IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2011-100-000065
[2013] NZWHT AUCKLAND 17

BETWEEN	CARL SANTO SAFFIOTI AND EIJA MARITA SAFFIOTI Claimants
AND	GREGORY PAUL AND KIM MACHELLE WARD First Respondents
AND	NORMAN OLIVER PORTMAN Second Respondent
AND	JOHN STEPHEN HANCOCK Third Respondent
AND	JIM STEPHENSON: ARCHITECT LIMITED Fourth Respondent
AND	MARTYN CLEARY (Not Served) Fifth Respondent
AND	TONY HERON Sixth Respondent
AND	AUCKLAND COUNCIL (Removed) Seventh Respondent
AND	QUINTON DAVID DALGLISH (Removed) Eighth Respondent
AND	NU AGE PLASTER LIMITED (Removed) Ninth Respondent
AND	FREDERICK ALFRED CHARD (Removed) Tenth Respondent
AND	ACR REROOFING LIMITED Eleventh Respondent

Hearing: 9, 10 and 11 April 2013

Appearances: Mr & Mrs Saffioti, R J Hooker
Mr and Mrs Ward, S Grant and N Taefi
Mr Portman, self represented

Mr Hancock, no appearance
Jim Stephenson: Architect Limited, A Jones
Mr Heron, self represented
ACR ReRoofing, no appearance

Decision: 12 June 2013

FINAL DETERMINATION
Adjudicator: P A McConnell and G Wadsworth

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INTRODUCTION

[1] In December 2004 Carl and Eija Saffioti purchased their home at 34 Wairere Avenue, Mount Albert. Despite taking steps prior to the purchase to ensure the home was sound and well built it leaked. They have completed the remedial work which included recladding with weatherboards and reroofing the property with eaves. They are seeking the costs of carrying out the remedial work together with consequential costs and general damages from the respondents to this claim.

BACKGROUND

[2] Gregory and Kim Ward were owners of the property when the house was built in 2002 and after living in the house they sold it to Mr and Mrs Saffioti. Mr and Mrs Saffioti say that Mr and Mrs Ward breached the warranty in 6.2(5) of the agreement for sale and purchase because the house did not comply with the performance based Building Code. Mr and Mrs Ward however say that they complied with all their obligations under the Building Act as the building work was completed in compliance with the building permit, there were no significant departures from the consented drawings and they obtained a code compliance certificate (CCC).

[3] Mr Portman and Mr Hancock were the directors of 345 Builders Limited ("345"), the company that had a design and build contract with the Wards for the construction of the house. Mr Portman accepts he was personally involved in the building work but says he neither carried out nor supervised any of the defective work that has caused the property to leak. Mr Hancock did not attend the hearing but in previous statements has said that the construction of this house was Mr Portman's responsibility and not his.

[4] Jim Stephenson: Architect Limited (JSAL) was engaged to do the design work for the house. Mr and Mrs Saffioti say that JSAL is liable for the full amount claimed as it failed to provide specific details in the drawings for the various building elements with which defects have been associated. Mr Stephenson says that JSAL's engagement was limited and that while he completed the majority of the drawings he was never asked to finish them nor was he asked to prepare a specification. In any event he

says that there is no evidence that the house could not have been built weathertight by normally competent builders if they have followed good trade practice and available technical material.

[5] Mr Heron was an employee and one of several designated signatories for Approved Building Certifiers Limited (ABC), a building certifier. The Saffiotis say that in signing the CCC on behalf of ABC Mr Heron personally assumed all the legal liability of ABC in relation to the building consent inspection and certifying process. Mr Heron however says he did not personally assume the responsibility of his employer when he signed the CCC on its behalf. He says signing the CCC was an administrative act and all he was required to do was to check that the inspections had been carried out and paperwork completed.

[6] ACR Roofing Limited (ACR) supplied and installed the roof and metal parapet caps. Mr and Mrs Saffioti' expert evidence is that deficiencies in the installation of the parapet caps and failure to provide suitable saddle flashings at the parapet cladding junctions has contributed to the leaks and that this work was most likely done by ACR.

[7] Therefore the issues we need to decide are:

- What are the defects that have caused the leaks?
- What remedial work was required and what is the reasonable cost of that work?
- What is the extent of the warranty in clause 6.2(5) of the sale and purchase agreement and have Mr and Mrs Ward breached that warranty?
- What were the respective roles and involvement of Mr Portman and Mr Hancock in the construction of the house? In particular do either Mr Portman or Mr Hancock owe Mr and Mrs Saffioti a duty of care and if so, have either of them breached that duty?
- What was the extent of JSAL's involvement in the completion of the drawings for building consent purposes?
- Did JSAL breach any duty of care owed to Mr and Mrs Saffioti and if so, has any breach been causative of loss?

- Did Mr Heron as an employee and an authorised signatory of ABC documents owe Mr and Mrs Saffioti a duty of care in signing the CCC? If so, has Mr Heron breached any duty of care owed? In particular by signing the CCC did Mr Heron personally assume the responsibility of his employer in the full consent inspection and certification process?
- Did the work done by ACR cause or contribute to leaks? If so, what is the loss or damage that has flowed from that work?

WHAT ARE THE DEFECTS THAT HAVE CAUSED THE LEAKS?

[8] Noel Casey, the assessor, and Barry Gill, the expert for Mr and Mrs Saffioti, carried out investigations and completed reports on the house. Mr Casey carried out an invasive investigation in early 2010 and took numerous moisture readings around the house. As recorded in his report he found only three areas where the moisture readings were above 20 per cent and another five that were between 17 and 20 per cent. He concluded that deficiencies in the installation of the barge boards and the entry roof support posts had caused damage. In addition there was damaged framing that needed to be replaced below the balcony which had previously been repaired. He also identified areas of future likely damage around the joinery, at the penetrations through the cladding and where the cladding was finished down to or near the ground level. He concluded that the appropriate remedial scope was targeted repairs at a cost of $141,561.

[9] Mr Gill's report was based on his investigations and observations before and during the remediation process. Once the cladding was removed he found that there were additional areas of damage. He identified five different defects with the house. The major one, at least in relation to the remedial scope, being inadequate sealing or failure to seal between the PVC sill and jamb flashings.

[10] At the hearing Mr Casey agreed with Mr Gill's defects list and his conclusions as to the additional defects, given the further evidence that became available during the remedial work. None of the respondents specifically challenged Mr Gill's list of defects.

[11] We are accordingly satisfied that the defects which caused or contributed to leaks in the house were:

A. The timber barge boards were imbedded within the EIFS cladding.
B. The joinery penetrations lacked an adequate weathertight seal.
C. The parapet cap flashings were ineffective.
D. The apron flashings lacked a kick-out or appropriate means of diverting water away from the cladding.
E. The service penetrations were not sealed.
F. There were no saddle flashings provided at the parapet cladding junctions.

A. Embedded Timber Barge Boards

[12] This defect was identified in the assessor's report as well as by Mr Gill. There was a failure to extend the plaster finish behind the barge boards. It appears that, at least in some locations, the barge boards were fitted directly over the top of the polystyrene before they were plastered without allowing sufficient space for the plaster to be pushed up behind the barge boards. There was also a failure to provide a drip detail at the barge board cladding junction.

[13] The way the work was carried out on the house was contrary to good building practice as evidenced by the then applicable BRANZ good practice guide for EIFS dwellings. It is also contrary to the technical information contained in the NuAge Plaster Systems Guidelines.

[14] Mr Gill and Mr Casey agreed that this defect was the responsibility of both the cladder/plasterer and whoever installed the barge boards. They accepted that if this was the only defect the house would not have needed to be reclad. Mr Casey advised that the appropriate remedial scope and cost for this work was included within summary table one in paragraph 15.7 of his report. His estimate was that approximately 75 per cent or $94,942 of this amount related to the barge board remedial work.

B. Joinery penetrations lacked a weathertight seal

[15] Mr Gill's evidence was that with some windows there was no sealant between the sill and jamb flashings and with others there was some sealant but it was inadequate. His opinion was that the damage had been accentuated by lack of a correct drip detail at the base of the cladding. With the NuAge Plaster System the jamb and sill flashings were provided as part of the cladding system and generally installed by the cladding installer.

[16] This was not a defect that would have been able to be seen once the plastering work was completed. Mr Casey's view was that at least some of the windows would have appeared to be sealed at the time of installation of the flashings. If a builder was carrying out a walk around inspection the sealant on those windows would have appeared to be "nice and new and in place" prior to the plastering work. There is no evidence of the number, or percentage, of the windows that lacked any sealant.

