IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI 2010-100-32, 34, 35, 36, 37, 38, 39, 40 and 41
[2011] NZWHT AUCKLAND 50, 51, 52, 53, 54, 55, 56 and 57

BETWEEN	BOAC Claimants
AND	AUCKLAND COUNCIL First Respondent
AND	HUGHES & TUKE CONSTRUCTION LTD Second Respondent
AND	DAVID CHARLES TUKE Third Respondent
AND	DAVID B MCGLASHAN Fourth Respondent
AND	RRL GROUP LIMITED Fifth Respondent
AND	BARRY RUSSELL BROWN (Undischarged Bankrupt) Sixth Respondent
AND	ALUMINIUM CITY (PENROSE) LIMITED (in Liquidation) Seventh Respondent
AND	SCOTT MARSHALL (Removed) Eighth Respondent
AND	FROGLEY PLUMBING SERVICES LIMITED Ninth Respondent
AND	STEPHEN JOHN FROGLEY Tenth Respondent
AND	VERO INSURANCE NEW ZEALAND LIMITED Eleventh Respondent

Hearing: 11-15 July 2011

Closing Written Submissions: 20 July 2011

Closing Oral Submissions: 22 July 2011

Closing Written Submissions on Quantum solely: 9th September 2011

Extended Hearing for Closing Oral Submissions on Quantum solely: 13th September 2011

Appearances: Mr P Langlois and Mr R Potter for the claimants
Mr P Robertson for the first respondent
Mr D Wilson for the second and third respondents
Mr G Kohler for the fourth respondent
Mr S J Frogley, the tenth respondent – self represented
Ms T Wood and Ms Tompkins for the eleventh respondent

Decision: 21 October 2011

REASONING FOR FINAL DETERMINATIONS
Adjudicator: K D Kilgour

CONTENTS

[1] These proceedings concern nine individual claims which have been heard concurrently.[1] The nine claimants each own a residential townhouse (unit) which is affected by leaky building issues. Remedial work has been completed. The nine claimants seek to recover the costs of remedial work together with general damages and consequential damages of $2,373,193.00 from Auckland Council, Hughes & Tuke Construction Limited, David Tuke, David McGlashan, RRL Group Limited (in liquidation), Frogley Plumbing Services Limited and its principal, Stephen Frogley alleging that they are responsible for the damage that was caused to their units.

[2] Mr Tuke was the principal director and shareholder of Refdin Holdings Limited the owner and developer of the units and of HTC, the head building contractor. Mr Tuke states that he was not the developer and did not assume any personal responsibility. Mr McGlashan was employed by HTC as its quantity surveyor and the claimants allege that he project managed the development of the units. Mr McGlashan denies this and says his role was solely administrative. HTC engaged RRL to install the roof. The claimants allege incorrect roofing installation has caused defects which is denied by RRL and says most of the unit owner's claims against it are limitation barred because the work it undertook was accomplished more than ten years before the claims were filed. The claimants allege that Frogley Plumbing Services Limited caused such plumbing defects as gutters being embedded in the cladding which has caused damage to the units. Frogley states that such installation is the responsibility of other trades. The Council carried out the inspections and issued the Code Compliance Certificate in relation to each unit. It however argues that the majority of its inspections were properly undertaken and in any event its inspections in relation to

[1] See Appendix 1.

stage 4 of the development were outside the ten year limitation period.

[3] The issues that I need to decide are:

- What building defects are causative of leaks?
- What is the appropriate repair option?
- Did the Council negligently undertake its regulatory inspections and were the majority of the inspections time limitation barred?
- Claim against Hughes & Tuke Limited
- Was David Tuke the developer of the Broadwood Villas?
- Was David McGlashan the project manager and if so, was he responsible for the defects?
- Was the roofing work by RRL Group Limited limitation barred?
- Claim against Frogley Plumbing Services Limited and Stephen John Frogley
- The affirmative defences of contributory negligence
- What is the appropriate measure of each claimant's loss?

FACTUAL BACKGROUND

[4] Broadwood Villas is a residential complex of 29 town houses at 20 Sunnynook Road, Albany which was designed and built in the mid-1990s. The development is on land which was acquired by Refdin Holdings Limited.

[5] Refdin was a company formed by Mr Tuke solely to acquire the land, develop the units and market their sale. Refdin was liquidated following completion of the development. Refdin engaged HTC to head construction of the units which were built in five stages. HTC engaged the sub trades.

[6] The nine claims formed part of stages four and five of the construction. Stage four related to construction of units 1-5. An application for building consent for this stage of the construction was submitted by Mr McGlashan on behalf of Refdin on 4 September 1995. Accompanying the application were building plans drawn by architects engaged by Refdin and a generic set of specifications. The plans for both stages four and five show the exterior of the complex was to be covered with solid plaster over a 4.5 mm Hardibacker substrate. The Council issued building consent number T10111 pursuant to the stage four application on 13 October 1995. Construction began approximately October 1995. Stage four was completed by October 1996 and the Council issued a Code Compliance Certificate for building consent T10111 on 7 October 1996.

[7] Building consent for stage five was made by Refdin on 3 November 1995. Stage five comprised units 23-29 (units 23, 24, 26, 27, 28 forming part of this proceeding). The application again included plans drawn by Refdin's architects and a generic set of specifications. The Council issued building consent T10298 on 20 February 1996. It was a condition of that consent that the stucco plaster wall covering comply with NZS3604. Construction of stage five commenced in February 1996 and was completed in December 1996. Council issued a Code Compliance Certificate on 31 December 1996.

[8] On 14 January 2006 the then owner of unit 29 (which does not form part of this proceeding), wrote and distributed a letter to the claimants and other owners within Broadwood advising them that her unit had significant weathertightness issues and that extensive building repairs would shortly be commencing at her unit. This was the first indication that the claimants had of serious water ingress issues within the complex.

[9] Each of the claimants applied for a WHRS assessor's report between 11 May 2006, when the owner of unit 28 made application, and the last application, unit 1, was made on 21 August 2006.

[10] The WHRS assessor's reports prepared pursuant to those applications identified a number of water ingress defects in the construction of the units.

[11] The claimants instructed Hampton Jones Property Consultants Limited (Hampton Jones) to investigate the damage to the nine units and to coordinate and supervise the required remedial work. Hampton Jones advised that the only satisfactory way to remediate the units and provide homes that were weathertight and Building Code compliant was to reclad entirely and replace damaged timber.

[12] Nine individual applications for building consent in relation to the remedial works were made to the Council on 18 and 25 July 2008. The Council issued building consents pursuant to such applications and, following a competitive tender process, the remedial works began about 12 July 2009 and were largely completed by the end of December 2009.

WHAT DEFECTS ARE CAUSATIVE OF WATER INGRESS?

[13] The experts' conference on 22 March 2011 was attended by:

- Noel Casey, the WHRS assessor;
- Simon Parry and Christopher Ackerman of Hampton Jones who recommended to the claimants the remediation scope and supervised remedial work on all nine units;
- Stuart Wilson, the claimants' independent remediation expert from Maynard Marks;

- David Medricky, the remediation expert for HTC;
- Geoffrey Bayley, the Council expert;
- William Hursthouse, the expert for Vero Insurance New Zealand Limited, the insurer for RRL Group Limited.

[14] The outcome of the conference is recorded in the agreed defects schedule that was signed by the experts. The evidence of these experts was heard concurrently during days 3 and 4 of the hearing from which I have no difficulty in finding the claimants have proved the existence of a number of significant defects replicated in each of the nine units.

[15] The defects proven to my satisfaction are:

Defect 1

i. Defects 1, 2 and 3 from the experts' conference I have grouped as one primary defect. Mr Casey, Mr Hursthouse and Mr Medricky agreed that grouping them together makes sense because it is so difficult to distinguish between the three. The defect includes improper installation of the window joinery. The window and door joinery being installed with metal head flashings only extending past the window jambs but there were no sill and jamb flashings, in particular no form of flashing installed below the window joinery. The silicone sealant applied to the jamb and sill sidings of the windows was inadequate. The texture plaster finish was also proud of the aluminium joinery and it did not go up behind the flange of the windows, and, as the sealant itself had failed this allowed moisture to gain access in behind the windows and effectively caused damage. The consented drawings required sill flashings as detailed

in the drawings and in the specifications.[2] This defect applied to every window in the textured plaster clad walls of all units and the experts agreed that this defect had caused advanced timber decay and was a primary defect.

Defect 2

ii. Defect 5 on the experts conference record was the next significant primary defect. This defect is that the timber fascia and barge boards have been recessed into the stucco plaster at roof level: the stucco plaster has been taken up to the lower edge of the timber barge boards instead of being installed to the full height of the elevations extending behind the barged details. Over time differential movement of the building frame has caused horizontal hairline cracking through the stucco in contact with the timber barge boards. Wind driven moisture tracking down to the lower edge of the barge boards has been absorbed through the cracking and the stucco via capillary action which presents a non-obstructive root to moisture ingress back behind the stucco and into the rigid backing and timber frame. The consented plans required the stucco plaster to be finished up behind the fascia and barge boards and such was also recommended by the BRANZ Good Housing Building Guide. All units were affected with this defect and evidence of visual damage was clearly visible in respect of units 5, 23 and 27.[3]

[2] Detail 21 volume 5 of bundle section 4.10 page 26.
[3]Photographs 3.1, 3.2, 3.5, 3.6, 3.7, 3.8, 3.9, 3.10 and 7.6 of Stuart Wilson's brief of evidence 17 June 2011 best illustrate this defect.

Defect 3

iii. Lack of clearances to the finished paved and unpaved ground is the next significant defect. Consented drawings referred to the manufacturer's literature which contained standard details to ensure avoidance of this defect. In respect of stage 4 (units 1-5) it was a defect impacting on three elevations to the first floor only on the two end units (northwest wall unit 1 and south east wall unit 5) and on two elevations at units 2 and 4. And, similar specific areas to all units in stage 5. Mr Hursthouse and Mr Wilson explained that knowledge in the industry at the time was that stucco needed to be free draining at the bottom and this was clearly explained in the BRANZ Good Stucco Guide.[4]

Defect 4 – stage 5 solely

iv. The final significant defect (numbered 9 from the conference) affects stage 5 units solely and concerns the construction of the internal butynol gutters which have directed moisture behind the plastering weatherboards onto the timber framing. The defect was isolated to the front walls of the stage five units and figure 15 in the Hardibacker 1995 instruction manual details the correct installation.

