WEATHERTIGHT HOMES TRIBUNAL
CLAIM NO: TRI-2008-101-000067

BETWEEN	**CONCHITA TWEEDDALE** Claimant
AND	**MICHAEL PEARSON** First Respondent
AND	**KAREN TUCKER** Second Respondent
AND	**PALMERSTON NORTH CITY COUNCIL** Third Respondent
AND	**PAUL HUMPHRIES** Fourth Respondent
AND	**STEVEN HARLEY** Fifth Respondent
AND	**SARAH SMITH and BARRY NIX trading as BARRAKUDA DESIGNS** Sixth Respondent

Hearing: 16 & 17 September 2009

Appearances: Phillip Drummond, Counsel for the Claimant
Gordon Paine, Counsel for the First & Second Respondents
Paul Robertson, Counsel for the Third Respondent
Helen Brown, Counsel for the Fourth Respondent
Brian Henry, Counsel for the Fifth Respondent
Andrew Bell, Counsel for the Sixth Respondent

Decision: 1 December 2009

FINAL DETERMINATION

Adjudicator: R Pitchforth

CONTENTS

BACKGROUND

[1] This case concerns a leaky house as a result of defective plastering and high ground levels. The vendors gave warranties which were breached. The level of supervision of the building was inadequate. The plans were adequate for consent purposes and to permit competent tradespeople to erect a weathertight dwelling.

HISTORY OF HOUSE

[2] Michael Pearson and Karen Tucker owned a section and wished to build a house on it. They approached Barrakuda Design to prepare plans and specifications.

[3] The contract with Barrakuda was to provide a sketch design, working drawings and tendering administration. It expressly excluded project supervision.

[4] Mr Pearson applied for the building consent.

[5] Upon completion of the plans and the tendering process Mr Pearson and Ms Tucker entered into a construction contract with Humphries Construction Limited to build a house at 9 Ake Ake Avenue Palmerston North for $142,732.67 inclusive of GST.

[6] On 23 April 1998 Mr Pearson and Ms Trucker applied for resource consent for a discretionary activity.

[7] The contract provided that the builder shall carry out and complete the whole of the works in a thorough and workmanlike manner to the reasonable satisfaction of the owner, in strict accordance with the Building Act 1991, the Building Regulations 1992 and the Building Code, and any building consent issued in respect of the building.

[8] During the course of construction S B Harley tendered on 20 May 1999 for the plastering work for $13,400 excluding GST. The work was described as plastering all walls with light texture finish, plaster to the foundations and all reveals and sills, forming a chimney cap and plastering on column, supply and fix paper and netting. The tender was accepted.

[9] Mr Harley plastered the dwelling.

[10] Humphries Construction Limited completed the building and upon payment handed the keys to Mr Pearson and Ms Tucker.

[11] Mr Pearson and Ms Tucker then contracted with Daryl Currie to put the garden in. He put the soil in the garden next to the house.

[12] Mr Pearson and Ms Tucker recall removing the front garden from the wall before the council would grant a code compliance certificate.

[13] Mr Pearson and Ms Tucker also contracted for other work to be done including tiling, paving and a driveway.

[14] Mr Pearson and Ms Tucker occupied the house and had no concerns about leaks. They maintained the property.

[15] Differences arose between Mr Pearson and Ms Tucker and they decided to sell the house. As they were real estate agents they attempted to sell it themselves but later used the services of their employer, L J Hooker.

[16] By an undated agreement for sale and purchase Mr Pearson and Ms Tucker agreed to sell the property to Conchita Tweeddale for $280,000 for possession on 29 June 2001.

[17] Ms Tweeddale obtained a brief LIM report which did not indicate anything amiss. A building inspection report was not ordered as Ms

Tweeddale and her solicitor considered that it was unnecessary for a nearly new house.

[18] Ms Tweeddale bought the house because she wanted somewhere for her daughter to live while she attended Massey University.

[19] When her daughter left university Ms Tweeddale rented it to tenants.

[20] In late 2004 Ms Tweeddale was alerted to possible problems by a tenant and arranged for Fred Hammer & Co 1998 Ltd (Hammer) to conduct a building inspection.

[21] In a report dated 1 February 2005 Hammer reported on a number of issues. Some were related to internal plumbing problems. Those items relating to water ingress were:-

> 1. Up stairs curved wall (photo A Pg 1) – the quadrant roofs flashings (photo B pg 2) have failed causing a sudden leak. This water has soaked down into the wall below, damaging the fibre-glass insulation, gib board, skirting and of course the decorating. To be sure that this does not happen again I recommend a qualified plumber or butylene specialist (or combination) completely reroof and flash this area including the outlets x 2 – making sure a complete weather seal is achieved. After this, a builder should be contracted to replace the insulation, gib board and finishing beadings. He should be able to sub-let the decorating to a painter. With regard to the scope of work needing redecoration this will have to be left in the court of the plasterer- he should view the job and make allowance to repaint whatever is necessary I order to achieve a top class finish e.g. walls/ceiling.
>
> 2. Referred to interior bathroom problems.
>
> 3. Exterior –roof spouting. These are OK
> Chimney (Pg 4 Photo F). I noted silicone has been smeared to the edge flashing and the top cap flashing fixings need to be resealed these two areas should be checked for weathertightness by a plumber as they will, in time, draw water into the chimney framing.
>
> 4. Exterior. Hard Plaster (pg 8 – 10) I noted a serious number of cracks with what appears to be neither rhyme or reason, as to the position or direction. This, in my opinion, has been mainly caused due to no construction or

> relief joints either vertically or horizontally. I would suggest it would be a waste of time at this stage to cut relief joints into the plaster work as it has already moved, thereby releasing most of the stress in the plaster. I contacted the original plasterer to ask why he thought these cracks had appeared. He was unhelpful and I got the feeling he did not want to know. I then contacted a reputable Hard Plasterer in Palmerston North and he advised me there was a product, supplied by Resene, (Resene 2000 System) that when three coats of the specialised paint product are applied , the system would give water proof membrane finish to the plaster. The person advised me that behind the hard plaster there would be a building paper barrier. He was pretty sure that the building paper would not have sustained significant damage, but suggested a repair as mentioned above.
>
> 5. Related to the garage.

[22] Acting on this advice Ms Tweeddale instructed Bridson & Co Plumbers Ltd to affect some of the recommended repairs. They lifted a section of the roofing tile and inspected it to look for roof leaks. They treated the roof with Duram sealant, sealed joints between the roof and spouting on either side, and refitted the roof tiles. They did this work in February 2005.

[23] Ms Tweeddale thought that the problem may have been related to an earthquake. She made a claim to the Earthquake commission.

[24] Kevin O'Connor of Kevin O'Connor & Associates Ltd inspected the property on 30 May 2005. He reported:-

> The inspection brief is to identify the case of cracks to the dwelling. This is in relation to a report provided to us and authored by Fred Hammer & Co Ltd…..and the relevant section refers to extensive random cracking of the exterior plaster finish.
> Investigation work has extended to a visual inspection of the house interior and exterior. No destructive or non destructive testing or analysis has been carried out.
> …..
> We inspected the exterior, and confirm that there is extensive cracking in the plaster surface, scattered all round the house. The cracks are more numerous on the north-east and north-west sides of the house – the sides receiving the most sunshine. Some cracks propagate from window (and other) corners, but not all such corners have cracks. They appear to have formed over a period of time, and we suspect that they are continuing to

> propagate. The spacing of the cracks varies, but in a number of areas appear to conform with stud and dwang lines.
> No control joints were incorporated in the plaster work; and this has led to uncontrolled shrinkage cracking; subsequently exacerbated by thermal movement.
> The cracks in the plaster are not the result of earthquake activity.

[25] The application was declined by the Earthquake Commission as a failure to install control joints is not an earthquake issue.

[26] Ms Tweeddale also made an insurance claim which was unsuccessful.

[27] At the same time Ms Tweeddale made enquiries of the Weathertight Homes Resolution Service. On 9 December 2004 she applied for an assessor's report. There were difficulties with the report that was made at that time. Eventually the Department of Building and Housing arranged for a new report which was made on 6 April 2008. An amended report was made on 15 April 2009. These later reports were before the tribunal and were relied upon.

[28] The assessor conducted a visual examination and reported that all elevations are clad in solid plaster cladding, stucco, with a near smooth trowelled and painted finish. Alloy joinery is recessed into the wall and fitted with a head and jamb flashings and small external sill flashing.

