IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2010-100-000043
[2011] NZWHT AUCKLAND 36

BETWEEN	ANTHONY AND ANGELA DAWSON Claimants
AND	AUCKLAND COUNCIL (formerly known as NORTH SHORE CITY COUNCIL) First Respondent
AND	OSBORNE PRICE CONSTRUCTION LIMITED Second Respondent
AND	MARK AND JOANN-LEE FULLER Third Respondents
AND	GREG PAUL THOMAS (Removed) Fourth Respondent
AND	IAN BLACK Fifth Respondent
AND	BARNEY CORNAGA Sixth Respondent
AND	BROWNS BAY REALTY LIMITED Seventh Respondent
AND	GAIL HEIGHWAY TWHIGG (Removed) Eighth Respondent
AND	JOHN TWHIGG (Deceased) Ninth Respondent
AND	BRUCE WALLBANK Tenth Respondent

	AND	THE PICTON TRUST CO LIMITED Eleventh Respondent

Hearing:	23, 24 and 25 May 2011
Closing Written Submissions:	3 June 2011
Counsel Appearances:	Mr T Rainey and Mr D Cowan, for the claimants Mr D Heaney S C, and Ms C Goode for the first respondent Mr Mark Fuller the third respondent, self represented Ms H Chung for the sixth and seventh respondents Mr B Wallbank the tenth respondent, self represented
Decision:	2 August 2011

FINAL DETERMINATION
Adjudicator: K D Kilgour

CONTENTS

INTRODUCTION

[1] In late October 2006 Anthony and Angela Dawson (the claimants) purchased a home at 360B Glenvar Road, Torbay. It was known to the Dawsons that the home had leaking issues in the past and that there possibly could be more in the future.[1] The Dawsons purchased the property without seeking any expert advice or requiring a LIM, and apart from representation from the seller's agent, Barney Cornaga, relied solely upon their own judgment.

[2] The home was the configuration, size and locality that the Dawsons wanted for their next family home. All of this induced them to make an unconditional offer to buy at the maximum stretch of their finances. The offer they made was roughly $100,000 less than the Fullers (the vendors) were seeking.

[3] Since the purchase the home has continued to leak. It now requires a full reclad to be made weathertight.

[4] The Dawsons have brought this claim against:

- the Auckland Council (the first respondent);
- the remedial builder Osborne Price Construction Limited (the second respondent);
- the sellers, Mark and Joanne-Lee Fuller (the third respondent);
- Ian Black the remedial waterproof membrane applicator (the fifth respondent);
- Mr Cornaga, the real estate agent (the sixth respondent) and his licensed realty firm, Browns Bay Realty Limited (the seventh respondent);
- the original builder, Bruce Wallbank (the tenth respondent); and

[1] Evidence of Mr Dawson in answer to question from Mr Heaney SC, morning of Day 1 Hearing.

- the developer, The Picton Trust Co Limited (the eleventh respondent).

ISSUES

[5] The more significant initial issues are in respect of the affirmative defences of voluntary assumption of risk, break in the chain of causation and contributory negligence. I need to initially determine these issues:

- What are the defects causing water ingress to this home and what is the appropriate repair option?
- Did the Dawsons buy with full knowledge of the leaking issues?
    i. Has there been a break in the chain of causation?
    ii. Volenti non fit injuria?
- Were the Dawsons contributorily negligent?
- What is the reasonable measure of loss?

FACTUAL BACKGROUND

[6] On 18 July 1995 The Picton Trust Co Limited applied through its agent, the late John Twhigg, to the North Shore City Council (the Auckland Council), for building consent to construct a dwelling at 306B Glenvar Road, Torbay, Auckland.

[7] During the initial stages of this claim Dion Murphy was engaged and acted as a representative of Mr Twhigg and his wife, Gail Twhigg. Memoranda responding to the claims filed by Mr and Mrs Twhigg stated that the late Mr Twhigg acted as agent for The Picton Trust Co Limited (The Picton Trust) and that he organised building materials, subcontractors, applied for building consents and otherwise dealt with the accounting and management matters for that company. Ms Twhigg is the director and sole shareholder of The Picton Trust.

[8] Mr Murphy conceded in his memorandum to the Tribunal on 16 May 2011 that The Picton Trust was the developer of the property at 306B Glenvar Road, Torbay. Because of Ms Twhigg's age and infirmity she was unable to attend the hearing to give evidence personally.

[9] The Picton Trust Co Limited obtained building consent from the Council on 24 August 1998 under building consent no. E13322. In June 1998 The Picton Trust had purchased the block of land 306 Glenvar Road, Torbay from Bruce and Raelyn Wallbank. Bruce Wallbank has participated throughout this claim representing himself.

[10] Once the building consent was issued to The Picton Trust, Mr Twhigg contracted K1 Limited (now struck off) to assist on a labour-only basis to build the dwelling. Bruce Wallbank was the sole director owner and employee of K1 Limited. Mr Wallbank undertook and controlled the labour-only building work under the management and direction of Mr and Ms Twhigg. K1 Limited constructed and framed up the dwelling, installed the doors, windows and gib board, completed the skirting and internal finishing, undertook some exterior ground work, built the retaining walls, and applied the liquid membrane to the deck surfaces. The exterior cladding, the roofing, plumbing, concrete laying, electrical work, painting, tiling, gib stopping, glazing and iron work were all undertaken by subcontractors engaged by Mr Twhigg for The Picton Trust.

[11] The home was built between August 1998 and 20 April 2000. The Council carried out various inspections of the building work required under the building consent and on 30 March 2000 undertook a final inspection. The Council failed that inspection. A final inspection re-check undertaken on 17 April 2000 was approved and on 20 April 2000 the Council issued a Code Compliance Certificate.

[12] In early May 2000 The Picton Trust sold the home to Mr and Mrs Fuller. They initially occupied the home as their family home.

The Fullers subsequently moved overseas for employment reasons but retained the home as an investment and had it rented.

[13] Mark Fuller continues to work overseas and has now separated from Joanne Fuller. The Fullers have participated throughout this proceeding and until the hearing were presented by counsel. Mark Fuller returned to New Zealand and represented the third respondents defence to the claim after disengaging their counsel during the hearing. However, I permitted the Fullers to file closing submissions through their counsel.

[14] The Fullers rented out the home from 8 December 2003. During 2004 a leak occurred in the downstairs bedroom ceiling immediately under the enclosed northern deck. The tenant moved out in July 2004 and Mr Fuller arranged for the damage to the interior downstairs bedroom and the deck to be repaired. Upon completion of such repairs the Fullers decided to sell.

[15] In November 2004 the Fullers received an offer to purchase from Scott and Susan Watson for $530,000. That sale agreement was conditional upon the Watsons obtaining a satisfactory builder's report. The Watsons obtained a builder's report from NZ House Inspections Limited and as a consequence of that report decided not to proceed with the purchase. The Watsons provided the Fullers with a copy of the report. In the report Nigel Purdie, who wrote the report for NZ House Inspections Limited, reported that:

> Several cladding faults are noted including some weathertightness issues. High moisture meter readings are recorded in several locations at bottom plate level on the ground floor plus stained carpet. This indicates moisture ingress is occurring in several locations throughout the dwelling. As noted in the opening paragraph, this dwelling represents a high risk to moisture ingress. Monolithic cladding attached to the dwelling with no soffit or eaves providing any wall protection and a flat roof construction with parapets to the perimeter.

[16] Mark Fuller subsequently lodged a claim with the Weathertight Homes Resolution Service in March 2005.

[17] The Department of Building and Housing which managed the Weathertight Homes Resolution Service sought consent from the Fullers to undertake destructive testing at the home as part of the process of preparing an assessor's report. The Fullers did not give that consent.

[18] The WHRS assessor, Neil Alvey, inspected the home on 19 April 2005 and 22 April 2005 and completed his report in late May 2005. Because the assessor was not permitted to undertake a full and invasive building survey of the home his report was limited. But he did identify a number of leak causes and recommended targeted repairs to the enclosed northern deck. He estimated the repair costs to be approximately $10,000 excluding GST.