[17] Mr Gill's evidence was that this defect alone would have required the reclad of the house as there were windows on all elevations of the house. Mr Gill and Mr Casey also agreed that it was generally accepted good trade practice at the time to seal junctions between the sill and jamb flashings.

C. Ineffective parapet cap flashings

[18] There was a failure to provide sufficiently lapped joints between the separate lengths of cap flashing which was accentuated by insufficient falls to the cap flashings. This defect with the cap flashings resulted in damage at the junctions or corners. Mr Gill's evidence is that the plaster had been applied prior to the parapet cap being installed.

[19] Mr Gill confirmed that if this had been the only defect the house would not have needed to be reclad. He provided copies of pages 28-30 from his report with the extent of the remedial work that would most likely be required as a result of this defect shaded in green.[1] While he accepted the work extended to approximately 30 per cent of the exterior surface of

[1] Additional document 8 submitted during hearing.

the property he did not consider dividing the remedial costs by 30 per cent would provide an accurate indication of the cost of the work that would be required to remedy this defect.

[20] The construction party who installed the parapet caps would be primarily responsible for this defect. While the experts were also critical of the flat topped framing for the parapet caps Mr Gill's evidence was that flat tops for parapets was a relatively standard industry practice when the house was built. Mr Portman also said that at the time this house was built there was no requirement for slopes to the top of balustrades and parapets. In addition one of the methods of creating a slope, as illustrated in the NuAge technical material, was by the cladder inserting a polystyrene fillet over the top of the framing before plastering. In any event we do not consider that the failure to provide a slope to the parapet caps has been a significant cause of water ingress. The parapet caps were metal and water pooling on top of the metal cap is unlikely to have contributed to damage unless there were other more serious defects with the way they were installed.

D. Apron flashings lacked kick-out

[21] Mr Gill's evidence was that failure to provide a suitable kick-out at the end of the apron flashing caused or contributed to damage on one elevation only. Mr Gill accepted that kick-outs to apron flashings were not a requirement at this time this house was constructed. However it was always a requirement that flashings were to divert water away and there was no adequate means of diversion. This defect was the responsibility of whoever installed the apron flashings.

E. Service penetration to cladding

[22] The junctions between the meter box and the cladding as well as the pipe and general service penetrations through the cladding system relied entirely on sealant. This defect was most likely the responsibility of either the cladder or the plumber and affected one elevation. If this had been the only defect it could have been remedied by relatively minor remedial work.

F. No saddle flashing provided at parapet cladding junction

[23] There was a failure to provide a suitable saddle flashing at the parapet cladding junction. This defect is related to the parapet cap defect outlined at C above and was the responsibility of the cap flashing installer. Mr Gill's evidence was that if this was the only defect the remedial work that would have been needed was less than that required to remedy the parapet cap defect. Mr Gill's estimate was that it would be between five and ten per cent of the total of work required to remediate the house.

Defects with deck

[24] The claim includes an amount of $6,149.81[2] being the Pilcher and Edwards account to repair the original deck leak. Neither Mr Gill or Mr Casey provided any evidence in relation to the defects which had resulted in the deck leaks as that work had been carried out prior to their involvement with the house. In addition there is no detail about the deck defects in either the defects schedule attached to the second amended statement of claim or the defects list filed prior to the hearing. No other evidence was filed in advance of the hearing in relation to the deck other than Mr Saffioti's account of the leaks occurring and the invoice for the remedial work being included in the common bundle.

[25] At the end of the hearing Mr Portman asked whether any evidence had been given regarding the defects with the deck. We then allowed Mr Saffioti to informally give evidence in relation to the work that was done. His recollection was that there were issues with the lack of upstand to the deck membrane and an inadequate slope to the deck. Mr Portman however disputed this evidence as he could recall constructing the deck with a slope.

[26] We note that even if there had been a lack of slope it would be unlikely to have caused the leak, at least on its own. The deck was lined with a waterproof membrane and tiled. The most that any lack of slope in the surface of the deck would have done would be to have allowed water to pool on the deck. This would not have caused a leak unless there had

[2] Second amendment statement of claim, 12 February 2012 at [59].

been some other defect in the application of the membrane or the tiling work over the membrane.

[27] While we accept that the deck leaked there is no reliable evidence on which we can determine the cause of the water ingress through the deck and into the room below. The most we can say is that it may have been caused by a breakdown or damage to the waterproof membrane installed over the deck, or by a failure to provide a sufficient upstand. The claim in relation to the deck has not been established against any of the named respondents.

WHAT REMEDIAL WORK WAS REQUIRED AND WHAT IS THE REASONABLE COST OF THAT WORK?

[28] After receiving the assessor's report Mr and Mrs Saffioti had drawings prepared for targeted repairs to the house. Following a meeting between their remedial designer, David Hawsworth, and the Council in relation to the proposed targeted approach Mr and Mrs Saffioti decided to fully reclad their house with weatherboards and to reroof their house with a design that included eaves. Mr Saffioti confirmed that the main reason why they decided to fully reclad the house was to reduce any stigma and the associated deduction that would most likely be made to the sale price when they eventually sell the house.

[29] The additional damage discovered when the cladding was removed however establishes that a reclad was necessary. Both Mr Casey and Mr Gill agreed that the only appropriate remedial scope to remedy the damage and defects subsequently discovered to the house was a full reclad.

[30] However we are not satisfied that the property needed to be reroofed in order to address the defects which have caused damage. Mr Saffioti said that he had been advised that the inclusion of eaves would be generally similar in price to rebuilding the parapets. His recollection is that the eaves option was about $2,000 more than re-building the parapets. However, in addition to the increased cost of reroofing with eaves, Mr and Mrs Saffioti have incurred other related costs as a result of choosing this option. Those costs include the resource consent that was required for the

inclusion of eaves and the associated surveying work, as well as the cost of replacing the existing iron roofing which was approximately ten years old when the remedial works were carried out.

[31] Mr Saffioti acknowledged there was some betterment involved in re-roofing the house and in the course of the hearing he voluntarily deducted $6,000 from the amount claimed to reflect this. On the evidence presented however we are unable to conclude whether this deduction is sufficient to account for the level of betterment involved in the reroofing cost. In addition we do not consider that the costs involved in the resource consent application and the special building compliance survey are claimable against any of the parties.

[32] The defect which tipped the appropriate remedial scope from a partial reclad to a full reclad was that associated with the joinery penetrations discussed at B above. For the reasons detailed in other parts of this determination none of the served respondents are liable for this defect. Therefore it is unnecessary for us to reach a firm conclusion on the total claimable cost of the remedial work.

General Damages

[33] Mr and Mrs Saffioti have applied for general damages of $60,000. The *Sunset Terraces* and *Byron Avenue*[3] Court of Appeal decisions establish that the appropriate measure of general damages depends on individual circumstances. However, for owner occupiers the usual award will be in the vicinity of $25,000. White J in *Coughlan v Abernethy*[4] confirmed that standard awards are for general guidance and for the purpose of reducing costs and facilitating consistency. Some flexibility is required in appropriate cases when applying those standard awards, to reflect the particular circumstances and grounds upon which general damages are sought.

[34] The only evidence provided to support the application for general damages is some brief comments in Mr Saffioti's affidavit. In particular he

[3] *North Shore City Council v Body Corporate 188529 (Sunset Terraces)* [2010] NZCA 64, [2010] NZLR 486 (CA), *O'Hagan v Body Corporate 189855 (Byron Avenue)* [2010] NZCA 65, [2010] 3 NZLR 486.

[4] *Coughlan v Abernethy* HC Auckland, CIV-2009-004-2374, 20 October 2010 at [119].

states that he and his wife suffered considerable stress since learning of the building defects and water entry. He further says that his wife suffers from asthma and he believes her condition was aggravated by the water damage in the house and the associated fungi. Mrs Saffioti did not give any evidence and no medical evidence has been provided.

[35] We do not consider that an award of damages of $60,000 is warranted. While we accept Mr and Mrs Saffioti have suffered considerable distress since learning of the building defects this is not a property that had widespread water ingress and a myriad of high moisture readings. We accordingly conclude that an appropriate award for general damages is $25,000.

WARDS

The extent of the Vendor warranty

[36] The contract between Mr and Mrs Ward and Mr and Mrs Saffioti was recorded on the seventh edition of the REINZ/ADLS sale and purchase agreement form. Clause 6.2 (5) of the agreement warranted that at the giving and undertaking of possession:

> (5) Where the vendor has done or caused or permitted to be done on the property any works for which a permit or a building consent was required by law:
>
> (a) The required permit or consent was obtained; and
> (b) The works were completed in compliance with that permit or consent; and
> (c) Where appropriate, a code compliance certificate was issued for those works; and
> (d) All obligations imposed under the Building Act 1991 were fully complied with.

