IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2009-100-000067
[2010] NZWHT AUCKLAND 31

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 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

Hearing: 17, 18, 19 and 20 August 2010

Final Written
Submissions received: 7 September 2010

Closing Oral Submissions:	10 September 2010
Counsel Appearances:	Mr P Wright and Ms J Reid for the claimants Mr P Grimshaw and Mr B Easton for the first respondents Mr D Heaney SC and Ms C Goode, counsel for the second respondent Mr M Talbot, counsel for the fourth respondent Mr P Napier, counsel for the fifth respondent
Decision:	28 October 2010

FINAL DETERMINATION
Adjudicator: K D Kilgour

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INTRODUCTION

[1] In 1997/1998 Mr and Mrs Boe, built a large and expensive home in North Hamilton on the banks of the Waikato River that never received a Code Compliance Certificate (CCC). Mr and Mrs Boe are two of three trustees of the Boe Family Trust and were the only trustees that participated in these proceedings.

[2] The claimants, Mr and Mrs Aldridge, purchased the dwelling from the Boes in December 2006. The Aldridges were aware that they were purchasing a home with weathertight defects and that the second respondent, Hamilton City Council, would not issue a CCC without a weathertightness report. Subsequent to purchase, the Aldridges have been unable to obtain a satisfactory weathertightness report in order for the Council to issue a CCC.

[3] The Aldridges lodged their claim on 2 July 2008 with the Department of Building and Housing whereby the assessor's report evidenced the defects and the leaks occurring to the house. Accordingly the Aldridges seek full remedial costs from the four remaining respondents participating in this proceeding:

- First respondents - Mr and Mrs Boe, previous owners
- Second respondent - Hamilton City Council, territorial authority
- Fourth respondent - Mr Swart, labour-only builder
- Fifth respondent - Mr Murphy, building surveyor engaged by the Boes

[4] It is noted that as the sixth respondent, Mr Ken Martin, was adjudicated bankrupt on 16 April 2010, the claimants no longer proceeded with their claim against him.

FACTUAL OVERVIEW

Construction of the Dwelling

[5] In 1995 the Boes purchased the land at 11 Riverlinks Lane, Hamilton through their family trust and soon after Mrs Boe arranged for plans to be drawn up for a new dwelling to be built on the land. According to Mrs Boe, the dwelling was intended to be their dream home which they were going to reside in indefinitely.

[6] The third respondent, Mr Scott, was engaged by Mrs Boe to draw up plans for their new home. Mr Scott had previously drawn up plans for alterations and extensions to the Boes' beach house and was described by Mrs Boe as an experienced architect. Mrs Boe wrote to Mr Scott with extensive specifications for the home she wanted him to design. Mrs Boe continued to correspond with Mr Scott regarding further specifications over the following year, and with the Boes residing in Hamilton and Mr Scott in Whangamata, the design process took a little longer than normal.

[7] The Boes also engaged an engineer for all ground and foundation work. However as the engineer had not completed that work by the time Mr Scott had finished the plans, it was decided that the Boes would apply to the Council for a two-stage building consent to prevent further time delay. Accordingly the first building consent application was lodged and later approved for solely the foundations, retaining walls and concrete slab.

[8] In order to finalise the plans for the home Mrs Boe wrote to Mr Scott with further specifications. In response, Mr Scott indicated that although the house was initially to be about 350m² in area and cost about $425,000, the floor area would now be 794m² and therefore estimated at about $800,000 to construct due to the ongoing additions.

[9] Sometime in early January 1997 the plans and specifications were complete to the Boes' satisfaction. Mrs Boe then completed and lodged the necessary application for the stage two building consent giving the estimated value for the building of the home at $500,000.

[10] Since late August 1996 Mrs Boe had been seeking planning permission from the Council for the construction. However on 14 March 1997 the Council finally granted resource consent for the construction of the new home and as a result, consent for stage two of the construction was also issued on 9 April 1997. Mr Scott had no involvement after the Boes received the stage two building consent.

[11] The Boes had difficulty retaining a builder to build the house. Mr Harvey, who previously carried out building work for the Boes' motel, was initially engaged by the Boes to build the house. It was intended that he would be in charge of the construction on a day-to-day basis with Mr Scott supervising the construction but after spending a week on the site trying to peg out the home and mark off heights and levels, Mr Harvey explained that the proposed home was too complicated for him and beyond his expertise. The Boes thereby began discussions with another builder recommended by Mr Harvey, but that builder also reached the same conclusion. In the end the Boes engaged the fourth respondent, Mr Swart, on a labour-only basis to erect the framing, install the external and internal joinery, and to fit the Harditex cladding and the internal gib board. There was no written contract for Mr Swart's employment.

[12] Mr Swart commenced work in either late December 1996 or early 1997. He had some role in co-ordinating the sequential operation of the other trades, but he did not have any supervisory or management control over the other trades engaged by Mrs Boe. Mr Swart was also the person who contacted the suppliers for materials to be delivered when necessary, but he did not supply any of the

materials himself as the Boes sourced and purchased the materials. It is noted that during construction Mr Swart contacted Mr Scott on two occasions in relation to the flashings and sill detail around the windows. However as Mr Scott had already been disengaged from the project, Mr Scott made it clear that his involvement in the construction had ended and indicated that he was not at all willing to assist.

[13] Mr Swart completed his work on the main part of the dwelling between early 1998 and March 1998 with the main building envelope having all been completed by the end of 1997, including the framing, joinery installation, roof, plastering, internal lining and gib stopping. Although Mr Swart also erected most of the foundation work he did not do all of it as some of the foundation work had already been commenced by Mr Visser when he arrived on site. Mr Visser was engaged by the Boes to commence the foundation work particularly for the squash court and its retaining wall. Mr Swart had no involvement in that particular work.

[14] Whilst Mr Swart was on site he called for building inspections to be undertaken during construction. The last building inspection during the construction process was the pre-lining inspection in September 1997.

[15] The Boes took occupation of the new home sometime between early autumn 1998 and mid-summer 1999. 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. That site visit resulted in a letter dated 8 February 2000 from the Council listing seven items still to be completed[1] and that reasonable progress of the building work

[1] These items are not relevant to the present claim.

should be made within 12 months after work has commenced. The letter concluded with the following advice to the Boes:

> "Upon satisfactory completion of the project, a Code Compliance Certificate will be issued which is normally a requirement should you ever wish to sell your property, which would also avoid any delay should a proposed purchaser request a Land Information Memorandum from Council.
>
> We look forward to receiving your advice of completion of building work."

[16] The Boes did not arrange for a final inspection until 2005 when they decided to relocate to Australia and therefore sell the home. The real estate agent suggested to the Boes that they should get a price of around $3million and on 6 October 2005 the agent received a market valuation of $2,752,000.00 including chattels from Darragh Fergusson & Green. According to Mrs Boe an offer for $2.9million was made soon after the property was marketed and that the potential buyer wanted to get a contract signed. However it was when that potential buyer asked for a copy of the CCC that the Boes discovered that their property did not have one as they never called for a final building inspection. In September 2005 Mrs Boe arranged for a final inspection to be carried out on the property but by that time, the proposed buyer "had gone cold on buying the house because of the lack of a CCC". The real estate agent therefore told Mrs Boe that without a CCC the house would be much more difficult to sell and that the price achieved would be significantly reduced.

