IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2010-100-000100
[2011] NZWHT AUCKLAND 64

BETWEEN	NORTH HARBOUR TRUSTEE COMPANY LIMITED, RED LUNDAY DE WAAL, JON WILLIAM DE WAAL AND MARK GLANVILLE THOMPSON as Trustees for the DUE NORTH TRUST AND JEROBOAM TRUST Claimants
AND	LESLIE WALTER GARDNER AND MARGARET LINDA GARDNER First Respondents
AND	NORTH SHORE CITY COUNCIL Second Respondent
AND	STEPHEN RAE MCNALLY, GAEL CHRISTINA MCNALLY AND IAN ANDREW MASSON (Removed) Third Respondents
AND	BRIAN MOHAN AND BRUCE KNEGT (Removed) Fourth Respondents
AND	MICHAEL MAY (Removed) Fifth Respondent
AND	BRIAN MITCHELL (Removed) Sixth Respondent
AND	RRL GROUP LIMITED (In liquidation and removed) Seventh Respondent

Hearing: xx Month 2011

Appearances: First initials then Surname for the claimant
First initials then Surname for the first respondent

Decision: 22 November 2011

FINAL DETERMINATION
Adjudicator: M A Roche and P A McConnell

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INTRODUCTION

[1] Mr and Mrs de Waal purchased a stucco clad house in December 2006. They later discovered that it was a leaky home that required substantial repairs. Before buying the house, they considered a report on it prepared by Brian Mitchell which identified a number of potential weathertightness issues. Mrs de Waal discussed the report with a lawyer and with Mr Mitchell before committing to buy the house. The de Waals claim that the Council and the developers, Mrs and Mr Gardner, are each liable for the full cost of the repairs that were carried out on the house. The Council claims that the de Waals were negligent to buy the house given the warnings contained in the Mitchell report.

BACKGROUND FACTS

[2] In August 1997 Mr and Mrs Gardner purchased a property at 13 William Street, Takapuna, and began developing the land with a plan to subdivide and build two new dwellings.

[3] On 27 August 1999 the Gardners, trading as "Sylvan Design", applied to the North Shore City Council for building consent to construct two residential dwellings being 13A and 13B William Street. This consent was issued on 8 September 1999.

[4] 13B William Street was built between September 1999 and January 2000. During this time a number of building inspections were carried out by Council inspectors. The house passed a final inspection on 21 January 2000, and on 16 June 2000 a final Code Compliance Certificate (CCC) was issued.

[5] In mid to late December 2006 the de Waals viewed the house which was for sale. The real estate agent gave them a copy of Mr Mitchell's inspection report which had been prepared for the vendors. The report noted that there were no elevated moisture

readings at the house but identified a number of its features that are associated with leaky homes. The report also noted that the only way to definitely determine whether deterioration to framing timbers exists is by invasive testing which was not undertaken.

[6] Mrs de Waal made an appointment with a lawyer and showed him the report. The lawyer advised her to contact Mr Mitchell and to discuss the report with him. Mr Mitchell and Mrs de Waal have disputed what was said in their conversation. Mr Mitchell says he told Mrs de Waal that he had prepared the report for the vendors of the house and that she should get her own report. Mrs de Waal cannot recall this advice and remembers feeling reassured about the house after talking to Mr Mitchell.

[7] Mr de Waal had a friend who worked in the construction industry and who was familiar with cladded homes. Mr de Waal contacted him to discuss the house. The friend advised him that in terms of weathertightness, stucco was the best of the various cladding products. Mr de Waal was reassured by this advice.

[8] On 22 December 2006, the de Waals signed a sale and purchase agreement for the property as trustees of their respective family trusts. They took possession of the property on 2 April 2007.

[9] The de Waals first realised there were problems with the house in May 2008 when Mrs de Waal's foot went through her bedroom balcony floor. On 2 February 2009, the de Waals applied to the Weathertight Homes Resolution Service for an assessor's report. The report recommended extensive repairs. The de Waals resolved to do these before pursuing the claim further. In addition to the repairs they carried out some alterations to the house. While the repairs and alterations were carried out the de Waals moved into rented accommodation. A CCC for the repairs was issued by the Council on 21 January 2010.

MATTERS IN DISPUTE

[10] The Council denies that it was negligent in issuing a building consent and in conducting inspections during construction. The Council's position is that the inspections were performed in accordance with the standard of a reasonable building inspector at the time. The only exception to this is the issue of inadequate ground clearances which the Council acknowledges should have been identified on inspection.

[11] The Council says that Mr Mitchell's report contained clear warnings about potential weathertightness issues with the house. They say that the de Waals were negligent in continuing with the purchase despite the content of the report and in failing to obtain an additional report as advised by Mr Mitchell. The Council alleges that by proceeding with the purchase, the de Waals voluntarily assumed the risk that the house would leak.

[12] The de Waals deny that they were negligent. They claim that Mr Mitchell's report was reassuring because it showed that the house did not have elevated moisture levels and that it was reasonable for them to proceed with the purchase given this reassurance.

[13] The Council and the de Waals are in dispute about the proportion of the costs that are attributable to betterment of the property. At the hearing expert witnesses on behalf of each of them gave their opinion about a number of disputed items in this regard.

THE ISSUES

[14] The issues that we need to address are:

i. What are the defects which caused water ingress?
ii. Was the Council negligent in issuing the building consent?

iii. Was the Council negligent in conducting its inspection?
iv. Were the de Waals negligent in proceeding with their purchase of the property, given the contents of Mr Mitchell's report?
v. Did the de Waals voluntarily assume a risk that the house was leaky?
vi. Are the Gardners liable for the claimants' loss?
vii. What was the necessary remedial scope?
viii. What is the appropriate deduction that should be made for betterment?
ix. What contribution should any liable parties make?

WHAT WERE THE DEFECTS CAUSING MOISTURE INGRESS?

[15] Neil Alvey, the de Waals expert, Noel Flay, the Council's expert, and Jerome Pickering, the Department of Building and Housing assessor, gave their evidence concurrently on the defects that allowed moisture ingress.

