IN THE WEATHERTIGHT HOMES TRIBUNAL
TRI-2008-100-000046

BETWEEN	**BORIS and GIORDANA BACIC** Claimants
AND	**TULIP HOLDINGS LIMITED (previously named Buildcorp Holdings Ltd)** (In liquidation & removed) First Respondent
AND	**NORTH SHORE CITY COUNCIL** Second Respondent
AND	**JAMES MICHAEL FAIRGRAY** Third Respondent
AND	**RICHARD ARTHUR ZGIERSKI-BOREYKO** Fourth Respondent
AND	**MALCOM BROWN MURRAY DAY ARCHITECTS** (Removed 5 August 2008) Fifth Respondent
AND	**SEAN LAKE** Sixth Respondent
AND	**NORTH HARBOUR ROOFING LIMITED** Seventh Respondent
AND	**ALAN JAMES FORD** Eighth Respondent
AND	**JOEL MCLELLAN** (Removed 23 December 2008) Ninth Respondent

Hearing: 13, 14, and 15 May 2009

Appearances: Claimants – self represented
Second respondent – C Goode
Third respondent – self represented
Fourth respondent – self represented
Sixth respondent – M Tolhurst
Seventh respondent – R Butler
Eighth respondent – P Rice

Decision: 11 June 2009

FINAL DETERMINATION
Adjudicator: P McConnell

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INTRODUCTION

[1] Mr and Mrs Bacic, as recent immigrants to New Zealand, were looking for a home for themselves and their unborn child. They visited a show home in Pannill Place, which met their requirements and decided to purchase a similar apartment, “off the plans”, with the expectation that it would be completed in March 2000. The house

however was not completed until October 2000 and they settled the purchase in November 2000.

[2] Mr and Mrs Bacic experienced problems with their new home from the day they moved in and within less than two years the body corporate consulted a weathertightness expert to complete a report on the complex. Moisture ingress has occurred causing extensive damage to the cladding and framing. Some remedial work has been carried out but the majority is yet to be done.

[3] Mr and Mrs Bacic are seeking $275,523.25 from the North Shore City Council, the territorial authority which issued the building consent and carried out several inspections during construction, James Fairgray, the general manager of the development company, Richard Zgierski-Boreyko, who issued the practical completion certificate, Sean Lake, the site manager during the construction, North Harbour Roofing Limited, the company which supplied and installed the roof, and Alan Ford, the director of A J Ford Limited, the building company which carried out the building work during the construction on a labour-only contract.

[4] The amount claimed includes costs incurred to date on repairs to an inter-tenancy wall of $13,330.00, estimated remedial work of $213,339.25, consequential costs of $12,184.00 and general damages of $50,000.00.

BACKGROUND AND MATERIAL FACTS

[5] In 1998, Melview Ponderosa Limited, the owners of a property situated in Pannill Place, Browns Bay, engaged architects to complete drawings and specifications for three blocks of terrace style units for building consent purposes. After construction of two of the blocks, Melview sold the development, including the plans of the yet to be built block, to Buildcorp Developments Limited.

[6] On 17 October 1999, Mr and Mrs Bacic entered into an agreement to purchase unit 2/7 Pannill Place from Buildcorp Developments Limited for $208,000.00. Mr and Mrs Bacic bought the unit "off the plans" as it was yet to be constructed. The agreement was subject to their solicitor's approval. It also provided that settlement would be completed on the issuing of title and on practical completion. Practical completion in the agreement was defined as the stage of construction when:

> "The unit is substantially complete so that it is capable of being used by the purchaser for the purposes for which it was intended without material inconvenience notwithstanding that there may be items of a comparatively minor nature which may require finishing, alteration or remedial action and notwithstanding the fact that any other unit or part of the development may not have achieved practical completion at the time."

[7] The agreement for sale and purchase provided that the vendor would use its best endeavours to provide a Code Compliance Certificate (CCC) to the purchasers on the settlement date. The unavailability of such certificate would not however entitle the purchasers to delay the settlement date and/or claim compensation.

[8] By deed of assignment dated 17 November 1999, Buildcorp Developments Limited assigned the benefit of the agreement to Buildcorp Holdings Limited which then became Tulip Holdings Limited (Buildcorp). Buildcorp went into liquidation during the course of the adjudication and was accordingly removed as a party to these proceedings.

[9] Joel McLellan was the managing director of Buildcorp and at the time of acquisition of the Pannill Place development, James Fairgray was Buildcorp's general manager. James Fairgray's primary responsibility was the financial management of Buildcorp and contract management. He was the person primarily responsible for dealing with the agreements for sale and purchase and contractual issues with the purchasers of units. The structure of Buildcorp for the

management at the Pannill Place development also included a project manager and a site manager. Initially Sher Baloch was the project manager for Pannill Place and when he left Buildcorp, his role was taken over by Li Yan.

[10] The project manager was office-based but the expectation was that that person would visit the site two or three times a week or more often if necessary. In addition to the project manager, a site manager was also appointed. The site manager was primarily site-based and his role was to provide an administrative role on site and ensure the project manager was informed of progress on the site and of any issues as they arose. John Dryden was the original site manager for Pannill Place but his role was taken over by Sean Lake in early 2000.

[11] Before entering into the agreement for sale and purchase, Mr and Mrs Bacic had been assured that the developers were a well-known and respected development company. They were further assured that the territorial authority would carry out regular inspections to ensure that the building work complied with the Building Act and Code.

[12] The expectation at the signing of the agreement for sale and purchase was that construction would be completed by March 2000. However there were delays in the construction of the units and construction was not completed until near the end of October 2000. During the winter of 2000, Mr and Mrs Bacic were concerned about the delayed building work and contacted the North Shore City Council directly. They were assured by a building advisor at the Council's Albany office that the Council was checking each stage of the construction process and if there were any issues they would be noted.

[13] In September 2000, Buildcorp engaged Mr Zgierski-Boreyko, trading as CAD Drafting Technologies, to inspect and write a letter of

practical completion for the eight unit complex, including Mr and Mrs Bacics' unit. As he had not been involved in either the design or construction of the units, Mr Zgierski-Boreyko queried whether he was an appropriate person to complete such a certificate. He was, however, assured by Buildcorp's lawyers that this was not out of the ordinary and they provided him with further background information on the completion of such a certificate. Mr Zgierski-Boreyko was asked to inspect the completed development in terms of the plans and specifications annexed to the agreement for sale and purchase which were general arrangement drawings and not working drawings. He issued a practical completion certificate dated 2 October 2000 which stated:

> "We confirm that we have inspected the eight units at Lot 64 and 65 Pannill Place, PONDEROSA and are satisfied that the units have achieved practical completion. We are satisfied with the level of finish and that the units have been built in accordance with the plans and specifications provided."

[14] The Council undertook a final inspection on or about 18 October 2000. That inspection failed for a number of reasons that were set out in Field Memorandum No. 33453. The issues that related to unit 2 included:

- Fire stopping – fireline to be completed in subfloor;
- Fire stopping to be completed in sealing space;
- Butynol membrane to deck area to be certified by improved installer;
- Step between unit floor and deck level to be minimum 50mm.

At some point between 18 October 2000 and 30 January 2001, the issues in relation to the first two points were resolved.

[15] The practical completion certificate was sent to Mr and Mrs Bacic's solicitors and they carried out their own inspection of the unit

on 23 October 2000. Mr and Mrs Bacic were advised by Buildcorp that the issue of the CCC was imminent and that there were only minor issues to be resolved for this to happen. They settled the purchase on 6 November 2000 and moved into their new home after being advised by their solicitor that the terms of the sale and purchase agreement were met.