[17] The Council's building inspector confirmed at the final inspection visit in September 2005 that all seven items that were outstanding from 2000 had been completed. However, since construction had been completed several years earlier the Council was not prepared to issue a CCC until an independent report about the cracks on the exterior was received. The need for an independent report was further reinforced by Mr Saunders, the

Council's Building Control Manager, in a telephone conversation with Mrs Boe the following day where he stated that due to the length of time that had lapsed, the Council needed to consider any maintenance issues and therefore an independent report into the cracking in the Harditex was required before the Council could issue a CCC.

[18] Mrs Boe telephoned Mr Murphy, a registered building surveyor whom the Boes had engaged on earlier occasions to carry out other building related investigations on properties they owned or had an interest in. She explained the difficulty she was having in selling the home as it required a CCC and asked if he could therefore take a look at the house to assist her in getting a report to the Council for the issue of a CCC. Mr Murphy's diary note of 22 September 2005 indicated that Mrs Boe had telephoned him that the cladding had been carried out in 1997, that the local authority consent had not been signed off and that the Council on a recent site visit had agreed to accept a Producer Statement Report. Mr Murphy also noted that the matter was urgent and that although the Boes were absent from the home, their daughter was staying in the house.

[19] Mr Murphy visited the house on 8 October 2005 and took a number of photographs but as it was raining heavily that day, he was unable to carry out any non-invasive testing and his outside inspection was restricted. Mr Murphy observed that the house consisted of a number of different cladding systems including concrete masonry, Harditex and insulclad, and that the cracking to the exterior, although very minor, was extensive. From that visit, Mr Murphy determined that he was not in a position to reasonably provide a report to the Council for the obtaining of a CCC as he was not involved with the build or any inspections during the building; nor was he prepared to assess the entire cladding system or its installation.

[20] In response to an email from Mrs Boe, Mr Murphy stated his concerns regarding the dwelling's potential moisture ingress and therefore his nervousness in providing a statement as to its weathertightness. He stated that:

> "...There is also extensive movement and cracking of the cladding that is obviously also interacting with moisture, either as a cause or more probably as an aggravating factor to an original movement crack. These issues are fundamental to compliance with Building Code and compromise compliance with sections E2 and B2 particularly.
>
> Any maintenance will need to be carried out by a company very well trained and experienced specifically in this type of work. I observe there have been earlier repairs that has seen joints ground out and sealed..."

[21] On 14 October 2005 Mrs Boe wrote to Mr Murphy explaining the circumstances surrounding the Council requiring a report on the cracking. She stated in February 2000 a Council inspector went out to the house to carry out a final inspection and during that visit the inspector identified seven items that needed to be completed. These items were listed in the Council's letter of 8 February 2000 which Mrs Boe enclosed. Mrs Boe explained that a Council inspector returned to the property in September 2005 and found that the outstanding items had been completed to his satisfaction and that although the house looked to be in a very good condition, the inspector noticed some cracking on the exterior of the house. Due to the length of time that had lapsed since the completion of the house, Mrs Boe stated that she was therefore required to get an independent report in relation to the cracking before a CCC could be issued and that when the inspector received such report, the CCC would be issued.

[22] There are some inaccuracies in Mrs Boe's letter to Mr Murphy as the abovementioned building inspection in February 2000 was not for final inspection, and the Council's letter of 8 February

2000 did not state that upon completion of the seven items listed a CCC would be issued.

[23] On 5 November 2005 Mr Murphy revisited the house and following that inspection, he provided a report to Mrs Boe headed "Assessment of Cracks in Harditex Cladding", which she copied to the Council. The report identified cracking to the Harditex and that moisture testing suggested that moisture had begun to penetrate the cracks. Although the report stated that the cracks were at a relatively low level risk at that stage, advice on remedial and maintenance work was provided. It was recommended that such work be done and not be deferred to another winter season. The report also included the usual disclaimer which stated that the report was prepared for Mrs Boe's use only and that it was not to be relied upon by other persons without Mr Murphy's written approval.

[24] For reasons that were never explained at the hearing, the cracks were not repaired and the house was not repainted until the spring of 2006. At this time the Boes were residing in Australia.

[25] In a letter dated 17 March 2006 the Council wrote to Mrs Boe advising that before a CCC could be issued it required the cracks repaired and a producer statement from the cladding repair contractor confirming that repairs have been completed in accordance with the manufacturer's specifications. The Council required confirmation that the cladding met the 15 year durability requirement under the Building Act. Due to the age of the dwelling, this requirement necessitated a total repaint on the basis after six to eight years, water starts to penetrate the paint system. Once this work was completed, the Council required a weathertightness report. If the report was acceptable to the Council, it would then consider whether a CCC would be issued.

[26] In September 2006 the Boes approached another real estate agent, Ms Fischer, in order to sell their home. In statements made to Ms Fischer, both verbally and in an email, the Boes stressed the need to ensure that any potential purchaser fully understood that there was no CCC. As a result, the Boes provided Ms Fischer with the following documents to copy to any serious potential purchaser:

a) Valuation report from Darragh Fergusson & Green;
b) The Council's letter dated 8 February 2000;
c) Mr Murphy's report into the cracking of the cladding; and
d) The Council's letter dated 17 March 2006.

[27] According to Mrs Boe, Ms Fischer stated that $3million was a realistic price if the house had a CCC but without such, the house would be difficult to sell and the price would be substantially less. For that reason Ms Fischer's advice was for the house to be auctioned.

[28] On 23 October 2006 Mrs Boe emailed Mr Murphy mentioning that the Boes were getting buyer resistance because their home did not have a CCC. She mentioned that as a serious buyer thought there was a possibility that the whole place would need to be reclad in order to get code compliance, "is there any way you could help us get this Code of Compliance (maybe if we indemnified you)". Mrs Boe concluded her email by emphasising that as the house was due to be auctioned on 15 November, they needed to act fast.

[29] Mr Murphy did not respond to this email as he was not in a position to assist. However he did speak with Mrs Boe on 1 November concerning another property owned by the Boes. During that conversation Mrs Boe asked Mr Murphy to provide a very brief conclusion to his earlier report on cracks to the Harditex but Mr

Murphy refused stating that his report had to be read in its entirety or it could be misconstrued.

[30] On 13 November 2006 Mrs Boe emailed Mr Murphy stating that an interested buyer, Mr Aldridge, had received a copy of his report.

Purchase of the Dwelling

[31] In 2005 the claimants, Mr and Mrs Aldridge, decided to purchase a house on the river in Hamilton. They had already underbid at auction on two other riverside properties and were unsuccessful – one sold for $1.8million and another for $2.5million. Mr Aldridge said that he had viewed several other properties and had gained a good feel for market value. Nearing the end of October 2006 Mr Aldridge's real estate agent introduced him to Ms Fischer.

[32] Mr Aldridge mentioned that it was very important to them that they make a thorough pre-purchase investigation and carry out proper due diligence on the property. Accordingly they obtained a LIM report for the Boes' house dated 10 November 2006 and were advised by their solicitor that there were no issues with the title to the property. The LIM report contained the Council's letters of February 2000 and March 2006 and disclosed that the property had no CCC for the stage two build. Mr Murphy's report was not attached to the LIM report.