[37] Sub-clause (a) of cle 5 was satisfied because building consent for the construction of the house was issued on 1 November 2001. Sub-clause (c) was satisfied because once the house had been built a CCC was issued on 16 April 2002. Mr and Mrs Saffioti's breach of warranty claim is based on the provisions in sub-clauses (b) and (d). They say that the

following events before, during and after the construction of the house are relevant when assessing the scope of those two sub-clauses and whether, and if so the extent to which they have been breached:

a) Before the house was built Mr and Mrs Ward had obtained resource consent for the subdivision of the section, were subsequently involved in obtaining the building consent and appointing the builder and the architect and were also involved in the design of the house.

b) Mr and Mrs Ward made inadequate enquiries of the builder, elected to use a private certifier, ABC, instead of the Council to inspect and certify the construction of the house and frequently visited the site during the construction works and so were in a position to observe the house as it was built.

c) Mr and Mrs Ward received but did not read ABC's document file after the house had been built and did not read the detailed provisions of the sale and purchase agreement before they signed it.

[38] We accept that Mr and Mrs Ward's involvement in the consent, design, construction and subsequent sale of the house included the events relied on by Mr and Mrs Saffioti. However, we do not consider that those events were sufficient to place Mr and Mrs Ward in a different category from that of any other vendors who have purchased land, had a house built on it and subsequently decided to sell that house.

[39] We do not consider that Mr and Mrs Ward were developers or experienced house builders. Mr and Mrs Ward did not have building or technical qualifications or experience that were sufficient to place them in any different category of vendors. Instead we consider that they were an ordinary couple who, like many others in a similar position, had some preliminary involvement in the design and occasionally observed the subsequent construction of their house. The contract they had with 345 Builders was a design and build contract sometimes known as a turn-key contract.

Claue 6.2(5) (b)

[40] Mr and Mrs Saffioti's breach of warranty claim is based on the premise that because the house contained the alleged defects it was not completed in accordance with the building consent or the obligations imposed under the Building Act 1991. There was no reference at all to the Building Code until Mr Hooker's opening and closing submissions.

[41] Mr and Mrs Saffioti say that the natural and ordinary meaning of sub-clause (b) is that Mr and Mrs Ward warranted that the house had been constructed in accordance with the building consent and in accordance with the Building Code. This interpretation of sub-clause (b) relies primarily on *Aldridge v Boe*[5] where the High Court considered an appeal by the purchasers whose claim against the vendors had been dismissed by an earlier decision of the Tribunal.[6] Mr and Mrs Ward however say that the situation in *Aldridge* was very different to their situation and that the High Court has rejected Mr Hooker's argument as to the meaning of sub-clause (b) in *Keven Investments Ltd v Montgomery*[7] *and Brebner and Wentzel v Collie.*[8]

[42] In *Aldridge*, the vendors did not apply for a CCC until six years after they occupied the house which they had built and after a prospective purchaser had withdrawn because no CCC was available. After inspecting the house the Council refused to issue a CCC because of concerns as to the extent and consequences of visible cracks in the exterior cladding and until the vendors had produced a report on the condition of the cladding. The vendors obtained such a report which recommended repairs. After receiving the report the Council advised the vendors that it would not consider whether to issue the CCC until the repairs has been completed and a further satisfactory report had been provided.

[43] The vendors carried out some repairs and repainted the cladding. They were unable to obtain a further report endorsing the condition of the cladding before they placed the house on the market. The earlier cladding

[5] *Aldridge v Boe* HC Auckland, CIV-2010-404-7805, 10 January 2012.
[6] *Aldridge v Boe* [2010] NZWHT Auckland, 31.
[7] *Keven Investments Ltd v Montgomery* [2012] NZHC 1596.
[8] *Brebner and Wentzel v Collie* [2013] NZHC 63

report and the correspondence with the Council were disclosed to the purchasers before they bought the house at auction.

[44] The relevant vendor warranty was at cl 14.2 of the auction sale and purchase agreement. Apart from the omission of the phrase "at the giving and taking of possession", sub-clauses (a) and (b) of that clause were identical to the equivalent provisions in sub-clauses (a) and (b) of clause 6.2(5) here. The clauses corresponding to (c) and (d) had been omitted from the auction sale agreement and were replaced by clauses which recorded the purchasers knew that no CCC had been issued and that the Council had declined to issue a CCC.

[45] After reviewing the facts the Court held that the information disclosed to the purchasers before the auction was not sufficient to make them aware that the house did not comply with the Building Code and that in the circumstances the purchasers reasonably assumed that the process to obtain the outstanding the CCC would be a straightforward task.

[46] Adopting the approach outlined by the Court of Appeal in *Pyne Gould Guinness Limited v Montgomery Watson*[9] the Court held that the meaning of cl 14.2 (b) was to be informed by the intention of the parties taking into account all the surrounding circumstances and the factual matrix. Based on its assessment of the factual background and the purchasers' incomplete knowledge it found that despite the removal of sub-clauses (c) and (d), sub-clause (b) included a warranty that the works were completed in accordance with the Building Code and could not be read down so that it did not warrant this degree of compliance.

[47] The High Court revisited the status of sub-clause (b) in *Keven Investments Ltd v Montgomery.*[10] In that case the vendors had built and occupied a house before selling it to the purchasers. A CCC had been issued for the completed house. The sale and purchase agreement was recorded on the eighth edition of the REINZ/ADLS standard form which contained a similar vendor warranty clause 6.2(5). Some parts of that clause were different from cl 6.2(5) here but sub-clause (b) was the same.

[9] *Pyne Gould Guinness Limited v Montgomery Watson (NZ) Ltd* [2001] NZAR 789.
[10] *Keven Investments Ltd v Montgomery* above n?

The only significant difference was that the eighth edition of the REINZ/ADLS standard form agreement omitted sub-clause (d) entirely.

[48] The High Court considered that the specific factual background in *Aldridge* led to that court's assessment of the parties' intentions and its interpretation of the scope of sub-clause (b). In particular it noted the absence of a CCC and the misunderstanding caused by the limited information disclosed to the purchasers as well as the effect of an exclusion clause in the auction agreement. After considering the provisions of the Building Act 1991 and assessing the parties' intentions the court held that the scope of the warranty in sub-clause (b) was limited to requiring the works to be completed in accordance with the plans and specifications attached to the building consent and any relevant conditions expressly recorded in that consent.

[49] The Court held that on the facts the parties had not intended sub-clause (b) to warrant that the works complied with the Building Code or that all obligations imposed under the relevant Building Act had been complied with.[11] In doing so it expressly noted the potential unfairness to vendors if sub-clause (b) had what it described as such an "extended meaning".[12]

[50] In *Brebner v Collie*[13] the vendor had purchased land and arranged for a house to be built in 2003. After the first final inspection the Council required six minor matters to be repaired. After those works had been completed the Council carried out another final inspection a year later. That inspection led to a notice to rectify and subsequently two determinations by the DBH. After the vendor had carried out the repair and rectification works as required by the determinations the Council eventually issued a CCC in 2007.

[51] The High Court held that despite the interpretation of the scope of sub-clause (b) in *Aldridge* and the purchasers' awareness of the earlier DBH determinations the ordinary and natural meaning of sub-clause (b) was a warranty that at the giving and taking of possession that the works which the vendor had caused to be carried out had been carried out in

[11] Above n10 at [54]
[12] Abvove n10 at [51]
[13] *Brebner v Collie* [2013] NZHC 63.

compliance with any consent that the vendor was required by law to obtain for those works. The Court followed the approach in *Keven* that the "consent" referred to in sub-clause (b) is the consent itself and the plans and specifications to which the consent refers, and that sub-clause (b) did not contain a term or condition that the works should be or were carried out in accordance with the Building Code.

[52] The Court did not accept the purchasers' argument that they could establish a breach of the warranty in sub-clause (b) if they could show a failure to observe any aspect of any plan, specification or condition or the Building Code. In doing so the Court observed that "not every omission or departure will give rise to a breach of warranty."[14] Instead it held that to establish a breach of sub-clause (b) a purchaser must satisfy the Court that the works as a whole were not completed in compliance with the consent read as a whole.