[16] Mr Pickering investigated the house during February and March 2009. His investigation included visual assessment, taking moisture reading and carrying out destructive testing. He also sent timber samples for laboratory analysis. Mr Alvey reviewed Mr Pickering's report and other relevant documents. He also made what he described as "numerous" visits to the house both before and during its remediation. Mr Flay reviewed the relevant documents and photographs and visited the house once in October 2010. When he saw it, the cladding and windows had been removed and the framing timber replaced.

[17] The experts were in broad agreement about the nature of the defects that caused the house to leak and agreed that there were nine key defects which allowed moisture ingress. As will be seen later in the decision, there were differences between them as to

whether the Council or other parties were responsible for these defects.

Balconies

[18] Three of these key defects related to the house's upstairs balconies. These were the flat top to the balustrade walls, the handrail penetrations through these flat tops, and the splitting of the deck membrane "skirting" upstand caused by nail fixings going through it.

[19] In addition, the experts noted that the stucco wall cladding had been given an insufficient clearance to the deck tiles with the result that moisture had been able to penetrate the cladding through capillary action.

[20] In his report Mr Pickering found that the timber framing to the deck was untreated and had advanced rotting and that leaking in this area had caused considerable damage to the timber substrate and supporting timbers. Water had also penetrated into the ceiling of the room below the master bedroom. Similar damage was observed in respect of the other deck.

Windows

[21] Two of the nine main defects related to the windows. The first of these was the incorrect installation of jamb flashings and jamb/sill junctions in respect of some but not all of the windows. The second was problems with the mitred sill detail to the corner window units.

[22] Although Mr Pickering had not identified problems with the windows in his report, at the hearing he concurred that there were significant defects.

[23] The experts all agreed that failed mitre sill details to corner window units was a significant defect and a major contributor to the damage to the house. In his brief Mr Alvey stated that the problem was that these details had been butt jointed rather than welded or sealed.

Lack of "kickouts" at ends of apron flashings

[24] The experts agreed that the absence of kickouts at the ends of apron flashings to the critical roof junctions resulted in moisture ingress on the south and west elevations.

Cladding clearances

[25] On various locations around the house the wall cladding was installed hard down onto the ground resulting in water ingress to timber framing through capillary action.

Pergola

[26] The solid plaster pergola beam was constructed without a slope and without any secondary capping system. This allowed surface water to penetrate the beam through small cracks resulting in high moisture content and timber decay.

WAS THE COUNCIL NEGLIGENT IN ISSUING THE BUILDING CONSENT?

[27] Mr Cartwright for the claimants and Mr Flay for the Council gave evidence concurrently on issues of Council liability. In addition, Mr Alvey made some comments about Council liability in his briefs and in his evidence.

[28] It is not alleged that there were any problems with the design that should have properly been detected by the Council prior to the

issue of the building consent. The details provided in the plans approved by the Council have not been linked to any defects. The criticism of the plans made by the claimants is that they failed to attach the relevant technical information which would have provided guidance for the builder in respect of construction details not specified in the plans. The relevant technical documents were the Hardibacker technical information manual and the BRANZ Good Stucco Practice Guide. In his evidence, Mr Alvey expressed the view that had these documents been available to the builder, there would have been appropriate guidance in respect of details not specified on the plans and the creation of defects might have been avoided.

[29] Mr Flay's view was that the plans provided a level of detail that was considered acceptable at the time and that details not shown on the plans were readily available in the relevant technical literature. He considered that it could reasonably be expected that a builder would be able to resolve any doubt concerning the correct formation of details such as jamb flashings by reference to this literature.

[30] Mr Cartwright's view was that it could not be assumed that all builders would either have their own copies of the relevant technical literature or that they would obtain copies should the need arise. He considered that it was necessary to tailor plans to the lowest skill level and therefore the documents should have been attached to the plans.

[31] Mr Alvey may be correct that construction problems with the jamb flashings and other details might have been avoided had appropriate construction details been included either on the plans themselves or in documents attached to the plans. However, the Court of Appeal in *Sunset Terraces*[1] held that Councils did not need to ensure manufacturer's specifications were attached to consent

[1] *North Shore City Council v Body Corporate 188529* [2010] NZLR 486 (CA) (Sunset Terraces).

documents as they were entitled to assume that reasonably competent builders would have access to and would refer to this information. Given this authority, the Tribunal declines to find that the Council was negligent to issue the building consent without the relevant specifications being attached to the consent documentation. As this is the only issue raised against the Council in respect of the building consent, the Tribunal finds that the Council was not negligent in issuing it.

WAS THE COUNCIL NEGLIGENT IN CONDUCTING ITS INSPECTIONS?

[32] The claimants' case is that the Council was negligent as it failed to exercise all reasonable skill and care in carrying out its inspections of the house. The Council denies this except in relation to the ground clearances and says that its inspections met the standards of a reasonable Council officer at the time.

[33] 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*[2], the obligation is on the Council 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.

[34] With the exception of the ground clearances for which the Council has conceded liability, each of the nine major defects identified by the experts will be considered in order to determine

[2] *Sunset Terraces* High Court citation at [409].

whether they could or should have been detected by the Council inspector.

[35] We turn first to the flat topped balustrade walls. The effect of balustrade walls having a flat rather than sloped surface is that water sits on it rather than draining off. It can then travel through any penetrations in the surface and enter the timber framing below. In this case, surface water was able to travel through the handrail penetrations which Mr Pickering described as poorly fixed.

[36] The experts disagreed as to whether the flat top balustrades should have been identified as a defect during inspections in November 1999 and January and March 2000. Mr Flay's view was that a reasonable Council officer would not have identified the flat topped balustrade as being a defect at this time. His evidence was that it was common practice then for balustrade tops to be flat and that it was not known these would cause water ingress. Mr Flay gave evidence that in July 2000, BRANZ ran a seminar at which they informed the building industry that flat top balustrades with surface handrail penetrations were causing major damage. It was not until then that it became clear to inspectors and the wider industry that balustrades tops should be sloped. Therefore a reasonable Council officer inspecting the balustrade in late 1999 and early 2000 could not have been expected to identify this problem.