[33] Mr Aldridge visited the Council twice prior to the auction. On one of those visits he carefully examined all the documents on the property's file which did not contain any plans or copies of any building reports. The two letters from the Council to the Boes in February 2000 and March 2006 were again included.

[34] On a visit to the property Mr Aldridge noticed that the painting was nearing completion. Mr Aldridge spoke to the painter to ascertain that the painting had been completed properly. He also received from his real estate agent a summary of the work prepared by the painter which Mr Aldridge said he understood to be the producer statement required by the Council. At this stage, Mr Aldridge said that he satisfied himself in discussions with the painter that the plastering repairs and painting work had been completed to the manufacturer's specifications.

[35] Mr Aldridge received from his agent a copy of the valuation of 6 October 2005 stating that in October 2005 the current market value was $2,752,000.00 inclusive of chattels. He also received from their agent an undated letter from Mrs Boe to Ms Fischer stating, amongst other matters, that:

> ...I think the Council should give us a letter stating that all the required Building Consents were obtained, the house was built as per the submitted plans, all required engineering certificates and Producer Statements were produced and provided to the Council, all required inspections were carried out by the Council. But the final paperwork was never completed and so no Code of Compliance was issued. Now because of the time delay and age of the house the Council will not issue a Code of Compliance.
>
> BUT then I was told that because of the time lapse the Council would not issue a Code of Compliance because it could not be backdated – it would have to have today's date on it and under the Code of compliance law that means the Council have to guarantee the house for the next 15 years. The Council will do that for the first 15 years of a new house but as our house is already 5 years old they would not do it (effectively that would be issuing it to a 5 year old house up until it was 20 years old).

[36] Mr Aldridge approached an officer at the Council to discuss the above letter, particularly the part that: "the Council would not issue a Code Compliance Certificate as it could not be backdated

and that the Council would have to guarantee the house until it was 20 years old". The Council officer told Mr Aldridge that that decision would be made by Mr Saunders. According to Mr Aldridge, he tried to contact Mr Saunders but he was unsuccessful as he was on annual leave.

[37] Mr Aldridge later learned that Mr Murphy had prepared a report and eventually received a copy of the report from his real estate agent on the day before the auction. On 14 November 2006 Mr Aldridge phoned Mr Murphy and asked him to confirm the report and enquired about the cladding issues identified. Mr Murphy confirmed he had written the report and stated that he did not undertake a code compliance report, the house was nearly ten years old and expressed the same concerns as the Council. In response to Mr Aldridge's enquiries over repairs undertaken by Mr Martin, Mr Murphy said that although he had not been present during or after such repair works, he knew Mr Martin's work and had no reason to believe that the repairs to the cracks would have been other than well done. The conversations, which was no longer than seven to ten minutes, concluded with Mr Murphy telling Mr Aldridge that if he did not want a property with a high level of cladding maintenance, "then a plaster clad house may not be for him".

[38] Mr Aldridge attended the auction. At the commencement of the auction the auctioneer stated that the house did not have a CCC, that the vendors would not be getting one and that the vendors make no representations about the state of the house. Nevertheless, after subsequent negotiations with the Boes' agent, Mr Aldridge signed an unconditional contract on behalf of the Aldridge Family Trust to purchase the property for $2.35 million. The Aldridges took occupation of the property following settlement of the purchase in December 2006.

[39] On 7 March 2007 Mr Aldridge met with Mr Saunders at the Council. This meeting eventually led to a series of events culminating in Mr Aldridge receiving a final determination from the Department of Building and Housing on 29 May 2008 that the property did not comply with the Building Code. Consequently, the Council issued a Notice to Fix on 13 June 2008 and Mr Aldridge lodged the present claim with the WHRS on 7 July 2008.

PRINCIPAL ISSUES

[40] In setting out the material facts surrounding the present claim, the initial and salient issues requiring determination are:

(i) The defects occurring to the dwelling;
(ii) The quantum of the claimants' loss;
(iii) The responsibilities, if any, of the respondents in relation to that loss; and
(iv) The responsibility, if any, of the claimants for their own loss.

DEFECTS

[41] An experts' conference was convened on 10 August 2010 and was attended by the following experts, all of whom I accept are well-qualified to give expert evidence:

- Mr C Phayer, the WHRS assessor;
- Mr P O'Sullivan, for the claimants;
- Mr T Jones, for the first respondents;
- Mr G Bayley, for the second respondent;
- Mr P Jordan and Mr P Probett, for the fifth respondent;

- Mr P Ranum (costing only), for the first respondent;
- Mr S Albrecht (costing only), for the claimants.

[42] Mr Phayer was the only expert who had undertaken invasive and destructive testing to the dwelling with his findings recorded in an extensive expert report of 6 November 2008. No expert was critical of Mr Phayer's report or his scope of works and considerable consensus emerged from the assembled experts as to defects causing the damage as a result of the moisture ingress. As a result, the experts agreed that the following defects were the material causes of moisture ingress:

(i) Cladding
(ii) Window edge
(iii) Lack of horizontal control joints
(iv) Flat top to balcony balustrades
(v) Inadequate clearance to the deck surface.

[43] During the second day of the hearing, the experts as to defects, joined by Mr Hursthouse who was an expert for the fourth respondent, were empanelled. All experts gave evidence honestly and on a factual basis.

[44] Mr Jones visited the site two days prior to the hearing while Mr Hursthouse visited the site on the morning of the second day of the hearing. Remedial work on the dwelling had commenced in late June 2010 and at the time of Mr Jones and Mr Hursthouse's visits, approximately 10% of the home had been unclad as a result of the remedial work to be undertaken. The evidence provided by Mr Jones and Mr Hursthouse was therefore able to effectively corroborate the findings and evidence provided by Mr Phayer.

[45] According to Mr Hursthouse and Mr Jones the significant moisture ingress damage suffered by this home relates to the cladding, particularly the cladding to ground clearance defects. They also stated that their visits clearly revealed that the resulting timber damage necessitating timber replacement would not be in excess of 25%, indeed somewhere between 10%-25%.

[46] As there was no substantial dispute as to the key causes of damage I accordingly conclude, after considering all the expert evidence as to defects, that the primary causes of the moisture ingress occurring to the home are:

a) Cladding:
   - Inadequate cladding to ground clearances
   - Bottom edge of Harditex cladding not protected as required by Harditex manufacturer. I accept the expert evidence on this defect notwithstanding the evidence that Mr Buckman, the plasterer, had pre-sealed the Harditex cladding after it was delivered to the building site and before Mr Swart installed it
   - Bottom edge of Harditex cladding not overlapping plaster block work.

b) Window edge: the return surfaces of reveal had no drip edge even though the building consent and the James Hardie literature required one.[2]

c) Lack of horizontal control joints: a breach of the manufacturer's literature and the building consent.

d) Flat tops to balcony balustrades: breach of the building consent and the manufacturer's literature

e) Inadequate clearance to the deck surface: it is noted that during his visit to the remedial site, Mr Hursthouse

[2] See item 3, Leaks List prepared by Mr O'Sullivan.

saw four of the five decks unclad and observed no damage from this defect.

