

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV 2009-404-301

BETWEEN	RAMAN RANCHHODJI PATEL Appellant
AND	RAYMOND MARTIN OFFORD AND SUSAN MARIE OFFORD First Respondents
AND	AUCKLAND CITY COUNCIL Second Respondent
AND	RICHARD JOHN PEARSON Third Respondent
AND	PETER PHILLIPS SR Fourth Respondent
AND	CLIVE PARKER Fifth Respondent

Hearing: 9 June 2009

Counsel: G D R Shand for Appellant
No appearance by or on behalf of First Respondents
F Divich for Second Respondent
J N Bierre for Third Respondent (leave to withdraw granted)
D A Cowan for Fourth Respondent (leave to withdraw granted)
No appearance by or on behalf of Fifth Respondent

Judgment: 16 June 2009

JUDGMENT OF HEATH J

This judgment was delivered by me on 16 June 2009 at 9.30am pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Introduction

[1] Mr Patel appeals against a decision given in the Weathertight Homes Tribunal (the Tribunal) on 5 December 2008. He does not dispute liability but challenges the Adjudicator's finding that he was a "developer" and the contribution that he ought to make to co-defendants as a joint tortfeasor.

Background

[2] In 1995 Rite Price Construction Ltd acquired land in John Rymer Place, Kohimarama. Mr Patel was the sole director and principal shareholder of that company. The intention was to build two dwellings on the property, one for Mr Patel and his wife to occupy and the other to sell.

[3] Construction on the first house began early in 1996. That dwelling was completed by October 1997. Around August 1998, construction of the second house began. That was completed in January 1999.

[4] Mr and Mrs Offord bought the second dwelling. They occupied it until mid 2004. When they placed the property on the market for sale, a prospective purchaser obtained a pre-purchase inspection report. Serious defects in waterproofing were identified. The sale did not proceed.

[5] Mr and Mrs Offord brought claims in the Tribunal to recover damages. Mr Patel and Rite Price Construction Ltd were sued as project managers and developers. The Auckland City Council (the Council) was sued as the territorial authority with obligations to inspect the premises before issuing a code compliance certificate. Mr Pearson, (the architect), Mr Phillips, (the builder) and Mr Parker (the plasterer) were also sued, in respect of work undertaken by each.

Proceedings in the Tribunal

[6] In accordance with the Tribunal's usual practice, an Experts' Conference was convened on 3 October 2008. It was attended by representatives of Mr and Mrs Offord, Mr Patel and Mr Pearson. An assessor appointed by the Weathertight Homes Resolution Service was also present. Remedial costs were also agreed, in a total sum of \$403,220.15 (the proved remedial costs).

[7] The experts agreed that there were five significant causes of damage to the house. They were:

- a) The balustrade walls were waterproofed inadequately. These walls were around the balconies, the garage and the deck. This defect represented approximately 40% of the proved remedial costs.
- b) The parapet walls were waterproofed inadequately. They were the lower walls around the outside of the decks and the garage, containing the guttering. These defects represented 30% of the proved remedial costs.
- c) Failure to install side or sill flashings around the aluminium windows and doors. This represented 25% of the proved remedial costs.
- d) In several locations, plaster had been penetrated as a result of inadequate sealing or flashing; an example being around the area of an electric meter box. These factors caused 2.5% of the proved remedial costs.
- e) Inadequate ground clearance in the south eastern corner of the garage. This defect allowed water to seep into the stucco cladding from ground level. This caused 2.5% of the proved remedial costs.

The Tribunal's decision

(a) Liability

[8] The Adjudicator (Mr S G Lockhart QC) found that Mr and Mrs Offord had proved their claim and awarded damages in the amount agreed as proved remedial costs.

[9] Mr Patel was held liable in tort, both as a project manager and developer, for failing to supervise the building work adequately.

