IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2010-100-000109
[2011] NZWHT AUCKLAND 70

BETWEEN	JASON GLEN LANDON AND SHARON MARY PEACE Claimants
AND	AUCKLAND COUNCIL First Respondent
AND	DMITRI AND ANNA LECHTCHINSKI Second Respondents
AND	GRAHAM MURRAY (Struck Out) Third Respondent
AND	ALAN MARK MATTHEWS Fourth Respondent
AND	KEITH BERNARD MIDDLETON Fifth Respondent
AND	IAG NEW ZEALAND LIMITED Sixth Respondent

Hearing:	29, 30 November and 8 December 2011
Appearances:	Andrew Steele, for the Claimants Frana Divich for the First Respondent Lawrence Ponniah for the Second Respondent Adina Thorn for the Fourth Respondent Timothy Bates for the Fifth Respondent Amy Shakespeare and Chris Hlavac for the Sixth Respondent
Decision:	22 December 2011

FINAL DETERMINATION
Adjudicator: S Pezaro

BACKGROUND

[1] The house at 44A Liverpool Street, Royal Oak, is a leaky home. It is owned by Jason Landon and Sharon Peace (the claimants) who bought it from the second respondents, Dmitri and Anna Lechtchinski in February 2000. The claimants did not notice any Weathertight issues with the house but after reading publicity about leaky buildings they realised that the ten year limitation period was approaching and decided to apply to the Weathertight Homes Resolution Service for an assessor's report. The WHRS assessor, Philip Browne, concluded that the house suffered from weathertightness defects and required a total reclad. The claimants then engaged their own expert, Stuart Wilson of Maynard Marks, who reached the same conclusion. None of the respondents have challenged the conclusion on the defects or scope of remedial work required to remedy the defects.

[2] The claimants have not carried out the repairs and proceeded with their claim on the basis of estimated repair costs. Their claim is for $427,851.00 including the cost of remedial works, pre-remedial costs, consequential costs, interest, and general damages.

THE CLAIM AGAINST EACH PARTY

[3] The claim against the Auckland Council is for negligence in conducting the building inspection. The Council conceded that it owed the claimants a duty of care which it breached by failing to identify the following defects which necessitated a full reclad:

a) lack of vertical control joints within the wall cladding,
b) lack of clearance between cladding and adjacent ground and between the cladding and the deck surface,

c) solid deck barrier being formed without a membrane or other protection to the top, and
d) a fireplace protection where the top of the cladding is used inappropriately as a roof.

The Council cross-claims against the second, fourth and fifth respondents and led evidence in support of these claims.

[4] The claimants allege that Dmitri and Anna Lechtchinski were either developers or head contractors. Alan Matthews, the fourth respondent, and Keith Middleton, the fifth respondent, were the two directors of Matthews & Middleton Limited (MML), the company contracted by the Lechtchinskis to build the house. It is claimed that both Mr Matthews and Mr Middleton were on site supervising or carrying out the construction and that their work is causative of relevant defects.

[5] The claim by Mr Mathews and Mr Middleton against IAG New Zealand Limited, the sixth respondent, is that IAG is liable to indemnify Mr Matthews and Mr Middleton under the public liability policy of insurance held by MML.

THE ISSUES

[6] The issues that I need to consider are:

- quantum;
- whether the Lechtchinskis were the developers;
- what work did Mr Matthews and Mr Middleton carry out and their liability for any work; and
- any liability by IAG under the public liability policy.

QUANTUM

[7] The only expert evidence on quantum was adduced by the claimants and the Council. The claimants called two expert witnesses, Stuart Wilson, a building surveyor and Daniel Johnson, a quantity surveyor. The Council's evidence on quantum was given by Ross Wood, a quantity surveyor. The dispute about the costs of remedial work between the claimants and the Council narrowed prior to adjudication. In the course of the hearing the claimants withdrew their claim for the cost of probe installation which was disputed by the Council and the Council made significant concessions leaving only four items in dispute.

Remedial cost

[8] The claim for the estimated cost of remedial work is $310,188 based on the Maynard Marks report. The four items in dispute which I need to consider are:

a) the cost of installing concrete nibs;
b) the cost of insulation;
c) the amount claimed for sealant; and
d) the fees paid to Lighthouse NZ Limited, a company providing guidance and support to owners of leaky homes.