[29] All the cladding was badly cracked and formed a diagonal diamond type crazed pattern with cracks of varying width.

[30] The cracks appeared worse near the base of the cladding which the assessor concluded was likely to be the effect of water draining and trapped in the lower cladding sections.

[31] Just above the ground the cracks are horizontal and follow the top of the foundation. These cracks penetrate the entire thickness of the cladding.

At this point the cladding extends as solid plaster down and over the concrete foundation and continues to ground. This is in variance with the plans, specified details and good trade practice. There is no allowance for cladding drainage and prevention of wicking from ground moisture into the plaster. Efflorescence could be seen weeping from horizontal cracks on the western corner confirming that water is exiting the cracks.

[32] There is no evidence of control joints in the cladding. Whilst these are not always visible in a performing cladding – they would be plainly visible in this situation as cracks should now be visible following the joints (designed to crack) if any were in place. The lack of control joints will also be a factor in the cause of cracking issues.

[33] The assessor also noted that on the southeast wall a clothesline had been fixed to the cladding and has pulled away. A pergola has been attached in similar style to the northern corner. Both are features which allow water to enter but no additional moisture was found which would have justified the damage from invasive testing.

[34] The assessor made two destructive cuts on the north-western lounge wall. The first below the upper bedroom window revealed no decay.

[35] The second cut was made below the first and under the lounge window. The assessor found damp skirting, base plate, an ants' nest and Stachybotrys fungi growing on the back of the fibre cement Hardibacker.

[36] The assessor's view is that the source of the water is the cracks in the cladding above and below the window aggravated by the inability of the cladding to drain and the ground water being able to wick behind the cladding which goes below ground level. The assessor said that it was probable that this situation would be repeated around the building.

[37] Two further destructive tests were made at the northern corner. The cut beneath the lounge window revealed that the windows were installed as

required by the plans, though the assessor does criticise the smallness of the sill flashings.

[38] A second cut at the base of the dining room door revealed that the joinery correctly had a steel jamb flashing embedded into the wall. However, the Hardibacker did not extend below the base plate as expected which meant that any water that enters the cladding isn't drained below the base plate and could run from the end of the Hardibacker and enter the base plate if it finds a break in the plastic wrap that extends up from the concrete foundation.

[39] The assessor noted that the plastic was wrapped up beneath the Hardibacker approximately 300 mm, just enough to offer some protection from water trapped in the lower cladding. The plaster was found to be pushed in and around the Hardibacker base preventing drainage.

[40] The assessor examined the plaster. He found that it exceeded the recommended maximum thickness of 21 mm min 26 mm max with the actual measured distance from the Hardibacker approx 35 mm and up to 39 mm below the Hardibacker. He also noted that the plaster mix appeared over dry with a crumbly effect with lots of fine debris accumulating. Steel reinforcing mesh is embedded in the plaster, but although embedded away from the back of the plaster in the inspected area, it is, when compared to the thickness of the plaster, too far back, giving little or no strength to the outer 20 mm of plaster, i.e. there is nearly the entire minimum recommended plaster thickness of 21 mm on the outer side of the mesh left un-reinforced.

[41] The assessor speculated that the mesh has been pushed back between the larger mesh spans giving little or no reinforcing effect. He would have had to remove more plaster to show this but as little water is entering the framing the additional destructive testing was considered inappropriate.

[42] The timber framing was water stained but was not decayed. Water sodden framing will eventually leach out the boron when decay will commence. Future damage will occur with further leaking.

[43] The assessor recommended removing the plaster cladding at about 500 mm above the bottom plate including removing the plaster from around the foundation. Plaster should be removed from around the window sills to allow for the increased thickness of the overlay of a plaster system. The clothesline and pergola should be removed.

[44] The Hardibacker and building slip layer should be repaired to extend below the bottom plate. There should be adequate ground to cladding distance to ensure coverage below the bottom plate and to allow cladding drainage.

[45] Ants and fungi should be removed.

[46] The entire cladding envelope should be overlaid with a reinforced plaster cladding system following the manufacturer's instructions. It should be plastered and painted to match the existing plaster.

[47] Free standing post supports should be provided for the pergola and clothesline so they do not penetrate the surface.

[48] The assessor provided a quantity surveyor's report that the cost of remediating the damage was $106,221.00 including GST plus the cost of professional fees.

THE PARTIES

[49] The parties to the claim are:-

- Conchita Yap Tweeddale, a landlord living in Taihape, the claimant.

- Michael Graham Pearson, a land agent, one of the original owners of the property, first respondent.
- Karen Frances Tucker, a land agent, one of the original owners of the property, second respondent.
- The first and second respondents say that for the purposes of this claim they should be treated as one party. In the light of the facts it seems proper that I do so.
- The Palmerston North City Council, the territorial authority, third respondent (the Council).
- Paul Humphries, the director of Humphries Construction Limited (struck off), fourth respondent.
- Stephen Boyce Harley, plasterer, fifth respondent.
- Sarah Smith and Barry Nix trading as Barrakuda Designs, sixth respondent.

PROCEEDINGS

[50] The claimant claimed against the original owners, Mr Pearson and Ms Tucker, the Council, Mr Humphries and the plasterer, Mr Harley.

[51] The claimant identified the defects listed by the assessor and claimed the cost of repairs.

[52] Various interlocutory matters between the parties were dealt with by preliminary orders prior to this hearing.

ISSUES

Is the claim time barred?

[53] Mr Pearson, Ms Tucker and Mr Harley claimed that the claim is statute barred by the Limitation Act 1950. These parties did not refer to s 37 which provides a special approach to accounting for limitation periods under

the Act. This topic was not addressed by any substantive submissions and I treat it as abandoned.

Is the house a commercial building and so outside the Tribunal's jurisdiction? Was the house a commercial building?

[54] Some parties placed reliance on the fact that the house was rented out as a basis for no duty of care. Mr Harley contended that the building was not a house.

[55] Counsel for Mr Pearson and Ms Tucker made much of the fact that the property was rented.

[56] The house was not rented out for the first two years of its life. It was not built as commercial premises and was not sold on that basis. It could easily revert to a residential home without structural changes.

[57] Despite the claimant being a landlord with other properties this house was originally purchased as a flat for her daughter. Later it became wholly tenanted.

[58] The council denied that it owes a duty of care to Mrs Tweeddale who is now an absentee landlord. She never intended to live in the property. The property is in the same position as a motel.

[59] The grounds for this submission are the judgments of the Court of Appeal in *Te Mata*[1] and *Blanket Bay*[2] in which it was found that the council owed no duty of care to the developers of a motel.

[1] *Te Mata Properties Ltd & Anor v Hastings District Council* [2009] 1 NZLR 460; [2008] NZCA 446 (Unreported), Court of Appeal, CA 450/2007, O'Regan, Robertson and Baragwanath JJ.
[2] *Queenstown Lakes District Council v Charterhill Trustees Ltd* [2009] 3 NZLR 786; [2009] NZCA 374 (Unreported), Court of Appeal, CA 441/2008, 25 August 2009, Chambers, Arnold and E France JJ.

[60] The council referred to *Hamlin* [3] as authority for the proposition that a common law duty of care was owed to Mr Hamlin as original owner/occupier because the building laws were to protect his health and safety.

[61] The council says the headnote to *Te Mata* sets out the law as found by the majority at Par 82:-

> Held: The duty of care of a local authority in inspecting buildings was an exception to the general rule that claims for pure economic loss were not recoverable in negligence. The exception could not be generalised beyond the case of the public interest in secure residential property for habitation without demolishing the rule to which it was an exception. Interests of habitation and health and presumed economic vulnerability meant that a council owed a duty of care to the owner of a dwelling house. A motel owner's interest was outside the requirements that the premises be the plaintiff's place of habitation and contain potential risk to health.

[62] The council say that these decisions overrule *Sunset Terraces* and *Byron Avenue.* That being the situation, the council says it owes no duty of care.

[63] In *Sunset Terraces* and *Byron Ave* the Court focused on the intended residential end use of the building in question. In *Sunset Terraces*, where the Council was found liable, Heath J was careful to limit his finding of the existence of a duty of care to owners of properties intended to be used for residential properties. At para [220], Heath J. said:

> [220] In my judgment, a territorial authority owes a duty of care to anyone who acquires a unit, the intended use of which has been disclosed as residential in the plans and specifications submitted with the building consent application or is known to the Council to be for that end purpose.

[64] The same reservation was expressed by Venning J in *Byron Ave* when the judge rejected the Council's submission that the duty did not automatically extend to the owners of industrial or commercial properties.

