WEATHERTIGHT HOMES TRIBUNAL
CLAIM NO: TRI 2008-101-000045

BETWEEN	**ALISON MARGARET HEARN, MURRAY DEANS and HARTHAM TRUSTEES LIMITED as Trustees of the A HEARN FAMILY TRUST** Claimant
AND	**PARKLANE INVESTMENTS LIMITED** First Respondent
AND	**EMPA GROUP CONSULTANTS LIMITED** Second Respondent
AND	**WELLINGTON CITY COUNCIL** Third Respondent
AND	**RAJU MORAR, NEESHA MORAR and ISHWERAL MORAR as Trustees of the I & R MORAR FAMILY TRUST** Fourth Respondent
AND	**MARK ANDREW DEBNEY** Fifth Respondent
AND	**TONG LIU and WEN TENG** (REMOVED) Sixth Respondent
AND	**BARRY MILLAGE** Seventh Respondent
AND	**BARRY MILLAGE ARCHITECTS LIMITED** Eighth Respondent
AND	**WADESTOWN DEVELOPMENTS LIMITED** Ninth Respondent
AND	**HAYIM NACHUM** Tenth Respondent

Hearing: 11th, 12th and 15th December 2008

Counsel Appearances: Matthew Sherwood-King, counsel for claimants;

M Anderson, counsel for the first respondent,
C Matsis, counsel for the second respondent,
D Heaney SC and C Goode, counsel for third respondent,
R Poutawera, counsel for fourth respondent,
J Tizard, counsel for the fifth and ninth respondents
J Langford and A Kothroulas, counsel for the seventh and eighth respondents.

Appearances:	Mr Chris Phayer, WHRS Assessor. Ms. Alison Hearn, claimant. Mr Oliver Gilbert, expert for the claimant. Ms Dianne Johnson, expert for the claimant. Mr Sam Hay, expert for the claimant. Mr Thomas Wutzler, expert for the claimant. Mr James White, expert for the claimant. Mr Royston Davidge (by telephone), expert for the claimant. Mr Gary Wilson, employee of the first respondent. Mr Peter Blades, director of the second respondent. Mr Russel Cooney, expert for the third respondent. Mr Colin White, witness of the third respondent. Mr Peter Heazlewood (by telephone), expert for the fourth respondent. Mr Mark Debney, fifth respondent and director of the ninth respondent. Mr Gary Koornneef, expert for the fifth respondent. Mr Dennis O'Sullivan (by telephone), expert for the fifth and ninth respondents.
Decision: 30 April	

INTERIM DETERMINATION
ADJUDICATOR: R PITCHFORTH

CONTENTS

INTRODUCTION

[1] The claimants are Alison Margaret Hearn, Murray Deans and Hartham Trustees Limited as trustees for the A Hearn Family Trust (the Trust). The Trust is the owner of a home situated at 2C Lytton Street, Wadestown which, is a badly built dwelling. Some of the faults have resulted in water ingress making it a leaky home whilst other defects are not related to the leaks.

[2] The Trust seeks redress from the parties it believes to be responsible and those parties deny liability or in turn seek indemnity from others.

PRELIMINARY ISSUES

The Parties

First and Tenth Respondents - Woodward Shelf Company No. 1 Limited and Mr Hayim Nachum

[3] The first respondent, Woodward Shelf Company No 1 Limited, formerly Boulcott Investments Group Limited, previously known as Parklane Investments Limited (Parklane) was the previous owner and developer of the site on which the property is situated. Parklane took part in some of these proceedings, including filing a statement of defence, making claims against other parties, attending the taking of evidence and cross-examining of witnesses, providing an expert witness for the experts' conference, and negotiating a possible settlement.

[4] On 27 November 2008 counsel for Parklane wrote to the Tribunal and the other parties advising that the company had not traded for three years and was no more than a shelf company with no assets or liabilities and that the company had been put into liquidation. He also advised that his client's director was disappointed that the claimants had rejected his goodwill, presumably some proposed settlement.

[5] As Parklane is now in liquidation they were removed as a party to the claim with all remaining parties agreeing that I could not make a decision against it. The Wellington City Council then sought the joinder of Mr Hayim Nachum, Parklane's sole director. Parklane's counsel advised that they did not act for the sole director but made submissions in opposition to the application for joinder.

[6] On the basis of the submissions from the parties in support of joining Mr Nachum, I concluded that it was desirable for him to be joined as a party. There was tenable evidence of a breach of duty and a causative link to the remedial work required. I accordingly joined Mr Hayim Nachum, the sole director of the company to the claim, as the tenth respondent.

[7] Mr Nachum however did not appear at the hearing, as the period required for filing a response had not yet expired. The parties agreed to recall witnesses in the event that Mr Nachum may need to cross-examine them. If Mr Nachum has any claim that he wishes to pursue, the parties will respond during the statutory periods.

Second Respondent – EMPA Group Consultants Ltd

[8] The second respondent, EMPA Group Consultants Limited (EMPA), was the engineer involved in the construction on the site. EMPA made an application for removal at the start of the hearing on the basis that there were no grounds for the claim against EMPA and no factual evidence to indicate that EMPA is responsible for any issues relating to the leaks. Counsel for EMPA, Mr Matsis, submitted that it was wrongly assumed that if Mr Blades (the sole director and director of EMPA) was involved at the start of the project he is naturally involved in the end of the process. It was therefore submitted that because this expert opinion was not based on factual evidence, there could be no finding against EMPA.

[9] Mr Heaney SC for the Council, said that as the racking of the dwelling was not an issue in the case and as that was the only engineering

issue signalled by the parties, EMPA should be removed. However, if the claim is more than that, he thought that EMPA should stay.

[10] Mr Tizard, counsel for the fifth respondent said that engineering issues relate to the driveway and the case against the builder is not concerned with the driveway, and so there was no need to keep EMPA in. Mr Tizard also pointed out that the claimants had no contract with EMPA.

[11] Mr Sherwood-King on behalf of the claimant Trust opposed the application on the grounds that the bank is a significant issue. He submitted that Mr Blades was involved in the design stages of the house and on site during the dwelling's construction, and so any removal would be premature. He cited the evidence of Mr Taylor, a chartered professional engineer, as the basis of the claim against EMPA. He also pointed to the evidence of Ms Dianne Johnson, a building surveyor, that the defects of the bank were causing leaks. The claimants insisted that there would be evidence to show that EMPA was liable.

[12] On the basis of the opposition by the claimants, the application for removal was declined. During the hearing the Council made extensive efforts to show that EMPA was liable to the Council.

Fourth Respondent – Trustees of the I & R Morar Family Trust

[13] The fourth respondents are Raju Morar, Neesha Morar and Ishweral Morar as trustees of the I & R Morar Family Trust (Morars). The Morars were previous owners of the property. They originally filed a statement of defence and a claim for set-off against Parklane, EMPA and the Council with an indication that they did not wish to be represented at any preliminary conference, mediation or subsequent adjudication.

[14] The Morars were subpoenaed for cross-examination on 22 August 2008 but took no further steps until the hearing where they were represented by Mr Poutawera. They made an application for removal at the start of the

hearing that was opposed by the other parties. The Morars' application for removal was declined.

Joinder of Body Corporate 88315

[15] In closing submissions the claimants sought to join Body Corporate 88315 as a further respondent to the proceedings relying on the judgment of Heath J in *Body Corporate 188529 & Ors v North Shore City Council & Ors (No. 3) (Sunset Terraces)* [30 April 2008] HC, Auckland, CIV 2004-404-3230. Counsel for the claimants submitted that if a body corporate has standing for High Court purposes, it must also have the same standing for Weathertight Homes Tribunal purposes. However counsel acknowledged that the Weathertight Homes Resolution Services Act 2006 (the Act) sets out a procedure that must be followed in order for multi-unit claims to be brought to the Tribunal. In particular, section 22(3) of the Act was not complied with and therefore Body Corporate 88315 could only be joined as a respondent in this claim.

[16] The basis of the application was that there is no certainty over what part of the property is controlled by the Body Corporate and what part is controlled by the claimant Trust. Counsel for the claimants believed the joinder was necessary to complete the jigsaw and to remove objections to jurisdiction on the grounds that the Tribunal only has jurisdiction over the claimants' property.

[17] EMPA opposed the application on the grounds that the claimants were attempting to circumvent the requirements of those provisions of the Act relating to multi-unit complex claims and that the Body Corporate does not meet the definition of 'respondent' in the Act. It was submitted that this is an inappropriate use of the Tribunal's powers under s 111. In addition, as the claimant Trust did not seek to join the Body Corporate during the hearing or put the other parties on notice, a joinder at this stage would be prejudicial to the respondents.

[18] In support of those submissions, the third respondent, Wellington City Council (Council) submitted that it would also be prejudiced by the late joinder. In particular, the Council did not have the opportunity to call engineering evidence or give evidence relating to the losses that may have arisen in respect of the Body Corporate land. The Council also stated that no evidence was called because not only was there no claim by the Body Corporate, but also the Council knew that any claim by the Body Corporate would fail. Furthermore, the Council stated that it would be *ultra vires* for the Tribunal to determine such a claim.

[19] In opposing the application for joinder, the fifth and ninth respondents noted that the claimant's right to recover in respect of common property was always at issue and so the claimants could have taken steps to gain the consent of The Body Corporate to have it joined as a party. These respondents argued that the Body Corporate is not a claimant in this claim as the necessary authority required by section 22 of the Act was not achieved. Neither was there any meaningful documentation, whether claim or defence, no representation and no evidence pointing to liability to or by the Body Corporate. Its late joinder would therefore deprive respondents of the opportunity to provide evidence in rebuttal of any claims.

[20] There seemed to be some confusion as to the status of the owners and the Body Corporate. The situation is best described in the words of Venning J in *Body Corporate 189855 & Ors v North Shore City Council & Ors (Byron Ave)* [25 July 2008] HC, Auckland, CIV 2005-404-005561 where he stated at para [56]:

> ….Under the Unit Titles Act 1972 the Body Corporate is not the legal owner of the common property as the common property is held or owned by the unit owners as tenants in common. That is a significant feature of the Act. While the Body Corporate has obligations and rights under the Act in relation to the common property, it does not own it. It has an administrative role in relation to common property.

[21] The claimant Trust is one of the tenants in common of the Body Corporate land. If there is any claim arising as a result of the construction on

the Body Corporate land, it falls within the claim of the claimant. The application to join the Body Corporate was therefore declined.

Seventh and Eighth Respondents – Mr Barry Millage and Barry Millage Architects Ltd

[22] Mr Barry Millage and Barry Millage Architects Limited applied to be removed as parties to this claim. Evidence given in relation to the involvement of these parties came from Mr Cody, a Council witness, who said that he had been involved in the preparation of the joinder application. Mr Cody's understanding was that Mr Millage had issued a practical completion certificate referring to inspections made by him. Mr Cody agreed that he had no information showing that Mr Millage or his company was the on-site architect. He confirmed that there was no other evidence on the Council file.

[23] Mr Cody referred to the sheet labelled 'Hayims List' and an email from Mr Millage to Ms Goode (counsel for the Council) in which Mr Millage denied being an architect for Parklane and had been:

> Asked to cast my eye over it, and issue a practical completion certificate so that the developer could get finance and the Code Compliance Certificate from the [Council].

[24] Mr Cody accepted that there was no Council record of sighting the practical completion certificate until some nine years after it was created. It therefore follows that the Council did not rely upon it at the time. Mr Cody was asked about the second ground for joining Mr Millage namely that he had prepared drawings. He could not help or provide any evidence to support this allegation.

[25] Ms Goode indicated that she had further evidence in relation to this matter, but did not elect to give evidence. Parklane had also made allegations against the seventh and eighth respondents but did not provide any evidence.

[26] There being no other evidence adduced indicating that Mr Millage or Barry Millage Architects Limited were involved with this property, I conclude that neither party has any liability to the Council or any other party. The claims against them are accordingly dismissed. This effectively deals with the application for removal.

[27] Ms Kothroulas, who appeared for these parties, was then given leave to withdraw.

