IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2007-100-000064

BETWEEN	**PAUL WHITE and WILNA WHITE** Claimants
AND	**RODNEY DISTRICT COUNCIL** First Respondent
AND	**LORELLE JOY KERKIN** (Solely and in her capacity as sole trustee of the Estate of Gregory William Kerkin) Second Respondent

Hearing:	27th, 28th and 29th January 2009 11th February 2009
Counsel Appearances:	G Shand and H Diamond-Cate, counsel for claimants; D Heaney SC and S Macky, counsel for first respondent; and M Black, counsel for second respondent.
Appearances:	Mr Patrick O'Hagan, WHRS Assessor. Mrs Wilna White and Mr Paul White, claimants. Mr Simon Paykel, expert for the claimants. Mr Bill Cartwright, expert for the claimants. Mr Paul Ranum, expert for the claimants. Mr Steve Hubbuck, officer with first respondent. Mr John Kerr. Mr Geoffrey Bayley, expert for the first respondent. Mrs Lorelle Kerkin, second respondent. Mrs Jocelyn Bridge. Mr Roger Hammond. Mr Peter Jordan. Mr Peter Beran, expert for the second respondent.
Decision:	4 March 2009

FINAL DETERMINATION
Adjudicator: K D Kilgour

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THE DWELLING

[1] The subject of this claim is a leaky house situated at 6 Castaway Place, Army Bay, Gulf Harbour, Auckland.

[2] It is a two-storey dwelling on the east side of Castaway Place. The land upon which the house is situated slopes down from Castaway Place with the garage in the front of the house. The house has a five-degree sloping long-run iron roof and is clad with an expanded insulating foam system (EIFS) texture coated.

[3] Around the roof perimeter is a small parapet, which is lined internally with fibre cement sheet and a metal cap over the top. The roof has an internal gutter along the sides of the roof that was lined with butynol rubber membrane.

[4] The house has three decks, two of which have tile flooring, whilst the third deck has timber decking as the floor. All three decks have solid handrails around them and this handrail has a flat top section with a steel handrail fixed through this flat section. The floor substrate of the decks was at the same level as the inside floors.

FACTUAL BACKGROUND

[5] In the winter of 1993, the second respondent, Mrs Kerkin and her late husband (Gregory William Kerkin) jointly purchased a vacant section at 6 Castaway Place (as described in Certificate of Title 68B/190 North Auckland Registry).

[6] On 16 June 1993, the first respondent, Rodney District Council ("Council"), issued a building permit to Mr and Mrs Kerkin, enabling them to commence building the house, the subject of this claim.

[7] The construction period of this house was between June 1993 and November 2001 with the Code Compliance Certificate being issued on 30 November 2001. Mr and Mrs Kerkin however occupied and lived in the house from early 1994. At some time between 1994 and 2001 Mr and Mrs Kerkin retro fitted a length of tin to the internal sealing under the large northern deck to address a leak.

[8] On 15 December 2001, Mr and Mrs Kerkin entered into an agreement for the sale of the property to the claimants, Paul Michael

White and Wilna White. Settlement and possession of that sale occurred on or about 25 January 2002. The agreement for sale was conditional upon the purchasers acquiring finance sufficient to complete the purchase and a satisfactory Land Information Memorandum from the Council. Both of these conditions were satisfied prior to the settlement of the sale.

[9] The sale agreement was drafted on the Real Estate Institute of New Zealand and Auckland District Law Society form of Agreement for Sale and Purchase of Real Estate (7th Edition 2 July 1999). The agreement included the then standard Vendor Warranty and Undertaking clause 6.2(5), which reads:

> "6.2 The vendor warrants and undertakes that at the giving and taking of possession:…"
>
> "(5) Where the vendor has done or caused or permitted to be done on the property any works for which a permit or building consent was required by law:
>
> (a) The required permit or consent was obtained; and
> (b) The works were completed in compliance with that permit or consent; and
> (c) Where appropriate, a Code Compliance Certificate was issued for those works; and
> (d) All obligations imposed under the Building Act 1991 were fully complied with."

[10] The claimants were new immigrants to New Zealand, but had previously owned two houses when living in Britain. That ownership experience taught them the importance of obtaining a building survey report when buying a home. Their experience in Britain was that to obtain mortgage finance for home purchasing, the lender required a building surveyor's report.

[11] This was not the case in New Zealand and, the claimants obtained sufficient finance for the purchase of the subject dwelling without a building surveyor's report. They however instructed Mr

Peter Jordan to carry out a building inspection in December 2001 even though the agreement for sale and purchase was not conditional on a building report. Mr Jordan was the principal of Building Condition Assessments Limited and is an accredited and nationally recognised building surveyor.

[12] The report prepared by Mr Jordan, dated 24 January 2002, ("Jordan Report") raised a number of significant water ingress concerns. There is some uncertainty as to whether the claimants received that report before settling their purchase; the probability is that they received the report on or about 13 January 2002. In any event, the claimants' purchase was not conditional upon the receipt of a satisfactory report and the contract was already unconditional at the time they received the report.

[13] At the hearing the claimants explained that they obtained the building survey report because of their homeownership experience in Britain and they just wanted further assurance that the home they had bought in New Zealand was satisfactory.

[14] The claimants did not show a copy of the Jordan Report to their conveyancing lawyer for some time. Nor did they show a copy of the report to the WHRS assessor in December 2003 or in February 2004 when he examined the house and only showed the Jordan Report to their expert, Mr Simon Paykel, some four weeks before the hearing.

[15] After settling the purchase and taking occupation, the claimants took some action in response to Mr Jordan's recommendations. This action was initiated after meeting with Mr Jordan who provided them with an outline specifying the remedial work required.

[16] Mr Jordan's maintenance recommendation included:

"A. SHORT TERM:

- Seal water tank lids to prevent water ingress…
- Remove small sections of under-deck lining, wall lining and sealing lining to inspect and check for damage, repair if necessary and reinstate.
- Determine whether wall cladding should be cut above the deck after removal of interior wall lining.
- Re-fix parapet cladding to inside face of parapet.
- Ventilate bathroom ceiling fan to the exterior of the house…

B. MEDIUM TERM:

- Paint the galvanised steel roof cladding.
- Replace worn window sash stays.
- Remove deck barriers to curve decks and alter to enable fixing to the sides of the barrier."

[17] In May and June 2002, the claimants sought "building quotations" from C & P Builders Limited, A.W. Dempsey & Son Limited and B.J. Martin Builders Limited, to carry out all of the remedial work required to the deck, handrail and windows itemised in the Jordan Report. Each of the quotations received were in the vicinity of $19,000 NZ dollars, excluding GST.

