**IN THE WEATHERTIGHT HOMES TRIBUNAL**

**TRI-2010-100-000004**
**[2011] NZWHT AUCKLAND 7**

| | |
|---|---|
| BETWEEN | AMIT MALIK AND MELISSA MARGARET DAWN MALIK<br>Claimants |
| AND | AUCKLAND COUNCIL<br>First Respondent |
| AND | EVERBRIGHT HOMES LIMITED<br>(struck off Companies Register)<br>(Removed)<br>Second Respondent |
| AND | PUTZ TECHNIK PRODUCTS LIMITED (struck off Companies Register)<br>(Removed)<br>Third Respondent |
| AND | HITCHINS NEW ZEALAND LIMITED<br>(Removed)<br>Fourth Respondent |
| AND | ABLE WATERPROOFING LIMITED<br>(struck off Companies Register)<br>(Removed)<br>Fifth Respondent |
| AND | JUN BIN QUI<br>Sixth Respondent |
| AND | PAUL JOSEPH GRAHAM<br>(Deceased)<br>Seventh Respondent |
| AND | SHEAN CHEN<br>(Removed)<br>Eighth Respondent |

| | |
|---|---|
| Hearing: | 30 November and 1, 2 and 3 December 2010 |
| Closing written submissions: | 15 December 2010 |
| Closing oral Submissions: | 21 December 2010 |
| Counsel: | Mr James Holland for the Claimants<br>Ms Frana Divich for the first Respondent |
| Decision: | 25 January 2011 |

**FINAL DETERMINATION**
**Adjudicator: K D Kilgour**

**CONTENTS**

## INTRODUCTION

[1] This case concerns a home at 22A Invermay Street, Sandringham, Auckland. It was built in 2006. It was plaster clad with a ventilated cavity. It leaks. The developer, builder and other impugned trades involved with construction have either left the country, become insolvent, not been located or died. That leaves the local authority.

[2] The local authority stated the defects were confined principally to the deck and could be remedied by targeted repairs. The claimants elected to fully reclad the house for they allege a systemic failure of the moisture management system. The remedial work was completed in 2010.

[3] The claimants went to hearing claiming in negligence against the local authority solely.

## ISSUES

[4] The salient issues for determination by this Tribunal are:

- Has damage, or future likely damage, been established in relation to any part of the building other than the balcony?
- What was the appropriate repair option?
- What was the cost of the appropriate repair option?
- Did the claimants voluntarily assume the risk in relation to the property when they settled with knowledge of defects? Alternatively but similarly, did the claimants, by settling with knowledge of the defects, break the chain of causation?

## FACTUAL BACKGROUND

[5] In early 2006, the claimants, Mr Amit Malik, a young criminal barrister, and his wife, Mrs Melissa Malik, an architectural student,

were living with their three young children in an old home in Auckland. One of their children has respiratory problems and another was developing asthma symptoms. This was their third home and they decided to sell and buy a newly built home.

[6] After looking at a number of newly built homes, none plaster-clad, they came across a home, newly built but not yet completed, at 22A Invermay Avenue, Three Kings. In July 2006 this home had not yet been issued with a Code Compliance Certificate by the then Auckland City Council, the first respondent. On their brief inspections of this home the Maliks noticed that it was designed to make the most of the sunshine, it had a centralised vacuum system and in all other respects said Mrs Malik "…it seemed to tick all the boxes as far as providing a healthy environment was concerned."

[7] The claimants stretched themselves financially and entered into a purchase agreement on 22 July 2006 with Mr Ping Ma the vendor to buy 22A Invermay Avenue, Three Kings for $745,000.00. The only conditions in the agreement were that settlement would take place after the property had received a Code Compliance Certificate and the vendor was to provide a warranty as to workmanship, which he did.

[8] This agreement the claimants signed was on the usual Auckland District Law Society standard form, 7th edition, Agreement for Sale and Purchase of Real Estate. The claimants did not obtain any specific advice from their property lawyers, a Lower Hutt firm of solicitors, before signing the agreement to buy.

[9] By way of background, building consent for the home was applied for on 27 October 2004 and Mr Ma arranged for the house to be built between 7 May 2005 and 22 June 2006. The Council undertook its final inspection on 11 July 2006 and (after it was applied for on 18 July) issued a Code Compliance Certificate on 4 September 2006.

[10] Mr Ma, the vendor, has never participated in this proceeding and indeed has never been located. Mr Malik stated that Mr Ma vanished shortly after settlement of the purchase.

[11] The home is a two storey building with a concrete ground floor slab and a timber suspended first floor. The walls are timber framed. The external cladding is the Putz Technique System 300, being a built-up thin modified coat plaster over 400mm polystyrene and 20mm polystyrene battens. It has a drained and ventilated cavity. The windows and door joinery are powder coated aluminium. The roof is multi pitched and made up of concrete interlocking tiles.

**THE INSPECTIONS**

[12] The house was built after the Building Act 2004 came into force. As required by its governing legislation, the Council undertook the usual building inspections. A number of inspections were failed but were subsequently passed by another inspector even though the work noted in the failed inspection had not been fixed. To illustrate, on 22 June 2006 a final inspection was undertaken and failed. A subsequent final inspection on 3 July 2006 also failed noting, amongst other matters, “that the meter box and kitchen vent were to be flashed, holes in spreader to be made larger, cladding must be 35mm above apron flashing, hole to be repaired between deck up-stand to tiles and cladding too close to upper deck.” These were all breaches of E2 of the Building Code. A further final inspection was undertaken by a different Council inspector on 11 July 2006 and passed. As mentioned, the Council issued its Code Compliance Certificate for the home on 4 September 2006.

**THE PURCHASE**

[13] The Maliks were due to settle their purchase on 30 November 2006. They were of the view that if the Council issued a

Code Compliance Certificate for the home, then they could safely rely on that as evidencing proper construction and that code compliance was more reliable than a builder's report. In any event after they raised with the vendor a concern about a boundary, the vendor told them that they were no longer welcome to enter the property except for the purposes of a pre-settlement inspection. Mrs Malik stated that subsequent to these events, when observing the property from the road she noticed some aspects of the deck which caused her concern; as a result the Maliks engaged Mr Neil Alvey of House Assessments Limited (now Kaizon Limited) to do a final inspection with them to ensure that there were no outstanding weathertightness issues.

[14] Mr Alvey, an experienced building surveyor, undertook a site inspection and produced a report dated 27 November 2006 which was delivered by facsimile to the Maliks on 28 November 2006. Mr Alvey's report was headed "Surveyor's Report on Weathertightness of External Envelope". The report highlighted, amongst other matters:

- ...the top fixed handrails to the master bedroom balcony are a significant weathertightness design risk factor...
- The roof revealed the roof apron flashing to the south elevation is not profiled to fit the tiling... the current gaps potentially allow wind driven rain to enter the tiling/framing junction.
- ...the guttering has been laid to incorrect falls with standing water to the garage roof gutter....
- The workmanship and finish of the cladding was average/poor...
- The cladding clearance is inadequate to the north elevation to the garage...
- ...the cladding clearance is inadequate to the master bedroom balcony...

- The retro fitted head flashing to the electric meter box has been cut short and does not extend past the meter box opening...

- The electricity cable penetrations are reliant on sealant and are not installed as per the Putz Technique standard penetration detail...

- There is evidence of the balcony surface water runoff entering the cladding cavity...

- The above defects should be rectified as a matter of urgency...

- The handrail to the master bedroom balcony is fixed through the top of the tiling and waterproofing with no attempt at waterproofing fixing points...

- ...several minor items of poor workmanship were noted...

[15] Then, after they had received this report two days before settlement was due, Mr Malik contacted his property lawyer for advice. The Maliks and their lawyer tried to negotiate a purchase price retention with the vendor's lawyer but to no avail. The proposed retention sums ranged from $30,000 down to $4,000 (though the Maliks did not explain how they arrived at these figures). Mr Alvey's evidence is that after his 27 November 2006 report, he had no further contact that year with the Maliks. The property lawyer's file indicated that the Maliks and the property lawyer were concerned that Mr Alvey's report indicated the house was not code compliant but the vendor would not entertain any retention of purchase monies by the Maliks.

