IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2010-100-000064
[2012] NZWHT AUCKLAND 20

BETWEEN	GLEN JOSEPH HEATH AND MICHELLE SUZETTE HEATH Claimants
AND	AUCKLAND COUNCIL (formerly known as NORTH SHORE CITY COUNCIL) First Respondent
AND	LYNETTE GAY HART (NEE BOLTE) Second Respondent
AND	DAVID GRAHAM DELAMARE (Removed) Third Respondent
AND	THORNE DWYER STRUCTURES LIMITED Fourth Respondent
AND	ROBERT LESLEY REID Fifth Respondent
AND	JULIAN MATTHEW WOULDES Sixth Respondent
AND	DENISE JEANETTE OLIPHANT Seventh Respondent
AND	DAVID KENNETH HILT Eighth Respondent
AND	JON STUART MILLS Ninth Respondent

Hearing:	20 July 2011
Appearances:	F Divich and C McLean for claimants and first respondent L G Hart (Gay Bolte), the second respondent, self represented
Decision:	30 March 2012

FINAL DETERMINATION
Adjudicator: P R Cogswell and K D Kilgour

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[1] This case concerns liability for additions to a house at 93 Landing Drive, Albany. The additions were added when the second respondent, Lynette Gay Hart, was the owner of the house.

[2] There is no claim against her for any other defects in the property because she was not the original owner when the house was first built.

[3] A settlement in relation to those original works has been entered into between Glen Joseph Heath and Michelle Suzette Heath (the claimants), Auckland Council (first respondent), Thorne Dwyer Structures Limited (fourth respondent) and Denise Jeanette Oliphant (seventh respondent). The Auckland Council proceeds against Ms Hart under rights of subrogation granted to it under the settlement.

[4] The claimants do not wish to proceed with their claim against Robert Lesley Reid (fifth respondent), Julian Matthew Wouldes (sixth respondent), David Kenneth Hilt (eighth respondent) or Jon Stuart Mills (ninth respondent).

[5] Accordingly, this case only involves a consideration of Ms Hart's liability to the claimants for the additions to the house. Auckland Council also has a cross-claim against Ms Hart in relation to amounts it has paid in the settlement.

BACKGROUND TO THE CLAIM

[6] On 13 January 2003 Mr and Mrs Heath entered into an agreement for the purchase of the property at 93 Landing Drive, Albany with Ms Hart. The agreement was conditional on them being satisfied with a builder's report.

[7] A builder's report identified certain defects in the house. The lawyers for the parties exchanged correspondence about the defects identified, the result of which was that Ms Hart agreed to

undertake certain work and the agreement was declared unconditional.

[8] Mr and Mrs Heath settled the purchase on 21 August 2003. Subsequent to their settlement of the purchase and following possession, the claimants became aware of damage to the house.

[9] On 26 May 2005 they made application for a Weathertight Homes Assessor's Report. An addendum report was sought and was completed on 9 January 2009. The assessor's report and the addendum report identified certain defects suffered by the house as a result of the ingress of water. Both reports concluded that the claim met the criteria set out in the Weathertight Homes Resolution Services Act 2002 and the amended 2006 Act.

[10] Mr and Mrs Heath have completed the required remedial works to the property. Those remedial works cost them $77,898.00.

ISSUES

[11] The issues the Tribunal needs to determine are:

a) Can the Auckland Council sue Ms Hart under a right of subrogation acquired under the settlement?
b) Is Ms Hart liable to Mr and Mrs Heath for breach of clause 6.2(5) of the agreement?
c) Is Ms Hart liable to Mr and Mrs Heath for breach of the special condition relating to identified remedial works?
d) If the answer to (b) or (c) is yes, then:
    i. What are the defects that have caused damage to the house?
    ii. What is the appropriate level of damages to be awarded in favour of Mr and Mrs Heath and can they claim equitable contribution against

Ms Hart for any amounts the Auckland Council paid to settle these proceedings.

HISTORY OF THE PROPERTY

[12] On or about 2 May 1997 the North Shore City Council issued a building consent under building consent reference A11993 for the construction of the dwelling.

[13] At various times during the period from 2 May 1997 until about 31 October 2000 the Council carried out a number of inspections of the construction of the dwelling.