CHRONOLOGY AND BUILDING PROCESS & FACTUAL BACKGROUND

Background

[28] In 1998, Parklane owned land at 2 Lytton Street. Parklane proposed building four units on the site. To do this the site was divided into 2A and 2B and on each site there were to be two units. The units were named 2A, 2B, 2C, and 2D. The use of this ambiguous numbering system caused subsequent confusion. However for clarity, I shall refer to the units by their unit numbers. The unit that is the subject of this adjudication is unit 2C.

[29] The two projects had two separate consent numbers even though both projects were carried on at much the same time and as the evidence from the Council showed, the monitoring of the projects were also treated as one matter.

Preparation for building

[30] On 1 December 1998 Tong Liu applied to the Council for a building consent as the agent for Parklane. The application was for two new houses on Lot 3 DP 85270. The owner was named as ‘Parkline (sic) Investments Ltd’ and the applicant was ‘In Perspective’, the trading name of Tong Liu. It was given number 48567. Details of those involved in the building were labelled ‘TBA’.

[31] Also on 1 December 1998, Mr Peter Blades of EMPA completed 'Producer Statement – PS1 – Design' in relation to two three level townhouses at 2B Lytton Street. These townhouses would become units 2C and 2D.

[32] The space for the insertion of the name of the design firm has been left blank. Mr Blades in the PS1 stated that he was to:

> "[P]rovide structural design services in respect of the requirements of Clause(s) B1 / Structure of the Building Regulations 1992 for part only as specified of the building work. The design has been prepared in accordance with Lot 3.0, Cl 2-70, B1/VmI & 2,4,5 B1/ ASI respectively of the approved documents issued by the Building Industry Authority and the work is described on EMPA Group drawings titled 'Proposed new townhouses, Lytton St (indecipherable) and numbered 50, 51, 52, 53, 54, 55, 56 and the specification and other documents according to which the building is proposed to be constructed."

[33] He went on to certify that:-

> As an independent design professional covered by a current policy of Professional Indemnity Insurance to a minimum value of $200,000 I BELIEVE ON REASONABLE GROUNDS that subject to
>
> i. the site verification of the following design assumptions – soil condition to be verified upon site excavation and confirmed by Engineer, and
> ii. all proprietary products meeting the performance specification requirements,
>
> the drawings, specifications and other documents according to which the building is proposed to be constructed comply with the relevant provisions of the building code.

[34] The document was signed by Mr Blades who also gave his qualifications and his registration number. That was the last formal involvement Mr Blades had with this project.

[35] On 18 December 1998 the Council issued an Approval of Building Consent No. 48567. The approval stated that 'the building work **<u>may not</u>** take place because the proposed works fail to comply with either the requirements of the transitional District Plan or the Proposed District Plan'. Resource management consent was required. The consent stated that it did not detail all matters that may or could affect this building consent and

referred to the Project Information Memorandum (PIM). Para 7 of the consent stated that:

> Code Compliance Certificates will not be issued for works where there are outstanding inspections, where it is no longer possible to inspect work undertaken, or where there are outstanding monies to be paid relating to the consent.

[36] Under **Item: Structural**, the requirements were:

> Foundations on solid ground
>
> The Design engineer is to supervise the work and comply with the supervision clause below.
>
> All structural work is to be supervised by the Engineer responsible for the design who shall furnish a certificate to the manager on completion of the structural work verifying that the work has been completed in accordance with his plans and specifications as approved in the building consent and that the workmanship is of satisfactory quality.
>
> Producer statement consent.

[37] Under **Item: Building**, the requirements are, inter alia:-

> The Environmental Control Business Unit is to be given 48 hours notice before commencing work and 24 hours notice before carrying out any of the following inspections.
>
> i. Siting, placing any concrete, foundations, piles/poles or timber flooring.
>
> ii. Wastes in/under slab floor
>
> iii. Fitting any external and /or internal linings
>
> iv. Testing and plotting any drainage work before backfilling
>
> v. On completions
>
> Foundations to be into solid ground
>
> Other approvals required
>
> 1) Grease all bolts, nuts, washers that are in contact with treated timber, and exposed to the weather elements.
>
> *2)* Cladding systems: refer to the manufacturers specifications for bracing, nailing, and the finishing coatings requirements.

[38] Under **Item: Resource Management** the requirement was:-

> No work may commence until such time as a resource Consent for a building which is over the 8 meter (including exclusion for gables and hip roof) height limit is granted or the proposal is amended to comply.

[39] On 16 December 1998 Parklane applied for an Application for Earthworks Consent citing Mr Peter Blades, EMPA Group (engineer).

Building History

[40] From this point on, it is not always easy to ascertain which part of the Council file applies to unit 2C. Mr Cody said in evidence:

> In respect of some confusion about the recording of information for the projects, I think our inspection records show that. However, given the timing of the projects, and as I referred to before, the fact that they were being undertaken by the same developer, the same contractors, then I would take this development, ie these two projects, and I would take the inspection records for both, and I would look at them both simultaneously, and say that these represent a picture for the whole development.

In the absence of evidence from those who created or maintained the file, Mr Cody's assumption may well be the best explanation for the Council's behaviour.

[41] There was nothing, according to Mr Cody, that indicated that the Council was given 48 hours notice before work commenced with regard to the siting of the foundations. Mr Cody had no information about when the first inspection was made, and, if anything was said or done about the siting and placing of foundations, there was no Council record for that.

[42] Mr Cody's evidence was that by the end of February 1999, no resource consent had been obtained but that the Council had carried out two inspections of the work that had been done. Mr Cody speculated that this was part of the reason why the Council did not inspect the ground lines and excavation to the south of the property but thought that as there was an engineer involved, this was not a concern.

[43] Mr Cody assumed that the work being done on units 2A and 2B, where he understood that engineers were active on site, would be similar to the work done on units 2C and 2D. Mr Cody said that there was reference in the Council files to the Council not having sighted the foundations but being satisfied when advised that there was a structural engineer involved. Mr Cody also confirmed that the first inspection was pre-cladding and the second was pre-lining.

[44] On 1 February 1999 Mr Toogood approved the preclad for units 2A and 2B. He also said in the notes:-

> Told builder to strap down roof trusses to studs and use stainless steel nails to bracing sheet of hardisheets. Engineer Peter Blades supervised all foundation work.

[45] On 3 March 1999 the Council issued a stop work notice until the resource consent was approved. Mr Cody confirmed in cross-examination that the Council regarded building activity that was not in accordance with the building consent as serious.

[46] The diary notes attached to Mr Cody's evidence were part of a more extensive set produced by the Council for discovery. Looking at the diary notes and Mr Cody's answer to a question on the point, the Council clearly treated the whole site as one building project. The running total of time spent on the project by the Council includes both projects. From their point of view the files show that all the parties were treated as being the same.

[47] On 23 February 1999 two separate officers spent 30 minutes at the site. Mr Toogood approved the pre-line for units 2A and 2B and Mr Quinn approved one for units 2C and 2D. There is no mention in the diary of the stop work notice. On 29 April 1999 Mr Taane visited the site to discuss stormwater with the plumber. On 12 May 1999 Mr Taane tested and approved stormwater and sewer installations. On 17 May 1999 Mr Taane did not give the final approval as amended plans were required.

[48] On 17 May 1999 Mr Toogood also attended the site. The diary entry reads:-

> Final to 2 units could not inspect for final as unit 2A had been altered so much that I told builder and gave him a site to bring it up if code I also said that when he takes AMP's into office he would have to go to the processing building officers for approval and we would need the engineers report on. All ok the units foundation inspection as I had not seen any of the foundation before pouring concrete and unit 2a had a basement added which was not on the WCC documents. (sic)

[49] On 20 May 1999 Mr Toogood checked the lower deck boundary.

[50] At some stage during the building process Mr Blades visited the neighbouring site and told the builder that the earthworks for unit 2C should be completed as it had obviously not been done. Mr Blades said that, even if he had been asked to, he would not have issued a PS4 as the requisite engineering work had not been done.

[51] On 19 August 1999 the Council issued a final Code Compliance Certificate for Building Consent No 48567. The Code Compliance Certificate was issued with certain conditions. They were:-

> This certificate relates only to building consent No 48567 (Units C and D). Nothing in this certificate states or implies that the following building work at the same or similar address complies with the building code:
>
> 46396 Two new townhouses (Units A and B) at 2A Lytton Street
>
> 54963 Lower basement and changes to floor plan related to SR 46396
>
> The issuing of this Code Compliance Certificate does not certify approval by Wellington City Council that the building work can be occupied. Council has no power under the Building Act 1991 to authorise occupation. The decision to occupy a building is made solely by the building owner on the basis that the owner considers that the state of the building is safe for occupation.

After the issue of the Code Compliance Certificate

[52] After the issue of the Code Compliance Certificate there was extensive activity in relation to the site and the other two dwellings. The Council sought to rely on this material to show that work undertaken on other

consented buildings after the issuing of the Code Compliance Certificate is proof that the Council cannot be negligent in relation to the claimants' dwelling. For instance, Mr Cody's evidence was that the PS4 issued in December 1999, (well after the relevant Code Compliance Certificate was issued) was treated or relied upon by the Council in respect of both projects. I do not accept that that inference can be made.

Sale to I & R Morar Family Trust

[53] Parklane sold the property to the Morars in 1999. The Morars purchased the property through a real estate agent and did not seek any pre-inspection reports. They purchased a new property on the assumption that it would be soundly built and not need any maintenance for some time. The Morars assume that their legal adviser checked whether there was a resource consent and Code Compliance Certificate.

[54] The Morars occupied the house for the first few years and then leased it for three or four years. The trustees registered a change in trustees on 14 August 2003. Mr Nachum called the Morars shortly after they arrived at the property so he could put the missing shelves in the wardrobes. They next spoke to him about the garage floor in 2004. There was some damage due to faulty plumbing in a shower-box. Mr Nachum was involved with the repairs.

[55] On 27 September 2004 the Council sent and the Morars received a letter following a landslip at the property. The Council inspectors reported that the property did not have stormwater controls to the external decks and urged the Morars to urgently fit spouting and downpipes to all decks and discharge them to an approved out-fall. The letter was not specifically directed to weathertightness issues, though there may have been some factors that were relevant. Mr Cody's evidence was that the work was not a Council requirement. The assessor did not regard the issue as one within the weathertightness legislation. The Morars took no action as it was not obligatory.

[56] The Morars undertook almost no maintenance while they owned the property. They cleaned the gutters once but were afraid of heights and did not attempt to do so again. They did not observe any cracks and did not undertake any painting or other work on the cladding. While they lived at the property, they saw no signs of dampness or of any external leak. The Morars' evidence was supported by Mr Peter Heazlewood who provided building support to the Morars and later carried out various maintenance items for Mrs Hearn.

[57] The Morars attempted to sell the property in 2002 and 2003. Two or three prospective purchasers obtained pre-purchase inspection reports and elected not to proceed. Following the failure of the sales due to the pre-purchase reports, the Morars contacted Mr Nachum concerning the difficulty in gaining a sale for the property due to the builders' reports. Mr Nachum suggested that the estate agent was not doing his job properly and recommended an agent who could sell the property. That agent would not proceed with a sale as the garage floor needed repair.

[58] The Morars were not shown the prospective purchasers' inspection reports and so they sought a report from the Weathertight Homes Resolution Service (WHRS). The Morars chose the WHRS as it was the cheapest and most economical way of getting a report. They did not then believe that the house was leaking. Their only ground for concern was the prospective purchasers' pre-inspection reports.

[59] The subsequent WHRS report was prepared by Mr Colin White and was issued in September 2004 (White Report). The Morars disagreed with some aspects of the WHRS report and said that, to them, there was not any evidence of a leak. They consider that Mr White did not identify any particular leak.

[60] Mr Heaney SC, who called Mr White under subpoena, took steps to discredit him as a witness before he gave evidence. The report was referred to but was not produced. It was not part of the official record for this claim

[61] The report apparently identified some work that was required but not related to leaks. The cost was estimated at $6,000 to $8,000. The Morars were in the process of negotiating with Mr Heazelwood to have repairs done when the property was sold.

[62] The Morars knew the agent for unit 2B, David Vaughan, who commented that there were excess buyers for unit 2B so they told him that he was welcome to take prospective buyers through the property at unit 2C. During the sale and purchase process, the Morars were not asked and did not volunteer any information about weathertight issues. They did not meet the claimants.

