IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2005-404-005561

BETWEEN	BODY CORPORATE NO. 189855 First Plaintiff
AND	PAULINE LOUISE HOUGH & ORS Second Plaintiff
AND	NORTH SHORE CITY COUNCIL First Defendant
AND	STEPHEN FRANCIS SMYTHE Second Defendant
AND	PATRICK JAMES O'HAGAN Third Defendant
AND	CENTRE OF ATTRACTION LIMITED (FORMERLY O'HAGAN INDUSTRIES LIMITED) (IN LIQUIDATION) Fourth Defendant
AND	JOSEPH WALDEN Fifth Defendant
AND	STACK NZ LIMITED Sixth Defendant
AND	ANDREW PLASTERING CO (1994) LIMITED Seventh Defendant
AND	ALAN MAXWELL GRANT First Third Party (Discontinued)
AND	BARRY GLENN BRACEWELL Second Third Party (Discontinued)

Hearing: 4,5,7,8, 11-15, 18-21, 26-27 February 2008

Further written
Submissions: 20, 29 May 2008

Appearances: M C Josephson and G B Lewis for Plaintiffs
S A Thodey and S B Mitchell for First Defendant
M Gilbert and N C Z Khouri for Second Defendant (leave to withdraw)
M E Casey QC for Third and Fourth Defendants
M A H Macfarlane and K A Meikle for Fifth and Sixth Defendants
E St John for First Third Party (leave to withdraw)

Judgment: 25 July 2008

JUDGMENT OF VENNING J

This judgment was delivered by me on 25 July 2008 at 3.00 p.m., pursuant to Rule 540(4) of the High Court Rules.

Registrar/Deputy Registrar

Date........ ...

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Introduction

[1] The Building Act 1991 came into force on 1 July 1992. It heralded a new approach to the regulation of building in New Zealand. The Act mandated a shift from prescriptive standards to a performance-based code. Over the next few years the change in approach under the Act led to the use of different building materials and methods to those that had been formerly employed. The passing of the Building Act 2004 suggests that the new approach was not successful. The different materials and methods used under the 1991 Act have, in a considerable number of instances, failed, leading to what is known as the leaky home crisis. It has been said that as many as 40,000 buildings may be affected. 45 Byron Avenue is one such building.

[2] 45 Byron Avenue is a block of 14 residential units in Takapuna on the North Shore of Auckland. A number of expert building consultants agree that it has defects that amount to breaches of the New Zealand Building Code. At issue in this case is the cause of those defects and the responsibility for their consequences.

The parties involved in the construction of 45 Byron Avenue

[3] 45 Byron Avenue was developed under the Unit Titles Act 1972 by Stephen Smythe, through his company Couldrey Properties Limited (formerly Byron Developments Limited). Mr Smythe was also the architect, initially through his firm Smythe and Grant Limited and later, personally. Bracewell Construction Limited built the development. Mr Walden and his company Stack New Zealand Limited were initially the architect's representative and later, the project manager. Andrew Plastering Co (1994) Limited was the plasterer.

[4] Mr O'Hagan, through his company Centre of Attraction Limited, (formerly O'Hagan Industries Limited), recommended, designed and supervised certain remedial work.

[5] The North Shore City Council issued the building consent for 45 Byron Avenue. Council officers also inspected the development at various stages of its construction and approved aspects of it. The Council has, however, declined to issue a code compliance certificate for the development.

The construction process

[6] Couldrey applied for building consent on 26 September 1997. The Council issued a building consent on 13 January 1998.

[7] 45 Byron Avenue was originally to be built in two stages. But Couldrey ran into financial difficulties early on in the project. It did not sell enough units initially with the result that it had insufficient funds to complete the development in the two stages as originally contemplated. In the end 45 Byron Avenue was built in four stages. Stage 1 involved construction of the entire basement floor level and the construction and completion of apartments 7 to 14. Stage 2 comprised the construction to a closed-in stage of apartments 1 to 6 and the completion of apartment 4. Stage 3 involved the lining of the interiors of apartments 1, 2, 3, 5 and 6. In stage 4 the internal fit-out and completion of apartments 1, 2, 3, 5 and 6 was finalised.

[8] Couldrey's financial difficulties led to the resignation of the original architect Smythe and Grant Limited on 15 October 1998. Mr Smythe continued as architect and involved Mr Walden and Stack as project manager. Couldrey also had difficulty paying Bracewell Construction. It justified its non-payment by raising issues as to the quality of Bracewell Construction's work. There was a stand-off between Bracewell Construction and Couldrey which went to arbitration. To support its case at arbitration Couldrey obtained reports from Prendos Limited (a building consultant) dated 2 December 1999 and 30 November 2000. The reports detailed a number of defects in the building. Despite those reports Bracewell Construction was largely successful at the arbitration, the arbitrator finding that 45 Byron Avenue had been built in accordance with the plans and specifications.

[9] After the arbitration, Bracewell Construction completed some limited remedial work at 45 Byron Avenue. It then asked the Council to carry out final inspections on 18 January 2002 and 5 March 2002 with a view to obtaining a code compliance certificate. Couldrey had retained one of the units. Shortly after the inspections and before the Council issued a code compliance certificate, Mr Smythe wrote to the Council on behalf of Couldrey and drew its attention to the fact that the unit appeared to have problems with moisture ingress. The Council inspected the property once again and on 22 March 2002 advised Couldrey that it was not in a position to issue a certificate of code compliance. Later that year, the Body Corporate secretary sought a meeting with the Council to ascertain why it would not issue a code compliance certificate. Following the meeting the Council recommended the Body Corporate and owners instruct a building consultant to advise them.

The initial remedial work

[10] The Body Corporate then instructed Centre of Attraction Limited, (then called O'Hagan Industries Limited) in July 2002. Mr O'Hagan identified that the application and detailing of the cladding did not comply with either the contract specification or the relevant standards. After further investigation, Mr O'Hagan recommended that the windows and doors of the units be removed and replaced and a flashing detail be installed. Mr O'Hagan designed the flashing detail and supervised the remedial works. The remedial work was carried out by R D Wells Limited. The remedial works were completed in early 2004.

Refusal to issue a code compliance certificate

[11] Even after completion of the remedial works the Council was still not satisfied that the requirements of the Building Code were met. It maintained its refusal to issue a code compliance certificate. The Body Corporate referred the matter to the Department of Building and Housing (formerly the Building Industry Association). The Department of Building and Housing issued a determination in December 2005. It also declined to grant a code compliance certificate.

[12] The Body Corporate and the owners of 12 of the 14 units issued these proceedings in 2005. They seek damages including the cost of a full reclad. It is agreed that to reclad the building will cost $1,933,419.77 plus GST.

Key defects in the original construction

[13] The expert building consultants, Mr Wilson and Mr O'Sullivan for the plaintiffs, Mr Powell for the Council and Dr Walls for Mr O'Hagan all agreed that there were six key defects in the original construction. They were:

a) The window and door openings were not constructed in a weathertight manner.

The experts agree that this defect amounts to a breach of the New Zealand Building Code and requires a re-clad of the entire complex.

b) The deck wall/wingwall junctions lack weathertight flashings and cladding clearance.

The experts agree that this defect amounts to a breach of the code. They differ on the remedial work required. Mr Powell and Dr Walls consider localised repairs would be sufficient (if the defect existed on its own) whereas the others favour an entire re-clad.

c) The deck membrane detailing around post and fixing penetrations was inadequate.

The experts agree that this defect amounts to a breach of the code. They differ on the remedial work required. Mr Powell and Dr Walls consider localised repairs would be sufficient (if the defect existed on its own) whereas the others favour an entire re-clad.

d) The cladding to columns on the north elevation was taken below ground allowing wicking of moisture into timber framing.

The experts agree that this defect amounts to a breach of the code. They agree a re-clad is not required.

e) The cladding to concrete decks was taken hard down allowing wicking of moisture into the timber framing.

The experts agree that this defect amounts to a breach of the code. Mr Wilson and Mr O'Sullivan suggest a re-clad of the southern elevation. Mr Powell believes a more localised repair would be sufficient.

f) The canopy roof junction intersections with the walls and columns have no kickout flashings and directed moisture into the junction thereby saturating the gib board and compromising the fire rating of the building.

The experts agree that this defect amounts to a breach of the New Zealand Building Code and requires a re-clad of the entire complex.

Key defects in the remedial work

[14] The expert panel (excluding Mr O'Sullivan who had not reported on the remedial works) identified the main defect of the remedial work as:

- Sill flashings (for 50%) of the doors fell backwards and stop end details were not installed in a weathertight manner.

  The experts agree that this defect amounts to a breach of the code. They differ on the remedial work required. Mr Powell and Dr Walls consider localised repairs would be sufficient (if the defect existed on its own) whereas the others favour an entire re-clad.

The plaintiff unit owners

[15] Three of the current plaintiffs bought their units off the plans before construction started. Mr and Mrs McConville purchased unit 11 in March 1997. Mr Blackmore and Ms Sheehy purchased units 13 and 14 in November 1997. Mr Jupp purchased unit 4 in January 1998.

[16] Four of the plaintiffs purchased during the drawn out construction process. Gydick Investments Limited purchased unit 9 in late 1999. Mr Kennett and Ms Blakie purchased unit 3 on 17 June 2001. Ms Hough purchased unit 1 on 1 March 2002. Mr Wilson and Ms Stuart purchased unit 7 on 2 March 2002.

[17] Four of the plaintiffs purchased their units after the involvement of Mr O'Hagan and his company with the remedial works. RCA Investments Limited purchased unit 5 on 14 November 2003. Sue Bradley Properties Limited purchased unit 12 on 24 May 2004. Ms Bradley had earlier bought the unit in her own name, in April 2003, before transferring it to her company a year later. The Clark Family Trust purchased unit 8 from Ms Clark on 5 July 2004. Ms Clark had originally purchased it in March 1999. Ms Kim and Mr Hyung purchased unit 10 on 16 May 2005.

[18] The owners of units 2 and 6 have not joined in this proceeding.

The issues in this proceeding

[19] The proceeding raise the following issues:

- Can the Council owe a duty of care to the second plaintiffs who bought the units for investment?

- Does the Council owe a duty of care to the second plaintiff in the circumstances of this case?

- The nature and extent of the Body Corporate's claim.

- Was the Council negligent in issuing the consent?
- Was the Council negligent during the inspection process?
- Did the Council approve the work even though it did not issue a code compliance certificate?
- Can any owners claim against the Council for negligent misstatement?
- What was the Council's role in relation to remedial works?
- The personal liability of directors.
- What claims can be established against Mr Smythe?
- Are either or both Centre of Attraction Limited and Mr O'Hagan liable to the plaintiffs in relation to the remedial work?
- The Council's role in relation to the remedial work.
- The claim against Mr Walden and Stack.
- The claims against Andrew Plastering.
- Contribution/apportionment.
- The individual claims of the second plaintiffs.
- Quantum.
- Betterment.

Can the Council owe a duty of care on *Hamlin* principles to owners who may be investors?

[20] Ms Thodey submitted that the principle confirmed in *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA) and [1996] 1 NZLR 513 (PC) that Councils were liable to houseowners and subsequent owners for defects caused or contributed to by Council officers did not automatically apply to the plaintiffs in this particular case.

[21] Ms Thodey submitted that the duty did not automatically extend to the owners of industrial or commercial properties: *Three Meade Street v Rotorua District Council* [2005] 1 NZLR 504 and *Te Mata Properties Limited v Hastings District Council* (HC NAP CIV 2004-441-151, CIV 2004-441-569 17 August 2007 Williams J). She noted that in the present case only three of the plaintiffs lived in the units (Ms Hough, Ms Clark and Ms Kim). The majority of owners were investors and had bought the units for commercial purposes. Ms Thodey submitted that the focus should be on the owner's purpose, or the use they put the property to, and the Council should not owe a duty to the plaintiffs who bought the property for investment or commercial purposes.

[22] I reject the submission that there should be a different approach to the existence of a duty from unit to unit depending on whether the unit (which in each case was residential) was bought for the personal occupation of the owner or for investment purposes.

[23] At a practical level the approach Ms Thodey advocated would be unworkable. In the case of successive owners of one unit the Council could owe a duty to some but not all, depending entirely upon the purposes the particular owner bought the unit for (personal residence or investment). It is also quite possible that during the course of ownership the purpose might change in relation to an individual owner, if for instance the owner initially bought the unit to live in themselves but later purchased another home and decided to rent the unit out.

[24] To the extent there is a distinction to be made between commercial property and individual's homes, as discussed in *Three Meade Street v Rotorua District Council* the appropriate focus is on the intended end use of the building in question. The end use in *Three Meade Street* was the business of a motel. The intended end use was commercial. The intended use of a block of apartments is residential. That is the case with 45 Byron Avenue. The Council was aware the intended use was residential. The application for a building consent required the applicant to specify the intended use of the building. Couldrey confirmed the intended use was residential. I agree with the reasoning of Heath J in *Body Corporate 188529 and Ors v North Shore City Council & Ors* AK HC CIV 2004-404-003230 30 April 2008 on this issue. The start point must be that *prima facie* the Council owed a duty to the owners and subsequent owners of the units at 45 Byron Avenue in accordance with *Hamlin*.

Does the Council owe a duty of care on *Hamlin* principles to the individual owners in this case?

[25] Ms Thodey then submitted that, in any event, *Hamlin* did not apply on the facts of this case. She submitted:

- *Hamlin* was a case concerned with latent as opposed to patent defects. It should be restricted to such defects.

- Underlying the *Hamlin* decision was the principle of general/community reliance. Most of the plaintiffs had illustrated that they had no such general expectations of the Council in this case.

- The socio-economic circumstances that underpinned the principle of general/community reliance in the *Hamlin* decision no longer existed.

- In some instances, notably unit 7, the owners made their own decisions to complete settlement of their purchase and did not rely on the Council. Other owners relied on their solicitors in completing the purchase, not the Council.

[26] In *Hamlin* the cracking problem was caused by inadequate foundations and the foundations were latent, or hidden, whereas the moisture ingress in the present case was caused by inadequate detail or defects in relation to the windows, doors, cladding and the weatherproofing of various junctions and joints. While at a superficial level it could be said the defects were observable in that a purchaser of the units could see the windows, doors and the cladding, the defects would not have been apparent to a layperson. The purchasers were not tradesmen. They may have been misled by the appearance of soundness. In *Hamlin* the cracks started to appear after two years. The issues in the present case only arose over time and once the moisture ingress had progressed to the stage that there was visible damage to the units. The principle in *Hamlin* prima facie applies to this case. The Council's protection from a liability unlimited in time is to be found in s 91 of the Building Act 1991 which provides a limitation defence after 10 years.

[27] Next, Ms Thodey submitted that under cross-examination the plaintiffs showed they had no general expectation or reliance on the Council and indeed, some had no understanding of the Council's involvement in the development. But the whole point of the general/community reliance principle is that it applies in circumstances where there is not specific reliance and even in cases where the individual plaintiff may not have shared the community expectation of reliance.

[28] The issue of general reliance was considered by the House of Lords in *Stovin & Anor v Wise* [1996] AC 923. In that case Lord Hoffmann stated at p 954:

> This ground for imposing a duty of care has been called "general reliance." It has little in common with the ordinary doctrine of reliance; the plaintiff does not need to have relied upon the expectation that the power would be used or even known that it existed. **It appears rather to refer to general expectations in the community, which the individual plaintiff may or may not have shared**. … Thus the doctrine of general reliance requires an inquiry into the role of a given statutory power in the behaviour of members of the general public, of which an outstanding example is the judgment of Richardson J. in *Invercargill City Council v. Hamlin*.
>
> (emphasis added)

[29] In *Hamlin* the Privy Council confirmed that general reliance in that sense applies in this situation:

> … general reliance (as distinct from specific reliance established on the facts of a particular case) has been a feature of this branch of New Zealand law for many years. …
>
> So there was nothing new in the concept of reliance by house buyers generally as an element in the imposition of a duty of care. In the present case Cooke P drew attention in that connection to the "Report of the Commission of Inquiry into Housing in New Zealand", (1971) 4 AJHR H-51, over which he presided. He made the following comment at p 519:
>
> > ". . . whatever may be the position in the United Kingdom, home-owners in New Zealand do traditionally rely on local authorities to exercise reasonable care not to allow unstable houses to be built in breach of the bylaws."
>
> But even if (which Their Lordships doubt) it were possible to detect in the present case an increased emphasis on reliance when compared with previous cases that is just the sort of change of emphasis which is to be expected in a developing branch of the common law.

[30] Ms Thodey next submitted that the socio-economic circumstances referred to as underpinning the principle of general/community reliance in the *Hamlin* decision no longer existed. Ms Thodey made the point that the plaintiffs were not so vulnerable to the risk of harm as Mr Hamlin because there were now means by which they could protect themselves. Mr Eades, an experienced conveyancing solicitor confirmed that pre-purchase reports on property are now more commonplace, and information such as that contained in a Land Information Memorandum (LIM), can now (since 1 December 1992) be obtained from Councils. Also, the Government no longer supports home ownership or low cost housing, or at least it did not when these units were built.

[31] It is correct that in more recent times purchasers have the statutory mechanism of LIMs (that were not available to Mr Hamlin) which enables them to obtain information from the Council about a property before buying it. The standard form of agreement for sale and purchase expressly provides for the purchaser to make a decision whether to obtain a LIM or not. It is also much more common to obtain pre-purchase reports as to the soundness of buildings. In addition there has also been considerable publicity of the leaky building syndrome issue since about 2001, 2002.

[32] I also accept that the New Zealand of the early 21st century is a quite different society from the New Zealand of 1970's when Mr Hamlin's house was built on

inadequate foundations in Invercargill. The principal dynamic for such social and economic change was the market driven reform that followed the change in Government in 1984. As noted, the Building Act 1991 itself reflected a philosophical change in the approach to the control of the building industry. However, the societal change and the change in approach under the Building Act 1991 would have been well appreciated by the members of the Court of Appeal when they delivered their decision in *Invercargill City Council v Hamlin* in 1994. Despite that, the Court of Appeal confirmed the principle of community reliance. Richardson J reaffirmed that local authorities owed a duty of care to homeowners in issuing building permits and inspecting houses under construction for compliance despite the change of emphasis towards the performance based code under the Building Act 1991. Richardson J observed at p 528:

> While the Building Act 1991 adopts more of a free-market approach than the preceding legislation did, **it continues to reflect the premise that local authorities owe duties of care to home-owners in issuing permits and inspecting buildings.** Changing the basis of risk allocation must have various direct and indirect economic impacts which could only be assessed and weighed in a comprehensive inquiry by those charged with that responsibility. The material before the Court is totally inadequate to determine the short run and long-run implications, to quantify the costs involved and to assess the feasibility and desirability of change. … Parliament which has spoken in the Building Act 1991 could be expected to insist on a careful and comprehensive assessment before changing one of the fundamental bases of that legislation.
>
> (emphasis added)

[33] The position was also adverted to by the Privy Council in *Hamlin*. While observing that the Building Act 1991 had been passed a year and a half after the decision in *Murphy v Brentwood District Council* [1991] 1 AC 398 the Law Lords observed:

> It is neither here nor there that the Building Act 1991 was not in force at the time of the inspection of the foundations in the present case. The question is whether New Zealand law should now be changed so as to bring it into line with *Murphy's* case. If the New Zealand Parliament has not chosen to do so, as a matter of policy, it would hardly be appropriate for their Lordships to do so by judicial decision.
>
> [1996] 2 WLR 367 (PC)

[34] I conclude that the Council owed a duty of care to the purchasers and subsequent owners of 45 Byron Avenue in issuing the consent, inspecting the project during the construction process and when determining whether to issue a code compliance certificate. I return to the issue of the Council's role in relation to the remedial work later.

