IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2009-404-6497

UNDER	The Weathertight Homes Resolution Services Act 2006
BETWEEN	LEE ANTHONY FINDLAY AND MICHAEL ARNE SANDELIN AS TRUSTEES OF THE LEE FINDLAY FAMILY TRUST Appellants
AND	AUCKLAND CITY COUNCIL First Respondent
AND	ROY STANLEY SLATER Second Respondent

Hearing: 27 April 2010

Appearances: E St John for the Appellants
D J Heaney and K M Parker for the First Respondent
M C Frogley for the Second Respondent

Judgment: 16 September 2010

RESERVED JUDGMENT OF ELLIS J

This judgment was delivered by me on 16 September 2010
at 2 pm, pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

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[1] The appellants are the trustees of the Findlay Family Trust which in 1996 built a property in Arney Road, Remuera. The Trust remains the owner of the house which, since it was built, has been lived in by Mr Findlay and his family.

[2] The Auckland City Council granted a building consent in relation to the plans for the Arney Road home and subsequently conducted some 19 inspections of the property. A code compliance certificate was issued by the Council on 11 July 2000.

[3] The house was leaky. There is now no dispute that the cost of its remediation (recladding) was $445,420.42. A negligence claim was brought by the Trust in the Weathertight Homes Tribunal against the Auckland City Council. General damages were also sought. The Council joined the second respondent Mr Slater, the builder, to the proceeding. No other parties were joined. Presumably this was because they were unable to be located or had gone out of business. This is a matter that has assumed some significance in this appeal and I shall later return to it.

[4] Put briefly, the Tribunal (Adjudicator K D Kilgour) found that, because of the basis upon which the builder had been employed by Mr Findlay, the scope of duty of care owed by him was limited to his contractual duties, which the Tribunal found had not been breached. Thus Mr Slater was completely exonerated. By contrast, the Tribunal found that the Council was negligent in its inspections and was liable for the full amount of the claim.

[5] The Tribunal also held, however, that Mr Findlay/the Trust were contributorily negligent due (in general terms) to their failure properly to manage, oversee and coordinate the construction process. The Tribunal held that this contributory negligence was such that Mr Findlay/the Trust should bear 85% of the responsibility for the damage. That left the Council bearing 15% of its liability.

[6] The Trust appeals from the finding of contributory negligence and from the Tribunal's refusal to award it general damages. The Council cross-appealed on the grounds that the Tribunal was wrong to find that the Council was causative of the damage and/or was wrong to exonerate Mr Slater and/or was wrong to find that Mr Findlay's own liability was limited to 85%.

[7] In this judgment Mr Findlay and his Trust are treated synonymously for all purposes other than the final question of general damages. For convenience reference will usually simply be made to Mr Findlay.

The Adjudicator's Report

The damage to the house and its causes

[8] The expert evidence before the Tribunal was in agreement that the principal causes of the damage to the property were;

a) Water entry through the top of the dwelling around the fascia and the gable ends;

b) Water ingress around the windows; and

c) Ground levels and abutting concrete against the stucco.

[9] It was also agreed that any one of those matters would have led to the need for a full re-clad of the house. The apportionment arrived at between the three causes was 40%, 40% and 20% respectively. That apportionment is also not in dispute.

The Council's position

[10] The Council successfully argued before the Tribunal that by analogy with the *Sunset Terraces* case[1] it did not owe a duty in relation to the approval of the plans/granting of the consent. That issue was not, however, the focus of argument before me and I take it no further.

[11] As regard the subsequent inspection process the Council sought to argue against liability on the grounds that it could not, with reasonable care, have

[1] *Sunset Terraces* [2010] NZCA 64.

discovered the defects at the time of the inspections and in the alternative that it did not cause Mr Findlay's losses, on the grounds that a proper inspection would not have prevented the damage in any event. I understand that the Council also submitted that it owed no duty of care to Mr Findlay because he was an "owner/builder" who was responsible for his own loss.

[12] In rejecting these arguments the Tribunal said:

> [50] The final inspection was in April 1999, some two years after the home was occupied; certainly on that site visit the council should have then detected, if not earlier, the defects, especially the very obvious ground clearance problems. This therefore suggests that the council did not have a sufficiently effective approval and inspection regime to detect the significant water ingress problems with this home such as cladding imbedded in the concrete, windows installed lacking sealant protecting the jams and sills, the deck lacking a waterproof membrane under the tiles, and the fascia not being spaced off the plaster work.
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> [51] Based on those findings, the Tribunal accordingly determines that the Auckland City Council failed to carry out adequate and satisfactory building inspections. The building defects agreed by the experts should have been observed when inspections were carried out and the faults ordered to be corrected. The lack of a sufficient inspection regime to detect the significant water ingress problems is not a justification for diminishing the duty of care owed to home owners.
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> ...
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> [55] The evidence of Mr Nevill and Mr Gillingham suggested that if the defects were captured and remedied at the proper time of construction, the required and more targeted fix would have been attended to at that time. That would have been a targeted fix or partial reclad at the time a Notice to Fix should have been issued by the Council. However the critical factors were the timing of the inspections, detection at the early and proper stage in the construction, and the prompt issue of the Notice to Fix, which would have avoided the much greater resulting damage that occurred years later. In any event, the repair costs would have been considerably less had the Notice to Fix been issued – at least by that time both the claimants and the contractor who did the impugned work, would have been on notice of the damage occurring to the home and would therefore have had an obligation to fix such defects at that time as required by the Building Act and the contractor's terms of engagement with the claimants. No such notice was given by the Council and therefore no targeted repairs were carried out.
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> [56] The Tribunal therefore finds the errors of the Auckland City Council were causative of the major defects experienced by the claimants' home and thereby concludes that the Auckland City is liable for the full amount of the established claim.

The Builder's position

[13] Mr Slater was employed by the appellants as the builder on site. Mr and Mrs Findlay said before the Tribunal that Mr Slater was paid to act as site foreman and to supervise the sub-trades. Mr Slater denied he was ever given that responsibility. In accepting Mr Slater's account the Tribunal said:

> [74] I find that Mr Slater's contract was to attend to the carpentry build in accordance with permitted plans and specifications. While the plans lacked design detail in significant areas, I find Mr Slater complied strictly (as his competency and experience allowed) with the terms of his contract. He performed his carpentry role in accordance with the plans and specifications and so did not breach his labour only contract. Independent contractors, even labour only, like Mr Slater, can owe a duty of care in tort to their principals. But such a tortious duty of care is no greater than that which his contractual obligations imposed in *Rolls Royce NZ Ltd v Carter Holt Harvey Limited*. [sic]
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> ...
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> [76] The Tribunal accepts Mr Slater's evidence and finds that Mr Slater was employed as a labour only carpenter with no project management/supervisory/site management role. Mr Slater solely agreed to undertake a labour only carpentry role and to do just what he was directed to do by the plans and specifications. He was paid an hourly rate of $25 by cheque and a lesser sum by cash thereby reflecting the fact that no supervision was involved. Indeed, his evidence, and that of Mr Stewart, is that they only ever undertook labour only carpentry project with no responsibility or supervisory role involving the entire project and/or management of other trades.
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> [77] In conclusion, the evidence satisfies me that Mr Slater had no supervisory or managerial role. Instead I find that Mr Findlay had total control of the contractors throughout the project.

Others who were responsible

[14] In the context of the Tribunal's discussion of Mr Slater's position it considered in some detail all the specific causes of damage to the house. More particularly, and in relation to the three principal causes referred to at [8] above it said that:

> *i. Ground clearances and stucco into concrete*
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> [81] Contractors employed by Mr Findlay set the ground clearances before Mr Slater came onto the building site. Concrete contractors also

employed by Mr Findlay laid the concrete against the stucco after Mr Slater completed his contract. Mr Slater therefore had no responsibility or liability for this defect.

[82] Mr Findlay chose not to bring a claim against the concrete contractor who took the driveway and paving edges above the bottom of the stucco cladding finish to the home. All experts agreed that this was another significant cause of water ingress and damage.