[53] The background to Mr and Mrs Ward's sale to Mr and Mrs Saffioti is significantly different to that in *Aldridge*. Unlike that case there had been no refusal here to issue a CCC. Nor had there been any investigations followed by reports and correspondence outlining necessary repairs and other steps before an application for a CCC could be made and might be considered. Nor were any documents provided to Mr and Mrs Saffioti which could have caused them to misunderstand what needed to be done to obtain a CCC. Instead a CCC had been issued for the house in April 2002. Mr and Mrs Saffioti had obtained a pre-purchase report from Futuresafe Building Inspections Ltd dated 29 September 2004[15] which did not identify any defects or raise any queries with the CCC or the house's compliance with the Building Code.

[54] The background here is similar to that in *Keven* and to a lesser extent *Brebner*. Both of those judgments was issued after the judgment in *Aldridge* but after considering the specific facts and the reasoning in *Aldridge* declined to follow that court's interpretation and instead concluded that the scope of sub-clause (b) was limited. Although the agreements under consideration in *Keven* and *Brebner* were the eighth edition of the REINZ/ADLS standard form we do not consider that there is any material

[14] Above n13 at [59].
[15] Additional document 4 submitted during hearing

difference between sub-clause (b) of clause 5 in the seventh and eighth editions which prevents us from applying the reasoning in *Keven* and *Brebner* to the facts here and adopting the interpretation of sub-clause (b) contained in those decisions.

[55] We consider that the ordinary and natural meaning of the warranty in sub-clause (b) of the contract between Mr and Mrs Ward and Mr and Mrs Saffioti was that the house had been constructed in accordance with the building consent issued on 1 November 2001, the plans attached to that consent and any relevant conditions contained in the consent. There was no specification. We do not consider that there are sufficient grounds on which to assume that when Mr and Mrs Ward and Mr and Mrs Saffioti signed the sale and purchase agreement in September 2004 they intended that the scope of the warranty in sub-clause (b) should extend to compliance with the Building Code.

Clause 6.2(5) (d)

[56] Although sub-clause (d) refers to obligations under the Building Act, Mr and Mrs Saffioti say that the warranty extends to the Building Code. They rely on s 7 of the Building Act 1991, which says that all building work must comply with the Building Code to the extent required by the Building Act. As a result Mr and Mrs Saffioti say that the natural and ordinary meaning of sub-clause (d) is that Mr and Mrs Ward warranted that all building work complied with the Building Code and that the warranty in sub-clause (d) was breached because the defects identified at the house show that the Wards did not fulfil all of the obligations imposed under the Building Act.

[57] In *Ford v Ryan*[16] the vendors had sold their house to the purchasers on terms recorded on the seventh edition of the REINZ/ADLS standard form which contained an identically-worded cl 6.2(5) as that under consideration here. In that case no CCC had been issued, which the High Court readily accepted as constituting a breach of cl 6.2(5)(c).

[16] *Ford v Ryan* (2007) 8 NZCPR.

[58] In *Ford* the building consent did not contain any specific requirements. When it examined specific defects which the purchasers alleged existed at the time of the contract the Court held that so far as the works carried out by the vendors for which a building consent was required, any failure to comply with any part of the Building Code which would prevent the issue of a CCC would constitute a breach of the warranty in sub-clause (d). McKenzie J also noted that it is the purchaser who has the responsibility to be satisfied as to the quality of the property being purchased and that the Latin maxim caveat emptor still applies which generally excludes any warranty as to quality.

[59] In *Hooft Van Huijsduijnen v Woodley*[17] the Tribunal had dismissed the purchasers' claim against the vendors based on an identically-worded cl 6.2(5) in the seventh edition of the REINZ/ADLS standard form agreement. In that case a CCC had been issued and the vendors had done nothing to fail to comply with any part of the Building Code which would prevent the issue of such a certificate. The Tribunal found that the vendors did not breach the warranty in sub-clause (d). The purchasers appealed to the High Court and argued that sub-clause (d) ought to be read and interpreted literally.

[60] The High Court observed that the meaning of sub-clause (d) was "not at all clear"[18] and noted that it had been removed from subsequent versions of the standard form agreement for sale and purchase, possibly because of the uncertainty of its breadth.[19] It held that there was no reason to read down sub-clause (d) by limiting its scope to Building Act requirements that relate to the CCC or the permit and concluded that the scope of sub-clause (d) was not as restricted as had been held in *Ford*. Instead it held that sub-clause (d) was a warranty by the vendor that the works which had been carried out complied with the Building Act and therefore the Building Code and that sub-clause (d) would be operative where the building consent or the CCC had been wrongly granted.

[61] After deciding on this interpretation of sub-clause (d) the Court noted the understandable concern that vendors could be liable for a leaky

[17] *Hooft Van Huijsduijnen v Woodley & Ors* [2012] NZHC 2685.
[18] Above n17 at [24].
[19] Above n19 at [30].

home which first shows its defects many years after construction and distant from any vendor knowledge regarding the construction of the house. It considered that the dilemma created by this potential liability would be avoided by what it described as an inherent restriction in the scope of sub-clause (5) which it defined in the following terms:[20]

> ...the warranty in cl 5(d) can do no more than warrant that given the then level of knowledge of house construction that the work done on the house was to that appropriate standard of knowledge and, therefore, at the time, complied with the Act.

[62] After reviewing the alleged defects and the factual circumstances the Court found that the house was not weathertight due to unpredictable product failure, the use of building techniques subsequently found to be inadequate and subsequent events outside the vendors' control. It held that these events did not constitute a breach of the warranty in sub-clause (d) because they had not occurred or were not known of when the house was built given the state of knowledge of house construction at the time. Based on this finding and the restricted scope of sub-clause (d) the court held that the house was built in accordance with the Act and the Code.

[63] The most recent High Court decision on cl 6.2(5) is *Newton v Stewart*[21]which followed *Ford v* Ryan when considering the meaning of warranty in cl 6.2(5). Williams J noted that cl 6.2(5) is not:[22]

> a warranty as to the quality of the home. Specifically it is not a warranty that the home is watertight. It undertakes only that if consents were required for work done on the house during the vendor's tenure, then such consents were duly obtained and their terms complied with."

[64] We consider that the ordinary and natural meaning of sub-clause (d) of the contract between Mr and Mrs Ward and Mr and Mrs Saffioti was that a building consent had been obtained before the house was built, the house had been built in accordance with that consent, and that a CCC had been issued after the house had been completed. We consider that there

[20] Above n17 at [36].
[21] *Newton v Stewart [2013] NZNC 970*
[22] Above n21 at[98]

was no intention for the warranty in sub-clause (d) to include compliance with the Building Code beyond the compliance necessary to obtain the consents referred to in the preceding sub clauses. At the time of settlement there had been no failure by Mr and Mrs Ward that would have prevented the CCC from being issued and the CCC demonstrated that the Building Code had been complied with.

Was there a breach of clause 6.2(5)?

[65] Mr and Mrs Saffioti say that Mr and Mrs Ward breached the warranty in clause 6.2 (5) because the existence of the defects shows that the house was not completed in accordance with the building consent and that Mr and Mrs Ward did not comply with the obligations in the Building Act and Building Code.

[66] The building consent directed Mr and Mrs Ward to carry out the building work "in accordance with the attached plans and specifications so as to comply with the provisions of the Building Code". The consent contained seven specific conditions, none of which relate to any of the six defects listed in paragraph [11] above.

[67] The particulars of claim against Mr and Mrs Ward make no allegation of breach of any specific provision of the building consent or Building Code. In addition neither in his opening nor closing submissions did Mr Hooker refer to any particular provision of the Building Code which he alleged was breached. Other than a reference to "NZBC B2 NZBC E2" in Mr Gill's defects schedule there is no allegation that the defects which have caused the leaks are contrary to any specific provision of the Building Code. The claim is that because the house subsequently leaked it did not comply with the performance based Building Code, in particular B2 and E2.

[68] In this case Mr and Mrs Ward obtained the appropriate permits and building consents for the construction of the house. They engaged experienced builders to carry out and supervise the construction of the house and they obtained a CCC on completion of construction. There is no evidence of work being carried out without a building consent. Nor is there any allegation or evidence that any of the construction parties departed

from the plans or the Building Code other than the fact that several years after Mr and Mrs Ward sold the house it leaked and the defects referred to earlier were discovered.

[69] Mr Hooker did not attempt to link any of the defects to any specific provision in the building consent or in the plans. This omission is surprising in light of the conclusion in *Brebner*[23] that not every omission or departure will constitute a breach of warranty and the analysis in that case of two defects that were linked to specific provisions of respectively a NZ Standard and a provision of the consent which were held to constitute breaches of sub-clause (b).

