IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2008-100-000119
[2010] NZWHT AUCKLAND 26

BETWEEN	HAI CAO and YANMING TAO Claimants
AND	TONY TAY AND ASSOCIATES LIMITED (In Liquidation) First Respondent
AND	AUCKLAND CITY COUNCIL Second Respondent
AND	BRIAN WILLIAM NEWTH Third Respondent
AND	ALLAN CHRISTINI (Removed) Fourth Respondent
AND	TONY MENG HIANG TAY Fifth Respondent
AND	SELINA SIAW NYUNAK TAY Sixth Respondent
AND	JOHN WATTS TRADING AS JOHN WATTS ROOFING SERVICE (Removed) Seventh Respondent

Hearing:	24 and 25 August 2010
Closing Submissions:	30 August 2010
Appearances:	Claimants - Matt Taylor Second Respondent - Paul Robertson Third Respondent – Adina Thorn and Tim Herbert Fifth Respondent – Self represented Sixth Respondent – No appearance
Decision:	24 September 2010

FINAL DETERMINATION
Adjudicator: P A McConnell

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INTRODUCTION

[1] Anna Tao and Henry Cao are the owners of a property at 1/21 St Vincent Avenue, Remuera. They purchased the property in November 2003 as a home for themselves and their extended family. The house was approximately 8 years old at the time of purchase but had recently been repainted and appeared to be in very good condition.

[2] Within six months of buying the property a leak was discovered in the ground floor bedroom and further leaks appeared over the next few months. In March 2005 they filed a claim with the Weathertight Homes Resolution Service. The assessor concluded that defects in the construction had caused leaks resulting in damage to the cladding and framing and that significant remedial work was required. Ms Tao and Mr Cao initially intended to undertake remedial work prior to proceedings for adjudication. However they have been unable to afford this and have based their claim on the estimated cost of remedial work of $622,275 including professional fees and consent fees.

[3] The claimants allege that the Auckland City Council, Brian William Newth, Tony Tay and Selina Tay are responsible for the defects in resulting damage. The Auckland City Council was the territorial authority that issued the building consent, carried out inspections and issued the Code Compliance Certificate. Mr Newth was a labour-only builder engaged by Tony Tay and Associates Limited to carry out specific construction work. Tony Tay and Selina Tay are alleged to be the developers of the property and in that capacity owe Mr Cao and Ms Tao a non-delegable duty of care.

THE ISSUES

[4] The issues I need to decide are:

- What are the defects that caused the damage?
- Was the Council negligent? Did it breach the duty of care it owed the claimants in carrying out the inspections and issuing the building consent and Code Compliance Certificate?
- Was Mr Newth negligent? In particular does Mr Newth owe the claimants a duty of care as a labour-only builder? If so, did he breach that duty of care and has that breach caused or contributed to the dwelling leaking?
- Was Tony Tay a developer and if so did he breach any duty of care owed?
- Was Selina Tay a developer and if so did she breach any duty of care owed?
- What is the appropriate level of damages to award? In particular should damages be assessed on the remedial cost or the loss of value?
- Is the claim limitation-barred?
- Were the claimants contributorily negligent in failing to obtain a building report or pre-purchase inspection?
- Did the claimants fail to mitigate their loss?
- What contribution should each of the liable respondents pay?

MATERIAL FACTS

[5] In July 1992 Sheng-I Chang and Huang Pi-Huei Chang (the Changs) purchased the land at 21 St Vincent Avenue, Remuera. At some stage between then and 1994 the Changs entered into an agreement with Tony and Selina Tay to develop the land. The Changs and Mr and Mrs Tay then entered into an agreement with Tony Tay and Associates Limited (TTAL) for TTAL to design and build three townhouses at 21 St Vincent, Remuera. This is recorded in an outline specification dated 15 July 1994 on TTAL letterhead stating TTAL's clients were the Changs and Tony and Selina Tay.

[6] On 17 October 1994 an application for building consent was lodged with the Council. That building consent records the applicants as the Changs with the contact person being Tony Tay with Tony Tay's status being stated as "design and build". The building consent application was signed by Tony Tay. Units 2 and 3 were built first with the construction of unit 1 starting in May 1995.

[7] On 31 May 1995 Brian Newth entered into a labour-only contract with TTAL to carry out construction work for the proposed Unit 1. The contract value was $24,720.00 and included erection of pre-cut and pre-nailed frames, carrying out carpentry work in accordance with plans and specifications, fixing of exterior hardibacker, hanging all pre-hung doors, installing windows and specified interior fit-out. That contract included a provision that Mr Newth would not be held responsible for:

> "[A]ny omissions, defects or damage which occurred out of advice, design, technical specification or documents not directly commissioned or provide by the Contractor or that could not reasonably be foreseen by the Contractor at the date of signing this document, or sub-contractors or other labour not directly employed by the Contractor in accordance with the conditions at Clause 7c".

[8] On 26 June 1995 the title for unit 1 was transferred from the Changs to TTAL. On 1 August 1995 the title was transferred from TTAL to Tony and Selina Tay. Construction of the property was completed in December 1995 with the Code Compliance Certificate being issued on 19 December 1995.

[9] Mr and Mrs Tay lived in the property until June 2001 when they sold it to Vincent Group Limited (Vincent). On 7 November 2003 Mr Cao and Ms Tao entered into a sale and purchase agreement to buy the property from Vincent with settlement on 14 November 2003.

[10] Prior to purchasing the property Ms Tao and Mr Cao were provided with information from Vincent's real estate agent which included a LIM report that had been obtained by the vendors for the purposes of sale. Ms Tao and Mr Cao sought legal advice prior to signing the contract but did not obtain a pre-purchase report. Their undisputed evidence was that the property had been freshly painted and was presented in very good condition when they viewed it.

[11] Ms Tao and Mr Cao first experienced leaks in the property in mid-2004 after heavy rain resulted in a damp and musty smell coming from the corner of the ground floor bedroom. This problem continued to occur during periods of heavy rain. Throughout the winter of 2004 further leaks appeared. In October 2004 Ms Tao and Mr Cao contacted Mr Tay and he suggested that they call Jim Williams a maintenance man. Mr Williams inspected the property in November 2004 and his view was that the house was a type that was susceptible to leaky building syndrome and that many of the windows did not have appropriate features required for weathertightness.

[12] In December 2004 Ms Tao and Mr Cao made a claim under their insurance policy for damage to the property which was ultimately declined. At around the same time they engaged Mr Zhan to inspect the property and carry out some repairs to the roof. He also applied sealant around some of the windows.

[13] The insurance assessor's opinion was that the leaks were due to problems on the outside of the house as opposed to internal problems and an expert engaged by the insurer advised the claimants to call Prendos. A claim with the Weathertight Homes Resolution Services was subsequently lodged in 24 March 2005. The assessor's report concluded that there were significant issues with the dwelling and recommended extensive remedial work. The assessor inspected the property again in 2007 with an addendum report being issued on 27 June 2007. The addendum report estimated the repairs to be $437,503.00.

[14] In mid-2007 Ms Tao and Mr Cao engaged Alexander & Co Limited to prepare a remedial design and specification for their property. The contract work was subsequently put out for tender with Scope Projects Limited being the successful tenderer. Apart from some issues of betterment none of the respondents raised any specific dispute with the proposed remedial costs. What is in dispute is the appropriate level of damages and whether it is economic to fix the property given the fact that the estimated cost of remedial works exceeds the value of improvements.

WHAT ARE THE DEFECTS THAT CAUSED THE DAMAGE

[15] The assessor, Warren Nevill, and the claimants' expert, Mark Powell, both undertook extensive investigations of the property. The Council's expert, Ernest Joyce, also visited the property to do a visual inspection and considered the reports and briefs provided by Mr Nevill and Mr Powell. He did not significantly dispute the opinion or conclusions of the other experts with his brief being confined largely to the issue of control joints. Bill Cartwright also gave evidence as an expert for Mr Newth. Whilst carrying out a visual inspection he did not primarily give evidence on the defects but largely addressed the defects as identified by Mr Powell. His evidence was mainly on issues concerning the potential responsibility or liability of Mr Newth and the Council for the defects. Mr Flay also gave evidence on behalf of the Council on its responsibility and on whether the alleged defects were acceptable and/or should have been detected by a Council officer at the time of the inspections. He had not visited the property until the site visit on the first morning of the hearing.