...

iii. Fascia

...

[87] I find that on examination of the evidence, Mr Slater fixed the fascia in accordance with the plans and his then understanding of the required sequence of events so that the house could be closed-in as soon as possible. I therefore conclude that the fault with the fascia is a combination of a design defect, the plasterer's inadequate plastering job, and the lack of onsite oversight of the various trades. Co-ordination of the trades however was the responsibility of Mr Findlay and not Mr Slater and therefore Mr Slater cannot be found liable for this particular defect.

iv Aluminium joinery

...

[90] Mr Slater installed the Hardibacker cladding and the windows. Ideally, Mr Slater should not have installed the windows until required, or in conjunction with, the plasterer. I find Mr Slater's window installation, whilst out of sequence with the build, was not, in proportion to the entire claim, sufficient to incur any significant culpability. Because the windows were installed before the stucco, Mr Nevill said it would have been pointless for Mr Slater to put a bead of sealant on the back of the flange because it would have dried some time before the plasterer came on site to apply the stucco. Mr Nevill's evidence is that what was required here was a waterpoof sealant to be applied to the back of the window face and pushed on to the stucco to bond with the stucco.

[91] Mr Findlay engaged the plasterer and the plasterer's quotation of 24 May 1996 allowed for the application of "mastic where required". This indicates that the intention was for the plasterer to provide a mastic seal to the external joinery jambs, sills and other penetrations. It would therefore have been obvious to the surface coat applicator that there was no flashing around the window jambs and sills, indicating that the plasterer would have liability for this damage. Mr Slater should have been called back by the plasterer and/or Mr Findlay to assist at the time of plastering with the re-fit, water proofing and window installation.

[93] Furthermore, I find that the claimant ordered the wrong windows as the windows supplied did not provide mechanical flashings for the jambs and sill. This meant that the approved waterproofing was non-existent as the plasterer failed to seal the window and door units. The responsibility for ensuring that the windows and door surrounds were properly flashed, sealed,

> and watertight therefore lay with the plasterer and Mr Findlay to provide the required detail and supervision for the work to ensure that the installation of the windows were completed to a satisfactory standard. Mr Slater's role in the construction however did not extend this far and therefore he has no liability for this defect.
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> [94] A significant leak cause, was the fascia ends adjacent to the gable roof which concerned plastering finish up to the fascia, the plasterer's inadequate waterproofing of the window joinery jambs and sill ends was further impugned plastering. Mr Nevill opined that the plastering work was below standard. The Tribunal finds that these water ingress locations, their cause and the resulting damage were all the result of inadequate work by the plasterer. However, Mr Findlay for reasons best known to him did not bring a claim against the plasterer.

[15] At various points in the determination the Tribunal also referred to design defects as a significant contributing cause of some of the damage.

[16] The two matters that arise out of this aspect of the Tribunal's analysis are:

a) The clear attribution of fault to a number of persons not joined as parties to the proceedings in the Tribunal, namely the plasterer, the tiler, the concrete contractor and the architect; and

b) The Tribunal's apparent view that the Trust/Mr Findlay was somehow at fault for not bringing a claim against those other persons.

[17] The Tribunal's focus on these matters is not confined to the passages I have cited above; similar references are made repeatedly, and throughout the determination. The statements made in paragraph [131] (quoted in the section that follows) provide a further example. This is a matter to which I shall return later.

Mr Findlay's contributory negligence

[18] As I have said, the Tribunal ultimately held that Mr Findlay had contributed significantly to his own loss, as the Council and Mr Slater had submitted. The Tribunal said:

> [127] I have found on the balance of probabilities that Mr Findlay, by contracting the trades involved and without engaging someone of

competence to supervise their construction work, that he assumed responsibility for the build's management.

[128] I find that the above mentioned failures provided the opportunity for the building defects to occur causing the loss now claimed for. The Tribunal finds that the above carelessness on the part of Mr Findlay was causative of the damage, in the sense that it considerably contributed to the occurrence of the building defects leading to the water ingress and the resulting damage to the home.

[129] Mr Findlay's lack of experience with the building industry and home building, and as his former wife Ms Findlay put it, their naivety, resulted in Mr Findlay controlling the build himself.

[130] Mr Findlay admits in his testimony that he undertook the project with an eye on the budget, but at the same time striving to achieve quality and an imposing building. As a result he did not engage the architects to supervise the works. Neither did he engage his co-trustee for advice on managing a building job and contracting trades. Instead he engaged all contractors directly saving supervision fees and the margins payable when the builder is hired to take overall responsibility for a project. Mr Findlay unilaterally elected to undertake control of the building project and consequently Mr Findlay shouldered overall responsibility for the project himself.

[131] The architect's plans lacked a number of design details which could have been properly addressed by the architect on site if the architect or a competent building site manager had been engaged to manage the construction process. From the evidence, the plasterer, the concreter and the tiler/membrane applicator, who were all engaged directly by Mr Findlay, are blameworthy, and yet Mr Findlay has not joined any of these three tradesmen to this claim.

[132] I find that his whole objective was to build the home as economically as possible, but, by doing so Mr Findlay failed to take reasonable care in looking after his and his Trust's interests with the building project. That is, he failed to properly instruct, supervise and manage their sequential roles (and by his own admission he had no building experience, so he did not know how). He failed to implement site management and quality supervision. Indeed, he appointed no one to undertake the supervisory role normally undertaken by a contracted project manager or architect (the architect had quoted to undertake such a role). He was, he said in evidence, most definitely aware of the need for project management. He failed to properly and competently manage the project and for that he is to blame significantly for the damage. In failing in this organisational aspect, Mr Findlay took on the responsibility for ensuring the work done by the contractors was done properly, whether knowingly or not.

[133] I agree with Mr Heaney SC's submission that Mr Findlay as employer of the contractors and named employer under the consented specifications did not adhere to the specifications. Just two examples of Mr Findlay's departures from the specifications were:

(i) Failure to invite tenders from contractors, provide them an approved programme, employ only experienced workers familiar with the materials and specified techniques; and

(ii) Failure to hold site meetings with the architect, the main contractors' representative and the site foreman.

[134] The Auckland City Council when approving the specifications submitted by Mr Findlay, expected, and so provided, that the architect was to supervise constructions and the specifications.

[135] Mr Findlay was in control of the building project and thereby assumed responsibility for its management/oversight. As in *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548 (HC) Mr Findlay's acts and omissions were directly linked to and causative of the significant building defects. Personal involvement with the build does not necessarily mean physical building work – the degree of control, as I have found on the evidence in this claim, can include personal involvement with administering and co-ordinating the construction of the building.

[136] I find Mr Findlay considerably at fault. The evidence establishes that the claimant trust allowed (it seems without any explicit authority of the other trustee) Mr Findlay to undertake and manage the construction of this complex home. In that respect Mr Findlay has failed and so has significantly contributed to the claimant Trust's own loss. I therefore find that the claimant Trust was contributorily negligent to the extent of 85%.

[19] The factual basis for these conclusions and the nature of the Tribunal's reasoning here will be examined later in this judgment.

Issues and approach on Appeal

[20] The issues to be determined in this appeal are essentially these:

a) Was the Tribunal correct to find that the Council was negligent?

b) Was the Tribunal correct to find that Mr Slater was not negligent?

c) Was the Tribunal's assessment of contributory negligence on the part of Mr Findlay based on the correct legal analysis?

d) When the correct legal analysis is applied, to what extent can Mr Findlay be said to have contributed to his own loss and to what

extent should his entitlement to damages from any and all tortfeasors be reduced on that account?

e) In the event that both Mr Slater and the Council were negligent what is the correct apportionment of liability between them?

f) Is the Trust entitled to an award of general damages?

[21] As regards most of these issues, normal appellate principles apply: *Austin Nichols & Co Inc v Stichting Lodestar*.[2] In other words, in a general appeal such as this the appellate court has the responsibility of considering the merits of the case afresh. The weight it gives to the reasoning of the court or courts below is a matter for that court's assessment. Thus I am required to reach my own conclusion, and what, if any, influence the Tribunal's reasoning should have is for me to assess.