[70] Adopting the above interpretation of sub-clause (b) we are unable to link any of the six defects to a relevant requirement in the building consent. None of the seven conditions listed in that consent are relevant to the defects and nor can we link any of the defects to a requirement or provision in the plans attached to the consent. Accordingly we do not accept that Mr and Mrs Ward have breached the warranty in sub-clause (b).

[71] There is also no evidence that at the time Mr and Mrs Ward sold the house it did not comply with the performance based Building Code. To the contrary the information before the Tribunal suggests that house was not at that stage leaking. Mr and Mrs Ward were not aware of any potential issues with the property and the pre-purchase inspection report that Mr and Mrs Saffioti obtained before they declared the purchase unconditional concluded the house was in very good condition and had been very well maintained. It also stated that "the installation of the plaster system has initially been well carried out and we have found no areas of concern in terms of water tightness" In addition when the assessor carried out his investigation over five years later there were relatively few high moisture readings.

[72] We consider that Mr and Mrs Ward have not breached the warranty in clause (d). This sub-clause has been satisfied because a CCC was issued, the defects were not a result of departures from the building

[23] At [59].

consent, Mr and Mrs Ward did nothing to influence the issue of that consent and they were not aware of any defect or issue with the house that amounted to a breach of the Building Act or Code either when the consent was issued or when the house was sold. The claims against Mr and Mrs Ward are therefore dismissed.

WHAT WERE THE RESPECTIVE ROLES AND INVOLVEMENT OF MR PORTMAN AND MR HANCOCK?

[73] Mr Portman and Mr Hancock were the two directors of 345 Builders Limited, the company contracted to carry out and supervise the construction work. 345 engaged all the relevant contractors including the cladding contractors and the roofer. Both Mr Portman and Mr Hancock accept they each had some personal involvement with the construction work.

[74] Mr Hancock in his written evidence says that his involvement was at the very end of the job only and he was not even aware that the house was being built until sometime during construction. Mr Hancock did not however attend the hearing. He had earlier advised that due to health issues he may not be able to attend. On the morning of the first day of the hearing the Tribunal contacted him as he had not arrived and he advised that he did not think he would last the day. However he made no attempt to attend for even part of the day to give evidence or be questioned on his written evidence. Nor did he seek an adjournment, nor provide any confirmation that health issues prevented him from attending. In addition he did not ensure his witness, Mr Jarman, attended the hearing to be questioned even though he knew that Mr Jarman had been scheduled to give evidence on the first day of the hearing.

[75] Mr Portman attended the hearing and accepted that he was the person who negotiated the contract on behalf of 345 Builders and was in charge of the site during the initial stages of the construction work. He was responsible for the progression of the construction work from the building slab through to the framing of the house in preparation for the cladding. Mr Portman says Mr Hancock took over responsibility for the site after the frame-up stage and Mr Hancock was the one who asked for the final

inspection. Based on this evidence we accept that Mr Hancock was in charge of the site when the cladding installation was completed and plastered and the parapet caps installed.

[76] Mr and Mrs Ward can only recall meeting Mr Hancock on one or two occasions. However we do not consider that this is necessarily inconsistent with Mr Portman's evidence. Mr Portman accepts he was the main contact person and Mr and Mrs Ward do not recall a number of the other people engaged in the construction work.

[77] Mr Portman's evidence was supported to some extent by his witness Mr Waitapu who says that he can recall Mr Hancock being fully aware of the house being built from the beginning and can also recall Mr Hancock being present towards the end of the build working on the upstairs deck area and doing the tiling and sealing.

[78] We found Mr Portman to be generally a reliable witness. Not unexpectedly he did not have a clear recollection of specific details or time lines. In addition when his recollection was inconsistent with the documentary record that still exists he was willing to accept that he could be wrong. We do not consider that he was guarded in his evidence or that he was intentionally minimising his role in the construction while trying to place all the responsibility on Mr Hancock.

[79] Based on the evidence presented we conclude that Mr Portman's role was to administer the contract on behalf of 345 which included negotiating the contract, liaising with the owners and dealing with the subcontractors. He was also responsible for on-site project management during the initial stages of the construction and together with employees or contractors of 345 completed the framing of the house, including the deck and the parapets.

[80] We conclude that Mr Hancock's role was significantly greater than what he recalls in his written evidence. It is also possible he may have confused this house with a later property that 345 constructed. We accept that Mr Hancock had only minimal involvement in the contractual negotiations and in the initial construction work. However he was

responsible for the internal finishing of the house and was the on-site project manager during the later part of the building work, in particular when the plastering work was done and the parapet caps installed. Mr Hancock also installed the barge boards.

[81] The main defects are with the cladding and roofing work. This work was carried out by independent specialist subcontractors. While we do not know who the cladding applicators were we accept Mr Portman's evidence that they were licensed applicators for the NuAge Plaster system. Mr Portman said that 345 used NuAge Plaster Systems because it was a BRANZ appraised and approved system which used licensed applicators to install the cladding and NuAge gave a warranty on their work. Mr Portman confirmed that he and Mr Hancock were not experienced in cladding with EIFS systems and they relied on the expertise of the licensed applicators and the fact that NuAge did a pre-cladding and a pre-plastering check and gave a warranty or producer statement at the end of the job that said they had done the work to a set standard. In these circumstances Mr Portman said that he would look at the sub-contractors' work but he would not sign it off.

DO MR PORTMAN OR MR HANCOCK OWE THE CLAIMANTS A DUTY OF CARE AND IF SO, HAVE EITHER OF THEM BREACHED THAT DUTY?

[82] It is settled law that a builder owes a duty of care to a subsequent purchaser.[24] In this case the builder was 345, which was struck off the Companies Register in October 2003. Mr and Mrs Saffioti seek to recover from Mr Portman and Mr Hancock who were both directors of 345 when the house was built.

[83] The effect of incorporation of a company is that the acts of its directors are usually identified with the company and do not give rise to personal liability. However, the courts have for some time determined that while the concept of limited liability is relevant it is not decisive. Wylie J in *Chee v Stareast Investment Limited,*[25] concluded that limited liability is not

[24] *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 (CA).
[25] *Chee v Stareast Investment Ltd* HC Auckland, CIV-2009-404-5255, 1 April 2010.

intended to provide company directors with a general immunity from tortious liability.

[84] In *Morton v Douglas Homes Ltd,*[26] Hardie Boys J concluded that where a company director has personal control over a building operation he or she can be held personally liable. This is an indicator of whether or not his or her personal carelessness is likely to have caused damage to a third party. In *Dicks v Hobson Swan Construction Ltd (in liq),*[27] Baragwanath J concluded that as Mr McDonald who was the director of the defendant builder had actually carried out the construction of the house he was personally responsible for the defects which resulted in the house leaking and therefore personally owed Mrs Dicks a duty of care.

[85] In *Hartley v Balemi,*[28] Stevens J concluded that personal involvement does not necessarily mean the physical work needs to be undertaken by a director but may include administering the construction of the building. He observed:[29]

> Therefore the test to be applied in examining whether the director of an incorporated builder owes a duty of care to a subsequent purchaser must, in part, examine the question of whether, and if so how, the director has taken actual control over the process and of any particular part thereof. Direct personal involvement may lead to the existence of a duty of care and hence liability, should that duty of care be breached.

[86] The Court of Appeal in *Body Corporate 202254 v Taylor*[30] has more recently considered director liability and analysed the reasoning in *Trevor Ivory Limited v Anderson.*[31] It held that the assumption of responsibility test promoted in that case was not an element of every tort. Chambers J expressly preferred an "elements of the tort" approach and noted that assumption of responsibility is not an element of the tort of negligence.

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[26] *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548 (HC).
[27] *Dicks v Hobson Swan Construction Ltd (in liquidation)*(2006) 7 NZCPR 881 (HC).
[28] *Hartley v Balemi* HC Auckland CIV-2006-404-2589, 29 March 2007.
[29] Above n28 at [92].
[30] *Body Corporate 202254 v Taylor* [2008] NZCA 317, [2009] 2 NZLR 17 (CA).
[31] *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517 (CA).

[87] Based on our conclusions as to the roles of Mr Portman and Mr Hancock in the construction we accept they personally owed Mr and Mrs Saffioti a duty of care in relation to the actual construction work they each carried out and in relation to the general supervisory or control role they each assumed at various stages of the construction. The issue however is whether they breached any duty of care owed.

[88] While 345 had a contractual responsibility in relation to the totality of the construction work this does not mean that Mr Portman and Mr Hancock are necessarily liable in tort for the work done by other specialist contractors on site. Mr Portman and Mr Hancock were entitled to rely upon the expertise of specialist contractors in carrying out the work such as the cladding and roofing. They would however be liable for any defects in the work of the specialist subcontractors that should have been readily apparent from the type of inspection a normally competent builder who had a project management or supervisory role would carry out during the time each of them were responsible for the site.

