IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2010-100-000121
[2012] NZWHT AUCKLAND 15

BETWEEN	MICHELLE ANNE BREBNER AND DARCY RAYMOND WENTZEL Claimants
AND	LUONIE BETH COLLIE First Respondent
AND	AUCKLAND COUNCIL Second Respondent

Hearing: 5, 6, 7 December 2011

Appearances: G Shand and J Collins for the claimants
Ms Collie was self-represented

Decision: 14 March 2012

FINAL DETERMINATION
Adjudicator: M A Roche

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[1] In 2007 Michelle Brebner and Darcy Wentzel bought a five year old house in Orakei from Luonie Collie. They subsequently discovered that it was a leaky home that required significant repairs.

[2] Ms Collie had the house built for her. She had difficulty obtaining a code compliance certificate (CCC) and made two applications to the Department of Building and Housing (DBH) for determinations that the house complied with the Building Code before the CCC was finally issued.

[3] Before purchasing the house, Ms Brebner and Mr Wentzel obtained copies of the DBH determinations and a builder's report. The report identified many deficiencies in the construction of the house and a number of weathertightness concerns. Nevertheless Ms Brebner and Mr Wentzel declared the purchase unconditional. They claim that Ms Collie is liable to them under a vendor warranty clause in the agreement for sale and purchase for the cost of repairing the house. In addition, they claim that Ms Collie is a developer and is liable to them in tort for the cost of repairing the house.

[4] The issues that I need to address are:

I. What are the defects causing the house to leak?
II. What is the cost of repair?
III. Was Ms Collie a developer?
IV. Did Ms Collie owe a duty in tort to future purchasers because of the role she assumed in the building process?
V. What were the alleged departures from the building consent?
VI. What is the correct interpretation of the vendor warranty at clause 6.2.5 of the agreement?
VII. Did Ms Collie breach the vendor warranty?

VIII. Did Ms Brebner and Mr Wentzel waive the vendor warranty in clause 6.2.5 of the agreement for sale and purchase by accepting a builder's report that identified defects in the house?

BACKGROUND FACTS

[5] In 1999 Ms Collie bought a section in Orakei. She then subdivided the section into two lots and sold one of them.

[6] In April 2002 Ms Collie entered a contract with Warren Marston of Euro Vision Homes to construct a house on the remaining section. This was a "turnkey" construction contract, which is a contract where a contractor completes a project for a fixed price and then hands it over to the client who is required to do no more than "turn a key" to the completed building.

[7] Mr Marston lodged an application for a building consent which was issued on 7 May 2002. The consent provided for the construction of a monolithically clad house without a ventilated cavity.

[8] The house was constructed during 2002 by Mr Marston (now deceased) and his employee Shane Dekker. A number of inspections were carried out by the Auckland Council during 2002 and each was passed.

[9] The relationship between Mr Marston and Ms Collie broke down and he left the site. This appears to have occurred shortly before the first 'final' inspection on 17 January 2003 as Mr Dekker booked the previous inspection in November 2002.

[10] No weathertightness issues were identified at this inspection. Six minor matters were required to be attended to before the CCC

was issued. These included the installation of a top rail to the deck balustrades.

[11] In November 2003 the Council received information from the Weathertight Homes Resolution Service about the factors common to leaky building claims. This information showed that monolithically clad houses without cavities were particularly susceptible to weathertightness problems.

[12] On 16 January 2004 a second 'final' inspection was carried out. In a letter to Ms Collie following this inspection, the Council confirmed that the items requiring rectification from the first 'final' inspection had been completed and rechecked. However, the inspector had noted that the cladding had no cavity and Ms Collie was advised that a further inspection of the cladding would be carried out by a team of experts.

[13] This inspection resulted in a notice to rectify being issued requiring that a 20mm ventilated cavity be installed between the cladding and wall frame.

[14] Ms Collie then made her first application to DBH for a determination that the house complied with the Building Code. This determination was issued in May 2005. It determined that the cladding did not comply with the performance requirements of the Building Code. It noted a list of concerns in relation to the cladding including problems with floor clearances, ground clearances, control joints and flashings. It also noted additional deficiencies such as inadequate balcony outlets and overflows and failed balcony deck membranes.

[15] The determination prescribed the rectification of a long list of items and determined that their rectification to the approval of the Council would result in the house being compliant with the Building

Code notwithstanding the lack of a ventilated cavity. It directed that a new notice to fix be issued.

[16] On 14 September 2005 the new notice to fix was issued by the Council. Ms Collie, now without the assistance of Mr Marston, engaged another builder, John Andrews, to carry out the work the Council required.

[17] On 30 August 2006 a second DBH determination on the refusal to issue a CCC was issued. The purpose of this determination was to assess whether, in light of the work that had been carried out since the issue of the first determination, the house now complied with clauses E2 (external moisture) and B2 (durability) of the Building Code.

[18] The second determination noted communication difficulties between Ms Collie and the Council, that Ms Collie had commenced repairs on the house before receiving the new notice to fix directed in the first determination, and that this work was started in the absence of consultation or agreement with the Council.

[19] The determination stated that the current performance of the cladding was adequate and that the cladding system as installed complied with clause E2 of the Building Code. In particular the determination held that inter-cladding junctions were adequately waterproofed and that the provision of control joints in the cladding were not necessary.

[20] The determination also concluded that following rectification of three specified items to the satisfaction of the Council, it was expected that the building would become and remain weathertight and would comply with Clause B2 of the Building Code.

[21] On 16 February 2007 the Council determined that the three outstanding items specified in the second determination had been completed to its satisfaction.

[22] On 22 February 2007 a CCC for the house was issued. This certificate recorded that the Council was satisfied on reasonable grounds that the building work complied with the building consent.

[23] On 20 July 2007 Ms Brebner and Mr Wentzel agreed to purchase the house. The agreement was conditional on their obtaining and approving a LIM report and upon their obtaining and approving a builder's report. The agreement provided that they could terminate the agreement if they disapproved of the LIM report or any aspect of the builder's report.

[24] The LIM report has not been disclosed. The builder's report they obtained referred to concerns arising from weathertightness issues raised in the DBH determinations. It noted that there were "numerous" exterior details and junctions that were questionable, that the standard of workmanship in respect of the significant remedial works that had been undertaken was poor, that although there was no indisputable evidence of moisture ingress, the author's opinion was that moisture ingress was possible and that the condition of the house was below what would normally be expected of a house this type and age.