[16] Clause 6.5 of the agreement for sale and purchase states the breach of warranty or undertaking does not defer the obligation to settle. This was the advice given to the Maliks by their property lawyer and the Maliks were concerned to avoid penalty interest for failure to settle. Eventually after receiving a settlement notice issued by the vendor's property lawyer the Maliks settled the purchase one

day late and incurred one day's penalty interest. They settled without prejudice to their rights at law.

[17] A day before settlement and just after receipt of Mr Alvey's report, Mrs Malik said that she spent most of the day at the Council's offices speaking to various Council officers about her concerns over the weathertightness of the home and trying to persuade them to revoke the issue of the Code Compliance Certificate. Mrs Malik's view was that the only way they could at that time avoid their contracted purchase was if the Council cancelled its Code Compliance Certificate. The advice from Council officers was that revocation of the Code Compliance Certificate was not possible.

[18] Subsequent to settling the purchase and taking occupation Mr Malik stated that they have observed water ingress into the house in three specific areas. The first concerned pooling of water in the upstairs deck adjacent to the master bedroom. Secondly, the Maliks noticed that the windows in the downstairs lounge area were causing leakage to the inside carpet walls and window sills, necessitating immediate repair. At that time they engaged Forme Developments Limited to effect repairs at a cost of $1,216.98. The third water ingress concern was leakage through the windows of the upstairs bedroom facing the front of the house.

[19] Mr Malik stated that they made attempts early in 2007 to locate the vendor and to institute proceedings against him but to no avail.

[20] In November 2007 the Maliks engaged Prendos Limited to seek guidance as to how they should proceed to remedy the weathertightness problems they were observing. Mr Malik said that they chose Prendos Limited because a lawyer friend had advised them that Prendos was a leader in the field of leaky home repairs.

[21] On 4 October 2007, before they engaged Prendos Ltd however, the Maliks had lodged an application for a WHRS assessor's report with the Department of Building and Housing. The WHRS assessor, Mr David Templeman, reported on 30 May 2008. Mr Templeman engaged another experienced building surveyor, Mr Paul Probett, to provide infrared camera data and MDC Limited to install moisture probes into the house which provided moisture readings and timber strength analysis.

[22] The WHRS assessor Mr Templeton identified the risk factors with the house as:

- lack of paving clearances to bottom of cladding at garage and master bedroom balcony;
- insufficient falls to balcony and floor curved detailing;
- faulty sealing of top fixed balcony hand rails;
- faulty sealing of cladding penetrations;
- incorrect flashing installation;
- insufficient falls to garage gutter; and
- inappropriately installed open flashings to south elevations.

[23] Mr Malik gave the WHRS assessor at his first site visit a copy of Mr Alvey's report which found areas of non-compliance at the roof, wall cladding, flashings and in the construction of the balcony off the master bedroom.

[24] The WHRS assessor concluded in his report that the house met the criteria set out in section 14 of the Weathertight Homes Resolution Services Act 2006 (the Act). In the areas of the deck frame he found that the timbers had become so saturated that fungal growth had become established. The timber surfaces he observed were stained, the fibre cement soffit saturated and corrosion had developed on the structural steel elements. He undertook invasive testing around the area of the deck. Mr Templeman also stated in his report that information obtained from the implantation of the moisture

probes indicated some possible timber damage and loss of strength as a result of earlier failures and repairs.

[25] Other than at the deck structure, Mr Templeman stated that he did not observe any other breaches of the cavity but notwithstanding this, he did identify in paragraph 15.4 of his report locations of potential future water ingress and likely damage.

[26] The Maliks had asked Prendos Limited to review the WHRS assessor's report but Prendos was slow in reporting and eventually the Maliks discontinued their engagement and re-engaged Mr Alvey and his company, Kaizon Limited, on 6 May 2009. Mr Alvey was engaged to undertake an invasive weathertightness assessment. On 15 December 2009 the Maliks instructed Kaizon Limited to provide design, building, contract administration, timber inspection services and expert witness assistance with regard to this claim and to proceed with the necessary remedial work.

[27] Kaizon's destructive testing and investigation had initially identified failure at the deck area and Kaizon's pre-lodgement meeting with the Council proceeded because a targeted repair was considered feasible.

[28] Details of the defects requiring remediation identified by Kaizon are reported in Mr Alvey's brief of evidence dated 15 September 2010. Kaizon's remediation plans and specifications were reported to Kwanto Limited, a firm of quantity surveyors, so that cost estimates of targeted repairs and a full reclad could be compared. Mr Antony Hodge, Kaizon's remediation expert, stated that construction costs for targeted repairs estimated by Kwanto Limited were $159,832.90 and construction costs for a full reclad in weatherboard (not plaster cladding), were $157,910.23. These costs are exclusive of building consent fees and remediation expert costs. This means that the estimated cost to reclad the property in weatherboard was actually less than the targeted repair to the Putz Technik cladding, so

Mr and Mrs Malik instructed Kaizon to proceed with a full reclad of the house.

[29] Kaizon applied for building consent with the Auckland City Council on 2 December 2009. Kaizon issued appropriate tender documents on 1 December 2009 to three remediation builders and negotiated with the lowest tenderer, Reconstruct Limited. Reconstruct Limited had tendered for $179,952.75. Following further negotiation with Reconstruct, the cost was agreed at $186,538.34, which was still significantly less than the other two tenderers. Mr Alvey said Reconstruct was very keen to obtain this remediation job and to build a relationship with Kaizon, presumably to obtain further work.

[30] The Council granted building consent for a full reclad in weatherboard on 6 January 2010. The final lump sum remediation contract concluded with Reconstruct was $184,128.90 inclusive of GST. Remedial work commenced on 18 February 2010 and was due to be completed within 18 weeks but this was extended by three weeks because of additional works (replacement of the spouting which had incorrect falls, was leaking and could not be overhauled).

[31] Mr and Mrs Malik said in evidence that as a consequence of the stress of the leaky home they elected to move cities. They vacated the Auckland home in early December 2009 and moved to the Hawkes Bay.

[32] Mr Malik said that after filing the application for adjudication, he attempted settlement negotiations with Auckland Council but without success.

**Respondents not proceeded against**

*Sixth Respondent*

[33] At a witness summons hearing on 25 June 2010, which the sixth respondent Mr Jun Qui attended, Mr Qui stated that because of the eighth respondent Mr Sean Chen's limited ability to speak and write English, Mr Chen engaged him to assist in the completion of the application for the building consent. This was Mr Qui's sole involvement. No credible evidence has been produced impugning Mr Qui. The claim against Mr Qui fails and is dismissed.

*Seventh Respondent*

[34] It was established at the witness summons hearing on 25 June 2010, which the seventh respondent, Mr Paul Graham, joined by telephone from his Thames Hospital bed, that he had signed a producer statement for the waterproofing applicator. Mr Graham died insolvent and intestate on 19 July 2010. As indicated in *Cathie v Simes,*[1] the Tribunal is unable to make a determination against a person who is known to be deceased. As mentioned, Mr Graham died intestate and insolvent, and as a result there is no estate to bring proceedings against. Paragraph 21 in Part 2 of Schedule 3 of the Weathertight Homes Resolution Services Act 2006 allows actions against estates, but as he died insolvent it has no application to the claim against Mr Graham. Ms Divich stated in closing oral submissions that the Council would not be seeking contribution from the sixth and seventh respondents.

*Eighth Respondent*

[35] On Monday 29 November 2010 a teleconference was held and the claimants and Council agreed to removal by consent of the eighth respondent, Mr Chen. I then ordered the removal from this

[1] *Cathie v Simes* CA 121/04, 9 September 2004.

proceeding of Mr Shean Chen. No credible evidence had been produced impugning his involvement at the building consent stage.

## HAS DAMAGE TO ANY PART OF THE BUILDING OTHER THAN THE BALCONY BEEN ESTABLISHED?

[36] The WHRS assessor, Mr Templeman, reporting on 30 May 2008, stated that the home leaked and the principal cause was the cantilevered deck off the master bedroom. The deck was an integral part of the home and external moisture had entered the entire body of the deck structure through the upper surface. His report recommended a targeted repair, by demolishing and reconstructing the deck. Mr Templeman stated in his report that he did not observe any breach of the ventilated cavity and he thought that otherwise the external envelope had been constructed in a compliant manner. His invasive investigations were limited to the deck area alone. He identified a number of other possible risk factors requiring further investigation, but he carried out no further investigations at these other places because he said in evidence that Mr and Mrs Malik would not allow him to do so, though they deny this. In any event, Mr Templeman's concerns were similar to the concerns Mr Alvey expressed in his report of report of November 2006.