[16] Mr and Mrs Bacic experienced problems with the unit from the day they moved in. On the first day, water started pouring down the light fitting into the lounge when they ran their first bath. A number of other problems occurred including electrical faults and some cracking in the wall linings. Mr and Mrs Bacic contacted Buildcorp regarding the problems and defects, as they arose. Buildcorp responded by dealing with some of the issues but advising that others were more maintenance issues, and so Mr and Mrs Bacic would need to address these themselves.

[17] Mr and Mrs Bacic were also concerned about the delay in the issue of the CCC and contacted Buildcorp on several occasions to try and find out more information. They were advised by Buildcorp that outstanding issues were of a minor nature and that Buildcorp and the Council were working to resolve them.

[18] Mr and Mrs Bacic also contacted the North Shore City Council asking for information about their file and the issuing of the CCC. They had significant difficulty getting detailed information and even finding out who the person was who was dealing with their case. On at least two occasions when they personally visited the Council, they were given the wrong file. Despite their repeated requests for information, they were never provided with the Council's memorandum no. 33453. The first time they saw this memorandum was when they received the WHRS assessor's report in January 2004. However they were reassured that the outstanding issues were not major when one of the adjoining units (unit 1/7), was granted an Interim Code Compliance Certificate.

[19] During a Body Corporate meeting convened in September 2002, other unit holders also expressed concerns about cracks they had noticed in their units. At the meeting it was agreed that Dr Walls of Building Code Consultants Limited would be contracted to carry out an investigation. The subsequent lack of a cohesive approach to resolving the problems on the part of all the owners of the units meant that some owners began to undertake further investigations and carry out their own repairs on a unit by unit basis. This culminated in the Body Corporate passing a resolution that each owner would be responsible for completing and paying for any rectification work directly benefiting their unit. The Body Corporate secretary was removed in June 2003 and replaced by Centurion, the current Body Corporate secretary.

[20] On 6 January 2003, Mr and Mrs Bacic lodged an application with the Weathertight Homes Resolution Service. Although the WHRS assessor's report is dated 28 November 2003, they did not receive a copy of the report until 13 January 2004. That report concluded that the dwelling was a leaking home and that the claim was eligible.

[21] Four of the other units had work done by Jump New Zealand Limited between 2003 and 2005 under the supervision of Prendos Limited. This included some repair work to the inter-tenancy wall between Mr and Mrs Bacic's unit and unit 3, then owned by A and M Carter. Part of this claim is 50% of those costs for repairs to that inter-tenancy wall. The costs of repairs to the other units varied. It is understood repair costs for one of the units was less than $100,000.00. The costs of repairs to unit 3 as recorded in WHRS claim no. 692, was $140,125.91 and the costs for 1/9 unit in the neighbouring block, as recorded in WHRS claim no. 499, was $191,360.44.

[22] In March 2004, the Council issued a notice under section 42 of the Building Act 1991 to rectify the building work. In June 2005, the Council requested access to the unit in order to carry out an invasive report. Richard Maiden of Prendos was engaged by the Council to do that work. A copy of his report was sent to the claimants in October 2006.

[23] Mr and Mrs Bacic attempted to get quotes and approval to carry out the remedial work. A proposal for targeted repairs was put before the Council but the Council advised Mr and Mrs Bacic that it would not issue a building consent for the proposed work. As a result of conflicting information and escalation of costs in relation to repairs of other units in late 2007, Mr and Mrs Bacic applied for an addendum report from the Department of Building and Housing. That report was issued on 31 January 2008. Mr and Mrs Bacic filed their application with the Tribunal dated 15 May 2008. The claim is based on an estimate for the remedial work other than the claim for a half share of the repairs to the inter-tenancy wall with unit 3.

THE UNIT AND ITS PROBLEMS

[24] Mr and Mrs Bacic's unit is on three levels and is one of eight in a block of units built in Pannill Place sloping downward from east to west with every second unit in the block stepping down from its uphill neighbour by approximately 1.4 metres in order to follow the contours of the ground. The ground also slopes upwards towards the rear of the properties so that the first door of each unit opens out to a small rear courtyard at the rear of each of the units.

[25] The complex was constructed with kiln-dried untreated timber wooden framing. The front of the unit is supported on a concrete foundation with the back half supported on a concrete perimeter foundation. Each unit has a concrete tile roof and aluminium windows, and the exterior walls, including the inter-party walls, are lined with fibre cement sheet, texture coated and painted

known as Harditex. James Hardie provided a technical information catalogue with its product which was required to be followed by those involved in the dwelling construction. The relevant catalogue for the construction of this unit is the 1998 version. It contains detailed information about how the product was to be installed and fixed to other structural components.

[26] The technical background to these claims is now well understood. Section 7 of the Building Act 1991 (the Building Act) requires that all building work for residential properties, such as the subject dwelling, comply with the Building Code which is part of the regulations enacted under the Building Act. Section 32 of the Building Act requires building work to be done in accordance with a Building Consent; and the local authority, in terms of section 43, shall only issue a CCC if it is satisfied on reasonable grounds that the building work complies with the Building Code.

[27] The Building Code sets functional and performance requirements which all building work must meet. The relevant clauses of the Building Code for this claim are clauses B2 (durability), E1 (surface water) and E2 (external moisture).

[28] Throughout the building work the local authority's obligation under the Act is to carry out inspections to ensure that it is satisfied on reasonable grounds that the certified work complies with the Building Code. At the completion of the building work, provided the Council is satisfied that the work complies with the Building Code, a CCC can be issued. In this case a CCC has not been issued.

THE ISSUES

[29] The issues to be determined in this claim are:

(a) The defects to the dwelling and the contribution of those defects to the damage

(b) The cost of repairs
(c) The claim for general damages and consequential losses
(d) The liability of each respondent for the damage and consequential losses
(e) Contributory negligence and failure to mitigate

DAMAGE TO THE DWELLING AND ITS CAUSES

[30] Stephen Ford, the assessor, Bill Cartwright, the claimants' expert, William Hursthouse, the expert engaged by North Harbour Roofing and Richard Maiden, the Council's expert, gave their evidence concurrently on the defects to the dwelling and subsequent damage. Apart from the issue of whether the roofing work undertaken by North Harbour Roofing contributed to the damage, the experts were largely in agreement on the defects and causes of damage. Whilst there was a difference in the priority given to different causes, all agreed on the major defects.

[31] All experts agreed that water ingress from the top of the walls was a major cause of damage to the timber framing. In particular the failure to adequately waterproof was caused by poor workmanship in the installation of the flashings and failure to seal the fibre cement behind the metal flashings. There was also unprotected cladding at the end of the gutters and the fascias were lapped the wrong way. In addition there is a lack of reinforcing to the corners in the cladding on either side of the beam. The capping and cladding has failed and allowed water to enter the timber framing which in turn caused rotting and cracking.

[32] The manufacturer's specifications as set out in the 1998 technical catalogue published by James Hardie Pty Ltd was not followed. That information required the application of sealant or some waterproofing agent to the cladding under and around the flashings to prevent water entering and decaying the timber framing.

[33] The experts also agreed that the flat tops to the deck balustrades and the top fixed handrails were major contributions to the damage, particularly to the deck walls. This also was contrary to the technical literature which required a slope to the top of the balustrades.

[34] The third major defect on which the experts agreed was lack of flashings in the windows on the west inter-tenancy wall between units 1 and 2. There were no head flashings as required nor any other adequate form of sealant and this allowed water to enter into the framing.