[16] The most reliable expert evidence on the defects which have caused damage to this property was accordingly given by Mr Powell, Mr Nevill and to a lesser extent Mr Joyce who gave their evidence concurrently. Except as outlined below there is little disagreement

between the experts on the defects with the property and each defect's contribution to the damage.

Windows

[17] All experts agreed that the major cause of leaks to this dwelling was deficiencies with the installation and waterproofing of the windows. They also agreed that this defect alone necessitated a full reclad of the dwelling. There are a number of different types of windows present in the dwelling including windows with curved heads, conservatory, glass block, bay, faceted and corner windows. While there were some differences with their method of installation all or almost all the windows leak. This is caused by an absence of flashing or any other method of adequate sealing between the window joinery and the stucco plaster cladding. The majority of the windows were installed hard against the hardibacker. This precluded any other option of creating a weathertight seal between the stucco plaster and window frame. This was compounded by the plaster being taken onto the face of the joinery flanges which meant cracks were inevitable and such cracks would then enable water to access the framing.

[18] The experts' opinion was that this method of installation could never have worked. Mr Nevill's opinion was that there was long standing knowledge in the building industry that this method of installation would not work. He further said that BRANZ knew about the issue and the building industry knew about the potential issues

[19] At the time this dwelling was built stucco over hardibacker was technically an alternative solution rather than an acceptable solution. However the hardibacker technical material did not include specific details for the installation of windows at this time and therefore E2/AS1 would apply as the applicable detail for the installation of windows. E2/AS1 provided:

> *"3.0 EXTERIOR JOINERY*

3.0.1 Windows and doors, and the joints between them and cladding materials, shall be as weatherproof as the cladding itself.

3.0.2 Windows and doors shall have head flashings, and scribers or proprietary seals between facings and the building cladding."

[20] The different subsections of E2/AS1 are cumulative. This was accepted by all the experts including Mr Flay. I do not therefore accept the suggestion that provided sealant was used the installation of windows complied with E2/AS1. For sealant to be an acceptable means of weatherproofing in relation to installation of windows the first subsection of E2/AS1 would need to be met, namely the windows and joints between them and cladding materials needed to be as weatherproof as the cladding itself. Only if the use of proprietary seals achieved this result could it be concluded that the installation of the exterior joinery complied with E2/AS1.

[21] I accept Mr Nevill's clear and unequivocal that the way these windows were installed was never going to work. Mr Nevill is an experienced and qualified builder. After undertaking an apprenticeship he worked for over 15 years in the building industry as a self employed building contractor for a number of years. His view was that any tradesperson involved in the external cladding and window installation at the time this house was built should have known that the windows would not be weathertight given their method of installation.

[22] Mr Powell agreed with Mr Nevill's opinion. Mr Joyce, whilst not necessarily disagreeing, stated that reliance on sealant was widespread at the time this dwelling was built and due to the introduction of newer products, tried and tested building methods were not always followed or considered appropriate.

[23] Mr Newth argues that it could not be established how many windows were installed hard against the hardibacker and how many

were not. His counsel submitted that the claimants had failed to carry out the maximum potential destructive testing so were unable to prove which windows were affected by the lack of sealant and which were not. While I accept not every window has been invasively tested I am satisfied that the available evidence is sufficient to establish that there are deficiencies in the waterproofing of all windows and that they all currently leak or are likely to leak. It is neither reasonable nor necessary for claimants to invasively test every window. I am satisfied that deficiencies in the installation of windows is widespread, whilst not all windows were installed hard against the hardibacker most were and those that were not had other defects.

Ground Levels

[24] Both Mr Powell and Mr Nevill indentified that another defect in the construction of this dwelling was that the stucco had been taken down to the ground and other horizontal surfaces including the steps, window recesses and onto roof shingles and into gutters. All the experts agreed that this was a problem with the building. Lack of ground clearances meant moisture taken into the building envelope could not escape and could also result in moisture accessing the cladding by capillary action.

[25] I accept there is evidence of damage as a result of the combination of the window installation defects and the lack of clearances with the ground. Moisture that got in from above has been trapped and this has caused damage to the framing and bottom plate. I also accept that there are clearance issues between the cladding and other horizontal surfaces. Although Mr Powell considers damage is likely from the lack of clearances between the stucco and the roof shingles and gutters he accepts that no testing has been carried out to establish this.

[26] Mr Powell at the hearing confirmed that at least in relation to ground levels, the stucco had been taken down lower than the hardibacker. Accordingly the ground clearance issue would appear to be the responsibility of the plasterer rather than the builder.

Inadequate Staircase Construction

[27] All the experts agreed that the lack of waterproofing to the staircase off the lounge on the north elevation caused damage. I am satisfied from the evidence presented that this damage was severe but confined primarily to the staircase itself and the cladding and framing in the area around the stairs. Appropriate remedial works to rectify this defect would require recladding that elevation at least up to the next storey, together with reconstruction of the steps.

[28] The plans provided little detail for construction of the steps and only appear on one of the plans. I accept Mr Newth's evidence that it was originally intended that these steps were to be made of concrete. Sometime after the hardibacker had been installed Mr Newth was asked to construct wooden steps. The installation of the steps against the hardibacker is one of the contributing causes to damage in this area. The other major defect was that no waterproofing was installed. The general consensus of experts was the waterproofing should have been installed before the ply and brought up under the hardibacker.

No Head Flashing to Garage Door

[29] All the experts accept that there were no head flashings installed to the garage door. They also accept that it was a requirement at the time. The Council accepts that a reasonably competent Council inspector should have detected the absence of the flashing and taken action. The Council and Mr Newth however contend that no specific damage has been identified as a result of this defect. They submit that any damage in this area has been caused by other defects. Mr Powell acknowledged that he could not

identify any water entry that he could attribute to the lack of a head flashing. His opinion however is that the lack of a flashing has meant that water draining from above to the door head has become trapped and has caused damage. A moisture content reading of 100% was taken in that location.

[30] At most this defect would have contributed to damage rather than being a primary cause of damage. Any damage as a consequence of this defect would be minor and localised. This defect does not significantly affect the remedial scope or cost as the dwelling will need to be reclad because of other defects.

Lack of Drainage Provision at Change of Substrate

[31] Mr Powell's evidence was that a lack of drainage provision at the change from timber to masonry resulted in moderate but widespread damage. His opinion was that this was evident on all elevations and should have been detected by the Council during inspections. In Mr Powell's opinion a drip screed was required by NZS4251: 1974. The Council however submitted that there was no Building Code requirement for such drainage at the time this house was constructed and accordingly this should not be considered to be a defect for which any party has liability.

[32] Mr Powell acknowledged that there were several documents available at the time this house was built that failed to show the need for drainage at the base of a wall. In these circumstances he also accepted that council inspectors could not have insisted on such a requirement as it exceeded the minimum requirement of an acceptable solution.

Lack of Control Joints

[33] All the experts agreed that this building should have had control joints installed in various locations but none were installed. Whilst Mr Powell's initial opinion was that the damage as a result of

this defect was moderate he reviewed this to minor at the beginning of the hearing. I accept that control joints should have been installed in this property and I also accept none were. There is however little, if any evidence, that any significant damage has been caused by this defect. This is not a property with serious and wide spread cracking which is something often attributed to lack of control joints.

