IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI 2012-100-000017
[2013] NZWHT AUCKLAND 7

BETWEEN	PATRICK AND LESLEE O'CONNELL Claimants
AND	AUCKLAND COUNCIL First Respondent
AND	CEDRIC DUDLEY FRENCH Second Respondent
AND	ROBERT PETER JOSEPH TOEBOSCH Third Respondent

Hearing:	27 and 28 November 2012
Closing Written Submissions:	12 December 2012 – claimants first and second respondents 14 December 2012- Mr Toebosch, third respondent
Closing Oral Submissions:	19 December 2012
Appearances:	Ms S Wroe for the claimants Mr D Barr and Ms Lydiard for the first respondent Mr M Meier for the second respondent Robert Toebosch the third respondent- self represented
Decision:	19 March 2013

FINAL DETERMINATION
Adjudicator: K D Kilgour

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[1] In 2001-2002 Patrick and Leslee O'Connell had a house built for themselves at Red Beach. Although they moved into their home in July 2001 there had been no final inspection nor had the CCC issued. No further inspections were called for until March 2005. That and subsequent inspections failed and the Council issued a notice to fix in July 2009. By that time the O'Connells realised their house leaked.

[2] Mr and Mrs O'Connell have now fully reclad the house and are claiming $304,070.61 (including remedial costs of $298,245.96) from Auckland Council who issued the building consent and carried out inspections, Cedric French, the builder who the O'Connells say also project managed the construction, and Robert Toebosch. Mr Toebosch was a director of Jasac Limited (struck off), the company the O'Connells contracted to install the cladding system.

[3] Mr French denies that he was the project manager for the construction of the home and says that none of the building work for which he was responsible caused or contributed to leaks. Mr Toebosch also denies liability as it was his company that was contracted to install the cladding and he says he did not personally carry out, control or supervise the work. The Council accepts it owes a duty of care but denies any negligence as it failed various inspections and issued a notice to fix. Alternatively it says there is no causative link between any negligence on its part and the O'Connells' loss.

[4] The issues I therefore need to decide are:

- What are the defects that have caused leaks?
- What was Mrs O'Connells role in the construction?
- Was the Council negligent in carrying out its inspections? If so has its negligence caused or contributed to the O'Connells' loss?
- Was Mr French responsible for contract management or site supervision?
- Is Mr French responsible for any of the established defects?
- Does Mr Toebosch personally owe the O'Connells a duty of care?

- Were the O'Connells contributorily negligent?

MATERIAL FACTS

[5] In 2000, the O'Connells approached a building designer who drew up plans for a substantial two storey home. The plans called for a Rockcote EIFS cladding system. There were to be two chimneys on the home, one on the west elevation which the plans described as decorative but nevertheless illustrated a completed chimney top and flue. The chimney on the east elevation was to be constructed for a working fireplace.

[6] The designer recommended a builder Mr French. The O'Connells approached Mr French who provided a labour-only quote. The O'Connells accepted this quotation and a written building contract was completed. Mr French was a sole trader and traded under the trading name CD French Building Contractors.

[7] This was the first and only experience that the O'Connells had with building a home. While Mr O'Connell worked for a building supply company, Carter Holt Harvey, he was engaged in an IT role solely. Mrs O'Connell's background was also in IT, but at the time of construction she was a stay at home mother with responsibility for the upbringing of two young daughters.

[8] Mr O'Connell arranged for a building supply account to be established at the local Carter Holt supply store for Mr French to use for the supply of materials so that they could get the benefit of Mr O'Connell's staff discount. Mr French however accessed directly from another material supplier some building materials such as nails, screws, block fill, concrete material, jib board and panel pins.

[9] Mrs O'Connell supplied the plans to Carter Holt who estimated the required quantity of timber required and supplied to the building site the necessary pre-framed and framing timber. Mrs O'Connell assisted the building by obtaining and engaging the necessary contractors. She arranged for payment of all materials and labour directly and she made all necessary arrangements for the contractors to access the "employee account" with Carter Holt.

[10] Mr French called for the necessary Council building inspections, during his time on the building site including the significant ones for this claim being the pre-line inspection on 5 April 2001 and the post-line and pre-plaster inspections undertaken over two days on 9 and 10 May 2001. Mr French completed his building work in either late July or early August 2001.

[11] While the consented plans called for a Rockcote EIFS cladding system, Mr Toebosch approached the claimants on behalf of his company Jasac Limited and quoted to install a Hitex EIFS cladding system. Mr Toebosch was the operative director of Jasac Limited which was struck off the Companies Register in January 2004. Mrs O'Connell accepted Jasac's quotation and Jasac supplied and installed the Hitex cladding and plastering material. The terms and conditions of Jasac's engagement attached to its quotation accepted by the O'Connells[1] states that:

> Jasac will not be held responsible for any damage whatsoever caused in the following circumstances (but not limited to).....
> 18(c) where the client has altered ground lines.....

[12] Mr Toebosch did not know Mr French and had not worked with Mr French before. Mr Toebosch took all his instructions from Mrs O'Connell.

[13] When Mr French left the building site in July or early August 2001 he informed the O'Connells that they would be unable to obtain a code compliance certificate until the driveway was laid with a drainage sump. The O'Connells were not in a financial position to complete the driveway and this work was not done until March 2005.

[14] Mrs O'Connell then telephoned the Council to undertake a property inspection. Mrs O'Connell said she expected the Council inspection to be a final inspection in order to get a code compliance certificate. However the inspection undertaken by the Council was not a final inspection as the O'Connells had not completed the prescribed form required by s 43 of the Building Act 1991. In any event the inspection did not achieve the issue of a code compliance certificate. Instead a letter of

[1] Common bundle of documents at 16.1.

requisition was issued[2] listing the outstanding matters requiring attention and asking the O'Connells to request a final inspection once the outstanding matters were complete.

[15] Mrs O'Connell stated that undertaking completion of these Council requisitions took some time. Initially she engaged a builder for some minor completion work. The builder however noticed during his work a few bulges in the plaster around the front edge of the deck. Mrs O'Connell attempted to contact Mr Toebosch without success and subsequently engaged another Hitex tradesman who immediately noticed that the chimney cappings were not complete. This meant that the O'Connells had to engage a roofing contractor to finish capping the chimney tops. This work was completed in December 2006.

[16] There was a further failed Council inspection on 17 January 2007 followng which the Council wrote another letter listing matters requiring attention and concluded with, "…we reserve the right to issue any further requisitions as may be required to bring this consent to a satisfactory conclusion…".

[17] After receiving a written request for a CCC the Council wrote again on 9 February 2007 advising it would require a specialist cladding inspection to ensure that the building work complied with the requirements of the Building Code. Mrs O'Connell's attempts to arrange this took a considerable time as the approved inspectors she contacted were unable to promptly attend to her request. One inspector recommended installing moisture detection probes in the home which the O'Connells went ahead and installed. Reports from the moisture detection probes indicated remedial work was required to a bathroom which was undertaken in mid 2008.