[37] Mr Cartwright took a contrary view and gave evidence that a competent builder inspector at the time should have identified the flat top balustrade as a defect, particularly because the plans had provided for an open rail system rather than the solid balustrade that was constructed. This departure from the plans should have invited greater scrutiny. Mr Cartwright considered that there was industry awareness at the time of the need for balustrades to have a sloped surface. This had been prescribed in the Good Stucco Practice Guide which was published in February 1996.

[38] In *Mok v Bolderson*[3], Whata J considered the issue of whether a pre-purchase inspector was negligent in failing to identify observable defects that did not accord with recommendations in the Good Stucco Practice Guide. It was held that the inspector was negligent. Whata J noted that the guide had been published by BRANZ whom he described as "the country's leading publisher on building construction issues". He held that although the Good Stucco Guide might not have been well known in the industry at the time, a person holding himself out as an expert should have been aware of concerns raised in the guide.

[39] It is our view that the standard set by the High Court of pre-purchase inspectors is applicable to Council building inspectors who similarly were holding themselves out as experts and upon whom greater reliance was placed by homeowners in fact and by law. It certainly should not be lower. We find that the inspector should have been aware of the provisions in the Good Stucco Practice Guide and accordingly, that the flat top and handrail penetrations which combined to form a defect should have been identified on inspection by the Council. The Council was negligent in this regard.

Solid plaster pergola beam

[40] The problem with the pergola beam was similar to that of the flat topped balustrades. It was constructed with insufficient slope allowing water to sit on top of it and to enter its cladding via small cracks resulting in high moisture readings and timber decay. The provisions of the Good Stucco Practice Guide regarding the necessary fall for horizontal surfaces are similarly applicable and the lack of slope should have been identified as a defect on inspection.

Failure to provide kickouts to apron flashings

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

[41] This was one of the nine principal defects agreed on by the experts. The function of kickouts to roof apron flashings is to direct water to the outside. Their absence meant water could be directed back into plaster. They were not installed on the house, resulting in high moisture readings and timber decay at the roof to wall junctions on two elevations.

[42] The experts differed as to whether the absence of kickout flashings was something a reasonable inspector at the time should have noticed.

[43] Mr Flay expressed the view that it was not common practice at the time to inspect the lower ends of flashings to see that they directed water to the outside. In his brief he stated that a reasonable council officer having noted the presence of roof flashings of sufficient width would have relied on the roofer to have formed the kickout (which could not be viewed from the ground) and that at the time, a typical council inspector would have relied on the roofer to have completed the roofing work in a workmanlike manner.

[44] Mr Alvey disagreed that a visual inspection was not possible. His view was that it would have been unusual if there were no vantage points. He considered that from such a point the defect (lack of kickouts to direct water outside) would have been obvious.

[45] Mr Alvey considered that the lack of kickout flashings was a defect that should have been identified by a prudent Council inspector. His opinion was that the failure to provide these flashings represented a failure to comply with the performance requirements of Building Code. In his brief he referred to two BRANZ bulletins published in February 1993 and November 1994 which provided guidance on the installation of flashings on domestic properties and required the installation of flashings designed to divert water away from any point where it could enter the structure. Mr Cartwright concurred with Mr Alvey's view.

[46] In *Byron Ave*,[4] Venning J found that at the time of the *Byron Ave* inspections (between 1998 and 2002) a reasonable inspector would not have been looking for kickout flashings so the Council was not negligent in failing to require them. He also held that the inspector was entitled to take the view that proper trade practices would be adopted to waterproof the intersection of the roof canopies and decks with the walls. Venning J accepted evidence that in the type of construction under consideration in *Byron Ave,* waterproofing was generally done by continuing a membrane up behind the wall flashing to form an upstand and that kickout flashings were not a usual feature.[5]

[47] Mr Flay has suggested that because kickouts to the apron flashings would not have been visible from the ground, the inspector was entitled to assume that the apron flashing complied with the Building Code without checking further. In his brief he says that the inspector, having observed the presence of roof flashings, would have relied on the roofer to have formed a kickout without checking further. The Tribunal does not accept this view and does not consider it is supported by the dicta of Venning J in *Byron Ave* concerning the need or lack thereof to require kickouts.

[48] We do not understand Venning J to be saying inspectors bore no responsibility for checking that roof to wall junctions were weathertight. Rather that kickouts were not necessarily required and that the inspectors in *Byron Ave* were entitled to assume that a membrane upstand had been properly installed in accordance with proper trade practice.

[49] In the present case there is no evidence that a membrane upstand of the type described in *Byron Ave* was present or assumed to be present by the inspector. There is also no evidence of a producer statement from the roofer which the Council could have

[4] Body Corporate 189855 v North Shore City Council HC Auckland CIV 404-5561, 25 July 2008 [Byron Ave] at [154].
[5] [152]

relied on to satisfy itself that the area had been properly waterproofed. Mr Alvey's evidence that the defect would have been visible is accepted. Given the absence of a producer statement, the absence of evidence that a membrane upstand was present or assumed to be present, and the evidence that the defect would have been visible, we find that there was no basis upon which the inspector could have been satisfied the junction was weathertight. In these circumstances, the failure to identify the absence of kickouts or diverters to the apron flashings was negligent.

Failure to provide flashing to meter box cladding penetration

[50] On the west elevation water had entered behind the meter box and penetrated the timber framing. Mr Alvey in his brief referred to NZS 4251, 1998 which stated that all surface penetrations through plaster larger than 150mm diameter or equivalent area shall be fully flashed. His evidence was that the failure to provide adequate flashings had resulted in high moisture contents and timber decay. Mr Alvey considered that the failure to flash the meter box in itself would have necessitated the re-cladding of the first storey portion of the west elevation.

[51] Both Mr Cartwright and Mr Flay gave evidence that it was common practice at the time to seal around metre boxes as it was not well understood that sealed metre boxes were a weathertightness risk. Mr Flay also gave evidence that given this location, the metre box may not have been observed when inspecting a sample of the plaster work.

