IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2009-100-000067
[2012] NZWHT AUCKLAND 27

BETWEEN	STEPHEN LESLIE ALDRIDGE, KATHLEEN MARGARET ALDRIDGE AND CA TRUSTEES LTD AS TRUSTEES OF THE SL & KM ALDRIDGE FAMILY TRUST Claimants
AND	JOHN WILLIAM AND ROBYN BOE AND KAY LYNETTE PEEBLES (Claims finally determined in the High Court) First Respondents
AND	HAMILTON CITY COUNCIL Second Respondent
AND	BRUCE ROBERT SCOTT (Removed) Third Respondent
AND	MICHAEL SWART Fourth Respondent
AND	KERRY MURPHY Fifth Respondent
AND	KEN MARTIN (Bankrupt) Sixth Respondent
AND	ROOF TILING SERVICES LIMITED (Removed) Seventh Respondent
AND	GAVIN ANDREW WALKER (Removed) Eighth Respondent

Reply Submissions
Received: 5 April 2012

Counsel

Appearances:	Peter Wright, for the claimants David Heaney SC and Catherine Goode for the second respondent, Hamilton City Council Michael Talbot for the fourth respondent, Michael Swart Peter Napier, counsel for the fifth respondent, Kerry Murphy
Decision:	31 May 2012

DETERMINATION
On issues referred back from the High Court
Adjudicator: K D Kilgour

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PROCEDURAL ISSUES

[1] This claim was originally heard in the Tribunal in August 2010. An appeal was filed against the determination and the High Court[1] dismissed two of the four affirmative defences run by the respondents. The High Court referred the remaining issues back to the Tribunal for determination. These are:

a) the liability of the respondents and any of them other than John and Robyn Boe and Kay Peebles, the first respondents;
b) contributory negligence;
c) limitation;
d) quantum.

[2] These issues are as referred to at paragraphs [103], [354], and [355] of Justice Potter's judgment. A case conference was convened to set a timetable for determination of these remaining issues. The remaining parties agreed that the High Court accepted the factual findings in my determination [5]-[39], that no further evidence would be produced ,and, that the resumed proceedings proceed on the basis that the parties make further submissions to the Tribunal on:

a) matters arising out of her Honour's decision; and
b) matters arising out of any other related judicial decision.

[3] The case conference set a timetable for filing such submissions.

[4] In reaching my decision on these issues I have therefore had the benefit of both the audio recording and transcript of the earlier Tribunal hearing, the evidence filed at that hearing, the decision of the High Court and submissions produced for this determination.

QUANTUM

[5] Potter J did not make any findings on quantum. I had in the Tribunal hearing the benefit of hearing both the defects and quantum experts so the High Court referred the issue back to me for determination.

[6] Mr Wright made submissions on quantum suggesting that some of my earlier findings contained arithmetic error. My earlier findings [50] were based on Mr Ranum's figures and were otherwise derived from the tender process which I, and all the experts, had agreed was robust and an appropriate process. The claimants' real argument was that I should not have placed such reliance on Mr Ranum's figures. However they have failed to establish that these figures were incorrect.

[7] I am not persuaded to alter the quantum as I found it at the Tribunal hearing. That finding was made after listening to all the evidence and no further evidence has been adduced. Quantum was not adjusted on appeal to the High Court.

[8] I concluded in paragraph [50] of my earlier determination that the reasonable and realistic costs for the necessary remedial work in order to restore the home to a weathertight code compliant home to be $755,683 excluding GST.

[9] I also determined that in addition to the remedial costs the claimants have proven their claim for consequential costs of $35,670.

[10] I now finally determine the fair and reasonable remedial costs for this home to be:

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[1] *Aldridge v Boe* HC Auckland, CIV-2010-404-7805, 10 January 2012.

Repairs	$755,683.00
Plus GST	$113,352.45
Subtotal	$869,035.45
Consequential costs	$35,670.00 inclusive of GST
TOTAL	$904,705.45

GENERAL DAMAGES

[11] The claimants seek general damages of $25,000. Mr Wright submits that, an award of $25,000 would be appropriate for the house has been occupied by Mr and Mrs Aldridge and their children.

[12] Mr Heaney SC and Ms Goode submit that this is not a general damages case; and, that there was no evidence from the claimants of any stress and anxiety suffered.

[13] Mr Aldridge did state in evidence before the Tribunal that his dealings with the Council, builders and surveyors have caused stress. But these were all matters he knew he would have had to contend with to get a code compliance certificate before he entered into the agreement to buy the home.

[14] Mr and Mrs Aldridge did not provide any evidence of stress and anxiety as a consequence of owning a leaky home.

[15] As I have not upheld the Aldridge's claim for damages for their "leaky house" they are not entitled to general damages for non-economic loss. But if their claims were upheld there is no dispute from recent authorities that they would be entitled to general damages. However, as they did not provide any evidence of stress and anxiety suffered from the detrimental effects of owning a leaky home I would consider the appropriate amount to be considerably less than their claimed amount.

CLAIM AGAINST MICHAEL SWART, THE FOURTH RESPONDENT

[16] Paragraph [13] of my decision 28 October 2010 determined that Mr Swart completed his work on the main part of the dwelling between early 1998 and March 1998. The main building envelope having then been completed. Potter J, in her judgment, stated it is not disputed that 7 July 1998 is the relevant date for the long stop limitation period. The Aldridges' claim was filed with the Tribunal on 2 July 2008. Potter J, at paragraph [349] of her judgment, stated that I did not mention Mr Swarts return to the home (then occupied by the Boes) in 1999 to carry out the job of assisting with the erection of the pergola beams.

