IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2008-101-000013
[2010] NZWHT AUCKLAND 8

	BETWEEN	PETER DEVON LEE and ESTELLE MARY LEE Claimants
	AND	NAPIER CITY COUNCIL First Respondent
	AND	WARREN RICHARD THOMPSON, MARGARET JEAN THOMPSON and MEGAN CLARE MACDONALD as trustees of the ARKLOW TRUST Second Respondents
	AND	ANGUS CHARLES BEATTIE Third Respondent
	AND	JULIE MARIE BEATTIE Fourth Respondent
	AND	ANGUS CHARLES BEATTIE, JULIE MARIE BEATTIE, STEPHEN ALEXANDER GREER and STEPHEN ROBERT SHEPHERD as trustees for the ANGUS and JULIE BEATTIE FAMILY TRUST Fifth Respondent
	AND	ROSS ANDREW (Removed) Sixth Respondent
	AND	HASTINGS ALUMINIUM CO. LIMITED (Removed on 29 August 2008) Seventh Respondent
	AND	GEOFFREY CLARK (Removed) Eighth Respondent
Hearing:	8 and 9 February 2010; and Final submissions received 25 February 2010	
Appearances:	Max Courtney, for the claimants David Heaney and Catherine Goode, for the first respondent David Chan, for the second respondent Third respondent, self represented Fourth respondent, self represnted Nathan Gray for two of the trustees of the fifth respondent	
Decision:	19 March 2010	

FINAL DETERMINATION
Adjudicator: P A McConnell

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INTRODUCTION

[1] Peter and Estelle Lee are the owners of a property at 17 Auckland Road, Napier. They purchased the property in September 2003 to be their retirement home. The house was approximately 2 years old with the Code Compliance Certificate having been issued in March 2003. Within nine months of shifting in the Lees realised they had a leaky home and had lodged a claim with the Weathertight Homes Resolution Service. The assessor concluded that defects in the construction had caused leaks resulting in damage to the cladding and framing and that significant remedial work was required.

[2] The claimants allege that the Napier City Council, Warren Richard Thompson, Margaret Jean Thompson and Megan Clare MacDonald as trustees of the Arklow Trust (Arklow Trust), Angus Charles Beattie, Julie Marie Beattie in their personal capacity and also together with Stephen Alexander Greer and Stephen Robert Shepherd as trustees of the A and J Beattie Family Trust (Beattie Trust) are responsible for the defects and resulting damage. The Napier City Council is the local authority that issued the building consent, undertook inspections during the construction process and issued the Code Compliance Certificate. Mr and Mrs Lee purchased the property from the Arklow Trust which acquired the property before the Code Compliance Certificate was issued from the Beattie Trust. The Beattie Trust was the owner of the property during the majority of the construction work. The claimants allege Angus and Julie Beattie were the developers and/or builders of the property.

THE ISSUES

[3] The issues I need to decide are:

- What are the defects that caused the leaks?
- The liability of the Napier City Council. In particular should the Council have detected any of the defects during the inspection

regime and were they negligent in issuing the Code Compliance Certificate?

- Does the Arklow Trust have any liability to the claimants in either contract or tort?
- What was Mr Beattie's role in the construction? In particular was he the builder or developer?
- What was Mrs Beattie's role in the construction?
- Was the Beattie Trust the developer and if so, what liability do any of the trustees have for any of the defects and consequential damage?
- What are the appropriate costs to rectify the defects?
- Are the Lees entitled to consequential and general damages?
- Were the Lees contributorily negligent or did they fail to mitigate their loss?
- What contribution should each of the liable respondents pay?

MATERIAL FACTS

[4] In considering this claim, it is useful to set out a chronology of the key events:

Angus Beattie "or his nominee" agrees to buy 17 Auckland Road	16 June 1999
Title issued to Stephen Alexander Greer and Stephen Robert Shepherd trustees (the then trustees of the Beattie Trust).	14 June 2000
Initial building consent application filed	14 April 2000
Building consent application reinstated	11 July 2000
Construction commences	July 2000
Stephen Greer and Stephen Shepherd resign as trustees and replaced by Angus and Julie Beattie	20 April 2001
Flood and Beattie Limited placed in liquidation	1 June 2001
Wall inspection (pre-stucco)	27 July 2001

Agreement for sale and purchase from Beattie Trust to Arklow Trust	November 2001
Settlement of sale to Arklow Trust	21 December 2001
Final inspection by Napier City Council – fails	29 October 2002
Letter from Council to Arklow Trust regarding final inspection and listing 8 items to be addressed	12 November 2002
Final building inspection – passed	27 February 2003
Code Compliance Certificate issued	4 March 2003
Agreement for sale and purchase between Arklow Trust and the Claimants	4 September 2003
Settlement of sale and purchase	26 September 2003
Claimants seek engineering advice and are advised the building is defective	27 February 2004
WHRS application	11 June 2004
Assessor's report issued	5 November 2004
Addendum report issued	10 September 2007

[5] In June 1999 Mr Beattie agreed to buy 17 Auckland Road, an empty section. He states he purchased it with the intention of building a home for him and his family. The Beattie Trust settled the purchase of the section. At that time the trustees of the Beattie Trust were Stephen Greer and Stephen Shepherd, Mr Beattie was a beneficiary of the Trust but had no authority to sign any documentation on behalf of the Trust.

[6] Without any apparent consultation with the trustees, Mr Beattie proceeded to have a house built on the section. He was the one who chose the plans, lodged the building consent, arranged for the contractors to work on site and also carried out some of the construction work himself. Mr Beattie says that Flood and Beattie Limited were contracted to build the home but there is no other evidence to support this allegation. In any event, that company went into liquidation part way through the construction period. At around the same time Mr Greer and Mr Shepherd resigned as trustees of the Beattie trust and were replaced by Angus Beattie and Julie Beattie.

[7] As a result of the financial difficulties caused by the liquidation of Flood and Beattie Limited the bank required the Trust to sell the almost completed property at 17 Auckland Road. Mr and Mrs Beattie entered into an agreement for sale and purchase with the Arklow Trust in November 2001. Under the terms of that agreement the house was to be completed and a Code Compliance Certificate issued by 11 December 2001 being the proposed settlement date. The work was not completed and after some negotiation the Arklow Trust agreed to settle the purchase on 21 December 2009 on the express agreement that Mr Beattie and/or the Beattie Trust would complete all outstanding work and obtain a CCC. Mr and Mrs Thompson then moved into the property.

[8] The matters that were not complete at the time of settlement were listed by Mrs Thompson in a handwritten list which was page 1 of the Appendices to Mr Thompson's Affidavit. The matters for completion were mainly issues to do with internal decoration and landscaping. The evidence also suggests that some cracks occurred in the plaster while the property was owned by the Arklow Trust. These appear to have been remedied by Mr Beattie or someone working on his behalf before the CCC was issued.

[9] The Council and claimants also refer to work being done on the balcony after purchase. The Napier City Council letter dated 12 November 2002 made reference to an overflow required off the deck. It is unclear from the evidence presented when this work was actually done but most likely between November 2003 and March 2003 by Mr Beattie or someone working on his behalf.

[10] The Arklow Trust had some difficulty getting Mr Beattie to complete the outstanding matters and the Code Compliance Certificate was not issued until 4 March 2003.

[11] The claimants first became aware that there could be some issues with the dwelling when they sought engineering advice in February 2004

to install two sails over the deck for shading. The engineer they engaged advised them that the building was defective. The Lees subsequently engaged a building consultant who issued a report and advised the claimants to lodge a claim with the WHRS.

WHAT ARE THE DEFECTS THAT HAVE CAUSED THE LEAKS?

[12] Mark Hazelhurst, the assessor, Alan Light, the claimants' expert and Geoffrey Bayley, the Council's expert, gave their evidence concurrently on the defects to the dwelling and subsequent damage. They were joined by James White when discussing issues of quantum.

[13] The experts did not agree on the contribution of some defects to the damage or as to whether various issues were defects. They also disagreed as to whether lack of maintenance contributed to the damage. The experts however agreed that the dwelling was a leaky home and that a total reclad was necessary.

Installation of Joinery

[14] All the experts agreed that there was water ingress around the joinery particularly in the downstairs bedroom and the upstairs lounge. There were no jamb or sill flashings installed and in the view of Mr Hazelhurst and Mr Light no other adequate method of sealant to prevent water entry. They further noted that the solid plaster was taken up to and above the flange of the window.

[15] Whilst Mr Bayley accepted that there was moisture ingress through some of the windows, he noted that with other windows the moisture readings had quite acceptable levels. Mr Hazelhurst's view however was that moisture was not the only sign of damage, particularly in the Hawkes Bay. Mr Light advised that in some cases where there was no evidence of damage around the windows, moisture ingress through the joinery caused damage further down. In particular with the lounge windows there was only limited damage to the sill plate but significant damage below.

[16] Mr Bayley was also of the opinion that E2AS1 did not require the joinery to have jamb and sill flashings but provided that sealant was an acceptable solution. His observation was that there appeared to be sealant.