[16] Three further groupings of defects emerged from the conference numbered 6, 7, 8 in the experts' agreed defects schedule. None is material. Defect 6 related to what could be described as "defective stucco application" probably causative of cracking in the cladding in some areas. However on the basis of the expert evidence I conclude that this defect has not contributed to water ingress, there was no evidence of damage.

[4] Photographs 2.9, 2.12, 2.14, 2.16, and 2.18 of Stuart Wilson's brief of evidence of 17 June 2011 best illustrate this defect.

[17] Defect 7 groups two secondary defects. The meter boxes on the units in stage five were installed in solid plaster and a probable cause of some localised damage.[5] The other defect in 7 is described as "pergola and deck penetrations" having been directly fixed through solid plaster wall cladding and relates to all units. Again there is no evidence of damage but as Mr Medricky stated at the hearing these penetrations are probable areas of "future likely damage".

[18] Defect 8 is a column in the experts' conference record which includes five concurrent defects. One only emerged during the hearing of any significant relevance. That is the "apron flashings embedded in plaster and having a lack of turn out at the end of the apron flashings". On the basis of the expert evidence from the hearing I conclude that there are just three instances of apron flashings having been cut short, relating to units 1, 4 and 5. There was no evidence of any significant damage from this secondary defect.

WHAT IS THE APPROPRIATE REPAIR OPTION?

[19] Mr Parry and Mr Ackerman were responsible for designing the scope of required remediation and managing the remediation project for each of the nine units. They recommended to the claimants, who accepted their remediation scope, that each unit be fully reclad. Mr Wilson's opinion was that the only proper remediation required a full recladding of each unit because of the primary defects that existed with each unit and their non-compliance with both the building consent documentation and the relevant industry technical publications.

[20] The other experts concurred that defects 1, 2 and 3 required a full reclad to the stucco areas on the timber framing of each unit was required.

[5] See photograph 5.19 in Stuart Wilson's brief of evidence of 17 June 2011.

[21] Whilst the consensus from the experts was that defect 5 (para 15 Defect 2 (ii) above) was a primary defect, and, there was evidence of high moisture readings at the bottom of the barge boards, there was no consensus that this defect alone would require a full reclad. I however conclude that this defect cumulatively with the other primary defects meant that the tipping point had been reached for each unit to be fully reclad.

[22] The agreement of the experts concerning defect 3, (insufficient cladding to ground clearances), was that it could be remediated with a partial reclad of just the entire wall affected if it had been the sole defect. With the exception of Mr Bayley the experts considered that the percentage of remedial costs for this defect alone would be between 20 and 40%.

[23] If Defect 9, internal butynol gutters directing moisture behind the plaster and weatherboards was an isolated defect it could be remediated as a targeted repair. Again, with the exception of Mr Bayley, the experts considered remedial costs to be 15% of the remedial costs of the stage five units only.

[24] The scope of the remediation undertaken by the claimants was with the exception of a number of owner's choice/betterment items, unchallenged by the experts.

[25] I am satisfied therefore from the evidence before me that the appropriate repair option for each of the nine units was the extensive recladding undertaken during 2009.

CLAIM AGAINST AUCKLAND COUNCIL

[26] The thrust of Mr Langlois' submissions articulating the claimants' claim against the Council was that the legislative frame work empowers Councils to determine whether a Code Compliance Certificate should be issued and if not then to issue a Notice to

Rectify Mr Langlois argues that this points to a policy that the Council should carry any loss caused if it neglects its duty to inspect. Furthermore that Councils need to obtain producer statements for aspects of construction which are not visible during inspections. Mr Langlois submitted that Council inspectors have the ability to ask for evidence of compliance and the onus is on the Council inspector to assess compliance with the Code at each element of inspection.

[27] Mr Robertson for the Council stated that, as with any civil case, it is for the claimants to prove the Council has acted negligently. He said that the Council is entitled to expect that the building work will be completed by reasonably competent builders and to take into account that with the Broadwood villas project, a building company of some substance was involved.

[28] Heath J in *Sunset Terraces,*[6] whose decision was upheld on appeal by the Supreme Court, defined the duty of a local authority as follows:

> In my judgment, a territorial authority owes a duty of care to anyone who acquires a unit, the intended use of which has been disclosed as residential in the plans and specifications submitted with the building consent application or is known to the Council to be for that then purpose. The duty is to take reasonable care in performing three regulatory functions in issue: deciding whether to grant or refuse a building consent application (*not an issue in this proceeding because time barred*) inspecting the premises to ensure compliance with the building consent issued and certification of compliance with the Code…
>
> [221] The obligation of the Council can be no higher than expressed in the statute itself: namely, to be satisfied on reasonable grounds that a building consent should issue; to take reasonable steps in carrying out inspections and to be satisfied on reasonable grounds that Code compliance should be certified.

[6] *Body Corporate 188529 v North Shore City Council* HC Auckland, CIV-2004-404-3230, at [220] - [221] (*Sunset Terraces*).

[29] That same decision stated that a Council ought to have prepared a building inspection regime that enabled it to determine on reasonable grounds that all relevant aspects of the Building Code had been complied with. In the absence of a regime capable of identifying waterproofing issues the Council is negligent.

[30] Baragwanath J in *Dicks v Hobson Swan Construction Limited*[7] stated:

> [I]t was the task of the Council to establish and enforce a system that would give effect to the Building Code.
> Cases I have cited establish that the Council may not only be liable for defects that a reasonable Council inspector, judge according to the standards of the day, should have observed but it can also be liable if defects were not detected due to the Council's failure to establish a regime capable of identifying whether there was compliance with material aspects of the Building Code.

[31] Mr Langlois stated that the claimants accept that while the standard of care practiced by the Council will be at first measured against the practice of other Councils at the time, a Council which followed those standards will still be liable if common sense dictated that certain measures be taken which were not taken.

[32] The High Court recently in *Mok & Ho v Bolderson & Ors*[8] stated at para [136] that industry practice is not always determinative. This equates with Mr Langlois' submission that widespread bad practice can still be bad practice.[9]

[33] Jeffrey Farrell, manager of Development and Compliance at Whakatane District Council gave evidence on the practice of Councils. Under questioning from Mr Langlois, Mr Farrell conceded

[7] *Dicks v Hobson Swan Construction Limited* (in Liq) (2006) 7 NZCPR 881 (HC) at [116].
[8] *Mok v Bolderson* HC Auckland, CIV-2010-404-7292, 20 April 2011.
[9] *Edward Wong Finance Co Limited v Johnson, Stokes & Master* [1984] AC 296 (PC).

that the Council's inspection regime was not rigorous, there was no formal decision making process for assessing alternative solutions, and there was no programme that recorded the decision making by the building inspectors. Mr Farrell conceded that the Council file did not illustrate requests for a producer statement where that would have been appropriate and there was no robust record keeping process to illustrate why or how a number of failed inspections were subsequently passed or how Council inspectors were persuaded that defects which existed had been remedied. There was no record keeping on the Council file of how a building inspector was led to believe that earlier problems identified had been remedied.

[34] Mr Farrell agreed that with a large building project such as Broadwood Villas the Council would have applied more rigour to its inspection process with the earlier units given that all 29 units were of similar design and configuration.

[35] It is generally understood that the standards by which the conduct of a Council should be measured are set out in *Askin v Knox*[10] where the Court concluded that a Council officer's conduct would be judged against the knowledge and practice at the time the negligent act or omission was said have to take place. It was reinforced by Stevens J in *Hartley v Balemi.*[11]

[36] In determining whether the Council has failed to meet the standard of care expected of it while conducting inspections of stages 4 and 5 and issuing the Code Compliance Certificate for those stages it is only necessary to concentrate on three of the primary defects. For they alone have caused the significant remedial work required for each of the units.

[10] [1989] 1 NZLR 248.
[11] *Hartley v Balemi* HC Auckland, CIV-2006-404-2589, 29 March 2007.

Defect 1 – Joinery Installation

[37] I accept the evidence of Mr Wilson and Mr Casey that the consented plans called for sill flashings to be installed to the windows and doors. The Hardibacker technical literature also included details for the installation of jamb flashings and sill flashings around aluminium windows and the February 1996 edition of the BRANZ Good Stucco Practice Guide stated at paragraph 3.7.1 that windows should have had head and jamb flashings.[12]

[38] Mr Farrell's evidence was that the building practice of the time accepted sealants as an alternative solution to mechanical sill and jamb flashings. However Mr Farrell's answers to Mr Langlois' questioning, that the acceptance of sealant at the time was contrary to applicable building guides available to inspectors and that demonstrated fundamental flaws in the Council's inspection and approval regime, was equivocal. There is no evidence that the Council considered whether there were reasonable grounds for believing that the use of sealant would satisfy the Building Code, nor was there any evidence from the Council that a producer statement for the installation of the windows was requested or received. There is no record of the Council's decision making process of how the inspectors determined to approve the window installation contrary to the consented plans. Absence of records of the Council's decision making process causes me to conclude that the Council ignored in its inspections of the window installations the installation recommendation of the BRANZ and Hardibacker documentation calling for the installation of mechanical flashings.

[12] Stuart Wilson Brief of Evidence dated 17 June 2011 at paragraph 17, April 1995 Hardibacker technical literature – figures 24 to 26 and figures 29 to 30 – common bundle Volume 2 Document 1723; BRANZ Good Stucco Practice Guide, February 1996, para 3.7.1 – common bundle section 2 page 1752; Brief of evidence William Hursthouse , dated 23 May 2011, para 21.3(a) stating that the consented plans detailed the plaster finishing behind the frames of the joinery.

Defect 2 – Timber fascia and barges embedded

[39] The consented plans detailed plaster cladding finishing up behind the fascia and the BRANZ House Building Guide also shows the plaster cladding finishing up behind the plaster coating.[13]

[40] Mr Farrell's evidence was that this could not properly be inspected by the Council inspector because visually the plaster appeared to be behind the fascia.[14] There is however no evidence that proper enquiries were made by the building inspectors to satisfy themselves that the work complied with the Building Code. There was no evidence on the Council file that the building inspector sought to establish that the building work complied with the consented plans or that the building inspector had requested a producer statement to indicate compliance with the specification and plans.

Defect 3 - Insufficient cladding to ground clearances.

[41] The consented specifications stated that the stucco plaster must be installed over Hardibacker in accordance with the manufacturer's instructions.[15] The April 1995 edition of the Hardibacker technical literature included details requiring cladding clearances.[16] The February 1996 edition of BRANZ Good Stucco Practice Guide at paragraph 3.9.1[17] stated that damage to framing in cladding backing is often caused with moisture from the ground being sucked up by capillary action behind the stucco. That document stated that "…under no circumstances should stucco plaster be carried down to ground level…".

