IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2010-101-000037
[2012] NZWHT AUCKLAND 30

BETWEEN	SIMON WRIGHT AND CHRISTINE ARGYLE Claimants
AND	MACDEE MCLENNAN CONSTRUCTION LIMITED First Respondent
AND	DUNCAN MCLENNAN Second Respondent
AND	PORIRUA CITY COUNCIL Third Respondent
AND	ALAN HEATHCOTE (Removed) Fourth Respondent
AND	COLIN PROUSE Fifth Respondent
AND	GERRY KNOL Sixth Respondent

Hearing: 23 June 2011

Appearances: Richard Johnstone for the Claimants
Graeme Reeves for the First and Second Respondents – leave to withdraw granted
Paul Robertson for the Third Respondent

Decision: 2 July 2012

FINAL DETERMINATION
Adjudicator: R Pitchforth

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BACKGROUND

[1] The claimants, Simon Wright and Christine Argyle, are the owners of a house at 3B Cromarty Place. The house leaked. The claimants have repaired the house, allege negligence on the part of the respondents and seek recompense for the cost of remediation, consequential expenses, interest and damages.

[2] The first and second respondents, Macdee McLennan Construction Limited and Duncan McLennan appeared at the commencement of the adjudication, admitted liability and indicated that they would abide by the decision of the tribunal. Mr Reeves was then given permission to withdraw. They took no further part in the proceedings. These respondents are referred to as the builders in this decision.

[3] The third respondent, the Porirua City Council was the local authority. The claimants alleged negligence in the consent, inspection and certification process. The Council challenged both liability and quantum. Its responses were that:

(a) The remedial costs are excessive;
(b) General damages should be limited to $25,000; and
(c) The claimants placed no or no reasonable reliance on the earlier involvement of the Council.

[4] The claimants settled and withdrew the claim against the fourth respondent, Alan Heathcote. The Council indicated that it would not proceed with its cross claim. There being no other interested parties making submissions Mr Heathcote was then removed from the proceedings.

[5] The fifth respondent, Colin Prouse, was the pre-purchase inspector employed by the claimants. He also undertook repairs to

the house. The claimants did not proceed with their claim against Mr Prouse as that dispute had also been settled.

[6] The sixth respondent was Gerry Knol, the plasterer, who took no part in the hearing.

[7] The issues to be decided were:

a) What was the effect of the claimants' actions during the purchase of the property?
b) What were the defects?
c) Which of the defects were visible to Mr Prouse at the time of his inspection and therefore accepted by the Council as being visible to an inspector and was the council negligent in relation to those defects?
d) Was the Council negligent in relation to the other defects?
e) Did the Council have an affirmative defence?
f) The cost of remediating the defects.
g) Whether the remediation costs were excessive.
h) Whether the general damages claimed of $40,000 were excessive.

THE PRE-PURCHASE REPORT

[8] The claimants accept that at the time of purchase they were generally aware of the leaky house syndrome. They visited the house before purchase and did not see anything which was or might be a weathertight problem. The vendors did not alert them to any problem.

[9] Ms Argyle then went to the Council offices and inspected the full Council files in early August 2003. She particularly noted that there was a code compliance certificate. The claimants say that there was nothing in the Council file at that time to show that the house

was not constructed in accordance with the consent. The claimants said they were entitled to assume that the Council's documents were in order, the house had been built in accordance with the consent and it was Code compliant.

[10] Satisfied with the Council's documents, the claimants then contracted Mr Prouse on 18 August 2003 to conduct a pre-purchase inspection based on the Building Code. He offered a choice of reports ranging from the cheapest, 46 checks on key areas with a verbal report, a more expensive written report, and the most expensive which would involve a more extensive inspection and a written report about weathertightness issues. The claimants opted for the middle option, the written report exception to the Building Code at a cost of $299.00.

[11] The claimants received the pre-purchase report from Mr Prouse by 20 August 2003 outlining his observations of defects. The report said that it was a general assessment of the property based on a visual non-destructive inspection covering reasonably accessible areas and was made without moving the vendors' chattels.

[12] Mr Prouse commented on five items. These were:

- The manner of attachment of the pergola to the cladding which he said would leak in time.
- Bubbling in the cladding indicating the need for horizontal expansion joints.
- Flat parapet tops which would allow moisture ingress unless protected by a waterproofing membrane.
- The stainless steel handrail which also should be protected by waterproofing underneath the base of the posts.

- Roof apron flashings which ought to have kick-out flashings to prevent moisture ingress although sealant currently prevented this from occurring.

[13] The report made no recommendation about further testing and contained no advice that invasive testing could reveal latent defects. It recommended that the items identified should be attended to "to gain long term assurance of a weathertight house" and that professional advice should be sought on the correct method of correcting the identified items.

[14] The claimants considered that the Prouse report meant that there were issues which precautionary work would overcome. They understood that the work was easily achievable. Mr Prouse did not report that further testing was required, or that the house was not built in accordance with the building consent or that it was non–compliant with the Code. He did not advise the claimants as to other defects. At his subsequent meeting with the claimants, he told them the house was sound.

[15] The claimants proceeded with the purchase. In reliance on Mr Prouse's report, they identified a number of items which they required to be repaired by the vendor before they would settle.

[16] The clause in the agreement for sale and purchase based on the pre-purchase report was:[1]

> Prior to settlement and in a proper and tradesman like manner the vendor shall undertake the following repairs to the property to the entire satisfaction of Colin Prouse of AAA Building Maintenance, prior to the possession date:
>
> (i) Fitting 'kick out' flashings at the lower end of the apron flashings on the roof.

[1] Agreed Bundle of Documents 48 at [523].

(ii) Reaffixing the pergola including its support post to the dwelling in a thorough and tradesmanlike manner and ensuring that the same is weatherproof.

(iii) Remedying (if deemed necessary by the said Colin Prouse) the horizontal bubbling in the cladding.

(iv) Remedying (if deemed necessary by the said Colin Prouse) the parapet walls.

(v) Sealing (if deemed necessary by the said Colin Prouse) in a thoroughly weatherproof manner between the handrail supports and the top of the upper deck walls.

(vi) Weatherproofing (if deemed necessary by the said Colin Prouse) of and around the ranchslider doors.

The vendor warrants that prior to the dwelling being constructed the consent of Western Hills Development Limited was obtained to the plans for the dwelling as built and will provide written evidence of the same prior to possession date.

[17] Although Mr Heathcote was originally going to carry out the repairs it was subsequently arranged that Mr Prouse would do so. Mr Prouse had not been consulted about the scope of work set out in the agreement. He complained that his list had been misused but, as the contract was signed, he could not add to the list. Mr Prouse was asked to ensure the repairs on the list were completed to his satisfaction before the settlement date of 3 October 2003.