[17] Mr Hazelhurst and Mr Light however believe that the more general provisions of E2AS1 1998 3.1.1 should be interpreted in light of the more specific provisions in NZS 4251. In particular 2.1.4.2 provided detailing for head, sill and jamb flashings. They further noted that the stucco guide, that was relevant at the time, as well as the relevant James Hardie technical material included recommendations for sill flashings. Mr Light also submitted that any sealant that was applied did not comply with the October 1991 BRANZ Bulletin on how to design a sealant joint and did not follow good trade practice at the time. Mr Light's opinion was that there still should have been a sill tray behind the sealant if sill and jamb flashings were not installed.

[18] It is relevant to note that the plans and specifications for this dwelling provided references to technical material that stipulated mechanical flashings. I accept the evidence of Mr Light and Mr Hazelhurst that where sealant was applied it was inadequate and did not comply with good practice at the time. Mr Hazelhurst said that with the windows he tested, any sealant used was only smeared on and was totally inadequate. It is also most likely that some windows had no sealant or sill and jamb flashings. The fact that sealant had failed within three years of construction also suggests that the sealant, if it was applied, was never adequate and did not fulfil the functional requirement of the Code. At the time this building was constructed, the Building Code was performance-based, not descriptive. I accept that any sealant used did not perform as required and was not applied in accordance with good building practice at the time.

[19] This is a dwelling where significant and serious water ingress was detected and detailed in a report some 18 months after the Code

Compliance Certificate was issued and less than 3 years after the dwelling was built. It was suggested that the windows may have been adequately sealed when installed and the sealing may have perished or deteriorated over time. I do not think this explanation is likely given the significant water ingress and concerns raised in Mr Hazelhurst's first report completed on 5 November 2004.

[20] Mr Bayley further submitted that a significant cause of water ingress through the windows could have been as a result of inherent defects in the window construction. He submitted that unsealed screws in the mullion bases could have been the problem. He noted that these had been causative of water ingress in other dwellings.

[21] In light of this allegation, Mr Hazelhurst revisited the property and carried out further tests to one of the windows. His tests concluded that the window mitres and mullion bases had been sealed. He dye-tested the north facing lounge window and no leaks appeared through the window's frame. He said there was clear evidence of the screws being sealed underneath rather than from on top. His conclusion was that the aluminium manufacturer was not responsible for the leaks.

[22] Mr Hazelhurst only carried out this further detailed examination on one window but information obtained from earlier inspections together with visual inspections means it is reasonable to assume that other windows were manufactured in the same way as the window that was examined in more detail. It is not practical or possible for experts to carry out the same level of investigation in relation to all windows. Furthermore Mr Bayley's opinion was based on a visual observation only and his experience in other houses. He did not undertake any invasive investigation on the windows in this dwelling. There is accordingly no evidence that any of the joinery leaks in this dwelling were caused by defects in the manufacture of the windows.

[23] I conclude that moisture ingress has occurred around the joinery due to defects in the installation. In particular no sill or jamb flashings

were installed as recommended in the technical literature and as specified in the references in the plans and specifications for this dwelling. Sealant, where used, was not adequate and did not perform appropriately. Other defects with the windows included no slope to the upper surface of the sill of some windows and solid plaster up and over the flange.

[24] Mr Hazelhurst considers that the defects in the installation of windows was a primary water entry point and a primary defect for the dwelling. Mr Light put the contribution of this defect between 30% and 50% and Mr Bayley at around 25%. I accept that this was a primary defect in the sense that if this had been the only defect a full reclad would most likely have been necessary.

Cracking in the Plaster

[25] All the experts agreed that cracking in the plaster was both a cause of water ingress and also a result of water ingress. There were a large number of potential issues that could have caused cracking and a number of these were evident in this property. No control joints had been included and this was contrary to the requirements of the time and good building practice. There was also poor detailing particularly in relation to roof junctions. Plaster mix is also likely to have contributed to the cracking as well as other defects in the application of the plaster.

[26] Lack of adequate flashings and poor detailing of roof junctions also contributed to the cracking. The experts also accepted that there were no mid floor flashings in this building which meant that any water that entered the dwelling could carry on down to the bottom plate. They also agreed that mid floor flashings should have been constructed.

[27] I accept that extensive cracking evidence throughout the dwelling has been a significant cause of water ingress. The extent of the cracking is so extensive that re-cladding is required. Mr Hazelhurst was of the view that this was the primary cause of water ingress together with the window flashings. The other experts attributed lower percentages to this defect.

[28] Mr Bayley was of the view that lack of maintenance was a significant cause of the cracking. I will deal with the issue of lack of maintenance further on in this determination.

Deck

[29] Mr Hazelhurst noted that the main issue in relation to the deck was that a nail had popped through the membrane and had been plastered over. As it was concealed behind the plaster it would not have been able to be seen by anyone other than the plasterer or builder. The problem was however exacerbated by a lack of fall in the deck level and potentially by inadequate drainage. The drainage vents for the deck were at a higher level than the interior floor level which meant they would not prevent flooding into the house when there was heavy rain. There is evidence of this occurring on one occasion only.

[30] There were also cracks in the balustrade plaster. It is also possible that some of the high moisture readings in the balustrade was caused either by water soaking in or wicking up from the deck. All the experts agreed that the deck had not been built as designed. The design stipulated that a gutter was to be installed. Mr Light and Mr Hazelhurst were of the view that if the deck had been built in accordance with the consented plans it was unlikely that the deck would have contributed to leaks.

[31] I accept that the nail popping through the membrane was the primary cause of damage to the deck. However lack of slope, inadequate drainage and failure to build the deck in accordance with the consented plans contributed to the damage. As a result of the defects and damage the deck needs to be re-built.

Roof Defects

[32] The experts in general agreed that there were issues with the junctions between the roof and the exterior cladding and parapets which has allowed water ingress. Mr Hazelhurst was of the view that although

the detail of the roof was not robust he did not believe the roof itself was leaking and needed replacing. He considered the junction issues would largely be remedied by recladding the house on a drained and ventilated cavity and some targeted repairs to the internal gutter and other suspect areas.

[33] Mr Bayley was of the view that a significant cause of leaks in the roof area was a result of unmaintained cracks to the parapet tops. Mr Light considered that the zero pitch to the dining room roof and its extension out beyond the iron cladding is allowing water to get into the soffit and then travel back under the iron roof. Reference was also made to defects in the construction of the small roof area above the bay window in the rumpus room.

[34] These latter two areas were both recognised as a defect by Mr Hazelhurst and Mr Light who also considered they were causes of water ingress. They were both of the opinion however that, putting aside any structural issues, the roof defects could be remedied by targeted repairs and would not require a total replacement of the roof. All the experts agreed that the guttering would need to be replaced and this was included in their costings.

[35] The claimants also referred to zero pitch to parts of the curved roof and unusual soffit details. They submit that there are also other structural deficiencies in relation to the roofing of this dwelling. There is however no evidence that any of the other defects were a cause of water ingress or damage. I am satisfied that the defects with the roof which have caused leaks to the dwelling were largely associated with where the roof abutted other building elements such as walls and parapets. There were also defects with some of the guttering, with the dining room roof and with the small roof area above the bay window in the rumpus room. These defects however can be remedied by re-cladding and targeted repairs rather than a total re-roof.

[36] In addition to the weathertightness issues there may be some other structural issues associated with the roof. Evidence on this issue was not definitive as the expert opinion was that it would be difficult if not impossible to reach a conclusive view on this issue without extensive destructive testing or until the cladding was removed. I accept the claimants are not in a position to be able to provide any better evidence on this issue. That however is always a risk claimants take when proceeding to adjudication before completing the remedial works or demolition and rebuild. As it has not been established that there are other structural issues in relation to the roof, it is not necessary to determine whether they are weathertightness related, and if not, whether the Tribunal has jurisdiction to deal with them.

Ground Clearances

[37] Mr Light considered that there was a small but significant area by the garage where lack of ground clearances was an issue resulting in leaks. None of the other witnesses disputed this evidence and I accordingly accept that lack of ground clearances is an issue but only in one or two isolated areas.

Lack of Maintenance

[38] Mr Bayley submitted that failure to carry out regular and routine maintenance both before and after Mr and Mrs Lee purchased the property contributed to water ingress and damage. Mr Bayley was specifically asked to address the issue of whether lack of maintenance was a contributing cause of the damage that was outlined in Mr Hazelhurst's 2004 report. His opinion was that failure to maintain the property was a significant cause of water ingress and the damage detailed in Mr Hazelhurst's 2004 report.

[39] His opinion in this regard is inconsistent with the evidence presented and in my opinion defies logic. Mr and Mrs Lee purchased an all but new home in September 2003. While it was largely built by December 2001, the finishing work was not completed until early 2003

with the CCC issued on 4 March 2003. By 11 June 2004, less than nine months after purchase and 15 months after the date of the CCC, they had filed their claim with the WHRS. The assessor in compiling his report investigated 20 different sites around the dwelling and concluded that a complete reclad of the dwelling was the most suitable solution to address the widespread defects and issues with the construction of the dwelling. He concluded that there were areas of leaking and areas of poor trade practice that could cause leaks in the future.

