IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2009-100-000021
[2010] NZWHT AUCKLAND 21

BETWEEN	SHARON and DAVID WALL Claimants
AND	JANE ALISON MALONE AND ESTATE OF STEPHEN DAVID MALONE First Respondents
AND	NORTH SHORE CITY COUNCIL Second Respondent
AND	JOHN FINLAY (Removed) Third Respondent
AND	WILLIAM CARL BRAHNE (Removed) Fourth Respondent
AND	PHILLIP NEVILLE WARREN (Removed) Fifth Respondent

Hearing:	25, 26 and 30 March 2010
Final Written submissions received:	23 April 2010
Closing oral submissions:	25 May 2010
Counsel Appearances:	Mr J D Turner and Mr J Skinner, counsel for the Claimants; Mr C S Henry, counsel for the First Respondent. Mr P Robertson, counsel for the Second Respondent;
Witness Appearances:	Mr F Wiemann, WHRS Assessor; Mr P Crow, Expert for Claimants; Mr D Wall, Claimant; Mrs S Wall, Claimant; Mr G Stone, Council Officer; Mr S Panckhurst, Council Officer; Mr S Alexander, Second Respondent's Expert; Mr Price, Second Respondent's Expert as to Quantum; Mr J White, WHRS Assessor's Expert as to Quantum; Mr A Farrell, First Respondent's Expert; Mrs J Malone, First Respondent
Decision:	20 July 2010

DETERMINATION AS TO LIABILITY
Adjudicator: K D Kilgour

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INTRODUCTION

[1] In 2003 the claimants purchased the property at 6 Opal Close, Albany, North Shore City ("the property") from the first respondents. The first respondents caused the construction of the dwelling between 1997 and 1998.

[2] In 2006 the claimants discovered water ingress at various locations. They therefore lodged the present claim on 1 May 2007 with the Department of Building and Housing under the Weathertight Homes Resolution Services Act 2006 claiming for damages resulting from the alleged defective construction of the property.

[3] The claimants seek damages, both jointly and severally, against:

i. The first respondents, the estate of Mr Malone and Mrs Malone, firstly as the vendors who allegedly breached the warranties under their agreement for sale and purchase, and, secondly in negligence for the defective construction of the property; and
ii. The second respondent, the North Shore City Council, in connection with the performance of its functions under the Building Act 1991.

For the reasons which follow, I have found that the claimants have succeeded in their contractual claim. The principle governing an award of damages in a breach of contract claim is that the claimants cannot actually recover more than their loss. Instead their loss must be the cost of curing the breach of contract. As I have determined that the claimants have not proven their quantum claim for a full reclad, this decision is therefore a determination as to liability solely.

ISSUES

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

- Damage to the dwelling and its causes;
- Damages claim – issues over quantum;
- Whether a claim can be made against the estate of Mr S Malone;
- The responsibility of the first respondent in contract and in tort;
- The responsibility of the second respondent in issuing the building consent and in its inspection process.

MATERIAL FACTS

[5] The first respondents, Mrs Jane Malone and her late husband, Mr Steven Malone (Malones), owned the property on which the concerned dwelling was built. They purchased the property with a view to building their home. Mrs Malone preferred to have a group builder construct a home for them but she was persuaded by her late husband, who managed a property maintenance business, that he could manage the building of their new home, even though he was not a builder. Mr Malone therefore supervised and arranged the building of the home.

[6] The Malones engaged the former third respondent, Mr John Finlay, to draw up plans and specifications in order to construct the home. On 14 April 1997 Mr Finlay also applied to the second respondent, the North Shore City Council, for the necessary building permit.

[7] After the Council issued building consent no. A12011 on 4 June 1997 for the intended construction, Mr Finlay's engagement on the project concluded and Mr Malone went about engaging the necessary trades to build the home. Construction commenced and progressed through 1997 and was ready for occupation in February 1998. It is noted however that the home was not strictly built in

accordance with the permitted drawings. For instance, the external cladding system was changed from Harditex to a Plaster Systems Limited insulclad system, changes were also made to the balcony, and the west ground floor deck and timber seat were not included on the drawings. There is no explanation as to who initiated the building changes from the permitted plans. Nor were there any documents indicating that the Council approved the changes.

[8] The Council undertook five building inspections during the construction from July 1997 through to February 1998. In February 1998 the Council building inspector issued a Field Memorandum to Mr Malone stating:

> "Tidy job but handrails to upper level decks too low (only 800) (needs pipes) – ground levels too high concrete touching insulclad and grass levels only 100 below slab. Left site memo 22568."

[9] The following year on 9 November 1999, after a further inspection was undertaken by another Council inspector, the ground levels were noted as still being inappropriate. As a result the Council still had not issued a Code Compliance Certificate for the home.

[10] Somewhere around September or October 2003, the Malones decided to sell the home because Mr Malone's business had failed and they needed their equity in the home to pay the business debts. Aware of the fact that the property had not yet received a Code Compliance Certificate, Mr Malone called for a further Council inspection and on 20 October 2003 Mr Geoffrey Stone of the Council attended at the property. According to Mr Stone, although the height of the balustrade to the balcony had been increased to meet the requirements of the Building Code, it was immediately obvious to him that the owners still had not addressed the ground level concerns set out in the earlier site memorandum. In evidence Mr Stone said he also noticed from this site visit a number of weathertightness risk factors (such as balustrade cladding to tiles,

roof and wall junctions, round headed window) and he went back to Council management to discuss such concerns. As a consequence of that meeting Mr Stone issued the following Field Memorandum to Mr Malone on 6 November 2003 stating:

> "The following building items were found to contravene the New Zealand Building Code and approved documents, and require rectification and re-inspection prior to covering in. Failure to comply with this notice could have Council refusing to issue a Code of Compliance Certificate on completion:
>
> (1) Height of protected and unprotected ground levels, below finished floor level, to comply with NZS3604-1999 and NZ Building Code (Code details attached).
>
> (2) Council requiring written report on the wall cladding from either a BRANZ accredited advisor or a member of the NZ Institute of Building Surveyors who holds a weathertightness training course certificate. The outcome of this investigation will help Council decide if it can issue a Code Compliance Certificate (CCC)."

[11] Mr Stone made a brief site visit to the property on 20 November 2003 where he noticed that Mr Medricky of South City Builders Surveyors Limited, who was commissioned by Mr Malone to carry out a cladding inspection, was undertaking some remedial work in the vicinity of the balcony. It was at this site visit that Mr Medricky and Mr Stone discussed the use of channel drains as an alternative means of achieving ground level clearance and compliance with the Building Code, and after returning to the site on 21 November 2003, Mr Stone saw that channel drains were being installed to address the ground clearance issue in the vicinity of the garage. As a result the Council was satisfied that the ground clearance requisition had been satisfied.