[3] *Invercargill City Council v Hamlin* [1966] 1 NZLR 513 (PC).

The Council's argument in that case was on the basis that only three of the plaintiffs lived in the units whereas the majority of owners were investors and had bought the units for commercial purposes. At para [24] Venning J stated:

> [24] To the extent there is a distinction to be made between commercial property and individual's homes, as discussed in *Three Meade Street v Rotorua District Council* the appropriate focus is on the intended use of the building in question. The end use in *Three Meade Street* was the business of a motel. The intended end use was commercial. [In the present case] the intended use of a block of apartments is residential. That is the case with 45 Byron Avenue. The Council was aware the intended use was residential. The application for a building consent required the applicant to specify the intended use of the building. [The development company] confirmed the intended use was residential. I agree with the reasoning of Heath J in *[Sunset Terraces]* on this issue. The start point must be that *prima facie* the Council owed a duty to the owners and subsequent owners of the units at 45 Byron Avenue in accordance with *Hamlin*.

[65] The purpose of the Act, s 3, is:

> To provide owners of dwellinghouses that are leaky buildings with access to speedy, flexible and effective procedures for the assessment and resolution of claims relating to those buildings.

[66] The building fits within the definition of a dwellinghouse in s 8 and there is no authority for the proposition that the Tribunal is restricted to dealing with cases relating to owner-occupants. If there were such a restriction, claims by many claimants, including family trusts and bodies corporate, would be excluded.

[67] It was not suggested that the building was intended to be built as a motel or that it is currently run as such so as to exclude the house from my jurisdiction according to the definition of a dwellinghouse under s 8. Letting a house to tenants, even if they have tenancy agreements relating to particular

areas of the building, is not sufficient to equate it with a motel where the units are rented on a nightly basis.

[68] The building was clearly one which was intended to have the principal use occupation as a private residence, s 8 (definition of dwellinghouse) (a).

[69] This claim is within my jurisdiction.

[70] The council is not exempt from liability as this property is within the class of buildings covered by *Hamlin*.

[71] Based on the guidance of those High Court decisions, I find that the Council in the present case owed a duty of care to the claimant in relation to the building in question.

[72] There are similarly no grounds for denying liability on this ground for Mr Pearson, Ms Tucker and Mr Harley.

Were the first and second respondents developers?

[73] Ms Tweeddale alleges that Mr Pearson and Ms Tucker were negligent developers and failed to exercise reasonable care and skill in the construction of the house. As a result, they were responsible for the breach of the duty of care and responsible for the loss.

[74] The grounds for this allegation are that they:-

- Undertook the subdivision;
- Contracted with a designer to design the house
- Applied for building consent and a code compliance certificate;
- Applied for a non notified land use consent;
- Oversaw the construction;
- Engaged a builder;
- Engaged their own subcontractors including:

    - a tiler for interior work;
    - a contractor for the balustrade;
    - landscaper responsible for the pavers and garden levels; and
- Sold the property a short time after it was completed.

[75] Ms Tweeddale says that these factors indicate that it was not a turnkey project as they took an active part in engaging contractors and the development. Hence Mr Pearson and Ms Tucker were developers and should be liable in tort for the negligence of their subcontractors.

[76] Counsel referred to *Body Corporate 199348 & Ors v Nielsen*.[4] That case dealt with a much more complicated management structure and credibility issues in relation to the developer so is not helpful in this case where those factors are absent.

[77] The council denied that it owed Mr Pearson and Ms Tucker a duty of care. It outlined the steps that they had taken in relation to the construction, namely:-

- Engaged contractors; the architects, the builder and the landscape developer
- Applied for a building consent
- Selected and paid the subcontractors
- Advised the council of completion and requested a code compliance certificate
- Took responsibility for the landscaping and paving by removing those items form the building contract.
- Profited from the sale of the property shortly after the issue of the code compliance certificate.

[78] As a result, the council alleges that they are, for want of a better word, developers. It is the process which brings responsibility, not the label.

[4] (3 December 2008) HC, Auckland, CIV 2004-404-3989, Heath J.

[79] Mr Pearson and Ms Tucker deny that they were developers. There was no evidence that they believed they were developers and the basis put forward by others to show that they were is explained by their need to sell the property following the breakdown of their relationship.

[80] Whether or not the original owners were developers is not a question of their subjective beliefs, but an objective test.

[81] On this occasion the matters which they retained in their own hands such as the garden levels and pavers were significant in relation to the defects which created leaks. The list of activities is sufficient to show that the site development was not a complete turnkey operation, though the construction of the dwelling was wholly delegated to the building company.

[82] I find that Mr Pearson and Ms Tucker have some responsibility for parts of the project which have caused problems and owed subsequent owners a duty of care in relation to the actions they took. I do not find that they were commercial developers which would remove any responsibility of the council.

Breach of contract between original owner and claimant

[83] Ms Tweeddale's second allegation was that the original owners breached their contract in that they breached the warranty and undertaking and in particular clause 6.2 of the agreement for sale and purchase. The allegation is that the work has not been completed in accordance with the building permit or consent because the dwelling leaks and the construction methods are not durable and resistant to water penetration.

[84] Ms Tweeddale relied on Clause 6.2 (5) and (6) of the agreement for sale and purchase. The terms of the contract were:-

> 6.2 The vendor warrants and undertakes that at the giving and taking of possession:
> …

(5) Where the vendor has done or caused or permitted to be done on the property any works for which a permit or building consent was required by law:
(a) The required permit or consent was obtained; and
(b) The works were completed in compliance with that permit or consent; and
(c) Where appropriate, a code compliance certificate was issued for those works; and
(d) All obligations imposed under the Building Act 1991 were fully complied with.
(6) Where, under section 44 of the Building Act 1991 (the Act), any building on the property sold requires a compliance schedule (the building), all obligations imposed on the vendor under the Act are fully complied with. Without limiting the generality of the foregoing, the vendor further warrants and undertakes that:
(a) The vendor has fully complied with any requirement specified in any compliance schedule issued by a territorial authority under section 44 of the Act in respect of the building; and
(b) The building has a current building warrant of fitness supplied under section 45 of the Act; and
(c) The vendor is not aware of any reason that the vendor has not disclosed in writing to the purchaser, which would prevent a building warrant of fitness complying with section 45 of the Act from being supplied to the territorial authority when the building warrant of fitness is next due; and
(d) the territorial authority has not issued any notice under section 45(4) of the Act to the vendor or to any agent of the vendor which has not been remedied by the vendor, and the vendor is not aware of any reason, that the vendor has not disclosed in writing to the purchaser, which could entitle the territorial authority to issue such a notice.

[85] Ms Tweeddale says that Mr Pearson and Ms Tucker breached the contract as the dwelling was not constructed in accordance with the building consent. The house does not meet the terms of the Building Act 1991 due to water penetration, the construction methods were not suitable, it does not provide adequate resistance to penetration by water and it failed to meet the specifications required under NZS 4251 1998 in relation to the cladding, foundation, drainage gap and exceeding the maximum plaster thickness requirements. The cladding extends down and over the concrete foundation and continues to ground, contrary to the plans and good trade practice. The house does not comply with B2 as to durability and E2.2 which requires adequate walls to prevent penetration of water that could cause undue dampness or damage to the building elements.

[86] As the works were not compliant not all the obligations imposed under the Building Act were complied with. Clause 6.2 (5) (d) is relied on as the basis for the breach of contract.

[87] As a result of the breach of warranty Ms Tweeddale says the original owners as vendors were responsible for the loss suffered by her.

[88] The house was not sold as a commercial building or, as was suggested, a motel like business, so it was not a building which required a compliance schedule under s 44 Building Act 1991. Therefore there was no breach of warranty in relation to clause 6.2(6) of the agreement for sale and purchase.

[89] Ms Tweeddale relied on *Heng v Walshaw & Ors* (Interim Determination),[5] particularly paras 267-280. In that case it was held that the dwelling leaked and so the building work did not comply with the Building Code. Accordingly there was a breach of warranty. It was for the owners to seek an indemnity from those responsible for the actual work.

[90] The council says that the taking down of the plaster to touch the ground is a breach of the requirements of the Building Code and hence Mr Pearson and Ms Tucker are liable under their contractual warranty to the claimant.

[91] Mr Pearson and Ms Tucker deny that they were in breach of any of the warranties set out in the contract. They say that the construction was a turnkey operation and that they had no involvement in the construction apart from paying for it. They say they are innocent victims. They had no way of knowing that the work done for them under contract was defective and hence have no liability in contract or in tort.