[17] Mr Wright contends that: (i) Mr Swart had a general duty of care to remedy his faulty building work when coming back onto the building site to work on the pergola and (ii) his affixing of the pergola beams was defective and causative of damage. Mr Wright's submission places reliance on *Johnson v Watson.*[2]

[18] Potter J, again at paragraph [349] states, that if Mr Swarts' work on the pergola… "was a discrete task unrelated to any defects that had at that stage manifested themselves, then *Johnson v Watson* will indeed be distinguishable on its facts, as Mr Talbot submits". She also states that the issue of any "continuing duty" in terms of *Johnson v Watson* must be considered in the context of the full factual background.

[19] My earlier determination found in paragraph [46] there was no substantial dispute as to the key causes of damage. The primary causes of the moisture ingress occurring to the Aldridges' home are set down in paragraph [46] and they did not include any defect involving the pergola construction.

[2] *Johnson v Watson* [2003] 1 NZLR 626 (CA).

[20] Mr Swart's evidence is that he was working on another job in Hamilton in the autumn of 1999 when he was approached by Mr Boe to see if Mr Boe could borrow his sabre saw as he wanted to use it on some pergola beams he was erecting onto the house. Mr Swart stated that he told Mr Boe that it would not be an easy task so Mr Boe asked him if he could come out and do it. This was Mr Swart's sole reason for returning to the house in the autumn of 1999.

[21] Mr Swart carried out the task of fixing the pergola brackets to the face of the plastered Harditex cladding and lifted the pergola beams into place. He invoiced the Boes in May 1999 for that task. Mr Swart's clear evidence was that the brackets were face fixed and bolted to the house. He confirmed the bolts penetrated the cladding.

[22] However, the construction criticism of the experts was not premised on that method of fixing. Mr Phayer, was the only expert who undertook invasive testing, stated that the brackets were fixed behind the Harditex and fibre plaster. I am confident that Mr Swart's clear evidence is that the brackets were face fixed over the painted plaster more than a year after the house was completed. Mr Swart also stated that there were holes directly above the pergola brackets through which wires were run out of the house and checked on to the top of the pergola beams. These wires were to power lights on the pergola columns. Mr Hursthouse mentioned the wired holes could not be ruled out as causing water ingress or damage in the vicinity of the pergola beams. Mr Phayer erroneously premised his findings in respect of the pergola beams on his assumption that the brackets themselves penetrated the plaster. He did not mention in his report the holes above the brackets through which the wiring was run. Mr Phayer accepted during the Tribunal hearing that there were other defects in the relevant areas of the pergola brackets that could explain his relevant test results and he said he could not rule out other causes for the damage which he had attributed to the pergola beams brackets. The other experts, apart from Mr Hursthouse,

made conclusions in respect of the pergola beams brackets in reliance on the assessor's observations. Mr O'Sullivan in cross-examination accepted that the brackets could be face fixed and not concealed and his evidence eventually was that he could not rule out other faults causing damage in the relevant areas of the pergola beams.

[23] The claimants were able to place reliance on the authority of *Johnson v Watson* to resist an application by Mr Swart to be removed from the proceedings during the earlier stage of this claim. The factual findings I detail above now put Mr Swart's involvement with the primary defects outside the ten year long stop period such that *Johnson v Watson* is distinguishable on its facts. I do not accept Mr Wright's submission that Mr Swart had a continuing duty of care to identify and rectify earlier defects when he returned to the home in the autumn of 1999 to assist solely and specifically with the erection of the pergola beams. This work of Mr Swart on the pergola was a discrete task unrelated to any defects that had at that stage manifested themselves.

[24] Both Mr Wright and Mr Talbot made extensive submissions on *Johnson v Watson.* I agree with Mr Talbot's response submissions of 29 March 2012. Mr Swart's involvement in 1999 is distinguishable from the factual situation in that case. The experts found, with which I agreed (para 19 above) that certain of the original construction work was faulty and the material and substantial cause of the home leaking. Mr Swart's work on the pergola bore no relationship to the original work and was not defective. Such work did not increase the extent of the remedial works arising from the original construction defects. Mr Swart returned to the home in 1999 for the discrete task, in contrast to *Johnson v Watson*, and so did not give rise to a duty to identify or prevent or remediate damage from the original time barred construction defects.

[25] The claim against Mr Swart fails due to it being limitation barred. Given that none of the experts gave evidence of actually observing any defect from the affixing of the pergola beam brackets resulting in water ingress, I cannot determine that the pergola beam brackets were fixed defectively.

CLAIM AGAINST KERRY MURPHY, THE FIFTH RESPONDENT

[26] The claimants allege that Mr Murphy's report of November 2005 was negligent in its making, contained negligent misstatements and that his conduct by reference to his report was misleading and deceptive.

[27] Potter J at [213] of her judgment stated that Mr Murphy's report did not contain any express representation that the house complied with the building consents and the Building Code or that it did not suffer from weathertightness issues. She stated that the report could not be interpreted as a representation that the house was watertight.

[28] Potter J agreed that the report expressly defined the limited purpose for which it was made and the limited scope of the inspection leading to the report. Potter J further determined [221] that Mr Murphy's report was an opinion clearly based on reasonable grounds, limited in scope and made by an expert who is competent to express such an opinion.