[19] The Fuller claim went to mediation on 29 November 2005. Mr Fuller attended the mediation without legal representation. The respondents participating in the mediation were the Council and John and Gail Twhigg. The Fullers had named Mr Wallbank as a respondent but as he was not served with proceedings he was unaware of the mediation. In any event, mediation in November 2005 concluded a settlement between the Fullers, the Council, and Gail and John Twhigg as trustees of the Picton Trust. The mediated settlement recorded that the respondents did not admit liability, the Fullers agreed to carry out all repairs necessary to remedy the defects (presumably as identified in Mr Alvey's report) and in the event that the Fullers sold they warranted that they would include a special condition in any sale agreement to state:

> The purchasers acknowledge that a claim has been made by the vendors against the North Shore City Council in respect of alleged defects in the building and the Council has by settlement agreement dated 29 November 2005 paid compensation to settle the claim. The purchasers agree that in the event they sell the

> property or otherwise assign their beneficial interest in the property to another party, they will include a condition on the same terms as this condition, including the requirement by subsequent purchasers or assignees to include this condition.

[20] The Fullers never inserted this provision in any of their sale agreements but nothing turns on this omission.

[21] The Fullers further agreed to indemnify the Twhiggs and the Council against any claim brought against either of those parties in relation to or in any way arising directly or indirectly out of the home, and that indemnity extended to all costs on a solicitor-client basis and disbursements incurred in defending such claims.

[22] Prior to the mediation, Mr Fuller had arranged for repair work to commence on the home. Osborne Price Construction Limited (OPC) was engaged to undertake remedial work suggested by Mr Alvey, the WHRS assessor. OPC participated in this claim proceeding up to the day of the hearing with legal counsel who was disengaged at the commencement of the hearing by its principal Nicholas Osborne. Mr Osborne did not attend the hearing and did not give evidence.

[23] Mr Osborne inspected the property on 20 July 2005 and concluded further repairs than those contemplated would be necessary. He was not in a position to give a fixed price as the extent of the repair work was unknown and he was not prepared to be involved with any waterproofing membrane installation to the deck (the northern and enclosed deck).

[24] The Fullers at this stage were under financial constraints. The house had not been rented since July 2004. They needed to borrow from their bank for the repair work. Shortly after OPC began repair work Mr Osborne discovered that the damage was far greater than anticipated. Mr Fuller travelled back from Singapore in late November 2005 to attend the Fuller claim mediation and during that

visit met Mr Osborne onsite who explained to him that OPC would carry out all the work which it considered necessary to properly repair the property. OPC commenced the repair work in early November 2005. The work started without a building consent. At the time of Mr Fuller's visit to New Zealand the repair work had progressed to a point which was disclosed in photographs taken by Mr Rush, a Council building inspector who visited the home on 1 December 2005. Such photographs disclosed that repair work included remedial workings to the northern enclosed deck, the exterior cladding to the kitchen and garage. Mr Fuller had earlier enquired of the Council which advised that the works in respect of the deck required a building consent. This was confirmed by Mr Rush's visit to the home on 1 December 2005. On that date Mr Fuller applied to the Council for a building consent solely for the repairs to the enclosed northern deck notwithstanding that at that stage OPC had extended its repair work to other parts of the building completely unrelated to the deck.

[25] On 10 January 2006 the Council issued building consent number BA1225003 for the work to the deck. The 2004 Act permitted property owners to make a series of applications for building consents for various stages of proposed building work.[2] Councils are expected to issue building consents if satisfied that the proposed work disclosed in the building consent application, if built in accordance with the plans and specifications, would reasonably comply with the Building Code at the time of issue of the consent.

[26] Following the mediated settlement, Council noted the fact of the WHRS claim and the need for follow-up remedial work might be necessary to ensure that the home complied with the Building Code on its property information register (PIR) for this home. The Council PIR noted on 30 August 2005:

[2] Section 44(2), Building Act 2004.

> The property at 306B Glenvar Road is subject to a WHRS claim in relation to weathertightness. Follow-up remedial work may be necessary to ensure that this building complies with requirements of the NZ Building Code.

[27] The Council's PIR was added to from time to time and included a note from M V Jones, case manager, weathertightness, on 16 February 2006 stating that it was obvious from the information accompanying the building consent application that the building work on which the application related had already commenced. That note indicated the deck to which the building consent had issued was, amongst other matters, found to be faulty under the WHRS assessment for weathertightness.

[28] On 2 February 2006 a pre-line inspection for the deck area was carried out and passed by Mr Rush for the Council. A final inspection was undertaken on 25 May 2006 and as there were six outstanding issues to be attended to a field memorandum was issued which included that the building consent had not been complied with because it required timber framing and cladding replacement to be certified by a weathertightness consultant. OPC as it progressed remedial work discovered that more and more framing timber was damaged.

[29] The Fullers were getting increasingly large repair cost invoices from OPC. They were having trouble meeting such invoices from their mortgage funding. Nevertheless, the Fullers were aware that it would be very difficult to sell before the repair work had been completed. The repair work undertaken by OPC was mostly completed by April 2006. The waterproof membrane repair to the deck was undertaken by Ian Black (the fifth respondent) who has taken no part in this proceeding.

[30] On 1 August 2006 the Council made it clear to Mr Osborne that the building consent issued related only to reconstruction of the northern deck floor outside the master bedroom, and that all other

works which OPC had undertaken were done without building consent. As such the Fullers were required to apply for a certificate of acceptance for that extra work. By 7 August 2006 Mr Osborne satisfied Council in relation to the timber replacement, material description and scope of works carried out in respect of the enclosed deck solely. An application for a certificate of acceptance was forwarded to Mark Fuller on 12 August 2006. He faxed it back to the Council listing a description of the building work as:

> Remove internal and external wall linings, identify where water was entering the building, replace all affected timber and treat remaining timber with metalex, replace internal and external linings and paint.

[31] This work description was based on the WHRS assessor's requirements in Mr Alvey's report. However the application for the certificate of acceptance provided no further information in support of the application. OPC continued to satisfy the Council requisition in respect of the building consent. The Council was eventually satisfied concerning the Insulclad specification and Mr Black provided a guarantee for the waterproofing application. The Council made a decision to address the certificate of acceptance application itself instead of passing such applications for processing to an engaged third party, which was then its usual procedure.

[32] In early September 2006 the Council considered the photographs received from Mr Rush on 1 December 2005. The Council determined that they showed damage to the garage, exterior kitchen framing and the bedroom off the northern deck. The Council informed Mr Fuller on 4 September 2006 of the shortcomings in his certificate of acceptance application.

[33] The letter mentioned that it may be necessary to have the additional work inspected by a weathertightness consultant and that some work already undertaken may have to be opened up to allow satisfactory inspection.

[34] In early November 2006 the Council received the outstanding requirements of its building consent VA1225003 including the Plaster Systems Insulclad workmanship guarantee and the material components guarantee. The Council was then sufficiently satisfied to issue a Code Compliance Certificate for the rebuild of the existing and enclosed northern deck on 12 December 2006. By that time the home had been sold to the Dawsons.

[35] Due to increasing financial pressure the Fullers decided to put the home back on the market for sale without obtaining the certificate of acceptance for the repair work from Council. Fullers received an offer for $565,000 on 24 August 2006, subject to finance. The finance condition was not satisfied. It subsequently emerged that those purchasers had also received an unfavourable building report on the property which prevented them from obtaining the necessary loan.

[36] Mr Fuller then engaged Mr Cornaga to sell the home. Mr Cornaga faxed Mr Fuller on 31 August 2006, referring to the earlier purchaser's building report, stating:

> Even though you have repaired quite a bit of the house, there are still some wet spots, the big front deck appears to be a problem, falls the wrong way.

[37] The Fullers' neighbour, Mr Hanna, had taken a number of photographs of work undertaken by OPC. Mr Fuller arranged for those photographs to be given to Mr Cornaga so that he could copy them to interested buyers.