[18] The O'Connells eventually engaged an approved building inspector who undertook the cladding assessment. This involved an invasive test which identified a number of concerning issues. As a result the Council's durability inspector, Karen Malcolm, inspected the dwelling and issued a notice to fix. The Council advised the O'Connells to engage a weathertightness consultant. They engaged Neil Alvey of Kaizon Limited to

[2] Common bundle of documents Section 3, at 349.

undertake an invasive investigation following which they were advised by Kaizon to issue these proceedings.

[19] The appointed WHRS Assessor, Harry Young concluded that the home was a leaky home and met the eligibility requirements of the Act. He considered targeted repairs would be adequate to address weathertightness issues he identified at the home.

[20] The O'Connells also contracted Kaizon to manage the remediation of their home. Kaizon undertook further investigation and noted additional defects to those in the assessor's report and also identified numerous high moisture content readings obtained from the moisture detection probes installed at the home. The report (based on Kaizon's then limited knowledge of the required recladding) concluded that the wall planes highlighted, might require recladding as the result of additional investigation.

[21] Kaizon met with Karen Malcolm of the Council. Ms Malcolm subsequently emailed Kaizon stating:

> There would also be a requirement that confirmation be given that the walls to have targeted repairs have the building wrap correctly wrapped, failure to determine this would mean that Council would not be able to say that the building complies with the Building Code.

[22] Kaizon advised the O'Connells that further extensive investigation work would be required to be able to provide that confirmation to the Council. Kaizon also formed the view that to suitably remediate damage to the cladding system would require each affected wall plane to be fully reclad.

[23] The O'Connells decided that the full reclad of the home was the only practical and sensible option to satisfy Council. The remedial work was completed in early 2012 and included a reclad with weatherboards and also further owner's choice work on repairs to the roof.

[24] The cost of the remedial construction including the roof, decks and walls, amounted to $388,817.89 excluding GST. However at the hearing

the claimants made concessions for owner's choice/betterment and reduced the claim to $291,128.00 including GST, but excluding consequential costs and general damages.

THE EXPERT EVIDENCE

Defects Experts

[25] In summary Mr Alvey's identified defects are:

1. A gap in the PVC drip edge to the perimeter of the roof sarking board in two locations.
2. Lack of adequate kick-out to the end of the roof apron flashing.
3. Lack of waterproof membrane between the pergola and the timber frame; more specifically described as poor detailing and finish of butyl rubber membrane where it overlaps onto the top of the pergola beam.
4. Inadequate sealant applied between the cladding and pipe spacer before bolt inserted into spacer at pergola fixing.
5. Building paper had incomplete or insufficient lap at joints and allowed water to track into underlying timber framing.
6. No waterproofing membrane at junction of balcony balustrade wall top and adjacent wall.
7. Inadequate fall to near-flat clad surfaces to two chimney tops and penetrations through balcony balustrades.
8. Poorly applied liquid applied membrane to the decks of the north and west elevations.
9. Lack of clearance between base of cladding and ground on west, east and south elevations.
10. Lack of clearance between wall cladding and roof apron flashing.
11. Timber decking has been installed with inadequate clearance from external wall cladding on the west elevation.
12. Timber framing and contact with ground has H3 treated instead of H5 timber.
13. Inadequate coating applied to an exposed structural steel beam beneath the main deck.

[26] The defect experts gave their evidence concurrently at the hearing after having previously discussed Mr Alvey's observed leak locations at an experts' conference. They were Mr Alvey and William Cartwright engaged by the O'Connells, Simon Paykel, engaged by the Council, Noel Jellyman, engaged by Mr French and Mr Young, the assessor.

[27] I address each of the leak locations and conclude in each case whether such a leak location has permitted water to penetrate and cause damage requiring remediation.

Defect One - Gaps in the PVC drip edge to perimeter of roof sarking board

[28] The experts agreed that the PVC preformed drip edge corner is generally formed by creating a butt joint between the two PVC pieces. As a consequence it is naturally a point of weakness. Mr Cartwright said that overlapping the jointing would have been a possible installation method, but I accept the evidence of Mr Jellyman that lapping would not be ideal for it would create a bump or an uneven surface in the roof. Mr Jellyman mentioned a building tape fastened immediately underneath the jointing would now probably be used but at the time of this installation butt jointing of the PVC drip edge was installed otherwise in accordance with the trade practice of the time.

[29] The experts agreed this was a minor defect occurring at two locations clearly marked on the roof plan attached to the defects schedule from the experts' conference. The experts also agreed that damage had been caused to the roof sarking boards where the PVC preformed drip edge has separated at the corners.

[30] It is more probable that the defect had been created as a result of movement of the PVC caused by thermal movement and swelling of the roof sarking board following initial moisture ingress.

[31] Mr Paykel and Mr Jellyman provided evidence of their own observations of thermal movement of PVC on various properties throughout New Zealand. Mr Alvey and Mr Young said that they had some experience of thermal movement of PVC in England and as a result did not believe the

thermal movement had occurred in this case. However, it is common knowledge that climate, UV levels and other weather factors differ between New Zealand and England. In relation to New Zealand conditions E1-AS1, dated 19 August 1994 recorded a thermal expansion rate for PVC and listed materials that can be used for gutters under that acceptable solution. PVC has the greatest thermal expansion rate. I prefer the evidence of Mr Jellyman and Mr Paykel because of their greater knowledge of New Zealand's conditions and the technical literature makes mention of relatively high rated thermal expansion for PVC materials.

[32] In the event I conclude that it was a minor defect found in two locations solely causing underlying timber damage capable of targeted repair.

[33] Mr Alvey stated that there was other damage associated with the roof as when the asphalt roof shingles were removed damage was observed in three valley locations as shown on the roof plan annexed to the schedule from the experts' conference. He said that this damage was caused by moisture penetration through holes made by concealed fixings of the asphalt shingle tiles.

[34] I agree with Mr Paykel and Mr Jellyman that no evidence was adduced that damage was observed from the reduced ridge ventilation. The additional remedial work had been done solely in order to obtain a CCC. Lack of a CCC was not causative of damage. This part of the claim is unsustainable.

Defect Two - Lack of adequate kick-outs to end of roof apron flashings

[35] The experts agreed that this was a minor defect found in two locations on the east elevation. The required remedial work was restricted to recladding the affected wall planes in those areas. Mr Jellyman and Mr Cartwright agreed with Mr Paykel that normally the kick-out flashings would be installed by the roofer.