[29] Potter J at [222] concluded that Mr Murphy's report did not amount to an actionable misrepresentation by the Boes that the house complied with the building consent and/or the Building Code and did not suffer from any weathertightness issues. She further concluded in that paragraph that Mr Murphy's report could not provide a basis for the misrepresentations claimed by the Aldridges.

[30] I consider that Potter J's findings means that Mr Murphy's November 2005 report was not negligent in the making and did not make or contain negligent misstatements.

[31] Mr Murphy did not provide the report to the claimants. I prefer the evidence of Mr Jordan and Mr Probett over that of Mr Jones and Mr O'Sullivan. Mr Jordan and Mr Probett's evidence was clear that given Mr Murphy's limited instructions his report was entirely appropriate and complied with the relevant Rules of the New Zealand Institute Building Surveyors. Mr Jones and Mr O'Sullivan's evidence failed to refer to the relevant Rules and yet both acknowledged that the Rules are relevant to the issue of a building surveyor's duty and that these Rules themselves recognise that a more limited report than that which Mr Jones and Mr O'Sullivan said should have been done, could be done. The evidence of Mr Jones and Mr O'Sullivan was unrealistic when they stated that Mr Murphy should have undertaken a completely thorough inspection regardless of his limited instructions and what the client wanted. Under questioning Mr Jones appeared to agree that the report did provide what the Boes wanted.[3] Mr O'Sullivan's evidence was unrealistic when he stated that the inspection undertaken by Mr Murphy should have involved a full audit of the cladding system, even though the report clearly recorded that that was not what was done, or requested.[4]

[32] There was no evidence that Mr Murphy's conclusions in his report as to the cladding cracking were wrong or that the report was not reasonably based on information available to Mr Murphy at the time of the inspection.

[33] For the above reasons and from the findings of Potter J in her judgment, paragraphs [213] through to [222] the claimants' claim

[3] Page 18 transcript of Mr Jones' evidence.
[4] Page 79, lines 8-19 of the transcript of the fourth day of evidence.

in negligence, in preparing the report and the alleged negligent misstatements in the report, fail.

[34] The claimants' particulars of claim made no allegation against Mr Murphy for negligent misstatement or breach of the Fair Trading Act 1986 concerning his answers to the telephone enquiry from Mr Aldridge in November 2006.

[35] The claimants in their submissions relative to this determination have switched the focus of their argument to Mr Aldridge's telephone enquiry of Mr Murphy alleging a breach of s 9 of the Fair Trading Act 1986. Probably as a result of Potter J's findings mentioned above. The Tribunal is not a pleading based jurisdiction and Mr Murphy's counsel Mr Napier does not take issue with the claimants' switch of focus with their argument against Mr Murphy. Mr Wright's submissions in support of the claim are that Mr Murphy's report did not include reference to the causes of the cracks in the cladding although the evidence should have. Once Mr Murphy had confirmed the report to Mr Aldridge in his telephone call, he necessarily accepted that Mr Aldridge was relying on it, and most importantly during the conversation over the telephone, Mr Murphy did not mention the real reason for not getting the code compliance report sought by Mrs Boe when her real concern was that the house did not comply with the Building Code as he had set out in his email of October 2005 to Mrs Boe.

[36] Under s 9 of the Fair Trading Act 1986 the question of whether the telephone conversation was misleading is addressed by me in the following steps:

i. Whether the conduct was capable of being misleading?
ii. Whether Mr Aldridge was misled by that conduct?
iii. Whether it was reasonable for Mr Aldridge to have been misled by that conduct?

[37] There is no dispute that in November 2006, the day before the auction sale, Mr Aldridge telephoned Mr Murphy to enquire about the report. Mr Murphy's evidence,[5] which Mr Aldridge accepted,[6] was that the telephone conversation took less than ten minutes.

[38] Mr Murphy's evidence of that conversation was:[7]

> 55. However I did receive a telephone call from Mr Aldridge later the same day regarding the property. I made a file note of that conversation **[reference]**. The date and time recorded on that diary note was written by my personal assistant, who wrote the date and time of the call on the top of the sheet when filing the following morning. I recorded the telephone call from Mr Aldridge in my diary once the call had ended **[reference]**.
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> 56. Mr Aldridge informed me that he was a potential bidder at the auction for the property and that he had received a copy of my report addressed to the Boes. He asked me to confirm the report I had done on the property. I confirmed I had written the report and that it consisted of six pages. He then asked me why I would not do a code compliance report. I explained to Mr Aldridge that I would not do one for the same reason the Council would apparently not do one, that is, that the property was nearly 10 years old and I, as could the Council, be liable for another 10 years from the date of any report.
>
> 57. Mr Aldridge then raised the issue of the repairs that had been carried out to the cracks on the property. He informed me he had spoken to the plasterer Ken Martin who had carried out the repair work. I informed Mr Aldridge that I knew Mr Martin as he was involved in another job I was doing and he was doing a very good job in respect of that property. I explained that I had no reason to believe anything other than that his repairs would have been well

[5] Page 87, lines 6-9 of the transcript of the fourth day of evidence.
[6] Page 31, lines 5-8 of the transcript.
[7] Briefs of Evidence of Kerry Graeme Murphy dated 6 August 2010 at [55]-[59].