[22] And as the Supreme Court has very recently said: [3]

> ... for present purposes, the important point arising from *Austin, Nichols* is that those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion involves an assessment of fact and degree and entails a value judgment. In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case the criteria for a successful appeal are stricter: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong. The distinction between a general appeal and an appeal from a discretion is not altogether easy to describe in the abstract. But the fact that the case involves factual evaluation and a value judgment does not of itself mean the decision is discretionary. (Citations omitted).

[23] In my view the only aspect of the Tribunal's decision that can be said to be truly "discretionary" is that part which relates to apportionment. I accept that (consistent with the dictum above) I should not lightly interfere with the Tribunal's assessment in that regard. However any such caution is necessarily subject to any issue that may, quite properly, be taken with the correctness of any underlying legal principles or approaches.

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[2] *Austin Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

[3] *Kacem v Bashir* [2010] NZSC 112 at [32].

[24] Bearing those matters in mind I now turn to consider each of the issues identified above in turn.

Was the Tribunal right to find that the Council was negligent?

[25] The Council did not seek to argue before me that it did not owe a duty of care to the appellants. I record, however, that that argument was in my view rightly rejected by the Tribunal. The Court of Appeal's decision in *Riddell v Porteous*[4] makes it clear that while a claimant's conduct might form the foundation for a successful claim in contributory negligence, it is not a matter which is generally capable of negating the duty owed by a local authority.

[26] While it seems that certain other decisions may have suggested that contributory negligence by an owner/builder is in some special category and can negate a duty of care I consider they are based on a misreading of Lord Wilberforce's dictum in *Anns v Merton Borough Council*,[5] as was explained by the Supreme Court of Canada in *Ingles v Tutkaluk Construction Ltd*.[6] As that decision makes clear the only circumstance in which a builder/owner's contributory negligence might conceivably negate the duty imposed on a local authority to inspect is where that contributory negligence has in some way actively and completely prevented the authority from performing its duty at all.

[27] Whether or not the Council's inspection process was negligent and whether or not that negligence was causative of Mr Findlay's loss was raised in the Council's notice of cross-appeal but was also not the subject of any real argument before me. Accordingly I have no reason to differ from the views formed on the evidence by the Tribunal in these respects.

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[4] *Riddell v Porteous* [1999] 1 NZLR 1.
[5] *Anns v Merton Borough Council* [1978] AC 728 (HL).
[6] *Ingles v Tutkaluk Construction Ltd* [2000] 1 SCR 298.

Was the Tribunal right to find that Mr Slater was not negligent?

[28] In finding that Mr Slater was not negligent it seems that the Tribunal principally considered that:

a) Mr Slater was employed as a labour only carpenter with no project management/supervisory/site management role;

b) Mr Slater's tortious duty could be no wider than his contractual duty and (it followed) that -

c) Mr Slater was not in breach of his contractual and/or tortious duty because he did not depart from the plans and specifications.

[29] I am prepared broadly to accept the first of these propositions, on the basis both of the evidence I have read but in particular the Tribunal's assessment of the credibility of the critical witnesses (principally Mr Slater and Mr Findlay).

[30] The second proposition (that Mr Slater's tortious duty could be no wider than his contractual duty) was based on the Court of Appeal's decision in *Rolls Royce v Carter-Holt Harvey Ltd*.[7] Although not made clear in the determination itself, the relevant passage is to be found at paragraphs [67] to [69] of the Court of Appeal's judgment:

> [66] Before proceeding further, we note that the claim could not succeed in its present form. To recap, the main duty alleged in this case is a duty to take reasonable care to ensure that the Plant was constructed in accordance with contractual specifications contained in a contract to which Carter Holt was not a party. There is no duty in tort to take reasonable care to perform a contract. At most, there is a duty to take reasonable care in or while performing the contract, which is quite a different concept. Carter Holt's pleadings mainly assert the former. A duty formulated in such terms is essentially contractual in nature and therefore cannot be owed to one who is not a party to the contract.
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> [67] Even where the duty alleged is couched in the statement of claim in more general terms, the loss is linked for the most part to losses arising from the failure to meet the contractual specifications. This raises the related issue of the relevant standard of care. The difficulty in setting a standard of

[7] *Rolls Royce v Carter Holt Harvey Ltd* [2005] 1 NZLR 324.

> quality, if tort liability is imposed, has long been a reason put forward for not imposing a duty of care in this type of case – see for example Lord Brandon's dissent in *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520 at 551-552.
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> [68] The problem is not so acute in the case of buildings or products destined for private individuals, although there may remain issues with ensuring that any standard imposed is no greater than any standard set in a relevant contract. As a majority of the High Court of Australia pointed out in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2004] HCA 16 (para 28), at the least, the contract defines the task that was undertaken and there would be difficulty in holding that a defendant owed a duty of care if performance of that duty would have required the defendant to do more or different work than the contract with the original owner required or permitted. Even where there is concurrent liability in contract and tort, the courts are careful to ensure that tort liability does not extend beyond the contractual liability with regard to matters covered by the contract - see *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, 194 and *Frost and Sutcliff v Tuiara* [2004] 1 NZLR 782**,** 789 where Tipping J said for this Court that, in conventional circumstances, the two causes of action will usually be concurrent and co-extensive. It should be no different where the contractual relationship is indirect.
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> [69] The problem of setting quality standards, which do not relate specifically to contractual standards, is acute when dealing with commercial construction contracts for specialist plant with detailed specifications, as is the case here. This in itself must be a factor weighing against a duty being recognised.

[31] The present case is not one that raises some of the more difficult issues referred to here, namely whether a builder's duty to subsequent owners of a defective building extends beyond the parameters of the contractual duty that was owed by him to the original owner. Accordingly I agree with the Tribunal that the extent of any tortious duty owed by Mr Slater to the appellants can for present purposes be said to be "concurrent and co-extensive" with the contractual duties that were owed by him to Mr Findlay. But an inquiry is therefore required as to what the relevant terms of the contract, and therefore the extent of Mr Slater's duty, were.

[32] There was of course no written contract here. And I have accepted the Tribunal's finding that Mr Slater had not agreed to act in some kind of overarching supervisory/management role. I also accept that (as the Tribunal found) it would be a term of the contract that he was not (without authority) to depart from the plans and specifications and that it seems that he did not do so. However as the Tribunal also found, those plans and specifications were vague and deficient in a number of critical

respects, and no steps were taken by Mr Slater to seek clarification or to receive more detailed instructions.

[33] Whether viewed in tortious or contractual terms it seems to me that Mr Slater had a duty to construct the house not only in accordance with the plans but competently and in accordance with reasonable standards and with the building consent which necessarily incorporated the relevant statutory requirements. Mr Slater accepted in his evidence that he was familiar with the Building Code and that he well understood the importance of weathertightness: [8]

> **MR HEANEY:** In that respect I assume I'm correct, aren't I, in saying you knew there was a building code in existence.
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> **MR SLATER:** Yes
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> **MR HEANEY:** And you would have been familiar with that code, wouldn't you?
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> **MR SLATER:** Yes.
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> **MR HEANEY:** And you would have known that at that time the building code was, to use my words, a performance base code requiring a building to perform to certain standards?
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> **MR SLATER:** Yes.
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> **MR HEANEY:** And in particular and in connection with this house you would have known the code required the building to be constructed so as not to allow water ingress?
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> **MR SLATER:** Yes.
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> **MR HEANEY:** And whether that be in the code or not, that's basic to building as you have always known it, isn't it Mr Slater?
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> **MR SLATER:** Yes.

[34] The view that the extent of Mr Slater's duty required something more than merely a slavish adherence to the (inadequate) plans and specifications is fortified by reference to an orthodox duty analysis, as to which the Court of Appeal in *Rolls Royce* said:

> [98] The assumption of responsibility and reliance concepts have also been used where the allegation is that services were negligently performed. ...

