CLAIM NO: TRI-2007-101-000029

UNDER the Weathertight Homes Resolution Services Act 2006

IN THE MATTER of an adjudication

BETWEEN	**TRUSTEES EXECUTORS LTD as TRUSTEE FOR THE SIMPSON FAMILY TRUST**
	Claimants
AND	**WELLINGTON CITY COUNCIL**
	First Respondent
AND	**HEYHOE BUILDERS LTD**
	Second Respondent
AND	**JEANETTE O'CALLAGHAN**
	Third Respondent
AND	**G R W CONSULTANTS LTD. T/A FIRST WINDOWS AND DOORS**
	Fifth Respondent
AND	**CHRISTOPHER HEYHOE**
	Seventh Respondent
AND	**PAUL SIMPSON**
	Eighth Respondent
AND	**MIRANDA PATRICK**
	Ninth Respondent
AND	**BRIAN ANDREOLI**
	Tenth Respondent

Dates of Hearing: 20, 21 and 22 February 2008

Appearances:

Claimants
Philip Ross – Counsel
David Bigio - Co Counsel
Miranda Patrick - Claimant / Ninth Respondent
Erne Joyce - Expert
David Cunningham - Expert
John Barton - Witness
Jeanette Schmidt - Witness
Ronald Smith (telephone) – Witness

First Respondents
Stephen Cody - Council Employee
Helen Rice - Counsel
Frana Divich - Co Counsel
Russell Cooney - Expert
Patrick Lawrence - Expert
Earl Gordon – Expert

Second and Seventh Respondents
Chirstopher Heyhoe - Respondent / Director
Scott Galloway - Counsel
Reece Poutawera - Co Counsel
Peter Lalas – Expert

Third Respondent
Jeanette O'Callaghan – Respondent

Fifth Respondent
Rod Allwood - Director
Alexander Laplanche - Director
Dan Parker - Counsel
Thomas Wutzler - Expert
Laurie Barker – Expert

WHRS Assessor – Dianne Johnson

Date of Decision: 7 March 2008

FINAL DETERMINATION

R. Pitchforth

BACKGROUND

[1] This was a claim for $1,122,927.79 plus interest for damage to a leaky home.

[2] In 1992 Miranda Patrick and Paul Simpson were husband and wife, (the Simpsons). In December 1992 they purchased a section at 10 Parutu Way, Beacon Hill, Wellington, with the intention of developing the site.

[3] The Simpsons commissioned Mr Conroy, an architect, to complete concept drawings for a house on the site.

[4] In May 1993 the Simpsons approached and then commissioned Jeanette O'Callaghan, an architectural draughtswoman, to prepare working drawings based on the architect's plans.

[5] The Simpsons believed that the contract was:

- to prepare working drawings,
- supervise the construction project, and
- manage the whole process acting as their agent and ensuring their interests were protected.

[6] The nature of the contract was disputed by Mrs O'Callaghan who says, inter alia, that the Simpsons were not willing to pay for supervision of the contract.

[7] Mrs O'Callaghan drew plans from the architect's sketches for a Firth masonry villa. Mrs O'Callaghan worked with Firth and Brunsdon Cathie Ltd, a design engineering company, in producing the plans. Application for building consent was made on or about 24 December 1993.

[8] The project was put out to tender. Two tenders were received. Neither tender was accepted though the Simpsons entered into negotiations with Heyhoe Builders Limited, (the builder).

Contract and Cladding

[9] The Simpsons met with Mr Heyhoe, a director and employee of the builder, and Mrs O'Callaghan in March 1994. They wanted a house like the one designed but could not afford it. An EIPS cladding system seemed to Mrs O'Callaghan the only method of lowering costs.

[10] The Simpsons say that Mr Heyhoe recommended *Glenclad* on the grounds that it reduced the cost of construction, it would look and feel like masonry walls, it would be warmer and the internal construction would be easier.

[11] The Simpsons say that Mrs O'Callaghan endorsed the recommendation as a good option.

[12] The Simpsons say they accepted the recommendation and caused the house to be redesigned and costed. Although the new price was still above budget they accepted the price.

[13] Mrs O'Callaghan and the builder dispute the claimants' version of the discussions but agree that the house was redesigned with EIPS cladding.

[14] The revised plans were submitted in May 1994 to the Wellington City Council (the council) for approval. The approval was not granted because the site was in a 'Specific Design Area' so all elements to do with wind bracing would have to be designed by a structural engineer.

[15] Brunsdon Cathie Ltd provided the design and the plans were resubmitted.

[16] In June 1994 the council confirmed that the wind bracing design had to be a loading of 1.95KPa and required all elements including cladding, windows etc to be designed for this loading.

[17] Brunsdon Cathie Ltd then carried out the specific design of the house and sent details to be incorporated in Mrs O'Callaghan's drawings.

[18] On or about 23 June 1994 consent was issued by the council and uplifted by Mrs O'Callaghan. The consent was subject to an addendum relating to wind pressure.

[19] In June 1994 the Simpsons and Heyhoe Builders entered into a contract.

The Construction Process

[20] In her role as the employers' representative Mrs O'Callaghan made fortnightly site visits and checked the monthly claims made by the builder.

[21] The Simpsons were not happy with the progress of the construction. The project was behind schedule but the Simpsons intended to move in on 11 November 1994 as expected. However, as the house was not closed in they were not able to occupy the property for another few weeks.

[22] The builder says that practical completion had, in essence, been achieved on or before 23 December 1994.

[23] On 12 April 1995 the Simpsons signed a certificate of practical completion, though they now say they had misgivings.

Code Compliance Certificate (CCC)

[24] The council made visits during construction and after practical completion made further visits relating to code compliance.

[25] On 9 October 1995 the Wellington City Council reported:

> 10 Parutu Way, Beacon Hill: Building Consent 3835. A final inspection of the above property was carried out on 28 September 1995 and the following works are still required:
> (a) Handrail to stairs.
> (b) As-laid drainage plans.
> (c) Engineer's certificate.
> (d) Balustrade to deck.

[26] The main barrier to the issuing of the certificate was that the fall from the patio was more than 1 metre.

[27] The balustrade was not part of the contract with the builder.

[28] Although the Simpsons obtained a quote for a balustrade it was too expensive and the work was deferred.

[29] The Simpson's pointed out further defects to the council that further delayed the issuing of a CCC.

[30] The Simpsons took their problems to a television programme, *My House, My Castle.* They allege, but it is disputed, that the programme was the reason why problems were dealt with.

[31] A CCC was issued on 13 August 1999.

Completion of Building

[32] I find that the building was complete by 12 April 1995 except for the matters mentioned in the Wellington City Council report. Once maintenance and the first three compliance matters had been dealt with the builder's obligations were at an end.

[33] It is common ground that the major cause of the delay in issuing the CCC was the failure of the Simpsons to construct the balustrade to the deck, which was not part of the builder's contract.

Defects and Maintenance

[34] The Simpsons commissioned Neville Anderson, a building consultant, to do a report on the project. The report dated 12 January 1995 pointed out that the project was running extremely late but the workmanship was of a high standard. Some faults (including leaks) were noted.

[35] Defects were notified to Mrs O'Callaghan as they were identified. Various matters were dealt with as part of the standard maintenance following building.

[36] In July 1995, a maintenance list was produced after a site visit with the builder, Mrs O'Callaghan and the Simpsons. Further maintenance lists were prepared in October and November 1995.

[37] In February 1996 the builder was still owed $15,551.67 plus GST. The Simpsons complained of various matters with which they were dissatisfied, including leaks.

[38] The Simpsons offered a payment of $3,351.67 in full settlement, which was rejected.

[39] The Simpsons and the builder then took their differences to arbitration.

Knowledge of Leaks

[40] The lack of ground clearances was observable from the time of construction.

[41] In her evidence at para 35 Ms Patrick says:

"Almost immediately there were problems with the windows and doors."

And at Para 36:

"Sure enough the doors leaked uncontrollably …."

And at para 37:

"The fifth respondent started attending to the numerous leaks we experienced through windows."

[42] The report of Neville Anderson of 12 January 1995 refers to:

- Investigation of serious leak in storeroom.
- Entry hall
- 4 - Seal gaps between aluminium and wooden frame at tops of windows.
- Lounge
- Check for leak in west corner of lounge, possibly from rainwater head.

[43] On 13 March 1995 Ms Patrick (then Simpson) faxed Mrs O'Callaghan:-

> Jeanette,
> Seems the flooding was worse than I thought when I rang you on Friday. I am concerned about the fact that the carpet goes down on 20th of this month, and on Friday it would have been ruined in the lounge. Also, if the bed hadn't been soaking it up, in the bedroom.
> Please ensure Chris gets straight onto this as I am not going to delay the carpet.

[44] The Simpsons say that the windows leaked and G R W attended to those leaks. The Simpsons say that the repairs were temporary, though they did not realise it at the time.

[45] On 21 June 1995 the Simpsons showed on a house maintenance form that there were leaks in the storeroom, rumpus room, French doors and under the French doors onto a small deck into the lounge.