[63] The Morars sold the property to the claimants on 13 October 2005 with settlement on 14 December 2005. The Morars say they were unaware of any leaks or weathertight issues at the time of sale. The agreement referred to repairs to be completed before purchase but the Morars' evidence was that it was damage caused by an impact from a car and some inside work unrelated to weathertightness.

Discovery of leaks

[64] In or about December 2006 the claimant became concerned about weathertightness issues at the property and on or about 16 March 2007 the claimant applied to the WHRS for an assessment.

EXPERTS' REPORTS AND EVIDENCE

The Assessor's Report

[65] Mr Phayer was the WHRS assessor assigned to this claim. In the course of his investigation, he inspected the Wellington City Council file. He reported:-

> 2.3 The property file records contain moderate levels of detail in respect of the general construction design. The architectural drawings basically

include floor plans, building elevations and cross sections, and do not include larger scale, pertinent design details (Appendices D & E). The property file is considered incomplete, as some documentation and responses to site reports are not included.

2.4 No supporting technical or advisory literature, such as that produced by cladding manufacturers is included on the property file. The project specification is considered a generic document, rather than being project specific, with examples of discrepancies indicated below. It would appear the design and building details for this project were approved by the Territorial Authority (TA) as an alternative solution.

2.5 In general terms, it appears the overall shape and form of the building is largely in accordance with the architectural design concept of the consent documentation. However, it is apparent from my site inspection that various discrepancies exist between the building consent documentation, as submitted to the TA, and the actual construction erected. The more obvious discrepancies include:

[66] The specified details and the construction details were then set out in a table. No parties disagreed with this aspect of the report. These details were:

Specified Details	**Constructed Details**
Exterior cladding specified as 6mm Hardiflex™, but noted on drawings as Harditex™	7.5mm Harditex™ installed. Not fully jointed & coated in some areas
Solid balcony walls indicated to deck areas	Mixed solid walls and open timber balustrades
Double thickness wing walls indicated between decks at inter-tenancy line	Single thickness wing walls constructed
Texture coating indicated to parapet walls	Texture applied on face only
Elevation appearances and balcony floor plans	On-site changes include, timber pergola not installed, window arrangements altered (west) & upper balcony floor plan changed
Modified ground line and foundation bracing implications (structural design drawing S5)	Modified ground line changed

[67] At para 6.2, Mr Phayer noted a number of design features that have the potential to enable damage to be caused to the dwellinghouse by water penetration during its intended life. None of these items were contested by any party. They were:-

- Monolithic wall cladding not installed strictly in accordance with manufacturer's instructions and with inadequate water management features
- Inadequate cladding clearances against sloping bank (south elevation)
- Inadequate weatherproof coating provided to monolithic cladding in some areas
- Face-fitted external joinery, with inadequate perimeter waterproofing
- Exposed parapet walls and apron flashings
- Deck barrier wall junctions and handrail/capping details
- Balcony areas cantilevered over living spaces
- Inadequate weatherproof detailing at penetrations for services
- Elevated site location and three story building in high wind zone
- Moderate eaves and no eaves over garage doorway
- General ground contours

[68] The assessor also noted items of inadequate or poor workmanship that do not affect the weathertightness of the property and are therefore outside the scope of this decision. However as they affect health and safety issues, the claimant is encouraged to deal with them as part of any remedial work. The assessor conducted invasive and destructive testing as well as obtaining laboratory analysis of the samples. These aspects of the report were also uncontested.

Other expert reports

[69] The claimants engaged a registered building surveyor, Mr Thomas Wutzler regarding the necessary remedial work required for the subject dwelling (Wutzler Report). During his investigations, Mr Wutzler conducted a thorough examination of the property and conducted extensive invasive tests. His report confirmed the assessor's report. He gave evidence of poor workmanship and extensive damage that was not substantially challenged. Ms Dianne Johnson, another building surveyor engaged by the claimants also provided a thorough corroborative report that reached the same conclusions (Johnson Report). I accept both these reports.

[70] The experts agreed that the Johnson report was factually correct but disagreed that all the matters referred to were a causative factor in relation to leaks. In particular some items relating to the shared driveway and the inadequate construction of the car deck were challenged. I accept that these matters are not the cause of the leaks but they did cause more water to be directed to the place where leaks occurred.

[71] Abuild Consulting Engineers Limited (Abuild) produced evidence on behalf of the claimants relating to the bank under the deck and the flow of water down the bank. They also provided evidence that the low factor of safety and incipient instability does not comply with the building code or the Building Act 2004. Abuild recommended dismantling the deck and the upslope façade for the house, the construction of a timber pole wall together with an anchored retaining wall, and construction of ground anchors.

[72] Mr Roy Taylor of Roy Taylor Engineer Ltd provided a report showing that the soil structure is marginal. He also noted some tilting of the whole house of approximately 2mm in 600 mm vertically affecting most of the walls of the house. The unit is leaning away from the car deck.

[73] Although a matter of concern to the claimant, it was conceded by the claimant that this racking of the house and the inadequacies of the deck and the bank were outside the scope of a weathertight claim. However, any changes to the deck will require consent and it is unlikely to be given without engineering approval.

Council's Experts

[74] The Council appointed two experts for the experts' conference, Messrs Cody and Cooney. Neither expert filed an expert report but each produced a statement in evidence. Although they said that the evidence was their own independent expert view reached without consultation, it is notable that their evidence was in many cases identical, word for word.

[75] Counsel for the Council explained that she had transferred the information from the expert reports into the statements. It would have been more useful to the Tribunal if the reports had been filed before the experts' conference so that the experts could then examine the situation based on their view. The Council's counsel was also of the view that the High Court Rules relating to expert witnesses do not apply to the Tribunal. This view is contrary to para 9.2 of the Chair's Directions for standard and lower value claims (para 11.2 of the Chair's Directions for Multi-Unit Claims).

[76] Some parties challenged the expertise of the Council's experts. In relation to Messrs Cooney and Cody, who were both experts called by the Council, such a challenge was reasonable as their evidence on many points was identical and neither had produced a report filed with the Tribunal.

[77] Mr Cody gave evidence as an expert witness. He has extensive qualifications and experience, which includes a Certificate Builders Business from TAFE, NSW in 1985. He said that he represented the Wellington City Council as their technical expert on more than 60 claims brought through the WHRS Act. He also said that he had a good understanding of the requirements of a performance-based building code and gave advice to councils on these matters. He has been involved in reviewing Council processes and guidelines and is involved at a national level in the creating of a process to deal with building products.

[78] Mr Cooney disclosed no formal qualifications but has taught courses recognised by NZQA in relation to building matters.

[79] I have outlined these backgrounds because their evidence was on behalf of the Council rather than as an independent expert. They were required to look at council files and reconstruct what had happened during the building process. They put the results in the best light possible. Some was opinion evidence about matters outside their area of expertise and so has been treated accordingly. I accept that they are experts in the matters for which they claim expertise, namely:

- Principles of weathertightness design,
- Identification of building defects,
- Identification of consequential loss caused by those defects,
- Whether the defects amount to a breach of the Building Act and the New Zealand Building Code
- Remedial works that are required to remedy the defects and consequential damage; and
- The costs of those remedial works.

[80] They were asked to give opinions on other matters on behalf of the Council outside of their specific areas of expertise. They included:

- Whether the council's processing of the building consent was adequate;
- Whether the defects in the garage floor and threshold and the damage to the walls adjacent to the garage door opening would have been clearly obvious to the trustees at the time of purchase;
- Should the trustees then have employed a building surveyor who would have found the other defects?

Mr Koornneef's evidence

[81] Mr Koornneef was engaged as an expert on behalf of the ninth respondent, Wadestown Developments Limited (Wadestown). He is a building inspector who provides reports for prospective purchasers. He had not been instructed at the time of the experts' meeting and so was not present. He was however given an opportunity to meet the other experts at the hearing and discuss their reports.

[82] Mr Koornneef's expert opinion was that he did not consider the cracking has resulted from poor workmanship but was a design problem with the materials used. He considered it could be addressed by regular and timely maintenance. He also recommended widespread use of sealants.

[83] Mr Koornneef did not have the benefit of data from extensive investigations nor did he make the extensive invasive tests made by others. His evidence is outweighed by the other experts and does not affect the assessor's report or the conclusions reached at the experts' conference.

TECHNICAL BASIS OF CLAIM & CAUSES OF DAMAGE TO THE HOUSE

[84] The statutory 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, is required to 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 issued by the local authority.

[85] 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).

[86] At the completion of the building work, the local authority's obligation under the Act is to issue a Code Compliance Certificate, but only if it is satisfied on reasonable grounds that the certified work complies with the Building Code (section 43 of the Building Act).

[87] The experts including the assessor met under the chairmanship of Adjudicator Ruthe on 17 July 2008. They considered the assessor's report and the reports prepared and tabled by the experts. They reached a consensus on a number of matters. At the request of the Council, the experts had an earlier assessor's report (the White report) at the meeting. Like the originals of the Cooney and Cody reports, it was never produced by the Council.

[88] The experts discussed the leaks referred to in the assessor's report. The minutes of the meeting show that unless it is otherwise noted the experts

agreed on the matters considered. The experts did not agree on some matters that they claimed were outside the jurisdiction of the Tribunal. There is however no substantial dispute as to some of the key causes of damage.

[89] After considering all the expert evidence I conclude that the primary causes of the moisture ingress are as follows:

(a) The monolithic wall cladding was not installed in accordance with the manufacturer's instructions nor did it have adequate water management features.
(b) The cladding gives insufficient cover to the joists.
(c) The cladding is not fully jointed and coated to the south elevation. It is not fully coated behind the batten at the junction of dissimilar cladding materials, behind the downpipes fascias, barges and stringers and coated on only one side of the parapets. It is not fully joined at the tops of the inter-tenancy and balustrade walls.
(d) Horizontal joints are lacking or inadequate. The experts agreed that the sheet layout was incorrect adjacent to the windows and there were no control joints.
(e) Inadequate capping detail, a flat top, and installation over uncoated cladding sheet.
(f) The upper floor level and enclosed balustrade wall has the original capping installed directly over timber framing. The flat timber capping was not in accordance with the manufacturers' literature. The capping being installed prior to the fibre-cement being fully coasted increases the likelihood of moisture absorption.
(g) Face-fitted joinery with inadequate perimeter weatherproofing and either no or inadequate head flashings. In addition the use of sealant as a fillet to the edge of the aluminium joinery rather than installing sealant to using an inseal strip behind the facing.
(h) Substandard sealing of rustic plugs, no soaker flashings and timber plugs were loose fitted.

(i) Waterproof coating had delaminated and ply substrate failed. Workmanship was inadequate in the installation of the membrane with no evidence of joint filling or alternative bond breaking provisions. The mat was not correctly embedded within the liquid membrane.

(j) Lack of spouting on deck edge of the northern decks. Mr Cody did not agree that the lack of collection from the decks did not cause the moisture entry below. Mr Cody however agreed in cross-examination that moisture coming from the last timber slat in the outside car deck is running down onto the end of a double floor joist. He described the wedge as being part of the actual building structure itself whereas the two dominant pieces of timber were part of the car deck. Mr Cody thought that the change from solid to slatted balustrade was not a compliance issue.

(k) The modified ground line is changed from consent drawings. There is very a steep bank to the south of the building with minimal retaining structures and acknowledgement of previous landslip history in the immediate vicinity. On the south elevation a small area of soil has collapsed and is currently stockpiled against the south east corner of the lower floor.

(l) The construction of the garage threshold was not constructed to accommodate a liquid applied membrane and the remedial work is inadequate and incomplete.

Damage

[90] The timber in the building is damaged to a large extent and requires replacing. There are consequential repairs required.

[91] Some of the damage claimed as a result was instability and or movement in the property in proximity to the modified ground line and movement away from the bank. A claim for the ‘racking’ of the building was abandoned during the hearing. The claimant accepted that the remedy was outside the jurisdiction of this Tribunal.

[92] The remaining particulars of damage were:

- the high moisture content leading to cracks in and damage to the cladding,
- decay in the wall and floor framing and parapets,
- damage to internal decoration and flooring, carpets and other floor coverings.