[10] The Council was held liable on the basis that it failed to inspect work carried out to erect the dwelling in accordance with the building consent that it had issued and for certifying negligently compliance with the Building Code.

[11] Mr Pearson was held responsible for failing to draw plans containing adequate detail for the balustrade positioning and failing to specify materials to be used in its construction and capping. While the Adjudicator accepted that variations to the plans were made during the course of building work, he held that Mr Pearson should have drawn Mr Patel's attention to the fact that the drawings did not provide sufficient detail, in respect of a sloped timber capping required for the balustrade.

[12] Mr Phillips was engaged as a "labour only" contractor to carry out carpentry work on the property. He was neither a master builder nor a registered builder. Mr Phillips accepted in evidence that he was responsible for "a greater part of the construction of the dwelling, which included the framing and the installation of the windows": see the Adjudicator's decision at para [88]. The Tribunal held that Mr Phillips was negligent in two respects:

- a) first, in constructing inadequately the flat top balustrade walls and
- b) second, in installing inadequately the Hardibacker.

[13] Mr Parker did not participate in the adjudication process. Nevertheless, on the evidence given at the hearing, the Adjudicator found that he undertook negligently some of the plastering work, both in respect of the Hardibacker and the block wall. The Adjudicator accepted evidence from Mr Phillips that the flashings for the windows were the responsibility of the plasterer.

(b) Contribution

[14] For the purpose of assessing contributions to the damages ordered, as among the five joint tortfeasors, the Adjudicator said:

[109] Mr Patel has responsibility for all five major causes of damage. It was Mr Patel's responsibility as the developer and the project manager to carry out and ensure that the building works of the house were carried out in accordance with the Building Consent and the Building Code.

[110] [The Council's] role was to inspect as it progressed the building work of the house and grounds. The Tribunal has held that there were failures by the third respondent in respect of inspecting and observing errors in the construction work, and then ensuring that such errors were eliminated.

[111] ..., Mr Pearson the architect, owed a duty of care in respect of the building plans which he drew. It has been held that his plans lacked sufficient detail in respect of the parapets and balustrade.

[112] ..., Mr P Phillips, was a "labour-only" carpenter and his liability is limited to a very large extent as he relied on directions received from the first respondent.

[113] ..., Mr C Parker, owed a duty of care in respect of the plastering work he carried out. The deficiencies in the plaster work was his responsibility.

[15] The Adjudicator assessed each liable party's contribution by reference to the percentage of total loss caused by each defect. In tabulated form (taken from the decision under appeal), the calculations are set out below:

Defect 1 – 40% of total cause of damage – Balustrade			
	% of total liability (joint and several)	% of respondents' apportionment for defect 1	% of total liability
Mr Patel	100	40	16
Auckland City Council	100	22.5	9
Mr Pearson	100	17.5	7
Mr Phillips	100	10	4
Mr Parker	100	10	4

Defect 2 – 30% of total cause of damage - Parapets			
	% of total liability (joint and several)	% of respondents' apportionment for defect 2	% of total liability
Mr Patel	100	50	15
Auckland City Council	100	30	9
Mr Pearson	0	0	0
Mr Phillips	100	10	3
Mr Parker	100	10	3

Defect 3 – 25% of total cause of damage – Window joinery			
	% of total liability (joint and several)	% of respondents' apportionment for defect 3	% of total liability
Mr Patel	100	64	16
Auckland City Council	100	8	2
Mr Pearson	0	0	0
Mr Phillips	0	0	0
Mr Parker	100	28	7

Defect 4 – 2.5% of total cause of damage - Penetrations			
	% of total liability (joint and several)	% of respondents' apportionment for defect 4	% of total liability
Mr Patel	100	60	1.5
Auckland City Council	100	40	1
Mr Pearson	0	0	0
Mr Phillips	0	0	0
Mr Parker	0	0	0

Defect 5 – 2.5% of total cause of damage – Ground clearance			
	% of total liability (joint and several)	% of respondents' apportionment for defect 5	% of total liability
Mr Patel	100	60	1.5
Auckland City Council	100	40	1
Mr Pearson	0	0	0
Mr Phillips	0	0	0
Mr Parker	0	0	0

TOTAL	Total % of liability	Total % of apportionment
Mr Patel	100	50
Auckland City Council	100	22
Mr Pearson	40	7
Mr Phillips	70	7
Mr Parker	95	14

The appeal

[16] The appeal is brought under s 93 of the Weathertight Homes Resolution Service Act 2006. The appeal is by way of re-hearing.