[35] There were also a number of other defects identified by the experts. All of these were contrary to either the technical literature or good building practices of the day. However in general the experts agreed that either these made only a minor contribution to the dwelling leaking or there was little evidence that they currently contributed to leaks. Some may fall into the category of being likely to cause future damage. These defects are:

(a) Bolt fixings and other penetration of wall linings
(b) Cladding in contact with horizontal surfaces
(c) Cladding nails through members at upstands and nails too close to the base of sheets
(d) Inadequate ventilation at ground level
(e) Lack of reinforcing to the corner joints of the cladding on either side of the beam
(f) Insufficient fall in the deck

[36] The assessor in his reports also identified as a cause of damage water from a steep roof running into the main roof with a shallow angle and the water not being retained in the flashing and entering into the roof cavity. Mr Hursthouse however, after more extensive investigations, concluded that there was no evidence that the smaller valley flashing was overflowing, as there was no stain on the soffit lining and the connecting timber was clear. He accepted

that there was historic evidence of water ingress from the larger valley flashing but all indications were that the repairs undertaken earlier were successful.

[37] The other experts did not dispute Mr Hursthouse's conclusions and accepted that they were based on more extensive investigations than those they had carried out. However they did not accept that the lack of drip-edge to the bottom beam was a significant contributing factor to the dwelling leaking. They also believed that the water ingress prior to the repairs to the larger valley flashing could have contributed to some of the damage in the bottom beam.

[38] I am satisfied Mr Hursthouse's investigations were thorough and his conclusions are reasonable. I accordingly conclude that there was no evidence that the valley flashings are a current contributing factor to the dwelling leaking. At the very most, the leaking that occurred before the repair work to the larger valley flashing may have contributed to the current damage in the beam. However I would conclude that the degree to which this contributed to the damage is not sufficient to be regarded as a substantial and material cause of any loss suffered.[1]

[39] I therefore conclude that the major contributing factors to the dwelling leaking are the flat tops and top-mounted balustrades, the poorly installed parapet caps together with the associated issue of unsealed fibre cement behind the metal flashings, and the lack of flashings in the west wall windows. The defects listed in paragraph [35] are also established but are not significant causes of damage.

QUANTUM OF CLAIM

Remedial Works

[40] No party specifically disputed the claim for 50% of the repair cost for the inter-tenancy wall. In addition, the only disputes in relation to the $134,437.50 as set out in the remedial works estimate related to the $17,437.50 for the deck reconstruction and also the 10% contingency allowance of $9,400.00. In relation to the deck, Mr Hursthouse, Mr Cartwright and Mr Ford all stated that for the remedial work to be carried out, the deck would need to be removed and replaced. Therefore even though the lack of slope may not be a contributing factor to the dwelling leaking, their evidence was that it was inevitable that the deck would need to be replaced to carry out the required remedial work. Mr Maiden in his witness statement stated that he saw no evidence to suggest the deck needed to be replaced. However, at least by implication, he accepted the evidence of the other experts.

[41] On the basis of the evidence I am satisfied that the remedial work cannot be completed without reconstruction of the deck. Accordingly the $17,300 estimate for this work has been established as part of the remedial work claim.

[42] In relation to the contingency sum, Mr Maiden stated a maximum of $5,000.00 for contingency was appropriate in the circumstances of this case. Mr Ranum, the claimants quantity surveyor, however disagreed as he advised that the contingency allowance was also to cover any unforeseen items. He said that it would be rare for anyone to allow less than $10,000.00 for contingency in relation to the remedial work for leaky homes.

[43] Mr and Mrs Bacic have received two detailed quotations for the proposed remedial work, the costings prepared by Mallard Cooke and Brown which form the basis of the application, and costings prepared by Progressive Building Limited. The contingency allowance in the Progressive Building Limited report is $10,088.81 plus GST out of the total repair bill of $153,223.83. The contingency

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[1] See *Johnson v Watson* [2003] 1 NZLR 626 (CA) at [18] and *Sunset Terraces* at [233], see

allowance in the Mallard Cooke and Brown costings is $9,400.00 plus GST. The allowance for contingency in the assessor's report on is calculated 10% (of a lower repair estimate) and comes out at $9,060.00 exclusive of GST. Therefore on the basis of the detailed estimates provided, and on the evidence of Mr Ranum, I accept a contingency allowance of $9,400.00 is reasonable and has been established.

Professional Fees

[44] No disputes arose with the $500.00 claimed for disbursements, the $843.75 for Mallard Cooke and Brown fees, the $2,925.00 for Citywide Building Consultants' fees, and the $5,000.00 building consent fees. What was disputed however was the need for the timber analysis cost of $4,000.00, for maintenance of $1,230.00, and the drafting and project management fees. Mr Maiden in his initial report suggested $3,000.00 would be sufficient for drafting fees as opposed to the $8,775.00 quoted by Inside Drafting Services. The drafting fee component of the Progressive Building Limited's quote was between $5,000.00 and $6,000.00. Mr Ranum also stated that other quotes had been obtained at the time of the Inside Drafting Services fee and they had been more expensive. On this basis, I accept the quote from Inside Drafting Services of $8,775.00 is reasonable.

[45] All the experts however expressed reservations about the fees quoted by Maynard Mark which are part of the claim. It is unfortunate that no one from Maynard Mark was able to attend the hearing to specifically address the questions raised. The experts suggested that Maynard Mark's fee was estimated on the basis that they would be starting from scratch and needing to do a complete assessment of the structural integrity of some aspects of the dwelling as well as the causes of damage and the extent of damage. All the experts agreed that due to the number of reports that had been completed on this unit and also having regard to the information

n 4 below.

obtained from the remedial work done on other units, a large amount of reliable information was already available. The experts also accepted there was no need for a structural engineer to complete a further review of the roof structure as this has not been identified as an issue and appropriate engineering work was done at the time of the change of roofing material.

[46] The total professional fees, excluding drafting and consent fees, amount to almost $43,000.00 which is approximately 33% of the total building fees. Mr Maiden in his evidence stated that Prendos charge between 12% and 15% for professional fees for the management of remedial projects and their fees are not considered to be a cheap option. Mr Maiden suggested professional fees of $17,000.00 for a project this size would be appropriate.

[47] I accept Mr Maiden's evidence. It is difficult to justify professional fees, exclusive of drafting fees, that would amount to almost half of the costs of the remedial work. I also note that Progressive Building Limited, in its estimate provided in September 2008, allowed an amount of $9,100.00 exclusive of GST for a remediation specialist. This remediation specialist would have fulfilled a similar function to the proposed contract by Maynard Mark.

[48] I conclude that the claimants have established remedial work costs to the value of $182,643.75. This amount is calculated as follows:

Detail	**Costs**
Half share of inter-tenancy wall repairs	$13,300.00
Estimate of remedial work	$117,000.00
Estimate to reconstruct deck	$17,300.00
Building consent fees	$5,000.00
Mallard Cooke and Brown QS	$843.75
Citywide Building Consultants fees	$2,925.00
Drafting fees	$8,775.00

Professional fees	$17,000.00
Disbursements	$500.00
TOTAL	**$182,643.75**

Consequential Losses

[49] The claimants are seeking $12,184.00 to cover rental accommodation during the repair work, relocation costs and other ancillary matters. They presented evidence establishing the level of rental they are likely to have to pay while the remedial work is being carried out. I accept relocation expenses are reasonable and necessary given the extent of the repair work and the size of the dwelling. No party disputed the amount being claimed for consequential amounts. The claim of $12,184.00 has accordingly been established.

General Damages

[50] The claimants are seeking $50,000.00 in general damages for emotional harm, stress and anxiety following from their discovery that they owned a leaky home. Mr and Mrs Bacic gave evidence of the stress and difficulty they have been under because of their leaky home problems. They were recent immigrants in New Zealand who believed they had taken all reasonable precautions to ensure they had a brand new low maintenance home for themselves and their new baby. Unfortunately, the reality has been very different. This has had a large personal cost for both Mr and Mrs Bacic which was only exacerbated by the inability of the North Shore City Council to provide reasonable information in a timely way in the early stages when initially approached by Mr and Mrs Bacic. The difficulties are not as yet behind them as they still have the whole remedial process to live through.