Concrete nibs

[9] The argument about the cost of the concrete nibs is in relation to the rate applied and the amount claimed for propping. The claimants challenge Mr Wood's expertise in assessing the scope of work required to install the concrete nibs. Mr Wood's opinion was that the sum of $7,650 should be deducted from the sum claimed for the concrete nibs. In Mr Wilson's opinion the rate calculated for propping associated with the replacement of the timber framing in

addition to that required for the concrete nibs. Mr Johnson's view was that the work required to install the nib and the resulting propping required could not necessarily be done at the same time as the framing. I prefer the evidence of Mr Wilson on this issue. He is more appropriately qualified than Mr Wood to comment on the scope of works required and the manner in which the work needs to proceed. I therefore accept the costings prepared by Mr Johnson which was based on Mr Wilson's scope of works. I conclude that the amount claimed for the installation of the concrete nib is reasonable and justified.

Insulation

[10] In Mr Wood's opinion a sum of $1,140 amounted to betterment for replacement of the pink batts insulation. Mr Wood said that only 50% of the existing insulation needed to be replaced because only 40% of the timber required replacement. Mr Browne agreed with Mr Wood that the insulation could be removed, stored and re-used. However the claimants submit that all the insulation should be replaced. They rely on the evidence of Mr Wilson that re-using insulation results in a greater labour cost than replacing all the insulation. Further Mr Wilson stated that insulation which is reused cannot be guaranteed as required by the Building Act. In evidence Mr Wilson also raised the issue of the space required to store 50% of the insulation. I accept the concerns expressed by Mr Wilson about the risk of re-using insulation and his opinion that to do so is not good practice. I do not accept that the risk and the difficulty of storing half the insulation are justified or economical when compared with the minimal cost of new insulation. For these reasons I award the full amount claimed for insulation.

[11] The total awarded for the estimated cost of remedial work is therefore $310,188.

Pre-remedial costs

[12] The sum of $40,856 is claimed for pre-remedial costs and interest of $4,346 on this amount to the date of hearing.

Sealant

[13] By the end of the hearing the Council had reduced its dispute with the claim of $83.82 for the cost of sealant to $20. This reduction was made on the basis that Mr Wilson agreed that $20 worth of sealant would reasonably have been expended on normal maintenance. I accept Mr Wilson's evidence and therefore award the sum of $63.82 for sealant.

Lighthouse fees

[14] The sum of $3,324.18 paid to Lighthouse is disputed. In evidence Ms Peace said that the claimants engaged Lighthouse when they first discovered the weathertightness issues to advise them on the engagement of experts. Ms Peace referred to the DBH website and materials which emphasise the importance of engaging an expert at an early stage. Ms Peace said that she did not know what a building surveyor was and needed guidance through the process.

[15] The Council disputes liability to pay these fees on the basis that they are not recoverable because they relate to legal advice. The Council relies on the decision of this Tribunal on costs in *Colaco v Auckland Council.*[1] The conclusion reached in *Colaco* about Lighthouse fees was reached in the context of a decision on liability for costs, not damages. That decision is therefore not directly relevant to this claim. However the Council also argues that there is a degree of double handling between Lighthouse and the remedial experts and the WHRS assessor.

[1] *Colaco v Auckland Council* WHT TRI-2010-100-000105, 5 June 2011.

[16] The Lighthouse invoices were issued between September 2008 and April 2010. These invoices post-date the claimants' application to DBH for an assessor's report and the assessor's report. The work itemised includes assistance in selecting a building surveyor, reviewing the Council property file, reviewing the WHRS report, an Official Information Act request to Auckland Council, correspondence with the respondents advising them on remedial work progress and instructing and communicating with Maynard Marks. There was also a significant amount of work involved in preparing a remedial strategy, correspondence, and reviewing the Council property file and the claimants' ownership documentation, preparing a timeline of events and an index of documents, and producing documentation for the application for adjudication.

[17] In my view a significant amount of this work was unnecessary. There is no apparent reason for filing an Official Information Act request to the Council nor any reasons for Lighthouse to obtain or produce the Council documents as these would have been produced either in the WHRS report or by the Council as part of its discovery. Reviewing the claimants' ownership documentations is generally a matter carried out by lawyers for which no claim could be made in this Tribunal. In addition, preparing a chronology and bundle of documents is part of preparing for these proceedings and therefore any cost incurred cannot be claimed. The time claimed by Lighthouse for preparing a remedial strategy in my view duplicates work carried out by Maynard Marks. Once such an expert has been engaged it is not, in my view, necessary for such an expert to be briefed by an organisation such as Lighthouse. The time billed for communicating with Maynard Marks in handing over the file is not a cost that flows from the respondents' negligence.

