IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2011-100-000005
[2011] NZWHT AUCKLAND 44

BETWEEN	DENNIS GRAHAM RINGWOOD Claimant
AND	AUCKLAND COUNCIL First Respondent
AND	RONALD ANTHONY URLICH AND JANICE WILMA URLICH Second Respondent

Hearing:	23,24 and 25 August 2011
Appearances:	Ms G Brunton and Mr T Rainey, for the claimant Ms F Divich for the first respondent Mr D Wilson for the second respondents
Decision:	14 September 2011

FINAL DETERMINATION
Adjudicator: M A Roche

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INTRODUCTION

[1] Dennis Ringwood lives with his wife Catherine and their three children in a house at 112C Remuera Road, Auckland. The house is one of six built around the same time as part of a development carried out by Ronald and Janice Urlich. In March 2007, after learning that other houses in the development were leaking, Mr Ringwood lodged a claim with the Weathertight Homes Resolution Service. The WHRS assessor concluded that the house required extensive remedial work. Mr Ringwood now claims that the Auckland Council and the developers, the Urlichs, are each liable for the full costs of the remedial work, consequential losses and damages.

BACKGROUND FACTS

[2] In or around 1997 Mr and Mrs Urlich bought the property at 112 Remuera Road with the intention of developing the site and building four townhouses. At that time, they intended to live in one of the finished houses and sell the other three. Later they purchased the neighbouring property, 114 Remuera Road, and incorporated this property into the development. Two townhouses were built on that property.

[3] The Urlichs engaged an architect, Graham Hayhow (now deceased), to design the townhouses. They were built by Gordon McIntyre, an experienced builder who had worked on several building projects for the Urlichs in the past. The first houses to be built were 112A and 112B. On 16 June 1999 the Urlichs applied for consent to build two standalone dwellings, 112C and 112D Remuera Road. This was issued by the Auckland City Council on 8 September 1999 and the following day unit 112C passed a Council inspection of its foundations. On 22 April 1999 it passed a final inspection. On 18 May 1999 an interim Code Compliance Certificate (CCC) was issued and on 12 January 2000 a final CCC was issued in respect of unit C and unit D.

[4] On 11 August 2000 the Urlichs sold 112C Remuera Rd to Redman Advertising and Mark Aitken Limited who sold it to a Mr Choy and Ms Reddy in 2002 who, in turn, sold it to Mr Ringwood on 13 May 2007.

[5] About a year after buying the house, Mr and Mrs Ringwood learnt that their neighbours in the development were experiencing weathertightness issues with their homes and attended a neighbourhood meeting where the role of the Weathertightness section of the Department of Building and Housing was explained. On 27 March 2009 Mr Ringwood applied to the Weathertight Homes Resolution Service for an assessor's report. The report was issued on 15 July 2009 and recommended a full re-clad of the house.

[6] The Ringwoods resolved to repair the house before pursuing the claim further. After engaging architects and going through a tender process, they engaged a builder who carried out some alterations in addition to their remedial work. They also engaged Barry Gill of Hobbspeare Limited (a building consulting company) to provide timber remediation services. The repairs were carried out between April and August 2010. During this time, the Ringwoods moved into rented accommodation. A CCC for the repairs was issued by the Council on 21 January 2011.

MATTERS IN DISPUTE

[7] The Urlichs do not deny that they were the developers of the house and that as such owed a duty of care to future purchasers. They say however that the claim against them in respect of 112C Remuera Road is time barred because the construction work on the house had been completed by early March 1999. The limitation period therefore expired in early March 2009, several weeks before Mr Ringwood filed his application for a WHRS assessment on 27 March 2009.

[8] The Urlichs also deny that the construction defects necessitated a full re-clad of the house. They say that there is little evidence of any leak-related damage to the house except in a few very discrete areas and that targeted repairs at far less cost could have been carried out. They also say that a lack of maintenance contributed to the damage to the house.

[9] The Ringwoods and the Auckland Council do not accept that the claim against the Urlichs is time barred and say that acts or omissions which breached the duty of care owed by the Urlichs occurred inside the limitation period. The Council admits that its inspector was negligent in carrying out the final inspection of 112C Remuera Road and that the inspector failed to notice a number of visible defects. The Council accepts that this failure caused the claimant's loss and a full re-clad of the house was required.

[10] The Council denies however that it was negligent in issuing a CCC in respect of the house on 12 January 2000.