[52] The 1998 version of E2AS1 provided that sealant was appropriate where it was not directly exposed to sunlight or weather and easy to use and replace. The assessor's photograph (photo 06) shows that metre box was in a sheltered location and not directly exposed to sunlight or weather. Given this location and the evidence of Mr Cartwright and Mr Flay concerning practice at the time, we find

that it was not established that the Council was negligent in failing to detect this defect on inspection.

Incorrect installation of jamb flashings and jamb sill junctions

[53] In contrast with some other cladding products there was no proprietary flashing system provided for installation with stucco. The plans did not specify how the jamb flashings were to be installed and the jamb/sill junctions formed. As a consequence they were designed onsite. In a number of cases, water was able to penetrate between the joinery and the jamb flashing although this was variable with some of the flashings being installed effectively and some not.

[54] Mr Cartwright gave evidence that at the solid plaster inspection, the inspector should have ensured that the flashing components were assembled correctly and that the jamb sill lapped the jamb flashing over the sill. Mr Flay's view was that a reasonable inspector would have merely recorded that the component was in place.

[55] Mr Cartwright gave evidence that an inspector would have checked a sample of two or three windows and if they were properly installed, would then have been entitled to assume that the rest were too.

[56] Mr Alvey's evidence was that some but not all of the flashings were defectively installed. The flashings were successful in some locations and not in others. Mr Alvey did not identify the numbers or location of the windows which were variously properly and improperly installed although the moisture readings provide some indication of this. There is no inspection record before us identifying which or how many windows were inspected.

[57] As not all the flashings were installed defectively it is possible that the inspector checked and passed properly installed flashings which he or she reasonably assumed were a representative sample. In these circumstances it is not established that the Council inspection was deficient.

Mitre joints

[58] The experts all agreed that failed mitre sill details to corner window units was a significant defect and a major contributor to the damage to the house. In his brief Mr Alvey stated that the problem was that these details had been butt jointed rather than welded or sealed.

[59] Although the experts agreed that the mitre joints had failed causing damage, it was not established at the hearing that the joints were defective when inspected and should have been noticed on inspection by the Council.

[60] Mr Cartwright gave evidence that mitre joints are formed during the manufacturing process and that it was common for sealant to be applied to the mitred joint by the manufacturer. He commented that these mitre joints were not something building inspectors would usually pay particular attention to as they would be reliant on the manufacturers doing their job properly. He said that if the joint was open at the time of inspection it would have been obviously defective and should have been picked up. He was unable to say that this was the case however as the joints may well have failed subsequent to inspection.

[61] In his brief Mr Alvey had criticised the construction of the mitre sill details as being butt jointed rather than welded or sealed in a continuous manner. At the hearing, two photographs of these joints were examined in the course of the evidence of Mr Cartwright and Mr Flay on council liability. It was not established that these

photographs showed butt joints. One showed a mitred joint and the other was insufficiently clear to be able to tell. Mr Flay expressed the opinion that all the joints were mitred.

[62] The Mitchell report did not identify problems with the mitre joints. On the contrary it stated that the external joinery appeared sound.

[63] Although it is established that the mitre joints on the corner windows failed and have caused damage, it was not established that this was a defect that existed and would have been apparent on inspection. It is accepted that these mitre joint failures may well have occurred subsequent to construction. It is not therefore established that the Council inspection was deficient with respect to these joints.

WERE THE DE WAALS NEGLIGENT IN PROCEEDING WITH THEIR PURCHASE OF THE PROPERTY, GIVEN THE CONTENTS OF MR MITCHELL'S REPORT

[64] The Council has submitted that the de Waal's failure to obtain an independent report, and their decision to purchase the house in light of the contents of the Mitchell report, broke the casual chain between the Council's negligence and their loss. The Council also submits that the same facts give rise to the affirmative defences of volenti (voluntarily assumption of risk), intervening event and contributory negligence.

[65] The most applicable of the defences raised by the Council is contributory negligence and accordingly we turn to it first.

[66] Section 3 of the Contributory Negligence Act 1947 provides:

> Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be

> defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.

[67] Section 3 allows for the apportionment of damage where there is fault on both sides.[6] In assessing whether a plaintiff is at fault, the standard is that of the reasonable person although the person's own general characteristics must be considered. [7]

[68] The test for assessing the existence and extent of contributory negligence were helpfully discussed and clarified by Ellis J in *Findlay v Auckland City Council*.[8] After considering case law on the standard of care expected of plaintiffs in terms of protecting themselves from harm, she determined three questions to be answered. In the context of this case these question are:

(a) What if anything did the de Waals do that contributed to their loss?
(b) To what degree were those actions or inactions a departure from the standard of behaviour expected from an ordinary prudent person in their position (with their particular characteristics)?
(c) What was the causal potency of those actions or inactions to the damage suffered? In other words, to what extent did their actions or inactions contribute to the damage?

[69] Before determining the above questions it is necessary to consider the content of the report and the events that took place after the de Waals received it.

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[6] Stephen Todd (ed) *The Law of Torts in New Zealand* 5th ed, Brookers, Wellington, 2009 at [21.2.02]; *Hartley v Balemi* HC Auckland CIV 2006-404-002589, 29 March 2007 at [101].
[7] *Byron Avenue* 2010 NZCA65 at [79].
[8] *Findlay v Auckland City Council* HC Auckland CIV 2009-404-6497, 16 September 2010, at [59]-[64].

Contents of the report

[70] The Mitchell report is five pages long. It makes references to moisture readings on the first and last pages. On the first page it states, "It should be noted that there were no elevated moisture readings present at the time of the inspection so indications are that framing timbers will be in reasonable order."

[71] On the final page the report reads:

> Indicative moisture readings of the framing timbers were taken around the dwelling utilising a Carrel & Carrel 301 Capacitance Moisture Meter, paying particular attention to the areas around windows and doors and adjacent to flashings. The indicative moisture readings taken around the dwelling fell within the New Zealand Standard range of between 0% to 18% at the time of inspection. It is recommended that occasional moisture checks be made of the dwelling in order to address quickly any problems that may occur in the future. The only way to fully determine whether deterioration to framing timbers exit is by invasive testing. No invasive testing was undertaken at the time of the inspection.