[8] Transcript at 289-290.

> [99] Assumption of responsibility for a statement or a task does not usually entail a voluntary assumption of legal responsibility to a plaintiff, except in cases where the defendant is found to have undertaken to exercise reasonable care in circumstances which are analogous to, but short of, contract, and it is foreseeable that the plaintiff will rely on that undertaking. If that is the case then, subject to any countervailing policy factors, a duty of care will arise. In other cases, the law will deem the defendant to have assumed responsibility where it is fair, just and reasonable to do so: *Attorney-General v Carter*, at pp 168 – 169 (paras [23] – [27]). Whether it is fair, just and reasonable to deem an assumption of responsibility and then a duty of care will depend on a combination of factors, including the assumption of responsibility for the task, any vulnerability of the plaintiff, any special skill of the defendant, the need for deterrence and promotion of professional standards, lack of alternative means of protection and so on – that is, essentially the matters discussed above at paras [58] – [65]. Wider policy factors will also need to be taken into account.
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> [100] Finally, we note that assumption of responsibility for the task cannot be sufficient in itself, at least insofar as the negligent construction cases are concerned.

[35] The application of these dicta to the position of "labour only" builders in the context of their construction of a leaking home has been recently and specifically considered by Hugh Williams J in *Boyd v McGregor*.[9] There his Honour said:

> [60] The passage cited from *Rolls-Royce* leads to consideration of the functional aspects of the appellants' position. First – and, almost certainly, foremost – whatever their contractual position and the possibility of oversight from Mr Jensen, the appellants assumed responsibility for installing the windows, the faulty installation of which was a prime cause of the house leaking. A competent builder and thus the appellants should have known that good trade practice is to achieve weathertightness and to do that requires the installation of flashings on the windows even if they were not drawn in the plans. A competent builder and thus the appellants should have known that to achieve weathertightness good trade practice and the manufacturer's manual required the installation of sealant around the windows, even if the manual (if obtained) might have been ambiguous on the point. Competent builders and thus the appellants would have known that once the defects concerning flashings, sealant and their workmanship around the windows generally was covered up, the owners would be vulnerable in the sense of being unable to discover the lack of weathertightness that resulted. Competent builders and thus the appellants should have had the skills required in carrying out the work that the appellants undertook so as to achieve weathertightness, a fundamental requirement of all statutory obligations and infringing on building and good trade practice. Being unable to ascertain the defects, the owners could not protect themselves against them.
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> [61] The cases demonstrate the extent of the appellants' involvement in the building also requires to be taken into account. In that regard, an

[9] *Boyd v McGregor* HC Auckland CIV-2009-404-5332, 17 February 2010.

> objective assessment must lead to the conclusion that, weathertightness of a building – whether domestic or commercial – is so inherently part of competent building that those who undertake building work are required to achieve weathertightness as a necessary component and should be visited with responsibility to those who erect buildings or have them erected. Thus they should be held liable if their work fails that fundamental function.
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> [62] There is therefore nothing arising from issues of policy, proximity or any of the other factors mentioned in the authorities to lead to the conclusion the adjudicator was incorrect in finding the appellants owed a duty of care to the McGregor Trust. The appellants' position is akin to that of the deck-builder in *Riddell v Porteous* [1999] 1 NZLR 1, 8 that:
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> > [Counsel's] first argument was that the extent of Mr Porteous's duty of care was restricted by his limited role as a labour only builder, consistently with his limited contractual duties. This argument must fail once it has been found that Mr Porteous took it upon himself to depart from the approved plans and specifications.
>
> [63] With the exception the appellants were one step further removed contractually than Mr Porteous' position, that citation is apt to dispose of the arguments advanced on their behalf. They departed from statutory, regulatory and good trade practice requirements where competent builders would not have departed from them, and in ways which caused substantial damage to the McGregor Trust through lack of weathertightness.

[36] Thus in *Boyd* the (labour only) builders were found to be under a duty to the homeowner Trust even though they were merely sub-contractors whose work had been supervised by a head contractor. The relationship here between Mr Slater and Mr Findlay was more proximate and there was necessarily more direct reliance by Mr Findlay on Mr Slater's competence.

[37] Accordingly and for essentially the same reasons as recorded by Williams J, I do not consider the fact that Mr Slater's contract was "labour only" obviated the implicit requirement for the building work to be done competently. And as Williams J also makes clear the fact that Mr Slater may technically not have departed from the (deficient) plans and specifications does not somehow mean that he was not under a duty also to comply with other statutory and regulatory requirements. Williams J refused to distinguish *Riddell v Porteous* on that basis and I respectfully agree. It follows that I consider that the Tribunal was incorrect to do so.

[38] I therefore consider that Mr Slater owed a duty to Mr Findlay either in contract or tort to build the house with reasonable skill and care and in compliance with the relevant regulatory standards. The house he built was defective, non-

compliant and (ultimately) barely habitable; the thing speaks for itself. More particularly, the evidence of both Mr Slater himself and of the experts makes it clear that Mr Slater was at fault in relation to both the fascia and the windows.

[39] As regards the sequencing of the fascia, for example: [10]

> **MR ST JOHN:** Right pieces in the right order. You've been in the Tribunal while a lot of evidence has been given and I think everyone by now knows that the fascia should have been installed after the plastering had been completed. Have you understood that evidence?
>
> **MR SLATER:** Basically, yes.
>
> **MR ST JOHN:** Back when you completed the house, did you understand that it was the appropriate sequence?
>
> **MR SLATER:** Yes, yes.
>
> **MR ST JOHN:** Thank you. Did Mr Findlay or anyone tell you to ignore that proper sequence and to put up the fascia up before the plastering?
>
> **MR SLATER:** No

[40] And as regards the windows: [11]

> **MR HEANEY:** Well it sounds very much to me, the way you describe it, and tell me if I'm wrong, that these windows were put in ahead of what should have been the appropriate schedule, because they were put in before the plaster.
>
> **MR NEVILL:** It may have worked if they had a full flashing system.
>
> **MR HEANEY:** So a competent builder installing these windows would have known, wouldn't he, that if the windows were going in first, then they would have to be installed with a full flashing system for it to work properly?
>
> **MR NEVILL:** I believe so.
>
> **MR HEANEY:** Or, in the alternative if they were put in the way they were put – well in fact you can't put them in the way they were put in without the flashing system, if you're putting them in ahead of the plaster, can you?
>
> **MR NEVILL:** No.

[10] Transcript at 59.
[11] Transcript at 273.

[41] Where Mr Slater's work necessarily and obviously required integration with the work of other contractors it could in my view reasonably be expected that dialogue would occur and (if necessary) further advice or directions sought. That did not happen. Although Mr Findlay was the obvious potential conduit for such dialogue I consider it would have been evident to Mr Slater that Mr Findlay was not playing (and could not play) an active role in terms of initiating any discussions of this kind.

[42] In short, and in terms of the three principal causes of damage to the Findlay home, I consider that Mr Slater must be held (jointly and severally) responsible for the damage caused by both the fascia and the windows. I do not consider he ought properly to be held liable for the 20% damage that is attributable to the concreting; I have already indicated that I do not accept that he had a supervisory role and thus it must be concluded that he had nothing to do with that aspect of the build.

[43] Like the Council's, Mr Slater's liability for the fascia and the windows is solidary in nature. The effect of this is that, subject to both any finding of contributory negligence and any ultimate apportionment between him and the Council, he is 100% responsible for 80% of the total damage.

Was the Tribunal right in its approach to assessing contributory negligence?

[44] As I have indicated above I have formed the view that there are two aspects of the Tribunal's approach to contributory negligence that require closer scrutiny. These are:

a) The repeated suggestion that the plaintiff Trust was somehow at fault for not suing other contractors who appear to have been plainly regarded by the Adjudicator as negligent and causative of much of the relevant damage; and

b) What appears to be the Tribunal's consequent allocation of the irrecoverable share of liability attributable to those other contractors to the plaintiff Trust rather than to the defendant Council.