[17] To the extent that the Court is asked to interfere in the apportionment of contribution as among joint tortfeasors, it may do so if satisfied that the Adjudicator's decision was "unreasonable": *Steel Structures Ltd v Rangitikei County* [1974] 2 NZLR 306 (CA) at 309-310.

[18] Mr Pearson, the architect, cross appealed against Mr Patel, in relation to the calculation of their respective contributions as joint tortfeasors. However, before the hearing counsel for those parties reached an accommodation whereby each abandoned their appeal against the other, with no order as to costs. Mr Bierre, for Mr Pearson, was given leave to withdraw.

[19] Mr Parker took no steps on appeal.

[20] Mr Phillips has advised the Court that he will abide the outcome of the appeal. He cannot afford to participate further and makes it clear that if his contribution were increased, he intends to take steps to adjudge himself bankrupt. Counsel for Mr Phillips, Mr Cowan, was given leave to withdraw at the commencement of the hearing.

[21] As Mr and Mrs Offord have received an award in their favour, they did not participate in the appeal.

Competing submissions

[22] Mr Shand, for Mr Patel, submits that the Judge ought not to have found Mr Patel to be a "developer" of the property. He submits that that finding coloured the Adjudicator's view of Mr Patel's role in the development and resulted in an excessive assessment of his contribution to the causes of loss.

[23] By reference to s 17(1) and (2) of the Law Reform Act 1936, Mr Shand submitted that the assessment of Mr Patel's contribution to the loss was unreasonable. He identified the need for the Court to consider both the causative potency of conduct of a particular defendant and the relative blameworthiness of the parties. Mr Shand referred to *Farry v Carter* (High Court Wellington, CP 123/997, 4 December 1998, Gendall J) at p 14 and *Aberdeen v Township of Langley* [2007] BCSC 993 at paras [62] and [63].

[24] In short, Mr Shand's complaint was that Mr Patel had been held responsible in respect of defects for which others carried out the primary work. For example, in relation to the balustrades and parapets, he submitted that both Mr Phillips and Mr Parker, as those responsible for construction, ought to have borne the bulk of responsibility.

[25] In relation to the problems arising from inadequate joints to the windows, Mr Shand submitted that Mr Patel's liability had been fixed far too high, particularly in relation to the apportionments made in respect of both the Council and the plasterer.

[26] Mr Shand accepted that Mr Patel's liability could not be less than that required of the Council.

[27] Ms Divich, for the Council, submitted that this was not a case in which it was appropriate for me to interfere with relative contributions to loss determined by an Adjudicator who heard and saw witnesses give evidence over a period of 7 days. She submitted that the contribution findings made by the Adjudicator were open to him on the evidence and ought not to be disturbed on appeal.

[28] On the finding that Mr Patel was a "developer", Ms Divich relies on my judgment in *Body Corporate 199348 v Nielsen* (High Court Auckland, CIV 2004-404-3989, 3 December 2008) in which I expressed the view that the word "developer" was not a term of art. She submitted that all that was required was a determination of relative responsibility of a tortfeasor, irrespective of the label used to describe his or her role in a building development.