[89] In the particulars of claim filed in advance of the hearing no specific factual allegations were made as to how Mr Portman or Mr Hancock were individually negligent. The claim against them is expressed in very general terms, namely that they breached their duty of care by failing to ensure the building work was carried out in a good workmanlike manner and that the work was required to comply with all the requirements of the Building Act and Building Code. In Procedural Order 14 we directed that together with a defects list Mr and Mrs Saffioti were to provide information on which defects were being alleged against which party and if this information was not adequately able to be detailed in the defects schedule then they needed to file further and better particulars of claim against each party. The only further information that was provided against Mr Hancock and Mr Portman was the defects schedule.

[90] In that schedule Mr Gill only put a tick beside the builder in relation to defect A, being the timber barge boards being embedded within the EIFS cladding. Beside the other five defects he put probably. This was appropriate given the fact that Mr Gill did not have any firsthand knowledge of the roles of the builders or the contract under which they were engaged.

In his evidence he acknowledged that the work resulting in defects B to F would most likely have been carried out by subcontractors and not the contracted builders.

[91] The most significant defect with this house, and the one that changed the scope of work from a targeted repair to a full reclad, was the failure to adequately seal between the jamb and sill flashings discussed at defect B above. The flashings were installed by the cladding contractors. Mr Gill's evidence is that the defects with the installation of the joinery would only have been visible between the period when the flashings and polystyrene were installed and the plastering work was done. In addition there was sealant on some windows and it would not have been visibly apparent on all windows that there were likely to be problems.

[92] This defect would not have been able to be identified once the plaster was applied over the flashings. We are satisfied that this defect would not have been apparent from the type of inspection a competent builder would undertake of a specialist contractor's work, particularly as Mr Portman has said that the cladding company Nu Age Plasters Limited used licensed applicators and provided a warranty for their work.

[93] The parapet caps were most likely installed by ACR when Mr Hancock was responsible for the site. There is no evidence that the ineffective parapet cap flashing was something that would have been apparent on a visual inspection on completion of the job by the roofer. We note that Mr Casey did not note this as a defect in his report even though he got up on the roof and inspected the parapets.

[94] We are satisfied that Mr Portman and Mr Hancock were entitled to rely on the expertise of the experienced subcontractors in carrying out the cladding and the roofing work. There is no evidence to suggest that Mr Portman or Mr Hancock failed to engage appropriate and experienced contractors other than the fact that the house has subsequently leaked. We accept Mr Portman's evidence that one of the reasons he used the NuAge system was because NuAge had an appropriate checking and monitoring system in place. We also accept that the defects with the windows and the parapet caps could not readily have been detected by a

site supervisor or project manager. We accordingly conclude that neither Mr Portman nor Mr Hancock were negligent in failing to note these defects during construction.

[95] The same can be said for the meter box penetration. The experts agreed that the issue with the junction box would not have been remarkable at the time as it was quite common to rely on sealants. The plastering system around the pipe however looked rough and Mr Hancock, who was responsible for the site at the time this work was done, should have noticed this defect. The cost associated with remedying this defect would on its own be relatively minor.

[96] The installation of the timber barge boards, and the failure to provide suitable saddle flashings was either work done by the builders or work that should have been detected or prevented by the person responsible for the site at the time the work was done. The issue with the timber barge boards is primarily a sequencing issue and also arose because the barge boards were installed on top of the polystyrene before the plastering without leaving any room for the plaster to be applied. We accept on the evidence provided that it is most likely Mr Hancock installed the barge boards or was responsible for the site when they were installed. Mr Portman initially said he may have assisted Mr Hancock to fix the garage barge boards on but on reflection he thought this might not have been the case. His evidence was that he would not have fixed the barge boards over the polystyrene in the way they were here. He said he would either have packed the framing line out sufficiently to allow for the cladding and then fix the barge board or put a z flashing in behind the fascia and stepped it out.

[97] We also accept that the saddle flashings should have been installed at the parapet cladding junctions. This would either have been the job of Mr Hancock, who was responsible for the site at that time, or he should have ensured that work was done by the installer of the cap flashings.

[98] We therefore conclude that while both Mr Portman and Mr Hancock owe the Saffiotis a duty of care there is no evidence that Mr

Portman breached any duty of care owed. There is insufficient evidence to establish that any of the work done by Mr Portman, or anything Mr Portman did not do that he should have done, had a causative link to the Saffiotis' loss. We do not consider he was negligent in handing over responsibility for the site to his co-director Mr Hancock. The fact that Mr Portman returned to site every couple of days does not in itself make him liable for the workmanship of the specialist subcontractors who carried out work during the period he was not in charge of the site or for the work done by Mr Hancock.

[99] We however conclude that Mr Hancock has breached the duty of care owed at least in relation to the barge boards, the pipe penetration and the saddle flashing. The only evidence we have of the loss flowing from these breaches is the evidence given by the assessor that the work to address the first of these issues would have been about 75 per cent of the total work that he costed at $126,000. Therefore the damage flowing from this defect amounts to $94,500. The issue with the saddle flashing the experts concluded was relatively minor and was approximately five to ten per cent of the construction work.

[100] We are however satisfied that the matters for which we find Mr Hancock liable could have been remedied by targeted repairs or a partial reclad. The evidence currently before the Tribunal is insufficient for us to determine what the cost of that work would be.

[101] We will provide Mr and Mrs Saffioti with a further opportunity to provide evidence of the loss flowing from the defects that have been established against Mr Hancock before making any orders as to quantum.

[102] However we note that if we had found Mr Portman to be liable we would have dismissed the claim against him on the basis that quantum had not been established. As Mr and Mrs Saffioti are aware Mr Portman travelled from Australia specifically to give evidence at the hearing. Quantum is an essential part of what needs to be established for any claim to be successful. We reminded Mr Hooker of this at the beginning of the hearing when Mr Hooker submitted that Mr and Mrs Saffioti only had to prove liability and then it was for the respondents to establish contribution

and damage. We said that we did not accept the submission and that there were going to be potential problems as it was likely that some parties would not be liable for the full amount of the remedial work. Despite this Mr and Mrs Saffioti did not seek to file any further quantum evidence

[103] We raised this point again with Mr Hooker at the end of the second day of the hearing as it was evident by then that the roofer would not be liable for the full amount claimed. In closing submissions Mr Hooker again submitted that Mr and Mrs Saffioti only had to establish liability and then it was for the respondents to establish quantum.

[104] The parties who attended the hearing all opposed the suggestion that Mr and Mrs Saffioti should be allowed to produce further evidence on quantum. As the two parties we have found liable did not attend the hearing we do not consider there is any additional prejudice or cost to them, or to the other parties, in providing Mr and Mrs Saffioti with an opportunity to provide further quantum evidence. A timetable for filing further evidence is set at the end of this determination.

WHAT WAS THE EXTENT OF JIM STEPHENSON: ARCHITECT LIMITED'S (JSAL) INVOLVEMENT IN THE COMPLETION OF THE PLANS FOR BUILDING CONSENT PURPOSES?

[105] Mr and Mrs Saffioti allege that JSAL breached the duty it owed them because the plans and drawings were not of the standard expected of a reasonably prudent architect and that they were inadequate to enable the house to be constructed in accordance with the Building Code. Other than ticks in the "Arch" column of Mr Gill's Defects Schedule, the Saffiotis did not provide any specifics of how the plans were deficient nor did they provide any evidence as to the inadequacy of the plans from an appropriately qualified expert. We note that neither Mr Casey nor Mr Gill have any design expertise. It is however accepted that the only allegations against JSAL relate to omissions from the plans.

[106] JSAL does not deny it owed Mr and Mrs Saffioti a duty of care but says that it cannot be found liable for omissions from the plans when it was neither contracted, nor given the opportunity, to complete the plans and

provide the missing details. Mr Stephenson says that his company did not submit the plans for building consent nor were they ever presented by him as completed drawings. He says that the design drawings were provided to the builder when they were about 60 per cent complete for the engineer to add his details. He expected the drawings to be returned from the builder after the engineering details had been added so he could complete the drawings. However the plans were not returned to JSAL for additional details to be provided but were submitted to the Council after some changes were made by the engineer.