[18] Mr Prouse undertook to manage the repairs. The remedial work was allocated to various parties. Mr Heathcote was responsible for the repairs being completed and would pay for them. The claimants did not seek consent from the Council; they thought that if anything was required it was Mr Heathcote's responsibility. Neither Mr Heathcote nor Mr Prouse thought to apply for consent or notify the Council.

[19] During the course of the repair work Mr Prouse asked and was advised by Mr McLennan that there were membranes installed under the tops of the parapets and balustrades. This advice was

incorrect; there was no membrane found when later remedial work was done.

[20] The claimants declared the agreement unconditional about 30 September 2003 just prior to the agreed possession date. Mr Prouse had repaired some of the defects in the property but there was work still to be completed. It was agreed that the vendors would pay for it.

[21] Work was not completed when settlement and occupation was required and a $3,000 retention was agreed; the retention money was to be released once Mr Prouse was satisfied the work was done.

[22] After moving in the claimants experienced a series of leaks and had ongoing involvement with both Mr Prouse and Mr McLennan about these. In January 2007 the claimants engaged a remediation specialist to assist them with what they still thought were isolated leaks. He advised them that they had a house with fundamental systemic problems, in other words, a leaky home.

THE DEFECTS

[23] I was invited to draw the inference that, as the Council had not called witnesses in relation to the defects, I should determine that they were liable for all defects and consequently all amounts claimed. I declined to draw such an inference without considering the evidence. If the Council chooses to rely on the evidence that has been given by other parties, including cross examination, then no criticism need be made. It has the burden of proof for any affirmative defence. The adequacy of the evidence is a matter for the adjudicator.

[24] Evidence as to the defects was provided by Murray Proffitt, the assessor and Thomas Wutzler, the claimants' expert. Some defects were also mentioned in Mr Prouse's report referred to by the parties.

Roof and drip edge

[25] There was a failure to turn down the ends of the metal roof to form a drip edge (exacerbated by low pitch) and a failure to form a drip edge to the barge flashing over the kitchen roof. There was a lack of cover to the flashings on the north east and south west elevations. The building underlay had been incorrectly installed by laying it vertically rather than horizontally as would be required for a roof pitch of less than eight degrees. As a result the water was running back under the edge of the roof and pooling on and wetting the roofing underlayer accessing the top of the fascia and the cladding behind the gutter on the north west and west elevation of the kitchen, at the gutter line and at an internal gutter adjacent to the barge. Water penetrated the roof cladding and was able to reach the roof timbers.

[26] The damage was a degradation of roofing underlay, decay of roofing timbers and mould on the fibre cement sheet. The damage required the replacement of the roof.

[27] I accept Mr Wutzler's view that the lack of a down turn would have been visible in 2000. However, Mr Wutzler agreed that a downturn was not required by E2/AS1, the standard which inspectors are required to apply so that the Council was not negligent in not requiring changes. The roofing underlay would have probably not been inspected.

[28] The construction was negligent so the builders are liable.

Skylight

[29] Mr Proffitt, found that there was leaking at all four sides of the skylight. A proportion of the leaking was occurring at the apron flashings at the intersection with the deck barrier and bedroom three where the capillary gap had been omitted at the cladding. He said that it is unlikely that this moisture would affect more than the fibre cement sheet in contact with the flashing as the greater proportion of the observed moisture is likely to have travelled down from the deck barrier wall.

[30] Mr Proffitt considered the causes of this leak were insufficient lap of the apron and barge flashings over the skylight frame and lack of capillary break folds, no kickout at the apron where the apron flashings terminate at bedroom three and deck barrier walls, insufficient cover to the turn downs and omission of capillary break folds to the barge flashing and a poor junction between the barge fascia and the cladding.

[31] There was inadequate detailing of the skylight including inadequate flashings with lack of upstand, no turn down and insufficient cover. There was a lack of protection to junctions between the skylight and the cladding on the north west elevation.

[32] The defect contributed to decay to the roof framing timbers and mould on the plasterboard.

[33] There was no evidence that this was observed by Mr Prouse or should have been detected by Council inspectors.

[34] This is a building defect for which the builders are liable.

Apron flashings

[35] The apron flashings were poorly detailed so that water got under the cladding of the parapets through unsealed laps in the

apron flashings. This defect contributed to mould and decay to the fibre cement sheet, degradation to the building underlay, decay of framing timbers, corrosion of fastenings and mould on the inside face of the interior plasterboard wall lining. The damage was sufficient to justify a reclad on all elevations.

[36] In his report, Mr Prouse identified the lack of kick outs to the ends of the apron flashings and the cladding. In the course of the repairs he applied a tape to the junction and painted it. Although intended to divert water away from the cladding, this caused water to accumulate at the apron flashing/cladding junction further up the apron flashings. The repair did not provide an adequate and durable junction to prevent water ingress at the ends of the apron flashings. Mr Prouse was negligent in failing to properly repair this fault.

[37] The Council accept that Mr Prouse found a defect in the apron flashings and accordingly that the Council inspector ought to have done so too.

[38] The builders were responsible for the original work and Mr Prouse for the way in which he repaired the apron flashings. The Council inspectors were negligent in failing to observe the deficiencies in the flashings. The defect justified a reclad of the house.

Fascia board junctions

[39] The fascia boards were fixed directly to the cladding with no capillary break between the lower edge of the fascia and the cladding. The poor detailing of the fascia board/cladding/apron flashing junction allowed water to enter under the cladding of the parapets and through the unsealed gaps in the apron flashings. Very high moisture contents were recorded in the cladding and framing below every location where a fascia board terminated at the lower

perimeter of the roof. It was likely that the junctions at the end and also along the length of the fascia boards leaked to some extent.

[40] The damage was mould and decay in places in the fibre cement sheet, degradation of the underlay, decay of the framing timbers, corrosion of fastenings and mould on the inside face of the interior wall lining.

[41] I find that the defect was created by the builders and Mr Knol and caused leaks, but there was no evidence that the Council inspectors should have seen the defects.

Parapets

[42] All the parapets and deck barriers had horizontal cracks at the corner junctions and water penetrated via capillary action so they leaked. All parapets had inadequate falls and inadequate flashings over and around the parapets. The parapets were formed without adequate waterproof membrane or other appropriate protection on all elevations except the south. Where the cladding was taken hard down to the roof apron flashing and where there are raked (angled) parapets water accumulated at the parapet ends contributing to moisture levels. There were leaking lateral cracks across the top of the parapet cladding in two locations on the north east elevation above bedroom one and at one location on the south west elevation above bedroom two. Top fixed handrails also leaked. Moisture was trapped in some walls but in others it penetrated to the bottom plate. There was pervasive moisture within the cladding. The moisture contributed to the dampness at the inter-storey joint.