[72] The balance of the report discusses the features and the conditions of the house. In the section of the report entitled "Exterior" it is noted that the house is clad with a solid plaster render finish over hardibacker and "as with all solid plaster systems that are applied over a flexible timber frame there is always the potential for cracking and therefore moisture infiltration." The report noted that there was minimal cracking in the cladding at the time of inspection but advised that this should be monitored and minor cracks should be repaired immediately.

[73] The report then identified a number of features of the house associated with weathertightness issues. Five of these are among the nine key defects agreed on by the experts. These defects and the commentary in the report about them are as follows:

- Ground clearances - “the claddings do extend to ground level, which is no longer acceptable practice as capillary infiltration can occur”.
- Flashings - “the major area of difficulties to plaster systems in the past has been infiltration of water around the windows and doors, along bottom plates and adjacent to flashings. The moisture readings taken were normal.” And later, “the head and sill flashings around the house are in reasonable order but all seals should be monitored”.
- Balustrades - “the flat topped handrails to the deck do provide potential for water infiltration if there are no additional flashings or membrane present under the plaster.”
- Deck - “the plaster finish extends to the deck levels around the house so capillary infiltration could occur.”

The de Waal’s actions after receiving the report

[74] As noted earlier, after consulting a lawyer and showing him the report, Mrs de Waal telephoned Mr Mitchell to discuss the contents of the report with him. Their recollections of their conversation are at variance. Mr Mitchell claims to have a particular recall of the conversation because of other events that were occurring at the time. Mrs de Waal does not claim a detailed recollection of the conversation but recalls feeling “confident” about purchasing the house after talking to Mr Mitchell.

[75] He says that he told her several times that she should get her own report. She cannot recall receiving this advice but accepts that Mr Mitchell may be correct.

[76] The Tribunal finds that both Mr Mitchell and Mrs de Waal were honest witnesses and neither attempted to mislead the Tribunal about the content of their conversation. Given that some five years

have passed since their single, short conversation, it is not surprisingly that they remember it differently. It is accepted that Mr Mitchell, having told Mrs de Waal that his report was prepared for the vendor, told her to obtain her own report. It is unclear however whether she understood what, if any difference a second report would have made. In other words, whether she was being told to get her own report because Mr Mitchell was annoyed that she had a report he had prepared solely for the vendor, or whether she was being told that an alternative report might give her different and important information.

[77] Mr de Waal also made an enquiry about the weathertightness risks of the house in that he telephoned a friend involved in the construction industry who told him that of the various monolithic claddings, stucco was the safest.

What did the de Waals do that contributed to their loss?

[78] The first of the framed questions is, if anything, what the de Waals do that contributed to their own loss? The answer is that they proceeded to purchase the house knowing that it was of the type associated with leaky home syndrome and when they were in possession of a report that identified a number of characteristics that were associated with risks of moisture ingress.

[79] It is not established that failing to obtain a second report was an additional factor that contributed to their loss. Had the de Waals obtained an independent pre-inspection report as they were advised to do by Mr Mitchell, it is likely that its content would have been similar with perhaps a greater emphasis on risk rather than on maintenance because it was a report for a purchaser rather than for a vendor. There is nothing to suggest that any substantially different information about the condition of the house would have been disclosed.

[80] Had a second report been commissioned around the time of purchase, the moisture readings would have similarly been in an acceptable range. The second report would probably have likewise advised that invasive testing is the only way to conclusively determine the existence of deterioration to framing timber. It is not established that had such testing been carried out in December 2006, the existence of decay would have been detected.

To what degree were those actions or inactions a departure from the standard of behaviour expected from an ordinary prudent person with their particular characteristics?

[81] The second question to be determined is whether the de Waals, by proceeding to purchase the house, departed from the standard of an ordinary prudent person with their particular characteristics.

[82] The de Waals have no particular characteristics that are relevant to the assessment of whether their conduct fell below that of persons of ordinary prudence. They are ordinary New Zealanders. They had previously owned property but had no particular property expertise. Their awareness of leaky building syndrome would have been that of any reasonably well informed members of the public.

[83] Having considered the report, and the evidence about the enquires the de Waals made after receiving it, including the conversation with Mr Mitchell, we find that a reasonable person in their position would have understood the following:

- The house was the type associated with leaky home syndrome (monolithically clad).
- The house had a number of features that were associated with weathertightness problems.

- The house did not have any elevated moisture levels which indicated that the timber framing had not deteriorated.

- Invasive testing was the only way to determine with certainty that the timber framing was unaffected by leaking.

[84] Although the report identified features associated with 'leaky homes' it gave no indication that any problems had occurred as a result of these features. On the contrary, the language of the report was reassuring. The flashings were said to be "in reasonable order". The framing timbers were indicated to be "in reasonable order". Cracking in the cladding was noted to be "minimal".

[85] After receiving the report the de Waals took the prudent steps of obtaining legal advice and discussing the contents of the report with its author. They then proceeded to purchase a monolithically clad home which they understood on reasonable grounds to be in good order.

[86] Having regard to all of the above, it is not accepted that the actions of the de Waals in purchasing the house departed from the standard of an ordinary prudent person with their particular characteristics. It is not established that the de Waals should reasonably have been able to foresee the damage to themselves in proceeding.

[87] In reaching this conclusion we have considered other 'leaky homes' cases where purchasers have been found to have contributed to their own loss. The conduct of the de Waals contrasts with that of the purchasers held to be negligent. For example in *Byron Ave,*[9] three unit owners were found to have been negligent

[9] *Byron Avenue* [2010] NZCA 65

after they each failed to obtain information that was readily available to them, which would have disclosed that their units were defective.

[88] The de Waals did not fail to obtain readily available warning information. Neither did they fail to inspect the house or make enquiries about it. As previously noted, it is not established that destructive testing carried out around the time of purchase would have revealed leak related damage. We conclude that the de Waals were not negligent. A conclusion to the contrary would impute negligence to any purchaser of a monolithically clad house around this time period that had similar risk features but exhibited no damage on inspection.