THE ISSUES

[11] The issues that I need to address are:

i. What were the defects which caused water ingress?
ii. Did a lack of maintenance contribute to the weathertightness problems with the house?
iii. What was the appropriate scope and cost of remedial work?
iv. When was the house built?
v. Did the Urlichs breach the duty of care they owed Mr Ringwood as the developers of the property?
vi. If so, did this breach occur before or after 27 March 2009?
vii. Was the Council negligent in issuing the CCC, and if so, was this negligence causative of loss?

WHAT WERE THE DEFECTS CAUSING MOISTURE INGRESS?

[12] Barry Gill, the claimant's expert; Simon Paykel, the Council's expert; David Medricky, the Urlichs' expert; and Frank Wiemann, the Department of Building and Housing assessor, gave their evidence concurrently on the defects that allowed moisture ingress.

[13] Mr Wiemann investigated the house in June and July 2009. His investigation included visual assessment, taking moisture readings and carrying out destructive testing. He also sent timber samples for laboratory analysis. Mr Gill was engaged by the claimant both as an expert for this proceeding and to carry out timber remediation on the house. He made 14 visits to the site both before and during the repairs. He also had timber samples from the framing of the house analysed. Neither Mr Paykell nor Mr Medricky viewed the house prior to the remedial work being carried out although both visited the site after the repairs were completed. Both had viewed the reports of Mr Wiemann and Mr Gill which annexed the results of the timber analysis.

[14] Although there were some differences between them, Messers Wiemann, Paykel and Gill were in broad agreement about the nature of the defects and the need to re-clad the house. Mr Medricky took a different view. He considered that with some exceptions the defects were minor in nature, that there was little evidence of damage, and that targeted repairs would have been appropriate.

[15] Messrs Wiemann, Paykel and Gill identified insufficient and incorrectly installed flashings to the window joinery as being a significant defect. The majority of the windows had aluminium joinery while four had timber joinery.

[16] Mr Wiemann recorded his visual observations of the window units in his assessor's report. He recorded that the aluminium windows had sill flashings that were embedded into the surrounding plaster at their ends and that there was associated plaster cracking and mould growth. He considered that water entry and subsequent damage was likely.

[17] With respect to the timber windows Mr Wiemann recorded that they were installed flush with the cladding without any visible protection against water entry. At the junctions he observed cracked plaster and algae growth.

[18] Mr Wiemann carried out destructive testing at the corner of two windows sills, one on a northern elevation bedroom and the other from the master bedroom. While removing plaster from around the northern bedroom window he found that it was delaminated as a result of water entry. He observed that a jamb flashing had been installed, however it was 150mm short of the sill. This allowed any water that entered along the flashing to reach behind the cladding instead of being directed onto the sill flashing and to the outside. He also observed that the fibre cement had mould on its front and back surface and that the building paper was incorrectly installed leaving some timber exposed. The timber was visibly damaged and had little resistance to moisture meter probes. An elevated moisture reading was taken.

[19] The destructive testing of the master bedroom sill had similar results. When removing the plaster Mr Wiemann observed that it was brittle which showed there had been water entry at the corner of the jamb and sill. The fibre cement was damp and brittle and the jamb flashing was short of the sill flashing. The timber was not properly covered with building paper and had mould on its surface. An elevated moisture reading was taken from the sill stud. A timber sample was taken for analysis. The results found no decay but high

fungal growth suggestive of recent activity. Tests indicated that this sample (sample F) had been boron treated.

[20] A representative sample of 12 aluminium windows were investigated by Mr Gill during the removal of the cladding from the house. Like Mr Wiemann, he found the jamb flashings were cut short of the sill flashings causing water that entered the cladding to be channelled straight down instead of being diverted out. He found that the sill flashings were wrongly installed as they had not been extended past the window jamb line, preventing the jamb flashing being able to discharge on to the sill flashing. The water that had entered as a result of this defect was evidenced by water-damaged building wrap, rusting to the plaster reinforcement mesh, and timber analysis which confirmed that the framing had been exposed to moisture.

[21] Mr Gill examined one of the four timber windows. He found that it lacked sill flashings leaving the jamb flashings to drain any water that had entered the cladding directly onto the hardibacker. Again this resulted in water-damaged building wrap and rusting to the plaster reinforcement mesh.