[36] The experts agreed that whilst the kick-out may have been of adequate length according to the standards at the time of construction, it

had been embedded in the plaster and it was this workmanship fault which caused the moisture ingress and damage. The plasterers, Jasac Limited's, workmanship was responsible for this defect.

[37] I conclude that this was a proven defect and caused by Jasac, allowing plaster to embed the kick-out.

Defect Three –Lack of waterproof membrane between the pergola and timber frame

[38] The experts agreed that this defect was more appropriately described as "poor detailing and finishing of butyl rubber membrane where it overlaps onto the top of pergola beam". They also agreed that the cause of the defect was that the butyl rubber membrane was not dressed properly at the external corner. I accept Mr Paykel's evidence that this is a sequencing of trades defect which has resulted in incomplete workmanship. The junction should have been terminated correctly to achieve a weathertight and durable junction. The experts agreed that this was a minor defect causing isolated damage and that the remedial work would be restricted to replacing the flat roof area including the pergola junction.

Defect Four – Inadequate sealant applied between cladding and pipe spacer before bolt inserted into space at the perimeter of pergola fixing

[39] Mr Alvey pointed to photographs showing an inappropriate reliance on sealant around the perimeter of the casings and the cladding. Mr Alvey and particularly Mr Jellyman disagreed as to whether sealant had been applied but had failed. Mr Jellyman's opinion was that there appeared to be a white silicone substance around the bolt and that the striations on the bolt suggested that the bolt was pushed into the silicone. I accept the evidence of Mr Jellyman that the placement of silicone at this place was not going to prevent the penetration of water in any event. The action of inserting the bolt into the sealant causes the sealant to be pushed aside and therefore compromising the weathertightness in any event. Weathertightness of the bolt penetrations is primarily reliant on the externally applied sealant, not any sealant placed inside the bolt hole. The experts agreed that the external sealant had been applied but had simply

cracked and failed. I am therefore satisfied that sealant was applied to the perimeter spacing but subsequently failed.

[40] I accept the evidence of Mr Jellyman and Mr Paykel that the cause of moisture ingress was the failure of the sealant around the cladding and bulk penetrations not the internally applied sealant. I also accept that as a minor defect the water ingress has only stained the timber and the bolt could be remediated by reapplying sealant from the outside.

Defect Five - Building paper had insufficient lap

[41] Mr Alvey's opinion was that building paper had incomplete or insufficient lap at some joints and allowed water to track into underlying timber framing. He pointed to areas of gaps and insufficient lapping in the building paper and illustrated with reference to photographs. He said that these areas of vulnerability had allowed water which had ingressed due to other defects to penetrate the timber causing damage.

[42] Mr Young, Mr Paykel and Mr Jellyman were all strongly of the view that the building paper had not caused damage to the dwelling. I accept the evidence of Mr Paykel who said that it could not have allowed moisture to ingress the home because it was not a primary barrier.

[43] Photograph [21] which Mr Alvey mentions in his evidence shows a small length of building paper incorrectly lapped but in a well protected area under an enclosed deck. To show that the paper has been lapped the incorrect way, Mr Alvey has inserted a finger behind the building paper and the caption of the photo states:

> Photograph [21] – the building paper has been incorrectly lapped and doesn't allow moisture to shed along the outer face of the paper contrary to the requirements of NZS3604:1999. This defect is evident throughout the building.

[44] Kaizon's initial investigation of window corners concluded that building paper had been incorrectly lapped. This led to Kaizon's recommendation of a full reclad. Had Kaizon undertaken further investigation it would have revealed that the building paper was correctly lapped in the areas identified by Kaizon. Instead an extra strip of paper

had been inserted underneath the windows creating that appearance when a small cut out was taken at the wrong location. I find that Kaizon had wrongly identified that there was incorrectly lapped building paper. There is only evidence that the building paper had been incorrectly lapped in the one area as shown in photograph 21 and there is no evidence of resulting damage. I therefore do not accept Mr Alvey's argument that the building paper was a primary defect. Building paper is a secondary means of defence against water ingress. I accept the evidence of the other experts that the building paper had not caused damage. Moisture found on the building paper was clearly from another source which allowed water ingress and there was no evidence that the building paper has failed or that there is any loss resulting.

Defect Six – No waterproofing membrane at junction of balcony balustrade wall top and adjacent wall

[45] Again, the experts agreed that this was a minor defect.

[46] Mr Alvey's evidence is that this defect was the lack of a turned up flashing at the junction. However, the evidence of the other experts, particularly Mr Paykel and Mr Jellyman, was that the junction between the balcony parapet wall and adjacent wall could be formed by installing the preformed pre-plastered balustrade top section on the timber framing and applying the first layer of plaster to that section and then applying a liquid applied membrane above the first coat of plaster. The top of the liquid applied membrane would then be plastered over and finished with paint. Mr Toebosch said this was the actual method of waterproofing this junction. Mr Paykel and Mr Jellyman were in agreement that this was an appropriate method of construction at the time.

[47] Mr Jellyman was also of the view that the existence of a liquid applied membrane could only be detected by forensic testing by an appropriate laboratory. Mr Alvey accepted that no such testing was undertaken and that Kaizon stopped investigating the junction once it had been determined that there was no metal "saddle flashing in place". I accept the evidence of Mr Jellyman and Mr Paykel that this was not the only means of waterproofing this junction.

[48] The experts also agreed that damage to this area may have been caused by the metal handrail fixings which were directly above the area where elevated moisture readings and timber damage was recorded.

[49] I conclude, that the O'Connells have failed to establish that there was no liquid applied membrane applied between the plaster coats and have thus failed to establish that this was in fact a defect. I accept the evidence of Mr Paykel and Mr Jellyman that the junction could have been waterproofed, in accordance with the standard of the day and the Hitex literature, by using a liquid applied membrane between layers of plaster. There is no evidence before me that the liquid applied membrane was not applied for the necessary testing was not undertaken.

Defect Seven – Inadequate fall to near flat clad surface to two chimney tops and penetrations through balcony balustrades

[50] Mr Alvey alleges that the Hitex plastering technical literature clearly shows that a substantial fall should be provided to all near flat clad surfaces. The top of the deck balustrade pillar had a fall of 0.5 degrees. It is alleged that the failure to provide an adequate slope allowed water to sit on top of the texture coating and enter the cladding via small cracks. He alleges that no membrane had been provided (defect six above) and the lack of fall also existed to the top of the false chimneys on the eastern west elevations.

[51] This defect can be divided into two locations, the top of the false chimneys and one balcony post.

Top of false chimneys

[52] Tops of the false chimneys were finished by using a temporary sheet of polystyrene to prevent moisture ingress on a short term basis. The polystyrene was given one plaster coating containing a waterproofing element, albeit temporary.