[89] As noted earlier, the Council raised the defences of volenti and intervening event in addition to contributory negligence.

[90] In support of the defence of intervening event, the Council relies on the judgement of Heath J in *Sunset Terraces* where he held that the negotiation of an abated purchase price because of weathertightness problems broke the chain of causation between a purchaser's loss and the Council's negligence.[10] This has little applicability to the present case.

[91] The Council also relies on the obiter dicta of Tipping J in the Supreme Court judgement in *Byron Avenue* and *Sunset Terraces.*[11] This is to the effect that if a purchaser fails to request a LIM which would have given notice of actual or potential problems, rather than just constituting contributory negligence at a high level, it may break the chain of causation from the Council's negligence at the inspection stage.

[10] *Body Corporate 188529 v North Shore City Council* HC Auckland, CIV-2004-404-3230, 30 April 2008
[11] *North Shore City Council v Body Corp* 188529 (Sunset Terraces) SC 27/2010 ,17 December 2010 at [79].

[92] It is not alleged that the de Waal's failed to request a LIM which would have given them notice of problems with the property. The only way for them to have determined with certainty whether problems existed would have been through invasive testing to which the vendors may not have consented because of the damage such testing creates.

[93] In the Court of Appeal *Sunset Terraces* decsion, Baragwanath J stated that the purchaser's opportunity for intermediate inspection is very limited compared to building inspector's rights of inspection during construction. He commented that it would be a rare case indeed where the significance of the opportunity for intermediate inspection breaks the chain of causation.

[94] We do not consider that this is such a case. It is not accepted that any failure on the part of the de Waal's broke the chain of causation between themselves and the Council's negligence.

[95] Similarly the defence of volenti is not established. It is an absolute defence but in order to establish it the Council must show that the de Waals fully appreciated the extent of the risk they took in purchasing the house and with that knowledge decided to bear it.[12] This is not established.

Liability of the Gardners

[96] Neither Mr nor Mrs Gardner attended the hearing. They have not denied that they were the developers of 13 William St Takapuna. On the contrary, Mr Gardner stated in an affidavit that he was the builder and developer of the property. In a response dated 2 May 2011, Mrs Gardner denied any participation in building the house and denied any liability for its weathertightness problems. She did not however deny that she had been a co-developer with her now former husband.

[12] S Todd The Law of Torts in New Zealand 21.4.02

[97] The Tribunal is satisfied that Mrs Gardner was a co-developer with her husband. She jointly purchased the William St site with him and jointly sold the developed houses upon their completion. She is named with her husband in the documentation relating to the development. Mr and Mrs Gardner traded as "Sylvan Design". Both their names appear at the top of the Sylvan Design letterhead on which letters were written by them to the Council concerning the development.

[98] While Mrs Gardner had a less "hands on" involvement with the development than her husband who had the dual role of builder and developer, she still received the financial benefit of the development and owed a duty of care as a developer to future purchasers.

[99] The rationale for the imposition of a duty of care on developers was discussed in *Body Corporate 188273 v Leuschke.*[13] The imposition of liability on developers arises from the fact that the 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.

[100] The duty of care owed by a developer was defined in *Mt Albert Borough Council v Johnson*[14] as being a duty to see that proper care and skill are exercised in the building of houses that cannot be avoided by delegation to an independent contractor.

[101] Proper skill and care was not exercised in the building of the house. Instead, it was constructed with a large number of defects that have necessitated extensive repairs. The Gardners breached the duty of care that they owed to future purchasers and are liable for the damage caused to the de Waals. They are both liable for the full amount of the established claim

[13] *Body Corporate 188273 v Leuschke Group Architects Ltd* (2007) 8 NZCPR 914.
[14] *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234.

[102] In addition to the duty owed by him as developer, Mr Gardner owed a duty of care to future purchasers in his role as the builder of the house.[15] He breached this duty of care by constructing the house with defects. His responsibility for the damage to future purchasers is therefore greater than that of his former wife.

WHAT WAS THE NECESSARY REMEDIAL SCOPE

[103] The remedial work that was carried out included the complete recladding of the house and the removal and replacement of affected timber. There are two matters at issue. First is whether a complete recladding of the house was required and second is whether the defects for which the Council was responsible necessitated the recladding of the house.

[104] In his assessor's report, Mr Pickering stated that each elevation affected would require recladding over the 20mm drained cavity that is now required under the Building Code. His recommended scope of repairs included the removal of all exterior cladding, the removal of affected timber and the extension of roof overhangs to accommodate the additional wall thickness.

[105] Mr Alvey and Mr Flay also agreed that the recladding of the house was necessary however Mr Flay's view was that the windows, for which the Council is not liable, were the main cause of the need to reclad.

[106] It is accepted that the defects were such that a complete reclad of the house was necessary. We now turn to the issue of whether the Council should be jointly liable with the Gardners for the full cost of the amount of the necessary remedial work. It has been determined that the Council was not liable for the window defects or the absence of flashings to the metre box. The question is whether

[15] *Bowen v Paramount Builders* [1977] 2 NZLR 394

the remaining defects would themselves have necessitated the recladding of the house.

[107] The Council has been held liable for the ground clearances, the three defects associated with the balconies, the pergola beam and the lack of kick outs or diverters to the roof apron flashings. In his report Mr Pickering recommended a reclad of the house but did not identify either of the two window defects. His view was that non-window defects themselves made a reclad necessary because repairs requiring the removal of sections of cladding necessitated the installation of a cavity in order to achieve Building Code Compliance.[16]

[108] In his evidence Mr Alvey expressed the view that even if the window defects were removed from the equation, the remaining defects would still necessitate a full re-clad.

[109] Mr Flay disagreed. He considered targeted repairs in respect of the apron flashing defects and the ground clearance defects would have been possible with the use of horizontal flashings at the cladding repair junctions. In response, Mr Alvey expressed the view that consent for such repairs would be difficult to obtain and the repair would be difficult to achieve. Mr Pickering agreed with Mr Alvey as he considered that the junctions of the targeted repairs proposed by Mr Flay would be risk areas.