[35] Ms Thodey's final point on this aspect of the case was that the unit owners, to a greater or lesser degree, all placed reliance on their solicitors or other parties to protect them. She submitted that that particular reliance should displace any general reliance on the Council. Ms Thodey referred by way of example to Mr Wilson, the owner of unit 7 who had obtained a LIM and who knew there was no code compliance certificate for 45 Byron Avenue when he settled the purchase. The submission raises the issue of the application of the principles of intermediate inspection or examination and contributory negligence in a case such as this.

[36] There are two ways in which the question of intermediate inspection may be relevant to the imposition of a duty of care. The first relates to the consideration of whether a plaintiff is in sufficient proximity to the negligent act of the defendant to bring them within the ambit of the defendant's duty of care. The duty of care imposed on a council (and builder) extends to subsequent purchasers: *Bowen & Anor v Paramount Builders (Hamilton) Ltd & Another* [1977] 1 NZLR 394; *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234; *Proprietors Units Plan v Jiniess Pty Limited & Ors* [2000] NTSC 89, 116-123; *Bryan v Maloney* (1995) 182 CLR 609, 630, 665. But the duty does not extend to anyone who purchases with actual knowledge of the defect or in circumstances where he or she ought to have used their opportunity of inspection in a way which would have given warning of the defect: *Bowen v Paramount Homes* at 413 (per Richmond P); *Mt Albert Borough Council v Johnson*, 241-242 (per Cooke J).

[37] A defendant who otherwise owes a duty of care to the plaintiff and seeks to avoid liability on the grounds of lack of reliance based on the possibility of intermediate examination by the plaintiff has a significant hurdle to overcome. In *Jull v Wilson and Horton* [1968] NZLR 88 Richmond J, after an extensive review of the authorities, concluded that:

> such a person cannot shelter behind a reasonable expectation of intermediate inspection unless the expectation was strong enough to justify him in regarding the contemplated inspection as an adequate safeguard to persons who might otherwise suffer harm.

[38] At first instance in *Bowen* Speight J had found that Mr McKay, the vendor, had actual knowledge of the nature of the foundations and suspect nature of the ground and the Bowens could have acquired that knowledge by an inspection of the building permit and associated plans. In delivering the decision of the Court of Appeal Richmond P rejected that finding and concluded that Paramount could not have had any reasonable expectation that the Bowens would use their opportunity of inspection in such a way as to obtain warning of a risk which was not then reasonably apparent to them. Richmond P confirmed what is required is an act on the part of the plaintiffs exhibiting such disregard for their own interests as to make their own conduct the sole cause of damage. That is a much higher threshold than even an allegation of contributory negligence.

[39] The difficulty a defendant seeking to rely on the principle of intermediate inspection faces was confirmed in *Stieller v Porirua City Council* [1986] 1 NZLR 84. The Court of Appeal rejected a submission for the defendant Council that the defective weatherboards were available for inspection and the plaintiffs had an opportunity to examine them before purchasing, concluding at p 95:

> There is no reason why the Stiellers should have been expected to subject the weather-boards to a critical examination before buying the house. … it looked attractive and there was nothing about the whole structure which alerted him to the real problems which were later experienced. … as a matter of law, a person who creates a dangerous situation cannot escape liability on the ground of expectation of intermediate examination unless the expectation is strong enough to justify him in regarding the contemplated inspection as an adequate safeguard to persons who might otherwise suffer harm: *Bowen v Paramount Builders Ltd* [1977] 1 NZLR 394; *Jull v Wilson & Horton* [1968] NZLR 88.

[40] The second way in which the question of intermediate inspection may be relevant is in relation to causation. If a plaintiff acted with such disregard to his or her own interests as to make their conduct the sole cause of damage which they suffered then there may be a break in the chain of causation: *Bowen v Paramount Homes* at pp 412, 413.

[41] I turn to the issue of contributory negligence. Section 3 of the Contributory Negligence Act 1947 provides that where a person suffers damage as a result partly of his own fault, and partly of the fault of any other person or persons, the damages recoverable in respect of the damage suffered 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.

[42] The availability of contributory negligence in cases such as this has been recognised in *Morton v Douglas Homes* [1984] 2 NZLR 548, at p 580, although Hardie Boys J found the facts of that case did not support such a finding.

[43] In *Gilbert v Shanahan* [1998] 3 NZLR 528 Tipping J in delivering the judgment of the Court of Appeal identified the two issues for consideration as causal potency and relative blameworthiness:

> When contributory negligence is alleged, two aspects have to be considered: causal potency and relative blameworthiness. The causative negligence of Ms de Bernardo was in not advising Mr Gilbert he had no legal obligation to sign the guarantee. The only logical basis on which Mr Gilbert could have contributed causally to that failure by any negligence of his own, was in his failing to bring the preliminary agreement to Ms de Bernardo's attention and to enquire of her whether, in the absence of any reference therein to a guarantee, he was obliged to sign one. All the other matters upon which the Judge relied were, with respect, unrelated to the operative negligence of Ms de Bernardo. They had no causal potency in the circumstances.
>
> p 534

[44] In *Gilbert v Shanahan* Shanahan Partners had advised Mr Gilbert and his company in relation to an agreement to lease and subsequent documentation. Even though the agreement to lease did not require Mr Gilbert's guarantee Mr Gilbert signed a guarantee. The solicitors did not advise him that he did not need to do so. The company became insolvent and Mr Gilbert was called upon to answer his guarantee. The High Court found for Mr Gilbert but reduced his claim by 90 percent on the basis he was guilty of contributory negligence. The Court of Appeal allowed the appeal because there was no causal potency.

[45] The second leg identified by Tipping J was that of relative blameworthiness. It was also a feature discussed by the Court of Appeal in *Helson v McKenzies (Cuba*

Street) Limited [1950] NZLR 878 (SC) and (CA) where the Court cited with approval from the decision of Denning LJ in *Davies v Swan Motor Co (Swansea) Limited* [1949] All ER 620 at 632:

> While causation is the decisive factor in determining whether there should be a reduced amount payable to the plaintiff, nevertheless the amount of the reduction does not depend solely on the degree of causation. The amount of the reduction is such an amount as may be found by the court to be "just and equitable," having regard to the claimant's "share in the responsibility" for the damage. This involves a consideration, not only of the causative potency of a particular factor, but also of its blameworthiness.

[46] In the case of *Heller v Martens et al* 213 DLR (4th) 124 the Alberta Court of Appeal considered the issue of contributory negligence and comparative blameworthiness in a case where the plaintiff did not cause the accident, but his negligence was a major factor in the damage he suffered. The plaintiff was injured when the defendant's vehicle failed to stop at a stop sign and collided with his van. The plaintiff was not wearing a seat belt. As a result his injuries were much more serious than they would have been had he been wearing a seatbelt. The trial Judge apportioned the plaintiff's liability for his contributory negligence at 25 percent. The Court of Appeal held that an integrated approach of comparative blameworthiness was to be preferred to a causation approach because it required a Court to examine all the circumstances of the party's misconduct to determine their relative negligence. Apportionment should be affected by the weight of the fault attributed to each of the parties not the weight of causation. The Court held there was no error of law in fixing the plaintiff's contributory negligence in that case at 25 percent.

[47] There is a related issue that arises on the facts of this case. It is that in a number of instances the purchasers did arrange for inspection reports of the units from consultants or trades people before completing settlement. Ms Thodey submitted that the reports should have identified the faults and if they did not, then the plaintiffs' remedy was to sue the report writers. A similar argument was raised in *Morton v Douglas Homes Limited*. In that case one of the purchasers, Mrs Kelland sought advice from a tradesman, Mr Leary. Mr Leary inspected the property but did not observe the subsidence. The subsidence should have been obvious to Mr Leary because it was obvious to the Housing Corporation valuer. The issue was whether Mrs Kelland should be fixed with contributory negligence

because Mr Leary had failed to see the defects which, had he seen and appreciated their significance, would have persuaded Mrs Kelland not to proceed with the purchase. In rejecting that submission Hardie Boys J referred to the doctrine of identification as stated in Salmond on Torts (17th Ed, 1977) pp 522 and 523:

> "The contributory negligence of a servant of the plaintiff is a good defence, in the same cases and to the same extent as that of the plaintiff himself, whenever the plaintiff would have been responsible for that negligence of his servant had harm ensued from it. …" [But] "The contributory negligence of an independent contractor or other agent of the plaintiff for whom he is not responsible, on the other hand, is no bar to the plaintiffs action."

[48] Hardie Boys J considered that Mr Leary was at best an independent contractor personally answerable for his own negligence but not capable of rendering Mrs Kelland liable for it. Mrs Kelland could not be identified with any lack of care on his part. Prima facie, similar reasoning would seem to apply to the reports the purchasers obtained in this case.

[49] The differing circumstances of the various purchasers mean that the principles of intermediate inspection and contributory negligence are not able to be applied in a general way. They must be considered and applied to the particular circumstances of each plaintiff. That is an exercise to which I return later in this judgment.

The nature and extent of Body Corporate 189855's claim

[50] Body Corporate 189855 came into existence when the unit plan for the Byron Avenue development was deposited with the District Land Registrar. The Body Corporate is comprised of all the owners for the time being of the individual units: s 12(2) Unit Titles Act 1972.

[51] The Body Corporate claims against the defendants as first plaintiff. The operative statement of claim does not distinguish between the Body Corporate's claim and the claim by the individual unit owners. During closing submissions Mr Josephson accepted that as the default rules under the schedules to the Unit Titles Act 1972 applied the Body Corporate could not pursue a claim on behalf of the

damage to the individual owners' units. He confirmed that its claim was restricted to the damage to the common area. While the default rules had been amended Mr Josephson conceded that as the amendment was registered before the plan was lodged they were invalid: *Fifer Residential Limited v Gieseg* (2005) 6 NZCPR 306.

[52] Although counsel did not refer to the point I note that the Weathertight Homes Resolution Services Act 2006 permits a body corporate to sue for all losses caused to multi-unit developments, and in effect requires the claim to be brought by the Body Corporate: see s 18 and the definition of representative. The fact it was necessary for Parliament to expressly provide that the body corporate could sue on behalf of individual unit holders in respect of their claims as well as in relation to common property supports the conclusion that in the absence of such provision, the Body Corporate's claim is limited to the common property.

[53] Having identified that the Body Corporate's claim is limited to a claim in relation to common property, the next issue is whether the Council and other defendants owed a duty of care to the Body Corporate in relation to that common property.

[54] Ms Thodey submitted that there was no New Zealand authority supporting the imposition of a duty of care in favour of the Body Corporate, even if the claim was limited to the common property. In *Body Corporate Number 114424 v Glossop Chan Partnership Architect Limited & Anor* HC AK CP612/93 22 September 1997 the issue was raised but Potter J did not have to determine it.

[55] The general issue of the existence of a duty of care in favour of the Body Corporate has been considered in other jurisdictions. I accept Ms Thodey's submission that the overseas authorities should be treated with caution given that they turn on the particular statutory provisions in issue, but the general analysis of the Court of Appeal of Singapore in *RSP Architects Planners & Engineers (Raglan Squire and Partners) FE v MCST Plan No 1075* [1999] 2 SLR 449 is still of interest. In that case the Court of Appeal of Singapore reviewed the English, Australian and New Zealand authorities before confirming its own earlier decision of *RSP Architects Planners & Engineers v Ocean Front Pte Limited* [1996] 1 SLR 113 that

as the architects had been involved in the development from the start, and the architects were aware that the developers intended to apply for subdivision of the units and upon completion establish the management corporation, the architects owed a duty of care to the management corporation. The analysis leading to the imposition of a duty of care was an orthodox application of the principles discussed in, inter alia, *Hamlin* and *Bryan v Maloney*. It was not expressed to be restricted to parties in a contractual relationship or in a relationship akin to contract as Ms Thodey suggested. In both decisions the Court considered in some detail whether a duty of care should be imposed as a matter of principle. However I accept Ms Thodey's general point that the statutory wording is different to that of the provisions of the Unit Titles Act 1972.

[56] The issue has also been considered in some Australian States. In *Proprietors Units Plans & Ors v Jiniess Pty Limited & Ors* [2000] NTSC 89, the Northern Territories Supreme Court held that the body corporate was owed a duty of care by the builder. Also, in *Owners – Strata Plan No 43551 v Walter Construction Group Ltd* [2004] NSWCA 429 the New South Wales Court of Appeal confirmed that the owner's corporation was not able to sue in reliance on a section that authorised it to sue where the owners were jointly entitled to sue because not all were suing but, as legal owner of the common property, the owner's corporation could sue in its own right in relation to the damage to that common property. Under the Unit Titles Act 1972 the Body Corporate is not the legal owner of the common property as the common property is held or owned by the unit owners as tenants in common. That is a significant feature of the Act. While the Body Corporate has obligations and rights under the Act in relation to the common property, it does not own it. It has an administrative role in relation to common property.

[57] Ms Thodey also submitted there was no evidence that at the time of construction the Council officers were aware of the existence of the Body Corporate and that to the extent the Council officers were aware of who might be affected by their actions or omissions their knowledge would have been limited to individual unit owners.

[58] For the reasons that follow, this issue is not particularly relevant, but I note that the Council as a body would have been aware of the Body Corporate and its interest in the common property. Section 5(1)(g) of the Unit Titles Act 1972 requires the Council to certify the boundaries of the units and common property on the unit title plan.

[59] In the present case, Mr Smythe as the architect and developer would have been well aware of the Body Corporate's existence and role in relation to the common property. When Mr O'Hagan and Centre of Attraction Limited became involved they also knew of the Body Corporate's interest in the common property.

[60] But more importantly, in the case of the Council, it owed a duty at the consent, inspection and certificate of compliance stages to the owners for the time being of the building at 45 Byron Avenue in accordance with the principle confirmed in *Hamlin* based on the principle of general reliance. That duty was owed to the individual unit owners both in relation to their ownership of their individual units and also in their capacity as owners of the common property as tenants in common.

[61] In my judgment the question is not whether a duty is owed to the Body Corporate in respect of the common property. Any duty must be owed to the holders or owners of the common property who are the owners of the individual units. The Body Corporate has a duty to maintain and repair common property: s 15. For administrative convenience the Body Corporate is expressly authorised to sue for damage to the common property, but the individual unit owners own the common property. Put another way, the duty is owed to the unit owners in respect of the common property, but the effect of s 13 is that those owners' rights to sue for damage to common property are vested in the Body Corporate for administrative convenience. The Body Corporate is able to pursue a claim in respect of the common property because, although the common property is owned by the unit owners, the Body Corporate is given the power to sue and be sued in respect of damage or injury to the common property. Section 13(2) of the Unit Titles Act 1972 provides that a body corporate may:

> sue for and in respect of damage or injury to the common property caused by any person, whether that person is a unit proprietor or not.

I can see no reason in principle to exclude the application of a duty of care by the Council to the owners of the common property in this case.

[62] The common property is held by all the owners of the units as tenants in common in shares proportional to their unit entitlement in respect of their respective units. A report from Yeomans Survey Solutions Limited detailing the common property was presented by consent. Perhaps unusually, in this case, the common property comprises one entire aspect of the building structure, the south-western exterior elevation of the development. The other three aspects of the exterior relate directly to individual units. Yeomans estimate that 45% of the exterior weatherproofing fabric of the building complex is common property with the remaining 55% being private. The Body Corporate is able to pursue a claim under s 13 in respect of damage to the common property owned by the individual unit owners.

[63] It is relevant that in this case the common property is one of the exterior walls of the development. In other cases where the common property may be limited to driveways or services, the duty of care may not necessarily extend, at least if the duty of care is based on the principle of general community reliance. While the principle applies to residential dwellings, it may not apply to driveways that form part of the common property for example. See also *Simons v Body Corporate Strata Plan No. 5181* [1980] VR 103 (SC), 108.

[64] Ms Thodey's last submission on the point was that if the Body Corporate could sue in respect of the common property (as I have concluded it can – on behalf of the individual unit owners' interests in the common property), the Body Corporate's claim could only be as good as the make-up of the individual unit owners forming part of the Body Corporate and should be reduced to take account of the individual circumstances of the particular claimants. For example, in this case, the owners of two at least of the units in the development have not joined in the claim.

[65] In response, Mr Josephson referred to s 14(2) which provides that when any proceedings under that section are brought against the Body Corporate the Body

Corporate is deemed to be the owner and occupier of the common property, and judgment may be entered against it accordingly. He submitted that a similar analysis could apply to the situation where the Body Corporate sued for damage in relation to common property. However, s 14 is an express provision that deems a change in ownership of the common property, but only for the purposes of that section. There is no corresponding provision in relation to claims by a Body Corporate. Section 13 does not have that effect. The Body Corporate may sue for and in respect of damage to the common property but it is not deemed to own the common property for the purposes of pursuing a claim in respect of it. The common property remains owned by the individual unit owners. The Body Corporate simply acts as their agent in pursuing the claim.

[66] There is no need to read into s 13 a requirement that all owners of the common property must join in the claim as a pre-requisite to a claim by the Body Corporate in relation to the common property. The Body Corporate is made up of the individual unit owners from time to time: s 12, but it acts by majority decision. It has a duty to maintain and repair common property. The Body Corporate can bring a claim in relation to the entire common property even if not all the individual owners pursue separate claims in relation to their own units.

[67] However, as the claim is effectively on behalf of the individual unit holders' interest in the common property and the duty is owed to them then, to the extent the Council (or other defendant) may have a defence to a claim by the individual owners, the claim against it in relation to the common property must be reduced accordingly in proportion. As the Body Corporate is effectively acting as agent of the owners of the common property in pursuing a claim for damage to the common property, its claim in relation to the damage cannot be better than that of the particular unit owners from time to time and must be subject to the same defences.

[68] While the Body Corporate has perpetual succession it is different to a body corporate such as a company. The Body Corporate's powers and duties are prescribed by the Unit Titles Act and the rules (which must not be ultra vires). Importantly, the Body Corporate cannot trade: s 16. That confirms its special nature and distinguishes it from other body corporate structures.

[69] I conclude that rather than owing a duty to the Body Corporate as such, the Council owed the individual unit owners of the common property a duty of care in relation to the common property and that under s 13 the Body Corporate may pursue a claim (effectively on behalf of such owners) against the Council in respect of the damage to the common property, but that such claim can be proportionately rebated to the extent that the defendant may have a defence to the individual owner's claims. Again, that is a matter I return to later in this judgment.