[5] (30 January 2008) WHRS, DBH 00734, Adjudicator Green.

[92] Mr Pearson and Ms Tucker say it was accepted that there were no cracks at the time of sale, the use of treated timber had minimised the damage, they had left the property with lower levels of soil built up against the plaster and maintenance was lacking.

[93] The advertisement created for the sale of the property shows the exterior wall plastered down to the driveway paving leaving no gap. The marketing photos produced in evidence show the gardens built up against the cladding of the dwelling.

[94] Mr Pearson and Ms Tucker say that there is no evidence as to how the cracking has occurred. This matter is discussed elsewhere but it is sufficient to say here that the technical evidence does explain the problem.

[95] They also say that there is no evidence to show that the damage was present at the time of sale. The inadequacies observed by the assessor were not observable at the time of sale.

Discussion

[96] It is clear that the plaster was defective from the start. Those observations made by the assessor without invasive testing were observable by anyone at the time of sale. The inherent defects would not have been known without investigation. However, the warranty was that the building complied with all the aspects of the Building Act 1991, not that it complied with the best of the vendor's knowledge. It is an objective test.

[97] In other cases referring to clause 6.2(5)(d) the warranty is applied once the purchaser has shown that the work was done during the previous owner's ownership and it does not comply with the Building Act.

[98] In *Parsonage v Laidlaw*[6] the High Court assumed that the parties were bound by the contract. The dispute related to the proper identity of the

[6] (2008) 6 NZ Conv C 194,638.

parties. The same assumption was made in the Court of Appeal[7] and the Supreme Court.[8] The higher courts confirmed that a nominee can take advantage of the warranties in the agreement. That the vendors were not bound by the warranty was not entertained as a ground for not entering summary judgment.

[99] In *Jang v Tse & Ors*[9] the adjudicator found that there were breaches of the Building Act, there was therefore a breach of the clause in the agreement and accordingly the previous owner and vendor was liable.

[100] In *Wilson & Anor v Welch & Ors*[10] Adjudicator McConnell found that owners who did not comply with the Building Act were liable for a breach of the warranty.

[101] The tribunal in *White & Anor v Rodney District Council & Ors,*[11] in a part of the decision not changed on appeal,[12] the adjudicator found that the warranty applies in contracts where it appears.

[102] Mr Pearson and Ms Tucker may have reasonably believed that the house was code complaint on sale. However, the evidence is that it was not and they are therefore liable under the agreement for sale and purchase.

[103] As active real estate agents they should have known the scope of the warranties they were entering into and the implications for them in having that clause in the contract if the house was not compliant. They, or their agent, proffered the written contract to Ms Tweeddale. She had no reason to vary that term. If the contract was not what they intended to require a buyer to sign they should look to those responsible for preparing the contract.

[7] [2009] NZCA 291.
[8] [2009] NZSC 98.
[9] (14 July 2006) WHRS, DBH 00677.
[10] (28 March 2008) WHT, DBH 04734.
[11] (4 March 2009) WHT, TRI 2007-100-000064, Adjudicator Kilgour.
[12] (19 November 2009, HC, Auckland, CIV 2009-404-01880, Woodhouse J.

[104] I find that Mr Pearson and Ms Tucker were in breach of their contract. They are therefore jointly and severally liable on this count to the claimant for the awarded amount of the claim.

WERE THE PLANS AND SPECIFICATIONS DEFECTIVE?

[105] Ms Tweeddale made no claim against Barrakuda Designs.

[106] Mr Pearson and Ms Tucker claimed an indemnity from Barrakuda for the damage resulting from the inadequacy of the plans.

[107] Mr Pearson and Ms Tucker alleged deficiency in the plans relating to the pergola. There is no evidence that the pergola leaks. At the time the house was erected the plans were compliant. The pergola will, however, need to be removed and will have to be reattached in a manner that meets the current building code requirements. There is no valid claim against Barrakuda for this item.

[108] Mr Pearson and Ms Tucker alleged the plans were inadequate in that the gas and electrical meters were not flashed. Sealing the meter boxes is a matter for the builder and plasterer. There was no deficiency in the plans.

[109] Mr Pearson and Ms Tucker alleged that Barrakuda were in the business of supervising the construction of dwellings for others for profit. However there is no evidence that they were contracted to provide supervision for this project.

[110] I have already found that the plans were adequate for the purposes of building a weathertight home. There is no evidence of negligence.

[111] The reasons for making that finding are based on the expert evidence of Colin Hill, an expert architect familiar with designs for houses as drawn up at the same time as the plans prepared by Barrakuda. Mr Hill referred to the provisions of s 43(3) Building Act 1991 which allowed the

council to consent to the building work if the provisions of the building code would be met if the work was properly completed.

[112] It was widely accepted within the profession that it could be assumed the builders and trades people would have reference to the appropriate manufacturers' specifications and relevant New Zealand Building Standards. It was regarded that reference by builders and tradespeople to appropriate specification and standards was inherent in properly completed building work.

[113] Mr Hill was of the opinion that the documents prepared by Barrakuda were more than would be expected as standard compliance documentation for the construction of a dwelling in 1999.

[114] Mr Hill thought that both the council and the designer were entitled to assume that a competent contractor would construct the dwelling to the code requirements from the documents submitted for the consent. I accept that evidence.

[115] In *Body Corporate 188529 v North Shore City Council (Sunset Terraces)* [2008] 3 NZLR 479 Heath J at [545] said:

> Despite the faults inherent in the plans and specifications, I am satisfied, for the same reasons given in respect of council's obligations in relation to the grant of building consents, that the dwellings could have been constructed in accordance with the Building Code from the plans and specifications. That would have required builders to refer to known manufacturers' specifications. I have held that to be an appropriate assumption for Council officials to make. The same tolerance ought also to be given to the designer.

[116] On the same basis the designers in this case were entitled to rely on the competence of the builders. There is no negligence on behalf of Barrakuda Designs.

[117] I find that the plans and specifications were sufficient to be used to erect a watertight home. They were adequate for the issue of a building consent.

[118] The claims against Sarah Smith and Barry Nix trading as Barrakuda Designs are dismissed.

WERE THE COUNCIL'S CONSTRUCTION MONITORING PROCEDURES ADEQUATE?

[119] The claim against the Council was that the Council owed the claimant a duty of care to use reasonable care and skill in carrying out its functions under the Building Act 1991 in relation to the issuing of the building permit, inspecting the work and issuing the code compliance certificate.

[120] Michael Pearson and Karen Tucker allege that the council owed them a duty of care to ensure that the property was designed, erected and inspected in accordance with the Building Act, the Code and to ensure that the house was free from water ingress

[121] The negligence was failure to notice the matters identified by the assessor as being defects and issuing a code compliance certificate without being satisfied that the building would comply with the Building Code.

[122] Ms Tweeddale alleges that the assessors report shows defects which are the result of insufficient or negligent building inspections, the code compliance certificate was issued on no reasonable basis, and that she was entitled to rely on the code compliance certificate. She relied on the council's processes to her detriment. She claims the total amount of the loss from the council.

[123] Matters in which the council was negligent were:-

- Ground level clearances

- Exterior stucco walls down over concrete foundations to the ground
- Failure to ensure adequate flashings for the pergola, gas meter, electric meter and clothesline
- Failure to ensure adequate or proper control joints in the cladding.
- Issuing a code compliance certificate when it was obvious that the building did not comply with the building code.

[124] The claimant accepts that much of the plaster work would not be observed so that the hidden defects could not have been detected by the building inspector. It also accepts that if the inspector did not see the plaster in progress he would not have seen the lack of control joints.

[125] Counsel for Ms Tweeddale says that the Council's duty of care is set out in *Stieller v Porirua District Council*.[13] This matter went on appeal[14] and the judgment of the Court of Appeal (per McMullin J) is as set out in the headnote:

> In the High Court the Judge found the inspections made by the Council during construction had been negligent: the building inspector ought to have seen and recognised that the weather-boards did not meet the grading standards required by the bylaws; he should also have discovered the defects in the stormwater drainage and the guttering on the patio and ensured that they were remedied before the building was completed. The plaintiffs were awarded special damages of $12,893, without interest, and general damages of $1000. The Council appealed.
>
> **Held:**
> The bylaw-making power conferred on local authorities by s 684(1)(20) and s 684(1)(21) of the Local Government Act 1974 was wide enough to cover the construction of soundly built houses against the risk of acquiring a substandard residence. Thus, the construction of houses with good materials and in a workmanlike manner was a matter within the Council's control; and a Council might be liable for defects in exterior cladding even though questions of safety and health did not arise. In this case, the weather-boards used in the construction of the house did not comply with the Council's building code, and the Council had been negligent in failing to ensure that its own bylaws were observed. The Council could not escape liability by claiming that the plaintiffs had an opportunity to inspect the weather-boards before buying the house.