[12] After receiving a copy of a report produced by Mr Medricky dated 20 November 2003 the Council were able to identify concerns and additional issues relating to the cladding. The Council conveyed

these concerns to Mr Medricky by email on 24 November 2003, which included the following:

(1) The ground level problem had not been addressed for several years; the Council had first required Mr Malone to reduce ground levels in February 1998;

(2) The Council had noted that there was no specific inspection undertaken of the insulclad cladding nor was there a producer statement on file or anything of a similar nature to give the Council an assurance that the cladding had been properly installed; and

(3) By 2003 there was a growing awareness amongst Councils that direct fixed, face sealed cladding systems were not proving durable. Accordingly the Council made a decision to require a written report on the wall cladding from either a BRANZ accredited advisor or a member of the NZ Institute of Building Surveyors.

[13] The Council remained concerned that the bottoms of the walls which had been in contact with the ground may have been damaged because they had been left in contact for several years. For those reasons Mr Medricky's report did not persuade the Council that it was justified in issuing a Code Compliance Certificate for the dwelling. Moreover after receiving an email from Mr Medricky on 26 November 2003 where he described recent extensive repair work to the balcony which was not mentioned in his report, the Council became more concerned about whether the dwelling complied with the Code in terms of weathertightness.

[14] Consequently the Council applied to the Building Industry Association (BIA) seeking a determination as to whether Mr Medricky's report and his subsequent email constitutes reasonable grounds that the building is Code Compliant in terms of weathertightness.

[15] Some correspondence took place between the BIA and the Council. The BIA wrote to the Council on 24 February 2004 containing the following comments:

> Notice to rectify:
> We note that the Council has not yet forwarded to the owner any reasons relating to the refusal to issue a Code Compliance Certificate. When this information has been sent to the owner, could you please ensure that a copy is also forwarded to the Authority.
>
> Cladding System
> The drawings of the house show a Harditex system. However, the cladding inspection specifies an EIFS – insulclad system. Please provide any documentation outlining approved changes from Harditex to insulclad...

[16] The Council replied on 21 April 2004:

> "Notice to rectify
> Council did not issue notice to rectify for reasons explained below. Since receiving your letter, as you may be aware, Council has spent some time considering this request and has received legal opinion from our solicitors in regards to our position...
>
> Cladding System
> ...The changes to the cladding system were not approved by Council and therefore no such amended plans application and consent documentation is held.
> ...
> There has been recent information and knowledge that face sealed cladding systems without an adequate drainage and ventilation cavity will cause irrevocable damage to structural elements in the event of leakage and/or the effect of residual moisture. Council cannot be satisfied that the cladding as installed on the above building will meet the functional requirements of Clause E2 External Moisture of the New Zealand Building Code. It was therefore unable to issue a Code Compliance Certificate. Therefore Council is of the opinion that proper weathertightness investigation needs to be undertaken to check compliance in order

> to satisfy on reasonable grounds. The extent and the type of testing should be decided by a weathertightness expert.
>
> Please also note some of the defects of the deck area, that lead to water ingress was not included in the report from South City Building Surveyors Limited. The writer was of the view that it was not a cladding issue. A number of telephone conversations and meetings took place on this issue and Council explained its inability to be satisfied on reasonable grounds regarding Code Compliance of cladding system, therefore leading to the need to apply for a determination.

[17] Ms McLaughlan, a registered building surveyor, was appointed by the BIA as an independent expert to examine the exterior cladding and provide a report of her findings. The report was completed in April 2004 and an addendum report was issued on 3 August 2004 following destructive testing. As a result of Ms McLaughlan's report, the BIA issued a draft determination on 28 September 2004 and a final determination after April 2005 stating, amongst other matters, that the cladding as installed does not comply with clause E2.3.2 of the Building Code thereby confirming the Council's decision to refuse to issue the Code Compliance Certificate. The determination noted that it was not for the BIA to decide how the cladding is to be brought into compliance for that is a matter for the owner to propose with the territorial authority. However the BIA did suggest that the owner commission a more extensive investigation of the cladding. The Tribunal notes that such an investigation is still to be carried out.

[18] In about October 2003 the Malones entered into a sale and purchase agreement with a Mr and Mrs Lippard. However after deciding that the house was too big for them, coupled with their concerns over the delay in the issuing of the Code Compliance Certificate, the Lippards sought to terminate their purchase. What eventuated was the Lippards agreeing to purchase the claimants' home which was adjacent to the Malones' dwelling while the

claimants purchased the Malones' property on 4 December 2003 with settlement occurring on 5 December 2003.

[19] The claimants entered into a sale and purchase agreement with the Malones using the approved form by the Real Estate Institute of New Zealand and the Auckland District Law Society (7th edition (2) July 1999). That standard form included the usual vendor warranty clause 6.2(5) as well as clause 14.0 requiring the Malones, as vendors, to complete the necessary works to obtain a Code Compliance Certificate.

[20] On 2 December 2003 the solicitors for the Malones sent to the solicitor for the claimants, copies of the two Field Memoranda from the Council and a copy of the cladding inspection report from Mr Medricky. The solicitor for the Malones also stated the following in his correspondence:

> "I am instructed that when Council came around to inspect the handrail which had to be signed off, they advised that they would also require a check on the cladding. This is a policy that I am not aware of. The owner is required to engage an independent inspector to inspect the reports. The inspector recommended certain remedial works which have now been completed.
>
> ...
>
> Apparently Council have advised that they are not willing to issue a Code Compliance Certificate because the inspector apparently is not insured and there is some reference to Geoff Stone carrying out an inspection when he did not.
>
> Council are now sending the property file to "BIA" and they are to direct Council to issue a Code Compliance Certificate or issue requisitions to complete.
>
> My client undertakes to do all that is required to obtain Code Compliance Certificate and is willing to enter into a separate deed to that effect with your client."

[21] Post-settlement communications ensued periodically between the solicitor for the Malones and the claimants' solicitors over satisfaction of the Malones' obligations as vendors under clause 14. By that time Mr and Mrs Malone had separated and Mr Malone had died in February 2005. On 21 October 2004 Mrs Malone wrote directly to the claimants stating that:

> "I write to confirm that I am willing to complete the works suggested in paragraph 8 [of R McLaughlan's addendum report which she had received via her solicitor in August 2004] and pay your legal costs up to NZD $1,500 as requested, providing the following criteria are met.
>
> (a) That funds can be withdrawn from the $20,000 held in trust to cover the work needed to be carried out.
>
> (b) That the Code of Compliance will issue once the "conclusions" "8" paragraph have been carried out.
>
> (c) No further financial/building requests will be made upon me to complete other work.
>
> I look forward to hearing from you. Please feel free to phone me if you want to discuss anything further.
>
> Regards
>
> Jayne Malone"

[22] The claimants' solicitor wrote to Mrs Malone's solicitor on 10 January 2005 including a copy of Mrs Malone's letter and mentioning that the $20,000 held on trust pending finalisation was not a cap on her liability as the BIA had indicated that costs will exceed $20,000. The letter from the claimants' solicitor required Mrs Malone's proposal for settlement failing which the claimants will have no choice but to instruct a duly qualified builder to commence remedial work. The letter concluded that if a reply was not received in 21 days, the solicitor will invite the claimants to proceed to instruct an independent builder.