[25] On 31 July 2007 Ms Brebner and Mr Wentzel's solicitor, Mr Vallant, wrote to Ms Collie's solicitor, Mr Bratley, stating that the building report raised certain issues the client wished to consider and seeking a 7 day extension to obtain a second opinion. This extension was granted but a second builder's opinion was not obtained.

[26] On 7 August 2007 Mr Vallant wrote to Mr Bratley, referring to advice given to Ms Brebner and Mr Wentzel that Ms Collie would attend to the rectification of the issues raised in the building report.

[27] Mr Bratley wrote back to say that this was a misunderstanding and that Ms Collie would not rectify the issues raised in the builder's report or carry out any further work other than moving a television aerial. Mr Bratley asked Mr Vallant to advise whether Ms Brebner and Mr Wentzel accepted the builder's report or whether they wished to cancel the agreement.

[28] A back-up offer had been made by this stage which allowed Ms Collie to exercise a cash-out clause against Ms Brebner and Mr Wentzel. They were placed in the position where they had the options of declaring the agreement unconditional or losing the house.

[29] Mr Vallant replied to Mr Bratley two days later in a handwritten fax that stated: "We are unconditional".

[30] Ms Brebner and Mr Wentzel settled the purchase and took possession of the house on 28 September 2007. Approximately six months later they noticed two leaks which they had repaired. Further leaks developed and in June 2010 they applied to the Weathertight Homes Resolution Service for an Assessor's Report. This report concluded that there was widespread damage and systemic deficiencies on all elevations and that a full re-clad of the property is required.

TRIBUNAL PROCESS

[31] Ms Collie was self-represented at the hearing. In his closing submissions, under the heading "No issues", counsel for the claimants, Mr Shand, referred to Ms Collie's failure to cross examine the claimants, their witnesses and the assessor Mr Templeman on

various matters. Mr Shand submitted that the effect of this was that the Tribunal had a relatively simple task in determining the claim. The implication of this submission is that the Tribunal is bound to accept evidence that has not been the subject of cross examination.

[32] This is not accepted. The Tribunal is not bound by the rules of evidence although it must comply with the principles of natural justice.[1] The Tribunal is an inquisitorial body with an investigative role and is entitled to ask questions and test evidence during the course of hearings. I did so in this case taking into account the fact that Ms Collie was self-represented.

WHAT ARE THE DEFECTS CAUSING MOISTURE INGRESS?

[33] Neither party presented expert evidence. The Department of Building and Housing Assessor, David Templeman, gave evidence about his investigation of leaks at the house which he had detailed in his assessor's report. Mr Dibley appeared as a witness for the claimants. He had been the inspector for DBH when the two determinations were made and had prepared two substantive reports and a cladding report for DBH which formed the basis of the determinations. Mr Dibley gave evidence contemporaneously with Mr Templeman.

[34] In his report Mr Templeman identified four key deficiencies causing current damage. These were:

Cracking in the cladding which had allowed moisture ingress

[35] Mr Templeman noted cladding cracks on most elevations. At various locations he noted high moisture readings and timber samples had advanced decay in some cases and superficial fungal growth in others. In his evidence Mr Templeman said that the cracking could be

caused by movement of the sub frame caused by the effect of moisture. Cracking can also be caused by differential thermal movement.

[36] Although cracks when formed allow moisture ingress, they can also be initially symptomatic of moisture ingress. They can be caused by defects but are not necessarily construction defects in themselves. Although in his report Mr Templeman identified cracking as a significant deficiency there is no definitive evidence of whether there are any causes of cracking other than those referred to in this section.

Cladding to the chimney top laid flat

[37] In his report Mr Templeman noted that there was no apparent membrane protecting the chimney. There was cracking at the wall edges which was a supplementary cause of moisture ingress to walls. Timber samples taken from the walls showed early soft rot and superficial fungal growth. In his evidence he criticised the flat topped construction of the chimney as constituting "shocking practice".

Failure of joinery flashing systems

[38] At the hearing Mr Templeman clarified that there were three window conditions on the building. These were those surrounded by polystyrene or EFIS, those which are abutted by weatherboard where the detail is different, and full height windows in the lounge area at the front of the house which again have a different joinery type. In his report Mr Templeman identified defects in respect of the EFIS joinery and the full height joinery.

Joinery installed in EFIS

[1] *Chee v Stareast Investment Ltd*, HC Auckland CIV-2009-404-5255, 1 April 2010.

[39] In the cladding report prepared for DBH in February 2005, Mr Dibley had commented on the joinery installed in the EFIS. He had cut away the plaster coating at the jamb/sill intersection of a bedroom window and noted the presence of purpose made perforated plastic flashings. He noted that the sill flashing extended beyond the jamb flashing and there was a silicon type joint between the two. He noted that the system he observed was similar to that used by other EFIS systems covered by BRANZ appraisals and appeared to provide equivalent weather protection.

[40] Mr Templeman carried out invasive testing on the bottom left hand corners of two windows surrounded by EFIS on the north east and north west sides where he had taken high moisture readings (cut outs B and F). He found moisture on the face of the building wrap and light mould on the timber. He noted there was no back flashing between the sill and jamb flashing, and that the jamb flashing was cut short. He also noted the absence of sealant between the window frame and flashing. This was an exposed junction and any sealant that had been present had not endured. He considered his findings in respect of these two windows were typical of the joinery throughout the house.

[41] The evidence establishes that the joinery on two EFIS windows has been installed defectively. However given Mr Dibley's finding in respect of the same window condition, these defects are not universal.

Failure of flashing system to full height joinery

[42] There are floor to ceiling windows on the north and south west walls. In his February 2005 report, Mr Dibley had noted in respect of the full height joinery that the soffit cladding had been installed below the top of the frame concealing any flashing that was present. However he commented that the deep soffit above these windows

provided protection to the window head and that the detail appeared to be adequate.

[43] Mr Templeman found that instead of flashings or sealant around the perimeter of these windows, reliance had been placed on paint to seal the aluminium frames. He noted that there was no drip edge provided to the beam over the window. In his report he recorded elevated moisture readings at the sills on both faces and noted moisture damage to timber sill liners. He did not carry out invasive testing.

Additional defects

[44] In addition to the key deficiencies he identified, Mr Templeman noted that cladding was taken down to the paving at the south west chimney wall. He also noted "defective balcony walls at drainage outlet and cladding corner cracks". At the north east elevation he noted severe decay on the balcony wall where he took a cut out sample, and the failure of the roof membrane. No information about the cause of moisture ingress to the balcony wall was given in his report.