[18] The claimants accept that at the time those quotations were obtained, and for the following year, they had the financial resources to undertake the remedial work suggested. However, the claimants failed to do any of the remedial work suggested by Mr Jordan even though they accept they were aware of the usual repair and maintenance obligations upon homeowners (such as painting, cladding fixing etc). Despite being aware of the maintenance or remedial work recommended by Mr Jordan, the only maintenance and repair work that the claimants undertook from the time of occupation in January 2002 through to the present has been to close off access to the northern deck and attempt to cover it from the weather.

[19] In late September 2002, the claimants approached their conveyancing lawyer, Mr McGowan, to seek remedial action from their vendors (Mr and Mrs Kerkin) for the "serious defects in the construction of the house" they had then encountered. Mr McGowan wrote to the vendors' solicitor on 2 October 2002 pointing out those serious defects as well as the "leaky deck issues".

[20] Mr and Mrs Kerkin, through their lawyer replied on 15 October 2002, mentioning amongst other things that:

> "We are also puzzled as to why it has taken 9 months from the time your clients received the report [Jordan Report] to alerting us as to its contents…"
>
> "Your second paragraph infers that subsequent to the purchase the defects became obvious and the Whites commissioned the report from Peter Jordan. That is patently not correct given that the report is dated one day prior to the date of settlement and possession."
>
> "Our clients were not aware of any defects as alleged…"
>
> "The house was inspected by the Council shortly before it was sold in elation to the railing on the deck. A final Code Compliance Certificate was issued.
>
> "Any claim by your clients will be defended."

[21] On 8 November 2002, the claimants' lawyer responded stating amongst other matters that:

> "We note that your clients are denying any liability in respect to the damage that has occurred. Our clients now wish to take mitigation measures and repair the deck during the Summer months. We advise that the deck can be made available for inspection by your clients and/or their engineers before repair work commences for the further 14 day period. If we have not heard from you or your clients within that period of time we will presume that your clients do not want the opportunity to inspect the damage. Our clients will instruct their builders to repair the damage and once work has been completed we'll be issuing proceedings

> for recovery of the same. In the circumstances please advise if you are authorised to accept service."

[22] No further action in this regard appears to have been taken at that time.

[23] The claimants advised the WHRS assessor that the first indication that there could be a water ingress problem was a musty smell in bedroom 3 downstairs and water entering the rear bedroom 2 at the window head. Late in 2003 one of their children fell through the deck tile floor on the small juliet deck outside the master bedroom. Following this accident, the claimants inspected the northern deck and upon lifting the loose tiles found decay substrate similar to the juliet deck.

[24] Apart from keeping off the decks, the claimants have not taken any further action other than filing these proceedings on 7 November 2003 and progressing the claim through to hearing. The claimants now state that they do not have the financial resources to fund the necessary remedial work.

[25] On 20 March 2007, the claimants obtained a quotation from K & B Builders for the required remedial work estimated at $173,941.87 (inclusive of GST). An updated quotation dated 15 May 2008 was received from the same builder amounting to $208,730.25 (inclusive of GST). The claimants also mentioned that a builder in December 2008 estimated that the cost of the repairs would then be $365,625.00 (excluding professional fees).

[26] The claimants have now been advised by Mr Paul Ranum of Mallard Cooke Brown Limited (the claimants' quantity survey expert) that the repair costs for the house will be $401,000.00.

THE CLAIM

[27] The claimants filed a statement of claim with this Tribunal on 31 October 2007 setting down the following causes of action:

Firstly, the claimants allege that the first respondent, Rodney District Council is liable for:

(i) negligently issuing the building consent, inspecting the building work and issuing the Code Compliance Certificate; and

(ii) the negligent misstatement in the Code Compliance Certificate.

Secondly the claimants allege that the second respondents are liable for two reasons:

(i) the second respondents negligently carried out their roles as the developer, head-contractor, and project manager of the development; and

(ii) the second respondents breached their contractual obligations in the agreement for sale and purchase, specifically clause 6.2(5).

[28] Since that statement of claim however, the claimants no longer pursue the claim against the first respondent regarding the issue of the Building Consent, as that claim is now time-barred by section 393 of the Building Act 2004.

[29] The claimants were originally claiming a total of $34,044.22 for "other losses/costs". On the last day of the hearing, the claimants conceded certain costs such as design fees, legal fees and expert fees. As a result, the claimants are claiming $401,000.00 for repairs based on a quote obtained by Mr Ranum and an additional $14,758.64 for other losses such as:

(a) $832.64 in local authority fees for lodging the Building Consent;

(b) $9,900.00 for alternative accommodation (the claimants are requiring to vacate the property during remedial work for some 22 weeks);

(c) $1,826.00 in additional utility charges; and

(d) $2,200.00 for storage costs.

[30] The claimants also seek general damages of $30,000.00 each.

[31] The total quantum claimed is therefore made up of:

(a)	Repair costs	$401,000.00
(b)	Consequential	$14,758.64
(c)	General	$60,000.00
	Total	$475,758.64

[32] The claimants' statement of claim alleges that the house was constructed with a number of structural defects allowing water to ingress. Those defects have caused damage to the subject dwelling, and therefore damages are sought to compensate the remedial works necessary to repair the damage/defects.

TECHNICAL BASIS OF CLAIM & CAUSES OF DAMAGE TO THE HOUSE

[33] The statutory background to these claims are now well understood. Section 7 of the Building Act 1991 (the Act) requires that all building work, for residential properties such as the subject dwelling, is required to comply with the Building Code which is part of the regulations enacted under the Act. Section 32 of the Act requires building work to be done in accordance with a Building Consent and the local authority, in terms of section 43 of the Act, shall only issue a

Code Compliance Certificate if it is satisfied on reasonable grounds that the building work complies with the Building Code.

[34] The Building Code sets functional and performance requirements which all building work must meet. The relevant clauses of the Building Code for this claim are clauses B2 (durability), E1 (surface water) and E2 (external moisture).

[35] At the completion of the building work, the local authority's obligation under the Act is to issue a Code Compliance Certificate, but only if it is satisfied on reasonable grounds that the certified work complies with the Building Code.

[36] An Experts' Conference was convened on 15 December 2008. Experts who attended such conference were:

- Mr Patrick O'Hagan, the WHRS assessor;
- Mr Simon Paykel;
- Mr Roger Cartwright, for the claimants;
- Mr Geoffrey Bayley, for the first respondent; and
- Mr Peter Beran, for the second respondent.

No consensus emerged from the assembled experts nor was there an agreement refining their disagreements. All experts were well qualified to give expert evidence and in the hearing each gave evidence honestly and on a factual basis which each believed could be proven.

[37] Whilst there was a dispute around a number of issues all of the experts, except Mr Peter Beran, were of the opinion that the house requires a full reclad. Mr Beran said he was not convinced a full clad was necessary because in his opinion insufficient invasive testing had been carried out to satisfy him this was needed.