[22] Mr Wiemann and Mr Gill were of the view that their findings in respect of the windows they investigated were representative, and applied to all the joinery at the house. In their view, the damage and future likely damage caused by the joinery installation defects necessitated the removal and replacement of all joinery at the house. This exercise, together with the water damaged state of the plaster, necessitated the re-cladding of the house. Mr Paykel concurred with this view.

[23] Another significant defect identified by Messrs Wiemann, Paykel and Gill was insufficient clearances between the cladding and ground levels at the front entrance and insufficient clearance between the cladding and the foundations right around the house. Both of these defects prevented drainage and allowed moisture to

penetrate from ground level through capillary action. The only evidence of damage attributable to clearance defects was at the bottom of the front entrance column where destructive testing was carried out by Mr Wiemann. This revealed deteriorated timber, damp and brittle plaster, wet and mouldy fibre cement and an absence of building paper.

[24] Another significant defect identified by Messrs Wiemann, Paykel and Gill was absent or incorrectly formed control joints in the plaster. They considered that the amount of cracking in the plaster layer on the house was beyond what would normally be expected and was excessive for a building of its age. The three experts considered that the excessive level of cracking was attributable to absent or incorrectly formed control joints which mitigate the effects of thermal movement. Mr Wiemann also considered that the absence of mesh in some areas also contributed to the cracking. The excessive cracking had allowed an unacceptable level of moisture to enter the plaster resulting in failure around vulnerable junctions such as window openings and also resulting in the plaster becoming delaminated.

[25] There was no disagreement between the four experts concerning the nature of the defects in the construction of the balconies. The experts all agreed that the balcony defects had caused leaks which had resulted in significant damage necessitating the demolition and replacement of the balconies. One of these defects was an absence of saddle flashings at junctions between the deck balustrades and the wall cladding. This had significance to the issue of whether targeted repairs or a re-clad should be carried out. The three experts in favour of a re-clad were of the view that because sections of the wall cladding needed to be removed in conjunction with the removal of the balconies, the water damaged, delaminated state of the plaster would have made the joining of new to existing cladding impossible. Mr Medricky did not agree and

maintained that the balconies could have been rebuilt and joined to the existing wall cladding as part of targeted repairs.

[26] Mr Medricky's view was that while there were many faults in the building, there was little evidence of damage and in fact little damage. He disagreed that the cracking that had been present in the plaster was excessive. He also considered that insufficient investigation had been carried out in respect of the window joinery defects and was of the view that each window should have been examined individually in order to determine whether it was defective. He did not consider that the evidence that was available supported the view that all the windows were failing.

[27] He considered that while some repairs were necessary, targeted repairs would have been appropriate and a re-clad of the house was unnecessary and unjustified. It was his view that the evidence was not sufficient to justify a full re-clad of the home as apart from the localised failures at specific sites such as the balconies, front entrance column and roof flue, there was no other proven damage.

[28] Analysis to determine the extent of timber decay and other microbiological activity was carried out by Beagle Consultancy in July 2009 on six samples submitted to it by Mr Wiemann. Mr Wiemann gave evidence that although he found decayed wood in the course of destructive testing, he did not submit obviously decayed samples. In May 2010, a further eight samples submitted by Mr Gill were analysed.

[29] Of the six samples submitted by Mr Wiemann, three showed the presence of boron (a preservative treatment). Of the eight samples submitted by Mr Gill, six were boron treated while two were not. There was no obvious pattern to the use of treated and untreated timber and the implication of the laboratory test results was that a mixture had been used in the construction of the house. This

had implications in assessing the remedial scope. Given that the locations of treated as opposed to untreated timber were not known, it was necessary to proceed on the basis that the timber was untreated.

[30] The Beagle Consultancy report to Mr Gill stated that there was dense fungal growth on all eight wood samples although no structurally significant decay. The report also stated that such wood is typically found in moisture-compromised wall cavities and in other locations and/or on the periphery of more seriously affected framing.

[31] The samples provided by Mr Wiemann were also found to contain the fungal growth, some prolific, although again no established decay.

[32] In his brief and in his oral evidence Mr Medricky commented on the timber sample laboratory test results obtained by Mr Gill and Mr Wiemann. He noted that the samples analysed for Mr Wiemann revealed no evidence of decay and commented that the conclusion from the timber sample data should be that while moisture may have penetrated into the walls of the house, it was of insufficient volume or frequency to cause decay.