[14] On 26 May 2000 Ms Hart became the registered proprietor of the property. She was not, prior to that time, involved in the construction of the original dwelling and there is no suggestion that she had any part to play in any further steps that were required to achieve a code compliance certificate for the original construction works.

[15] On 3 November 2000 the North Shore City Council issued a code compliance certificate in relation to the original construction works.

[16] In late November 2000 Ms Hart made an application for a building consent for additions to the original house. Those additions consisted of the creation of a master bedroom and en suite bathroom. Essentially, consent was obtained to "fill out" the remainder of the upper floor of the dwelling by the addition of a master bedroom and en suite bathroom.

[17] The building consent was signed by Ms Hart, but it recorded Ms Oliphant as the owner's representative. She was noted as the contact person for the project on both the North Shore City Council's project information memorandum and the building consent.

[18] The addition project was what is commonly known as a "turn key" project. Ms Hart engaged a builder and that builder completed the works for a fixed price. Ms Hart's evidence is that she had no involvement in the construction of the additions and did not supervise the builder. At the time she was a busy housewife and mother of two pre-school children and had no knowledge of building practices. We accept that evidence.

[19] The addition was constructed with a painted stucco rendered external cladding with recessed joinery over timber framed walls. The code compliance certificate for the addition works was issued on 20 September 2002.

[20] On 13 January 2003 Mr and Mrs Heath and Ms Hart entered into the agreement to purchase the property. The agreement for sale and purchase was in the standard form approved by the Real Estate Institute of New Zealand and by the Auckland District Law Society. It was the 7th Edition (2) July 1999 form of that agreement.

[21] As is material to this claim, the agreement contained a number of vendor warranties, including a warranty at clause 6.2(5) which stated:

> (5) 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:
>
> (a) The required permit or consent was obtained; and
>
> (b) The works were completed in compliance with that permit or consent; and
>
> (c) Where appropriate, a code compliance certificate was issued for those works; and
>
> (d) All obligations imposed under the Building Act 1991 were fully complied with.

[22] The agreement was subject to a number of conditions, one of which was for Ms Hart to satisfy. The balance of the conditions were

for the claimants to satisfy. In particular, the agreement contained special condition clause 14 which stated:

> This agreement is conditional on the Purchaser being satisfied with a Builders Report. Should the Purchaser in good faith be dissatisfied with any matter contained in the report the Purchaser may terminate this agreement by notice in writing to the Vendor or the Vendor's solicitor, such notice to be received by 4.00pm on the 14th day after receiving (sic) confirmation that the Vendor's clause 17 is unconditional. If notice is not received within time the Purchaser will be deemed to have waived the Purchaser's rights under this condition.

[23] Mr and Mrs Heath obtained a pre-purchase inspection report from Property Solutions Inspections (NZ) Limited. The author of that report was Jon Mills, the ninth respondent.

[24] The report identified various items including items relevant to the performance of the cladding system used at the dwelling. The report identified in relation to the new bedroom addition that there were some minor cracks in the plaster under the west window and down the connection of the addition to the original tilt slab. Moisture checks undertaken in that location were, however, normal.

[25] The report concluded that the general structure of the dwelling was sound but was showing "various amounts of cracking, majority of which is at joins in slabs and change from timber work to concrete."

[26] The report went on to make five recommendations. Those recommendations were set out on page 6 of the report as follows:

i. Check suspect leaking areas with hose and provide a quality sealant to further cracks and over lower bathroom windows. A similar colour to paint finish maybe available – PC sum $600.

ii. Seal up around fascia to dwelling on north side of entry foyer and all other surface cracks - $250.
iii. AAV trap advised to lower toilet basin - $40.
iv. Would advise terminating ensuite and laundry ceiling fans to exterior – PC sum $800.
v. Couple of bolts missing off north side timber pergola, being proposed - $20.

[27] Mr Heath gave evidence that he contacted the author of the report and discussed the issues identified in that report with him. According to Mr Heath, Mr Mills told him that the issues identified in his report were not "big ones" and should not put them off from proceeding with the purchase of the property. According to Mr Heath, Mr Mills went on to opine that if the Heaths had the suggested remedial work undertaken then they would have nothing to worry about.