[23] In June 2007, the claimants' lawyer wrote to Mrs Malone stating that as the claimants are experiencing difficulties with the property they are now commencing a claim with the Weathertight Homes Tribunal with a view to bringing closure to the matter. On 1

May 2007 the claimants lodged their claim with the Department of Building and Housing and the WHRS assessor issued his report on 25 July 2007 opining that the home meets the criteria set down in section 14 of the Weathertight Homes Resolution Services Act 2006.

Damage to the Dwelling and its Causes

[24] The WHRS assessor, Mr Frank Wiemann, reported that the causes of the water ingress were found in:

- Conjunction with the installation of windows and doors;
- The lack of jamb and sill flashings;
- Inadequate sealing between jambs and the cladding; and
- Other areas where water entry had been found were the balcony balustrade tops and the bottom plate area at several locations around the house.

[25] The WHRS assessor opined that a full reclad of the home was necessary to effect repairs sufficient to cover "future likely damage". Based on these findings Mr Wiemann's initial estimate of remedial costs was $150,300 and a further $91,125 for future likely damage thereby totalling $241,425. These estimates were revised on 5 June 2009 whereby remedial costs were estimated in the amount of $170,976 and $103,276 for future likely damage totalling $274,252 (including GST).

[26] The experts who participated in the experts' conference were:

- Mr Frank Wiemann, the WHRS Assessor;
- Mr Philip Crow, a registered building surveyor with some 40 years experience in the construction industry, engaged by the claimants;
- Mr Stephen Alexander an experienced building surveyor and recognised in providing technical analysis of building

performance and waterproofing engaged by the Council; and

- Mr Anthony Farrell, for Mrs Malone, a registered building surveyor and certified weathertightness surveyor with some 20 years experience in the business of building surveying.

[27] This hearing was preceded by an experts' conference convened 23 March 2010 and facilitated by another Tribunal Member. In accepting that the dwelling is not greatly affected by water ingress, all reached an agreement on the leak locations and causes. These were:

- The curved window (south side);
- Two windows (east side): it appeared at the hearing that Mr Crow misunderstood which two windows, but as there was a large consensus on the remedial work required on the east side, the issue of which two windows no longer seems relevant;
- Lack of ground clearance: it was clear that the leaks resulting from this defect, as already identified by Council, has caused the most extensive current damage as moisture has wicked up from the ground into the cladding damaging the timber framing;
- Deck/balcony balustrade installation on the two upper balconies.

[28] After considering all the evidence and giving great weight to the agreement from the experts' conference I conclude that water has entered this dwelling as a result of:

i. Deficiencies in the installation of joinery. This included a combination of inadequate jamb and sill flashings and the end of head flashing directing water into the cladding due to the installation of the curved window on

the south side and the lack of adequate jamb flashing seals to the two windows on the east side;

ii. The balcony and balustrade installation have resulted in at least two weathertightness defects - balustrade cladding to tiles and top fixing into timber cap; and

iii. Lack of ground clearance and probable building wrap taken down below ground level particularly at the north, east and west elevations, causing framing decay from moisture wicking up from the ground.

[29] The damage to the dwelling from these causes is best illustrated and explained by Appendix L of the experts' agreement.

CLAIM FOR DAMAGES

[30] The claimants' initial application for adjudication sought:

i. Damages for the remedial costs currently estimated at $317,662.00 (including GST);

ii. General damages of $50,000.00 being $25,000.00 for each of the claimants for stress and inconvenience;

iii. Interest of $92,796.29 pursuant to clause 16, Part 2 of Schedule 3 of the Weathertight Homes Resolution Services Act 2006 on the $317,663.00 calculated at 2% plus the bank bill rate of 2.72%.

Remedial Costs

[31] Although all the experts agreed that the necessary remedial work is the result of current damage they were divided into two camps when it came to deciding what works were necessary to prevent future likely damage. The WHRS assessor and Mr Crow opined that a full reclad is required to avoid future likely damage,

whereas Messrs Alexander and Farrell opined that a partial reclad was sufficient. In particular Messrs Alexander and Farrell stated that although the dwelling's windows were probably not installed in strict accordance with the manufacturer's instructions they are otherwise Code Compliant as they have not exhibited any water ingress concern for the past 12 years. Accordingly Messrs Alxander and Farell contend that current remedial damage can be relatively easy to ascertain. It is also noted that the EIFS cladding had not shown any concerns of water ingress and each of the experts stated that the EIFS cladding which envelops the house and differs from the proposed cladding in the consented plans, is usually more durable and therefore a more durable cladding.

[32] In any event the experts' estimate of remedial costs varies as follows:

Expert	Partial Reclad	Full Reclad
F Wiemann	$170,976.00 inc GST	$274,252.00 inc GST
P Crow	$204,253.00 inc GST	$308,733.00 inc GST
S Alexander	$159,406.00 inc GST	

[33] Counsel for the claimants indicated that the claimants intend to properly progress to the remediation of the home upon resolution of this claim. Counsel for the Council indicated that Mr Stone will be the Council officer processing any such remediation application. Nevertheless at this point in the proceedings I am still dealing with estimates of costings and an imprecise expert opinion on what remediation programme will satisfy the territorial local authority.

[34] Whilst the majority view of the experts is that a partial reclad is not feasible or probably too limited for the present requirements of the local authority, the necessary repairs and their costs cannot be established for the purposes of this determination until the Council's decision whether a partial or full reclad is required and the exact

costings of that remedial solution. I therefore determine that the claimants have not sufficiently proven their claim for quantum to enable for a full reclad of the property materially because they have not obtained the remedial solution from the Council in order to bring the dwelling into compliance with the Building Code.

[35] The claimants reduced the quantum sought for damages during the hearing from $317,662.00 (incl. GST) to $308,733.00 (incl. GST). However, this sum makes no allowance for the settlement which the claimants have reached with the former third respondent, Mr John Finlay, who was engaged by the late Mr Malone to prepare concept plans and specifications for the construction of the dwelling.

[36] The claimants withdrew their claim against Mr Finlay and as a result the Tribunal removed Mr Finlay in Procedural Order No 12 when the claimants advised that they had reached a post-mediation settlement with Mr Finlay. At the adjudication hearing, counsel the Malones and the Council sought from the claimants a concessional allowance from their quantum claim for the settlement reached with Mr Finlay.

[37] Mr Turner explained the settlement was at best vague and imprecise regarding a quantifiable amount and that such settlement nevertheless was confidential. Although, Mr Turner did indicate that the settlement was around Mr Finlay providing plans and drafting services to the claimants for the remedial works required, the value or consideration for that settlement is not quantified for the purposes of determining the amounts for which the remaining parties were allegedly responsible for. Neither are the settlement terms to be disclosed to this proceeding.