[13] [1983] NZLR 628.
[14] [1986] 1 NZLR 84.

> There was no basis for interfering with the Judge's award of damages (see p 91 line 10, p 97 line 2). Appeal dismissed.
> Brown v Heathcote County Council [1986] 1 NZLR 76, 78-80 (CA) applied.

[126] The Porirua Council could not show what inspections had been made. The inference was that the council did not have an operations system for checks at the appropriate stages during the construction process. This was in breach of its duty as explained in *Dicks v Hobson Swan Construction Ltd (In Liquidation)*.[15]

[127] Mr Pearson and Ms Tucker also allege that the council failed to ensure that the plaster was properly applied and that they relied on its skill and care.

[128] The council addressed the defects. The council says that something went wrong with the application of the plaster to the house.

[129] The evidence of the assessor and the acknowledgment of the claimant is that the council would not have known about the quality of the plaster unless it had happened to be present on site when it was applied.

[130] The council say the plaster was also finished too low down and that the failure to achieve proper separation between the bottom of the plaster and the finished ground would only have been evident to the council at the time of final inspection in certain locations.

Discussion

[131] It is clear that the council is correct that the plaster was finished too low down. The council should have observed this. Not to do so was negligent.

[132] The Quantity surveyor has estimated the cost of repairing this part of the work, which is unrelated to the cracks in the walls, at $4,657.85.

[133] This fault had no effect on the other cracking in the plaster.

[134] The council say that therefore they are only responsible, if they owed a duty of care, for the cost of repairing the bottom of the walls.

[135] The claimant is responsible for the areas of cladding where she has changed ground levels by building up the bark chips and allowing the grass and soil to build up.

[136] Reflashing the pergola and refixing the clothesline will be a minor cost. Both these items were not contrary to the requirements of the Building Code on installation and have not been the source of any water damage.

[137] As stated in *Dicks* at para [116], it is the task of the Council to establish and enforce a system that would give effect to the Building Code. This statement was later confirmed in *Sunset Terraces*:

> [450] … [A] reasonable Council ought to have prepared an inspection regime that would have enabled it to determine on reasonable grounds that all relevant aspects of the Code had been complied with.

[138] It is apparent from these cases that the test is not only what a reasonable council officer, judged according to the standards of the day, should have observed but a council may also be liable if defects were not detected due to the council's failure to establish a regime capable of identifying critical waterproofing issues.

[139] Based on the evidence before the Tribunal, I find that the council's monitoring systems were inadequate.

[140] In the event that the council does owe Mr Pearson and Ms Tucker a duty of care it alleges contributory negligence. The Act makes provision for contribution as set out below. My decision on contributions is at the end of this decision.

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[15] (2006) 7 NZCPR 881, Baragwanath J (HC).

[141] The Council says that if it owed a duty of care to Mr Pearson and Ms Tucker, then Mr Pearson and Ms Tucker were joint tortfeasors and are liable for failing to give attention to what was being done by their contractors.

[142] They were negligent in not instructing the head contractor, project manager or site supervisor to properly manage the development and construction of the property.

[143] The basis for this liability is set out in *Riddell v Porteous* [1999] 1 NZLR 1, 13 Blanchard J said:-

> But, as has already been referred to, where the owner employs a building contractor in the usual way and the council is negligent in its inspection, the council may render itself liable to the owner. Likewise, liability may attach where the owner engages the services of several contractors to do distinct portions of the work. An owner who, like the Riddells, takes such a course and fails to give sufficient attention to what is actually done by each of the contractors is not the "creator" of a contractor's poor workmanship, though possibly guilty of contributory negligence. The respective responsibilities for defects in the work may then have to be adjusted between the plaintiff owner and the defendant local authority. Here, however, there has been no plea of contributory negligence.

[144] The council also refers to their decision to deal with paving and landscaping on their own. It submits that they are responsible for 20% of the value of the council's responsibility.

[145] I also accept the council's argument based on *Riddell* that Mr Person and Ms Tucker were joint tortfeasors.

WAS MR HUMPHRIES RESPONSIBLE FOR THE DEFECTIVE DWELLING?

[146] The claimant's claim against Mr Humphries was that he was the person who carried out the building work and selected and supervised the sub-contractors. He had a duty to exercise due skill and care but breached that duty. As a result, the house had the defects identified by the assessor.

Ms Tweeddale alleges that Mr Humphries was the person who was responsible for the building of the dwelling and failed to exercise his duty of care. The house that he was responsible for leaks and as a result damage ensued. She claims the total amount of the loss from Mr Humphries.

[147] Ms Tweeddale says that the facts show that Mr Humphries:-

- Prepared the contract price based on the plans and specifications
- Worked on the dwelling. He acknowledged working on the laying of the slab.
- He organised and engaged various subcontractors to undertake work
- He supplied and ordered the materials
- The company entered into various agreements
- Mr Humphries engaged staff and was responsible for day to day supervision.
- He was the point of contact with Mr Pearson and Ms Tucker
- He coordinated the building works
- He was a one man building company
- He did not properly supervise the project as he was busy with other projects at the time
- The foreman was not paid extra to undertake supervisory tasks
- The foreman was responsible to Mr Humphries
- There was an absence of proper supervision or it was inadequate to ensure compliance with the building code;
- There was a failure to supervise the subcontractors and in particular the plasterer.
- The building was not constructed with proper ground levels;
- There was inadequate flashing of the clothesline, power box, and pergola.

[148] Mrs Tweeddale says that Mr Humphries was therefore responsible to ensure the dwelling was built in accordance with the plans consented to. It

should have been built in accordance with the Building Act 1991 and in particularly B2 as to durability and E2 as to prevention of penetration by water. He did not do this. He was personally responsible

[149] Mr Drummond, counsel for Ms Tweeddale submitted that the cases show that the builder of a dwelling is liable to a subsequent owner for defects.[16]

[150] Mr Drummond submitted that Mr Humphries had personal liability for his involvement in the building. He based his submissions on a number of cases.

[151] First was *Dicks* (supra) and the judgment of Stevens J in *Hartley v Balemi & Ors*.[17] He relied on para 89 of the latter case in which Stevens J concluded that in the context of leaky buildings adjudications and disputes there were two tests. They were the assumption of responsibility test in *Trevor Ivory v Anderson*[18] or the actual control test in *Morton v Douglas Homes Ltd*[19] (reflecting the observations of the Court of Appeal in *Rolls-Royce New Zealand Limited v Carter Holt Harvey Ltd.*[20]

[152] In *Morton* Hardie Boys J found the directors of a building company personally liable because of the control they exercised over the building work. Whilst they did not personally undertake or perform the building work, they each had exercised control over the building operations and they each made decisions or gave or failed to give directions concerning the proper extent of necessary foundations and piling work and the manner in which the work was to be undertaken.

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[16] See *Bowen & Anor v Paramount Builders (Hamilton) Ltd & Anor* [1977] 2 NZLR 394 (CA), *Invercargill City Council v Hamlin* [1996] 1 NZLR 513, *Dicks v Hobson Swan Construction Ltd (in liquidation) & Ors* HC AC CIV-2004-404-106, *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA), *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548, *Brown v Heathcote County* [1986] 1 NZLR 84, *Stieller v Porirua City Council* [1986] 1 NZLR 613, *Riddell v Porteous* [1999] 1 NZLR 1,12 (CA).
[17] (29 March 2007) HC, Auckland, CIV 2006-404-002598.
[18] [1992] 2 NZLR 517 (CA).
[19] [1984] 2 NZLR 548 (HC).
[20] [2005] 1 NZLR 324.

[153] Mr Drummond then says that following *Dicks* and *Hartley* a director may be personally liable in tort to owners and subsequent owners in relation to defective construction where it can be demonstrated that his or her personal carelessness in undertaking or directing the building operations caused the foreseeable damage and the act or omission causing the loss was the subject of his or her control. Therefore a director will be liable if he carried out defective building works.

[154] Michael Pearson and Karen Tucker allege that Mr Humphries owed them a duty of care to ensure that the property was designed, erected and inspected in accordance with the Building Act and the Code to ensure that the house was free from water ingress.