[107] When opposing JSAL's removal Mr and Mrs Saffioti stated that they did not agree that JSAL's involvement was as limited as Mr Stephenson submits. However they were not the owners at the time the property was built and accordingly their opinion was based on the incomplete documentary record that still exists. Mr and Mrs Saffioti provided no further evidence on this issue and at the hearing Mr Saffioti was unable to explain the basis on which he concluded JSAL's involvement was more extensive than Mr Stephenson claims. We do not consider that the documentary record is inconsistent with Mr Stephenson's recollection of events.

[108] At the hearing Mr Portman initially stated that he picked the drawings up from Mr Stephenson in order to lodge them with the Council. He however later retracted some of this evidence but said that he thought the second lot of additions by the engineer were not done until after the building consent had been issued and the building work had commenced. However Mr Portman's recollection is not consistent with the documentary record which shows both lots of engineering details were added to the drawings prior to the application for building consent.

[109] Mr Stephenson stated that the drawings themselves show that more detail was intended as there are blank circles drawn at various locations but no details are provided for these building elements. Mr Stephenson said the circles indicate that he intended to complete specific details of those building elements at a later stage. Mr Casey accepted that the circles on drawings usually indicate that there will be more detailed designs completed for those building elements. The inclusion of these

circles therefore supports Mr Stephenson's evidence that he intended to provide further detailed drawings of the areas that are circled.

[110] Mr Hooker in his closing submissions suggests that because Mr Ward said that he commissioned the architect to complete the plans, JSAL was responsible and contracted to Mr and Mrs Ward and not the builders and therefore the lack of opportunity to complete the drawings is no defence. We do not accept this submission as the evidence is that the contractual relationship was between JSAL and 345. Mr Ward accepted that he and Mrs Ward met with Mr Stephenson on only one occasion and then any other contact was through Mr Portman.

[111] In *Sunset Terraces*[32] William Young P concluded that architects can only fairly be expected to provide services for which they are contracted. The scope of the contract is also highly relevant in determining tortious liability because there are problems in imposing a duty of care which is more exacting than the contractual duty. He concluded that the limited scope of the designer's contract in that case was an answer to the claim in negligence.

[112] We conclude that JSAL was contracted by 345 on a limited or partial service basis. We also accept that when Mr Stephenson gave the drawings to Mr Portman he expected them to be returned to him for additional work to be completed once the engineering details were completed and a decision made on the cladding material to be used. The drawings were not however returned to JSAL for these further details to be provided.

DID JSAL BREACH ANY DUTY OF CARE OWED TO MR AND MRS SAFFIOTI?

[113] Given JSAL's limited engagement we conclude it was not negligent for failing to provide further details when it was not given the opportunity to complete them. In any event JSAL submits that that the weathertightness defects were not caused by design omissions but by

[32] *North Shore City Council v Body Corporate 188529* [2010] NZCA 64, [2010] NZLR 486 [152].

failure by the construction parties, in particular the builder, cladder and the membrane layer, to comply with good building practices and the technical information provided by the manufacturers of the products used.

[114] It is well established that the standard of care required of an architect in discharging his or her duties is the reasonable care, skill and diligence of an ordinarily competent and skilled architect.[33] Mr Hooker appears to be suggesting that the scope of duty and liability of an architect extends to providing each and every detail necessary for the proper and complete construction of a house in any set of drawings and specifications prepared for a dwellinghouse. This is not however the test that the courts or tribunal apply in determining whether an architect has breached any duty of care.

[115] In *Body Corporate 188529 v North Shore City Council*[34] (*Sunset Terraces*), Heath J concluded that an architect or designer is entitled to assume that a competent builder would refer to manufacturer's specifications or established literature for construction where there was insufficient detail in the plans. In that case, even though the plans were skeletal in nature, did not contain references or detail relating to manufacturer specifications and the specifications were poorly prepared and contained outdated references, the Court was satisfied that the dwelling could have been constructed in accordance with the Building Code. Heath J stated:

> [545] I am satisfied, for the same reasons given in respect of the Council's obligations in relation to the grant of building consents that the dwellings could have been constructed in accordance with the Building Code from the plans and specifications. That would have required builders to refer to known manufacturer's specifications. I have held that to be an appropriate assumption for Council officials to make. The same tolerance ought also to be given to the designer. In other respects, the deficiencies in the plans were not so fundamental, in relation to either of the two material causes of damage, that any of them could have caused the serious loss that resulted to the owners.

[33] *Eckersley v Binnie & Partners* [1988] 18 CON LR 1and *Saif Ali v Sydney Mitchell & Co* [1978] 3 ALL ER 1003.
[34] *Body Corporate 188529 v North Shore City Council* [30 April 2008] HC Auckland, CIV 2004-404-3230, Heath J.

[116] Heath J in considering the Council's liability in relation to the issue of building consent concluded that the Council in exercising its building consent function was entitled to assume that the developer would engage competent builders and trades people to carry out the work. The same assumption can also reasonably be made by the designer. This part of the decision was upheld by the Court of Appeal and it stated that no purpose would be served by requiring a designer to incur the cost of providing details not reasonably necessary for the task.

[117] The only appropriately qualified expert evidence provided by Mr and Mrs Saffioti was a letter addressed to their solicitors from Norrie Johnson dated 31 October 2011 disclosed during the course of the claim. This letter does not support Mr and Mrs Saffioti. Mr Norrie stated that the plans prepared by JSAL "were in my opinion sufficiently complete in the context of the relationship JSA had with Portman as he describes in his letter of 15 August 2011". He went on to conclude that:

> ...a reasonably competent builder could have constructed the development based on the plans I have seen but they would have had to ensure that the parts of the work not sufficiently detailed were constructed in a way that complied with the New Zealand Building Code.

[118] Mr and Mrs Saffioti did not file a brief from Mr Norrie nor did they get him to give evidence at the hearing. The only evidence they produced was Mr Gill's defects schedule in which he put a tick in the column under architect for a number of the defects. However at the hearing Mr Gill said that if the architect had only provided a limited service he would have to revise his opinion. He concluded it would not be fair to conclude the architect was responsible in these circumstances and said that if he had been known the architect was engaged on a limited contract he would not have ticked the column.

[119] Mr Gill also gave evidence that some of the alleged omissions were detailed in the NuAge technical material which he produced during the hearing. The NuAge literature has detailed drawings for joinery installation and flashings (Details 1-5), plastering behind the barge boards (Detail 9) the top of parapets (Detail 8), flashings at the roof to wall junctions (Detail

7) and it also required service penetrations to be sealed. It appears that these details were not followed in relation to the six building defects identified in paragraph [11].

[120] In addition Mr Gill gave evidence that the defective work on this property was not in accordance with various BRANZ practice guides available at the time this house was built such as the Good Exterior Insulation Finish Systems Practice and the Bulletin no 305 – Domestic Flashing Installation. While these guides were published as guides only they are the best evidence we have of what was considered good practice at the time.

[121] The present case can be distinguished from *Coughlan v Abernethy*[35] as in that case the omission from the drawings was ventilation vents, details for which were not included in the specifications or the cladding manufacturer's literature. In addition the requirements for adequate ventilation vents would not necessarily have been known by a reasonably competent labour only builder. It is also relevant to note that in that case the builder was engaged on a labour only basis and that the designer was also a director of the development company. The development company engaged a series of labour only contractors to carry out the construction work without ensuring there was adequate on-site project management or supervision of the contractors.

[122] The established defects with this house were a result of failure to comply with the technical material and specifications of the system manufacturer and good building practices. We accordingly accept on the basis of the evidence provided that the house could have been built weathertight, despite the omissions from plans, by reasonably competent builders, cladders and plasterers if they had followed good building practices and the technical material provided by the manufacturers of the products used.

[123] In conclusion therefore we accept that JSAL owed Mr and Mrs Saffioti a duty of care but that it met the standard of care required of it. In particular it did not breach its duty of care because it was only engaged on

[35] *Coughlan v Abernethy* HC Auckland CIV-2009-004-2374, 20 October 2010

a limited contract and was not given the opportunity to complete the design work for the alleged missing details. Mr and Mrs Saffioti have also failed to establish that the drawings prepared by JSAL were not prepared with the reasonable care, skill and diligence of an ordinarily competent architect by reference to the general practice of the day.

[124] Accordingly there is no material loss suffered by Mr and Mrs Saffioti's caused by any alleged deficiencies in the drawings. Therefore the claim against JSAL is dismissed.

DOES MR HERON OWE MR AND MRS SAFFIOTI A DUTY OF CARE?

[125] Mr Heron was an employee of ABC which, at the time this house was built, was as an approved building certifier under s 53 of the Building Act 1991. Mr Heron was one of several building control officers employed by ABC and one of six designated signatories approved by the Building Industry Authority to sign building certificates and CCCs issued by ABC. Mr Heron was not a director of ABC nor did he have any significant management responsibilities.