[45] Although for obvious reasons one of the principal thrusts of Mr St John's submissions was that the Tribunal had erred in its attribution of 85% liability to Mr Findlay he did not put the implicit underlying legal analysis directly in issue and thus it was not directly the subject of submissions before me. I later asked counsel to file further memoranda in that respect and I am grateful for the assistance received.

Should the plaintiff have sued the other negligent contractors?

[46] It is trite that where a number of persons have, through their negligence, caused loss to a plaintiff, that plaintiff has a choice about whether to sue one, two, or more of those persons. And because each defendant so sued is potentially concurrently liable *in solidum* for all the damage caused, recovery of the total amount of the loss can be sought by the plaintiff from any one of them. That is because the whole basis of the law of civil liability is that quantification is determined not by the degree of a defendant's fault but by the extent of the injury to the plaintiff.

[47] It follows that to the extent that there can be said to be any kind of responsibility for ensuring that all persons who are potentially liable to a plaintiff are parties to the relevant proceedings, it falls on the defendants. That is because it is they who will bear the full burden of any liability that is established in the event that such joinder does not occur, although any defendant who is ultimately found liable can of course also bring separate and subsequent contribution proceedings.

[48] Thus any "onus" in the present case was not on the Trust but rather on the defendant(s) to cross-claim against or seek contribution from the architects, the plasterer, the tiler and the concrete contractor. Because they did not, and because in the first instance the Tribunal found that the Council's negligence had caused the damage to the house but exonerated Mr Slater, it inexorably follows (as the Tribunal quite correctly stated) that the Auckland City Council was "liable for the full amount of the established claim".

[49] Similarly, insofar as I have now held that Mr Slater is also responsible for the damage resulting from the window and fascia defects, he is also prima facie liable

for the full damage resulting from those issues which, as I have said, is accepted to be 80% of the total amount claimed.

[50] This is of considerable consequence in relation to the question that follows.

Allocation of irrecoverable shares

[51] The defence of contributory negligence operates differently from the solidary liability that is imposed on defendants. More particularly, a plaintiff who has been contributorily negligent will have his entitlement to damages reduced, but only by an amount that is fairly reflective of the extent of his responsibility. That is reflected in s 3(1) of the Contributory Negligence Act which provides that:

> Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage:

[52] The same limiting focus on relative responsibility for damage does not apply when determining the extent of liability of a defendant, except when an assessment of just and equitable contribution is being made as between him and other defendants under s 17 of the Law Reform Act 1936. That is because, as I have said, the starting point is that each negligent defendant is concurrently liable *in solidum* for all of the damage caused to the plaintiff.

[53] The terms of s 3(1) also make it clear that the extent of a plaintiff's contribution or respective blameworthiness is to be ascertained by comparison with the respective fault of "any other person or persons". There is no requirement that those persons first be named in proceedings or found liable. By contrast, under s 17 the contribution of each tortfeasor is measured only against the responsibility of other tortfeasors.

[54] The potential unfairness resulting from the proportionate liability of contributorily negligent plaintiffs and the solidary liability of negligent defendants was considered by the New Zealand Law Commission in its 47th Report

Apportionment of Civil Liability (1998). Notably, having raised in its preliminary paper the issue of whether there was a need for reform in this area, the Commission ultimately recommended that there should be no change. It said:

> 11. This Commission in its preliminary paper (paras 180.187) proposed, as a compromise between solidary and proportionate liability, a solution under which, where the plaintiff has contributed to the loss, responsibility for uncollectable shares would be apportioned among solvent defendants and the plaintiff. In other words, if P obtains a judgment against D1 for an amount reduced by P's contributory fault, and that judgment is satisfied by D1 but D2 is unable to contribute his or her share, the loss should be apportioned among D1, any other defendants, and P. Such a proposal, it can be argued, runs completely contrary to the reasons we have advanced in support of solidary liability. If the correct view is that D1 is liable to P for all of P's loss, and questions of contribution among defendants are irrelevant to that liability, why should P's net entitlement be diminished because D1 cannot collect the share of P's entitlement that should be contributed by another defendant? It originates in Professor Glanville Williams.s monograph Joint *Torts and Contributory Negligence* (paras 102.104). His recommended legislation was adopted by the Irish Civil Liability Act 1961 and were supported by British Columbia.s Law Reform Commission in its 1986 *Report on Shared Liability*. Professor JG Fleming favours an essentially similar stance (1976, 250.256; 1979, 1482.1485, and 1491.1494) as does Professor RW Wright (after he earlier advocated the contrary view; compare 1988, 191.193 with 1992, 77.78). The opposing view is taken by the Ontario Commission in its 1988 report (para 186) and by the English Commission's Common Law Team in its 1996 report (paras 4.2.4.15).
>
> 12. In reaching its conclusion, the Common Law Team placed substantial emphasis on the decision of the House of Lords in *Fitzgerald v Lane* [1989] AC 328. In this case the suggestion that the contributory fault of P should be assessed separately as against each defendant (so as to make possible a different percentage apportionment as between P and D1 and as between P and D2) was rejected. Instead, the court used the approach that, because what was being measured was P's departure from appropriate standards, all the defendants were treated as a unit. *Fitzgerald v Lane* was discussed in our preliminary paper (paras 125 and 195) and the paper's draft statute was shaped on the basis that the *Fitzgerald v Lane* decision was accepted. It now seems to us that, once it is accepted that any reduction in P's claim is to be calculated by treating the concurrent wrongdoers as a group, then any rationale for allocating part of an uncollected share to P evaporates. The Commission's view now, therefore, is that no part of an uncollectable contribution should be allocated to P.

[55] In the present case I consider that it can reasonably be inferred from the terms of the Adjudicator's report that the Tribunal did not proceed on the basis of the law I have set out above. The exercise to be undertaken was not an assessment of Mr Findlay's and the Council's comparative blameworthiness as against each other but an assessment of Mr Findlay's fault as against all other persons who were

causative of the relevant damage. The determination makes it clear that those people included the architect, the plasterer, the tiler and the concrete layer.

[56] It also seems to me reasonable to infer that in leaving the Council with liability of only 15% the Tribunal may have been overly influenced by what is accepted to be the usual range of apportionment (10 – 20%) in defective building cases where a local authority is one of a number of tortfeasors. But for the reasons I have given, where there are a number of persons at fault but the Council is the only tortfeasor that "normal" range is no longer an appropriate yardstick.

[57] In other words, the fact that the approach I have outlined yields a result that is at odds with (most) other cases involving local authority liability in defective building cases is merely a function of the shape that these proceedings have taken. This was a point explicitly made by the New South Wales Court of Appeal in *Barisic* v *Devenport* :[12]

> At first sight, it might appear that some apparently surprising consequences follow, if one tort-feasor is not a party to the proceedings, but his fault is brought to account in assessing the plaintiff's share of responsibility. ... if a plaintiff at fault were to sue only one defendant who is at fault equally with him, he could recover a verdict against that defendant only slightly scaled down, if it were to appear that another person not a party was substantially at fault. However, on examination, the broader view is that these apparent anomalies are capable of remedy if available procedures are adopted, and that considerable difficulties and inconsistencies would arise if the total fault causing the loss were not consistently considered on every occasion on which the claimant's damage was reduced by reason of his share of responsibility. If it were not so, the extent of the plaintiff's rights would depend on the procedures adopted to enforce them. Indeed the use of the term "person or persons" supports the wider view of s. 10(1) that a change was thereby made in the substantive rights of a person who sustains loss by reason of the fault of others. Being substantive rights, they do not depend on the constitution of the proceedings to enforce the right. The apparent anomalies of the type earlier stated arise, not because of the nature of the claimants right, which depends on the faults which in fact produced the damage, but because of the deficiencies in the procedures that the parties have adopted or permitted to be adopted and, in particular, because available procedures to join all relevant parties so as to determine all competing rights in one action have not been availed of. If, as in the example earlier given, a tort-feasor alone sued is only slightly at fault, so as to be at risk of having an award which appears unfairly high, as earlier indicated, this is consistent with the lot of any tort-feasor, and he can meet this situation in the action by joining the other person at fault as a third party, or later suing him in a separate action for contribution. To award the lesser sum against him

[12] *Barisic* v *Devenport* [1978] 2 NSWLR 111 (at 122 -123 per Moffitt P).