[13] Consented plans 1 sheet A417 detail 1 on sheet A518 and details 9, 13 and 14 on sheet A519 – Stuart Wilson's brief of evidence dated 17 June 2001 at paragraph 49 and figure 7.7 of the BRANZ Housing Building Guide, refer to paragraph 50.
[14] Jeffery Farrell's supplementary brief of evidence at paragraph 5.
[15] Fibre cement sheet : fix timber framing to detail and to manufacturer's recommendations specification HO1:05 para 0651 – stage 4 [4.10/33]; stage 5 [4.10/179].
[16] April 1995 edition Hardibacker technical literature figure 15, page 9: "100mm clear of finished ground level" – see common bundle volume 2 document 1720.
[17] Common bundle volume 2 document 1755.

[42] Mr Hursthouse, Mr Medricky and Tony Dean (an expert witness called by Mr McGlashan) were of the view that it was well known in 1995-1996 that solid plaster cladding should not be taken down to ground level because this could lead to moisture wicking up through the plaster and causing damage. Mr Farrell's evidence was that the building inspectors were familiar with the industry literature (BRANZ and Hardibacker material).

[43] Mr Farrell agreed with Mr Langlois that the instruction and the 1996 Good Stucco Practice Guide warning at para 3.9.1 "damage to backings and structural frame and internal dampness are often result of moisture from the ground being sucked up by the capillary action behind the stucco. Under no circumstances should stucco be carried down to ground levels…", was a crystal clear instruction. Mr Farrell also confirmed that a reasonably conversant building inspector would have clearly understood that instruction. He also agreed that a building inspector should have ensured that this defect would not have occurred at the Broadwood Villas development.

Conclusion

[44] An inspector can enquire about the use of sealants when it is obvious to the inspector's eye that no adequate flashings are in place. Whilst the Council can expect a tradesman-like standard to be applied by builders using manufacturer's specifications and requirements, when it comes to inspections, the Council inspectors need to question the operatives on these aspects before the issue of the Code Compliance Certificates. There is no evidence that proper enquiry was ever made of the builder or how the Council satisfied itself of how construction was to avoid the defects I have determined and how the Council properly discharged its duty to ensure the building complied with the Building Code.[18]

[18] *Auckland Council v Ryang,* HC Auckland, CIV-2011-404-0025701, 28 September 2011, per Fogarty J, at [12] - [13].

[45] The overriding duty on a territorial authority is to enforce the Building Code's requirements. Inspection of window installations inserted into cladding for reasonably foreseeable failure of weathertightness is within the obvious ambit of the Council's duty; failure to react to defects apparent to qualified inspectors eye is also a breach of duty; failure to ask questions and record answers about the method used, when for example the cladding is erected incorrectly and there is the ability to inspect visually must also be a breach of that duty of care and all the more so when there are obvious departures from the consented plans. Failure, at the same time, by the building trades engaged on the building project to meet the standard of care imposed at law on them, does not excuse the Council's obligations.

[46] I am satisfied that because of all of these failures by the Council, the Council should not have issued a Code Compliance Certificates for the nine units.

[47] For the reasons mentioned, the Council has failed to meet the standard of care expected of it by issuing Code Compliance Certificates for stages 4 and 5 because it failed to either notice the defects or to ensure that those defects were corrected.

Council's defence of time limitation – stage 4 units

[48] Mr Farrell confirmed that the Council inspections would have been more rigorous when inspecting the first units built in stage 1 and would not have revisited issues which those inspections threw up later. Mr Robertson's submission was that the negligence of the Council if any, was at the early stage of stage 4 of the development and as with the building consents this aspect of construction is statute barred.

[49] Before determining this matter I set out the critical dates for the stage 4 development:

Unit Number	Effective 10 year start date (10 years prior to claim filing date)	Final Inspections	Extent completed
Unit 1	21 August 1996	On or after 2 October 1996	CCC issued 7 October 1996
Unit 2	31 May 1996	26 July 1996	CCC issued 7 October 1996
Unit 4	4 June 1996	26 July 1996	CCC issued 7 October 1996
Unit 5	23 May 1996	6 August 1996	CCC issued 7 October 1996

[50] In respect of each unit in stage 4 the Council completed some inspections and all final inspections and issued the units Code Compliance Certificate within ten years of the claimants lodging the claim. The Council's time barred defence fails. The Council's statutory duty during its inspection processes and certainly at its final inspections are to determine on reasonable grounds that all relevant aspects of the consent and the Building Code had been complied with. The Council owes a duty of care to each of the claimants when issuing the certificate of compliance. Associate Judge Christiansen in *Hamish Neil Campbell v Auckland City Council*[19] stated that section 393 of the Building Act expressly provides that the Council's regulatory function does apply to issuing Code Compliance Certificates. That decision is authority for the proposition that completion of the Code Compliance Certificate is certification on behalf of the Council that its obligations have been fulfilled so it provides an assurance of performance and confirmation that it has occurred.

[51] Accordingly, in relation to the 4 units in stage 4 in these proceedings, the Council's final inspections and certification that its obligations under the Building Code had been fulfilled were each done within ten years of the claimants' lodgement of the claim.

[19] *Hamish Neil Campbell v Auckland City Council* HC Auckland, CIV-2009-404-001839, 10 May 2010.

Council's actions were not time barred. The claimants are entitled to rely on the Council and where a certificate has been negligently issued, as in each of these claims, the claimants are arguably entitled to the losses suffered in respect of that negligent act.

[52] I accordingly conclude that the Council is negligent in respect of all nine claims and that it is jointly and severally liable for the full amount of the established claim in respect of each unit.

CLAIM AGAINST HUGHES & TUKE CONSTRUCTION LIMITED

[53] The claimants allege that HTC as the builder is liable to them for the defects in each of the units. In *Bowen v Paramount Builders Limited*[20] the Court of Appeal confirmed that a builder owes a duty to take reasonable care when carrying on building operations to avoid foreseeable loss to others arising out of defective construction.

[54] This principle was confirmed by the Court of Appeal in *Body Corporate 202254 v Taylor*[21] where Chambers J stated at [125]:

> The law in New Zealand is clear that if a builder carelessly constructs a residential building and thereby causes damage, the owner of the residential building can sue.

[55] The duty of the building company extends to work undertaken directly by its officers, employees such as Mr Tuke, Mr McGlashan and the site foreman. It will also be liable for the negligence of its employed carpenters.

[56] The claimants equivocally and the Council clearly sought to establish that HTC was also the developer.

[20] *Bowen v Paramount Builders Limited* [1977] 1 NZLR 394 at [406].
[21] *Body Corporate 202254 v Taylor* [2008] NZCA 317.

[57] I have earlier determined that HTC was not the developer, Refdin was. HTC did not own the land, did not design or commission the development, did not market or sell the units. It was not directing the project or deriving financial benefit from the development.

[58] Because the duty of a developer is wider than that of a builder, Mr Robertson submitted that the separation between Refdin and HTC is more illusionary than real. He also submitted that there was no written building contract whereby Refdin delegated the responsibility of constructing 29 units and undertaking building work to HTC.

[59] I reject that submission. The overlapping ownership between the two separate and incorporated entities does not at law mean the separation is illusionary.[22] Mr Tuke's evidence is that he was the managing director of HTC and in his role as managing director of Refdin engaged HTC to undertake the principal building and construction role. Companies are separate legal entities and although Mr Tuke was governing director of Refdin and HTC and exercised the right of control over both entities he did so as properly appointed agent and officer for both companies.[23] I accept the evidence of Mr Tuke, Mr McGlashan, Mr Turner and Mr Otway that the head builder was HTC.

[60] HTC set up a structure of managing the building work of its employed labour-only carpenters by appointing site foremen, and its line managers, as liaison persons, programmed the involvement of the contractors and subtrades on site. It contracted with the subcontractors providing for the mechanics of completing subcontracted work including the terms of payment. Payments to the contractors and subtrades were made after some investigations into the adequacy of the work by HTC.

[22] *Solomon v Solomon & Co. Ltd* [1897] A.C.22 [at law the building contract need not be in writing]; *Lee v Lee's Air Farming Ltd* [1961] NZLR 325.
[23] *Lee v Lee's Air Farming Limited* [1961] NZLR 325.

[61] Mr Wilson's submission is that HTC was the head building contractor; it employed competent staff and carried out supervision of the building work and engaged relevant subtrades, predominantly companies or tradesmen or suppliers who HTC had previously worked with who and believed to be competent and experienced. Mr Tuke's evidence was that he engaged competent foremen to supervise the building works and employed competent subcontractors.

[62] HTC's response to the claim is it built the units following the consented plans and specifications or architectural directions, and, where building work was carried out by a respondent subtrade, the liability for loss apportioned to that work should rest with that subtrade.[24] Mr Wilson also referred me to the established authority of *Morton v Douglas Homes Limited*[25] which stated that provided the builder follows that advice a builder engaging the services of an architect may well discharge its duty of care by engaging such an expert's services.

[63] However the Court in that case went on to find that although specific design details were obtained they were not followed and this led to the building company being liable in negligence.

[64] I have determined in paragraph [15] above the proven defects and the principal defects were caused because the workmanship did not follow strictly the consented plans.

[65] The workmanship, the systems of control, supervision and quality checks which HTC had in place for the construction of the units in stages 4 and 5 were inadequate. Clear construction defects and errors and design defects, particularly in the cladding, window installation and weatherproofing resulted in the defects that caused the claimants' loss.

[24] *Hudsons Building and Engineering Contracts,* (11th ed, 1995) at 4.072.

[66] Delegation is of no avail to HTC in respect of failure to perform building work in accordance with the building permit. Mr Robertson referred me to the 1979 decision of Speight J in *Callaghan v Robert Ronayne Limited.*[26] Speight J held in that decision that the building company could not avoid liability for the building work completed by its contractors as it was subject to a statutory duty to build in accordance with the building permit.

[67] Mr Wilson conceded that, if it is established that HTC failed to follow the plans, then there could be liability and that HTC could have some liability for poor workmanship by its carpenters and contractors.

[68] Mr Wilson also concedes that in respect of the construction of the units in stage 5, the relevant building work of HTC was generally accomplished within the ten year limitation period.

[69] I conclude for the above reasons that HTC is negligent in respect of its build of all the units in stage 5. HTC is jointly and severally liable for the full amount of the established claim in respect of units 23-28.

HTC caused defects – Stage 4 Time limitation barred?

[70] However, in respect of the units in stage 4 HTC submits that all of its building work that caused the defects established in this claim were constructed outside the ten year longstop limitation period from the date of lodging the claims.