> done. However I qualified this by stating that I had not been present during or after this work had been done by him.
>
> 58. Mr Aldridge then spoke to me about the plaster system and asked me what I thought about the plaster system. I explained that the most important thing would be maintenance in terms of washing the building often, inspecting closely and thoroughly for any cracks annually and keeping a lookout for paint discolouration. I explained that most manufacturers said a plaster house should be painted every 10 years. I also said you should paint every six years for the first two or so repaints. The conversation ended with me telling Mr Aldridge that if he did not want a high level of involvement or commitment to the property, then a plaster house may not be for him.
>
> 59. I am aware that Mr Aldridge has stated at paragraph 109 of his brief that I advised him to put in place a three year maintenance contract with Softwash Limited. I did not advise him to do this and I have never heard of a company called Softwash Limited. As stated above, I told Mr Aldridge maintenance was important on a plaster house and that involved washing it regularly, checking it for cracks, and re-painting it every six years or so.

[39] I accept Mr Murphy's evidence that he promptly caused to make a file note of that telephone conversation, and, I am satisfied that it accords with his above recollection. Mr Aldridge did not make a note of the conversation nor was there mention of the telephone conversation in the claimants' particulars of claim. Furthermore, Mr Aldridge made very little mention of that telephone conversation in his brief of evidence. He only stated:

> 72. I asked Mr Murphy about the cladding issues he referred to in his report. He assured me that with an appropriate maintenance programme we would not have any problems.

[40] In Mr Aldridge's reply brief he alleged that Mr Murphy said that the plaster system used on the claimants' home was fine if it was kept clean and properly maintained.

[41] I prefer Mr Murphy's recollection of the telephone conversation, and I call into question Mr Aldridge's recollection of the events for the following reasons:

- Mr Aldridge accepted that he was "now seeking to tell the Tribunal something different than what was contained in his reply brief of evidence."[8]
- In answer to Mr Grimshaw he stated that Mr Murphy's report was a clean weathertightness report[9] but then accepted that it was not such a report.[10]
- He stated that he had carefully read Mr Murphy's report and particularly paragraph two of that report on the cracking (which sets down the limitations of the report) and yet he still maintained that he thought the report was a clean weathertightness report.[11]
- Mr Aldridge admitted to Mr Heaney when questioned that he had not seen a clean weathertightness report and that Mr Murphy's report was not a clean weathertightness report.[12]

[42] I highlight these concerns I have with the credibility of Mr Aldridge's evidence, because the claimant's further submissions of 9 March 2012 allege that the Aldridges relied on the telephone call as grounds for the allegation of misleading and deceptive conduct by Mr Murphy. The claimants allege that when Mr Murphy spoke to Mr Aldridge on the telephone he did not mention his concerns that the house did not comply with the Building Code and that this is why he

[8] Page 39, lines 5-9 transcript.
[9] Page 13, lines 1-4 transcript.
[10] Page 45, line 23-47 transcript.
[11] Above n10.
[12] Page 28 line 35-42 transcript.

would not give a code compliance report. The claimants allege that such conduct, that is, failure to mention, was misleading and deceptive and likely to mislead or deceive.

[43] Mr Aldridge's expert, Mr O'Sullivan, acknowledged that when Mr Murphy told Mr Aldridge that he had not been prepared to do a code compliance report that sufficiently informed Mr Aldridge that there were potential weathertightness issues with the home.[13]

[44] Nothing Mr Murphy said or failed to state in his report or in his telephone conversation with Mr Aldridge objectively had the capacity to mislead or deceive a person in Mr Aldrige's position. Mr Aldridge admitted that he was an experienced businessman, used to taking calculated risks and was commercially savvy.[14] It seems that it was Mr Murphy's disclosure (of his email of October 2005 to Mrs Boe) that caused the claimants to allege reliance on the telephone conversation, not Mr Aldridge's own recollection, for, by his own admission, Mr Aldridge could not remember what Mr Murphy actually said to him in his telephone conversation.[15]

[45] I am not satisfied that objectively Mr Murphy's conduct throughout his brief conversation with Mr Aldridge had the capacity to mislead or deceive Mr Aldridge, an experienced businessman, familiar with due diligence enquiries of the type he was then undertaking particularly having purchased previously a number of properties, residential and commercial.[16] Mr Murphy's conduct throughout the telephone conversation could not be construed as causative of the claimants' alleged loss or damage. So drawing an inference from the evidence as a whole, the claimants have not proven a breach of s 9 of the Fair Trading Act 1986.

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[13] Page 82 lines 4-32 transcript of fourth day of evidence.
[14] Page 14 lines 22-24 transcript.
[15] Page 42 line 19 to page 43 line 12 transcript.
[16] *Red Eagle Corporation Limited v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492 at [503]–[504], SC.

CLAIMS AGAINST HAMILTON CITY COUNCIL, THE SECOND RESPONDENT

[46] Potter J did not make any factual findings on my determination on 28 October 2010, which found that the last building inspection during the construction period was in September 1997.

[47] The Boes did not call for any subsequent building inspections before they took occupation between early autumn 1998 and mid-summer 1999.

[48] In early 2000, a Council officer paid a visit to the home having discovered that the final inspection had not been performed and to ascertain what stage had been reached with the building work. Mr Flay, giving evidence for the Council, said such a property visit was a s 41 (Building Act 1991) audit. It was not a final inspection commissioned by the property owner.

[49] The Council's permit consents and its building inspections undertaken up to September 1997 are all time barred.