[38] A partial settlement between some of the parties to the adjudication does not prevent the claimants from continuing to pursue their claim against the remaining respondents as they are

partial settlements of a liability *in solidum*. In accordance with the principles outlined in the decision of Duffy J in *Body Corporate 185960 v North Shore City Council (Kilham Mews)*,[1] the claimants are entitled to seek judgment against the remaining respondents for the full amount of their loss. However as noted by Duffy J in *Kilham Mews*, this does not mean that a claimant can recover damages for more than his or her whole loss:

> [16] It would thus be unjust and contrary to the common law to allow recovery for the full amount of the damages against [the remaining respondents], considering that the [respondents have settled with the claimants]. The paramount rule to take into consideration here is that the [claimant] cannot recover damages for more than his or her whole loss (*Allison v KPMG Peat Marwick*[2]).

[39] Following the decision of the High Court in *Kilham Mews* the claimants are entitled to entry of judgment against the remaining respondents for the full amount of the damages claimed. However, since the claimants have already settled with Mr Finlay for an undisclosed sum, the claimants cannot recover from the remaining respondents an amount which would cause the claimants to recover more than the total amount of the established quantum.

[40] As the claimants have already settled with Mr Finlay any amount or consideration paid by that respondent must be deducted from the full amount of the claim established. So as not to infringe the general common law principle just mentioned and for public policy reasons.[3] The three quantum experts - Mr Crow for the claimants, Mr Price for the Malones, and Mr White for the WHRS assessor, each estimated approximately the same quantum for plan drafting services, namely $10,000.00. It seems therefore, that if the claimants choose not to make it a concession from their claimed quantum for drafting services due to the abovementioned settlement,

[1] HC Auckland, CIV-2006-004-3535, 28 April 2009.

[2] [2000] 1 NZLR 560 (CA).

[3] See *Cadogan Petroleum Plc v Tolley* [2010] EWHC 1107 (Ch).

however vague and imprecise as to value, I am left with no alternative but to make a value determination and I do so at $10,000.00 (excl. GST).

General Damages

[41] The evidence of the claimants at the hearing was unequivocal. The claimants moved out of their home to a more suitable (greater size) rental accommodation for family reasons, not because it was unsuitable for living in due to its weathertightness defects. Since then the claimants had the subject property rented out. At the hearing the claimants reduced their claim for general damages to $15,000.00 in total.

[42] The Court of Appeal in its recent decisions in *Sunset Terraces*[4] and *Byron Avenue*[5] have settled the quantum in relation to general damages for leaky homes whereby the appropriate sum to award owners who do not occupy the dwelling the total amount of $15,000.00 per residence.

[43] As there is nothing about this claim to suggest that the level of general damages should be higher or lower than what was awarded by the Court of Appeal to non-owner occupiers of leaky homes. I therefore determine that the claimants are entitled to general damages as non-occupying owners for the total sum of $15,000.00 due to the stress, inconvenience and harm suffered from owning a leaky home.

Interest

[44] It was conceded at the hearing that the claimants are not entitled to interest on the estimated remedial costs. This is because the claimants, have not undertaken remedial work and so have

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[4] *North Shore City Council v Body Corporate 188529* [2010] NZCA 64.
[5] *O'Hagan v Body Corporate 189855* [2010] NZCA 65.

incurred no repair expenditure entitling them to an interest award under clause 16, Part 2 of Schedule 3 of the Act.

Legal Costs

[45] The claimants claimed for legal costs on a 2B basis under the High Court Rules and pursuant to section 91 of the Weathertight Homes Resolution Services Act 2006. However as counsel for the claimants conceded at the hearing that the claimants are not entitled to legal costs in terms of section 91, the Tribunal is no longer required to make a determination on the matter.

Summary of Quantum

[46] There are still matters pending determination before the Tribunal can establish the aggregate amount of the claimants' loss. Such matters are whether a partial reclad or a full reclad will be appropriate for the requirements of the Council. Once the claimants have ascertained the actual Council remediation requirements and quantum of remedial costs then if the parties cannot reach agreement given the guidelines in this decision, the claimants are invited to make an application to the Tribunal for determination as to quantum. Accordingly, I have decided that this determination is an interim determination as to liability solely.

CLAIM AGAINST THE FIRST RESPONDENTS

Claim against the Estate of Mr Malone

[47] Mr Steven David Malone has been named as one of the first respondents in this claim as the alleged builder of the dwelling. According to the evidence Mr Malone caused the building of the property in that he instigated the design, obtained the building consent and engaged the various building trades involved with the

construction. However, before these proceedings were initiated, Mr Malone died in February 2005 intestate and insolvent.

[48] As indicated in *Cathie v Simes*,[6] the Tribunal is unable to make a determination against a person who is known to be deceased. Moreover section 3(3)(b) of the Law Reform Act 1936 provides:

> **3 Effect of death on certain causes of action**
>
> (3) No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this Part of this Act has survived against the estate of a deceased person, unless either-
>
> (b) The cause of action arose not earlier than 2 years before his death and proceedings are taken in respect thereof not later than 12 months after his personal representative took out representation:
>
> Provided that no such proceedings shall be maintainable unless notice in writing giving reasonable information of the circumstances upon which the proceedings will be based and the name and address for the prospective plaintiff and of his solicitor or agent (if any) in the matter is given by the prospective plaintiff to the personal representative of the deceased person as soon as practicable after the personal representative took out representation.

[49] The present proceedings were commenced more than 12 months after the death of Mr Malone. Pursuant to section 3(3)(b), the claim against Mr Malone is therefore statute-barred.

[50] For completeness Mr Malone died intestate and insolvent and as a result there is no estate to bring proceedings against. Section 21 of Part 2 of Schedule 3 of the Act therefore has no application to the claim against Mr Malone either.

[51] Accordingly, both the contractual and negligence claimis against the first respondents' proceed solely against Mrs Jane Malone as the sole surviving first respondent.

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[6] CA121/04, 9 September 2004, Chambers J.

Claim against Mrs Malone in Tort

[52] With this particular claim, the claimants allege that Mrs Malone, as the developer of the property, breached the non-delegable duty of care she owed to the claimants in failing to exercise proper care and skill in constructing the home with sound materials and in conformity with the Building Act 1991. It was submitted that Mrs Malone should be considered in these proceedings as a developer as the construction of the subject house was intended to be sold for profit upon completion and that Mrs Malone did indeed profit from the development. Accordingly the claimants contend that Mrs Malone is thereby liable for the damage to the home as illustrated by the experts' agreement as to defects.

[53] In response Mr Henry, counsel for Mrs Malone, argued that whilst she was a joint owner of the property with her late husband, her role in the construction of the dwelling was a passive one as she exercised no control over the design, or even the decision to sell the property. It was therefore submitted that as she did not owe a duty to the claimants, she was not legally or factually responsible for any weathertight failures and its resulting non-compliance for Code purposes. Instead it was argued that the project manager must carry the burden of responsibility for not taking proper steps to ensure the build achieved the required standard – that role however was not carried out by Mrs Malone.