[45] In his evidence Mr Templeman said there was no saddle flashing between the balustrade and main wall. However this was not mentioned in his report and he did not give evidence that it was a cause of damage. Mr Templeman also agreed when he was asked that the top fixed handrails (which Ms Collie installed at the request of the Council) were not good practice. No evidence was led or produced regarding leaks caused by these fixings. While damage was established in respect of the balcony wall, the cause was not.

Defects likely to cause future damage

[46] Mr Templeman noted three deficiencies that were the likely source of future damage. These were:

- The potential failure of the joinery flashing system.
- Failure to adequately seal weatherboard to wall junctions.
- The presence of ivy.

[47] The failure of the joinery flashing system is dealt with at [38]-[41] above. There are two areas of weatherboard cladding on the house. At the junctions with the cladding Mr Templeman noted the apparent absence of flashing or seals at the reveals and the absence of a head flashing. He considered that if it was not already occurring, this was likely to result in water ingress. The second DBH determination had found that these junctions were adequately weatherproofed.[2] I accept Mr Templeman's contrary view. With respect to the ivy, Mr Templeman noted that it is an invasive growth which prevents inspection of and maintenance to the garage walls.

Other defects discussed at the hearing

[48] There was discussion in the evidence about the metal cap flashings to the roof parapets. Mr Templeman was critical of the installation workmanship and considered them a source of future likely damage. However there is no evidence of current damage arising from them. In the course of Mr Dibley's evidence, it transpired that he had recently visited the house for the purpose of an inspection and had prepared a report which had not been produced to the Tribunal or shown to Ms Collie. In response to a question from Ms Collie, he stated that he had taken moisture readings under the cappings and none were at a level that indicated any damage. It is not established that the cappings are a source of damage or future likely damage.

[2] DBH Determination 2006/82 at [4.2]

[49] There was some discussion in the evidence of a sloping area of fibre cement that had been covered with butynol. Mr Templeman expressed the view that water ingress to the lower walls was partly attributable to the failure of this membrane. Mr Dibley commented in response to a question by Ms Collie that the deck membrane and the sloping butynol roof might have contributed to moisture ingress into the bedroom wardrobe below the balcony, although further invasive testing would be required to determine what caused this.

[50] When asked whether a lack of maintenance had contributed to the damage, Mr Dibley stated that he did not think that it was significant except for the garage roof where the flat gutter was blocked with debris.

[51] Mr Dibley commented in his evidence that the lack of control joints was a likely cause of cracking. In his closing submissions counsel submitted that control joints represent good trade practice and referred to relevant pages of the BRANZ Good Exterior Insulation and Finish Systems Practice which comments on control joints that are sometimes but not always prescribed. However the DBH determination which was made in reliance on the reports of Mr Dibley found that the house did not require control joints.

Further defects claimed in the amended statement of claim

[52] A further list of claimed defects was set out in the amended statement of claim. Some of these were the same defects that were identified in the assessor's report. However, a large number were not identified or discussed in the assessor's report.

[53] Some were discussed at the hearing as noted above. No evidence was produced to support the additional claimed defects. The only documentary evidence concerning current defects and damage was the assessor's report. Therefore the additional defects

claimed have not been established. The defects which can be relied on for the purpose of this decision are those set out in the assessor's report.

Did a lack of maintenance cause damage?

[54] Ms Collie suggested that a lack of maintenance on the part of Ms Brebner and Mr Wentzel had contributed to the damage to the house. This is not established on the evidence. Neither Mr Templeman nor Mr Dibley identified a lack of maintenance as a significant problem contributing to the need to reclad the house although as noted above, the presence of ivy is a source of future likely damage.

Conclusion

[55] There are three main defects established that have caused damage. These are the installation defects in relation to the window joinery surrounded by EFIS and the installation defects in relation to the full length joinery. In addition it is established that the flat topped chimney is a source of damage, and that there are discrete areas where there are insufficient ground clearances leading to moisture ingress.

[56] Mr Templeman's findings regarding the sources of future likely damage are also largely accepted.

[57] Mr Templeman stated in his report that the four main deficiencies he observed constituted a breach of the Building Act in respect of Building Code clauses B2 and E2. He concluded in his report that the removal of the entire cladding was necessary to repair damage to the timber framing and to fully identify all areas of such damage and that cladding should then be re-installed over a drained cavity.

COST OF REPAIR

[58] I accept Mr Templeman's view that a reclad of the house is required. Two witnesses gave evidence on behalf of the claimants about the cost of repairs. The first was Craig Sharrock who is a quantity surveyor and the director of Reliant Residential Limited, a company that specialises in leaky building remediation. He gave evidence that he had inspected the property in September 2011 and read Mr Templeman's report. Following his inspection, he provided a written quote to Ms Brebner and Mr Wentzel for the remediation of the property. This itemised quote was annexed to his brief of evidence. The quote was for $350,384.14 (GST inclusive).

[59] Christopher Davis also gave evidence for the claimants on the cost of the repairs. He is an experienced builder and director of Forme Reclad Limited, a company which specialises in leaky building remediation. He also inspected the property in September 2011 and provided Ms Brebner and Mr Wentzel with a written quote of $351,543.50 (GST inclusive) for the remediation of the property. This itemised quote was attached to his brief.

[60] Ms Collie did not provide any evidence on the cost of repairs.

[61] I accept that the quotes annexed to the briefs of Mr Davis and Mr Sharrock are an accurate estimate of the cost of repairs and find that the remediation of the house will cost $350,384.00 (GST inclusive).

[62] Ms Brebner and Mr Wentzel claimed consequential losses of $37,593.48. This sum represents lost rent and reduced rent caused by leaks at the house. It also includes carpet cleaning costs, the hire of a dehumidifier and some repair work carried out by Auckland Butynol Ltd. The sum claimed was supported by documents filed by

the claimants. Ms Collie did not challenge the claimed consequential losses. I accept that Ms Brebner and Mr Wentzel have incurred consequential losses of $37,593.48 as a result of the house leaking.

WAS MS COLLIE ACTING AS A DEVELOPER?

[63] Ms Brebner and Mr Wentzel claim that Ms Collie was acting as developer in respect of the house. They claim that she owed a developer's non-delegable duty of care to future purchasers and that this duty was breached when the house was built with defects.

[64] The rationale for the imposition of a duty of care on developers was discussed in *Body Corporate 188273 v Leuschke Group Architects Ltd.*[3] This duty arises from the fact that a developer is responsible for and controls every aspect of the development process, and from the fact that the purpose of the development is the developer's own financial benefit. There are two limbs to the test which must be established: control and the purpose of profit.

