IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI 2010-100-000112
[2012] NZWHT AUCKLAND 4

BETWEEN	ROGER JERZY AND SAMANTHA KAY ZAGORSKI Claimant
AND	WILKINSON BUILDING AND CONSTRUCTION LIMITED First Respondent
AND	ALLIED HOUSE INSPECTIONS LIMITED Second Respondent
AND	AUCKLAND COUNCIL Third Respondent
AND	RICHARD ANDREW JOHN WILKINSON Fourth Respondent
AND	CATHERINE WILKINSON Fifth Respondent
AND	TIMOTHY JOHN BURCHER Sixth Respondent
AND	HITEX BUILDING SYSTEMS LIMITED Seventh Respondent
AND	IAN CONRAD HOLYOAKE Eighth Respondent

Hearing: 14, 15, 16 and 22 November 2011

Appearances: Claimants – Stuart Robertson and Michael Lake
First Respondent – John McDonald and Carolyn Boell
Second Respondent – No appearance
Third Respondent – Paul Robertson
Fourth, Fifth and Sixth Respondents – Michael Black
Seventh and Eighth Respondents – Bill Endean

Decision: 3 February 2012

FINAL DETERMINATION
Dealing with Liability – Quantum adjourned
Adjudicator: P McConnell and M Roche

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INTRODUCTION

[1] In May 2006 Mr and Mrs Zagorski purchased a house in Meadowbank from the Wilkinsons. The house was a former leaky home which the Wilkinsons had purchased through their family trust and repaired. In early 2010 the Zagorskis decided to sell the house. They commissioned a pre-sale property inspection. This revealed that the house was, again, a "leaky home".

[2] The Zagorskis have brought a range of claims against the various respondents. When they bought the house it was described in real estate advertising material as being in "excellent" condition. It has transpired that shortly before the sale, a moisture probe system installed by the Wilkinsons indicated elevated moisture levels in a number of locations. The Zagorskis claim that they were induced to buy the house by a false representation as to its condition and seek cancellation of the sale and purchase contract. They also claim damages from the vendors, including Mr Burcher, an independent trustee who did not sign the sale and purchase agreement, for breach of vendor warranties in the agreement.

[3] The Zagorskis obtained a pre-purchase report before purchasing the house from Allied House Inspections Limited. They claim that Allied was negligent in its inspection because it failed to bring the presence of moisture detection probes at the house to their attention and to either test the property using the probes or recommend that the Zagorskis do so.

[4] Mr Wilkinson is a builder and the director of Wilkinson Building and Construction Limited. He carried out the construction work necessary to repair the house but did not install the cladding. The cladding used was the Hitex system. It was installed by subcontractors engaged by the cladding manufacturer, Hitex Building Systems Limited. Mr Holyoake is the director of Hitex and had some

involvement with the job. The Zagorskis have claimed in negligence against Mr Wilkinson and Mr Holyoake personally and against their companies. They also allege that in buying, remediating and selling the formerly leaky home for profit, Mr and Mrs Wilkinson were acting as developers and as such owed a duty of care to future purchasers.

[5] The Zagorskis have also claimed in negligence against the Council alleging that its officers were negligent in issuing the building consent and in conducting inspections of the remedial work.

[6] The issues that we therefore need to address are:

I. What are the defects causing leaks and damage?
II. Was Allied negligent when inspecting the house and reporting on its condition to the Zagorskis?
III. Was there a breach of the vendors' warranties in the sale and purchase agreement by the trustees?
IV. Is Mr Burcher liable under this agreement even though he did not sign it?
V. Are the Zagorskis entitled to cancel the agreement for sale and purchase of the house?
VI. Were Mr and Mrs Wilkinson acting as developers?
VII. Did Mr Wilkinson and Wilkinson Building and Construction Limited breach their duty of care to future purchasers as builders?
VIII. Is Hitex liable for the creation of defects?
IX. Did Mr Holyoake personally owe a duty of care to future purchasers? If so, did he breach that duty of care?
X. Was the Council negligent in issuing the building consent?
XI. Was the Council negligent in conducting its inspections?
XII. What is the appropriate scope of the remedial work?
XIII. How should quantum be calculated?

BACKGROUND FACTS

[7] In May 2004 the trustees of the Wilkinson family trust purchased 2/59 Fancourt Street, Meadowbank. The house was a leaky home that had been the subject of a settlement with the Council. After purchasing the house the Wilkinsons had the house re-clad with Hitex which was supplied and installed by Hitex Building Systems Limited. The building work apart from the cladding installation was carried out by Mr Wilkinson's company under his supervision. The house was inspected a number of times by Council inspectors while it was being remediated and on 9 June 2005 a Code Compliance Certificate was issued. The Wilkinsons lived in the house until May 2006 when they sold it to the Zagorskis. They then moved to rental accommodation for eighteen months while building the house in Meadowbank Road where they presently reside.

[8] Mr Holyoake, the Hitex director, had some involvement with the Hitex installation, particularly after the site supervisor resigned towards the end of the job. There were forty other Hitex jobs being done at the same time however and Mr Holyoake was spread thinly.

[9] Mr Holyoake is also the director of the Moisture Detection Company Limited (MDCL) which manufactures and installs probes in houses for the purpose of detecting moisture. Moisture probes (MDU) were installed at the house when it was re-clad. The probes were read on several occasions while the Wilkinsons were living at the house and on each occasion, Mr Wilkinson was sent a report concerning the results.

[10] A reading carried out in December 2005 showed two locations on the rear deck of the house where moisture readings were extremely high. On 8 February 2006 Mr Holyoake wrote to Mr Wilkinson and told him that two probes were recording leaks in the deck that needed attending to.

[11] No remedial work was carried out on the deck. However, on 18 May 2006 50 additional probes were installed at the house. The installers found advanced decay in the rear deck timber framing and called Mr Holyoake who came and removed samples of the decayed timber.

[12] Readings taken on this occasion are set out in a MDCL report that is dated 18 May 2006. There is a dispute about the date Mr Wilkinson was sent this report. He says he received it on 18 May 2006 and that it was made available to prospective buyers at an open home at the house on 24 May 2006. Mr Holyoake says that he sent the report to Mr Wilkinson on 30 May 2006 when he heard the house was being sold. Neither Mr Zagorski nor the real estate agent, Mr Lantz, has any recollection of the report being available at the open home. Mr Zagorski says he did not see it at any stage when purchasing the house.

[13] On 28 May 2006 the Zagorskis entered into a sale and purchase agreement for the property. This agreement was conditional on a building report being obtained that was satisfactory to the Zagorskis. The agreement was signed by Mr and Mrs Wilkinson in their capacity as trustees for the Wilkinson Family Trust. The third trustee, Timothy Burcher, who is the Wilkinson's solicitor, did not sign the agreement. However he was named as one of the vendors and subsequently signed the property transfer.