[28] On 14 March 2003 the Heath's lawyers wrote to Ms Hart's lawyer recording that the parties had discussed the pre-purchase inspection report and had reached agreement that, in consideration for special condition 14 being declared satisfied, certain works would be completed by Ms Hart prior to settlement.

[29] The work was to be completed to a "proper and tradesman-like standard" at the vendor's expense prior to possession date and was described as follows:

1. The works set out in points numbered 1,2,3 and 5 of page 6 of the Property Solutions Inspections (NZ) Limited's report dated 5 March 2003.
2. The painting over of any sealing carried out consistently with the existing colour of the house.
3. The remedying of the cause of the leaking around the balcony attached to the level one master bedroom.

[30] Later that day, in response to that communication, Ms Hart's lawyer confirmed:

> My client agrees to 1, 2 and 3. Agreement unconditional.

[31] The Heath's claim alleges that by 14 March 2003 Ms Hart had incurred the following liabilities under the agreement:

a) The obligations under the vendor warranty set out at clause 6.2(5) of the agreement; and
b) The liability to carry out the work agreed in the exchange of correspondence between the parties' solicitors on 14 March 2003.

[32] The claimants then proceeded to settlement under the agreement and settlement took place on 21 August 2003.

[33] Taken together, the assessor's evidence defines the defects in the additions as:

a) Deck constructed with insufficient threshold to allow for waterproofing wall connections.
b) Inadequate flashings to joinery.
c) Inadequate flashing at horizontal junction of new building to existing concrete walls.
d) Inadequate flashing at junction of roof to existing chimney.
e) Lack of flashing at junction of stucco timber feature band under fascia.
f) Lack of control joints in cladding.
g) Paving levels.

[34] Mr and Mrs Heath undertook a tender process for the remedial works recommended by their architects, Jensen Chambers Young Limited. They were not satisfied with the prices received.

Due to the fact that Mr Heath was an employee of the construction company Mansons TCLM Limited, he considered himself able to achieve a better price by retaining Colin Tilley Builders Limited on a labour-only contract and by providing the materials himself at favourable rates due to his employment. This decision clearly resulted in substantial savings over the anticipated full contract prices he had been provided through the tender process.

[35] The remedial works included recladding of the addition and the reuse of joinery, together with the replacement of any timber as required. The total cost of the entire remedial project was $77,897.62. Mr and Mrs Heath say the division of costs between the original dwelling and the additions are as follows:

a) Remedial costs to original dwelling - $13,770.93;
b) Remedial costs to addition - $64,126.69.

[36] Mr and Mrs Heath now seek relief against Ms Hart under the agreement. That claim is articulated as being a claim pursuant to clause 6.2(5) of the agreement and a claim for breach of the agreement reached with the second respondent that she would, prior to possession date, “remedy the cause of leaking around the balcony attached to the master bedroom”.

[37] None of the other work carried out by Ms Hart under the agreement is complained about.

CLAIMS AGAINST SECOND RESPONDENT

[38] The claims against Ms Hart are claims in contract for breach of the two terms of the agreement. We will call them in this determination the “vendor warranty claim” and the “vendor works claim.”

[39] Mr and Mrs Heath contend in their vendor warranty claim that Ms Hart breached clause 6.2(5) of the agreement because she had done or caused or permitted to be done the construction of the additions to the house and that all the obligations under the Building Act 1991 were not fully complied with. That is because the property contained the defects relating to water ingress identified by the assessor and those defects are a breach of clause E2 of the Building Code.

[40] Secondly, in the vendor works claim, Mr and Mrs Heath say that Ms Hart breached the special condition agreed directly between the parties to remedy the cause of the leaking around the balcony attached to the level one master bedroom – which is the bedroom created by the addition works.

SETTLEMENT

[41] By a settlement agreement dated 15 October 2010, Mr and Mrs Heath settled their claims against the following parties:

a) Auckland Council, the first respondent - the relevant territorial authority.
b) Thorne Dwyer Structures Limited, the fourth respondent - the engineering company that prepared the wall and foundation designs and certified the tilt slab construction for the original dwelling.
c) Denise Jeanette Oliphant, the seventh respondent - the designer responsible for the design of the architectural plans and specifications for the addition.