[53] The evidence of all the experts is that this defect has caused extensive damage to the chimney framing and to the adjacent wall planes, requiring full recladding of the chimneys themselves and the elevations on

which the chimneys are situated. It was accepted by the experts that the issue with the chimney tops was that the temporary waterproofing method only provided short term protection. Damage resulted because no permanent solution was built. Final capping and flue to the decorative chimney and the flashings, flue and final capping to the intended real chimney were never installed.

[54] I accept the consensus of the experts that this was a primary defect allowing water ingress and resulting damage.

Top of balcony post

[55] The issue with the top of the balcony post is that no preformed cap or other waterproofing was installed in respect of one post prior to plastering and painting. This had caused damage to that particular post. The evidence of Mr Paykel and Mr Jellyman was that if this defect had occurred in isolation, then it could have been remedied by:

i. cutting off the top portion of the post;
ii. slicing the remaining section with a new post; and
iii. repairing the cladding.

[56] This was not disputed by the other experts. Had there not been significant damage to the underlying deck due to the deck membrane failing, this defect could have been repaired cheaply and in isolation.

Defect Eight – Poorly applied liquid applied membrane to the decks of the north and west elevation

[57] I accept the evidence of the experts that this was a primary defect and had caused significant damage requiring significant remedial work to the deck areas.

Defect Nine – Lack of clearance between the base of the cladding and the ground on west, east and southern elevation

[58] All experts agreed that this too was a significant defect and had significantly contributed to the need for remedial work to the home.

Defect Ten – Lack of clearance between the wall cladding and the roof apron cladding and the roof apron flashing

[59] The experts accepted at the experts' conference and at the hearing that the damage in this area had been caused by the plaster embedded kick outs to the apron flashings and therefore it is encapsulated in defect two.

Defect Eleven – Timber decking has been installed with inadequate clearance from external wall cladding on the west elevation

[60] The experts agreed that this was a minor defect because it only affected the wall junction between the south west elevations. Mr Paykel and Mr Jellyman said that there was insufficient photographic evidence to establish whether any damage had occurred due to this defect. Mr Jellyman's evidence is that the BRANZ publication at the time (no. 355)[3] stated that when installing a timber strip decking a gap should be left between the decking and the building but there was no statement as to the measure of the gap. He said that all that was required for the gap was to be able to get a width of one's measurement tape between the timber and the building. Mr Young said he did find a gap between the timber and the building. It was only where the framing of the deck butted in that it became tight but he said that there was still a gap.[4]

[61] I accept Mr Jellyman's evidence that from the photographs it was apparent that the decking has been installed with a gap for drainage. It was only in one very small area on the upper deck and the lower deck where the decking timber was arguably slightly too close to the cladding. There is no evidence that the decking timber being too close to the cladding has actually led to moisture ingress and water damage. Water will only ingress past the cladding if the paint protection has been compromised in some way. The only timber sample taken by Kaizon in this area was adjacent to the liquid applied membrane which is known to have failed and been a significant cause of moisture ingress.

[3] Common bundle of documents section 5, at 5.593-5.594.
[4] Common bundle of documents at 5.460, photo [84].

[62] I conclude that there is no evidence of damage with respect to this defect. I further accept that Mr Jellyman's evidence that photograph [87] shows an adequate gap which was of sufficient width for the standard of building at the time.

Defect Twelve – Timber framing in contact with ground was H3 treated instead of H5 timber

[63] H5 treated timber was the standard of the time if the timber was to be in direct contact with the ground. However, I find that the treatment level of framing for this home was correct at the time of construction. The alleged defect here is that the soil has been piled up around the exterior of the chimney footing subsequently to building. Therefore this defect relates to ground clearance and is included within defect nine.

Defect Thirteen – Inadequate coating applied to the exposed structural steel beam beneath the main deck

[64] The structural beam supporting the first floor deck on the west elevation is exposed beneath the timber decking. Mr Alvey alleged that the steel beam was inadequately treated for external exposure. Mr Alvey and Mr Paykel accept that there was some level of treatment to the steel beam, but were unable to determine what level of treatment. However it is a minor defect and I accept the evidence of Mr Paykel and Mr Jellyman that the damage had resulted due to leaking from the defective liquid applied membrane to the deck above.

SUMMARY ON DEFECTS

[65] In conclusion I determine that defects numbered five, 10, 11, 12 and 13 are not proven defects and the O'Connells claims in respect of these are unsustainable.

[66] Defects one, two, three, four and six and the inadequate fall to the one balcony balustrade are minor defects, which alone have not led to the need to re-clad.

[67] The primary defects causative of significant damage are the poorly applied liquid membrane to the decks, the ground clearances and the inadequate fall to the surface to the chimney tops.

[68] Mr Young and Mr Paykel concluded, due to the inadequate ground level clearances, the lack of protection and finish to the chimney tops, poorly applied liquid membrane, and the plaster embedded in the kick out flashings, which caused damage to the affected wall planes, that a full reclad of the home has proven necessary.

[69] I conclude that the home required a full reclad and it is accepted that renewal of the roof was not a necessary part of the remedial work.

WHAT WAS MRS O'CONNELL'S ROLE IN THE CONSTRUCTION?

[70] Mrs O'Connell explained to Mr Young when he attended to commence his invasive investigation for the WHRS assessor's report, that she "project managed" construction. The second respondent, Mr French, initially counterclaimed that Mrs O'Connell acted as project manager and was responsible for quality control and supervisory functions of the trades engaged in construction of the home. To a lesser extent the first respondent Council initially made the same allegations.

[71] Whilst these counterclaims were resiled from during the hearing I wish to reiterate my findings given at the hearing in respect of Mrs O'Connell's involvement.

[72] I find that Mrs O'Connell did engage all of the trades involved with construction of the home and she directly paid them. She had some involvement in the coordination of the trades going onto the building site. She was involved in supplying to the various trades the plans and specifications which they were to work from. Essentially her role was administrative; it was a facilitation role; it was limited to coordinating building supplies and engaging the necessary trades involved in the construction.

[73] Mrs O'Connell did not apply any building knowledge or expertise on the building site for she had no building knowledge or skill to undertake

any building work. There is no evidence of Mrs O'Connell's involvement whatsoever in the actual building process.

[74] I am satisfied that Mrs O'Connell had no responsibility for ensuring work was completed in accordance with the technical literature and the consented plans and specifications.[5] The claims that Mrs O'Connell project managed the building of their home is clearly unsustainable.

WAS THE COUNCIL NEGLIGENT IN CARRYING OUT ITS INSPECTIONS?

[75] The O'Connells claim against the Council centred around two inspections, the post line and pre-plaster inspections undertaken on 9 and 10 May 2001.