[126] The claim against Mr Heron relates to his role in signing the CCC that was issued in respect of the house on 16 April 2002. The job card from ABC records 15 building inspections carried out on 11 separate dates which were all approved. These were all carried out by Martin Cleary other than the drainage inspection which has no relevance to any of the defects with this house which have contributed to leaks. In addition to the building inspections there was also a final document vetting check which was approved by Mr Cleary prior to Mr Heron receiving the file and signing the CCC.

[127] Mr Hooker submits that Mr Heron by signing the CCC assumed the full responsibility of ABC for the complete building consent inspection and certification process. While no specific allegations are made of anything that Mr Heron did wrong, Mr Hooker argues that as he signed the CCC he is liable for the full amount claimed because the house did not comply with the Code because it subsequently leaked.

[128] Mr Hooker provided no evidential or legal support for this proposition. His argument appears to be based on the wording in the BIA approval of ABC. It stated:

> Any building certificate or code compliance certificate issued by Approved Building Certifiers Limited under the Act should be signed personally by one of:
>
R N Boler	M B Palmer	T G Heron
S G King	C S Dackers	M J MacMillan
>
> Those signatories personally and Approved Building Certifiers Limited as a corporate entity shall comply with the Approved Building Certifiers Limited quality manual dated 18/9/2000 approved by the authority including any subsequent amendments to it or revisions or replacement of that document which have been approved by the Authority in writing under the signature of the Authority Chief Executive.

[129] Mr Hooker had been unable to obtain a copy of the quality manual referred to in the approval and the Tribunal does not have a copy of any such manual. Mr Heron also did not have a copy. In closing submissions Mr Hooker submitted that we were entitled to infer that the manual required the house to be built weathertight and as it leaked Mr Heron did not comply with the manual. He also suggested that the circumstances elevated Mr Heron's defence to be an affirmative defence.

[130] We do not accept that Mr Heron is raising an affirmative defence which shifts the burden of proof to him in defending the claim against him. In any event we consider that Mr Hooker's submission misrepresents the requirement on Mr Heron as a signatory. If Mr Hooker's submissions were accepted this would mean that in signing the CCC Mr Heron not only had to personally comply with the quality manual but he had to ensure that every other employee or office holder of ABC that had been involved in the consent and inspection process also complied with the quality manual. This is not what the approval says. We consider that all the approval required was for Mr Heron to ensure he complied with the manual for the parts of the certification process for which he was responsible.

[131] We also consider Mr Hooker's submissions conflate the two different processes of issuing a CCC and signing a CCC. Mr Heron signed the CCC as an authorised signatory on behalf of ABC but that certificate was issued by ABC. There is no evidence to support the allegation that Mr Heron did anything wrong when he actually signed the CCC. In particular there is no evidence that he did not follow the usual process which a competent signatory would carry out before signing a CCC on behalf of a certifier or a territorial authority. Mr Heron explained that the process he needed to follow was to ensure that there was a record of the required inspections being carried out and passed and that a document check had been completed and passed.

[132] We accept Mr Hooker's submissions that Doogue AJ and Priestley J's decisions in *Body Corporate 318596 v Mathis*[36] are authority for the fact that Parliament did not extend immunity to employees of private certifiers in the same way as they did to employees of territorial authorities. We also accept that it is arguable that an employee of a private certifier can owe homeowners a duty of care. Those decisions however relate to employees and certifiers that actually carried out the negligent inspections.

[133] We also accept that the words of the approval of ABC imposed a personal obligation on Mr Heron for which he could owe a duty of care. That obligation was to comply with the manual in relation to the steps he took when signing documents. However there is no evidence that Mr Heron was negligent in the steps that he took as of ABC's authorised signatories before he signed the CCC. Mr Hooker could not articulate anything that Mr Heron had done wrong nor could he articulate anything that Mr Heron had not done which he should have done. Mr Gill accepted that the physical act of signing of a CCC was primarily an administrative act and a formality. The argument against Mr Heron rests on the proposition, which we reject, that Mr Heron assumed personal liability for the work of the inspectors and other staff who were involved in the prior inspection and consenting process.

[36] *Body Corporate 318596 v Mathis* HC Tauranga, CIV-2009-463-285, 7 October 2011; [2012] NZHC 373.

[134] We do not accept Mr Hooker's submission that Mr Heron did not understand his duty or that he did not possess a copy of a manual. Mr Heron gave clear evidence that he knew about the manual, was familiar with its content, and that a copy was available to him at the ABC office. It is now several years since he worked for ABC but he could give a general summary of what was in the manual. We consider that it is reasonable to assume that if the manual did contain process or practice guidelines they would most likely have been consistent with the process Mr Heron followed when signing CCCs on behalf of the company.

[135] If ABC was still in existence it would have been liable for the defects that should have detected in the inspection process. Mr Heron did not carry out the inspections nor did he control or supervise the other ABC employees who did. We also do not consider he assumed any such responsibility when signing the CCC. Therefore we conclude that while it may be arguable that Mr Heron personally owed a duty of care there is no evidence that he breached any duty of care owed. The claim against him is accordingly dismissed.

DID THE WORK DONE BY ACR CAUSE OR CONTRIBUTE TO LEAKS?

[136] The claim against ACR is in relation to the defects with the parapet caps and the barge flashings. ACR also supplied and installed the trim line roofing but there are no issues with that work. ACR accepts that it supplied and installed parapet caps and that it provided the barge flashings. In its application for removal it however said that it left site before the cladding and barge boards were fitted so left the barge flashings on site for the work to be done later but it was not called back to fit the barge flashings.

[137] While the roof may have been fitted before the cladding was installed Mr Gill's evidence clearly establishes that the cladding and plastering work had been completed prior to the installation of cap flashings. We therefore reject ACR's statement that it left site before the cladding was fitted to the house.

[138] We further note that ACR did not attend the hearing despite receiving notice of the hearing. Section 74 of the Act provides that a party's

failure to attend a hearing or to act does not affect the Tribunal's power to determine the claim against it. In addition s 75 of the Act provides that the Tribunal may draw inferences from a party's failure to act and determine the claim based on the available information. We are satisfied from the information before the Tribunal that ACR was responsible for installing the parapet caps and most likely the barge flashings. We have concluded that there are deficiencies with the installation of the parapet caps and that there was also a failure to provide suitable saddle flashings at the parapet and cladding junction. These are both the responsibility of ACR.

[139] Mr Gill's evidence is that these defects could appropriately have been remediated through targeted repairs rather than a full reclad. He prepared sketch drawings of the work he considered would likely have been required to remedy the defects with the parapet caps and advised that the issue with the saddle flashings was only on the north eastern elevation. He was unable to estimate what the cost of those targeted repairs would be.

[140] ACR's maximum liability would be the costs required to remedy the two defects for which they have some responsibility together with a contribution towards consequential and general damages. We are unable to quantify that liability as insufficient evidence has been presented on the appropriate cost of that work needed to address the two defects for which we find ACR liable.

CONCLUSION AND QUANTUM EVIDENCE

[141] The claims against Gregory Paul and Kim Machelle Ward, Norman Oliver Portman, Jim Stephenson: Architect Ltd and Tony Heron are dismissed.

[142] We have found that both John Stephen Hancock and ACR Reroofing Ltd are liable for a portion of the remedial costs together with a contribution towards consequential costs, interest and general damages. We are unable to determine the quantum of that liability from the evidence currently available.

[143] As neither Mr Hancock nor ACR Reroofing attended the hearing we will provide a further opportunity for Mr and Mrs Saffioti to provide evidence on the cost of the work that was required to remediate the three defects for which they have been found liable. The timetable for this evidence to be filed is:

- Mr and Mrs Saffioti are to file any additional evidence on the costs associated with the remedial work to address the defects with the timber barge boards, parapet cap flashings and apron flashings by 4 July 2013.
- Mr Hancock and ACR will have until 18 July 2013 to file any reply evidence.
- The Tribunal will then decide whether a decision can be made on the papers or whether a short quantum hearing should be convened.

TIMETABLE FOR COSTS

[144] The timetable for any party to apply for costs pursuant to s 91 of the Act is:

- Application for costs to be filed 4 July 2013.
- Party against whom costs are sort are to file any opposition by 18 July 2013.
- Applicant for costs will have until 31 July 2013 to file a reply
- A decision will then be made on the papers.

DATED this 12th day of June 2013

P A McConnell	G D Wadsworth
Tribunal Chair	Tribunal Member