[42] The amount paid in settlement was $55,000 and the settlement agreement included the following clauses:

a) In consideration of the Council paying a majority of the settlement amount the claimants assign to the Council all of their causes of action and rights in the

proceeding and the Council will (in its own name and/or name of the claimants) be able to carry on with the proceeding against Ms Hart as if it were an insurer exercising a right of subrogation – clause 10.

b) The claimants and the Council specifically record that the settlement contemplates the claimants and the Council continuing with the claims against Ms Hart – clause 11.

c) The parties record their intention as being that the Council will be in the same position as if it were an insurer making a payment to the claimants under an insurance policy in respect of the loss and damage the claimants have suffered, which is then entitled to pursue the full amount of the claim against the other respondents – clause 13.

[43] The Council's position is that jurisdiction exists to bring this subrogated claim on the basis of the High Court decision of *Petrou v Weathertight Homes Resolution Services*.[1]

[44] The facts of the *Petrou* decision are similar to, but not quite identical to the facts in the present case. However, we do not consider that the minor differences in the expression of the terms of the settlement agreement in the present case of any moment and do not make the *Petrou* case distinguishable.

[45] The reasoning in *Petrou* was that jurisdiction to determine claims continues following a settlement in circumstances where the party seeking to continue the claim is exercising rights of subrogation only.

[46] By contrast, if a party had taken an absolute assignment of the causes of action held by the owner of the dwelling house, the claimant assignors will no longer be the "owners" and so jurisdiction

[1] *Petrou v Weathertight Homes Resolution Services* HC Auckalnd, CIV-2009-404-1533, 24 November 2009.

would no longer reside in the Tribunal to determine the claims. Sections 14-18 of the Act make it clear that a key component of the eligibility criteria is that the claimant must own the dwelling house.

[47] A cause of action is a common law chose in action which may be assigned. An absolute assignment of a chose in action effects an immediate transfer of the chose from the assignor to the assignee. The chose no longer belongs to the assignor and the assignor cannot sue on the cause of action constituting the chose.[2]

[48] As was pointed out in the *Petrou* decision, there is a fundamental difference between an assignment of a chose in action and the doctrine of subrogation. Rights of subrogation vest by operation of law rather than as the product of express agreement.[3] Subrogation means literally the substitution of one person for another and arises in insurance cases as an incident of the contract of indemnity. Upon payment to the insured of the loss covered by the policy of insurance, the insurer is entitled to receive the benefit of the rights and remedies of the insured against third parties. It is entitled to exercise those rights in the name of the insured to seek compensation for the loss from third parties.

[49] Randerson J went on to state in the *Petrou* decision that in contra distinction from the consequences of the assignment of a person's rights of action, the insurer is not entitled to bring the action in its own name. It remains an action belonging to the insured. The insurer has a right to control the proceeding and to recover its loss from the proceeds. Any surplus belongs to the insured.[4]

[50] The settlement agreement in this proceeding clearly records that the Council is pursuing this claim in the name of the claimants as it has a right of subrogation. In terms of the *Petrou* decision, that is entirely appropriate and we find that the Council is entitled to

[2] *Petrou v Weathertight Homes Resolution Services* above n1 at [23].
[3] At [26].
[4] At [27].

advance the claimants' remaining claims against Ms Hart pursuant to rights of subrogation which it has vested in it.

AUCKLAND COUNCIL'S CROSS-CLAIM

[51] The Council also asserts a cross-claim against Ms Hart. That cross-claim is articulated as being a claim for the difference between the amount it paid to settle the claim in relation to the additions ($34,228.68) and 20% of $64,126.68 ($12,825.34) which equals $21,403.34.

[52] The Council submits that the "usual" contribution when considering joint tortfeasor contributions is 20%. It says that it was the party that paid the majority of the settlement proceeds to the claimants. It admits that there is little guidance to be had in relation to the issue of contribution between vendors and a council from other cases, but submits that the Tribunal has a discretion to apportion the liability between respondents as it sees fit.

VENDOR WARRANTY CLAIM

[53] The claimants allege that the contract claim against the second respondent under clause 6.2(5) of the agreement is "simple and tidy".