[33] Messrs Gill, Wiemann and Paykel disagreed with the conclusion Mr Medricky drew from the timber analysis results. In his brief Mr Paykel commented that treated timber decays at a lower rate than untreated timber. However if it gets wet, damage to treated framing will increase over time to the point of significant decay. In his view, the lab test results in respect of the timber supported the decision to re-clad. The evidence of the three experts was that although there was no decay detected in the wood samples submitted, the fungal growth that was present was evidence that the wood was being exposed to water. Although not damaged yet, probably because of the presence of boron, it would in the future develop decay.

[34] Messrs Paykel, Gill and Wiemann were of the view that it would not have been possible to get building consent for targeted repairs and that, even if consent was technically available, targeted repairs would not have been possible because of the need to replace all joinery and because of the water damaged, delaminated state of the plaster.

[35] Mr Medricky disagreed and gave evidence that he had been able to obtain consent for similar repairs. When asked whether consent for targeted repairs would have been granted on the basis that the framing timber was untreated he conceded that this was unlikely. He did not agree however that the lack of boron in a number of timber samples showed that untreated timber had been used. He advanced an alternative explanation which was that the boron may have been leached out by water that entered the framing.

[36] The difficulty with this explanation is that it suggests that an amount of water was reaching the framing that was sufficient to leach out all traces of boron. This in itself indicates that the re-clad was necessary.

Conclusion on Remedial Scope

[37] I accept that it is probable that the defects found in respect of the 13 windows examined by Mr Gill and the two subjected to destructive testing by Mr Wiemann were present in respect of all the windows and that these defects caused actual damage and were likely to cause future damage. The construction defects in the installation of both the timber and aluminium window joinery necessitated the removal of all the joinery units and the plaster around them. This, in itself, necessitated a full re-clad of the house.

[38] The need for the re-clad was also contributed to by the need to demolish and remove the balconies including sections of the cladding to which they were attached at wall junctions. I accept the evidence of the three experts in favour of the re-clad that the

delaminated state of the plaster would have made targeted repairs at these areas unrealistic. I further accept the evidence of the three experts that it is unlikely that building consent for targeted repairs would have been granted in any case given that the timber analysis found that a proportion of the timber framing showed no evidence of treatment and had been exposed to water.

[39] There appears to have been minimal damage caused by the ground level clearance defects. I do however accept that this defect would have caused future likely damage and contributed to the need to remediate the house.

WHAT IS THE APPROPRIATE COST OF THE REMEDIAL WORKS?

[40] Evidence concerning the appropriate cost of the remedial work was given by Daniel Johnson who is a quantity surveyor and the director of a quantity surveying consultancy. Mr Johnson had reviewed the documentation relating to the repairs that were carried out including the tender report, plans and payment claims. He gave evidence that he had met with Mr Paykel and Mr Gill on 22 June 2011. At that meeting, agreement was reached as to what deductions for betterment should be made from the costs incurred by the claimant. This was because, as noted earlier, some alterations and improvements were made to the house when the remedial work was carried out. Following the deductions for betterment, the total agreed costs were $320,385.00 (including GST). No other evidence was before the Tribunal concerning the remedial costs. I accept the evidence of Mr Johnson and find that the claimant has established his claim in relation to the remedial work to the amount of $320,385.00.

DID THE CLAIMANT CONTRIBUTE TO HIS LOSS BY A LACK OF MAINTENANCE?

[41] In his brief of evidence, Mr Medricky commented on an apparent lack of maintenance to the house. He concluded that the house had deteriorated because of a lack of maintenance and that this deterioration would have had an effect on its weathertightness and would have contributed to the damage. He commented on photographic evidence showing mould, mildew, lichens and debris on the balcony and said that their presence would prevent materials on which they are settled or attached from drying out. He also commented on an apparent lack of painting which is necessary to protect cladding and on the fact that although it appeared that some cracks had been filled, it was unknown whether this had been done in a timely manner.

[42] At the hearing Mr Ringwood was questioned about maintenance. He denied that he and his wife had failed to maintain the house. He gave evidence that after purchasing the house, he carried out recommended repairs to cracks identified in the pre-purchase inspection report he obtained. He also gave evidence that the pre-purchase report he had obtained noted the presence of "numerous external cracks" that had been repaired and repainted and that the house was "well presented in sound structural conditions". The implication of the report was that the house had been adequately maintained by the previous owners.