[50] The claimants allege that the Council was negligent in its property inspection in early 2000 in not observing the ground clearance defect, and then issuing a notice to rectify which was a significant defect leading to the need to reclad the home. The Aldridge's say that the Council's inspectors when visiting the home in 2000 and again in 2005 should have recognised this defect and brought it to the attention of the owners. The Aldridge's allege the Council was subject to a continuing duty of care which encompassed an obligation to remedy ongoing omissions and that it cannot claim that its failure to detect defects prior to 8 July 1998 is spent and of no relevance in terms of its return to the home for a final code compliance inspection in 2000 or the further code compliance inspection in 2005. Mr Wright also submitted that the Council ought to have raised concerns about the other defects and because of

these omissions it remains liable for its breach of a continuing duty of care.

[51] The claimant's expert Mr O'Sullivan stated that councils throughout the country at the time of the building of this home had a poor track record for detecting and correcting weather tightness faults during construction of buildings prior to the *Hunn* Report in 2002. He said that much of this was due to the lack of knowledge by council officers; the common area of non compliance was the lack of clearance between the cladding and the ground. Mr O'Sullivan's evidence was that this was not new knowledge.[17]

[52] The Council's response is that it is trite law that council's are not clerks of works. It submitted that the duty pleaded by the Aldridge's far oversteps the statutory role of territorial local authorities and the obligations of an inspecting council. With this home, the Boes who obtained building consent and the builder who carried out the work had not called for building inspections since 1997.

[53] Mr Heaney SC submitted that the Aldridge's fall into the category of homeowner contemplated by cases he referred to[18] and that they are not owed a duty of care. He submitted that such authorities establish that it is not an absolute rule that every home owner or subsequent buyer is owed a duty of care by the Council. I reject that submission. In this case, the *Hamlin*[19] principle clearly establishes, and, so too does Richmond P in *Bowen v Paramount Builders (Hamilton) Ltd,* [20] that the Aldridge's fit within the proximity principle such that the ambit of the duty of care owed by the Council encompasses them as subsequent buyers. Councils owe a duty of care, in their inspection role, to owners, both original and subsequent, of buildings designed to be used as homes. The

[17] Brief of Evidence of Philip Vernon O'Sullivan dated 11 June 2010 at [58]-[59] and Reply Brief of Evidence dated 16 August 2010 at [29].
[18] *Lester v White* [1992] 2 NZLR 483 at [493]; *Sparham-Souter v Town and Country Developments (Essex) Ltd* [1976] QB 858, Lord Denning at [868].
[19] *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC).

Aldridges come within the scope of this duty. The Council submitted however that even if there was a duty of care owed the Council has not been negligent.

[54] The main evidence concerning breach of duty by the Council was addressed by Mr Cartwright, an expert witness called by the Boes. Mr Cartwright conceded[21] that the Council should not issue a notice to rectify unless it was sure that there were defects bound to cause the building to fail. Mr Cartwright mentioned that he had not issued any notices to rectify when working at the Auckland City Council and that he could not identify any items not identified in the Council's letters to the Boes that any reasonable council officer could have concluded were bound to fail. I am satisfied from Mr Cartwright's evidence that the Council was not negligent in failing to issue a notice to rectify when it went to the home in 2000. There was no other expert on council practices and procedures called in the hearing and so I am entitled to conclude, particularly from Mr Cartwright's evidence, that the Council acted commensurate with its duties when it visited the home as part of its s 41 audit in early 2000.

[55] Mr Flay in his evidence conceded, when questioned by Mr Wright that when a building inspector goes on a site visit or a building inspection, the inspector needs to know how to visually detect areas of non-compliance. Mr Flay accepted that a building inspector when on a site visit has to be reasonably diligent and has to be looking for matters of non compliance. However I accept Mr Flay's evidence that the visit by the Council officer to the home in early 2000 was not the usual building inspection visit, nor was it a final inspection. It was a s 41 audit whereby the Council was inquiring as to reasonable progress towards completion. The building inspector detected a number of incomplete items, none of which is relevant to this claim. The Aldridge's claim is that the building inspector should have detected the ground clearance defect but did not. The evidence at

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[20] *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 at [413].
[21] 5.09 pm 17 August 2010 transcript.

the hearing did not establish what length of time the building inspector spent at the property in early 2000. Mrs Boe's evidence was that when the building inspector called she was outside sunning herself and so rushed inside to shower and change. She was unable to explain how long that took and there was no evidence as to what that building inspector was doing during that time. I accept Mr Flay's evidence that the building inspector was not there to detect items of non-compliance. His visit was to confirm for the Council that the building was not complete. Mr Flay's evidence which was not contradicted, was that building inspectors are required to do a diligent non compliance overall check at the final inspection. The inspection of early 2000 was not an opportunity for the Council to inspect building works, but to ascertain reasonable progress towards completion. Immediately after that audit visit, Council wrote its letter of 7 February 2000 pointing out matters to be addressed by Mrs Boe and advising her that when the building project was complete she should call for a final inspection.

[56] Mrs Boe did not call for that final inspection until five and a half years later in September 2005.

[57] I accept Mr Flay's evidence, countering Mr O'Sullivan's, that Council officer's knowledge and understanding of the ground clearance defects in 2000 was not as well known as it is today. Mr Flay said this was partly because of the lack of understanding that possibly caused the Council officer not to requisition the ground clearance defect, but, more probably it was because of the nature of the site visit. The evidence presented at the hearing was insufficient for me to make a finding as to whether the Council inspector did a complete and thorough property inspection of the exterior of the home. Mrs Boe's evidence was that she certainly did not accompany the building inspector around the home.