[54] They refer the Tribunal to two decisions being:

a) *Ellison v Scott*;[5] and
b) *Ford v Ryan.*[6]

[55] The evidence is that the addition project was carried out by Ms Hart under a "turn key" contract with the builder, David Hilt. Ms Hart was not involved in the construction and she did not supervise the builder.

[5] *Ellison v Scott* HC Tauranga, CIV-2009-470-1153, 19 August 2010.
[6] *Ford v Ryan* (2007) 8 NZCPR 945.

[56] Like many other owners in New Zealand, Ms Hart was a homeowner who engaged a designer (Ms Oliphant) to design the additions to her home and then contracted with a builder (Mr Hilt) to construct the addition. She paid the bills. She did not contribute to the technical completion of the construction.

[57] Clause 6.2(5) of the agreement for sale of the property imposes a warranty on Ms Hart that, in relation to any work that she had done or caused or permitted to be done on the property for which a building consent was required, that she:

a) Obtained the required consent; and
b) Completed the works in compliance with that consent; and
c) Obtained a code compliance certificate for those works; and
d) That all obligations imposed under the Building Act 1991 were fully complied with.

[58] In the present case:

a) Ms Hart obtained a building consent.
b) The works were completed in accordance with that building consent (as evidenced by the Council's inspection regime which checked the works).
c) Ms Hart obtained a code compliance certificate for the additional project.

[59] Accordingly, the only breach of the warranties contained in clause 6.2(5) available to the Heaths was that she breached the warranty that all obligations imposed under the Building Act 1991 were "fully complied with".

[60] The Building Act being a performance based regime, it is argued that it is possible to interpret clause 6.2(5)(d) as an ongoing performance warranty for houses. That possible interpretation has been removed in the later addition of the sale and purchase agreement because it was considered inappropriate for vendors to give a warranty that Building Act obligations had been fully complied with, particularly in light of the "leaky home" litigation.[7]

[61] The Heaths submit that we should interpret clause 6.2(5)(d) as being a warranty of the current and ongoing compliance with the Building Act of the addition works Ms Hart had undertaken. In the two cases cited to me by counsel, neither of those dealt with the situation of a vendor who has had construction work undertaken under a turn key contract and who had obtained the relevant building consent and a code compliance certificate.

[62] In *Ellison v Scott*, the owner had undertaken building works without obtaining the requisite building permit and had not obtained a code compliance certificate in respect of that unpermitted work.

[63] In *Ford v Ryan*, the owners had failed to obtain a code compliance certificate for works carried out by them. It was found that Mr Ryan was a builder and had undertaken some of the building work himself and had also engaged and supervised contractors in relation to other work.

[64] The analysis of the High Court in *Ford v Ryan* proceeds on the basis that the Ryans were in breach of subparagraph (d) because of their failure to obtain a code compliance certificate for the building work they carried out. The Court stated in *Ford v Ryan*[8] that:

> ...the combined effect of paragraphs (c) and (d) [of the agreement for sale and purchase clause 6.2(5)], so far as that part of the

[7] Peter Nolan "8th Edition of the Agreement for Sale and Purchase of Real Estate" (CLE Seminar, Auckland, March 2007).
[8] *Ford v Ryan* above n6 at [21].

> works carried out by the vendors for which a building consent was required is concerned, is that:
>
> a) The lack of a code compliance certificate constitutes a breach of paragraph (c); and
> b) A failure to comply with any part of the Building Code, which would prevent the issue of such a certificate, constitutes a breach of paragraph (d).

[65] We take that to mean that MacKenzie J interpreted subparagraph (d) as meaning that the warranty set out in that subparagraph would be met if a code compliance certificate was issued for the subject building works. That is because the Building Code would have been met through the issue of the code compliance certificate.

[66] We do not interpret the Court in *Ford v Ryan* as extending the reach of subparagraph (d) as being an ongoing warranty that the building would continue to comply with the Building Code performance requirements on an ongoing basis into the future.

[67] Clause 6.2(5)(d) must be read in the context of the preceding sub clauses 6.2(5)(a),(b) and (c). Each of the sub clauses refers to permits, consents and code compliance certificates issued pursuant to the Building Act. The intended meaning of "all obligations" in sub clause (d) is, therefore, governed by the scope of the preceding sub clauses.