[46] Mrs O'Callaghan's maintenance list of 11 July 1995 refers to leaks in the arcade roof, in the plaster between the hardiflex floor and concrete in the garage, the fireplace, the lounge windows and doors, the master bedroom and rumpus room door and window leaks.

[47] The maintenance list of 27 October 1995 refers to rumpus room skirting which is water damaged and leaking doors and fireplace.

[48] The 13 November 1995 list refers to the need for waterproof doors in rumpus room, leaking fireplace and the leaking arcade.

[49] In her evidence, supplementary brief, 16 February 2008, Ms Patrick says at par 56:

> "I would like to clarify a misconception concerning the initial leak into the master bedroom which was detected in 1995. At that point some work was done on the ceiling and it appeared for a short period that the leak had gone away, but in fact it had not, and it reappeared. At the arbitration the reoccurrence of the leak was treated as a new incident but in fact it was not. The original leak had not been repaired by the work that was originally done so in fact this leak was not actually stopped until 1998 when John Argue carried out remedial work. During the intervening period my husband and I did everything we could to stop that leak."

[50] A list (author unspecified) dated 17 April 1997 and produced by the claimant shows references to leaks.

[51] On 18 June 1998 Ms Patrick faxed a list of defects to the council. She referred to the French doors leaking. She referred to the leak in the

master bedroom manifesting itself down the recessed light as being ongoing since the house was built.

[52] When the existence of the leaks became known to the council they issued a notice to rectify on 24 July 1998 dealing with issues raised and the leak in the ceiling of the master bedroom.

[53] On 2 November 1998 J R Argue Ltd reported that leaks in the master bedroom had plagued the owners since 1994.

[54] On 11 May 1999 the council undertook a further inspection and issued a notice to rectify dated 21 May 1999.

[55] Included in the notice to rectify was a reference to:

- Ground clearances outside garage and entry foyer do not comply. A secondary flow path is required to be provided to remove water in adverse conditions from this area; and
- The arcade roof as constructed does not comply with E2 or E3 of the building code.

[56] In 1999 in a series of television programmes in *My House, My Castle*, (produced in evidence), Ms Patrick referred to a long history of leaks in the building.

[57] In her brief of evidence dated 2 November 2006 Ms Patrick said in paras 35 – 37 that after April 1995 “Almost immediately there were problems with the windows and doors with numerous leaks through the windows”.

[58] In submissions to the Disputes Tribunal she said, “Upon completion, in 1996 [sic], there were immediately numerous problems with water leaks including the French doors”.

[59] The matters identified for the claimant by the Joyce Group, the absence of control joints, flat parapets, markings on the window joinery, were all ascertainable in 1994.

[60] All matters were rectified to both Ms Patrick's and the council's satisfaction by 13 August 1999 when the CCC was issued.

Transfer to Trust

[61] The Simpsons, believing that the house was now weathertight, transferred the house to the claimant trust. The contract was dated 12 September 2000 with possession date of 12 October 2000.

[62] The trust purchased the property with notice of the defects and the usual warranties expressed in the ADLS standard form, July 1999 edition.

[63] Ms Patrick and her son are the only beneficiaries of the trust.

Building Defects and Disputes

[64] The French doors leaked almost immediately after installation. They were replaced in June 1997 by a sliding door provided by G R W Consultants Ltd (GRW). The replacement doors leaked but that dispute has been dealt with by the Disputes Tribunal.

[65] The Simpsons took their dispute with the builder to arbitration in 1996. The dispute included a claim for leaks. The statement of claim dated 18 October 1996 refers to the arcade, the windows, a leak in the bedroom and to leaks generally. The same statement of claim refers to the leaky French doors which have been dealt with by the Disputes Tribunal.

[66] An interim award was made by the arbitrator on 28 March 1998. Further litigation followed in relation to the enforcement of the award by the builder.

[67] The Simpsons took their dispute with Mrs O'Callaghan to the Disputes Tribunal.

[68] The Weathertight Homes Resolution Services Act 2002 was assented to on 26 November 2002 and came into force the following day.

[69] The assessor's report indicates that the application for an assessor's report was made on the 27 November 2002.

[70] The matter proceeded as a claim under the 2002 Act. It was set down for hearing on 12 February 2007 before it was adjourned *sine die*.

[71] On the 3rd of May 2007 Philip Ross wrote to WHRS giving notice pursuant to s148 of the Weathertight Homes Resolution Act 2006 withdrawing the claim from the Adjudication Process under the Weathertight Homes Resolution Service. He also stated the Claimant intended to file an application under s150 of the 2006 Act to have its claim adjudicated by the Weathertight Homes Tribunal.

[72] On 6 August 2007 the claimants re-filed their application under the 2006 Act and sought wider remedies.

[73] An attempt to mediate the differences was made but was reported back on 21 January 2008 as unsuccessful.

THE CLAIMS

[74] The statement of claim filed sought $1,122,927.79 plus interest.

[75] Ms Patrick also cross-claimed for $80,000 for general damages. She abandoned the claim for general damages in the middle of the afternoon of the second day of hearing.

[76] In the early afternoon of 20 February 2008 the claimant accepted the expert's view as reported from the experts' conference that it was not necessary to completely reclad the house.

[77] It was assumed by the parties that the claim was now the amount reported as the cost of repairs by the assessor, namely $83,437.00.

[78] On 21 February the claimant then added a sum of $84,896.00 to the claim for 'full repair costs', $80,000.00 for diminution in value, consequential losses of $24,080.87 and remedial work of $55,455.83.

[79] Later on 21 February 2008 the claimant adjusted its claim to $168,333.00.

The Damage

[80] The experts appointed by the parties met and agreed to the following matters:

Defect 1 *- Cladding installation*

[81] The cladding installation is in variance with the Glennclad literature for movement of control joints. No damage was observed that could be directly attributed to the non-installation of the recommended joints over either timber framing or blockwork.

Defect 2 *- Parapet tops- EIFS Cladding installation*

[82] The parapet tops are installed in variance with the Glennclad literature.

[83] Moss is growing on the flat parapet tops and the plaster coating has cracked indicating that low level moisture transfer is occurring. This moisture

will track down the building wrap and away from the structure at the bottom of the cladding or dry by diffusion of water vapour either through the exterior cladding or through interior linings.

[84] The experts agreed that there was moss growth, the coating is cracked and moisture is entering at one confirmed location and likely elsewhere. The cause of the cracks was not established. Remedial work would require the rebuilding of the tops incorporating a control joint to the parapet and wall. Moss and cracking showed lack of maintenance.

[85] A high moisture reading was recorded at one probe location – at the southern angled corner of the front elevation. At this location the parapet is exposed to weather from both the north and the south to the front, back and end of the parapet. Water is penetrating the cladding at the top of the corner and the underlying structure has been damaged.

Defect 3 *- Building wrap*

[86] The building wrap has been incorrectly installed at the arcade end of the garage rear (courtyard) wall.

[87] The wrap is in close contact with the plaster coating and is allowing transfer of moisture behind the cladding. This moisture is holding in the wrap and increasing the humidity level in the adjacent wall cladding system. The moisture is unable to drain at the bottom of the cladding sheet and is only able to dry by diffusion of water vapour either through the exterior cladding or though the interior linings.

[88] No current damage has been identified in the wall framing that can be attributed to the incorrectly installed wrap.

Defect 4 *- penetration of services*

[89] Service pipes, meters and wires penetrating the cladding have been face sealed.

[90] No current damage has been identified which can be attributed to the non-installation of flashing to service penetrations. There is possible moisture entry at the garage wall but it was not proven to the experts' satisfaction.

Defect 5 *- windows*

[91] The windows have been installed at variance with the Glennclad literature. Head flashings have not been installed. Sill and jamb flashings have been installed.

[92] High moisture content readings were recorded adjacent to five of the windows. At each of the five locations there was a history of, or evidence of, adjacent leaks.

[93] The assessor's investigation is inconclusive in determining if faulty window installation is a primary cause of damage.

Defect 6 *- Junction of dissimilar materials – balcony*

[94] The junctions of the EIFS cladding and the balcony framing are reliant on sealant to prevent moisture passing between the wall system components and the balcony structure and into the wall cavity.

[95] High moisture readings and decay were detected at the south end of the family room balcony at the angled external corner and the south end of the lounge balcony where the cladding is poorly aligned inter-story.

[96] The 'as built' construction has failed to provide adequate movement and moisture control between the two structures. Moisture is penetrating the external envelope at the side of the balconies and tracking down and damaging the lower level corner framing.

[97] The balcony framing is also compromising the ground floor level drainage plane and allowing building up of moisture in the ground floor and balcony framing.

Defect 7 *- Junction of dissimilar materials*

[98] Junctions have been bandaged and painted. No current damage has been identified which can be attributed to the lack of mechanical flashings.

Defect 8 *- Bottom of sheet*

[99] The installation of the cladding at the courtyard and garage is at variance with the Glennclad literature. Casement beads have not been fitted to protect the bottom of the polystyrene.

[100] No damage was observed to the bottom of the cladding sheets at these locations that can be attributed to the lack of a casing bead.