[58] For these reasons I reject the Aldridge's claim that the Council was negligent at its early 2000 home visit when it failed to

notify the Boes of the ground clearance defect. That visit was sufficient to enable the Council to determine that it was not then proper to consider the issue of the code of compliance certificate and that was clearly evidenced in its letter of 7 February 2000 requiring Mrs Boe to call for a final inspection when their home was completed. I am satisfied from Mr Flay's evidence that what happened during and subsequently to the early 2000 home visit the Council's actions were normal and proper and consistent with the practices of other councils.

[59] Mr Flay stated that most councils did not, even in 2005 and 2006, specifically identify or list building items of non compliance, or restrict their requisitions to such non compliant items discovered. Mr Flay said that it was obvious to councils in 2005 and onwards that there could be more than just the obvious and apparent issues of non compliance. Because councils did not undertake invasive testing there could and would normally be non-detectable matters of non compliance, so the practice of councils was then to require the homeowner to obtain a weathertightness report for the building from an approved building surveyor. That is what the Council did following its site visit in the spring of 2005. Copies of those letters were placed by the Council on its property file giving notice to everybody who enquired of the Council's concern with the building.

[60] Mr Flay's evidence was that by 2005 the exterior cladding on the home was nearing ten years old and near the end of its 15 year life expectancy under the Building Code. This was the key reason the Council would not issue a code compliance certificate without first receiving what it termed... "A Clean Weathertightness Report."

[61] The Council's inspection in 2005 identified problems with the cracking of the cladding and with subsequent correspondence addressed water ingress concerns which it then had and the need for a weathertightness report. All of this was apparent from the Council's property file and LIM.

[62] Tipping J in *Sunset Terraces*[22] stated:

> If a purchaser obtains a LIM which discloses moisture problems before becoming committed to the purchase, it is unlikely that any proceedings could ever be taken against the Council.

[63] For these reasons, and after considering all the evidence, and the decision on appeal, I find that the Council with its property inspections in 2000, 2005 and 2006 acted reasonably, cannot be held in breach of its duty of care and the evidence satisfies me that none of the Council's actions constituted a material or substantial cause of the Aldridge's loss.

[64] The Aldridge's claim against the Council is not proven and so must fail.

THE AFFIRMATIVE DEFENCE OF CONTRIBUTORY NEGLIGENCE

[65] The High Court, at [355] referred back to the Tribunal for determination on the issue of contributory negligence. The second, fourth and fifth respondents all submitted that Mr Aldridge acted with such disregard for the claimants interests as to make their buying conduct a contributory cause of the damage that the claimants now have suffered.

[66] Section 3 of the Contributory Negligence Act provides:

(1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks

[22] *North Shore City Council v Body Corporate 188529 (Sunset Terraces)* [2010] NZSC 158 at [149].

> just and equitable having regard to the claimant's share in the responsibility for the damage:
>
> Provided that –
>
> (a) This subsection shall not operate to defeat any defence arising under a contract;
>
> (b) Where any contract or enactment providing for the limitation of liability is applicable to the claim, the amount of damages recoverable by the claimant by virtue of this subsection shall not exceed the maximum limit so applicable.
>
> (2) Where damages are recoverable by any person by virtue of the last preceding subsection subject to such reduction as is therein mentioned, the Court shall find and record the total damages which would have been recoverable if the claimant had not been at fault.
>
> (3) Section 17 of the Law Reform Act 1936 (which relates to proceedings against, and contribution between, joint and several tortfeasers) shall apply in any case where 2 or more persons are liable or would, if they had all been sued, be liable by virtue of subsection (1) of this section in respect of the damage suffered by any person.

[67] Section 3 clearly allows for apportionment of responsibility for the damage where there is fault on the part of the claimant or other parties. "Fault" is defined by s 2 of the Contributory Negligence Act as meaning:

> ....negligence, breach of statutory duty, or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence.

[68] *Jones v Livox Quarries Limited*[23] established that the essence of contributory negligence is a failure on the part of the claimant to take reasonable care to protect his or her own interests where the risks are reasonably foreseeable or ought to have been

[23] *Jones v Livox Quarries Limited* [1952] 2 QB 608 (CA).

known to the claimant. The two key considerations are causal potency and relative blameworthiness.

[69] Stanley Burnton J in *Badger v Ministry of Defence*[24] stated;

> ... As in the case of negligence, the question of fault is to be determined objectively. The question is not whether the claimant's conduct fell below the standard reasonably to be expected of him, but whether it fell below the standard reasonably to be expected of a person in his position: did his conduct fall below the standard to be expected of a person of ordinary prudence?.....

[70] Contributory negligence is a person's carelessness in looking after his own interest.[25] In determining responsibility the law eliminates the personal equation.

[71] What the Aldridges knew was clearly explained in Potter J's judgment at [108].

[72] Whether there was contributory negligence would depend therefore on what a prudent purchaser would have made of the information known to the Aldridges at the time of their purchase. Whether the claimants conduct constituted contributory negligence is a question of fact to be determined objectively.

[73] The principles for assessing contributory negligence are straightforward. The causal potency of the claimant's actions need to be viewed in light of all possible causes to enable me to make a finding of fact as to the appropriate level of contribution.

