the builders adopted sound construction methods. In such circumstances a project manager who properly discharged his task of ensuring the buildings were constructed in a good and workmanlike manner would have acted to ensure methods were used that resulted in weather-tight buildings. That this did not occur reflects a failure on the part of Mr Gailer to perform the task of project manager in accordance with the expected standard.

[112] There was evidence that Mr Gailer was regularly on the construction site. He was assigned the role of project manager under the joint venture and received payment for carrying out the role. His own evidence was that he:

a) Arranged for the building consent to be obtained;

b) Obtained plans and specifications;

c) Got the various trades people organised;

d) Arranged for materials to be supplied;

e) Made sure the work was proceeding smoothly;

f) Took care of payments to contractors for the whole project;

g) Dealt with all the accounts;

h) Was responsible for the paperwork;

i) Appointed real estate agents to sell the properties;

j) Managed the project;

k) Made sure things were happening;

l) Visited the site, according to him, on average three or four times a week to make sure that the building was progressing smoothly;

m) Checked whether the builders needed any materials;

n) Performed cleaning up work.

The above tasks are consistent with Mr Gailer being the project manager.

[113] Mr Gailer qualified this account of his activities by asserting that he undertook them in his capacity as a director of Kilham Mews Limited. However, I have already found that Kilham Mews Limited was no more than a bare trustee and had no active role in or authority to execute any part of the development. I do not accept, therefore, that Mr Gailer undertook these tasks as a director of Kilham Mews Limited. The participants in the joint venture were the developers of the project. Under the joint venture agreement Mr Gailer, not Kilham Mews Limited, was appointed as the project manager. Mr Gailer carried out tasks associated with the role of project manager. There is nothing in the evidence to persuade me that Mr Gailer performed these tasks as a director of Kilham Mews Limited.

[114] Mr Gailer also attempted to suggest that other persons carried out the role of project manager. But, I have seen no evidence to persuade me that someone other than Mr Gailer performed this role. Mr Gailer suggested that Celestar Property Developments Limited was engaged to oversee construction. However, he later

confirmed that the written contract between himself and that company set out the terms of Celestar's engagement. As stated in the contract, those terms did not include project management. Mr Gailer also attempted to suggest that Mr Norrish had been engaged as project manager. This assertion was based on a reference in one of Mr Norrish's invoices to a $2,000 management fee. There was no evidence as to what was covered by this fee. A fee of this amount is far removed from the fees payable to someone responsible for management of the project. I am not prepared to accept on the strength of this evidence that Mr Norrish was the project manager.

[115] In my view, the only reasonable inference to be drawn from all the evidence is that Mr Gailer carried out the task of project manager. That he did so in a manner which failed to meet the standard of care the law expected of someone with this task has been a cause of the defective workmanship that is a characteristic of the buildings at Kilham Mews. It follows that I find he is liable on the plaintiffs' alternative cause of action as well.

Loss

[116] In cases of defective buildings, the measure of damage is cost of repairs, when repairing the damage is reasonable, otherwise it is the buildings' depreciation in market value: *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 at 526.

[117] In this case some defendants have settled with the plaintiffs. This has given the plaintiffs some measure of recovery. I propose to adopt an approach whereby I will identify the loss I consider the plaintiffs have suffered and the amounts they in principle would be entitled to recover. Once those amounts are quantified, the parties will be in a position to determine what amounts remain recoverable after the settlement sum is taken into account. I will reserve leave to the parties to come back to Court to resolve this issue should they be unable to agree over the sum that remains outstanding and how it is to be apportioned between the plaintiffs. Most of the damage has been to the individual units. This means the loss each of the second plaintiffs has suffered and the impact of the settlement payments on that loss will need to be identified before a judgment sum for each such plaintiff can be entered.

First plaintiff

[118] The first plaintiff is only entitled to recover loss arising from damage to common property. The only common property that has suffered damage as a result of the defendants' breaches of their duty of care is the roof of the carport to unit 1. The unchallenged estimated cost of repairing this damage is $618.75. I find, therefore, that the first plaintiff is entitled to that amount.

Units 5 and 6

[119] Units 5 and 6 have already been repaired. The evidence was that the repair costs for both units came to $290,974.27. I am satisfied on the evidence I have heard that the repair work undertaken for these units was necessary in order to ensure they reached a proper workmanlike standard of construction. It follows that I consider the owners of units 5 and 6 (the plaintiffs Gavin Tiffen, unit 5, and Robert and Rhonda Jackson, unit 6) are entitled to recover the sum of $290,974.27.