[51] In setting the level of general damages, I am guided by the High Court. In recent cases the High Court has awarded general damages to successful claimants of between $20,000.00 and

$25,000.00 for each owner-occupier claimant.[2] Where there are two owners to a unit, in some decisions they are awarded amounts within this range jointly, and in others they are awarded up to $25,000.00 each.

[52] Ms Goode submitted that Mr and Mrs Bacic were not entitled to general damages, as they should be held responsible for the long delays in getting remedial work done. Whilst Mr and Mrs Bacic must take some responsibility for how long it has taken to get to this point, I accept that many of the delays were largely outside their control. Mr and Mrs Bacic were faced with conflicting information from experts and from the Council and saw their neighbours living through situations where estimated costs "grew exponentially" as repairs progressed. They were not in a financial position to proceed with repairs until they had firm quotes and estimates and knew exactly the extent of the damage.

[53] I do not accept that the length of time from when Mr and Mrs Bacic became aware they had a leaky home until the time they filed these proceedings, means that this is not an appropriate case for general damages. While the level of damages should not be increased to take into account the length of time Mr and Mrs Bacic have been living in a leaky home, they have clearly established that they have suffered considerable stress and inconvenience. That stress and inconvenience will continue throughout the remedial work. There is nothing about this claim to suggest that the level of general damages should be lower than what has been awarded to owner-occupiers of apartments in multi-unit complexes in recent High Court decisions. I accordingly award general damages of $20,000.00 each to Mr and Mrs Bacic.

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[2] *Sunset Terraces*, n 4 below. *Body Corporate 189855 & Ors v North Shore City Council & Ors* (*Byron), Body Corporate 183525 & Ors v Tony Tay & Associates Ltd & Ors* and *Body Corporate 185980 & Ors v North Shore City Council & Ors.*

LIABILITY OF NORTH SHORE CITY COUNCIL – FIRST RESPONDENT

[54] The claim against the Council is that it was negligent in both the processing of the building consent application and in carrying out inspections during the construction and certifying process. In particular it is alleged that the Council was negligent in failing to identify the weathertightness defects in the inspections undertaken.

[55] It is well accepted that a local authority owes a homeowner a duty of care in issuing the building consent, inspecting the building work during the construction and in issuing a CCC.[3] The issue therefore is whether the Council breached that duty of care and whether any such breach relates directly to the defects which caused damage.

Claim in relation to Building Consent process

[56] The claimants allege that there were inadequacies in the design of the dwelling and that the drawings and specifications, on which the consent was based, do not contain sufficient details to ensure defects did not occur and that construction could be adequately completed. The claimants allege that in processing the building consent application, the Council should have been mindful of the issues that these inadequacies raised. It therefore breached its duty of care to the claimants in approving the building consent application.

[57] In *Body Corporate 188529 & Ors v North Shore City Council & Ors* (No 3) (*Sunset Terraces*),[4] Heath J concluded it was reasonable for the Council to assume, in issuing building consents, that the work could be carried out in a manner that complied with the Code. He stated:

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[3] *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 at 526-40, *Bowen v Paramount Builders (Hamilton) Limited* [1977] 1 NZLR 394, *Sunset Terraces*, n 4 below.

[4] [2008] 3 NZLR 479.

> "[399]…To make that prediction, it is necessary for a Council officer to assume the developer will engage competent builders or trades and that their work will be properly co-ordinated. If that assumption were not made, it would be impossible for the Council to conclude that the threshold for granting a building consent had been reached.
>
> ………
>
> [403] In my view, it was open for the Council to be satisfied, on reasonable grounds, that the lack of detail was unimportant. I infer that the relevant Council official dealing with this issue at the time concluded that the waterproofing detail was adequately disclosed in the James Hardie technical information and had reasonable grounds to be satisfied that a competent tradesperson, following that detail, would have completed the work in accordance with the Code."

[58] In my view, the Council in this case had reasonable grounds on which it could be satisfied that the provisions of the Code could be met if the building work was completed in accordance with the plans and specifications and technical literature. I accordingly conclude that the claimants have not proved negligence, at the building consent stage, on the part of the Council.

The Inspection Process

[59] The claim that the Council failed to exercise due care and skill when inspecting the building work is that it failed to inspect with sufficient thoroughness to identify the established defects and that this failure amounted to negligence and caused the claimants loss.

[60] The Council's inspections were carried out by Council officers pursuant to section 76 of the Building Act 1991. Several inspections were carried out during the original construction process, with a final inspection on 18 October 2000. This inspection failed and memorandum 33453 was issued identifying a number of matters that needed to be addressed before a Code Compliance Certificate

could be issued. While there is no record of a further inspection following the 18 October inspection, it appears likely that there was one prior to 30 January 2001. In a letter dated 30 January 2001, only two outstanding issues are noted in relation to unit 2 and an additional query was added in relation to timber treatment. It appears from the copy of memorandum 33453 on the Council file that a number of the other issues had been ticked off but there is no reliable record of when this happened.

[61] Mrs Zgierski-Boreyko, who gave evidence on behalf of Mr Zgeirski-Boreyko, was contracted by Buildcorp to try and address the outstanding issues with the CCC in early 2001. She gave evidence of the steps taken to address the issues. While there was no evidence on the Council file of various visits, communications and documents, I accept Mrs Zgierski-Boreyko's evidence and conclude that by mid-2001 all issues had been addressed to the satisfaction of the Council other than the issue of the step between the unit floor and the deck level mentioned in memorandum 33453.

[62] While no Code Compliance Certificate has ever been issued for unit 2, this was largely because of a change of policy by the Council in relation to monolithically clad homes and the issues that subsequently arose in relation to this complex. The only outstanding matter for the issuing of the CCC before this time was the lack of step. This has not been an issue that any of the experts believed contributed to the dwelling leaking. It is also noted that an interim Code Compliance Certificate was issued for the adjoining unit 1 on 18 April 2002, which is of similar design and construction.

[63] Mr Flay, a technical advisor for the Council, in his witness statement suggested that the Council was not liable as Mr and Mrs Bacic could establish no reliance on the inspection process. This issue was not pressed in any specific way in the closing submissions by the Council. There is however clear evidence that Mr and Mrs Bacic did rely on the inspection regime by the Council. They gave

evidence that when they purchased the house, they were aware that territorial authorities carried out inspections of buildings to ensure they complied with the Building Act and with the plans and specifications. Throughout the course of the construction process, they specifically contacted the Council in this regard as they had concerns regarding the delays. The Council confirmed its role in carrying out inspections. In addition, prior to settlement, the Bacics were informed that there were only some minor issues that needed resolution before the Code Compliance Certificate would be issued. Mr Zgierski-Boreyko also relied on the fact that the Council had carried out inspections and again he was advised that there were only a couple of issues that needed to be addressed for the CCC to be issued. In these circumstances I conclude that Mr and Mrs Bacic have established that they relied on the Council to carry out inspections competently throughout the construction process.

[64] The Council submits that it can only be liable for defects that a reasonable Council officer, judged according to the standards of the day, should have observed during the course of the inspection. They acknowledge that they should have picked up the flat top balconies and top fixed rails during the inspections and accordingly accept liability in relation to those defects. The Council however submits that the other defects either could not have been detected by a Council officer or were not considered to be defects judged by the standards of the day.

[65] I accept that the adequacy of the Council's inspections needs to be considered in light of accepted building practices of the day. The High Court however has in more recent cases placed a greater responsibility on territorial authorities than the level of responsibility advanced by the Council in this case. Heath J in *Sunset Terraces* states that:

> "[450….[A] reasonable Council ought to have prepared an inspection regime that would have enabled it to determine on reasonable grounds that all relevant aspects of the Code had been complied

with. In the absence of a regime capable of identifying waterproofing issues involving the wing and parapet walls and the decks, the Council was negligent."