Remedial Work

[47] The abovementioned causes of the leaks have resulted in moisture ingress and timber decay. Although Mr Bayley considers a full reclad marginal, all the other experts as to defects are of the opinion that a full reclad is required for the home. As there is sufficient consensus from the experts that a full reclad is necessary, I therefore conclude that the repair work necessary to remediate this home requires that it be fully reclad.

QUANTUM

Remedial Costs

[48] The claimants have engaged Prendos Ltd as their remediation specialists. Prendos undertook a tendering process whereby three tenders were received and negotiations for the remediation contract were made with the lowest bidder. The majority of the experts stated that Prendos' tendering process was appropriate, robust and reached a fair and reasonable result.

[49] The claimants' quantum expert, Mr Albrecht of Prendos, calculated his costings differently from the other experts on quantum, and as a result a line by line comparison was not possible. Accordingly the quantum experts gave evidence as a panel and the panel essentially worked from Table 1 and Table 2 of Mr Ranum's brief of evidence. The panel was in reasonable consensus with the quantum of the claim, except for Mr Albrecht and Mr O'Sullivan whose concerns were based on their quantum methodology and the confidence in the negotiated tender pricings.

[50] Whilst I accept that remedial work is difficult to estimate, it is important to note that the experts were assisted by the evidence of Mr Jones and Mr Hursthouse who had visited the remedial building site once 10% of the cladding had been removed. Taking into account the evidence before the Tribunal as well as the majority view of the experts' panel, I conclude that the reasonable and realistic costs for the necessary remedial work in order to restore the home to a weathertight Code compliant dwelling to be $755,683 excluding GST, based on the following amounts:

Revised tender[3]		$565,808.00
Provisional sum[4]		$56,175.00
	Subtotal	**$621,983.00**
Contingency (10%)		$52,900.00
Consultants' fees		$72,800.00
Council fees		$8,000.00
	Total (excl. GST)	**$755,683.00**

Consequential Costs

[51] In addition to the remedial costs the claimants seek $35,670 in consequential costs based on the following amounts:

Moving and storage	$12,250.00
Landscaping and planting	$14,000.00
Air conditioning removal and reinstatement	$3,000.00
Insurance	$6,420.00

[52] I accept that the claimants will need to move out of their home and place their furniture in storage off site until the remedial work is completed; and although there has been no serious challenge to any of these amounts, there were some differences in

[3] Mr Ranum's Brief of Evidence, Table 2: Lump sum works of $508,035 plus Mr Phayer's wall reinstatement figure. I preferred Mr Phayer's evidence on the wall reinstatement figure of $86,563; an adjustment to Table 2 of $57,773.

[4] This was arrived at starting with Mr Ranum's adjusted provisional sum amount of $131,400. I determine that this sum is more realistic than Mr Albrecht's adjusted sum after listening to the panel's evidence and then deducting betterment: P & G ($65,525), windows ($18,350)

opinions as to how long the remedial work would take thereby affecting the costs for moving and storage. Messrs Phayer and O'Sullivan both estimated that the remedial work will take some 40 weeks. Mr Bayley estimated that the remedial work will take 26 weeks and Mr Jones estimated it at 20 weeks.

[53] I accept that the repairs to this house will be a large and complex job, notwithstanding that the timber decay replacement is most probably considerably less than Prendos first expected. Accordingly I find that the more realistic period for accommodation is 40 weeks and therefore the claim for consequential costs is upheld to the full extent of $35,670.

RESPONSIBILITY OF THE FIRST RESPONDENTS, MR AND MRS BOE

[54] The specific causes of action levelled against the Boes by the claimants are both in contract based on pre-contractual misrepresentation and breach the Agreement for Sale and Purchase, and tort in terms of their duty as developers, builders and/or head contractors. Mr Grimshaw, counsel for the Boes, however submits that each of these causes of action alleged by the claimants fail against all respondents based on the defence of volenti non fit injuria (voluntary acceptance of risk) and the argument that the respondents did not cause the claimants' loss. The issue that the Tribunal must therefore focus on in this determination is whether the respondents caused the loss which the claimants have in fact suffered, or whether that loss was caused by the claimants themselves.

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and squash court windows ($1,350). I accepted Mr Albrecht and Mr O'Sullivan's statement that their figures did not include cladding over masonry.

Claim in Contract

[55] As mentioned above the claimants allege that the Boes ought to be found liable in contract due to misrepresentations made prior to the purchase as well as for breach of the terms in the Agreement for Sale and Purchase, namely the vendor warranty set out under clause 14.2 of the Agreement.

(i) Misrepresentation

[56] The claimants allege that the misrepresentations are contained in two documents, namely the email from Mrs Boe to Ms Fischer in October 2006 and Mr Murphy's report of November 2005. According to the claimants these documents amounted to representations by the Boes that the house complied with the building consent and the Building Code and that the house did not suffer from weathertight issues.

[57] Section 6 of the Contractual Remedies Act 1979 (CRA) states that where a party to a contract has been induced to enter into it by a misrepresentation made by or on behalf of another party to that contract, a right to recover damages is provided for.[5] Accordingly, in order for a claim of misrepresentation to be actionable under section 6, the claimants must establish that the misrepresentation was a statement that related to or implied some existing fact or some past event,[6] and that statement was untrue.[7]

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[5] Note Contractual Remedies Act 1979, s7 goes further in recognising a right of cancellation in certain circumstances.
[6] *Ware v Johnson* [1984] 2 NZLR 518 at 537.
[7] *Awaroa Holdings Ltd v Commercial Securities and Finance Ltd* [1976] 1 NZLR 19 at 30. It is noted that whether the maker of the statement knew it to be untrue is irrelevant in actions based on or raising innocent misrepresentation between contracting parties under the CRA as section 6 of the CRA confers damages for misrepresentation "whether innocent or fraudulent" – see *Snodgrass v Hammington* [1994] ANZ ConvR 159.

[58] In addition Mr Grimshaw for the Boes, submits, and the Tribunal accepts, that in order for the claimants to prove their claim for misrepresentation, they also need to establish that:

(a) there has been a false or erroneous statement of fact;[8]
(b) the misrepresentation was made by or on behalf of the Boes;
(c) the misrepresentation induced the claimants to enter into the contract of purchase; and
(d) the claimants have suffered loss as a result of relying on that misrepresentation.

[59] Given the requirements stated above, the first matter to consider is whether or not the existence of a problem with leaks or weathertightness was said not to exist and whether, if indeed said, those statements were true or untrue when they were made.

[60] Focusing on the documents to be considered by the Tribunal in this claim, the email to Ms Fischer recorded Mrs Boe's understanding of her discussions with the Council:

> "I think the Council should give us a letter stating that all the required Building Consents were obtained, the house was built as per the submitted plans, all required engineering certificates and Producer Statements were produced and provided to the Council, all required inspections were carried out by the Council. But the final paper work was never completed and so no Code of Compliance was issued. Now because of the time delay and age of the house the Council will not issue a Code of Compliance.
>
> When the house was completed the Council did a final inspection and then sent a list of minor things that needed to be completed in order to get a Code of Compliance (I think you have a copy of this letter). We did all these things – notified the Council that they had been done, and we

[8] *Bisset v Wilkinson* [1927] AC 177; *Savill v NZI Finance* [1990] 3 NZLR135 at 145.