Other Defects

[34] There were a number of other defects noted by Mr Powell in his defects list. The majority of these however resulted in only minor or localised damage. They included:

- Gutters and roof barge flashings terminating into stucco;
- Defective window joinery;
- Gaps between stucco and apron flashings stop ends;
- Pergola fixed hard against stucco face;
- Unflashed and inadequately sealed roof cladding junction to main bedroom dormer window;
- Exposed fixings to roof shingles;
- Roof parapets with inadequate height at ridge junction;
- Unsealed penetrations;
- Lack of drip edge to entrance soffit;
- LAM lined roof gutters without adequate falls;
- Cladding not spaced off fire rated plaster board.

Conclusion

[35] The key and most significant defect with this property is deficiencies in the installation of the joinery. This affects all elevations and this defect on its own results in the need for a reclad. Lack of ground clearances is a further issue that affects all elevations. Inadequacies in the construction of the external staircase and failure to install a head flashing to the garage door are also defects that have contributed to leaks although the latter to a minor

degree only. Both of these defects are localised and could be remedied by targeted repairs.

[36] There are a number of other issues that have contributed to the dwelling leaking. There are also other construction defects which have not significantly contributed to the leaks and subsequent damage such as lack of control joints.

WAS THE COUNCIL NEGLIGENT?

[37] The claim against the Council is that it was negligent in its inspection and in the issuing of the Code Compliance Certificate (CCC). The Council accepts it owes the claimants a duty of care but denies it was negligent in carrying out inspections and issuing the CCC. The Council carried out 18 building inspections during construction and submits that it had a good system of inspection in place. The only live issue they say is whether it ought reasonably to have detected defects that are now responsible for damage. The Council did not call any inspectors who carried out inspections on the dwelling but relies on the evidence of Mr Flay that the inspections undertaken were to an appropriate standard and therefore it was not negligent. It submits that a Council officer should be judged according to conduct of other Council officers and against the knowledge and practice at the time at which the particular act or omission was said to take place.

[38] In making this submission the Council relies on *Hartley v Balemi*[1] which states:

> "[71] It is an objective standard of care owed by those involved in building a house. Therefore, the Court must examine what the reasonable builder, council inspector, architect or plasterer would have done. This is to be judged at the time when the work was done, i.e. in the particular circumstances of the case...

[1] HC Auckland, CIV-2006-404-2589, 29 March 2007, Stevens J.

> [72] In order to breach that duty of care, the house must be shown to contain defects caused by the respondent(s). These must be proved to the usual civil standard, the balance of probabilities. Relative to a claim under the WHRS Act, it must be established by the claimant owner that the building is one into which water has penetrated as a result of any aspect of the design, construction or alteration of the building, or the materials used in its construction or alteration. This qualifies the building as a "leaky building" under the definition of s5. The claimant owner must also establish that the leaky building has suffered damage as a consequence of it being a leaky building. Proof of such damage then provides the adjudicator with jurisdiction to determine issues of liability (if any) of other parties to the claim and remedies in relation to such liability..."

[39] I accept that the adequacy of the Council's inspections needs to be considered in light of accepted building practices of the day. The High Court in other recent cases has also set out the responsibility on territorial authorities in carrying out inspections. Heath J in *Body Corporate 188529 v North Shore City Council (Sunset Terraces)*[2] states that:

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

[40] And at paragraph 409,

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

[41] In *Dicks v Hobson Swan Construction Limited* (*in liquidation*) (*Dicks*),[3] the Court did not accept that what it considered to be systemically low standards of inspections absolved the Council from

[2] [2008] 3 NZLR 479 .

liability. In holding the Council liable at the organisational level for not ensuring an adequate inspection regime, Baragwanath J concluded:

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

[42] I am satisfied that *Dicks, Sunset Terraces* and *Byron Avenue*[4] establish that the Council may not only be liable for defects that a reasonable Council officer, judged according to the standards of the day, should have observed. It can also be liable if defects were not detected due to the Council's failure to establish a regime capable of identifying whether there was compliance with significant aspects of the Code. The Council however does not have the function of a clerk of works and, even with an adequate inspection regime in place, will only have limited opportunities to inspect the work as it progresses. There will be defects where it would not be reasonable to conclude that they should, or could have been identified by a competent council inspector. I need to take these matters into account in determining whether the Council has any liability. In doing so, it is appropriate for me to consider each of the key defects as established in paragraphs 15 to 36.

Windows

[43] All experts agreed that the manner in which these windows have been installed was a key cause of leaking. The Council submitted that it was not negligent in its inspection of the windows as it appeared sealant had been applied and this was an appropriate method of waterproofing windows under E2/AS1. E2/AS1 allowed proprietary seals or sealant as part of the waterproofing system and as there was some evidence of sealant the Council had met its duty.

[3] (2006) 7 NZCPR 881 per Baragwanath J (HC).

Furthermore the Council argued that the application of sealant behind the reveals would not have been visible to the Council officer unless he or she was on site when this work was undertaken. Therefore the Council cannot by any reasonable system of inspection ensure that such sealant was in place. Mr Flay's evidence was that the windows at the time would have looked visually compliant and in accordance with the practice of the day and therefore the Council was not negligent.

[44] In summary the Council submit that because 3.0.2 of E2/AS1 allowed proprietary seals or sealant as part of the waterproofing system provided there was some evidence of sealant the Council officers could not be negligent. In the alternative the Council appears to argue that as sealant applied between the hardibacker and the joinery would not have been visible to a Council inspector they were entitled to assume that it had been applied and therefore the window installation complied with the Code.

[45] The weakness of these arguments is however that they ignore 3.0.1 which requires windows and doors, and the joint between them and the cladding material, to be as waterproof as the cladding itself. Therefore if sealant was not used so that the windows and jointing between windows and cladding were weatherproof they did not comply with the Code. I do not believe it is good enough for the Council to say that because they could not determine where or whether sealant was used, or whether it was used appropriately, they were entitled to assume that it was. A further weakness in the Council's argument is that it fails to address the evidence of Mr Nevill that these windows were never going to be weatherproof due to the method of installation and this should have been known at the time. By hard fixing the windows to the hardibacker there was little possibility that they could be adequately sealed and be code complaint.

[4] *Body Corporate No. 189855 v North Shore City Council* HC Auckland, CIV-2005-404-5561, 25 July 2008, Venning J.

[46] I accept that proprietary seals were permitted but any sealant that was applied to the windows in this dwelling was inadequate and in some places non-existent. It was not applied in a manner that met the requirements of E2/AS1. The presence of appropriate sealing was crucial to the weathertightness of the windows. I accept on the evidence presented that the adequacy of the method and manner of sealant application could and should have been detected on a visual inspection by a competent building inspector. I accordingly conclude the Council was negligent in failing to detect deficiencies with the installation of windows.

Ground Levels

[47] The claimants submit the Council ought to have identified issues with ground clearances on the final inspection of the property. They submit acceptable solution E2/AS1 at 2.3 deals with solid plaster on timber framing. When constructing a house with solid plaster on a timber frame figure 3 applies. This shows a minimum 50mm gap between the bottom of the finished plaster and the ground for claddings on both a rigid backing and a non-rigid backing. The claimants also referred to the April 1995 hardibacker technical information which contains the same requirement.

[48] Whilst the hardibacker 1995 technical information had been published by the time this house was built it was not the documentation that applied at the time building consent was granted. The early version did not include any requirements for ground clearances. The Council submits that there was no requirement for the cladding to be kept clear of finished ground surfaces at the time the house was consented. Accordingly it was not negligent in failing to detect this issue during inspections or at the final inspection.

[49] I accept that the ground clearance issues would have been visible to a building inspector undertaking the final inspection in

December 1995. The issue is whether a prudent inspector should have detected the ground clearance issue and therefore not pass the building without it being corrected. Mr Flay's evidence is that whilst it is now widely appreciated that it is important to keep the bottom walls clad with solid plaster clear of finished surfaces this was not understood or a requirement in 1994. The hardibacker material at that stage provided no details for clearances and the show home that featured on the front of the installation guide clearly had cladding down to tiled surfaces.