[40] It is not reasonable to suggest that owners who purchase a house less than two years old have been negligent because within 8 months of purchase they have not carried out maintenance work. In addition Mr Bayley's submissions are contrary to the undisputed evidence. First there was evidence that cracking had been repaired whilst the Arklow Trust owned the property. In addition Mr Lee stated that he did, in the initial years after purchase, carry out regular maintenance by sealing and painting cracks both in the cladding and in the parapet areas. He accepted he had not continued with this due both to age and health issues and also because they knew the house required substantial remedial work to the extent that they were considering whether it should be demolished.

[41] I accept that failure to carry out maintenance over the last few years may have increased the degree of water penetration and subsequent damage. This would however only be a minor contribution to total overall costs as the property required substantial remedial work from as early as 2004.

[42] Mr Hazelhurst also expressed the view that often cracks occur as a result of damage and that water ingress occurs before a crack becomes evident. Mr Light also correctly points out that Mr Bayley has applied the wrong test to the B2 Durability question when dealing with the issue of maintenance. The test is not whether in fact normal maintenance is undertaken but rather whether failure of B2 durability would occur despite normal maintenance if it was done. I am satisfied from the evidence

presented in this case, that normal maintenance would not have prevented or remedied the very extensive issues with this dwelling.

[43] I also reject the submission by Mr Bayley that failure by the Arklow Trust to carry out regular maintenance contributed to the dwelling leaking. From the time they purchased the property through until March 2003, they spent a considerable amount of time and effort in trying to get Mr Beattie to complete the house. The Code Compliance Certificate was issued on 4 March 2003 and they sold the property some six months later. To suggest that the leaks occurred because the Arklow Trust do not carry out maintenance within the six month period between when the Code Compliance Certificate was issued and when they sold the property to the Lees is not reasonable.

Conclusion and Summary as to Damage

[44] Based on the evidence presented, I am satisfied that the key defects causing water ingress and damage to the dwelling are:

- Inadequate flashing and waterproofing of joinery;
- Defects in plaster mix, stucco plastering and application
- Absence of control joints causing cracks in the plastering and failure to install mid floor flashings;
- A nail penetrating the deck membrane. This was the primary cause of damage to the deck however an insufficient fall in deck and failure to build it in accordance with the consented plans contributed to the damage;
- Defects in internal guttering system and roof to wall junctions together with design and construction to dining room roof and small bay windows roof in the rumpus room;
- Insufficient cladding clearances in relation to a small area by the garage.

LIABILITY OF THE NAPIER CITY COUNCIL

[45] The claim against the Council is that it was negligent in the processing of the building consent application, in carrying out inspections

during construction and in issuing the code compliance certificate. In particular it is alleged that it was negligent in failing to identify the weathertightness defects both in the plans and during the inspections undertaken.

Building Consent

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

[47] In *Body Corporate 188529 & Ors v North Shore City Council & Ors* (No 3)(*Sunset Terraces*),[1] Heath J concluded it was reasonable for the Council to assume, in issuing building consents, that the work could be carried out in a manner that complied with the Code. He stated:

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

[48] No specific evidence was adduced or pleaded as to the inadequacy of the plans at the time of consent. The defects with the

property were largely construction defects and failure to follow the consented plans rather than defects in the plans themselves. The Council cannot be liable for issuing a building consent where the defects have arisen through failure by the builder or other contractors on site to follow consented plans or good construction practices.

[49] In my view therefore the Council had reasonable grounds on which it could be satisfied that the provisions of the Code could be met if the building work was completed in accordance with the plans, specifications and technical literature by a competent builder. I accordingly conclude that the claimants have not proven negligence or breach of statutory duty at the building consent stage, on the part of the Council.

The Inspection Process

[50] The claim that the Council failed to exercise due care and skill when inspecting the building work is based on failure to inspect with sufficient care. It is further alleged that the Council did not have reasonable grounds to conclude that the dwelling complied with the Building Code when issuing the CCC. This failure, the claimants submit, amounted to negligence and caused the claimants loss.

[51] The Council inspections were carried out by Council officers pursuant to section 76 of the Building Act 1991. Several inspections were carried out during the construction process with a failed final inspection in October 2002, a further final inspection in February 2003 resulted in a CCC being issued on 4 March 2003.

[52] The Council submits that many of the issues with the dwelling could not have been identified as defects at the time of construction. In particular it submits that a Council officer should be judged against the conduct of other Council officers and against the knowledge and practice at the time at which the negligent act/omission was said to take place.

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[1] [2008] 3 NZLR 479.

[53] I accept that the adequacy of the Council's inspections needs to be considered in light of accepted building practices of the day. I further accept that the Council is only likely to have a liability to a subsequent owner if it can be established that the Council did not have reasonable grounds upon which to conclude that the building complied with the Building Code and consented plans.

[54] The High Court in recent cases has set out the responsibility on territorial authorities in carrying out inspections. Heath J in *Sunset Terraces* states that:

> "[450]….[A] reasonable Council ought to have prepared an inspection regime that would have enabled it to determine on reasonable grounds that all relevant aspects of the Code had been complied with. In the absence of a regime capable of identifying waterproofing issues involving the wing and parapet walls and the decks, the Council was negligent."

[55] And at paragraph [409]:

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

[56] Justice Heath did however acknowledge that the Council was not a clerk of works or a project manager. He said:

> "[183] In carrying out its inspection role, it is plain that the Council ought not to be regarded as a clerk of works or as a project manager. Even before the Building Act was passed, the Council's duty to third parties was "to exercise reasonable care, not an absolute duty to ensure compliance". The Council's role is to provide an appropriate degree of oversight for public policy reasons. Its performance must be judged against the standards of the day and knowledge of the quality (or otherwise) of particular products used in the construction process. It does not take on any responsibility for ensuring, in fact, that all completed work complies with the Code."

[57] In *Dicks v Hobson Swan Construction Limited* (in liquidation),[2] the court did not accept what it considered to be systemically low standards of inspections absolved the Council from liability. In holding the Council liable at the organisational level for not ensuring an adequate inspection regime, Baragwanath J concluded:

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

[58] These authorities establish that the Council is not only liable for defects that a reasonable Council officer, judged according to the standards of the day, should have observed. It can also be liable if defects were not detected due to the Council's failure to establish a regime capable of identifying whether there was reasonable compliance with significant aspects of the Code. I will therefore be applying this test in determining whether the Council has any liability. In doing so, it is appropriate to consider each area of defect as established in paragraphs 14 to 44.

Installation of Joinery

[59] I am satisfied from the evidence provided that the Council inspectors should have noted the defects in relation to the joinery installation at the time of their inspections. I accept the evidence of Mr Hazelhurst and Mr Light that sealant was not suitable in this dwelling because of the way the windows were constructed and the way the plaster came up beside the window. I am also satisfied that it should have been reasonably apparent that where sealant was applied it was not adequate.

[60] Baragwanath J in the *Dicks* decision concluded that where sealant was being used as a substitute for cavities and flashings it was necessary for the Council to establish and enforce a system that was able to determine whether or not adequate sealant was present. They failed to do

[2] (2006) 7 NZCPR 881 (HC), Baragwanath J at para [116].

so in this case. In addition I am satisfied that the method of construction was such that it should have put a reasonable Council officer on notice that the waterproofing details in relation to the joinery were not adequate.

Cracking in Plaster

[61] The Council could not reasonably have detected any issues with the plaster mix or any of the defects in the workmanship in terms of the application of the stucco finishing. However a Council officer should have detected the lack of appropriate control joints and the absence of mid-floor flashing during one of their inspections.

[62] Cracking in the plaster was picked up during inspections prior to the Code Compliance Certificate. In a letter dated 12 November 2002 from John Brydon to Mr and Mrs Thompson, one of the issues to be addressed before the Council would issue the CCC was cracks to the exterior lining. Mr Beattie in response wrote a letter to the Council stating any cracks had been filled and painted with membrane paint and he also attached a letter from the applicator about the original application of the plaster. I consider the appearance of these cracks at such an early stage should have resulted in further questions being asked and further care taken to ensure the dwelling was built weathertight. The Council should therefore have detected the lack of control joints at the very least.

Deck

[63] I accept the Council cannot be responsible and could not reasonably have seen the main issue with the deck being the nail that popped through the membrane. However it is clear that some of the other issues with the deck were detected. Firstly, the Council officer was aware that there was an inadequate slope. It appears he may have made a judgment call and decided that he would not require this matter to be remedied due to the extensive work that would be required. The Council officer also detected lack of adequate overflow but does not appear to have checked the overflow that was installed. There is however no evidence that the inadequate overflow and/or the positioning of the

overflow have caused any water ingress issues with this house apart from the one occasion where there was significant flooding to the upstairs lounge area.