Defect 9 *- Bottom of sheet clearances/hard landscaping*

[101] The installation of the paving and asphalt at the courtyard and garage area is at variance with the Glennclad literature. The hard landscaping has been laid in close contact with the bottom sheets so that the required clearance from the bottom of the cladding to the top of the ground cover has not been achieved.

[102] The opportunity for the draining of moisture from behind the building wrap or back of the cladding system has been compromised. The only opportunity for the drying is by diffusion of water vapour either through the exterior cladding or through the interior linings.

[103] The elevated finished ground level has further compromised the performance of the external envelope by allowing the transfer of surface

water onto the bottom of the plaster coating and the bottom edge of the polystyrene cladding.

[104] This moisture has been transferred on the ground floor framing and is a contributing cause to the damage at bottom plate level at the arcade end of the courtyard.

[105] It was agreed that the cladding system is meeting the performance expectations when it is able to drain and dry. At the rear elevation and garage the lack of a bottom of sheet clearance has compromised the drying cycle, moisture is therefore building up and causing damage to the structure.

Defect 10 *- Stormwater collection – internal gutter and rainhead*

[106] The waterproof membrane to the internal gutters has come loose from the ply substrate at the external end and sides above all three rainheads.

[107] The outlets are on the front elevation and exposed to extreme weather conditions. At the garage the rainhead has also suffered wind damage.

[108] Stormwater is penetrating the external envelope under or over the membrane and draining down the building wrap/back of the polystyrene cladding at the external corners. Where there is a break in the drainage plane moisture is accumulating in and damaging the underlying structure.

[109] The ends of the internal gutters are primary ingress points for the moisture detected on the ground floor framing of the front elevation.

[110] The gutter membrane and rainhead require maintenance.

Defect 11 *- Roof*

[111] Moisture ingress has occurred and is continuing to occur at roof level during extreme weather conditions.

[112] The roof cladding on the east side of the garage does not extend fully over the framing so that there is only protection from the apron flashing. Water ingress is occurring through a hole in the flashing.

[113] The assessor says that the roof cladding has been installed without the ends of the trough being crimped or capped. In extreme wind conditions moisture is being blown under the end of the roof cladding and into the structure.

[114] The experts agreed with this description relating to the bottom ends of the roof only. There is no expert evidence available on the construction at the top end of the roof cladding.

Defect 12 *- Window fabrication*

[115] All but the expert for the window supplier agreed that aluminium windows are designed and tested for water penetration and structural strength. Performance requirements above an ultimate wind pressure of 1550Kpa and water penetration over 330Kpa are outside the scope of the New Zealand standard and must be designed to the specific site requirements. Specific design is typically undertaken by a suitable qualified engineer. Design is typically supported by a producer statement.

[116] The expert for the window supplier, Thomas Wutzler disagreed saying that the statement was too generic and did not reflect industry practice at the time of construction or an understanding of NZS 4211.

General

[117] The experts agreed with the assessor's assessment of the damage.

[118] It was agreed that the recommended repairs were one way of repairing the damage.

[119] The experts disagreed on questions about the wall cladding and joinery systems.

[120] It was agreed that *stachbotrys* was detected in one location but there was disagreement that sufficient *stachbotrys* was detected to have required vacation of the property.

[121] The experts made no comment on the arcade.

JURISDICTION

[122] The claim is in respect of a single dwellinghouse and the claimant has proof of ownership or the authority of the owner to act in respect of the claim.

[123] The present claim was filed with this tribunal on 6 August 2007.

[124] It is made under the transitional provisions of the Act.

[125] On 10 September 2007 the claimant asked for the jurisdiction to be widened under s 139 and gave the tribunal written consent for invasive testing (or further invasive testing) of the dwellinghouse concerned. The claim was widened by the tribunal.

[126] The assessor issued the following reports:

- Assessor's Report 19 June 2003.
- Assessor's Addendum Report dated 8 January 2006

- Assessor's Addendum Report dated 2 February 2007 (Appendix 7) Cost estimate
- Assessor's Addendum (Second) Report dated 18 February 2008

[127] Five procedural orders were issued relating to the management of the case. The timelines for providing details of the claim and briefs of evidence by the claimant were not kept leading to problems with responses. Details of the claim were still being introduced during the hearing. There were consequential delays in the supply of defence briefs and reply briefs.

[128] Prior to the hearing the first respondent gave notice that there were issues relating to limitation, *res judicata* and *estoppel*. The first respondent also said that it would argue four issues - whether the council owes a duty of care, whether the Consumer Guarantees Act 1993 applies to the council, whether the cause of action accrued to the previous owner rather than the claimant, and whether the claim was time barred pursuant to s 4 of the Limitation Act 1950.

[129] Other parties raised limitation issues.

[130] On 12 February 2008 the expert witnesses appointed for this case by the parties met under the chairmanship of tribunal member Christopher Ruthe. The experts recorded those matters with which they were in agreement.

LIMITATION ISSUES

[131] Section 14 of the Weathertight Homes Resolution Services Act 2006 (the Act) in relation to a dwellinghouse claim says:

> The criteria are that the claimant owns the dwellinghouse to which the claim relates; and –

(a) it was built…..within the period of 10 years immediately before the day on which the claim is brought; …

[132] The Act does not preclude the operation of the Limitation Act 1950. Section 4 of the Limitation Act 1950 says:

(1) Except as otherwise provided in this act….the following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued, that is to say –
(a) Actions founded on simple contract or on tort…….

[133] Section 37 of the Act, provides:

(1) For the purposes of the Limitation Act 1950 (and any other enactment that imposes a limitation period), the making of an application under s 32(1) has effect as if it were the filing of proceedings in a court.

[134] The claim was brought within 10 years of the date when the house was built.

[135] As previously discussed, the claimant identified all the damage, which was more than minimal damage, prior to 27 November 1996, the date six years before the claim was commenced by making an application for an assessor's report.

[136] The respondents who are potentially liable submit that the claim is therefore time-barred.

[137] The claimant concedes that there have been many leaks over a very long period. The claimant says that all the leaks were fixed as soon as they became evident and did not begin to leak again until 2002.

[138] The claimant says that each fresh leak would constitute a fresh cause of action.

[139] The claim was promptly registered as soon as the building started to leak again in 2002 and accordingly, it is argued, is within the limitation period.

[140] The claimant's submission amounts to saying that there were causes or instances of damage not known when the repairs were done. The assessor's report has shown that the causes were reasonably discoverable at the time the leaks were first noticed.

[141] The Simpsons effected repairs and believed that the house was sound when it was transferred to the claimant on 14 November 2000. However, neither the period without problems nor the transfer is a basis for either suspending the time limit or deferring the time from which time would run.

[142] The claimant says that these matters have been previously canvassed by Adjudicator Green under the previous legislation.

[143] Adjudicator Green said in his Procedural Order No. 4 and Determination of Preliminary issues:-

> "[98] I have carefully considered the principles and factors to be balanced in relation to the applications to strike out the claim, but in the end, while there may be problems for the claimant with causation, I am not satisfied that the respondents have discharged the onus of proving on the balance of probabilities that they have a complete defence on the ground that the claim is statute barred.
>
> [99] I am not satisfied that all the necessary material is before me to enable a determination to be properly made. The points raised in support of a limitation defence hinge on disputed factual matters and determining when a prudent householder would have discovered the latent defects in this case requires a determination of evidence which must be adduced and tested at a substantive hearing.
>
> [100] Therefore this is not a clear case in respect of which to exercise the jurisdiction to strike out and I leave the limitation issue to be

determined at the hearing. Accordingly, the application to strike out the claim on the ground that the claim is statute barred is declined."

[144] This present case is of course a separate case that the claimants were entitled to bring under the 2007 Act. However, it is also clear from Adjudicator Green's decision that this is the correct forum in which to decide the limitation issue.

[145] The claimant relies on the long stop provision in s 91 Building Act 1991. That Act was repealed before the present claim was filed. The relevant section of the Building Act 2004 is:-

> **393 Limitation defences**
>
> (1) The provisions of the Limitation Act 1950 apply to civil proceedings against any person if those proceedings arise from —
>
> (a) building work associated with the design, construction, alteration, demolition, or removal of any building; or
>
> (b) the performance of a function under this Act or a previous enactment relating to the construction, alteration, demolition, or removal of the building.
>
> (2) However, civil proceedings relating to building work may not be brought against a person after 10 years or more from the date of the act or omission on which the proceedings are based.
>
> (3) For the purposes of subsection (2), the date of the act or omission is,—
>
> (a) in the case of civil proceedings that are brought against a territorial authority, a building consent authority, a regional authority, or the chief executive in relation to the issue of a building consent or a code compliance certificate under Part 2 or a determination under Part 3, the date of issue of the consent, certificate, or determination, as the case may be; and

(b) in the case of civil proceedings that are brought against a person in relation to the issue of an energy work certificate, the date of the issue of the certificate.

Compare: 1991 No 150 s 91

[146] This long stop limitation is an absolute bar to any claims. However, in order to mount a claim in contract or tort the claim must be filed before the expiration of the time under the Limitation Act, namely 6 years. Once that hurdle has been overcome, there may be opportunities to reach back 10 years in prosecuting the claim.