[38] There is no substantial dispute as to some of the key causes of damage. After considering all the expert evidence I conclude that the primary causes of the moisture ingress are:

(a) Balconies:-

- The plywood flooring is untreated and no waterproof membrane was installed prior to applying the tiles;
- The balcony outlets have no means of ensuring the junction as weathertight due to a lack of waterproofing;
- The cladding on the balcony balustrades finishes below the tiled surface;
- A perspex handrail, supported by metal brackets, has been installed penetrating the horizontal surface of the balustrades without providing any seals or flashings to ensure weathertightness;

(b) EIFS Cladding

- There are no jamb flashings installed behind the face of the windows.
- There are structural decking joists that penetrate through the cladding without any flashings or means of ensuring the junction is durable and weathertight for the northern and juliet decks;
- No head flashings have been installed over the garage door and no drip edge or overhang has been constructed;
- Raised gardens and soil have been installed against the EIFS cladding on the western elevation of the garage and against the cladding outside bedroom 4 on the northern elevation.

(c) Internal Roof Gutters

- The finishing around the internal downpipe outlets is poorly finished and there is insufficient downturn to provide inadequate and durable seal;

(d) Roof Parapets

- The fibre cement cladding on the internal face has no protective coating to prevent moisture from absorbing and transferring into the timber frame. The sheets have degraded and lost their structural stability. The sheets also have insufficient fastenings and a timber backing does not support some joints.

[39] The above mentioned causes of the leaks have resulted in moisture ingress, timber decay and corrosion of the steel lintel over the garage door. There is sufficient consensus from the experts agreeing that a full reclad is necessary. I accordingly accept that a full reclad is required.

[40] There is also general consensus among the experts that if the claimants had pursued and completed the remedial work recommended by the Jordan Report, then all of the present leak causes and damage most probably would have been discovered and so been able to be remedied at that time. Whilst the building quotations which the claimants obtained from May to June of 2002 were for remedial work on the decks alone (each in the vicinity of $19,000.00), the consensus of the experts was that embarking upon such remedial work would have uncovered further work necessary to repair and future proof the house against further moisture ingress damage.

LIABILITY OF THE FIRST RESPONDENT, RODNEY DISTRICT COUNCIL

[41] The first claim of negligence alleged by the claimants against the first respondent, the Rodney District Council, relates to the local authority's inspection of the building work during construction and in determining whether to issue and issuing a Code Compliance Certificate.

[42] The claimants allege that the local authority owes a duty of care to homeowners for economic loss arising out of defects caused by the local authority's negligence in the course of the building process. The local authority owed a duty of care to the claimants in issuing the building consent, inspecting the building work during construction, and in issuing a Code Compliance Certificate. They allege it is a general duty unaffected by issues of specific reliance.

[43] The local authority's inspections in this case was carried out by Council officers pursuant to section 76 of the Building Act 1991. That section defines inspections as, amongst other matters:

> "[The] taking of all reasonable steps to ensure –
>
> (a) That any building work being done in accordance with a building consent;"

[44] Local authority officers inspected the construction work between 18 August 1993 and 20 November 2001 and conducted some 17 site visits. On 30 November 2001, the local authority issued the Code Compliance Certificate 93/1029 for the property. The local authority's file establishes that a Mr Paul Griffin undertook a number of the building inspections including the final inspections on 26 October and 20 November 2001 and the Code Compliance Certificate was issued by a Ms Janice Davenport. Neither of these people were called in evidence by the first respondent. Instead, the local authority produced evidence from one of its senior officers, a Mr Hubbuck, who purported to give evidence about Council practice up until 2001 although he was not in New Zealand before 1995 and did not start working for the Rodney District Council until 2000. Mr Hubbuck did state that Paul Griffin was still working in the Rodney District.

[45] The law is quite clear. A local authority can be liable to owners and subsequent purchasers of residential properties for defects caused or not prevented by its building inspector's

negligence: *Invercargill City Council v Hamlin;*[1] *Bowen v Paramount Builders (Hamilton) Limited;*[2] *Mt Albert Borough Council v Johnson;*[3] *Stieller v Porirua City Council;*[4] *Body Corporate 188529 & Ors v North Shore City Council & Ors (No 3) (Sunset Terraces);*[5] *and Body Corporate 189855 & Ors v North Shore City Council & Ors.*[6]

[46] In *Sunset Terraces*, Heath J defined the duty of a local authority as follows:

> [220] In my judgment, a territorial authority owes a duty of care to anyone who acquires a unit, the intended use of which has been disclosed as residential in the plans and specifications submitted with the building consent application or is known to the Council to be for that end purpose. The duty is to take reasonable care in performing the three regulatory functions in issue: deciding whether to grant or refuse a building consent application, inspecting the premises to ensure compliance with the building consent issued and certification of compliance with the Code. The existence of such duty reflects the need to balance a homeowner's moral claim for compensation for avoidable harm against the Council's moral claim to be protected from an "undue burden" of legal responsibility. Put in that way, the duty takes account of the changed statutory framework and avoids tying the duty to the practices of a bygone era.
>
> [221] The obligation of the Council can be no higher than expressed in the statute itself: namely, to be satisfied on reasonable grounds that a building consent should issue; to take reasonable steps in carrying out inspections and to be satisfied on reasonable grounds that code compliance should be certified.

[47] The claimants allege that the local authority breached its obligations owed to the claimants by not identifying a number of the defects present in the property during the inspection process and that they issued a Code Compliance Certificate in November 2001 when reasonable grounds did not then exist for it to

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[1] [1996] 1 NZLR 513 at 526-40.
[2] [1977] 1 NZLR 394.
[3] [1979] 2 NZLR 230 (CA).
[4] [1983] NZLR 628.
[5] [30 April 2008] HC, Auckland, CIV-2004-404-003230, Heath J.

be satisfied that the building work complied with the Building Code. Of particular note in this regard is that Mr Jordan noted key issues in completing his inspection very shortly after the Code Compliance Certificate was issued.

[48] The claimants allege that the local authority's breaches amounted to negligence and caused the claimants' losses set down in paragraphs [29]-[31] above.

[49] The evidence for the claimants about territorial authority practice was given by Mr Bill Cartwright. He worked for the Auckland City Council from 1984 to 2002 and since then has been a private building surveyor. Mr O'Hagan and Mr Jordan were also able to give helpful evidence on local authority building inspection practices from their own extensive experience.

[50] Mr D Heaney SC and Ms S Macky, counsel for the Rodney District Council, concede that the local authority owes a duty of care to the claimants particularly in respect of carrying out its inspections of the house during the construction period. However, they deny that the local authority has breached any duties of care owed. They submit that the Council's actions in relation to this house and the claim as a whole need to be viewed in the correct context. They acknowledged that the claimants' dwelling falls into the category of a leaky building but that it is not a leaky building as a result of the Council's alleged negligence. Rather, it is the product "of a systemic failure in the building industry brought about by the changes instigated by Parliament from a prescriptive building system to a performance based system".