[64] Mr Bayley suggested that there was no requirement for a slope on the deck but only roofs. I accept that this deck should have been categorised as a roof as it formed part of the roof of one of the downstairs bedrooms. I therefore accept that a slope was required and a Code Compliance Certificate should not have been issued when the Council officer recognised the lack of fall. Whilst this was not the major defect in relation to the deck, it did contribute to the deck leaking. The deck was also not built in accordance with the consented plans. This is an issue that should have been detected by a Council officer.

Roof and Guttering

[65] I am satisfied that a Council officer should have detected the inadequate flashing and poor detailing of the junctions between the roof and other building elements. The changes to the guttering and the novel guttering systems that was constructed for this dwelling should also have been detected by the Council officer.

Conclusion

[66] In summary I conclude that the Council was negligent in failing to identify the inadequate flashing and waterproofing of joinery, the failure to install inter-storey flashings and control joints, the lack of cladding clearance by the garage, the lack of fall on the deck and the fact it was not built in accordance with the consented plans. I am also satisfied that the Council should have noted some key changes from the consented plans in relation to some of the other construction details. This would have highlighted the issues of non-compliance with the Code and put the Council inspector on notice to make further enquiries.

[67] There are however areas of damage which it is not reasonable to have expected the Council to have noticed. A Council officer could not

reasonably have noted issues to do with the mix of the stucco plaster or workmanship issues in relation to its application. It also could not reasonably have seen the nail penetrating the membrane which was the main issue in relation to the deck. Given however the extent of the damage that has been caused by the defects that should have been detected by the Council, and the fact they occur on all elevations, I conclude that the Council contributed to the defects that necessitated the full recladding of the dwelling.

LIABILITY OF THE ARKLOW TRUST

[68] The claim against the Arklow Trust is both in contract and negligence. The claimants allege that the Trust breached paragraph 6.2 of the agreement for sale and purchase when it sold the property to Mr and Mrs Lee. In particular it is alleged they caused or permitted work to be done on the property which was defective and non-Code compliance. They also further allege that the Arklow Trust caused or permitted work to be done on the property for which a building consent was required by law and that work was either defective, not completed in accordance with the Building Code or was not Code compliant.

[69] The claimants further submit that the Arklow Trust assumed responsibility as builder or developer of the property and as such owed the claimants a duty of care. They submit that the Arklow Trust breached the duty of care as the work was not carried out in a good and tradesman-like manner.

[70] The undisputed and unchallenged evidence is that when the Arklow Trust agreed to purchase the property it was on the condition that all building work would be completed and a Code Compliance Certificate would be issued prior to settlement. By the scheduled settlement date this had not been achieved and the Thompsons were in a position where they needed to move into the property. They accordingly agreed that settlement would take place but that the Beattie Trust and/or Mr Beattie would complete all outstanding work and ensure a Code Compliance Certificate was issued.

[71] At the time of purchase the construction work was all but complete. There were some relatively minor things that needed finishing off but the major construction work was completed. Exterior and interior walls had all been completed and painted, windows were installed and the roof finished. There was an extensive list of finishing items that still needed to be completed at the time the sale and purchase was signed. These are listed in further terms 14-20. These were mainly landscaping or internal decorative finishing other than:

- Repair the holes and dents in the exterior plaster work.
- A further coat of fibre glass to be laid to balcony floor.

[72] Some of these issues were completed prior to settlement others were still outstanding at settlement. Mr Thompson gave evidence that the item to do with repairing the holes and dents related to more aesthetic issues and not to cracking in the plaster work. It is unclear from the evidence whether the additional layer of fibre glass was laid before or after settlement. In any event this issue has not been implicated in any way in the weathertightness issues.

[73] The other evidence relating to work done on the property after the purchase by the Arklow Trust is the letter from the City of Napier to Mr and Mrs Thompson dated 12 November 2002. That letter raises eight issues which the Council believed needed to be addressed before a CCC was issued. These were:

- A change to the spouting system had been made without approval from the Council. Full details are acquired.
- The toilet on the top-storey is loose and not sealed around the base.
- The downpipe on the deck requires fixing to the wall.
- An overflow is required of the deck.
- The deck barrier requires to be constructed as per the approved plans.

- There are concerns over some of the cracks in the exterior linings. These need to be looked at by the applicator of the exterior coating.
- A change to the window in the dining room has removed the only brace in that wall, full details are required.
- An electrical appliance certificate is required.

[74] Mr Beattie responded to that letter on 13 December 2002. From that letter it is apparent that work was done to fix the downpipe to the wall, install an overflow of the deck and to complete the construction of the deck barrier as per the approved plans. In addition the cracks in the plaster were repaired. Whilst some of this work would fit within the category of construction work, with the exception of the overflow of the deck, there is no evidence it was not done in accordance with the consented plans. In any event as a consequence of any work being undertaken together with further information provided by Mr Beattie, a Code Compliance Certificate was issued by the Council.

Claim in Breach of Contract

[75] In order for Mr and Mrs Lee to have a successful claim for breach of paragraph 6.2 of the agreement for sale and purchase it would need to be established that there was work done or caused or permitted to be done to the property after the purchase by the Arklow Trust that failed to comply with the permit, consented plans or Code that caused leaks. The Arklow Trust can have no responsibility for work that was carried out prior to them being owners under the warranties contained in 6.2 as it applies only where the Trust had done, or caused or permitted to be done, work on the property.

[76] There is no evidence before the Tribunal that the work done while the Arklow Trust was the owner of the property, was done without any required permit or consent. The only evidence of any work not done in accordance with the plans or consents while the Arklow Trust owned the property was the installation of the overflow to the deck. The overflow was

not adequate and was above the level of the room going off the deck and this contributed to the flooding that occurred in October 2004.

[77] Both the Council and the claimants also allege that plastering work was done after the Arklow Trust purchased the property. However there is only evidence of cracks being repaired which is more in the nature of regular maintenance work for which consents are not required. There is no evidence that the filling or repairs to these cracks was defective or caused or contributed to the leaks. To the contrary the filling of cracks was inspected by the Council and passed on the final inspection.

[78] The measure of damages in contract is the amount which, so far as money can do it, will serve to restore the plaintiffs to the position they would have been in had the breach not occurred. The claimants are not claiming for any loss that has occurred as a result of the deck flooding so the claim for this inadequacy in the overflow would need to be based on the cost of rectification. The Council submits that repairs to the overflow would require the deck to be rebuilt. They however provided no evidence to support this submission and I do not accept this submission. It was not a primary defect in relation to the leak and could be remedied by the installation of a complying outlet. I am therefore satisfied that the defects with the overflows could have been remedied by targeted repairs. No evidence has however been presented as to what those costs would be but they are likely to be minimal in comparison to the total amount claimed. The claimants have therefore failed to establish that any awardable loss has resulted from any breach of contract by the Arklow Trust.

[79] The fact that the Trust reluctantly agreed to settle prior to the CCC being issued does not somehow bring all construction work into the ambit of 6.2(5). In addition it does not bring into the ambit of 6.2(5) the items on the 12 November 2002 list which only required further information from Mr Beattie rather than additional construction work. The reason for this is that the Trust did not cause or permit the work to be done. Any waiver given to the Beattie Trust on settlement does not make the Arklow Trust liable for work done prior to their purchase. This is contrary to the proper

interpretation of clause 6.2 of the contract and contrary to the evidence. The warranty clause in 6.2(5) covers only work done by, for or with permission of the vendor - it does not cover work by a predecessor in title.

[80] The third cause of action as set out in Mr and Mrs Lee's statement of claim must fail for the same reason. There is no evidence that the Arklow Trust have done or caused or permitted to be done on the property any work for which a building consent was required by law which did not comply with consents or was not done in a good and tradesmanlike manner, other than the deck overflow. The list of outstanding work at the time of purchase is not disputed and there is no evidence that either it was not covered by the original building consent or that if it wasn't, that a building consent was required for this to be done.

Claim in Tort

[81] The claimants allege that the Arklow Trust assumed the responsibility as builder and/or developer of the property. There is however little evidence supporting this allegation. The clear and undisputed evidence is that it was Mr Beattie and/or the Beattie Trust's responsibility to do this work and that it was Mr Beattie, or people engaged by him, who carried it out. The Arklow Trust did not undertake any building work, nor is there any evidence the trust paid for building work to be done after buying the property. Furthermore there is little evidence that any of the work done on the property after it was purchased by the Trust has contributed to the dwelling leaking.

[82] The claimants have provided no submissions on the legal basis for the conclusion that the vendors owed them a duty of care. I do not accept that the Arklow Trust was a developer or builder. Unless they were a builder or developer the Trust or the trustees could not owe the claimants a duty of care.

[83] I accordingly conclude that there is no factual or legal basis for a tortious claim against Warren Richard Thompson, Margaret Jean Thompson and Megan Clare MacDonald as trustees of the Arklow Trust.