[147] The claimant refers to *Matai Industries Ltd v Jensen* [1989] 1 NZLR 525, 532 (Tipping J) for the proposition that the limitation defence is not a bar to the proceedings but an affirmative defence that has to be proven by the party raising the defence. The onus is on the defendant to show that the claim is subject to the limitation defence.

[148] In *Simms Jones Ltd v Protochem Trading NZ Limited* [1993] 3 NZLR 369, 382 Tipping J said:

> **"Time of accrual of cause of action in tort**
>
> Assuming, contrary to the previous findings, both a duty and negligence it would then have been necessary to establish when the tort cause of action accrued for the purposes of the Limitation Act 1950. Mrs Courtney submitted that if this point were reached *Simms Jones*' cause of action in tort was none the less statute barred on the same basis as the major part of the cause of action in contract…….
>
> A cause of action accrues when every fact exists which would be necessary for the plaintiff to prove in order to support its right to the judgment of the Court: see *Williams v Attorney-General* [1990] 1 NZLR 646 at p 678. The conventional view is that the cause of action accrues as soon as any actionable damage has occurred, in spite of the fact that further actionable damage might well accrue thereafter."

[149] In *Pullar v The Secretary of Education* (CA 206/06, 6 September 2007), Chambers J said at para 13:

> It is now well established that, when through negligent construction design or inspection, damage occurs in a building, its cause being obvious, any cause of action which may exist accrues when the damage

> becomes manifest. That is because from that point economic loss occurs, as the market value of the building would be affected.

And in para 15:

> We are by no means convinced that this was a case of 'latent damage'. The defects were readily apparent as early as 1997, indeed perhaps late 1996. There was no mystery about what was wrong. Mr Barns wrote to Mr Pullar in October 1997 asking him to return to fix the leaking windows and the other damage to which he referred. We strongly suspect that any cause of action in negligence had accrued by then.

In Para 16 he says:

> But even if we were wrong about that, there can be no doubt whatever that a cause of action had definitely accrued by the time of Mr Barnett's inspection and report……We do not need to ask, in Hamlin terms, whether 'and by reasonable [building] owner would or should have called in 'an expert' by then: the Ministry after all had called one in. The defects were obvious. So was the remedial action required.

In Para 19 he says:

> With respect, the judge applied the wrong test. It is not necessary, in order for time to start running, to be able to pinpoint with precision the exact cause of every defect. Indeed, that would frequently mean time could not start running until the remedial work was underway! That would in turn mean that the building owner could not sue the builder in advance of the repair work as no cause of action would have by then accrued. That is not and never has been the law. What one is concerned to ascertain is when economic loss has occurred: when was the market value of the building affected? We suspect the market value of this building was affected back in 1997 That was clearly affected by the time the Barnett report was prepared in December 1998.

[150] In *Trustees Executors Ltd v Morel & Ors* [2007] NZSC 27 the Supreme Court reviewed the principle of discoverability, namely, that the damage claimed by the homeowner is economic loss and until the damage is discovered, the value of the property is unaffected and the cause of action has not accrued. In the leading judgment Tipping J refers to Hamlin and says:

> ***Hamlin's case***
>
> **[39]** The best starting point lies with the decisions of the Court of Appeal and the Privy Council in the *Hamlin* litigation, which concerned latent damage to buildings.[21] In his judgment in the Court of Appeal in that case, McKay J said:[22]

"The ordinary time limit for an action in contract or in tort is thus calculated from the date on which the cause of action accrued. The phrase 'cause of action' has been defined as meaning every fact which it will be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court: *Cooke v Gill* (1873) LR 8 CP 107 at p 116 and *Read v Brown* (1888) 22 QBD 128 (CA). In contract the cause of action accrues as soon as there has been a breach of contract. In an action in tort based on a wrongful act which is actionable per se without proof of actual damage, the cause of action will accrue at the time the act was committed. Where the claim is based on negligence, however, damage is an essential part of the cause of action, and until the damage has occurred the cause of action is not complete.

This is described as 'familiar law' in the judgment of this Court delivered by Cooke P in *Askin v Knox* at p 254. He goes on to point out that it is equally familiar that the six-year rule could operate unfairly to the owner of a building if 'damage' resulting from defective construction were regarded as arising before he knew, or ought reasonably to have known of it. On the other hand, there could be unfairness to defendants if allegations of negligence could be raised many years after the work has been carried out. The judgment notes the unsatisfactory disharmony that has developed between New Zealand law and English law in dealing with these difficulties.

The Limitation Act 1950 is based on the Limitation Act 1939 (UK), and the sections set out above adopt substantially the same wording. The decisions of the English Courts are accordingly relevant and of persuasive authority, and they have been referred to in the New Zealand cases. ….

The matter now falls to be determined by this Court, and it is appropriate to examine both the English and the New Zealand cases in which the question has arisen."

[40] The Privy Council's analysis in *Hamlin* was such that the case was brought within conventional limitation jurisprudence.[23] Their Lordships' reasoning was that no loss occurred until the latent cracking was discovered or discoverable. Lord Lloyd of Berwick for the Board said:[24]
"Once it is appreciated that the loss in respect of which the plaintiff in the present case is suing is loss to his pocket, and for physical damage to the house or foundations, then most, if not all the difficulties surrounding the limitation question fall away. The plaintiff's loss occurs when the market value of the house is depreciated by reason of the defective foundations, and not before. If he resells the house at full value before the defect is discovered, he has suffered no loss. Thus in the common case the occurrence of the loss and the discovery of the loss will coincide.

But the plaintiff cannot postpone the start of the limitation period by shutting his eyes to the obvious. In *Dennis v Charnwood Borough Council*, a case decided in the Court of Appeal before *Pirelli* reached the House of Lords, Templeman LJ said at p 420 that time would begin to run in favour of a local authority:

> '. . . if the building suffers damage or an event occurs which reveals the breach of duty by the local authority or which would cause a prudent owner-occupier to make investigations which, if properly carried out, would reveal the breach of duty by that local authority.'
>
> In other words, the cause of action accrues when the cracks become so bad, or the defects so obvious, that any reasonable homeowner would call in an expert. Since the defects would then be obvious to a potential buyer, or his expert, that marks the moment when the market value of the building is depreciated, and therefore the moment when the economic loss occurs. Their Lordships do not think it is possible to define the moment more accurately. The measure of the loss will then be the cost of repairs, if it is reasonable to repair, or the depreciation in the market value if it is not: see *Ruxley Electronics and Constructions Ltd v Forsyth* [1995] 3 WLR 118.
>
> This approach avoids almost all the practical and theoretical difficulties to which the academic commentators have drawn attention, and which led to the rejection of *Pirelli* by the Supreme Court of Canada in *Kamloops* . . . Whether or not it is right to describe an undiscoverable crack
> as damage, it clearly cannot affect the value of the building on the market. The existence of such a crack is thus irrelevant to the cause of action. It follows that the Judge applied the right test in law."
>
> **[41]** Immediately following this passage Their Lordships affirmed that their advice on the limitation point was confined to the problem created by latent defects in buildings. They abstained, as had Cooke P in the Court below, from considering whether the "reasonable discoverability" test should be of more general application "in the law of tort".[25]
>
> **[42]** The reasoning of the Privy Council means that cases of the *Hamlin* kind do not involve any departure from the conventional approach to when a cause of action accrues. The element of knowledge or discoverability affects when the loss occurs. Only through that issue does it affect when the cause of action accrues. The focus remains upon occurrence of loss rather than on discoverability of a loss which has already occurred. Their Lordships expressly reinforced the general limitation position when they observed:[26]
> "[Our] approach is consistent with the underlying principle that a cause of action accrues when, but not before, all the elements necessary to support the plaintiff's claim are in existence. For in the case of a latent defect in a building the element of loss or damage which is necessary to support a claim for economic loss in tort does not exist so long as the market value of the house is unaffected."

[151] Ms Patrick had noticed the leaks, which were not latent in the sense discussed in *Hamlin*, in 1995. She had an expert inspect the property in 1995.

[152] Ms Patrick had arranged for repairs before selling the property.

[153] The liability of the respondents could only arise from the original construction or installation of the items which were alleged to be the cause of the leaks.