Future Damage

[93] It is clear that the house will continue to leak and rot. It is unlikely to have a life of 50 years as stipulated in the Building Code at clause B2 performance requirements. Future damage will include irreversible fungal decay that will lead to structural failure. The external cladding, internal cladding and thermal insulation materials will continue to deteriorate. Health may be affected and the cosmetic damage will become more noticeable.

Lack of Maintenance

[94] Some experts said that they thought that with better maintenance the damage would have not have been as great. This would have been, in most cases, a matter of degree.

[95] Mrs Hearn as trustee gave evidence that she employed Mr Heazlewood to undertake maintenance and provided a list of work undertaken. He was working to his recommended maintenance programme. Although witnesses may disagree with the priorities of the programme or its effectiveness, Mrs Hearn relied on professional advice in dealing with maintenance issues.

[96] Although there were items of incomplete maintenance, I do not find that this contributed to the defects in the building and the cause of the leaks. In the normal course of events, some work would have taken place after the time when the leaks were discovered. This matter can be addressed when considering betterment.

REMEDIAL WORK & QUANTUM

[97] The experts at the meeting all agreed that the only satisfactory remedy is to completely reclad the building. Additional areas of damage are likely to become apparent and will have to be repaired. Such items will include decayed timber framing. The assessor set out a general scope of work that was further developed by the claimant's expert witnesses.

[98] Mr Wutzler completed a scope of works based on the assessor's inspections as well as his own inspections and expectations for the reclad. Mr White of Kwanto assessed the cost of the work based on those inspections. He revised his costs taking into account that any repainting would be betterment and an undertaking from the Council, through counsel, that double glazed windows are not required in order to obtain a Code Compliance Certificate.

[99] Mr Cooney contested the amount required to repair the defects that are within my jurisdiction to award. He believed that some proposed work should be removed from the schedule as these items were outside my jurisdiction or were over and above the work needed to remedy the defects and the damage caused. These included:-

- Engineering works relating to the bank and driveway;
- The installation of fire-rated sheets beneath part of the ground floor;
- Full replacement of all joinery with double glazed units;
- The replacement of undamaged (untreated) timbers to the decks and garage floor with treated timbers;
- More extensive replacement of floor and wall framing at the ground floor (in part for lack of maintenance); and
- The installation of a rigid air barrier and for the replacement of all undamaged downpipes and spouting.

[100] Mr Cooney emphasised that the house is now ten years old and the cracks should have been identified during regular house inspections and immediately repaired as recommended by James Hardie as part of its maintenance. He also commented that the house is now due for repainting. Mr Cooney recommended deductions for normal wear and tear and deduction of the painting costs. Betterment issues such as painting have been removed from the Kwanto assessment.

[101] Some of the costs relate to the removal of the car deck and its replacement. Mr Cooney's evidence was that this should be excluded as it is not causative of the leaks. While Mr Cooney is correct in relation to the leaks, I am satisfied that in order to repair the dwelling it will be necessary to clear away the deck. I am also satisfied from the evidence of all the witnesses that the deck, even if replaced, would not be adequate to receive a Code Compliance Certificate. In order to do the work and achieve compliance the deck will need to be reconstructed to the standard required by the Council. The evidence is that the Council expect a PS4 from a qualified engineer before they would issue such a certificate.

[102] Mr Gary Henry Wilson, originally a witness for the first respondent but later called by the Council, gave evidence that remedial work was required on the building. He said that he could do it for $107,718.75 including GST. He agreed that he might find more work than expected but that his relationship with Mr Nachum and his companies was such that he was prepared to take any losses that may arise in individual contracts.

[103] Mr O'Sullivan, called by the Council, was probably at a disadvantage having prepared a quotation based on early evidence and his experience with another of Mr Nachum's properties. He was not present to hear other evidence and gave evidence by phone. Other expert witnesses would have required further information before being able to accept Mr O'Sullivan's quote.

[104] The claimant did not accept this alternative solution, there being less analysis of the repairs required and the costs of repair than had been supplied by Ms Johnson, Mr Wutzler and Kwanto.

[105] On the balance of probabilities, I think it is more likely that the claimant's figures are correct. I accept the quantity surveyor's figures. I accept that this is the proper scope of work to render the dwelling weathertight. The cost of the work is $444,907.00 including GST.

[106] The claimant also claimed ancillary costs. These were not disputed. They are (inclusive of GST):

• Insurance during reclad	$ 1,200.00
• Alternative accommodation for four months	$ 6,750.00
• Furniture storage	$ 850.00
• Moving chattels to and from house	$ 1,900.00
• Cattery costs for four months	$ 4,200.00
Total:	$14,900.00

[107] There was no proof of interest payments arising from the damage.

General damages for stress and inconvenience

[108] Mrs Hearn gave evidence of her experiences and asked for damages. However Mrs Hearn was not a party in her own right. She was a witness giving evidence as one of the trustees. Moreover, the trust was not in a position to suffer anxiety or stress.

[109] I therefore conclude that I do not have jurisdiction to make an award in favour of one who is not a party, and so Mrs Hearn's claim for general damages fails.

Claim Against Parklane

[110] As outlined above, Parklane is now in liquidation and the claim against it was not pursued. Parklane's claims against other parties were similarly abandoned.

Claim against Morar Family Trust

Claim in contract

[111] The claims against the Morars are breach of contract, misrepresentation under the Contractual Remedies Act 1979, unilateral mistake and common mistake under the Contractual Mistakes Act 1977.

[112] The first breach of contract claim related to a letter sent by the Council advising the Morars to fit spouting and downpipes to the decks. It was alleged by the claimant Trust that this was a notice in breach of clause 6(1) of the agreement for sale and purchase. However the letter was clearly advisory and accordingly it was not a "notice, demand, requisition or requirement" for the purposes of cl 6(1) of the agreement. I conclude there was no breach of contract on this point.

[113] The second breach of contract claim relates to the work done on the garage floor. The Morars received a report in 2004 that the tenant's car tyre had gone through the floor of the garage. The Morars thought the damage in the garage was because of dripping vehicles. Mr Morar spoke to Messrs Nachum and Paul of Parklane. Parklane undertook to repair the floor but never did the work. The Morars then arranged with Mr Heazlewood to undertake the repairs but on attending the site found that the repairs had been made.

[114] The Morars' tenant made or caused the repairs to be made. The Morars did not pay for any repairs. No inspection of the repair was undertaken by or for the Morars. Ms Johnson gave uncontested evidence as to the extent of the repair and the need for a permit or building consent as it involved repair to ply substrate and the application of the liquid applied membrane to the garage floor.

[115] The Morars say that they have never undertaken any repairs personally as they purchased new premises with the expectation that they will never have to make any repairs. I find that, apart from the damage to the garage floor that they believed to be the result of drainage from a vehicle, the Morars did not know that the building was leaking.

[116] The Morars' agreement for sale and purchase contained an undertaking in 6.2(5)(d) that:-

> Where the vendor has done or caused or permitted to be done on the property any works for which a permit or building consent was required by law:
>
> (d) all obligations imposed under the Building Act 19991 and/or the Building Act 2004 (together 'the Building Act") were fully discharged.

[117] I find that the Morars had responsibility for the repair of the damage to the garage floor. They knew about the issues and were in breach of their warranties and undertakings in allowing the repair work to be undertaken without appropriate consents and approvals.

[118] As trustees of the I & R Morar Family Trust, the Morars are therefore liable to the claimants for the cost of bringing the garage floor up to code compliance standard. From the evidence I assess the amount due to be $10,000.00.

Misrepresentation

[119] The second cause of action was that the Morars made false representations to the claimants relating to weathertightness. No evidence of a misrepresentation was produced. The parties never met and there was no representation by the agent. Accordingly this claim must fail.

Unilateral mistake

[120] The third cause of action was an alleged unilateral mistake by the claimants. No evidence was led to show that the claimant was mistaken about any issue in relation to the contract. Mrs Hearn's evidence showed that she did not consider the matter of weathertightness, therefore could not have made a mistake that the Morars may have known about. This cause of action therefore also fails.

Common mistake

[121] The fourth cause of action was common mistake. There was however no evidence that either party had considered the weathertightness issue in the course of the transaction. Cooke P said in *The New Zealand Refining Company Limited v Attorney-General* (1993) 15 NZTC 10,038 (CA) at p 10,051:

> The arbitrator took the view that there could not be a common mistake as to a matter to which the parties did not even turn their minds. As he said, 'mistake means something more than an omission. It connotes a positive belief on a matter wrongly held, rather than the complete failure to consider that matter at all'.

[122] In *Ladstone Holdings Ltd v Leonora Holdings Ltd* [2006] 1 NZLR 211 (HC), Potter J made the following comments:

> [82] Where a party or parties have not turned their minds to the matter in issue it cannot be said that they have misconceived it or indeed formed any belief or conception about it. They are neither correct nor mistaken.

> [83] This approach is reinforced by the requirement in s 6(1) (a) (ii) of the contractual Mistakes Act that the parties alleging the mistake were influenced in the decision to enter into the contract by a mistake.
>
> …
>
> [85] It is difficult to accept that a party can be influenced in its decision to enter into a contract by a matter to which it has not turned its mind at all. Thus, even if it were accepted that a mistake could arise out of complete ignorance of a matter or aspect of a matter, the requirement for the so-called mistake to have influenced the party to enter the contract will not be met.

The learned Judge then referred back to *The New Zealand Refining Co* case (supra) to find no common mistake.

[123] Mrs Hearn in her evidence showed that she was not concerned about weathertightness issues. The Morars' evidence was similar. There was accordingly no mutual mistake. This cause of action fails.

Liability of EMPA Group Consultants Limited

[124] The claimant says that EMPA owed it a duty of care as a subsequent purchaser to carry out and complete its design and supervision responsibilities in respect of the work in a thorough, professional and tradesmanlike manner and in strict accordance with good engineering practice. It also had a duty to comply with the Building Act and the Building Code.

[125] The claimant says that EMPA was negligent and breached its duty of care in failing to do these things. The particulars are that EMPA:

- Inadequately and/or incorrectly excavated modified ground line;
- Inadequately and/or incorrectly excavated ground bank to the south of the property;
- Inadequately and/or incorrectly installed sub-floor bolted fixings and bracing provisions; and
- Inadequately and/or incorrectly installed structural connections.

[126] During the hearing, the Council placed much emphasis on EMPA's involvement in the project and alleged negligence. Discussion at the hearing of the relevance of a document headed 'Hayim's list' as at 13 August 1999 revolved around a note for the need to 'obtain information from engineer that bearing of eastern most post under garage is adequate.' Someone has written 'Peter Blades EMPA' in the margin. The author of the note obviously did not know which engineer to approach.

[127] EMPA denied the allegations and said that it did not carry out any of the work that was the subject of the allegations and did not complete or provide a PS4 in relation to the property.

[128] There is no evidence that Mr Blades knew of the note or the mention of his name. He did not take any steps in relation to the post. I find that EMPA had no involvement in constructing this dwelling after the issuing of the PS 1. I further find that EMPA did not undertake any action that led to leaks and consequent damage.

[129] The claims against EMPA are accordingly dismissed.

Claim against Wellington City Council

[130] The claimant says that the Council was negligent in the way it issued the building permit, inspected the building work and signed off with a Code Compliance Certificate. The Council denied that it owed a relevant duty of care or that it had been negligent.

[131] The Council challenged the experts' findings. However, as already stated, I accept the points of agreement from the experts' meeting as the Council's experts were present at that meeting. They are accordingly bound by those conclusions. The Council also challenged the consequent allegations of negligence and denied liability.

The consent application

[132] The claimant alleges that the Council negligently and in breach of its duty of care failed to satisfy itself on reasonable grounds that the building detailed in the building consent would meet functional and performance requirements of the Building Code, the relevant New Zealand Building Standards including but not limited to NZS:3604:1990 and NZS 4203:1992. The particular matters alleged are that the Council failed to satisfy itself on reasonable grounds and ensure that the following items in a high wind zone would meet the functional performance requirements of the Building Code:-

- The alternative building solutions detailed in the building consent documentation (including the Liquid Applied Membrane (LAM)):
- The installation of the LAM:
- The installation of the monolithic cladding:
- The eaves width and envelope complexity:
- The deck design (including the drive/garage interface).