[71] Mr McGlashan meticulously kept records which enabled him to unequivocally state the built-by date for each of the units in stage 4. The primary defects causing a reclad involved the external joinery

[25] *Morton v Douglas Homes Limited* [1984] 2 NZLR 548.
[26] *Callaghan v Robert Ronayne Limited* (1979) 1 NZCPR 98 at [108].

installation, the cladding application, the roof to wall cladding junctions and the plastering to ground clearances.

[72] The uncontested evidence of Mr McGlashan, substantiated by his record keeping, satisfied me that the defective building acts and works for which HTC is responsible were completed by:

i. Ms Newman's unit 1 – 16 August 1996. Unit 1 date of lodgement of claim 21 August 2006.
ii. Ms Price's unit 2 – 24 May 1996. Date of application of claim 31 May 2006.
iii. Ms Turner's unit 4 – 24 May 1996. Date of application of claim 4 June 2006.
iv. Mr Wimer's unit 5 - Mr McGlashan undertook two site inspections before completion; one on 10 May 1996, when most of the building work causing defects he said were complete; and, 24 May 1996, when he stated the building work was, overall, 100% complete. So I determine that such were complete on or most probably before 23 May 1996 and the claim was lodged on 23 May 2006.

[73] There is no evidence that any building work of HTC that caused defects was undertaken within the ten years limitation period.

[74] It is well established that the longstop provision in the Building Act provides an absolute bar against claims of negligent building work ten years after the work was completed. Clearly HTC continued with building work on the five units in stage 4 after the above mentioned dates. But clearly from Mr McGlashan's evidence even if building work was performed within the ten year period, the claim is not within time unless any defective building work that has caused damage is within time. There must be a causative link between the act or omission which is within time and the damage on

which the claim is based.[27] Any omission, such as HTC not recognising its earlier defective building work during attendances at the building site within the ten year period does not provide a cause of action because it is not the omission which has caused the damage.

[75] For the reasons above I determine that the claim against HTC in respect of the five units in stage 4 fails.

CLAIM AGAINST DAVID TUKE

[76] Mr Tuke was the managing director of Refdin. The shareholders were HTC as to 999 shares and 1 share held by Mr Tuke. Mr Tuke was also the managing director of HTC. Mr Tuke's evidence is that he was the controlling director of both companies. No other party had an active role to play in Refdin for it had no employees.

[77] The claim against Mr Tuke is in negligence that he assumed control and personal responsibility for the construction of the claimants' units as the developer and builder.

[78] Mr Tuke did not file a brief of evidence before the hearing. His evidence was that as Refdin had no employees he was the sole decision maker for the company. He made the decision for Refdin to purchase the land, to instruct the architects, to prepare drawings which he approved. It was his decision to engage the engineer and for the company to contract with UDC Finance Limited to fund the development. It was clearly Mr Tuke's decision on behalf of Refdin to engage Refdin's principal shareholder, HTC as the builder and head contractor for the development.

[79] Clearly Refdin was the developer of the Broadwood project. Refdin owned the land, controlled design, construction and marketing

[27] *Johnson v Watson* [2003] 1 NZLR 626.

and it was the legal entity sitting at the centre and directing the entire project and all for its own financial benefit. Refdin as developer owed a non-delegable duty of care to the purchasers of the 29 units.[28] It was conceded by Mr Wilson for HTC and Mr Tuke that Refdin was the developer.

[80] The claimants adduced no substantial evidence of Mr Tuke assuming any personal responsibility in addition to or separate from Refdin. Mr Langlois' submission was that Mr Tuke as the sole active director of Refdin had personal control of the development project and put in place all parties and all processes to allow the development to proceed. But such submissions were not substantiated with cogent evidence of assumption of personal control.

[81] The effect of in-corporation of the company is that the acts of its directors are usually identified with the company and do not necessarily give rise to personal liability.[29] As noted by Priestly J in *Body Corporate 183523 v Tony Tay & Associates Limited*[30] the mechanism by which a limited liability company makes decisions, commitments and enters into legal relationships is through the physical actions of its directors.

[82] Mr McGlashan's evidence was that all decisions were made by Mr Tuke and that he referred all decision making within his "domain" to Mr Tuke. It was Mr Tuke's evidence that he put in place the necessary chain of command, which involved Mr McGlashan and the two site foreman engaged by HTC to oversee and supervise the construction of the 29 units. It was Mr Tuke's expectation and, he said his terms of engagement with the site foremen were that they would ensure and supervise that the building was strictly in

[28] *Body Corporate 188273 v Leuschke Group Architects Limited* HC Auckland, CIV-2004-404-002003, 28 September 2007.
[29] *Trevor Ivory Limited v Anderson* [1992] 2 NZLR 517 (CA).
[30] *Body Corporate 183523 v Tony Tay & Associates Limited* HC Auckland CIV-2004-404-4824, 30 March 2009 at [150].

accordance with the consented plans and specifications. It was also Mr Tuke's evidence that HTC engaged competent and experienced subtrades and it was his expectation that the subtrades would undertake their respective works in compliance with the consented drawings, specifications and in compliance with the Building Code.

[83] Denis Turner was one of the site foreman employed by HTC. His evidence was that Mr Tuke would on occasions come onto the building site but never got involved and he said "he never interfered with us".

[84] The assumption of responsibility allegation made by the claimants and the Council against Mr Tuke was a direct reliance on the authority from *Morton v Douglas Homes*[31] which is authority for the proposition that directors can be liable "as developers" because of the degree of control they wield over the project. "Developer" is simply a label. It is the particular functions which the party carries out which gives rise for imposing a non-delegable duty of care.[32]

[85] The issue in relation to the claim against Mr Tuke is whether in the circumstances there was a sufficient relationship of proximity such that Mr Tuke assumed personal responsibility towards the claimants.

[86] The submission of Mr Wilson was that there is no evidence produced by the claimants or the Council that Mr Tuke assumed the degree of personal responsibility for an item of work which was subsequently proven to be defective. He submits that none of the defects have been linked in any way to any act or omission on the part of Mr Tuke.

[31] [1984] 2 NZLR 548 (HC).
[32] *Body Corporate 199348 v Gregory Nielsen* HC Auckland, CIV-2004-404-3989, 3 December 2008; and *Body Corporate 188273 v Leuschke Group Architects Limited* HC Auckland, CIV-2004-404-002003, 29 September 2007.

[87] The decision in *Body Corporate 202254 v Taylor*[33] is, submits Mr Wilson, much against the imposition of a personal duty of care on a company director in circumstances like that with this proceeding. Mr Wilson submits that an assumption of personal responsibility requires showing a position akin to acceptance of a contractual obligation and that consequences of incorporation should be accepted in the absence of special circumstances.

[88] Mr Wilson concedes that Mr Tuke as a director obviously made many decisions and certainly on a wider basis it would be right to say it was he that decided to proceed with the entire development of Broadwood. Mr Wilson submits however that all such decisions were made by Mr Tuke in his capacity as director of Refdin and that the company structures were always clear.

[89] I accept that no evidence was led from any witness, whether as evidence in chief or in cross-examination, which has made any link between the defects identified being caused by the act or omission on the part of Mr Tuke personally. Mr Tuke's actions in relation to the development by Refdin were those of a director on behalf of Refdin and not of a developer in its own right. There is no obvious rationale for finding Mr Tuke to be a developer simply because Refdin was incorporated to develop solely Broadwood Villas.

[90] Mr Tuke did not in his individual or personal capacity acquire the land on which Broadwood is sited. He did not contract in his personal capacity for the design, the construction and the selling of the completed and built townhouses. All those decisions and actions were taken by Refdin, a company now struck off the Companies Register and the construction by HTC. Mr Tuke was at all relevant times a director of Refdin but there was no evidence before me that Mr Tuke in his individual capacity personally attend to the designs,

[33] *Body Corporate 202254 v Taylor* [2009] 2 NZLR 17.

the plans and development and marketing of Broadwood development. His involvement at all levels are properly attributable as the decisions and the actions of Refdin and HTC where appropriate. Mr Tuke as managing director was the directing "mind and will" of Refdin and HTC. The actions, knowledge and intention of Mr Tuke are properly treated as the actions and the knowledge and intention of the company themselves.[34] However, just because Mr Tuke was not the developer or indeed the builder, does not mean that he is absolved from liability in respect of the development. Limited liability does not provide company directors with a general immunity from personal liability and where a company director exercises personal control over a building operation he will owe a duty of care, associated with that control.[35] The existence and extent of any duty of care owed by Mr Tuke in respect of this construction of the units is determined by a consideration of his role and responsibilities on the building site.[36] No probative evidence has been adduced establishing that Mr Tuke took any hands-on role with the development and certainly in the construction of the units. He assumed no personal responsibility for the organisation or supervision of the construction work. For Mr Tuke to be particularly exposed to liability the facts need to be established that he personally was involved in site and building supervision or architectural and design detail.[37] Claimants and other respondents have failed to prove any such involvement on behalf of Mr Tuke.

[91] There is no evidence before me that Mr Tuke in his individual capacity or as a director was responsible for creating defects or that his work exacerbated the defects. The claim against Mr Tuke for the reasons I set out above therefore fails.

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[34] Ross Grantham, "Attributing Responsibility to Corporate Entities: a doctrinal approach" (2001) 19 Co & Sec L J 168.
[35] *Morton v Douglas Homes Limited* [1980] 2 NZLR 548 (HC).
[36] *Auckland City Council v Grgicevich* HC Auckland CIV-2007-404-6712, 17 December 2010 at [72] – [75]; *Chee v Stareast Investments Limited* HC Auckland CIV-2009-404-5255, 1 April 2010.

CLAIM AGAINST DAVID MCGLASHAN

[92] Mr McGlashan has been employed as a quantity surveyor by HTC since September 1992. HTC's letter engaging Mr McGlashan stated that he was to be employed as a quantity surveyor and this was confirmed in his subsequent employment contract which set down his duties and responsibilities none of which involved building site supervision or qualitative oversight of HTC Builders or subcontractors.

[93] The claimants allege Mr McGlashan was the project manager for the Broadwood development and that he failed to properly project manage and so allowed the units to be constructed with the defects.

[94] The claimants produced no evidence to substantiate their allegation that Mr McGlashan permitted the units to be constructed with the defects. The claimants produced no evidence to substantiate their claim against Mr McGlashan other than equivocal opinion from Mr Wilson set down in his brief of evidence.[38] Such impugning opinion grouped Mr McGlashan with HTC. Mr Wilson concluded that the defects in each of the nine units were caused by the main builder failing in its responsibility to deliver a weathertight Building Code compliant development. Mr Wilson did not adduce any factual evidence impacting adversely on Mr McGlashan.