[50] I accept Mr Flay's evidence that there was no regulatory requirement for solid plaster to be completed clear of finished ground surfaces at the time this house was built. For this reason the absence of clearance would not at the time had been in breach of an acceptable solution to the Building Code. The Council accordingly was not negligent in failing to detect this issue.

Lack of Control Joints

[51] I accept that control joints should have been installed in this dwelling and were not. I also accept the Council was negligent in failing to identify the omission of appropriate control joints. However I am not satisfied that any damage has been proven as a result of lack of control joints. There is accordingly no causative link between any negligence on the part of the Council in failing to identify this defect and the damage suffered.

Inadequate Staircase Construction

[52] The Council's defence in relation to this defect is that it was not the practice of a reasonably competent Council inspector to inspect for this defect at the time. Whilst that may well be the case I do not accept that this absolves the Council of responsibility. The reason for this conclusion is the minimal detail about the construction of the stairs on the plans and those that were provided were for stairs to be made from concrete.

[53] In a situation where there has been a clear departure from or addition to the consented plans, and no details were provided, it was incumbent on the Council to make enquiries to ensure the work was done in accordance with the Code. There is no evidence that the Council made any enquiries as to the method of construction. Basic enquiries or a routine inspection would have revealed that there were significant problems both in terms of the sequence of construction and the lack of waterproofing. The Council is liable for this defect.

No Head Flashing to Garage Door

[54] No head flashing had been installed above the garage door and one was required. The Council was negligent in failing to detect the lack of a head flashing to the garage door during its inspections of the property. The Council accepts a reasonably competent building inspector should have detected the absence of the flashing but submits no specific damage has been established as a result.

[55] I accept the primary cause of damage around this location is from other defects. This does not however discount Mr Powell's opinion that the lack of head flashing has contributed to the damage. Whilst not the predominant cause of damage I am satisfied that there is evidence that the lack of head flashing contributed to the damage to the dwelling.

Other Defects

[56] There were a number of other defects for which it has been alleged the Council is liable. It is unnecessary to address these in detail given the conclusions reached on other defects. For some of these defects either there was no Building Code requirement for such a detail at the time or there is no evidence that these defects have contributed to damage.

Conclusion on Council Liability

[57] In summary I conclude the Council was negligent in failing to identify defects in relation to the installation of the joinery, the construction of the external stairs and the lack of a head flashing to the garage door. Whilst there are other defects for which the Council is not responsible, given the extent of the damage that has been caused by the defects that should have been detected by the Council, and the fact they occur on all elevations, I conclude that the Council has contributed to defects that necessitate the full recladding of the house. It is accordingly jointly and severally liable for the full amount of the established claim.

WAS MR NEWTH NEGLIGENT?

[58] Mr Newth was a labour-only builder contracted to carry out specified construction work of the dwelling. While Mr Newth worked under contract with the head builder I am satisfied that he, in that capacity, owed the claimants a duty of care. His position is no different to that of Mr Boyd and Mr Halliday in *Boyd v McGregor.*[5] Mr Newth has a National Certificate in carpentry and is currently a registered member of the Certified Builders Association and a licensed building practitioner. He has been involved in the building industry for approximately 26 years. At the time this house was built he would have had approximately 10 years experience in the building industry and was working as an independent building contractor.

[59] I accept the submissions made on behalf of Mr Newth that the scope of the duty owed, and whether he was negligent or not, depends on the scope of his involvement and the functions he was contracted to carry out. Mr Newth's contract involved carrying out the specified construction work in accordance with the plans with TTAL providing all materials and components required for the work. Mr Newth accepted his work included the installation of the joinery

[5] HC Auckland, CIV-2009-404-5332, 17 February 2010, H Williams J.

and the hardibacker. He was also engaged to construct the external stairs. When giving evidence Mr Newth advised that he was given the plans but cannot recall having seen any specifications. He also cannot recall whether he had the relevant hardibacker technical material at the time.

Window Installation

[60] Mr Newth accepts he installed the windows and the head flashings. He stated he was not involved in the design of the windows or how they would fit into the building. In addition as he was not given any instructions by TTAL or Mr Tay on how the windows were to be made weathertight he assumed that would be the responsibility of the plasterer or other trades following him. He stated in evidence he did not recall installing any sealing around the windows or any sealant between the windows and the hardibacker. He assumed the plasterer would ensure the windows were sealed.

[61] Counsel for Mr Newth also submitted that whether the windows were installed hard against the hardibacker was something of a "red herring" as the issue was whether they were still capable of being completed to comply with E2/AS1. I agree with the latter part of this submission but not the former part. The key issue is whether the windows were capable of being completed so that they complied with E2/AS1. The evidence of Mr Nevill and Mr Powell in particular however is that the windows could not have complied with E2/AS1 if they were installed hard against the hardibacker because this prevented the adequate waterproofing of the windows. This method of installation prevented the creation of weathertight seals between the window frame and the plaster cladding. As already stated I accept Mr Nevill's evidence that this method of installation was never going to work. His evidence also was that a competent builder at the time should have been aware of these deficiencies.

[62] I accordingly conclude that Mr Newth was negligent in the manner in which he installed the windows. Whilst others may bear more responsibility than him, as an experienced builder he should have been aware that the way he was installing these windows meant that they could not be properly waterproofed. At the very least Mr Newth should have raised this issue with TTAL and sought further information on how the windows were going to be waterproofed. There is no evidence he did this.

[63] I further note that most of the experts considered that sealant should have been provided between the windows and the hardibacker when they were installed. Even Mr Cartwright, Mr Newth's own expert, said that this is what he would have done if he had been installing the windows. Mr Newth's own evidence was that he did not put sealant behind the windows when he installed them.

Staircase Construction

[64] While the contract did not require Mr Newth to install a timber staircase he accepted he was asked to install it part way through the construction process. The plans originally provided for a concrete staircase. After the change was made Mr Newth agreed to build and install the stairs.

[65] There are two problems with the installation of the stairs which have resulted in leaks. Firstly they were installed after the hardibacker and secondly they were installed without any waterproofing membrane. Whilst the claimants do not suggest Mr Newth should have installed the waterproofing membrane they do submit it should have been installed prior to both the hardibacker and the ply which Mr Newth agrees he did install. The installation of the stairs after the hardibacker had been installed and prior to the installation of the stucco also meant that it was impossible for the plasterer to appropriately plaster this area and complete his work in a weathertight manner.

[66] I do not accept counsel for Mr Newth's submission that this was a new defect advanced by Mr Powell's reply evidence served on 24 August 2010. Inadequate staircase construction was included as the seventh defect on Mr Powell's defect list attached to his first brief. It was also referred to in the assessor's initial report as being a cause of damage.

[67] Mr Newth was not responsible for the sequence in which the stairs were installed. Mr Cartwright rightfully says that this put Mr Newth in a difficult situation. I do not however accept that it was impossible. Mr Newth should have been aware at the time he was constructing the stairs that they could not be adequately waterproofed. Once again he should have raised this issue with Mr Tay or Mr Wilson from TTAL. There is no evidence that he did this. In addition, I do not accept his counsel's submissions that it was reasonable and prudent for Mr Newth to assume that TTAL had the sole responsibility for ensuring the steps were made waterproof. Whilst there was disagreement between experts as to how this could have been achieved they were all in agreement that the way they were built, and the sequence in which they were built, precluded any adequate waterproofing being subsequently carried out. Mr Newth was accordingly negligent in constructing the stairs with a complete absence of waterproofing. I accept he should reasonably have known that the stairs could not have been adequately weatherproofed after the construction work he carried out.

No Head Flashing to Garage Door

[68] I accept Mr Newth was negligent in failing to install a head flashing above the garage door. This flashing was required and any competent builder should have known this. Again, Mr Newth says he was acting under the instructions of Mr Tay who asked him to install a timber fascia around the outside of the garage door and that Mr Tay did not supply a head flashing. Although this may mean that Mr

Tay and/or TTAL have more responsibility for this defect than Mr Newth, it does not resolve him from responsibility.