[43] The plans and specifications specified Harditex as the substrate for the texture coat. On sheet four of the plans it is stated

that the "top of parapet to comply with Hardie's recommendations."[2] James Hardie's Technical Information required a slope of one in ten (approx six degrees) and the installation of reinforced waterproof membrane across the top surface of the parapet and 200 mm down the sides. Mr Wutzler identified the product used as Duratex, a fibre cement product manufactured by BCG Fibre Cement. The relevant installation instructions state that Duratex must not be applied to nominal horizontal surfaces such as the top of parapets, sills, decking, upstands etc. These surfaces must be sloped a minimum of 15° to the horizontal for light texture finishes, or a minimum of 30° for heavy texture finishes. The alternative is to install a fully sealed and waterproof membrane system immediately under the cladding on the horizontal surface or install a capping.

[44] Resultant damage was mould and decay in places in the fibre cement sheet, degradation of the building underlay, decay of the framing timbers, corrosion of the fastenings and mould on the inside face of the interior plasterboard wall lining.

[45] This defect and damage required the full reclad of all elevations.

[46] The parapets would have been highly visible in 2000 and it would be obvious to an inspector that the flatness of the parapets was contrary to the installation instructions for the specified cladding system consented to and the lack of a waterproof membrane should have been queried.

[47] The Council accepted that the inspectors should have noted, as Mr Prouse did in his report, that the top faces of the parapets were flat and were likely to leak.

[2] Harditex Technical Information, James Hardie Technical Information, July 1998, figure 68.

[48] The parapets and deck barriers were negligently constructed and the builders and Mr Knol were responsible. The inspection process failed to note this defect and the Council was accordingly negligent in its inspection process.

Flat topped balustrades

[49] All the balustrades leaked. On the north east and south west elevations the balustrade was constructed with a flat top without adequate protection on top or at the junctions on the north east and south west elevations.

[50] The texture coating was so thin that it was obvious that no waterproof membrane had been installed. Water was able to pool and penetrate through the cladding, especially where the pergola support and handrail supports penetrated the cladding.

[51] The plans showed three ways to complete the tops of the balustrades. The choice made was the one requiring a slope to the solid balustrade. The Duratex requirements were the same as for the parapets.

[52] The resulting damage was mould and decay in the fibre cement sheet, degradation to the building underlay, decay of framing timbers, corrosion of fastenings and mould on the inside face of the interior plasterboard wall lining and decay of the deck joists.

[53] This defect required the recladding of the north east and south west elevations.

[54] The builders and Mr Knol were responsible for this defect and were negligent. The Council inspectors should have noted the defect and not to do so was negligent.

Balustrade penetrations

[55] The front solid timber deck balustrade was penetrated on the north east and south west elevations by the pergola support posts, handrail supports and the secondary overflow. The penetrations were inadequately protected.

[56] This defect was a result of the negligence of the builders and Mr Knol.

[57] The Council accepted that its inspectors ought to have observed the lack of waterproofing to the handrail and the timber post. To fail to do so was negligent.

[58] The resulting damage found during destructive testing was mould and decay to the fibre cement sheet, degradation to the building underlay, decay of framing timbers, corrosion of fastenings and mould on the inside face of the interior plasterboard wall lining and decay of the deck joists.

[59] Mr Prouse applied sealant to bridge the gap between the balustrade surface and the timber post. The repair did not prevent ongoing water ingress through the splits in the timber and nail penetrations. The ongoing differential movement would have compromised the seal within a short space of time.

[60] The damage would have required the recladding of the front north eastern elevation but as removing some features would compromise other elevations this defect required the recladding of all elevations.

[61] The builders, Mr Knol, Mr Prouse and the Council were negligent in relation to this defect.

Pergola beams

[62] There was a leak where the front deck pergola post was attached to the top of the barrier wall and penetrated the cladding of the barrier. The joint was reliant on sealant to provide weathering and combined with the risky detail of the flat barrier top and disparate material properties of the unpainted timber and the fibre cement sheet, differential movement caused the sealant to rupture and lose adhesion from the materials. This leak was the primary contributor to moisture in the deck barrier, the deck substructure and the north corner of the garage below.

[63] The resulting damage was mould and decay to the fibre cement sheet, degradation of the building underlay, decay of framing timbers, corrosion of fastenings, decay of the deck joists, decay in particle board flooring and decay of carpet.

[64] Mr Prouse found that the pergola penetrations were poorly protected and applied a tape along the top surface of the stringer to bridge the gap between the stringer and the cladding. He then painted the tape. Ongoing movement of the stringer would have broken the seal after a short time. The repair was inappropriate.

[65] The Council accept that the inspectors should have observed the pergola penetrations seen by Mr Prouse.

[66] The builders were negligent in the construction, Mr Prouse in the repairs and the Council for failing to observe the original defect during construction.

Polystyrene Bands

[67] Flat topped polystyrene plant on bands were attached at the inter-storey level, around the first floor and around the master bedroom window and garage door allowing water to pool,

contributing to mould and decay to the fibre cement sheet, degradation to the building underlay, decay of framing timbers, corrosion of fastenings and mould on the inside face of the interior plasterboard wall lining. This was linked to the control joints and the poor installation of the fibre cement cladding. The damage resulting from these connected defects required a reclad of the north eastern, south eastern and north western elevations. Difficulty in matching at the corner joint with other elevations was sufficient to justify recladding the building.

[68] The application of the band was Mr Knol's negligence. The builders were also responsible

[69] Mr Wutzler said that such a band was obviously defective but it was not present when the Council inspected. Accordingly, there is no negligence on the part of the Council.

Cladding

[70] The fibre cement sheet cladding system was poorly installed. The Duratex cladding was substituted for the consented Harditex fibre cement sheet cladding system with a 1.5 mm to 2 mm texture coating. The claimants said that such a substantial change in the cladding and coating should have been subject to an amendment in the consent.

[71] The cladding was not installed as instructed in the manual. The Duratex manual[3] shows an anti capillary gap requiring a timber overhang by two–three mm. It recommends a control joint gap of eight–ten mm.[4] It also instructs: "Do not bond architectural profile section below sheet joint." Under "Control joints" it says "Vertical relief joints must be provided at a maximum of 5400 mm horizontal

[3] *Duratex Manual*, BGC Fibre Cement Technical Information (December 1999) at [9] figure 7.
[4] At [10] figure 10.

centres in continuous run walls."[5] Similarly, BRANZ House Building Guide[6] requires, a definite gap between the apron flashing and the cladding saying "Leave 30–50 mm gap between cladding and flashing."