> believed we had our final sign off. We were not aware that we did not have a Code of Compliance (I did not know that there was a certificate involved until we decided to sell the house and the real estate agent asked for it). I personally came into the Council Office to get the certificate and that's when I learned that we did not have the final sign off. The Council Inspector came out came out to do the final inspection again – and said everything was fine. BUT then I was told that because of the time lapse the Council would not issue a Code of Compliance because it could not be back-dated – it would have to have today's date on it and under the Code of Compliance law that means the Council have to guarantee the house for the next 15 years. The Council will do that for the first 15 years of a new house but as our house is already 5 years old they would not do it (effectively they would be issuing it to a 5 year old house up until it was 20 years old)."

[61] It is well-established that there is prima facie, no misrepresentation if one party makes it clear that he or she is merely expressing his or her opinion or belief on the matter or that he or she is passing on information received, or a statement made by a third party, and not adopting it as his own. Accordingly, as stated in *Bisset v Wilkinson*[9] an expression of opinion properly so called is not a representation of fact and in the absence of fraud, its falsity does not afford relief.

[62] Based on a reading of the contents contained in Mrs Boe's email to Ms Fischer, I determine that such statements made therein can only properly be understood as Mrs Boe's opinion or understanding of what the Council had informed her. As a result, I find that the contents of Mrs Boe's email to Ms Fischer did not amount to a misrepresentation under section 6 of the Contractual Remedies Act.

[63] In regards to the report prepared by Mr Murphy, the claimants alleged that the house was represented as having

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[9] Ibid.

complied with the building consent and the Building Code and was weathertight. The contents of Mr Murphy's report however does not contain any such representations and cannot be construed as representing what the claimants attributed to that report. Specifically, the following matters referred to in the report clearly suggests otherwise:

> "ASSESSMENT OF CRACKS IN HARDITEX CLADDING
> Report on:
> Assessment of cracks in Harditex cladding...
> 2.0 Reason for Visit and Scope of Inspection
> 2.1 To carry out visual assessment of cracking to the Harditex clad dwelling.
> 2.2 To prepare a report specifically focussing on the cracks that have appeared...
> 2.3 ...
> 2.4 The inspection is not an audit of the building design, cladding system installation or compliance with the NZ Building Code.
> 2.5 Internal inspection or testing was not carried out.
> 2.6 No destructive or invasive investigation or testing was carried out.
>
> Disclaimer
> This report has been prepared for the addressee's use only, in terms of instructions to us...
>
> 7.0 Conclusion
> 7.1 The existing cracks at time of writing are...
>
> Limits to Accountability:
> The comments are limited to that which is available to visual inspection. Concealed items ... are not confirmed by this report..."

[64] Based on a reading of the contents of Mr Murphy's report as a whole, I determine that the report did not amount to a misrepresentation requiring a right to relief under the Contractual Remedies Act.

[65] For completeness, I also determine that there was no reliance by the claimants on the documents they refer to in this particular claim. This is especially the case since Mr Aldridge directly contacted the Council as to the contents in Mrs Boe's email, thereby seeking verification of the information provided in the email and relying on a response that would be provided by the Council, rather than the email. Although Mr Aldridge was unable to obtain the verification he needed at the time of his visit to the Council as Mr Saunders was not able to be contacted, his actions nevertheless establish that he was not solely relying on the statements made by Mrs Boe in her email, whether they were her opinions or otherwise.

[66] In terms of relying on the report, leaving aside that the report clearly stated that it was a report on the "Assessment of Cracks in Harditex Cladding" and that cracking to the Harditex was identified and that moisture testing indicated that moisture had begun to penetrate the cracks, Mr Aldridge telephoned Mr Murphy seeking verification of the statements he made in his report. In that short telephone conversation, Mr Murphy confirmed that he prepared the report, he did not undertake a code compliance report and expressed the same concerns as the Council. Although Mr Murphy did make representations as to the repairs to the cracks, Mr Murphy was clear that he had not been present during or after such repair works. Moreover, to place emphasis on the matters discussed over the telephone would miss the point of the claimants' allegation that they relied on the statements made in Mr Murphy's report rather than the statements made by Mr Murphy over the phone.

[67] For these reasons, I therefore conclude that there was also no reliance by the claimants on the contents of the report prepared by Mr Murphy. The claimants' claim of pre-contractual misrepresentation must fail.

(ii) Vendor Warranty

[68] The focus of this particular claim is the vendor warranty contained in clause 14.2 the Agreement for Sale and Purchase for the subject dwelling which provides:

> The Vendor warrants and undertakes that:
>
> 14.2 Where the Vendor has done or caused or permitted to be done on the property any works for which a permit or building consent was required by law;
>
> (a) The required permit or consent was obtained; or
> (b) The works were completed in compliance with that permit or consent

Accordingly, the claimants contend that clause 14.2 amounted to a warranty from the Boes that the house was built in accordance with the Building Code.

[69] On a strict reading of clause 14.2 it is clear that as vendors the Boes have failed to meet their obligations contained therein given the defects in the construction at para [45] above. However to make a determination solely on the words of clause 14.2, would ignore the reality of the agreement's constitution and also the intentions of the parties to the agreement. Accordingly these matters must also be considered by the Tribunal in determining whether such matters ought to influence its overall decision on the issue at hand.

[70] The first matter to consider is that the claimants knew that the house did not have a CCC when they entered into the Agreement. In fact, the claimants knew that the Council had concerns about the cladding on the house and that it required a clean weathertightness report before considering whether a CCC could be issued.

[71] Secondly, the claimants also knew that a clean weathertightness report was not prepared prior to the purchase. Although it may be argued that Mr Murphy's could be construed as such, it is clear that Mr Murphy's report could not be described as a "clean" weathertightness report, especially since the report recorded that water had begun to penetrate the cladding and that repairs to the cracking were needed to prevent further water ingress.

[72] Thirdly, the Boes specifically recorded in the Agreement itself that they would not be obtaining a CCC. Indeed, Mr Aldridge's visit to the Council to verify the contents of Mrs Boe's correspondence with Ms Fischer suggests that the Mr Aldridge, not only acknowledged that the dwelling did not have a CCC, but also Mr Aldridge was enquiring as to how one could be obtained after he purchased the dwelling.

[73] Finally, clause 5.3 of the Agreement of which the claimants are a signatory, specifically provides that:

> 5.3 That neither the vendor, the vendor's agent nor the auctioneer shall be liable in any manner whatsoever in respect of the condition of the property, and in particular but not in limitation in respect of the condition or structural soundness of the buildings...

Accordingly, clause 5.3 clearly prohibits the claimants from seeking recovery for any loss or damage in respect of the condition or structural soundness of the dwelling.

[74] In terms of clause 5.3 it is clear that it is wholly inconsistent with the wording of clause 14.2. Mr Wright for the claimants submits that if it is possible to read the two clauses together, then they will be given effect to. However due to the inconsistencies between clauses 5.3 and 14.2, such an exercise is impossible. Accordingly, Mr Wright

puts forward the view that where the provisions of an exclusion clause are such as to wholly nullify another positive clause of the contract, the exclusion clause is to be ignored and unqualified effect given to the other clause.[10] Again however, the Tribunal is not prepared to make a determination on this matter solely upon the words of a single contractual term especially since the contractual term sought to be relied upon is inconsistent with other terms in the agreement as well as other highly relevant factors surrounding the construction of the contract.