[95] Mr Hursthouse's original brief suggested Mr McGlashan had some liability. Mr Hursthouse resiled from allegations of negligence against Mr McGlashan during the hearing after having heard and read the evidence of witnesses[39] who had actual knowledge of the role undertaken by Mr McGlashan.

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[37] *Cao v Auckland City Council* HC Auckland, CIV-2010-404-7093, 18 May 2011 at [156].
[38] Reply brief from Stuart Wilson 17 June 2011 paragraphs [100] – [108].
[39] Mr Tuke, Mr Turner and Mr Ottway.

[96] Mr McGlashan filed extensive briefs of evidence[40] which clearly explained his role, which was unequivocally quantitative and administrative and not qualitative, during the building of stages 4 and 5 (indeed he was of course engaged by HTC in that same role throughout all five building stages). The majority of the documents that were discovered in this proceeding emanated from Mr McGlashan. He was a fastidious record keeper and retained his diaries and written communications from the Broadwood development. Such documentation was immensely helpful in substantiating Mr McGlashan's employed role and also understanding the role of other participants. There was an absence of relevant documents from other participants such as HTC, the site foreman, the architects, the engineers, the window manufacturer's records and the subcontractors' files and records. The Council engaged Mr Smith in February 2011 to provide an opinion in respect of the role of Mr McGlashan concerning the construction works at Broadwood. His instructions were to address and analyse the role of Mr McGlashan in the construction process and whether or not that role impacted on the alleged defects identified.

[97] Mr Smith's conclusions were that Mr McGlashan was involved as a building professional with control over the building work at Broadwood, that he saw some defects in construction and that he did not take effective action to have them remedied before the units were onsold.

[98] Mr Smith's original brief of evidence dated 14 March 2011 was compiled before Mr McGlashan's brief and essentially on the basis of Mr Smith's interpretation of what Mr McGlashan's diary notes and communications meant. Mr Smith's reply brief[41] failed to in any way deal with Mr McGlashan's two briefs of evidence which he should then have had and read. Maybe Mr Smith took the view not to accept Mr McGlashan's explanation of what his notes meant. In

[40] Brief of evidence dated 18 March 2011 and reply brief of evidence dated 2 June 2011.

any event I do not accept Mr Smith's evidence established Mr McGlashan had any responsibility for the quality of the construction. I agree with Mr Kohler's submission that what was noticeable from Mr Smith's evidence was the paucity of examples (from some 22 folders of evidence) for his inference that Mr McGlashan had directed onsite construction changes from the consented plans or had become aware of defects. It became clear during the hearing, particularly from Mr McGlashan that most of Mr Smith's references were erroneous. Mr Smith did not have the benefit of hearing the evidence of Mr Otway and Mr Turner and his original opinion of Mr McGlashan's role was formed before receipt of Mr McGlashan's evidence. In any event the conclusions which Mr Smith drew from Mr McGlashan's records were neither warranted from the records nor from proper interpretation of the records themselves. This conclusion was not consistent with the evidence of the witnesses who had actual knowledge of Mr McGlashan's role.

[99] Mr Dean gave evidence for Mr McGlashan and unlike Mr Smith he formed his views after receipt of Mr McGlashan's evidence and particularly Mr McGlashan's explanation as to his diary notes and communications. Mr Dean's evidence was unequivocal:[42]

> "I am of the opinion that Mr McGlashan's role was that of a quantity surveyor who was given a task of organising, planning, managing and finalising the financial aspects of the building project. He was not a site supervisor nor was he a clerk of works. He may have loosely been referred to as a Project Manager, but his role would have been more accurately described as a Project Administrator or as a Quantity Surveyor."

[100] Mr McGlashan's evidence was that although he was described as the project manager at the Broadwood development, his role was essentially administrative. At all times he worked under the direction of Mr Tuke. Whilst Mr McGlashan signed the

[41] Reply brief of evidence from Clint Smith dated 21 June 2011.
[42] Tony Dean's brief of evidence dated 25 March 2011, paragraph [59].

application for building consent submitted by Refdin, he was not employed by Refdin (indeed Refdin had no employees) and did so under the instruction of Mr Tuke. Mr McGlashan's role included, amongst other matters, preparation of a construction budget from the draft drawings to be approved by Mr Tuke and to work with Refdin and HTC's financier/bankers representatives with respect to funding and the drawdown of progress payments. His role included calling tenders for the subcontract works, analysing tenders, negotiating prices for materials from suppliers, processing invoices and subcontractor claims, "policing" the construction budget at all times and continually reporting and seeking approval from Mr Tuke. He was also involved with the preparation of the construction programme in conjunction with the site foreman and the subcontractors and regularly consulted with the site foreman and monitor onsite progress against the construction programme. He had a role in liaising with the sales agents, the new unit purchasers and co-ordinating practical completion inspections by the financiers' architect. Mr McGlashan's evidence was that HTC employed site foremen, Mr Turner and Mr Otway, to manage the construction site on a day-to-day basis and they were responsible for coordinating the work of various subcontractors and in particular the HTC builders. Whilst the site foremen dealt with Mr McGlashan on a daily basis they ultimately reported to Mr Tuke and this was consistent with the evidence of Mr Tuke, Mr Otway and Mr Turner.

[101] Mr Tuke, Mr Turner and Mr Otway confirmed the evidence of Mr McGlashan at the hearing.

[102] I agree with Mr Kohler's submission that in relation to claims against parties such as Mr McGlashan, the law is usefully set down in *Body Corporate 185960, Gaitely v Northville City Council*[43] and

[43] *Body Corporate 185960, Gaitely v Northville City Council* HC Auckland, CIV-2006-004-003535, 22 December 2008.

Lake v North Shore City Council[44] Asher J at para [38] noted, and Duffy J in the *Gaitely* decision held:

> Enquiry into the responsibilities attaching to the particular role, as well as the actions and omissions of the person who occupied that role, will be necessary.

[103] Mr McGlashan's title and job description as project manager was not, as Asher J held at para [33] in anyway conclusive, though:

> [M]ay provide some indication of the nature of the experience and skill and the assumption of responsibility of a particular respondent.

[104] Mr McGlashan's evidence, which I accept because of his clear recall and interpretation of his diary notes was that he was not responsible for overseeing the workmanship aspects of the building or managing onsite the carpenters, independent contractors or subcontractors for compliance with the Building Code. Such responsibility was outside Mr McGlashan's expertise and area of competence. Whilst Mr McGlashan frequently liaised and had communications with HTC's site foreman and subcontractors he was essentially performing an administrative conduit role between them and the designers and/or decision makers.

[105] There was no evidence before me that Mr McGlashan ever went beyond his area of competence, or that he instructed a departure from the consented plans or tried to oversee or supervise HTC's workman, foremen or any of the subtrades. There was no evidence that any acts or omissions of Mr McGlashan were causative of damage.

[106] For these reasons I conclude that the claim against Mr McGlashan fails.

[44] *Lake v North Shore City Council & Ors* HC Auckland,CIV-2009-004-001625, 1 April 2010.

CLAIM AGAINST RRL GROUP LIMITED (IN LIQUIDATION)

[107] RRL Group Limited was formerly known as Ross Roofing Limited and it contracted with HTC to carry out the concrete tile roofing of stages four and five. RRL was placed into liquidation on 1 March 2011. Vero Insurance New Zealand Limited was joined to the proceeding as the insurer of RRL as RRL held public liability cover with Vero from 31 March 1994 through to 31 March 2011.

[108] It is alleged that RRL Group breached its duty of care by failing to exercise the skill of a reasonable roofer when it constructed the roofs of the nine units and that the roofs were installed without diverters/kick outs and that some apron flashing terminations had been cut short.

[109] During the course of the hearing all experts, except Mr Bayley, confirmed that these were the only alleged defects in respect of RRL's work. The experts, excluding Mr Bayley, agreed that the damage had not been caused by the lack of diverters and that there was only isolated damage attributable to the short apron flashings on units 1 and 5.

Claim time limitation barred

[110] Vero's response was that all claims against RRL (and therefore Vero) in respect of defective work on stage four are time barred based on the ten year "long stop" provision in section 393(2) of the Building Act 2004. The Building Act prevents civil proceedings relating to building work being brought after a period of ten years or more from the date of the act or omission on which the proceeding is based.

[111] I have already determined that the act or omission complained of was the installation of shortened led apron flashings

on units 1 and 5. The uncontested evidence of Mr Ross was that the lead apron flashings were installed on or by the following dates:

- Unit 1 lead apron flashings installed by 25 June 1996 and the claim for unit 1 was lodged on 21 August 2006;
- Unit 5 the lead apron flashing was installed by 1 May 1996 and the claim for unit 5 was lodged on 23 June 2006.

[112] This evidence was also conceded by the claimants.[45] RRL did return to the building site to complete and check its contractor's tiling mortar work. The evidence is that in respect of unit 1 the contractor completed the mortar work on or before 6 August 1996[46] and in respect of unit 5 the contractor completed the mortar work before 6 August 1996 and the units were passed by the Council for Code Compliance issuance.[47]

[113] Mr Ross' evidence is that RRL engaged contractors for its roofing work. Payment to RRL's contractors for stage four depended on RRL returning to the site to check on completion with the tiling and mortar work. I accept Mr Ross's evidence that RRL's checking would have been done soon after its contractors did the work so that those contractors could be paid. Payment was released by HTC to RRL on 21 August 1996 in respect of block 4.[48] I deduce from this that RRL's checklist for completion of its contractor's works would have been completed before 21 August 1996. The claim against RRL in respect of unit 1, even if based on RRL's checklist is clearly time barred. The claimants and the Council argue that in relation to unit 5 RRL (a subcontractor) had a duty to warn HTC about the lead

[45] See paragraph 7 claimants' notice of opposition to Vero's strike out application dated 30 May 2011.
[46] Common bundle of documents pages 136 and 141 setting out remaining work to be completed with no mention of tiling and mortar work.
[47] Common bundle of documents volume 5 page 140.
[48] Common bundle of documents volume 6 page 925.

apron flashings when it returned to the site to inspect on its tiling the mortar work.

[114] In any event, it is appropriate to consider the actual work that was allegedly defectively when considering limitation.[49] *Johnson v Watson* is authority for the proposition that the actual defective construction or repair work which gives rise to the claim is the relevant defective act or omission and not the respondents' mere presence on the building site. A claim is not within time unless any faulty work that caused the damage is within time as stated in *Johnson v Watson*. There must be a causative link between the act or omission which is within time and the damage on which the claim is based. An omission within the ten year period which fails to warn or to repair earlier faulty work does not provide a cause of action because it is not the omission which has caused the damage.