Was the Council negligent in issuing the consent?

[70] The plaintiffs allege the Council was negligent in:

- issuing the consent;
- inspecting the building work;
- approving the building work;
- approving and inspecting the remedial works.

[71] The extent of the duty owed by the Council when considering the application for a building consent and in issuing the consent was noted by Hardie Boys J in *Morton v Douglas Homes Limited* as a duty:

> to take reasonable care to ensure that the plans and specifications show a structure that complies with the bylaws and other requirements which it is the local authority's responsibility to administer.
>
> p 600

[72] But in *Lacey v Davidson & Manukau City Council* HC AK A546-85 15 May 1986 Henry J considered that the duty in issuing a building permit did not extend to ensure:

> that the plans and specifications are fully detailed and include references to standards of work and the building practice to be adopted. The basic purpose of the plans is to apprise the Council adequately of the building to

> be constructed and of its method of construction so that the Council can be satisfied its building or planning requirements are not going to be breached.

[73] The extent of the duty must now be informed by s 34(3) of the Building Act 1991, which expressly refers to the standard to apply to buildings constructed after 1 July 1992 by reference to the provisions of the Building Code. It provides:

> (3) After considering an application for building consent, the territorial authority shall grant the consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work was properly completed in accordance with the plans and specifications submitted with the application.

[74] Having regard to the authorities referred to and the wording of the section, the duty relating to the issuing of a consent may be expressed as a duty owed by the Council to owners and subsequent purchasers to take reasonable care to ensure the plans and specifications show a building that if properly completed in accordance with those plans and specifications, will comply with the Building Code.

[75] The standard is that stated in *Askin v Knox* [1989] 1 NZLR 248 namely the standard to be regarded as reasonable at the relevant time for the officers carrying out the task in issue. I remind myself that the parties and the Court are approaching the matter with the benefit of hindsight and the knowledge that now exists of the various issues that have contributed to the leaky building crisis. But I acknowledge Mr Josephson's submission that where the general practice of the particular profession or occupation falls below the standard required by the law then the general practice may itself be negligent: *McLaren Maycroft & Co v Fletcher Development Co Limited* [1973] 2 NZLR 100.

[76] The plaintiffs' principal allegation against the Council on the issue of the consent is that the plans were lacking in detail, so that the Council could not have been satisfied on reasonable grounds that the building work would comply with the provisions of the Building Code as to durability: B2 or external moisture: E2, and as a result, 45 Byron Avenue was built with the defects identified by the experts.

[77] The plaintiffs' evidence on this issue was given by Mr Morrison, an architect, Mr Cartwright, an experienced Council officer and inspector, and Mr Wilson, a

building surveyor. Mr Wilson's evidence as to the practice of councils at the time was of limited assistance as Mr Wilson was not in New Zealand at the relevant time. He did not come to New Zealand until 2004. His evidence was based on his review of documentation relating to the period. The more direct evidence was from Mr Morrison and Mr Cartwright.

[78] Mr Miller, the officer who processed the consent in this case, gave evidence for the Council as did Mr Jones, another experienced Council officer. In addition Mr Flay gave evidence concerning a Building Industry Association audit in 1995 of the Council processes. Mr Powell also gave evidence for the Council but his evidence was of limited assistance on this issue for the same reason that Mr Wilson's evidence was of limited assistance. Mr Powell did not come to New Zealand until mid 2003.

[79] The application for consent lodged on 26 September 1997 was accompanied by the set of plans and accompanying specifications prepared by Mr Smythe. The plans and specifications must be read together. The application also included the documents incorporated into the specifications by reference.

[80] Mr Miller confirmed the plans included 16 sheets relating to construction of the building showing the site plan, floor plans, elevations, section schedules and details together with specifications which described the intended construction and finish. Fire related matters such as egress, installation, and sanitary matters such as plumbing and drainage were provided for in a further set of documents. The plans were limited in some areas. For example, they only identified the windows and doors were to be powder coated aluminium. Further provision for the windows and doors was left to the specifications.

[81] Mr Josephson submitted there was insufficient detail in the plans and specifications and that the Council should have requested further details as to how the window/door openings, wingwalls/wall junctions, post penetrations and cladding to decks/ground were to be made weathertight. In the absence of such detail he submitted the Council did not know how these features were to be constructed and had no basis for being satisfied that the building would comply with the external moisture requirements of the code.

[82] Ms Thodey submitted that the Council acted reasonably in issuing the consent in that it had a sufficient degree of information in the documents filed in support of the application for building consent and a sufficient understanding of what would occur during construction to enable it to conclude that the building would comply with the code when built. Ms Thodey submitted that when considering whether to issue the consent Mr Miller was entitled to take the view that further detail and plans would be provided during the construction process.

[83] I turn to consider the four principal complaints made by the plaintiffs in relation to the lack of details for the consent.

Windows/door frames

[84] The relevant Building Code clause detailing the acceptable solution at the time provided:

> Acceptable solution E2/AS1
>
> 3.0.1 Windows and doors, and the joints between them and *cladding* materials, shall be as weatherproof as the *cladding* itself.
>
> 3.0.2 Windows and doors shall have head flashings and scribers or proprietary seals between facings and the *building cladding*.
>
> 3.0.3 Windows shall comply with the water leakage requirements of Clause 12 of NZS 4211.
>
> 3.0.4 Windows complying in all respects with NZS 4211 are an alternative solution, but will exceed the performance of NZBC E2.

[85] While the code provided for acceptable solutions, it contemplated other, alternative solutions.

[86] The plans did not provide window and door flashing details. Mr Morrison said that in his opinion if the plans did not include details as to how the applicant proposed to weatherproof the windows the Council would have no way of knowing how they were to be constructed and could not make an assessment as to whether they would be constructed in such a way that the performance requirements of the code could be satisfied. In his opinion the window flashing details were a significant

omission from the consented plans and specifications and that this corresponded to and contributed to the other defects.

[87] Mr Morrison noted that the BRANZ Good Stucco Practice Guide issued in 1996 warned that one of the main causes of failure in stucco clad buildings was "poor detailing" (particularly flashings and control joints). In his opinion it was not reasonable for Mr Miller to have relied on the detailing of the windows and doors to be the subject of subsequent construction drawings. This was because the detailing of windows and doors is a critical area for weathertightness. He supported this by reference to the BRANZ bulletin No. 365 issued in January 1998 and the recommendations within it for joinery details. Although published after the consent issued, Mr Josephson submitted the bulletin reflected the appropriate practice at the time, and noted it contained input from several Council officers.

[88] Mr Cartwright also considered that the Council should have sought further details as to how the windows and doors were to be flashed.

[89] On the other hand, Mr Jones said that he would have been "comfortable" with issuing the consent. It was a large scale development. In his experience he would have expected at least a medium sized construction company and architect and a project manager to have been engaged. Like Mr Miller he would have anticipated that construction drawings would be prepared throughout the development. Mr Jones accepted that the windows fall into the category of an alternative solution but said he would have been satisfied with the design as subsequently proposed by Mr Smythe. Of course that design was not before Mr Miller at the time he issued the consent.

[90] Mr Flay, a technical adviser to the Council gave evidence about the BIA's audit of the Council's processes in 1995, two years before the application was lodged in this case. Six buildings were selected for review. Mr Flay referred to one in particular where the auditors concluded that sufficient information had been provided at the time of consent. Despite that, problems were later identified and a claim taken to the Weathertight Homes Resolution Service. Mr Flay's evidence

really does no more than support the general submission that just because there has been a loss does not mean that a party has been negligent.

[91] While the plans did not provide any details in relation to the installation of the windows and doors, the specifications did refer to weathertightness and how it was to be achieved in relation to the windows and doors. The specifications required the successful tenderer to submit full sized section samples and evidence that the windows complied with the requirements of NZS3504 and NZS4211. Further, the windows and doors were to be fabricated by a member of the Architectural Aluminium Association of New Zealand. They were to be nominated by brand and type for approval. The jamb reveals were to be tanalised pinus radiata. The specifications also provided for the installation of flashings as follows:

> 407 FLASHINGS: Install flashings to heads, jambs and sills of frames as supplied and recommended by the window manufacturer and as detailed on the drawings. Head flashings to be finished to match window finish.
>
> 409 SEAL FRAMES to each other and to adjoining structure and finishes, as recommended by the manufacturer and to make the installation weathertight.

[92] The specifications thus contemplated that the aluminium doors and windows would be manufactured by an authorised manufacturer and would be installed in accordance with the manufacturer's recommendations. They also provided that flashings to heads, jambs and sills would be installed as recommended by that manufacturer and as detailed on the drawings and, as installed, would be weathertight.

[93] Both the detail in acceptable solution E2/AS1 and the flashings requirement in the specifications provided to the Council in this case anticipated flashings and proprietary seals. Both were general in nature.

[94] While s 34(2) enable the Council to seek further information, the Council, through Mr Miller, was not obliged to require details for every last aspect of the building project. Mr Miller was entitled to issue the consent if the plans and specifications (with the documents they incorporated) showed a building that a competent tradesman would complete in such a way that it would be in compliance

with the code. Inevitably as the building project evolved there would need to be further details. Mr Bracewell confirmed that was common practice, especially for large building projects.

[95] The specifications provided a basis for the issue of the consent in relation to the doors and windows. Mr Miller would have had reasonable grounds to be satisfied the requirements of the code would be met if the windows and doors were properly installed in accordance with the specifications which, in this case, incorporated flashings as supplied and recommended by the manufacturer. The acceptable solution required head flashings, scribers or proprietary seals. The specifications referred to flashings to heads, jambs and sills and frames. Given the detail of the specifications and the involvement of an architect, it was reasonable for Mr Miller to consider that later detailed drawings would be consistent with the specifications and thus code compliant.

[96] Given the provisions in the specifications the plaintiffs do not satisfy the Court that Mr Miller was negligent by not requiring further detail of the window and door openings before issuing the consent.

[97] However, the issue of the consent and the inspection process are related. In issuing the building consent on the basis of the specifications and in the expectation there would be further construction drawings for major elements, such as the windows, the onus on the building inspector to ensure that the building as built complied with the plans and specifications was accordingly increased. The less detail the Council required at the consent stage, the greater the onus was on the inspector to ensure compliance at the inspection stage. Baragwanath J touched on this aspect in *Dicks v Hobson Swan Constructions Ltd (in liquidation) & Ors* HC AK CIV 2004-404-001065 22 December 2006 where he observed:

> [88] The operation of applying silicone sealant is not of any complexity. But the significance of failure to apply it properly is not as immediately obvious as a failure to provide adequate foundations. While an absence of directions would not constitute negligence if accompanied by an inspection process sufficiently robust to discern whether the work in critical areas was in fact up to standard, no such process was provided.

Deck Wall/Wingwall junctions

[98] The plaintiffs next submit the Council was negligent in granting the consent when the plans and specifications did not provide details on how the wall/wingwall junctions were to be made watertight.

[99] Mr Morrison considered the plans were defective because they failed to provide any flashing details for this joint. Mr Cartwright was of the opinion that Mr Miller should have considered how the deck/wing wall junction was to be weatherproofed and should have requested details of the junction before granting consent.

[100] Mr Miller said that in 1997, when processing the application for consent, he would not have expected the plans to have contained a large scale detail of those junctions.

[101] Mr Jones's evidence was consistent with Mr Miller's. He said that at the relevant time there was no guidance highlighting the need for a flashing in such locations. As noted, he would have issued the consent. While Mr Jones accepted under cross-examination that a prudent council officer in 1997 would know that if the wingwall junction was not adequately weatherproofed it might leak, that is not the point. The issue is whether Mr Miller should have required the detail before issuing the consent.

[102] With respect to Mr Morrison and Mr Cartwright, their evidence does seem to me to be informed by the problems that have been subsequently identified in this case. The standard is to be that which would be reasonable at the relevant time for officers like Mr Miller. The fact some would have required more detail does not mean that Mr Miller was negligent in not seeking the further detail. Mr Jones, an experienced Council officer would not have required the detail either.

[103] The plaintiffs' evidence does not satisfy me that in 1997/1998 a council officer should have required detailed drawings of this junction before issuing the consent. Put another way I am not satisfied that the Council was negligent in not

doing so given the practice at the time. The evidence from experienced Council officers varies on this point. Nor do I consider, in light of that evidence from Mr Jones, that it can be said the practice was so far below an acceptable standard that the general practice was negligent.

Post penetrations

[104] The plaintiffs next submit the Council was negligent in granting the consent when the plans did not include flashing details for the deck post penetrations.

[105] The consented plans referred to a drawing A112 relating to the deck balustrading area. Drawing A112 provides detail for the deck post penetration. That drawing was not on the Council file. Mr Miller has no specific recollection of this particular approval so was unable to confirm whether or not he had seen the drawing A112 before approving the plans. Drawing A112 is dated December 1997, some two months after the application for consent was filed with the Council. There is no documentary trail to suggest the detail was made available to the Council before Mr Miller issued the consent. I draw the inference that it was not before Mr Miller when he issued the consent. Given the detail was referred to on the plans submitted for consent, Mr Miller should have called for it so that he could consider it before issuing the consent.

[106] Mr Miller and through him the Council was *prima facie* negligent in approving the plans and issuing a consent where he failed to call for and consider a detailed cross-section that was referred to in the plans. In the result however, this particular act of negligence was not itself causative of any loss arising from the issue of the consent, as drawing A112 existed and the experts accept that it detailed a satisfactory means of weatherproofing the deck penetration.

Cladding

[107] The plaintiffs then submit the Council was negligent in granting the consent when the plans and specifications did not expressly detail cladding clearances to the ground for the north elevation and for the cladding to the concrete decks.

[108] While the plans did not provide any detail regarding the separation distance, the specifications incorporated the BRANZ Good Stucco Practice Guide. The specifications in relation to solid plaster provided:

> EXECUTION …
>
> 408. PLASTERING – CONCRETE/MASONRY: Lay up bond, flanking and finish coats to the requirements of NZS 4251 and recommendations of BRANZ "Good Stucco Practice," under atmospheric conditions that will not adversely affect the finished work. Scratch the initial coats of plaster to provide a mechanical key for following coats. …

[109] The BRANZ Good Stucco Practice Guide provided, inter alia, for separation distances at ground and deck levels. It was put to the Council witnesses that the specification only related to the application of the plaster coats rather than the finishing details such as separation distance. But the specification deals with the various stages of the plastering process, from material and product selection to preparation and lastly execution. There is no need to restrict the reference in the execution section to finishing requirements to the basic application of the plaster. Part of the finishing process is to determine where the plaster is finished, or taken down to. That was expressly provided for in the Good Stucco Guide. It was also referred to in the James Hardie publication: Hardibacker Technical Information, referred to by Mr Wilson.

[110] In *Morton v Douglas Homes* Hardie Boys J accepted that the Council was not required to spell out every detail of commonly employed procedures but must be entitled to assume that a builder and his contractors are familiar with and will apply the normal skills and techniques of their respective crafts. In this case, Mr Miller was similarly entitled to consider that the plasterer would apply the normal skills of a plasterer and comply with the requirements of the Good Stucco Practice Guide

referred to in the specification, (and the Hardibacker booklet), and if he did, that that aspect of the work would be code compliant.

[111] In summary, I find that with the exception of the post penetrations the plaintiffs fail to establish the Council was negligent in issuing the consent. In relation to the post penetration, while the Council should not have issued the consent without obtaining a copy of drawing A112, the failure to do so was not itself causative of any loss.

Was the Council negligent during the inspection process?

[112] The second head of negligence alleged by the plaintiffs relates to the Council's inspection of the development during its construction.

[113] A Council can be liable to owners and subsequent purchasers for defects caused or not prevented by its building inspectors' negligence: *Invercargill City Council v Hamlin; Bowen v Paramount Builders (Hamilton) Limited; Mt Albert Borough Council v Johnson*; *Stieller v Porirua City Council.*

[114] The inspection in this case was carried out by Council's officers pursuant to s 76 of the Act. That section defines inspection as inter alia:

> [the] taking of all reasonable steps to ensure—
>
> > (a) That any building work is being done in accordance with a building consent; or …

[115] Council officers inspected 45 Byron Avenue on a large number of occasions. The Council records disclose 94 inspections initiated at the request of either the developer or builder between 30 January 1998 and 5 March 2002. In addition there were a number of other inspections not initiated by such requests.

[116] Most of the inspections were carried out by Mr Oden, an experienced building inspector. Mr Oden confirmed that he and the other officers inspecting the work would have carried out the following inspections:

- foundations and floor slab;

- above ground structure;

- pre-line inspection;

- post-line inspection after the first application of the fire-rated gib board and prior to any stopping of the gib board;

- pre-plaster inspection, and

- final inspection.

[117] The first stage of units 7 to 14 was constructed between May 1998 and September 1998. The second stage, units 1 to 6, was commenced between July and early September 1998. During the period from May to September 1998 Mr Oden and the other officers inspected the project regularly. Most of the inspections were initiated by Bracewell Construction. That was standard practice. The Council relied on the contractor to advise it when the work was at a stage requiring inspection.

[118] But there was little activity requiring input from the Council between November 1998 and May 1999. During that period the Council was not asked to attend the site. Mr Smythe and Couldrey were in dispute with the builder, Bracewell Construction. By the time the Council was asked to return to the site in May 1999 a number of the units had already been sold and occupied.

[119] I have some sympathy for Mr Oden in the situation that he and the other Council inspectors found themselves in with this development. The development took much longer than it should have. It was completed in stages. There was a gap of over six months when the Council was not called to the site. Once the units were occupied, it was difficult for Mr Oden and the other inspectors to access the internal and first floor parts of the units to inspect.

[120] I also accept that Mr Oden was a generally careful inspector. He (and others) issued a number of field memoranda identifying issues to be addressed by the builder. But nevertheless I find that in certain aspects the inspections of the property or the steps the Council officers took to address issues they identified were not sufficient to satisfy the duty on the Council in relation to the inspection of this development. That is so particularly in relation to the windows and door sills, the cladding to the concrete decks and, to a lesser extent, the wingwall junctions.

[121] I turn to consider the principal complaints made by the plaintiffs in relation to inspection process.

Windows/door frames

[122] Mr Miller approved the building consent on the basis of the plans and specifications and in the expectation that the windows and doors were to be installed in accordance with the manufacturer's specifications and the further drawings that were to be provided. Although he had not included them with the application for consent, Mr Smythe had drawn details for the window head, sill and jamb on 30 May 1997, apparently for the purposes of pricing. The drawing showed a window positioned close under an eave, without a head flashing. Bracewell Construction referred the drawings to a manufacturer who in turn provided details of their proposed work on 20 April 1998, some three months after the consent had issued. Mr Smythe then recommended that head flashings be installed but when told that the head flashings would be a variation and an extra he was not prepared to authorise the additional cost. The windows were installed as originally detailed by Mr Smythe without head flashings even where the windows were not situated under an eave.