[75] It is noted that Mr Aldridge gave evidence that he received the Conditions of Sale which formed the terms of the Agreement before the auction from his agent and that he obtained legal advice on those conditions. However Mr Aldridge gave no evidence that his solicitor sought to vary any of the Conditions of Sale.

[76] Based on all the evidence relating to the construction of the contract, I determine that it is fair and reasonable in the specific circumstances of the present case to conclude that the claimants and the Boes intended to enter into the agreement for the sale and purchase of a dwelling that had no CCC and therefore with no guarantee or warranty as to the condition of the building. As a result, the claim that the Boes breached clause 14.2 of the Agreement must fail.

Claim in Tort

[77] In terms of the claim in tort against the Boes, the claimants allege that the Boes breached their duty of care owed as developers and/or head contractors. It was apparent from the hearing that Mrs Boe significantly manages the operations of the Boe Family Trust and based on the available evidence, this allegation is based on the contention that Mrs Boe was the "mind and force" of the building

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[10] *Laws of New Zealand* Contract (online ed) at [146].

project, contracted the various trades involved in the construction and made arrangements for the payment of such contractors.

[78] In response however Mrs Boe's undisputed evidence is that the home was intended to be their "dream home" for their permanent use as a family home. Indeed, following occupation the evidence is that the dwelling was used as the Boes' family home for seven years and that it was only in the last year or so of their ownership that their circumstances changed due to relocating overseas thereby necessitating the sale.

[79] Therefore in order to determine whether Mrs Boe owes the claimants a duty of care as a developer, a full examination of the role Mrs Boe played in relation to the construction is required.

(i) Was Mrs Boe a Developer?

[80] In determining whether Mrs Boe was a developer, it is important to come to terms with what a developer is. An analysis of the New Zealand cases concerning the liability of developers in negligence to purchasers of defective buildings was carried out by Doogue AJ in *Body Corporate 187820 v Auckland City Council*.[11] In that decision the judge held that there are two essential considerations: firstly, the party must have direct involvement or control in the building process, and secondly the party is in the business in constructing dwellings for other people for profit.

[81] Since the decision in that case, recent decisions of the High Court have provided a helpful definition of a developer. For instance, in *Body Corporate 188273 v Leuschke Group Architects Ltd* Harrison J stated that:[12]

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[11] (2005) 6 NZCPR 536 at [27].
[12] HC Auckland, CIV-2004-404-2003, 28 September 2007.

> [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.

[82] 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". Accordingly it is the function carried out by a person or entity that gives rise to the reasons for imposing a non-delegable duty of care on the developer.[13] 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.

[83] The following factors derived from the evidence before the Tribunal are relevant in considering Mrs Boe's role in the construction process:

(a) Mrs Boe has experience with previous building projects for houses and motels;
(b) The Boes purchased the land at Riverlinks Lane in order to build a house on that land;
(c) Mrs Boe arranged for plans to be drawn up for the contemplated house;

[13] *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234.

(d) Mrs Boe forwarded Mr Scott extensive specifications for the home she wanted him to design;

(e) Mrs Boe was involved in obtaining the necessary building and resource consents from the Council in order to begin construction work;

(f) Mrs Boe engaged the various contractors to undertake the construction work on a labour-only basis;

(g) All invoices were provided directly to and paid by Mrs Boe;

(h) The Boes sourced and purchased the building materials themselves; and

(i) The Boes occupied the home themselves for seven years.

[84] In contracting the various trades for the project, Mrs Boe's evidence is that she contracted tradespeople she considered to be sufficiently competent to undertake the work. It is noted however that the evidence of some of the tradesmen was that Mrs Boe was on site regularly,[14] running the job,[15] cost-conscious,[16] and that Mrs Boe was directly involved in the making of decisions regarding heights, aesthetics, and other decisions as to the nature and extent of the works.[17]

[85] To summarise the evidence regarding this issue, Mrs Boe owned the property in her capacity as a trustee and was in control of the consent, design, construction, approval and ultimately the marketing process. She was the person who decided on and engaged the tradespeople involved in the construction. She was responsible for the implementation and completion of the construction process and had the power to make all important

[14] Mr Wright.
[15] Mr Buckman.
[16] Mr Watkins.
[17] Mr Wright.

decisions. Even though Mrs Boe was unable to recall how much it cost to purchase the land and build the home, I accept that she was conscious of the costs in having the home constructed.

[86] Given those circumstances, I find that Mrs Boe was the party sitting at the centre of, and directing the project. The difficulty however is determining that Mrs Boe was undertaking that role for her own financial benefit, as required in *Leuschke*. Being cost-conscious will often mean that an owner will engage trades on a labour-only basis thereby requiring the owner to undertake control of administrative matters relating to the project. However by doing so, it does not mean that a person should automatically be categorised as a developer, particularly when in this case the Boes were not in the trade of building residential properties and furthermore the evidence establishes that the dwelling was intended as Boes' dream family home. To take the words of Ellis J in *Findlay Family Trust*,[18] Mrs Boe was merely organising the building of a house in which she and her family would live.

[87] For the reasons stated above, I find that the claimants have not established that Mrs Boe was a developer and therefore she did not owe the claimants a non-delegable duty of care associated with that role.

(ii) Was Mrs Boe a Head-Contractor?

[88] Even given my conclusion that Mrs Boe is not a developer, the evidence outlined above clearly indicates that Mrs Boe's role in the project was akin to that of a head contractor. In arguing that Mrs Boe was a head contractor Mr Wright referred me to the decision in

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[18] *Findlay & Anor (trustees of the Lee Findlay Family Trust) v Auckland City Council* HC Auckland, CIV-2009-404-6497, 16 September 2010.

Gardiner v Howley[19] where the Court held that the former owners were liable as head contractors as they had hired builders on a labour-only basis and appointed various other contractors to undertake different aspects of the work. It was the fact that the former owners in that case had assumed and taken control over the various tradesmen that attracted liability.

[89] Mrs Boe engaged each of the trades, paid the contractors' invoices, controlled the designs for the dwelling, and processed the resource and building consents. As mentioned in the discussion as to whether Mrs Boe was a developer, Mrs Boe also had the power to make all important decisions and as there was no overall contracted site supervisor, the building project was in effect run and controlled by Mrs Boe. Moreover, the evidence also suggests that it would have also been Mrs Boe's decision not to engage a site supervisor for the project.

[90] Upon finding on the evidence that Mrs Boe was the head contractor, I accordingly determine that Mrs Boe owed the claimants the duty of care associated with that role.

(iii) Did Mrs Boe Breach her Duty of Care?

[91] Mr Grimshaw relies on the decision in *Mowlem v Young*[20] in stating that role of the Boes in this claim was similar to that of Mr Young. At pp7, Robertson J held that:

> This was nothing more than a professional man building a house and getting appropriate workmen to come in and do the physical jobs which needed to be done. I cannot accept the submission that the evidence discloses that Mr Young was the builder and head contractor and was accordingly the constructor of the retaining walls. I understand why Mr

[19] HC Auckland, HC117/92, 17 May 1994, Temm J.
[20] HC Tauranga, AP35/93, 20 September 1994.