### Experts' Conference

[37] An experts' conference was convened on 18 November 2010. It was attended by the following experts, all of whom are well qualified to give expert evidence:

- Mr D Templeman, the WHRS assessor;
- Mr N Alvey, for the claimants;
- Mr A Hodge, for the claimants; and
- Mr S Paykel, for the Council.

[38] All the experts agreed at that conference that the upper level deck, northern elevation (being the only deck/balcony in the home) was a significant defect allowing moisture ingress which had caused

significant timber decay and required full reconstruction. Mr Paykel agreed with the remedial works carried out to repair the deck, and the Council acknowledged at the hearing that it owed a duty of care to the claimants to exercise reasonable skill and care when carrying out its inspections of the building work during construction, and it accepted that it had failed to identify, during the course of its inspections, the construction failings with the deck/balcony.

**Apron Flashings – a defect limited in effect**

[39] A number of other construction defects and leak causes were identified at the experts' conference but there was little agreement about them. Mr Paykel stated that insufficient evidence had been shown to him that they were a cause of water ingress. There was however considerable consensus that the apron flashings had insufficient height to their up-stands and were inadequately terminated at three locations. Those three terminations at the end of the apron flashings required repair because they were a source of future likely damage. All experts agreed that they could be fixed in isolation.

**The alleged principal defect**

[40] However the alleged principal defect, other than the deck, which caused moisture ingress was the improper installation of all window joinery on all elevations. All the experts agreed that the external joinery was improperly installed, but there was a considerable difference of opinion between the claimants' experts and the WHRS assessor, whose opinion was closer on this defect to that of the claimants, on the one hand, and Mr Paykel on the other. Mr Paykel was not satisfied with the claimants' evidence that moisture ingress had caused damage necessitating remedial installation of all window joinery.

## WHAT WAS THE APPROPRIATE REPAIR OPTION?

[41] As mentioned earlier, this claim concerns a home constructed with a drained and ventilated timber cavity, with an absence of elevated moisture readings, but with total window joinery installation failure[2] and an acknowledged[3] presence of fungal damage on the timber framing on all four elevations of the home.

[42] In September 2009 the Council advised that it would consider a partial reclad/targeted repair but in January 2010 it issued a building consent for a full reclad, as proposed in the claimant's scope of works. However, in March 2010 the Council's lawyer wrote to the claimants advising that the Council did not agree with the scope of repair work and that it was the Council's view that the claimant's evidence supported a partial reclad solely (full reconstruction of the balcony/deck and related cladding to the north elevation). The Council maintained this position at the hearing.

[43] Whilst the Council conceded that there was evidence of fungal damage on the timber framing, the Council's position was that there was no explanation how this occurred in the absence of elevated moisture readings and that there was no evidence of how the cavity may have been breached by moisture. Indeed, the Council's entire response to the claim against it was that the claimants needed to prove that there were elevated moisture readings and a systemic failure around the entire home.

### Mr Templeman

[44] The WHRS Assessor, Mr Templeman, in his report of May 2008 relied upon moisture probe readings which showed no elevated readings other than around the deck area. At that time he recommended a partial re-clad, namely reconstruction of the deck,

[2] Both jam sill failures and an absence of PEF rods.
[3] Council's counsel opening submissions at para [24].

because the only elevated moisture readings were in the vicinity of the deck.

[45] However, during the adjudication Mr Templeman acknowledged, after listening to Dr Wakeling's evidence, that he now understood the building science of bio deterioration relating to how water bridged the cavity, and he also agreed with the claimants' experts as to how moisture had bridged the cavity, as alleged by the claimants in their claim.

[46] In his closing submissions, counsel for the claimants stated that the claimants' experts and Mr Templeman were all agreed that:

i. the overfilling of the expanded foam into the cavity created a direct moisture path for water to run down the front face of the frame and it was this water entry path that caused the corrosion staining, fungal growth and decay that followed; and that

ii. it was the lack of an effective air seal (PEF rod) that allowed wind driven rain to enter the gap between the window liner and frame due to a pressure differential between the outside and inside of the home and caused the water staining and mould growth on the window liners and the physical water entry to ingress inside the dwelling to the lounge, bedrooms and other areas adjacent the window joinery.

[47] I accept the submission and the evidence of the claimants' experts as to how the ventilated timber cavity was breached.

**Dr Robin Wakeling**

[48] Dr Wakeling received from the claimants' remediation expert during the repair work, twenty seven wood samples taken from all four elevations.

[49] Dr Wakeling stated at paragraph [35] of his Brief of Evidence:

> [35] In summary, of the 27 wood samples examined, 2 contained advanced decay, 5 contained early stages of decay, typically well established decay, all of which may have caused a risk of structural failure nearby. The remaining 20 framing samples contained fungal growths typical of building spaces that have been compromised by ongoing external moisture ingress into internal spaces, e.g., wall cavities.

[50] Dr Wakeling had this to say about the types of fungal decay indentified in the twenty seven wood samples:

> [36] The types of fungal decay and fungal growths identified at 22a Invermay Avenue, typically require the presence of moisture substantially in excess of levels consistent with sound building practice and it was therefore clear that 22a Inverymay Avenue had experienced moisture elevation greatly in excess of acceptable levels. Fungal morphology, and/or decay micro morphology, consistent with recent moisture exposure, not constructional moisture, was present in the majority of samples. I have examined the schematics of the four elevations (IMG.Y17111042.PDF). It is reasonably clear that recent fungal growths and/or decay, was present on the majority, [later corrected to “a number”] if not all the samples, which was in turn caused by multiple moisture entry points, i.e., the number and scope of sampling points appeared to have been comprehensive and that they covered all four elevations at multiple points that incorporated a range of different building details.

[51] Mr Paykel stated during the hearing that the fungal growths present in the home may have resulted from moisture ingress during the building process. Dr Wakeling was sceptical about this suggestion in his answer at paragraph [41] of his brief of evidence:

> [41] The types and degrees of fungal growths and decay damage observed, was typical of a prolonged moisture ingress scenario of at least 2-3 years at some locations. In my

> experience, monolithic buildings start to leak soon after construction although there is often a lag phase of moisture build up of 6-18 months and a further lag phase related to spread of damage is dependent on the precise building detail. Sometimes sealant failure later on can cause, or compound moisture ingress, but cases where sealant failure alone is the cause are probably rare. A further delay can occur of up to 10 years between arrival of moisture within internal spaces, and detection of damage. Considerable scope therefore exists for in accurate diagnosis of the timing of moisture arrival and damage if inadequate sampling and/or inadequate expertise is brought to bear.

[52] Dr Wakeling explained that he had examined the schematics of the four elevations of the home and decided the causes of fungal growth in the twenty seven wood samples he examined were as follows:

> [43] I have examined these schematics of the four elevations (IMG.Y17111042.PDF) and it is clear that the fungal growths and/or decay present on the majority, if not all the samples, was caused by multiple moisture entry points. Bearing in mind diversity of locations from where the samples were taken over the four elevations, this strongly suggests that moisture ingress was related to multiple building features and therefore probably had multiple causes. From this it can be deduced that fungal growth and/or decay was caused by external moisture entry across multiple elevations at multiple points. This observation is consistent with a building in need of wide spread remediation.

[53] Ms Divich asked Dr Wakeling whether the timber at the home was treated. Dr Wakeling's response was that whilst he suspected that the bulk of the timber was H1.2 LOSP treated, this type of treatment was the most difficult of wood treatments to detect. He said of the wood treatment:[4]

> Some of the [27] samples either were not treated or they were very poorly treated, because adequately treated H1.2LOSP

[4] Dr Wakeling cross examination by Ms Divich NOE page 3 line 15.

> treated wood would not have had the amount of decay that was present for a small number of the sample. So either there was some untreated ones that slipped in or they were poorly treated.

[54] Ms Divich asked Dr Wakeling to explain and to reconcile the low moisture readings obtained with the fungal growths in the samples. Dr Wakeling stated: [5]

> Well as I have mentioned earlier moisture readings were inherently unreliable in terms of false negatives. There obviously very reliable if you get a positive, if you get a reading of 40+ then that's very useful and your almost certainly got an issue that needs looking into. On the other hand if your consistently getting values close to the EMC its very likely that's purely a result of the timing of when you were there...