[123] The acceptable solution described in the Building Code contemplated windows would have head flashings. The specification that Mr Miller relied on in issuing the consent contained a reference to head flashings. As the windows installed at 45 Byron Avenue were installed without head flashings, they were an alternative solution. As such the Council had an obligation to be reasonably satisfied that the requirements of the Act and code would be met by that alternative solution.

[124] Mr Bracewell confirmed that the building inspector would have seen the windows set in place before the plastering was carried out. Mr Oden obviously saw the windows did not have head flashings. There are a number of references in the inspection reports to inspection of window flashings, scribers and plugs. While Mr Miller may have been entitled to issue the consent in reliance upon the later provision of manufacturer's drawings, when Mr Oden was presented with windows without head flashings he was on notice that that was an alternative solution under the code. At that point he should have checked the consented plans to confirm the alternative solution had been approved when the consent was issued. On learning that it had not, he would then have to take reasonable steps to satisfy himself that the proposed alternative solution would perform in accordance with the code. Mr Oden said he had no specific recollection of the further construction drawings concerning the windows. Under cross-examination, he accepted that as the design was drawn up by Mr Smythe he would have assumed that it would "probably" comply with the Building Code and be acceptable as an alternative solution. Mr Oden said that as the windows were to be recessed he anticipated they would be protected from adverse weather. He was not unnecessarily concerned by the fact they lacked head flashings as he considered the overhead protection together with the drip edge would provide sufficient protection. Mr Oden's approach follows through to the inspection reports where he ticked-off the window flashings at various points – e.g. the final building checklist for five units on 25 May 1999.

[125] But given the lack of such a major feature as a head flashing, Mr Oden was not entitled to assume the windows would "probably" comply. That is particularly so given that all experts accept that the site in question was in a high wind zone. It was also potentially exposed to salt spray. Mr Oden was, or should have been aware of those factors. Next, while the Good Stucco Practice Guide included figures that detailed recessed windows the text still referred to head and sill flashings as "essential". Further, Mr Oden's reliance on the drip edge may have been flawed. Mr O'Sullivan of Prendos noted in his reports that the drip edge was ineffective.

[126] Ms Thodey submitted that it was not put to Mr Oden that he could not reasonably have concluded the windows were designed to or would perform in accordance with the code. But there was no need to put that expressly to him, given

his evidence that he considered the windows had sufficient overhead protection and his statement that you couldn't tell if there was compliance with the statutory standard unless there was a full design available.

[127] The evidence establishes that from a relatively early stage, there was moisture ingress around a large number of the windows. Mr O'Sullivan expressed concern about that following his inspection in 1999 and 2000. Mr O'Hagan also confirmed that when he carried out his inspection in late 2002 there was a large amount of white staining (efflorescence) on the painted surface occurring under the windows. Efflorescence is consistent with the presence of moisture. Mr Wilson's later moisture reading tests and destructive testing also confirm the presence of moisture. Mr Oden's response was to suggest that Mr Wilson's testing was some four to five years after his initial inspections. But the code required watertightness and durability for much longer than five years for windows.

[128] Nor is it an answer for the Council to submit, as Ms Thodey did, that the evidence did not establish the windows were leaking at the heads or jambs. The window junctions failed. They were not weathertight. While the principal evidence of damage was at the sill area, there was some evidence of damage to the timber further up the jamb. The evidence is consistent with moisture entering the window junction and running down the jamb to collect at the sill. The major damage was done to the timber framing about the sill area. The windows as installed were not an acceptable alternative solution. Just as it is no answer for the Council to say that not all the windows leaked, it is not an answer to say that those that did leak did not do so because of a lack of head flashing. There is evidence to suggest otherwise. The sill flashings were also defective on a number of windows, in that they sloped backwards. The evidence leads to the conclusion the defective design of the windows (which were not an acceptable solution) and the problems with installation of the sills, both of which should have been picked up by the inspectors and addressed by them at the least contributed to the problem of moisture ingress around the window junctions.

[129] The windows that Mr Oden and the other inspectors accepted as "probably" compliant were not weatherproof. Mr O'Sullivan's reports and Mr Wilson's

evidence confirm that a number of the window junctions allowed moisture into the building.

[130] The principal concern in relation to the doors was the flat or backward sloping sill flashings. The flat flashings allowed water to pool and moisture to enter the plaster cladding by capillary action. In his 1999 report Mr O'Sullivan noted that at the base of the doors and full height windows sill trays with near level surfaces had been used causing water to pond against the stucco plaster allowing the moisture to ingress in breach of the BRANZ recommendation. Mr O'Hagan noted that on the unit he inspected, unit 6, the sills appeared to be sloping in towards the building. I note that the problem does not seem to have been addressed by the remedial work. Mr Powell accepted that of the 31 door sets providing deck access, flashings were installed on only 16. Of those 14 fell backwards at some point on their length.

[131] Mr Oden said that none of the sills on the doors he inspected sloped backwards. He considers that the joinery must have been pushed out of their original positioning when the plaster was applied to the Hardibacker and the sills were not then correctly repositioned. That is a matter, however, that would have been observable on a post-plaster inspection. Apart from a reference in an inspection report to the flashing under the door sill at unit 12 requiring further checking there is no record of such a concern being noted, or if noted, addressed on those inspections or at any later time.

[132] I conclude that the Council was negligent in failing at the inspection stage to confirm that the windows proposed by Mr Smythe as an alternative solution were acceptable, and in failing to identify and satisfactorily address, that a number of the door sills were defectively installed. They are matters that a visible inspection would have identified as issues requiring attention and/or further investigation. The negligence of the Council was a contributory factor to the moisture ingress through the window and door joints.

Cladding to deck

[133] The plaster cladding extended down to the concrete deck. That fact, and the lack of proper weatherproofing in the deck area were also significant contributors to the moisture ingress at 45 Byron Avenue. Mr Powell confirmed that the cladding was installed in contact with the concrete decks/fire aprons in two specific areas on the south side of the building in a way that was not code compliant. The problem stems from the decks and fire aprons being formed by cantilevering the concrete floor out beyond the wall face. The timber framing then appears to have been built up off the concrete floor topping so that in these areas there was a limited step-down or clearance between the interior floor and the fire apron surface. It was not possible to then carry the plaster down the minimum required 50 mm beyond the bottom wall plate. Instead it was terminated hard down on to the concrete apron. The problem applies in particular to units 7, 9, 11 and 13. The problem was not so serious in the other upstairs units, units 1, 3 and 5 where a butyl rubber apron flashing was installed between the wall and fire aprons.

[134] This issue should have been noted by Mr Oden. It was an obvious problem. In Dr Wall's view the cladding down to the concrete was the major defect. Mr O'Sullivan noted the lack of sufficient height separation between the interior and exterior floor levels at the base of the cladding and the lack of separation distance between the interior level of permanent paving in his first report of December 1999. The issue was not addressed during the inspection period by the Council inspectors because Mr O'Sullivan returned to it in his report of November 2000 noting that the base of the plaster of units 7, 9, 11 and 13 was hard down on to the fire aprons on the south-western side of the units and that there was insufficient step-down between the internal floor levels and the external balconies and/or fire aprons.

[135] Mr Oden's notes do record that the cladding down to concrete was noted as an issue. But the sequence of correspondence in late 2001 and the later inspections recorded in the field memoranda and other notes lead to the conclusion that either the Council had accepted the position or, at the least, had not done anything effective to require it to be remedied by the date of the recheck field memo of 5 March 2002. The outstanding work was approved that day. But the fact the cladding remained

down to the deck would still have been obvious to the inspector on the most cursory inspection at that time.

[136] I conclude that the Council was negligent in failing to properly address this issue during the inspection process and that it has contributed to the moisture ingress around the surrounding area as identified by Mr Wilson in his report.

Wingwall junctions

[137] Mr Cartwright considered that the Council inspector should have noticed at both pre-plaster and final inspection there was no means of water being diverted away from the wingwall junction with the wall. Also, in a number of instances, the plaster on the wall was hard down against the flat top capping on the wingwall.

[138] Mr Oden said that at the time of the construction there was no suggestion in any literature that he was aware of that there should be flashings in these locations. At the time of construction these types of junctions were not thought to be at risk. Mr Powell also considered that the junctions were likely to have been considered code compliant when installed. While it is now recognised that lack of flashings at such points gives rise to weathertightness issues that was not the case at the time of construction.

[139] Mr Jones' initial evidence was that there was no industry guidance about the vulnerability of such junction, and no guidance referring to the need for clearance in the plaster. But under cross-examination he accepted that a prudent building inspector would realise that if not waterproofed adequately the junction might leak.

[140] Mr Bracewell confirmed that Mr Smythe prepared a detail for a flashing at this junction, it seems after construction of stage one had been completed. That suggests that Mr Smythe identified the need to provide flashings at this point.

[141] Further, Mr Wilson, Mr Morrison and Mr Cartwright all believe the absence of a flashing would have been noticeable to the inspector, and that the junction should have been checked at pre-plaster and even final inspection.

[142] I find that given the number of the wingwall junctions and the importance of the wingwall feature to the design and the development overall, Mr Oden should have turned his mind to the waterproofing of the junction. By failing to do so, Mr Oden was negligent. As Mr Jones accepted, a prudent building inspector would realise that if not waterproofed adequately the junction would leak.

[143] However, I also note that the evidence is that the problem is largely limited to the stage one units.

Cladding to columns on the northern elevation

[144] The cladding to the columns on the northern elevation were taken below the ground allowing wicking of moisture into timber framing.

[145] It appears that Mr Oden did identify this issue, but for the reasons that follow I conclude that he failed to take sufficient action to rectify it. However, in the context of this case, this is not a major problem. Mr Wilson accepted that the damage from this defect alone would not warrant a full reclad as the moisture would only wick-up the timber framing to a certain level. The cladding down to the concrete decks on the southern elevation was serious, given the situation of the decks as an integral part of the structure. But by contrast, the damage caused by the faults on the northern elevation was relatively confined.

Post penetrations on the deck

[146] There is evidence of moisture ingress around the area where the posts penetrate the deck. There was a detailed drawing which showed a metal flashing. In the event a different method of installation and finishing was used.

[147] Mr Wilson considered that moisture may be entering the cracks in the posts or the junction between the top of the flashing and the posts. Cracks in the posts are, to a degree, maintenance items.

[148] Mr Oden's evidence, which I accept on this point, is that any builder worth his salt would have understood how this sort of junction would need to have been waterproofed. Trade practice at the time required the flashing detail be carried out by butyl membrane. The butyl was turned up the post by 100 mm and then saw curved around. This was acceptable trade practice at the time. While Mr O'Sullivan noted some problems with the adhesion the practice at the time was satisfactory if the work was carried out correctly.

[149] I conclude that Mr Oden was not negligent in approving the post penetrations as he saw them finished at the relevant time. It is likely that the problems with the post penetrations have developed over time and are due, in part at least, to maintenance issues.

The canopy roof and deck junction intersection with the walls/no kickout flashings

[150] Mr Cartwright was of the view that during the inspection process a prudent Council officer would have identified that there were no kickout flashings installed where the roof canopy and decks terminated at the walls. Without the kickout flashings water can be directed back into the plaster.

[151] On the other hand Mr Jones noted that kickout flashings were not a well publicised product at the time of the construction of 45 Byron Avenue. In his opinion they were not an item that an inspector or certifier would have been looking for. He noted that kickout flashings are different from the apron flashings that an inspector would have been looking for and that were to be found at 45 Byron Avenue, at least in some instances.

[152] Mr Oden also said that kickout flashings were not a feature of this type of construction. The areas were generally waterproofed by continuing a membrane up the adjacent vertical structure behind the wall flashing to form an upstand. The Council was largely reliant on good trade practices to ensure this work was done correctly.

[153] Mr O'Sullivan of Prendos did not make a point of noting the lack of kickout flashings in his very full investigations in December 1999 and November 2000.

[154] I conclude that at the time of these inspections a reasonable inspector would not have been looking for kickout flashings so that the Council was not negligent in failing to require them. Mr Oden was entitled to take the view that proper trade practices would be adopted to waterproof the intersection of the roof canopies and decks with the walls.

The effect of the Council's negligence

[155] The experts' panel agree that the faults where I have found the Council was negligent are breaches of the Building Code. The evidence satisfies me that these faults, and the negligence of the Council during the inspection phase have been major contributors to the problem of moisture ingress at 45 Byron Avenue. The extent of the problem, the moisture ingress and consequent damage are such that a full reclad is required to address the issues.

The Council's approval of the building work – short of issuing a code compliance certificate

[156] Mr Oden said that the Council did not consider 45 Byron Avenue was ever completed and so was not prepared to issue a code compliance certificate. But in my judgment the only reasonable conclusion to draw from the sequence of correspondence on the Council file and the relevant field memoranda is that by March 2002, and until it received the complaint from Mr Smythe about moisture ingress in unit 2, the Council had largely approved the construction of work at 45 Byron Avenue and was at the point of issuing a code compliance certificate.

[157] As early as January 2000 Bracewell Construction wrote to the Council noting that the developer was refusing to pay monies owing until it received the code compliance certificate. Bracewell asked the Council to carry out a final inspection at that time. The Council replied by letter of 24 January 2000 to advise that there were numerous building and plumbing issues of non completion or non compliance to be

addressed. The Council was aware that Mr O'Sullivan of Prendos had inspected the property.

[158] The arbitration between Couldrey and Bracewell Construction then followed. Although largely successful in the arbitration Bracewell Construction did agree to return and undertake certain remedial work identified as required by the Council and Prendos. The Prendos defects were more detailed than the defects identified by the Council.

[159] On 29 June 2001 the Council signed off an inspection certificate in relation to a final building, plumbing and drainage inspection for unit 3. The certificate noted that the consent was for 14 units and a final code of compliance certificate would be issued when all the units complied, but was otherwise unqualified. The only reasonable inference to be taken from that inspection certificate is that both internally and externally unit 3 at least complied with the requirements of the Building Code.

[160] On 27 August 2001 Bracewell Construction wrote again to the Council following an inspection of unit 6. Mr Bracewell recorded his understanding that all outstanding issues had been completed with the exception of unit 2 and the exterior site works to unit 1. That understanding was not directly challenged. On 30 October 2001 the Council sent a final inspection note relating to unit 7 confirming that internally all work had been approved. A similar certificate was issued for unit 6. Again that is consistent with the approval of units on a one-by-one basis, with the final consent to follow the approval of the last unit.

[161] On 3 December 2001 the Council wrote to the Body Corporate summarising the Council's position regarding the inspection and approval process at that time. Mr Oden recorded that all 14 apartments were subject to the one building consent. The letter went on to record inter alia:

> … 2. Council officers have now carried out and cleared most all outstanding field memorandums and remedial works, in conjunction with Mr Kerry Bracewell of Bracewell Construction through meetings on site.

> However there are some works and inspections that are to be completed on units 1 and 2 exterior/ground levels to cladding in to the final inspection of unit 2.
>
> 3. Access to unit 2 has not been made available internally for final inspections by Council. Mr Bracewell has advised Council that they have not been given keys for access/completion/rechecks etc. either.
>
> The Code Compliance Certificate for the whole block of the 14 apartments therefore may not be issued until Council Officers are satisfied on reasonable grounds that building code compliances have been met.

[162] The inference I draw from that letter and the various steps that had preceded it is that from the Council's point of view, as at 3 December 2001, the only outstanding matters preventing the issue of the code compliance certificate were the work identified as required in relation to units 1 and 2, namely the exterior and ground levels to cladding and the final internal inspection of unit 2. That is also consistent with the Body Corporate's understanding as recorded in its letters to Mr Blackmore on 11 December 2001 and 24 January 2002 after discussion with the Council. It is also consistent with the field memorandum that Mr Oden had issued during the course of the project leading up to that time.

[163] The property was reinspected on 18 January 2002. Mr Oden recorded the following issues in his field memorandum:

> Subject to the conditions of the building consent being fulfilled relating to relevant producer statements from services and engineers/surveyors etc. being forwarded to Council. Unit 2 to complete ground clearance to the exterior cladding and provide relevant stormwater controls to outfall to meet Building Code compliances. To replace broken/cracked concrete to Council f/paths. To call for inspection prior to backfill etc. All remaining units have been finalised.

[164] The field memorandum provided for a recheck to confirm whether the issues identified had been dealt with. On 5 March 2002 the recheck was carried out and signed off with a further hand-written note to the field memorandum. It was not signed off by Mr Oden, but it was signed off by another Council officer. It records "Unit 2 work completed and f/path damage". The inference to be drawn from that field memorandum of 18 January 2002 and the recheck on 5 March 2002 is that by 5 March 2002 the Council was satisfied with the physical construction work related to the project. Once the Council had received the relevant producer statements it would

have issued the code compliance certificate. But the inspection of the construction work was otherwise completed and approved. There was no suggestion, either in the letter of 3 December 2001 or the subsequent field memorandum that there was any construction work outstanding, other than the work identified in relation to units 1 and 2 which had been attended to by 5 March 2002.

[165] However, before the Council could complete its final review of the file and issue the code compliance certificate, Mr Smythe wrote on 19 March 2002 on behalf of Couldrey to advise that there was clear evidence of efflorescence on the exterior plaster cladding which Prendos had confirmed was caused by water ingress around the windows. In response the Council inspected the site again. It then wrote a further letter on 22 March recording that inter alia:

> 3. The solid plaster cladding and the potential ingress of moisture has been observed today and noted previously. This matter should be further followed up and raised with the building contractors.
>
> 4. Council is also aware of Prendos Limited being extensively involved with the building to include moisture checks etc. as requested by you previously. (To date I am not aware of the Prendos report having been made available to Council on such mattes of concern).
>
> 5. The upstand butyl rubber deck flashing on the upper floor of your unit as pointed out by you and observed today does appear to be overflashed and possibly face fixed to the solid plaster cladding. Clearly this should be checked by the building contractors and relevant remedial works carried out where necessary to rectify the potential problem. Because of the above matters, the Council is in no position to issue a code of compliance certificate. …

[166] The position was confirmed to Bracewell Construction by Mr Oden on behalf of the Council on 12 April 2002.

[167] The members of the Body Corporate sought clarification of the position. At the request of the Body Corporate the Council then met with representatives from the Body Corporate and confirmed in a letter of 16 July 2002 that:

> We also advised you that, given the possibility of moisture ingress through the plaster work and/or any other vulnerable areas of the exterior finishing, you should seek the independent advice of a registered building consultant to check and assess this aspect of the work.

[168] That advice ultimately led to the Body Corporate instructing Mr O'Hagan.

[169] In summary, the position was that by the end of March 2002 the construction of 45 Byron Avenue had been completed, but the units had been constructed with defects that were by then becoming apparent.

[170] Once the Council's attention had been drawn to the particular problems with unit 2, it was justified in refusing to issue a code compliance certificate even when pressed to do so in March 2002. In light of its knowledge at the time, it could not properly do so. But having reached that view that there were substantial issues of concern which prevented the issue of a code compliance certificate, the Council should have issued a notice to rectify under s 43(6). Where the building work does not comply with the code (and the matter is more than minor – as the non-compliance in this case was by this time) the Council is required by the section to issue a notice to rectify. That notice would have identified the general work that the Council required to be rectified.