[155] They also allege that Mr Humphries failed to ensure that the plaster was properly applied and that they relied on his skill and care.

[156] Mr Pearson and Ms Tucker also made allegations about the pergola and clothesline. The pergola attachment does not leak. The clothesline was installed by Mr Humphries or his employee. He advised them that this was the standard way of attaching the clothesline.

[157] Mr Pearson and Ms Tucker say that Mr Humphries was the liaison person between them and the personnel on the site, he laid out the site, visited the site and was seen wearing his apron, an indication that he was working there. Mr Humphries was the go-between between them and the sub trades and arranged the appointment of the plasterer.

[158] The council say that Mr Humphries should have seen any plaster in contact with the ground when reviewing the house prior to telling Mr Pearson and Ms Tucker that it was finished. He should have addressed the problem at that time.

[159] Mr Humphries denies the allegations, says he was not a party to the contract in his personal capacity, all the work was carried out by Humphries

Construction Limited, its subcontractors and other employees. Mr Humphries says he did not personally carry out, direct or control any building work or carry out any supervision under the contract.

[160] He acknowledges that if he had personally carried out the building work that has caused leaks or supervised the work, and the supervision has caused the property to leak, then he could owe a duty of care and be liable.

[161] Mr Humphries says that there is no evidence to support his liability. He carried out the work with due skill and care and there was no breach of duty.

[162] Mr Humphries' evidence was that he laid out the site and then relied on his staff and subcontractors to do their work.

[163] Apart from Ms Tucker having seen Mr Humphries on site wearing his apron, there is little information about the physical work that Mr Humphries may have done on site.

[164] Mr Humphries was the ultimate supervisor. He submits that there must be some positive act of supervision which causes the leaks. However, in this situation there was a clear lack of supervision by a senior person in the company. Employing a foreman is not a sufficient quality control measure. The foreman was limited in his powers. He was not empowered to manage the job on his own. Mr Humphries says he could have been contacted if issues arose. It was Mr Humphries' task to provide overall supervision and on his own evidence, which indicated a *laissez faire* approach, he did not do it.

[165] Similarly, appointing a subcontractor and taking no further steps is insufficient supervision.

[166] Mr Humphries says that the installation of the Hardibacker is not contrary to the plans and specifications, but if it is, then it is not a defect in the property. Even if it is a defect, it did not contribute to a leak.

[167] Mr Humphries doesn't know who installed the clothesline but it was fitted in accordance with current practice and is not the cause of a leak. The installation of the clothesline was not part of the contract.

[168] The pergola was similarly fitted in accordance with common practice and does not leak.

[169] Mr Humphries says he was not responsible for the garden and paving work creating inadequate clearance which has caused wicking.

[170] Mr Humphries said that his work was tendering for work, contracting subcontractors for jobs, negotiating supplier rates, liaising with clients and dealing with human resource issues. A large amount of time was spent on financial matters.

[171] Mr Humphries prepared the tender for the construction of the house.

[172] Mr Humphries was involved in establishing the site, locating boundaries, datum heights, setting up the level of the floor slab and sorting out the services.

[173] Mr Humphries then worked on a house in Hawkes Bay.

[174] The company was very busy so Mr Humphries appointed a foreman to manage the carpenters and apprentices. That person would have liaised with sub trades and managed the quality of work.

[175] Mr Humphries appointed Mr Harley as the plasterer. He was contracted to carry out the work in accordance with the plans and specifications. No one at Humphries Construction had knowledge of plastering. The first respondent contracted with the building company. Mr Humphries arranged for the company to contract with Mr Harley. Mr

Humphries decided that he would take no further responsibility other than appointing Mr Harley.

[176] Mr Humphries gave evidence that he walked around the house with Mr Pearson and Ms Tucker before advising them that the house had reached practical completion. This was the basis for being paid by the bank. At that time Mr Humphries could have arranged for the visible defects to have been repaired.

[177] It was Mr Humphries who signed a contract to say that the company would construct a code compliant house.

[178] The council argues that Mr Humpies is liable for 20% of the damage for which the council may be responsible.

[179] Mr Humphries is like the builder in *Chapman v Western Bay of Plenty District Council*[21] who in a similar position did not properly supervise the building and was found liable. Mr Humphries was a little more 'hands on' than the builder in that case.

[180] As the senior company officer responsible for project managing this project and failing to do it properly, Mr Humphries is liable for this failure. He owed a duty of care to the subsequent purchaser. He is jointly and severally liable for the amount of this claim.

Was the plastering carried out negligently?

[181] Ms Tweeddale alleged that Mr Harley was the plasterer and failed to properly plaster the dwelling, was in breach of his duty of care and caused the defects identified by the assessor. He is therefore responsible for the loss and she claims the full amount from him.

[21] (11 November 2009) WHT, TRI 2008-101-000100, Adjudicator Pitchforth.

[182] The defects in the plaster and their probable causes are the direct result of the negligence of the plasterer.

[183] Michael Pearson and Karen Tucker alleged that Mr Harley owed them a duty of care to ensure that the property was designed, erected and inspected in accordance with the Building Act, the Code, and to ensure that the house was free from water ingress. They also allege that Mr Harley failed to ensure that the plaster was properly applied and that they relied on his skill and care.

[184] The council said that Mr Harley is responsible for the plaster problems. It referred to *McGregor & Ors v Jensen & Ors*[22] in which the adjudicator apportioned 65% of the blame to the plasterer.

[185] Mr Humphries said that subcontractors owe owners a duty of care to carry out the subcontract works in accordance with the Building Act and the Building Code. It is not usual for a builder to supervise the plasterer in mixing and applying plaster. He relied on the subcontractor to carry out his specialist work. The cause of the defect is inadequate plastering. Mr Harley was entirely responsible for the negligent work and, as in *McGregor v Jensen* (supra) his contribution would be at least 60%.

[186] Mr Hill, an architect who gave expert evidence, referred to the BRANZ Good Practice Guide – Stucco 14.3 defects, causes and repairs, lists the most common causes of frequent random cracking as:-

18.1 Vibration in the building frame
18.2 Reinforcing not furred
18.3 poor curing (of plaster)
18.4 poor sand quality and high water demand
18.5 cement rich mix
18.6 Distortion of rigid backing (no gap between sheets) resulting in uneven plaster thickness.

[22] (24 July 2009) WHT, TRI 2008-100-000094, Adjudicator McConnell.

[187] Mr Hill says that if the NZBS NZS 4251:1974 *Code of Practice for Solid Plastering,* section 8, had been adhered to these causes of cracking would have been avoided. Control joints are required at 2.1.9 and if created as required there would be a linear pattern to the cracking. It would be unusual to design the location of control joints as the plasterer would be relied on to apply the plaster to the standard.

[188] The 2004 guide, p 84 identifies defects and causes.

> 14.1 Craze cracking is caused by over trowelling (often with a steel trowel), mix with excessive fines and poor curing.
> 14.2 Cracks from corners of opening are caused by no control joints or diagonal reinforcing strips across corners, cement rich mix and possible structural movement.
> 14.3 frequent random cracking (horizontal as well as vertical) is caused by vibration in the building frame, reinforcing not furred, poor curing, poor sand quality with high water demand, cement rich mix, distortion of rigid backing (no gap between sheets) resulting in uneven plaster thickness.

[189] Mr Hill said that adherence to the plans and specifications would have avoided the problem of water wicking from ground moisture into the plaster.

[190] Mr Hill was also critical of the landscaping which is higher than the Code's requirement of 225 mm below the floor line. He noted that the concrete paving was approximately 100 mm below the finished floor level.

[191] Mr Harley agreed he had a duty to exercise skill and care when carrying out plasterwork but denied that he failed to exercise such skill and care.

[192] Mr Harley says there is no proof of a leak and accordingly there is no jurisdiction to make a finding against him. He says the assessor does not understand the plastering process. There is no need for a drain space at the bottom of the plaster. Plaster with or without a cavity does not drain to the

bottom but ingresses through the paint and the paint must breathe. He says Mr Hill's evidence supports this view.

[193] In Mr Harley's second view the purpose of the plaster is to support and Elastomatic Membrane Acrylic Paint which is designed to bridge the natural cracks of the plastering system. He was not contracted to apply such paint. Plaster that is not painted with Elastomatic Membrane Acrylic Paint does not prevent ingress of moisture.

[194] These two views are difficult to reconcile.