[55] Clearly Dr Wakeling was of the opinion that this home, which had a cavity and low moisture readings, suffered damage as a result of water ingress and this is clear from his answer to the following question from Ms Divich: [6]

> Ms Divich. My question is how we reconcile this fungal growth with a low probe readings and we've had probe readings on more than one occasion.
>
> Dr Wakeling. I would expect nothing else, because... what would be unusual if you didn't get any growth and there was a high reading, that would be unusual and you'd think what was going on. That doesn't make sense. But it does make perfect sense to have fungal growth and/or depth of structural damage caused by bio deterioration where you've recorded low readings; it's just that you weren't there at the right time to record the high readings. In some types of decay, some types of brown rot decay, will actually occur at moisture contents very close to the fibre saturation point and so you don't need much of a change in atmospheric conditions for the moisture to go down close to EMC at the time you were there and then it can flick up again. Brown rot fungal are very, very efficient at...its

[5] Dr Wakeling cross examination by Ms Divich NOE page 9 line 10.

> rather like baker's yeast if you keep baker's yeast in your lader, it can remain dormant for years, but if you put water on it, it can be metabolising within minutes and decay fungi, ok, there not quite as extreme as that but suffice to say when moisture arrives they will kick in and start growing again. When they dry out they become dormant. So they are very good at coming and going, or their activity coming and going as moisture comes and goes. And so you might just happen to be there when the moisture is low.

[56] Dr Wakeling also expressed a view on the issue of timber replacement at remediation. He said that the wood replacement decision is really a judgement call to be made on the building site by the claimants' remediation expert. Dr Wakeling stated why it was a decision for the remediation expert during the remedial building: [7]

> Ms Divich. If you look at your latter report which is dated 15 March 2010 and you got TS11 through to TS24, all of them, the preliminary replacement guide is *possibly*. Is that unusual do you expect to see some decay in some of them?
>
> Dr Wakeling. Well it's unusual to have so many in a row that are all the same recommendation. But a large proportion of a lot of batches of wood would have that particular recommendation. In other words it would be foolish to say no [to replacement]. Even though the wood might be sound, which it was, where I use the word "possibly" it would be foolish to…or potentially misleading and therefore potentially foolish to say no [to replacement] because the fact that there is – there's quite clearly been a moisture issue means that there may be wood nearby which is more seriously affected, so it's – there's a need for another layer of information that can only come from the building surveyor who has got the specific site knowledge…

[57] The subject of corrosion and iron stain on framing timber at the home also caused differences of opinion between the expert engaged by the Council, Mr Paykel, and Mr Alvey. Dr Wakeling's view was firm as to how the rust stains had come about.[8]

---

[6] Dr Wakeling cross examination by Ms Divich NOE page 9 line 23.
[7] Dr Wakeling cross examination by Ms Divich NOE page 12 line 26
[8] Dr Wakeling cross examination by Ms Divich NOE page 15 line 29.

> *Ms Divich. This morning we had some discussion while you were here about the corrosion to the staple fixings on the building wrap. Is that something you think was unusual considering that this building wrap was put onto the building during the winter and was probably open for a couple of month?*
>
> *Dr Wakeling. Page 16 line 6... I think some of the corrosion that I saw its typical of what you would see in a wall cavity that's been damp, wet for several years in many cases*
>
> *Dr Wakeling. Page 16 line 21.... Based on the amounts of iron stain that I've seen and also some of the spread patterns of the iron stain and the corrosion, they fit much better within what you'd expected in a leaky wall cavity rather than another scenario. But there may well be some fixings in there which don't fit that overall that was my impression. The thing about iron stain it will only occur at moisture contents above the fibre saturation point and you tend not to get that in most location son a building site during construction...*

[58] I found the evidence of Dr Wakeling, who is a bio-deterioration expert, convincing and compelling. His evidence was never seriously challenged by Council and no expert contradicting Dr Wakeling was called by Council.

**Mr Alvey**

[59] Mr Alvey's evidence for the claimants was that there were no fewer than 76 potential points of water ingress at the home. He stated that these essentially were the areas adjacent to the jam sill flashings where the sill flashings do not extend beyond the jam flashings by 20mm and the head flashing areas which are also short of jam flashing. He also stated that neither had MS sealant applied to the junction.

[60] Mr Alvey's view concerning the building cavity was:

> It is however very clear that a cavity base system will not effectively cope with water ingress from defects such as a systematic defect to the moisture management system around openings that were present at 22a Invermay Avenue.

[61] Mr Alvey's view on why the window flashings allowed water to get into the building was as follows:[9]

> Mr Alvey: The reason why it's never going to work is, if you look at the defect photos, there are large gaps between the jam and sill flashings and in a lot of cases the sill flashings don't extend pass the jam flashings. So there is no way you can create a seal at all, because the gaps too large, so the flashings have to go out. Mr Alvey was clearly of the view that excluding the deck which everyone accepted was a defect, was that the two principle defects in this home were the systemic failure of all the joinery and the apron flashing defects.

[62] Ms Divich put the question to Mr Alvey in cross examination:[10]

> ...[S]o really this case is turning on the windows...
>
> Mr Alvey: There is no plausible explanation as to where the decay patterns the corrosion the staining and all other evidence it's been collected could come from other than the windows. And the lack of high moisture content readings to me, is a complete red herring, because you've got the drained and ventilated cavity which does do its job, so you have intermittent wet/dry scenarios

[63] I found Mr Alvey's evidence persuasive.

**Mr Paykel**

[64] Mr Paykel was the only expert who appeared not to accept the building science behind how water had bridged the cavity.

[9] Mr Alvey cross examination by Ms Divich NOE page 101 line 10.
[10] Mr Alvey cross examination by Ms Divich NOW page 108 line 14.

[65] Mr Paykel's suggested solution to stop water crossing the cavity was the application of sealant to the jam/sill junctions which did not meet. But there were large gaps between the two flashings.[11] The sill flashings were cut short on the jam flashings and I accept the evidence of the claimants' experts that the sealant would not bridge the gaps of this size and nature or if it did, it could only be considered a short term solution. The application of sealant would not achieve a fully flashed opening or an effective moisture management system and Mr Paykel's evidence did not address how the expanded foam that is bridging the cavity in numerous locations is to be removed to prevent water from bridging the cavities. I therefore reject Mr Paykel's suggested solution.

**Conclusion regarding alleged principal defect**

[66] In summary I prefer the evidence of the claimants' experts and I find the expert evidence of Dr Wakeling compelling. I accept the evidence of the claimants' experts that the extent of the damage caused to this house by the joinery and deck defects were such, and given that the joinery defects occurred on all elevations, that the necessary and most reasonable and cost effective remediation option was a full reclad. I accept the evidence of the claimants' experts that all the window joinery needed to be re-installed correctly in accordance with the manufacturer's installation requirements. This meant removal of all window cladding up to a minimum 500mm on all four sides of each window and as all windows were defective, the extent of the re-installation, decladding and recladding meant an extensive repair job. I accept the evidence of Mr Alvey and Mr Hodge that a robust remediation design meeting the minimum requirements of the building code, showed that the cost of the targeted repair proposal, compared to the cost of a full reclad, was not cost effective because targeted repair work would be so extensive. Although theoretically this home could possibly be targeted repaired, in practice the cost of that targeted repair would

[11] Photos 20 to 45 exihbit N to Mr Alvey's September Brief of Evidence.

probably have exceeded the cost of the full reclad which was indeed undertaken. In any event further uncovered decay would probably have been discovered during targeted repairs.

[67] The lack of PEF backing rod in all window installations to support the expandable foam has resulted in incomplete air seals which led to an unequallised air pressure within the cavity. [12] I accept the evidence of the claimants' experts that this allowed wind driven rain to be directed into the framing and to collect around the joinery penetrations. Dr Wakeling established that this defect has already caused timber damage requiring repair. I also determine that it is a source of future likely damage. By that I mean that the original joinery installation was unlikely to meet the requirements of the Building Code going forward because of the way it had been installed. The windows were all installed incorrectly and were unlikely because of that to meet their life expectancy under the Building Code. I accept Mr Alvey's and Mr Hodge's evidence that the only successful way of remedying this defect was to remove the windows, remove the incomplete foam and reinstall the windows with compliant seals. I reject Mr Paykel's view that he does not consider these to be a defect. I also accept the evidence of Mr Alvey and Mr Barry Gill, a well informed witness called by the claimants, that this defect would have been visible during the Council inspection process. The Council inspector should have prodded through the foam to feel for the presence of the PEF backing rods.