[38] Mr Cornaga did not market the home as a leaky building. Instead the sales flyer which he produced stated that an urgent sale was required and that the home was priced to sell "at $599,000 negotiable".

[39] Mrs Dawson located on the online auction website "TradeMe" the Fullers home for sale and on 22 October 2006 attended an open home arranged by Mr Cornaga. On first observation, the Dawsons mentioned that the home met their requirements as to size, configuration, locality and schooling. Mr Cornaga showed them the home's original (20 April 2000) Code Compliance Certificate and the remedial photographs obtained from Mr Hanna.

[40] At the open home Mr Cornaga disclosed to the Dawsons that the home had been a leaky building, was the subject of a claim to the Weathergtight Homes Resolution Service and that remedial work had been undertaken and completed. Mr Cornaga told the Dawsons he still had concerns over the large eastern deck and that the study immediately beneath that deck was exhibiting high moisture readings, that further remedial work would be required, and that the vendors were waiting for a "letter of acceptance" or Code of Compliance from the Council.

[41] Mr Dawson was an interior designer for a boat builder. He indicated to Mr Cornaga that he could carry out some further remedial work. Prior to attending the open home the Dawsons had arranged with their bank the ability to borrow funds sufficient to purchase a new home without the need to sell their existing property. The Dawsons disclosed to Mr Cornaga that they could buy up to $490,000. The Dawsons knew that the home had been subject to earlier offers to buy and that these had not been accepted. On 23 October 2006 the Dawsons met Mr Cornaga at the property and made an unconditional offer to buy at $490,000. The Dawsons knew that the Fullers were under increasing financial pressure to sell and that they had limited time to effect a private sale.

[42] The Dawsons signed an offer drawn up by Mr Cornaga on the agreement for sale and purchase form (7th edition) then approved

by the Real Estate Institute of New Zealand and by the Auckland District Law Society. The condition requiring a LIM was deleted. No changes were made to the standard terms and conditions and no conditional clause was inserted regarding the expected "letter of acceptance" from the Council. A further term was inserted being clause 14 and read as follows:

> The purchasers acknowledge that they are aware that the building has some weathertight issues. Some remedial work has been undertaken and more remedial work will need to be undertaken and on this basis the vendor assumes no liability for the quality of the building work or the weathertightness of the dwelling.

[43] Mr Cornaga said that he left a copy of the agreement with the Dawsons and whilst he explained the salient matters of the agreement such an explanation was confined to the front page, not to the standard terms and conditions, and he did not take the Dawsons through the precautionary notes set down on the backing sheet to the agreement. Mr Dawson had previously purchased two homes. He was familiar with real estate buying. Mrs Dawson was not.

[44] The Dawsons signed the unconditional offer to buy without seeking expert advice.

[45] Later that week and before the Fullers had signed the offer from the Dawsons, the Dawsons mentioned to Mr Cornaga that they were wanting to get a property survey report done on the property for their mortgagee. Mr Cornaga suggested they contact Allied House Inspection Limited. Instead they engaged Future Safe Limited to undertake a non-invasive building survey. That company's employee Greg Thompson undertook a property inspection and reported on 27 October 2006.

[46] The Fullers were encouraged by Mr Cornaga to seriously consider the Dawsons' offer and they accepted on 26 October 2006.

The Dawsons settled their purchase on 17 November 2006 and took occupation that day.

[47] The Dawsons never showed their property lawyer the Future Safe report. Mr Dawson did not consider it to be an unfavourable report notwithstanding that it identified:

a) "extreme" levels of moisture underneath the front deck by the front door;
b) several areas of "extreme" and "hazard" levels of moisture at the pillars and low parapet wall of the east balcony and underneath the front door;
c) "extreme" moisture reading of the wall of the room to the left of the study; and
d) "extreme" moisture readings on both sides of the exterior pedestrian door to the garage.

[48] The report defined "extreme" as 30% plus moisture content likely to result in timber deterioration which could require timber removal.

[49] The Dawsons received the Code Compliance Certificate for the repair to the northern deck from the Fullers in December 2006. At that time they did not understand that further remedial work was undertaken outside of the building consent for the northern enclosed deck.

[50] By October 2007 the Dawsons were becoming increasingly concerned about moisture ingress and there was a definite musty smell in the study after heavy rain. They engaged a further building survey report from House Residential Limited. That report heightened their moisture ingress concerns and so on 15 August 2007 they lodged an application for a WHRS assessor's report with the Department of Building and Housing under the Weathertight Homes Resolution Services Act 2006.

[51] Mrs Dawson completed the WHRS application and stated:

> Before we bought the house we were made aware of possible repairs needed due to leaking on deck going down to office room below. Musty and damp smell is obvious in this area. House has had prior repairs on different areas of the house in the past. High moisture meter readings is mentioned above areas.

[52] Alan Light undertook the WHRS assessor's inspection and reported on 1 February 2008 that the home was a leaky home and required remedial work estimated to cost $156,242 including GST. The report concluded the following defects:

a) systemic failure to the deck upstand and detail and handrail support fixings east elevation deck junctions;
b) the roof above the living room was not watertight and causing water ingress at the deck/wall junction;
c) the roof parapet area to the south elevation was not watertight due to failure of the water membrane; and
d) the north elevation leaks were due to the remediation work membrane installation north deck above bedroom.

[53] After receiving Mr Light's report, the Dawsons commissioned another report from Prendos Limited. They did this to get a more accurate costing of the remedial work necessary. Prendos confirmed Mr Light's findings and added that "the targeted repairs carried out in 2006 were poorly executed and have not achieved compliance with the New Zealand Building Code." Prendos recommended a complete recladding of the home with a drained and ventilated cavity together with the replacement of the roof membrane to establish weathertightness.

[54] In February 2007, shortly after buying the home, Mr Dawson suffered a brain aneurism which necessitated extensive brain surgery. As a result of this he was off work for some time in 2007. He was only able to return to light work and in October 2008 was made redundant. He is now a sickness beneficiary. The Dawsons,

because of their financial constraints and Mr Dawson's health, have been unable to undertake the usual homeowner repairs, or even regular or deferred maintenance tasks. Furthermore they have not been in a financial position to effect remedial work before learning the outcome of this proceeding. Their claim is based upon expert evidence from Prendos Limited as to defects, scope of remedial works and estimate of the costings for such repairs.

[55] The Dawsons are claiming remedial costs of $503,000 including GST and general damages of $25,000. Mr Light, during the hearing revised his estimate of remedial costs for a partial reclad to $250,000 inclusive of GST. The Council's defect expert Trevor Jones recommended a full reclad for the home with his estimate of remedial costs to achieve CCC at $326,000.

WHAT ARE THE DEFECTS CAUSING WATER INGRESS?

[56] The Council expert Mr Jones carried out a visual inspection in August 2010 and has considered photo and investigation reports from the other two experts. An experts' conference was convened on 4 May 2011. This conference concluded with a report from Mr Light, Mr Hill and Mr Jones' setting down ten probable defects. The experts were heard concurrently at the hearing where greater consensus emerged. The three experts were in agreement that the principal defects causing leaks were:

i. East Deck – the handrails are top fixed. Leakage has occurred through the deck edge cappings as there are no cross falls and any sealant to the joints has failed. There is inadequate fall to the deck, inadequate cladding to deck clearances and the waterproof membrane failed due to differential movement with the overlaid tiles.

ii. South Elevation Deck – the experts agreed that this was constructed in a similar manner to the eastern deck with tiles over a liquid applied membrane,

negligible fall but better clearances, and also some protection from the roof cover. Nevertheless there was high risk with the junction between termination of the deck and the EIFS cladding between deck and joinery. Remedial work was carried out beneath this southern deck in 2005/2006 but no remedial work was undertaken to the deck. Mr Jones is unsure whether the deck is actually failing as opposed to the deck edge termination. The deck edge termination is not code compliant and Mr Light accepts that this deck requires remedial work, though his report did not impugne this deck construction.