[154] This situation was discussed in *Johnson v Watson* [2003] 1 NZLR 626, 631 (CA), para 18:

> **[18]** We return to the question of causation in the present case. There can be no doubt that if the original workmanship was faulty it was ***a*** cause of the total damage in a "but for" sense. Had the original work not been faulty there would have been no damage capable of being increased by ineffective prevention work. The fact that the original work was on this basis causative of the total damage does not mean that there cannot in law be any additional and concurrent cause of part of the total damage. It is not unusual to find that certain consequences have more than one cause. To be recognised as a cause in law, the allegedly causative circumstance does not have to be ***the*** cause. It is enough if it is ***a*** cause which is substantial and material: see for example ***Price Waterhouse v Kwan*** [2000] 3 NZLR 39 at p 47, para [28]. Substantial in this sense means more than trivial or de minimis. Material means that the alleged cause must have had a real influence on the occurrence of the loss or damage in suit.
>
> **[19]** Here negligence in carrying out the prevention work, be it act or omission, if established, is a concurrent cause of the damage which it failed to prevent. Its purpose was to prevent such damage and it would be unrealistic to take the view that it was not ***a*** substantial and material cause of that damage. In such circumstances as these it is not the law that because the further damage could not have occurred without (but for) the originally faulty workmanship, such workmanship must be regarded as the sole cause of that damage. A concurrent cause, such as the ineffective prevention work, is in a sense the opposite of a novus actus interveniens. It is in reality a novus actus causans, or in other words a new default which runs with the earlier default so as to cause, or at least materially contribute to, the further damage which it was its purpose to prevent.
>
> **[20]** If, as in Lord Atkin's example, the Johnsons had engaged a builder other than Mr Watson to carry out the prevention work, and that builder had been negligent, he could hardly rely on Mr Watson's originally faulty work (assuming such to be established) as the sole cause of the damage suffered by the Johnsons as a result of his failure to perform the prevention work properly. In causation terms the position cannot logically be different when it is Mr Watson himself who is said to have been negligent in his performance of the prevention work.
>
> **[21]** For these reasons we cannot accept Mr Bell's argument that the further damage was in law caused only by the original faulty workmanship. The ***East Suffolk*** case is clearly distinguishable and in

> the circumstances of this case we prefer the approach of Lord Atkin. We agree with Mr Bell that ***Mount Albert Borough Council v Johnson*** [1979] 2 NZLR 234 (CA) is of no direct assistance on the present causation issue, albeit the conclusion we have reached is consistent with the general tenor of the judgments in that case. We have considered the other authorities to which the Court referred in its Minute of 18 September 2002 and those to which counsel referred in their supplementary written submissions. We find none of them of such direct help as to warrant specific reference. Equally we do not regard any of them as being inconsistent with the conclusion we have reached.
>
> **[22]** It is clear therefore that the Johnsons are not absolutely barred by s 91(2) of the Building Act 1991 in relation to prevention work carried out by Mr Watson after 19 November 1991, being ten years prior to the date (19 November 2001) when, in their second amended statement of claim, the Johnsons first raised the issue of defective repair/prevention work. Hence the Johnsons may continue their proceeding in respect of relevant acts or omissions occurring after 19 November 1991.
>
> **[23]** A word should also be said about the primary limitation period of six years which applies in contract and tort. It is only in respect of allegedly faulty prevention work occurring after 19 November 1995 that the Johnsons have a clear untrammelled right of action. Before they can make a claim in respect of prevention work occurring between 19 November 1991 and 19 November 1995, they will have to establish their contention that their cause or causes of action in relation to such work were concealed by fraud or their discovery was delayed until at least 21 November 1995 so as to extend the accrual of their cause of action to within the necessary six-year period pursuant to s 28 of the Limitation Act. The Johnsons have the onus of proof in that respect: see ***Humphrey v Fairweather*** [1993] 3 NZLR 91 at p 94.
>
> **[25]** The present case is not one of continuing damage of a progressive kind, as it would have been if some of the damage from the original faulty construction work had occurred within time and some was statute-barred. Here all claims in relation to the original construction work are absolutely barred. It is only because the Johnsons have a further cause or causes of action in relation to such of the prevention work as can be shown to be within time, that they are able to sue at all.

[155] In early 1995 at the latest, when Mr Anderson conducted an inspection, the Simpsons knew that they had a leaky home. They identified many faults while they were occupying the home. An expert could have discovered the causes of the leaks which were not immediately apparent.

[156] A period of dormancy of a fault does not make the fault a new cause of action.

[157] In relation to all but the first respondent, the time runs from the date on which the Simpsons knew, or ought to have realised, that the leaks were defects that affected the value of the home. I find that they knew of the leaks in 1995, well before 27 November 1996, the earliest time from which the claim could run in order to be within the limitation period.

[158] I find that these dates have been proven or agreed to by all parties.

[159] Accordingly, the claims against the second, third, fifth, seventh and tenth respondents fail.

Issue Estoppel

[160] The claimant also pleads *issue estoppel* based on Adjudicator Green's interim decision in Procedural Order No. 4 para 97. That discussion related to the assertion from claimant's counsel that the evidence will establish when latent defects were discovered. Clearly a decision based on the possibility of evidence is not binding on the tribunal that hears the evidence and evaluates it.

The Council

[161] The Wellington City Council issued a CCC on 13 August 1999. The council is the only respondent that could be affected by this date unless it brings a cross-claim against the other respondents as a result of a successful claim against it.

[162] The relevant sections of the Building Act 2004 are:

> **391 Civil proceedings against building consent authorities**
> Any civil proceedings against a building consent authority in respect of the performance of its statutory function in issuing a building consent or a code compliance certificate must be brought in tort and not in contract.

Compare: 1991 No 150 s 90

and s393 quoted above in relation to limitation.

[163] Section 391 reflects the decision of Master Kennedy-Grant in *McWhinney v Taipa* HC Akl CP 29-SD99 7 March 2001, a decision made before the current Act was passed. He canvassed a number of authorities and found that there was no scope for the application for the law of contract where the terms of the agreement between the parties were statutorily determined. (Quoting *Norweb Plc v Dixon* [1995] 1 WLR 636 and *W1-6 v Essex County* Council [1999] Fam 90 (CA).

[164] He rejected submissions that the statutory regime governing [resource management] applications constitutes a contract between the relevant authorities and the public and that the plaintiffs, as members of the public, are entitled to the benefit of that contract. He said that the concept is unworkable and unnecessary as the plaintiffs still have rights to sue for breach of statutory duty, negligence and misfeasance in public office.

[165] The claimant's submissions based on the assumption that the relationship was contractual cannot succeed.

Council's Negligence

[166] The claimant alleges that the Council negligently issued the CCC. The negligence specified was that the Council:-

- Failed to check that the cladding material was suitable for the site and fit for purpose.
- Failed to ensure that it was adequately and appropriately installed.
- Failed to ensure that there were control joints and that the cladding material made provision for drainage of water that permeated the cladding membrane

- The code of compliance certificate was issued despite the fact that the windows were rated only ‘very high’ in terms of NZS 3604:1990.
- The inspector failed to notice that the earthworks behind the concrete slab were inadequate to permit the drainage of water from behind the concrete slab, thus allowing water to penetrate the concrete block retaining wall at the back of the lower storey of the building.
- That the council in carrying out its statutory duties was providing a service to customers pursuant to s2 Consumer Guarantees Act 1993.
- The council bore a statutory responsibility to ensure that all the requirements of the building consent were met and that the construction work complied in all respects with the Building Act 1991, the Building Regulations 1992 and the Building Code which is the first schedule to the regulation.
- The council’s obligation was to ensure, through the inspections it carried out at the property, that the building work met the requirements of the consent and the durability requirements of the building code.

[167] The first two and the last two claims were advanced to support the perceived need to replace the entire cladding of the building. That claim was abandoned during the hearing.

[168] There being no contract between the Council and the Claimant, the Consumer Guarantees Act 1993 does not apply.

[169] The faults were all matters that were discoverable, at least by early 1995 when Mr Anderson made his report. The damage had occurred at the time of transfer to the claimants.

[170] The Council argued that it owes a duty to the first owner who discovers, or could reasonably have discovered damage or defects to the property. The Simpsons were those first owners and consequently the only persons to whom the Council owed a duty of care. They submitted that they did not owe a duty of care to subsequent owners.

[171] In *Stieller v Porirua City Council* [1983] NZLR 628 it was held that the council owed a duty to subsequent purchasers but that the standard of the duty owed was that of a reasonably prudent building inspector. At 634:

> As I have already mentioned, this is a case in negligence and the plaintiffs rely on *Dutton's* case and the line of authority which continues the declaration of principle in that case. There have been a number of cases upon those principles both in New Zealand and elsewhere and while the facts of each case differ in the principles which are applicable are clear, as Lord Wilberforce said in *Anns v Merton London borough Council* [1978] AC 728, in a much quoted passage at p 751, it is no longer necessary to fit the facts of a particular case into a fact situation of a previous case in which it has been found a duty of care exists. This case is not, in my view, a new situation but is merely an example of a situation in which in a number of other cases the duty of care has indeed been held to exist. In my opinion the principal issue in this case is the requisite standard of care and whether the defendant has met that.
>
> There can be no real doubt, and it was not seriously disputed, that the plaintiffs vis-a-vis the defendant are within the sufficient relationship of proximity which results in the reasonable contemplation if there is carelessness that will be likely to cause damage. I paraphrase a further part of the passage in Lord Wilberforce's speech which I have mentioned above. That being the case, there is in this situation no need, in my view, to consider separately whether there are any considerations of policy or otherwise which ought to negative or reduce or limit the scope of that duty. The decisions in such cases as *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234, and *Dennis v Charnwood Borough Council* [1982] 3 All ER 486, are sufficient to show that the Council has a duty of care and that that is not for policy reasons to be negatived or limited. It may be said that the authorities, on their particular facts, have been based on resulting damage or on the likelihood of injury or discomfort. This case is presented on the basis that the house is defective and that that is damage which gives grounds for the claim in negligence. I accept that that is sufficient grounds for a claim in this case. Any doubts on this aspect were, I believe, much discounted in New Zealand by the judgment of Cooke and Somers JJ in the *Mount Albert* case, in particular at p 239, when Their Honours, after referring to the decision in *Bowen v Paramount Builders Ltd* [1977] 1 NZLR 394, made it clear that a house purchaser can recover for defective premises "at least when the loss is associated with physical damage". Any doubts have been put to rest by the decision of the House of Lords in *Junior Books Ltd v Veitchi Co Ltd* [1982] 3 All ER 201, in which case there was no suggestion of damage, other than the defects in the floor, or the likelihood of injury or other discomfort and the

damages to be claimed were for remedying the defects. If it were necessary, which I believe it is not, I would hold that in this case there has been damage to the house and at least discomfort and the reasonable likelihood of that from the substance and effect of the defects.