Kennett/Blakie alternative claim against the Council – negligent misstatement

[171] Mr Kennett and Ms Blakie, the owners of unit 3, bring an alternative claim against the Council based on negligent misstatement.

[172] The basis for that claim is the certificate the Council issued on 29 June 2001 that:

> A final building, plumbing and drainage inspection was carried out at unit 3 45 Byron Ave, Takapuna. The inspections confirm that all work has been completed as per the approved plans. Unit 3 only. Building consent number T12582 has now been cleared.
>
> T12582
> This consent is for 14 units. A final code of compliance certificate will be issued when all units comply.

[173] Mr Kennett and Ms Blakie agreed to buy unit 3 by agreement for sale and purchase dated 19 June 2001. The agreement for sale and purchase they entered contained a clause providing that the agreement was conditional upon them being satisfied with "the Council records on the property". They were anxious to confirm the Council had approved their unit as they were aware that a code compliance

certificate had not been issued. They say that they relied on the Council's statement in its certificate of 29 June 2001 in confirming the purchase of unit 3.

[174] In issuing the statement, knowing that it could be used by the existing owner of the property and indeed could be relied on by that owner and any subsequent owner the Council was in a position of a special relationship with the existing and subsequent owners of unit 3. The Council had special skill and knowledge about building controls relating to the construction of Byron Avenue under the Building Act 1991 and the Building Code. It assumed responsibility for its statement about unit 3 which was provided to Mr Kennett and Ms Blakie as interested purchasers.

[175] The issue is whether Mr Kennett and Ms Blakie relied on the statement in confirming their purchase as they allege and whether the Council was in breach of the duty of care it owed to Mr Kennett and Ms Blakie in the circumstances.

[176] Mr Kennett impressed as a careful and cautious witness. The inclusion of the clause in the agreement for sale and purchase confirms his and Ms Blakie's generally cautious approach to the purchase of this unit. Mr Kennett clarified that he had had several conversations with Council officers before confirming the agreement. He had been aware that a final code compliance certificate would be issued when all units complied. He was also told there was a list of remedial items required for each unit. The list of items required for unit 3 were identified. He said in his evidence that:

> In discussions with the Council when those items were completed each unit could be signed off and when they were all completed a final code of compliance certificate would be issued.

[177] I accept that Mr Kennett and Ms Blakie would not have confirmed their purchase of unit 3 had they not received the written statement from the Council that unit 3 work had been completed in accordance with the plans and that T12582 had cleared. The qualification regarding the final code compliance certificate was not sufficient in the circumstances. There was a clear inference the final code compliance certificate would issue when the remedial work to all units was completed. It was only later, in late March 2002, that the Council determined not to issue the code compliance certificate on the substantive ground that there were

weathertightness issues in relation to the whole development. Mr Kennett and Ms Blakie relied on the statement issued by the Council as to its approval for unit 3 in confirming the contract.

[178] I find that the Council was negligent and in breach of its duty in issuing the certificate. Unit 3 has been found to have defects, just as the other units do. The certificate was not limited to an approval of the internal work to unit 3 only, as was the case of other certificates. To the extent it was qualified by the reference to the code compliance issuing when all 14 units were complete, it was at best ambiguous. Taken in context, the statement was misleading, and the Council was negligent and in breach of its duty of care in issuing it. Mr Kennett and Ms Blakie relied on it to their detriment.

Wilson/Stuart – alternative claim against the Council – negligent misstatement

[179] Mr Wilson and Ms Stuart, the owners of unit 7, also claim against the Council in negligent misstatement.

[180] After entering the agreement for sale and purchase on 2 March 2002, Mr Wilson became concerned at publicity regarding leaky homes.

[181] Mr Wilson and Ms Stuart were aware that a code of compliance certificate had not been issued but thought that a code compliance certificate would be a formality once the outstanding items relating to other units were signed off. They were reassured from time to time by the real estate agent about that. Mr Wilson also engaged a building inspector to carry out an inspection of the unit. The report concluded the unit was in near new condition. But Mr Wilson wanted more. In Mr Wilson's words:

> The important thing was that we get a letter from the Council signing off our unit.

[182] Mr Wilson was reassured when the real estate agent forwarded a copy of a fax from the vendor Ms Stothers in which she enclosed a final inspection report from

the Council for unit 7. The inspection report addressed to Ms Stothers was dated 30 October 2001 and stated:

> A final building, plumbing and drainage inspection was carried out at unit 7 only. The inspections confirm that all work has been completed as per the approved plans. Number unit 7 has now been cleared.

The inspection report was signed by Mr Oden.

[183] On receipt of the inspection report from Ms Stothers, Mr Wilson and Ms Stuart proceeded with the purchase.

[184] For the reasons given above, I accept that the Council owed a duty of care to the owners and potential purchasers of unit 7 in issuing that report.

[185] The real issue is whether Mr Wilson and Ms Stuart were entitled to rely on the report as a statement issued by the Council. The Council produced a copy of the certificate from their files which importantly records that the word "(internal)" was included in the report.

> A final building, plumbing and drainage inspection was carried out at unit 7 only. The inspections confirm that all work has been completed as per the approved plans. Number unit 7 has now been cleared. … The inspections confirm that all work has been completed as per the approved plans (internal).

[186] The "(internal)" was hand-written by Mr Oden. Mr Oden confirmed that he had made that notation at the time he prepared the notice. He made the same notation on a similar report in relation to unit 6. Ms Stothers, the vendor, gave evidence. She could not explain how the form that she had sent to Mr Wilson and Ms Stuart's solicitors did not have the word "(internal)" on it. She denied deleting it herself. I do not accept Ms Stothers' evidence. It is apparent from Ms Stothers' evidence that from an early stage she was disenchanted with her purchase of unit 7 and was anxious to sell it. Ms Stothers had the report from the Council of 30 October for four months before she achieved the agreement for sale and purchase with Mr Wilson and Ms Stuart. She had ample time and reason to delete the word "(internal)" before making the document available to the purchasers. I prefer Mr Oden's evidence, which is consistent with the document on the Council file and also

consistent with the report he issued for unit 6, that he qualified the inspection report by the reference to the word "(internal)".

[187] The document that Mr Wilson and Ms Stuart relied on as being a confirmation of the work carried out on unit 7 was therefore not the document that the Council had issued. It had been altered. The Council's report confirmed the approval was limited to internal matters only. Mr Wilson and Ms Stuart were not entitled to rely on the document as being a full approval of unit 7. The Council is not liable to Mr Wilson and Ms Stuart under this head.

What was the Council's role in relation to the remedial works?

[188] The plaintiffs also claim against the Council in relation to the remedial work. I return to that issue when considering the plaintiff's claim against Mr O'Hagan and Centre of Attraction Limited.

The personal liability of directors – Trevor Ivory revisited

[189] The issue of a director's liability in tort when the plaintiffs' contract is with the director's company arises in this case in relation to the plaintiffs' claim against Mr Smythe, Mr O'Hagan and Mr Walden.

[190] The present leading New Zealand authority on the issue of director's liability in these circumstances is *Trevor Ivory Limited v Anderson* [1992] 2 NZLR 517 (CA). The Court of Appeal held that an officer of a company might, in the course of activities on behalf of the company, come under a personal duty to a third party, breach of which might entail personal liability. The Court said the test is whether there has been an assumption of a personal duty of care by the director, either actual or imputed. Liability in each case will depend on the particular facts of the case, the degree of implicit assumption of personal responsibility and the balancing of policy considerations.

[191] In the case of *Trevor Ivory Limited v Anderson*, the plaintiffs had sought advice from Trevor Ivory Limited, a one man company operated by Mr Ivory regarding the type of spray to use around their berry crop. Mr Ivory advised the use of round-up but did not advise the plaintiffs to protect their berries in any way. The Court considered that Mr Ivory had made it plain to the world that limited liability was intended when he formed his company. There was no just and reasonable policy consideration for imposing an additional duty of care in that case. He had not assumed a duty of care towards the plaintiffs and was not personally liable.

[192] Both Cooke P and Hardie Boys J referred to the special position of the director as agent of the company in these circumstances. Cooke P noted at p 520:

> [a] person may be identified with a corporation so as to be its embodiment or directing mind and will, not merely its servant, representative, agent or delegate.

Hardie Boys J said at p 526:

> To describe a director as the agent of the company can be deceptive. It is a useful description, for a corporation, being an "abstraction" (per Lord *Haldane in Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705), cannot of itself think, resolve or act, but does so through its directors. In that sense they are certainly agents; but in the popular rather than the strictly legal sense of the word.

[193] The Court of Appeal took the view that Mr Ivory was effectively the embodiment of the company's directing mind and, absent an assumption of personal liability could not concurrently bear personal responsibility for the acts that had been attributed to the company.

[194] To similar effect is the decision of the House of Lords in *Williams v Natural Life Health Foods Limited* [1998] 1 WLR 830. In delivering the judgment with which the other Law Lords concurred, Lord Steyn held that the relevant principles were founded on the assumption of responsibility principle which applied both to statements and also, in these circumstances, to the provision of services.

[195] The *Trevor Ivory* decision has been criticised in a number of articles including: Neil Campbell "Claims against directors and agents" *New Zealand Law Journal* April 2003; Professor Peter Watts *NZ Lawyer* 15 December 2006 p 10. It

has received support from other authors, including: Grey Seagar and Caroline Eric *New Zealand Law Journal* August 2006 p 268; and Professors Grantham and Rickett, "Company directors' liability for torts" *New Zealand Law Journal* May 2003. It has also been the subject of discussion by Professor Stephen Todd and Mr Andru Isac in "Directors' Torts" *Commercial Law Essays: A New Zealand Collection* edited by Rowe and Hawes 2003 p 39.

[196] I consider the argument advanced by Professor Todd in the latter article to be convincing, particularly the suggestion that the question should be whether there has been an assumption of responsibility by the defendant (who may also be a company director) for a task, rather than whether there has been an assumption of legal liability towards the plaintiff: *White v Jones* [1995] 2 AC 207 per Lord Browne-Wilkinson at 273-274. If there is to be a duty imposed it should be because the law imposes the duty because of what the defendant has said or done not because that person has decided to assume some legal responsibility towards another.

[197] The company structure provides limited liability to investors (shareholders). Directors can be liable to the shareholders because of their role in the governance of the company. Generally directors of a company will not owe a duty to parties dealing with the company merely because of their position as directors (apart from a duty to creditors in certain situations provided for in the Companies Act 1993). But there is no reason in principle for there to be a rule of law providing for a "director's immunity" for operational acts carried out by directors actually or effectively as employees of the company.

[198] An employee of a company, if negligent in the course of his employment can be liable to the company's client, and the company will be vicariously liable for the employee's actions. Often a director of a small company will also act as an employee of the company. If a director is also acting as an employee of the company carrying out a task that would have to be undertaken by another person employed for the tasks, if not by the director, then there is no reason at law why that director should not be personally liable if he or she is negligent in carrying out that task.

[199] In such a case the director's liability to third parties has nothing to do with his or her position as director but rather arises because of their actions in the discharge of the business operation of the company. It arises because the director has a relationship of proximity to the plaintiff. It may arise if the director undertakes operational acts in the course of undertaking the company's business under the contract the company had with the third party. In acting in such an operational way the director is not acting as a director of the company directing the will of the company, but rather is acting as an employee or servant of the company. In that capacity the director/employee should not need to assume any particular or special legal responsibility towards the third party to be liable.

[200] However, the law that I must apply for present purposes is that confirmed by the Court of Appeal in *Trevor Ivory*. Before the individual directors can be liable there must have been an assumption of personal responsibility by them to the plaintiffs. That requires a careful consideration of the factual matrix. As McGechan J observed in *Trevor Ivory:*

> All will depend upon the facts of individual cases, and the degree of implicit assumption of personal responsibility, with no doubt some policy elements also applying. … There was no representation, express or implicit, of personal involvement, as distinct from routine involvement for and through his company. There was no singular feature which would justify belief that Mr Ivory was accepting a personal commitment, as opposed to the known company obligation. If anything, the intrinsic high risk nature of spray advice, and his deliberate adoption of an intervening company structure would have pointed to the contrary likelihood.

[201] I turn to consider the position of the various parties sued in their personal capacity.

What claims can be established against Mr Smythe?

[202] Although Mr Smythe defended the proceeding during the course of the interlocutory processes and prior to trial, at the outset of the hearing his counsel sought and was granted leave to withdraw. Mr Smythe did not appear personally, so was not represented during the course of the hearing.

[203] The plaintiffs allege that Mr Smythe assumed personal responsibility for architectural and project management services and owed a duty to the plaintiffs in undertaking those services.

[204] Apart from being the controlling figure behind the development company Couldrey, Mr Smythe was also the architect primarily responsible for the project. He had a direct and personal involvement in the day to day construction. Although the initial construction documents record variously that the architect was David van Ryswyk or Stephen Smythe of Smythe Grant Limited Architects, and Smythe Grant Limited were initially the architects (as a firm) the evidence establishes that Mr Smythe was the architect responsible for the development.

[205] In his answers to interrogatories Mr Smythe admitted undertaking the design work, drafting plans and specifications, checking plans and specifications prepared by others, and discussing the design and construction of the apartments.

[206] Within a short time of the project commencing Mr Smythe was the only architect involved. He also had control of the project as architect. Smythe Grant's letters to Couldrey of 9 April 1998 and 15 September 1998 confirmed Mr Smythe's role even when that firm was involved:

> Stephen Smythe will assist [Mr Walden] in all design clarification, design matters, site inspections and quality control.

[207] Mr Bracewell was quite definite that Mr Smythe was the architect on site and was responsible for all relevant design, detailing and quality control. Mr Smythe had a clear personal involvement in the design and construction of 45 Byron Avenue. He assumed responsibility towards the plaintiffs. The windows and doors were constructed without head flashings. Mr Smythe made that decision.

[208] As architect Mr Smythe owed a duty to take reasonable care to prevent damage to the original and subsequent owners of 45 Byron Avenue: *Bowen v Paramount Builders (Hamilton) Limited.* It is no answer to the plaintiffs' claim against Mr Smythe that the plans he had submitted were approved by Council: *Voli v Inglewood Shire Council* (1963) 100 CLR 74.

[209] Mr Morrison's evidence is that the lack of proper weathertightness details in the drawings prepared by Mr Smythe used at both consent and construction stages contributed to six of the key defects in the original construction. An architect would have been expected to have had more detailed knowledge of the appropriate building requirements than the Council officers inspecting the building would. In particular the inadequate window flashings, the lack of flashing details to the wingwalls and the failure to provide an adequate step-down from internal levels to decks were fundamental design problems in the project. The failure to provide adequate step-down led to both the backward sloping sills and also the related problem of the plaster being taken down to the concrete decks. 45 Byron Avenue was built with a number of construction defects that were caused by a lack of detail or by defective detail in the plans and construction drawings in relation to a number of important features such as head flashings, step-down levels and flashings to wingwalls.

[210] Mr Smythe was negligent in failing to provide proper weathertightness details in relation to these features in the drawings he prepared for the development. Such negligence was a major contributor to the lack of weathertightness identified by the experts. The plaintiffs make out their claim against Mr Smythe.

Are either or both Centre of Attraction Limited (in liquidation) and Mr O'Hagan liable to the plaintiffs in relation to the remedial work?

[211] The plaintiffs pursue claims against Centre of Attraction Limited and also Mr O'Hagan personally. They allege that Mr O'Hagan assumed personal responsibility for providing the services by Centre of Attraction Limited and that he owed a duty of care to undertake those services with reasonable skill and care which he breached by failing to identify a number of the defects in the original work.

Is Mr O'Hagan liable personally?

[212] The first issue in relation to the plaintiff's claim against Mr O'Hagan is whether he can be personally liable to the plaintiffs. On behalf of the plaintiffs, the Body Corporate contracted with Centre of Attraction Limited for that company to

carry out the work. Mr O'Hagan was the director of the company. It was essentially a one-man company. Mr O'Hagan dealt with the Body Corporate secretary and personally carried out the work that the company contracted to do. The issue on the state of the current law is whether Mr O'Hagan assumed a personal responsibility to the plaintiffs.

[213] The company was initially contracted to inspect the units and cladding and report whether they complied with the Building Code. It was apparent the work was to be carried out by Mr O'Hagan. Mr O'Hagan was the building consultant. He set out his personal qualifications and experience in a letter to all unit holders. Mr O'Hagan reported on 24 July 2002 that his inspection revealed the application and detailing did not comply with either the contract specification or relevant standards. Mr O'Hagan subsequently attended the annual general meeting of the Body Corporate on 18 September 2002 to speak to his report. At a special meeting on 4 December 2002 the Body Corporate resolved to contract:

> Pat O'Hagan to obtain the necessary specifications, estimates & quotations, to recommend to the Body Corporate suitable contractors for such work, to supervise all work and sign off on completion.

[214] The Body Corporate instructed the company on 6 December 2002. The company accepted that appointment on 18 December 2002. The remedial work was to cover not only the common property but also the individual owner's units. The contract was with the company. All the correspondence from the Body Corporate was written to the company. The company replied on its letterhead, but the correspondence from the company was signed by Mr O'Hagan as building consultant rather than as director. With the exception of the 19 March report the correspondence and reports authored by Mr O'Hagan were written in the first person.

[215] Mr O'Hagan personally carried out the work the company was contracted to do. No-one else was involved. Mr O'Hagan controlled the work. He carried out the inspections, the preparation of the specifications and detail and the supervision of the remedial work. In carrying out this work Mr O'Hagan was not acting as a director of the company but rather as an employee/servant of the company giving effect to the company's obligations under the contract. The company was only instructed

because of Mr O'Hagan's personal expertise and to ensure the plaintiffs would have the benefit of that experience. Mr O'Hagan was responsible for all the work which forms the basis of the plaintiff's claim in relation to the remedial work. As Hardie Boys J observed in *Trevor Ivory*:

> Assumption of responsibility may well arise or be imputed where the director or employee exercises particular control or control over a particular operation or activity, as in *Adler v Dickson* [1955] 1 QB 158 (although there the issue did not arise, as it was a pretrial decision on a different point of law). *Yuille v B & B Fisheries (Leigh) Ltd* [1958] 2 Lloyd's Rep 596 is another illustration. This is perhaps more likely to arise within a large company where there are clear allocations of responsibility, than in a small one. It arose however in the case of a small company in *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548, 593ff; but not in a case to which I made some reference in my judgment in Morton, namely *Callaghan v Robert Ronayne Ltd* (Auckland, A 1112/76, 17 September 1979), a judgment of Speight J. It may be that in the present case there would have been a sufficient assumption of responsibility had Mr Ivory undertaken to do the spraying himself, but it is not necessary to consider that possibility.

[216] Earlier, in *Morton v Douglas Homes* Hardie Boys J had emphasised the need to consider the issue of control:

> The relevance of the degree of control which a director has over the operations of the company is that it provides a test of whether or not his personal carelessness may be likely to cause damage to a third party, so that he becomes subject to a duty of care. It is not the fact that he is a director that creates the control, but rather that the fact of control, however derived, may create the duty. There is therefore no essential difference in this respect between a director and a general manager or indeed a more humble employee of the company. Each is under a duty of care, both to those with whom he deals on the company's behalf and to those with whom the company deals in so far as that dealing is subject to his control.