> Bush uses those words in his submission. But they lack an air of reality in what was going on. Mr Young needed walls. Mr Young arranged for people to do it. To now say that makes him a contractor or a developer is in my judgment to miss the import of the distinction which the Court of Appeal was drawing in *Mt Albert Council*."

[92] In the recent High Court decision of *Findlay Family Trust*[21] Ellis J cited the above passage in finding that Mr Findlay's role was on all fours with that of the owner in *Mowlem v Young* and later concluded that the finding that Mr Findlay assumed the role of project manager himself in failing to employ a project manager was incorrect. Instead, Ellis J stated that the most that can be said in that situation is that Mr Findlay failed to employ someone with relevant qualifications or experience to supervise the project, to oversee and check the work of the contractors and to coordinate the work between them. Accordingly, Ellis J held that at best, this might amount to a negligent omission on the part of Mr Findlay.

[93] In stating that however, Ellis J also in *Findlay* made reference to the Court of Appeal's judgment in *Invercargill City Council v Hamlin*,[22] specifically the following passage:

> [I]t has never been a common practice for new house buyers, including those contracting builders for construction of houses, to commission engineering or architectural examinations or surveys of the building or proposed building. In the low-cost housing field the ordinarily inexperienced owner was contracting with a cottage builder on fairly standard plans amended to suit the owner's wishes and pocket. That contracting was within the framework of encouragement and often financial support from the State and of the protection provided by local body controls and adherence to the standard bylaws. It accorded with the spirit of the times for local authorities to provide a degree of expert oversight rather than expect every small owner to take full responsibility and engage an expert adviser.

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[21] *Findlay Family Trust*, above n 21.
[22] [1994] 3 NZLR 513.

[94] The present claim is analogous to the facts in *Findlay Family Trust* in that the subject dwelling was constructed out of a moderately complex project and therefore does not fall within the category of "low-cost housing", as mentioned in *Hamlin*. Nevertheless, consistent with the Court of Appeal's comments in *Hamlin*, it was not common practice in 1996 for project managers to be employed even in projects such as the Boes. Accordingly, such case law authority gives strength to Mrs Boe's evidence that she was entitled to assume that the tradespeople engaged would carry out their work competently and in accordance with the necessary building requirements.

[95] Moreover, there is insufficient evidence suggesting that the trades specifically relied on Mrs Boe to control, supervise or monitor the work in terms of compliance with the necessary building requirements, in any event. Nor was there any evidence that such tradesmen were expecting to rely on Mrs Boe in that capacity, and the Tribunal infers that any such expectation would be unrealistic in any event due to Mrs Boe's lack of relevant building expertise and the fact that she was employed full time in their motel business. There is no evidence that any decision that Mrs Boe made or any sequencing issues for which she would have some responsibility would have led to or caused any of the building defects which are set down in para [46] above.

[96] For these reasons, I find that Mrs Boe did not breach the duty of care she owed as a head-contractor.

[97] The Tribunal realises that due to the above findings, there is no need for a consideration of the defence of volenti non fit injuria or the argument of a lack of causation raised by Mr Grimshaw in relation to the Boes' responsibility. However, as those defences

have been supported by the other respondents in this claim and are highly relevant to the Tribunal's determination of the responsibilities of those other respondents as well, it is therefore appropriate that the Tribunal make a determination as to those defences.

VOLENTI NON FIT INJURIA (VOLUNTARY ACCEPTANCE OF RISK)

[98] Mr Grimshaw, supported by the other three respondents, submits that the claimants' claims against all respondents fail due to the defence of volenti non fit injuria. The basis for this submission is that the claimants voluntarily assumed the full extent of the risk of buying a house with no CCC with known weathertight defects. Mr Grimshaw submitted that this is a very fact-specific case as the claimants purchased the home not only with knowledge of the weathertightness defects but also knowing that the Council would not guarantee the issuing of a CCC without a weathertightness report. Accordingly, Mr Grimshaw submits that the claimants entered into the purchase with their eyes wide open in knowing about the risks posed by the defects relating to the home, but yet chose to proceed with the transaction in any event.

[99] Volenti non fit injuria is a full defence to a claim whereby the onus of proof rests on the respondent to establish that the claimant freely and voluntarily agreed to accept the risk of the harm that in fact eventuated.[23] Two types of cases of volenti was enunciated by the Court in *James v Wellington City Council*:[24]

> It is well recognised that a defence of volenti may arise in one or other of two ways. In the more simple type of case the defendant relies solely on

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[23] Stephen Todd (ed) *The Law of Torts in New Zealand* (5th ed, Brookers, Wellington, 2009) at [21.4.03].
[24] [1972] NZLR 1978 at 982.

> the action of the plaintiff in voluntarily encountering an existing risk of which the plaintiff is fully aware. The second type of case involves some form of transaction or dealing between the parties before the risk is actually encountered by one of them... [I]n this type of case the defence of volenti could be founded either on express agreement or on a term implied in a contract or on the somewhat wider concept of a transaction

[100] Based on the facts of the present claim, it is clear that the claim has the potential to fall within both types of volenti cases enunciated in *James v Wellington City Council*. However the real issue for the Tribunal to consider is whether the claimants voluntarily accepted the risk of the loss which they are now experiencing. It is important to note however that it is not sufficient if a respondent can prove that the claimant was aware of the risk at the time of the damage. Instead the volenti defence is primarily based on whether a respondent can establish that the claimant fully appreciated the danger. Accordingly as the test is a subjective one, the volenti defence is known to be especially hard to establish.

[101] The evidence to be considered by the Tribunal in relation to this defence include the following:

(a) Mr Aldridge knew that the home did not have a CCC prior to purchase;

(b) Mr Aldridge had seen the Council's letter of 17 March 2006 stating 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 a CCC is issued, and that a weathertightness report was required in order for the Council to consider whether to issue a CCC;

(c) Mr Aldridge had a copy of Mr Murphy's report identifying issues of extensive cracking, evidence of external water effects being found, and moisture tests

suggesting that moisture had begun to penetrate the cracks;

(d) Mr Aldridge knew that the repair work recommended by Mr Murphy to be done promptly was not carried out until another winter had passed;

(e) Mr Aldridge knew that Mr Saunders from the Council was the person with ultimate authority to decide on the issue of a CCC and yet Mr Aldridge went ahead with the purchase without communicating with Mr Saunders;

(f) In the absence of legal advice, Mr Aldridge negotiated a purchase agreement after the auction without any conditions for a CCC or a weathertight report;

(g) Mr Aldridge knew that the Boes were making no warranties about the condition or structural soundness of the house;

(h) Mr Aldridge knew at the time of purchase that he was buying the home at a significant discount from the late 2005 valuation he had obtained; and

(i) Mr Aldridge admitted that he was aware of the leaky home publicity and yet purchased an expensive and monolithically-clad house in late 2006 without his own independent expert investigations/inspections.