One factor which can negative the duty of care is the extent of the discretion and its bona fide exercise by the defendant in a situation such as this. This is a matter which has been made plain in Anns' case and other later cases. There has been recent reference to this aspect in *Fellowes v Rother District Council* [1983] 1 All ER 513. In my view that factor does not apply in this case. The defendant exercised its powers in respect of the issue of a building permit and in respect of the inspection of the building as it progressed. It had moved from the exercise bona fide of its discretions to the operational aspect of its duties and clearly was under a duty to take care in the course of these activities.

It was suggested that the defendant could not be liable or ought not to be made liable without the builders being joined in the proceedings. Whether or not the builders or any other parties may be liable in particular situations a Council's liability is independent; it may be sued separately and at least in the *Charnwood* case was so sued successfully. It was also suggested that to be liable it had to be shown that the plaintiffs had placed some reliance on the defendants activities either in issuing the building permit or in inspecting the premises. Reliance is an important issue in liability for negligence under the Hedley Byrne principle. It is not in form a necessary requisite in liability under the general head of negligence as in this case. Finally, it is noted that, unlike a number of the other cases, this is not a case which relates to foundations or the resultant effect on a building of defects in those. That, of course, cannot make any difference. Liability does not depend upon the part of the structure which is at fault although it may have some effect on the standard of care and its exercise.

The standard of care in all cases of negligence is that of the reasonable man. The defendant, and indeed any other Council, is not an insurer and is not under any absolute duty of care. It must act both in the issue of the permit and inspection as a reasonable, prudent Council will do. The standard of care can depend on the degree and magnitude of the consequences which are likely to ensue. That may well require more care in the examination of foundations, a defect in which can cause very substantial damage to a building. This as I have said is not a question of foundations but rather of the exterior finishing and materials.

In respect of the issue of the permit it is alleged that the plans and specifications were inadequate and that other defects which I have already mentioned constituted a non-compliance with the bylaws and, in particular, chapters 2 and 6 of NZSS 1900 and the Drainage and Plumbing Regulations 1959. Tested against the standard of architects and engineers it may well be that these plans and specifications were inadequate and failed to provide all the details that ought to have been given. It is plain that they did not comply in strict terms with the words of the standard bylaws in that within the terms of NZSS 1900 Chapter 2, 2.5.1, they did not "furnish complete details of design and qualities and descriptions of all materials of construction and workmanship". Further, the change from cedar to pinus radiata was a deviation which was not dealt with in accordance with the provisions of 2.14.1. The plans and specifications in respect of the gutter or spouting in the front of

the patio deck and in respect of the stormwater drains did not comply with reg 16 of the Drainage and Plumbing Regulations. The plaintiffs say that the defendant must comply strictly with the words of these bylaws. On the other hand, the evidence satisfies me that the common practice of local authorities does not require that strict compliance. The reasons for that are practical and expedient because such strict compliance would so add to the burden of local authorities and builders that it would be difficult, if not impossible, to have buildings approved and built at least without a great deal of additional cost and time. Such reasons cannot weigh against the appropriate standard of care in each case. On the other hand reasonableness is the fundamental basis of the measure of the standard of care. In accordance with ordinary practice the plans and specifications put forward were adequate for the purposes of issue of a permit and I am satisfied that the defendant complied with the appropriate standard and was not careless in the issue of a permit. The omission of the decking of the patio deck and of the gutter on the front patio were within the ordinary practice and were clearly matters which could be dealt with on later inspections. The alleged defect on the flat roof results from a matter, namely the capping, which is a detail omitted from the plans and specifications but is not, in my view, a matter which ought reasonably to have been required. The change in the weather-boards involved a change made by the builders and applicants for the permit and was therefore clearly consented to and indeed proposed by the only persons with whom the defendant was strictly concerned. The weather-board proposed, that is to say pinus radiata, is a kind of weather-board which is acceptable under the bylaws. Even if it was not acceptable under the Housing Corporation's requirements there was a clear implication when the proposal was made by the builder owner that that requirement at least so far as the weather-board is concerned was being waived or amended at the same time.

As far as inspection is concerned, there must be a similar standard bearing in mind that the defects complained of relate to the outer fabric of the house. As I have said, there is some difficulty in ascertaining precisely how many inspections were made or their time. It is clear that there was an inspection before the linings were to be installed. That entailed an inspection of the outside of the house and the interior structure. That inspection and the defendant's inspections are not of the same kind or quality which an architect or engineer will do when supervising the erection of a building. I am satisfied, however, that that inspection is intended to ensure that the building has been — so far as it has been — properly erected. Further on that inspection it is encumbent on the building inspector to ensure that what has been done complies with the bylaws…

As I have said, the alleged defects in relation to the flat roof seems to be a complaint about the material capping the parapet walls. I am not satisfied on the evidence that there is a defect in that regard. Even if there were, however, I do not believe that the inspector in any of his inspections was required to make such a detailed examination which would have ascertained any such defect. That is beyond the scope of the inspector's duties. It is clear, as I have already noted, that there continues to be a leak problem in the upper floor which is said to emanate from the flat roof. No other cause has been suggested than the fabric capping the parapet wall. I reject the allegation of carelessness in that respect and, that being so, cannot find any carelessness on the part of the defendant in respect of those leaks. It is accepted by the builder that some channel blocking has been omitted from around the upstairs

> toilet window. On the evidence that I have before me that has not caused any of the leaks that have been complained of.
>
> As I have already said, there is no significant or substantial defect in the concrete floors but even if there were there is no evidence that that could be a matter which could have been recognised during any inspection during the course of building. This again is a matter for which the defendant can have no responsibility.

[172] The test of the duty of care owed by the Council as a statutory authority to the owners is based on the knowledge of construction and building science as at the time of construction.

[173] The test for such matters is set out in *Askin v Knox* [1989] 1 NZLR 248 (CA). In that case Cook P stated:-

> A reasonable builder and reasonable State Advances and local authority inspectors could have thought that the bottom of the trenches, with the extra precaution of the slab in the corner, provided reasonable solidity by the standards of 1963. None of them were insurers of the plaintiffs. They or their employers are liable only if they failed to exercise reasonable care. ….
>
> In the early 1960s inspectors, acting according to the standards then regarded as reasonable, may have been less conscious of the risk of subsidence that has been underlined by the litigation of more recent decades. This unwillingness to find negligence may be a misfortune for the plaintiffs, but it also illustrates the drawback of trying to resolve a dispute of fact more than 20 years afterwards. We make some observations later in this judgment about time limits.

[174] The standards required of a council were also canvassed in *Dicks v Hobson Swan* (HC, Auckland, CIV 2004-404-1065, 22 December, Baragwanath J).

[175] I accept the description of the situation relating to building consents and CCC's as set out in the judgement of Baragwanath J.

> **The Council**
>
> [64] There is no denial that the Council owed Mrs Dick a duty of care. But there is a dispute as to the nature of that duty and whether it has been breached. Because Parliament has spoken the starting point

is the Building Act and Code which require ore elaborate consideration at this stage.

The Building Act and Code

[65] A 1990 report (Reform of Building Controls) by the Building Industry Commission to the Minister of Internal Affairs recommended the introduction of what was termed "a performance based" scheme to replace the regulatory scheme.22

The report exhibited a high level of confidence that a combination of light handed regulation and the mechanisms of a market would produce better results than the existing scheme. The Commission considered that judicial decisions of the 1970s and 1980s holding councils liable for building defects had led councils to impose increasingly onerous requirements on those engaged in building works and had produced costs which were higher than the private owner would have chosen.23

[66] On 1 July 1992 the Building Act replaced the former regulatory scheme which had been criticised as overly prescriptive and stifling of innovation. While it is now seen to have possessed the distinct advantage of requiring adherence to proven building techniques and procedures that would ensure weather-proofness, hindsight must be stripped out of the present exercise. The Act has been repealed as from 31 March 2005 by the Building Act 2004 which has no application to this case.