[18] For these reasons I am not satisfied that the Lighthouse fees have been proved by the claimants to be reasonably incurred or

that they are costs which flow from the damage caused by the liable parties.

[19] For these reasons the claim for pre-remedial costs is reduced by $3,344.18 being the sum of that part of the cost of the sealant for which the claimants are liable and the fees paid to Lighthouse, leaving a balance of $37,511.82. The claim for interest is reduced by $454.81 being the interest claimed on Lighthouse fees. The amount of interest awarded is therefore $3,891.19.

Consequential Costs

[20] In closing Ms Divich said that the medical costs claimed were not challenged. The Council's only challenge to the consequential costs is therefore the time required for the remedial work which determines the claims for accommodation, storage and other related costs. The claimants claim that the work will take 14 weeks on the basis of three tenders which suggest a remedial period of 12-14 weeks. The Council submits that the medium point of 13 weeks should be accepted as reasonable. Mr Wood estimated that the claimants would need to vacate the property for an estimated 12-14 weeks and Mr Wilson accepted that it would be possible to complete the work within 14 weeks. Given that Mr Wood's expertise is in costings and not in determining the scope of remedial works required, I accept the evidence of Mr Wilson on this issue.

Damages

[21] In closing the claimants attempted to increase their claim for general damages from $25,000 to $50,000. I declined to accept this amendment to the claim at this stage of proceedings. If the claim had been for damages of $50,000 I would have questioned the claimants on general damages. I therefore determine this aspect of the claim on the basis of a claim for general damages of $25,000.

[22] During the hearing Mr Bates suggested to Ms Peace that the claimants could have reduced their stress by applying for the Government's financial assistance package. Mr Bates did not pursue this argument. In closing he advised that Mr Middleton relied on the submissions of the Council in respect of quantum. The Council did not challenge the claim for general damages nor did any of the other respondents. Ms Peace and Mr Landon gave evidence in their briefs and at the hearing of the significant stress, both emotional and financial, which has resulted from their leaky home. I am satisfied that they are entitled to the sum of $25,000 for general damages.

[23] The claim is therefore approved to the amount $399,052.00.

Remedial cost	310,188.00
Pre-remedial cost	37,511.82
Medical bills	221.00
Consequential costs	22,240
Interest	3,891.19
General damages	25,000
TOTAL	**$399,052.00**

DMITRI AND ANNA LECHTCHINSKI

[24] The claim that the Lechtchinskis were developers of the claimants' property is focussed on Mr Lechtchinski. Ms Lechtchinski did not give evidence. It is submitted by Ms Divich for the Council that the history of Mr Lechtchinski's property dealings support ths claim that he is a property developer. However Mr Matthew's evidence was that Mr Lechtchinski lends him money to buy property, subdivide and build houses and Mr Mathews described himself as a developer.

[25] Since Mr Lechtchinski and his family arrived in New Zealand in the mid-1990s they have purchased several properties with an existing house, subdivided the section, built a new dwelling, and sold both houses within a short time of completion. Whether this development was funded by Mr and Ms Lechtchinski, their family, or family related companies, it is arguable that Mr and Ms Lechtchinski were the developers of at least some of these properties. The question however is whether they were the developers of the claimants' property.

[26] Mr Ponniah submits that they were not the developer of 44A Liverpool Street. Mr Ponniah refers to the definition of the residential property developer under section 7 of the Building Act 2004 which states:

> **residential property developer** means a person who, in trade, does any of the following things in relation to a household unit for the purpose of selling the household unit:
>
> a) builds the household unit; or
> b) arranges for the household unit to be built; or
> c) acquires the household unit from a person who built it or arranged for it to be built.