[51] Mr Heaney SC stated that the Council's inspection process at this house ought not be looked at with the benefit of hindsight but must be viewed taking into account the fact that the Building Act 1991 had only recently come into force including section 7 of the Building Regulations 1992.

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[6] [25 July 2008] HC, Auckland, CIV 2005-404-005561, Venning J.

[52] Mr Heaney SC further stated that in respect of local authority inspection systems it has been recognised by judicial authority that Councils are not in a position of a clerk of works. Nor are they insurers or guarantors of building work.[7]

[53] Mr Heaney SC further submitted that it was not standard practice by local authorities to carry out roofing inspections during this construction period. Mr Heaney SC pointed me to a decision by adjudicator David Carden in *De Wet v Waitakere City Council,*[8] stating that: "it was reasonable practice in 1994 – 1996 for Council inspectors not to carry out roofing inspections during construction."[9]

[54] Mr Heaney SC conceded that all the various expert witnesses agreed that the primary cause of damage to the claimants' property is the lack of waterproofing membrane underneath the tiles to the two cantilevered decks. Yet, Mr Heaney SC contended that taking into account that local authorities are not always on site and are not a clerk of works, local authority inspectors could not have had an opportunity at the claimants' property to be on site at the time the waterproofing membrane was supposedly laid. He further stated that the only way a local authority inspector could have determined whether the decks had butynol waterproofing membrane underneath the tiles would have been to carry out destructive testing.

[55] Mr O'Hagan stated that he would not expect a Council inspector to require the tiles to be lifted to ascertain whether or not waterproofing membrane was installed. Mr Heaney SC referred me to a determination of Adjudicator Green in *Milligan v Robert Brown Developments,*[10] which stated that Council officers are not expected to carry out building inspections by undertaking destructive testing to

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[7] See *Mt Albert Borough Council v Johnson,* n 3 above and *Stieller v Porirua City Council*, n 4 above.

[8] [2 October 2006] WHRS, DBH 2109.

[9] Ibid 102, 103

establish compliance with the Building Code. Mr Heaney SC stated that Mr Jordan, when he undertook his property inspection in January 2002 recommended that there was some moisture ingress issues occurring with the decks and that the tiles ought to be lifted to inspect the integrity of the waterproofing membrane. Mr Heaney SC concluded from that that Mr Jordan had no reason to believe that a waterproofing membrane had not been installed underneath the tiles.

[56] Mr Cartwright (one of the claimants' experts) however stated that the decks as built do not comply with the Building Code. Mr Jordan stated that in 1993 the local authority ought to have adopted some means of ensuring that the work was in accordance with the Building Consent and unlikely to be defective, and that may have been by actual inspection of the membrane or by producer statement. Mr Jordan further stated that a reasonable and prudent inspector in late 1993 going to the site, seeing what was actually constructed, ought to have taken steps to satisfy himself about compliance with the Building Code given the obvious variation from the consented plan in relation to the northern and juliet decks. And in 1998 and later in 2001, Mr Jordan stated there was even a higher level of responsibility expected from local authorities.

[57] Mr Hubbuck stated that there was no record on the Council file that the inspectors identified the discrepancy between the method of construction of the decks on the consented plans as compared to how the decks were in fact physically constructed and he accepted that the reasonable and prudent Council officer ought to have identified the difference between the deck as constructed and the deck on the consented plans. He further accepted that the method of construction of the decks had led to moisture ingress and serious damage.

[10] [20 December 2004] WHRS, DBH 756.

[58] Mr Hubbuck produced at the hearing a Council manual identified as an inspection regime that he said ought to have applied in 1993 and 1998.

[59] Mr Jordan, when considering the Council's inspection regime as set down in the above mentioned manual, suggested that there were a couple of significant omissions. He said it was a basic list of inspections but was not as comprehensive as he would have expected, and considered that there ought to be an inspection of the roof and membrane.

[60] Mr Cartwright's view was that the Council ought to have carried out a roof inspection.

[61] It was apparent from the evidence that the first respondent's inspectors when inspecting the house did not follow their own checklist. Mr Jordan's view was that a reasonable and prudent Council inspector ought to have taken steps to be satisfied about compliance with the roof and its construction with the Building Code and the Building Consent, even in 1993.

[62] Mr Jordan stated that in 1998 a reasonable and prudent Council inspector at final inspection would carry out a thorough inspection of the outside and inside of the house looking at things like ground clearances, cladding clearances, handrail heights, waterproofing and wet areas. Mr Cartwright and Mr Jordan were therefore of the view that a reasonable and prudent inspector ought to have identified the construction defects with this house.

[63] Mr Hubbuck accepted that the purpose of a local authority's final inspection was to enable the Council to be in a position to assess compliance with the Building Code. Mr Paykel, Mr Cartwright and Mr Beran were of the view that a Code Compliance Certificate should not have been issued by the first respondent in November

2001 or that they did not have reasonable grounds to issue such a certificate.

[64] A local authority's statutory obligation when it comes to certifying the Code's compliance must be satisfied on reasonable grounds that the building work complied with the Code requirements. Heath J stated in *Sunset Terraces* that " The inspection process, leading up to that certification, is designed to enable the Council to express that final conclusion and to incorporate it into the code compliance certificate required by the legislation."[11]

[65] There is sufficient consensus amongst the experts for me to conclude that the Council was negligent in failing to detect the significant faults with this house, all of which were breaches of the Building Code. The two principal construction defects (the northern and juliet decks and roof parapet cladding) were definite construction departures from the permitted plans. The local authority missed both these defects or failed to pay any attention to them. They were both significant causes of water ingress and Mr Jordan, just two months after the last local authority inspection, detected both and alluded to both as water ingress problems.

[66] The law regarding a local authority's duty of care in this area is now clearly understood and most particularly set down in *Sunset Terraces*. The preponderance of High Court decisions overrules any determination of this Tribunal or its predecessor alluded to by Mr Heaney SC in his submissions.

[67] I conclude therefore that the first respondent's inspections in failing to detect such faults and in issuing the Code Compliance Certificate was negligent. After considering all the evidence I determine that the Rodney District Council is jointly and severally

[11] See n 5 above, [446].

liable for 100% of the total damages as set out in paragraph [114] below.

(b) Negligent Misstatement

[68] The second head of negligence alleged by the claimants is negligent misstatement relating to the Land Information Memorandum (LIM), issued by the Rodney District Council.

[69] The claimants stated that their purchase agreement was conditional on their satisfaction with the LIM. The original LIM issued by the Rodney District Council to the claimants' conveyancing lawyers omitted reference to a Code Compliance Certificate. The claimants' solicitors subsequently obtained a copy of the Code Compliance Certificate issued by the local authority by which it represented that reasonable grounds existed for it to be satisfied that the construction of the house complied with the Building Code. The claimants' conveyancing lawyer sent a copy of the Code Compliance Certificate to the Council on 16 January 2002. The local authority then re-issued page 3 of the LIM on 22 January 2002 that stated that it issued a Code Compliance Certificate on 30 November 2001.