[54] The law is clear that those who build or develop residential properties owe a non-delegable duty of care to subsequent purchasers.[7] The key issue however before the Tribunal is whether the role of Mrs Malone during the construction ought to be considered as that of a developer.

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[7] *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA); *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 and *Dicks v Hobson Swan Construction Ltd (in liq)* HC Auckland, CIV-2004-404-1065, 22 December 2006, Baragwanath J; at para [77]; Stephen Todd (ed) The Law of Torts in New Zealand (4th ed, Brookers, Wellington, 2005) at 6.4.902(1).

[55] Although the evidence of the role undertaken by the late Mr Malone may appear to be analogous to that of a developer this does not mean that Mrs Malone, as his wife and co-owner of the property, was also the developer by default. Consequently, the role of Mrs Malone must be considered separately from her late husband.

[56] An assessment of the evidence before the Tribunal does not support the allegation that Mrs Malone was in fact a developer in this case. Other than her involvement as a joint property owner with her late husband and her agreement to allow him to manage the whole construction himself, the Tribunal is satisfied that Mrs Malone who was working full time during the construction was not a developer especially since they lived in the house for five years before Mr Malone's financial situation caused them to sell nor did she have any significant control or involvement in the building of the home for which she could be said to have owed the claimants a duty of care.

[57] The Tribunal further notes the claimants' allegation that Mrs Malone ought to be considered as a developer on the grounds that she and her late husband intended to sell the property once construction was completed. However, Mrs Malone's undisputed evidence is that the dwelling was intended for their use as a family home. Although she admits that some of the contractors' payments were made from her joint account with her late husband, particularly in relation to the interior and finishing of the house, the evidence shows that Mrs Malone was not the "mind and force" of the building project, or even the person who determined and authorised the payments. The Tribunal further accepts Mr Henry's submission that any "control" that may attach to Mrs Malone as a result of payments being made to contractors from her joint bank account was: "unrelated to the actual building process or more particularly to any

construction defects”,[8] and therefore is irrelevant for the present proceedings.

[58] Accordingly for the reasons given above, the claim that Mrs Malone is a developer who owed the claimants a duty of care is not proven. The claim in tort against Mrs Malone must therefore fail.

Claim against Mrs Malone in Contract

[59] The claimants’ second claim against Mrs Malone is for breach of contract alleging that Mrs Malone is severally liable to the claimants under the agreement for sale and purchase dated 4 December 2003. This cause of action is made on the allegation that Mrs Malone failed to meet the vendor obligations under both clauses 6.2(5) and 14 of the agreement. Those clauses stated the following:

> “6.2 The vendor warrants and undertakes that 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.”
>
> “14.0 It is acknowledged by the vendor and purchaser that there is an outstanding requisition with the North Shore City Council in relation to the wall cladding (as per attached). The vendor undertakes that they will do all things as required by North Shore City Council or the BIA or as shall be necessary to enable the issue of a Code Compliance Certificate.
>
> 14.1 This agreement is conditional upon the cancellation of the existing agreement for sale and purchase of the property between the

[8] *Body Corporate No 187820 v Auckland City Council* (2006) 6 NZCPR 536 at [66].

vendor and Mr and Mrs Lippard as purchasers by 5pm 4th December 2003.

14.2 This agreement is further conditional upon the contemporaneous settlement of the sale contract between Mr and Mrs Wall on the one part and Mr and Mrs Lippard (of the other part) in relation to the property at 8 Opal Close by 5th December 2003.

14.3 The parties agree that the sum of $20,000.00 shall be deducted from the purchase funds and held in the purchaser's solicitor's trust pending satisfaction of Clause 14.0. It is acknowledged that the vendor may access this sum to complete works necessary to obtain the Code of Compliance Certificate. It is acknowledged however that the vendors' liability to remedy works necessary to obtain the Code of Compliance will not be limited to the said sum of $20,000."

[60] In terms of clause 6.2(5) the claimants firstly allege that in breach of clause 6.2(5)(d), Mrs Malone did not provide a house that met the requirements of the Building Code, as required by section 7 of the Building Act 1991. Secondly, it is submitted that the Malones' failure to obtain a Code Compliance Certificate for all the works breached clause 6.2(5)(c).

[61] As for clause 14, it is alleged that despite requests to Mrs Malone to perform her obligations as the vendor, the necessary works to obtain the Code Compliance Certificate remained outstanding. The claimants argued that there was no time limit to the obligations set down in clause 14 and that the sum of $20,000 mentioned was essentially a performance bond which does not actually reduce or abate the purchase price. The claimants further argued that the words of clause 14 clearly express that the vendors' liability to carry out the necessary repairs to obtain the Code Compliance Certificate is not limited to $20,000.

[62] In response, although Mrs Malone concedes that the defects in the dwelling appear to breach clause 6.2(5), she was unaware of that state of affairs at the time of entering into the agreement. Accordingly Mrs Malone submits that any breach of that clause is a

direct result of the Council's failure to properly carry out its statutory duties, and to that extent she ought to be held responsible for no more than 5% of the total liability that she and the Council together may be found to have to the claimants. It was also submitted on behalf of Mrs Malone that any such liability is limited to the amount of $20,000 as that was the amount which she and the claimants both reasonably had in mind at the time they entered into the agreement. It is contended that none of them had in mind that the Malones would be responsible, by virtue of clause 14, for an unquantifiable risk arising from weathertightness issues since none of them knew of such. Accordingly Mrs Malone submits that she should not be liable for the cost of addressing those weathertight issues, by virtue of clause 14.

[63] The Tribunal is satisfied that in failing to meet her obligations under clause 14 to complete the outstanding works necessary to obtain a Code Compliance Certificate, as well as her failure to provide a home that meets the requirements of the Building Code as she warranted under clause 6.2(5), the Tribunal is satisfied that Mrs Malone breached her contract with the claimants. The only issue which the Tribunal must therefore determine is the amount Mrs Malone ought to be held responsible for in breach of clauses 6.2(5) and 14.

[64] Mr Henry submitted that the question that needs to be determined in cases of this nature is clearly summed up at 21.2.3 of the text *Law of Contract in New Zealand* in reference to *The Heron II*[9] decision where the House of Lords held:[10]

> "[T]he question is not, as Asquith L J said, whether the damage should have been foreseen by the defendant, but whether the probability of its occurrence should have been within the reasonable contemplation of both parties at the time when the contract was made..."

[9] *Koufos v C Czarnikow The Heron II* [1969] 1 AC 350.
[10] John F Burrows, Law of Contract in New Zealand (3rd ed, LexisNexis NZ, Wellington 2007) at 21.2.3(a).

[65] In *Pyne Gould Guinness Ltd v Montgomery Watson (NZ) Ltd*[11] the Court of Appeal stated at p29 that the proper approach to take in interpreting a contract is to read the words of the contract, ascertain their natural and ordinary meaning in the context of the document as a whole and then look to the surrounding circumstances to cross-check whether some other or modified meaning was intended. Further guidance is found in *Vector Gas Ltd v Bay of Plenty Energy Ltd*[12] Tipping J noted: (quote 29 from the beginning to "after its formation".