Other Defects

[69] The claimants alleged initially that Mr Newth was responsible for the lack of ground clearances. Mr Powell however agreed at the hearing that the stucco had been taken down below the hardibacker. There is therefore no evidence on which I could conclude that Mr Newth has any responsibility for this defect. Whilst there is more evidence that Mr Newth was partially responsible for lack of clearances with other horizontal surfaces there is no evidence this has caused damage.

[70] Mr Newth was also negligent in failing to install control joints in the hardibacker as required. However I have already concluded that there is little, if any, evidence of damage as a direct result of this defect. The other defects alleged were either not the responsibility of Mr Newth or are defects for which there is little evidence of any significant damage.

Conclusion

[71] I conclude Mr Newth was negligent in the manner in which he installed the joinery and the external stairs. I also conclude he was negligent in failing to install a head flashing to the garage door. The developer, head builder or project manager may have more responsibility than Mr Newth for these three defects. This can be taken into account in terms of contribution but is less relevant when determining liability. There are other defects for which Mr Newth is not responsible but given the extent of the damage that has been caused by defects for which he is liable, I conclude that he has contributed to defects that necessitate the full recladding of the dwelling. He is accordingly jointly and severally liable for the full amount of the established claim.

WAS TONY TAY A DEVELOPER?

[72] The claimants allege that Mr Tay was a developer of the property in that he together with Mrs Tay had ultimate control and overall responsibility for the design and construction of the property. They submit that the documentation establishes that Mr and Mrs Tay together with the Changs were the developers of the property and it was the Changs and the Tays who engaged TTAL to carry out the design and construction work. The claim against Mr Tay is not in relation to his role with TTAL. The claim is that Mr Tay personally was a developer independently to his role with TTAL. This is as a result of his involvement with the Changs initially, his involvement during construction and the fact that the title of the dwelling was transferred into his name during the course of the construction process.

[73] Mr Tay, although legally represented until shortly before the hearing, did not file any response nor did he file any witness statements. He attended the Tribunal on the afternoon of the first day of the hearing only and attempted to produce some documents. The other parties opposed the late filing of the documents as they related to the adjudication of the claim for the neighbouring property. The Tribunal refused to accept production of documents and statements at such a late stage and also questioned their relevance to the current proceedings. Mr Tay was allowed to give evidence and was asked questions by the Tribunal and parties. He was also invited to file closing submissions but he declined to do this. He was encouraged to attend the rest of the hearing but also failed to do this. Section 75 of the Weathertight Homes Resolution Services Act 2006 (the Act) provides that the Tribunal may draw inferences from parties' failure to serve a response or make submissions or comment within appropriate timeframes or do any other thing the Tribunal asks for or directs.

[74] Mr Tay denied he was a developer and said that at all times he relied on the expertise of employees of TTAL who were responsible for the design, construction and supervision of construction.

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

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

[76] A helpful definition of a developer can also be found in *Body Corporate 188273 v Leuschke Group Architects Ltd:*[6]

> "[32] The developer, and I accept there can be more than one, is the party sitting at the centre of and directing the project, invariably for its own financial benefit. It is the entity which decides on and engages the builder and any professional advisers. It is responsible for the implementation and completion of the development process. It has the power to make all important decisions. Policy demands that the developer owes actionable duties to owners of the buildings it develops."

[77] Harrison J also observed that the word developer is not a "term of art or a label for ready identification", unlike a local authority, builder, architect or engineer. He regarded the term as "a loose description, applied to the legal entity which by virtue of its ownership of the property and control of the consent, design, construction, approval and marketing process qualifies for the imposition of liability in appropriate circumstances". It is the function carried out by a person or entity that gives rise to the reasons for imposing a duty of

care on the developer. Whether someone is called a site manager, project manager or a developer does not matter. The duty is attached to the function in the development process and not the description of a person.

[78] In order to determine whether Mr Tay was a developer an examination of the role he played in relation to construction is required. The following factors are relevant in considering Mr Tay's role:

a) The Changs entered into an agreement with Tony and Selina Tay to develop the land. There is an outline specification dated 15 July 1994 on TTAL letterhead where the project is expressed to be the three townhouses at 21 St Vincent Avenue, Remuera and the client is expressed to be the Changs and Tony and Selina Tay. This document suggests that the Changs and Mr and Mrs Tay jointly engaged TTAL to design and build all three townhouses.

b) Mr Tay personally signed the application for building consent for the three-unit development lodged on 17 October 1994 as the contact person for the applicants. The applicants were expressed to be the Changs. The name of the contact person and signatory was said to be Tony Tay and his status was design and build. There is no mention of TTAL on that document.

c) Mr Tay's name appears as the applicant owner on the Project Information Memorandum dated 17 October 1994.

d) Mr Tay was involved in managing and overseeing the construction of the property. Mr Newth's evidence was that it was Mr Tay who engaged him and who discussed his role with him. Mr Newth states that he understood that Mr Tay was the builder and designer. He said Mr Tay was overseeing the whole project although there was also a project manager appointed by TTAL.

[6] HC Auckland, CIV-2004-404-2003, 28 September 2007, Harrison J.

e) Mr Tay was regularly on site. Mr Newth's evidence, which Mr Tay largely accepted, was that he visited site every second day. Mr Newth said that when Mr Tay was on site he would ask about the process of the job and he would also look around quite a bit. Although there was a project manager it was Mr Tay that Mr Newth frequently went to if he had queries or questions.
f) Mr Tay was the person who requested Mr Newth to construct the wooden stairs.
g) It was Mr Newth who was specifically asked by Mr Tay to install a timber fascia around the outside of the garage door rather than to install head flashings.
h) The property was transferred into the name of Tony and Selina Tay in August 1995 well before construction of the property was complete.

[79] From the information provided I accept that Tony Tay together with the Changs were the developers of the complex. I however also accept Mr Tay's evidence that he relied on some of the experts engaged by TTAL who did work on the property. TTAL was the designer and builder but was not the developer of the property. While Mr Tay was entitled to rely on its expertise in relation to the work it carried out this does not negate any role Mr Tay had as a developer nor any duty he owed to the claimants as a result. It also does not mean that Mr Tay does not owe the claimants a duty of care as a developer.

[80] Mr Tay was the person sitting in the centre of and directing the development of Unit 1 for his own benefit. He together with the Changs decided on and engaged TTAL who in turn engaged the other subcontractors. He attended site meetings and was on site regularly making decisions as to changes from the plans as drawn. He was, together with staff from TTAL, responsible for the implementation and completion of the construction process and had the power to make all important decisions. The fact that this property

became the home for Mr and Mrs Tay and that they lived in the property for some time prior to selling it to Vincent does not in itself mean that Mr Tay was not a developer. I accordingly conclude that Mr Tay was a developer of the property at 1/21 St Vincent Avenue.

Did Mr Tay Breach the Duty of Care Owed?

[81] As a developer Mr Tay owes the claimants a non-delegable duty of care. There is however evidence that at least two of the defects with this dwelling were constructed specifically at Mr Tay's direction. It was Mr Tay who decided part way through the construction process that the exterior stairs would be built of wood. Both the timing and manner of their construction meant the stairs could not be made weathertight. Mr Newth's evidence is also that Mr Tay was responsible for the lack of a head flashing to the garage door. Whilst Mr Tay was not directly involved in the plans or details for waterproofing the windows it was Mr Tay who instructed Mr Newth and it was Mr Tay who gave him the plans. It also appears Mr Tay had some responsibility with the sequencing of the jobs. The instructions given to Mr Newth were inadequate. He was not given appropriate detail and inadequate attention was given to how the dwelling was going to built watertight.

[82] In conclusion therefore I accept that Mr Tay owed the claimants a duty of care as a developer of the property. I further conclude he breached that duty of care and those breaches resulted in defects which have required the dwelling to be reclad. Mr Tay is accordingly jointly and severally liable for the full amount established as set out in paragraph 103.

IS SELINA TAY A DEVELOPER?