[65] Ms Brebner and Mr Wentzel allege that Ms Collie was a developer by virtue of her ownership of the property, her control over the consent, design, construction, approval and marketing, the financial interest she had in the development of the property and the responsibility she took for implementing and completing the development process. They rely on the fact that Ms Collie appears to have benefited financially from the development of the property.

[66] In evidence Ms Collie agreed that she purchased the section which was subdivided in 1999 for approximately $320,000 and in 2004 sold the spare section for approximately $420,000. Ms Brebner and Mr Wentzel purchased the house in 2007 for $1,070,000.00. They submit that Ms Collie's net financial benefit from the development of the house is such that it is fair that she be found to be

a developer and held liable as such in tort to Ms Brebner and to Mr Wentzel.

[67] Ms Brebner and Mr Wentzel also rely on the fact that Ms Collie sold the property in the same year that the CCC was finally issued, that she dealt with the Council after Mr Marston's departure, and that her correspondence with the Council indicates that she was knowledgeable about building processes.

[68] Ms Collie denies that she had the house built for the purpose of profit. She claims that her intention when building the house was to live in it and run her beautician business from it. She also denied that she had profited significantly from it and gave evidence that after the "devastating route" the building process took she could not afford to keep it.

[69] Ms Collie denied familiarity with building processes and said that her only previous experience of building had been when she and her husband had a house built 42 years ago.

[70] In *Mowlem v Young*[4] Robertson J found that a professional man building a house who got workmen to come and perform the work was not a developer. In *Findlay v Auckland City Council*[5] Ellis J concluded that organising the building of a house to live in does not make someone a developer. The only circumstances in which a homeowner who has built a house for their family to live in has been found to be a developer is when they have a history of building and selling houses sufficient to conclude that the person is in the business of constructing dwellings for profit. There is no evidence to suggest that Ms Collie is in this situation.

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[3] *Body Corporate 188273 v Leuschke Group Architects Ltd* (2007) 8 NZCPR 914.
[4] *Mowlem v Young* HC Tauranga, AP 35/93, 20 September 1994.
[5] *Findlay v Auckland City Council* HC Auckland, CIV-2009-404-6497, 16 September 2010.

[71] I conclude that the claimants have not established that Ms Collie's purpose was to make a profit. I accept her evidence that she intended to live in the house when it was completed but that her plans changed during the four years that elapsed between its substantial completion and the eventual issue of a CCC. Ms Collie had to deal with the Council after Mr Marston's departure. When the contract began, she had no intention to involve herself in this way. She had no knowledge of or expertise in building. The claim that Ms Collie was a developer fails.

IS MS COLLIE LIABLE IN TORT IN RESPECT OF THE ROLE SHE ASSUMED IN THE BUILDING PROCESS?

[72] It is suggested that after Mr Marston's departure, Ms Collie became a project manager or head contractor in respect of the work that was carried out in accordance with the DBH determinations and the Council's notice to fix in order to obtain the CCC. The submission is that the role she assumed gave rise to a tortious liability to future purchasers.

[73] Ms Collie's evidence is that she engaged the builder John Andrews to carry out the work and did not direct or supervise him. Mr Andrews confirmed this in his evidence. She engaged a plasterer recommended by Mr Andrews and a butynol installer recommended by BRANZ. Her son, who is an engineer, attended to the sealing of the penetrations from the top fixed handrail into the deck balustrade.

[74] Ms Collie personally liaised with the Council and DBH but this liaison alone is insufficient to give rise to a duty of care. In *Aldridge v Boe*[6] Potter J analysed the cases where the issue of whether an owner has tortious liability as a head contractor or project manager has been considered. She found that the review of cases identified

[6] *Aldridge v Boe* HC Auckland, CIV-2010-404-7805, 10 January 2012.

five factors which suggest a finding that an owner has liability as a head contractor.[7] These are:

- significant property development experience (and thus competence to assume the role);
- attends on-site meetings;
- involvement in the process of applying for building consents and permits including input in the drawings and specifications;
- arranges for inspections by the local authority;
- assumes a supervisory role over the various trades people engaged on a labour-only basis.

[75] Ms Collie does not have property development experience. She engaged Mr Marston to design and build her house including undertaking all necessary liaison with the Council.

[76] Although Ms Collie subsequently liaised with the Council and DBH, she continued to work as a beauty therapist while the house was being built. There is no evidence that the contractors she engaged relied on her to control, supervise or monitor their work. Like Mrs Boe in *Aldridge*, she did not hire a project manager after Mr Marston departed but it does not follow that she assumed a project management role. It is not established that she owed future purchasers a duty of care arising out of the role she undertook after Mr Marston's departure.

[77] The claim in tort against Ms Collie fails. However, had I found that Ms Collie did owe a duty of care and breached it giving rise to the claimant's loss, I would have also found that Ms Brebner and Mr Wentzel were contributorily negligent to a high degree given that they went ahead and purchased the house knowing what was contained in the two DBH determinations and their building report.

[7] [322].

WHAT WERE THE ALLEGED DEPARTURES FROM THE BUILDING CONSENT?

[78] It is alleged that the building work that Ms Collie caused or permitted to be done was not completed in accordance with the building consent in the following respects:

- The house leaks and therefore does not comply with the Building Code.
- The building work did not comply with the specifications.
- The building work did not comply with the plans.
- The house was not constructed according to NZS 3604:1999.
- The finished floor level condition was breached.

Failure to comply with the Building Code

[79] The house leaks and has failed to perform to the performance standards of the Building Code. Ms Brebner and Mr Wentzel submit that breaches of the performance standards of the Building Code breach the building consent because the preamble to the consent provided that it was:

> ...a consent under the Building Act 1991 to undertake building work in accordance with the attached plans and specifications so as to comply with the provisions of the New Zealand Building Code.

[80] The submission in essence is that if the house does not currently comply with the performance standards of the Code, the building consent and therefore the vendor warranty are breached. I do not think this interpretation is correct because it turns the vendor warranty into a guarantee of quality.

Failure to construct in accordance with the specifications

[81] Ms Brebner and Mr Wentzel submit that the house was not built in accordance with the specifications that were attached to the building consent. Paragraph 1.12 of the general specifications provides that 'all workmanship shall conform to good trade practice'. It is submitted that 'good trade practice' is measured by the applicable BRANZ Good Practice Guide and BRANZ Bulletins.

[82] In his closing submissions Mr Shand set out the various ways in which aspects of the completed house depart from the requirements in these guides. He submits that these departures breached good trade practice and therefore breach the specification and the building consent.