[14] Mr Pike from Allied inspected the property and provided a report to the Zagorskis which was generally positive about the house. While there is a reference in the report to moisture plugs being noted throughout the house, there was no emphasis on or explanation about the plugs in the report. After receiving the Allied report, the Zagorskis made the sale and purchase agreement unconditional.

[15] In February 2010 the Zagorskis decided to sell the house because they were relocating to Sydney. They had enjoyed living

there and had had no problems except for the fact that their son Max experienced frequent and persistent respiratory infections that severely impacted on his ability to attend school and carry out other normal activities.

[16] The Zagorskis were advised to obtain a pre-sale property report. In March 2010, their inspector visited the property. He observed the MDUs installed in the skirting boards and told the Zagorskis that they could have the probes read and could obtain historical moisture readings as the current owners of the house. They arranged this with MDCL and on 12 May 2010 received a report which, combined with correspondence from their inspector, established that:

a) the exterior of the property had a number of defects allowing moisture ingress;
b) there were a number of high moisture readings; and
c) the property had been tested on 18 May 2006 (ten days before they had signed the sale and purchase agreement), revealing high moisture readings.

[17] After taking legal advice the Zagorskis decided not to proceed with selling the house.

[18] Initially, the Zagorskis attempted to have the trustees of the Wilkinson Family Trust buy the property back from them. After the Wilkinsons declined to do so and denied liability for the problems with the house, the Zagorskis applied to the Weathertight Homes Resolution Service for an Assessor's Report. This report concluded that there were numerous defects to the exterior cladding of the building and that the remediation of those defects would cost $508,044.44.

WHAT ARE THE DEFECTS CAUSING LEAKS AND DAMAGE?

[19] The Department of Building and Housing Assessor, Richard Angell, the claimants' expert Richard Maiden, the Wilkinson's expert, Geoffrey Bayley, the Council's expert, Clint Smith and the expert for Mr Holyoake and Hitex, Alan Light, gave their evidence concurrently on the defects that allowed moisture ingress.

[20] Mr Angell made two site visits to the house. His investigation included visual assessment, taking moisture readings and carrying out invasive and destructive investigation. He also sent timber samples for laboratory analysis. Mr Maiden visited the site on three occasions and carried out destructive testing and opened areas previously investigated in order to clarify the causes of water ingress and damage. Mr Bayley inspected the site on two occasions and in the course of these inspections took photographs and samples. Mr Smith visited the site on three occasions. Mr Light visited the site on two occasions and re-drilled the existing moisture probe sites and took further samples. Evidence of a third visit he made contrary to a direction of the Tribunal was disregarded pursuant to an oral determination made during the hearing.

[21] The experts, with the exception of Mr Light, were in agreement about the nature of the defects that caused the house to leak. They agreed on a list of eight principle defects at an experts' conference convened prior to the hearing.

[22] There was some difference between the experts about whether some of the decayed framing was caused by leaking in the original cladding. Mr Bayley for example suggested in his brief that decay attributed by Mr Angell to the original cladding could equally have been caused by leaks in the Hitex cladding. Mr Light also commented at the hearing that because timber samples taken by Mr Angell had not been cultured it was difficult to ascertain whether the decay was active or historical.

[23] Ultimately however there was general agreement that the issue was not significant given the current leaks. In other words, the remedial scope is not significantly affected by the fact that leaks which are causing timber damage are affecting decayed timber that was left in situ when the house was re-clad. Mr Light was the only expert who did not accept that current leaks were causing damage.

[24] The defects agreed to by the experts are discussed below.

Balustrade Wall to Deck Junctions

[25] The experts except for Mr Light agreed that there were leaks at the junction between the balustrade wall and the main wall on both the north and south decks.

[26] On investigation of the south deck Mr Angell found that at the balustrade/main wall junction the framing was visibly saturated and decayed and the building wrap had water stains. There was water under the flashing tape. The moisture reading in the area was 100%.

[27] Mr Angell also found elevated moisture readings on the northern deck below the balustrade wall. The framing on the garage opening below was visibly saturated with water stained building wrap.

[28] The balustrade wall on the south deck has a metal capping. In his report Mr Angell noted that the junction between the capping and the wall cladding was unsealed. In addition, the underlying metal saddle flashings which were supplied and installed by Hitex were inadequately sealed to the underside of the capping, providing paths for moisture to track behind.

[29] The balustrade wall on the northern deck has a timber capping which terminates behind the cladding. Cracks have developed at the junction between the plaster and the capping allowing moisture ingress.

Ground Clearances

[30] On various locations around the house, the Hitex cladding is terminated with insufficient clearance to adjacent surfaces including unpaved ground and decks. In his report Mr Angell noted that the minimum clearances provided for in the Hitex specifications were not achieved in some locations.

[31] Damage associated with cladding ground clearance issues was identified at the left hand side of the garage opening on the northern elevation where there was an elevated moisture reading and the framing and building wrap had visible water stains; the external corner to the lounge which had water stained framing and building wrap; on the left hand side of the garage opening; at the east elevation courtyard door opening where there were pockets of soft rot and the left hand side of the same door opening where there was also soft rot.

[32] Damage to the deck was also attributed to inadequate clearance levels between the Hitex and deck surfaces as noted below.

Northern Deck

[33] One of the principle defects agreed on at the experts conference was the combined problems relating to the northern deck which collectively had resulted in the need to re-clad the wall below it. These defects were the lack of cladding clearance to the deck surface, the lack of fall to the deck and the application of cladding over the top of membrane which provided a path for moisture ingress.

[34] The deck wall on the west elevation had elevated moisture readings and water staining on the plywood brace and building wrap. There was saturated timber and water stained building wrap close to

the deck surface which Mr Angell in his report attributed to moisture entering through capillary action.

Windows

[35] During his investigation of the house, Mr Angell had concluded that there were no sill trays installed under the windows. At their pre-hearing conference the experts, with the exception of Mr Light, had agreed that the problems with the door and window joinery were a tipping point for concluding that a complete re-clad was required. However at the hearing Mr Maiden gave evidence that sill trays or flashings were present.

[36] He did not consider them to be properly installed because the sill flashing discharged onto the top of the polystyrene upstand on at least one of the windows. This meant that any moisture that gained entry in this area would be trapped and would inevitably cause damage. It was unclear whether this applied to all windows or only one or two as all windows had not been invasively tested. However there is no evidence of moisture ingress around the windows as there are no high moisture readings or evidence of damage around the windows therefore we accept the windows are currently performing.

[37] Mr Maiden and Mr Angell considered that inadequacies with the window installation to be a cause of likely future damage. While Mr Bayley and Mr Smith had initially agreed with this assessment, after further discussion and clarification of the window construction, they concluded that as the windows and the associated flashings had performed adequately for the six years since the remedial work was completed, it was unlikely they would fail in the future.