iii. North Deck (2005 work) – again it was agreed that there has been failure of the decks waterproofing membrane, with the tiles sitting above and causing differential movement. Further fault was found with the lack of fall and the deck edge capping clearances to the underside of the deck were insufficient. The experts agreed that it was acceptable to have the tiles over the liquid applied membrane in 2005 but nevertheless agreed that leaking was confirmed between the tile membrane and the upstand. Exactly which defects are causing water ingress is unclear but it is probably a combination of defects causing damage.

iv. Cladding/Roof – the south elevation gable roof is covered with EIFS cladding and the parapet cap detail has failed. Whilst the relevant technical literature did not preclude EIFS roofing at the time of the 2005 work, Insulclad was not considered to be an appropriate roofing material. A further issue with this junction was the new cladding from the 2005 remedial work joined onto the old with no reinforcing of such joints. The 2005 repairs came onto both sides of that roof area. Mr Hill considers that the junction of

the parapet and cladding has failed as has the junction between the EIFS and the vertical wall. Mr Jones is unsure as to whether the leak damage is caused by these junctions or the parapet cap flashing junction above.

v. Roof/flat liquid applied membrane roof – Minimal upstand to the painted galvanised parapet cap flashings. The liquid applied membrane terminations were short over the head of the EIFS cladding. This resulted in the failure of the torched on laps to the membrane flat roof. In relation to the minimal upstand, Mr Light said that this was an appropriate detail at the time of construction. Mr Hill and Mr Jones disagreed as they did not think it complied with the 1995 Profile Metal Roofing Handbook. The cladding and parapet cap flashings junctions with the sloping gable roof relies on sealant which has failed. They agreed that there were other cap flashing issues, including mitre corner joints which have no soaker flashings so are reliant on sealant and there has been top fixing through the parapet capping.

[57] Mr Hill proposed in his remedial scope of works that the roof damage necessitates 50% timber replacement. Mr Light and Mr Jones disagreed. Mr Jones said there are no high, or, only marginally high, moisture readings which do not establish damage to the roof framing and ply overlay. Mr Light considered no roof ply or framing need replacing. All experts agreed that in relation to the roof and the deck areas there was a lack of, or inappropriately executed, maintenance contributing to damage in relation to the roof generally. Mr Light's view was that the lack of maintenance is a critical factor. Mr Hill proposed a scope of remedial work which Mr Jones does not specifically challenge in any way. Mr Hill and Mr Jones both agree that the home requires a full reclad over a ventilated cavity.

[58] Mr Light proposed a more restricted scope of works. He considered remedial work required repairs to the decks, a partial reclad of eastern and northern elevations only, the rebuild of the parapets and re-applying the liquid applied membrane, repainting the cracks in the cladding and a general exterior repaint. His view was that the degree of damage suffered by this home does not warrant a full reclad. During the hearing he conceded that a full reclad was necessary.

[59] At the hearing Mr Light proposed the use of an on site boron injection treatment known as Rot Stop. Mr Hill and Mr Jones were of the view that the effectiveness of Rot Stop was not sufficiently proven. Mr Light's remediation views at the hearing moved from a realistic objective repair to an untested ideology. I determine from such expert opinion, that the appropriate repair option is a full reclad in accordance with the scope of works set out in Mr Hill's report.

[60] OPC was not responsible for creating any of the above defects (all original construction). The claimants' claim in negligence against OPC, but there is no evidence that its 2005 remedial work exacerbated the position with the defects although I do find that OPC's remedial work with the northern enclosed deck was inadequate, and also the work undertaken in paragraph [56 iv] above.[3]

DID THE DAWSONS BUY WITH KNOWLEDGE THAT THE HOME WAS A LEAKY BUILDING?

(1) Has there been a break in the chain of causation?

[61] Mr Heaney and Ms Chung submitted that the Dawsons' loss was not caused by any act or omission of the respondents, but instead by the Dawsons themselves due to their decision to purchase unconditionally despite knowledge that the house was 'blighted'. Therefore, by taking a calculated risk that the house needed to be

[3] Oral evidence of Mr Trevor Jones.

repaired to be made weathertight and Code Compliant, the respondents' submission is that such risk not having paid off the Dawsons cannot now place responsibility on the respondents for their shortcut or bad bargain.

[62] The legal principles relating to causation have been comprehensively set out in *Scandle v Far North District Council*. These principles are as follows:[4]

> [37] Whether or not an action or omission has caused damage entails a two stage inquiry.[5] First, there is a factual inquiry into whether the defendant's conduct caused the loss. This involves the application of the "but for" or causa sine qua non test. The purpose of this test is to determine if the loss would have arisen even without the defendant's conduct. If so, the defendant's conduct cannot be said to have caused the loss.[6] But if the loss would not have occurred but for the conduct, the second stage of the inquiry commences...
>
> [38] The second stage of the inquiry looks to see if there is causation in a legal sense; if there is, legal liability for the loss will follow. This involves two steps. First, the appropriate scope of liability for the conduct is assessed; and secondly, there is an investigation into the proximity between the cause and the loss.[7]
>
> ...
>
> [40] The second step can be viewed as either the final stage of the causation inquiry, or as a separate inquiry into remoteness of damage. It is then that the court comes to assess the issue of proximity, by looking at whether the conduct constituting a factual cause is a substantial and material cause of the loss. It is not enough that the conduct merely creates the opportunity or occasion for the loss to occur; only if the conduct was a substantial and material cause is legal causation established.

[63] Based on the evidence that the Dawsons knew that the home had been the subject of a WHRS claim; that the home has

[4] *Scandle v Far North District Council* HC Whangarei, CIV-2008-488-203, 30 July 2010, Duffy J.
[5] *ACC v Ambros* [2007] NZCA 304, [2008] 1 NZLR 340.
[6] See *Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883.
[7] At [25].

weathertight issues and whilst some remedial work had been undertaken more work was required; that the Fullers were giving no assurances as to weathertightness; and that the Dawsons proceeded to buy without enquiry, a determination that the respondents in this claim still ought to be held liable for the claimants' bad judgment would be unjust. The material and substantial cause of the Dawsons' loss in this case was their decision to buy a home with known weathertightness issues. The most that can be said of the respondents' alleged breaches is that at best, they created an opportunity for the occurrence of the Dawsons' losses. I am supported in this finding by the Supreme Court in *Byron Avenue* where the Court, contemplating how a prospective owner may manage his or her risk and ordinarily protect him or herself in purchasing a property, stated:[8]

> It is clear that the plaintiff's own conduct may go beyond contributory negligence and become the real cause of the damage. This is simply a plaintiff based example of what was traditionally called a novus actus intervenines. That was a convenient label to describe a new cause which intervenes and removes all causal potency from the original negligence. The intervening cause can arise from the conduct of a third party or from the conduct of the plaintiff himself.

[64] The Dawsons' decision to proceed with the purchase of the home on their own wilful volition operated as a *novus actus interveniens* breaking any causal chain which the respondents may have created. In the event that I am wrong in determining that the defence of lack of causation has been established, I also consider the defence of volenti non fit injuria raised by Mr Heaney and Ms Chung.

(2) Volenti non fit injuria?

[65] Mr Heaney submitted that this is a case where the Dawsons are the authors of their own misfortune. He stated that the Dawsons

[8] *North Shore City Council v Body Corporate 189855* [2010] NZSC 158.

purchased this home in the knowledge that it was a leaky building, which had been the subject of a weathertight homes claim and that further remedial work was needed. They offered a price to buy which was considerably lower than the asking price of the Fullers and whilst probably not really expecting it to be accepted, they thought that if it was, they could do whatever work was necessary to affect the repairs themselves. Mr Dawson acknowledged that they were making a "cheeky offer". They thought that they could get a real bargain because of the Fullers' financial position. It was submitted that this was a case where the purchaser took a gamble which did not pay off.