[70] The claimants stated that in deciding to declare their purchase agreement unconditional, they relied on the statement in the Code Compliance Certificate about the building work. They contend that this was a negligent misstatement on the part of the first respondent.

[71] I do not find the claimants' evidence credible regarding this matter. Their agreement for purchase included the LIM condition. The initial LIM they received from the local authority was incomplete for it did not include the Code Compliance Certificate. Nevertheless, they instructed their conveyancing lawyer on 21 December 2001 to render their purchase unconditional.

[72] The evidence does not support the claim of negligent misstatement by the Rodney District Council. The claimants' evidence was that in deciding to declare the purchase agreement unconditional they relied on the Code Compliance Certificate (even though the house was not code compliant). Yet they instructed their conveyancing lawyer to render their contract of purchase unconditional when they had only received an incomplete LIM omitting reference to the existence of a Code Compliance Certificate.

[73] I conclude that there is no evidence to found a claim of negligent misstatement against the first respondent. The evidence does not support the claim that the claimants relied upon the local authority's statement in the LIM and Code Compliance Certificate to found the claim.[12] This claim in relation to negligent misstatement on the part of the Council, therefore fails.

LIABILITY OF THE SECOND RESPONDENT, MRS KERKIN

(a) Claim in Contract

[74] The claimants allege that the second respondent was in breach of the vendor warranty and undertaking as set down in clause 6.2 (5) of their agreement for sale and purchase dated 15 December 2001. The claimants allege that Mr and Mrs Kerkin (Kerkins) caused or permitted construction work to be done which required a Building Consent and indeed the Kerkins applied for that Building Consent on 3 June 1993. The claimants alleged that the house was not built in accordance with the Building Act 1991 and did not comply with the Building Code. Indeed, the expert witnesses (Messrs O'Hagan, Beran, Cartwright and Paykel) and the first respondent's witness, Mr Hubbuck, all agreed that water ingress had occurred and that the house did not comply with the Building Code in January 2002.

[12] See *Hedley Byrne & Co Limited v Heller & Partners Limited* [1964] AC 465 (HL).

[75] The claimants conclude that Mrs Kerkin, both in her individual capacity and also as the sole trustee of her husband's estate, is therefore in breach of clauses 6(2)(5)(b) and (d) of the agreement for sale and purchase and is liable to the claimants for all losses they suffered.

[76] The Kerkins jointly purchased the property upon which the house was constructed. Notwithstanding that Mrs Kerkin stated that she had little or no involvement with the construction of the house. I find her evidence lacked credibility in significant areas.

[77] She jointly owned the property with her late husband. The evidence suggests she had significant input into the construction of the house. The late Mr G Kerkin controlled the earlier beginnings of the house and its construction. Mrs Kerkin said she controlled the household finances and paid the bills. She therefore paid the various tradesmen engaged by both her and her late husband jointly, who were contracted from time to time to construct various parts of the building. Mrs Kerkin also had a direct involvement at times with the local authority and with the local authority's inspectors. I therefore find that both Mr and Mrs Kerkin were jointly engaged in the building of the house.

[78] The Kerkins engaged Contemporary Design & Build Limited (CDB) (former company no. 503583) now liquidated and struck off the Companies Register, to design their house, erect the house's foundation, and to take the building to at least frame-up-stage. Three of the principals of CDB gave evidence at an earlier witness summons hearing. The three had difficulty in recalling precise details as to CDB's actual involvement. From the totality of the evidence, I find that the Kerkins did not engage CDB with a turnkey contract (as stated by Mrs Kerkin and submitted by her counsel). CDB usually undertook turnkey contracts and the company quoted initially for a

turnkey contract. The evidence however is that the Kerkins could not afford such a contract and further suggests that the Kerkins were always going to undertake much of the finishing work themselves.

[79] CDB designed the house and took development to the frame-up-stage. It did not construct the roof and only framed up the decks. Whilst the evidence is not precise about the cladding, it probably did not install the cladding of the house. The decks and parapets were not constructed in accordance with the permitted plans. CDB principals stated that the Kerkins chose and purchased much of the building material themselves. The evidence of Mr C Crean (a director of CDB) recalled this aspect because he mentioned that the company's contract with the Kerkins was most unusual and that Mr Kerkin continually reduced CDB's involvement. I found the evidence of Mr Crean credible.

[80] The Kerkins' involvement was therefore considerable. They significantly controlled construction of their house. Mr Kerr, a neighbour of the Kerkins, gave brief evidence suggesting that from his observation Mr Kerkin was in control of the project. Mrs Bridges, Mrs L Kerkin's mother, stated that Mr G Kerkin tiled the decks (northern and juliet) and some three years later painted the tiles. Mr Jordan indicated the decks were poorly constructed.

[81] The Kerkins engaged the services of several contractors to do distinct portions of the building work (for example, CDB the foundations and frame-up and another entity as the roofing contractor, being just two). In doing so they failed to give sufficient attention to what was actually done by each contractor. Much of the resulting construction work was defective allowing the water to ingress resulting in the damage to the house. Throughout, the Kerkins controlled the construction. They were the genesis of the leaky house.

[82] I find that the Kerkins made the decisions to depart from the plans and specifications, probably upon cost reduction grounds. There is evidence that the Kerkins controlled the engagement of all contractors and carried out various portions of the building work themselves. The Kerkins decided on the types of material, cladding and roof and how the decks were to be clad. The late Mr G Kerkin laid the tiles on the two defective decks and he painted the tiles with presumably paint thought to have some waterproofing qualities but which was a defective sealant.

[83] I also find that the Kerkins were head-contractors and or project managers. Whilst they were not developers, for they built this house for their own occupation, they nevertheless controlled the building project and attempted to finish the house themselves. They also directed or allowed significant departures from the permitted plans. The evidence concerning the significant sources of the leaks also indicates that this house had been leaking before the Kerkins sold it. They must have retro-fitted the tin sheet under the internal ceiling beneath the deck. Mr Jordan identified the house as a leaky building in January 2002, the month the Kerkins sold it and just two months after the local authority's issue of its Code Compliance Certificate.

[84] I therefore conclude that the second respondent, Mrs Kerkin, was in breach of her warranty in the sale and purchase agreement and that such breach resulted in the damages now claimed by the claimants. The second respondent (jointly and severally in her personal capacity and as sole trustee of her late husband's estate) is therefore liable to the claimants for the full amount of the damages assessed in paragraph [114] below.

(b) Claim in Tort

[85] The claimants' second cause of action against the second respondent, Mrs Kerkin, alleged that the Kerkins were developers, head contractors and project managers and thereby owed a non-delegable duty of care to them as purchasers to ensure that the house was constructed with due care and skill, in accordance with reasonable building practices and to comply with all statutory and regulatory requirements.