[83] One of the departures from good trade practice relied on is the top fixed penetrations through the flat top cement balustrade which the BRANZ Good Texture Coated Fibre Cement practice says should be avoided. This was not part of the original construction. Ms Collie was directed to install the handrail by the Council following the initial 'final' inspection in January 2003. It was one of the three outstanding items in the final DBH determination that was approved by the Council before the CCC was issued.

Departure from plans

[84] The departures relied on are:

a) The use of fibre cement as a cladding on some return walls and the balustrade when this was not a cladding noted on the plans.
b) Parapets built with variable slope and metal capping.
c) Fibre cement covered with butynol used as a roofing cladding.

[85] The use of fibre cement cladding rather than EFIS has not been identified as a defect in Mr Templeton's report. In his evidence Mr Templeman agreed that top fixing a hand rail through fibre cement was not good practice. However neither is it good practice to top fix a hand rail through EFIS. The flat topped chimney has been identified as a defect. However it is my understanding that the defect is related to the lack of slope and the absence of membrane rather than the substitution of cladding materials used. There was no other discussion in the evidence about the use of fibre cement as a cladding on this house. It is not established in evidence that this departure from the plans has resulted in damage.

[86] There is no evidence that the parapets as constructed are causing damage to the house. Ms Collie gave evidence that the metal cappings which are not provided for on the plans were installed to comply with a DBH recommendation.

[87] The plans do not specify the material for the small sloped surface beside the deck. The covering of the fibre cement with butynol on a sloping roof surface was not identified as a defect in Mr Templeton's report. At the hearing Mr Templeman stated that there was evidence of water ingress into the walls below and that he partly attributed that to failure in the membrane above. Mr Dibley commented in his evidence that there may be moisture ingress from this detail but that testing would be required to determine this.

[88] The butynol was placed over the fibre cement after the DBH determination found that the flat sloping fibre cement surface needed to be covered. The detail was subsequently approved by DBH.

Departure from NZS 3604: 1999

[89] Clause 14 of the building consent provided that, 'The buildings in this consent have been designed to NZS 3604: 1999 and must be constructed accordingly'.

[90] NZS 3604: 1999 sets down the construction requirements for timber framed buildings. At 11.6.1 it provides that:

> *Joints between windows and doors, and the cladding, shall be made weatherproof by one or more or a combination of the following systems:*
>
> *a) Head, jamb and sill flashings;*
> *b) Scribers;*
> *c) Proprietary seals;*
> *d) Sealants that are:*
> *i. Not directly exposed to sunlight or weather;*
> *ii. Easy to access and replace.*

[91] This requirement is performance based. As various joints have not proved to be weatherproof, it is submitted that the joinery fails to comply with NZS 3604 and that this failure breaches the building consent and therefore clause 6.2.5(b) of the agreement for sale and purchase. The windows which have been found not to be weatherproof were defectively constructed despite being approved by the Council and DBH. Whether this constitutes a breach of the vendor warranty will depend on the correct interpretation of clause 6.2.5 and the extent to which it is a warranty of quality.

Ground Clearances

[92] Finally it is submitted that the ground clearance deficiencies identified by Mr Templeman breach the ground clearance requirements specified at paragraph 16(e) of the building consent which state that these clearances should be 100mm off the ground if permanently paved and 150mm if unpaved. This is accepted. However the Council and DBH inspected the property and were

aware of the ground clearance issue when they determined to issue the CCC which certified that the house complied with the Building Code. Ms Brebner and Mr Wentzel were also aware of this defect when they elected to declare their contract unconditional.

WHAT IS THE CORRECT INTERPRETATION OF THE VENDOR WARRANTY CLAUSE IN THE AGREEMENT?

[93] Ms Brebner and Mr Wentzel assert that Ms Collie breached the vendor warranty given at clause 6.2(5) of the sale and purchase agreement. This clause provides:

> (5) Where the vendor has done or caused or permitted to be done on the property any works :
>
> (a) any permit, resource consent or building consent required by law was obtained; and
>
> (b) the works were completed in compliance with those permits or consents; and
>
> (c) where appropriate, a code compliance certificate was issued for those works.

[94] The agreement in this case is the 8th edition of the sale and purchase agreement approved by the Auckland District Law Society. The previous version included a fourth sub paragraph pursuant to which vendors gave a warranty that:

> (d) all obligations imposed under the Building Act 1991 and/or the Building Act 2004 (together "the Building Act") were fully discharged.

[95] Because the Building Code is performance based, clause 6.2.5(d) had the potential to be interpreted as an ongoing performance warranty for houses. It was removed because it was considered inappropriate for vendors to give a warranty that Building

Act obligations had been fully discharged particularly in light of the "leaky home" litigation.[8]

[96] Ms Brebner and Mr Wentzel claim that Ms Collie is liable for the failure of the house to satisfy the performance requirements of the Building Code notwithstanding the absence of clause (d) from their agreement. This is because as noted earlier, they submit that compliance with the Building Code was an inherent part of compliance with the building consent.

[97] There has been some controversy surrounding the interpretation of the warranties given by vendors in clause 6.2.5(b) and (d). These clauses can be interpreted as a warranty that no non-consented work has been performed and that all relevant permits, consents and completion certificates have been duly obtained from the territorial authority. This is what Ms Collie achieved albeit in an exercise that took four years. Alternatively they can be interpreted as a warranty of current and ongoing compliance with the Building Act. This interpretation has vendors warranting not only that the requisite consents and certificates have been issued, but that they have been properly issued.[9]

[98] I have considered the three most recent High Court decisions which consider the vendor warranty. None of these deal with the situation of a vendor who has had a house built under a turnkey contract and who has obtained all relevant consents and certificates. In two of the cases no CCC had been issued. In the other the vendor was a developer who controlled and was significantly involved in the construction.

[99] In addition to these cases, summary judgment was granted against a vendor in a claim based on this clause in *Parsonage v*

[8] Peter Nolan "8th Edition of the Agreement for Sale and Purchase of Real Estate" (CLE Seminar, Auckland, March 2007).

Laidlaw.[10] However the issue in dispute in that case was whether the plaintiffs had been sufficiently identified in the agreement for the purposes of the Contracts Privity Act. The Court did not consider the meaning of clause 6.2.5 and it does not appear to have been disputed between the parties. The clause at issue was that in the 7th edition of the agreement and included clause (d).

[100] The vendor warranties in clause 6.2.5 were considered by Justice Mackenzie in the case of *Ford v Ryan*.[11] Again, the clause at issue included clause (d). In that case the purchasers discovered after purchasing a house that a CCC had not been issued for it. A Council inspection found that significant repairs including a reclad were required before a CCC could be issued.