[66] Mr Heaney and Ms Chung both submited that this is a clear case where the defence of volenti non fit injuria defeats the Dawsons' claims against all respondents. Both counsel further submitted that if I do not accept that the defence of volenti is available then there must be a significant deduction against any amount the Dawsons are entitled to recover against any party for contributory negligence. The submissions of Mr Heaney and Ms Chung regarding this defence suggest that this is a most fact-specific case. The Dawsons entered into the purchase with their eyes open knowing the risks posed by the home having leaking issues.

[67] Volenti non fit injuria is a full defence to a claim. The onus of proof rests on the respondents to establish that the claimants freely and voluntarily agreed to accept the risk of the harm eventuated.[9]

[68] The facts of the present claim indicate that the claim has the potential to fall within both types of volenti cases enunciated in *James v Wellington City*.[10] The issue for the Tribunal is whether the claimants voluntarily accepted the risk. The test is a subjective one.

[9] Stephen Todd (ed) *The Law of Torts in New Zealand* (5th ed, Brookers, Wellington, 2009) at [21.4.03].
[10] *James v Wellington City* [1972] NZLR 978 (CA) at 982.

[69] Mr Heaney submitted that only full knowledge of the **risk** is required, not full knowledge of the **harm** that will be suffered, which in this case is the extent of the leaks. I accept that submission. In support of this he referred me to the following passage from the Law of Torts in New Zealand:[11]

> ..the consent is not the harm itself but to the risk of harm being inflicted by negligence...

[70] Accordingly, for the volenti defence to operate full understanding of the danger or risk is what is necessary, not full knowledge of the harm or loss that comes to pass. Mr Heaney submitted that to hold otherwise means that the doctrine is voluntary assumption of loss not voluntary assumption of risk.

[71] Mr Heaney stated that the facts of this case leave no other conclusion but that it is a classic case of volenti. He submitted that the losses sought to be recovered by the Dawsons have not been caused by any neglect on the part of the Council, were not caused by representations or warranties on the part of the Fullers, or via their agent, or as a result of negligent building work by Mr Wallbank. He said that the single cause of the Dawsons having to meet costs of recladding their home is the risk they took when deciding to buy the home knowing it had been a leaky home and that it required more remedial work and not immediately attending to that work or underestimating such repair work. Mr Heaney and Ms Chung argued that despite the attractions of a bargain from the Fullers facing a mortgagee sale, the Dawsons were completely free to make their agreement to buy conditional upon obtaining a LIM and undertaking a search of the Council property files and/or a suitable building surveyor's report, but, they chose to take none of these actions. Instead they were prepared to take the risk and bought "as is".

[11] Todd *The Law of Torts in New Zealand*, above n 9, at 214.

[72] Mr Heaney submits that in light of the Dawsons' knowledge about the condition of the home in late October 2006, and their wilful decision to proceed to buy, they were taking a calculated risk in the hope that they were getting a bargain. It was their risk to take. Where the claimant has voluntarily taken on the risks that cause him or her injury, volenti extinguishes the cause of action.[12]

[73] Mr and Mrs Dawson and Mr Cornaga each properly affirmed under oath their written briefs of evidence. Their oral evidence was at times conflicting, evasive and unsatisfactory. It was evident that they all had difficulty in recalling exactly what was said and understood at the open home in late October 2006 and at the time of the writing up and signing of the agreement for sale and purchase. I accept that the events that they were being asked to recall were some five years back and so their inconsistencies are understandable. Nevertheless their varying explanations and recall does throw some doubt on their credibility.

[74] Mr and Mrs Dawson stated in their written briefs of evidence that they were aware of and accepted special condition clause 14. Mr Dawson, in paragraphs 25 to 27 of his brief of evidence, stated that Mrs Dawson initially signed the agreement before Mr Cornaga and that Mr Cornaga then inserted special condition 14 at a later stage. However that part of that agreement was again presented to Mrs Dawson to initial special condition clause 14. Mrs Dawson does not contest Mr Dawson's evidence that she initialled the agreement in her brief of evidence. In any event Mr Rainey's closing submissions accept that the Dawsons agreed to clause 14.[13]

[75] Whilst the sales flyer given to the Dawsons at the open home by Mr Cornaga made no mention of the home being sold as a leaky home, Mr Cornaga did advise the Dawsons that the property had

[12] Including the Dawsons claim for breach of warranty (clause 6.2.5 of the Sale Agreement) against the Fullers; *Mouat v Clark Boyce* [1992] 2 NZLR 559 and *Dairy Containers v NZI Bank Limited* [1995] 2 NZLR 30.
[13] See paragraph [61] above which sets down clause 14.

previously suffered from weathertightness issues and had been the subject of a claim under the Weathertight Homes Resolution Service. Mr Cornaga also told the Dawsons that as a result of a Weathertight Homes Resolution Services process the Fullers had carried out repairs necessary to fix the problem under a building consent issued by the local authority.[14] In this regard he stated that the remedial work had been carried out and showed the Dawsons photographs of work being carried out.[15]

[76] I am satisfied from the Dawsons' evidence that Mr Cornaga did tell them that the local authority had approved the repairs and whilst it had not issued a Code Compliance Certificate for the repair work (there was some confusion in his oral evidence as to whether he mentions a Code Compliance Certificate or a certificate/letter of acceptance) that the issue of the Code Compliance Certificate was in process. When questioned Mr Dawson admitted that he did not know what the Code Compliance Certificate was in relation to.[16]

[77] Further having heard Mr Cornaga I am satisfied that he told the Dawsons about elevated moisture readings in the downstairs study which he considered to be a result of a leak in the the main eastern deck. I accept that Mr Cornaga faxed a relevant email to the Dawsons on 25 October which evidenced that elevated moisture reading. I accept Mr Cornaga's evidence that he expressed to the Dawsons his concerns that further repair work would be necessary, especially around the eastern deck and the study, for Mr Dawson told him that he was working in the boat building industry and could carry out further remedial work to the home himself. I do not accept Mr Dawson's evidence as credible when he said he thought after seeing the photographs and hearing from Mr Cornaga that all repairs had been attended to.

[14] Mr Cornaga's evidence Day 2 at 11.3.03.
[15] Transcript Day 2 at 11.29.50.
[16] Mr Dawson's evidence 23 May 2011, 11:42-16.

[78] The evidence of Mr and Mrs Dawson was clear, this home was in the locality that they wanted to move to and upon viewing it they learnt that it was the size and configuration they needed. This is consistent with Mr Cornaga's recall that Mr and Mrs Dawson seem to "absolutely love the property". Mr Cornaga's evidence is that they also told him that they never thought that they would be able to buy a house in the Torbay area. This too is consistent with the Dawsons wanting to make an offer, unconditional, to buy at the top of their price range when they learnt of the financial difficulties being experienced by the Fullers. Mr Dawson's evidence is that they were making "a cheeky offer". Mr Dawson's evidence was that they were under no time constraint, but he understood that the Fullers were because of their financial difficulties and so made the unconditional offer to buy without seeking expert advice from anyone before buying. He also stated that, but for the time constraints on the Fullers which he wanted to take advantage of, he would have waited for a building surveyor's report.

[79] The Dawsons chose not to obtain a LIM before rendering the contract unconditional, for as Mr Cornaga stated, if the contract was made subject to receipt of a satisfactory LIM it would not be an unconditional offer. Had the Dawsons obtained a LIM it would have disclosed potential weathertight issues as set down in paragraphs [26] and [27] above. Tim Jones gave evidence, an experienced property lawyer called by the Council, that a reasonably experienced conveyancing lawyer, upon reading clause 14 and/or obtaining a LIM which would have disclosed the PIR notes of 30 August 2005 (see paragraph [26] above), would have sent someone of experience to the Council to inspect the Council's property files. Those files would have revealed that this home was the subject of a WHRS claim, that follow-up remedial work would be necessary, that the building does not presently comply with the requirements of the New Zealand Building Code and that there was unconsented remedial work undertaken in 2005 as part of the repairs to the northern enclosed deck.