> because the other at fault was absent would deny the terms of s. 10(1) and would lead to inconsistencies. If only the fault of parties could be considered in fixing the plaintiffs share of fault, difficulties would arise. Should the sum awarded the plaintiff differ, if the second tort-feasor is a "party" in the action (s. 3(1) of the 1946 Act), but only as a third party? Although perhaps not relevant for present purposes, some quite extraordinary problems would arise if such a sole defendant had judgment given against him which ignored the fault of the other absent tort-feasor who was later sued for contribution, and then by the plaintiff in a separate action.

[58] As matters have developed in this appeal, however, the Council is in my view no longer to be regarded as the sole tortfeasor, at least insofar as 80% of the damage is concerned. That may in itself serve to ameliorate some of the concern that appears to have driven the Tribunal's decision.

Was the Trust contributorily negligent and (if so) to what extent should the Trust's entitlement to damages be reduced on that account?

[59] I have said that the Tribunal's attribution to the Trust of 85% of the responsibility for the damage to the house was in my view arguably the result of confusion between the solidary liability that is imposed on joint tortfeasors and the contributory liability that may be imposed on a negligent plaintiff. That conclusion can and should be further tested by reference to the ordinary principles that govern how the existence of any such contributory liability is properly to be ascertained and then, the extent of such liability is to be measured.

[60] The relevant authorities were usefully and comprehensively summarised by Stevens J in *Hartley v Balemi*[13] in the following way:

> [101] ... s 3 allows for apportionment of responsibility for the damage where there is fault on both sides or fault on the part of the plaintiff and other parties. "Fault" is defined by s 2 of the Contributory Negligence Act as meaning:
>
> > …negligence, breach of statutory duty, or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence.
>
> ...

[13] *Hartley v Balemi* HC Auckland CIV-2006-404-2589, 29 March 2007.

[103] For present purposes, an important aspect of the definition of fault when considering the conduct of a claimant, here the appellant, is the requirement that the negligence alleged gives rise to liability in tort. But in the context of contributory negligence care must be taken as to how the definition of fault in s 2 of the Contributory Negligence [Act] is applied to alleged contributory negligence of a claimant.

[104] This issue is highlighted in ... *Badger v Ministry of Defence* [2006] 3 All ER 173. On the issue of the alleged contributory negligence [of] a claimant, Stanley Burnton J stated at [7]-[8]:

> … as in the case of negligence, the question of fault is to be determined objectively. The question is not whether the claimant's conduct fell below the standard reasonably to be expected of him, but whether it fell below the standard reasonably to be expected of a person in his position: did his conduct fall below the standard to be expected of a person of ordinary prudence? These propositions were stated more elegantly by Lord Denning MR (with whose judgment the other members of the Court of Appeal agreed) in *Froom v Butcher* [1975] 3 All ER 520 at 523, [1976] QB 286 at 291:
>
> > Negligence depends on a breach of duty, whereas contributory negligence does not. Negligence is a man's carelessness in breach of duty to *others*. Contributory negligence is a man's carelessness in looking after *his own* safety. He is guilty of *contributory* negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable prudent man, he might be hurt himself (citation omitted).
>
> He added ([1975] 3 All ER 520 at 525-526, [1976] QB 286 at 294):
>
> > In determining responsibility, the law eliminates the personal equation. It takes no notice of the views of the particular individual; or of others like him. It requires everyone to exercise all such precautions as a man of ordinary prudence would observe (citations omitted). Nowadays, when we have no juries to help us, it is the duty of the judge to say what a man or ordinary prudence would do. He should make up his own mind, leaving it to the Court of Appeal to correct him if he is wrong.

[105] It is clear therefore that reasonable foreseeability of the risk of harm by a claimant is a prerequisite to a finding of contributory negligence. This principle was articulated by Denning LJ (as he then was) in *Jones v Livox Quarries Ltd* at 615:

> Just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself, and in his reckonings he must take into account the possibility of others being careless.

> [106] Incidentally, the approach of Lord Denning MR in *Froom v Butcher* was recently endorsed by the Court of Appeal in *Swarbrick Excavating (Christchurch) Ltd v Transit New Zealand* CA156/05 3 November 2006.
>
> [107] Moreover, it is axiomatic that decision-makers, in determining questions of contribution where negligence by a plaintiff is alleged, must only look at negligence or fault which is causal and operative: see *Griffin v Wimble & Co* [1950] NZLR 774 approving *Davies v Swan Motor Co Ltd* [1949] 2 KB 291 (CA). As stated in Todd at 22.2.03 (854):
>
> > Negligence by the plaintiff can be disregarded if this was not a proximate cause of damage of which he or she complains. Ordinary principles of causation and remoteness must be applied before any question of apportionment can arise.
>
> [108] Negligence is an effective cause of injury if, judged broadly and on common sense principles, the injury is a direct consequence of the defendant's negligence (citations omitted). ...
>
> [109] In *Sew Hoy & Sons Ltd v Coopers & Lybrand* [1996] 1 NZLR 392 (CA), McKay J at 399 held that causation means more than the mere creation of an opportunity to incur loss. It was also accepted in that case that causation requires more than meeting the "but for" test, that there must be legal causation as well. ...
>
> [110] As outlined in Todd at 21.3.01 in reliance on *Price Waterhouse v Kwan* [2000] 3 NZLR 39 (CA) at [28], the fundamental problem in this field is to distinguish between causing a loss and providing an opportunity for its occurrence.

[61] Stevens J then went on to discuss issues relating to the standard of care expected of a plaintiff in terms of protecting himself from harm. That particular issue has also more recently been the subject of consideration by the Court of Appeal in *O'Hagan v Body Corporate 189855*[14] where Baragwanath J noted the argument made by Glanville Williams (and accepted by many subsequent commentators) that s 3 of the Contributory Negligence Act requires as a condition of liability a higher degree of fault from a plaintiff who fails properly to look after his own interests than the degree of fault necessary to render liable a tortfeasor who carelessly injures the plaintiff to whom he owes a duty of care.

[62] Baragwanath J then went on to consider the causation/blameworthiness distinction drawn by Lord Denning in *Davies v Swan Motor Co Ltd* and said (at [67]):

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[14] *O'Hagan v Body Corporate 189855* [2010] NZCA 65 ("Byron Ave").

> It was common in pre-Accident Compensation Act damages claims for juries to be directed when considering contributory negligence to take account both of causative potency and moral blameworthiness. With their considerable experience in this sphere the Australian courts have rejected the test of moral blameworthiness and preferred "the degree of departure from the standard of the reasonable person". Since the test is objective, subject to the point that the reasonable person is, in general, attributed with the characteristics of the plaintiff ([79] below), the Australian test has obvious appeal. I incline to the view that the formulations express the same point in different language. It is unnecessary in this case to choose between them; here they lead to the same result. (Citations omitted).

[63] And at [79] he said:

> The principle requires an objective test but expressed in terms of the person's own general characteristics. In the related sphere of damages a defendant must take the plaintiff as is and pay greater damages to someone who possesses a thin skull than to another who does not. In principle, there should be a finding of no or reduced departure from the relevant standard/"moral blameworthiness" on the part of someone who, without any or much personal fault, acts in a manner that would be held careless in the case of another plaintiff. I consider that to be a better justification for the kinder view that is conventionally taken of the conduct of children who may be morally blameless where an adult would not. (Citations omitted).