[101] Mackenzie J held that the responsibility to be satisfied as to the quality of the property purchased including any buildings lies entirely on the buyer and held that clause 6.2.5 was not a warranty as to quality and should not be converted to one.[12] He noted the dicta of Prichard J in *Ware v Johnson*[13] that 'caveat emptor applies with particular stringency to contracts for the sale and purchase of land and generally excludes the implication of any warranty as to fitness or quality'.

[102] Mackenzie J found that the warranty had been breached because of the lack of the CCC. However, for reasons he outlined, he did not award damages.

[103] There have been two further recent High Court decisions which consider clause 6.2.5. In neither case was the interpretation of the clause the primary matter at issue.

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[9] *Johnston v Abide Homes Ltd* WHT TRI 2008.100.101, 11 August 2009
[10] *Parsonage v Laidlaw* HC Auckland, (2008) 6 NZ ConvC 194, 638.
[11] *Ford v Ryan* (2007) 8 NZCPR 945, 13 December 2007.
[12] At [16], [25], [48].
[13] *Ware v Johnson* [1984] 2 NZLR 518 at 534.

[104] The first of the two is *Body Corporate 208191 v Holl*.[14] The clause at issue in *Holl* was that in the seventh edition of the sale and purchase agreement which included the paragraph (d) that is not in the version of the agreement under consideration in this case.

[105] The primary issue in respect of the vendor warranty in *Holl* was ownership. The vendor was a company director whom Woolford J found to be personally liable in negligence because his acts and omissions could be directly linked to the creation of defects and damage. Following completion of construction, ownership of the property was transferred from the director's company to the director and his wife who subsequently sold it to the plaintiffs. The director was held to be liable in contract for a breach of the vendor warranty because of the control he exercised over construction notwithstanding that he did not own the property at the time.

[106] The vendor in *Holl* had had decades of experience in the building industry and as the director of the development company had exercised considerable control over the work. The *Holl* decision did not analyse the extent of a vendor's liability under clause 6.2.5 nor did it consider the circumstances of a turnkey vendor who does not personally control the building work.

[107] The second recent High Court decision to consider a clause analogous to 6.2.5 is *Aldridge v Boe*[15] which was an appeal from a decision of this Tribunal. Like *Ford v Ryan* this case concerned a house that had never received a CCC. Unlike *Ford v Ryan* the purchasers in *Aldridge* were aware of this when they purchased the house.

[14] *Body Corporate 208191 v Holl* HC Auckland, CIV 2006 404 5373, 16 December 2011.
[15] *Aldridge v Boe* HC Auckland CIV 2010 404 7805, 10 January 2012.

[108] In *Aldridge* Potter J placed considerable emphasis on the knowledge of the parties in determining whether the vendor warranty clause should be given "strict effect" or "read down". She held that on the natural and ordinary meaning of the clause, the purchasers warranted that the work complied with the building consent. However she said that if, in accordance with the approach in *Investors Compensation Scheme v West Bromich Building Society*[16] and *Pyne Gould Guiness Ltd v Montgomery Watson (NZ) Ltd*,[17] the surrounding circumstances and background knowledge of the parties indicated that this was not their intention, then the natural and ordinary meaning of the clause should give way and should be read down such that the vendors did not warrant that the building work complied with the building consent and therefore the Building Code.

[109] Potter J accepted the evidence of the purchaser Mr Aldridge that although he knew the CCC had not been issued, in the absence of knowledge about the state of the building work, he assumed that this was simply an administrative process that had not been undertaken. She found that had the Aldridges known that there was outstanding work that had to be done to achieve compliance with the Building Code and by inference the building consent that would indicate it was unlikely that the vendors intended to warrant that the works complied with the building consent.[18]

[110] Having regard to the state of knowledge of both parties, she found that the parties intended the clause to warrant that the building work complied with the building consent.

DID MS COLLIE BREACH THE VENDOR WARRANTY?

[16] *Investors Compensation Scheme v West Bromich Building Society* [1998] 1 ALL ER 98.
[17] *Pyne Gould Guiness Ltd v Montgomery Watson (NZ) Ltd* [2001] NZAR 789.
[18] At [270].

[111] Ms Collie initially had a turnkey contract with her builder who completed the house to the final inspection stage. Despite having passed all Council inspections during construction and having only minor matters outstanding at the final inspection, she then spent four years dealing with the Council and DBH before she was able to obtain a CCC. During this process she was required to revisit many aspects of the construction, previously approved by the Council, before the CCC was finally issued.

[112] Ms Collie entered the DBH determination process when the Council refused to issue a CCC for the non-ventilated cladding system it had granted consent for. The nub of the dispute before the DBH was whether the cladding as installed complied with the Code. This included consideration of the components of the system such as the backing sheets, the flashings, the joints and the plaster and/or the coating as well as the way the components were installed and worked together.[19]

[113] The first determination considered the flashings around doors and windows. The lack of weather seals and flashings to the jambs and sills of the face-fixed windows at the weatherboard linings was noted. Mr Dibley's observation that the head flashing over the bathroom window as incorrectly fitted in front of the building wrap was noted as well as his opinion that this detail was unlikely to leak.

[114] The second DBH determination recorded that Mr Dibley had been commissioned to undertake a second inspection of the house in November 2005 to inspect the items that were required to be fixed. He had provided an addendum report noting that some of the issues raised had been repaired but not all of the issues raised in the first determination had been adequately addressed.

[19] DBH Determination 2005/83 at [1.2].

[115] In March 2006 Mr Dibley made a third inspection of the house and provided a third report. As noted earlier, the DBH then determined that the cladding system as installed complied with clause E2 of the Building Code and that, following rectification of three outstanding items, would comply with the durability requirements of clause B2 of the Building Code.

[116] These items were duly inspected by the Council and the CCC was issued. As noted by Potter J in *Aldridge,* a CCC is issued when and if the territorial authority confirms that the building work does comply with the Building Code and provides evidence by the territorial authority that the works do in fact comply with the Code.[20]

[117] It is difficult to see what more Ms Collie could have done to ensure the compliance of her house with the statutory and regulatory regime. If clause 6.2.5 is read as a warranty that all relevant permits, consents and completion certificates have been duly obtained from the territorial authority and complied with to the satisfaction of the relevant authorities, Ms Collie did not breach clause 6.2.5(b).

[118] In effect counsel for the claimants is submitting that the warranty is an underwriting by the vendor of the inspection and certification regime, in short that it is a guarantee of quality. The house leaks as a result of details approved by the Council and DBH. I do not accept that an interpretation of the warranty clause which renders Ms Collie liable in these circumstances is correct.