[120] Since the owners of units 5 and 6 have already paid for the cost of the repairs they seek interest on the sum of $290,974.27. I consider that they are entitled to interest under the Judicature Act 1908. Such interest is to be calculated from the date of the proceedings' commencement.

[121] Unit 5 was rented out. Mr Tiffen also seeks lost rental to cover the period of a rent reduction by $120 for 22 weeks over the time of the repairs. This comes to a total of $2,640. Lost rental in such circumstances has been recognised as a consequential loss that is recoverable: *Body Corporate No 189855 & Anor v North Shore City Council & Ors* at [39]. I consider that Mr Tiffen is entitled to receive $2,640 to cover that loss.

[122] The owners of units 5 and 6 also seek general damages at $25,000 per individual. They gave evidence of the personally damaging effects of the buildings defects on them. This evidence was unchallenged. I am satisfied that the owners of units 5 and 6 are entitled to an award of general damages.

[123] General damages of $25,000 per individual owner is in line with sums of general damages awarded in other leaky building cases: *Dicks* at [123]; and *Body Corporate 188529 & Ors v North Shore City Council & Ors* (Judgment No 4) at [33] to [39]. In this case I consider $25,000 to be an appropriate sum for those plaintiffs who are owner-occupiers of their units. Mr and Mrs Jackson were owner-occupiers until their marriage ended, which is something they attribute to the stress of owning a leaky building. I consider they each are entitled to an award of $25,000 in general damages. In Mr Tiffen's case he has not occupied unit 5 since 2003. He chose to rent the property out from that time. Whilst I can accept that he has nonetheless suffered some personal stress from the unit's defects, I consider that the experience of owning a leaky building would be less stressful for him than for someone who has to live with the defects on a day to day basis. This view is consistent with that taken in *Body Corporate 189855 & Anor v North Shore City Council* at [399]. Therefore, the award of general damages Mr Tiffen is entitled to should be less than $25,000. I consider that $15,000 is a more appropriate sum.

Unit 2

[124] Mr Lau, the owner of unit 2, purchased the unit from Mr Gaitley (who was the owner of units 1 and 2 and is now the owner of unit 1) knowing it was a leaky building. The unchallenged value of the unit as at 9 August 2005 (when Mr Lau purchased it), if not defective, was $360,000. It was sold for $269,000. The loss on sale was $91,000. There has been no challenge to the valuation evidence. The vendor has assigned his chose in action to Mr Lau who seeks judgment on the loss of $91,000, together with interest from that date under the Judicature Act 1908. I find that Mr Lau having taken the assignment of Mr Gaitley's chose in action regarding unit 2 is entitled to recover the loss of $91,000.

[125] Mr Lau is also entitled to interest under the Judicature Act. The interest is to run from the date the proceedings were commenced.

[126] Mr Lau also seeks an award of general damages. In my view an award of general damages is personal. I do not consider it is capable of being assigned to another person. Furthermore, the property was sold to Mr Lau in 2005. At that time Mr Gaitley had only recently learned of the leaky building problem. Insufficient

time had passed for Mr Gaitley to experience the stress and anxiety of a kind that could support an award of general damages. Accordingly, Mr Lau's claim for an award of general damages fails on two grounds.

Remaining Units

[127] The remaining seven units are yet to be repaired. The costs of repairing them are estimated to be:

Unit	**Unit Owner**	**Total (including GST)**
1	K J Gaitley	$127,602.72
3	Djimindi Property Investments Ltd	$ 97,197.05
4	N Y and W Y Chan	$145,795.43
7	P Cox	$145,101.78
8	P G and P L Kerrigan	$ 95,082.23
9	H T C and W T Wang	$113,106.74
10	L G and M M Somerville	$ 97,335.91
		$821,221.86

I accept the evidence of the plaintiffs on this topic. There was no challenge to the plaintiffs' evidence quantifying the costs of repairs. The costs seem to me to be within the range of repair costs spent on units 5 and 6. I consider, therefore, that the plaintiffs are entitled to recover the above sums as costs of repairs for their units.

[128] Like unit 5, units 1, 3, 8 and 9 were rented out. The owners of those units will suffer a loss of rental. The plaintiffs estimate this loss to be approximately the same as that lost by Mr Tiffen. I accept the plaintiffs' estimate as reasonable. Recovery of such loss was considered to be reasonably foreseeable in *Body Corporate No 189855 & Anor v North Shore City Council & Ors*. It follows that I find the owners of units 1, 3, 8 and 9 are each entitled to recover consequential losses of $2640 to cover the lost rental.