[68] I also accept the evidence of Dr Wakeling that his laboratory analysis confirms that some of the framing timber was untreated. Mr Paykel at the hearing appeared to be in agreement with this finding.

[69] The Council's response appeared to deny that there was evidence of water ingress and probable damage to timber framing. I reject this response for the evidence of the claimants' experts'

[12] See photos 52,53 and 107 of exhibit N of Mr Alvey's Brief of Evidence.

showed obvious visual signs of water ingress and Dr Wakeling's laboratory analysis confirmed this.

[70] Mr Paykel's evidence was that the existing framing timber did not require an *in situ* preservative treatment. And yet he acknowledged the presence of untreated timber and the possible leaching of preservative from any treated framing due to ongoing moisture ingress. So I reject his view that the existing framing could be left without the application of timber preservative. The acknowledged remediation practice, the recommendations of Dr Wakeling and the building consent requirements of Auckland Council require all timber wall framing left in place to be applied with an approved timber preservative.

[71] I accept the evidence of the claimants that there is proven timber decay, associated fungi (including soft fungi) and toxigenic mould discovered at various locations on all elevations throughout the house during remediation (and all remote from the deck/balcony). This meant that their scope of works for the targeted repair would have had to be greatly extended. The resulting additional cost of undertaking such a targeted repair as opposed to a full reclad would also significantly increase and so I accept the evidence of the claimants that a full reclad was the most cost efficient and reasonable method to render the home Code compliant.

[72] I am satisfied that Dr Wakeling's evidence explains the low moisture readings from the installed moisture probes. Furthermore Dr Wakeling has established that there was significant timber damage consistent with the breakdown of the approved ventilated cavity. And I accept Mr Alvey's evidence that the only plausible explanation as to how water managed to cross the drained and ventilated cavity was that there were faulty window installations on all elevations.

[73] After reading the experts' briefs of evidence and reports and hearing their answers to cross-examination, I determine that the

evidence of the claimants' experts, and particularly that of Dr Robin Wakeling, was most credible and compelling. This expert evidence established that there was widespread failure of the moisture management system and that the most appropriate and least expensive remediation proposal to follow was a full recladding of the home.

[74] For the reasons set out above I determine that the appropriate repair option was a full reclad.

**WHAT WAS THE COST OF THE APPROPRIATE REPAIR OPTION?**

[75] As determined earlier in this decision, I have concluded that a full recladding of the home was the most appropriate and least expensive remediation proposal to follow.

[76] The claimants engaged Kaizon Limited as their remediation specialists. Kaizon was instructed by the claimants to proceed with a full recladding of the home in weatherboard not plaster (that is, not a like-for-like repair). It was owner choice to re-clad in weatherboard.

[77] Kaizon undertook a tendering process whereby three tenders were received for weatherboard re-clad and then it negotiated for a lump sum remediation contract with the lowest tenderer. Whilst the Council's expert had some minor criticism of this process, after considering all the evidence I determine that the tendering process was appropriate, it was robust and reached a fair and reasonable result.

[78] The claimants, prior to concluding the tender, had engaged Kwanto to estimate remedial costs for their scope of works and Kwanto estimated the costs to be in the vicinity of $208,536.00. The actual costs of the full reclad including the actual lump sum contract

payments to the remediation contractor and all remediation fees totalled $227,912.68.

[79] The Council's quantum expert, Mr J G Ewen, estimated a full reclad at $179,966.04[13] but this was from a limited scope of works provided to him by Mr Paykel, which included less timber replacement and excluded structural works which Council experts determined was outside the scope of the weathertight repairs.

[80] Generally I preferred the evidence of Mr Hodge, the claimants' quantum expert, as regards quantum. Primarily this was because of his cautious and diligent approach to cost reduction and minimising the term of the remedial contract. However, I accept aspects of the Council's quantum expert's evidence in relation to three significant items of betterment or owners' choice. I accept Mr Ewen's evidence[14] that the owners' choice of cladding (changing from EIFS plaster to weatherboard) was designed to "future proof" the house and had an element of betterment which he estimated at $4,700.00.

[81] The claimants' lump sum agreed with Reconstruct was for recladding in weatherboard. Mr Alvey and Mr Hodge stated that Reconstruct was asked for an estimate to re-clad in EIFS plaster. That estimate was slightly greater than the cost of weatherboard so that the claimants' argument was that weatherboard was not betterment and was cheaper than a like for like repair.

[82] I do not accept that Reconstruct's estimate for plaster cladding was a competitive quote because the other two contractors who tendered were not invited to quote on a plaster finish. The decision to re-clad in weatherboard was a deliberate decision taken by the claimants to future proof the home. It was their choice. Re-cladding either way would involve little difference in building

[13] See schedule 5 of J G Ewen brief of evidence darted 26 November 2010.
[14] See J G Ewen brief of evidence of 8 November 2010 and annexure 5 (as amended).

application and coatings but I accept Mr Ewen's evidence that generally weatherboard is more costly, albeit slightly, and is betterment. In this instance I determine a betterment element at the estimated amount of $4,700.

[83] Mr Hodge also agreed upon reflection with Mr Ewen that there was betterment or owners' choice estimated at $5,198.61 relating to depreciation and maintenance painting to the exterior of the home.

[84] Finally consultant fees included an element of owners' choice which Mr Ewen estimated at $4,295.98. I also accept his evidence on this matter. Mr Hodge did not seriously object to this estimate of betterment.

[85] Accordingly I adjust downwards the claimants' remediation quantum of $227,912.68 by the three owner choice estimates totalling $14,194.59.

[86] Taking into account the evidence and actual costs before the Tribunal as well as the evidence of Mr Alvey, Mr Hodge and Dr Wakeling which I have preferred over Mr Paykel's, I conclude that the reasonable and realistic costs for the remedial work undertaken to restore this home to a weathertight Code compliant dwelling is $213,718.09.

**Consequential Costs**

[87] The claimants have claimed interest for monies expended on the remedial works. The claimants entered into bank borrowing to fund the remedial costs.

[88] I have the discretion to award interest and to set the period for which interest should be awarded. I am satisfied that Mr and Mrs Malik have established their claim to interest.

[89] I am empowered to award interest at an interest rate set down in clause 16(1) of Schedule 3 to the Act. Accordingly I award interest at the rate of 5.19% (the 90 day bill rate of 3.19% at the beginning of the hearing plus 2%) for the period when borrowings were fully uplifted, i.e. from the end of remediation works, to the date of issue of this determination, seven months, on the determined remediation costs of $213,718.09. This equates to the sum of $6,470.31.

[90] The claimants sought relocation costs for the expenditure incurred in the move to the Hawke's Bay and the capital expenditure in buying a home in the Hawke's Bay. Neither has a sufficiently close causative connection to this claim and I reject those claims. However I accept the evidence of Mr Alvey and Mr Hodge that it was appropriate for the claimants to vacate their home for the period of remediation so they would have incurred relocation costs. The Council quantum expert, Mr Ewen, estimated this to be $2,287.48, which I accept.

[91] The claimants claim $1,148.06, being the price paid to Prendos Limited for that firm's engagement. Whilst there seemed to be no immediate benefit received by the claimants for this expenditure from Prendos Limited, I nevertheless determine that it was an appropriate cost incurred by the claimants in attempting to strategise a remediation programme.

[92] The claimants also incurred earlier costs for repairs to the second bedroom upstairs window when they engaged Forme Developments Limited to undertake repairs costing $1,216.98, and contract work insurance of $680.37. The Council has not objected to these claims. I accept both sums as appropriate.

[93] The claimants' claim for two valuers' fees incurred in relation to their borrowing for remedial costs: a Seagar & Partners valuation

report cost $675.00 and a QV valuation report, post borrowing, $500.00. I accept these expenses.