[72] The fibre cement sheet cladding lacked drainage and capillary gaps at the base of the cladding on either side of the garage door and at the deck upstands, the bases of the walls and deck balustrades in places. The cladding was installed hard down on the roof flashings/head flashings. There was a lack of or incorrect installation of horizontal control joints including but not limited to an insufficient gap between the top of the lower Duratex sheet and bottom of the top Duratex sheet. Incorrect positioning also meant that the polystyrene band could not be attached to the top sheet with the result that the joint would fail to accommodate movement. There was no sealant on the end of the control joint flashings. There was penetration of the control joint flashing turndown by fixings. There was a lack of provision for drainage at the horizontal control joint. There was a lack of vertical control joints. There was a poor detailing of sheet joints.

[73] The damage was extensive cracking and areas of high moisture content in the cladding and delamination of the jointing compounds in the cladding of the walls, parapet tops and deck barriers. The cracking was a combination of uncontrolled movement in the cladding due to omission of control joints and the incorrect installation of the horizontal inter-storey joint, incorrect detailing of external corners with the omission of PVC mouldings and applied coating that permitted the entry of water. The cracking combined with the sunny location continued to allow more moisture ingress and exacerbated the problem. The mid tone colour of the exterior cladding caused more thermal movement than a pale colour scheme.

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6 House Building Guide, BRANZ (1993) at [153].

[74] Mr Prouse reported that there were instances of the cladding appearing to bubble along horizontal lines. This indicated the need for horizontal expansion joints, if not already in place. He was concerned enough to send a photo with a message to a building consultant on 3 October 2003. He said:

> The attached photo shows a horizontal control joint under a coating of a Nuplex product called Flexifine. In the gap between the two fibre-cement sheets has been placed a sealant (looks like MS). Typically CSR and Hardies require a z flashing on a horizontal joint. This is usually disguised by placing a 'decorative band' over the joint.
>
> In this case the designer has tried to achieve a completely monolithic look by omitting the first flashing and relying on the long term integrity of the sealant and exterior coating systems.
>
> The question is should the control joint have a z flashing installed (at some cost and inconvenience) or can the sealant be left as it is?
>
> There is no suggestion of the joint leaking, as the coating system has not cracked – just bulged at the joints.

[75] On 15 October 2003 Mr Prouse wrote to the claimants to say:

> I met Gerry [Knol] today and we agreed that the most sensible solution in terms of both aesthetics and function (weathertightness) was to extend the plaster band on the left wall of the entrance, in the same colour, around to the right over the entrance and continuing over to the right hand corner, running under the grey painted fascia board…Gerry has quoted me $200 to do the job.

[76] These defects would have been highly visible at different times in 2000 during the course of Council inspections though some would have been covered before the final inspection.

[77] Those responsible for the cladding were negligent. They were the builders and Mr Knol. The Council was negligent in not

noticing the cladding was not applied as consented or recommended by the manufacturer.

[78] The damage from the defects affected all elevations with mould and decay to the fibre cement sheet, degradation to the building underlay, decay of framing timbers, corrosion of fastenings and mould on the inside face of the interior plasterboard wall lining; as a consequence all elevations required recladding.

Exterior joinery

[79] The exterior joinery (excluding the entry door), on the north east, north west and south west elevations, the stairwell window and the door and window on the south east elevation, leaked. In relation to two windows the moisture may have just reflected the general level of dampness in the cladding.

[80] At the window heads water entered via cracking and capillary action where the cladding is taken hard down to the head flashing with the moisture tracking along the head flashing until it reached the unsealed end. The water then entered the wall cavity and the jambs and trimmer studs beneath (some of the moisture may have been from the parapet tops above). Some of the moisture entered via the unsealed gaps beneath the ends of the head flashings where the sheet had been cut to accommodate the head flashing.

[81] Water running down the inside corner of the cracks on the kitchen and study corner windows was consistent with a leak at the mitred joint of the head flashings. At the three corner windows (kitchen, study and bedroom three) close proximity to leaking at the barge fascia and or parapet ends made it difficult to assess the exact cause or separate one leak from the other. The open mitre in the sill extension possibly contributed to moisture levels at the southern corner of bedroom three and the family room beneath the window.

[82] Water entered the jamb junctions by capillary action via the small gaps and cracks formed in the cladding's applied coatings at the jamb extrusion to cladding junction which lacked flashings, sealant or foam tape to deflect the moisture. An exacerbating factor was that the sealer coat had not been applied to the fibre cement sheet prior to the installation of the joinery allowing moisture into the sheet.

[83] Although moisture seen at the base of the cladding and beneath windows and doors was primarily from leaks at the heads and jambs, it was possible that water was also being driven under the deck doors and from there being taken inside by capillary action and pressure differential mechanisms. Differential pressure was also likely to assist the transport of moisture towards the inside once water had penetrated the outer coatings of the cladding and the perimeter of the joinery frames.

[84] The installation of the exterior joinery failed to adhere to the manufacturer's installation details such as providing capillary gaps, sealing flashings and sealing the jamb to cladding junction. The consented specifications required "Head flash to all joinery. Flashings to extend 30 mm beyond frame."

[85] Defects found at the window cladding junctions included inadequate extension of head flashings (not mentioned by the assessor), lack of adequate sealing to the ends of head flashings, cladding installed hard down on the head flashings, inadequate head flashing upstands (45-50 mm), excessive gaps between the horizontal fold of the head flashing and the window head flange, inadequate protection of the junctions between jambs and cladding such as lack of jamb flashings or sealant or Inseal tape under the jamb flange on the original construction and lack of drainage gaps at the sill. The butt jointing of the head flashings to the multi facetted

windows would have inevitably failed due to the thermal movements in the head flashing. The junctions between the jambs (sides) and the cladding had no protection other than the seal provided by a very thin texture coating. In 2000 there would have been either a jamb flashing or compressible foam tape. The specifications required sealing with Inseal 3109 (U100).

[86] In the study corner window there are failed mitre joints of the head flashings at the external corner with no back flashing behind the joint. The study corner window is poorly installed as the mitred joint in the sill extrusion between the two window frames has failed at the base of the window. The kitchen corner window is poorly installed so there is inadequate protection of the window/cladding junction at the exterior corner at the base of the frame. The joinery has failed.

[87] The damage was mould and decay to the fibre cement sheet, degradation to the building underlay, decay of framing timbers, corrosion of fastenings, and mould on the inside face of the interior plasterboard wall lining, decay in flooring and carpet.

[88] The lack of extension of head flashings, lack of sealing of the ends of the head flashings and the butt jointing of some of the head flashings would have been visible to inspectors in 2000. An inspector should have noted the deviations from the consented documents and manufacturer's specifications.

[89] All the windows had to be removed for checking and it was found that the leaks from the windows affected all elevations and required a full reclad.