Analysis

(a) *The “developer” finding*

[29] A “developer” owes a non delegable duty to an owner of a property: see *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA). That duty extends, in some cases, to directors of corporate developers: *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548 (HC) at 595; cf *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 597 (CA) at 523 (Cooke P). However, I do not consider that the term used to describe the functions carried out by an individual is determinative, for the reasons I gave in *Nielsen*, at paras [66] and [67].

[30] Mr Patel does not dispute liability. The Adjudicator explained Mr Patel’s role:

[27] Mr Patel acknowledges that he undertook the role of project manager in the building of the subject dwelling, as he was responsible for undertaking the following tasks:

- (a) he applied for and was granted the building permit;
- (b) called for inspections by the Auckland City Council;
- (c) entered into a contract with many of the labourers and arranged for materials to be delivered in his own personal name as opposed to using the name of the second respondent company;
- (d) he had previous experience as a project manager;
- (e) he was on the site early each day and stayed on site for most of the day;
- (f) he was involved in the overall control of the construction of the house;
- (g) he was regularly involved in giving directions to the contractors and explaining the work that he wanted done;
- (h) he physically carried out some of the work himself, such as the cladding up the hardibacker; and
- (i) he did not employ an architect or a project manager or a construction manager to oversee the construction of the house.

...

[30] ... in addition to Mr Patel's involvement as a project manager ..., Mr Patel also:

- (a) held an architectural qualification;
- (b) selected and approved the contractors and the supplies of materials;
- (c) made alterations or authorised changes from the architect's drawings or plans;
- (d) no other individual or individuals were employed as developers;
- (e) together with his wife, were the only persons who would gain financially if a profit was obtained.

[31] In my view, it was unnecessary for the Adjudicator to make any finding that Mr Patel was a “developer”, of the type to which the *Mount Albert Borough Council v Johnson* duty attached. The finding was unnecessary for the reasons set out in *Nielsen*, at paras [66] and [67]. All that was required was for the Adjudicator to weigh in the balance the tasks undertaken by Mr Patel in relation to work undertaken negligently by other actors and then to determine relative contributions to the damages awarded.

[32] In holding that the finding that Mr Patel was a “developer” was unnecessary, I do not criticise the Adjudicator. My judgment in *Nielsen* was delivered only two days before the Adjudicator’s decision was released.

(b) Contribution issues

(i) Principles

[33] The tables set out at para [15] above identify clearly the percentage of responsibility attributed to each negligent party in relation to each defect. Those percentage calculations have been made first on the basis of the percentage of the particular cause to the total damage, from which a percentage figure relative to the total liability of all joint tortfeasors has been extrapolated.

[34] Section 17(2) of the Law Reform Act 1936 mandates the test to be applied in determining the amount of contribution recoverable as between joint and several

tortfeasors. The touchstone is what a Court finds “to be just and equitable having regard to the extent of that person’s responsibility for the damage”.

[35] The question of contribution for apportionment of liability is an exercise in judgment. It is not a mathematical exercise. In *British Fame (Owners) v MacGregor (Owners)* [1943] AC 197 (HL) at 201, Lord Wright (from whom other members of the House did not demur on this point) emphasised that the assessment was directed at the degree of fault and was different in kind from “a mere finding of fact in the ordinary sense”. His Lordship described the question as one of “proportion, of balance and relative emphasis”, through weighing different considerations. It was acknowledged that the assessment of contribution involved “an individual choice or discretion, as to which there may well be differences of opinion by different minds”.

[36] In *British Fame*, the House of Lords also expressed views on the extent to which it might be appropriate for an appellate court to interfere with an assessment made by a trial Judge on questions of contribution. Viscount Simon LC opined “that the cases must be very exceptional indeed in which an appellate court, while accepting the findings of fact of the Court below as to the fixing of blame, nonetheless has sufficient reason to alter the allocation of blame made by the trial Judge”: at 198-199. The remaining members of the House agreed with those observations. As Lord Simon recognised, existence of a general rule does not exclude the possibility that such a case might exist.