[195] Mr Hill's expert evidence was that the design specification records the use of a Dulux acrylic paint as the paint finish for this solid plastering. NZS4251:1:1998 at 2.6 prescribes the requirements for the paint finish and confirms the use of a general acrylic paint as a suitable paint.

[196] Mr Harley says that there were control joints applied in accordance with the best practice at the time.

[197] Reference to the James Hardie Technical Information Guide during the hearing showed that hidden control joints were acceptable. Refer to para at the end p 6 and p 7 of the James Hardie Hardibacker brochure June 1996.

[198] Mr Harley says there are control joints as can be seen by the vertical window cracks. He does not accept the assessor's view that this is an unusual way to provide control joints.

[199] Mr Harley says it is normal for plaster to develop cracking and crazing and disagrees with the assessor.

[200] Mr Harley says the plaster was applied in accordance with the contract. The contract included a requirement that the plaster would extend over the side of the concrete foundations. He also denies the produced specifications are those that he worked to.

[201] Mr Harley says that when the work was done there was sufficient ground clearance. Soil has been placed against the plaster work since it was finished.

[202] Mr Harley says he did not push solid plaster in around the Hardibacker base.

[203] Mr Harley denies that he prepared the plaster mix inappropriately.

[204] Mr Harley thought that the problems were due to a lack of maintenance or that water was coming in through the roof.

[205] Mr Harley called as a witness Nathan Smith who was a paint salesman of some years standing.

[206] Mr Smith was of the view that a general purpose water based paint was used at the time of construction. This was acceptable at the time.

[207] Although not a plasterer, Mr Smith thought that the plaster was deteriorating due to the breaking down of the paint system.

[208] Mr Smith recommended repainting the house with an Elastomeric Membrane with a light reflective value rated between 40% and 100%, namely Wattyl Flexigard paint.

[209] This paint would not fill gaps bigger than about 1 mm so the surface would need to be filled and repaired before painting.

[210] Mr Harley relied on the Hammer report to show that the plaster could have been repaired by painting. The report of a plasterer who has not seen the dwelling to a person who was not a witness gives this view little weight.

[211] Mr Harley disagrees with the assessor and says that as the wall is weathertight no replacement is necessary.

[212] In all the contested matters I prefer the experts' views to those of Mr Harley.

[213] There was no evidence to support Mr Harley's view that maintenance would have remedied such matters as the Hardibacker's placing and the quality of the plaster mix. There was no evidence of water ingress though the roof.

[214] I find that the plaster was defective in the ways described above by the assessor and Mr Hill.

[215] The plasterer was in breach of the duty of care he owed to the owner and subsequent owner when he applied the defective plaster coating.

[216] Mr Harley is jointly and severally liable to the claimant for the amount of the claim.

COUNCIL'S RESPONSIBILITY FOR NEGLIGENT PLASTERING

[217] The council submitted that the only work for which they might be found liable is the repair of the plaster at the bottom of the wall in the places that the ground levels are unacceptably low and would have been so at the time of inspection.

[218] The council were not on site continually and are not expected to act as a clerk of works. There is no evidence that they were there at any stage during the plastering and therefore would not have been in a position to know that it had been poorly done. They could only be on notice and liable for matters which were obvious when they did inspect the property.

[219] The repairs to these portions of the wall amount to $2,995.00 according to the schedule prepared by the quantity surveyor and not challenged at the hearing.

[220] A proportionate share of consent fees, margins, overhead and contingency amount to $1662.85.

[221] The council submit that the maximum that they can be liable for is therefore $4,657.85. They claim a portion back from each of the other parties.

[222] The council is responsible for the defective plastering which is visible. I accept their submissions.

[223] The Palmerston North City Council is jointly and severally liable for the repairs to a maximum of $4,657.85.

COST OF REMEDIAL WORKS

[224] In each case the claimant sought the cost of the remedial works. There was no dispute as to the quantum shown in the assessor's report, namely $106,221.00.

[225] There was no strong evidence that the assessor's proposed repairs and the quantity surveyor's estimated costs were not reasonable.

[226] Accordingly, the full amount of the claim that is awarded is $106,221.00. The only liable party which has a lower maximum liability is the council as explained above.

DAMAGES FOR STRESS AND ANXIETY

[227] The claimant also sought $10,000 as damages for stress and anxiety.

[228] Ms Tweeddale acknowledges that she has not lived in the property but says that she has undergone stress and anxiety at having a leaky home claim for about a quarter of the value of the building. She has been worried about the house.

[229] Causes of stress were:-

- The stress of owning a leaking house
- Living with the problems since 2004;
- The property looks unsightly;
- She is not able to deal with the property until this issue is resolved
- The property has had holes cut in it
- Bringing the claim has caused stress;
- The property has fungi in the walls;
- A major investment is deteriorating

[230] Mr Drummond relies on *Sunset Terraces*[23] where at paras 398-399 Heath J said:-

> [398] The essential difference between the respective experts was that those who gave evidence for the Council and the designer premised their opinions on the ability of a designer or Council official to assume a competent tradesperson would carry out the work, while those who gave evidence for the individual proprietors were less inclined to accept that assumption. On reflection, I consider the better view is that expressed by the Council's and the designer's experts.
>
> [399] I base that conclusion on s 34(3) of the Building Act 1991. The Council must predict whether there are reasonable grounds to conclude that the work could be carried out in a manner that complied with the Code. To make that prediction, it is necessary for a Council officer to assume the developer will engage competent builders or trades and that their work will be properly co-ordinated. If that assumption were not made, it would be impossible for the Council to conclude that the threshold for granting a building consent had been reached.

[231] Ms Tweeddale seeks $10,000 on the basis that this is 80% of the amount Heath J awarded to absentee owners.

[23] Body Corporate 188529 v North Shore City Council & Ors [2008] 3 NZLR 479 (HC).

[232] The council oppose the awarding of general damages as Ms Tweeddale is a professional investor with nine properties. Her evidence of the stress of being a party to proceedings is not a ground for general damages recognised by the law.

[233] In *Rowlands v Collow*[24] Thomas J distinguished between stress from the damage and stress damages due to going to a hearing:

> Mr Delany acknowledged that the practice in New Zealand, at least since Gabolinscy v Hamilton City Corporation [1975] 1 NZLR 150, 163, has been to award general damages in tort for annoyance, frustration, discomfort and inconvenience. However, he pointed out that the cases to date appear to have been concerned with damage to dwellinghouses where unreasonable living conditions have been inflicted on the owners. The focus has been on the disruption caused to daily domestic life. Nevertheless, I do not consider that the fact it is a driveway and not a dwellinghouse which is in issue in this case alters the basic principle. People whose lives are disrupted by the construction of a defective driveway can also suffer distress and anxiety.
> However, Mr Delany correctly warned me against awarding damages relating to distress and anxiety caused by the "frustration and hassle" which inevitably arise out of a breach of contract or tort or are associated with Court proceedings. He further submitted that there was little or no evidence of distress or anxiety on the part of the owners which can be attributed to Mr Collow's design of the driveway or, I imagine he would argue, his supervision or lack of it.

[234] The stress due to the preparation for the hearing was discussed in , *Stevenson Precast Systems Ltd v Kelland:*[25]

> [80] The remaining periods for which she claims from March 2000 to July 2001 are all related to preparation for trial, correspondence with lawyers, discussions with experts, preparing briefs and attendance at the trial. I am satisfied that the claim for this later period cannot be allowed. The law does not permit recovery for time spent by a party in preparation for litigation, on the basis that such a loss is not a reasonably foreseeable consequence of the breach of contract.
>
> ……
>
> [104] In her evidence relating to general damages, she referred to her involvement in preparation for the present court proceedings. Or the reasons I have already expressed in par [80], I disregard this element entirely Just as

[24] [1992] 1 NZLR 178,209 (HC).
[25] (9 August 2001) HC, Auckland, CP 303-SD01, Tompkins J.

> time spent on preparation for litigation is not compensatable, nor is the stress and worry inevitably involved in a claim of this kind.

[235] The High Court has made awards for stress for those owning rental properties. There are no reasons given apart from the acceptance that damages are payable. On that basis I award the $10,000.00 sought.

RENTAL LOSS

[236] A claim for loss of rental was abandoned during the hearing.

DID MS TWEEDDALE MITIGATE HER LOSS?

[237] Mr Pearson and Ms Tucker alleged that Ms Tweeddale had made no attempt to mitigate her loss.

[238] Ms Tweeddale denied not having attempted to mitigate her loss and referred to the reports and work done in an attempt to remedy the situation.