[94] The claimants' claim an appropriate rental for alternative accommodation during remediation work. They claim $650 per week (supported by a rental valuation) which they would have had to incur for alternative accommodation if they had not purchased and moved. I determine that the claimants are due rental costs for 18 weeks at $650.00 per week totalling $11,700.00. The actual remediation contract period was 22 weeks but I determine that the last three weeks of that contract (which were unplanned) was to repair guttering that was failing due principally to a lack of maintenance and not related to moisture ingress.

**General Damages**

[95] The claimants seek general damages for the considerable stress, anxiety and inconvenience associated with owning a leaky home. Both Mr and Mrs Malik gave compelling evidence of family ill health and stress occasioned by their "leaky home" predicament. I determine they are entitled to general damages.

[96] At the closing Mr Holland submitted that general damages should be awarded on a per owner basis. Ms Divich disagreed quoting *Findlay & Anor (trustees of the Lee Findlay Family Trust) v Auckland City Council & Anor*[15] Ellis J in the *Lee Findlay* decision made it clear that reasonable general damages awards in leaky home cases for occupiers should be $25,000.00 per dwelling, not per person. I am satisfied from the Maliks' evidence presented at the hearing that they have established their claim for the usual general damages award for occupiers. I am satisfied that the stress and illness experienced by the Maliks justifies an award at the upper limit.

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

[97] I accordingly determine that the claimants are entitled to general damages of $25,000.00.

**Summary of Quantum**

[98] I accordingly determine that the quantum allowed for this claim should be $263,413.81 (inclusive of GST where appropriate) made up of:

| | |
|---|---|
| Claimants remediation expenditure | $227,912.68 |
| Less my deductions for owners choice | $14,194.59 |
| **Sub Total** | **$213,718.09** |
| Rental | $11,700.00 |
| Relocation costs | $2,287.48 |
| Contract work insurance | $680.37 |
| Prendos Limited | $1,148.06 |
| Forme Developments Limtied | $1,216.98 |
| Seagar & Partners Valuation | $675.00 |
| QV Valuation - post borrowings | $500.00 |
| Interest | $6,470.31 |
| General Damages | $25,000.00 |
| **TOTAL** | **$263,396.29** |

**WAS THE COUNCIL NEGLIGENT?**

[99] The claimants allege that the Auckland City Council was negligent in carrying out inspections during the building of the home and in issuing a CCC on 4 September 2006. The claim against the Council is that it failed to exercise due care and skill when inspecting the building work. The failure to inspect with sufficient care allegedly amounted to negligence which in turn caused the claimants loss.

[100] Whilst the Council carried out 18 building inspections during the construction period, 13 of these between the period 7 May 2005 through to 11 July 2006 are relevant to this claim. The Council

inspections were carried out pursuant to Section 90 of the Building Act 2004 which states:

> **Inspections by Building Consent Authorities**
>
> (1) Every building consent is subject to the condition that agents authorised by the building consent authority for the purposes of this section are entitled, at all times during normal working hours or while building work is being done, to inspect –
>
> a) land on which building work is being or is proposed to be carried out; and
>
> b) building work that has been or is being carried out on or off the building site; and
>
> c) any building.
>
> (2) The provisions (if any) that are indorsed on a building consent in relation to inspection during the carrying out of building work must be taken to include the provisions of this section.
>
> (3) In this section, inspection means the taking of all reasonable steps to ensure that building work is carried out in accordance with a building consent.

[101] The case presented for the Council essentially was that no damage could be proved from their inspection failures. The Council's response focused strongly on the primary allegations:

- that the Code Compliance Certificate was issued just over 4 years ago (4 September 2006);
- that the home was built with a drained and ventilated cavity which is considered to be state of the art leaky building science;
- that the moisture probes installed at the home did not show elevated readings for areas other than the deck/balcony; and
- that there was no evidence as to how the drained and ventilated cavity had been breached by the ingress of water.

[102] The Council relied upon the evidence of its expert Mr Paykel and argued that its inspections were undertaken to an appropriate standard and without negligence. Mr Paykel at the time of construction of the home was a Council officer employed to undertake inspections.

[103] Ms Divich referred me to the following extract from *Hartley & Anor v Balemi & Ors*[16] in which she summarises the correct analysis for me to adopt:[17]

> [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. In the overall assessment, as was said in Fardon v Harcourt – Rivington (1993) 146 LT391; [1932] all E R Rep 81 (HL) at 83, what amounts to negligence is a question of fact in each case.
>
> [72] In order to breach that duty of care, the house must be shown to contain defects caused by the respondent (S). This 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 material used in its construction or alterations. This qualifies the building as a "leaky building" under the definition in Section 5. 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 any such liability: see Section 29 (1).

[104] The references are to the 2002 WHRS Act, but the current 2006 Act is to the same effect. Ms Divich submitted that because of the nature of the claim (negligence) and for jurisdictional reasons,

[16] *Hartley v Balemi & Ors* HC Auckland, CIV 2006-404-258929, March 2007.

proof of damage is essential. I have addressed that matter earlier in this determination and determined that to the satisfaction of the Tribunal proof of damage has been established.

[105] The Council admits that it should have identified during the course of its inspections the defects concerning the deck/balustrade and it accepts that these defects have led to timber decay and elevated moisture readings and that the remediation work required to remedy that defect was a reclad.

[106] Mr Paykel's evidence also accepted for the Council that there is no sealant to the jam/sill junctions of the window joinery and that the window installation on all elevations does not comply with the manufacturer's specifications. Mr Paykel agreed that this would lead to moisture passing into the cavity.

[107] Further, the Council accepted that the lack of PEF backing rods could provide a pathway for water to bridge the cavity by capillary action. The evidence of both Mr Paykel and Mr Woodger for the Council was that the absence of the PEF backing rods would not be visible to a Council officer at the time of inspecting the air seal. That is because the windows would have been installed, in place and with the expandable foam inserted and around the joinery junctions before the pre-cladding inspection was called for.

[108] The Council argues that it did not breach any duty of care (apart from its submission concerning the deck/balcony) as it had a reasonable system of inspection in place. It stated that its method of building inspection in 2006 is the same as it presently undertakes and that such inspection methodology has been approved as to an acceptable and reasonable standard by the Department of Building and Housing.

[17] At [72] per Stevens J.

[109] The claimants' expert on Council inspections was Mr Barry Gill. Mr Gill stated that many of the issues that should have been identified as defects during and at the time of construction by the Council inspection officers were either indentified as defects at the time of inspection and subsequently but wrongly passed, or were missed altogether.

[110] On 18 July 2005 a Council officer passed the pre-cladding inspection. Then on 28 July 2005 the cladding inspection failed which included, amongst other matters, contravention of the Building Code in relation to the Putz-Technik cladding which had not been installed in accordance with the manufacture's manual. On 3 August 2005 that cladding was re-checked and passed.

[111] A final inspection on 22 June 2006 failed for a number of matters and then a further and final inspection on 30 July 2006 failed again for various breaches of E2 of the Code including cladding too close to the upper deck, cladding needing to be 35mm above the apron flashing and the meter box in the kitchen vent to be flashed. Then on the final check on 11 July 2006 the home was passed for the issue of a Code Compliance Certificate with some of these defects and a number of the deck failures still not remedied.

[112] Mr Holland submitted that the adequacy of the Council inspections needed to be considered in light of the accepted building practices at the time and he referred me to what he submitted was the relevant law as stated by Heath J and Baragwanath J. I agree with these submissions.

[113] Heath J in *Body Corporate 188529 & Ors v North Shore City Council & Ors*[18] stated that:

> [450] Much was made by Mr Bayley of the need to avoid judging the inspections by today's standards, rather than the

> standards at the time. In reaching the conclusion that the Council was negligent in failing to put in place an adequate inspection regime, I am not focusing on whether a reasonable Council knew or ought to have known, in 1997 or 1998, of the pitfalls with the method of construction employed particularly the use of monolithic cladding on an untreated timber. My point is more substantive. It is that 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.

[114] And at paragraph [409]:

> [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.

[115] In *Dicks v Hobson Swan Construction Limited (in liquidation)*[19] the Court did not accept that what it considered to be systemically low standards of inspection absolved the Council from liability. In holding the Council liable at the organisational level for not ensuring an adequate inspection regime, Baragwanath J concluded:[20]

> 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.