[90] This defect arose from the negligence of the builders and Mr Knol. The Council inspectors were negligent not to notice the defective flashings. The inspectors would not have necessarily noted the defective nature of the joinery.

Meter box

[91] The cladding is butted to the sides, top and bottom of the meter box. Flashings or scribers have not been installed. Any sealant present has failed to prevent moisture ingress to the wall which had a very high moisture content.

[92] The builders and Mr Knol were responsible for this defect. The Council inspectors should have noted it and were therefore negligent.

Capillary gap and ground clearances

[93] On all elevations there were inadequate ground clearances from the top of the slab to the ground. Mr Proffitt could find no distinct evidence that leaking was occurring at the base of the cladding due to the lack of capillary gaps between the cladding and the foundation wall. He accepted that it is possible that where there was insufficient or no gap and where the timber deck bears against the bottom edge there could be exacerbating factors due to moisture from further up being trapped. There would also be a certain amount of wicking in wet weather. The application of plaster to the concrete foundation at the base of the cladding effectively sealed off the capillary gap or drainage gap in place.

[94] The formation of ground clearances in this manner failed to meet the requirements of the Duratex manual[7] which required a 150 mm minimum clearance from the top of the concrete slab to paving or 225 mm minimum from the top of the concrete slab to landscaped ground level. NZS 3604 (1990/1999)[8] required a clearance of 150 mm between the top of the slab and the paving and 225 mm from the

[7] Duratex Manual above n 3 at [9] figure 7.
[8] New Zealand Standard 3604 at [157] figure 7.10 and BRANZ Bulletin 353 at [5] figure 3.

top of the slab to unprotected ground. The BRANZ Bulletin[9] illustrates the same requirement. Applying plaster and sealant at the base of the Duraplast sheet breaches this requirement.

[95] As there was no distinct evidence of water entry from this defect there can be no liability on this issue. The defect was cured during the reclad.

Texture Coat

[96] The texture coat was very thin, less than one mm, and patchy with the fibre cement substrate visible beneath the modified plaster coating. It had been applied too thinly to form a waterproof barrier. This affected all elevations.

[97] There were medium to very high moisture content readings on all elevations in the fibre cement sheeting showing undue moisture in the building wrap. Water penetrated the vertical cracks at all corners and a number of sheet joints. The moisture had not penetrated the framing to any great depth. Moisture entered due to a failure of the coating systems. The failure was either of the coating product or the application of an insufficient quantity. The omission of a sealer coat behind the inter-storey band suggested a lack of care. Cyclic wetting and drying had contributed to the cracking.

[98] The coating failed due to the negligence of Mr Knol in not applying a proper product or not applying it in sufficient quantity. The builders were also responsible.

[99] The resulting damage was mould and decay to the fibre cement sheet in places, degradation of the building underlay, decay of framing timbers and corrosion of fastenings.

[9] BRANZ Bulletin 353 at [5] figure 3 (C,D).

[100] The inadequacy of the coating system led to sufficient damage to the fibre cement cladding that it required replacement. This justified a full reclad of the dwelling.

[101] The builders and Mr Knol were negligent and are responsible for the defect and damage. Council inspectors were negligent in not noting that the coat was too thin.

Liquid applied membrane (LAM)

[102] Mr Proffitt said that the membrane may have leaked. It appeared to have been recoated with the application of a woven cloth reinforcing at the upstand, perhaps applied later. This was additional to the manufacturer's specification. Decay was observed on the supporting timber substrate. A hole had been found and sealed sometime before the inspection.

[103] Mr Wutzler thought that the poor dressing down into the drainage holes was a risk. He found the membrane overly thin as he could see the grain of the ply substrate beneath. There had been a second application after it had ruptured. The reapplication sealed the base of the cladding at the base of the balustrade and elevation inhibiting drainage of any water which had penetrated.

[104] On the north east and south west elevations the LAM was inadequately applied with inadequate upstands measuring only 45 mm in places, inadequate installation to deck outlets and overflows, less than one mm thick in places and it was applied to an inappropriate substrate. BRANZ Bulletin[10] illustrates the membrane is to be returned 150 mm up behind the cladding. If not appropriately sealed these junctions promote water ingress to underlying timbers. The inadequate thickness of the waterproof membrane was poor trade practice.

[10] BRANZ Bulletin 345 at [2] figure 1.

[105] The damage was the degradation of the building underlay, decay of the framing timbers, and mould on the fibre cement sheet, degradation of the plasterboard ceiling and corrosion of the steel beam.

[106] Although the membrane may well have been defective the reapplication at a later date by unnamed applicators in a defective manner would be the responsibility of the unknown applicators rather than the current parties to the claim.

Thresholds

[107] There were insufficient thresholds between the inside floor level and the exterior deck levels on the north west and southwest decks. The assessor noted that the application of expansive foam to the study and hallway door thresholds from the outside is likely to be an exacerbating factor in that it is likely to have increased entrapment of moisture from leak sources higher up the structure and retained a certain amount of moisture from those sources as well as moisture from the foam from the exterior. Most foams are not suitable for immersion in water, are not waterproof and are not UV stable.

[108] The inadequate thresholds led to decay of threshold timbers. Repairs required included the reclad of the front north eastern and rear south western elevations.

[109] This defect should have been visible to Council inspectors.

[110] Mr Wright accepts in his brief that he installed the foam on the advice of Mr Prouse after leaking had occurred around the door.

[111] The construction by the builder and the failure of the Council to observe the insufficient thresholds was negligent.

REMEDIAL WORK

[112] The assessor recommended the replacement of the cladding with a drained and ventilated system based on fibre cement cladding installed and detailed to the manufacturer's specifications. The windows were to be removed and replaced with proper flashings and wider jamb reveals. New fascia boards with a capillary break were to be applied and roof edges were to be extended, roof underlay repaired and drip edges to be made to drain into the gutter. Apron and kick out flashings had to be installed. The pergola had to be removed. Parapet tops needed metal cap flashings with a capillary break, and saddle flashings where they abut walls. New flashings were required for the skylight with kick outs and capillary breaks. The remediators had to install a new deck membrane, upstands and door thresholds on the front and rear decks and provide a gap between the timber deck and the cladding. Extrusion joints on joinery had to be resealed. There were further consequential recommendations.

NEGLIGENCE OF FIRST AND SECOND RESPONDENTS

[113] The first and second respondents, Macdee McLennan Construction Limited and Duncan McLennan, the builders have been found negligent in respect of the defective work outlined above. As a consequence of their negligence it was necessary to reclad the building. Accordingly I find them each liable for the full amount of the established claim.

NEGLIGENCE OF GERRY KNOL

[114] Gerry Knol was responsible for the inadequate coating of the building and the interface between the plaster and other parts of the structure as outlined above. His negligent actions required the complete reclad of the building. Accordingly I find him liable for the full amount of the established claim.