[43] Mr Ringwood also commented that given the large trees around the house, the amount of leaf fall shown on the balcony in the photographs could appear in a day. He also said that he and his wife had regularly swept up fallen leaves on the balconies.

[44] Messrs Weimann, Paykel and Gill did not agree that a lack of maintenance had contributed to the damage to the house. They were of the view that the build-up of material between the balcony

floor and wall visible in photographs arose from the lack of clearance between the deck surface and the clad wall. This lack of clearance would have contributed to the build-up of debris and made its removal difficult.

[45] Mr Gill also commented that photographs in his report showing the balcony in a dirty, leaf strewn state were taken several days before the cladding was due to be removed and were not therefore necessarily representative of the state of the balcony prior to the decision to re-clad the house.

[46] I find that it is not established that a lack of maintenance on the part of Mr and Mrs Ringwood contributed to the damage to the house. It was construction defects, in particular but not limited to problems with the joinery, that necessitated the re-cladding of the house.

WHEN WAS THE HOUSE BUILT?

[47] The Urlichs have raised an affirmative defence against the claim that they are liable for the loss caused to Mr Ringwood as a result of the defects to the house. They say the claim against them is limitation barred under section 91(2) of the Building Act 1991 which provides that civil proceedings relating to building work may not be brought against any person 10 years or more after the date of the act or omission on which the proceedings are based.

[48] It is the position of the Urlichs that the construction of the house was completed more than 10 years before Mr Ringwood commenced this proceeding on 27 March 2009. Therefore any acts or omissions which led to damage in the house were done outside the 10 year limitation period. The claimant and the Council have disputed that construction was completed prior to 27 March 1999. They say in any case that breaches of the Urlichs' duty of care to future purchasers occurred after 27 March 2009.

[49] Although not necessarily entirely determinative of the limitation issue it is relevant to determine when construction of the house was completed.

[50] The evidence available to establish the dates of construction consists of the Council's inspection and correspondence records and Mr Urlich's diaries from 1998 and 1999.

[51] As noted earlier, building consent for the house was issued on 8 September 1999 and its foundations passed inspection the following day. Although building consent was issued for units C and D together, the construction of unit C preceded that of unit D. Mr Urlich gave evidence that at the time, he lacked funds to build both units at once. His intention to proceed only with unit C is recorded in a letter from him to the Council dated 2 September 1998 in which he stated he was only going to commence the construction of unit C and that he was hoping unit C would be finished and sold by January or February 1999 so that he would then have the funds to proceed with unit D.

[52] There are various entries in Mr Urlich's diaries that relate to the construction of unit C. Some of these correlate to the Council's inspection records. For example, there is a diary entry on 4 December 1998 recording a pre-line inspection for unit C. The Council records show that a pre-line building inspection was carried out on this date.

[53] Mr Urlich's diary records completion of plastering and the commencement of painting on 27 January 1999. It is accepted that the entries concerning painting and plastering relate to unit C as on the same date there is a note recording the pouring of footings for unit D. The implication of the 27 January 1999 diary entries are that at that date, the construction of unit C had reached this stage of exterior painting meaning that the joinery was installed and the balconies constructed.

[54] Mr Urlich's diary entry for 18 February 1999 notes "site clear unit C". In his brief, Mr Urlich stated that this meant that the drainage had been completed and the scaffolding removed and that he then arranged for a landscaper to flatten the land around the house. He also stated that by this stage, the aggregate concrete close to the house would have been completed and that within one or two weeks of 18 February 1999, concrete pavers would have been laid near the house and that afterwards ready lawn was ordered and laid. He referred to an entry on 22 February 1999 where he noted "unit C grounds" which he said indicated that at this stage work on the grounds was being carried out.

[55] Other relevant entries in February and March 1999 are notes concerning light fittings, the ordering of carpet on 2 March 1999 and the finishing of grounds on 4 March 1999. An entry on 15 March 1999 noted "carpet" which Mr Urlich stated would have been for the carpet laying in unit C. An entry on 23 March 1999 was a reference to tiling. Mr Urlich stated that by this stage the tiling was complete and that his note referred to measurements of this work which he needed to calculate because he had supplied the tiles and paid for their installation on a square metre rate measured upon completion.

[56] On 29 March 1999 there is a note of the ordering of the fencing and retaining wall for unit C which was to create a fence between unit C and unit D. The final inspection of unit C was carried out on 22 April 1999. Prior to this, apart from a reminder about the inspection on 20 April 1999, there are no further entries in the diary relating to unit C.