[86] I have found that the Kerkins had direct involvement and control over the construction of the house. Whilst they were not developers as that term is understood in *Mt Albert Borough Council v Johnson,*[13] the Kerkins were nevertheless head contractors, project managers and controlled the build. I am satisfied on balance from the totality of the evidence that Mr and Mrs Kerkins' role as project managers is well founded for the following reasons:

- Their actions in overseeing all aspects of the construction, engaging the various trades involved and in undertaking some of the work themselves, fit the description of head contractor and project manager.[14]
- The law is clear regarding the legal responsibility of head contractors / project managers.
- Those who are in control and oversee the construction of residential properties owe a non-delegable duty of care to subsequent purchasers.
- That duty arises where a person assumes legal responsibility by giving directions in relation to the construction of a dwelling at an operational level and/or having direct involvement in matters of construction of the dwelling which gives rise to damage or loss.

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[13] See n 3 above, 240-241.
[14] See *Gray & Ors v Lay & Ors* [11 March 2005] WHRS, DBH 0027, Adjudicator Dean, 22.1-22.7.

This has been clearly established in New Zealand, in particular I refer to *Lester v White*[15] and *Chase v De Groot.*[16]

[87] The duties the law imposes on head-contractors / project managers of houses cannot be delegated.[17] Such head-contractors cannot avoid those duties through suggesting they merely played a passive role in the building process. Such legal duties are imposed irrespectively of any reliance placed on the various contracted trades.[18] I find that the Kerkins took responsibility for giving the directions necessary to the various trades they engaged and supervised (whether in an active or passive way) throughout the build. Mr G Kerkin probably had the greater involvement and was more often in "control" as Mrs Kerkin stated. However, they overall, jointly took responsibility and governance of the building. The building had someone at the centre directing the construction process and I find that it was the Kerkins who assumed this role throughout from 1993 to 2001.

[88] Mr Black also submitted a "limitation defence" on behalf of the second respondent. He suggested the principal defects were the decks which resulted in water ingress to the house, and that the construction of these decks (whether by "act or omission") was carried out "over 10 years ago". There is no evidential support that the decks were completed in 1993. Indeed, Mrs Bridge stated that Mr G Kerkin laid the tiles and then some three years later painted them. I therefore find this defence fails.

[89] Mr Black made comprehensive submissions suggesting that the Kerkins were not developers, builders or controlled the building work, but, instead entered into a turnkey contract with CDB. I conclude that the evidence I have heard does not support such a

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[15] [1992] 2 NZLR 483.
[16] [1994] 1 NZLR 613.
[17] See *Mt Albert Borough Council v Johnson*, n 3 above.
[18] See *Dicks v Hobson Swan Construction Ltd* (in liquidation) (2006) 7 NZCPR 881, Baragwanath J.

submission. I find that the Kerkins were negligent and in breach of their non-delegable duty of care to subsequent owners. The evidence establishes that the house is a leaky building and that it did not comply with the Building Code. The Kerkins as project managers of the construction of their house, must carry the burden of responsibility to ensure that their engaged contractors achieved the required standards[19]. The Kerkins' breach of such a non-delegable duty of care caused the losses and damages suffered by the claimants. I therefore find that the second respondent, Mrs Kerkin (jointly and severally in her personal capacity and as sole trustee of her late husband's estate) is liable in negligence for the full amount ordered set down in paragraph [114] below.

SECOND RESPONDENTS' CROSS-CLAIM AGAINST THE FIRST RESPONDENT, RODNEY DISTRICT COUNCIL

[90] The second respondent claims that the Rodney District Council, as the territorial authority was responsible for performing the duties and exercising the powers conferred under the Building Act 1991, with regard to the building work necessary to construct a house, and therefore owed the Kerkins duties to exercise reasonable skill and care in performing its statutory functions. Counsel for the second respondent submitted that there were policy considerations supporting the position of the said duty of care and that the existence of such duty of care for negligent inspections by a local authority has been well established. A number of authorities were submitted in support of such submissions.

[91] Having found however that the evidence supports the foundation that the Kerkins were the head contractors and supervisors of the house construction and indeed, the genesis of the house build, the reality is that this is a clear case of the head contractor/building controller causing damage by their own

[19] See *Shepherd & Ors v Lay & Ors* [11 March 2005] WHRS, DBH 939, Adjudicator Dean.

negligence. I conclude that the second respondent cannot succeed in a claim against the first respondent, the Rodney District Council, for damages. The High Court in *Three Mead Street Limited v Rotorua District Council*[20] clearly confirmed that "a Council owes no duty of care to a builder whose own defective workmanship was the cause of the damage."[21]

[92] I conclude that this cross-claim by the second respondent cannot succeed.

REMEDIAL COSTS

[93] The claimants submit that in leaky building cases, the measure of damages is the reasonable cost of remedial work when repairing the damage.[22]

[94] The Tribunal agrees and I conclude from all of the experts' evidence that repairing the damage is possible and reasonable notwithstanding that Mr Black for the second respondent advanced that demolition and construction of a new home might be a cheaper option.

[95] On issues of quantum I conclude that the claimants' experts argued somewhat too cautiously and for an overly expensive reclad.

[96] Mr Ranum estimated the costs for remedial work at $401,000.00. Mr Ranum reviewed in his testimony, a breakdown of costs for the remedial works submitted by K & B Builders of $208,730.25. He said he believed that estimate to be unrealistic and significantly underestimated the scope and complexity. Mr Ranum made this critical assessment without having seen the house and

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[20] [2005] NZLR 504, Venning J.
[21] Ibid [54].
[22] See *Invercargill City Council v Hamlin*, n 1 above, 526-540.

purely from the scope of works given to him by his engaging party. Mr Ranum's estimate of remedial costs included a new roof, preliminary and general costs at 12%, 60% timber replacement, cavity cladding costs at $150.00 per square meter, large project management costs and professional fees. He said that the current economic climate, where builders maybe more competitive, would not impact significantly on his estimate.

[97] The consensus from the experts Messrs O'Hagan, Bayley and Beran, was that 60% timber replacement was too high. Mr Beran said that there was insufficient moisture testing done to extrapolate a need for 60% timber replacement. The consensus from these experts was timber replacement of 20% to 30% was more probable. They were also of the view that:

- preliminary and general allowances would be 6-8%;
- professional fees more in the vicinity of $25,000.00;
- claddings costs more likely to be $105.00 per square meter;
- replacement of the roof was unnecessary - for if any decay in the roof framing was discovered during repair work (and none was evident) then that would be confined to outside the building envelope and remedial work would simply mean cutting away and replacing the decayed part of the roof rafters.

[98] Whilst I found Mr Ranum's costing evidence thorough and extensive, he was not prepared to make what appeared to be appropriate concessions, particularly when confronted with the opposing expert views of Mr G Bayley, who had done a thorough scrutiny of Mr Ranum's costing.