PORIRUA CITY COUNCIL

[115] The Council should have detected the defects as listed above and not to do so was negligence in the conduct of its inspection regime. It follows that the code compliance certificate was also negligently issued. The Council's negligence in relation to those defects justified the reclad of the dwelling. Although as noted below the Council should not be liable in respect of the damage to the pergola, the defects for which it is responsible themselves necessitated the full reclad. I find the Council liable for the full amount of the established claim.

Council Response

[116] The position of the Council is that because of the information the claimants had prior to the purchase of the house, they did not rely upon the Council inspections and the code compliance certificate as proof that the house complied with the Building Code. They argue that the claimants' knowledge of the defects identified by Mr Prouse broke the chain of causation between any negligence on the part of the Council and their loss.

[117] The Council relies on the judgment of Heath J in *Sunset*[11] in respect of the Sanghas and submits that the facts in this case are stronger.

[118] The facts concerning the Sanghas in *Sunset* were that in May 2004 the Sanghas investigated buying a unit in a development. They were made aware of weathertightness problems by the real estate agent, the Council and the Body Corporate. The Body Corporate had obtained a report and had instructed an engineer to manage the repairs. The sale and purchase agreement provided for

[11] *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479 (HC).

the quoted cost of the repairs to be held back and applied as abatement to the purchase price.

[119] Heath J held that the Sanghas were different from the other claimants and that in their case; the information represented by the CCC was "effectively spent." They were aware of the water ingress problems and bought in reliance on their own judgement rather than in reliance on the CCC. Their reliance on their own judgement and the abated purchase price was held to be an intervening act which broke the chain of causation and accordingly, their claim failed.

[120] As noted by Potter J in *Aldridge v Boe*[12] the situation of the Sanghas in *Sunset* (together with the Devlins) is the only example in leaky building cases where the plaintiff's conduct has been held to constitute an intervening act which has broken the chain of causation and become the effective cause of the plaintiff's loss.

[121] The defence of intervening act (novus actus interveniens) has been described as occurring when a plaintiff's conduct goes beyond contributory negligence and becomes the real cause of the damage[13]. It has a higher threshold and is more difficult to establish than contributory negligence. Justice Venning commented in *Byron Ave*[14] that the defendant who seeks to avoid liability on the grounds of lack of reliance based on the possibility of intermediate examination by the plaintiff has a significant hurdle to overcome.

[122] In *Sunset,* William Young P observed:

> In leaky building cases, the opportunity for intermediate inspection that a 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

[12] *Aldridge v Boe* HC Auckland, CIV-2010-404-7805,10 January 2012 at [170].
[13] *North Shore City Council v Body Corporate 188529 (Sunset Terraces)* [2010] NZSC 158 at [83].
[14] *Body Corporate 189855 v North Shore City Council)*, HC Auckland, CIV 2005-404-5561, 25 July 2008 at [37].

> whether the local authority owes a duty of care. To put this in another way, the opportunity for a purchaser to inspect a completed residential unit does not warrant any lack of care by the building inspectors in the course of their inspections. 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.[15]

[123] The facts in this case are, it was submitted, stronger than the facts in *Sunset*. In *Sunset,* the Sanghas knew about the problems with the deck which was one of two primary defects and which was assessed by Heath J in the High Court as the cause of 75 per cent of the damage.[16] The Sanghas knew they were buying a leaky home and negotiated an abatement of the purchase price on that basis. It transpired that the cost of the work required was more than they had appreciated but that is beside the point. They did not rely on the CCC or the Council inspection regime for an assurance that the house did not have defects allowing moisture ingress. They knew that it did.

[124] The circumstances of the claimants in this case are different. The Prouse report commented on a number of the house's features. Only with respect of the pergola was there any advice that the feature would give rise to future leaks. Accordingly the claimants cannot now say that they relied on the Council in respect of the pergola. The comment regarding the parapet walls was that if it did not have a waterproof membrane it would leak. Mr McLennan advised (wrongly) that it did have this membrane; however this does not relieve the Council of its responsibility in respect of this hidden defect. The Council had been responsible for ensuring this feature was properly constructed prior to being covered over and hidden from view.

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[15] *North Shore City Council v Body Corporate 188529 (Sunset Terraces)* [2010] NZCA 64.
[16] *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479 (HC) at [61].

[125] It is incorrect to say that the Prouse report resulted in the CCC being "spent" in the manner that the CCC in *Sunset* was "spent" against the Sanghas. With the exception of the pergola, the claimants knew at best that there were various items Mr Prouse thought should be addressed in order to gain long term assurance of a weathertight house. His report did not recommend further investigation or provide any evidence of current leaks or damage. Contrary to the assertion of counsel for the Council, the report did not state that the house was not or did not appear to be Code compliant or that it had been built contrary to good trade practice or manufacturer's requirements. The level of knowledge that can be ascribed to the claimants from the report is quite limited compared to the knowledge held by the Sanghas.

[126] There are two further High Court cases in which the significance of pre-inspection reports and other information obtained prior to purchase has been considered. These are *Coughlan v Abernerthy*[17] and *Aldridge*.[18] In both, the level of knowledge of the plaintiffs regarding water ingress problems with the houses they purchased was equivalent to if not higher than that in the present case. In neither was it found that the knowledge of the plaintiffs was sufficient to relieve the respondents of responsibility either in terms of an intervening act or the voluntary assumption of risk.

[127] In *Coughlan* the report obtained by the plaintiffs identified a number of water ingress problems but left them with a clear impression that any problems with the house could be overcome with modest repairs. They negotiated a small reduction in the purchase price. White J examined the application of the facts before him to the defence of *volenti* and considered whether the purchasers had voluntarily assumed the risk that their house was a "leaky home". He considered the correct question for the purpose of *volenti* was

[17] *Coughlan v Abernethy* HC Auckland CIV-2009-004-2374, 22 October 2010.
[18] *Aldridge v Boe* .

whether it was established that the plaintiffs had full knowledge of the nature and extent of their leaky home problems which led to their claim for repairs. He found that they did not.

[128] In *Aldridge* Potter J listed what the Aldridges did and did not know about the weathertightness concerns with their house when they purchased it.[19] This list included a report which noted that testing suggested that moisture had penetrated through cracks in the cladding which required repair. The Aldridges also knew that a weathertightness report was required before a CCC could be issued and that this report had not been obtained.

[129] The facts identified in *Aldridge* were examined through the prism of both the affirmative defence of *volenti* and intervening act.