[57] I found Mr Urlich to be a credible witness. I accept that his diary is an accurate, if somewhat scanty, record of the construction of unit C. It is corroborated in part by the record of council inspections. I find that the evidence establishes that the construction of unit C was complete prior to 27 March 1999.

DID THE DEVELOPERS BREACH THEIR DUTY OF CARE TO THE CLAIMANT?

[58] As the developers of 112C Remuera Rd, the Urlichs owed a duty of care to future purchasers.

[59] This duty was defined in *Mt Albert Borough Council v Johnson*[1] as being a duty to see that proper care and skill are exercised in the building of houses that cannot be avoided by delegation to an independent contractor.

[60] The rationale for the imposition of a duty of care on developers was discussed in *Body Corporate 188273 v Leuschke.*[2] The imposition of liability on developers arises from the fact that the developer is responsible for and controls every aspect of the development process, and from the fact that the purpose of the development is the developer's own financial benefit.

[61] The date to which the Urlichs' duty of care as developers continued is not necessarily determinative of their liability. The claimant and the first respondent must first establish that an act or omission on the part of the Urlichs' breached their duty and caused the claimant's loss. Nevertheless, the submissions place considerable emphasis on the question of the date on which a developer's duty of care terminates.

[62] The claimant and the first respondent have submitted that the duty of care of developers extends until the subject of the development, in this case the house, is sold. It is submitted that the developer's control of the property is exercised until the property is sold and that the development process is completed when profit is realised at sale. As the house was not sold by the Urlichs until 11 August 2000, their duty of care to future purchasers continued to this

[1] *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234.
[2] *Body Corporate 188273 v Leuschke Group Architects Ltd* (2007) 8 NZCPR 914.

date which is within the limitation period. It is argued that accordingly, the claim against them is not statute barred and the limitation defence fails. As noted above, establishing that the duty continues past the limitation period does not in itself establish liability and is not necessarily fatal to the limitation defence.

[63] In the alternative, the claimant and second respondent have argued that if the duty of care of a developer does not continue up to the point of sale, it continues until the CCC for the developed property is issued. In this case the relevant date is 12 January 2000.

[64] There is an absence of authority on the proposition that the duty of care of a developer continues to the point of sale. Counsel for the second respondent has relied on two interim decisions of the High Court which have considered the issue of whether a duty of care is owed up until the time a CCC is issued. Only one of these, *O'Callaghan v Drummond*[3] concerns a developer. In that case, French J held that the argument that the developer's duty of care continued in the manner suggested was tenable. She was however 'not convinced' about it at that stage.

[65] The second case is *Soulis v Wellington City Council.*[4] Here it was argued that the applicants, as the owners and parties in control of the property when construction was carried out, had a tortious duty of care to subsequent purchasers which continued up to and including the date that the CCC was issued. Gendall J held that although the argument faced difficulties, it was not 'wholly untenable' and therefore a third party notice should not be set aside.

[66] In addition to the above decisions, counsel for the first respondent relied on a decision of this Tribunal, *Marywil v North Shore City Council.*[5] This decision concerned the liability of a director of a building company who personally performed building

[3] *O'Callaghan v Drummond* HC Christchurch CIV-2007-409-001441, 21 October 2008.
[4] *Soulis v Wellington City Council* HC Wellington CIV-2006-485-1164, 18 August 2009.
[5] *Marywil Investments Ltd v North Shore Council* WHT 2008-100-31, 14 July 2009.

work on a house and therefore owed a duty of care in respect of that work. The question before the Tribunal was when this duty of care terminated, the director/builder having left the site by October 1994 but the building contract not having been completed until a later date. It was held that the limitation period began at the earliest on the date the construction work was completed.

[67] *Marywil* is of little assistance in this case as its facts are so different from the ones before me. It concerned the duty owed by a builder rather than a developer and the relevance of the date of sale was that it was an indication of when the dwelling was built. Settlement had been delayed to allow the completion of building work. *Marywil* is not authority for the proposition that, without more, the duty of either a builder or a developer continues up until sale. In the present case, the first sale of the house occurred some 15 months after building work was complete.