[38] While we accept that there are potential issues with one or more of the windows there is no reliable evidence that these issues apply to all or even a majority of the windows. In any event the windows have performed satisfactorily to date and accordingly we

conclude that it has not been established that they are likely to be a source of damage in the future.

Control Joints

[39] In his report Mr Angell identified problems with the inter storey horizontal control joints which in some locations have been inadequately terminated at the internal and external corners providing paths for moisture ingress into the framing. The same defect was observed and photographed by Mr Maiden who, in the course of his investigation, observed and photographed a hole at the end of a control joint big enough for a screwdriver to go through and touch the framing behind. Mr Light suggested that this hole was in fact created by Mr Angell. Mr Angell denied this and we accept that the defect was created on installation and not by subsequent investigation.

[40] Although there was some suggestion that water could have been entering from above the control joint, Mr Angell stated that he observed wet framing directly below the gap at the end of the control joint. His view, which we accept, is that the gap was the most likely source.

[41] When giving his evidence, Mr Holyoake demonstrated the Hitex control joint componentry and explained its features and how it fitted together to achieve weathertight junctions. Mr Angell stated that the joint componentry as demonstrated by Mr Holyoake, was not what he observed at the house.

Buried Fascias

[42] In his report Mr Angell stated that this defect was created by cladding being plastered after the installation of flashings which were lapped under fascias. As a consequence, there are areas where the fascias and flashings are buried within the plaster. As the plaster does not extend up behind the flashing and fascias, the junctions are

prone to cracking and provide paths for moisture ingress. Mr Angell recorded elevated moisture readings in the framing below the buried fascias and found that framing below the fascia on the right hand side of the southern elevation was visibly decayed. He noted that the advanced decay indicated that the damage is likely to have been contributed to by defects in the original construction. The implication of this observation is that in this location, decayed timber remained in place. However, the elevated moisture readings indicate that fresh damage on top of original damage is occurring.

[43] The buried fascia defect is closely associated with the defects at the roof to wall junctions on the southern elevations which the experts agreed were inadequately weatherproofed. In his report Mr Angell noted that the apron flashing at the east elevation lacked a diverter and that there were unsealed edges to the cladding at the roof to wall junctions which will be prone to moisture ingress. Mr Maiden noted that there did not appear to have been roofing work carried out in the course of the re-clad and that there had been a failure to alter the apron flashing during the remedial work to protect the new cladding edge after installation. This allowed a pathway for moisture behind the cladding into the wall. He attributed the high moisture reading on the framing on this elevation to this defect.

[44] We are satisfied that the burying of the fascias in the plaster is a defect that has contributed to the dwelling leaking. The construction work in this regard was not only contrary to good trade practices at the time but also to the Hitex specifications. While Hitex, and its contractors, are primarily responsible for this defect more minor responsibility also lies with Mr Wilkinson, his company and the Council. This defect is in the transition area between the original building work and the remedial work and results, in part, from inadequate attention to these areas in the remedial design and sequencing and extent of the remedial work. It is also a defect that should have been apparent from a visual inspection of the property.

Retaining Wall Cappings

[45] Concrete block retaining walls on the western and southern elevations have metal cappings with stop ends or back flashings behind the cladding. In his report Mr Angell noted that moisture can track off the capping and behind the adjacent cladding. Samples of wood from the stud adjacent to the steps on both walls were sent for analysis. The results found the wood had soft rot and dense fungal growth. Mr Angell found the framing on the western retaining wall was wet and had water staining on the building wrap.

[46] There was little discussion of this defect in the evidence. In his report Mr Angell noted the absence of evidence that the retaining walls were re-waterproofed during the remedial work and concluded that the defect was outside the scope of the 2006 Act. In his brief Mr Smith noted that the Council had no responsibility for this defect.

[47] No party addressed the issue of responsibility for this defect in their opening or closing submissions. In his defects schedule Mr Bayley notes that this defect requires a discrete repair that would give rise to a negligible proportion of the remedial work. Given the absence of evidence and submissions regarding liability for this defect we make no findings in respect of it.

WAS ALLIED NEGLIGENT WHEN INSPECTING THE HOUSE AND REPORTING ON ITS CONDITION TO THE ZAGORSKIS?

[48] The Zagorskis claim that greater attention should have been drawn to the moisture plugs in the Allied pre-purchase report. They say that Allied should have recommended that the probes be read and that historical test results should be obtained. It is the Zagorskis case that had they received the MDCL reports of 2 December 2005 and 18 May 2006 which showed elevated moisture readings, they would not have proceeded with the purchase.

[49] The Allied pre-purchase report is 22 pages long. Different pages in the report deal with different rooms or topics. Towards the middle of the report is a page entitled "Rumpus Room". This page addresses the condition of the rumpus room and has photographs of the room next to the text. The last line on the page reads "moisture plugs noted throughout the house". There is no other reference to the moisture plugs in the report. Nor is there any explanation of what they are for or any recommendation relating to them.

[50] At the hearing, the expert witnesses all agreed that, in 2006, a pre-purchase inspector should have investigated further after noticing the probes or recommended that the historical reports be obtained. They considered that greater significance should have been attributed to the moisture plugs in the report.

[51] Given the placement of the single sentence noting the presence of moisture plugs in the middle of the report, on a page entitled "Rumpus Room", we do not consider that the Zagorskis acted unreasonably by failing to enquire about the significance of the moisture plugs. There was no indication in the report that the plugs were important or could provide further information.

[52] Allied was served with the claim and all relevant procedural documents but has taken no part in these proceedings. It raises no defence to the claimants' claim.

[53] Allied owed a duty of care to the Zagorskis to act as a reasonable and prudent inspector.[1] We find that Allied breached this duty of care. It should have enquired further after noticing the moisture plugs and ensured that the plugs and their implications were drawn to the Zagorski's attention and readings obtained. The claim in negligence is made out. Allied is liable for the full amount of the established claim.

[1] *Mok v Bolderson* HC Auckland, CIV-2010-404-007292, 20 April 2011.

[54] The Zagorskis claimed in the alternative that Allied breached an expressed or implied term of their contract with the Zagorskis, the term being to bring the presence of, and ability to obtain data through the moisture plugs to the Zagorskis' attention. Given the finding regarding the breach of duty of care and Allied's liability in respect of the claim, it is unnecessary to determine the contractual claim.

WAS THERE A BREACH OF THE VENDORS' WARRANTIES IN THE SALE AND PURCHASE AGREEMENT BY THE TRUSTEES?

[55] The Zagorskis claim that the Wilkinson family trustees 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 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 and/or the Building Act 2004 (together "the Building Act") were fully discharged.