[66] And at paragraph 409,

> "The Council's inspection processes are required in order for the Council (when acting as a certifier) to determine whether building work is being carried out in accordance with the consent. The Council's obligation is to take all reasonable steps to ensure that is done. It is not an absolute obligation to ensure the work has been done to that standard."

[67] In *Dicks v Hobson Swan Construction Limited* (in liquidation),[5] the Court did not accept that what it considered to be systemically low standards of inspections absolved the Council from liability. In holding the Council liable at the organisational level for not ensuring an adequate inspection regime, Baragwanath J concluded:

> "[116]…It was the task of the council to establish and enforce a system that would give effect to the building code. Because of the crucial importance of seals as the substitute for cavities and flashings it should have done so in a manner that ensured that seals were present."

[68] It is apparent from these cases that the definitive test is not only what a reasonable Council officer, judged according to the standards of the day, should have observed. A council may also be liable if defects were not detected due to the Council's failure to establish a regime capable of identifying critical waterproofing issues.

[69] The main areas of damage to this building relate to inadequacies in the cap flashings and associated problems, the flat tops to the deck balustrades and top fixed handrails and the lack of flashings in the windows on the west inter-tenancy wall. Ms Goode for the Council acknowledged liability in relation to the flat tops to the deck balustrades and the top fixed handrails only. However she

[5] (2006) 7 NZCPR 881 (HC) at para [116], per Baragwanath J.

advised that the Council could not reasonably have seen the inadequacies in the cap flashings as this was not a specific area of inspection. In addition she noted the particular difficulties or defects in this area also related to the sequencing of work with the flashings and guttering which were affixed prior to texture coating being applied leaving unsealed fibre cement behind the metal flashings. She did not consider this was something the inspectors, at the time, could reasonably have seen.

[70] In relation to the windows on the west wall, Ms Goode submitted that the Council had no knowledge of these windows and therefore cannot be held to be responsible. Windows were not included on this wall in the consented plans but were a variation negotiated by the claimants at the time of purchase.

[71] Framing was completed for the windows during construction and the wall was Harditexed. The windows were inserted later, most likely in late January 2001. All the experts agreed that retro-fitting these windows after the cladding had been installed, texture coated and painted was not good practice. They considered it would be very difficult, if not impossible, to install adequate flashings and ensure weathertightness in these circumstances.

[72] It is difficult to reconstruct from the documentation now available a full chronology of the inspections that were undertaken. With the time that has passed since then, the quality of the evidence has diminished. Given Mr & Mrs Bacic's evidence of their difficulties in getting information from the Council, there was significant lack of co-ordination of the Council's documentation even as early as 2002. But as already stated, I do not accept h that the fact that there is no evidence in the current council record of various events, inspections or advice, means that event, inspection or advice did not take place.

[73] Evidence was given of discussions between Buildcorp and the Council regarding the variations to the plans. The fact that windows were going into this wall should also have been evident

during inspections as the windows were framed prior to cladding being erected. This should also have alerted the inspector and at the very least resulted in questions being asked at the time of the final inspection and in subsequent discussions and communications between the Council and Buildcorp. In addition, windows were in place over a year before the interim CCC was issued for unit 1. The inter-tenancy wall, complete with windows, passed inspection and was included in that CCC.

[74] Any defects, particularly lack of watertightness deficiencies, in the upper part of the wall would cause water to run down inside the cladding and cause damage further down. I accordingly do not accept the argument that the Council did not know about these windows because they must, at the very least, have known they were there at the time of the final inspection of unit 1 and the issuing of the interim CCC for that unit.

[75] I accordingly conclude that the Council was negligent in failing to detect the lack of head flashings and lack of any adequate flashing or sealant in the windows in the inter-tenancy wall.

[76] In relation to the cladding defects and deficiencies in the installation of the cap flashings, there was no agreement by the experts as to which, if any of these, a Council inspector could or should have noticed. These were mainly at roof or just under-roof level and it was not the practice of Council inspectors to do roof inspections. It is difficult however to see how the Council could have determined whether the building work had been carried out in accordance with the consent or that all relevant aspects of the Code had been complied with, when no effort was made to check key weathertightness issues such as the installation of cap flashings and other flashings.

[77] I accordingly conclude that the Council had either not established a regime, or did not follow any regime, that was capable

of identifying key waterproofing issues involving the fixing of claddings, the installation of cap flashings and the construction of the deck. Because I accept the crucial importance of the appropriate fixings of claddings and cap flashings, an inspection regime should have been established to ensure key elements were present. The Council was negligent in failing to do this. In reaching this conclusion I accept that the Council does not have the role of a clerk of works. There are however defects that were either readily apparent by a visual inspection or by keeping appropriate records of changes to the consented plans. I accordingly conclude that the Council is jointly and severally liable for 100% for the total damages as set out in paragraph [125].

LIABILITY OF JAMES MICHAEL FAIRGRAY – THIRD RESPONDENT

[78] The claim against James Fairgray is that as the general director of Buildcorp, he owes the claimants a duty of care to use proper care and skill in the construction of the dwelling. It is alleged he failed to do this and as a consequence Mr and Mrs Bacic have suffered a loss.

[79] Mr Fairgray accepts he owes the claimants a duty of care to exercise all reasonable skill and care in the conduct of the work he was asked to do. However he denies he breached that standard of care. His evidence is that he was primarily responsible for the financial and contractual management of the company. In particular he dealt with the purchasers of units and the financial management of the company. He was not involved in the construction or in supervision of the construction as this was left to the project managers and the site managers.

[80] Mr Fairgray also submits that apart from occasionally meeting with purchasers and unit owners on site, he was rarely on site during the construction of the units. This is confirmed by the

majority of other parties and witnesses who had any involvement during the construction. There is no evidence that Mr Fairgray was directly involved in the construction of the units or in the supervision of the construction. There is also little evidence that he was directly involved in negotiating contracts with those involved in the construction as this appears to have been more the responsibility of the project manager, initially Sher Baloch.

[81] I accordingly conclude that it has not been established that Mr Fairgray was involved in the construction work nor was he involved in its direct supervision. There is also no evidence directly linking any decisions he made in his role as general manager to the defective workmanship, changes from the specifications or the defects, which have resulted in the dwelling leaking. Ms Goode submitted that Mr Fairgray, as an individual, directed the initial cladding of the western wall with Harditex and then the removal of the Harditex and fitting the windows in January 2001. However other than his asking Mr Lake to organise the builders to install these windows, there is no evidence that Mr Fairgray directed the cladding of the wall or oversaw the subsequent installation of the windows.

[82] In the alternative, Ms Goode submitted that Mr Fairgray was negligent as general manager for failing to ensure the construction was adequately supervised. The difficulty with this argument is that an adequate structure appears to have been put in place for the management of the construction. In this regard, I note that both a site manager and a project manager were appointed to oversee the site and the construction. Even if one accepts the limited nature of the site manager's role as portrayed by Mr Lake, the role of the project manager was to attend the site regularly and ensure work was completed in a timely way and in accordance with the plans and specifications.

[83] An employee can be personally liable if the appropriate level of duty of care is established and that employee has shown to have

acted negligently. However, it would be going one step further to conclude that Mr Fairgray was personally liable because another employee, for which he had line responsibility, was negligent in the way that employee carried out his role of project manager or site supervisor.

[84] There is insufficient evidence to establish that Mr Fairgray had any direct responsibility or involvement in either the construction or supervision of the construction and accordingly the claim against him is dismissed.

LIABILITY OF RICHARD ARTHUR ZGIERSKI-BOREYKO – FOURTH RESPONDENT

[85] Mr and Mrs Bacic claim that in issuing the practical completion certificate, Mr Zgierski-Boreyko owed them a duty of care. They submit that they relied on the certificate in completing settlement, as under the terms of agreement for sale and purchase they were obliged to settle on practical completion. They believe Mr Zgierski-Boreyko should have notified them of some of the defects that were readily apparent in the dwelling. In failing to do so, he was negligent, the claimants allege.