Discussion

[80] Mr Heaney referred me to *Heard v New Zealand Forest Products Limited,* where North and Cleary JJ described the distinction between volenti and contributory negligence as:[17]

> A plaintiff may be guilty of contributory negligence if he did not know or nevertheless ought to have known of the danger which confronted him. But he can never be held to have been volens unless it is first shown that he had full knowledge of the nature and extent of the risk he ran, and then with that full knowledge, in fact incurred it. Again, a plaintiff may be guilty of contributory negligence where he is careless for his own safety, but he may be truly volens even when he is exercising the upmost care for his own safety. As Bowen L.J aptly pointed out in *Thomas v Quartermaine* (1887) 18 QBD 685: 'carelessness is not the same thing as intelligent choice' (ibid.,698) it is the latter with which we are concerned. Furthermore, full knowledge and appreciation of the risk is only a bar when the plaintiff is 'free' to act on it. There must in other words be freedom of choice.

[81] Mr Heaney and Ms Chung submitted that in this case the Dawsons freely assumed the risk of incurring the damages which they now seek to recover by entering into the transaction to buy unconditionally with knowledge that the house had weathertightness issues and needed more repairs. I accept the submission of Mr Heaney that it appears that the Dawsons agreed not to find out exactly how much further repairs would be required and certainly the extent of the damage being caused by the eastern deck, as the Dawsons were keen to take advantage of the Fullers' adverse financial situation and secure this purchase (at a cheeky price) in the locality that they wanted desperately to move to. In other words they were the authors of their own misfortune as they set out to take

advantage of the Fullers' financial difficulties and in doing so took short cuts.

[82] The evidence before me suggests, and, especially after listening to Mr and Mrs Dawson, that the facts known to the Dawsons before they decided to buy and which I consider to be relevant in relation to this defence, include the following:

a) The Dawsons knew the Fullers asking price, albeit negotiable, was $599,000 and the rating valuation for the home $680,000, but offered $109,000 less than the asking price.
b) Mrs Dawson was clearly not experienced in buying real estate in New Zealand,[18] but Mr Dawson was and admitted that he had knowledge of the leaky home syndrome and that it was well known by late 2006.
c) The Dawsons knew the home had been the subject of a 2005 Weathertight Homes Resolution Services claim.[19]
d) Remedial work had been carried out on the home and the Dawsons had seen photographs of such remedial work.
e) The Code Compliance Certificate or the certificate of acceptance (Mr Cornaga's evidence is that he was confused as to which was expected from the Council) had not been issued for the repair work and the Dawsons made no enquiry of the Council.
f) The Dawsons clearly underestimated Mr Cornaga's concerns about leaks in the study from the main (eastern) deck and Mr Dawson thought he could attend to any repair work himself.
g) The Dawsons wanted, and indeed were encouraged by Mr Cornaga, to make an unconditional offer to buy

[17] *Heard v New Zealand Forest Products Limited* [1960] NZLR 329 (CA) at [357].
[18] The Court of Appeal in *Byron Avenue* dismissed the notion that unfamiliarity with New Zealand conditions altered the level of care required of a claimant; see [80] per Baragwanath J.

and so agreed to strike out the requirement to obtain a LIM. The LIM would have disclosed significant Council concerns over weathertightness.[20]

h) The Dawsons knew that the home had been subject to earlier unsatisfactory offers to buy and made no enquiry why, and that the Fullers were under financial and time pressure to sell.

i) The Dawsons made an unconditional offer without, seeking expert advice (for example, from their lawyer or a building surveyor).[21]

j) The Dawsons knew from clause 14 that more remedial work was necessary and that the Fullers were not accepting liability for weathertightness.

[83] For the purposes of volenti knowledge of the risk of harm is not the same as knowledge of the harm which, in this case, is the extent to which the home leaks. The consent in the volenti defence is not the extent of harm itself, but, the risk of harm being inflicted by negligence. Mr Dawson considered that he could manage the risk with his carpentry ability to undertake any repair work himself. Had his health and finances allowed and had he been able to attend immediately to the weathertightness problems he may have averted the harm that has now befallen them.

[84] Assessing all the evidence, I find that the respondents have established that Mr and Mrs Dawson had sufficiently full knowledge of the risk that they were running when they purchased this home knowing it had weathertightness issues. As a result of the volenti defence being established, I find that the acts and/or omissions of the respondents did not cause the claimants' loss. The claimants fail in their claims against all the respondents to this proceeding.

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[19] Brief of Evidence of Mr Dawson, 25 February 2011, at [10].
[20] See paragraph [26] above.
[21] The evidence of Tim Jones was that clause 14 would occasion a reasonable conveyancing lawyer to search the Council property files (the PIR of the consent file).

[85] Nevertheless, due to the impact that these two determinations will have on the Dawsons, I will now consider the defence advanced of contributory negligence.

WERE THE DAWSONS CONTRIBUTORILY NEGLIGENT?

[86] I have earlier determined that the material and substantial cause of the Dawsons' loss in this case was their decision, taken voluntarily and knowingly, to buy a home with known weathertight concerns.

[87] The defence of contributory negligence has been specifically pleaded by Mr Heaney for the Council and by Ms Chung for the sixth and seventh respondents. The onus is on the respondents to affirmatively establish 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*[22] established that the essence of contributory negligence is a failure on the part of the plaintiff to take reasonable care to protect his or her own interests where the risks are reasonably foreseeable or ought to have been known to the plaintiff. The claimant who fails to take reasonable care in looking after his or her own interests and thereby contributes to his own loss may be confronted with the defence of contributory negligence,[23] as the claimants have been in this proceeding. When considering responsibility for the loss in question, the concepts of causal potency and relative blameworthiness must be taken into account.[24]

[88] As has already been discussed, the Dawsons purchased the home knowing of the weathertightness issues, knowing that it would need further repairs and, in particular, that water was entering the study through the eastern deck. Indeed, in evidence the Dawsons acknowledged in their application to the WHRS that they purchased

[22] [1952] 2 QB 608 (CA) at [615].
[23] Todd p894.
[24] Todd, *The Law of Torts in New Zealand*, above n 9, at 996.

on an “as is” basis. Before settlement of their purchase they had received the building surveyor’s report from Greg Thomas (the fourth respondent, now removed) which found that the home did show moisture ingress problems. Trevor Jones in his brief of evidence identified these problems in Mr Thomas’ report and his evidence was not challenged. Mr Dawson acknowledged, when questioned, that he knew how “to get out of contracts admitted to”, although he did not elaborate on this point. Notwithstanding the concerns expressed in Mr Thomas’ report, the Dawsons proceeded to settle the purchase. Mr Heaney makes the observation that proceeding to settlement was all the more surprising given that the Dawsons were borrowing significant sums of money (the entire purchase price) to buy the home.

[89] The Tribunal in *Crosswell & Ors v Auckland City Council,*[25] held that the claimants’ failure to obtain a pre-purchase inspection report when they had been aware of intermittent water leaks over a number of years, coupled with their acceptance that they were aware at the time of the purchase of the growing publicity surrounding the leaky homes, was negligent.

[90] In *Hay v Dodds* the Tribunal found that the claimants had failed to take reasonable care before purchasing their home and determined that the claimants’ failure to take the advice of an architect friend to obtain a report from a building inspector meant their claim should be reduced by 75%. In reaching that decision the Tribunal noted: [26]

> Mr Hay elected not to take that advice, as he decided that... the house is what he and his wife wanted, despite the fact it may have had some problems. He decided to not find out whether it had problems, or the size and extent of any problems.

[25] *Croswell & Ors as Trustees of the Crosswell Family Trust v Auckland City Council* WHT TRI-2007-100-41, 17 April 2009, Adjudicator S Lockhart QC.
[26] *Hay v Dodds* Claim 01917, Adjudicator Dean (under the 2002 Act).

[91] The circumstances in *Hay* are very similar to the present case. The Dawsons however took a riskier approach when acquiring their home as they purchased the home knowing that it had weathertightness issues and would need further repairs, and in particular that water was entering the study through the eastern deck. In *Hay* the claimants purchased their property in 2001 whereas the Dawsons purchased in late 2006. In 2001 there was very little public awareness or understanding of weathertight home problems, but by 2006 the problem was well known.