[56] The Wilkinsons are vendors who have done or caused or permitted to be done works for which the permit or building consent was required.

[57] The Zagorskis claim that clause 6.2(5)(b) of the agreement was breached because the works were not completed in compliance with the Building Consent. In their closing submissions the Zagorskis do not rely on Mr Wilkinson's non-consented departures from the building plans that were discussed during the hearing (alterations to

the roof parapet and reconstruction of the glass block window). There is no evidence that these departures resulted in any damage.

[58] There are three breaches of the Building Consent relied on in the closing submissions. The first two relate to the failure to remediate the timber to BIA requirements as specified on the consent. It is submitted that not all the timber was treated to BIA requirements which has resulted in structural unsoundness in breach of clause B2 of the Building Code.

[59] We find that this breach of the building consent is not established. There was disagreement amongst the experts as to whether timber damaged prior to the remediation was present. In any case it is not established that any damage has arisen from this breach if it has occurred. The presence of previously decayed timber has not in itself significantly increased the remedial scope particularly given the evidence of new leaks affecting such timber.

[60] The other alleged breach of the building consent is that the exterior cladding is not weathertight and therefore does not comply with the performance requirement of clause E2 of the Building Code.

[61] In its introduction, the Building Consent states on page 1:

> The Building Consent is 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.

[62] The Zagorskis appear to be suggesting that failure to meet the performance standards requirements of the Building Code is *per se* a breach of the building consent. This is a strained interpretation. It is our view that clause 6.2(5)(b) is a warranty that the house was built in accordance with the consent issued which means that the approved plans and specifications were followed. We consider that

issues of compliance with the Building Code are more appropriately dealt with under clause 6.2(5)(d) which deals specifically with Building Act requirements.

[63] We turn now to clause 6.2(5)(d). Under this clause, Mr and Mrs Wilkinson warranted that all obligations under the Building Act had been fully discharged. This encompassed compliance with the functional requirements of E2 of the Building Code relating to external moisture. At the time the vendor warranty was signed the house did not comply with the functional requirements of clause E2. The cladding had been installed with defects that would allow moisture ingress. In particular, there were two well established leaks on the deck. These were evidenced by the December 2005 and May 2006 MDCL reports and the letter from Mr Holyoake of 8 February 2006 referring to the two leaks.

[64] Mr Wilkinson was aware that the leaks referred to in Mr Holyoake's letter had not been fixed and that extremely high moisture readings had been taken on 18 May, less than two weeks before he signed the sale and purchase agreement. He should have been aware that the functional requirements of clause E2 of the Building Code had not been met and therefore that the obligations under the Building Act were not complied with. As the builder and project manager he was directly responsible for the construction of the leaking deck. As vendor he had failed to ensure the Building Act was fully complied with even after leaks had specifically been drawn to his attention. He signed the vendor warranty with knowledge of these leaks. We find that he breached clause 6.2(5)(d).

[65] We place considerable emphasis on the fact that the leaks were present and had been identified prior to the sale. There is some controversy around the interpretation of 6.2.5(d). Because the Building Code is performance based, the warranty could be interpreted as an ongoing performance warranty for houses with no

limitation. This concern does not arise in a case such as this when a builder/vendor knowingly warranties that a leaking building fully complies with all obligations under the Building Act.

[66] Clause 6.2.5(d) has been removed from the current version of the Law Society Sale and Purchase agreement. The Law Society subcommittee considering the clause considered it inappropriate for vendors to give blanket warranties that Building Act obligations had been fully discharged particularly in light of the "leaky home" litigation. They also expressed concern that parties against whom a vendor may have had recourse if the warranty proved incorrect would be protected by the expiry of limitation periods.[2] Again, this concern does not arise in this case.

[67] We find that the Wilkinsons were in breach of the vendor warranty they gave pursuant to clause 6.2(5)(d) of the agreement. They are accordingly likely to be liable in contract for the full amount of the established claim.

IS MR BURCHER LIABLE UNDER THIS AGREEMENT EVEN THOUGH HE DID NOT SIGN IT?

[68] Mr Burcher was named as a vendor on the sale and purchase agreement. Although he did not sign the agreement, he signed the transfer of title. The Zagorskis claim that Mr Burcher is personally liable under the agreement, and in particular under the vendor warranty clause of the agreement. They say that Mr Burcher did not attempt to limit his liability to Mr and Mrs Zagorski by inserting a limitation of liability for trustee clause in the agreement and that by signing the transfer instrument, he ratified the agreement and is therefore bound by its terms including the vendor warranties.

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

[69] Mr Burcher relies on section 24(1)(b) of the Property Law Act 2007 which provides:

> (1) A contract for the deposition of land is not enforceable by action unless –
>
> a) the contract is in writing or its terms are recorded in writing; and
>
> b) the contract or written record is signed by the party against whom the contract is sought to be enforced.

[70] The position of Mr Burcher is that because he did not sign the agreement, either as a trustee or personally, he cannot be liable under it.

[71] The Zagorskis claim that if Mr Burcher is not bound by the agreement including its vendor warranties, the agreement is invalid and should be cancelled.

[72] None of the case law relied on by the parties' addresses the liability of a trustee who is not a signatory. The claimants in their closing submissions contend that *Scott v Ellison*[3] holds that a relevant factor is whether or not in purchasing a property a person chose not to sign but nevertheless took benefit of the property. On our reading of the case there is no such factor identified and it is relevant that although the property that was the subject of that case was owned by two trustees, it was only the trustee who was a signatory to the agreement that was sued.

[73] We find that the agreement is not invalid and the dispute about Mr Burcher's personal liability can be resolved by reference to the Property Law Act and the terms of the agreement. Legal title to the property transferred to the Zagorskis when Mr Burcher executed the transfer instrument on 11 July 2006. However, by signing the transfer he did not adopt personal liability under the terms of the sale and purchase agreement. Clause 10 of the agreement provides that:

[3] *Scott v Ellison* [2011] NZCA 302 (CA).

> "Obligations and warranties of the parties in this agreement shall not merge with the transfer of title to the land or with delivery of the chattels (if any)."

[74] The vendor warranties given by Mr and Mrs Wilkinson as signatories to the agreement are independent of the transfer of title. We accept Mr Burcher's argument that pursuant to the Property Law Act he is not bound by a warranty he did not sign.

[75] It was suggested in the hearing that had Mr Burcher wished to limit his liability under the agreement he could have inserted a limitation of liability clause after receiving the completed agreement from the Wilkinsons and before executing the transfer. Whether the Zagorskis would have agreed to such an amendment is unknown. However, the Zagorskis were aware both at the time the agreement was signed and on settling their purchase, that only two of the vendors had signed the sale and purchase agreement. They did not requisition for Mr Burcher to sign. We find they cannot now enforce warranties under the agreement against Mr Burcher. They can however enforce the vendor warranties against the vendor signatories, Mr and Mrs Wilkinson.