[68] The claimant and the first respondent have placed reliance on the vendors warranty at clause 6.2(5)(d) of the August 2000 sale and purchase agreement between the Urlichs and the first purchasers. Effectively this is a warranty that building work done or permitted to be done by the vendor complies with the Building Code. As the house clearly did not meet the weathertightness performance standard of the code, the purchasers would have had a remedy in contract against the Urlichs.

[69] It is the position of the claimant and the first respondent that the contractual obligation of the Urlichs to the first purchasers should inform the scope of the tortious duty owed to the claimant, the third purchaser, and in particular that the existence of the warranty given in August 2000 points towards the developer's duty of care being in existence at that date. It is submitted that it is 'trite' that the terms of parties' contractual obligations help inform the scope and nature of duties of care in tort.[6]

[6] *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324.

[70] I find that the terms of the contract between the Urlichs and the first purchasers are of limited assistance in this case. The contractual warranty that the house complied with the Building Code is not unlike the duty on the developer to ensure a house is built with due skill and care. The position remains however that under the Building Act, the breach of this duty by act or omission must occur within 10 years of proceedings being brought.

[71] All three counsel referred to the decision of the Court of Appeal in *Johnson v Watson.*[7] Again, this case concerned the tortious liability of a builder rather than a developer. In *Johnson v Watson* Tipping J stated that an act or omission occurs on a particular day and that the starting point of the statutory limitation period is measured from the day of the occurrence of an act or omission.[8] Later in the decision he held that when plaintiffs could not be expected to identify an exact day when an act or omission took place, there may be an argument for saying that a builder is under a continuing duty to remedy faulty building work right through to the date of completion and that there is a continuing omission until that date.

[72] As noted earlier, the duty of a developer is to see that proper care and skill are exercised in the building of houses. Proper skill and care were not exercised in the building of the house at 112C Remuera Rd. A series of defects in construction led to damage and future likely damage and necessitated extensive remedial work. The acts or omissions that led to defects being created were performed during construction. The starting date for the statutory limitation period in respect of each of them was the day they occurred. If that is not discernable then the latest they are likely to have occurred is the day construction was completed. The house was completed prior

[7] *Johnson v Watson* [2003] 1 NZLR 626
[8] Ibid at 629

to 27 March 1999. The acts or omissions that led to defects that caused damage occurred before or by this date.

[73] It is argued that the Urlichs as developers made further omissions in breach of an ongoing duty of care after construction was completed. These omissions consisted of the ongoing failure on their part to detect and remedy construction defects up until the date of sale or, in the alternative, the date of issue of the CCC.

[74] Taken to its logical extension, if the view of Tipping J in *Johnson v Watson* that an act or omission is an event that occurs on a particular day is accepted, then omissions comprising of the failure to detect and remedy defects in finished buildings will occur on a daily basis for an indefinite period as in many cases a developed property will remain unsold for extended periods.

[75] The argument that such omissions occur in respect of defects, including hidden defects, that were created outside the statutory limitation period, runs counter to the purpose of the statutory limitation period in respect of building work. This purpose is to create finality, to ensure fairness given the effect of time on the freshness of memories and the availability of witnesses, and to give certainty to intended defendants so that they can plan such things as document destruction and liability insurance.[9]

[76] The argument that a developer has a duty to detect and remedy defects between construction and sale suggests developers have an inspection obligation similar to that of the Council. This is not the case. It is the Council who has the responsibility to have an inspection regime that enables it to determine on reasonable grounds that all relevant aspects of the Building Code have been complied with.[10] It is the Council upon whom future purchasers rely on in this regard. While a developer's duty of care is non-delegable in respect

[9] *Dustin v WHRS* HC Auckland CIV-2006-404-276, 25 May 2006, at [22]
[10] See *Sunset Terraces* [2010] NZCA 65 per Heath J at [450]

of subcontractors, this does not extend to failures on the part of Council inspectors.

[77] Another difficulty raised by this argument is that even if it were accepted that developers had a duty to inspect, detect and remedy defects between the completion of construction and sale of a house, it would be necessary to establish that new damage was caused by such an omission. Loss or damage that has already been caused by acts or omissions cannot be re-caused. The loss to the claimant arises from the acts or omissions in construction. It is not established that additional loss is attributable to the alleged omission (failure to detect and rectify between completion and sale).

[78] The argument of the claimant and the second respondent is essentially that the failure to detect and rectify a damage-causing act or omission done outside the limitation period constitutes an omission within the limitation period. This is contrary to the authority in *Johnson v Watson* that identifiable damage needs to be additional and separate to the loss or damage that occurred as a result of acts or omissions outside the limitation period.