[27] Further Mr Ponniah submits:

a) That the Lechtchinskis entered into a turn-key building contract with Matthews & Middleton Limited;
b) Mr Matthews managed the project and the subcontractors.
c) Matthews & Middleton arranged and supervised all subcontractors other than the driveway and landscaping contractors.
d) The work was supervised by the architect Mr Murray.
e) All building materials were supplied by the builders.
f) The Council inspections were arranged by the builders;

g) The Lechtchinskis had no direct involvement or control over the building works or the construction. They simply made progress payments when due.
h) The Lechtchinskis had little or no knowledge of New Zealand building practices and spoke little English.
i) At the relevant time Mr Lechtchinski worked as a pizza delivery person.

[28] A developer was defined by Harrison J in *Body Corporate No 188273 v Leuschke Group Architects Ltd*:[2]

> [31] The word 'developer' is not a term of art or a label of ready identification like a local authority, builder, architect or engineer, whose functions are well understood and settled within the hierarchy of involvement. It is a loose description, applied to the legal entity which by virtue of its ownership of the property and control of the consent, design, construction, approval and marketing process qualifies for the imposition of liability in appropriate circumstances.
>
> [32] 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. It has the power to make all important decisions. Policy demands that the developer owes actionable duties to owners of the buildings it develops.

[29] Ms Divich submits that the fact that Mr Lechtchinski was a construction engineer in Russia and Ms Lechtchinski was a real estate agent since 1996 supports the claim that they were the developer. In addition Ms Divich points to the fact that Ms Lechtchinski was the owner of the property when the building work occurred, Mr and Ms Lechtchinski applied for the building consent

[2] *Body Corporate No 188273 v Leuschke Group Architects Ltd* (2007) 8 NZCPR 914 (HC).

and that there was no separate project manager. Further Ms Divich submits that the polystyrene mouldings installed only on the front elevation of the house because it is visible from the road and that this is more consistent with a property built for sale than a family home. She also submits that the reason given by the Lechtchinskis for selling the property within 18 months, to move to a new school zone, did not "ring true".

The evidence

[30] Steven Allwood, a glazier, wrote a letter dated 29 September 2011 stating that he had business dealings with Mark Matthews and supplied him with materials from 1995. Mr Allwood stated in his letter that in 1997 Mr Lechtchinski and Mr Matthews were working together on 44A Liverpool Street and stated in his letter that he had recently seen them together on a building project in Blockhouse Bay. Mr Allwood was summoned to give evidence. He was questioned about his sighting of Mr Lechtchinski at Liverpool Street. Mr Allwood said that he had never been on the site but that as he drove past Liverpool Street he saw Mr Matthews and Mr Middleton on site. When Mr Allwood was asked how much he had seen of the building site which is down a long driveway and behind the original house, Mr Allwood said he could not see the building site from the road. He then said that what he saw was Mr Lechtchinski loading gear into a van.

[31] I did not find Mr Allwood's evidence at the hearing consistent with his letter in which he gave the impression that he had seen Mr Lechtchinski and Mr Matthews working together on the building site of 44A Liverpool Street. The evidence that Mr Allwood subsequently gave at hearing, of seeing Mr Lechtchinski putting something into a van, is a far cry from observing Mr Lechtchinski actively involved in the construction.

[32] Mr Matthews accepts that he was on site as the builder. His evidence is that Mr Middleton was with him as well as an apprentice, Aaron Williams. Mr Matthews does not say that Mr Lechtchinski was on site. Ms Peace gave evidence that they looked at the property with a real estate agent who told them the house was well built because the vendors were a real estate agent and a builder/developer who built the house for themselves and their extended family.

[33] The evidence of Mr Lechtchinski was that the property was built with separate areas for his family and for Ms Lechtchinski's parents. It was the evidence of Irina Kozlovskaia, Ms Lechtchinski's mother, that she specified her requirements for the bathroom and kitchen. Ms Divich questioned Mr Lechtchinski about the fact that the plans did not include a separate full kitchen and the area that he identified as the kitchen on the plans was labelled as a bar.

[34] Whether or not there were two full kitchens I accept that there was some provision for a second area for cooking. I accept therefore that Mr and Ms Lechtchinski and her parents intended to live at 44A Liverpool Street. I make no finding on their reason for selling after some 18 months but the evidence does not support a finding that the Lechtichinskis built this house for resale or profit rather than as a family home. Although Mr Lechtchinski accepts that he engaged the person who laid the concrete driveway, this is not inconsistent with the contract or with the position of a homeowner engaging a builder on a full contract but completing the final concreting and landscaping themselves.

[35] I conclude that the Lechtichinskis were not the developer of 44A Liverpool Street. For this reason the claim against them fails.