[92] Section 3 of the Contributory Negligence Act 1947 states that where a person suffers damage as a result partly of his or her own fault, and partly the fault of another person, the damages recoverable in respect of the damage suffered should be reduced to the extent the Court or Tribunal thinks is just and equitable, having regard to claimant involvement and responsibility for the damage.

[93] The consistent theme throughout the case law on contributory negligence is that the test is a question of fact, not of law, and is generally determined by whether the claimant acted reasonably in the circumstances.[27] The evaluation of whether or not the claimants' behaviour was reasonable in the circumstances must be made objectively.

[94] The authority most commonly cited when considering allegations of contributory negligence is the High Court decision of Justice Venning in *Byron Avenue.*[28] In this case it was noted that in building defect cases the availability of a contributory negligence defence has been discussed in cases as long ago as 1894.[29] He also referred to a number of other decisions in other areas of the law

[27] *Hartley v Balemi* HC Auckland, CIV-2006-404-002589, 29 March 2007, at [113].
[28] *Body Corporate 189855 v North Shore City Council* HC Auckland CIV-2005-404-5561, 25 July 2008 (*Byron Avenue)*.
[29] At [42].

such as solicitor negligence claims. Justice Venning considered that:[30]

> The differing circumstances of the various purchasers mean that the principles of intermediate inspection and contributory negligence are not to be applied in a general way. They must be considered and applied to the particular circumstances of each plaintiff.

[95] Justice Venning took into account a number of various evidential issues in reaching his conclusions, two of which are applicable to this matter:

a) Failure to obtain a LIM, particularly where it is provided for on the face of the agreement for sale and purchase and where it would have alerted the purchaser to issues, could amount to contributory negligence.
b) If a claimant failed to follow up on information which indicated that a significant sum had been charged for capital repairs, it could amount to contributory negligence if further enquiry could have identified defects and damage.

[96] On appeal the Court of Appeal upheld the finding of contributory negligence. Shortly after his decision in *Byron Avenue*, Justice Venning released his judgment in *Jung v Templeton.*[31] In that decision he was of the opinion that as the building report revealed moisture ingress problems Mr Jung, the purchaser, should have investigated further. He concluded that the report ought to have been discussed with the building surveyor and Mr Jung's conveyancing solicitor. Justice Venning concluded that:[32]

> [T]he purchaser of a building who later complains of defects in it can be guilty of contributory negligence either by failing to avail themselves of the opportunity of an inspection or, having availed themselves of inspection, by failing to act reasonably in response to it:

[30] At [49].
[31] *Jung v Templeton* [2010] 2 NZLR 255 (HC).
[32] At [61].

> *Bowen & Ors v Paramount Builders (Hamilton)* [1977] 1 NZLR 394, 413. *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234 at 241-242 and *Morton v Douglas Homes Limited* [1984] 2 NZLR 548 at 580 (although Hardie Boys J found that the facts of that case did not support such a finding).

[97] He then went on to say:

> In the circumstances, I have no doubt that if this case had proceeded to trial the Council would have successfully raised a claim of contributory negligence against Dr Chung. Given the authorities of, for example, *Hartley v Balemi* HC AK CIV-2006-404-002589, 29 March 2007, Stevens J and *Body Corporate 189855 v North Shore City Council* HC AK CIV-02005-404-005561, 25 July 2008, Venning J, the level of the plaintiff's contributory negligence would have been between 25 and 75%.

[98] Justice Venning went further, to conclude that the lawyer's advice in that case, that a contributory negligence finding may have been between 10-15% was in fact "conservative".[33]

[99] The application of these principles was later considered by the Supreme Court in *Byron Avenue*, though it was not a point on appeal. The Supreme Court commented:[34]

> If a prospective purchaser obtains a LIM which discloses a moisture problem before becoming committed to the purchase, it is unlikely that any proceedings could ever be taken against the council. A prospective purchaser may, however, fail to request a LIM in circumstances where the LIM, if requested, would probably have given notice of actual or potential problems. If, as is likely to be the case, the purchaser's failure amounts to negligence, a question may arise as to whether that negligence amounts only to contributory negligence, albeit probably at a high level, or whether the prospective purchaser's negligent omission amounts to a new and independent cause of the loss which removes all causal

[33] At [62].
[34] *North Shore City Council v Body Corporate 188529 (Sunset Terraces)* [2010] NZSC at [79].

> potency from the council's original negligence at the inspection stage.

[100] The Court continued, saying more generally:[35]

> It is clear that the plaintiff's own conduct may go beyond contributory negligence and become the real cause of the damage. This is simply a plaintiff-based example of what was traditionally called a novus actus interveniens. That was a convenient label describing new cause which intervenes and removes all causal potency from the original negligence. The intervening cause can arise from the conduct of a third party or from the conduct of the plaintiff himself.

[101] While the Supreme Court was contemplating obtaining a LIM the comments are equally applicable to other steps that would lead to a prospective purchaser being on notice of issues, particularly in light of *Jung v Templeton*, a case not concerned with a LIM. Contributory negligence applies regardless of unfamiliarity with property purchasing in New Zealand (Mrs Dawson's situation) for the Court of Appeal in *Byron Avenue* dismissed the notion that unfamiliarity with New Zealand conditions altered the level of care required of a purchaser, Justice Baragwanath held:[36]

> Certainly anyone who comes to New Zealand and engages in what, in any society, is a relatively sophisticated engagement with local legal norms should be required to take such reasonable steps to discern what they are.

[102] As I have set out earlier in this judgment, the losses sought to be recovered by the Dawsons have not been caused by any negligence on the part of the Council, have not been caused by representations on the part of the Fullers, or Mr Cornaga, or the Browns Bay Realty, or from any of the building work undertaken by OPC or Mr Wallbank. The single cause of the Dawsons having to meet the costs of recladding their home today is the risk they took

[35] At [83].
[36] At [80].

when deciding to buy the home knowing it had been leaky and that it still needed more repairs. This I determine is the cause of their loss for which they are solely blameworthy. Despite the attractions of the bargain presented to them (the Fullers facing a mortgagee sale) the Dawsons were completely free to make their agreement conditional upon obtaining a LIM, a search of the Council property files (which of course would include the building consent file) and a suitable building surveyor's report. They chose not to do so.

[103] I determine accordingly that the Dawsons were negligent in failing to take these further steps to protect their position when they knew the home was a leaky building. I determine that the Dawsons' carelessness in failing to take reasonable care to look after their own interests is the material and substantial cause of their loss and that a contributory negligence reduction of 100% is just and equitable.

WHAT IS THE REASONABLE MEASURE OF LOSS?

[104] Although the claimants fail in their claim, I consider it appropriate to make a finding on what would be a reasonable measure of loss (if successful). The Dawsons progressed their claim on estimates of remedial costs. Mr Hill's evidence was that the repair costs will be $489,004.74 inclusive of GST. The Council and counsel for Mr Cornaga and Browns Bay Realty submitted that these repair costs are excessive and are disproportionate to the value of the home once completed. Mr Hill's repair cost estimates are not actually his own but are derived from a colleague in Prendos Limited who did not give evidence. As such the Dawsons' claim is based on costings that have not been established as appropriate in evidence.

[105] Mr Jones agreed that the home required a full reclad but stated that the remedial costs should be no more than $327,631.30 inclusive of GST. Mr Jones stated, that whilst recladding an existing dwelling is a more costly building project than building a new home,

he said this reclad would not be a difficult construction project. The other experts did not contradict Mr Jones' evidence.

[106] Mr Light who is proposing a partial reclad and has proposed a restricted scope of works, revised his initial estimate of remedial costs at the hearing to $250,000 inclusive of GST and consent fees.

[107] The calculation of damages is a practical exercise and the cost of remedial work is the obvious place to start. Remedial work is not appropriate where it is out of all proportion to the benefit to be obtained.[37] In *Invercargill City Council v Hamlin* the Privy Council held:[38]

> …the measure of loss will… be the cost of repairs, if it is reasonable to repair, or the depreciation in the market value if it is not…

[108] Venning J in *Byron Avenue* stated that in weathertightness claims this was the law to be applied.