ARE THE ZAGORSKIS ENTITLED TO CANCEL THE AGREEMENT FOR SALE AND PURCHASE OF THE HOUSE?

[76] The Zagorskis seek a declaration that they are entitled to cancel the agreement on the ground of misrepresentation under the Contractual Remedies Act 1979. They claim that they were induced to enter the agreement in reliance on the misrepresentation made to them by the real estate agent and the flyer advertising the house that it was in "excellent" condition. It is accepted that the house was not in excellent condition and that there was a misrepresentation.

[77] To satisfy the requirements of section 7(3)(a) of the CRA, the Zagorskis must establish that the misrepresentation induced them to enter the contract. We find that they have failed to do this.

[78] Mr Zagorski gave evidence that he and his wife viewed the house through a private arrangement with the real estate agent, Mr Lantz, before it was advertised. In his brief he said that "we immediately fell in love with the location and the floor plan of the house". It was later, when the Zagorskis visited the house a second time during an open home, that they were told by Mr Lantz that the house was in excellent condition and received the flyer describing the condition of the property as excellent.

[79] Although they entered the sale and purchase agreement the following day, they did not make the agreement unconditional until after they received the report from Allied advising them about the condition of the property. The existence of the special clause allowing them to obtain and be satisfied with a builder's report points away from the conclusion that they were induced to enter the agreement by a misrepresentation as to the house's quality.

[80] Having made their own enquiries as to the quality of the building work prior to declaring the contract unconditional, we find that they did not rely on the representation that the condition of the property was excellent nor did the representation induce them to enter the contract.

[81] We have found that the Wilkinsons breached the vendor warranty contained in clause 6.2(5)(d) of the agreement. The Zagorskis claim that this also constituted a misrepresentation of the property's condition. However, given that the Zagorskis undertook their own enquiries as to the quality of the building work, we find they were not relying on section 6.2(5)(d) as a warranty of quality, and were not induced by it to enter the contract.

[82] The claim for cancellation on the basis of misrepresentation pursuant to section 7(3)(a) fails.

[83] The Zagorskis have claimed in the alternative that the breach of the vendor warranty in itself gives rise to a right on their part to cancel pursuant to section 7(4)(b) of the CRA. To succeed, they must establish that the effect of the breach of the warranty is to substantially reduce the benefit or increase the burden of the contract to them. In addition, the Tribunal must be satisfied that it is just and practicable to cancel the contract.

[84] We have found that the Zagorskis were not relying on clause 6.2(5) as a warranty of quality. The breach of clause 6.2(5) did not therefore substantially reduce the benefit or increase the burden of the contract to them pursuant to section 7(4)(b) of the CRA.

[85] The claim for cancellation on the basis of breach of contract pursuant to section 7(4)(b) fails.

[86] Had we found that the breach of clause 6.2(5) substantially reduced the benefit or increased the burden of the contract to the Zagorskis, we would have declined to reverse the contract under section 9 of the CRA. Section 9 gives the Court, in this case the Tribunal, the power to make an order re-vesting the property in the vendor and returning the purchase price to the purchasers if it is just and practicable to do so. We find that it is not.

[87] The claimants submit that the Tribunal's discretion to grant a remedy under section 9 is wide and in their submissions refer the Tribunal to the High Court case *Hinton v Smith*[4] where the discretion was considered.

[88] In *Hinton* the Court made an order that a property be re-vested to the vendor and that the vendor return the purchase price to

[4] *Hinton v Smith* HC Hamilton, CIV-2007-419-1047, 16 July 2009.

the purchaser. Dobson J commented that the purchasers were entitled to the order they sought reversing the transaction unless it would be unjust or impracticable to direct that that occur. He went on to say that it may be inequitable to make such a reversal order when defendants have so altered their position pursuant to the contract being cancelled that an undue burden is placed on them.[5]

[89] A significant difference between *Hinton* and the present case is that in *Hinton,* cancellation of the contract was sought only two months after settlement. In the present case some six years have elapsed since the contract was settled.

[90] The Wilkinsons have purchased a section and built their current home and have thus substantially altered their position in reliance of the contract. The Zagorskis enjoyed the occupation of the house for a period of five years prior to becoming aware of the problems that cause them to now seek cancellation of the contract. They have received a rental income from the property for a further year.

[91] Having regard to all these factors we find that it is unjust or impracticable to make the order sought by the Zagorskis. Had we found that the conditions in section 7(3)(b) of the CRA were satisfied, their claim for a re-vesting order pursuant to section 9 of the CRA would fail.

WERE MR AND MRS WILKINSON ACTING AS DEVELOPERS?

[92] The Zagorskis claim that Mr and Mrs Wilkinson acted as developers when they bought, remediated and sold the house, and that they owed a non-delegable duty of care to future purchasers. They claim this duty was breached when the house was created with defects and that the Wilkinsons are liable in tort as developers.

[5] At [94]-[95].

[93] The rationale for the imposition of a duty of care on developers was discussed in *Body Corporate 188273 v Leuschke.*[6] This imposition 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.

[94] There is no question that Mr Wilkinson, and to a lesser extent Mrs Wilkinson, were responsible for and controlled the 2004/05 remedial work. Neither is it disputed that when they sold the house to the Zagorskis in May 2006 they made a considerable profit. The matter in dispute is whether profit was the purpose of the project for the Wilkinsons and whether they can be considered to be developers for controlling the recladding work. The Zagorskis say that this is the case and rely on the Wilkinsons' history between 2002 and 2004 of buying, improving, and selling properties for profit that they lived in for limited periods of time.

[95] The Wilkinsons deny being motivated by profit when they purchased and remediated the house. Mr Wilkinson gave evidence that they intended to make the house their long-term family home. However, their circumstances changed when Mrs Wilkinson's mother moved in with them in 2006. A decision was then made to pool resources with her and to build a house that provided separate accommodation for the Wilkinsons and Mrs Wilkinson's mother. They remain living with Mrs Wilkinson's mother in the house they built after selling Fancourt Street to the Zagorskis.

[96] The Wilkinsons' history of buying and selling four properties including an investment property within four years does not establish that they were acting as developers. While they were clearly moving up the Auckland "property ladder" during this period, the evidence stops short of establishing a pattern whereby the Wilkinsons have

[6] *Body Corporate 188273 v Leuschke Group Architects Ltd* (2007) 8 NZCPR 914 (HC).

bought, remediated and sold properties for profit. It is not established that their intention and motive in purchasing and remediating Fancourt Street was profit. Fancourt Street was their family home for almost two years and we accept that their plans changed when it became necessary to accommodate Mrs Wilkinson's mother with their family.

[97] The claim that the Wilkinsons were developers fails.