[76] Ms Wroe submits that the evidence of Mr Cartwright combined with the defects described by Mr Alvey point to a failure on the part of the Council to undertake a sufficiently robust and thorough pre-plaster inspection in order to ensure that the home was then ready to be completed with the final plastering. She further submits that the Council had the opportunity to inspect key weathertightness details at the pre-plaster inspection yet either failed to do so, or failed to recognise that once plastered, compliance with the Building Code could not be achieved. Mr Cartwright states that the pre-plaster inspection was the Council's final opportunity to view details which would be covered up and difficult to undo once the plastering was complete.

[77] The Council admits that it owed the O'Connells a duty of care in respect of the conduct of its inspections, but says it does not owe a duty of care in relation to the preline, post-line,and pre-plaster inspections as they were no more than an intermediate inspection and the Council knew that critical issues would be checked at a later inspection.

[78] The standards by which the conduct of a Council officer should be measured are set out in *Askin v Knox*[6] where Cook J concluded that a

[5] *Mowlem v Young* HC Tauranga, AP 35/93, 20 September 1994; *Findlay v Auckland City Council* HC Auckland, CIV 2009-404-6497, 16 September 2010.
[6] *Askin v Knox* [1989] 1 NZLR 248 (CA).

Council officer's conduct will be judged against the knowledge and practice at the time at which the negligent act or omission was said to take place.

[79] The Court of Appeal in *Byron Avenue*[7] accepted that the Council owed a duty of care in its inspections even before the final inspection issuing a Code Compliance Certificate. It stated:

> [59] I consider that the *Hamlin* principle imposes on councils in respect of residential apartments a duty of reasonable care when inspecting work that is going to be covered up and so becomes impossible to inspect without destruction of at least part of the fabric of the building, even before issuing a code compliance certificate (or advice serving the same function). The effect of carelessness in the inspection phase was to lock in a defective condition which was not reasonably detectable by purchasers. They were entitled to rely on due performance by the Council of its inspection function, whether performed by itself or by an expert.

[80] The obligation on the Council is to take all reasonable steps to ensure that the building work is being carried out in accordance with the consent and the Building Code. It is 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. *Byron Avenue* makes it clear this duty is owed in relation to the inspections that were undertaken particularly in relation to items that will be covered up before subsequent inspection.

[81] The O'Connells submit that defects one, two, five, six and seven should have been identified during the course of the post line and pre-plaster inspections. Mr Barr however submits the Council cannot be held liable for any of the five defects listed above because either they could not, or would not have been identified by a reasonable council Officer at the time and because the standard practice of councils was to inspect those items at the final inspection and the Council knew that these issues would be checked at a later inspection.

[82] In considering whether the Council breached its duty of care I will therefore consider each of the defects alleged against it.

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[7] *O'Hagan v Body Corporate 189855* [2010] NZCA 65, [2010] 3 NZLR 486.

Defect One – Gaps in the PVC drip edge to perimeter of roof sarking board

[83] I have already concluded that this defect had been created as a result of movement of the PVC caused by thermal movement and that the actual construction of this building item was in accordance with trade practice at the time.

[84] I accept Mr Cartwright's evidence that the mechanically fastened PVC drip edge would in all probability have been butted quite tightly at installation but would have been partially concealed by the asphalt tiles and potentially by the spouting, meaning it would have been difficult, but not impossible, for a Council officer to inspect. However it was a weatherightness risk factor. The May 2001 inspection would have been the only convenient time for a Council officer to have inspected because the scaffolding to enable easy inspection, would be in place. Mr Cartwright conceded that it was not clear this defect would have been identified by a Council officer in the ordinary course of inspections. Mr Cartwright's evidence, particularly in his reply brief, was that standard practice of councils at the time was not to inspect such an item until the final inspection. The final inspection for this property failed. Furthermore Mr Paykel's evidence was that this defect was not identified by any expert until the scaffolding was installed to commence the remedial work and therefore it was not an obvious defect.

[85] I conclude therefore that the claimants have not established that a Council officer would have expected to identify this defect at the time of the May 2001 inspection. In any event it was a minor matter. Mr Jellyman estimated the targeted repair cost for the damage caused by the two drip edge separations would be in the vicinity of a few hundred dollars.

Defect Two – Lack of adequate kick out to end of the roof apron flashing

[86] While Mr Alvey and Mr Cartwright stated that this defect could have been identified at the pre-line, post-line and final inspections Mr Hubbuck and Mr Paykel stated that kick out flashings were not a feature of cladding that was an issue for councils at the time. However more

importantly, as already concluded the actual defect was not a lack of the kick outs but that the flashing was imbedded into the plaster. Therefore this defect could not have been identified at the pre-plaster inspection for the plaster was not then in place. Accordingly the Council cannot be liable for this defect.

Defect Five – Building paper had incomplete or insufficient cap at joints and allowed water to trade into the underlying timber framing

[87] I have determined that this is not a defect. I also accept Mr Hubbuck's evidence that the limited issues with the building paper being a defect was at stud and corner locations such that the alleged insufficient lapping could not have been visible from the inside of the dwelling at the pre-line inspection.

Defect Six – No waterproofing membrane at junction of balcony balustrade wall top and adjacent wall

[88] I accept the evidence of the experts that it was an acceptable practice to apply a liquid membrane between two coats of plaster and that the O'Connells have failed to establish that a membrane had not been installed. Furthermore Mr Cartwright conceded that this defect would not have been visible at the pre-plaster inspection if the plastering had not started and it had not started by 10 May 2001. The Council also obtained a producer statement from the Hitex applicator to confirm that the issues such as this had been addressed. There is no evidence that it was unreasonable for the Council to have relied on such a producer statement. The Council is accordingly not liable for this defect.

Defect Seven – Inadequate fall to near flat clad surfaces to two chimney tops and penetration, through balcony balustrades

i. Top of balustrade slope

[89] I accept that the slope of the deck balustrade pillar would most likely have been created directly prior to plastering by the installation of a pre-formed polystyrene cap or other membrane. Therefore I am satisfied that the deck balustrade pillar could not have been checked by a Council

officer for an appropriate waterproofing cap at the time of the pre-plaster or post-line inspection. The O'Connells have therefore failed to establish that a reasonable Council officer would have identified this issue during the course of a pre-line, post-line and pre-plastering inspection.

ii. False chimney tops

[90] What had been installed and noted as a defect was in fact a temporary waterproofing cover. During the course of construction it became clear that the O'Connells decided not to install a real fireplace with one of the chimneys and failed to engage anyone to install the chimney flues as shown on the plans at both locations. There was no evidence that the O'Connells advised the Council, or any trades engaged, of their changed intentions over the chimneys.

[91] The O'Connells were unable to recall when they changed their intentions, and in particular whether this was before or after the relevant Council inspections. Mr Cartwright conceded that whilst he would have expected some enquiry to have been made by the Council inspector he would have expected such an enquiry to have occurred at the final inspection. I am satisfied therefore that the O'Connells have failed to establish that a reasonable Council officer would have identified this issue during the course of a pre-line, post-line or pre-plaster inspections.