Against that authority, Mr Casey referred to the case of *Laughland v Stevenson* (HC AK CP1114-91 Hillyer J 17 March 1995) where the Court rejected an argument the defendant had assumed a personal obligation. But in that case the focus was on an evidentiary dispute whether the plaintiffs knew they were dealing with a company (of which the defendant was one of three directors) or not. Each case really must turn on its facts.

[217] Certainly Centre of Attraction Limited owed the owners of 45 Byron Avenue a duty in carrying out the inspections and in designing and supervising the remedial

work. It had a duty, co-existent with its contractual duty to remedy the defects (within the scope of the contract).

[218] The issue in relation to the claim against Mr O'Hagan personally is whether in the circumstances there was a sufficient relationship of proximity between the parties and whether Mr O'Hagan as director has assumed personal responsibility towards the owners of 45 Byron Avenue.

[219] In the particular circumstances of this case, there was nothing more that Mr O'Hagan could have done to assume personal responsibility to the plaintiffs for the work that he carried out on behalf of his company. I find that on the facts of this case Mr O'Hagan assumed such a personal legal responsibility towards the plaintiffs by his personal involvement at all levels of the work, the initial investigation, the design and particularly the level of personal control he exerted over the supervision of the work. Mr O'Hagan effectively sold his personal services to the plaintiffs in the material provided to them and at the meeting he attended.

[220] The next issue is whether Mr O'Hagan and through him Centre of Attraction Limited were negligent in performance of their obligations.

[221] I focus initially on the claims made against Mr O'Hagan. The plaintiffs allege that Mr O'Hagan was negligent by failing to identify a number of defects such as:

- the cladding to the columns;

- cladding to the concrete decks;

- the canopy roof junction intersection with walls built without kickout or other suitable flashings;

- the deck membrane detailing around the posts in fixing penetrations;

- no damp proof course to timber framing of the north-eastern corner;

- apron flashings at roof level were sealed to the face of the building reliant on silicone sealant;

- no relief joints at the intercladding junctions between timber framing and lower masonry walls;

- the deck wingwall junctions/weathertight flashings and cladding clearance.

[222] The plaintiffs also plead that Mr O'Hagan's design for the initial remedial works was defective in that it permitted moisture to seep under the sill flashing and failed to specify head flashings.

[223] Finally the plaintiffs plead that Mr O'Hagan failed to properly supervise the initial remedial works so that they were constructed with the remedial defects.

[224] The plaintiffs' claim against Mr O'Hagan:

- the cost of the initial remedial works as a wasted cost;

- the increase in cost of the full remedial works.

[225] In the course of opening, counsel for the plaintiffs also made a claim for the full cost of the entire remedial works on behalf of those unit owners who had purchased after the O'Hagan repairs.

[226] This argument, not pleaded, seems to be based on the premise that if Mr O'Hagan had identified the major problems he would have recommended a reclad rather than repairs and the owners who purchased after the remedial work would now not be facing the cost of the recladding.

[227] The argument is misconceived. The reclad is required because of the original defects in the building. Mr O'Hagan was not responsible for creating those original defects. There is no evidence that Mr O'Hagan's work exacerbated the position. At worst, there were two consequences of the inadequate remedial work. First, the remedial work failed to completely address the issue and so gave rise to wasted costs

for those people who owned the units at the relevant time. Second, the cost of recladding may have increased with time.

[228] The plaintiffs' case against Mr O'Hagan under this head is based on a misconceived application of the "but for" test. The plaintiffs' case is that but for Mr O'Hagan's negligence the most recent purchasers would not now be faced with the cost of the reclad. That, however, is to take a far too narrow analysis of causation in this case.

[229] The "but for" test is the starting point for causation but it is not the complete analysis: *Sew Hoy & Sons Ltd (In Receivership and in Liquidation) v Coopers & Lybrand* [1996] 1 NZLR 403; *Price Waterhouse v Kwan & Ors* [2000] 3 NZLR 39. As the Court of Appeal observed in the *Price Waterhouse* case:

> [28] There is a material, indeed a crucial difference between causing a loss and providing the opportunity for its occurrence. The line between these concepts can often be difficult to draw but the distinction is vital. … Plaintiffs in this field must show that the defendant's act or omission constituted a material and substantial cause of their loss. It is not enough that such act or omission simply provided the opportunity for the occurrence of the loss. The concept of materiality denotes that the act or omission must have had a real influence on the occurrence of the loss. The concept of substantiality denotes that the act or omission must have made a more than de minimis or trivial contribution to the occurrence of the loss. Looking at the question in this dual way is both a reminder of the difference between opportunity and cause, and a touchstone for distinguishing between them. In some instances the words used have been material *or* (as opposed to *and*) substantial. It is preferable, for the reasons just mentioned, to focus on both concepts for they are each relevant to causation issues. No form of words will ultimately provide an automatic answer to what is essentially a question of commonsense judgment.

[230] In the present case the plaintiffs' loss was caused by a combination of factors that had led to the construction of 45 Byron Avenue with the original defects. The first factor was the defective design in relation to the windows, floor levels and wing walls. Mr Smythe, the architect is responsible for that. Next, the Council's negligence when carrying out its inspections of the construction process contributed to the plaintiffs' loss. Finally, for present purposes, the negligent workmanship of the plasterer was also a factor. But Mr O'Hagan's actions have not led to the need for the reclad. The remedial work was not a contributing factor to the need for a reclad. The remedial work has not caused the loss which arises out of the need for a

reclad. Indeed, the basis of the plaintiffs' case is that the reclad was required because of the original defects not the remedial works. To this extent the present case is different to *Johnson v Watson* [2003] NZLR 626 where the failure of the remedial work contributed to additional loss or damage.

[231] Further, and in any event, there is no sufficient evidence of reliance on the remedial work by the individual unit owners who purchased after the remedial work had been carried out. Absent evidence of reliance on Mr O'Hagan or his company and given that general or community reliance does not apply to a consultant such as Mr O'Hagan involved in remedial work there is no basis for this unpleaded claim. I dismiss it.

The scope of the remedial work

[232] It is necessary to determine the scope of the remedial work. Mr O'Hagan was initially instructed to inspect the cladding to determine whether it complied with the New Zealand Building Code with respect to section E2 External Moisture and if it had been fixed properly. He confirmed those instructions in the letter of 10 July 2002 to all unit owners. Mr O'Hagan's inspection revealed a lack of control joints and concern over the flashing details around the sill areas of windows and door areas. In his first report of 24 July 2002 he also identified problems with the flashing of the deck above the exterior corners of the units below. He noted that unit 6 had previously been repaired. He was also concerned at the flashing of the fire protections into the unit walls. In the report he took the reasonable view that as the building had settled the installation of control joints at that stage would be of little value except where existing cracks were in places that on the original design would have required control joints. Mr O'Hagan concluded that the principal issues were the windows and the moisture ingress around the windows and doors.

[233] At the owner's request, Mr O'Hagan attended the Body Corporate annual general meeting on 18 September 2002 and confirmed the main faults in the building which he identified as the moisture ingress around the windows and doors. Some time later, in December 2002 he was instructed to detail the specifications for the work required so quotes for the work could be obtained. He was also to supervise

the work. The work contemplated at the time was the work related to the main problems that he had initially identified, namely the windows and doors.

[234] Mr O'Hagan confirmed the scope of the work he was to carry out in a letter of 18 December. He noted that he would draw up the specifications for the remedial work, which would include an examination of all likely areas of remedial work. He also agreed that the design would be started and that quotes would be obtained. He agreed to:

- draw up the specification and site visit;

- design the flashing details for all openings;

- select contractors and meet with the Body Corporate.

He estimated that his supervision would include:

- site supervision three hours per day for the duration of the contract estimated to be six weeks so 30 days at 3 hours – 90 hours. At $60 an hour that supervision would cost $5,400.

[235] The scope of the remedial works was defined by the exchange of correspondence of 6 December and 18 December 2002. While Mr O'Hagan referred to "all likely areas of remedial work" in context that was a reference to all likely areas in relation to the doors and windows. By that stage and after his meeting with the unit owners the focus of the work was the principal issue identified in the earlier report namely addressing the issue of weathertightness around the doors and windows.

[236] After carrying out invasive tests, Mr O'Hagan recommended (in his report of 19 March 2003) that every door and window should be removed and a flashing installed that drained any moisture to the outside and also had a dam end on it so moisture could not enter the stud cavity. Mr O'Hagan recommended a jamb flashing should be installed to the doors and a sill flashing installed that drained to the outside

of the windows. Although he suggested that at the time that work was carried out other faults identified could be rectified, the quote he provided from a builder and approximate costs were for the work in relation to the doors and windows (and associated cracking), but nothing more.

[237] It was beyond the scope of the contract that Centre of Attraction Limited made with the plaintiffs in December for Mr O'Hagan to do anything more than address the remedial work in relation to the doors and windows. That was the focus. While the repair work carried out by the builder R D Wells extended to including bell casts (at the Council request) and the repair of butynol at certain junctions, that work was incidental. The principal focus throughout remained on the doors and windows. That was what the quote related to.

[238] In this case the tortious duty owed by Mr O'Hagan and through him the company was co-extensive with the contractual scope of the contractual obligations: *Frost & Sutcliffe v Tuiara* [2004] 1 NZLR 782. The relevant factual context was the same in relation to both in this case. While the contract was with Centre of Attraction Limited, Mr O'Hagan was to carry out the work. The duty he owed the plaintiffs as a consequence of assuming a personal responsibility was a duty to carry out the company's obligations under the contract in relation to the doors and windows.

Reclad/targeted repair

[239] A related issue arises, namely whether Mr O'Hagan should have recommended a reclad rather than the targeted repairs, and was negligent in not doing so. The experts now agree that the original defects in the window and door openings were so extensive as to require an entire reclad. The plaintiffs submit that Mr O'Hagan should have recommended a reclad as opposed to the targeted repairs that he proposed.

[240] In Mr Morrison's opinion, by late 2002 and early 2003 it was recognised that confirmed leaky buildings such as the Byron Avenue development should be reclad in full. Mr O'Sullivan had recommended a reclad in his report of November 2000.

However, Mr O'Sullivan had also provided details for repair work in the alternative to a full reclad. Mr O'Sullivan was careful to point out that his report was written in 2000 and since then information had come to light which would exclude those sort of repairs.

[241] On the other hand Dr Wall said that it was common practice between 1998 and 2003 to undertake targeted repairs to cladding systems rather than to go to the considerable expense of a total reclad. Undertaking targeted repairs was the accepted practice of the day. BRANZ Bulletin No. 425 "Finding Leaks" issued in April 2002 had a section dealing with repairs that confirmed that the primary approach was for repairs rather than recladding.

[242] I prefer the evidence of Dr Walls on this point. I find that targeted repairs was an option that a reasonable consultant such as Mr O'Hagan might properly have recommended in late 2002, early 2003 even for such extensive work as was required in this case. The recommendation for targeted repairs was not negligent.

[243] Further, even if a full reclad was the primary recommendation a consultant such as Mr O'Hagan would have been expected to provide the alternative option of targeted repairs to the owners. In 2002, as now, a principal concern of the owners was the cost. The evidence satisfies me that given the option, the owners would have accepted the cheaper option of targeted repairs. The plaintiffs are not able to establish they have sustained any loss by Mr O'Hagan's recommendation for targeted repairs as opposed to a recommendation for a reclad.

Are Mr O'Hagan and Centre of Attraction Limited liable for the defective remedial work?

[244] As noted, the experts agree that the remedial work recommended by Mr O'Hagan and supervised by him was defective, at least in part. The main defect was that the door sill flashings for about half of the doors fell backwards and the stop end details were not installed in a weathertight manner.

[245] Mr Wilson and Ms Powell also considered defects remained in relation to a number of windows as well, but Dr Walls did not agree. Mr Wilson's investigations in October 2007 still showed moderate to high moisture readings in excess of 30 points about the property including at a number of window and door openings. Dr Walls criticised the procedure Mr Wilson had adopted in carrying out those tests but even on Dr Wall's evidence there were still some limited elevated moisture readings in relation to the windows in units 12 and 13 and two in unit 4, although he put them down to maintenance problems by the owners. But in cross-examination Dr Walls acknowledged that the photographs of the sample areas showed patterns of dampness.

[246] Allowing for some criticism of Mr Wilson's moisture testing, when the test results are considered together with the results of the analysis from the destructive testing of the wood samples (which disclosed rot) the only conclusion to be drawn is that the remedial work was ineffective. The remedial work may well have improved the situation, but it did not address all the issues relating to moisture ingress at the windows and doors. The evidence is that half of the door sills still slope backwards and the stop-end details were not installed in a weathertight manner.

[247] I have already found that the scope of the remedial work was more limited than argued for by the plaintiffs. I now turn to the allegation that Mr O'Hagan's design was defective and that he failed to properly supervise the initial remedial works so they were constructed with the remedial defects.

[248] As to the allegation that the design was defective, Mr Casey submitted an exclusion of liability applied.

[249] In the letter of 18 December accepting the instructions to assist the Body Corporate Mr O'Hagan stated:

> Once the specification is drawn up the design of the flashing details could be started. While the flashing details are based on tested and established designs for the prevention of moisture ingress due to the building being an existing building with existing fittings the design will have to be modified. Should the Body Corporate require these designs to be tested it will be at their cost and **if the designs are accepted without testing then this acceptance releases the designer from further liability**.

(emphasis added)

[250] The plaintiffs instructed Mr O'Hagan to proceed on that basis. He prepared the designs accordingly. The Body Corporate did not have the design tested. An exclusion clause may exclude liability for negligence provided it is expressed in such a way as to exclude liability in tort: *White v John Warwick & Co Limited* [1953] 1 WLR 1285; *Producer Meats (North Island) Limited v Thomas Borthwick and Sons (Australia) Limited* [1964] NZLR 700. Whether the exclusion clause does exclude liability for negligence depends upon the expectations of the parties as objectively assessed from the terms of the agreement, its purpose and the factual setting: *Vickery v Waitaki International Limited* [1992] 2 NZLR 58.

[251] The clause was directed at excluding liability in relation to the design of the flashing detail. The reason liability was to be excluded is expressly stated, namely that the detail was to be modified to apply to an existing building. The clause excludes liability in the event the Body Corporate chose not to have the flashing independently tested. The Body Corporate did not have the flashing independently tested. The clause was intended to exclude liability in the very event that the plaintiffs now seek to impose liability on Mr O'Hagan. The plaintiffs say that the flashing detail was inadequate and did not achieve its purpose. Any defect in the design of the clause could only have arisen from negligence in design. It was that very issue that the clause sought to address. I find that the clause is effective to exclude liability for defective design in the circumstances of this case.

[252] Further, the evidence does not support a finding of negligence in relation to the design. Mr O'Hagan's design was based on a flashing detailed in trade brochures. Mr O'Hagan was cross-examined on the basis the brochures depicted different materials or situations than that existing at 45 Byron Avenue. But Mr O'Hagan never suggested otherwise. He accepted that he adapted the detail. It was for that reason that he suggested testing the design. Mr O'Hagan can not be said to have been negligent in seeking to adapt an existing design for application in the existing building at 45 Byron Avenue. The claim based on defective design fails.

[253] As I have found that the scope of work was properly limited to the windows and doors, that leaves the issue of supervision. Mr O'Hagan accepted that he did not supervise the remedial work to the extent that he initially recommended. I have some sympathy for him because, according to his evidence the representatives of the Body Corporate made it clear to him that they wanted to minimise costs. That was a feature of the evidence of a number of the owners. But Mr O'Hagan was responsible for determining the level of supervision required to achieve the desired end. While a Council inspector might be justified in limiting his inspections by sampling, Mr O'Hagan and Centre of Attraction Limited had quoted for a specific amount of supervision. The Body Corporate accepted his quote and was reliant upon him as an expert building consultant to ensure the supervision was carried out. Mr O'Hagan accepted there was no clear agreement between him and the Body Corporate for more limited supervision than he initially quoted and which he considered (at least initially) was required. Mr O'Hagan took it upon himself to reduce the time spent on supervision.

[254] While it reduced the problem, the remedial work did not entirely solve the principal issue of moisture ingress about the windows and doors. The doors in particular remained a problem. This was despite the fact Mr O'Hagan identified the problem with the door openings as the greater concern in his first report of 24 July. Dr Walls accepted that a number of the door sill flashings were reinstalled without a slope or sloped backwards. That would have been apparent to Mr O'Hagan if he was viewing the work.

[255] Centre of Attraction Limited and Mr O'Hagan had agreed Mr O'Hagan would spend three hours a day on site supervision for the duration of the contract which was estimated to be six weeks so 30 days at three hours i.e. 90 hours. In total Mr O'Hagan says he attended the site to assess the progress of the remedial works on five occasions between 6 November through until 8 February, i.e. five occasions in three months. He accepted that he would have seen probably something close to one in 10 of the installations of the remedial work. That was significantly less than the supervision that he said he would carry out of three hours a day over a 30 day period, i.e. 30 extensive inspections. On the evidence I conclude that a principal reason the

work was ineffective was Mr O'Hagan's failure to supervise the remedial work to the extent required to ensure the work was properly completed.

[256] The builder, R D Wells was not known to Mr O'Hagan. That should have underlined the importance of supervision to him. Mr O'Hagan came to the decision that he could reduce the amount of supervision he had agreed to (and which his company could have contractually enforced against the plaintiffs) on the basis of what he described as a judgment call. He attended the site and inspected the first couple of repairs carried out by Mr Wells which he considered satisfactory. Mr O'Hagan accepted that part of the object of the supervision was to ensure the builder knew of the importance of the falls being correct. But the falls were not installed correctly in relation to the bottom sills of the doors. Mr O'Hagan said that because of the original defective design the flashings at the sills could only be installed level. But the problem is that they were not even installed level. The evidence is that 50 percent of them were backward sloping. Mr O'Hagan and Centre of Attraction Limited have not pursued a third party claim against R D Wells Limited.

[257] In the circumstances I find that Mr O'Hagan was in breach of the duty he owed to the plaintiffs (or at least the unit owners at the relevant time) in relation to his failure to supervise the remedial work as he contracted to do. The failure to supervise in that way has led to the problems arising from the defective installation of the remedial work in some instances and particularly the continued problem with the backward sloping sills in relation to the doors.

The claim against Centre of Attraction Limited

[258] The plaintiffs' claim against Centre of Attraction Limited in both negligence (based on vicarious liability for Mr O'Hagan's action) and breach of contract.

[259] Centre of Attraction Limited was placed into voluntary liquidation shortly before the commencement of the hearing. I granted leave to the plaintiffs to continue with the proceedings against Centre of Attraction Limited (in liquidation). The focus of the discussion in relation to the liability of Centre of Attraction Limited has been on Mr O'Hagan's actions. I have found that Mr O'Hagan owed a duty of

care to the owners of the units and was negligent in relation to the supervision of the works. Centre of Attraction Limited (in liquidation) as his employer is also liable to the plaintiffs. It owed a concurrent duty of care which it breached through the negligence of its employee Mr O'Hagan and, in addition, it breached its contract by failing to supervise as it had contracted to do.