[133] The Council says it was not negligent in issuing the building consent. The reasons that they give are that the plans and specifications were consistent with the standard of the day and that the plans and specifications were sufficient to enable a competent builder to build the residential units and comply with the Building Code. The Council imposed a condition that the building works required ongoing engineer inspection.

[134] I accept this submission. In this respect I conclude the Council was not negligent.

Negligent Inspections

[135] There was a series of allegations relating to inspections. The Council submits that its inspection process was not negligent. It relies on the confusion that surrounded the building consents, supervision, and professional involvement with this group of units. It says that its behaviour was reasonable.

[136] The Council says that it does not guarantee that work is carried out in accordance with the Building Code. There is a lower standard, namely, that the Council needs to be reasonably satisfied that the work is proceeding not only in accordance with the plans and specifications but also in accordance with the Building Code. They say that it is only if the claimants can show that the Council has negligently carried out work below this lower standard that they may be liable.

[137] In this case it can be noted that the work did not follow the plans and specifications and was referred to as barely resembling the original design. There is no evidence that any Council officer was reasonably satisfied with the building.

[138] There is evidence that the Council officers were confused, as were the Council's experts, by the variety of numbering systems for the buildings on the site. The reason why the officers seem to have abdicated their role is that, in their submission, the Council thought they could rely on registered professionals approving the construction and attesting that the dwelling is built in accordance with the plans and in a proper manner.

[139] Due to the confusion of the Council officers and the low standard of record keeping, they failed to realise that the professionals that they thought they were relying on had no part in the construction after the application for consent. Without evidence, the Council could not say that it knew that the engineers and architects were supervising construction. It was only able to say that they did not know that the professionals were not involved.

[140] The Council attempted, in cross-examination, to persuade Mr Blades that a PS1 issued for the building was a PS4 and that the PS1 had been issued after the event and so carried the weight of a PS4. This attempt failed. All engineers who gave evidence were unhappy with the bank. The Council made no attempt at any stage to ensure either that the bank was satisfactory or to ask the owner to provide an engineer's certificate.

[141] I conclude that the Council was negligent in relation to its inspection and record keeping processes as set out in more detail in the following paragraphs.

Ground inspection

[142] The first inspection allegation was that the Council failed to undertake any inspections and/or ensure a suitably qualified engineer inspected and recorded the modified ground line and/or the excavated ground bank to the south of the property.

[143] Mr Cody relied on Mr Tait's diary notes of 19 and 22 November 1999 as proof that no further enquiries were needed. The full entry shows that the diary was headed 'Service Request Number 46396' being the consent number of units 2A and 2B. Mr Cooney's evidence was also based on entries after 19 August 1999 when the Council issued the Code Compliance Certificate for Building Consent 48567. It is therefore irrelevant to this matter.

[144] There being no evidence that a suitably qualified engineer inspected or supervised the works nor evidence that the Council had information upon which it could rely, Mr Cody's evidence does not help the Council. Mr Cooney's speculation is also of no assistance. The allegation is therefore proved.

Ground line

[145] The second inspection allegation is that the Council failed to note defects in the ground line and/or the excavated ground bank to the south of the property was steep and/or unstable. Mr Cody's evidence was that this would have been of no concern to the Council knowing that a registered engineer has been engaged by the developer.

[146] As already stated, there was, however, no proof of the engagement of an engineer for this purpose nor was there evidence which would

reasonably lead the Council to believe that this was the case. This allegation is also proved.

Foundations

[147] The third inspection allegation was that the Council failed to undertake any inspections of the site in relation to the placing of any concrete, foundations, piles/poles or timber flooring as stipulated in the building consent documentation. Once again Mr Cody's evidence was that the Council reasonably relied upon the involvement of Don Thomson and Peter Blades, the engineers engaged by the developer. The Council was told that it was an engineer-supervised construction, which was also a condition of the building consent.

[148] Mr Cody says that during construction the Council had no evidence that this supervision was not occurring. Mr Cooney's evidence was identical. There was no positive evidence to show that the Council was told that supervision was in fact occurring. This was negligent.

Flooring

[149] The fourth inspection allegation was that the Council failed to note defects and placing of any concrete floor, foundations, piles/poles or timber flooring, as stipulated in the building consent documentation. At page 4 of his brief of evidence, Mr Cody stated that:

> (d) The council relied upon the involvement of the registered engineers engaged by the developer. The council was told (Mike Toogood) that all work had been sighted by an engineer, so assumed it (sic) the developer was complying with supervised construction, which was a condition of the building consent.
>
> During the construction the council had no evidence that was not occurring

[150] Neither Mr Cooney nor Mr Cody produced evidence of either engineer's involvement with this site. The Council had no evidence that the supervision was occurring. This allegation was therefore proved.

West Elevation

[151] The fifth inspection allegation was that the Council failed to notice the poor window installation and absence of horizontal relief joints on the west elevation. The Council says, in reference to the need for the recladding of the western wall, the damage was caused by inadequate flashing of the windows. The windows have head flashings but only used a face-fixed sealant system for the jambs and sills. High moisture readings emanate from the windows.

[152] The Council claims that it is not negligent in relation to the window leaks because in 1998/99 that method of installation was in accordance with acceptable solution 01 of the Building Code. It was not appreciated then that this method of window fixing would lead to a catastrophic system failure. The inspectors would not have been alerted to the potential for problems because of the way in which the windows were fixed. The Council would have had no power to require that the windows be fitted with mechanical flashings.

[153] Mr Phayer and other experts refer to the window installation being in accordance with an acceptable solution. I accordingly accept that the Council could not be negligent in relation to the fitting of these windows.

[154] Mr Cody did not accept that Council officers would look at the cladding before approving lining as the main purpose to check moisture levels. He agreed that it was likely that they would have seen the lack of jointing. Messrs Cooney and Cody agreed that omitted joints were not noticed but also said that the absence of relief joints was not causative of water ingress.

[155] It seems clear that the Council did fail to notice the absence of horizontal relief joints. Accordingly that allegation is established.

[156] The Council says that as it has no liability for the window defects it should not be required to meet the cost of the western wall reclad. It would

appear from the reports that although the failure at the windows is part of the cause for the leaks, the other defects are grounds for recladding this elevation. The Council, being negligent, has some responsibility for this reclad.

Face fitted joinery

[157] The sixth inspection allegation was that the Council failed to note the face fitted joinery was installed with inadequate flashing and/or sealant weatherproofing. At para 24(f) of Mr Cooney's brief of evidence, Mr Cooney stated that:

> Jamb flange seals as specified by James Hardie are not visible and would only be able to be detected by council's inspector using an instrument such as a feeler gauge inserted behind a flange which was not standard or usual practise.

[158] None of this negates the assessor's report and the experts' findings.

Wall junctions and cappings

[159] The seventh allegation is that the Council failed to note inadequately finished deck balcony barrier wall junctions and handrail/capping fascia details. However if the wooden rail on the solid balustrade had been properly painted it would be weathertight, so the Council cannot be negligent.

[160] The Council says that it should not be responsible for the leak at the junction between the solid balustrade and the wall. Under the Building Code, cavities were not a requirement until many years after the Code Compliance Certificate was issued. The Council cannot be negligent because no cavity was in existence and they could not have compelled the builder to install one.

[161] Mr Cody's evidence is that a Council officer would not have noticed concealed details. He agreed that in hindsight it was not a prudent detail. He thought it could have stayed watertight if it had been maintained. Mr Cooney's evidence was that this type of construction was quite common at the time and the implications of the defects were not fully understood by

many in the industry and hence the Council's inspectors would not have been alerted to the issues.

[162] There was no evidence as to the actual situation or the Council officer's reaction to this detail. I accept that in light of building knowledge of the day, it was not negligent not to notice this detail would cause leaks.

Membranes

[163] The eighth allegation is that the Council failed to note inadequate installation in construction detailing of the LAM (liquid applied membrane). In addition the Council says it is not liable in respect of the LAM unless the inspector was on site when the liquid membrane was applied. Once it was done it would be impossible to ascertain whether it had been improperly applied.

[164] The Council stated that the damage to the garage and the garage floor was known, as the damage was drawn to Mrs Hearn's attention, as one of the claimants, prior to purchase. Having been told that a car wheel had gone through the garage floor she must have known there was an issue with the garage floor. She should not expect any of the respondent parties to be responsible for the claimant Trust buying something they knew was damaged.

[165] The Council submits that the failure was due to the failure of the LAM, and accordingly plead that they cannot be liable as they could not have been expected to determine its inadequacies after it had been applied.

[166] Messrs Cooney and Cody said that the reinforced waterproofing membrane would have appeared fine when new. Both witnesses further said that a problem might have occurred by the application of a cement-based screed on top of the membrane above the bottom edge of the wall cladding on a balcony. Mr Cody said that a reasonable Council officer of the day would have been satisfied with what he saw. He would not have been able to know that the bottom deck had an un-reinforced LAM product used.

[167] Mr Cooney said that there was a fillet at the junction of the deck with the walls and there was a clearance between the bottom edge of the cladding sheets and the fillets. These decks had adequate drainage off the outer edge. Both witnesses said that the product has not been maintained and this may have been the cause of failure.

[168] Although the LAM failed and can now be seen to be inadequate, there was no evidence to say that the new membrane would have any features that would alert the Council inspectors to the deficiencies.

Surface water from car deck

[169] The ninth inspection allegation was that the Council failed to notice that there was no or inadequate provision to prevent surface water from the car deck entering the property.

[170] Both witnesses said that a building inspector would have accepted the weather bar at the garage door threshold together with a metal angle protection to the membrane at the outer edge. The metal bar appears to have been removed in front of unit 2C though is still present in front of the adjoining properties.

[171] Mr Cody thought that a reasonable officer would have been satisfied with the detail of the garage floor at the entrance. Both witnesses said that the Council would not have seen this as a problem as water from outside, particularly the street, would have drained between the open slatted boards to the ground beneath.

[172] The Morars and Mrs Hearn made the same assumption. I accept that this is a reasonable assumption even for skilled inspectors. I accept that the garage door feature including a metal bar would have satisfied a prudent council inspector. It appears that might have been in place at the time of inspection.

Plan and construction differences

[173] The tenth inspection allegation was that the Council failed to notice the discrepancies between building consent documentation as submitted to the Council and the actual construction erected in a number of respects. Mr Cody's response was again that the Council acted on the assumption that registered engineers and architects were supervising and had provided producer statements and that it was reasonable for the Council to rely on those supervisors. He referred to the Building Act 1991 (which was then in force) which allowed a Council to rely on the inspections/supervision by an engineer or architect to confirm compliance with the Building Code.

[174] Mr Cody was unable to produce documentation showing that this was the factual situation. No council officer who was working at the time was called. In respect of the individual matters alleged, both Messrs Cooney and Cody said in almost identical wording:-

- The change from entirely solid to partly solid walls balcony walls has not resulted in any defects or damage from water entry.
- Double thickness wing walls have not resulted in any defects or damage from water entry.
- Texture coating: this is an aesthetic matter and is not a building code compliance matter. James Hardie's specifications for the coating of Harditex allow for a range of textured and smooth coating finishes.
- As there was stopping and painting to visible parts it would have appeared to the Council's inspectors to have complied with James Hardie's specifications.
- There does not appear to be any maintenance to these walls as recommended by James Hardie nor any temporary sealing to mitigate damage being caused by defects in the (no longer new) jointing and coating.

- The change in spec from textured to smooth finish has not resulted in any defects or damage from water entry.
- Elevation and balcony changes: these changes all complied with the building code. No defects or damage resulted. These changes have not resulted in any damage from water entry.
- Modified ground line: The change in ground line has not resulted in any defects or damage from water entry.

[175] Mr Cody said that a well-maintained unit should be painted every 10 years but pointed out the lack of painting and cleaning affected the situation. He suggested that if it had been painted once the leaks were known about, the level of damage would have been less. He did not accept that painting a building, which was not otherwise due for painting but which was known to leak, would have been a waste of resources.

[176] In relation to all these matters, where the Council's evidence concerning leaks conflicts with the assessor's report and experts' meeting, the latter view prevails.

Greased Bolts

[177] The eleventh inspection allegation was that the Council had failed to note defects in that the bolts, nuts and washers in contact with the timber and exposed to the weather elements were in place and greased as required in the building consent approval document. This was accepted by the Council but it said it did not cause any water ingress damage. I accept that submission.