Conclusion on Council liability

[92] I am satisfied that the standard of practice of the time of councils was to undertake a more vigorous inspection of relevant building elements with a waterproofing risk factor at the final inspection unless such were to be covered in and unable to be then inspected. The evidence advanced by the O'Connells' experts that the Council should have adopted a different practice is not conclusive.

[93] Mr Cartwright and Mr Paykel's evidence satisfies me that the defects could have been identified at the final inspection. Their evidence also concluded that a reasonable Council officer at the time would not have looked vigorously at these issues until the final inspection. The final inspection failed and outstanding issues identified were not attended to until

the remedial work was undertaken. Therefore even if not all issues were noted in the failed final inspection there appears to be no causative link between any alleged failure to note defects at the final inspection and the O'Connells' loss.

[94] Mr Cartwright conceded that the Council met the standards of the time. I reject Ms Wroe's assertion that the Council did not turn its mind to waterproofing or failed to note key weathertightness issues that would subsequently be covered up. Mr Hubbuck, the Council inspector specifically noted the flashings and the mastic to the windows at the pre-plaster inspection. This is entirely a waterproofing issue.

[95] I therefore conclude that the Council did not breach its duty of care, for it did not fall below the standard of a reasonable Council officer at the time of construction and certainly at the time of the pre-line, post-line and pre-plaster inspections. Councils cannot be found liable at the pre-line, post-line and pre-plastering inspections for defects that are not then identifiable and which could and more properly should be inspected at the final inspection.

[96] The O'Connells submitted too that the Council was negligent with its 23 March 2005 inspection. They argued that such inspection was a final inspection and the conduct of the inspection was incapable of ensuring that the defects were identified and prevented. The Council's response was that this inspection was not a final inspection of all building elements and that its conduct of this inspection was not negligent. I accept the Council's submission that this inspection was not a final inspection. I am satisfied from the evidence of Mr Hubbuck that in 2005 the practice of Rodney District Council was, once identifying that a home's cladding was face fixed monolithic plaster, to refer the external envelope to a specialist cladding inspector for a final rigorous inspection. It appears that this is what the Council did, although the O'Connells may not have been aware of this until 2007, as there is no evidence that the O'Connells were given written notice.

[97] In any event the significant damage to the home necessitating a full reclad was as a consequence of the temporary chimney capping, the ground clearance issues, the LAM application and the kick outs embedded in plaster. These would clearly have occurred by early 2005. A cladding

inspection by a specialist some two years earlier than 2007 would not have altered the significant deterioration already caused. I further note that the O'Connells took a further two years, as the cladding inspection was not undertaken until 2009. I am satisfied that the inspection by the Council in 2005 was not negligent and in all probability the Council rightfully recognised that there were significant issues with face fixed monolithic clad buildings at the time. I am satisfied that the Council cannot be found liable when it failed relevant inspections, in 2005, 2007 and 2009 and did not pass the allegedly defective work.

[98] The only defects to which the Council could possibly face liability for in this claim are those defects which could have and should have been identified at the pre-line, post-line and pre-plaster inspections. None of the defects were or could have been. The claim against the Council fails. Each of the defects the O'Connells have alleged the Council would be liable for (pre-line, post-line or pre-plaster inspections), the O'Connells have either failed to prove that it was a defect or failed to establish that a reasonable Council officer could have identified the defect at that time. I also conclude that the Council had no reason to identify these defects prior to the final inspection in fulfilling its statutory role.

WAS MR FRENCH RESPONSIBLE FOR SITE SUPERVISION OR PROJECT MANAGEMENT?

[99] The O'Connells say that Mr French owes them a duty of care both as the builder of the house and as the project manager. They say that he breached that duty of care in building their home in a manner that did not comply with the Building Code and by failing to manage and supervise the subcontractors with reasonable skill and care to ensure the construction of the home complied with the Building Code.

[100] The law is well established; a builder owes a duty of care for work undertaken by him even if that work was undertaken on a labour-only contract.[8] Mr French accepted that he built the O'Connells house to the extent that he undertook the carpentry work including the installation of the timber framing, pergola and the timber decking. He also installed the building paper. Mr French engaged Ray Duff, a qualified builder, to work

[8] *Bowen v Paramount Builders Limited (Hamilton) Limited* [1977] 1 NZLR 394 (CA); *Boyd v McGregor* HC Auckland, CIV-2009-404-5332, 17 February 2010.

with him on this contract, and, he also employed Michael Hawkins, a young apprentice carpenter. I therefore accept he owes a duty of care to the O'Connells in respect of this work whether undertaken by him or his employees or direct contractors.

[101] Ms Wroe submits that Mr French's duty of care extends beyond work that he admits was undertaken by him or his contractors and includes project management and site supervision of the contractors engaged by Mr and Mrs O'Connell. She placed some importance on the last sentence of Mr French's labour-only quotation which stated "all building works will be carried out in accordance with plan & specs supplied. This price includes all site supervision and project management".

[102] Mr French submitted that these words only meant that he was quoting to project manage the building work listed in his quotation not the entire construction. His evidence, which I accept, was that he advised Mrs O'Connell that he generally worked on a labour-only basis, but was prepared to undertake a limited role of project management for her to the extent that he would liaise with contractors as to the sequencing and timing of their involvement during the time he remained on the building site.

[103] Mr French's quotation of 27 November 2000 clearly states that it was a labour-only quotation. Interpreting the final sentence to mean that Mr French was agreeing to project manage the whole job is not consistent either with the fact that it was a labour only quotation or the discussions he had with Mrs O'Connell. The written contract was a standard form contract prepared by Mr French's lawyer for general use rather than one specifically for this job. While the written contract did not specifically mention labour only it also did not record that Mr French was responsible for all subcontractors or in particular contractors engaged directly by Mr and Mrs O'Connell. No contractor's margin was provided for or paid.

[104] Clause 18 of the contract stated:

> **18. Contractor responsible for work of subcontractors**
> The contractor [Mr French was defined in the contract as the contractor] is responsible for all work of all subcontractors engaged by the contractor in the works covered in the specifications and is,

> in particular, responsible for procurement of any guarantee required by or called for under this agreement for this specification.

I accept that this clause only recorded that Mr French was responsible for the work of all subcontractors engaged by him. Mr French was not agreeing to be responsible for the contractors engaged by Mr and Mrs O'Connell.

[105] While the claim against Mr French is in negligence the *Rolls-Royce New Zealand Limited v Carter Holt Harvey Limited*[9] decision establishes that the contract can define the task to be undertaken, such that the tort liability of Mr French does not extend beyond the contractual liability with regards to matters covered by the contract.