[119] The departures from the consent complained of either have not been linked to the defects identified in Mr Templeman's report or are essentially complaints concerning the house's condition, performance and quality. Following *Ford v Ryan* I find that these issues of performance and quality fall outside the scope of the vendor

[20] Aldridge v Boe, above n14 at [265]-[266]

warranty in clause 6.2.5(b) and that Ms Collie did not breach this clause.

[120] In the alternative, if a wider interpretation of clause 6.2.5(b) is preferred, before any finding of liability can be made, it is necessary to examine the knowledge of the parties and the issue of waiver.

Knowledge of the Parties

[121] Potter J in *Aldridge* noted that it is necessary to consider the knowledge of the parties in determining whether the vendor warranty clause should be given 'strict effect'. It is necessary therefore to consider the knowledge of Ms Brebner and Mr Wentzel and the circumstances in which they confirmed the agreement to purchase the property.

[122] Ms Brebner and Mr Wentzel were required to declare their purchase unconditional or cancel it. They chose to go unconditional. At this time they were aware of the history of the house, the difficulties Ms Collie had in obtaining a CCC and of the content of the DBH determinations. They also had an extensive report on the current condition of the house.

[123] The real estate agent, Leila Morris, appeared as a witness for Ms Collie. She filed an affidavit annexed to which was a marked up copy of the second DBH determination. The markings identified various matters of concern that had been noted in Mr Dibley's inspection reports. In her evidence Ms Morris stated that the marked up report was given to her by Mr Wentzel and used by him to justify the first offer he made. I accept this evidence. Mr Wentzel was aware of the defects identified during the determination process even before entering the conditional agreement.

The Building Report

[124] The sale and purchase agreement was conditional on Ms Brebner and Mr Wentzel obtaining and approving a builder's report. The condition allowed them to cancel the agreement if they disapproved of any aspect of the report.

[125] The builder's report obtained by Ms Brebner and Mr Wentzel noted at page 4 that 'you' had specific concerns relating to the weathertightness issues raised in the two DBH determinations. It then summarised the history of the house including the Council's original refusal to issue a CCC, the DBH investigations and concerns, and the determinations.

[126] The building report is 25 pages long and it is impractical to reproduce significant parts of it in this decision. However the aspects of the report which refer to defects which have since also been identified by Mr Templeman, and relied on by Ms Brebner and Mr Wentzel as constituting breaches of the building consent, will be discussed.

[127] At page 6 of the report the ground clearance defect, subsequently identified by Mr Templeman, was noted and an explanation of the weathertightness consequences of ground clearance defects given.

[128] At page 8 the exterior cladding was described as being in a condition that would be reasonably expected with defects which included:

- 'Horizontal hair cracks at southwest side of chimney at approximately the level of the entry soffit'.
- 'Sealant filled holes (having the appearance of moisture test probe holes) observed at base corner of chimney'.

- ‘Cracking between horizontal windows of the studio (southwest facing wall)’.
- ‘Significant horizontal repaired crack at southeast side adjacent to under cover lawn mower area, adjacent to laundry door’.
- ‘Considerable and obvious repairs at the north corner outside of the parapet handrail to living area deck (external upper corner)’.

[129] The report noted that the repairs observed were presumably reactionary and recommended that “you” make enquiries as to who carried out the work and why.

Windows

[130] The report noted that there was no head flashing to the full length lounge joinery and that the cladding system had been rebated over the top of the aluminium joinery. With regards to the windows in the EIFS, it was noted on page 10 that there was:

> Cracking at the interface of the aluminium joinery and plaster system at northwest mid bedroom. When pressure is applied to the aluminium frame there is movement which opens a fine crack between the two.

With respect to the window and the weatherboard cladding it was noted ‘the window side (master bedroom door) flange does not sit tightly back to the weatherboards and there is no apparent sealing at this point’.

[131] The builder’s report also noted that there was no sill flashing evident and that the junctions between the plaster system and the aluminium window flange appeared reliant on sealants.

[132] The upper studio door was noted as having “considerable amount of sealant and inter face with plaster at hinged side”.

Chimney

[133] At page 17 of the report the following comment was made regarding the chimney:

> The top of the chimney is clad on top as the main house cladding. Wall cladding systems used on horizontal surfaces is a well documented risk factor. A stainless steel flange of the flue and rainhat is attached to the flat top with screws and appears reliant on sealants around perimeter to provide a weatherproof junction to the plaster system...This situation is similar to concerns raised in the determination in regard handrail fixing brackets.

The concern with the handrail was that ‘when pressure was applied to the handrail there was some movement and sealant interface with stainless steel (was cracked in places)’.

Deck

[134] It was noted that the decking membrane had been retrospectively fitted and it was recommended that enquiries be made as to who carried out this work and as to whether the Council was consulted about or inspected it. The top fixed handrail was noted as being a significant cause of deck failures and concern was expressed about the heavy sealing in some instances and the cracking and movement when pressure was applied as noted above.

[135] The report recommended that inquiries be made as to who had carried out the work and why and whether it was undertaken by qualified tradespeople and also if was inspected by the Council.

[136] A number of other weathertightness concerns were raised in the building report such as the presence of unsealed penetrations and the lack of spouting to a roof resulting in uncontrolled roof flows onto the critical junction of the apron flashing and the roof cladding.

[137] At page 21 it was noted that in the interior of the house there was cracking between the wall and the ceiling on the northwest side of the master bedroom below the deck and parapet handrail. The possible significance of this area being beneath a deck was noted.

[138] The report concluded that the house appeared to be reasonably built from a structural point of view and reasonably finished internally although numerous exterior details and junctions were questionable. Later it noted that although the non-invasive inspection did not detect indisputable evidence of weathertightness failures or moisture ingress, experience of destructive testing where similar details are present suggested that moisture ingress was possible. Further investigation was recommended. The characteristics of the house were noted as putting the house in the “at risk” category for weathertightness.

[139] Finally it was noted that looking past the generally good presentation, the condition of the house was below that which would normally be expected of a house of this type and age.

[140] In her evidence Ms Brebner said she and Mr Wentzel did not initiate the investigations and enquiries recommended in the report. She recalled her lawyer, Mr Vallant sending a letter requiring the rectification of the various items raised in the report to Ms Collie’s solicitor. However, the cash out clause was then exercised and “overtook everything else”. In her brief Ms Brebner describes the decision to purchase the house as “a leap of faith” and acknowledged that the purchase decision had been a very emotional one as her marriage was under pressure.