[110] We accept the view of Mr Alvey and Mr Pickering that the defects for which the Council has been found liable necessitated the reclad of the house. Although the Council is not liable in respect of the metre box which is located on the single story portion of the west elevation it is unrealistic to divorce this small area of recladding from the remedial work as a whole. We conclude therefore that the Council is jointly liable with the Gardners for the full cost of repairs.

[16] See WHRS Assessor's Report at 15.6.2 (page 40) .

WHAT IS THE APPROPRIATE DEDUCTION THAT SHOULD BE MADE FOR BETTERMENT

[111] The next issue to be considered is the appropriate deduction for betterment.

[112] In addition to the necessary remedial work, some alterations were made to the house. These largely consisted of using better quality or more expensive materials such as copper finishings and double glazed windows. Other changes included closing in a balcony, installing a skylight and altering the roof line. In addition, the house was reclad with weatherboards rather than with stucco plaster. The change of cladding and the alterations to the house constitute betterment. It is necessary therefore to determine the appropriate deduction to make for these items from the total cost of the remedial work and consequential expenses.

[113] The de Waals have claimed $366,184.25 for their remedial work. This sum represents the total project costs minus betterment.

[114] Mr Love for the claimants and Mr Ewen for the Council gave expert evidence to the Tribunal concerning the appropriate deductions to be made for betterment. Mr Love is a chartered building surveyor employed by Kaizon Limited, the company that was the project manager for the remedial works. Mr Ewen is a quantity surveyor.

[115] There were a number of differences between the parties concerning the deductions that should be made for betterment. A number of these were resolved in Mr Love's reply evidence and at the hearing. The differences that remained were as follows:

Kaizon Project Management Fees

[116] It was the Council's case that a deduction should be made from Kaizon's project management fees to reflect the proportion of

the work that related to betterment. A related issue was whether cladding the house with weatherboards instead of plaster extended the duration of the work. This was significant because Mr Alvey gave evidence that the Kaizon fee was determined by the contract's duration rather than its value. His view that was that using weatherboards instead of plaster did not extend the length of the contract and in fact slightly shortened it because plaster is a five process operation while weatherboards are applied in a single step.

[117] Mr Alvey gave evidence that the other items of betterment did not extend the contract. For example although a deck was enclosed this was not on a critical path and it took the same amount of time to enclose the deck as it would have taken to reconstruct it.

[118] Mr Ewen disagreed with Mr Love. His opinion was that the change of cladding to weatherboards and the alterations to the roof would have extended the duration of the contract by three weeks. Mr Pickering expressed the view that there was no material difference in the length of time required for weatherboards and plaster.

[119] It is not established that the betterment carried out extended duration of the contract. As the Kaizon project management fee was predicated on contract duration, it is not accepted that a proportional deduction for betterment should be made.

Scaffolding

[120] Mr Ewen and Mr Love disagreed about the deduction that should be made in respect of scaffolding hire. Mr Love had calculated that the betterment resulted in scaffolding being required for one extra week and calculated a deduction accordingly. Mr Ewen disagreed on the basis that approximately two thirds of scaffolding costs are related to directing and dismantling it at the beginning and end of the job. He considered therefore that a proportional deduction taking into account the value of the betterment rather than the extension of time should be made.

[121] The scaffolding would not have been required if remedial work was not necessary. We accept Mr Love's opinion that a deduction of $624.01 representing one week's scaffolding hire should be made.

Plastering of base

[122] Mr Ewen and Mr Love disagreed over whether the plaster finish to the base of walls constituted betterment. Mr Ewen considered that it did. Mr Love and Mr Alvey disagreed on the basis that application of plaster to the base was necessary because the removal of stucco which had been at ground level caused damage. Mr Ewen considered despite this, had the house been clad with plaster, less cost would have been involved in applying plaster to the base as the plasterer would have already been on site. He considered that half the amount he had originally deducted should be made. This represents approximately $450. We agree.

Painting

[123] The claimants conceded that a proportion of the internal painting constituted betterment as the paint finish was ten years old at the time the remedial works were undertaken. The dispute between the claimants and the Council was whether this figure should be calculated on the basis that the lifespan of the internal paint was 15 years (Mr Love's view) or 12 years (Mr Ewen's view). Both experts agreed that the lifespan of internal paint depends on the nature of the occupants. In this case the occupants are a large family. We accept Mr Ewen's view that 12 years is an appropriate measure. The deduction for betterment in respect of the internal paint work should therefore be adjusted to the figure calculated by Mr Ewen ($9,853.20). It is noted that $7565.71 has already been deducted in respect of painting. The difference is $2287.49.

Audio System

[124] The claimants included the cost of installing their audio system at the temporary accommodation. The Council submitted that this was not a foreseeable loss and did not relate to repairs at the property. We agree. The amount claimed in this regard should be halved to represent the cost of removing and installing the system once rather than twice. We allow $1,337.29 rather than $2,432.66.

Insurance Cover

[125] Mr de Waal gave evidence at the hearing that the cost of cover did not relate to the duration of the work as it was issued for a six month minimum period. The Council has submitted that the insurance premium must have been assessed on the total value of the building works and a deduction is therefore required to reflect betterment. No evidence has been provided to support submission. No deduction is warranted.

Architect Fees

[126] Mr Love accepted the deduction for architect fees calculated by Mr Ewen. This is $11,272.31.

Consequential damages

[127] The de Waals have claimed the cost of rental accommodation ($24,000 being 25 weeks at $960 per week) and removal and storage ($3,402). Council has submitted that the rental is ‘on the very high side’ and that the award for these costs should be adjusted to reflect betterment.

[128] As it is not established that the betterment undertaken extended the duration of the construction work. No reduction in the de Waal’s rental and storage costs are warranted.