[79] Although *O'Callaghan* and *Soulis* establish that it is arguable, it is not established in law that the duty of a developer extends until the CCC is issued or the developed property is sold. Even if it were, it is not established that the duty of a developer to see that proper care and skill are exercised in the building of houses encompasses a duty to inspect, identify defects and rectify them subsequent to the completion of construction. Even if it were, it is not established that any such failure on the part of the Urlichs caused damage additional to the damage that was caused by acts and omissions that are outside the limitation period.

[80] The breach of duty that caused the claimant's loss occurred prior to 27 March 1999. By that date the Urlichs had breached their duty as developers to ensure that the house was built with proper care and skill. No new loss-causing breaches of their duty of care

have been established after this date. I find that the limitation defence raised by the Urlichs is made out and that the claim against them by the claimant and the counter claim against them by the first respondent fails.

WAS THE COUNCIL NEGLIGENT IN ISSUING THE CCC AND IF SO DID THIS NEGLIGENCE CAUSE LOSS?

[81] The Council has conceded that it breached its duty of care to the claimant when conducting the final inspection of the house on 22 April 1999. This is because it failed to observe defects which led to the need to re-clad the house. It is conceded that the Council is liable for the established claim and the damages sought. The Council has sought to apportion this liability with the Urlichs but has failed due to the success of the limitation defence and to the failure to establish loss caused by acts or omissions carried out by the Urlichs subsequent to construction.

[82] It has been argued by the claimant that construction defects should have been identified when the final inspection was carried out, that those defects ought to have precluded the Council from issuing a CCC, and that it was negligent in doing so.

[83] Counsel has submitted that in light of the concessions it has made in respect of the final inspection it is unnecessary to determine the issue of whether the Council was negligent in issuing the CCC.

[84] I agree. Having conceded its liability for the established claim because of its admitted negligence in respect of the final inspection it is indeed unnecessary to determine the liability issues arising from the issue of the CCC.

[85] The second respondent has accepted its liability for the agreed cost of remedial work. It has also accepted that the claimant is entitled to general damages. The amount claimed in this regard is

$25,000 which is the amount the Court of Appeal in *Byron Avenue* confirmed was in the general vicinity available to owner-occupiers.[11]

[86] Mr Ringwood's brief gave details of the distress he and his family had experienced as a result of their leaky home experience. This included significant financial pressure and anxiety arising from the funding of the repairs and the disruption to the family both in terms of the time required to resolve the problems and the need to relocate for 18 weeks. I accept that the usual award for damages should be followed in this case and general damages are set at $25,000.

[87] Consequential losses are claimed in the sum of $30,329.85. These represent the costs of temporary rental accommodation, storage and moving costs, valuation fees, insurance and expert's fees. Invoices to support these claims were produced. No challenge was made to the sum claimed. It is accepted that this claim is made out.

Conclusion as to Quantum

[88] The claim has been established to the amount of $375,714.85 which is calculated as follows:

Remedial work	$320,385.00
Consequential damages	$30,329.85
General damages	$25,000.00
TOTAL	$375,714.85

Interest

[89] The claimants are seeking interest on the loans to fund repairs. The Act provides for interest to be awarded at the rate of the

[11] *Body Corporate 189855 v O'Hagan* (Byron Avenue) [2010] NZCA 65.

90 day bill rate plus 2%. No submission has been made as to the appropriate start date for the interest calculation. In the circumstances of this case it is appropriate that interest be awarded from the due date of the third progress claim to Passion & Soul Architecture Ltd which was 3 August 2010.

[90] The established costs, exclusive of general damages, are $350,714.85. The 90 day bill rate plus 2% is 4.96% which means interest accrues at $47.66 per day. There are 408 days between days between 3 August 2010 and 14 September 2011. Interest of $19,445.28 is therefore awarded. The final amount for the established claim including interest is $395,160.13.

CONCLUSION AND ORDER

[91] The claimant has established his claim to the extent of $395,160.13. The Auckland Council as successor to the assets and liabilities of the Auckland City Council is ordered to pay Dennis Graham Ringwood the sum of $395,160.13.

[92] The claim against Ronald Anthony Urlich and Janice Wilma Urlich is dismissed.

DATED this 14th day of September 2011

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M A Roche

Tribunal Member