ALAN MATTHEWS

[36] Mr Matthews denied liability for the weathertightness defects although he accepted that Matthews and Middleton Limited were contracted to carry out the construction. In Mr Matthews' brief he said that Mr Middleton was on site more than he was and that Mr Middleton put up the framing, prepared and nailed the fibre cement sheets, constructed the deck and installed the windows. Mr Matthews disputed responsibility for the inadequately formed sheets. He also said that the horizontal and vertical control joints were not required but that, if they were, this defect should have been picked up by the plasterer and the Council. Mr Matthews in evidence said that he assumed that the texture coating applicator would apply sealant to the joinery but said that he did not discuss this with the texture coater.

[37] Mr Matthews agreed that he was on site and installed the harditex and the windows which Mr Wilson and Mr Browne identified as primary defects. It was the evidence of Mr Wilson that each of these defects on their own would have required a full reclad of the property. Builders are liable for their defective work[3] and as a builder on site carrying out work that caused defects. Mr Matthews is therefore personally liable in negligence for the full amount of the claimants' loss.

KEITH MIDDLETON

[38] Mr Middleton denies being on site or carrying out any relevant building work. Mr Middleton called evidence from his wife, Karmen Middleton, and John Bissett, Ian Prescott and Christopher Coulter who all said that Mr Middleton worked for them. Ms Middleton's evidence was that Mr Middleton was working on three other significant projects at the time that Liverpool St was built and could not have been involved in the construction of the claimants'

[3] *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 (CA).

dwelling. Ms Middleton's evidence was credible but primarily focussed on the breakdown of the MML partnership. Although she gave evidence of dealing with the Council in relation to the Housing New Zealand work that Mr Middleton did through Mr Bissett, Ms Middleton was not in a position to confirm what time Mr Middleton spent on each relevant job.

[39] I did not find the evidence of Mr Middleton, Mr Bissett, Mr Prescott and Mr Coulter reliable or consistent. Mr Middleton was evasive when answering questions about the time that he spent on different jobs. Although he said he could not recall working on the Liverpool St site, he produced a photograph showing the harditex being installed. Mr Middleton said that he did not know who had taken the photograph or how it had come into his possession but accepted in evidence that he had possibly taken it himself. Mr Middleton said that the person in the photograph was either Mr Matthews or Mr Middleton's father who is also a builder.

[40] The evidence of Mr Bissett, Mr Prescott and Mr Coulter did not assist Mr Middleton. Mr Bissett could not give specific evidence of when Mr Middleton worked for Housing New Zealand although he said Mr Middleton did extensive work for Housing New Zealand. In evidence Mr Bissett accepted that he could be biased. The evidence of Mr Prescott was that Mr Middleton worked for him full time and that Mr Prescott would have known that Mr Middleton was not on site for a period of three weeks. This evidence is inconsistent with that of Mr Coulter who says that Mr Middleton was onsite on his job for three weeks continuously in August 1997, the same time that Mr Prescott said Mr Middleton was working on his job. Mr Prescott said that his evidence of the amount of time Mr Middleton spent on site was based on the dates on delivery dockets for materials. There was a gap in the delivery dates between 1 October 1997 and 20 November 1997 and it is possible that Mr Middleton was working at Liverpool Street during this time.

[41] In addition, I did not find Mr Coulter's evidence that Mr Middleton assisted him following a failed building inspection on 11 August 1997 credible. This evidence is not consistent with the Council records of that inspection which show that it was a plumbing inspection which failed. In evidence Mr Middleton accepted that he would not have attended to the issues raised by that failed inspection.

[42] The evidence of Ms Kozlovskaia was that she visited the site on a regular basis during construction, at least three times per week, and saw Mr Middleton on site. She said that Mr Middleton's son was about the same age as her granddaughter and they played together.

[43] In closing Mr Bates submitted that these witnesses were not giving evidence that Mr Middleton worked exclusively for them during the relevant period and that Mr Middleton was involved with these three jobs part time. However, if I accept this submission, there is no logical reason why Mr Middleton could not also have been working at Liverpool Street during the same period.

[44] The photograph produced by Mr Middleton is more likely to have been taken by him than anyone else and demonstrates that Mr Middleton was on site when the harditex was installed, consistent with the evidence of Mr Matthews. I conclude that Mr Middleton was involved in the construction and I accept the evidence of Mr Matthews that Mr Middleton was involved in installing the framing and the cladding and constructing the deck.