[66] In using the tools of interpretation outlined by the above case law authorities, the natural and ordinary meaning is that the parties to the agreement for sale and purchase acknowledged that there was an outstanding requisition from the Council for a written report on the wall cladding from either a BRANZ Accredited Advisor or a member of the NZ Institute of Building Surveyors, who holds a weathertightness training course certificate, and that the Malones agree that they will do all things required of them to bring about the issue of a Code Compliance Certificate for the home.

[67] I accept that the claimants and Mrs Malone were of the view at the time they entered into the contract that to satisfy the outstanding Council requirement required work of a minor nature. However neither the Malones nor the claimants or their respective advisers made any enquiry of the Council, its officers or of Mr Medricky as to the work necessary to bring the house into compliance with the Building Code. Moreover Mrs Malone's property lawyer at the time was aware that the Council required a report on the weathertightness of the cladding before it could consider whether a Code Compliance Certificate can be issued. Although Mrs Malone's property lawyer mentioned that this must have been a new Council policy. Neither he nor the Malones seem

[11] [2001] NZAR 789.
[12] [2010] NZSC 5 at [29].

to have made any proper enquiry concerning their lack of understanding of such a Council requirement. However the Tribunal is of the view that the Council would still have required such a report even if enquiries were made in any event. As a result little weight is placed on the statement that the Council's requirement for a weathertightness report must have been a new policy.

[68] I agree with the claimants' submission that there is no time limit imposed by clause 14 by which the Malones were to complete the necessary works to obtain a Code Compliance Certificate, and as those works have not been done the obligations agreed to by Mrs Malone at clause 14 remains outstanding.

[69] I also agree with the claimants' further submission that the sum of $20,000 mentioned in clause 14.3 does not reduce or abate the purchase price. The relevant words of clause 14.3 are:

> "The vendors' liability to remedy works necessary to obtain the Code of Compliance will not be limited to the said sum of $20,000."

[70] Those words clearly mean that the liability under the obligation in clause 14.0 is not limited to $20,000. The Tribunal is thereby satisfied that the amount of $20,000 is essentially a performance bond which the Malones, as vendors have access in order to fund and perform the obligation in clause 14.0. Moreover the Tribunal accepts that Mrs Malone's liability will not be limited to that amount in failing to remedy the works necessary to obtain a Code Compliance Certificate. Upon that finding, the Tribunal must determine how much Mrs Malone ought to be held responsible for given her failures under the contract.

[71] The basic rule relating to measure of damages is that the damages awarded should place the innocent party in the position they would have been in if the contract had been performed.[13]

[72] The Tribunal also accepts that the law relating to, as pointed out by counsel for the claimants and counsel for Mrs Malone, remoteness of damage is that established by *Hadley v Baxendale*.[14] That case held that damages are recoverable for loss which was within the reasonable contemplation of the parties to the contract at the time it was entered into and are likely to result from such a breach.

[73] As stated earlier in reference to the decision in *The Heron II*, the issue is not whether damage should have been foreseen by Mrs Malone but whether likelihood of damage should have been within the reasonable contemplation of the parties at the time they entered into the contract. I determine that the claimants' current loss due to the failure of the Malones to fulfil their obligations under the contract was foreseeable at the time the parties entered into it and not so remote as to be non-recoverable under the rule in *Hadley v Baxendale*.

[74] The Tribunal notes that although the claimants' expert indicated that $20,000 may well have been sufficient if the Malones had got right on to the matter immediately following settlement of their sale to the claimants, the Tribunal finds that such an opinion does not add any significance for not only is it speculative but it also does not take into account the claimants' total loss as well as the fact that no deadline as to when such works had to be completed by under clause 14. Seven years on the claimants are still seeking a Code Compliance Certificate for the property and while they wait for

[13] *Robinson v Harman* [1843-60] ALL ER Rep 383; *The Heron II* [1969] 1 AC 350 (HL); *Stirling v Poulgrain* [1980] 2 NZLR 402 (CA) per Cooke J; *IT Walker Holdings Ltd v Tuf Shoes Ltd* [1981] 2 NZLR 391 (CA).
[14] (1854) 9 Exch 341.

compliance to be achieved the claimants continue to suffer loss that all parties to the agreement contemplated if the Malones failed to carry out the necessary work. Accordingly, the Tribunal finds that in breaching the terms of the agreement for sale and purchase, specifically clause 6.2(5) and 14, Mrs Malone is responsible for the full amount of the claimants' claim in order to put the claimants back into the position they would have been in if Mrs Malone had performed her side of the contract.

RESPONSIBILITY OF COUNCIL IN ISSUING THE BUILDING CONSENT AND IN ITS INSPECTION PROCESS

[75] The claimants' claim against the Council for breach of its statutory under the Building Act 1991 as well as in negligence, is based on the following functions it undertook:

- The issue of the building consent in approving the plans and specifications for the building;
- Not having a proper system in place for inspecting the building works to ensure that they comply with the building consent, Building Code and Building Act 1991; to take whatever steps were necessary to ensure compliance, including the issue of a Notice to Rectify and taking any other enforcement steps as required by the Building Act 1991.

Issuing the Building Consent

[76] In terms of the issue of the building consent, the WHRS assessor, Mr Wiemann, stated in his report that the home leaked partly as a result of its design. However Mr Wiemann did not articulate on any of the possible design defects in his report. In addition, at the experts' conference none of the experts impugned

the plans and specifications in their evidence other than Mr Farrell, the expert engaged by Mrs Malone.

[77] The Tribunal is guided by the High Court's decision in *Sunset Terraces*[15] (and this part of the decision is not overturned in the Court of Appeal) which found that the territorial authority had no liability in respect of issuing a building consent for the plans, notwithstanding their lack of design detail. At [252] Heath J stated:

> "...[I]n exercising its 'building consent' function, the Council was entitled to assume that the construction work would be undertaken in conformity with the consent. Importantly, the assessment is predictive in nature. Greater leeway ought to be given to decision-makers who are required to predict what might happen, as opposed to those who determine, with the benefit of hindsight, what did, in fact, happen."

[78] Further at [545] in relation to the designer's responsibility for the plans and specifications provided for consent, Heath J found that:

> "Despite the faults inherent in the plans and specifications, I am satisfied, for the same reasons given in respect of the 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. In other respects, the deficiencies in the plans were not so fundamental, in relation to either of the two material causes of the damage, that any of them could have caused the serious loss that resulted to the owners."

[79] Although Mr Farrell generally accepts that the standards for building plans were somewhat lower at the time the claimants' dwelling was constructed, his view is that the level of detail was scant and arguably not sufficient for a builder to construct a weathertight dwelling nor for a building consent authority to issue a building

[15] HC Auckland, CIV-2004-404-3230, 30 April 2008, Heath J.

consent in any event. The Tribunal however notes that the claimants' own expert held the opinion that the plans and specifications, read and considered together with the manufacturer's specifications, provided sufficient detail for a builder to construct a weathertight dwelling.