[86] Mr Zgierski-Boreyko denies that he owes the claimants a duty of care and alternatively submits that even if he did, he did not breach any duty owed. He submits that the extent of his responsibilities when issuing the letter of practical completion were found in the sale and purchase agreement. He was not engaged to observe or administer construction but only to inspect the completed dwelling in terms of the plans and specifications annexed to the agreement for sale and purchase. These were general arrangement plans only and not working drawings. He was also not required under the terms of inspection to inspect the construction method or compliance materials.

[87] Mr Zgierski-Boreyko submitted there is no statutory requirement for practical completion. It was a contractual obligation only under the agreement for sale and purchase and he met the terms of the contract. He submits that many of the defects within the building would not have been detected by the type of visual inspection he was required to carry out and that any loss suffered by the claimants has not been caused by him.

[88] He submits that the High Court has been hesitant in finding that the issue of a practical completion certificate means that a duty of care is owed to subsequent purchasers. In particular, he referred to Heath J's judgment in *Sunset Terraces*. In that decision Heath J concluded that the proximity between the unit holder and the issuer of the practical completion certificate was insufficient to give rise to a duty of care and in any event, any loss suffered would be too remote to be claimable. He went on to state:[6]

> "[553] Unlike the Council's obligations to inspect and to certify code compliance, there can be no community expectation on a designer to certify practical completion. Thus, it is necessary to prove actual reliance in order to establish that any loss has been suffered as a result of negligence of the designer in these circumstances."

[89] Priestley J also considered the roles of the issuer of a PCC in *Body Corporate 183523 & Ors v Tony Tay & Associates Limited & Ors*.[7] He concluded that the contractual purpose of the practical completion certificate was not an assurance about the quality of the construction but one of two triggers for the settlement date. He noted that for a successful claim to be mounted in terms of the practical completion certificate, the plaintiffs would need to establish that they relied on it as a pointer to the quality of construction or an assurance that construction was defect-free. He further concluded that no solicitor acting for any of the plaintiffs in that case relied on the certificate for any purpose other than an indication that the settlement

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[6] *Sunset Terraces*, n 4 above, para [553].

date was triggered. He also confirmed that it was necessary to prove actual reliance before loss flowing from negligence in issuing the certificate arises.

[90] In this case it is clear that the practical completion certificate was one of the triggers for the settlement of the agreement for sale and purchase. Mr and Mrs Bacic were advised by their solicitors that they were obliged to settle as practical completion had been achieved. However, settlement was not immediate upon the issuing of the practical completion certificate as it was more than a month later that the settlement took place. In the meantime the claimants carried out their own inspection as they were entitled to do under the agreement for sale and purchase.

[91] Given the nature of the inspection and the wording of the practical completion certificate, I conclude that in this case, there is insufficient evidence that the claimants relied on the practical completion certificate as a confirmation of the quality of construction or an assurance that the construction was defect-free. I accept that the purpose of the inspection did not include certification of the design and quality of construction. It was primarily a visual inspection to confirm that the dwelling had reached practical completion in the terms set out in the agreement for sale and purchase. That being the case, even if I were to conclude that Mr Zgierski-Boreyko did owe the claimants a duty of care, there is no evidence that he was negligent in carrying out the inspection or that the loss they have subsequently suffered was a result of any such negligence. In this regard, I note that the defects that have resulted in the dwelling leaking were not ones that would have reasonably been detected by a person carrying out the type of inspection envisaged in a practical completion certificate. The claim against Mr Zgierski-Boreyko is therefore dismissed.

[7] [30 March 2009] HC, Auckland, CIV 2004-404-4824.

LIABILITY OF SEAN LAKE – SIXTH RESPONDENT

[92] The claim against Mr Lake is that as the site manager he had responsibility to supervise the building work and was in charge of sequencing of the various subtrades. Mr and Mrs Bacic claim that Mr Lake owed them a duty of care to exercise reasonable skill and care in supervising the construction of the unit and ensuring the unit was constructed in accordance with the Building Act. They claim he was negligent in carrying out this role and as a consequence, the dwelling leaks. In addition, it is alleged that Mr Lake was directly involved in the installation of the windows in the inter-tenancy walls with unit 1 which were installed without any flashings.

[93] Mr Lake denies he was responsible for quality issues on site. He submits his role was one of a site administrator rather than site manager and he was only responsible for issues such as ensuring the site was clean and tidy, that subcontractors turned up on time, that materials which were required were on site and that building inspections were ordered at relevant times. He denies that his role involved supervision of any of the tradespeople on site. In summary, Mr Lake says he was nothing other than a labourer or administrator. Mr Lake also advises that he was a psychiatric nurse with no building training or experience. He states that when he originally began to work for Buildcorp, he acted as a "gofer" for James Fairgray, the project managers and other quantity surveyors employed by Buildcorp.

[94] I accept that Mr Lake's formal training was as a nurse and that when he first began to work for Buildcorp, in either late 1996 or early 1997, he had little building experience. However he did have people management experience having owned and run a rest home. I also accept that Mr Lake's description of his role is a reasonably accurate one, particularly when describing his initial involvement with Buildcorp.

[95] By the time Mr Lake was appointed site manager at Pannill Place, he had been working for Buildcorp for two or more years in site administration, in a site manager's role. Mr Lake appears to be an intelligent, competent and motivated person. During the time he worked with Buildcorp, it is reasonable to assume that he picked up a reasonable amount of knowledge in the building industry, particularly in terms of site management and administration. This is consistent with the evidence of Mr Fairgray and Mr McLellan, who both stated that they believed Mr Lake had gained reasonable levels of knowledge and skill in site management by the time of this project. Accordingly, at the time of his involvement in the Pannill Place development, it would be a significant underestimation of Mr Lake's role and skills to say he was only a "qualified nurse with no previous building experience".

[96] Mr Fairgray in his evidence stated that the responsibility for work on site was a joint responsibility of the project manager and the site manager and that one of the roles of Mr Lake was to check that trades had done the work and completed it in order for further trades to come on and complete their role in the construction.

[97] Throughout the time that Mr Lake worked for Buildcorp, he was not officially an employee of Buildcorp but contracted his services through his company, Lake Health Services Limited. There was no written job description, contract of employment or document detailing Mr Lake's role. It is likely that as he gained more experience on the job, Buildcorp's project managers and other office staff relied on him more to manage and supervise the site. The fact that others assumed he might be performing a particular role does not however necessarily mean that Mr Lake has any liability for failing to carry out that role.

[98] Within the structure of Buildcorp, the project manager was primarily responsible for the quality of the workmanship. If the project manager failed to carry out this role, it was not Mr Lake's

contractual or legal responsibility to fill the gaps left. Given his lack of formal training and lack of hands-on building experiences, it would be unreasonable for Buildcorp to have made Mr Lake primarily responsible for quality. In any event, this was not primarily his role. His role was more to highlight potential concerns to the project managers who were ultimately responsible for these issues.

[99] I also note that the contracting of the tradespeople was primarily the responsibility of the project manger. Accordingly the sequencing issue in terms of the cappings and cladding was something that should have been addressed by the project manager when arranging the subtrades' involvement on site. They also set the time-sequence of the development. Mr Lake's responsibility was more to ensure that the tradespeople came and did the work in accordance with the project plan as set out by the project managers.

[100] I further accept that Mr Lake did not have the responsibility for ensuring work was completed in accordance with technical literature and the plans and specifications. He did not have the qualifications to do this work and there was no evidence that he was asked or required to do it. Accordingly he cannot be held responsible for the defects in relation to the deck and the more minor defects as set out in paragraph [35].