[83] The claimants allege that Selina Tay together with Tony Tay and the Changs were developers of the property. The only information implicating Mrs Tay is the outline specification dated 15 July 1994 and the fact the property was transferred into the names of

Tony and Selina Tay part way through construction. No evidence has been presented that she had any other involvement in the design or construction of the property or any onsite involvement during construction. The claimants have accordingly failed to establish that Mrs Tay was also a developer of the property. Even if I were to conclude that she was a developer there is no evidence that she had any involvement in, or direct responsibility for, the defects which have caused this property to leak. In those circumstances even if I concluded that she was jointly and severally liable with the other liable parties her apportionment would be set at 0%.

WHAT IS THE APPROPRIATE LEVEL OF DAMAGES TO AWARD?

[84] The claimants are seeking $566,137.00 for the estimated costs of the remedial work including estimated future professional and consent fees. This amount takes into account a deduction for betterment for painting and staining and GST on amounts not yet incurred at 15%. In addition they have already spent $68,446.00 on professional and consent fees for remedial design and management. Few other disputes were raised in relation to the remedial costs.

[85] Counsel for Mr Newth in their opening submitted that betterment included installation of new windows and of a cavity and that the new exterior cladding would be in a considerably better condition than the cladding which was being replaced. These issues were not pursued at the hearing in any significant way and nor were they covered by closing submissions. I am satisfied from the information provided that new windows would need to be installed as part of the remedial work. I also do not accept that the installation of a cavity is betterment when it is a necessary part of any remedial scope in order to get a building permit for the remedial work.

[86] The Council however submits that this is not a case where it was appropriate to award damages based on the estimated remedial

costs but rather it should be based on diminution of value. The Council submits that the remedial costs significantly exceed the difference in value between the current value of the property as is, and its value if it had been built in accordance with the building consent and Building Code.

[87] I heard the evidence of two valuers (Mr Gamby for the Council and Mr Clark for the claimants) who gave evidence on their opinion of the value of the property. The evidence was based on orthodox valuation principles. They largely agreed on the estimated value of the property in an unaffected state, one at $950,000 and the other at $965,000. The rateable value for the property is $970,000. Mr Gamby and Mr Clark differed on the estimate of the value of the property if it were sold with the defective house in place and with full knowledge of the issues of repair or demolition. The main difference between the two valuers was that Mr Gamby placed a residual value on the improvements, less demolition, of $175,000. He based this calculation on his assumption that the purchaser would buy the property and either live in it for up to 5 years or rent it out for a similar period before demolishing and rebuilding. Mr Clark placed no residual value for improvements but valued the property on the assumption that the owners would demolish and rebuild.

[88] When questioned at the hearing Mr Gamby stated that he believed the property would be able to be lived in for another five years as it was a well presented property and there was no obvious signs of leaks. Some of the experts did not agree with this. There is evidence that the downstairs of this property has a musty and wet smell. This was evident during the site visit on the first day of the hearing. Mr Nevill also gave evidence that samples had been tested and that stachybotrys chartarum was present in this property. Stachybotrys can result in health problems when spores become airborne and are inhaled, ingested or come into contact with the skin. This includes allergies, aggravation of respiratory problems, eye and skin irritation, headaches, nausea and flu-like symptoms. The people

at most risk are people with pre-existing asthma and those with weakened immune systems such as infants and the elderly.

[89] With the widespread nature of the defects to this property and the presence of potentially harmful moulds and mildews as well as a damp and musty smell throughout the lower level of the home I do not accept that it is reasonable to place a residual value on the improvements of $175,000. Whilst it is possible that some people may be willing to purchase the house as is and live in it for a number of years the number of people who are likely to do this would be sufficiently small to make the possibility of any value being placed on the improvements marginal. This is particularly the case with a five bedroom house as it is likely to be used for either a family or extended family situation. Very few people would be willing to expose their children or extended family to the potentially harmful effect of toxic moulds and mildews. It could also be a breach of the Residential Tenancies Act 1986 to rent the property out in this condition.

[90] I do not however accept Mr Clark's proposition that the sale of the property as is would be worth less than the land value. While there would clearly be a cost to demolishing the existing property it is more likely than not that the same concrete base would be used to rebuild. There would also be a limited value in some of the fixtures and fittings of the property which could be reused and some of the landscaping.

[91] I accordingly conclude that the 'as is' value of the site would be a little higher than the land value. Mr Gamby valued the land at $475,000, Mr Clark valued the land at $525,000 with the rateable value being $540,000. Taking into account the valuation evidence and an appropriate value for the concrete pad and reusable chattels, less demolition costs, I assess the value of the property 'as is' to be $513,000. The loss of value based on Mr Clark's valuation of

$965,000 is accordingly $452,000 which is $114,137 less than the estimated remedial costs.

[92] The claimants submit that damages to the amount of the cost of repair is the only measure that will provide fair and proper restitution for the loss they have suffered. They submit an award based on diminution value will under-compensate them and accordingly run counter to the basic principles of compensatory damages. In particular they submit that they are intending to carry out the remedial work and that they have an attachment to the property. They also submit that the remedial costs are the best and most accurate evidence of actual loss given the dispute between the valuation experts as to the value of the property 'as is'. They claim they are entitled to be put in the position they would have been in if the tort had not been committed and as they intend to restore and reoccupy the property it is reasonable to assess the damages on the basis of remedial costs.

[93] Legal authorities support the proposition that a successful claimant is not entitled to more than the value of the most appropriate remedy for the damage or loss caused. When assessing loss the Tribunal should not apply a fixed rule as there is no prima facie rule as to whether diminution of value or the cost to reinstate or restore defects is the most appropriate measure of loss. Each case must be judged on its own mixture of facts both as they affect the claimants and the other parties.[7] The Tribunal should also select the measure of damages which is best calculated to fairly compensate the claimants for the harm done while at the same time being reasonable

as between the claimants and the other parties.

[7] *Dynes v Warren & Mahoney* HC Christchurch, A252/84, 18 December 1987, Tipping J and *Warren & Mahoney v Dynes* CA 49/88, 26 October 1988; *Bell v Hughes* HC Hamilton, A110/80, 10 October 1984, Tompkins J.

[94] Tipping J in *Dynes v Warren & Mahoney*[8] stated that one of the matters to take into account when assessing loss is the nature of the property and the claimants' relationship to it. The other parties' connection with other properties is also of some relevance as is the nature of the wrongful act and the conduct of the parties subsequent to the wrong. The practicality of whether it is possible to recreate what has been damaged or unsoundly constructed on the site as originally intended and the practicality of the proposed remedial option are also appropriate considerations. Before reinstatement damages can be awarded I must conclude that is it reasonable to have the property reinstated.

[95] In this case the dwelling is the claimants' family home and their desire is to carry out the remedial work. The location, size and aspect of their home are important factors in their consideration. They have done some initial research on alternative properties they could buy in the area for the amount at which their home, undamaged, has been valued and believed this would be very difficult. They also point to the uncertainty of the valuation evidence and say the best evidence available to the Tribunal is the supported and substantiated remedial costs. They further note that apart from some minor issues of betterment none of the respondents have questioned these costings in any detail.

[96] The Council and Mr Newth on the other hand submit that it is not economic to repair as the remedial costs far outweigh the value of the property. The Council also points out that according to Ms Tao and Mr Cao's own evidence they are not in a position to be able to increase the size of their mortgage. Therefore if the full amount of the remedial costs is not awarded, or the remedial costs increase, they will not be able to complete the remedial work. The Council and Mr Newth further submit that the valuation evidence is the best evidence of loss available. While there is some difference in the

[8] HC Christchurch, A252/84, 18 December 1987

opinion of the valuers there is also uncertainty on the actual remedial costs.

[97] The key issue therefore is whether it would be unreasonable to award damages to the extent of the remedial work because the cost to the liable party exceeds what is fair. In deciding this issue I need, among other things, to consider whether it is economic to repair. Based on my conclusion as to the loss of value of the property being $452,000 I would calculate that the future remedial costs sought by Ms Tao and Mr Cao are 25.25% more than the loss of value.