[80] Given that the High Court's finding in *Sunset Terraces* directly relates to the present issue, the fact that the house was not built strictly in accordance with the plans and specifications the view of all the experts' (with the exception of one) that the water ingress issues were not due to any design defects and the opinion of the claimants' own expert that there was sufficient detail in the plans and specifications the Tribunal finds that the issue of the building consent therefore the claim against North Shore City Council must therefore fail.

Inspections

[81] Regarding the Council's inspections, counsel for the claimants, submits that the Council breached its duty of care to the claimants not only by failing to exercise reasonable care in its inspection of the building works to ensure that such works did not contravene the Building Code. It was also submitted that the Council did not take reasonable steps to either request amended drawings for the change in the cladding or ensure that the insulclad cladding systems was installed in accordance with the manufacturer's technical details. Mr Turner pointed out that the Field Memorandum of 11 February 1998 made specific reference to the Council's need for work that is to be covered up to be inspected prior to covering. However, by not inspecting the insulclad cladding and joinery before and after the plaster was applied, it is argued that the Council did not follow its own policy and therefore it could not have been satisfied on reasonable grounds that the home was weatherproof and would continue to be at the time of pre-line weatherproof inspections.

[82] It is submitted on behalf of the claimants that the faults in the installation of the cladding that were not addressed by the Council but were apparent at the time of pre-line inspection and that have caused or materially contributed to the damage included:

- Window joinery was face fixed with the insulclad cladding rather than recessed;
- The sealant joint down the window joinery jambs would have been visible had it been sealed in accordance with the manufacturer's instructions;
- A sill tray/flashing protruding would have been visible below joinery sills;
- The head flashing on the curved window had no "turn outs" which would have been visible; and
- There was no or insufficient gap between the bottom of the cladding, the balcony decks and the ground clearance.

[83] Mr Turner submitted that on 2 February 1998 Mr Malone called for a final inspection. However in refusing to issue a Code Compliance Certificate, the Council issued a Field Memorandum instead of a "Notice to Rectify". That Field Memorandum however did not mention any concerns in relation to the window cladding, joinery or weathertightness. The opinion of Mr Crow was that had the Council issued a Notice to Rectify instead of a Field Memorandum, a time frame would have been established in which the work was to be done. However as no time limit was imposed and the Council failed to follow up on its Field Memorandum by again neglecting to issue a Notice to Rectify after another inspection on 9 November 1999, the Council breached its statutory duty under the Building Act 1991 and wicking and capillary action occurred and the wall framing became damaged as a result.

[84] In response, the Council submits that the claim against it must fail for it did not act negligently or unreasonably or in breach of

its statutory duty when deciding not to issue a Code Compliance Certificate. Mr Robertson, counsel for the Council submits that in 1998, 1999 and again in 2003 the Council, pursuant to section 43(3) of the Building Act 1991, decided that it had insufficient information to be "satisfied" on reasonable grounds, that the house as constructed complied with the Building Code. Specifically, the Council points out that it first requested a report from an appropriate qualified building surveyor which was later prepared by Mr Medricky. However that report contained qualifications such that the Council was not confident to place reliance on it and as a result invoked section 17 of the Building Act 1991 and sought a determination from the BIA. The BIA's draft determination of September 2004 recommended that a Code Compliance Certificate should not be issued and instead it said that:

> "[9.1] Common sense dictates that the high moisture levels should be addressed as soon as possible"

[85] Consequently, the Malones were directed to propose remedial work to the Council for its consideration. However, as mentioned above, no such work has been proposed to the Council – and none of the necessary work has been undertaken. Instead the claimants purchased the home aware of the Council's concern about the cladding and according to the terms of the agreement for sale and purchase it was agreed that the Malones were obliged to undertake the necessary work to obtain such compliance from the Council. The Malones by virtue of clause 14 assumed the responsibility of achieving a Code Compliance Certificate.

[86] It is well-established in New Zealand that a territorial authority owes a duty of care to owners and subsequent owners of residential dwellings to take all reasonable steps to ensure that the building work was performed in accordance with the consented plans

and specifications to satisfy itself as to compliance.[16] This duty is also outlined in sections 43(3) and 76(1) of the Building Act 1991. The issue for the Tribunal is therefore not whether the Council owed a duty of care but whether that duty was breached in relation to the inspections it undertook.

[87] It is clearly apparent from decisions such as *Sunset Terraces*[17] and *Byron Avenue*[18] that the definitive test is not only what a reasonable territorial authority, judged according to the standards of the day, should have observed but also that a territorial authority may be liable if defects were not detected due to its failure to establish a capable inspection regime for identifying critical waterproofing issues. According to those decisions a Council's inspection process needs to be sufficiently robust to discern whether the building work at critical areas was up to standard, and in order to do so the Council must establish and enforce a system that would give effect to the Building Code.[19]

[88] During the construction the Council carried out five inspections of the building work. After the construction was completed, a further inspection was undertaken in February 1998 whereby the Council noted in a Field Memorandum that there were issues with the handrails and ground levels. Due to those matters the Council refused to issue a Code Compliance Certificate as it was not satisfied on reasonable grounds that the certified work complied with the Code, as required under the Building Act 1991. With the addition of the Council's concern over the wall cladding, the Council's reasons for again refusing to issue a Code Compliance Certificate after a further inspection on 20 October 2003 were the same, as noted in another Field Memorandum on 6 November 2003.

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[16] *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC); *Stieller v Porirua City Council* [1986] 1 NZLR 84 (CA).
[17] *Body Corporate 188529 v North Shore City Council (No. 3) (Sunset Terraces)* HC Auckland, CIV-2004-404-3230, 30 April 2008, Heath J.
[18] *Body Corporate 189855 v North Shore City Council (Byron Ave)* HC Auckland, CIV-2005-404-5561, 25 July 2008, Venning J.
[19] *Dicks v Hobson Swan Construction Ltd (in liq)* (2006) 7 NZCPR 881 (HC).

[89] Sections 43(6) and (7) of the Building Act 1991 makes it clear that the Council needs to know of a specific Code breach rather than general concerns about whether there may have been compliance. In this case, the Council applied to the BIA to ascertain whether there was a breach for although they were generally concerned about some of the building work, they were not certain. I therefore agree with the Council's submission that the issuing of a Notice to Rectify is a serious step and would only be issued where a definite breach of the Code is known. This particularly is so, as the failure to rectify the matters in a Notice to Rectify is an offence under s80(1)(c) of the 1991 Act. Moreover the Tribunal is satisfied that even if Notices to Rectify were issued, they would have set out the same issues outlined in the Field Memoranda and therefore such Field Memoranda was sufficient written notification to the Malones (who were the owners of the property at the time), of the Council's reasons for not issuing a Code Compliance Certificate. Moreover, *Balfour v Attorney-General*[20] is authority for stating that the power to issue a notice to rectify is a discretionary power as opposed to a mandatory duty. For these reasons, the Tribunal finds that the Council's failure to issue a notice to rectify in this matter did not result in a breach of its statutory duty.