[68] It is the obtaining of permits which is at the crux of the warranty provision given by the vendor. The purchaser wants to know that the building, or any alterations, have been done in compliance with the Building Act and the means of securing that assurance is for the vendor to warrant that the requisite permit/consent and code compliance certificate were obtained from Council and the completed structure was approved by Council. That is exactly the position in relation to this claim.

[69] MacKenzie J held that the responsibility to be satisfied as to the quality of the property purchased including any buildings lay entirely on the purchaser and held that clause 6.2(5) was not a warranty as to quality and should not be converted to one.[9] He noted the dicta of Prichard J in *Ware v Johnson*[10] that "caveat emptor applies with particular stringency to contracts for the sale and purchase of land and generally excludes the implication of any warranty as to fitness or quality".

[70] MacKenzie J found that the warranty had been breached by the Ryans because of the lack of the code compliance certificate.

[71] There have been two later High Court decisions which considered clause 6.2(5). In neither case was the interpretation of clause 6.2(5) the primary matter at issue.

[72] The first of those cases is *Body Corporate 208191 v Holl*.[11] In that case, the vendor was a builder who had decades of experience in the building industry, was the director of the development company and exercised considerable control over the building work. The *Holl* decision did not analyse the extent of the liability under clause 6.2(5) in any detail, nor did it consider the circumstances of a turn key vendor who did not personally control the building work.

[73] The second High Court decision to consider a clause similar to the one before the Tribunal in this claim is *Aldridge v Boe*[12] which was an appeal from a decision of this Tribunal. Like *Ford v Ryan* this case concerned a house that had never achieved a code compliance certificate. Unlike *Ford v Ryan* the purchasers in *Aldridge* were aware of this when they purchased the house.

[9] At [16], [25] and [48].
[10] *Ware v Johnson* [1984] 2 NZLR 518 at [534].
[11] *Body Corporate 208191 v Holl HC Auckland*, CIV-2006-404-5373, 16 December 2011.
[12] *Aldridge v Boe* HC Auckland, CIV-2010-404-7805, 10 January 2012.

[74] In *Aldridge*, Potter J placed considerable emphasis on the knowledge of the parties in determining whether the vendor warranty clause should be given "strict effect" or be "read down". She held on the natural and ordinary meaning of the clause that purchasers warranted the work complied with the building consent.

[75] However, she said that if, in accordance with the approach in *Investors Compensation Scheme v West Bromwich Building Society*[13] and *Pyne Gould Guinness Ltd v Montgomery Watson (NZ) Ltd,*[14] the surrounding circumstances and background knowledge of the parties indicated that this was not their intention, the natural and ordinary meaning of the clause should give way and should be read down such that the vendors did not warrant that the building work complied with the building consent and therefore the Building Code.

[76] Potter J accepted the evidence of the purchaser Mr Aldridge that although he knew that the code compliance certificate had not been issued, in the absence of knowledge about the state of the building work, he assumed that this was simply an administrative process that had not been undertaken. She found that had the Aldridges known that there was outstanding work that had to be done to achieve compliance with the Building Code and by inference the building consent that would indicate it was unlikely that the vendors intended to warrant that the works complied with the building consent. Having regard to the state of knowledge of both parties, she found that the parties intended the clause to warrant that the building work complied with the building consent.

[77] Based on the above, when interpreting the ambit of clause 6.2(5)(d) of the agreement, we must, to the extent possible, stand back and objectively consider what the parties intended the warranty clause to mean.

[13] *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 ALL ER 98.
[14] *Pyne Gould Guiness Ltd v Montgomery Watson (NZ) Ltd* [2001] NZAR 789.

[78] In *Pyne Gould Guiness Ltd v Montgomery Watson (NZ) Ltd* the Court of Appeal said:[15]

> The proper approach to take to interpreting a contract is to consider the words of a contract, ascertain their natural and ordinary meaning in the context of the document as a whole, then use the factual background to cross check whether some modified meaning was intended.