LIABILITY OF ANGUS CHARLES BEATTIE

[84] The claimants allege that Angus Beattie was the builder and developer of the house and as such he owed them a duty of care. They claim he was responsible for all defects in the dwelling as he failed to ensure it was built in a good and tradesmanlike manner and in accordance with the plans, specifications and the Building Code.

[85] Mr Beattie did not dispute the evidence in relation to defects nor did he dispute the quantum being claimed. He however submitted that he was not the builder and developer in his own right as any involvement he had with the property was either in his role as a director or employee of Flood and Beattie Limited or as a trustee of the Beattie Trust. Unfortunately for Mr Beattie the evidence of the other parties does not support this submission.

[86] Mr Greer, who at the time of the purchase of the land was one of two trustees of the Beattie Trust, advised that it was Mr Beattie who decided to purchase the section. He signed the agreement for sale and purchase in his own right but recorded the purchaser as Angus Beattie or nominee. Mr Greer's undisputed evidence however was that Mr Beattie did not have the authority of the Trust to sign contracts or enter agreements on behalf of the Trust. Only the two trustees, Mr Greer and Mr Shepherd, had signing authority as Mr Beattie at that stage was only a beneficiary of the Trust. Mr Greer also said he did not even know a house was being built on the section until after he retired as a trustee. Clearly the Trust was not involved in any of the planning, development and construction decisions at least until the time Mr Greer and Mr Shepherd resigned as trustees.

[87] Mrs Beattie's evidence was that Mr Beattie was actually involved in construction work on the site and that she and the children visited him there on some occasions during construction. She said it was Mr Beattie who decided to build a house for the family and who made most of the

decisions in relation to the project. Mr Thompson's evidence was that it was Mr Beattie who was responsible for completing the construction and it was Mr Beattie he contacted in order to get all matters completed so the CCC could be issued.

[88] Mr Beattie said that he entered into an agreement for the construction of the house with Flood and Beattie and that he signed that construction agreement on behalf of the Trust. However there is no record of this agreement and in any event Mr Beattie did not have the authority of the Trust to sign such an agreement if one did exist. Flood and Beattie went into liquidation part way through construction some weeks prior to the pre-stucco inspection. Flood and Beattie cannot have been responsible for construction after 1 June 2001.

[89] Mr Beattie was in the middle of the development and construction of this property from the beginning. He was the one who decided to buy this section, seemingly without any consultation with Mrs Beattie or the trustees of the Trust. He either built or arranged for the dwelling to be built without consultation with, or permission from, the trustees of the Trust. He chose the design and personally undertook some of the construction work. He was the person primarily responsible for the control and supervision of the construction and for engaging the sub-trades. While it is alleged that Flood and Beattie were originally responsible for the construction, this could not have been the case after 1 June 2001. Even if Flood and Beattie had some involvement, it was under the controll of Mr Beattie. Mr Beattie accepted that he took over the role of project management from the time Flood and Beattie was placed in liquidation although he did say it was on behalf of the Trust. Mr Greer's evidence however is that he did not authorise or appoint Mr Beattie to act on behalf of the Trust and there is no evidence that Mrs Beattie agreed on behalf of the Trust for Mr Beattie to be the project manager after she became a trustee.

[90] I accordingly conclude that Mr Beattie was the developer and project manager. He applied for the building consent and was responsible for overseeing the work. He was the person primarily responsible for

ensuring the property was built in accordance with the consented plans and the Code. As either developer of project manager Mr Beattie owes the claimants a duty of care. Mr Beattie is therefore liable for all the major defects as they were either matters in which he was directly involved in carrying out or in supervising or overseeing. He was negligent in failing to ensure the joinery was adequately flashed and waterproofed, for failure to install inter-storey flashings and control joints and also for the defects evident in relation to the deck. The changes to the consented plans were either authorised by Mr Beattie or alternatively he was negligent in failing to identify these changes. I accordingly conclude that Mr Beattie is jointly and severally liable for the full amount of the claim proved as set out in paragraph 145.

LIABILITY OF JULIE MARIE BEATTIE

[91] The claimants' claim against Mrs Beattie is identical to the claim against Mr Beattie. Other than her involvement in the Beattie Trust however there is no evidence that Mrs Beattie was a developer, builder, project manager or had any other involvement in the construction of this dwelling for which she would owe the claimants a duty of care. Mrs Beattie's undisputed evidence is that the construction of the home as a family home was presented to her as a done deal. She did not agree with the decision and was only reluctantly involved to the extent of making some decisions in relation to colours, furnishings and fittings.

[92] There is no evidence to support the allegation that Mrs Beattie in her own right was a builder or a developer. She made some decisions in relation to colours and decore only. The claimants have failed to establish that she owes them a duty of care and accordingly the claims against her, other than in her role as trustee of the Beattie Trust, which is considered separately, fail.

LIABILITY OF ANGUS CHARLES BEATTIE, JULIE MARIE BEATTIE, STEPHEN ALEXANDER GREER AND STEPHEN ROBERT SHEPHERD AS TRUSTEES OF THE A & J BEATTIE FAMILY TRUST

[93] The claimants allege that the Beattie Trust was the developer or builder of the house and as such owed them a duty of care. It is further alleged the Trust breached the duty of care by failing to ensure that the house was built in a good and tradesmanlike manner and in accordance with the consented plans and the Building Code.

[94] There is no evidence that Mr Greer, Mr Shepherd or Mrs Beattie had any involvement in the construction of the property or any hands-on involvement in the development. Mr Greer's evidence was that neither he nor Mr Shepherd even knew a dwelling was being built on the property until after they had resigned as trustees. Whilst Mr Beattie was directly involved in the development and construction, I have found him personally liable in relation to that role and have also concluded that in most significant respects he was not acting on behalf of the Trust.

[95] I accept that there is no evidence that the Beattie Trust was the builder of the property. The only issue therefore to be determined is whether the Beattie Trust was the developer. If the Trust was the developer then the trustees at the relevant time are likely to be liable as the developers in their roles as trustees.

[96] The Building Act 2004, although not definitive gives some useful guidance as to the definition of a residential property developer. For the purposes of that Act, a "residential property developer" is defined at section 7 as:

> "A person who, in trade, does any of the following things in relation to a household unit for the purpose of selling the household unit:
> (a) Builds the household unit; or
> (b) Arranges for the household unit to be built; or

(c) Acquires the household unit from a person who built it or arranged for it to be built."

[97] A helpful definition of a developer can also be found in *Body Corporate 188273 & Anor v Leuschke Group Architects Ltd:*[3]

> "[32] The developer, and I accept there can be more than one, is the party sitting at the centre of and directing the project, and invariably for its own financial benefit. It is the entity which decides on and engages the builder and any professional advisers. It is responsible for the implementation and completion of the development process."

[98] Mr Greer's evidence was that the Trust was not in the business of developing properties but was in the business of owning properties. Whilst the Trust owned three or four other properties around this time they had not been purchased for development and resale but were rental properties. The Council submits that the trustees appear to have completely abdicated their responsibility by taking no interest in the Trust property and that therefore their negligent omissions have unquestionably resulted in the construction of the house without any proper control and this gives rise to liability. Whilst I accept that the professional trustees did to some extent abrogate their responsibilities in relation to the Auckland Road section and possibly other Trust properties, this does not in itself make them developers.

[99] From the evidence presented it appears that it was not the Trust that either built the house or arranged for the house to be built. It was not the Trust that was the party sitting at the centre of and directing the project. On the evidence I have found that this was Mr Beattie. There is no evidence that it was the Trust who engaged the builder and the other professional advisers. Whilst Mr Beattie said that he did this on behalf of the Trust, I have not accepted that evidence. Mr Greer said that the Trust made no agreement or decisions in relation to the development of the property and his undisputed evidence was that Mr Beattie did not have the authority to enter into such agreements on behalf of the Beattie Trust.

[3] (2007) 8 NZCPR 914, Harrison J (HC).

[100] Given the information available to the claimants it was reasonable for them to assume that the Beattie Trust was a developer of this property. However, it appears that the Trust had no role other than the ownership of the land at least until the time Angus Beattie became one of the trustees. Even then the only evidence that the Trust rather than Mr Beattie was involved in any significant way is from Mr Beattie. I consider Mr Beattie's evidence to be largely self-serving. It was not supported by either the evidence of other parties or the documents that have been provided as part of the claim. The documentary evidence that exists points to Mr Beattie being the developer and the person responsible for the construction and not the Trust.

[101] Mr Beattie's evidence in relation to the purchase of Auckland Road was that he acquired the section in order to build a home for him and his family. Mrs Beattie confirmed that when the home was being built it was Mr Beattie's intention that they live in it. The only reason his plans changed was because the bank required him to sell the property.

[102] In these circumstances the fact that the Beattie Trust was the owner of the section is not in itself efficient to establish that it was the developer or builder. The Beattie Trust was not the party sitting at the centre of the project. It was not the entity which decided on or engaged the builders and other professional advisers. In addition it was not responsible for the implementation and completion of the development process. The claim against the fifth respondent is accordingly dismissed.