[129] Taking into account the deductions established above, and, the concessions made by Mr Love and Mr Ewen the established quantum prior to the deduction of the de Waal's contribution is as follows:

Council Fees	$8,398.56
Contractors invoices	$13,369.70
Architects	$30,557.44
Removal and storage	$3,402.00
Rent	$24,000.00
Survey services	$7,226.10
Engineering	$2,822.35
Carpets and floors	$4,862.76
Insurance	$2,191.95
Remedial building costs	$366,184.25
Total	**$463,015.11**
Less	
Scaffolding deduction	$624.01
Audio system	$1,337.29
Painting	$2,287.49
Base plaster	$450.00
TOTAL	$458,316.32

[130] The established quantum is $458,316.32.

Interest

[131] The claimants are seeking interest on the cost of the remedial work and consequential expenses. The Act provides for interest to be awarded at the rate of the 90 day bill rate plus 2%. A schedule of interest was attached to Mr Holland's closing submissions. Payment for the remedial work was made in four instalments. The first of these was paid from the de Waal's savings. The second instalment was paid on 3 December 2010. The 90 day

bill rate plus 2% is 4.70% which means interest accrues at $59.02 per day. In the circumstances of this case it is appropriate that interest be awarded from the date the second instalment was borrowed. There are 361 days between 3 December 2010 and 22 November 2011. Interest of $21,306.22 is therefore awarded.

General damages

[132] The de Waals have claimed general damages of $25,000. This is the amount the Court of Appeal in *Byron Avenue* confirmed was in the general vicinity available to owner-occupiers[17] although in *Hamid v England,* Whata J commented that this amount was at the upper end.[18]

[133] The Council has submitted that any award of general damages should reflect the nature and extent of the betterment work and contributory negligence. Contributory negligence has not been established. Neither has it been established that the duration of the remedial work was affected by the betterment undertaken. There is no basis for the deduction sought.

[134] Mr de Waal's brief gave details of the stress he and his wife had experienced as a result of their leaky home experience. This included disruption, the effect on family relationships, financial pressures and anxiety arising from being embroiled in a bureaucratic process with uncertain duration and outcomes. We consider that an award of $25,000 is appropriate in this case. General damages in the sum of $25,000 are awarded.

The Conclusion as to Quantum

[135] The claim has been established to the amount of $375,714.85 which is calculated as follows:

[17] *O'Hagan v Body Corporate 189855 v* [2010] 3 NZLR 455 [Byron Avenue].

Remedial and consequential costs	$458,316.32
Interest	$21,306.22
General damages	$25,000.00
TOTAL	$504,622.54

WHAT CONTRIBUTION SHOULD EACH OF THE LIABLE PARTIES PAY?

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

[137] 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.

[138] Section 17(2) of the Law Reform Act 1936 sets out the approach to be taken. It provides that the contribution recoverable shall be what is fair taking into account the relevant responsibilities of the parties for the damage.

[139] We have found that the three remaining respondents are liable for the full amount of the established claim. They are the Mr Gardner, Mrs Gardner and the Auckland Council. It has been submitted for the Auckland Council that should liability be established against them, that liability ought to be restricted to 15%-20% of the losses claimed.

[140] We find that Mr Gardner should be bear the greatest apportionment. He was the developer and as such owed a non

[18] At [129]

delegable duty of care to future purchasers. He was also the builder responsible for the creation of defects which necessitated the reclad of the house. We conclude that his contribution of Mr Gardner should be set at 70% which encompasses 15% contribution as a developer and a 55% contribution as builder.

[141] Mrs Gardner was also the developer and owed a non delegable duty of care to future purchasers. However, she had less involvement with the house than her husband and, unlike him, did not create the defects that led to the need for extensive remedial work. We conclude that her contribution should be set at 15%.

[142] Although the Council was not responsible for carrying out the building work and nor was it a clerk of works, it failed to properly carry out its inspections. It had no basis for being satisfied that the roof to wall junctions were weathertight. It failed to detect the significant and obvious defects in respect of the ground clearances and horizontal stucco surfaces of the balustrades and pergola beam. It was not however liable for the incorrect installation of jamb flashings and jamb/sill junctions or the failure to provide a flashing for the metre box. We conclude that the contribution of the Council should be set at 15%.

CONCLUSION AND ORDERS

[143] The claim by North Harbour Trustee Company Limited, Red Lunday de Waal, Jon William de Waal and Mark Glanville Thompson as Trustees for the Due North Trust and Jeroboam Trust is proven to the extent of $504,622.54. For the reasons set out in this determination we make the following orders:

i. The Auckland Council is to pay North Harbour Trustee Company Limited, Red Lunday de Waal, Jon William de Waal and Mark Glanville Thompson as Trustees for the Due North Trust and Jeroboam Trust the sum of

$504,622.54 forthwith. The Auckland Council is entitled to recover a contribution from Leslie Walter Gardner of up to $353,235.79 and from Margaret Linda Gardner of up to $75,693.38 for any amount paid in excess of $75,693.38.

ii. Leslie Walter Gardner is ordered to pay North Harbour Trustee Company Limited, Red Lunday de Waal, Jon William de Waal and Mark Glanville Thompson as Trustees for the Due North Trust and Jeroboam Trust the sum of $504,622.54 forthwith. Leslie Walter Gardner is entitled to recover a contribution of up to $75,693.38 from the Auckland Council and from Margaret Linda Gardner of up to $75,693.38 for any amount paid in excess of $353,235.79.

iii. Margaret Linda Gardner is ordered to pay North Harbour Trustee Company Limited, Red Lunday de Waal, Jon William de Waal and Mark Glanville Thompson as Trustees for the Due North Trust and Jeroboam Trust the sum of $504,622.54 forthwith. Margaret Linda Gardner is entitled to recover a contribution of up to $75,693.38 from the Auckland Council and from Leslie Walter Gardner of up to $353,235.79 for any amount paid in excess of $75,693.38.

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

First Respondent- Leslie Walter Gardner	$353,235.79
First Respondent- Margaret Linda Gardner	$75,693.38
Second Respondent – Auckland City Council	$75,693.38

[145] If either of the parties listed above fail to pay its or his apportionment, this determination may be enforced against any of them up to the total amount they are ordered to pay in paragraph [143] above.

DATED this 22nd day of November 2011

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