[130] With respect to *volenti,* Potter J found that the Aldridges, like the Abernethys in *Coughlan,* were unaware of the nature and extent of defects which would ultimately result in significant weathertightness problems. It followed that they could not have known of the nature and extent of the risk of these problems when they purchased their house. She found that it was insufficient for the *volenti* defence that they knew there was no CCC and there were potential unidentified weathertightness issues. Potter J concluded that the stringent conditions of the *volenti* defence were not met.

[131] Potter J then considered whether there was an intervening act which broke the chain of causation. After reviewing the authorities and the arguments of counsel she concluded that the Aldridges' case was not like the Sanghas in *Sunset* because the Sanghas knowingly bought a property in 2004 that had been identified as having weathertightness problems from at least 2000. In knowledge of the problems and the estimated cost of repairs they negotiated a lowered purchase price. She found that the facts did

[19] *Aldridge v Boe* above n 12 at [107]-[109].

not establish that the Aldridges purchased a house with "known weathertightness concerns."

[132] Potter J found that the Aldridges did not know the nature and extent of the latent defects which would cost $900,000 to repair, did not know that the house they were purchasing did not comply with the Building Code (although they knew it did not have a CCC) and did not act with such disregard for their own interests so as to make their conduct the sole cause of the damage. She concluded that there had not been an 'intervening act' which broke the chain of causation between the Council's negligence and their loss.

[133] In this case, the claimants did not know there were water ingress problems with the house. However, they understood that some remedial steps as recommended by Mr Prouse were required to ensure that such problems did not occur. The Council has been found liable for a number of significant defects that were not identified in the Prouse report. These include the inadequate texture coating, the defective flashings, and the insufficient thresholds. They are also liable for secondary defects such as the meter box. With respect to the parapets and balustrades although Mr Prouse warned that these items should have (concealed) weatherproofing, this observation does not absolve the Council of liability as the party responsible for ensuring, on inspection, that this was present before being covered over. It is artificial to suggest that the limited visual inspection carried out by Mr Prouse broke the chain of causation between the claimants and the Council in respect of these issues.

[134] The Council has submitted that because Ms Argyle inspected the Council file she was in a position to assess deficiencies in the Council's inspection process in respect of the house. This is not accepted. Ms Argyle inspected the file to ensure that a CCC had been issued. She may have looked at various documents on file but

was not in a position to assess the adequacy of the Council inspections and was not looking at the file for this purpose.

[135] The affirmative defence of intervening act raised by the Council has not been made out.

[136] Having found that the affirmative defence of intervening act is not made out, it is appropriate to consider the issue of contributory negligence. Should I have found that the claimants' reliance on their own judgement was an intervening act that broke the chain of causation this would have been in effect a finding that their contributory negligence was responsible for 100 per cent of their loss. It is appropriate to consider whether some of the loss should be apportioned to them.

[137] Section 3 of the Contributory Negligence Act 1947 provides:

> Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.

[138] The section allows for the apportionment of damage where there is fault on both sides.[20] In assessing fault the standard is that of the reasonable person although the person's own general characteristics must be considered.

[139] The test for assessing the existence and extent of contributory negligence was clarified by Ellis J in *Findlay v Auckland*

[20] Stephen Todd (ed) *The Law of Torts in New Zealand* (5th ed, Brookers, Wellington, 2009) at [21.2.02]; *Hartley v Balemi* HC Auckland, CIV 2006-404-2589, 29 March 2007 at [101].

Council.[21] She determined three questions to be answered. In the context of this case these questions are:

(a) What if anything did the claimants do that contributed to their loss?
(b) To what degree were those actions or inactions a departure from the standard of behaviour expected from an ordinary prudent person in their position (with their particular characteristics?)
(c) To what extent did their actions or inactions contribute to the damage?

What, if anything did the claimants do that contributed to their loss?

[140] The first framed question is, if anything, what did Ms Argyle and Mr Wright do that contributed to their loss? The answer is that with an awareness of leaky home syndrome, they purchased a home that they knew had issues that needed to be attended to "to gain long term assurance of a weathertight house." [22] They did not consider that there could be defects additional to those mentioned in the report and relied on the report for the scope of the remedial works provided for in the agreement for sale and purchase.

[141] Although the Council criticised the claimants for not seeking a LIM report this did not cause loss as it would have disclosed little of any consequence.

[21] *Findlay v Auckland City Council* HC Auckland, CIV 2009-404-6497, 16 September 2010 at [59]-[64].
[22] Inspection of 3B Cromarty Place, Papakowhai, Porirua, AAA Building Maintenance Advisors, August 2003.

To what degree were those actions or inactions a departure from the standard of behaviour expected from an ordinary prudent person in their position (with their particular characteristics)?

[142] The claimants have no particular characteristics that are relevant to the assessment. They can be considered as similar to other home buyers.

[143] The claimants understood from the report they received that the fixing of the pergola needed to be attended to and that the other matters raised in the report required attention. In a meeting to discuss the report they were advised by Mr Prouse that the house was sound. I accept their evidence that they were not advised that any further inspection was recommended.

[144] They took the prudent step of requiring that the matters raised by Mr Prouse were attended to by the vendor. Their actions in proceeding to purchase the house did not depart from the standard of an ordinary prudent person with their characteristics. It is not established that the claimants should have been able to foresee the damage to themselves in proceeding.

[145] In reaching this conclusion I have considered other 'leaky homes' cases where purchasers have been found to have contributed to their own loss. The conduct of the claimants contrasts with that of the purchasers held to be negligent. For example in *Byron Ave,*[23] three unit owners were found to have been negligent after they each failed to obtain information that was readily available to them, which would have disclosed that their units were defective.

[146] The claimants did not fail to obtain readily available warning information. It has not been established that there was anything to find on a LIM report and Ms Argyle personally checked the Council

[23] *O' Hagan v Body Corporate 189855* (*Byron Avenue)* [2010] NZCA 65, [2010] NZLR 486.

file to ensure the house had a CCC. Neither did they fail to inspect the house or make enquiries about it. They were not advised that they needed further inspection by Mr Prouse. I conclude that the claimants were not negligent.

[147] For completeness I note that the submissions of the Council and the claimants make reference to a number of decisions that I have not referred to above. These include decisions of this Tribunal, overseas decisions and decisions which have been superseded by more recent authority. In considering the defences raised by the Council I have, in the interests of brevity, concentrated only on the current leading cases.

QUANTUM

[148] Although raised by other respondents only the Council contested the claim for damages or the consequential losses. The Council alleged that the costs of remediation were excessive.

[149] After evidence from Mr Proffitt the assessor the parties present agreed to the amount for scaffolding being reduced to $800.00 plus GST. The supporting evidence was that the scaffolding costs were $24,930.00 plus GST, (line 21 Progress Claim Certificate.) The difference which must be deducted from the claim is therefore $27,749.50 including GST.

[150] Although there was extensive questioning there was no other cost claimed which was shown to be excessive.