[64] Accordingly in order to assess the existence and extent of any contributory negligence on the part of the Trust/Mr Findlay it appears to me to be necessary to address the following three questions:

a) What is it that can fairly be said on the evidence to have been done (or not done) by Mr Findlay that contributed to the defects in the Arney Road house?

b) To what degree can those actions or inactions be said to represent a departure from the standard of the reasonable person (in Mr Findlay's position)?

c) What was the causative potency of those actions or inactions in relation to the damage suffered?

[65] Each will be addressed in turn.

What did Mr Findlay do or not do that contributed to his loss?

[66] The passages that I have set out above from the Tribunal's determination indicate that the Adjudicator considered that Mr Findlay:

a) Failed to employ a project manager; and

b) Thereby himself assumed the role of project manager; and then

c) Failed properly to manage, coordinate or oversee the work done by different contractors; and

d) (As a separate matter) ordered the wrong windows.

[67] In the context of making further submissions on the two preliminary matters addressed between [44] and [58] above, counsel for Mr Slater submitted that the operation of the doctrine of identification meant that Mr Findlay should also properly be held vicariously liable for the acts and omissions of the architects, plasterer, tiler and the concrete contractor.

[68] It is not disputed that Mr Findlay did not employ a project manager. The issue in that respect will be one of causative potency and degree of departure and that will be discussed later in those contexts below.

[69] The Tribunal's finding that Mr Findlay's failure to employ a project manager meant that he therefore assumed that role himself and "controlled" the build appears to me to be more questionable. Much of the Tribunal's analysis is based on this assumption.

[70] While I accept that the evidence points very clearly to an absence of oversight or control on anyone's part, it is quite a different matter to conclude from that evidence that Mr Findlay assumed control and then exercised it inadequately or negligently. Mr Findlay was not a developer; my own view of the facts is that he was merely organising the building of a house in which he and his family would live.

I do not accept that the evidence shows that he undertook, in any positive or meaningful way, active responsibility for controlling or supervising the various contractors or for checking their work in any but a superficial sense. To the extent there are statements in the determination that suggest that the Tribunal formed a different view I do consider that such an assessment is consistent with the evidence; it can only have been based on the assumption I have referred to in the previous paragraph.

[71] Nor (as far as I have been able to ascertain) was there any evidence to suggest that the contractors were expecting, or relied upon, Mr Findlay to control, supervise or check their work for compliance with the regulatory requirements or (in that sense) to "control" the build. Any such expectation would in the circumstances have been inexplicable and unrealistic given Mr Findlay's undisputed lack of relevant expertise and the fact that he was employed in full-time work elsewhere.

[72] In summary I consider that Mr Findlay's role was on all fours with that of the owner in *Mowlem v Young*[15] in respect of whom Robertson J said:

> This was nothing more than a professional man building a house and getting appropriate workmen to come in and do the physical jobs which needed to be done. I cannot accept the submission that the evidence discloses that Mr Young was the builder and head contractor and was accordingly the constructor of the retaining wall. I understand why Mr Bush uses those words in his submission. But they lack an air of reality in what was going on. Mr Young needed walls. Mr Young arranged for people to do it. To now say that makes him a contractor or developer, is in my judgment to miss the import of the distinction which the Court of Appeal was drawing in *Mt Albert Borough Council*.

[73] It follows that I do not consider that the Tribunal's propositions summarised by me at [66]b) and [66]c) are correct. It seems to me that the most that can be said in those respects is that Mr Findlay failed to employ someone with relevant qualifications or experience to supervise the project, to oversee and check the work of the contractors and to coordinate between them. At best this might (depending on the outcome of the next stage of the inquiry) amount to a negligent omission on his part.

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[15] *Mowlem v Young* HC Tauranga AP35/93, 20 September 1994 (at 7).

[74] As to the fourth proposition (that Mr Findlay ordered the "wrong" windows) there was a dispute as to the factual basis for that finding and in particular the admissibility of the evidence in this regard (being a letter apparently sent to Mr Findlay by Leuschke Architects detailing the required specifications, but not recalled by either Mr or Mrs Findlay, or Mr Slater). This is not a matter that I consider I can categorically resolve in the context of this appeal and I therefore merely take it into account in a general way in the assessment of the appropriate apportionment of responsibility that follows.

[75] Lastly (in terms of the acts and omissions for which Mr Findlay might be held responsible) I reject out of hand the possibility that Mr Findlay might properly be held to be vicariously liable for the negligence of the contractors who are not before the Court. A finding of identification would be quite inconsistent with the view I have formed of the nature and extent of Mr Findlay's involvement in the project. There can be no question of some non-delegable duty arising. These were independent contractors. They were not Mr Findlay's agents. There is no reason either in law or on the facts to depart from the usual rules in this respect.

To what degree can Mr Findlay's failure to engage a project manager be said to represent a departure from the standard of a reasonable person in his position?

[76] As the authorities discussed by Stevens J in *Hartley* make clear the central inquiry is whether, in failing to engage a project manager, Mr Findlay can be said to have been careless in looking after his own interests. More specifically, ought he reasonably to have foreseen the risk of damage that occurred if he did not employ such a person?

[77] The starting point should, I think, be a temporal one. The Arney Road house was built in 1996. The Building Act 1991 had been in force for less than five years. Nothing then was known of the deficiencies in its "performance based" regulatory style or (more specifically) of the leaky buildings crisis. Mr Findlay was entitled to place store in the fact that the law did prescribe results that contractors knew they had to achieve. Any awareness of danger that Mr Findlay might reasonably be expected to have could only therefore be of the most generalised kind.

[78] As well, the Court of Appeal's judgment in *Invercargill City Council v* Hamlin[16] had been issued only two years earlier. It had been upheld by the Privy Council at the beginning of 1996. As is well known, the Court of Appeal's decision focused very squarely on the unique indigenous conditions pertaining to housing, the building industry and the role of local authorities. It is notable that when describing those conditions the Court said (inter alia) at 525:

> ... it has never been a common practice for new house buyers, including those contracting with builders for construction of houses, to commission engineering or architectural examinations or surveys of the building or proposed building. In the low-cost housing field the ordinarily inexperienced owner was contracting with a cottage builder on fairly standard plans amended to suit the owner's wishes and pocket. That contracting was within the framework of encouragement and often financial support from the State and of the protection provided by local body controls and adherence to the standard bylaws. It accorded with the spirit of the times for local authorities to provide a degree of expert oversight rather than expect every small owner to take full responsibility and engage an expert adviser.

[79] There can be little doubt that the Arney Road home did not fall within the category of "low cost housing". It was a moderately complex project. However consistent with the Court of Appeal's comments in *Hamlin* the Assessor, Mr Nevill, stated in evidence that it was not common practice in 1996 for project managers to be employed even in projects such as Mr Findlay's. He described the state of affairs at that time as being "on the cusp" in that respect. It was only with the benefit of hindsight that he was able categorically to say that the engagement of a project manager was obviously the prudent course for a man in Mr Findlay's shoes to take.

[80] That said, Mr Findlay was a relatively sophisticated man building a relatively sophisticated house. He was concerned about quality and wanted a good result. He knew nothing himself about building or a project of this kind. On the other hand, he believed he had contracted with competent tradespeople. He knew there was a regulatory regime that they were obliged to comply with. In the end, I am prepared to accept that Mr Findlay did not take all reasonable steps to protect his position and thus can, to a limited extent, be said to have departed from the standard of care that might be expected of someone like him in 1996. Thus it become necessary to consider how much causative potency this failure had.

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[16] *Invercargill City Council v Hamlin* [1994] 3 NZLR 513.

What was the causative potency of Mr Findlay's failure to engage a project manager?

[81] Before the Tribunal there was much evidence about why Mr Findlay did not contract with Leuschke Architecture Group to project manage the build. It was certainly open to him to do so and it had been suggested by the architects. For its part, the Tribunal appears to have formed the view that Mr Findlay was wrong not to take up that suggestion and that it was this failure that was the principal cause of his loss.