[102] Mr Aldridge admitted under cross-examination that he was a “fairly commercially savvy” businessman and therefore had considerable experience that enabled him to make judgment calls. With that considerable business experience however, Mr Aldridge himself elected to proceed with the purchase without consulting the other trustees and certainly without consultation with his conveyancing lawyer or Mr Saunders. The result was that Mr Aldridge signed the Agreement for Sale and Purchase on behalf of the Trust which included the following terms:

5. The purchaser acknowledges:
   5.1 That the Purchaser has inspected the property and buys it **solely in reliance on the Purchaser's own judgment**;
   5.2 That **the Purchaser does not rely on any representation of the vendor**, the vendor's agent or the auctioneer or the auctioneer's agent as to any matter whatever obtaining to the property...;
   5.3 That **neither the vendor, the vendor's agent nor the auctioneer shall be liable in any manner whatsoever in respect of the condition of the property** and in particular but not in limitation in respect of condition or structural soundness of the buildings…

23. The Purchaser acknowledges that they are **aware that there is no final Local Body Code of Compliance Certificate** issued in respect of this property.

24. **The Purchaser acknowledges that the property does not have a Hamilton City Code of Compliance and the vendor will not be obtaining one**. (Emphasis added)

[103] In evidence, Mr Aldridge proffered his interpretations of the circumstances that led up to the purchase of the dwelling. Firstly, Mr Aldridge stated that the obtaining of a CCC was solely a matter of working through the Council's bureaucracy. However no evidence was adduced as to how he came to that conclusion other than believing that the Boes had simply become frustrated in fighting such bureaucracy and had given up. Secondly, Mr Aldridge initially stated that he thought Mr Murphy's report was a weathertight report. However under cross-examination, Mr Aldridge admitted that a proper reading of the report could never be construed as such. Thirdly, Mr Aldridge himself admitted that in regards to his decision to purchase the subject dwelling, "he took a punt which didn't pay off". This indicates that Mr Aldridge not only had an awareness of the risk of purchasing the home without a CCC but also knew of the uncertainty as to whether one would be forthcoming, as indicated in the Council's letter dated 17 March 2006. Finally, Mr Aldridge

considered he had undertaken an adequate “due diligence”. But by contrast, he also admitted that he was prepared to undertake whatever was necessary to obtain the CCC.

[104] Based on a subjective assessment of all the evidence as a whole, the Tribunal finds that the respondents have established that Mr Aldridge had full knowledge of the nature and extent of the risk he ran in purchasing a home that had no CCC and potential weathertight defects. From his own conscious volition Mr Aldridge chose to incur, and did in fact incur, the risk of his own mischance.

[105] As a result of the volenti defence being established in this case, the Tribunal finds that the acts and/or omissions of the respondents did not cause the claimants' loss. Accordingly the claimants fail in their claims against all the respondents to this proceeding. Due to the impact this decision will have on the claimants, I will now also consider the issue as to causation also raised by Mr Grimshaw if I am wrong in determining that the defence of volenti has been established.

LACK OF CAUSATION DEFENCE

[106] Mr Grimshaw's submission regarding the lack of causation in this case is again supported by the other three respondents, and based on the allegation that the claimants' loss was not caused by any act or omission of the respondents, but instead by the claimants themselves due to their knowledge that the house was “blighted” Therefore by taking a calculated risk that the house needed to be repaired in order to obtain a CCC, and realising that the risk has not paid off Mr Grimshaw submits that the claimants cannot now place responsibility on the respondents for their bad bargain.

[107] The legal principles relating to causation have been comprehensively set out in *Scandle v Far North District Council*.[25] These principles are as follows:

> [37] Whether or not an action or omission has caused damage entails a two stage inquiry.[26] First, there is a factual inquiry into whether the defendant's conduct caused the loss. This involves the application of the "but for" or causa sine qua non test. The purpose of this test is to determine if the loss would have arisen even without the defendant's conduct. If so, the defendant's conduct cannot be said to have caused the loss.[27] But if the loss would not have occurred but for the conduct, the second stage of the inquiry commences...
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> [38] The second stage of the inquiry looks to see if there is causation in a legal sense; if there is, legal liability for the loss will follow. This involves two steps. First, the appropriate scope of liability for the conduct is assessed; and secondly, there is an investigation into the proximity between the cause and the loss.[28]
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> ...
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> [40] The second step can be viewed as either the final stage of the causation inquiry, or as a separate inquiry into remoteness of damage. It is then that the court comes to assess the issue of proximity, by looking at whether the conduct constituting a factual cause is a substantial and material cause of the loss. It is not enough that the conduct merely creates the opportunity or occasion for the loss to occur; only if the conduct was a substantial and material cause is legal causation established.

[108] In decisions involving leaky residential dwellings, the terms "builder" or "contractor" have been given a wide meaning to include all specialists or tradespeople involved in the construction of a dwelling or multi-unit complex.[29] As these case authorities show, the

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[25] HC Whangarei, CIV-2008-488-203, 30 July 2010, Duffy J.
[26] *ACC v Ambros* [2007] NZCA 304, [2008] 1 NZLR 340.
[27] See *Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883.
[28] See *Ambros* at [25].
[29] See *Body Corporate 185960 v North Shore City Council* HC Auckland, CIV-2006-404-3535, 22 December 2008, Duffy J at [105]; Boyd v *McGregor* HC Auckland, CIV-2009-404-5332, 17 February 2010, H Williams J at [28].

courts have consistently held that builders, whether as head-contractors or labour-only contractors of domestic dwellings, owe the owners and subsequent owners of those dwellings a duty of care and are thereby held responsible for the costs for the necessary repairs as their defective work has caused the loss suffered by the claimants. The difficulty in applying that reasoning to the present case is that in such case authorities the claimants did not realise they were purchasing a non-Code compliant dwelling until after the transaction was complete, whereas in the present case the evidence establishes that this was not the case for the claimants.

[109] The Tribunal notes that the roles undertaken by the Council and Mr Murphy as parties to these proceedings are not related to the actual construction work. Nevertheless based on the evidence discussed earlier that the claimants knew that the Council required a report on the dwelling's cladding in order to consider whether the dwelling complied with the Building Code, they knew that it was never obtained, and they knew that Mr Murphy's report identified weathertightness issues that was occurring to the house at the time the claimants purchased it, a determination that these respondents still ought to be held responsible for the claimants bad judgment would be unjust.

[110] Without a full assessment of the responsibilities of the other respondents to this proceeding, in relation to the principles set out in *Scandle* above, the material and substantial cause of the claimants' loss in this case was the claimants' decision to buy a dwelling with known weathertight concerns. The most that can be said of the respondents' alleged breaches is that, at best, they created an opportunity for the occurrence of the claimants' losses. Mr Grimshaw submits, and the Tribunal accepts that the claimants' decision to proceed with the purchase of the dwelling operated as a novus actus

interveniens breaking any causal chain which the respondents may have created.

[111] In conclusion, I determine that for the reasons stated above the claimants' losses which are the subject of this claim, are not within the scope of the risk created by the respondents' conduct. As the claimants voluntarily and knowingly acquired a home that had weathertightness defects, no CCC and none was guaranteed to be forthcoming, it would therefore be wrong in law and principle to impose liability on the respondents in this case. Accordingly, the claimants' overall claim is dismissed.

DATED this 28th day of October 2010

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K D Kilgour

Tribunal Member