[99] Mr Paykel and Mr Ranum seemed to state that the only reliable assessment of the remedial costs was the schedule provided by Mr Ranum.

[100] After hearing all the experts on remedial requirements and possible costs, and considering the careful scrutiny Mr G Bayley made of Mr Ranum's costing, it is apparent to me that some of Mr Ranum's allowances are unrealistically high. I found the expert opinions of Messrs O'Hagan, Bayley, Beran and Jordan credible, more realistic and prepared when necessary to make appropriate concessions. For instance, Mr G Bayley did accept that his cost quotation analysis was mistaken on some matters. I found his evidence to be more realistic of current costings, although his final amended total was still missing some necessary cost items.

[101] I accept that remedial work is difficult to price for a great deal is really unknown until repairs commence. However, after considering the evidence of the WHRS assessor, and the respondents' experts, I find on balance that Mr Ranum's costings are unrealistically high.

[102] In determining the remedial costs I find:

- the preliminary and general expenses to be more like 7%;
- contractors overheads and margin to be more realistic at 8%;
- contingency allowance 10%;
- professional fees to be more in the vicinity of 12%.

[103] I accept the evidence of Mr G Bayley when he itemised the betterment components of Mr Ranum's remedial costs. I conclude that 60% timber replacement is too high an estimate, cladding costs are more realistic at $105/m^2$, and that a new roof is not necessary.

[104] Taking these factors into account I conclude that the costs of the necessary remedial work to restore the house to a weathertight code compliant dwelling to be $250,000.00 excluding GST.

OTHER LOSSES

[105] In addition to the remedial costs the claimants seek the following:

(a) $832.64 in Local Authority fees for lodging Building Consent for remedial works;
(b) $9,900.00 for an alternative accommodation;
(c) $1,826.00 in additional utility charges; and
(d) $2,200.00 for storage costs.

[106] There has been no serious challenge to any of these amounts. I accept that the claimants will need to move out of their house and place their furniture and possessions in storage off site until the remedial work is completed and the amounts sought to cover these expenses are reasonable.

[107] I therefore uphold the claim for other losses to the full extent of $14,752.68.

GENERAL DAMAGES

[108] The claimants jointly claim general damages in the amount of $30,000.00 each for stress, relationship pressures, inconvenience and loss of enjoyment of their property as a result of their house being a leaky building and the repair work that is yet to be undertaken.

[109] Mr Shand, counsel for the claimants, submits that $30,000.00 each in general damages is not unreasonable in the circumstances. He mentioned that the most recent leaky building decision in the High Court[23] awarded owners that lived in the units

[23] See *Body Corporate 185960 & Ors v North Shore City Council & Ors* ("Kilham Mews") [22 December 2008] HC, Auckland, CIV 2006-404-003535, Duffy J, [123]-[130].

$25,000.00 each. He submits that those unit owners were not as badly affected as Mr and Mrs White and their children.

[110] Mr Shand also pointed me to other recent leaky building cases where the Court awarded general damages to plaintiffs in similar positions as follows:

(a) In *Dicks v Hobson Swan Construction Limited & Ors,*[24] the High Court canvassed various awards of general damages and arrived at a figure of $22,500.00.

(b) In *Body Corporate 188529 & Ors v North Shore City Council & Ors (No.4)*[25] the Court awarded $25,000.00 in general damages to each individual.

(c) In *Body Corporate 189855 & Ors v North Shore City Council & Ors* ("Byron")[26] the Court awarded $20,000.00 to owner occupiers.

[111] I accept that Mr and Mrs White and their children have suffered stress, anxiety, inconvenience and disruption as a result of their home being a leaky building. Indeed, Mr and Mrs White have incurred medical expenses for the stress it has caused them. However, the claimants understood that their house was not maintenance-free and was a potential leaking building, and indeed, was a leaking building on or shortly after settlement of their purchase. Furthermore, the claimants' failure to take prompt remedial action has contributed to the deterioration of their house as well as the stress, anxiety, inconvenience and disruption they have suffered.

[24] See n 18 above, [123].
[25] [30 September 2008] HC, Auckland, CIV 2004-404-3230, Heath J.
[26] [25 July 2008] HC, Auckland, CIV 2005-404-005561, Venning J.

[112] Accordingly, I find that for these reasons this claim is distinguishable from the above mentioned High Court decisions whereby awards in the vicinity of $30,000.00 each for general damages have been made.

[113] I am satisfied that an award of general damages in the amount of $30,000.00 for each of the claimants in this matter is overly generous. Whilst I uphold the claim for general damages, a more modest award in the amount of $10,000.00 each for Mr and Mrs White in this matter is more realistic and better recognises the degree of stress, anxiety, inconvenience and the loss of enjoyment of their home that I apprehend they have suffered to date, given their own contribution to the problem. I find that the claimants have exacerbated their considerable stress, anxiety and inconvenience as a consequence of their inaction to address the remedial needs of their house. In determining the quantum of general damages, I am cognisant of the impact a further reduction based on my assessment of the claimants' failure to mitigate, will have.

SUMMARY OF DAMAGES

[114] To summarise the position therefore, I determine that the claimants have suffered loss and damage as a result of their dwelling being a leaky building in the amount of $316,002.68 calculated as follows:

Cost of repairs including GST (see para [59])	$281,250.00
Consequential losses (see para [63])	$14,752.68
General damages (see para [69])	$20,000.00
Total Damages	$316,002.68

MITIGATION AND INTERVENING ACTS

[115] The legal position regarding the obligation to mitigate is clear. The claimants must take all reasonable steps to mitigate their loss. They will not recover for any losses that should have been avoided.[27] The first and second respondents have submitted that the claimants have failed to mitigate their losses and carried out no effective maintenance even though they were aware of potential water ingress problems from the time of purchase.

[116] The duty to mitigate is significant. A claimant cannot succeed if subsequent to the tort or breach of contract he or she could reasonably have avoided the loss. In addition the law does not allow a claimant to recover damages to compensate for loss which would not have been suffered if he or she has taken reasonable steps to mitigating their loss. Sometimes a claimant cannot afford to take steps in mitigation of loss. The general principal is that the claimant cannot reasonably be required to spend money where he or she lacks the means to do so.[28]

[117] That is not the situation with this case. The claimants in evidence said that during 2002 and 2003 they had the financial means to undertake remedial work. In late 2002, the claimants' conveyancing lawyer informed the second respondent's lawyer that they "will instruct their builders to repair the damage - for they wished to take mitigation measures".

[118] The claimants are property owners with some experience in homeownership and in evidence stated that they are aware of annual maintenance requirements for houses. Furthermore, in this case, they obtained at around the time of purchase a report (the Jordan Report) identifying critical structural concerns with their house and

[27] *British Westing House Electric & MFG Co Limited v Underground Electric Railways Co of London Limited* [1912] AC 673 (HL), [689]; and *Sullivan v Darkin* [1986] 1 NZLR 214, [217]-[218] (CA).