DID MR WILKINSON AND WILKINSON BUILDING AND CONSTRUCTION LIMITED BREACH THEIR DUTY OF CARE TO FUTURE PURCHASERS AS BUILDERS?

[98] Wilkinson Building and Construction Limited was the builder. Mr Wilkinson personally undertook and supervised the building work, controlled the project and made all key decisions. His company owed a duty of care to the claimants (subsequent purchasers) as the builder.[7] Mr Wilkinson owed a duty of care as a builder and also as the project manager.[8] Mr Wilkinson gave evidence that he and his company carried out the work that was necessary to prepare the house for the application of the Hitex cladding. This involved removing the existing cladding, removing the decayed timber, treating the remaining timber with frame saver, putting on building paper and installing the windows and the parapet flashings over the curved roof and back deck. Mr Wilkinson also carried out the landscaping which determined the ground clearances.

[99] In his brief and his oral evidence Mr Wilkinson said that he placed considerable reliance on Mr Holyoake and Hitex because he had no experience with Hitex cladding. He was also anxious not to do work that was within the domain of Hitex because he did not wish to do anything that may later call the validity of the Hitex warranty into question. As noted above, the majority of the significant defects were caused by failures in the workmanship of the Hitex subcontractors.

[7] *Dicks v Hobson Swann* (2006) 7 NZCPR 881 (HC).
[8] *Auckland City Council v Grgicevich* HC Auckland, CIV-2007-404-6712, 17 December 2010.

[100] We do not consider that Mr Wilkinson or his company are liable for the weathertightness defects created by the Hitex subcontractors. He did not supervise their work but rather relied on their expertise. He was entitled to assume that by contracting with an experienced and reputable cladding company and by referring queries about the substrate to Mr Holyoake and the other Hitex officers, that he had taken adequate steps to ensure that the cladding installation was done properly. He could not be expected to sensibly inspect the work of the Hitex subcontractors especially given that a specialised Hitex site supervisor was on site to perform this role. It was reasonable for him to assume that the Hitex system was being installed in accordance with its technical requirements. Responsibility for the defects created by Hitex rests with Hitex and, to a lesser extent, Mr Holyoake.

[101] Two defects are associated with Mr Wilkinson's work. The first of these is the wooden capping on the deck balustrade wall. Mr Wilkinson has given evidence that he consulted Mr Holyoake about the adequacy of the balustrade capping prior to it being clad. Mr Holyoake has confirmed that this is the case. It has subsequently transpired that the capping which is embedded in plaster is a defect that allows moisture ingress. Although Mr Wilkinson consulted Mr Holyoake about this detail, as builder he is responsible for and liable in respect of the defect. However this liability is shared with Hitex and Mr Holyoake as well as with the Council who passed it at their final inspection. For similar reasons Mr Wilkinson also has some responsibility for the defect identified as buried fascias.

[102] The other defect associated with Mr Wilkinson personally is the external ground clearances. Again, it is established in evidence that he consulted Mr Holyoake about the ground clearances and followed his advice. However as the builder he is liable for the departure from the Hitex specification and the creation of the defect.

As above he shares liability for this defect with Hitex, Mr Holyoake and the Council who passed it at their final inspection.

IS HITEX LIABLE FOR THE CREATION OF DEFECTS?

[103] The Hitex cladding was installed by specialised subcontractors under the supervision of David Bedwell and later, Clint Aitken. Mr Holyoake, in his capacity as the Hitex managing director, also had some oversight and made some decisions that have been associated with defects.

[104] Several significant defects are associated with workmanship failures by the Hitex installers. These are:

- the balustrade wall junctions;
- the timber capping on the northern deck where cracking is allowing moisture ingress;
- the deck surface cladding clearance defects;
- the control joint defects; and
- the defect described above under the heading “Buried Fascias” which encompasses the defects at the roof to wall junction.

[105] Although there was some suggestion that the Hitex system itself failed resulting in the moisture ingress that has occurred, this is not established on the evidence. We find that the problems that have occurred are a result of the Hitex system being installed with a poor standard of workmanship and several decisions being made by Hitex officers which have given rise to the creation of defects.

[106] Hitex is liable for the work carried out by its sub-contractors who worked under the direct supervision of Hitex officers. Hitex owed a duty of care to future purchasers to ensure that the Hitex cladding was installed with reasonable care. It breached this duty and allowed the cladding to be installed defectively and incorrectly.

[107] We find that Hitex is liable for the full cost of remediating the house. Although there is some possibility that some of the timber that will require replacement contains decay that pre-dates the Hitex installation, it is not established that this is significant in terms of quantity or that replacement will not have been necessary in any case given the current leaks. We do not consider it is appropriate to make any discount to Hitex in this regard.

DID MR HOLYOAKE PERSONALLY OWE A DUTY OF CARE TO FUTURE PURCHASERS? IF SO, DID HE BREACH THAT DUTY OF CARE?

[108] Mr Holyoake was the managing director of Hitex. The Zagorskis, the Wilkinsons and the Council claim that the personal involvement of Mr Holyoake in the work carried out by Hitex at the house was sufficient to give rise to a duty of care on his part to future purchasers. The claims against Mr Holyoake are that he acted as a designer, builder or project manager and failed to properly discharge his duties in those roles, that he was the day to day decision maker on behalf of Hitex, and that he was intimately involved in the design and application of the Hitex cladding.

[109] It is well established that company directors that exercise personal control over a building operation will owe a duty of care associated with that control test in *Morton* was put in doubt in *Trevor Ivory*, but revision at it was set out in *Hartley v Balemi*.[9]

[110] The existence and extent of the duty of care owed by Mr Holyoake in respect of the work carried out by Hitex is determined by a consideration of his role and responsibility on this site.[10] His liability must be determined by the evidence of what he actually did. It must be established that Mr Holyoake had sufficient involvement in and control of the work to give rise to a duty of care.

[9] *Hartley v Balemi* HC Auckland, CIV-2006-404-2589, 29 March 2007.
[10] *Auckland City Council v Grgicevich* HC Auckland, CIV-2007-404-6712, 17 December 2010.

[111] There was some conflict between the briefs and oral evidence of Mr Wilkinson and Mr Holyoake regarding Mr Holyoake's role in the Hitex work at the house. Mr Wilkinson's evidence indicated a higher level of involvement and oversight of the job by Mr Holyoake and Mr Holyoake's, a lower level. Mr Holyoake denies that he had a level of involvement sufficient to give rise to personal liability.

[112] Mr Wilkinson described Mr Holyoake as being "intimately involved" with the project and in particular, overseeing and giving directions to the Hitex installers and also to Mr Wilkinson's staff to ensure the building's readiness for the application of Hitex. He said that Mr Holyoake oversaw the work even though there was a Hitex project manager on site and when this person left the job in mid August, Mr Holyoake took over direct supervision and then had weekly meetings or telephone discussions about the progress of the work.