[151] The amount of the claim was $337,476.19 which represented the payments made by the claimants for the remediation work including GST. The claim was supported by the Contract Progress Claim Certification schedules and supporting invoices.

[152] The claim for remediation which is proven is therefore:

Building work and materials	$ 337,476.19	
Project management costs	$ 84,607.60	
Less deduction for scaffolding	-$ 27, 749.50	
Less deduction for betterment	-$ 24,240.22	
Net building work	$ 370,094.07	$ 370,094.07
Additional costs		
Contract works insurance	$ 1,690.64	
House contents insurance	$ 1,540.00	
Quantity Surveyors	$ 1,125.00	
Architects fees	$ 4,808.82	
Valuations for financing	$ 1,200.00	
Roy Taylor Engineering	$ 1,856.25	
Sub total	$ 12,220.71	$ 12,220.71
Total cost of remediation.		$ 382,314.78

[153] The claimants also sought interest in the sum of $24,730.62 up to the date of the hearing and produced supporting documentation. In addition I award interest on the established costs of the remedial work from the date of hearing to 3 July 2012 calculated on the 90 day bill rate plus two per cent which is 4.65%.

[154] The application fee is a cost in the cause which the tribunal does not have power to award.

General Damages

[155] The claimants gave evidence of stress, anxiety, exhaustion and health problems as a result of owning and living in a leaky home. They had financial worries and additional costs related to extra travel and cell phone costs. There was stress on the children and lost career opportunities. This evidence was not contested.

[156] The claimants sought $20,000 each by way of general damages. They relied on *Byron Avenue* as authority that they were

entitled to individual awards which should be more than the going rate per apartment of $25,000.00. This equates with the circumstances of the claimants in *White v Rodney District Council*[24] where the court awarded $25,000 each. The amount claimed is reduced to $20,000 each as the claimants did not pay for alternative accommodation and therefore although inconvenienced they did not need to seek reimbursement. The claimants traced the background of general damages and the tendency to award no more than $25,000 per residence. The Council opposed more than $25,000.00 and referred to *Cao v Auckland City Council,*[25] *Coughlan v Abernethy.*[26]

[157] The claimants acknowledge that in *Cao v Auckland City Council* Andrews J referred to William Young P in *Byron Ave* saying "$25,000 is appropriate per unit for occupiers" but said that this was without reference to the supplementary judgment[27] which indicated that the Baragwanath judgment was the judgment of the court.

[158] The claimants say that Baragwanath J did not address the position of joint home owner occupiers so there is no definitive binding guidance from the Court of Appeal. They outlined the causes of their distress and the effects on them which are not unusual in leaky home cases. However, the Tribunal is bound by the High Court decisions and therefore I find that the level of damages for the claimants to be $25,000 as the occupiers of one residential unit. Similarly, I do not consider that there are grounds for reducing this amount.

[24] *White v Rodney District Council* (2009) 11 NZCPR 1 (HC).
[25] *Cao v Auckland City Council,* HC Auckland, CIV-2010-404-7093, 18 May 2011.
[26] *Coughlan v Abernethy* above n 17.
[27] *North Shore City Council v Body Corporate 189855* [2010] NZCA 235; [2010] NZLR 484.

Final value of Claim

[159] The final value of the claim which has been proved is therefore:

Remediation costs	$ 382,314.78
General damages	$ 25,000.00
Interest to date of hearing	$ 24,730.62
Interest hearing to 3 July 2012	$ 18, 262.50
Total	$ 450,307.90
Less settlement amount	$ 15,000.00
Established Claim	$ 435,307.90

WHAT CONTRIBUTION SHOULD EACH OF THE LIABLE PARTIES PAY?

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

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

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

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

[163] Section 17(2) of the Law Reform Act 1936 sets out the approach to be taken. It provides that the contribution recoverable

shall be what is fair taking into account the relevant responsibilities of the parties for the damage. Ellis J in *Findlay*[28] stated that apportionment is not a mathematical exercise but a matter or judgement, proportion and balance.

[164] MacDee McLennan Construction Limited and Duncan McLennan accepted that they were the builders and were liable. As a proportion of the responsibility for the work the level is high and I set it at 55 per cent.

[165] Mr Knol was responsible for some of the work for which the company is responsible and at least 20 per cent of the total loss was as a result of his work for the builders.

[166] The Council's responsibility for the negligence in the consent and inspection regime is high and I set it at 25 per cent of the claim. The Council also seeks a contribution from Mr Prouse.

[167] The terms of the settlement between the claimants and Mr Prouse provided that the claimants would withdraw their claim against him and that the claim against Mr Prouse would be terminated. While the Council opposed Mr Prouse's removal, due to the claim for contribution they wished to make, I am unable to conclude that Mr Prouse has been advised that the claim had not been withdrawn and the Council were still pursuing a claim against him. To the contrary Mr Johnstone advised that he had informed Mr Prouse that he did not need to attend the hearing.

[168] In these circumstances it would be contrary to natural justice to make orders against Mr Prouse without giving him the opportunity to be heard. If the Council still wishes to proceed with its claim for contribution against Mr Prouse it is to file particulars of that claim together with the quantum being sought within 21 days of the issuing of this determination.

[28] See above n 21.

CONCLUSION AND ORDERS

[169] The claim by Simon Wright and Christine Argyle is proven to the extent of $435,307.90. Macdee McLennan Construction Limited, Duncan McLennan, Gerry Knol and Porirua Council are all jointly and severally liable for this amount. For the reasons set out in this determination I make the following orders:

i. MacDee McLennan Construction Limited and Duncan McLennan are to pay the claimants the sum of $435,307.90 forthwith. They are entitled to recover a contribution of up to $195,888.55 from the Porirua City Council and Gerry Knol for any amount paid in excess of $239,419.35.

ii. Porirua City Council is ordered to pay the claimants the sum of $435,307.90 forthwith. Porirua City Council is entitled to recover a contribution of up to $326,480.93 for any amount paid in excess of $108,826.97 from Gerry Knol, MacDee McLennan Construction Limited and Duncan McLennan

iii. Gerry Knol is ordered to pay the claimants the sum of $435,307.90 forthwith. He is entitled to recover a contribution of up to $ 348,246.32from the Porirua City Council, MacDee McLennan Construction Limited and Duncan McLennan for any amount paid in excess of $87,061.58.

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

First and Second Respondents	$239,419.35
Third Respondent, Porirua City Council	$108,826.97
Sixth Respondent, Gerry Knol	$87,061.58

[171] If any of the parties listed above fails to pay his apportionment, this determination may be enforced against any of them up to the total amount they are ordered to pay in paragraph [172] above.

DATED the 2nd day of July 2012.

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Roger Pitchforth
Tribunal Member