[101] This situation is however somewhat different for the windows that were installed in the west wall. Mr Lake accepts that he came back with the builders in January 2001 to help install these windows. He knew where the windows were to be fitted and was involved in cutting the holes and installing the windows. He was the only person supervising this work on behalf of Buildcorp. I therefore find Mr Lake was negligent in assisting and/or supervising the installation of the windows in the west wall without any flashings. He was negligent in failing to ensure that they were installed so that they were weathertight. That was a responsibility Mr Lake took on when he helped to install the windows.

[102] As this defect relates to one elevation only and could have been remedied by targeted repairs if this had been the only defect, Mr Lake is not jointly and severally liable for the full amount of the claim. I assess the remedial costs that would relate to this elevation as being 33% of the total remedial costs, excluding the reconstruction of the deck and the half share of the unit inter-tenancy wall. This percentage is based on my assessment of the proportion of the remedial work that would have been required to fix the windows as compared to the total remedial work required. In this regard I have taken into account Mr Maiden's comments but do not consider them to be definitive as the other experts questioned his conclusions.

[103] 33% of the remedial work, exclusive of the deck and half share of the other inter-tenancy wall equates to approximately 27% of the total repair bill. Mr Lakes liability for of other parts of remedial expenses and amounts claimed will therefore be calculated at 27%. His joint and severally liability is therefore $62,161.50 calculated as follows:

33% of remedial work (excluding deck and inter-tenancy wall)	$38,610.00
27% of experts fees and other likely expenses	$9,461.82
27% of consequential losses	$3,289.68
27% of general damages	<u>$10,800.00</u>
	<u>$62,161.50</u>

LIABILITY OF NORTH HARBOUR ROOFING LIMITED - SEVENTH RESPONDENT

[104] The claim against North Harbour Roofing Limited is that as the company responsible for the installation of the roof, it had a responsibility to ensure that the work would be carried out in a manner that complied with the plans and specifications, the building consent and the Building Act. The claimants allege that defects in

the work carried out by North Harbour Roofing Limited have caused the dwelling to leak and in this regard they relied on information contained in the assessor's report.

[105] I have already concluded at paragraph [36] to [38] that there is no evidence that the building work carried out by North Harbour Roofing Limited is a current contributing factor to the dwelling leaking. At the very most the historic leaking from the now repaired valley flashing may have contributed to the current damage. The degree to which it has contributed however is not sufficient to be regarded as a substantial and material cause of any loss suffered. In *Sunset Terraces* Heath J stated at paragraph 233:

> "No person who breaches a duty of care can be held liable for loss suffered by another unless his or her own conduct was a cause of that loss…. Ultimately, a judicial value judgement is required to determine whether a factual finding of a nexus between act or omission and loss translates into a legal responsibility for a defendant to compensate a plaintiff. In *Johnson v Watson,*[8] the Court of Appeal held that a causal nexus was required between substantial and material cause and the loss suffered: see also *Price Waterhouse v Kwan,*[9] 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."

[106] I conclude that the loss suffered by the claimants in relation to the damage to the beam and roofing area would still have occurred even if the historic leak to the larger valley tray had not been a contributing cause. Any contribution from the work done by North Harbour Roofing Limited has been minor. It is not a substantial cause and therefore the claim against it is dismissed.

LIABILITY OF ALAN JAMES FORD – EIGHTH RESPONDENT

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[8] [2003] 1 NZLR 626 (CA).

[9] [2003] 3 NZLR 39 (CA) at para [28].

[107] Alan Ford was joined to these proceedings on the application of the North Shore City Council and of Sean Lake. The claimants have neither supported or opposed his involvement as a party in these proceedings. He was joined primarily on the basis of Mr Lake claims that Mr Ford was the contracted builder who visited the site on many occasions. In addition it was alleged that the builders on site were employed by him and worked under his supervision.

[108] Mr Ford was the director and a shareholder in A J Ford Developments Limited. That company has now been struck off. A J Ford Developments Limited was contracted as labour-only builders to carry out the construction work at Pannill Place. It was contracted to carry out the erection of the frames, fixing of the Harditex and installation of doors and windows and external skirtings. It had no involvement in constructing the foundations, installing the drainage, applying membranes or coatings, laying paving or landscaping or installing the roof and flashings or the internal linings. It was also not responsible for supervision or co-ordination of other subcontractors' on site.

[109] Mr Ford's evidence was that he provided two qualified builders and hammer-hands to carry out the construction work and that he was not personally involved in the work. He further advises that he was not involved in supervision of the work and that he only visited the site approximately once a week to ensure the workers onsite had sufficient materials and work to do.

[110] Mr Ford's defence to the claim is twofold. First, he submits that he was neither personally involved in the construction work nor in the supervision of the construction. Secondly, he submits all of the work carried out by his company was in accordance with good building practices and accordingly neither he nor the company was negligent or a cause of the dwelling leaking.

[111] In relation to this latter issue, there is clear evidence that some of the work carried out by A J Ford Developments Limited did contribute to the dwelling leaking. A J Ford Developments Limited was responsible for the installation of the deck balustrades that were constructed with flat tops. This was contrary to the technical literature. While his company was not responsible for the installation of the windows in the west wall it did install the frames for those windows and the Harditex over the top of the framing. The company therefore either knew, or ought reasonably to have known, that there would be associated difficulties with retro fitting these windows at a later date, particularly ensuring that they were weathertight. This is a matter that should have been raised at the time and there is no evidence that it was.

[112] Mr Ford did not, in his personal or individual capacity, enter into a contract to carry out the building work in the Pannill Place development. This was done by his company. In addition Mr Ford did not in his individual capacity personally carry out the construction work, as this was done by the company's employees. There is no evidence that he performed construction work at Pannill Place, nor is there any evidence that he was involved onsite in any construction capacity.

[113] Recent High Court decisions from *Dicks v Hobson Swan Construction Limited (in Liquidation)*[10] through to the more recent decisions of *Body Corporate 185960 & Ors v North Shore City Council & Ors* (*Kilham Mews*)[11] and *Body Corporate 183523 & Ors v Tony Tay Associates Limited*[12] have all established that to be personally liable a director needs either to assume some personal liability or to be directly involved in carrying out, supervising or controlling the defective work that has resulted in water ingress. In general, for a director to be personally liable he or she must have either carried out a particular task or assumed responsibility for that

[10] *Dicks*, n 5 above.
[11] Duffy J, HC Auckland, CIV 2006-404-003535, 22 December 2008.
[12] See n 7 above.

task and in doing so been negligent in an area, which has resulted in the creation of defects.

[114] There is no evidence that Mr Ford either undertook the construction work or supervised the construction. Mr Ford's evidence was that the company employed experienced and qualified builders who undertook the work. He did not work onsite nor did he attend the site on a daily basis. Even when he did attend, he did not personally instruct workers or control the work being undertaken by AJ Ford Developments Limited.

[115] Ms Goode on behalf of the Council submitted that Mr Ford was personally liable because he failed to ensure there was adequate supervision on site. In this regard she referred to *Body Corporate 199348 v Nielsen*[13] and *London Drugs Limited v Kuehne & Nagel International Ltd.*[14] However I can find no authority in either of those cases for this submission. In the former case, Mr Nielsen, the director of the development company, was found to have personal liability as he was the person onsite whom tradespeople dealt with. He was intimately involved in the project and was responsible for giving day to day instructions on the work to be undertaken. It was his degree of control on site that was pivotal to the conclusion that he assumed personal responsibility. *Kuehne & Nagel* concluded that while a company may be vicariously liable for the negligence of its employees, it does not exempt the employees or agents from personal liability. Neither of these cases provide any authority for the proposition that the director of a building company is personally liable for failing to provide onsite supervision when competent tradespeople are contracted or employed to provide building services on a labour-only basis.