[115] I determine that the apron flashings in respect of unit 1 were installed by 25 June 1996 and in respect of unit 5 by 1 May 1996.

[116] Accordingly as the claims for unit 1 and unit 5 were lodged more than ten years after those two dates I accept Vero's submission that all claims against RRL (and therefore Vero) in respect of defective work on stage four are time barred. For this reason the claim against Vero fails.

RRL's damage is de minimis

[117] If I am wrong in determining that the claim against RRL is time barred I need to determine the response of Vero that in the event of any damage caused by RRL is not a substantial or material cause of the claimants' loss. Vero accepts that RRL owed the claimants a duty to exercise proper care and skill when its roofing contractors installed the roof and apron flashings on the units.

[49] *Johnson v Watson* [2003] 1 NZLR 626 (CA).

[118] All experts agreed that the need to reclad the nine units did not arise as a result of damage attributable to the apron flashing terminations. Mr Hursthouse's evidence that the only evidence of damage attributable to the apron flashing terminations related to a short apron flashing termination on units 1 and 5, was accepted by all experts except Mr Bayley. Mr Bayley filed a second supplementary brief of evidence the night before the hearing (at 5.32pm on Sunday 10 July 2011). This brief related solely to RRL's liability for short apron flashings and apron flashing terminations without a diverter. Mr Bayley was of the view that there was evidence of significant damage attributable to the apron flashing terminations such that this defect should attract more than the 20% allocation by Mr Wilson for the claimants. Mr Wilson and Mr Parry resiled from this opinion during the hearing. Mr Bayley also expressed the view that there was a further defect for which RRL should be held liable, namely, the absence of Z flashings to the Fibrolite strip.

[119] Mr Hursthouse's response to this was that in his experience this was not work RRL would have undertaken for it was required to be accomplished prior to the roofing work commencing and the work in this area was undertaken in accordance with the consented detail.[50] It was also Mr Hursthouse's view that this was not a defect which lead to any damage of note and that view was expressed by the majority of experts at the experts' conference and reiterated at the hearing.

[120] Because Mr Bayley was unable to satisfactorily explain how he had reached his conclusions, and he conceded under questioning that in his view the lack of diverters was not in the forefront of the industry's knowledge at the time these units were built, I prefer the evidence of Mr Hursthouse. Mr Hursthouse's view[51] is that there was minimal damage associated with the short apron flashings on units 1,4 and 5 which may be attributable to those particular flashings

[50] Volume 5 page 25 of the common bundle of documents.

being cut short. Quentin Ross, a director of RRL, gave evidence at the hearing that RRL only ever installed lead apron flashings. It was established at the hearing that the apron flashings on unit 4 were clearly not lead, but metal. I accept therefore that RRL was not at all responsible for damage attributable to the particular metal flashings on unit 4. I also accept that the minimal damage attributable to the particular flashings being short on units 1 and 5 was not causative of the claimants' need to reclad units 1 and 5. I accept the uncontested evidence of Mr Hursthouse that there was no evidence of a consistent failure under the apron flashing ends and that even if the lead apron flashings were not particularly well formed, water did not automatically blow onto the vulnerable framing as there was none directly underneath the ends of which the led apron flashings. In addition the wall the lead flashing was chased into being masonry was not particularly succeptable to moisture damage in any event.

[121] Ms Wood submitted for Vero that based on the evidence of damage attributable to the short apron flashings and therefore RRL's work on units 1 and 5 would fall into the *de minimis* category for those two units.

[122] The cost associated with the isolated and minor damage to units 1 and 5 were set out in Mr White's supplementary brief. That costing was not contested. Mr White estimates the cost of remedying the isolated damage to unit 1 $8,338.13 and $10,072.98 for unit 5. It was accepted that Vero's insurance policy contained a product exclusion provision which excluded the cost of replacing product. Because of the product exclusion Vero cannot be liable under the insurance policies to pay the cost of replacing RRL's work. Mr White quantified the cost of replacing RRL's product in a supplementary brief of evidence[52] for unit 1 at $693.00 and for unit 5 $554.44. This sum needs to be deducted from the remedial costs.

[51] Brief of evidence of William Hursthouse dated 23 May 2011 paragraphs 106-211.
[52] Mr White's supplementary brief of evidence dated 6 July 2011 (pages 2 and 5 supporting calculations).

This means that Vero's maximum exposure if any for unit 1 would be $7,645.13 and unit 5 $9,518.58.

[123] The owner of unit 1's claim is in the vicinity $286,074.00 and the claim in respect of unit 5 at $306,327.00.

[124] Vero's reliance on the *de minimis* damage is based on Heath J's decision in *Sunset Terraces.* Heath J stated in that decision that a value judgment is required to determine a factual finding of a nexus between an act and a loss which translates into a legal responsibility for a respondent to compensate a claimant. He stated that:

> In *Johnson v Watson*, the Court of Appeal held that a causal nexus was required between substantial and material cause and a loss suffered (see also *Pricewater House v Kwan*) in that context, 'substantial means more than trivial or de minimis.' 'Material' means that the alleged cause 'must have had a real influence on the occurrence of the loss or damage in issue.

[125] Vero's submission is that the two apron flashing terminations have not had a real influence on the occurrence of the damage to units 1 and 5 and the claimants' loss in respect of those two units. The defective apron flashings are not a substantial and material cause of the claimants' loss. I determine on the evidence before me that the loss caused by these two short apron flashings is de minimis and as a result Vero is not a tortfeasor and is not jointly and severally liable for the claimants' losses in respect of the quantum claimed for units 1 and 5. Clearly the damage attributable to the short apron flashings on units 1 and 5 has not led to the claimants' need to reclad. The damage was only isolated and discrete and I accept the quantum evidence of Mr White which was not contested.

[126] For these added reasons the claim against Vero does not succeed.

CLAIM AGAINST FROGLEY PLUMBING SERVICES LIMITED AND STEPHEN JOHN FROGLEY

[127] Frogley Plumbing Services Limited was contracted by HTC to undertake all plumbing work for stages 4 and 5 and indeed all stages of the Broadwood development of Refdin Holdings Limited. Mr Frogley is its sole director.

[128] Frogley Plumbing Services Limited and Mr Frogley were joined to the claim on application by HTC supported by an affidavit from Mr Tuke. HTC filed a statement of claim in June 2011 alleging that:

i. all plumbing contract work for stages 4 and 5 were undertaken by Frogley Plumbing Services Limited;
ii. Frogley Plumbing Services Limited owed the claimants a duty of care to carry out all plumbing work in a workmanlike manner, that the company breached that duty of care for the plumbing work was defective and resulted in water penetration into each of the units owned by the claimants causing damage to those units; and, such plumbing defects included gutters being embedded in the cladding, poorly formed junctions of the gutters with the cladding and downpipe fixed directly through the cladding.
iii. Mr Frogley was personally involved by reason of his supervision and control of the plumbing work.

[129] The claimants articulated no claim against Frogley Plumbing Services Limited or Mr Frogley, but adopted HTC's claim.

[130] Mr Frogley's evidence is that his company engaged two or three experienced plumbers full time on the plumbing work required for stages four and five. The plumbing programme was conveyed to

the company by Mr McGlashan normally by fax. The plumbers took their direct instructions on site from HTC's site foreman. Mr Frogley would visit the building site once a week to oversee plumbing progress. I am satisfied from Mr Frogley's evidence that he had no close supervisory role on site and that he did not undertake any actual plumbing installation. Neither Mr Tuke, Mr McGlashan, Mr Turner nor Mr Ottway stated that they observed Mr Frogley undertaking any personal supervision of the plumbing works. On occasions HTC notified the company of the need to expedite progress with the plumbing installation, and, would on less frequent occasions, warn of liquidated damages consequences for late finishing.

[131] The experts' conference and the evidence of the defects experts did not impugn the plumbing work. There is no evidence on which I could reasonably conclude that the plumbing work has been identified as causing water ingress to any of the units. There is no evidence before me that Mr Frogley assumed any personal responsibility for the plumbing work.

[132] Defect 5 from the experts' conference – timber fascias and barge boards recessed into the stucco plaster at roof level was caused by poor workmanship, said Mr Wilson. This was confirmed by a number of other experts agreeing this defect was caused by poor trades sequencing between the carpenters and plasterer. Following carpentry work the plumber would have installed the guttering followed by the plasterer. The guttering would properly require removal to enable the plasterer to undertake carefully the plastering work. The sequencing of that work would be the responsibility of HTC and the plasterer. I accept Mr Frogley's evidence, in answer to questioning from Mr Kohler, that whilst it would be unusual, the plasterer could easily have unclipped the guttering and replaced it after completion of the plastering to facilitate the proper plastering up behind the barge boards and fascia.

[133] As there was no evidence of defective plumbing installation the claim for damages against Frogley Plumbing Services Limited and Mr Frogley therefore fails.

THE AFFIRMATIVE DEFENCES OF CONTRIBUTORY NEGLIGENCE

Unit 1 and Unit 23

[134] The defence of contributory negligence has been specifically raised in respect of unit 1-Ms Renee Newman's purchase on 30 August 2003; and unit 23-Mr Herbert Blincoe and Mrs Mary Blincoe purchased on 29 August 2003. Mr Robertson and Mr Wilson submit Ms Newman and Mr and Mrs Blincoe were contributory negligent by failing to obtain pre-purchase reports from a qualified building surveyor prior to entering into their purchase agreements in 2003. The onus is on the respondents to establish affirmatively the defence of contributory negligence. The standard of care required is the ordinary degree of care that is reasonable in the circumstances. *Jones v Livox Quarries Limited*[53] established that the essence of contributory negligence is a failure on the part of the claimants to take reasonable care to protect their own interest where they are, or ought to have been, known to the claimants and reasonably foreseeable. Claimants who fail to take reasonable care in looking after their own interests and thereby contribute to their own loss, may be confronted with the defence of contributory negligence.[54] When considering responsibility for the loss in question, the concepts of causal potency and relative blameworthiness must be taken into account.[55]

[135] Mr Langlois submitted that the Council's argument runs contrary to well established authority.

[53] *Jones v Livox Quarries Limited* [1952] 2 QB 608 (CA) at [615].
[54] Stephen Todd (Ed) *The Law of Torts in New Zealand* (5th ed, Brookers, Wellington, 2009) at 994.