[109] In *AXA Insurance UK Plc v Cunningham Lindsey United Kingdom (and unlimited companies)* Lord Pearson observed that:[39]

> A plaintiff can adopt an expensive approach to repairs, but can only recover by way of damages a sum that reasonably needs to be expended to make good the loss...

[110] Mr Heaney submitted that the dicta of Hardie-Boys J in *Brown v Heathcote County Council* needs to be kept in mind, where he stated:[40]

> Reasonableness is to mitigate any damages to be gauged with reference to the defendant's interest as well as the plaintiffs,

[37] Todd, *The Law of Torts in New Zealand,* above n 9 at 129.
[38] *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC).
[39] *AXA Insurance UK Plc*[2007] EWHC 3023 (TCC) 18 December 2007, at [51].
[40] *Brown v Heathcote County Council* [1982] 2 NZLR 584 at [615].

following *Derbyshire v Warren* [1963] 1 WLR 1067 at [1072] per Harmin LJ (CA)...

[111] Mr Jones analysed Mr Hill's remediation figures very carefully. He presented a clearly referenced schedule identifying the areas where Mr Hill's estimates were in his view excessive. The evidence of Mr Jones and Mr Hill was heard concurrently on remediation costs and both witnesses were carefully tested on their assumptions and deductions. Mr Jones statement of repair costs is based on his recent experience with remediation projects. He said with this home all framing timber is Boron treated, that there was no great volume of high moisture readings, no window installation or exterior joinery fixing damage, and that better labour and material prices are becoming probable. Mr Hill estimated that 50% of the timber would need to be replaced. Mr Jones estimate was 25% and he also stated that a part-time foreman was not a necessary expense. Mr Jones' figures include a working foreman as from his experience the remediation project is not difficult and the report of this home could be described as an average style reclad project.

[112] Mr Hills' allowance for provisional and general costs is 15%; Mr Jones says 10% is adequate as this project is not a particularly difficult reclad. Mr Jones says the floor coverings are already at replacement age and so no allowance should be made for floor covering, except $1,500 for the study.

[113] Mr Jones' figures are based on considerably less timber replacement than Mr Hill's, however, Mr Jones' evidence is supported by Mr Wallbank's evidence that all the timber was Boron treated. Mr Jones stated that there is no evidence of joist replacement necessary for the roofing. Mr Jones' evidence was not contested by another quantity surveyor.

[114] For the reasons stated above I prefer the remedial costs arrived at by Mr Jones. His figure includes a generous 15%

contingency should repair works uncover more replacement than presently estimated. I determine that Mr Jones' final figure of $327,631.30 is the most appropriate measure of the costs for remedial work. Whilst it is higher than Mr Light's $250,000, the Council concedes that it is reasonable taking into account all of the repair issues. However, Mr Heaney and Ms Chung submited that the remediation quantum sought by the claimants to reinstate the home was disproportionate to the value of the home. They both contended that the quantum of the claimants' loss should be measured against the cost of a new home.

[115] Three independent valuers provided evidence which was heard concurrently on the second day of the hearing. Alan Kroes was engaged by Mr and Mrs Dawson, David Regal by the Council, and Patrick Foote by Mr Cornaga and Browns Bay Realty.

[116] All three valuers were given the same instructions by their respective engaging parties, namely, to assess the home's market value in its undamaged state and "as is". After much questioning and discussion the independent valuers provided evidence which established an average value for the home in its undamaged state between $610,620 and $620,000 (Mr Kroes was not happy to shift from $620,000). In its current "as is" state, Mr Kroes stated the home was worth at least $296,000 and Mr Regal and Mr Foote placed the value at approximately $300,000. The net loss on the diminution of value basis would be in the vicinity of $320,000.

[117] Mr Heaney submitted that the diminution in value as a basis of calculating damages is appropriate where there are comparable houses in the same area that would serve as an appropriate replacement. Mrs Dawson's evidence was that she was not happy to move and Mr Dawson was not happy for his family to move notwithstanding that their circumstances had changed. The home is the sole matrimonial asset and it was suggested by the respondents' counsel that the retention of the home may not be financially feasible

in the relationship property settlement. Whilst Mrs Dawson had made enquiries of comparable homes in the area she was not definite on whether moving home might be a possibility. Mr Cornaga gave evidence (as a practicing real estate agent in the locality of the home) of the probable availability of alternative homes at an appropriate replacement price.

[118] Having heard the evidence of the valuation experts, this home is clearly not worth restoring in the manner proposed by Mr Hill's comprehensive scope of works and costings. An appropriate measure of loss for this home is $327,631.30; my determination of loss is similar to the valuer's diminution in value in paragraph [116] above.

Contractual Claim

[119] The meaning of clause 14 is straight forward. It is a provision whereby the Dawsons acknowledged that they were aware that the home had weathertight issues, that more remedial work needed to be undertaken and that there was no assurance as to the weathertightness of the home offered by the Fullers. In addition to the Dawsons' tortious claims they also claim against the Fullers for breach of warranty based on the standard clause 6.2(5) of the sale and purchase agreement. The Dawsons essentially allege that a great deal of the 2005 remedial work undertaken by OPC was unconsented work and that Fullers have breached their warranty in clause 6.2(5). The Fullers' position is that the contractual claim is precluded by clause 14. Clause 1.3(3) of the general conditions in the agreement is relevant.[41] I agree with the Fullers' submission that the warranties contained in clause 6.5(2) are all in effect about the quality of any building work and weathertightness being a Building Code essential. Mr Tim Jones concedes that clause 14 must prevail because of clause 1.3(3) if there is any conflict between it and the

[41] Para 20 of Tim Jones' brief of evidence dated 12 May 2011.

warranties in clause 6.5(2).[42] Mr Tim Jones appears to conclude that there is an inconsistency.[43] The purpose of the warranty in the clause 6.5(2) is to provide a warranty as to quality of building work and weathertightness and clause 14 is clearly contradicting this (it states that this house is not weathertight) so it must prevail. The breach of warranty claim cannot succeed.

Fair Trading Act claim

[120] Mr Cornaga was the sellers' (Fullers) agent and owed a duty of care to the Fullers. Real estate agents engaged by vendors do not owe such a duty of care to a purchaser where (as in this claim) the real estate agents are acting as agents on behalf of the vendor, not the purchaser.[44] The Dawsons allege that Mr Cornaga and the seventh respondent are liable to them, in tort and also under the Fair Trading Act 1986 for a statement that was allegedly made by Mr Cornaga, representing that the property was fully repaired.[45] Having considered the evidence and certainly after listening to Mr Dawson and Mr Cornaga, I am satisfied that the Dawsons' claim under the Fair Trading Act, that Mr Cornaga made a deceptive and misleading statement that the house had been fixed, must fail. Mr Dawson in answering Mr Heaney stated that he acknowledged that the house had leaking issues and there possibly could be more in the future. Mr Dawson's evidence does not satisfy me that he was told that the house had been fully repaired or that he relied upon Mr Cornaga for that mistaken belief. The Dawsons evidence was contradictory for it is not credible that they can say they believed that Mr Cornaga told them that all work was completed when they acknowledged that clause 14 stated that further repair work was required.

[42] Para 13 of Tim Jones' brief of evidence dated 12 May 2011.
[43] Clause 1.3(3) reads: where any inserted term (including any further terms of sale) conflicts with the general terms of sale the inserted terms shall prevail.
[44] *Van Workum & Ors as Trustees of the Van Workum Family Trust v Auckland City Council* [2010] NZWHT AUCKLAND 20 at [24] Adjudicator S Lockhart, QC.
[45] Para 28 of Mr Dawsons' brief of evidence dated 25 February 2011.

CONCLUSION

[121] The Dawsons fail in their claims against all respondents. Because of my findings above, I am not required to make a determination on the Dawsons' claim for general damages.

DATED this 2nd day of August 2011

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K D Kilgour
Tribunal Member