[116] In conclusion I accept that Mr Ford's company, A J Ford Development Limited was negligent in the building work that was carried out, but there is insufficient evidence to conclude that Mr Ford

[13] [3 December 2008] HC, Auckland, CIV 2004-404-3989, Heath J.
[14] [1992] 3 SCR 299.

was personally liable as he neither undertook the defective construction work nor supervised it. The claim against Mr Ford is accordingly dismissed.

CONTRIBUTORY NEGLIGENCE

[117] Ms Goode on behalf of the Council submitted that Mr and Mrs Bacic were contributorily negligent because they either failed to get a pre-purchase inspection or should have taken further steps when there were delays in the construction. The difficulty with Ms Goode's argument is that Mr and Mrs Bacic bought this property off the plans and accordingly there was no property to inspect at the time they entered into the agreement for sale and purchase. In addition, they sought legal advice in terms of the content of the agreement and their solicitor confirmed it was in order.

[118] Mr Tolhurst, on behalf of Mr Lake, suggested that the provisions within the agreement for sale and purchase were unusual and it was potentially negligent for any lawyer to have approved the format. These comments however appear to be made with the benefit of hindsight. At the time it was not considered unusual with staged developments to settle on the basis of the practical completion certificate, as CCC's were often not issued until the completion of the development.

[119] The law is clear in this area. Damages maybe reduced where the claimants' negligence has contributed to, or is a partial cause of, their loss. Where a claimant has been contributorily negligent, a Court may apportion loss by reducing the quantum of damages awarded to the claimants.[15] However, the judgments in *Sunset Terraces* and *Hartley v Balemi & Ors*[16] are authority for there needing to be a "relative blameworthiness" and a causal link between the plaintiff's and defendant's negligence.

[15] See *Day v Mead* [1987] 2 NZLR 443 (CA).

[16] [29 March 2007] HC, Auckland, CIV 2006-404-002589, Stevens J.

[120] The law is also reasonably clear that at the time Mr and Mrs Bacic entered into the sale and purchase agreement, homeowners were not negligent by failing to obtain a pre-purchase inspection. Therefore failure to make the purchase agreement conditional on a favourable building or pre-purchase inspection is not sufficient to establish contributory negligence.

[121] I accordingly conclude that there was no contributory negligence on the part of Mr and Mrs Bacic in relation to steps taken at the time they entered into the agreement for sale and purchase. I further conclude that there is nothing contributory negligent about the steps they took when there were delays in the building contract. They contacted the developers and also the Council. At the time they settled the purchase, they did so in the reasonable belief that there were only relatively minor issues to be resolved in relation to the CCC and that these would be attended to by Buildcorp in the near future.

[122] Mr and Mrs Bacic are not responsible for the position they find themselves in. They took reasonable steps in entering into the contract and in settling the purchase. Therefore the defence raised against Mr and Mrs Bacic that they were contributorily negligent fails.

FAILURE TO MITIGATE

[123] The Council submitted that Mr and Mrs Bacic have failed to mitigate their loss and as a consequence, the repair costs have significantly increased. They submit that the length of time taken to effect any remedial work should be taken into account by reducing the quantum awarded.

[124] The legal position regarding claimants' obligation to mitigate is clear. Claimants must take all reasonable steps to mitigate their

loss and cannot recover any losses that should have been avoided.[17] The claimants therefore cannot succeed in full, in any claim, in tort or breach of contract, if they could reasonably have avoided the loss. In addition, the law does not allow a claimant to recover damages to compensate a loss which would not have been suffered if they had taken reasonable steps to mitigate the loss.

[125] Mr and Mrs Bacic have outlined why there were significant delays in getting the remedial work done. There was a lot of confusion about the work that needed to be done and Mr and Mrs Bacic also had growing concerns about the escalating costs being faced by others in the complex undertaking remedial work. The costs of the remedial work established in this claim are similar to those incurred by Mr and Mrs Graham and Mr and Mrs Carter in 2004/2005. There is accordingly little evidence to suggest that the costs have increased since 2005 as a result of Mr and Mrs Bacics' having deferred remedial work for some time.

[126] Mr and Mrs Bacic have also been careful to ensure that they have continued to maintain their property and carry out ongoing repairs to stop further leaking and damage. It was suggested during the hearing that the repairing and sealing of cracks may have trapped the water in the property and therefore exacerbated damage rather than reduced it, but there is no evidence of this. Some of the moisture readings taken by the WHRS assessor for the addendum report showed a lower level than the original readings. It is likely that this is a result of the regular and careful repair work undertaken by Mr and Mrs Bacic as cracks appeared. Lack of maintenance also was not a relevant issue in this case as Mr and Mrs Bacic have been meticulous in their maintenance work.

[127] I conclude that the claimants have not failed to mitigate their loss and as a consequence there should be no reduction to the amounts established.

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[17] *British Westinghouse v Underground Electric Railways Co of London* [1912] AC 673 (HL),

CONCLUSION AS TO QUANTUM

[128] I conclude that Mr and Mrs Bacic have established their claim to the extent of $234,827.75 which is calculated as follows:

Remedial costs	$182,643.75
Consequential losses	$12,184.00
General damages	$40,000.00
TOTAL	$234,827.75

[129] I have found that the second and sixth respondents breached the duty of care they each owed to the claimants. The second respondent has been found liable for the full amount of $234,827.75 and the sixth respondent $64,720.24. Each of these respondents is a joint tortfeasor.

[130] Section 92(2) of the Weathertight Homes Resolution Services Act 2006, provides that the Tribunal can determine any liability of any respondent to any other respondent and remedies in relation to any liability determined. In addition, section 90(1) enables the Tribunal to make any order that a court of competent jurisdiction could make in relation to a claim in accordance with principles of law. The approach taken by the Tribunal in determining the amounts apportioned between joint tortfeasors is what is regarded to be just and equitable having regard to the relevant responsibilities of the parties for the damage.

[131] It has been well established in law that the parties undertaking work should have a relatively greater responsibility than the Councils. In recent cases the apportionment attributed to the Council is generally between 15-25%. However in this case the parties or individuals primarily responsible for the defective work are not parties to this claim, mainly because they are no longer in

[689]; and *Sullivan v Darkin* [1986] 1 NZLR 214, [217] – [218] (CA).

existence. The only liable parties are the Council and Mr Lake. However Mr Lake only has responsibility in relation to one area of damage. In relation to that one area, I attribute the responsibility as between the Council and Mr Lake being 80% to Mr Lake and 20% to the Council.

CONCLUSION AND ORDERS

[132] Mr and Mrs Bacics' claim is proven to the extent of $234,827.75. For the reasons set out in this determination I make the following orders:

I. The North Shore City Council is to pay Giordana and Boris Bacic with the sum of $234,827.75 forthwith. The North Shore City Council is entitled to recover a contribution of up to $49,729.20 from Sean Lake for any amount paid in excess of $183,098.55.

II. Sean Lake is ordered to pay Giordana and Boris Bacic the sum of $62,161.50 forthwith. Sean Lake is entitled to recover a contribution of up to $12,423.30 from the North Shore City Council for any amount paid in excess of $49,729.20.

III. The claims against James Fairgray, Richard Zgierski-Boreyko, North Harbour Roofing Limited and Alan Ford are dismissed.

[133] To summarise the decision, if the two respondents meet their obligation under this determination this will result in the following payments being made by the respondents to the claimants:

Second Respondent - North Shore City Council	$183,098.55
Sixth Respondent - Sean Lake	$49,729.20
Total Amount	$234,827.75

[134] However, if the second or sixth respondent fails to pay its or his apportionment, the claimants may enforce this determination against either of them up to the total amount that they are ordered to pay in paragraph [132].

DATED this 11th day of June 2009

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P A McConnell
Tribunal Member