South Cladding

[178] The twelfth inspection allegation was that the Council failed to note defects in that the cladding system had not been jointed and coated on the south elevation below the car deck level and at the inside face of the garage parapets when the cladding system coating was itemised as a specific requirement in the building consent approval document.

[179] Mr Cody's response was that there was nothing to show that the lack of jointing and coating below the car deck has caused water ingress/damage. Both witnesses also said that coating was an aesthetic matter not a building code compliance matter. The finish would have appeared to a building inspector to comply. Mr Cooney also said that there does not appear to be any maintenance to these walls as recommended by James Hardie nor any temporary sealing to mitigate the damage caused by the defects in the jointing and coating.

[180] I prefer the evidence of the assessor and expert's meeting. The lack of maintenance may have affected the extent of rot to a small degree, but the work would still need remediation.

Negligence in relation to the issue of the Code Compliance Certificate

[181] The claimants, as subsequent purchasers, say that the Council owed them an overriding duty of care to issue the Code Compliance Certificate only in circumstances in which the property did in fact meet all the standards, requirements, specifications, codes, regulations, bylaws and Acts required for such a Code Compliance Certificate.

[182] The claimant says that the Council negligently, and in breach of its duty of care, failed to observe any or appropriate procedures to review the position regarding the property adequately or at all so as to ensure that the breaches did not occur or were remedied before the Code Compliance Certificate was issued.

[183] The Council pleads that it was not negligent in issuing the Code Compliance Certificate given the assurance of a registered engineer that he was satisfied after inspecting the property and that it was built in accordance with the design. I have already found that the Council did not receive such an assurance.

[184] The Council also says that the issuing of a Code Compliance Certificate is merely a procedural matter and no further inspections were carried out by it, so it had no opportunity of returning and checking up on the engineer. It further says that because an architect issued a certificate of practical completion a week before the Council issued a Code Compliance Certificate the Council must have acted reasonably in carrying out inspections.

[185] The Council was unaware of the completion certificate until discovery was made for this hearing. They clearly did not rely on it. In addition the assertion that an inference should be drawn from the issuing of a practical completion certificate as proving that the Council inspected the property adequately is not sustainable. A completion inspection may very well not disclose those matters of which the Council must be satisfied before approving the next stage in the construction.

[186] No party gave evidence that they relied on Mr Millage's certificate. All relied on the Council to perform its duties. In cross-examination Mr Cody agreed that the Council had no evidence of the involvement of an architect.

[187] The Council should not have issued the Code Compliance Certificate.

[188] I find the Council negligent in the way in which it carried out the inspections and the issuing of a Code Compliance Certificate.

Further defences raised by the Council

[189] As a general defence, the Council says that it has not breached any relevant duty of care (if one is owed) because it reasonably relied upon professional advice and certificates to issue the building consent; the consent was issued subject to conditions; their inspections were carried out in a timely and thorough manner, and it was therefore reasonable for the Council to issue the Code Compliance Certificate in the circumstances.

[190] I find that the Council did not have the professional advice that it says that it relied on. Two of the inspections were made before the preconditions for the consent were met. Those inspections were not timely. The Council's inspections missed some important matters. The inspections were not thorough. I do not find that it was reasonable for the Council to issue a Code Compliance Certificate in the circumstances.

[191] The Council said none of the breaches has caused any loss as the defects complained of were maintenance issues. I accept the findings of the experts' conference at which the Council was represented. I also find that if the Council had properly inspected the property and declined to provide the Code Compliance Certificate until all was in order, the claimants would not have suffered their current loss. The breaches have caused loss.

[192] The Council says that if it is found negligent, its acts and omissions were not causative of the Morars' purchase from Parklane or the claimants from the Morars. The Council's actions are therefore not causative of the loss claimed by the claimants.

[193] The negligence alleged is not involved with the purchases of the property. I accept the Council's actions were not the cause of the purchases by these parties in particular, however, it was inevitable that someone would rely on the Council's procedures in relation to building houses. Although they may not know the details, it would include inspection and code compliance activities and the Council owed them a duty of care, whoever they were. In this case the claimant Trust relied on there being legitimate documentation not knowing that it was negligently issued. The Trust would not have been able to discover this negligence even if they had searched the Council's file.

Accrual

[194] The Council says that any cause of action accrued to the Morars and the claimant Trust has not proved that a cause of action accrued to it.

[195] A claim based on *Hamlin*[1] principles is a claim for economic loss. Time starts to run for limitation purposes from the time when damage is first discovered, because that is the time at which the value of the dwelling is reduced by the appearance of damage. The Council argues that the time when damage becomes apparent and a reasonable owner or purchaser would seek expert advice in respect of that damage is the point in time at which the economic loss is suffered by the owner. It is not necessary for the full extent or nature of the damage to be appreciated, provided that its general nature and cause are apparent to an owner, or are such that a reasonable owner would call in an expert who would identify its general nature and cause (see *Hamlin* at p 526 and *Pullar & Anor v R (acting by and through the Secretary for Education)* [6 September 2007] CA, CA 206/06).

[196] The Council argues that it follows that once significant damage to the unit from water ingress had become apparent, a cause of action in respect of the damage had accrued. It submits this occurred at the latest in 2004 when the Morars submitted a WHRS claim and the White report was provided. The Council submits that the date is important for limitation purposes and identifying the persons who are entitled to sue for the damage. Those persons are the owners of the unit at the time the cause of action accrued - see *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA) at 238 and 242; *Lester v White* [1992] 2 NZLR 483 at 493.

[197] The Council therefore argues that purchasers purchasing after the date on which the cause of action accrued did not themselves have a cause of action against the Council. There was no evidence of an assignment of the cause of action.

[198] The issue of when the cause of action arose is the key to determining who is the correct plaintiff in a building negligence claim. If the defects in the development now complained of were apparent or reasonably capable of being discovered by previous owners, it is they who have the right to bring a claim in negligence against the parties responsible.

[1] *Invercargill City Council v Hamlin* [1994] 3 NZLR 513, 519 approved in the Privy Council at [1996] 1 NZLR 513, 518

[199] The Council relied on *Sparham-Souter & Ors v Town and Country Development (Essex) Ltd* [1976] QB 858 where Lord Denning said at p868:

> One word more: the only owner who has a cause of action is the owner [of the house] in whose time the damage appears. He alone can sue for it unless, of course, he sells the house with its defects and assigns the cause of action to his purchaser.

[200] The Council also submits that the New Zealand courts have emphasised on numerous occasions that a plaintiff can only succeed in recovering damages for loss, if that loss took place when the plaintiff was the owner of the relevant property. The Court of Appeal in *Bowen & Anor v Paramount Builders (Hamilton) Ltd & Anor* [1977] 1 NZLR 394 (CA) in citing *Margarine Union GmbH v Cambay Prince Steamship Co Ltd* at p414, stated that:

> The general principle of English law is that he only can sue for negligent damage to property who had a proprietary interest in that property at the time when the damage occurred

[201] Cooke and Somers JJ in *Mt Albert Borough Council v Johnson* at p238:

> …Miss Johnson can only succeed on a cause of action arising during her ownership.

[202] Also in that case, Richardson J stated at p242 that*:*

> Damage is an essential ingredient. And, except where an existing right of action is assigned to a purchaser, he can sue only in respect of damage which occurs during the period of his ownership or occupation.

[203] Greig J said in *Lester v White* [1992] 2 NZLR 483 at p493:

> That duty of care is not owed to everyone or, indeed, to every subsequent owner. Apart altogether from the Limitation Act the plaintiffs' right of action depends upon proof of damage during their ownership which is referable to the breach of the duty of care.

[204] The Council submits that the conclusion is that there was no damage referable to the complaints arising during the claimants' occupation and ownership. It was therefore submitted that no duty was owed to the claimants and they were not entitled to make any claim for the damage that has occurred before their occupation and ownership.

[205] The Council submits that once an owner has discovered, or ought to have discovered, that it owns a defective building and has suffered an economic loss, then the owner has a six-year period to bring their claim. They argue that the corollary of this is that a purchaser of a property who knows, or ought to have known, of a defect at the time of purchase has no right of claim against the person responsible for defects.

[206] The Council relies on the reasoning of Richmond P in *Bowen* (at p413:

> It would also seem to me impossible to limit the class of purchasers to the first purchaser or any particular subsequent purchaser. At present I think that the ambit of the duty can be effectively controlled only by a strict insistence on the proximity principle to which I have earlier made reference in this judgment. In other words, I take the view that the duty of the builder is *not* owed to anyone who purchases a building with actual knowledge of the defect or in circumstances where he ought to have used his opportunity of inspection in a way which would have given him warning of that defect.

[207] The Council also directed me to Tipping J's comment in Murray v Morel & Co Ltd [2007] 3 NZLR 721 at para [69]:

> Save when the Limitation Act itself makes knowledge or reasonable discoverability relevant, the plaintiff's state of knowledge has no bearing on limitation issues. Accrual is an occurrence–based, not a knowledge-based, concept.

[208] The Council submits that the only conclusion open is that as the trustees purchased the property after damage was known to have occurred and received no assignment from the Morars, they cannot now recover damage.

[209] The claimant objects to the Council's submission on the subject of accrual on the basis that the argument was not raised either in their response

or during the hearing. There were a number of late submissions from all parties. It was a feature of the case. I allowed the submissions in.

[210] The claimants also submit that the facts do not support the criteria that the Council relies on. The claimant refers to *Pullar* (supra) at para [13]:

> It is now well established that, where through negligent construction, design, or inspection, damage occurs in a building, its cause being obvious, any cause of action which may exist accrues when damage becomes manifest. That is because from that point economic loss occurs, as the market value of the building would then be affected.

[211] The claimant points to the evidence that at the time of sale no damage was manifest. Evidence on this point was given by Mrs Hearn, the Morars, Mr White (the assessor), and Mr Koornneef. The claimant also refers to *Hamlin* (PC) (supra) at p526:

> The plaintiff's loss occurs when the market value of the house is depreciated by reason of defective foundations, and not before. If he resells the house at full value before the defect is discovered, he has suffered no loss. Thus in the common case the occurrence of the loss and the discovery of the loss will coincide.

[212] The claimant says it paid full market price for the house because the defects were not known and were not obvious to a buyer.

[213] I have already found that the Morars did not know that the house was leaking and neither did Mrs Hearn. She lived in the property some time before she became aware of possible weathertight issues. Accordingly, I do not accept the submission that the property was purchased after the damage was known to have occurred. Consequently, the accrual argument must fail.

Contributory negligence

[214] The Council alleged contributory negligence against the claimants, particularly Mrs Hearn. It said she :-

- failed to request a LIM from the Council;

- did not make the agreement for sale and purchase conditional upon obtaining a LIM report;
- failed to make the purchase conditional upon obtaining a satisfactory pre-purchase building survey/inspection report;
- failed to obtain a building survey/pre-purchase building inspection report after defects were identified prior to purchase; and
- did not make the agreement conditional upon her solicitor's approval in all respects.

[215] One of the key issues was the damage to the garage at the time of purchase. Mrs Hearn saw the damage to the garage floor and was told by the tenant that the floor had been repaired. The Council submitted that Mrs Hearn would have therefore known that the floor required a LAM or weather bar and therefore knew that the floor was not watertight. Mrs Hearn denied this under extensive cross-examination. Mrs Hearn did see other damage that she required to be fixed before settlement.

[216] The evidence showed that the claimant was concerned about the garage entrance and required the visible damage to be repaired. That was done. The damage to the garage floor was not obvious to them. Mrs Hearn could not be shaken in cross-examination on the point.

[217] Although Mr Cooney, as an expert, may have been concerned at the state of the garage floor or walls, (apart from the accident damage) there was no evidence to show that the damage was such that a layperson would have noticed anything amiss.

[218] These contributory negligence allegations were largely abandoned during the hearing. However, for the avoidance of doubt, I find that none of these actions referred to were negligent or contributed to the claimant's loss.

[219] The Council also submits that the claimants were on notice of the defects, had an opportunity to inspect, and, if they had been reasonable, would have enquired of a weathertightness expert inevitably resulting in a

warning and thus preventing economic loss. The Council also submits that the trustees knew of the weathertightness issues and purchased regardless. They were reckless or consented to the purchase of the house with the patent and latent defects.