[98] I must also take into account Ms Tao and Mr Cao's desire to remain living in the property and the fact it is their family home. I appreciate the concern they have that they may not be able to buy a replacement property for the amount their home has been valued when remediated. However they have done very little research into this and there is little disagreement between the valuers as to the value of the property remediated. The limited investigations done by the claimants do not negate the valuers' view that there would be other properties of a similar size in the general area for the amount at which they have valued this property once remediated. Information was provided during the course of the hearing which tended to establish that there were a large number of properties for sale in the Remuera area although it was acknowledged that many of these were being marketed without any indication of price. I am also satisfied that, for similar reasons as those given for Ms Tao and Mr Cao wishing to remediate the property, there will be a market for the property as a demolish and rebuild.

[99] I accept Ms Tao and Mr Cao's desire to carry out remedial work is sincere, and from their perspective reasonable. The decision to repair the property was however initially taken when remedial costs were significantly lower than the amount now being sought. There is now a genuine question as to whether it remains economic

to repair given the fact that the remedial costs are approximately 25% more than the loss of value. In addition even if Ms Tao and Mr Cao are successful in their claim it is not certain that they will be able to afford to carry out the remedial work.

[100] After taking all these matters into account I conclude that in the particular circumstances of this case the measure of damages best calculated to fairly compensate the claimants while at the same time being reasonable as between the claimants and the other parties is the loss of value. I have already concluded that this amount is $452,000.

[101] In addition to this amount the claimants are also entitled to a reimbursement of expenses to date in carrying out temporary repairs and remedial work. I accept that these steps were reasonable at the time the costs were expended and that it has only been the increasing cost of the remedial work which has ultimately made repair uneconomic.

[102] The claimants have also applied for general damages of $50,000 or $25,000 each. Whilst there has been some debate as to whether damages should be awarded on a per dwelling or per owner basis Ellis J concluded in *Findlay Family Trust*[9] that the *Byron Avenue*[10] appeal confirmed the availability of generally damages in leaky building cases in general was $25,000 per dwelling for owner occupiers. Ms Tao and Mr Cao have both suffered considerable stress and difficulty as a result of having a leaky home. I accordingly accept that it is appropriate to award general damages of $25,000.

[103] Ms Tao and Mr Cao have accordingly established their claim to the amount of $561,547. This amount is calculated as follows:

Loss of value	452,000
Professional & consent fees to date	68,446

[9] *Findlay & Anor as Trustees of the Lee Findlay Family Trust v Auckland City Council* HC Auckland, CIV-2009-404-6497, 16 September 2010.
[10] *O'Hagan v Body Corporate 189855* [2010] NZCA 65.

Repair costs	4,669
Valuation fees	1,450
Interest	9,982
General Damages	25,000
	561,547

IS THE CLAIM LIMITATION BARRED?

[104] Mr Newth in his initial response submitted that the claim was limitation barred both under the ten year limitation under the Building Act 2004 and the six year provision under the Limitation Act 1950. At the beginning of the hearing Mr Newth abandoned his claim for limitation under s393(2) of the Building Act on the basis of *Kells v Auckland City Council.*[11] In closing submissions however counsel for Mr Newth sought to reopen this affirmative defence as they say that during the course of the hearing they became aware of the recent decision of *Body Corporate 169791 v Auckland City Council* (*Farnham Terraces*).[12] In that case the Court concluded that a party could not seek contribution from a third party more than ten years after the alleged defective work had occurred. They say that Mr Newth was joined to this claim on the application of TTAL more than ten years after the work he carried out.

[105] Even if it were appropriate for Mr Newth, in closing submissions, to reintroduce a defence which he had abandoned, his submission that the claim is limitation barred based on the long-stop provision of the Building Act is not tenable. I do not accept Mr Newth's counsel submission that the decision in *Farnham Terraces* questions the applicability of *Kells*. In *Kells* Asher J concluded proceedings in the Tribunal are different to those in the High Court and that the effect of section 37 of the Act means the date of filing the claim with the Department of Building and Housing is the relevant date for determining limitation issues and not the date for filing with

[11] HC Auckland, CIV-2008-404-1812, 30 May 2008, Asher J.
[12] HC Auckland, CIV-2004-404-5225, 17 August 2010, Lang J.

the Tribunal or the date a party is joined. This is not a situation with a cross-claim or one where the *Dustin*[13] versus *Cromwell*[14] argument is particularly relevant. While Mr Newth may have been joined on the application of another party the claimants are now pursuing a claim against him.

[106] The claim was filed with the Department of Building and Housing within ten years of the construction of the property and within ten years of the work done by Mr Newth. The claim accordingly is not limitation barred under s393 of the Building Act.

[107] Mr Newth also submitted that the claim was limitation barred under the Limitation Act 1950. He submits the claimants should reasonably have become aware that leaks had been experienced at the time of purchase. There is evidence that there had been a leaking problem in 1998. Mr Tay when questioned about this acknowledged that a claim had been lodged with his insurance company which was accepted. Repairs were carried out and he said there were no subsequent leaks. No other evidence was given to establish that there were any other issues with leaking to this property between 1998 and the first leaks Ms Tao and Mr Cao experienced in mid-2004. There is no evidence that the Vincent Group experienced any leaks with the property while it was the owner. Therefore even if Ms Tao and Mr Cao had asked questions of the vendors before purchasing there is no basis on which I could conclude that they would have been told of any leaking problems.

[108] Mr Newth has the onus of proof to establish a six year Limitation Act defence. He has not established that the cause of action accrued more than six years before the claim was filed. I accept that the 1998 leak damage was repaired and believed to have

[13] *Dustin v Weathertight Homes Resolution Services* HC Auckland, CIV-2006-404-276, 25 May 2006, Courtney J.
[14] *Cromwell Plumbing Draining & Services Ltd v De Geest Brothers Construction Ltd (1995)* 9 PRNZ 218, Hansen J.

been fixed. That current damage is sufficiently separate and distinct to this earlier damage and leak.

[109] The Court of Appeal in *Sunset Terraces*[15] also concluded that where a previous owner has experienced leaks that is not necessarily a defence to a claim from a subsequent owner. The Court concluded:

> "Purchasers generally must be able to claim against those responsible for the condition of the leaky building unless they have such knowledge, or means of knowledge, as entails acceptance of its condition... It is commonly the case that the original owner knows or should know that there is deficiency in the workmanship. But that says nothing about the position of later buyers who are to be judged on what they know or should know. They may be caught by the ten year limitation under section 91. But there is no good reason to visit them with matters of which they are unaware."

[110] I am satisfied that Ms Tao and Mr Cao were not aware of any leaking issues at the time of their purchase. I do not accept the submissions made on behalf of Mr Newth that the claimants should have been put on notice by the fact that the property had been newly decorated at the time they purchased. Ms Tao and Mr Cao reasonably thought that the vendors were trying to present the property in its best light rather than redecorating the property in an attempt to cover up defects. In any event there is no evidence that Vincent experienced any leaks or had any knowledge of any weathertightness issues.

[111] I am satisfied therefore that the cause of action did not accrue until at least 2004. The claim was filed within less than 12 months of that time. The limitation argument accordingly fails.

[15] *North Shore City Council v Body Corporate 188529* [2010] NZCA 64.

WERE MS TAO AND MR CAO CONTRIBUTORILY NEGLIGENT?

[112] Awards of damages can be reduced because of contributory negligence where there is a failure on the part of the claimant to take reasonable care to protect his or her interests where they were, or ought to have been known to the claimant and reasonably foreseeable. Section 3 of the Contributory Negligence Act 1947 allows for apportionment of responsibility for damage where there is fault on both sides or fault on the part of the claimant and other parties. Fault is defined by s2 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."