WHAT ARE THE APPROPRIATE COSTS TO RECTIFY THE DEFECTS

[103] All parties agreed that the appropriate remedial scope included a full reclad of the dwelling. The experts however disagreed as to whether the roof needed to be replaced as part of the remedial work and also disagreed as to the costs of the appropriate remedial work. The claimants are claiming $537,680.00 for remedial costs. These costs include $18,166.00 (GST exclusive) of storage and relocation costs.

[104] The Council was the only party who disputed the remedial costs claimed. It submitted the appropriate remedial costs, exclusive of storage and relocation was $202,613.26. The assessor in his remedial report dated 9 September 2007 estimated that remedial costs to be $445,144.54.

[105] It is accordingly necessary to go through each of the significant areas of dispute to determine the appropriate remedial cost for this dwelling. A number of the issues in dispute related to whether the matters included in the claimants' scope of work and cost would be required. This included such things as double-glazing, replacing insulation, additional bracing and replacing the roof. With some other costs in dispute, Mr Hazelhurst was able to give specific and reliable evidence about what the actual costs were likely to be in the Hawkes Bay region. The Council suggested in these circumstances I should adopt the half-way point between the evidence provided by their expert, Mr Bayley and that of Mr Hazelhurst. They provided no reason for this. Where Mr Hazelhurst's opinion was based on detailed and actual knowledge of costings in the Hawkes Bay, I preferred his evidence and adopt his costings. I would further note that where Mr Hazelhurst was able to give evidence as to what actual costs were likely to be they tended to be closer to the estimates provided by the claimants' expert than the Council's expert.

Cost of Re-glazing

[106] James White, the claimants' quantum expert, advised that the cost of retro fitting of double-glazing in lieu of refurbishing of existing single-glaze was a scope issue. The claimants have included this in their scope of works because they had been unable to get a definitive answer as to whether or not they would be required to replace the existing windows so that they complied with current standards as part of their remedial work. Whilst Mr Brydon, a senior building consent officer with the Napier City Council, was unable to give a definitive commitment on this issue, the Council submitted that the provisions of the Building Act meant that double-glazing would not be required. Section 112(1)(b) of the Building Act 2004, they submit, requires that where a building is altered it must only

comply with the provisions of the Code to the same extent as before the alterations.

[107] While the Council officer could not give a definitive answer on this issue based on a theoretical scenario, I am satisfied that the Council cannot and should not require the property to comply with the current Code in relation to double-glazing in order to issue the appropriate consent for the remedial work to be completed. The cost allocated for double-glazing by the claimants was $41,055.00. I however accept Mr White's evidence that if double-glazing were not part of the scope there would need to be an additional $9,600.00 added in for work on refitting the existing joinery. The appropriate deduction from the amount claimed for remedial work for this issue is therefore $31,445.00. I however make no deduction for exterior joinery reveals as I accept this is a necessary part of the remedial work.

Recladding and Plastering

[108] The experts agreed that the measurement of 247.24 m² for cladding and plastering was correct. There was however significant disagreement over the costs for this work per square meter. Mr Bayley submitted the appropriate cost for $130.00 m² and Mr White submitted it was $200.00 m². Over the lunch adjournment, Mr Hazelhurst rung some Hawkes Bay plasterers and advised that the average cost quoted to him for the application of the stucco plaster was $110.00 m². Added to this would need to be the cost of providing and installing of the paper, batons and hardibacker. Mr Bayley's costing of $130.00 m² had been based on $90.00 for the plastering cost plus $40.00 for the additional expenses. Mr White's calculations had been based on approximately $120.00 m² for the plastering, $5.00 for the paper, $27.00 for the batons and $40.00 for the hardibacker. Mr Hazelhurst's view was that the paper was $5.00 per m² and that Mr Bayley's other costs were too low but Mr White's were a bit high.

[109] On the evidence presented, I am satisfied that the plastering costs should be calculated $110.00 m². I consider Mr Bayley's cost for the

batons and hardibacker to be too low and Mr White's to be somewhat high. I would estimate the total costs for these additional matters should be $60.00 m² making the total recladding and plastering costs of $170.00 m² rather than the $200.00 m² as costed by Mr White. This therefore reduces the amount claimable for remedial works by the claimants by a further $7,417.20.

Replacement of Deck

[110] All the experts agreed that the deck needed to be replaced. There was a disagreement as to the cost of doing this. The disagreement primarily revolves around the costs allocated for the recladding and plastering. Applying the same costing of $170.00 per m² for this work rather than $200.00 on the deck, the deck remedial work claimed should be reduced by $780.00.

Costs of a Remedial Expert

[111] The claimants are claiming $50,000.00 towards the cost of a remedial expert. Mr Bayley submitted that the reasonable cost for this item should be only $16,645.00. He stated that remedial experts could come as cheap as $90.00 per hour and disputed the $200.00 upon which Mr White's estimates were based.

[112] Mr Hazelhurst however advised that he was only one of two remedial experts in the Hawkes Bay. His usual charge out rate was $200.00 an hour. Occasionally he would go below this but at other times above. He advised the other remedial experts in the Hawkes Bay were more expensive than him. Mr Hazelhurst's view, with which the other experts largely agreed, was that a remedial expert would be required for five months on an average of 12 hours per week at $200.00 per hour over 21 weeks. This comes to $50,400.00, which is approximately the amount being claimed by the claimants. I accordingly accept that no deduction should be made from the amounts estimated for the cost of a remedial expert.

Insulation

[113] The claimants have included in their remedial scope 100% replacement of the insulation. This was to reflect both the current Code requirements regarding thermal efficiency and also concerns as to whether there is contamination by mould. The Council submitted that as only 15% of the timber was estimated at needing replacement, only 15% of the insulation would need to be replaced.

[114] Based on the evidence presented I am satisfied that the Council should not require insulation to comply with current Code requirements for the reasons already outlined in the section for double-glazing. However I accept that replacement of insulation will need to be above the 15% rate. The opinions of both Mr Hazelhurst and Mr Light were that mould would have contaminated the insulation requiring more than 15% to be replaced. A 50% allowance should be adequate and therefore the insulation replacement cost is reduced by $2,140.00.

Replacement of Plywood Ceiling

[115] The claimants included costs for replacing all of the plywood ceiling. They submit that the roof needs to be replaced and therefore all of the ceiling needs to be replaced. Even if the roof is not replaced they submit that it is not appropriate to patch the plywood ceiling as full panels would need to be replaced. Mr Bayley submitted that only one sheet of plywood ceiling was required and the cost of which he considered should be $288.00 rather than the $12,400.00 claimed.

[116] Mr Hazelhurst and Mr Light agreed that in order to appropriately repair the ceiling, full panels would need to be replaced and this would require more than the one panel estimated by Mr Bayley. They were however both of the view that the full ceiling would only need to be replaced if the roof was going to be replaced.

[117] I am satisfied that the total plywood ceiling does not need to be replaced as the damage to the ceilings can be appropriately remedied by

fitting new panels in the damaged areas. I accept the estimate of the 20% replacement suggested by the majority of the experts. This would cost approximately $2,480.00 reducing the amount claimed by the claimants by $9,920.00.

Internal Painting

[118] Part of the remedial costs includes the sum of $6,465.00 for internal painting. Mr Bayley, on behalf of the Council, submitted that that was betterment and as the normal life expectancy of internal paintwork has now expired. All the experts however agreed that the internal paintwork, other than the damage caused by water ingress, is in very good condition given the age of the house. The wear and tear to the internal painting during the Lees' ownership has been significantly less than would normally be the case. Mr Light submitted, and I accept his submissions, that internal painting costs should only be reduced by 25% for betterment. An amount of $1,616.00 should therefore be deducted from the amount claimed.

Timber Analysis

[119] The claimants have allowed $3,000.00 for micro biological timber analysis. The Council submitted that there was no need to undertake this testing as the adjudication hearing had resolved the matter of damage prior to undertaking the remedial work. Mr Bayley also stated that it could be covered by treating the timber with frame-saver. Mr Hazelhurst and Mr Light disagreed. They considered it was still necessary to test timber as you could not tell from a visual inspection as to whether sufficient timber had been removed and whether all rotten timber had been removed. I accept Mr Hazelhurst's evidence and conclude that the $3,000.00 allocated for timber analysis is appropriately charged as a remedial cost.

Additional Bracing – Portal Framing

[120] The claimants submit that it is likely that there is insufficient bracing in some of the external walls given the change from the consented plans. Mr Hall, an expert on behalf of the claimants, gave evidence that

there were areas of doubt as to the structural adequacy of the dwelling. He however said that his opinion could not be conclusive without extensive demolition work. In the circumstances there is insufficient evidence for me to conclude that there is structural inadequacy which requires the additional bracing.

[121] The cost of $5,000.00 to design a portal frame to remedy this potential defect is accordingly deducted from the remedial cost.