[220] Factors which contributed to recklessness are, it is alleged:

- purchasing a texture coated monolithically clad building in late 2005 when there was widespread knowledge of weathertightness risks;
- purchasing a property situated on a very steep site, with a road up above and with an obvious pile of dirt at the bottom of the cliff behind the house (slumped batter);
- the professional trustees' failure to advise on the risk of economic loss because they did not inspect the Council file or LIM for peace of mind with engineering issues, or in respect of leaky building syndrome;
- the professional trustees failure to advise fellow trustees to make the agreement conditional upon a satisfactory pre-purchase building report to rule out leaky buildings syndrome;
- the professional trustees' failure to advise his fellow trustees to make an agreement for sale and purchase conditional on a satisfactory LIM report;
- Mr Tait's failure to advise his fellow trustees to obtain a pre-purchase inspection report of the monolithically clad building prior to purchasing with regard to leaky building syndrome.

[221] The Council says that Hartham Trustees Limited is the alter ego of Mr Tait, so that Mr Tait should be treated as one of the claimants or be held to have the same responsibilities. The Council submitted that Mr Tait was negligent as a conveyancing solicitor. The standard suggested is that of a reasonably skilled and informed solicitor in light of knowledge at the time. That standard, say the Council, would have required obtaining a pre-purchase report and LIM. This negligence was contributory negligence to at least a 90% level.

[222] The Council gave evidence (via Mr Cody) that the claimants did not seek either a LIM report or a pre-purchase building inspection survey prior to purchase. The Council's evidence was that this was unusual in late 2005 following the Council's programmes and publicity from cases such as *Sacremento* in Auckland. Mr Cody produced but did not refer to about 90 Auckland Herald newspaper articles covering most of 2005 recovered from the Internet. He agreed that he had not seen them all.

[223] Mr Cody gave other evidence relating to conveyancing matters. However, as he is not an expert in this matter his opinion carried no weight. Mr Cody agreed that there was no reference on the Council file to the White report. The Council accepted that out of the 6,900 property sales in Wellington between July 2005 and June 2006, there were only 204 LIMs requested.

[224] During the hearing a number of people including expert witnesses for the Council struggled to make sense of the Council records. There is no evidence that a LIM obtained from the Council at the time of the purchase by the claimant would have disclosed anything of concern. It would not have revealed that the Council had issued a Code Compliance Certificate without an engineer's PS4.

[225] I do not find that the claimant was negligent in failing to request a LIM report.

[226] The allegation of negligence in purchasing a property situated on a steep site with a road above and a slumped batter was dealt with in evidence in two ways. The Council clearly consented to such a construction and denies that it was negligent. A purchaser cannot be negligent in purchasing a property consented to by the Council. The slumped batter was considered by some witnesses to be just a matter of sending someone in to shovel it out. This is not enough to make a purchaser negligent.

[227] The professional trustees, even if they had searched the Council file and sought a LIM would not have discovered that the Council had negligently issued a Code Compliance Certificate. They were not negligent. The allegation of negligence of the professional trustees' advice was not pursued with evidence.

[228] The allegations of contributory negligence are therefore rejected.

Claimant Trust purchased with knowledge

[229] The Council also submitted that the trustees purchased with knowledge of the defects in unit 2B that were patent and related to weathertightness and with knowledge that a pre-purchase report for that unit was based on an erroneous interpretation of the facts.

[230] The Council says that, if the trustees knew the situation in a neighbouring flat, they were negligent as professional trustees in purchasing the property without making the contract conditional on a LIM and pre-purchase inspection report. They say the pre-purchase inspection report for unit 2B shows what would have been found in unit 2C. The trustees therefore should have been on notice of the defects.

[231] The Council submits that the claimant's contributory negligence is in excess of 90%. This submission is made on the assumption that the trustees read the report on unit 2B. There is however no evidence that the trustees either saw or read the pre-purchase inspection report before the hearing. I find the report on unit 2B was unknown to any party until the hearing when it was produced by the builder's witness.

[232] The builder who repaired the property knew about the 2004 White Report but did not tell her. The Council says this is evidence of knowledge. It is not. The tenant knew that there had been three bad reports but was still upset that he had not had an opportunity to purchase the property. The

Council says this is evidence of knowledge. It is not evidence of knowledge by the purchaser.

Failure to mitigate

[233] The Council submitted that the claimants failed to mitigate the loss. They sought a reduction of 33% in line with *Hartley & Anor v Balemi & Ors* [29 March 2007] HC, Auckland, CIV 2006-404-002589. It also relied on *British Westinghouse Electric and Manufacturing Company Limited v Underground Electric Railways Company of London Limited* [1912] AC 673 for the duty to mitigate the loss. At p689 Viscount Haldane LC said:

> [The law imposes] on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps.

[234] Once the claimants knew there was a weathertight issue they stopped further maintenance. In light of the assessor's report, money spent on mitigation would have been wasted.

[235] There is no loss that mitigation would have prevented and this submission therefore fails.

JURISDICTION

[236] The Council has raised a late issue in relation to jurisdiction.

[237] This claim was commenced by the claimant applying to have an assessor's report prepared pursuant to s 32(1).

[238] The submission is that the claim is restricted under s33.

[239] Section 33 reads:

> **33 Restriction if assessor's report prepared for claim brought in respect of dwellinghouse by former owner**

(1) An owner of a dwellinghouse in respect of which an assessor's report has already been prepared in relation to a claim brought in respect of the dwellinghouse by a former owner must not apply to the chief executive under section 32(1)(a) unless—

(a) the owner or some former owner has applied to the chief executive under section 32(1)(b); and

(b) the chief executive has refused to approve the assessor's report already prepared as suitable for the owner's or former owner's claim.

(2) This section overrides section 32(1)(a).

[240] The Morars caused a report to be prepared. They then withdrew their claim and did not assign the claim.

[241] The claimants did not seek to have the assessor's report as already prepared considered suitable for the owner's claim and therefore the Chief Executive did not make a refusal under s 33(1)(b).

[242] They say therefore the Phayer report requested on 16 March 2007 did not initiate the claim under the Act for the purposes of s 32(1)(a).

[243] The Council submits that the Tribunal lacks the jurisdiction to hear this claim.

[244] The claim was commenced under the 2002 Act, which did not have a section similar to s 32(1)(b). The Chief Executive therefore did not have the opinion of using the earlier report.

[245] Subpart 3 of part 2 of the Transitional Provisions deals with a claim if on the day before [1 May 2007] an evaluation panel had not decided whether the claim set out in s 7(2) of the 2002 Act is eligible (s 129).

[246] The claim met the eligibility criteria set out in s 13 and 14. In accordance with s 130 (1)(b), the Tribunal was required to adjudicate an application under s 62.

Conclusion

[247] I find that the Council was negligent and is accordingly liable for the amount of the claim set out below.

Claim against Mark Debney and Wadestown Developments Limited

[248] Mark Andrew Debney (Mr Debney) and Wadestown Developments Limited (Wadestown Developments) were joined to this claim on the application of the first respondent. Mr Debney and Wadestown Developments were alleged to be the builders. Mr Debney gave evidence that he was offered a contract by Mr Nachum to construct the Lytton Street properties at $1,000 per square metre. Mr Debney saw the calculations for the price but did not keep a written copy. Mr Debney originally declined the contract.

[249] At Mr Nachum's suggestion, on 2 November 1998, Mr Debney formed a company, Wadestown Developments, with the intention of performing the contract with labour-only contractors as employees. On 7 November 1998, Mr Debney entered into a contract on behalf of Wadestown Developments to build two units at 2b Lytton Street. There is no mention of the company on the document. Mr Debney does not know why.

[250] Accompanying the one-page contract were outline specifications for new dwellings and the *In Perspective* plans. Mr Nachum told Mr Debney which contractors were to be used. He supplied Mr Debney with a list of labour-only contractors. Mr Debney saw his role as organising materials, managing and paying subcontractors. Contractors would invoice Parklane for payments. Mr Debney did not see a need to supervise the work as it was clearly understood Mr Nachum would take control, make regular visits and use his own supervisors. He used Sidney Zradahl for the purpose.

[251] The company was paid on invoice for the work done. Mr Nachum nominated the subcontractors engaged by Wadestown Developments. Mr Debney briefly attended the site each day at 7.30 am to check on the

contractors' requirements and to view the process but did not deal with site preparation. Mr Nachum or his employees would supervise the site during the rest of the day.

[252] On 3 March 1999, the Council issued a stop work notice. At that stage the second floor framing and roof cladding had been constructed. While dealing with this problem Mr Debney was shown the building consent and noted three other approvals were required under the item 'Building'. The problem was dealt with and the notice removed after a few days. Unit 2C was completed and signed off in August 1999. Unit 2D was completed at the same time. Units 2A and 2B were not completed until November.

[253] I find that Wadestown Developments was the contracted builder. I also find that Mr Debney was involved in some of the day-to-day running of the construction. Mr Debney and Wadestown Developments were not however involved in the construction of the car decks nor were involved with the building after the issuing of the Code Compliance Certificate.

[254] Mr Debney says that as far as he was aware the horizontal jointings were installed. His evidence was that they were supplied and he saw nothing to indicate that they had not been used. Mr Debney thinks that the common practice would have been followed in relation to the horizontal joints - that is, a 3-5mm vertical gap backed with a sealed tape would be filled with silicone sealer before the cladding was plastered. Any cracking in the cladding could have been dealt with as part of regular maintenance. As far as he was aware, Mr Debney thought that the labour-only contractors and subcontractors built in accordance with the design and standard building practice.

[255] Wadestown Developments contracted with Parklane to construct the building. It was constructed under close supervision supplied by Parklane and Mr Nachum. Mr Debney was the director but also the manager of the employees of the company who did the work. He also did other work.

[256] Counsel for Mr Debney and Wadestown Developments conceded that as a general rule, a builder is liable to a subsequent purchaser of a dwellinghouse for loss or damage resulting from defects in the work undertaken by the builder when constructing the dwellinghouse. He referred to *Hamlin* in the Privy Council and referred to the reliance placed upon a builder. He then submitted that Mr Debney and Wadestown Developments lacked the element of control over the manner that the work was carried out so that they could not be liable. He submitted that Parklane exercised total control therefore Wadestown Developments could not be liable for the quality of the construction, as it did not do any.

[257] There may be room for argument as to the liability between Mr Debney, Wadestown Developments and Mr Nachum, but I find Wadestown Developments was clearly part of the process and employed those working on the site. Lack of management whether by abdication or some other weakness does not render the company as a builder free from liability.

[258] It was submitted that Wadestown Developments could only be liable for work included in their contract, thereby excluding deficiencies in engineering, car decks, ground works or installation of Traffiguard. I accept that submission.

[259] For Mr Debney it was submitted that he was not the developer or the company that had effective control of the project. It was also submitted that he never assumed any personal responsibility for any item of work nor was he involved in any of the day-to-day decisions resulting in loss or damage. I was referred to the decision of Heath J in *Body Corporate No 199348 & Ors v Nielsen* [3 December 2008] HC, Auckland CIV 2004-404-3989, particularly paras [71]-[73]. The same case was cited for the proposition that although Mr Debney was the human being through whom Wadestown Developments acted, that fact alone cannot give rise to personal liability on his part.

[260] Mr Debney described his involvement as being on site each morning, telling his builders what to do, arranging for materials and any other work which would be done during the day. Other matters were done for his

company by Mr Nachum. He says he was acting as a director and it was the company which did all this, not Mr Debney personally. There does not seem to be any authority that the assumption of responsibility is a subjective test in the sense that a person can declare lack of assumption and it is so. It has to be an objective test.

[261] There has been a further consideration of *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517 in *Body Corporate 202254 & Ors v Taylor* [2008] NZCA 317 *(Sienna Villas)*, the only judgment of the Court of Appeal on this issue decided after *Byron Avenue*. William Young P delivering the main judgment undertook an analysis of the key parts of the judgments of *Trevor Ivory* related to this issue. In para [24] he referred to Cooke P's judgment in *Trevor Ivory* where he said that the shareholder and the company are separate legal entities. However, Cooke P saw the problem as one of relationship with the outside world. He concluded:-

> If a person is identified with a company vis-à-vis third parties, it is reasonable that prima facie the company should be the only party liable.