[129] I consider that these plaintiffs are also entitled to an award of interest under the Judicature Act 1908 to be calculated from the date of the proceedings commencement.

[130] The owners of units 1, 3, 4, 7, 8, 9 and 10 also seek general damages to compensate them for the loss of amenities they have suffered through their properties being leaky buildings. Each owner seeks the sum of $25,000 as general damages. Where a unit is jointly owned, each owner seeks general damages of that amount. The unchallenged evidence of the owners of units 4 (Wan Yee Chan and Noon Yeun Chan), 7 (Peter Cox) and 10 (Lindsay and Mary Somerville) demonstrates they each have suffered loss of amenities and anxiety as a result of finding their homes are leaky buildings. For the reasons given in respect of the owners of units 5 and 6, I also find that the owners of units 4, 7 and 10 are each entitled to $25,000 in general damages. The owners of the remaining units (1,3,8 and 9) do not occupy their units. Consequently, the damage they have personally experienced from their units' defects is not as great as it is for owner-occupiers. For the same reasons as relate to Mr Tiffen, I consider that these plaintiffs are each entitled to a lesser award of general damages of $15,000 each.

Summary of damages

	Estimated cost of Repair	General Damages	Loss of Rental
Body Corporate	$618.75		
Unit 1	$127,602.72	$15,000	$2,640
Unit 2	$91,000 (loss of value)		
Unit 3	$97,197.05	$15,000	$2,640
Unit 4	$145,795.43	$25,000 (x 2)	
Unit 5	See below	$15,000	$2,640
Unit 6	See below	$25,000 (x 2)	
Unit 7	$145,101.78	$25,000	
Unit 8	$95,082.23	$25,000	$2,640
Unit 9	$113,106.74	$15,000	$2,640
Unit 10	$97,335.91	$25,000 (x 2)	

Units 5 and 6 $290,974.27 repair costs.

Cross-claims

First and third defendant's contribution claims against each other

[131] The North Shore City Council has a claim seeking contribution from Mr Gailer. The Council and the fifth third party have settled with the plaintiffs. The

Council is entitled to seek contribution towards its settlement payment from other tortfeasors found to be liable for the damage the plaintiffs have suffered. Since I have found Mr Gailer to be liable as a developer and in the alternative as project manager, the Council is entitled to judgment against him.

[132] Similarly, Mr Gailer seeks contribution from the North Shore City Council.

[133] The usual apportionment of liability in cases of this type is to hold the developer liable for four-fifths and the local authority liable for one-fifth of the damage. I see no reason to depart from that approach here.

Third defendant's claims against third parties

[134] Mr Gailer has served third party notices against Celestar Property Developments Limited as first third party; G L Norrish as second third party; S Campbell as third third party; and I Driver as fourth third party. The Court file shows that none of the persons have filed statements of defence to the notices. Proof of service on those persons was filed in Court on 9 February 2007. Since they have taken no steps to defend the claims made against them, I consider that Mr Gailer is entitled to judgment against them on liability. As regards proof of the quantum of the claims, Mr Gailer has not addressed the question of apportionment of the loss as between each third party. Leave is reserved to Mr Gailer to return to Court on this issue.

[135] Leave is reserved to the parties to file costs memoranda.

Result

[136] The plaintiffs have proved their claims against Mr Gailer. They have also proved their entitlement to recover the loss that flows from those claims. Entry of judgment on liability and damages is deferred until such time as the plaintiffs have established the quantification of their losses taking into account the sums of money already received from other defendants by way of settlement.

[137] The first defendant has proved its claim in contribution against Mr Gailer. The apportionment of the loss for which the defendants are liable is four-fifths for Mr Gailer and one-fifth for the first defendant. Entry of judgment is deferred until such time as the plaintiffs have established the quantification of their losses taking into account the sums of money already received from other defendants by way of settlement.

[138] Mr Gailer has proved his claim in contribution against the first defendant. Entry of judgment is deferred until such time as the plaintiffs have established the quantification of their losses taking into account the sums of money already received from other defendants by way of settlement.

[139] Mr Gailer's third party claims will be dealt with in a separate judgment once he establishes the appropriate apportionment of loss as between the third parties.

[140] Quantification of the interest awarded under the Judicature Act is required. Leave is reserved to the parties to return to Court on this issue.

[141] The parties have leave to file memoranda on costs awards.

Duffy J