Respondents Submissions

[74] The respondents' submissions can be summarised such that as Mr Aldridge was clearly a sophisticated businessman and has had considerable experience in purchasing and owning properties, in this matter he failed to take reasonable precautions to protect the

[24] *Badger v Ministry of Defence* [2006] 3 ALL ER 173.

claimant's interests where risks were reasonably foreseeable. Such failure so substantially contributed to the claimants' loss that a contributory negligence finding of near 100 per cent would be justified.

[75] The respondents submit that *Sunset Terraces*[26] indicated that failing to request a LIM before becoming committed to a purchase could be viewed as an effective cause of the purchaser's ultimate loss, then purchasing a substantial property when it is known that there is no code compliance certificate and that there have been problems in obtaining one must also be capable of being viewed as an effective cause of the purchaser's ultimate loss.

[76] The respondents re-iterated the knowledge that Mr Aldridge had and which was summarised at [108] of Justice Potter's judgment, and then emphasised that Mr Murphy's evidence[27] was that when telephoned he told Mr Aldridge that the Harditex system was disproportionately represented in building failures and made it clear that Mr Murphy was not endorsing that system. Mr Aldridge had knowledge of the Council's expressed concerns to Mrs Boe that the cladding was over 10 years old and near the end of its 15 year life expectancy under the Code. Mr Aldridge knew that there was concern with the state of the cladding, he knew that the Boes had tried to but were unable to obtain a code compliance certificate, he knew that the Council required a satisfactory weathertightness report before it could consider the issue of a code compliance certificate and that under these circumstances it was readily apparent to Mr Aldridge that if the claimants wished to fully protect themselves from the risks that no code compliance certificate would issue without substantial repairs to the cladding they would need to make the purchase conditional upon obtaining a satisfactory weathertightness report or the issue of a code compliance certificate. The respondents

[25] *Froom v Butcher* [1975] 3 ALL ER 520 at 523 (CA).
[26] *North Shore City Council v Body Corporate 188529 (Sunset Terraces)* [2010] NZSC 158 at [149].

submitted that the development of the law of negligence in the field of residential building in this country was not intended to cut across the fundamental principle of *"caveat emptor."* They submitted that Mr Aldridge knew that Mr Murphy had not provided the weathertightness report needed by the Council, that the Boes were not prepared to provide the usual vendor warranties in the sale agreement and had contractually excluded all liability for the condition of the home and that the claimants had agreed to this. The respondents accept, as Justice Potter observed, that no one knew the full extent of the defects or that the home was not code compliant and required to be fully reclad. They however argued that this was the nature of latent defect cases and given the knowledge that the Aldridges had and that they negotiated some contractual changes to the purchase agreement notwithstanding the sale was at auction, they should have gone further contractually and protected themselves but failed to do so and that this was a substantial contributory failing.

[77] The respondents concluded their defence with submissions that the contribution "…should be fixed at something in the order of 100 per cent". They referred me in support of this contribution level to the Court of Appeal decision in *Gilrose Finance Limited v Ellis Gould*[28] and argue that Mr Aldridge's contributory negligence was far greater because he was put on notice that a clean weathertightness report was necessary for a code compliance certificate and to suggest, as Mr Aldridge has, that a code compliance certificate is something separate from weathertightness is wrong. For the claimants' expert, Mr O'Sullivan accepted the linkage between the two.[29]

Claimant's Response to Defence of Contributory Negligence

[78] Mr Wright submitted that Mr Aldridge made known to the real estate agent his concern to carry out proper due diligence. He said

[27] 2.06 pm 20 August 2010 transcript.
[28] *Gilrose Finance Limited v Ellis Gould* CA [2000] 2 NZLR 129 (PC).

that Mr Aldridge had obtained all available relevant information including making two visits to the Council to inspect its file, pursued enquiries with the available Council officers, followed up with Mr Murphy's report by discussing it with him such that Mr Aldridge was focused and consistent in his pursuit of available information. He needed to satisfy himself regarding whether the material that had come to his attention during his enquiries indicated that there was anything seriously wrong with the property. His enquiries largely and necessarily focused on the lack of a code compliance certificate and he was entitled to accept the reasons given by Mrs Boe that it was essentially because of the Council's delay and clearly neither Mr Aldridge or anyone else were aware of the latent defects until invasive testing undertaken for the Department of Building and Housing's determination in February 2008 was carried out. Mr Wright said that there was no information uncovered by Mr Aldridge's enquiries indicating that a satisfactory weathertightness report would not be available and that his enquiries illustrated that the Council had no issues with the construction of the home. Such that further enquiries would not have revealed any further damning information so that there were no grounds for a finding of contributory negligence. Mr Wright contrasted the knowledge and actions of Mr Aldridge leading up to the purchase with the position of the Sanghas in the *Sunset Terraces* case. Mr Wright concluded that it could not be said that Mr Aldridge acted with such disregard for the claimants own interest as to amount to a cause for the claimants loss.

[79] Mr Wright emphasised that Mr Aldridge did in the circumstances make sufficient enquiries and that further enquiries would still not have uncovered the latent defects now determined.