[67] The purposes and principles of the Building Act were stated in s 6. They included provision for:

> necessary controls relating to building work and the use of buildings, and for ensuring that buildings are safe and sanitary…

To achieve the purposes of this Act, particular regard was to be had to the need to:

> safeguard people from possible injury, illness, or loss or amenity24 in the course of the use of any building…

[68] As already noted, it provided for regulations to be known as the Building Code prescribing functional requirements for buildings and the performance criteria See *Attorney-General v Body Corporate No 200200* [2007] 1 NZLR 95 at [7]. That problem remains. A recent report records that the average cost of a house has increased from three times the national income to 6.5 times: speech by Hon Chris Carter to the Affordable Housing Forum 30 October 2006 *The Capital Letter* 14 November 2006 29/43 p 8. 24 Defined by s 2 as "an attribute of a building which contributes to the health, physical independence and well being of the building's users but which is not associated with disease or a specific illness." with which buildings must comply in their intended use. Such code was promulgated by the Building Regulations 1992. Territorial authorities were given the functions of administering

the Act and regulations; receiving and considering applications for building consents; approving or refusing any application for a building consent within the prescribed time limits, and enforcing the provisions of the Building Code and regulations.26

[69] It was unlawful to carry out any building work except in accordance with a building consent issued by the Council in accordance with the Act.27 An owner intending to carry out any building work was required before the commencement of the work to apply to the Council for a building consent in respect of the work.28 The application was to be accompanied by a charge fixed by the Council:

> and by such plans and specifications and other information as the [council] reasonably requires.29

[70] The Council was required to grant or refuse an application for a building consent within the ten day period. It might within that period require further information, in which event the timetable was suspended until the information was provided.30 By s 34(3):

> After considering an application for building consent, the [council] shall grant the consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work was properly completed in accordance with the plans and specifications submitted with the application.

Consent might be granted subject to conditions; in that event the Council was to have regard to the Building Code.31

25 Section 48.
26 Sections 24(a), (b), (c) and (e).
27 Section 32.
28 Section 33.
29 Ibid.
30 Section 24(2).
31 Section 34(4) and (5).

[71] Section 43 provided:

> **43. Code compliance certificate**
>
> (1) An owner shall as soon as practicable advise the [council], in the prescribed form, that the building work has been completed to the extent required by the building consent issued in respect of that building work.
>
> (3) …the [Council] shall issue to the applicant in the prescribed form, on payment of any charge fixed by the [Council], a code compliance certificate, if it is satisfied on reasonable grounds that–
>
> (a) The building work to which the certificate relates complies with the building code;

…

(5) Where …a [council] refuses to issue a code compliance certificate, the applicant shall be notified in writing specifying the reasons.

(6) Where a [council] considers on reasonable grounds that it is unable to issue a code compliance certificate in respect of particular building work because the building work does not comply with the building code, or with any waiver or modification of the code, as previously authorised in terms of the building consent to which that work relates, the [Council] shall issue a notice to rectify…32

[72] The Council was empowered to take all reasonable steps to ensure that any building work was being been done in accordance with a building consent and to enter to inspect any building or building work.33

[73] Proportionality of response was contemplated by s 47:

47. Matters for consideration by [councils] in relation to exercise of powers

In the exercise of its [foregoing] powers… the [Council] shall have due regard to…

(a) The size of the building; and

(b) The complexity of the building; and

(b) The location of the building in relation to other buildings, public places, and natural hazards; and 32 A procedure provided by s 42. 33 Section 76.

(c) The intended life of the building; and

…

(g) The intended use of the building, including any special traditional and cultural aspects of the intended use; and

(h) The expected useful life of the building and any prolongation of that life; and

…

(k) Any other matter that the [Council] considers to be relevant.

The relevant provisions of the Building Code as to weather-proofness and durability have been cited ([15] above).

[74] So Parliament conferred on the Council:

(1) The obligation within ten days to grant or refuse a building consent;

(2) The power to charge for the cost of doing so;

(3) The power to defer its decision until necessary information was provided;

(4) The power to take all reasonable steps to ensure that building work was performed in accordance with the consent;

(5) The duty of issuing a certificate of compliance if satisfied on reasonable grounds that the work complied with the Building Code, such compliance including conformity with its weather-proofness and durability provisions; and

(6) The duty in the event of non-compliance to issue a notice to rectify.

[75] In order to be able to be satisfied as to compliance in relation to work that would be covered during of construction the Council must obviously make periodic inspections. The number and intensity of such inspections would be determined by application of the proportionality provisions of s 47.

Legal obligations under the Act

[76] Liability for negligence was plainly contemplated by s 91 which provided builders and councils with a limitation defence expressed in relation to building work and the exercise of functions under the Act relating to the construction of a building, including the issue of a building consent or a code compliance certificate. The test was stated by the Court of Appeal in *Askin v Knox* [1989] 1 NZLR 248 as the exercise of reasonable care. The common law measures the standard of reasonable care in the first instance against the practice of other councils but always subject to the determination of the Court that "independently of any actual proof of current practice common sense dictated" particular precautions: *McLaren Maycroft & Co v Fletcher Development Co Ltd* at 102 per Turner P.

[176] The standards of inspection were set out as follows:

[103] In *Ingles v Tutkaluk* [2000] 1 SCR 298 at 311-2 Bastarache J stated for the Supreme Court of Canada:

…where inspection is provided for by statute, a [local] government agency cannot immunize itself from liability by imply making a policy decision never to inspect… To determine whether an inspection scheme by a local authority will be subject to a private law duty of care, [the] court must act in a reasonable manner which constitutes a *bona*

> *fide* exercise of discretion… we must bear in mind that municipalities are creatures of statute… a policy decision whether or not to inspect must accord with th[e] statutory purpose.
>
> [104] I have adapted and abbreviated the citation to make the point that for a New Zealand court the crucial task is to achieve a construction of our statute that will give real effect to it within the guidance of New Zealand appellate authority. The Building Act is not within the class of statute described by Wilson J in *Kamloops v Nielsen* [1984] 2 SCR 2 at 11, adopting the policy/operational antithesis of Lord Wilberforce in *Anns v Merton London Borough Council*:
>
> …statutes conferring powers but leaving the scale on which they are to be exercised to the discretion of the local authority…[w]here there will be an option to the local authority whether or not to do the thing authorised but, if it elects to do it and does it negligently, then the policy decision having been made, there is a duty at the operational level to use due care in doing it.
>
> For the reasons stated at [74] above our statute imported a council duty to inspect.
>
> [105] So what should be the limits of the Council's liability in tort? It should be responsive to Richardson J's list in *Hamlin* at 524 of the distinctive characteristics of New Zealanders' conception of their home, endorsed by the Privy Council at 521.
>
> [106] In another area of the law of tort the House of Lords in *Wilsons and Clyde Coal Company Ltd v English* [1938] AC 57 decided that an employer must at common law take reasonable care and skill to provide and maintain proper equipment; to select properly skilled persons to manage and superintend the business; and to provide a proper system of working. That case concerned the high public interest of integrity of the person. But it is readily transferable to the simple obligation of a council to exercise reasonable care in discharging the task of implementing the statutory purpose of compliance with the Building Code. I see no principled reason why a New Zealand court should not utilise it in determining the nature and extent of councils' tortious liability.
>
> [107] As to (3), while the standard is no more than that of reasonable care, the law is as stated in *McLaren Maycroft*.

[177] The council and Ms Patrick gave evidence of frequent attendances over an extended period in an attempt to bring the building up to compliance standard. Ms Patrick supplied them with information which led to further requirements. She had the information from Mr Anderson which she could have disclosed to the council.

[178] The council drew various apparent defects to Ms Patrick's attention and on occasion enforced its requirements.

CLAIMANT'S EVIDENCE

[179] The evidence produced in support of the claimant's allegation of negligence against the council was that of Mr Cunningham and Ms Patrick.

[180] Mr Cunningham, in his brief of evidence, para 80 ff, says:-

- "that the state of the building shows that the cladding does not meet the requirements of B2.3.1 of the Building code in that it should satisfy the requirements of the code with only normal maintenance;
- that the cladding finishes below ground level;
- that the building wrap was incorrectly installed.
- that the council failed to prevent poor design of the arcade and the subsequent temporary sealant based repairs."

[181] Mrs Patrick gave no written evidence in support of allegations of negligence on the part of the council though she did say that the council had failed to ensure that the materials met the requirements of the special design requirements for the high wind zone.

Council's Evidence

[182] The council in response gave evidence relating to the various matters raised by the assessor. They relied upon the evidence of Stephen Cody, the team leader, building consent licensing services, at the Wellington City Council, and Russell Cooney a building consultant.

[183] The council referred to the report of the experts' conference.

Defect 1:- The experts at the experts' meeting agreed that no damage was observed that could be directly attributed to the non-installation of the recommended control joints over either the timber frame or block work.

Defect 2:- The parapet tops were not sloped. The council accepts that they should have been sloped but that there is no evidence of water entry as a result. It agreed that there is a crack in the parapet top at the southern angled corner of the front elevation. The council say that there was no evidence that this crack existed at the time of inspections and would not have leaked if it had been repaired at the time it became apparent.

Defect 3:- There is no damage identified in the wall framing that can be attributed to the incorrectly installed building wrap. The assessor has identified only one location where the building wrap is apparently in close contact with the plaster coating; beneath the end of an internal membrane lined gutter.