[28] See *Clippens Oil Company v Edinburgh and District Water Trustees* [1907] AC 291 (HL).

recommending short and medium term repairs. The claimants then obtained a scope of works from Mr Jordan and sought quotations from three builders to attend to the immediate remedial work. They also sought legal advice and approached their vendors, the Kerkins, for contribution. Having carried out all such enquiries, the claimants took no further action. In evidence they stated that they did have difficulty in engaging a builder. Their perseverance in trying to find a builder was missing. They did not take all reasonable steps, which the law requires of them, to mitigate their loss.

[119] The evidence determines that apart from lodging a claim on 7 November 2003 with the WHRS, the claimants took no effective steps to mitigate the damage that was occurring to their house.

[120] Had the claimants undertaken remedial work in 2002 – 2003, when they were financially able to do so, the evidence is that the costs would have been somewhere from $19,000 upwards to $60,000 (all excluding GST) or a little more. Their failure then to remedy the defects means that the remedial costs have over time increased significantly to around $316,000.

[121] I conclude from all the evidence that by not undertaking the necessary remedial work in 2002/2003 and annually the usual maintenance and repairs, the claimants allowed their house to deteriorate and thus greatly increase the extent and cost of remedial work.

[122] I find that the claimants failed to mitigate their loss. I assess the damages reduction at 45% of the total amount of the claim – i.e. $142,201.20 (45% of $316,002.38).

[123] The second respondent submitted that related to the mitigation issue is the *volenti* principle. The second respondents submitted that the claimants knowingly assumed the risk about the

deficiencies in the decks from 24 January 2002 (date of the Jordan Report) but failed to avoid the risk. I do not accept that this principle has any relevance to this case. There was no evidence adduced which concluded that the claimants received the Jordan Report or knew of the deck defects before they settled the purchase and took possession of their house.

CONTRIBUTORY NEGLIGENCE

[124] The first and second respondents submitted at the hearing that the claimants are contributorily negligent.

[125] Mrs White stated in her evidence that as a result of their experience with homeownership in Britain, they knew of the importance of engaging a building surveyor to provide a building report. Mrs White further stated that they would not have gone ahead and purchased the house if they had not obtained a LIM report identifying that a Code Compliance Certificate had been issued. The evidence records that the LIM report issued by the first respondent on 20 December 2008 did not in fact record that a Building Consent and Code Compliance Certificate had been issued and yet the claimants went ahead and declared their purchase unconditional on 21 December 2001. Furthermore, Mr White stated that the claimants did not want to have to wait until February for the information that was contained in the Jordan Report.

[126] The respondents submit that this evidence indicates the claimants were keen on purchasing the house and did not see that any adverse conclusions which might appear in the Jordan Report would be an impediment to proceeding with the purchase. They had already decided to proceed with the purchase and declared the contract unconditional prior to obtaining the Jordan Report.

[127] The respondents submit that the claimants failed to take simple steps of protecting themselves by making the purchase agreement conditional on the findings of their building surveyor's report.

[128] The law is clear in this area. Damages maybe reduced where the claimants' negligence has contributed to, that is, being a partial cause of, their loss. Where a claimant has been contributorily negligent, a Court may apportion loss by reducing the quantum of damages awarded to the claimants.[29] However, the *Sunset Terraces* decision and *Hartley v Balemi & Ors*[30] are authority for there needing to be a "relative blameworthiness" and a causal link between the plaintiff's and defendant's negligence.

[129] The law is also reasonably clear that homeowners, at the time the Whites entered into the sale and purchase agreement, are not negligent by failing to obtain a pre-purchase inspection. Therefore failure to make the purchase agreement conditional on a favourable building or pre-purchase inspection is not sufficient to establish contributory negligence.

[130] By the time the claimants obtained the report the sale and purchase was already unconditional. Accordingly they were contractually obliged to settle the purchase. The claimants lack of action in relation to the issues raised in the report are therefore more appropriately considered in relation to the issue of failure to mitigate. In addition the negligence on the part of the claimants had no causal link to the respondents' faults or to the loss the claimants have suffered.

[131] The defence (albeit partial) of contributory negligence advanced by the first and second respondents must therefore fail.

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[29] See *Day v Mead* [1987] 2 NZLR 443 (CA).
[30] [29 March 2007], HC, Auckland, CIV 2006-404-002589, Stevens J.

RESULT

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

I. The first respondent, Rodney District Council, breached the duty it owed to the claimants and is therefore jointly and severally liable to pay the claimants the sum of **$173,801.48** (being $316,002.68 less failure to mitigate reduction of $142,201.20).

II. The second respondent, Ms Lorelle Kerkin, is in breach of the duty she owed to the claimants and is therefore jointly and severally liable to pay the claimants the sum of **$173,801.48** (being $316,002.68 less failure to mitigate reduction of $142,201.20). The second respondent is also liable to the claimants for that same amount for her breach of the contractual warranty.

CONTRIBUTION ISSUES

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

[134] Section 92(2) of the Weathertight Homes Resolution Services Act 2006, provides that the Tribunal can determine any liability of any other respondent and remedies in relation to any liability determined. In addition, section 90(1) enables the Tribunal to make any order that a Court of competent jurisdiction could make in relation to a claim in accordance with the law.

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

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

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

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

[138] As a result of the breaches referred to in para [132], the first and second respondents are jointly and severally liable for the entire amount of the claim. This means that both respondents are concurrent tortfeasors and therefore each is entitled to a contribution towards the amount they are liable for from the other, according to the relevant responsibilities of the parties for the same damage as determined by the Tribunal.

SUMMARY OF THE RESPONDENTS' LIABILITIES

[139] Based on the evidence considered, I find that the first respondent, Rodney District Council, is entitled to a contribution of 70% from the second respondent in respect of the amount the second respondent has been found jointly liable for.

[140] The second respondent is therefore entitled to a contribution of 30% from the first respondent in respect of the amount the first respondent has been found jointly liable for.

CONCLUSION AND ORDERS

[141] The claimants claim is appropriate to the extent of $173,801.48. For the reasons set out in this determination I make the following orders.

[142] The Rodney District Council is ordered to pay the claimants the sum of $173,801.48 forthwith. The Rodney District Council is entitled to recover a contribution of up to $121,661.04 from Lorelle Joy Kirken for any amount paid in excess of $52,140.44.

[143] Lorelle Joy Kerkin is ordered to pay the claimants the sum of $173,801.48 forthwith. Lorelle Joy Kerkin is entitled to recover a contribution of up to $52,140.44 from the Rodney District Council for any amount paid in excess of $121,661.04.

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

First Respondent	$52,140.44
Second Respondent	$121,661.04
Total amount of this determination	$173,801.48

DATED this 4th day of March 2009

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K D Kilgour

Tribunal Member