[113] Mr Wilkinson also said that both he and the Hitex supervisor consulted Mr Holyoake before any work was carried out and that he referred all decisions to Mr Holyoake and to Hitex.

[114] The Hitex work was done from June to September 2004. Mr Holyoake gave evidence that a Hitex employee, David Bedwell, was the site supervisor at the Fancourt Street job and when he resigned in August 2004, he was replaced by Clint Aitken who has subsequently left the country. He agreed that he had attended the site on five occasions between 14 June 2004 and 1 September 2004. However two visits were for the purpose of installing MDU probes.

[115] Mr Holyoake agreed that he had checked the northern deck balustrade capping prior to it being clad, that he advised Mr Wilkinson about ground levels and that on 16 August 2004 he attended a meeting on site with Mr Wilkinson and Mr Bedwell to work through a list of six areas of concern that included the flashings at the fascia board ends. He also attended site on 1 September 2004 to inspect a

nag list of concerns that had been compiled. Mr Holyoake agreed that he was consulted by telephone by Mr Wilkinson about various construction details but said that these telephone calls were not as frequent as Mr Wilkinson had indicated in his evidence.

[116] Mr Holyoake completed the 'Advice of Completion of Building Work' on behalf of Hitex. This document, which was provided to the Council by Mr Wilkinson, stated that the Hitex had been installed in accordance with Hitex trade practices.

[117] One of the claims made against Mr Holyoake is that he was the designer of the work. In his brief Mr Wilkinson stated that Mr Holyoake drew the Hitex details onto the building plans and in this way 'provided the design plans for the building work'. Mr Holyoake denied involvement in the application for a building consent and stated that neither he nor Hitex prepared 'special drawings' for the house.

[118] The evidence does not establish that Mr Holyoake was the designer of the remedial work and the claim that as such he owed a duty of care to the Zagorskis fails. In any case, the defects were caused by failure in workmanship rather than design failures.

[119] We find that Mr Holyoake did not act as a site supervisor. There were specific Hitex employees who had this role. It is also accepted that he did not have a daily or even weekly overview of the progress of the Hitex job. However he did have some overview and on the visits he made to the site he personally involved himself in construction decisions that have been associated with defects. These are the northern deck balustrade capping which he approved, the ground levels which he advised Mr Wilkinson on and the flashing/fascia board end detail about which he was consulted. His personal involvement in the decision making that led to the creation of these three defects gives rise to personal liability in respect of them.

[120] Mr Holyoake is not however liable for the balance of the defects created by the Hitex installers such as the control joint defects as he did not personally direct or supervise their work. He filled out the 'Advice of Completion' document but did so in his capacity as an officer of Hitex. His involvement with this document does not give rise to personal liability for these issues.

[121] We note that it was Mr Wilkinson and his company that applied to join Mr Holyoake to this claim. At the very least the level of involvement Mr Holyoake had in the construction and decision making, in relation to the remedial work, is sufficient to form the basis of a cross-claim or claim for contribution by Mr Wilkinson.

WAS THE COUNCIL NEGLIGENT IN ISSUING ITS BUILDING CONSENT?

[122] The Council did not deny that it owed the claimants a duty of care in issuing a building consent, inspecting the building work during construction and issuing a Code of Compliance Certificate. Its duty is well established.[11] The question is whether it breached this duty in respect of the consent, the inspections or the issue of the CCC.

[123] The plans submitted for the building consent consisted of copies of the original construction drawings with handwritten notation showing the Hitex details. In addition the Hitex specification was submitted. This specification referred to Table 1 for ground clearance requirements but did not attach any such table. The Zagorskis submit that there were a number of other deficiencies in the specification.

[124] In his brief Mr Maiden criticises the lack of detail provided in the submitted plans. As examples he refers to the lack of detail as to the extent of the re-clad, the method for bracing against seismic activity and the absence of detail on how the roof to wall junction

[11] *North Shore City Council v Body Corporate 188529* [2010] NZSC 158, [2011] 2 NZLR 289..

would be waterproofed. The Council's witness, Mr Calvert, expressed a contrary view and in his brief states that a reasonable competent council would have issued consent on the basis of the information provided.

[125] The Zagorskis submit that the original drawings were the blue print for a leaky home in respect of which the Council had settled a claim. They therefore submit that the original deficient design and the scant Hitex specification were inadequate to enable the Council to be satisfied that the building work would comply with the Building Code if completed in accordance with them.

[126] We agree that the plans and specification were inadequate and lacked details in a number of respects. However, it is not established that inadequacies in the consent documentation have a causative link to the damage. The only specific example of a defect carried through from the original design to the remediated house concerns inadequate fall on a deck area. This is one of a number of composite defects affecting the deck area and it is not established that in itself it has caused damage.

[127] Although the plans and specifications lacked detail in some respects, it is not established that this lack of detail led to the creation of defects. The defects that were created were caused by poor workmanship on the part of the Hitex subcontractors and by decisions made by Mr Holyoake and implemented by Mr Wilkinson (in respect of items such as ground clearances, the balustrade capping defect and the buried fascia detail).

[128] Although the Council was negligent in issuing the consent we find that this negligence did not cause loss to the Zagorskis.

WAS THE COUNCIL NEGLIGENT IN CONDUCTING ITS INSPECTIONS?

[129] The Council carried out seven inspections during the construction of the house. Six of these were made by John Durand. The seventh and final inspection was carried out by Paul van Beurden. Both Mr Durand and Mr van Beurden gave evidence at the hearing.

[130] It is now generally accepted that the adequacy of the Council's inspections needs to be considered in light of accepted building practices of the day provided those practices enabled the Council to determine whether the Code had been complied with. As Heath J stated in *Sunset Terraces,*[12] the obligation is on councils to take all reasonable steps to ensure that the building was carried out in accordance with the building consents and Code. It is, however, not an absolute obligation to ensure the work has been done to that standard as the council does not fulfil the function of a clerk of works.

[131] At the hearing and in his closing submissions, counsel for the Zagorskis placed considerable emphasis on departures from the building consent which the Council inspectors failed to take issue with. These were the removal of parapet walls and the replacement of glass block windows with aluminium joinery. Counsel submits that this demonstrates a lack of competency on the part of the inspectors. There is however no causative link between these departures from the building consent and the Zagorski's loss. The non-consented changes did not result in leaks.

[132] Rather than examining the general conduct of the Council inspectors, it is necessary to consider whether the Council has liability for each of the defects that allow moisture ingress.

[12] *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479 at [409] (HC) [*Sunset Terraces*].

[133] Each identified major defect will be examined in order to determine the Council's liability in respect of it.