Defect 4:- No damage has been identified which can be attributed to the non-installation of flashings to service penetrations. In 1994 the sealant beads would have been hidden behind the fittings and therefore not observable to a council inspector.

Defect 5:- The window jamb and sill flashings are behind the windows and would not have been visible to the Council inspector at the time of inspection. The consent was not an insurance against a subsequent lack of maintenance creating a problem.

[184] There is no evidence that the windows failed to meet the relevant performance standards. (There was extensive evidence proving that they did).

Defect 6:- The sealing beads of the junction of dissimilar materials on the balcony would have been hidden from the inspector at the time of inspection.

Defect 7:- No damage has been identified which can be attributed to the lack of mechanical flashings on the junction of dissimilar materials between the EIFS cladding and the block work.

Defect 8:- No damage has been observed to the bottom of the cladding sheets that can be attributed to the lack of a casement bead.

[185] There is no evidence that water has penetrated the bottom plate by the paving apart from the sides of the garage door opening and the paving near the front door.

Defect 9:- There is no evidence that the waterproof membrane to the internal gutters was loose at the time of inspection.

Defect 10:- The council did not undertake roof inspections in 1994 and were not able to tell from the ground that the roof cladding on the east side does not extend fully over the framing.

[186] Perhaps fortuitously for the Council, the nature of this construction contract and the assiduousness with which Ms Patrick pursued all involved concerning the leaks, the council was frequently involved in inspections of the work.

[187] The inspection diary for the house refers to a number of visits:

- J Drysdale 2/7/98 to go over dwelling re faulty work – faults as per list
- J Drysdale 7/7/98 remedial pl dr bldg insp re outside works- lady owner fell went through glass panel at foot of stair not armour plate – has been replaced

- P Nichol 2/7/98 visited site with John Drysdale did inspection to establish what is wrong and what we can do. Need to re-inspect as ran out of time.
- J Drysdale 24/7/98 Assist P Nichol with NTR re non compliance list.
- J Drysdale 12/10/98 phoned by plumber's (Peter Hockley) Lawyer on the omission on AA value.
- J Drysdale 14/10/98 respond to letter from peter Hockley re time frames of rectifying remedial works.
- J Drysdale 4/11/98 to witness water penetration into garage from exterior light and note none complying seismic restraint on hwc tundish not done yet.
- J Drysdale-Smith 14/5/99 to re-inspect non complying plumbing works not approved hwc installation still does not comply re air break should be low enough to enable cold water expansion to outfall to it as well as tpr pipe, nut under ensuite basin has for some reason been cut and tape over plus bath faucet still turns in hand – owner informed- also noticed a new crack in footpath which extends up wall to and above a light fitting (on south eastern side near front asked owner to have engineer check)
- J Drysdale Smith 19/5/99 to go over ntr with Jon Moser
- J Drysdale Smith 21/5/99 meet on site to go over items on list (NTR) with Peter Hockley plumber and Chris Hayhow (sic)(builder) to fax plumber a copy on mon
- J Moser & M Scott 13/8/99 Final inspection for both plumbing and building works as identified in notice to rectify. All have been completed. Code compliance certificate issued on site to owners.

[188] As a result of those visits the council issued various notices to cease work and rectify.

[189] A notice issued on 24 July 1998 included in the list a leak in the ceiling of the master bedroom.

[190] A notice issued on 27 May 1999 included in the list :

- "Waterproof membrane to both foundation and exterior walls are to be qualified
- The arcade roof as constructed does not comply with E2 or E3 of the building code."

[191] A notice dated 4 August 1999 requiring proper barriers where people could fall 1 metre.

[192] Mr Cody from the council gave evidence about the inspection process. When the council issued the CCC the cladding had been in place approximately 5 years and it was performing. His view was that the in-service history of the cladding was such that the council officer had reasonable grounds to issue the certificate.

Council's Duty of Care

[193] The council, perhaps fortuitously, was not in the same position as the council in *Dicks*. Due to the constant pressure from Ms Patrick they frequently inspected the building.

[194] Perhaps also fortuitously, the places where damage occurred were:

- One location on the parapet top, a matter which required maintenance
- at the junction of dissimilar materials on the balcony
- on the bottom sheet by the arcade and garage
- stormwater collection by gutter and rainheads
- roof.

[195] These matters were all covered by the council's evidence as set out above. In none of those cases do I find that they acted negligently.

[196] I find that the council acted appropriately in the issue of the consent, on the inspections it carried out during the course of construction and in issuing the CCC in 1999.

[197] The process of issuing the CCC was completed before the sale of the house.

[198] The claimant never dealt with the council.

[199] It follows that although the council owes a duty of care to the claimant, there is no proof that it has breached that duty of care.

RESULT OF CLAIMS

[200] It follows that the claims against all but the first respondent are out of time being outside the Limitation Act 1950 period.

[201] The claim against the first respondent council fails as the council did not breach its duty of care to the claimant.

COSTS

[202] The first respondent seeks costs as reimbursement for preparing evidence and cross-examination of the claimant's witnesses on the basis that the claimant has acted in bad faith and/or the allegations by the claimant supporting its claim for in excess of $800,000 were without substantial merit. It was submitted that this behaviour came within s 91 of the Act.

[203] The first respondent referred to the changing nature of the claims during the process and particularly during the hearing.

[204] The second and seventh respondents claim costs on the basis that the test in s 91 is satisfied. They submit that the way the case has been handled by the claimant is extraordinary and irresponsible. The concessions which have been made regarding the scope of works, the Ortis estimate and

the claim for general damages should have been made years ago. If these steps had been taken at the appropriate time the second respondent says that it would be inconceivable that the matter would have reached adjudication. The amount of money wasted as a result of the claimant's stubbornness would have repaired the house several times over.

[205] The second and seventh respondents have further submissions which cannot be made until this determination is issued as they wish to refer to documents which are 'without prejudice save as to costs'.

[206] The fifth respondent GRW claims costs on the basis that the claim has from the outset lacked substantial merit and has not been brought with any factual, technical or legal basis. These factors have been brought to the claimants' notice from the outset with a request for evidence to support the claim against GRW. GRW claims that it has been put to considerable expense to defend baseless allegations.

[207] GRW was joined to the original WHRS claim in about September 2005.

[208] GRW immediately (21 September 2005) requested details of the respects in which the products supplied were allegedly defective and any specific damage caused by such defects. GRW maintained that there was no merit in the claim against it. Counsel indicated that the letter would be referred to on the issue of costs.

[209] On 10 October 2005 Parker & Associates wrote again to the claimant noting that the claim against it had no merit - that there was no duty, no breach, no damage (as confirmed by the WHRS assessor's report) and the claim was out of time.

[210] GRW's repeated requests for details of the claim against it and the evidence to support the claim have remained unanswered.

[211] GRW engaged the services of Helfen Ltd and Laurie Barker, both experts, and incurred further costs. The expert evidence was that there was no failure of the windows or the arcade.

[212] The evidence of Laurie Barker was provided to all parties in early December 2007. There is no indication that the claimant had read, considered or referred that report to its experts. There was no response to it.

[213] GRW sought to have the claim against it struck out but the then adjudicator declined to strike out the claim at that time before evidence was heard.

[214] The then adjudicator declined to strike out the claim on the basis that it was statute barred but noted that the claimant may have problems with causation.

[215] The claimant has plagued the process with delay. The claimant continued trying to delay the hearing up to the week before the hearing.

[216] GRW has been put to significant legal and experts' costs defending the claim in addition to staff time in responding to issues. GRW say they have lost work due to the publicity surrounding the case.

[217] GRW has always taken the claim seriously and responded to the claimant.

[218] The claimant has not responded to frequent requests to provide evidence of the failure of the windows and doors which indicates a lack or substantial merit or any merit to the claim.

[219] The claimant has not treated the responses or the supplied evidence in good faith. Failure to return the French doors as ordered by the Disputes Tribunal in 2004 similarly shows a lack of good faith.

[220] The claimant has failed to mitigate its losses.

[221] There is further information, which can only be supplied after this decision has been issued.

[222] Mr Parker referred to Procedural Order No. 18 (5 October 2004) of Adjudicator Dean in *Gray & Ors v Lay & Ors:*

> 5.2 I was satisfied that the BIA had a case to answer, and I gave the Council the opportunity to advance and prove its claims. However, when it became time to particularise the claims and produce its evidence in support of the claims against the BIA, the Council maintained broad-brush allegations, and produced virtually no evidence to support its allegations. I do not find the Council's actions in this matter are supportive of the suggestion that its claims had **substantial** merit. Its claims were fluid and never moved pas the generalised stage. It was going into the hearing with virtually no evidence to support its claims.
>
> 5.3 I accept the submission made by Crown Law that the Council's claims against the BIA may have had merit, but were never shown to have substantial merit. The Council forced the BIA to prepare a written response and witness statements all to no avail. The BIA is entitled to an award of costs on account of this unnecessary expenditure.

[223] There are apparent grounds for me to exercise my discretion as to costs.

[224] The respondents have until 28 March 2008 to make any further submissions in support of their application.

[225] The claimant has until 11 April 2008 to make any submissions in reply.

DATED this 7th day of March 2008

Roger Pitchforth

Tribunal Member