---

[18] *Body Corporate 188529 & Ors v North Shore City Council & Ors* [2008] 3 NZLR 479 (HC) at [450].
[19] *Dicks v Hobson Swan Construction Limited (in liquidation)* (2006) 7 NZCPR 881 (HC) .
[20] At [116]

[116] Mr Holland submitted that these authorities confirm that the Council in this case is liable for defects that a reasonable Council officer, judged according to the standards of the day, should have observed. Mr Holland further submitted that the Council 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 building Code.

[117] The evidence during the hearing turned and sharply focused on the major defects that were apparent on all four elevations namely: [21]

- installation or lack of installation of the PEF rods in all window joinery units; and
- jam, sill and head flashing installations and the gaps that were apparent in these installations again on all window joinery units and the failure to apply sealant.

[118] The Putz-Technik manufacturers manual requires:[22]

> An air seal must be installed around all joinery openings to minimise the risk of airflows carrying water into the joinery cavity.

[119] The Council approved and consented to such drawings and required the installation of an air seal to surround window joinery on all elevations. [23] The PEF backing rods were never installed to any window joinery on any elevation at the home. And yet the Council pre-line checklist provides for the PEF or pressure seals to be checked. [24] It appears that the Council inspector checked and ticked the box for the inspection of the pressure seals as being present when they were clearly not. I agree with the claimants' submission that this was a major inspection failure by the Council and I accept

[21] Mr Alvey cross examination by adjudicator NOE Page 107 line 32 & Page 108 line 1-3
[22] See Putz-Technik manual, Mr Alvey's brief of 15 September 2010 exhibit L at page 3 of the manual.
[23] Attached to Mr Gill's brief of evidence exhibit D sheet 1 detail PT-013.
[24] Pre line building checklist dated 19 August 2005, exhibit C to Mr Gill's brief.

Mr Alvey's evidence that such an inspection failure was a major cause of water ingress and eventual timber damage. Dr Wakeling indentified the presence of fungal growth to the timber window joinery surround on photo 53, exhibit N to Mr Alvey's brief of 15 September 2010 was caused by the absence of a PEF pressure seal and a gap in the foam surrounding a window installation.[25]

[120] The lack of sealant and flashings that were too short were failings located over all window joinery on all four elevations.[26]

[121] The claimants' witness Mr Gill stated that a BIA guidance document for the assessment of monolithic claddings stated that head, sill and jam flashings should be checked during a pre cladding inspection by the inspection certifier. Mr Gill also observed that the Council's checklists for building inspections that were operating at the time for the pre-cladding inspection required such flashings to be checked, and yet the three cladding inspections all wrongly observed that the flashings had been correctly installed.

[122] I find that these omissions alone were a major systemic inspection failure by Council officers and I accept Mr Alvey's evidence that they were a primary cause of damage. Mr Gill made the observation that "in my opinion the various defects that were evident to the flashing system should have prevented a Code Compliance Certificate from being issued".

[123] While at the time of construction Mr Gill had only recently arrived in New Zealand and was a processing officer for Rodney District Council with little building inspection experience here, I accept his evidence because of his expertise as a building surveyor before in the UK and since in New Zealand. The Council's evidence was that the inspection regime it had in place in 2006, during the time

[25] The window in question was the north elevation living room window identified by Mr and Mrs Malik as having allowed water to ingress to the adjacent floor area.
[26] Photographs of the affected joinery flashing failures can be seen in the photos attached to Mr Gill's brief of evidence (exhibit F photos 10-35).

of construction, is the same as the current regime and that it has been approved as an acceptable inspection regime by the Department of Building and Housing. But such an inspection regime did not enable the Council to determine on reasonable grounds that all relevant aspects of the Building Code had been complied with. Its inspection of this home was not capable of identifying waterproofing issues surrounding the joinery installation. I am satisfied that the claimants' evidence has established that these defects were apparent on all elevations. The flashing installation, the PEF backing rod installation and the correct air seal installation around all joinery openings in accordance with the Putz-Technik manual were aspects that should have been checked by a reasonable Council officer during the inspections.

[124] I conclude that the Council was negligent in failing to detect defects in construction which even their regime required checking approval. In addition other aspects were failed but then apparently passed without rectification. The Council's inspection processes with this home did not enable it to determine on reasonable grounds that all relevant aspects of the Building Code had been complied with.

[125] The Council's inspection regime applied to this home failed to detect significant water ingress defects (the deck/balcony construction and window/joinery installation on all elevations) and despite the Council's failure to notice such defects, it issued a Code Compliance Certificate. By doing so, the Council was in breach of its duty of care to Mr and Mrs Malik as purchasers. The Tribunal therefore finds the errors of Auckland Council resulted in the claimants suffering significant losses and concludes that the first respondent is liable for the full amount of the established claim.

**AFFIRMATIVE DEFENCES OF THE COUNCIL – *VOLENTI NON FIT INJURIA* / BREAK IN THE CHAIN OF CAUSATION / NO DUTY OF CARE**

[126] The Council's affirmative defence was that the claimants purchased the home knowing that it contained deck defects.[27] Ms Divich argued that in *Sunset Terraces,* the claimants (the Sanghas) were unsuccessful in their claim because they had knowledge of defects prior to settlement and they retained funds in order to remedy those defects. The retention of funds was insufficient to carry out the work. Ms Divich submitted that Heath J found that the actions in retaining the funds amounted to a break in the chain of causation.

[127] Ms Divich argued that the Maliks in this case had knowledge of defects prior to settlement and they would have retained funds had they been able to negotiate this with their vendor. The vendor would not agree. If the Maliks had managed to negotiate retention of funds they would then be in exactly the same situation as the Sanghas in *Sunset Terraces*. It is the Council's position that the Maliks' actions broke the chain of causation in relation to the Council's actions or alternatively that they accepted the risk that the property was not worth what they paid for it because it required repairs.

[128] Ms Divich also put her argument yet another way: that the Council does not owe a duty of care to someone who purchases with knowledge of defects and she referred me to *Bowen & Anor v Paramount Builders (Hamilton) Limited & Anor*[28] where the Court said at 412-413:

> The duty of the builder is not owed to anyone who purchases a building with actual knowledge of the defect or in circumstances where he ought to have used his opportunity of inspection in a way which would have given him warning of that defect.

[27] Mr Neil Alvey Inspection Report of 27 November 2006 paragraph 3.04.
[28] *Bowen & Anor v Paramount Builders (Hamilton) Limited & Anor* [1977] 1 NZLR 394 (CA)

[129] The Sanghas' situation in the *Sunset Terraces*[29] is clearly distinguishable from the present claim. The Sanghas entered into a purchase agreement with an abatement in the purchase price negotiated to permit the costs of repair to the deck which had weathertightness problems. It was the Sanghas' position that they would not have proceeded to purchase the unit had the Council information disclosed that there was a problem with the building. Further in that case the LIM and the Code Compliance Certificate obtained were from 1998 whilst the decision to purchase was made in 2004. At the time of purchase the Sanghas were aware of water ingress problems that the Council was not aware of in 1998. The Sanghas agreed to purchase the unit based on their own judgement of the abatement, not on the basis of the Council's Code Compliance Certificate. Heath J stated at para [289]:[30]

> Although the issue maybe analysed on different ways, I take the view that Mr and Mrs Sangha's reliance on the abated purchase price was an intervening act which broke the chain of causation. For that reason, their claim against the Council must fail.

[130] It has been submitted by the Council that in the present circumstances, the claimants proceeded with the purchase with full knowledge of the water ingress defects. To successfully raise the defence of the *volenti non fit injuria*, it must be shown:

1) that the claimant was fully aware of the factual circumstances and of the danger to which such circumstances give rise; and
2) that the claimant freely and voluntarily decided to incur the danger.[31]

[131] However in this claim, Mr and Mrs Malik had limited knowledge of the defects which they learnt about just prior to settlement and possession of their purchase. They were contractually

[29] *Body Corporate 188529 & Ors v North Shore City Council & Ors* (see above n18 at [289]).
[30] *Sunset Terraces* above n 19 at [289].
[31] *Osborne v London and North Western Railway* (1888) 21 QBD 220, 22

committed at law to proceed with the purchase before they gained knowledge of some water ingress defects. The Maliks gained their initial awareness of defects from Mr Alvey's report which was commissioned after the agreement for purchase became unconditional and briefly before settlement. The Maliks then attempted to negotiate a reduced purchase price on the basis of the weathertightness issues but the vendor did not agree. The Council in this claim is arguing that if the Maliks had managed to negotiate a retention of funds they would be in exactly the same situation as the Sanghas in *Sunset Terraces* and as such the chain of causation has been broken.