[141] Ms Brebner claimed that one factor that gave her reassurance was the provisions of the sale and purchase agreement that outlined the vendors' responsibilities and she claimed that the real estate agent, Ms Morris, had explained to her that this meant that the vendor had responsibility to comply with the Building Code. Both Ms Brebner and Mr Wentzel claimed that they had discussed the concerns raised in the builder's report with Ms Morris who had reassured them that if there were any major issues, the house would not have received a CCC.

[142] Ms Morris denied seeing or discussing the builder's report with Ms Brebner and Mr Wentzel and said that if she had been given a copy, she would have retained it on her file. She said although real estate agents typically see vendor's reports, it is unusual to see a purchaser's report. She denied giving them advice about the CCC. When asked if it was something she could have said, she replied 'no' as she was very careful about what she said to purchasers. She also denied explaining or giving advice about the vendor warranty clause in the sale and purchase agreement. She said that she would have only explained the special conditions of the agreement that required initialling and that she would have expected their solicitor to explain the standard clauses to purchasers.

[143] Ms Morris presented her evidence in a straightforward way. In contrast Mr Wentzel when giving evidence had difficulty recalling various matters such as instructing Mr Vallant to request rectification of defects noted in the builders report. I prefer the evidence of Ms Morris to that of Ms Brebner and Mr Wentzel as I found her very credible and Ms Brebner and Mr Wentzel less so. I accept that Ms Morris was not shown the report and that she did not explain or give advice to Ms Brebner and Mr Wentzel about the vendor warranty clauses in the agreement. I reject Ms Brebner's evidence that she relied on the warranty which had been explained to her by Ms Morris

when she instructed her solicitor to make the agreement unconditional.

[144] In his evidence Mr Wentzel said he telephoned the author of the inspection report, Ray Howarth, and stated that although he did not discuss the items in the report in detail with Mr Howarth, he asked him whether the issues raised "would be bad enough to stop us from purchasing the property". He stated that in response, Mr Howarth had told him that if plaster houses were maintained they didn't pose significant problems. Mr Howarth was not called as witness and without his corroboration I am not prepared to accept that he qualified his report in this manner. Given the level of detail in the report, the concerns raised and the inquiries and investigation recommended it would be very surprising for Mr Howarth to suggest that maintenance would be a complete solution in this case.

[145] Mr Wentzel said he was unable to remember whether or not he had showed the builder's report to Mr Vallant or discussed it with him. When the letter Mr Vallant sent Ms Collie's solicitor requesting rectification of items raised in the report was shown to him Mr Wentzel said that he did not recall instructing Mr Vallant to write it. He did however recall that Ms Collie's lawyer had advised that she was not going to rectify issues raised in the report apart from the TV aerial and that the decision then had to be made whether to cancel the contract or go unconditional. He confirmed that he had decided to make the agreement unconditional despite the content of the report which included the presence of significant remedial work and a poor standard of workmanship.

[146] Ms Brebner and Mr Wentzel were in possession of documents confirming the existence of the details of the house they claim constitute breaches of the building consent and the vendor warranty prior to confirming that the contract was unconditional. Even prior to entering the conditional contract, they had obtained the DBH

determinations and marked up aspects of the extensive concerns that had been identified by Mr Dibley in the course of his investigations.

[147] Having regard to the level of knowledge they had concerning the details they now rely on I consider that, in terms of the test formulated by Potter J in *Aldridge,* the vendor warranty clause should be 'read down'. I find that the parties did not rely on or intend the vendor warranty clause to warrant that there was compliance with the performance requirements of Building Code, the ground clearance provisions of the building consent, the performance requirements of NZS 3604:1999 with respect to joinery, and the "good practice" standards in the relevant BRANZ publications.

[148] To find otherwise would suggest that in respect of issues such as ground clearances, they relied on the warranty to reassure them that permissible ground clearances had been installed in accordance with the building consent when they knew this was not the case.

[149] Ms Brebner and Mr Wentzel were aware of the history of the house, the weathertightness concerns arising from this history and of specific weathertightness defects such as the flat topped clad chimney, the ground clearance deficiencies and the lack of flashings and reliance on sealant in respect of the joinery. Ms Collie had through her solicitor given written advice that she would not attend to the rectification of items identified in the builder's report except in respect of the fixing of a TV aerial.

[150] In these circumstances Ms Brebner and Mr Wentzel elected to make their purchase unconditional. It would be entirely artificial to find that having done so, they can rely on a strained interpretation of the vendor warranty clause to make good their losses.

[151] Following Ms Collie's refusal to rectify any defects, Ms Brebner and Mr Wentzel elected to "take a leap of faith" and proceed

with the purchase. They cannot now rely on the warranty for the rectification of those same defects.

DID THE CLAIMANTS WAIVE THE VENDOR WARRANTY IN CLAUSE 6.2.5 OF THE AGREEMENT FOR SALE AND PURCHASE BY ACCEPTING A BUILDER'S REPORT THAT IDENTIFIED DEFECTS IN THE HOUSE?

[152] Ms Collie was unrepresented at the hearing but earlier in the proceedings had been represented by Ms Thorn and had made a removal application the basis of which was that Ms Brebner and Mr Wentzel had waived the vendor warranty clause when they confirmed that the condition of the house was acceptable to them and made the agreement unconditional.

[153] The submissions made by Ms Thorn on the issue of waiver were that in terms of *Nectar Ltd v SPHC Operations (NZ) Ltd*[21] Ms Brebner and Mr Wentzel had two alterative and inconsistent rights which were to either cancel the contract or affirm it despite the poor condition of the property. With actual knowledge of the leaky building issues pertaining to the property they elected to confirm the contract and thereby waived their rights under clause 6.2.5(b).

[154] In his closing submissions Mr Shand submitted that a waiver of rights under clause 6.2.5 would require unambiguous representation, and that the claimants did not give notice of any such waiver. He had previously made this submission in opposition to Ms Collie's removal application. Ms Thorn had disputed the proposition that waiver of clause 6.2.5 must be by notice. She contended that the requirement of notice was confined to conditions and was not applicable to warranties.

[21] *Nectar Ltd v SPHC Operations (NZ) Ltd* HC Auckland CL 20/02, 7 May 2003.

[155] I have determined that Ms Collie did not breach clause 6.2.5 of the sale and purchase agreement and cause loss to the claimants. It is unnecessary therefore to make a finding in respect of the waiver argument raised on behalf of Ms Collie.

[156] The claim that Ms Collie is liable in contract or tort for the full cost of the remedial work required to make the house weathertight fails.

DATED this 14th day of March 2012

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M A Roche
Tribunal Member