[106] In interpreting the extent of Mr French's contractual responsibilities I am entitled to ascertain the meaning of the contractual terms which the documents would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation to which they were at the time of the contract.[10]

[107] It is relevant to note that from before the commencement of the build Mr and Mrs O'Connell intended the building materials to be sourced through Carter Holt where Mr O'Connell had a trade discount building materials account. Mrs O'Connell hired, and, had the right to fire, all other significant contractors. She engaged the roofer, the cladding installer Jasac Limited, the plumber, the interior fit out installer, the painter, the driveway and landscaping contractors and the liquid applied waterproofing membrane applicator, JD Enterprises. While JD Enterprises was introduced to Mrs O'Connell by Mr French, Mrs O'Connell contracted and paid JD Enterprises. I accept Mr French's evidence that JD Enterprises simply sent its invoices to Mr French because he facilitated the connection between Mrs O'Connell and JD Enterprises.

[108] In both the quote and the subsequent contract and in his discussions with Mrs O'Connell Mr French was agreeing to do no more than project manage or supervise the work of his subcontractors and to

[9] *Rolls-Royce New Zealand Limited v Carter Holt Harvey Limited* [2005] 1 NZLR 324 (CA) at [68].
[10] *Boat Park Limited v Hutchinson* [1999] 2 NZLR 74 (CA), adopted the approach referred to by Lord Hoffman in Investors *Compensation Scheme Limited v West Bromich Building Society* [1998] 1 ALL ER 98..

help sequence the work of other contractors while he was on site. I do not accept that Mr French ever agreed, or was paid to, project manage the total construction or the contractors directly engaged by the O'Connells.

[109] Mr French was not responsible for the supervision and project management of all contractors. His role in that respect was limited to sequencing the contractors during his time on the building site and supervising his direct contractors or employees such as Mr Duff and Mr Hawkins. Therefore he does not owe a duty of care as a project manager or in relation to workmanship issues of the contractors engaged directly by Mr or Mrs O'Connell. The duty he owes is limited to the construction work undertaken by him, his employees and direct contractors.

IS MR FRENCH RESPONSIBLE FOR ANY OF THE ESTABLISHED DEFECTS?

[110] I am satisfied that neither Mr French nor his contractors had any involvement in the construction or the workmanship that has subsequently been shown to be defective in relation to the ground clearances, chimney toppings, LAM application or plastering embedded in the kick out flashings. All this work was undertaken by other contractors directly engaged and paid for by the O'Connells.

[111] Defect one was caused by the roofing contractor and defect two, the embedding of the plaster, Jasac Limited. Defect three was the responsibility of the LAM applicator, JD Enterprises.

[112] Defect four I determined was not a defect. I accept Mr French's evidence that he inserted sealant inside the bolt hole (pipe spacer) in accordance with the Hitex details. Jasac was responsible for the sealing of the exterior of the bolts once the cladding was installed. Photographs of the bolts show silicone sealant around the bolt.[11] I accept Mr Jellyman and Mr Paykel's evidence that any deficiency of the sealant applied inside the pipe spacer would not have caused any watertightness issues.

[11] Common bundle of documents at 5.444 photo [58].

[113] I have determined that the building paper was not a defect and damage has not occurred as a consequence of the limited insufficient lapping of the building wrap.

[114] In relation to defect six Jasac was responsible for the installation of the Hitex system and the Hitex system had a waterproof membrane paint and coating system and a proprietary pre-sloped wall parapet top. Mr French therefore was not responsible for this building item.

[115] Mr French had no involvement with defect seven. Mr Paykel and Mr Jellyman's evidence, which I accept, is that Mr French as a labour-only contractor, would have had no involvement with the finish of the falls to the balcony and parapet walls or to the top of the chimney.

[116] I have already concluded Mr French had no involvement with the installation of the liquid applied membrane, defect eight. That was undertaken by J D Enterprises. Mr French had left the building site before the driveway and landscaping work was completed and therefore he had no involvement with defect nine.

[117] I found that defect 11 was not a defect as the decking had generally been installed with a sufficient gap for drainage.

[118] Defects 12 and 13 I have found not to be defects. Mrs O'Connell's evidence is that the framing material was organised by her through Carter Holt. I accept Mr French's evidence that he did not order the steel beam (defect 13) but in any event the evidence of Mr Jellyman and Mr Paykel establishes that the damage to the structural steel beam was a result of water ingress from the failure of the liquid applied membrane above.

[119] I conclude therefore that Mr French has not breached any duty of care he owed the O'Connells and accordingly the claims against him fail.

DOES MR TOEBOSCH PERSONALLY OWE THE CLAIMANTS A DUTY OF CARE?

[120] Mr Toebosch's former company, Jasac was engaged by Mrs O'Connell to install the cladding and plaster. Mr Toebosch was the sole

active director of Jasac and during its life all of Mr Toebosch's business was conducted through the company.

[121] The effect of the 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* [12] concluded that limited liability is not intended to provide company directors with a general immunity from tortious liability.

[122] Company directors that exercise personal control over a building operation will owe a duty of care to owners. In *Morton v Douglas Homes Ltd,*[13] Hardie Boys J concluded that where a company director has personal control over a building operation he or she can be held personally liable. In *Dicks v Hobson Swan Construction Ltd (in liq),*[14] Baragwanath J concluded that as Mr McDonald, the director of the building company, actually performed the construction of the house he was personally responsible for the defects which resulted in the dwelling leaking and therefore personally owed Mrs Dicks, the home owner, a duty of care.

[123] In *Hartley v Balemi,*[15] Stevens J concluded that personal involvement does not necessarily mean the physical work needs to be undertaken by a director but may include controlling the construction of the building. The Court of Appeal in *Body Corporate 202254 v Taylor*[16] considered director liability and analysed the reasoning in *Trevor Ivory Limited v Anderson.*[17] 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 tort" approach and noted that assumption of responsibility is not an element of the tort of negligence.

[124] The existence and extent of any duty of care owed by Mr Toebosch in respect of the work carried out by Jasac is therefore

[12] *Chee v Stareast Investment Limited* HC Auckland, CIV-2009-404-5255, 1 April 2010 at [101].
[13] *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548 (HC).
[14] *Dicks v Hobson Swan Construction Ltd (in liquidation)* (2006) 7 NZCPR 881 (HC).
[15] *Hartley v Balemi* HC Auckland, CIV-2006-404-2589, 29 March 2007.
[16] *Body Corporate 202254 v Taylor* [2008] NZCA 317, [2009] 2 NZLR 17 (CA).
[17] *Trevor Ivory Limited v Anderson* [1992] 2 NZLR 517 (CA).

determined by a consideration of his role and responsibility on this site.[18] His liability must be determined by the evidence of what he actually did. To be liable it must be established that Mr Toebosch had sufficient involvement in or control of the work to give rise to a duty of care.