[37] That approach to appellate intervention with assessments of contribution was confirmed in *Steel Structures Ltd v Rangitikei County*. In that case, the Court of Appeal followed the principles espoused by the Lord Chancellor in *British Fame*. McCarthy P, for the Court, expressed the relevant test as follows, at 309-310:

... An appellate court is always reluctant to interfere in the allocation of what a trial court considers just and equitable. In *Hoani v Wallis* [1956] NZLR 395 this Court said that interference can be justified only if the decision was one which no reasonable body of men could arrive at on the whole of the evidence. See also Cooke J in *Hibberds Foundry v Hardy* [1953] NZLR 14. These were appeals from jury verdicts, though both decisions were founded essentially on *British Fame (Owners) v Macgregor (Owners)*, *The Macgregor* [1943] AC 197; [1943] 1 All ER 33, an appeal from a Judge in Admiralty. We are prepared to accept, however, that where

the apportionment is effected by a Judge sitting without a jury, this Court will feel less constrained in exercising its power of review, but nonetheless the task of one seeking to upset an apportionment of a trial Judge, must always be heavy for an appellate court is seldom in as satisfactory a position to arrive at a fair and equitable weighing of causative potency and blameworthiness. ...

[38] Mr Shand referred me to a list of criteria for assessing contribution, taken from a judgment of the Supreme Court of British Columbia in *Aberdeen v Township of Langley*, at [62] and [63]. Groves J (by reference to a decision of the Court of Appeal of Alberta in *Heller v Martens* (2002) 213 DLR (4th) 124 at para [34] and *Chiefetz, Apportionment of Fault in Tort* (Aurora, Ont: Canada Law Book 1981) at 102-104) identified nine factors that could be taken into account in determining relative contributions:

- a) The nature of the duty owed by the tortfeasor to the injured person.
- b) The number of acts of fault or negligence committed by a person at fault.
- c) The timing of the various negligent acts. For example, the party who first commits a negligent act will usually be more at fault than the party whose negligence comes as a result of the initial fault.
- d) The nature of the conduct held to amount to fault. For example, indifference to the results of the conduct may be more blameworthy. Similarly, a deliberate departure from safety rules may be more blameworthy than an imperfect reaction to a crisis.
- e) The extent to which the conduct breaches statutory requirements. For example, in a motor vehicle collision, the driver of the vehicle with the right of way may be less blameworthy.
- f) The gravity of the risk created.
- g) The extent of the opportunity to avoid or prevent the accident or the damage.

- h) Whether the conduct in question was deliberate, or unusual or unexpected.
- i) The knowledge one person had or should have had of the conduct of another person at fault.

(ii) Approach to appellate review

[39] The Adjudicator's reasons for assessing relative contribution are sparse. While he explained the basis for his findings of negligence the assessments of contributions tend to be conclusory in nature.

[40] Based on the authorities, I consider that it was open to the Adjudicator to assess contributions to individual defects and then to stand back to consider the total apportionment to be made. Having said that, it was important to exercise judgment on questions of overall fault and causative potency, to avoid the possibility of a purely mathematical calculation.

[41] Although the reasoning is sparse, the assessment remains one that ought not to be disturbed on appeal, having regard to the tests set out in *British Fame and Steel Structures Ltd.*

[42] It would be tinkering to gainsay the Adjudicator's evaluation of relative contributions in respect of those defects which were minor causes of the loss. So, I am not prepared to interfere with the assessments made in respect of the penetrations to the stucco cladding and the inadequate ground clearance at the base of the cladding.

[43] Mr Shand's main complaints relate to the assessment of contribution in respect of the balustrades, parapets and window joinery.

[44] During the course of argument, Mr Shand could not resist the proposition that Mr Patel's contribution could be assessed as no lower than that of the Council. His primary concern was that the contribution ordered from Mr Patel did not reflect the

roles undertaken by him as project manager, compared with the errors made by the builder and the plasterer.