[45] For the same reasons given in respect of Mr Matthews, Mr Middleton is personally liable to the claimants for the full cost of repairs which arise from his defective work.

TO WHAT EXTENT IS IAG LIABLE TO PROVIDE COVER TO MR MATTHEWS AND MR MIDDLETON ?

[46] MML had cover under their public liability insurance policy with IAG for liability for damage that occurred prior to 31 July 2001. IAG will not be liable for damage that occurred after this date and the onus is on the insured to prove that relevant damage occurred within the period of cover. The policy provides cover for:

> (a) All sums which the insured shall become legally liable to pay in respect of accidental damage to property happening or caused as described in the Schedule under the heading of "Scope of Indemnity."

[47] The policy also provides cover for the cost and expenses of litigation recovered against the insured or incurred by the insured with the consent of the insurer. Much of Mr Matthews and Mr Middleton's submissions focussed on their claim for litigation costs however this claim only becomes relevant if the prior issue of whether damage occurred within the period of cover is resolved in favour of the insured. There is a relevant exclusion in the policy at clause 3(b) for:

> (3) Liability in respect of damage to property:
>
> ...
>
> (b) Being that part of any goods or land or building or structure on which the insured or any servant or agent of the insured is or has been working.

[48] IAG submits that the entire building is the insured's product and therefore is excluded by clause 3(b). Mr Bates submitted that the texture coating was not the product of work by MML and therefore Mr Mathews and Mr Middleton are entitled to cover. IAG argues that the texture coating is inseparable from the rest of the construction and that the coating has to be replaced as a result of the defective work by MML, whether or not the texture coating itself is

defective. It was the unequivocal evidence of Mr Wilson and Mr Browne that the main defects, which did not include the texture coating, necessitated a full reclad of the building.

[49] I accept the evidence of the experts that the texture coating will be destroyed and replaced in the course of repairing the defective work of Mr Matthews and Mr Middleton. On this basis I conclude that the cost of replacing the texture coating is excluded by Clause 3(b) of the policy because it arises from an element of the construction on which MML was working. However, even if I accept Mr Bates' argument that damage to the texture coating can be distinguished from damage to the substrate, it would not assist Mr Matthews and Mr Middleton because for the reasons that follow I do not accept that any damage occurred within the period of cover.

When did damage occur to the texture coating?

[50] Mr Matthews and Mr Middleton have not brought any evidence on this point. They rely on the evidence of Mr Gillingham who gave evidence in support of the Council's application to join IAG. Mr Gillingham's evidence was that because the defects were created during construction which was complete by the end of December 1997, any damage started to occur soon after completion and certainly within the first 12-24 months. In his opinion damage commences from the external face of the cladding and extends through the cladding and the structural timber framing.

[51] Damage is not defined under the policy however the question of what constitutes 'damage' has been considered by the courts. In *Technology Holdings Ltd v IAG New Zealand Limited*[4] the Court determined whether physical damage had occurred according to whether there has been an alteration or change to a physical state of the thing said to have been damaged. The Court held that it is not

[4] *Technology Holdings Ltd v IAG New Zealand Limited* HC Auckland, CIV-2005-404-3450, 13 August 2008.

necessary that permanent or irreparable damage occurs but there must be:

a) physical change to the property; and
b) an impairment of value or usefulness consequent on that physical change.

[52] In *Arrow International Ltd v QBE Insurance (International) Limited*[5] McKenzie J considered what constituted damage. He concluded that there must be an alteration to the physical state which is more than de minimis so that the point has been reached where physical damage has occurred. It is submitted for IAG that more than minimal damage must have occurred before 31 July 2001 in order for there to be cover under the policy.

[53] The evidence of Ms Peace is that when she inspected the house thoroughly before applying for an assessor's report in February 2007 she found only a few cracks. The evidence of Mr Lechtchinski is that if he had seen any cracking to the coating when the house was sold in February 2000 he would have fixed it.