[136] In *Sunset Terraces* at [577] Heath J held that the purchasers are not under a duty to obtain pre-purchase reports:

> To my knowledge, there has never been an expectation in New Zealand (contrary to the English position) of a potential homeowner commissioning a report from an expert to establish that the dwelling is soundly constructed. Indeed, it is a lack of practice to that effect which has led Courts in this country to hold that a duty of care must be taken by the Council in fulfilling their statutory duties. Both *Hamlin* and the building industry commission report run counter to Ms Grant's argument on this point.
>
> [578] I find that there was no duty to that effect on the purchasers, so the allegation of contributory negligence cannot be made out…

[137] The unit purchasers in the *Sunset Terraces* case purchased in 2003. Mr and Mrs Blincoe and Ms Newman purchased in 2003. Mr Tim Jones a conveyancing expert called by the Council said that prospective buyers from 2003 became more cautious and more willing to arrange pre-purchase building reports due to the large amount of publicity about the leaky home crisis. However I am not satisfied that the evidence supports a finding that a failure to do so in August 2003 amounts to contributory negligence.

[138] For the reasons stated the affirmative defence of the Council and HTC fails in respect of Ms Newman and Mr and Mrs Blincoe.

Anne-Marie Hume – Unit 25

[139] Mr Robertson submitted that the negligence of the conveyancing lawyer for the claimant of unit 25 is attributable to Ms Anne-Marie Hume and her fellow trustees.[56] He stated based upon the evidence of Mr Tim Jones,[57] that the reading of Ms Hume's building report would have put on notice a reasonable conveyancing

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[55] At 996.
[56] *North Shore City Council v Body Corporate 189855* [2010] NZCA 65 at [145], [146] and [190] (*Byron Avenue*).
[57] Brief of evidence of Timothy Jones dated 12 May 2011 at [124].

solicitor and so too the fact that a pre-purchase inspector was recommended by the vendors' real estate agent.

[140] Ms Hume gave evidence that she and her fellow trustees purchased unit 25 in September 2003. Ms Hume said she was aware of the leaky building issues around the time of her purchase and engaged a pre-purchase inspector recommended by her vendor's real estate agent. Her evidence was that she engaged fully with that pre-purchase inspector and indeed made enquiries of two other inspectors. The report which Ms Hume obtained commented on some defects and stated that certain work was required. Ms Hume's evidence is that she gave that report to her lawyer.

[141] I am satisfied that given the limited (albeit growing) knowledge of the leaky building issues in September 2003 and the efforts which Ms Hume went to with her building inspector there was no evidence before me that enables me to find any causative link between the advice or lack of advice of Ms Hume's conveyancing solicitor and her actions in continuing with the purchase of unit 25. In any event there is insufficient probative evidence for me to reach a finding of negligence on the part of her conveyancing solicitor.

[142] The affirmative defence alleged against Ms Hume's claim fails.

Susan Brown – Unit 28

[143] Susan Brown purchased unit 28 in September 2005. The agreement to buy was conditional on a pre-purchase inspection report but not conditional upon obtaining a LIM from the Council. Ms Brown's evidence was that she was aware of the leaking building issues around the time of her purchase. She mentioned that on or about 13 September 2005 she spoke to her solicitor and stated that she was concerned that HTC had cut out parts of the wall of the adjoining unit 29 for repair purposes.

[144] Mr Tim Jones stated that a reasonable conveyancing solicitor in September 2005 would have advised Ms Brown of the importance of obtaining a LIM. Ms Brown's evidence is that this did not occur. She was however advised to obtain a pre-purchase inspection report.[58]

[145] Ms Brown obtained a pre-purchase inspection report dated 23 September 2003[59] which noted a high moisture reading in the lounge. It also stated:

> It is always recommended to check with local Council regards or permits having been applied for and signed off, i.e. LIM/file search.

[146] Despite this advice, Ms Brown did not obtain a LIM.

[147] Had a LIM been obtained, then the clear evidence of the Council officer Ms Ronel Gerber said it would have noted the following:

> The property at 29/8 Tobago Place is subject to a specific claim in relation to weathertightness. Follow up remedial work for this unit via building consent may be necessary to ensure that the building complies with the NZ Building Code. The Council also understands that all other units at 1-28/8 Tobago Place have been constructed by the builder for 29/8 Tobago Place. The Council has therefore been legally advised as to extend this notation to any units so constructed, which have not been subject to a specific weathertightness claim or repair to date, in order to ensure that the Council's statutory duty of care for protection of the health and safety of all occupants in these units is maintained. This requirement prevails until such time as independent evidence to the contrary to the need for this notation is received from an expert certified by the NZ Institute of Building Surveyors, to inspect and report on weathertightness.

[58] Ms Brown's evidence 11 July 2011 at 3.30pm.
[59] Common bundle of documents volume 4, section 4.9 page 17.

[148] Mr Langlois submitted that the claimants do not accept that this notation would have appeared on the LIM, but did not produce any probative evidence in support of such submission.

[149] I am satisfied from hearing Ms Gerber that this notation would have appeared on the LIM, had it been obtained by Ms Brown, or her advisors, in September 2005.

[150] The LIM procedure is an effective way Councils can warn intending buyers. It has potentially causal potency because the LIM procedure allows local authorities to absolve themselves of earlier negligence by warning potential buyers.[60] Ms Brown confirmed under questioning that she would have been cautious if she had obtained a LIM with such a notation.[61] I am satisfied that the LIM would have given her notice of serious weathertightness concerns.

[151] I am therefore satisfied that the Council has affirmatively established that a contributing cause of Ms Brown's losses was her failure to take reasonable care to protect her own interests by not obtaining a LIM. Her failure to take such reasonable care contributed partly to her loss.[62] The notation on the LIM would have given notice of probable weathertightness issues with all the units in Broadwood villa development. Her failure to take advice from the building surveyor and the carelessness, of her or her conveyancing lawyer, not to obtain a LIM has materially contributed to Ms Brown's loss for which she should carry some responsibility.

[152] I determine that a reduction of 30% to the amount of damages awarded to Ms Brown is a fair and appropriate contributory negligence apportionment.

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[60] *North Shore City Council v Body Corporate 188529* [2010] NZSC 158 at [81].
[61] Ms Brown's evidence 11 July 2011 at 4pm.
[62] Omitting to get a LIM in late 2005 I find to be a departure from the standards of a reasonable buyer of the time with the claimants general characteristics and knowledge.

General Damages

[153] Each of the claimants submit that they are entitled to an award of general damages as a result of the stress and anxiety of owning and living in a leaky home.

[154] General damages are awarded to claimants in leaky home cases to compensate for the stress, inconvenience and anxiety caused from their leaky home predicament. It is a compensatory award personally to the claimant. The Court of Appeal's decision in *Byron Avenue* confirmed the availability of general damages in leaky home cases and it held that in general the usual award is $15,000 per unit for non-occupiers and occupiers $25,000 per unit.[63] This approach was affirmed by Ellis J in *Findlay*[64] and by Andrews J in the recent decision of *Cao Tao v Auckland City Council*, Andrews J stated that the judgments since the Court of Appeals decision in *Byron Avenue* have awarded general damages on a per unit basis and that was what was intended by the Court of Appeal as general guidance.

[155] I therefore reject Mr Langlois submission that Mr and Mrs Blincoe as owners of unit 23 are each entitled to an award of general damages.

[156] The evidence for Ms Betty Turner, the claimant of unit 27 was provided by her son-in-law, Gray Pearson. He stated that Ms Turner lived in unit 27 from 1996 until just a few weeks before the remediation works commenced in 2009. She then moved into a retirement village for she was in her 80s and in poor health. Regrettably Ms Turner died during the hearing. I admitted Mr Pearson's evidence as proof of the late Ms Turner's anxiety from owning a leaky home. Ms Turner's death does not defeat her claim

[63] *Byron Avenue* [2010] NZCA 65 at [153].
[64] *Findlay v Auckland City Council* HC Auckland, CIV-2009-404-6497, 16 September 2010.

for general damages[65]. As the award of general damages is personal to a claimant to compensate for stress and anxiety, the severity of her anxiety and the lack of use and interference with her unit was considerably less than the other claimants due to her move to a retirement village before remediation commenced. Accordingly, I determine that the late Ms Turner is entitled to an award of general damages at the lower end which I assess at $7,000.00.

[157] Mr Charly Wimer, the owner of unit 5 admitted that his principal place of residence is in Tahiti and that ownership of unit 5 entitles him to a non-occupiers claim for general damages of $15,000. I agree with that claim.

[158] In respect of the claimants of units 1, 2, 4, 23, 24, 25 and 28, I am satisfied that each has suffered stress and anxiety from their predicament with owning a leaky unit. Accordingly I determine that each of those claimants are entitled to general damages at the upper limit of $25,000 per unit.

WHAT IS THE APPROPRIATE MEASURE OF EACH CLAIMANT'S LOSS?

Remediation Background:

[159] The nine claimants combined and formed a small committee to manage remediation. The committee chaired by Mr Blincoe engaged firstly Lighthouse NZ Limited to provide litigation support and then engaged Hampton Jones Limited to undertake management of all remediation. Mr Ackerman and Mr Parry managed the remediation project for Hampton Jones. They both gave evidence for the claimants and Mr Ackerman gave quantum evidence.

[65] Matheson v Transmissions & Diesels [2000] 1ERNZ233

[160] Hampton Jones were engaged in October 2007. After the claimants accepted Hampton Jones' remediation proposal in November 2008 it prepared a tender package and in due course selected suitable contractors to undertake the remediation work in accordance with the project programme and supervision from Hampton Jones.

Acceptance of Tender Process:

[161] Mr Bayley for the Council gave evidence criticising the tender process, principally arguing that the tender documents requested each tenderer to base their price from the Rawlinson pricing handbook. Whilst I accept Rawlinson's pricing handbook as a generalised guide, and that Mr Bayley and James White, Vero's quantity expert, were both critical of such generalised pricings which very quickly become dated, I determine that the claimants tendering process was reasonable and acceptable.

[162] The remediation work was undertaken throughout 2009 and early 2010. The costings supporting each of the nine claims were advanced by Mr Ackerman.

[163] Mr Bayley was critical of various, what he called relevant, remedial documents missing from Hampton Jones' disclosed documents. In particular documents showing the calculation build-ups for adjustments to provisional sums, subcontract or invoices for lump sum works, breakdown of tender lump sum costs and only a sample of variation invoices being disclosed. I am satisfied that the claimants supplied the respondents with sufficient contractual documents including progress payment sheets, valuation calculation sheets and variation orders sufficient to enable Mr White and Mr Bayley to expertly critique the actual remediation costings.