[239] I find that Ms Tweeddale has attempted to mitigate her loss and make such repairs as advised and seemed necessary.

[240] It was also alleged by the first and second respondents that Ms Tweeddale has failed to take timely steps to identify the cause of the damage and prevent further damage.

[241] Ms Tweeddale's attempts to identify the causes of damage and pursue a claim were vigorous. She had the building inspected; she sought cover from her insurer and the Earthquake Commission and at the same time lodged an application with the Weathertight Homes Resolution Service. There is little more that she could have done.

[242] I find that Ms Tweeddale acted reasonably and has not failed to mitigate her loss.

Was there lack of maintenance?

[243] Mr Pearson and Ms Tucker alleged that Mrs Tweeddale had not maintained the property as a result of which the property is run down. The problems could have been remedied by regular maintenance.

[244] The council and Mr Humphries made similar allegations and sought a reduction in damages to recognise this.

[245] Reliance was placed by some respondents on the Fred Hammer report where it was recommended that a waterproof membrane be applied over the plaster and Mr Hill's view that much of the claim was for deferred maintenance.

[246] There was no evidence to show that the wider 3 mm and 4 mm cracks could be sealed in this way. There was no evidence to show that painting would have remedied the defects in the plaster coating.

[247] Ms Tweeddale undertook the steps outlined above in relation to the leaks and she applied to the WHRS in December 2004 to make this claim. At that time the house was less than 5 years old and painting was not then an issue.

[248] The assessor's report showed the problem with the plastering at which point there was no purpose in painting the plaster which would have to be replaced.

[249] Mr Hill did not visit the property nor make a list of items which he regarded as maintenance.

[250] Maintenance was minimal but more would not have cured the defects. In the circumstances it is not a factor which affects the outcome.

COSTS

[251] The costs regime is:-

> **91 Costs of adjudication proceedings**
>
> (1) The tribunal may determine that costs and expenses must be met by any of the parties to the adjudication (whether those parties are or are not, on the whole, successful in the adjudication) if it considers that the party has caused those costs and expenses to be incurred unnecessarily by—
>
> (a) bad faith on the part of that party; or
>
> (b) allegations or objections by that party that are without substantial merit.
>
> (2) If the tribunal does not make a determination under subsection (1), the parties to the adjudication must meet their own costs and expenses.

[252] To obtain an order for costs a party must show that one of the two grounds has been established.

[253] The claimant seeks costs against Mr Humphries. The basis of the application was that Mr Humphries decided the day before a scheduled mediation that he would not attend. The claimant was put to the expense of preparation and attending with counsel at a mediation that was abandoned.

[254] Mr Humphries made a non negotiable offer instead of participating in the mediation. He said that his absence was to save the cost of attending and that his solicitor would be available by phone to discuss the matter with any party. This is not sufficient behaviour to be regarded as participation in a mediation.

[255] The purpose of mediation is to explore the issues and interests of all the parties. Often the outcome is more creative than can be ordered by the tribunal and the outcome can be a better and more cost effective outcome than a hearing.

[256] On this occasion, if there had been a mediation, Mr Humphries and Mr Harley may well have been able to repair and make good the house for a small proportion of the amount now awarded. The cost of Mr Humphries fixing the clothesline would have been a fraction of the cost of arguing about it at the hearing. Other parties may well have been willing to contribute.

[257] The abandonment of the mediation made the hearing inevitable. This, and the lack of notice, triggers the bad faith provision of the section.

[258] In *Brodav Ltd & Anor v Walters and Anor*[26] Adjudicator Ruthe found that not attending mediation was sufficient grounds for an order for costs when the absence was an obstacle to settlement.

[259] Costs for 1 day under category 2B District Court scale are $1280.00. That is appropriate for the wasted day and I award accordingly.

[260] Mr Paine made a similar argument on behalf of the first and second respondents. A similar award is made to them jointly for $1280.00 as costs against Mr Humphries.

DAMAGES

[261] The amount of the damages claimed and allowed are :

[262]	Remediation	$106221.00
	Stress	$ 10,000.00
	Total	$116,221.00

[263] All amounts are inclusive of GST if applicable.

[264] All parties except the sixth respondents, Barrakuda and the council, are jointly and severally liable for that amount.

[26] (31 March 2009) WHT, TRI 2008-101-000059 & 66.

[265] The maximum that the council is liable for in relation to the remediation is $4,657.85. The council is jointly and severally liable for the whole of the stress damages.

RESULT

[266] For the reasons set out in this determination, the Tribunal makes the following orders:

I. The first respondent and the second respondent, Michael Graham Pearson and Karen Frances Tucker, are to be treated as one party. They owed a duty of care to the claimant. They also breached the warranty in the agreement for sale and purchase. In that capacity they are jointly and severally liable with the other respondents to pay the claimant $116.221.00.

II. The third respondent, the Palmerston North City Council breached the duty it owed to the claimant and is therefore jointly and severally liable to pay the claimants the sum of $4,657.85 for remediation. It is jointly and severally liable with the other respondents to pay the claimant $10,000.00 for stress damages.

III. The fourth respondent Paul Humphries breached his duty owed to the claimants and is therefore jointly and severally liable to pay the claimants the sum of $116,221.00.

IV. The fifth respondent Seven Boyce Harley breached the duty he owed to the claimant and is therefore jointly and severally liable to pay the claimant the sum of $116,221.00.

V. The claim against the sixth respondents was dismissed.

CONTRIBUTION ISSUES

[267] The Tribunal has found that the first, second, third, fourth and fifth respondents breached the duty of care each owed to the claimants. Each of the respondents is a tortfeasor or wrongdoer, and is liable to the claimants in tort for their losses to the extent outlined in this decision.

[268] Section 72(2) of the Weathertight Homes Resolution Services Act 2006, provides that the Tribunal can determine any liability of 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.

[269] 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.

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

> ***17 Proceedings against, and contribution between, joint and several tortfeasors***
>
> *(1) Where damage is suffered by any person as a result of a tort…*
>
> (c) *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…*

[271] The approach to be taken in assessing a claim for contribution is provided in section 17(2) of the Law Reform Act 1936. In essence, it provides that the amount of contribution recoverable shall be such as maybe found by the Court to be just and equitable having regard to the relevant responsibilities of the parties for the damage.

[272] As a result of the negligence referred to above the first, second, third, fourth and fifth respondents are jointly and severally liable for the entire amount of the claim. This means that these respondents are concurrent tortfeasors and therefore each is entitled to a contribution from the other, according to the relevant responsibilities of the parties.

[273] The Council made submissions as to the allocation of the blame amongst other parties. Their suggested allocation of damages among the parties was suggested as being 20% for the council, Mr Pearson and Ms Tucker jointly, and Mr Humphries. They submit that Mr Harley should pay 40%.

[274] The Council's proportion will be based on the lower amount of the remediation costs that it is liable for.

[275] I accept the proportions suggested.

CONCLUSION AND ORDERS

[276] The claimants' claim is proved to the extent of $116,221.00. For the reasons set out in this determination I make the following orders:

i. Graham Pearson and Karen Tucker are ordered to pay the claimant the sum of $116,221.00 forthwith. They are entitled to a contribution from the other respondents for any amount paid in excess of $27,390.79.
ii. The Palmerston North City Council is ordered the pay the claimant $ 14,657.85 forthwith. It is entitled to a contribution from the other respondents for any amount paid in excess of $6,657.85.
iii. Paul Humphries is ordered to pay the claimant the sum of $116,221.00 forthwith. Paul Humphries is entitled to recover a contribution from the other respondents for any amount paid in excess of $27,390.79.

iv. Steven Boyce Harley is ordered to pay the claimant the sum of $116,221.00 forthwith. Steven Boyce Harley is entitled to recover a contribution from the other respondents for any amount paid in excess of $54,781.57.
v. Paul Humphries is ordered to pay the claimant $1,280.00 as costs for the wasted mediation day.
vi. Paul Humphries is ordered to pay Mr Pearson and Ms Tucker jointly $1,280.00 as costs for the wasted mediation day.

[277] To summarise the decision, all respondents meet their obligations under this determination, this will result in the following payments being made by the respondents to the claimants:

First and Second Respondents	$27,390.79
Third Respondent	$6,657.85
Fourth Respondent	$27,390.79
Fifth Respondent	$54,781.57
Subtotal	$116221.00
Fourth Respondent's costs	$2,560.00
Total payable under this decision	$118,781.00

DATED the 1st day of December 2009.

Roger Pitchforth
Tribunal Member