[113] For fault to be established the conduct must fall below the standard to be expected of a person of ordinary prudence. Contributory negligence does not depend so much on a breach of duty but on a person's carelessness in looking after his or her own safety. A person may be contributorily negligent if they ought reasonably to have foreseen that, if they did not act as a reasonably prudent person, they might be hurt themselves. The reasonable foreseeability of the risk of harm by a claimant is a prerequisite to a finding of contributory negligence. Any negligence or fault must be causal and operative.

[114] Mr Newth and the Council submit Ms Tao and Mr Cao were negligent in failing to obtain a pre-purchase report. The Council submitted that at some point the general knowledge of risks inherent in purchasing stucco homes must have reached a point that any purchaser buying a house without making any further enquiries would be potentially guilty of contributory negligence. The difficulty with the Council and Mr Newth's argument is that there has never

been an expectation in New Zealand that a potential homeowner commission a report from an expert to establish that the dwelling is soundly constructed. Heath J in *Sunset Terraces*[16] stated:

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

[115] Justice Stevens in *Hartley v Balemi* overturned a WHRS adjudicator's decision reducing an award on the basis of contributory negligence for failing to obtain a pre-purchase inspection. In doing so Justice Stevens concluded that the question of fault is to be determined objectively and requires the claimant to exercise such precautions as someone of ordinary prudence.

[116] I do not necessarily disagree with the Council's submission that at some point the general knowledge of the risks inherent in purchasing a stucco or monolithically clad home reaches a point where any reasonable purchaser buying a home should make further enquiries and failure to do so would mean they are guilty of contributory negligence. However Ms Tao and Mr Cao purchased this property in 2003. Whilst the leaky home issue was getting media coverage by that stage it certainly had not reached the point where the risks were so well known that a reasonable purchaser would have obtained a pre-purchase report.

[117] The Council and Mr Newth have the burden of proving contributory negligence. Even if I were to accept that Ms Tao and Mr

[16] See n2 above.

Cao should have obtained a pre-purchase inspection there is insufficient evidence for me to conclude that there would be a causal link between their failure and the loss they have suffered. There is little reliable evidence on which I could conclude that a reasonably competent pre-purchase inspector in 2003 would have identified many of the risks that have now become apparent with this property. Whilst the issue with the ground clearances would certainly be capable of being detected on a visual inspection even Mr Newth's own expert said that these issues were not considered as seriously in 2003 as they are now.

[118] For similar reasons I do not accept Mr Newth's submissions that Mr Feng, the claimants' lawyer, was negligent in failing to advise Ms Tao and Mr Cao of the risk of leaky homes and to obtain a pre-purchase inspection report. Counsel for Mr Newth relies on Justice Venning's comments in *Byron Avenue.*[17] In that case Justice Venning concluded that a duty of care does not extend to anyone who purchases with actual knowledge of the defect or in circumstances where he or she ought to have used their opportunity for inspection in a way that would have given warning of a defect. Venning J however goes on to say that a defendant who wishes to avoid liability on the ground of lack of reliance placed on the possibility of intermediate examination by the plaintiff has a significant hurdle to overcome. In that case contributory negligence was found because no CCC had ever been issued and the purchasers had not obtained a LIM. He also concluded, in relation to the claim by Ms Hough who purchased in March 2002, that failing to insert a condition requiring a professional report or pre-purchase inspection did not amount to contributory negligence.

[119] In this case the house presented as a well maintained recently redecorated home. Ms Tao and Mr Cao did get a LIM report. Although it was obtained from the vendors' agent it had been

[17] See n4 above.

recently issued and there would have been no good reason to obtain a further LIM report.

[120] I accordingly conclude that neither the Council nor Mr Newth have established that Ms Tao and Mr Cao were negligent in failing to carry out any further inspections or obtain a pre-purchase report. In addition the claimants and Mr Newth have failed to establish that there would be a sufficient causative link between any alleged negligence and the loss now suffered. The contributory negligence defence accordingly fails.

DID THE CLAIMANTS FAIL TO MITIGATE THEIR LOSS?

[121] Mr Newth in his response and in opening submissions submitted that any award of damages should be reduced by Ms Tao and Mr Cao's failure to mitigate their loss. This issue was not specifically pursued at the hearing and was not covered in any detail in closing submissions. In summary Mr Newth submitted that the claimants failed to mitigate by failing to maintain the property properly, attaching items to the wall of the property without properly sealing the entry points, failing to wash the property and failing to carry out repairs to rectify defects.

[122] There was no evidence presented to support any of these allegations. To the contrary the evidence suggests that the property has been reasonably well maintained since it was purchased by Ms Tao and Mr Cao. They took relatively prompt and reasonable steps to investigate the issues on first becoming aware of leaks. Whilst there has been a delay in carrying out the remedial work that has largely been caused by the inability to obtain finance so they have not been able to afford to carry out the work. There is also insufficient evidence to establish that any delay or lack of action or maintenance by the claimants has either increased the damage or significantly affected the remedial costs. I accordingly conclude that

Mr Newth has failed to establish that Ms Tao and Mr Cao failed to mitigate their loss.

WHAT CONTRIBUTION SHOULD EACH OF THE LIABLE PARTIES PAY?

[123] Section 72(2) of the Weathertight Homes Resolution Services Act 2006 provides that the Tribunal can determine any liability of any respondent to any other respondent and remedies in relation to any liability determined. In addition, section 90(1) enables the Tribunal to make any order that a Court of competent jurisdiction could make in relation to a claim in accordance with the law.

[124] Under section 17 of the Law Reform Act 1936 any tortfeasor is entitled to claim a contribution from any other tortfeasor in respect of the amount to which it would otherwise be liable.

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

> Where damage is suffered by any person as a result of a tort… any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is… liable in respect of the same damage, whether as a joint tortfeasor or otherwise…

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

[127] One of the difficulties in assessing contributions in this claim is that as like many other claims, some of the parties primarily responsible for the defects are not parties to this claim either because they could not be identified or because they are bankrupt, in

liquidation or struck off. Ellis J in *Findlay*[18] stated that apportionment is not a mathematical exercise but a matter or judgment, proportion and balance.

[128] Mr Tay was one of the developers. He made key decisions in relation to changes to the plans and also some of the other building methods for this property. He should be responsible for a significantly greater contribution than Mr Newth who at all times worked under the instructions or directions of both Mr Tay and TTAL.

[129] Mr Newth's contribution however should not be less than that of the Council as whilst not primarily responsible for some of the defects he personally undertook some of the work that has caused or contributed to the damage. I accordingly set both the Council and Mr Newth's contribution to be 20% each and Mr Tay's contribution to be 60%.

CONCLUSION AND ORDERS

[130] The claim by Hai Cao and Yanming Tao is proven to the extent of $561,547.00. Auckland City Council, Brian William Newth and Tony Tay are all jointly and severally liable for this amount. For the reasons set out in this determination I make the following orders:

i. Auckland City Council is to pay the claimants the sum of $561,547 forthwith. Auckland City Council is entitled to recover a contribution of up to $455,237 from Brian William Newth and Tony Tay for any amount paid in excess of $112,310.

ii. Brian William Newth is ordered to pay the claimants the sum of $112,310 forthwith. Brian William Newth is entitled to recover a contribution of up to $455,237 from

[18] See n8 above.

the Auckland City Council and Tony Tay for any amount paid in excess of $112,310.

iii. Tony Tay is ordered to pay the claimants the sum of $561,547 forthwith. Tony Tay is entitled to recover a contribution of up to $224,620 from the Auckland City Council and Brian William Newth for any amount paid in excess of $336,927.

iv. The claim against Selina Tay is dismissed.

[131] To summarise the decision if the three liable parties meet their obligations under this determination, this will result in the following payments being made by the liable respondents to this claim:

Second Respondent, Auckland City Council	$112,310.00
Third Respondent, Brian William Newth	$112,310.00
Fourth Respondent, Tony Tay	$336,927.00

[132] If any of the parties listed above fails to pay his apportionment, this determination may be enforced against any of them up to the total amount they are ordered to pay in paragraph 130 above.

DATED this 24th day of September 2010

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Patricia McConnell

Tribunal Chair