[82] I have already concluded that Mr Findlay's failure to employ a project manager did involve some degree of departure from the standard of care that might reasonably be expected of him. But the more difficult question is what difference it would have made had Mr Findlay used his architects in this way. It is at this point and in this sense that the material distinction between acts of omission and acts of commission becomes most evident. As Todd says (in the context of causation generally):[17]

> More problematic is the case where a basis for a duty to act exists but the circumstances are such that whether action by the defendant would have averted the plaintiff's loss is unknown or inherently unpredictable. ... As a general rule, whether the conduct is a cause of harm is determined on the balance of probabilities. This rule, however, may be difficult to apply or quite inappropriate where the question is not as to what did in fact happen but as to what would have happened had the defendant acted. One solution is for the court to evaluate the chance that the damage would have been avoided and to give damages based on the value of that chance. .... Causal problems in omissions cases may sometimes be resolved in this way. (Citations omitted).

[83] While the more detailed discussion of this issue in Todd Chapter 20.2.04 raises a number of difficulties that have arisen both in practice and in theory with the valuation of chances, it seems to me that it is the only practical way of assessing causative potency here.

[84] The starting point is perhaps that it is not possible to conclude with any certainty at all that "but for" Mr Findlay's failure to engage Leuschke Architects (or someone like them) as project managers, he would have suffered no loss. The leaky

building crisis is not readily reducible to specific individual causes; it was the result of a systemic failure. And however well known Leuschke Architects may have been 15 years ago, it is a matter of public record that they have subsequently gone out of business due to their part in the crisis, and in the present case the Tribunal found their design failures were contributing causes of the damage.

[85] However as the quotation from *Hartley* above makes clear, "but for" is not the test – particularly in cases where the measurement of chance is required. Rather (and as Todd suggests) the more pertinent question is "did Mr Findlay's failure to employ Leuschke Architects (or someone else) as project managers significantly increase the objective probability that he would suffer loss?" Even then, however, the answer is far from clear. The best that can be said is that in all probability, some, but not all, of the damage would have occurred anyway.

[86] In the end I consider it is reasonable to conclude that the "chance" involved in Mr Findlay's failure to employ a project manager can be valued at no higher than 40% across all three principal causes of the damage. I do not consider that such an assessment differs significantly from the Tribunal's analysis, once the fault of the contractors who were not parties to the litigation is not attributed to Mr Findlay. I therefore consider that it is just and equitable that the damages recoverable by Mr Findlay from the Council and from Mr Slater should be reduced by 40% on account of his contributory negligence.

What is the appropriate apportionment of liability between Mr Slater and the Council?

[87] Once the above point is reached it remains necessary to apportion the remaining liability between Mr Slater and the Council. Apportionment is not a mathematical exercise but a matter for judgment, proportion and balance. Because I have taken a different approach from the Adjudicator to a number of the key underlying issues no particular assistance is to be derived from the apportionment exercise undertaken by the Tribunal. And while I bear in mind the "usual" apportionment approach as regards local authorities in cases such as this, I have

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[17] Stephen Todd (ed) *The Law of Torts in New Zealand* (5th ed, Brookers, Wellington, 2009) at 5.6.02.

found that Mr Slater cannot properly be held liable in relation to the concreting and so it follows that the Council must bear the unallocated loss in that respect. Putting liability for that damage to one side, however, I consider that the remaining liability as between the Council and Mr Slater should be apportioned 20:80.

[88] An application of that apportionment to the three cause of damage and taking into account Mr Findlay's contributory negligence can most easily be represented in tabular form:

Damage	**Mr Findlay**	**Mr Slater**	**Council**
Fascia (40%)	16%	19.2%	4.8%
Windows (40%)	16%	19.2%	4.8%
Concrete (20%)	8%	0%	12%
Total responsibility	**40%**	**38.4%**	**21.6%**

[89] Based on the total costs of remediation recorded at the beginning of this judgment that apportionment would result in liability in damages to the appellants in the sums of:

a) $171,064.48 by Mr Slater; and

b) $96,210.81 by the Council.

Is the Trust entitled to an award of general damages?

[90] Before the Tribunal the Trust claimed damages of $40,000 for anxiety, distress and inconvenience. The Tribunal denied the claim essentially on the basis that the Trust was not the occupier of the house. The adjudicator said at [143]:

> In *Byron Ave*[18] Venning J made various awards in favour of claimants for general damages ranging from no payments to trustees. [sic] It is noted that the High Court reached this decision when one of the trustees was an owner-occupier. This Tribunal is bound by this High Court decision to the effect trustees and trusts are unable to obtain general damages.

[91] The Tribunal also referred to the case of *La Grouw v Cairns*[19] as "not supporting the contention that it is authority for awarding damages for mental distress to occupiers whose occupation is as beneficiary and not owners" (at [144]). It then said (at [145]) that "Mr Findlay is not a party to this claim in his own right but only as a trustee" and concluded (at [146]) that it was (on the basis of other Tribunal decisions) "statutorily barred" from awarding general damages in favour of a trust.

[92] Since the date of the Tribunal's determination the Court of Appeal's decision in the *Byron Avenue* appeal ([2010] NZCA 65) has been released. That decision confirmed the availability of general damages in leaky building cases, and at [153] said that in general:

a) Such awards should not be made in favour of corporate owners;

b) The usual award was $15,000 per unit for non-occupiers;

c) The usual award $25,000 per unit for occupiers.

[93] As regards the trust issue, the Court of Appeal said that "[u]nlike a company, which is a different legal person from its shareholders, Ms Clark's legal status as owner of the unit did not alter when she transferred it to herself and her co-trustee" (at [49]), and that both her liability in tort and her entitlement to sue in tort remained unaltered (see [49]-[52]).

[94] In assessing general damages, the Court held that Ms Clark fell into the class of those who occupied the apartment (at [120]) and whilst acknowledging that she did not have the day to day exposure to the property, awarded her $20,000 for the

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[18] *Body Corporate 189855 & Ors v North Shore City Council* HC Auckland CIV 2005-404-5561, 25 July 2008.
[19] *La Grouw v Cairns* [2004] 5 NZCPR 434 (HC).

overall stress she has sustained, which required her to be treated differently from a absentee owner (at [128]).

[95] Significantly, at [120], the Court stated:

> ...For the reasons stated at [49] above the transfer has no legal effect upon Ms Clark's standing to sue and the transfer may be disregarded for present purposes. There can be no claim by the trustee who neither occupies the apartment nor has any personal economic interest in it.

[96] In my view that is sufficient to dispose of this aspect of the appeal in the Trust's favour, subject to a 40% reduction for the contributory negligence that I have found. Based on a starting point of $25,000 (which acknowledges that Mr Findlay not only owns but lives in the Arney Road house) the Trust is accordingly entitled to general damages in the sum of $17,000, payable pro rata ($13,600:$3,400) by Mr Slater and the Council.

Conclusions

[97] In summary:

a) The Trust's appeal and the Council's cross-appeal are allowed insofar as Mr Slater has been found to be liable in negligence to the appellants in relation to that 80% of the damage which is attributable to the fascia and the windows;

b) The Council remains liable in negligence for 100% of the damage;

c) The Trust's appeal is allowed insofar as the damages payable to the Trust by Mr Slater and the Council due to its contributory negligence shall be reduced by 40% rather than 85%;

d) The remaining damage is to be apportioned 80:20 as between Mr Slater and Council which (after taking into account (a) to (c) above) results in Mr Slater bearing 38.4% (or $171,064.48) of the

liability and the Council bearing 21.6% (or $96,210.81) of the liability;

e) The Trust's appeal in relation to general damages is allowed with such damages to be fixed at $25,000, reduced to $17,000 to reflect the finding of contributory negligence above. That sum is also to be apportioned 80:20 between Mr Slater and the Council, resulting in additional liability of $13,600 and $3,400 respectively;

f) The remainder of the Council's cross-appeal is dismissed.

[98] As will be evident from the above, the appellants have in large part succeeded in their appeal and are entitled to costs on a category 2 band B basis. In what I trust will be the unlikely event that Counsel are unable to agree they are to file memoranda with 10 days of the date of delivery of this judgment.

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Rebecca Ellis J