[79] The Court of Appeal went on to say the construction or interpretation had to accord with "common-sense".[16] Other cases which have followed this approach include *Jowada Holdings Ltd v Cullen Investments Ltd*[17] and *Wholesale Distributors Ltd v Gibbons Holdings Ltd.*[18]

[80] The *Pyne Gould Guiness Ltd* guideline that where there is ambiguity in meaning, an aid to the interpretation of a clause is to cross-check the word(s) natural meaning(s) against the factual background. In the present case the warranty is to be read in light of the fact that councils are responsible for the oversight of domestic house construction in New Zealand and the clause is there to ensure that the subject property has been vetted and approved in accordance with council and Building Code requirements.

[81] The *Hamlin* Rule in the Court of Appeal decision in *Invercargill City Council v Hamlin*[19] (and approved on appeal by the Privy Council) described the matrix behind the evolution of NZ law and Council's responsibility for home construction supervision. Richardson J stated:

> *"… it has never been a common practice for new house buyers**, including those contracting with builder for construction of houses,** to commission engineering or architectural examinations*

[15] At [29].
[16] At [23].
[17] *Jowada Holdings Limited v Cullen Investments Ltd*, CA 248102, 5 June 2003.
[18] *Wholesale Distributors Ltd v Gibbons Holdings Ltd* [2009] NZSC 37, [2008] 1 NZLR 277.
[19] *Invercargill City Council v Hamlin* [1994] 3 NZLR513 at [525].

> *or surveys of the building or proposed building ... It accorded with the spirit of the times for* ***the local authorities to provide a degree of expert oversight rather than expect every small owner to take full responsibility*** *and engage an expert adviser"*. (at page 525, lines 17-27).

[82] To give the clause a wide meaning would result in a person who, whilst as owner is protected by "*Hamlin*", as vendor becomes potentially liable for any building faults. It would expose the vendor to the very risk which the Court of Appeal held is totally inappropriate.

[83] The interpretation which the claimants and Council seek to place on clause 6.2(5)(d) would effectively place Ms Hart in the position of "underwriter" to the inspection and certification regime of the Council. This does not accord with either conveyancing reality or an objective assessment of the parties' intentions. To interpret clause 6.2(5)(d) as placing on a vendor a duty to remedy any defect that was shown retrospectively not to comply with the Building Act 1991 would be to defy common sense, to use the words of the Court of Appeal in *Pyne Gould Guinness Limited*.

[84] To cross-check our interpretation of the clause, we have also considered the vendor's ability to comply with the warranty if it is given the extended interpretation contended for by the Heaths. We simply cannot accept that it is common sense to hold that the vendor under a turn key construction contract must warrant the ongoing performance of a building in circumstances where she had no control whatsoever over the physical construction of the addition works and when she took all the relevant regulatory steps required to comply with the Council's requirements.

[85] Ms Hart obtained a building consent, she engaged an experienced builder to carry out the work pursuant to that consent, she obtained a code compliance certificate for the works once complete. How could she possibly fulfil a promise to the purchasers

that the building would comply with the Building Code performance requirements into the future beyond taking those steps?

[86] To hold that her warranty was some sort of future promise that the house would continue to meet the Building Code performance requirements would impose a higher standard of care than that imposed on the party who actually performed the construction work and a higher standard than that imposed on the territorial authority which undertook the consenting, inspection and certification role. We cannot accept that it is a correct interpretation of the clause and so we hold that Ms Hart has no liability in contract for breach of clause 6.2(5)(d) of the agreement.

[87] Accordingly, the vendor warranty claim fails.

VENDOR WORKS CLAIM

[88] The only part of the works carried out by Ms Hart in issue in this adjudication is the work described as:

> The remedying of the cause of the leaking around the balcony attached to the level one master bedroom.

[89] The Council pleads this contractual term at paragraph 9 of its amended statement of claim dated 18 February 2011. It alleges a breach of that term at paragraph 14(a) of its amended statement of claim.

[90] The Council does not specifically plead the vendor works claim as a separate cause of action, but we intend to treat this part of the claim separately in this determination.

[91] The issue to be determined is whether Ms Hart remedied the cause of the leaking around the balcony attached to the level one master bedroom.

[92] We do not consider that this obligation, given an ordinary meaning, meant that Ms Hart was obliged to remediate the deck/wall junction to the standards applicable under the Building Act 1991 and Building Code when this repair work was done in 2003.