Adjustments for betterment and excessive costs:

[164] I accept that a successful claimant is not entitled to anymore than the reasonable costs to remedy the damage caused.[66] The respondents should not pay for building features that are prudent to install in a remediation project but which are not required or are not a Council remediation consent requirement. I agree with Mr Robertson's submission:

> "In *Cao v Auckland City Council* at para [26], the High Court cited with approval the test set out in *Dynes v Warren & Mahoney*[67] upheld on appeal to the Court of Appeal, as follows:
>
> > The Court must select that measure of damages which is best calculated fairly to compensate the Plaintiff for the harm done while at the same time being reasonable as between Plaintiff and Defendant.."

[165] Mr Robertson and Mr Wilson submitted quite properly that it is unreasonable for the respondents to be required to pay for work that is not required to meet the Building Code. They submitted that owners' choice items are not recoverable by the claimants and Mr White and Mr Bayley gave thorough and extensive evidence regarding a number of owners' choice and betterment items. They both gave evidence where they found significant deduction should be made for excessive costings.

[166] Mr Bayley at the hearing was critical of the timber replacement and the timber replacement costings being based on the Rawlinson's new timber rate. Mr Bayley was however unable to demonstrate with any cogent evidence that the amount of timber replacement certified by Hampton Jones was too high.

[167] The three quantity experts, Mr Ackerman, Mr White and Mr Bayley spent time together prior to the hearing ascertaining the matters upon which they agreed and identifying those items of owners choice where they were unable to reach agreement. Their evidence was heard concurrently at the hearing.

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[66] *Lester v White* [1992] 2 NZLR 483.

[168] Mr White for Vero gave helpful quantum evidence and a brief of evidence dated 23 May 2011. The most helpful summary was described as "annexure J" to his brief of evidence. I accepted in evidence at the hearing on 21 July 2011 Mr White's updated "annexure J". Mr Langlois filed a memorandum on 22 August 2011 which attached further updated quantum summaries which I accept and which I have extensively referred to in reaching my determination. Attached to Mr Langlois' memorandum is a costing summary in respect of each unit claim. It is this document which I refer to during the remainder of this determination. That document summarises each of the three quantum expert's costing findings. I prefer and indeed substantially adopt Mr White's costings as summarised in that document. There is a degree of agreement amongst Mr Ackerman, Mr White and Mr Bayley following the experts' conference, and the meeting before the hearing. Mr Langlois did however criticise some of Mr White's costings on the basis that he had not visited the building site. I do not consider this to detract from Mr White's evidence for he is a very experienced quantum expert on remediation costings.

[169] A number of the alleged owners' choice or betterment items of disagreement relate to whether there was a specific Council requirement for remedial building consent purposes. These include downpipe replacement, the installation of slit drains in front of the garages, and the rigid air barriers. Mr Ackerman, Mr Parry and Mr Wilson had no involvement with the remedial design or obtaining building consent for remedial work as that part of the remediation project was undertaken by other employees from Hampton Jones. They were not called by the claimants to give evidence. Mr Medricky, Mr Hursthouse and Mr Casey all confirmed that the nine units were not in a high wind zone and whilst they accepted the above items would be a proper recommendation of a remediation

[67] *Dynes v Warren & Mahoney* HC Christchurch, A242/84, 16 December 1987.

expert, each is of the view that none would be a minimum requirement of Council for remediation building consent purposes. The claimants did not call evidence supporting their claims that installation of rigid air barriers, slit drainage and renewed downpipe were indeed Council requirements.

[170] In relation to the downpipe I accept Mr White's costings whereby he allowed for the removal and the reinstallation of the external downpipes.

[171] Mr Hursthouse and Mr Medricky stated that they had seen no evidence of the slit drains being a performance requirement of Council. I accept the evidence of Mr Hursthouse and Mr Medricky that rigid air barriers were not required to obtain building consent whilst Mr Wilson stated that the claimants' remediation experts were of the view that their installation would be a necessary requirement. I therefore reject Mr Langlois' submission that rigid air barriers is not only a good idea for remediation but a requirement. I accept Mr Bayley's opinion that given the locality of these units the application of frame saver, and the building paper application are a sufficient and effective air barrier.

[172] Mr Hursthouse said that the eaves extension was in a similar category. He said it was a good and sensible idea but not a Council requirement for consent purposes. Mr Casey said there was no need to extend the eaves for the remediation could be achieved as for unit 29 with a Z flashing under the fascia.

[173] I also accept the opinion of Mr Casey when he stated that the inter-tenancy walls could be repaired on a targeted basis and he did not see the need to repair the entire block walls.

[174] I accept the claim for interest, including interest lost on broken investment funds used in meeting the costs of remediation,

as justifiable consequential costs. I accept Mr White's minor adjustments for interest.

[175] I accept the deductions made by Mr White in respect of general roof repairs and work required to make good the roof, the barge boards pointing and to replace the existing failed mortar, for they were not defects linked to the negligence I have found.

[176] I accept the claimants' costings for financial management but not for remedial support. Whilst I accept that Lighthouse has provided a valuable service to the claimants and its litigation support the claimants have found invaluable, but, I do not accept Mr Langlois' submission that there was no duplication in the litigation support from Lighthouse and Hampton Jones once Hampton Jones was engaged and commenced its remediation programme. Accordingly I accept Mr White's deduction for part of the Lighthouse costings.

CONSEQUENTIAL COSTS ADJUSTMENTS

Unit 1 Renee Newman

[177] The claimant increased the size of her unit during remediation which involved Ms Newman in additional rental accommodation. Ms Newman has claimed 15 weeks whilst other claimants' claim between six and seven weeks. I determine that six weeks is justified and hence a deduction of $9,000 is warranted.

[178] The claimants' claim succeeds to the extent of $238,035.00 ($247,035.00 less nine weeks rental of $9,000.00 making a total of $238,035.00).

Unit 5 – Charles Wimer

[179] Mr Wimer conceded and I determine that his claim for general damages is proven to the extent of $15,000 and not as shown by Mr White at $25,000.00.

[180] The claimants' claim succeeds to the extent of $252,715.00.

Unit 24 – Keith Fong

[181] Mr Fong never returned to reside in unit 24 following remediation. The respondents submitted that because he intended to move out and sell the unit (which he has not yet done) he is not entitled to removal costs. I disagree with that submission. Mr Fong did, as a consequence of owning a leaky home, which required remediation, actually incur removal costs to facilitate the restoration work.

Unit 28 – Ms Susan Brown

[182] Mr White's total quantum for unit 28 of $218,794.00 omits the Prendos Limited costs incurred by Ms Brown in her early investigations of water ingress problems amounting to $4,274.00. Ms Brown is entitled to recoup these properly incurred remedial costs. That makes Mr White's total $223,060.00 less the 30% contributory negligence of $66,928.00 giving a total of $156,148.00.

[183] The claimants claim succeeds to the extent of $156,148.00.

CONTRIBUTION ISSUES

[184] Section 72(2) of the Weathertight Homes Resolution Services Act 2006 provides that the Tribunal can determine any liability of any respondent to any other respondent in relation to any liability to determine. 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.

[185] The approach to be taken in assessing a claim for contribution is provided in section 17(2) of the Law Reform Act 1936. In essence, it provides that the amount of contribution recoverable be such as maybe found by the Court to be just and equitable having regard to the relevant responsibilities of the parties for the damage.

[186] As a result of the breaches referred to earlier in this determination, the Council is solely and severally liable for the entire amount of each of the claims for units 1, 2, 4 and 5. The Council and HTC are jointly and severally liable for the entire amount of each of the claims for units 23, 24, 25, 27 and 28. This means that the Council and HTC are concurrent tortfeasors in respect of units 23, 24, 25, 27 and 28. And therefore each is entitled to a contribution towards the amount they are liable for from the other, according to the relevant responsibilities of the parties for the same damage as determined by the Tribunal.

Summary of the Respondents (Council and HTC) Liabilities

[187] In making an apportionment I must have regard both to the causative potency of the respondents' conduct and to the relevant blameworthiness of the parties. A number of recognised authorities[68] clearly set down that primary responsibility in building defects cases must lie with the building party. The Supreme Court in *Sunset Terraces* and *Byron Avenue*, when considering whether duties ought to be owed by Councils to owners of residential units within developments built by large construction companies concluded that, rather than negating a duty of care that may otherwise be owed, the more appropriate outcome would be for the apportionment of liability amongst the building parties to reflect a lower liability of the Council.

[68] *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA); *Morton v Douglas Homes* [1984] 2 NZLR 548; *Dicks v Hobson Swan Construction Limited (in liquidation)* HC Auckland, CIV-2004-404-1065, 22 December 2006.

The acts and omissions of HTC in this claim are more causally potent having been the creator of the defects.

[188] Recent authorities establish that there are very limited situations where the combined builders' responsibility is less than 80%.

[189] Upon considering the evidence, and based on the principles outlined above, I find that Council's responsibility is 20% in respect of units 23, 24, 25, 27 and 28 and HTC's 80% towards the amount that they have each been found jointly and severally liable for.

[190] To summarise the respondents' liabilities:

- The Council is severally liable for the full amount of the claim for units 1, 2, 4, and 5;
- The Council is found liable for 20% of each of the claims for units 23, 24, 25, 27 and 28;
- HTC is found liable for 80% of each of the claims for units 23, 24, 25, 27 and 28.

CONCLUSION AND ORDERS

[191] Whilst these nine claims have been heard concurrently they are individual claims. I now conclude with separate orders in respect of each of the nine claims.

[192] I adopt predominantly Mr White's costings as set down in the middle (headed "J White") column on the claimants' quantum spreadsheet of 22 August 2011 (see Annexure 2) for the reasons outlined above.

CONCLUSION AS TO QUANTUM

[193] The nine claimants have established their respective claims to the amounts which I now summarise:

TRI-2010-100-32 Unit 1 Renee Newman	$238,035.00
TRI-2010-100-34 Unit 2 Meryl Price	$176,726.00
TRI-2010-100-35 Unit 4 Karen Turner	$213,433.00
TRI-2010-100-36 Unit 5 Charles Wimer	$252,715.00
TRI-2010-100-37 Unit 23 Herbert and Mary Blincoe	$269,000.00
TRI-2010-100-38 Unit 24 Keith Fong	$214,843.00
TRI-2010-100-39 Unit 29 Anne-Marie Hume	$201,255.00
TRI 2010-100-40 Unit 27 the Executors of the Estate of the late Betty Turner (SL & GE Pearson)	$202,045.00
TRI-2010-100-41 Unit 28 Susan Brown	$156,148.00

[194] For the reasons outlined above I now make separate final determination orders in respect of each of the nine claims.

DATED this 21 day of October 2011

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K D Kilgour
Tribunal Member