[125] Jasac Limited employed three gangs of trained Hitex installers and plasterers. Mr Toebosch stated that when the company's employees arrived on the building site they would know what they were doing and Mr Toebosch's involvement was to secure the work, quote for the job and ensure the building materials were acquired and delivered to the site on time. Jasac was involved in more than one contract at a time. He visited all current building sites most days to ensure that Jasac jobs were progressing in a timely fashion. Mr Toebosch said that his company always had an onsite manager and only if something unusual came up would he be consulted for a final decision on an issue. Mr Toebosch stated that he did not personally undertake any of the cladding installation or plastering work himself. Jasac gave a producer statement/warranty at the conclusion of its contract to the O'Connells. Mr Toebosch's writing appeared at the bottom of the company warranty as he was the active director and responsible for the governance of the company.

[126] The O'Connells have failed to establish that Mr Toebosch had any involvement in carrying out any defective work causing weatherightness defects. The O'Connells are not subsequent purchasers but commissioned Jasac to undertake its work so Mrs O'Connell had opportunity to observe Mr Toebosch's actual involvement. They have failed to show that he exercised sufficient control or supervision of the work carried out by Jasac to establish that he personally owes them a duty of care. Mr Toebosch's involvement was in coordinating and paying for the supply of materials, engaging and arranging the qualified tradesmen to install the Hitex cladding and plastering. The company appointed one of those employees as site manager to supervise and manage the onsite contract. Mr Toebosch had some oversight involvement with the O'Connell contract, but I am not satisfied that it was direct personal involvement. These activities were simply involvement of a director/manager administering the construction of a home by an incorporated cladder.

[18] *Auckland City Council v Grgicevich* HC Auckland, CIV-2007-404-6712, 17 December 2010.

[127] Even if Mr Toebosch did owe a duty the O'Connells have failed to establish that any breach of that duty has contributed to their loss. Any duty of care can only relate to the work undertaken, controlled or supervised by Mr Toebosch. At most therefore he could only be liable for work associated with the cladding and plastering work carried out by Jasac.

[128] All experts agreed that the ground clearances and the chimney capping were primary defects giving rise to the need for a full reclad of the home. Mr Toebosch's evidence, which I accept, is that when his company completed its work and left the building site the landscaping and ground work had not been completed and there was no paving or ground work or gardening up to the bottom of the framing.

[129] In relation to the chimney Mr Toebosch accepted that his company constructed and installed a temporary polystyrene capping plastered with one coat of plaster, but which had the same colour pigment as the final coat. The intent being to keep the weather out until such time as the owners arranged for the installation of the chimney flues. Mr Toebosch said that the plans clearly indicated chimney flues on both chimneys notwithstanding that one was described as decorative.

[130] Mr Toebosch's understanding was that subsequent to Jasac's involvement a fireplace chimney installer would complete the flues and the capping to the chimney tops. Mr Toebosch said that his company never installed chimney flues, were not qualified to do so and it was not contracted by the O'Connells to install the chimney flues. Furthermore there is no evidence before me that the O'Connells ever explained to Mr Toebosch, or, for that matter to Mr French, their change of intention regarding the chimneys. I am therefore satisfied that neither Mr Toebosch nor his company were negligent when leaving the chimney with a temporary waterproofing capping, pending the completion of the fireplaces and chimney flues by another qualified trade.

[131] In relation to the other alleged defects I have already found that the building wrap was installed before Jasac started its work. I am also satisfied from Mr Toebosch's evidence that he and his company were conscious of watertight issues such that when Mrs O'Connell asked him to flat top a balustrade pillar he objected arguing that it was not good building

practice. He only agreed to her request under protest, and similarly when asked by her to complete an area of unclad footing.[19] His company installed a more robust less water absorbent cladding material to that area at his suggestion.

[132] Mr Toebosch accepts that Jasac was responsible for the kick-out flashings being embedded with plaster and Mr Toebosch accepts this was a defect likely to cause damage. The experts establish that it did cause damage. However there is no evidence that Mr Toebosch had any involvement in this work.

[133] The claim against Mr Toebosch is accordingly dismissed.

WERE THE O'CONNELLS CONTRIBUTORILY NEGLIGENCT?

[134] All of the respondents submitted that the O'Connells have contributed materially to their loss in various ways. The essential thrust of the submissions is a defence of contributory negligence. Having concluded that none of the named parties are liable I will only deal briefly with this issue.

[135] 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.

[136] Section 3 allows for the apportionment of damage where there is fault on both sides.[20] In assessing whether a claimant is at fault, the standard is that of the reasonable person although the person's own general characteristics must be considered. [21]

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[19] The Assessor's Report at photograph [62], section 5, Common Bundle of Documents at 197.
[20] 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-2006-404-2589, 29 March 2007 at [101].
[21] Above n7 at [79].

[137] 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*.[22] 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 questions are:

(a) What if anything did the O'Connells do (or not 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?

[138] Mr Barr submits that this case is akin to *Findlay.* That material damage resulted from the O'Connells' failure to engage a person to supervise completion of the building. Mr Barr also stated that it appeared that no one was engaged to complete the capping to the chimney or to install the flue and flashings to the fireplace. This was the responsibility of the O'Connells and they failed to do it. As a result, Mr Barr said, no permanent waterproofing method was installed to the chimneys and this has resulted in significant damage to the home.

[139] I accept that the claimants contributed to their own loss by failing to engage trades people to complete the construction of the home in a timely way, particularly in relation to the construction of the chimneys. They have also contributed to their own loss by failing to either supervise the installation of the driveway or the landscaping or to do so themselves. The ground clearances and chimney were the two significant defects that triggered the need for substantial remedial work.

[22] *Findlay v Auckland City Council* HC Auckland CIV-2009-404-6497, 16 September 2010, at [59]-[64].

[140] I also accept that the O'Connells departed from the standards of care that might be expected of a residential landowner commissioning the build of a new home in 2001. They had no building experience but did not seek appropriate advice. They should also have realised that the chimneys needed to be completed in a timely way. While they may have assumed Mr French had some supervisory role this could not have continued past the end of his contract when he was no longer on site. Mr French was out of the country when the driveway was poured and was no longer on site when the rest of the landscaping work was done.

[141] Mr and Mrs O'Connell's actions and inactions significantly contributed to the damage and their subsequent loss. Therefore if I had found any of the respondents liable I have would concluded that the circumstances of this claim would justify of reduction of 60 per cent of the damages otherwise recoverable by the claimants.

CONCLUSION

[142] I find that the O'Connells have failed to establish their claims against the respondents. Whilst the home required a full re-clad, the respondents are not responsible. The claims are accordingly dismissed.

DATED this 19th day of March 2013

K D Kilgour
Tribunal Member