[45] One point of difficulty, in determining whether there is merit in that submission, is that, as a result of the agreement reached between Mr Patel and Mr Pearson, there is no room for me to adjust the contribution to liability in respect of Mr Pearson. If that inability were to create an injustice to the Council, Mr Phillips or Mr Parker, I would be reluctant to reduce Mr Patel's contribution on the particular defect in issue.

(iii) Balustrades

[46] So far as the balustrades are concerned, Mr Shand submitted that the apportionment was unreasonable because:

- a) Messrs Phillips and Parker were physically responsible for the construction of the balustrades.
- b) Mr Pearson was the source of the design of the flat topped balustrades.
- c) The Council's expertise and statutory role in inspecting the building work to assess compliance with the Building Code and
- d) The Council's failure to identify any issues with the balustrades when it had the opportunity to do so through inspections.

[47] Mr Patel's responsibility in respect of the balustrade defect was assessed at 40%. That compares unfavourably with that of Mr Phillips and Mr Parker, both of whom were assessed at 10%. The Council's contribution was assessed at 22.5%.

[48] I agree with the Adjudicator that Mr Patel, as project manager, bore the greatest responsibility in respect of his failure to ensure that building work was undertaken properly. While Mr Phillips and Mr Parker did the actual work to

construct the balustrades, Mr Patel has acknowledged that he had responsibility for giving directions to the contractors, explaining the work that he wanted done and was involved in the overall supervision of the construction of the house: see para [27] of the Adjudicator's decision, set out at para [30] above.

[49] The Council's liability in respect of the defective work carried out on the balustrades was based on a finding that inadequate inspections were made. The Council's contribution to loss, under this head, was assessed at 22.5% compared with 40% for Mr Patel.

[50] I have no doubt that a significantly greater contribution was required of Mr Patel than the Council. His functions included co-ordination of work on site and supervision to ensure the work was carried out to an appropriate standard. That is inherent both in the acknowledgements that Mr Patel had involvement in the overall control of the site and that he regularly gave directions to those working for him. Mr Patel also had more opportunity to inspect the work than the Council inspectors.

[51] The real issue is whether Mr Patel's relative blameworthiness, in respect of the balustrade defect, ought to be assessed at a lower level because both Mr Phillips and Mr Parker's level of responsibility should be increased.

[52] The responsibility of both Mr Phillips and Mr Parker was set below that of Mr Pearson, whose design work contributed to the loss. If I were to increase the contribution required of Mr Phillips and Mr Parker on this aspect, the differential assessed by the Adjudicator, between the responsibility of Mr Pearson (on the one hand) and Messrs Phillips and Parker (on the other) would be undermined, in the absence of my ability to adjust Mr Pearson's contribution. Similarly, if I were to reduce Mr Patel's responsibility I would need to increase that of the Council. That would prejudice the Council because Mr Patel was on site at most times and had more opportunities than the Council to inspect workmanship in issue.

[53] For those reasons, I am not prepared to interfere with the assessment of contributions in respect of the balustrade defect.

(iv) Parapets

[54] Similar complaints are made in respect of the parapets. The defective work arose from the failure to comply with the Good Stucco Practice Guide and provisions of the Building Code. Mr Phillips erected the parapets, while Mr Parker plastered them.

[55] The Adjudicator assessed Mr Phillips and Mr Parker as each having a 10% responsibility in respect of this defect. The Council's contribution was assessed at 30% compared with Mr Patel's at 50%. Mr Pearson had no responsibility for this defect.

[56] The percentages assessed for the respective contributions to this cause of loss recognises that Mr Pearson bore no responsibility for what occurred. Therefore, it was necessary for the Adjudicator to assess questions of relative causal potency and culpability by reference to the roles played by Mr Patel, the Council, Mr Phillips and Mr Parker.

[57] No conceptual difficulty arises in adjusting the responsibilities of each of those actors, as nothing impacts on the position of Mr Pearson.