[132] It is my view that there are key factual differences which set the present case apart from *Sunset Terraces* and other decisions. The key difference is that the agreement for sale and purchase entered into by the Maliks was negotiated and committed to and became unconditional before the Maliks became aware of any potential weathertightness issues.

[133] The agreement for sale and purchase was signed on 22 July 2006. The agreement contained the usual general building warranty and a specific condition that a Code of Compliance Certificate would be obtained by a certain date before settlement. There was also a special term providing a warranty as to workmanship.

[134] The Council issued the Code Compliance Certificate on 4 September 2006 without conditions. The agreement at that point became unconditional for the Maliks. The Maliks did not consult Mr Alvey after receiving his report on 28 November 2006. Their evidence was inconclusive as to the quantum that they were seeking to retain when instructing their property lawyer to negotiate with the vendor's property lawyer the day before and on settlement. In any event the maximum figure mentioned in such negotiation was just $30,000.00 which is not a significant sum when related to the purchase price which was $745,000.00.

[135] The form of the agreement was the Auckland District Law Society/Real Estate Institute, 7th Edition. It contained the usual vendor warranties in clause 6.2 (5) relating to building work being completed in accordance with the building consent and that all obligations under the Building Act had been complied with. However, clause 6.5 states that any breach of warranty does not defer the obligation to settle and that settlement is without prejudice to the parties' rights at law or in equity. Mr and Mrs Malik's property lawyer did settle on the basis that settlement was without prejudice to the purchasers' rights at law.

[136] Refusing to settle would have presented significant contractual default problems under the agreement. Failing to settle would have exposed Mr and Mrs Malik to penalty interest, any losses suffered by the vendor and costs of litigation (for specific performance, damages etc).

[137] The Council filed at the hearing a memorandum from an experienced property lawyer which indicated that the Maliks were correct to proceed with settlement as they were contractually committed to do so.

[138] The significant factual difference from *Sunset Terraces*[32] is that the Sanghas knew of the water ingress problems at the time they entered into the agreement to buy the property and so they had leverage to negotiate a reduced purchase price and it was this factual situation that persuaded the High Court to determine in that case that the chain of causation had been broken.

[139] In the present case the Maliks attempted to negotiate a retention but failed to do so as they had no bargaining power. They were unconditionally committed at law to settle. As such, they were unable to "break the chain of causation". Nor do I accept that the Maliks' limited knowledge meant that they freely assumed the risk

[32] See n 18 above.

that the property had defects when they settled. Indeed Mrs Malik tried to persuade the Council to withdrawal the Code Compliance Certificate which it said it could not do. That is not indicative of an assumption of risk - on the contrary.

[140] The Council's defence of *volenti non fit injuria* must fail and so too must their claim that the chain of causation has been broken. The Maliks had no legitimate right to avoid their contract of purchase at the time of settlement.

**Contributory Negligence**

[141] Ms Divich submitted that the claimants contributed to their own loss. She submitted that the Maliks' actions in failing to make the agreement for sale and purchase conditional upon obtaining a satisfactory building report and, having obtained advice that repair work was necessary, failing to obtain advice on the costs of the appropriate repair work prior to settling, removed all causal potency from the Council's original negligence with its inspection failures.

[142] Ms Divich argued that at the time that the Maliks purchased the home in 2006, the "leaky building syndrome" was widely known. Ms Divich referred me to *Body Corporate 189855 & Ors v North Shore City Council & Ors (Byron Avenue)* [33] where Venning J stated at [354]:

> "By May 2005 there was considerable publicity about the leaky home problem...even accepting that Ms Kim did not know of the issues generally or the problems with this specific unit, Ms Kim was contributory negligent. She signed an agreement for sale and purchase without taking any proper advice at all. She committed to the purchase without making any enquiries or taking any steps to protect her own position. Given her lack of knowledge, she cannot be said to have purchased with knowledge of problems but she took no steps at all to protect

[33] *Body Corporate 189855 & Ors v North Shore City Council & Ors (Byron Avenue)* HC Auckland, CIV 2005-404-5561, 25 July 2008 at [354].

> her own interests. Ms Kim's contributory negligence is also fixed at 25%."

[143] The Council submitted that there are certain circumstances in this case which should lead to the conclusion that the Maliks should be found to have contributed to their own loss:

- they had actual knowledge of some defects prior to settlement and this knowledge should have alerted an architectural student;
- they did not take advice prior to purchase;
- they did not make the agreement conditional upon obtaining a satisfactory building report; and
- once obtaining the pre purchase report they did not obtain any further advice on the likely costs of remedial work.

[144] Section 3 of the Contributory Negligence Act 1947 states that where a person suffers damage as a result partly of his or her own fault, and partly the fault of another person, the damages recoverable in respect of the damage suffered should be reduced to the extent the Court or Tribunal thinks just and equitable, having regard to the claimants' share of and responsibility for the damage.

[145] In *Body Corporate 188529 & Ors v North Shore City Council & Ors* Heath J stated that:[34]

> To my knowledge, there has never been an expectation in New Zealand (contrary to the English position) of a potential home owner commissioning a report from an expert to establish that the dwelling is soundly constructed. Indeed, it is a lack of 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.

[146] On appeal *(Sunset Terraces)* Baragwanath J held:[35]

> In leaky building cases, the opportunity for intermediate inspection that the purchaser has is very limited compared to the rights of inspection which building inspectors have during the course of construction. So I see the former opportunity as irrelevant to whether the local authority owes a duty of care. To put this another way, the opportunity for a purchaser to inspect a completed residential unit does not warrant any lack of care by building inspectors in the course of their inspection. And I also think, it will be a rare case indeed where the significance of the opportunity for intermediate inspection breaks the chain of causation.

[147] In the Tribunal decision of *Aitken v Laudermilk*[36] the Council argued that the claimants bought the house when the "leaky building syndrome" was well known and as they took no steps to protect themselves by obtaining a pre-purchase inspection, they should be found to be responsible for contributory negligence. Adjudicator Pitchforth, in applying *Sunset Terraces*, held that there was no requirement to obtain a pre-purchase report.

[148] Although the authorities are clear that the failure to obtain a pre-purchase inspection does not lead to contributory negligence in every case, there are circumstances in which not arranging for an inspection will lead to a finding of contributory negligence. In the Tribunal's decision *Crosswell & Anor as trustees of the Crosswell Family Trust v Auckland City Council*[37], due to the claimants' failure to obtain a pre-purchase inspection report when they had been aware of intermittent water leaks over a number of years, coupled with their acceptance that they were aware in late 2005 of the growing publicity surrounding leaky homes, Adjudicator Lockhart held

---

[34] *Body Corporate 188529 & Ors v North Shore City Council & Ors* above n 19 at
[35] *North Shore City Council v Body Corporate 188529 (Sunset Terraces)* [2010] NZCA 64 at [166].
[36] *Aitken v Laudermilk* WHT TRI 2008-101-000098, 22 July 2009.
[37] *Crosswell & Anor as trustees of the Crosswell Family Trust v Auckland City Council* WHT TRI 2007-100-41, 17 April 2009.

that the claimants were negligent in failing to take further steps to protect their position when they knew the building had defects which had caused the leaks.

[149] The *Crosswell* decision can clearly be distinguished from the case before me. The Maliks were unaware at the time of negotiating their purchase of any weathertightness issues. Indeed, their evidence is that they were relying on the Council's inspection regime to ensure compliance with the building code and to ensure proper workmanship. Their agreement provided for the Code Compliance Certificate to be issued without conditions before the contract became unconditional and they also negotiated a warranty with the vendor as to workmanship.

[150] For the above reasons I am satisfied that there was no contributory negligence on the part of Mr and Mrs Malik in this matter. The Council's defence of contributory negligence must therefore fail.

**CONCLUSION AND ORDERS**

[151] The claim by Amit Malik and Melissa Malik is proven to the extent of $263,396.29.

[152] Auckland Council is ordered to pay the claimants the sum of $263,396.29 forthwith.

**DATED** this 25th day of January 2011

_____

K D Kilgour
Tribunal Member