[90] In terms of the Council's application to the BIA for a determination, the claimants put forward the argument that such a referral does not assist the Council or relieve it from liability for territorial authorities may still be liable even if it takes independent advice. This argument cannot be correct as section 17 of the Building Act 1991 specifically entitles territorial authorities to seek determinations from the BIA if it is in doubt about the issuing of a Code Compliance Certificate. By complying with the scheme of the Building Act 1991, the Council cannot be said to be negligent in embracing the BIA determination route. Moreover, the fact that the

[20] [1991] 1 NZLR 519 (CA).

Council sought a determination from the BIA as to whether the dwelling is Code Compliant in terms of weathertightness also does not point to any negligence on the part of the Council. Indeed the Tribunal is satisfied that the seeking of assistance from the BIA goes in the opposite direction to negligence.

[91] The claimants stated that they wanted a Code Compliance Certificate for the home and that in reliance upon the Council's inspections pursuant to its function, they were under the impression that the Council would issue a Code Compliance Certificate in the near future. Mr Turner referred me to the Tribunal decision of *Bacic v Tulip Holdings Ltd*[21] on the proposition that although the claimants purchased a dwelling which did not have a Code Compliance Certificate, the Council was nevertheless negligent as it told the claimants that the outstanding issues noted in a Field Memoranda were not major representing that the issue of a Code Compliance Certificate was imminent. That decision however must be distinguished as it is not a comparable case to the present.

[92] In *Bacic* the Tribunal found that the Council was negligent as it had indicated that all building issues had been addressed to its satisfaction, except for one matter which the experts believed had not contributed to the leaking. Furthermore, the Tribunal in that case concluded that while no Code Compliance Certificate was ever issued, this was largely because of a change of policy by the Council in relation to monolithically clad homes. In the present case, the evidence clearly indicates that the Council was not satisfied with the building issues still outstanding and that until those matters were addressed, a Code Compliance Certificate would not be issued. Accordingly the decision in *Bacic* is not relevant to the determination the Tribunal must make in this case.

[21] WHT TRI-2008-100-46, 11 June 2009, Adjudicator McConnell.

[93] The claimants admit that they did not have time to view a LIM report on the property or have a building surveyor inspect it. They also acknowledge that there was the risk that the Council would not issue a Code Compliance Certificate and that remedial work would be needed. On these grounds it is argued that there was no reliance by the claimants on the Council when purchasing the home and furthermore the risk of the Council deciding that their home was not Code Compliant had been identified by the contracting parties in clause 14 in the sale and purchase agreement.

[94] The Tribunal accepts that argument. The claimants knew prior to purchasing the home that the Council had not issued a Code Compliance Certificate, that the Council had doubts over the integrity of the cladding, and that it required a report from an appropriately qualified person regarding the integrity of the cladding from a weathertightness expert. There was no assurance from the Council that it would issue a Code Compliance Certificate. Indeed the evidence is that both the Malones and the claimants made no enquiry of the Council before the sale and purchase and the risk that the Council would not issue a Code Compliance Certificate and that remedial work would be needed was offset particularly in terms of clause 14 in the sale and purchase agreement. Accordingly, I determine that the claimants made a decision on the merits of the property without any general reliance on the Council. By not making any enquiry of the Council as to the material concerns, knowing that the home required a Code Compliance Certificate and that the Council had not issued one, was a critical omission.

[95] With their inspection programmes, local authorities carry out a series of inspections and it is incumbent upon it to revisit building issues already identified and notify building owners of any new defects they may discover in subsequent inspections. Indeed, this is the proper conduct of a Council discharging its duty of care, which the Tribunal finds occurred in the present case.

[96] For the reasons stated above, I thereby determine that the inspections undertaken by the Council on the property have not resulted or caused loss and damage to the claimants.

Summary of Council's Responsibility

[97] For the reasons above, the claimants cannot succeed firstly in their argument that they placed reasonable reliance on the Council issuing a Code Compliance Certificate when they knew that the Council had refused to do so and that the Council had reservations which were clearly known to the claimants. Secondly, there is also no duty by the Council to have issued a notice to rectify and therefore the Council was not negligent by failing to issue a notice to rectify once it became concerned over possible weathertightness issues surrounding the cladding. Accordingly there can be no breach of a duty of care for not doing so. Finally, the failings by the Council in its building inspections have not caused loss and damage to the claimants.

[98] In accepting that local authorities are not indemnifiers against negligent building practices over which they have only limited control by means of enforcement powers under the Building Act 1991,[22] I have reached the conclusion that the claimants' claim against the Council must fail.

CONTRIBUTORY NEGLIGENCE

[99] The Tribunal notes that counsel for Mrs Malone submitted a claim for contributory negligence. Section 3(1) of the Contributory Negligence Act 1947 provides for an apportionment of liability "where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons". The issue

[22] *Three Meade Street Ltd v Rotorua District Council* [2005] 1 NZLR 504 (HC); *Te Mata Properties Ltd v Hastings District Council* [2009] 1 NZLR 460 (HC); and *Kerikeri Village Trust v Nicholas* HC Auckland, CIV-2006-404-5110, 27 November 2008.

however is whether a contributory negligence claim can be made on behalf of Mrs Malone given that her liability in this case is based on contract.

[100] In *Ford v Ryan*[23] where a contractual claim arose under clause 6.2(5) of the standard REINZ/ADLS sale and purchase agreement, the High Court held that: "Contributory negligence is available only when the claim is or may be based in negligence". As the claim in tort against Mrs Malone fails I am not required to make a determination as to any contributory negligence by the claimants.

CONCLUSION

[101] The claim for breach of contract against the first respondent, Mrs Malone, succeeds. The claimants have the right to compensation for the loss of their bargain, the object being to financially restore the claimants to the position which they would have occupied had the contract been performed. The cost to the claimants must be the cost of curing the breach of contract. A detailed remedial plan has not been put in place and submitted to Council. The issue as to whether a partial reclad will suffice to remediate this dwelling sufficient for a Code Compliance Certificate to issue cannot yet be determined. At this stage it is inappropriate to make a determination as to quantum. If the parties cannot reach agreement given the guidelines in this decision and once the remedial scope has been accepted by the Council, then they can come back to this Tribunal for a determination as to quantum.

[102] The claims in tort against both Mrs Malone, and the second respondent, the North Shore City Council, have not been established and therefore fail. Mrs Malone has not been found to be a developer; the claimants placed no reliance upon the Council and the Council's

[23] (2007) 8 NZCPR 945 (HC).

building inspection omissions were not causative of the claimants' loss.

DATED this 20th day of July 2010

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K D Kilgour

Tribunal Member