Conclusion on Contributory Negligence

[80] I accept that the lack of a code compliance certificate does not always or perhaps in many instances, mean weathertightness

[29] Page 82, lines 4-3 transcript of the fourth day of evidence.

concerns. But, in this case I accept that from the information available to Mr Aldridge at the time of purchase there is, when carefully considered, clearly a linkage; namely:

i. Mr Aldridge had seen the Council's letter of 17 March 2006 which expressed Council's concerns that about six to eight years of water was starting to penetrate the paint system, that the cladding was required to meet the durability requirements of the Building Act of 15 years once the code compliance certificate was issued, and that a weathertightness report was required before the Council would consider whether a code compliance certificate could be issued.

ii. Mr Aldridge knew that the repair work to the cladding recommended by Mr Murphy was to be done promptly but in fact was not carried out until another winter had passed.

iii. No clean weathertightness report had been obtained, and the lapse of time since the Boes first learnt from the Council of its requirement for one and their failure to secure one, should have inferred on Mr Aldridge that obtaining a code compliance certificate was not going to be routine or as he put it, solely working through Council's bureaucracy.

iv. The valuation report from Darragh Fergusson & Green dated 6 October 2005 stated that no structural survey had been undertaken by the valuer and that the report could not have been regarded as a structural survey of the building.

v. The Boes, as sellers were making no representations of the condition and structural soundness of the home.

vi. Mr Aldridge acknowledged in evidence that he was aware of the leaky home problem.

[81] As Stevens J stated in *Hartley v Balemi*[30] "reasonable foreseeability of the risk of harm by a claimant is a prerequisite to a finding of contributory negligence." So what is it that can fairly be said to have been done or not done by Mr Aldridge that contributed to the claimant's buying a leaky home? Notwithstanding that Mr Aldridge said to his real estate agent that he was wanting to undertake a proper due diligence on the property before buying, Mr Aldridge must accept a significant portion of blame for failure to take salient current and independent advice from his own experts to fully and properly understand the findings or failings of his enquiries.

To illustrate:

i. He clearly misunderstood what was required of a clean weathertightness report.
ii. The significance of water having ingressed the cracks in the cladding and infected, possibly, untreated timber.
iii. The Council and building experts increasing concerns with monolithic cladding and lack of a ventilated cavity.
iv. The age of the cladding on the home at time of purchase.
v. Failure to make contact with Mr Saunders, the Council Officer he knew had ultimate authority to decide on the issue of a code compliance certificate.
vi. His lack of knowledge, and, enquiry of proper advisors, as to the process of obtaining a clean weathertightness report and code compliance certificate, and his blind acceptance from the sellers that obtaining a code compliance certificate for the home was just a "bureaucratic exercise" and which the sellers had lost patience with.

[30] *Hartley v Balemi* (HC) Auckland CIV 2006-404-2589, 29 March 2007, at [105].

[82] The Council's letter dated 17 March 2006 stated clearly that "......it is believed that at about 6-8 years water is starting to penetrate the paint system. Also the cladding is required to meet the durability requirement of the Building Act of 15 years once a code compliance certificate is issued.....Once the above work has been completed and has provided Council with a clean weathertightness report, and if the report is acceptable to Council, the Council will consider if it will issue a code compliance certificate."

[83] Since this letter Mr Aldridge had observed the house being painted, had spoken with the painter because the letter hinted real concern with water penetration, understood that a clean weathertightness report was required and even then Council would still have to consider whether to issue a code compliance certificate. Yet, with notice of Council concerns, and coupled with his awareness of the leaky home problem he still, as he put it, when answering a question from Mr Heaney, took a "punt" and unconditionally purchased the expensive but monolithically clad home.

[84] Given the markets increasing knowledge and concern in late 2006 with the leaky home problem, the increasing usage of buyers engaging expert building surveyors for pre-purchase advice, the warnings of already probable water ingress from a proper reading of Mr Murphy's non-current report and the Council's letter of 2006, Mr Aldridge's due diligence concentrating solely on assurances from the sellers "people", (the painter, Mr Murphy, the real estate agent and Mrs Boe) failure to ask of Mr Murphy the pertinent questions and to understand Mr Murphy's concerns with the Harditex product; I determine Mr Aldridge's actions and inactions fall below the standard reasonably to be expected of a person of ordinary prudence undertaking a purchase due diligence of an expensive monolithic clad home in late 2006.

[85] Because of these salient concerning matters, Mr Aldridge was taking a high risk in not first making contact with Mr Saunders,

in seeking knowledgeable and current advice from his own advisers, negotiating (for he was successful in negotiating the inclusion of additional chattels) condition precedents to the agreement for purchase to prudently protect the claimants' own interests. These "inactions" of Mr Aldridge represent a departure from the standards of a reasonable person in Mr Aldridge's position in November 2006 when buying an expensive monolithic clad home which did not have final certification from the regulatory authorities, and coupled with his admitted awareness of the leaky home problem.

[86] The facts of this case, when looked at objectively, are such that the Aldridges, despite Mr Aldridge's protestations to the contrary, must bear a reasonable portion of fault for the "punt" as Mr Aldridge admitted he was taking. I estimate the causative potency of Mr Aldridge's actions, and, particularly inactions [86] – [87] in relation to the damage suffered by the claimants to be 45 per cent.

CONCLUSION

[87] In conclusion, for the reasons stated above, the claimants overall claims against the second, fourth and fifth respondents fail; and, although it does not in any way affect the overall result of the claim, that the claimants were contributorily negligent to the extent of 45 per cent of their claim.

DATED in Auckland this 31st day of May 2012

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K D Kilgour

Tribunal Member