Preliminary and General, Margins and Contingencies

[122] The claimants have allowed 8% for preliminary and general, 15% for contractors, overheads and margins and 10% for contingency. Mr Bayley puts these figures at 2%, 5% and 10%. There is accordingly no dispute as to the appropriate contingency allowance, what is disputed is the preliminary and general sum and the margins. Mr Hazelhurst puts these sums in his report at 7% and 10%. His evidence in relation to contractors, overheads and margins was that 15% was on the high side but 5% was too low. Mr White and Mr Light were both of the view that the 5% figure suggested by Mr Bayley as being applicable in Auckland only related to multi-unit constructions with a large amount of repetition of features. Mr White said that he had never seen a situation where a 5% margin would apply on a single-dwelling.

[123] I accept Mr Hazelhurst's evidence that in the Hawkes Bay margins would not be less than 10% and accordingly set the amount allowable for contractors, overheads and margins at 10%. I also conclude that 8% preliminary and general sum is reasonable. The cost of scaffolding and protection should however be reduced to $10,000.00 as I accept the length of the work given the changes to scope would be approximately five months and not the seven months currently estimated.

Roof

[124] The claimants have costed a total replacement of the roof. Part of the justification for this is structural issues that they believe exist with the

roof and difficulties caused by being zero pitched to part of the curved roof. A roof replacement was included in the scope also because the claimants were unsure whether the Council would be willing to sign off targeted repairs.

[125] The experts however agreed that the water ingress issues in relation to the roof could be adequately remedied through targeted repairs rather than total re-roofing. They agreed the roof itself does not leak apart from in some isolated locations. They however agreed that the roof junctions with the walls and parapets leaked. In addition the dining room roof overhang would need to be re-worked and guttering would need to be replaced.

[126] I accept that the claimants have genuine concerns about the structural integrity of the walls and the roof as well as some other aspects of the construction. However the evidence presented fails to establish that either the full roof needs to be replaced or that replacement of the roof is the most cost-effective remedial option. I do not however necessarily accept the Council submissions that issues of structural integrity are not weathertightness issues and therefore outside the jurisdiction of the Tribunal. In some cases structural integrity will be clearly related to weathertightness issues. Where lack of bracing or lack of integrity causes more movement in the structure and increases cladding cracking, for example, this could be a weathertightness issue for which the Tribunal will be entitled to make awards. In other cases lack of structural integrity could raise issues of future likely damage.

[127] When comparing the costings for more targeted repairs as provided for in the assessor's report and the claimants' costings, I consider it appropriate that the amount of $37,500.00 be deducted from the remedial cost for the roof. I have taken into account the costs outlined in the Assessor's Report for targeted repairs in calculating this deduction

Conclusion on Remedial Costs

[128] Given the conclusions reached above, the proven remedial costs, excluding storage and relocation costs totals $347,475.93. This amount is calculated as follows:

Breakdown of Remedial Costs Awarded

Subtotal as per James White		**272,206.00**
Less		
Re-glazing		31,445.00
Plastering		7,417.00
Deck plastering		780.00
Insulation		2,140.00
Plywood ceiling		9,920.00
Internal painting		1,616.00
Portal framing		5,000.00
Roof		37,500.00
SubTotal		**176,388.00**
Preliminary & General	8%	14,111.04
SubTotal		**190,499.04**
Scaffolding & Protection		10,000.00
SubTotal		**200,499.04**
Contractor's overhead & margin	10%	20,049.90
SubTotal		**220,548.94**
Contingency Allowance	10%	22,054.89
SubTotal		**242,603.83**
Insurance		1,800.00
Building consent application		3,500.00
Detailed plans and specification		12,000.00
Remediation specialist		45,000.00
Microscopic testing		3,000.00
Miscellaneous consultants		5,000.00
Total (excluding G.S.T)		**312,903.83**
G.S.T		**39,112.97**
TOTAL (including GST)		**352,016.80**

Consequential Costs

[129] In addition to remedial costs, the claimants are seeking costs for packing, removing, storing and replacing household goods and for rental accommodation while the remedial work is being carried out. These amounts were calculated on the basis of seven months alternative accommodation and storage. There was no dispute in relation to the rates applied but the experts' general consensus was that if a re-roof and some other structural issues were not required, then the remedial timeframe would be five months rather than seven months.

[130] I accordingly conclude that the following consequential costs are reasonable and claimable:

Package and retrieval of household goods	$4,000.00
Storage for 5 months	$1,600.00
Rental accommodation for 5 months	$8,400.00
TOTAL CONSEQUENTIAL	$14,000.00

MEASURE OF LOSS RECOVERABLE

[131] The Council submitted that the costs of remedial work or rectification would not be the appropriate calculation for damages if it was out of proportion to the benefit to be obtained. In support of this submission they referred to *Invercargill City Council v Hamlin*[4] where their Lordships held at p526:

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

[132] When considering the area of damages regard needs to be to what is reasonable in the circumstances of this case. In *Warren and Mahoney v Dynes,*[5] McMullin J confirmed that the general rule was that the measure of damages would usually be the cost of rectification. He went on however to say at p20:

> "But the High Court went on to explain that this prima facie rule was subject to the qualification that the doing of the rectification work must be a reasonable course to adopt. In the *Bevan* case, Richmond (sic) P interpreted the High Court judgment to mean that the prima facie rule should be adopted unless the Court was satisfied that some lesser basis of compensation could in all the circumstances be fairly adopted. In many cases where the plaintiff wants his property restored to the same state it was in before the commission of the tort, the costs of restoration will be substantially greater than the amount by which the value of the property has been diminished and the test of reasonableness mentioned in *Bellgrove v Eldridge* and *Bevan* will become important."

[4] [1996] 1 NZLR 513 (PC).

[133] Three different values were referred to by the various experts and parties. Mr Alpin valued the improvements at $343,000.00, Mr White at $339,000.00 and the rateable value of improvements is $381,000.00. Various other values were also given depending on different variables.

[134] Mr Lee in giving evidence said that they had not considered selling the property in the state it was in and seeking loss of value by way of compensation. The reasons for this was that the location of the property was ideal for them and also because he did not wish to pass his problems on to someone else. He felt morally responsible to resolve the issues.

[135] The established cost for remedial works is not significantly outside the range of values of the improvements to the property. In the circumstances of this case, therefore I accept that it is reasonable to calculate damages awarded taking into account proven remedial costs rather than the value of the property.

[136] The claimants also in the alternative argued that the replacement value of the property should be accepted as the level of damages. I appreciate Mr and Mrs Lees concerns in relation to the property and understand the reason why they are considering rebuilding the dwelling rather carrying out remedial work. Given however that the cost of replacement is almost double the established cost of the remedial work, I conclude it would not be reasonable to assess damages on the replacement costs rather than the repair costs.

Stigma

[137] Mr and Mrs Lee are claiming $16,000.00 for stigma. The basis of this claim is that even when remedial work has been completed there will still be a stigma attached to the property, as a prospective purchaser would pay a lesser price due to the knowledge that it has been a leaky home. Mr and Mrs Lee submit that the market and in particular potential prospective purchasers would take into account the fact that the house

[5] CA 49-88, 26 October 1988.

had in the past been a leaky home and accordingly the house would achieve a lower price when sold.

[138] The opinion of Andrew White, a registered valuer instructed by Mr and Mrs Lee, was that stigma of 3% of the value of the property would be reasonable when assessing the potential market value of this property given the fact that it had been a leaky home. His opinion was that there is a market resistance to homes which have been leaking and damaged even though they have been remediated. He believes that market resistance is reflected in lower prices being obtained.

[139] Mr Aplin, a registered valuer instructed by the Council, considered stigma in relation to leaky homes can more significantly be attached to the type of construction. His submission is that all monolithically clad homes attract a stigma regardless of whether they have been leaking or not.

[140] Mr Aplin referred to an article by Dr Michael Rehm of the Department of Property at the University of Auckland entitled "Judging a House by its Cover: Leaky Building Stigma and House Prices in New Zealand"[6] in which Dr Rehm analyses sale details of housing over a number of years in accordance with cladding materials. Based on his analysis of that information, he concludes that monolithically clad homes in general attract a stigma. He further concludes that another avenue towards reducing leaky home stigma is appropriate remedial design. He states at p 74 that:

> "It is possible for a monolithic-clad property to recoup some of the stigma value loss if it is re-clad with a different material and the new cladding system features a vented cavity to mitigate against future weathertightness problems."

[141] It would be unrealistic to conclude that there would never be diminution of value for a leaky home that has been repaired. The difficulty claimants face with stigma claims is however twofold. Firstly, evidence suggests that all monolithically clad homes may attract a stigma or reduction in value because of the cladding material itself regardless of

whether they leaked. It is the claimants who have in this case chosen to buy, or in other cases chosen to build, properties which are monolithically clad.

[142] The second problem facing claimants is one of proof of actual loss. There are a number of factors that affect the purchase price or value of properties. In a rising market, or where there is a shortage of homes, an appropriately remediated formerly leaky home may attract very little, if any, stigma or reduction in value. However, in a depressed market this factor may have more relevance and mean a lower price could be obtained. Until such time as the claimants sell their property at a loss it is difficult to establish loss and therefore very difficult to conclude that there is any loss due to stigma.