[262] Cooke P thought that for an owner of a one man company to assume personal responsibility something special was required to justify putting a case in that class. Hardie Boys J's judgment is discussed at para [25] of the *Sienna Villas* case where he started from the point of view that:

> An agent is in general personally liable for his own tortious acts… But one cannot from that conclude that whenever a company's liability in tort arises through the act or omission of a director, he, because he must be an agent or an employee, will be primarily liable, and the company only liable vicariously. In the area of negligence, what must always first be determined is the existence of a duty of care. As is always so in such an inquiry, it is a matter of fact and degree, and a balancing of policy considerations. In the policy area, I find no difficulty in the imposition of personal liability on a director in appropriate circumstances.
>
> …
>
> Essentially, I think the test is, or at least includes, whether there has been an assumption of responsibility, actual or imputed. That is an appropriate test for the personal liability of both a director and an employee.

[263] McGechan J's judgment was referred to at para [26], and the following observations he made, relating to the giving of advice, cited :-

> When it comes to assumption of responsibility, I do not accept a company director of a one-man company is to be regarded as automatically accepting tort responsibility for advice given on behalf of the company by himself.

McGechan J then looked at situations where liability arises and thought that Mr Ivory had approached but not crossed the line by assuming personal responsibility.

[264] The Court then looked at *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830 (HL). In *Williams* the potential franchisees relied on the extensive experience of one of the directors. The House of Lords found that the director did not owe a duty of care to the potential franchisees. There were no personal dealings between the director and the plaintiffs, no exchanges or conduct crossing the line that could have conveyed to the plaintiffs that he was willing to assume personal responsibility for them.

[265] The Court of Appeal then discussed the four rationales for the approaches taken in *Trevor Ivory* and *Williams*. They were :

- 'disattribution', that is if the actions of the employee can be attributed to the company, they are necessarily not the actions of the employee;
- the concern that allowing a claim against an employee in these circumstances is erosive of the concept of limited liability;
- a sense that allowing a claim in tort against an employee would be inconsistent with the pattern of contractual relationships between the parties; and
- an 'elements of the tort' approach.

[266] The Court at para [30] said that "attribution provides a basis for imposing liability on a company, not conferring immunity on an individual." It also commented that the 'disattribution' theory had been laid to rest in

Standard Chartered Bank v Pakistan National Shipping Corpn [2003] 1 AC 959.

[267] In relation to limited liability the Court said at para [31]:-

> Although the concept of limited liability is relevant, it too is not a decisive consideration, a point made clearly by Lord Steyn in *Williams* at 834-835. Limited liability limits the financial risk of shareholders to the capital they introduce to the relevant company; it is not intended to provide company directors (or senior employees) with a general immunity from tortious liability. And, as cases such *as Standard Chartered Bank* and *C Evans & Sons Ltd v Spritebrand Ltd* [1985] 1 WLR 317 (CA) indicate, there is no such immunity. The critical feature in both *Trevor Ivory* and *Williams* is not that companies were involved but rather that the advice (in *Trevor Ivory*) and the representations (in *Williams*) were provided on behalf of a principal.

[268] In relation to inconsistency with contractual relationships the Court said at para [32] that:

> In these circumstances, the courts look for not just reliance on the particular expertise of the employee, but also 'reasonable reliance on the employee's pocketbook'…

However, the Court said that this only strictly applies in the *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL) situation. Those carrying out activities potentially dangerous to life or property owe a duty of care to all who may be adversely affected; and this is irrespective of whether the activities are carried out by that person to fulfil the obligations of his or her employer. They were not immunised from liability though they were able to take advantage of limitation of liability provisions in the contract between their employer and the appellant.

[269] With regard to the 'element of tort' approach, it was the rationale adopted by McGechan J in *Trevor Ivory* and treated by Lord Steyn in *Williams* as the ratio of the case that:

> In a situation where assumption of responsibility is an element of tortious liability, an employee who is acting on behalf of a principal can only be liable if there is a personal assumption of responsibility by that employee. Further… to preserve the existing framework of the law of contracts and the idea that a corporation has legal identity which is separate from those of individuals

involved in it, considerable caution is required before concluding that an employee has assumed personal responsibility.

[270] William Young P then said at para [34]:

> To put all of this in context, three further points need to be made:
>
> (a) So restricted an approach to employee responsibility is not taken in other cases which involve the provision of services of a professional or skilled kind, for instance social services provided by education authorities, a point illustrated by two House of Lords decisions, *Barrett v Enfield London Borough Council* [2001] 2 AC 550 and *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619… These cases largely turn on the principle that the trained staff of such an agency dealing with a child are under a duty of care to that child with the agency being vicariously responsible for their actions. Leaving aside the presumed intention of Mr Ivory in incorporating his company, his position vis-à-vis the company's clients was very similar to that of the trained staff vis-à-vis the children in the two House of Lords cases.
>
> (b) The *Trevor Ivory* and *Williams* cases have no application at all to cases in which assumption of responsibility is not an element of the tort, as *Standard Chartered Bank* demonstrates.
>
> (c) Damage to property typically involves liability which is independent of any assumption of responsibility (beyond what is implicitly accepted by anyone who carries out a potentially dangerous activity). So if Mr Ivory had himself sprayed the Andersons' plants, he would probably have been personally liable. He could certainly have been liable if, in the course of spraying the Andersons' plants, he had damaged a neighbour's plants. The hesitation we have as to the first of the examples just given illustrates that the distinction between "purely" economic loss associated with bargain disappointment and property damage is not always clear, cf the difference of opinion between the majority and La Forest J in *London Drugs*.

[271] In this case I do not think that it can be argued that the facts put Mr Debney into a category where he cannot be liable.

[272] Accordingly I find Mr Debney is liable for negligent building.

[273] The builders are not liable for work that they did not do. This relates to the deck and some of the later work. The work that they are liable for is the work that has, *inter alia*, led to the leaks.

[274] I find Mr Debney and his company Wadestown Developments provided inadequate supervision. He was not present and cannot know what in fact happened in relation to the matters he referred to.

[275] As previously described, the building is inadequate as a result of the negligence of Mr Debney and Wadestown Developments Limited and accordingly they are jointly and severally liable for the amount of the claim as set out below.

DAMAGES

[276] The amount of the damages claimed and allowed are :

[277]	Remediation	$444,907.00
	Insurance during reclad	$ 1,200.00
	Alternative accommodation for four months	$ 6,750.00
	Furniture storage	$ 850.00
	Moving chattels from house	$ 1,900.00
	Cattery costs for four months	$ 4,200.00
	Total	$459,807.00

[278] All amounts are inclusive of GST if applicable.

[279] The Morars' contribution of $10,000.00 is to be deducted from this amount to reach the amount for which the other parties are liable.

[280] The other parties are therefore liable for $449,807.00 as set out below.

RESULT

[281] For the reasons set out in this determination, the Tribunal makes the following orders:

I. The first respondent has gone into liquidation they are accordingly removed as a party and no order is made against the first respondent.

II. The second respondent EMPA Groups Consultants Limited has not been found negligent and accordingly claims against that party are dismissed.

III. The third respondent, the Wellington City Council breached the duty it owed to the claimants and is therefore jointly and severally liable to pay the claimants the sum of $449,807.00

IV. The fifth respondent Mark Andrew Debney breached the duty owed to the claimants and is therefore jointly and severally liable to pay the claimants the sum of $449,807.00

V. The ninth respondent Wadestown Developments Limited breached the duty it owed to the claimants and is therefore jointly and severally liable to pay the claimants the sum of $449,807.00

VI. The fourth respondent, Raju Morar, Neesha Morar and Ishweral Morar as Trustees of the I & R Morar family Trust, has been found to be in breach of contract with the claimant. The cost of replacing the floor is identified as $10,000.00. The trust is ordered to pay that amount to the claimants.

CONTRIBUTION ISSUES

[282] The Tribunal has found that the third, fifth and ninth respondents breached the duty of care each owed to the claimants. Each of the respondents is a tortfeasor or wrongdoer, and is liable to the claimants in tort for their losses to the extent outlined in this decision.

[283] Section 92(2) of the Weathertight Homes Resolution Services Act 2006, provides that the Tribunal can determine any liability of any other respondent and remedies in relation to any liability determined. In addition, section 90(1) enables the Tribunal to make any order that a Court of

competent jurisdiction could make in relation to a claim in accordance with the law.

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

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

> **17 Proceedings against, and contribution between, joint and several tortfeasors**
>
> (1) Where damage is suffered by any person as a result of a tort…
>
> (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is… liable in respect of the same damage, whether as a joint tortfeasor or otherwise…

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

[287] As a result of the negligence referred to above the third, fifth and ninth respondents are jointly and severally liable for the entire amount of the claim less the amount payable by the Morars. This means that these respondents are concurrent tortfeasors and therefore each is entitled to a contribution from the other, according to the relevant responsibilities of the parties.

[288] The Council made submissions as to the allocation of the blame amongst other parties. The only live issues from these submissions are the allocation between the builder and the Council. The Council also points to the contributory negligence of the other parties, namely:

- Mr Nachum and Parklane for failing to exercise quality control by ensuring that a proper programme of work was set out and followed by his contractors.
- Mr Debney and Wadestown Developments for failing to exercise quality control by ensuring a proper programme of work was set out and followed by his contractors.
- Professional engineers and architects who were retained by Mr Nachum to inspect and supervise breaching duties of care to the developer and subsequent purchasers.

[289] The third matter has been dealt with above. The claim against Mr Nachum has not been heard. There may well be grounds for reallocating responsibility under s 7(2) once that claim is heard.

[290] The Council's negligence is at the higher end of the scale and the normal range goes up to 30%. I therefore find that the Council's contribution should be 30%.

[291] The builders, Mr Debney and Wadestown Developments, are jointly liable for 70%. If they wish me to allocate responsibility between them they may apply for further orders.

[292] Based on the evidence, I find that the first respondent, Wellington City Council, is entitled to a contribution of 70% from the fifth and ninth respondents in respect of the amount the second respondent has been found jointly liable for.

[293] The fifth and ninth respondents are therefore entitled to a contribution of 30% from the third respondent in respect of the amount the third respondent has been found jointly liable for.

CONCLUSION AND ORDERS

[294] The claimants' claim is proved to the extent of $459,807.00. For the reasons set out in this determination I make the following orders:

i. The Wellington City Council is ordered to pay the claimants the sum of $449,807.00 forthwith. The Wellington City Council is entitled to recover a contribution of up to $ 314,864.90 from Mark Andrew Debney and Wadestown Developments Limited for any amount paid in excess of $134,942.10.
ii. Raju Morar, Neesha Morar and Ishweral Morar as trustees of the Morar Family Trust is ordered to pay the claimants the sum of $10,000.00 forthwith.
iii. Mark Andrew Debney is ordered to pay the claimants the sum of $449,807.00. forthwith. Mark Andrew Debney is entitled to recover a contribution of up to $134,942.10 from the third respondent for any amount paid in excess of $314,864.90
iv. Wadestown Developments Limited is ordered to pay the claimants the sum of $449,807.00 forthwith. Wadestown Developments Limited is entitled to recover a contribution of up to $134,942.10 from the third respondents for any amount paid in excess of $314,864.90

[295] To summarise the decision, all respondents meet their obligations under this determination, this will result in the following payments being made by the respondents to the claimants:

Third Respondent	$134,942.10
Fourth Respondent	$10,000.00
Fifth and Ninth Respondents	$314,864.90
Total	$459 807.00

Further proceedings

[296] This is an interim determination as the claim against the tenth respondent, Mr Hayim Nachum is yet to be heard. A timetable will be set once the Tribunal is advised as to the evidence of Mr Nachum and any cross-examination he may wish to conduct of the witnesses already heard. Whilst this may change the apportionment ordered it will not change decisions made in relation to liability of parties covered in this determination.

[297] Parties indicated that they wished to make submissions on costs. The timetable for filing such application is:

- Claims for costs are to be filed by 15 May 2009
- Responses are to be filed by 29 May 2009.

DATED the 30th day of April 2009.

Roger Pitchforth
Tribunal Member