[58] I consider that Mr Patel must bear the primary responsibility, for the same reasons that applied with regard to the balustrade defect. He was the person on site who had responsibility for supervising the work and had greater opportunities to inspect it than did the Council inspectors. Further, it was open to Mr Patel to direct the work to be done differently or to require remedial work to be undertaken by the builder and plasterer.

[59] When those factors are taken into account (remembering that the Council does not challenge its assessed contribution) I cannot characterise the Adjudicator's apportionment of responsibility in respect of the parapet defects as unreasonable.

(v) *Window joinery*

[60] The most significant issue raised by Mr Shand concerned the contributions in respect of the installation of windows and the head flashings. The work was completed with inadequate sill flashings and no jamb flashings, contrary to the Good Stucco Practice Guide and cl E2/AS1 of the Building Code.

[61] Both Mr Phillips and Mr Parker were involved in decisions about flashings to the windows and were physically responsible for the installation of the joinery, flashings and sealant. The Council failed to inspect adequately. Mr Patel's responsibility was fixed at 64%, while the Council's and Mr Parker's contributions were fixed at 8% and 28% respectively. No responsibility for this defect was attributed to Mr Phillips.

[62] I am not prepared to interfere with the assessment in respect of Mr Phillips, even though I have some concerns about the assessment of 28% responsibility for Mr Parker and no responsibility for Mr Phillips. Fundamentally, the inadequate workmanship in respect of the joinery, flashings and sealant was caused by a failure on the part of Mr Parker to do the work to the required standard and Mr Patel's failure to check that the work had been done adequately and, if necessary, give instructions for remedial work to be undertaken. Having regard to the roles played on site by Mr Patel and Mr Parker respectively, a significant differential is required as between those two parties.

[63] On the other hand, I consider that an 8% apportionment of responsibility for the Council is far too low, given the Council's ability to inspect and to require remedial work to be undertaken. As to the ability to do that, I refer to my judgment in *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479 (HC) at para [449].

[64] In my view, Mr Patel's level of responsibility has been assessed too high in comparison to that of the Council and the Council's liability has been set too low. Adjusting the relative contributions of Mr Patel and the Council, without interfering

with the level of responsibility assessed for Mr Parker, I conclude that a proper apportionment would have been 50% for Mr Patel and 22% for the Council.

(vi) Assessment of overall contributions

[65] The only adjustment I have made to the Adjudicator's assessments is to reduce Mr Patel's level of responsibility in respect of the window joinery defects. That has had the effect of increasing the Council's level of responsibility.

[66] I eschew a mathematical approach and, instead, stand back to see where the justice of the case requires an overall contribution to be fixed, having due regard to the level of responsibility and blameworthiness of Mr Patel and the Council, in relation to the three most significant causes of damage to the building.

[67] Viewed in that context, Mr Patel's level of responsibility has generally been assessed in the vicinity of 50%; the only lower level is in relation to the balustrade defect. On the other hand, the Council's level of responsibility has broadly equated to about 25%, save in respect of the two relatively minor causes of damage arising from penetrations and ground clearances.

[68] Therefore, the overall assessments of responsibility at which the Adjudicator arrived do not seem out of kilter. Mr Patel's responsibility was assessed at 50% and the Council's at 22%. While it might be argued that the Council's could have been fixed around 25%, I do not regard an adjustment of that type to be sufficient to warrant interference with the first instance decision on the grounds that it was unreasonable.

Result

[69] The appeal is dismissed.

[70] Costs are awarded in favour of the Council against Mr Patel on a 2B basis, together with reasonable disbursements. Both costs and disbursements shall be fixed by the Registrar.

[71] Before the appeal hearing began, I stayed a bankruptcy notice against Mr Patel pending determination of this appeal. On delivery of this judgment, that stay is lifted.

P R Heath J

Delivered at 9.30am on 16 June 2009

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