The quantum of the claim against Mr O'Hagan and Centre of Attraction Limited (in liquidation)

[260] The real loss as a result of the ineffective remedial work is the wasted costs of the remedial work. Mr Casey submitted that there was in effect no loss, because even if the remedial work was successful, the building would still need to be reclad because of the other defects. But that is tantamount to a submission that Mr O'Hagan should have recommended a reclad at the outset, a position that Mr O'Hagan argues against. The plaintiffs who bore the cost of paying for the remedial work which was not successful have suffered loss, namely the wasted cost of that work. In addition the plaintiff's claim the increased cost of the reclad since 2002/2003. In my judgment neither Mr O'Hagan nor Centre of Attraction Limited (in liquidation) is liable to the plaintiff for any increase in the cost of recladding since that time. Such a claim is premised on the basis that Mr O'Hagan should have recommended a reclad rather than carried out targeted repairs. But for the reasons given above, I do not accept that Mr O'Hagan was obliged to do that.

The Council's role in relation to the remedial works from the plaintiffs' point of view

[261] The plaintiffs allege the Council was negligent in approving and inspecting the remedial works. In particular it is alleged the Council was negligent in approving the remedial design which was defective and also that it was negligent in its inspection of the remedial work.

[262] It is unnecessary to consider the issue of approval of the design. As I have found that Mr O'Hagan was not negligent in relation to the design, the Council could not be negligent even if it had approved the design. The real issue was the

inspection. The Council sought to distance itself from the remedial work. Mr Oden accepted that Mr O'Hagan sent a number of drawings through to the Council and Council officers saw the work from time to time but he says that he thought Mr O'Hagan would issue a producer statement so the Council would not have to formally carry out its own inspections of the remedial work. But it was not open to the Council to seek to distance itself from the remedial work in that way. It had not yet issued a code compliance certificate. The remedial work was directed at achieving a code compliance certificate. The Council would have had to inspect the remedial work to approve it given the major issues that it had raised.

[263] But in any event, for practical purposes, nothing turns on the level of the Council's inspection. The plaintiffs were justified in carrying out the remedial works recommended by Mr O'Hagan. In my judgment this is a case of reasonable, but failed mitigation in so far as the plaintiff's claim against the council is concerned. The plaintiffs were effectively required by the Council to instruct someone such as Mr O'Hagan when it made it clear it would not issue a code compliance certificate and suggested instead they engage the services of a building consultant. Mr O'Hagan is a recognised and respected building consultant. The work Mr O'Hagan recommended be carried out has ultimately proved not to be successful. But that does not diminish the ability of the plaintiffs to recover the costs of that attempted mitigation from the defendants who were responsible for causing the need for the remedial work in the first place. In seeking to repair the defects in 45 Byron Avenue the plaintiffs were acting to mitigate their loss. They are entitled to recover the expenses of mitigation from the parties that caused or contributed to the original defects including the Council. The plaintiffs may recover the costs of attempting to mitigate even where the effort to mitigate is unsuccessful and the ultimate cost may be greater than if no steps to mitigate had been taken: *New Zealand Forest Products Limited & Another v O'Sullivan* [1974] 2 NZLR 80 and *Gardner v The King* [1933] NZLR 730.

[264] I conclude that the plaintiffs who incurred the cost of the remedial work may also recover the wasted costs of that remedial work from the Council (and for that matter, Mr Smythe).

Walden/Stack NZ Limited

[265] The plaintiffs say that Mr Walden and through him Stack owed them a duty of care. They allege the duty was breached by Mr Walden's failure to identify the original defects and by Mr Walden issuing the practical completion certificates notwithstanding the presence of the original defects.

[266] In the alternative the plaintiffs allege that the original defects existed when Mr Walden issued the practical completion certificates and the certificates were therefore negligent misstatements as to the quality of the work done on the property.

[267] As in the case of Mr O'Hagan the plaintiffs allege that Mr Walden personally owed a duty of care to them because he assumed personal responsibility for the issue of the practical completion certificates in the following circumstances:

- He was an experienced architect and/or project manager and he fulfilled the role of an architect and/or project manager/administrator during construction of the apartments.

- He personally issued the practical completion certificates and performed the Stack services as an employee/agent for either Smythe Grant or Stack.

- The Byron apartments were built with defects and the plaintiffs as owners will suffer a loss which was a foreseeable consequence of any failure by Mr Walden to exercise reasonable skill and care in the performance of his work.

- Mr Walden was or ought to have been aware of the significance of the issue of the practical completion certificates, namely payments would be due to the builder and settlement of the purchase of the units would take place.

- The owners are members of a class who rely on architects such as Mr Walden in inspecting and issuing completion certificates and are vulnerable to the risk of loss arising from carrying out such inspections and issuing completion certificates.

Did Mr Walden owe a duty of care to the plaintiffs?

[268] As I have come to the view that neither Mr Walden nor Stack owed a duty of care to the plaintiffs (and, even if they did, were not in breach of such duty), it is unnecessary to consider whether Mr Walden assumed personal responsibility towards the plaintiffs. Although it is pleaded Mr Walden was an architect the evidence establishes that he is not an architect. Mr Walden holds a BSc in quantity surveying. He has no degree or other qualification in architecture and at no time has been a registered architect. Stack specialised in commercial interior design. Mr Walden ran Stack's business together with two other directors until the company ceased trading in November 2006. Stack provided project management services for interior fit-outs of commercial buildings. It did not hold architectural registration during the time of the construction of the development at Byron Avenue.

[269] Mr Walden and Stack initially became involved in the project at the request of Mr Grant of Smythe Grant. Stack and Smythe Grant had adjacent offices in an office building in Newmarket. Through that contact, Stack was retained to act as the architect's representative in matters of project administration on the Byron Avenue property. Stack and Mr Walden's obligations were as described in a letter of 9 April 1998 from Smythe Grant to Couldrey:

> … We have agreed the following roles for the completion of the First Stage of the development:
>
> A. ROLES
>
> 1. Max Grant will be "the Architect" as described in the Conditions of Contract the building works, signing All Architects Instructions, Variation Orders, and Certificates of Payment and Completion etc.
>
> 2. I will be assisted at Smythe Grant's expense by Joseph Walden, who will act as "Architect's Representative", organising, chairing and issuing minutes of site meetings, monitoring the Contractor's Programme against the due date for completion, collating and issuing all required documentation, etc.
>
> 3. Stephen Smythe will assist Joseph in all design clarification, design matters, site inspections and quality control. This work will be provided by Stephen at no cost to Smythe Grant Ltd.

> 4. Emmit Partners will provide all cost reports to Smythe Grant as required for valuation of claims during the contract. This service will be provided by Byron Developments at no cost to Smythe Grant Ltd.
>
> …

[270] Emmitt Partners was the quantity surveyor for the project.

[271] Mr Walden's initial role as architect's representative was an administrative one. The architectural responsibility remained with Smythe Grant; primarily, Stephen Smythe.

[272] It was in that administrative capacity that Mr Walden prepared the practical completion certificate for Stage 1 on 17 July 1998 on Smythe Grant letterhead. Although he signed it, he did so "pp Max Grant". Mr Walden assumed no personal responsibility for the certificate.

[273] Subsequently, on 15 October 1998 Mr Grant withdrew Smythe Grant's services because of Couldrey's and Mr Smythe's financial difficulties. Mr Smythe personally assumed the role of architect. On 28 October 1998 Mr Smythe asked that Stack remain on the project. It was agreed that Stack and Mr Walden's role would remain as "architect's representative". Mr Smythe needed the involvement of an independent agency such as Stack and Mr Walden to satisfy his bank that the work had been done and that the payments were due before they would allow Mr Smythe to draw down the funds.

[274] Thereafter, and until Stack withdrew its services on 25 September 1999, Mr Walden issued practical completion certificates and payment certificates on Stack letterhead rather than on Smythe Grant letterhead.

[275] Although Stack issued practical completion certificates signed by Mr Walden, Stack and Mr Walden's role remained an administrative one. Mr Walden was the conduit between Mr Smythe and Bracewell Construction and Glenn Bracewell in particular. Neither Stack nor Mr Walden were responsible for drawing architectural detail or giving architectural advice. Mr Walden's role was to convey

architectural detail and architectural instructions from Mr Smythe to Bracewell Construction.

[276] Mr Bracewell confirmed the limited nature of Mr Walden's role. In his evidence Mr Bracewell described Mr Walden's role as:

> … he was more the paper work man for Stephen Smythe who was to do the site meetings, monitor the programme and basically shuffle the paper as such.

[277] Mr Bracewell confirmed that the role did not change after Smythe Grant's withdrawal. Mr Walden and Stack were not project managers in the sense that they controlled the project. As Mr Bracewell confirmed, Mr Smythe ran the project. In his words, "it was more the old school architect ran the show" type of project.

[278] The plaintiffs' case against Mr Walden and Stack hinges on the issue of the practical completion certificates. There is, however, no correlation between the issue of the certificate of practical completion and the defects in the Byron apartments. Mr Walden had no control or input over the quality of the work at Byron Avenue. Mr Walden was not the architect, Mr Smythe was. Neither Mr Walden nor Stack had control of this project in any meaningful sense.

[279] The basis for the general duty alleged in this case is not supported by the evidence. Neither Mr Walden nor Stack were architects or project managers (in the sense now generally understood) on the Byron Avenue project.

[280] All that is left is the plaintiffs' claim arising from the issue of the practical completion certificates. That is more properly considered under the plaintiffs alternative claim of negligent misstatement.

[281] Assuming for the moment Mr Walden and/or Stack owed a duty of care, the next issue is whether they were negligent. In this context, the contractual circumstances are relevant in deciding whether Mr Walden was negligent. As Richmond P observed in *Bowen v Paramount Homes* at p 407:

> It is clear that a builder or architect cannot defend a claim in negligence made against him by a third person by saying that he was working under a

> contract for the owner of the land. He cannot say that the only duty which he owed was his contractual duty to the owner. Likewise he cannot say that the nature of his contractual duties to the owner sets a limit to the duty of care which he owes to third parties. As regards this latter point it is, for example, obvious that a builder who agreed to build a house in a manner which he knows or ought to know will prove a source of danger to third parties cannot say, in answer to a claim by third parties, that he did all that the owner of the land required him to do. Nevertheless the nature of the contractual duties may have considerable relevance in deciding whether or not the builder was negligent. In relation to a claim made against an architect, Windeyer J in *Voli v Inglewood Shire Council* (1963) 110 CLR 74 put the matter in the following way:
>
> > ". . . neither the terms of the architect's engagement, nor the terms of the building contract, can operate to discharge the architect from a duty of care to persons who are strangers to those contracts. Nor can they directly determine what he must do to satisfy his duty to such persons. That duty is cast upon him by law, not because he made a contract, but because he entered upon the work. **Nevertheless his contract with the building owner is not an irrelevant circumstance. It determines what was the task upon which he entered.** If, for example, it was to design a stage to bear only some specified weight, he would not be liable for the consequences of someone thereafter negligently permitting a greater weight to be put upon it" (ibid, 85).
>
> (emphasis added)

[282] The provisions of the construction contract relating to the effect of the practical completion certificates are relevant. The principal effect of the issue of the practical completion certificate was to release certain retention moneys to the builder. The provisions of the construction contract confirm that the issue of a practical completion certificate does not, however, prevent the owner from suing for defects. The fact that right is maintained confirms that the draftsmen of the standard contract contemplated that defects may exist even though a practical completion certificate is issued. Put another way, the certificate is not a warranty that the building is free of defects.

[283] The process Mr Walden followed before approving the practical completion certificate is also relevant when considering whether he was negligent in issuing the certificates. When Bracewell Construction sought payment Mr Walden referred the matter to Emmitt Consulting, the quantity surveyors, to determine whether the work claimed for had been done. Having received Emmitt's confirmation the work had been done and also Mr Smythe's confirmation and approval as architect, Mr Walden

then issued the practical completion certificate. Mr Walden's act of issuing the practical completion certificate was an administrative one. He was entitled to rely on the quantity surveyor's confirmation the work had been done, and the architect's approval to quality.

[284] Neither Mr Walden nor Stack approved the quality of the workmanship. Mr Walden was in no position to determine the quality of the workmanship. Mr Walden and Stack were entitled to assume that if the independent quantity surveyor confirmed the work had been carried out as it did and Mr Smythe, the architect confirmed that the work was approved, he could issue the practical completion certificate. At the relevant time Mr Walden had no reason to question that. As Richmond P observed in *Bowen v Paramount Builders*:

> … At the same time, however, it seems to me that the fact that plans have to be approved by persons with a degree of expert knowledge is obviously relevant to the question whether a builder is negligent if he goes ahead and constructs the building. The position is somewhat analogous to that of an employer who purchases equipment from a reputable supplier. Up to some reasonable point such an employer is entitled to rely on the supplier providing him with safe equipment: *Davie v New Merton Board Mills Ltd* [1959] AC 604; [1959] 1 All ER 346.

[285] The inspection that Mr Walden and Stack were required to undertake was not a qualitative inspection but a quantitative one to ensure that the work said to have been carried out was carried out.

[286] So, even if Mr Walden and Stack owed a duty, in the circumstances of this case, Mr Walden and Stack were not negligent and in breach of that duty by issuing the certificates.

[287] Finally, and in any event, the plaintiffs cannot, in my judgment, establish any act by Mr Walden or Stack caused them loss. Essentially the plaintiffs' case against Mr Walden under this head is based on application of the "but for" test. The plaintiffs' case is that but for the issue of the practical completion certificate the development would have been brought to an end and the agreements for sale and purchase would not have been triggered. That, however, is to take a far too narrow analysis of causation in this case.

[288] The plaintiffs' loss has primarily been caused by the defective design. Mr Smythe, the architect, is responsible for that. Mr Walden and Stack's issuance of the practical completion certificates have not caused the loss.

[289] Nor is the submission that if the practical completion certificates had not been issued the project would have been brought to an end supported by the evidence. There were issues between Mr Smythe and Couldrey on the one hand and the builder, Bracewell Construction on the other. Mr Smythe and Couldrey were in financial difficulty and refused to pay Bracewell Construction the full amount claimed. The matter went to arbitration. The arbitration was resolved largely in the builder's favour. It is inevitable that if Mr Walden and Stack had not issued the practical completion certificates (after receiving the approval of the quantity surveyor and the approval and direction of Mr Smythe) that the matter would have gone to arbitration under the contract. There is no reason to suppose that the outcome would have been any different.

[290] The alternative claim against Mr Walden and Stack is in negligent misstatement. It is based on the allegation that the plaintiffs relied on the issue of the practical completion certificates to their detriment. But only four of the plaintiffs' purchases were directly affected by the issue of practical completion certificates. Further, the practical completion certificate for Stage 1 was issued on 17 July 1998. Although Mr Walden signed that certificate, he did so on behalf of Smythe Grant. The certificate was issued by Smythe Grant as architects to the project. The McConvilles, purchasers of unit 11 and Mr Blackmore and Ms Sheehy, purchasers of units 13 and 14, bought as a result of the issue of that certificate. Ms Dickie, a director of Gydick Investments Limited, bought in her own name under an agreement for sale and purchase under which settlement was triggered by the issue of the practical completion certificate for Stage 1, but she is not a plaintiff as she later transferred the property to Gydick Investments. The settlement of that later sale was not dependent upon or triggered by the issuance of any practical completion certificate.

[291] The only owner whose purchase was triggered by a practical completion certificate issued by Mr Walden and/or Stack (as opposed to Smythe Grant) was Mr

Jupp. His purchase was triggered by the issue of the practical completion certificates for Stages 2 and 3. They were issued on 4 December 1998.

[292] Although Mr Jupp said that he proceeded with the settlement on the basis of the certificate of practical completion, in cross-examination he accepted that he thought a practical building completion certificate was something to be signed off by the Council. He acknowledged that no-one had explained to him that the practical completion certificate was not issued by the Council. I accept Ms Macfarlane's submission that on the evidence Mr Jupp did not have a firm grasp of his agreement for sale and purchase regarding practical completion, did not look at the certificate at the time it was issued and misunderstood its nature so that it cannot be said that he relied on the practical completion certificate. There is a difference between the issue of the certificate triggering the requirement to settle and actual reliance on that certificate.

[293] Further, in the case of Mr Jupp, even assuming Mr Walden and/or Stack owed a duty in issuing the practical completion certificates and effectively confirming the work was complete except for minor defects for the reasons given above, it can not be said that Mr Walden and/or Stack were in all the circumstances of this case negligent in issuing the practical completion certificate. Nor can it be said the issue of the certificates was causative of any loss. The cause of Mr Jupp's loss was the defective design and later negligent inspection by the Council, not Mr Walden's issuance of the certificate.

[294] The plaintiffs' claim against Mr Walden and Stack must be dismissed.

Andrew Plastering Co (1994) Limited

[295] Andrew Plastering has not taken any steps in the proceeding. As it has not filed a statement of defence r 463 applies. The plaintiff is entitled to judgment subject to proof of quantum.

[296] For the sake of completeness I confirm that I accept a tradesman such as a plasterer working on site owes a duty of care to the owner and to the subsequent

owners, just as a builder does. There is evidence of negligence on behalf of the plasterer in finishing the plaster down to ground level on the columns on the northern elevation in some instances and, more significantly, down to the concrete deck in other instances. The evidence is that the cladding down to the concrete decks in particular has been a significant contribution to moisture ingress at Byron Avenue. The plaintiffs are entitled to judgment against the plasterer.

Cross claims/apportionment between defendants

[297] Each defendant is individually responsible to the plaintiffs for the losses they have caused. But where, as in this case, more than one of the defendants have caused or contributed to the loss sustained by the plaintiffs the Court may apportion responsibility between the defendants pursuant to s 17(1)(c) of the Law Reform Act 1936.

[298] In the present case there have been cross-claims issued by all defendants except Mr Smythe and Andrew Plastering. The only cross-claims that remain of relevance are those between the Council and Mr O'Hagan and his company. The Council alleges that if it is found liable then Mr O'Hagan and Centre of Attraction Limited (in liquidation) are liable as concurrent tortfeasors to contribute to or indemnify it for any loss which it may be liable for.

[299] In my judgment Mr O'Hagan and Centre of Attraction Limited are not liable to contribute to any of the losses the Council may sustain by way of liability to the plaintiffs in relation to the original defects in 45 Byron Avenue. The Council's liability for such defects arises out of its negligent inspection of the development during its construction and in one case from a negligent misstatement. The parties responsible for the original defects of the building are: Mr Smythe as architect; the Council as a result of a negligent inspection process; and the plasterer in relation to the specific issue of plastering down to the ground levels. Mr O'Hagan and Centre of Attraction Limited had no role to play in creating the defects which ultimately still require remediation and, in particular, require a reclad.