Balustrade walls to decks

[134] Hitex were responsible for installing saddle flashings at these junctions. We accept that these would have appeared to be fitted correctly and that the Council was not negligent in failing to observe this defect. However, the enmeshment of the wooden capping in plaster is an observable defect that should have been noted on inspection. The failure to do so was negligent and Council is liable in respect of it.

Control Joints

[135] We find that the control joint defects are the result of workmanship deficiencies. These deficiencies were hidden in that they were not easily visible.

[136] The control joints are one of a number of defects that have been attributed to poor workmanship on the part of the Hitex installers. It is the Council's case that it was entitled to rely on the Hitex producer statement as proof that the Hitex had been properly installed. Counsel for the Zagorskis takes issue with this and has submitted that the document entitled "producer statement"[13] is inadequate. We would agree if the "producer statement" was considered alone. The statement does not certify that the Hitex is properly installed. However, it refers to a second document, the Applicator's Advice of Completion, for this information.

[137] At the hearing, Mr Holyoake agreed that he filled out this document. The Advice of Completion does not specify the building consent number but does specify the Fancourt Street address. It states:

[13] ABD, Volume 2, Page 15.

> This is to certify that the Hitex external cladding is believed to have been completed to the extent required by the above building consent and has a minimum 50mm overlap at floor lines, under sill trays, head, jamb and sill flashings have been installed and any penetrations done at the time of plastering have been sealed.
> Hitex has been installed by a registered applicator.
> Hitex has been installed in accordance with Hitex trade practices.

[138] Hitex provided the producer statement and Advice of Completion which certified that the Hitex had been correctly installed carried out by registered applicators. The Council was permitted to rely on these documents and we find that it was reasonable for them to do so.

[139] Having noted the presence of control joints we consider that it was reasonable for the Council to rely on the producer statement/Advice of Completion as proof that they had been properly installed. We do not consider the inspector was negligent in failing to notice the defects in their installation.

Ground Clearances

[140] Mr Van Beurden carried out the final inspection. He noticed that in some places the usual clearance between the finished ground levels and the bottom of the cladding was absent. In his oral evidence he said he had never seen Hitex that close to the ground. He phoned his team leader at the Council, Simon Paykell. Mr Paykell told him to take it up with Hitex. He then had a 'heated discussion' with the Hitex officer on site who he described as 'pretty forceful and persuasive'. The officer insisted that the clearances were appropriate. The Hitex officer gave him the 'Advice of Completion of Building Work' which included a reference to ground clearances. Although in his brief Mr Van Beurden said he took comfort from this, the reference is illegible. It appears to read 'Non-standard ground clearance -'to be parked'.

[141] The inference we draw from the evidence is that Mr Van Beurden was persuaded to pass the ground clearances against his better judgement. We do not consider it was reasonable for him to rely on the forceful representations of the Hitex officer that there was no problem, or on the Advice of Completion document. The reference to ground clearances in the document is unclear and appears to contradict his own observation that Hitex was not usually installed so close to the ground. As noted earlier, Mr Angell observed that the clearances did not comply with Hitex specifications.

[142] We find that Mr Van Beurden breached the standard of a reasonable inspector. It is not accepted that because Hitex was satisfied with ground clearances that did not comply with its own specifications that the Council acted reasonably in approving them. They did not comply with Hitex specifications and should not have been passed. They have been associated with damage and the Council is liable in respect of this defect.

Buried fascia to two elevations/Roof to wall junction defect

[143] This defect is attributable to failure in workmanship by the Hitex installers. As noted earlier the buried fascia defect is associated with the roof to wall junction defect. In his evidence Mr Smith noted that the consented plans included a standard Hitex detail which provided for an apron flashing to protect the edge of the roofing.

[144] The Council has submitted that in respect of these details they were entitled to rely on the Hitex 'assurances'. This is a reference to the Advice of Completion which states that registered Hitex applicators installed the Hitex system in accordance with Hitex trade practices. While we accept Hitex should take primary responsibility for these defects, for the reasons outlined in paragraph [44] we also conclude that the Council together with Mr Wilkinson are also liable.

WHAT IS THE APROPRIATE SCOPE OF THE REMEDIAL WORK?

[145] The experts, except for Mr Light, had agreed at their conference prior to the hearing that a complete re-clad of the house was required. The deficiencies that were said to exist in respect of the windows were the tipping point for this conclusion. This consensus changed during the course of the hearing with only Mr Maiden and Mr Angell remaining convinced that the windows were a source of future likely damage. We have found that this is not established.

[146] The finding that the windows do not need to be remediated raises the question of whether a full re-clad is in fact required or whether a partial re-clad or more targeted repairs will suffice. An important determinant of this is whether the Auckland Council will give consent for targeted repairs or a partial re-clad. This question cannot be resolved on the evidence. The issue of targeted repairs arose late in the hearing and although experts gave ad hoc opinions about whether consent would be achievable, there is no proper basis for us to make a finding on this point.

[147] As it is uncertain whether the Zagorskis would be able to obtain building consent for targeted repairs it is not possible to determine the scope of remedial work and the quantum of damages. In addition we are not prepared to make a determination on the quantum of any partial re-clad or targeted repairs based on information one of the respondent's experts calculated during the course of the hearing. The issues of remedial scope and quantum are accordingly adjourned to allow the Zagorskis to obtain further expert advice and if necessary make an application for building consent to carry out targeted repairs to correct the established defects and repair the damage they have caused. Once the outcome of this is known a further short hearing will be organised if the parties are unable to reach agreement on the scope of repairs and the quantum of damages.

HOW SHOULD QUANTUM BE CALCULATED?

[148] We have found that all respondents except for Mr Burcher are liable to the Zagorskis. Mrs Wilkinson is liable in contract only under her vendor warranty. The other respondents are liable in negligence. Mr Wilkinson is liable in both contract and tort.

[149] The scope of the remedial work is undetermined and it is unknown whether targeted repairs, a partial re-clad or a full re-clad is required. In these circumstances we cannot determine whether the liable respondents have joint or several liability in negligence except in respect of Hitex whose workmanship is responsible for the majority of defects and whom we consider will have joint and several liability for the full amount of the Zagorski's damages. Mr and Mrs Wilkinson are also liable in contract for the full amount of the established damages. Allied will also be jointly and severally liable for this amount.

[150] If targeted repairs are carried out it will be appropriate to make a location by location assessment to determine contribution and liability. It is anticipated that Mr Wilkinson's cross claim against Mr Holyoake will be resolved in this context. If a full re-clad is required, it is more likely the three other parties with responsibility for defects will also be jointly and severally liable for the full amount.

[151] We further conclude that the claim in relation to stigma has not been established. Full reasons for this decision will be given in the context of the quantum determination.

DATED this 3rd day of February 2012

_____	_____
P A McConnell	M A Roche
Tribunal Chair	Tribunal Member