[93] That is to say, we do not consider that the parties agreed that she would rebuild the deck. There was no evidence given that the repair work would have required a building consent. We can only conclude, therefore, that that work could be carried out without a building consent.

[94] What we consider the parties agreed was that she would, in a "proper and tradesman-like standard" and at her cost, remedy the cause of the leaking.

[95] What Ms Hart says is that she had already had David Hilt undertake sealing works to the deck area. Mr Hilt was the builder who had constructed the addition. It is not clear to us from the evidence whether that work was done as part of the vendor works or not.

[96] We are left with the impression that work was done before the agreement was reached. We refer here to Ms Hart's Response dated 27 April 2011. She states at paragraph 16 of her Response that Mr Hilt had returned to the house "earlier that year" and sealed a leak from the deck.

[97] Ms Hart says that he used high quality sealant when he did that work. She says that the deck leak was repaired at settlement and that there is no evidence that the deck leaked subsequently, or that if it did, that was a new leak and did not evidence that the deck was not weathertight at settlement.

[98] Our view is that the evidence shows that Ms Hart relied on the work that had already been done by Mr Hilt as sufficient

compliance with the obligation she assumed. There is no evidence that she undertook any further work following the agreement being reached.

[99] That this work seems to have remedied any ingress of water appears to be supported by the pre-purchase building report. We refer here to pages 2 and 3 of that report. They state in relation to this area:

> *signs of sealant ...around new bedroom addition at deck connection to dwelling. Both these areas are showing previous leaks in around gib cove, with bubbling and damage to paint. Silicone around deck end appears okay...*

[100] The pre-purchase building work does not record that there was any evidence of ongoing damage arising from the deck/wall connection.

[101] The original assessor's report does not identify the north elevation deck as a cause of any damage. The assessor only identifies water entry through the concrete walls and pergola ledgers. He records that the defects he identified had resulted in damage to the interior paint finishes.

[102] The assessor does mention the deck/wall junction in the addendum report. At section 12.2.1.3 of his report he discusses the construction of the first floor deck and notes various non-compliant features. However, at 12.2.3 of his report, he makes the following comments:

> Stucco, substrate and timber framing found dry.
> Moisture content of plate on top of concrete wall 12.8%

[103] These findings are reflected in his photographs numbered 10 to 17. The areas examined appear to be dry. There is no evidence that the deck area was leaking.

[104] We asked the assessor at the hearing whether there was any evidence that the repairs to the balcony had failed. He was not able to confirm that the repairs to the balcony had failed or that new damage was evident.

[105] He was of the view that the deck structure did not comply with the current Building Code but was unable to say that non-compliance caused leaks. Given our finding that Ms Hart was not required to bring the deck structure up to current Code standard but only ensure that it did not leak, the non-compliant nature of the deck structure is not something that we can hold her liable for. In any event we are not satisfied that there was any proven damage arising from the work that Ms Hart commissioned in that area.

[106] The only evidence that was presented as demonstrating the failure of that work was evidence that the interior paint finishes were damaged in that area. But again, no evidence was provided that that damage had resulted from the failure of Ms Hart's repair work as opposed to the original damage discussed in the original assessor's report.

[107] Even if we were to conclude that Ms Hart breached the agreement by relying on the previous work undertaken by Mr Hilt rather than getting another person in to undertake repairs, in the absence of evidence that the vendor works had failed and caused new damage, we were unable to find that Ms Hart breached the contractual obligation she assumed under the special condition of the agreement. Or if she was in breach of the special condition, no damage arose from that breach.

[108] Accordingly, the vendor works claim fails.

DECISION

[109] As our findings are that Ms Hart is not in breach of either the vendor warranty claim or the vendor works claim, we do not need to deal any further with the issues set out at paragraph 11 (d) above.

[110] We also do not need to deal with the Council's cross-claim, other than to note that as the only claim against Ms Hart was in contract the Council would be unlikely to have a claim for contribution or a viable cross-claim.

[111] Accordingly, the claimants' claim is dismissed.

DATED this 30th day of March 2012

_____	_____
P R Cogswell	K D Kilgour
Tribunal Member	Tribunal Member