[54] The evidence of Mr Gillingham was that it was likely that there was damage within 36 months. Mr Wilson's evidence was that the building had systemic defects from the day of construction. Both Mr Gillingham and Mr Wilson agreed that hairline cracks could appear a short time after construction. However Mr Browne, Mr Wilson and Mr Gillingham agreed that there would be hairline cracking only which Mr Browne said might be visible to a "trained naked eye". Mr Wilson said that damage can exist prior to cracks appearing in the texture coating. However for the purposes of this claim, only damage to the texture coating is relevant. The evidence of Mr Browne and Mr Wilson was that the cracking was not the cause of moisture ingress and was likely to have occurred after the

[5] *Arrow International Ltd v QBE Insurance (International) Limited* [2009] 3 NZLR 650 (HC).

substrate had absorbed moisture. Further both Mr Browne and Mr Wilson referred to the rapid acceleration of the cracking between the date of Mr Browne's report and Mr Wilsons which they attributed to increased moisture ingress.

[55] Mr Bates relies on the experts' evidence that damage occurred to the texture coating prior to cracks being manifest to the naked eye. I do not accept that such 'damage' meets the test in *Technology Holdings* of a physical change to the property and a loss of value or usefulness. I do not accept that a physical change that cannot be observed by anyone other than a specialist or requires special equipment to detect constitutes a physical change to property. Nor do I accept that loss of value or usefulness can occur as a result of a physical change that is not clearly apparent. Even though *Arrow* was directed at the question of latent damage, I conclude that there must be some obvious alteration to the physical state of the home for damage to occur. Any damage that is likely to have occurred to the claimants' house within the policy period is therefore de minimis.

[56] I therefore conclude that any cracking to the texture coating before 31 July 2001 was so small as to be invisible to the naked untrained eye and that any such cracking would not reduce the value or function of the home. Therefore I do not accept that damage occurred within the policy period and conclude that IAG is not liable to provide cover for Mr Matthews and Mr Middleton. The claim against IAG is therefore dismissed.

APPORTIONMENT

[57] Section 72(2) of the Weathertight Homes Resolution Services Act 2006 provides that the Tribunal can determine liability of any respondent to any other respondent and remedies in relation to any liability determined. In addition, section 90(1) enables the

Tribunal to make any order that a court of competent jurisdiction could make in relation to a claim in accordance with the law.

[58] Under section 17 of the Law Reform Act 1936 any tortfeasor is entitled to claim a contribution from any other tortfeasor in respect of the amount to which it would otherwise be liable.

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

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

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

[61] The Council submits that its liability should be 20% which is consistent with the decisions of *Mt Albert Borough Council v Johnson,*[6] *Dicks v Hobson Swann Construction Limited*[7] and *North Shore City Council v Body Corporate 188529* (*Sunset Terraces*)[8]. I accept that this is reasonable and have therefore apportioned liability at 20% to the Council and 80% to the builders.

[62] I see no reason to distinguish between the liability of Mr Matthews and Mr Middleton. They were equally involved in the defective aspects of the construction and I therefore proportion their liability to the claimants at 40% each.

[63] Neither Ms Thorn nor Mr Bates made submissions on apportionment. As joint tortfeasors the first, fourth and fifth

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[6] *Dicks v Hobson Swan Construction Ltd (in liq)* HC Auckland, CIV-2004-404-1065, 22 December 2006.
[7] *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA).
[8] *Body Corporate 188529 v North Shore City Council* HC Auckland, CIV-2004-404-3230, 30 April 2008 [*Sunset Terraces*].

respondents are jointly and severally liable for the full amount of the claimants' loss. For the reasons given I apportion liability to Mr Matthews and Mr Middleton at 80% and 20% to the Council. I therefore make the following orders:

i. Auckland Council, Alan Mark Matthews and Keith Bernard Middleton are jointly and severally liable to pay Jason Glen Landon and Sharon Mary Peace the sum of $399,052.00 immediately.

ii. The Auckland Council is entitled to recover from Alan Mark Matthews and Keith Bernard Middleton any amount that it pays to the claimants over and above the sum of $79,810.40 being 20% of $399,052.00.

iii. Alan Mark Matthews is entitled to recover from Auckland Council and Keith Bernard Middleton any amount that he pays to the claimants over and above the sum of $159,620.80 being 40% of $399,052.00.

iv. Keith Bernard Middleton is entitled to recover from Alan Mark Matthews and Auckland Council any amount that he pays to the claimants over and above the sum of $159,620.80 being 40% of $399,052.00.

DATED this 22nd day of December 2011

S Pezaro
Tribunal Member