[143] I accordingly conclude that the claimants have failed to establish any diminution in value of their property due to stigma and this part of the claim is therefore dismissed.

General Damages

[144] The claimants are claiming $50,000.00 for general damages for emotional harm, stress and anxiety resulting from their discovery that they own a leaky home. Mr and Mrs Lee both gave evidence of the impact this has had on their lives and their health over the past few years. Rather than buying a low maintenance home for their retirement, they have had endless difficulties and problems with the property. In addition they have been unable to obtain an income from the ground level rooms which they had planned to run as a bed and breakfast type of operation.

[145] In setting the level of damages, I am guided by the High Court. In recent cases the High Court has ordered general damages to successful claimants of $25,000.00 for each owner-occupier claimant.[7] There is nothing about this claim to suggest that the level of damages should be

[6] (2009) 2(1) International Journal of Housing Marbets and Analysis, 57.

lower than what has been awarded to owner-occupiers of other dwellings in recent High Court decisions. I accordingly award general damages of $25,000.00 each to Mr and Mrs Lee.

Summary in relation to Quantum

[146] I am satisfied that the quantum is proven in the amount of $416,016.80. This amount is calculated as follows:

Remedial work as established	$352,016.80
Consequential costs	$14,000.00
General damages	$50,000.00
TOTAL	$416,016.80

WERE THE LEES CONTRIBUTORILY NEGLIGENT? OR DID THEY FAIL TO MITIGATE THE LOSS?

[147] The Council submitted that Mr and Mrs Lee were contributorily negligent in failing to make adequate enquiries and carry out adequate inspections of the property prior to the purchase. They submit Mr Lee was a builder with many years of experience and had also worked as a building inspector. They submit his failure to engage a pre-purchase inspector or for him to carry out a systematic and detailed inspection amounts to contributory negligence.

[148] Mr and Mrs Lee denied this allegation. Mr Lee stated that prior to purchasing the property he carried out a detailed inspection of the Council file. He noted that a Code Compliance Certificate had only been issued a few months earlier. Whilst he did know that there had been some particular issues raised as a result of this failed inspection he considered that as the Council had gone ahead and issued the Code Compliance Certificate they were reasonably satisfied the concerns and issues had been resolved.

[7] *Body Corporate No 189855 v North Shore City Council (Byron Ave)* HC Auckland CIV-2005-404-5561, 25 July 2008, Venning J; *White v Rodney District Council* HC Auckland, CIV-2009-404-

[149] The Council's submission that Mr and Mrs Lee were contributorily negligent by failing either to carry out or obtain a pre-purchase inspection fails for two reasons. Firstly Heath J in *Sunset Terraces* concluded that purchasers were not contributorily negligent by failing to obtain a pre-purchase inspection. He stated:

> "[577]To my knowledge, there has never been an expectation in New Zealand (contrary to the English position) of a potential homeowner commissioning a report from an expert to establish that the dwelling is soundly constructed. Indeed, it is a lack of practice to that effect which has led Courts in this country to hold that a duty of care must be taken by the Council in fulfilling their statutory duties. Both *Hamlin* and the Building Industry Commission Report run counter to Ms Grant's arguments on this point.
>
> [578] I find that there was no duty to that effect on the purchasers, so the allegation of contributorily negligence cannot be made out."

[150] Secondly the submission that there was a greater responsibility on Mr Lee because of his previous building experience is inconsistent with the conclusions of Steven J in *Hartley v Balemi & Ors*[8]. In that case it was concluded that the question of fault is to be determined objectively and requires the claimant only to exercise such precautions as would someone of ordinary prudence. It was concluded that the adjudicator had incorrectly applied a subjective test by relying on aspects personal to the claimants which had the effect of placing a higher standard of care upon them than applying the reasonable person standard required by law. The application of subjective elements to the consideration of whether Mr and Mrs Lee were contributorily negligent are therefore not warranted in terms of policy or in line with legal authority.

[151] The Council further submits that the costs have significantly increased either due to the claimants' failure to mitigate their loss and/or to maintain the property. They submit that by delaying repairing the property the claimants have failed to mitigate their loss and this is the only reason the costs have increased from the $174,000.00 estimated in the first

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1880, 19 November 2009, Woodhouse J.

assessor's report. Little direct evidence was given as to how the scope of the remedial works had changed between the two assessor's reports or as to whether or not the $174,000 figure was realistic even at the time it was proposed. Mr Hazelhurst, the assessor, was also not questioned on this issue.

[152] Woodhouse J in *White v Rodney District Council,*[9] concluded that the onus was on the respondent to establish that reasonable steps could and should have been taken by the appellants to mitigate their loss. The first Assessor's Report is dated November 2004. The adjudication claim under the 2002 Act was filed one year later in November 2005. The delay between obtaining the Assessor's Report and filing for adjudication was not unreasonable or unusual. Any delay between filing the claim for adjudication and the assessor directing that the assessor update his report does not appear to be the Lees' responsibility. From the record available from the Procedural Orders issued they appear to have taken reasonable steps to progress their claim. There is accordingly little evidence that Mr and Mrs Lee failed to take reasonable steps to mitigate their loss between filing their claim and the time the addendum report was requested. There is also no evidence that failure to mitigate since that time has increased the cost of the remedial work as the estimated costs of remedial work in the addendum are less than the amount that has been established in this claim. Accordingly any failure to mitigate since that time has not significantly increased the cost of the remedial work.

[153] The significant defects present in this home could not have been prevented by better ongoing maintenance. I further accept that any increase in the cost of the remedial work caused by an alleged failure to maintain would only be minable. There is little maintenance work that the claimants could have done which has not been done that has led to additional damage.

[154] The Council therefore has not discharged the onus it has to establish either that Mr and Mrs Lee have failed to take reasonable steps

[8] HC Auckland, CIV-2006-404-2589, 29 March 2007, Stevens J.
[9] See n7 above.

or that the remedial costs have increased substantially because reasonable steps were not taken. I accordingly do not accept that the amount of damages should be reduced on the basis of either contributorily negligence or failure to mitigate.

WHAT CONTRIBUTION SHOULD EACH OF THE LIABLE PARTIES PAY?

[155] I have found that the first and third respondents breached the duty of care they each owed to the claimants. Each of the liable respondents is a tortfeasor or wrongdoer, and is liable to the claimants in tort for their losses to the extent outlined in this decision.

[156] 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.

[157] 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.

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

> Where damage is suffered by any person as a result of a tort… 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…

[159] Section 17(2) of the Law Reform Act 1936 sets out the approach to be taken. It provides that the contribution recoverable shall be what is fair taking into account the relevant responsibilities of the parties for the damage.

[160] As a result of the breaches referred to above the first and third respondents are jointly and severally liable for the entire amount of the claim.

[161] It has been well established that the parties undertaking the work should bear a greater responsibility than the Council. Mr Beattie, I have concluded, was the developer and project manager. He is the one who either actually carried out the construction work or was responsible for its supervisions. In recent cases the apportionment attributed to the Council has generally been between 15% and 25%. There are no specific circumstances in this claim which dictate a greater or lesser amount should be awarded in this case and accordingly I set the Council's contribution at 20%.

[162] I therefore conclude that the first respondent is entitled to a contribution of 80% from the third respondent in respect of the amount for which it has been found jointly liable. The third respondent is entitled to a contribution of 20% from the first respondent.

CONCLUSION AND ORDERS

[163] The claim by Peter Devon Lee and Estelle Mary Lee is proven to the extent of $416,016.80. For the reasons set out in this determination I make the following orders:

i. Napier City Council is ordered to pay Peter Devon Lee and Estelle Mary Lee the sum of $416,016.80 forthwith. Napier City Council is entitled to recover a contribution of up to $332,813.40 from Angus Charles Beattie for any amount paid in excess of $83,203.40.

ii. The claims against Warren Richard Thompson, Margaret Jean Thompson and Megan Clare MacDonald as trustees of the Arklow Trust, second respondents, Julie Marie Beattie, fourth respondent, Angus Charles Beattie, Julie Marie Beattie,

Stephen Alexander Greer and Stephen Robert Shepherd as trustees for the Angus and Julie Beattie Family Trust, fifth respondent, are dismissed.

iii. Angus Charles Beattie, the third respondent, is ordered to pay Peter Devon Lee and Estelle Mary Lee the sum of $416,016.80 forthwith. Angus Charles Beattie is entitled to recover a contribution of up to $83,203.40 from Napier City Council for any amount paid in excess of $332,813.40.

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

Napier City Council	$83,203.40
Angus Charles Beattie	$332,813.40
Total amount of this determination	$416,016.80

[165] However if the first or third respondents fail to pay their apportionment, the claimants can enforce this determination against any respondent up to the total amounts they are ordered to pay in paragraph [163] respectively.

DATED this 19th day of March 2010

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P A McConnell

Tribunal Chair