[300] For the reasons given above the cost of the failed remedial works are properly to be regarded as attempts at mitigation and, as well as being recoverable against Mr O'Hagan and Centre of Attraction Limited (in liquidation) are recoverable as additional costs against the parties responsible for the original defects.

[301] The issue between the various defendants responsible for the original defects is the extent of the apportionment in this case. In *Todd on Torts* the author notes the generally accepted allocation of responsibility between builder and Council as 80 percent/20 percent. In *Mt Albert Borough Council v Johnson*, the apportionment was 80 percent/20 percent. In *Morton v Douglas Homes* the apportionment was 85 percent to the development company and 15 percent to the Council in some instances and in respect of others 90 percent and 10 percent respectively. In *Dick v Hobson Swan Construction Limited* the Court apportioned responsibility 80 percent/20 percent. In *BC160361 & Ors v Auckland City Council & Ors* HC AK CIV 2003-404-006306 25 June 2007 Harrison J, the Court apportioned responsibility to the building company and Council at 80 percent and 20 percent. In the recent decision of Heath J in *Body Corporate 188529 & Ors v North Shore City Council* HC AK CIV 2004-404-3230 30 April 2008 the Court apportioned responsibility at 85 percent to the builder and 15 percent to the Council.

[302] In this case the builder is not a party. The builder succeeded in the arbitration where it was found 45 Byron Avenue was built largely in accordance with the plans and specifications. The overwhelming weight of evidence is, however, that the design in general and the details in relation to the windows, the inadequate step-down and the lack of details in the wall junctions were major contributors to the issue of the moisture ingress at Byron Avenue. Mr Smythe as architect was responsible for those defective designs and details. As an architect he would be expected to have more knowledge about those issues than the Council inspectors. In terms of the responsibility in this particular case I fix the appropriate apportionment at 75 percent to Mr Smythe, 20 percent to the Council and 5 percent to the plasterer.

[303] That leaves the issue of the claims in relation to the wasted remedial costs. As between the plaintiffs and Mr O'Hagan and Centre of Attraction Limited the plaintiffs who incurred the cost and are entitled to recover may pursue Mr O'Hagan

and his company for the wasted costs of the remedial work. Alternatively, the wasted costs of the initial remedial works were properly incurred as a reasonable attempt at mitigation and the plaintiffs entitled to recover may pursue recovery of them from the Council. The plaintiffs cannot of course recover twice for the same loss.

[304] The issue between the Council and Mr O'Hagan and Centre of Attraction Limited is what the appropriate apportionment should be in relation to the costs of the initial remedial work. Mr O'Hagan was primarily responsible for the failure of the remedial works which, I have found, was due to his failure to supervise to the level required. However, the Council did have a role to play and a responsibility in relation to the remedial works. This is in addition to its contribution to the original defects. Mr O'Hagan only became involved because the Council refused to issue the code compliance certificate. Having reached the decision it would not issue a code compliance certificate the Council should have issued a notice to rectify identifying the work to be remedied. If it had done so then the work that Mr O'Hagan recommended would have addressed the issues of concern to the Council (as he understood in fact it did) and further, the Council would itself have had more of a role to play in relation to inspection. Its inspection of the remedial work was at best cursory. The Council largely left matters to Mr O'Hagan. But, as it had not issued a code compliance certificate and because it had identified major issues with the building but apparently treated the remedial work as coming within the original consent, it should have taken an active role in the inspection of the remedial work rather than rely on producer statements from Mr O'Hagan as Mr Oden suggested. I also note that by 14 April 2004 the Council was telling Mr O'Hagan he should limit his certification.

[305] In the circumstances I fix the appropriate apportionment between Mr O'Hagan and his company on the one hand and the Council on the other in relation to the wasted remedial costs at 75 percent to the O'Hagan interests and 25 percent to the Council.

The individual claims of the second plaintiffs

[306] I now consider the claims of the individual plaintiffs before the Court. The individual claims require consideration of the application of principles such as intermediate inspection and contributory negligence to the facts of their particular cases as those issues are raised by the Council in opposition to their claims.

Ms Hough – Unit 1

[307] Ms Hough agreed to purchase unit one under an Auckland District Law Society [ADLS] form of agreement dated 1 March 2002. She did not make the agreement conditional upon obtaining a pre-inspection report nor did she seek to obtain a LIM. She was aware at the time that the Council had not issued a code compliance certificate. She settled the purchase on 22 March 2002.

[308] It was submitted for the Council that Ms Hough was contributory negligent and failed to protect her own position by:

- failing to seek legal advice before signing the agreement;
- failing to insert a condition requiring a building or professional report;
- failing to make the agreement subject to the issue of a code compliance certificate;
- failing to obtain a LIM; and
- failing to make inquiry after signing the agreement.

[309] Ms Hough was not contributory negligent in failing to seek legal advice before signing the agreement. Although Mr Eades gave evidence that a purchaser (such as Ms Hough) has the opportunity to seek legal advice prior to signing an agreement for sale and purchase even he did not suggest it was common practice to do so. Further Mr Eades noted that there were other opportunities after signing the

contract for purchasers to take legal advice. It does not appear that any of the seven purchasers in this case who purchased using the ADLS form took legal advice before signing. It was not standard practice to do so. I find that neither Ms Hough nor any of the other purchasers were negligent by failing to take legal advice before signing the agreement for sale and purchase. The submission is not sustainable.

[310] Nor does the evidence satisfy me that as at March 2002 a purchaser of a recently built building could be said to have been contributory negligent by failing to insert a condition requiring a professional report or, for that matter, by failing to obtain a pre-purchase inspection report. While as Mr Eades said, prospective purchasers have become more cautious and will arrange a pre-purchase building report from a qualified consultant, he was speaking generally and at present. In the 1970's and 1980's it was never the practice: *Hamlin* at p 525. While it has become more commonplace since then, and particularly since publicity about the leaky home crisis, the evidence does not support a finding that failure to do so in March 2002 amounts to contributory negligence. Ms Hough observed what to her was a recently well-built building. The unit was only three years old at the time. The vendors explained there was no code compliance certificate but reassured her that the unit was well built and that the last two remedial items identified as outstanding had been completed. There was no reason for her to include a clause for or to require a pre-purchase inspection.

[311] The next matter the Council raised was Ms Hough's failure to make the agreement subject to the issue of a code compliance certificate. Ms Hough knew that the Council had not issued a code compliance certificate. Given the vendors' explanation that there were only two remedial items outstanding and that the final code compliance certificate would then issue, then, while it may have been more prudent for Ms Hough to make the agreement conditional on the issue of the certificate I am unable to find that her failure to do so was negligent. She unfortunately, but reasonably, accepted the vendors' advice about the code compliance certificate. Her failure to make the contract conditional on the issue of a code compliance certificate is not contributory negligence in the circumstances as they presented to her.

[312] The final matter raised by the Council at the time of the purchase was Ms Hough's failure to take advantage of the LIM condition. As Mr Eades noted, conditions as to LIMs are a feature of the ADLS forms and enable purchasers to obtain information from the Council files. It is much more common for a purchaser to obtain a LIM than to obtain a pre-purchase inspection. I agree that in an appropriate case the failure to take such a basic step as obtaining a LIM, particularly where it is provided for on the face of the agreement for sale and purchase, might amount to contributory negligence.

[313] However, in Ms Hough's case, the failure to obtain a LIM cannot be said to have had any causal potency or to have contributed towards her loss. By early March 2002 the Council was very close to issuing a code compliance certificate as I have found. If Ms Hough had checked the file in early March following her entry into the agreement for sale and purchase she would have had the advice the vendors had given to her confirmed, namely that the code compliance certificate had not issued. Further inquiries would have disclosed that the Council had reinspected on 5 March 2002 and had approved the outstanding work. The Council's position only changed after it received the letter from Mr Smythe. It recorded its position in its letter of 22 March. But coincidentally Ms Hough settled on the same day.

[314] On the issue of intermediate inspection, there was no reason for Ms Hough to enquire into potential problems with the unit. The unit was relatively new. There was no evidence that she was aware of any particular defects that might have put her on notice. The minor matters the vendors referred to were not sufficient.

[315] The Council then says that after purchase Ms Hough (and other second plaintiffs) have contributed to their losses by limiting or restricting the scope of the work to be undertaken by Mr O'Hagan and Centre of Attraction Limited. It is submitted for the Council that if Mr O'Hagan's instructions had not been limited in the way described it is "possible" that the remedial work and investigation scope would have been wider and more effective. I am not attracted to that submission. There was no notice to rectify. The owners were left to rely on Mr O'Hagan to identify what seemed to be the major issues preventing code compliance. The owners did not seek to restrict Mr O'Hagan's brief. Mr O'Hagan kept the Council

informed of the work he was proposing to do. He identified what he considered were the major issues and recommended remedial work which the plaintiffs authorised.

[316] I conclude that Ms Hough's claim is not affected by the principle of intermediate inspection. Nor is it to be reduced by application of the principle of contributory negligence.

[317] Ms Hough is entitled to recover her share of the wasted remedial costs and the future remedial costs.

[318] In addition, Ms Hough claims consequential losses. She has a flatmate. She gave evidence of the rental she will lose during repairs, and the additional costs to her of relocation and storage costs. She also seeks general damages, as do all the individual unit owners.

Mr Kennett and Ms Blakie – Unit 3

[319] Mr Kennett and Ms Blakie bought in 2001. They also used the ADLS form. Mr Kennett did not obtain a LIM report but after learning there was no code compliance certificate he instructed his lawyer not to settle the purchase until the Council had signed off on unit three. The Council later issued the certificate for unit three confirming Council approval in relation to that unit.

[320] No issues of intermediate inspection or contributory negligence (whether before or after purchase) arise in their case.

[321] For the reasons given earlier in this judgment I also find that in issuing the certificate the Council effectively made a negligent misstatement which Mr Kennett and Ms Blakie relied on to their detriment by completing the purchase. They can recover under that alternative head as well.

[322] Mr Kennett and Ms Blakie may recover their share of the wasted remedial costs and future remedial costs.

[323] Mr Kennett and Ms Blakie also claim for loss of rental and general damages.

Mr Jupp – Unit 4

[324] Mr Jupp bought off the plans using the "Byron" form of agreement prepared by Mr Smythe's solicitors. The agreement was made in 23 January 1998. It was conditional on the issue of a practical completion certificate. Mr Jupp settled his purchase on the issue of the practical completion certificate in December 1998.

[325] There is no basis to suggest Mr Jupp was contributory negligent in relation to his purchase. The units were in the process of being built. The principal of the development company was an architect. The building company was a well established building company. He was only to settle when a practical completion certificate issued. Mr Jupp had no reason to suspect anything other than the building would be properly completed. He had no personal knowledge or awareness of LIM's or code compliance certificates. In 1998 there was not the same publicity about leaky homes as there was even by March 2002 and later in 2002 and 2003.

[326] No issues of intermediate inspection or contributory negligence arises in Mr Jupp's case.

[327] Mr Jupp is able to recover his share of the wasted remedial costs and future remedial costs.

[328] Mr Jupp also claims loss of rental and general damages.

RCA Investments Limited – Unit 5

[329] Mr and Mrs Coulthard signed an agreement to purchase unit 5 on 14 November 2003. They nominated their company RCA Investments Limited as purchaser.

[330] Before signing the agreement, they had a builder friend look at the unit. He said it was fine. They were aware that the unit did not have a code compliance

certificate. Also, shortly before signing the agreement Mr Coulthard discovered that there was almost $8,800 owing in respect of building levies. These were for the repair works. Mr Coulthard said he understood that the sum related to general maintenance work. Mr Coulthard inserted a clause in the agreement to stipulate that the vendor was to deduct that sum from the purchase price. Although Mr Coulthard said the sum related to general maintenance, the agreement for sale and purchase recorded the payment was for "approved capital repairs".

[331] Mr Coulthard said he did not know what a LIM report was at the time but relied on a qualified conveyancer who did not recommend any further inquiries. He accepted in cross-examination that if he had been advised the prudence of obtaining a LIM he would have done so as he would have been interested in what the Council thought about the property at the date of the agreement.

[332] In my judgment there are features of the purchase of unit 5 that do raise the issues of contributory negligence.

[333] It can not be said that Mr Coulthard (RCA Investments) purchased with actual knowledge of the defects or that he acted with such disregard for his own interests so as to make his conduct the sole cause of damage which RCA suffered. Mr Coulthard did ask a builder friend to look at the unit. But Mr Coulthard's failure to protect his interests by failing to follow up the issue of the significant sum charged for capital repairs does amount to contributory negligence. Even a casual inquiry of the Council would have put Mr Coulthard onto a chain of inquiry.

[334] Although Mr Coulthard said that he had not heard about leaky buildings before he bought unit 5, by November 2003 there had been a good deal of publicity around the issue. In particular there had been two articles in the New Zealand Herald, on 24 September 2002 and 25 January 2003 as well as other media comment and television reporting. It is frankly unlikely Mr Coulthard was unaware of the problem. But more significantly, shortly before signing the agreement, Mr Coulthard learnt that the building had been repaired. The repairs were "capital" repairs. The share of cost for his unit was substantial, almost $9,000. Mr Coulthard should at that stage have been alerted that there were problems of a capital nature

with the unit, and made further inquiries. He accepted that he did not make any inquiries about what the repairs related to.

[335] If Mr Coulthard had made inquiry of the Council in November 2003 he would have learnt why the Council had refused to issue a code compliance certificate and that while Mr O'Hagan had been engaged to carry out remedial work the Council had still not issued a code compliance certificate. Mr Coulthard accepted that if he knew the Council was most "unhappy" with the development then he would not have proceeded to purchase the unit.

[336] The damage suffered by RCA Investments as a consequence of its own negligence was the purchase of a defective unit in a defective building. The quantifiable damage is the cost of repairs. The causative negligence of the Council in relation to the damage was in approving the inspection of the various units during the course of the construction even though the units were defective thereby exposing the owners of the units and subsequent purchasers to such damage. The way Mr Coulthard and RCA Investments contributed causally to the damage, was in completing the purchase of the unit when they had the opportunity to make inquiries of either the Body Corporate as to the nature of the repairs or of the Council as to the work the Council required to be carried out. Such inquiries would have disclosed why the Council had not issued a code compliance certificate. At the very least that would have entitled RCA Investments to raise issues with the vendor under clause 6 of the ADLS form. Also, while Mr Coulthard was aware a code compliance certificate had not been issued, there may well have been issues as to representations about that which he could have taken up with the vendor.

[337] In terms of relative blameworthiness, RCA, through Mr Coulthard, has failed to look after its own interests in a way similar to that of the driver who failed to use a seat belt. That must be reflected by a reduction in its claim. However, the major contributor to RCA's loss remains the negligence of the Council in approving the defective development during the inspection process. That has been a major cause of the units being built with the defects. The appropriate reduction in the circumstances is one of 25 percent.

[338] RCA did not pay for the remedial repairs, other than a contribution towards painting. The cost of painting was $1,406.57. Its claim for that and the future remedial costs against the Council must be reduced to take account of its contributory negligence.

[339] RCA also claims for loss of rent and consequential damages. Again such claims must be reduced for its contributory negligence.

Mr Wilson and Ms Stuart – Unit 7

[340] Mr Wilson and Ms Stuart signed an agreement to purchase unit seven on 2 March 2002. The real estate agent provided Mr Wilson and Ms Stuart with a Council certificate for unit seven and confirmed that two outstanding items for the whole development had been signed-off by the Council. Mr Wilson and Ms Stuart subsequently instructed their solicitor to obtain a LIM report. The solicitor did not advise of any issues arising out of that LIM report. They also had a Mr Robert Magnusson Ltd carry out an inspection of the unit. The report did not disclose any leaky building issues. Even though the inspection certificate had been altered by the vendor and was not a statement by the Council, Mr Wilson and Ms Stuart were not aware of that.

[341] On the information they had, there was nothing to put them on notice or inquiry about the state of the unit. They asked a builder to inspect the unit, and they had their solicitor obtain a LIM report. The solicitor did not raise any issues arising out of that. Further, from their point of view they were aware of the sign-off by the Council. Mr Wilson accepted in cross-examination that the code compliance certificate was yet to be issued but they left that matter in the hands of their solicitor. They did not have any reason to consider there would be any difficulty with that, particularly bearing in mind the certificate they had in relation to the unit.

[342] No issue of intermediate inspection or contributory negligence arises in Mr Wilson and Ms Stuart's case.

[343] Mr Wilson and Ms Stuart may recover for their share of wasted remedial costs and future remedial costs.

[344] Mr Wilson and Ms Stuart also claim for lost rental and general damages.

Ms Clark and Trustees of Clark Family Trust – Unit 8

[345] At the outset of the hearing Ms Clark was joined as an additional plaintiff subject to the defendants' positions being preserved under any applicable limitation defence. To the extent Ms Clark and through her the Body Corporate seeks to rely upon any actions or omissions of the Council before 4 February 1998, such claim is barred by s 91 of the Building Act 1991.

[346] Ms Clark purchased by agreement dated 20 March 1999. At the time there was no reason for her to have been put on inquiry. It was well before the issue of leaky homes had received much publicity, the apartments were architecturally designed and were being built by a reputable builder. Ms Clark was, through her solicitor, aware there was no code compliance certificate. She renegotiated a $2,000 reduction in price if the code compliance certificate did not issue. Given her knowledge at the time, that was a reasonable step to take. She then went overseas and was away from New Zealand between 2000 and 2002. In 2002 she learnt the Prendos report had disclosed serious problems with the unit. She supported the instruction of Mr O'Hagan to identify and address the repairs. Ms Clark paid for the repairs. In July 2004, and after the repairs had been carried out, Ms Clark agreed to sell the unit to her family trust. Ms Clark is a trustee of the family trust. As such the trust is fixed with Ms Clark's relevant knowledge of the property at the time of the transfer in October 2004.

[347] Ms Clark personally has suffered loss as a result of the cost of the failed remedial works. She is able to recover those from Mr O'Hagan, the Council and other liable defendants as failed mitigation. The limitation does not affect her claim. The Council inspection only started on 30 January 1998. The negligent inspection of the major defects occurred some time after that date. She is not, however, able to

recover the costs of the reclad and associated costs in her personal capacity as she no longer owns the unit.

[348] The position of the trust is more difficult. As noted, it is fixed with Ms Clark's knowledge in July 2004. Ms Clark was aware of the existence of the Prendos report and that remedial work had been required. While Mr Josephson submitted there was no evidence Ms Clark was aware of ongoing issues at the time, she was aware that the Council had refused to issue the code compliance certificate. There is no evidence that either trustee made any further inquiries before agreeing to the purchase.

[349] In the circumstances, the trustees acted with disregard for the interests of the trust by failing to take any steps at all to enquire into or to protect their position when they knew (through Ms Clark) that the building had defects and the Council had refused to issue a code compliance certificate. Their claims against the Council must be reduced on the grounds of contributory negligence. The appropriate reduction in their case is 25 percent.

Gydick Investments Limited – Unit 9

[350] Mr and Mrs Dickey, the directors of Gydick Investments Limited purchased unit 9 using the Byron form on 22 February 1997. In February 2000 Mr and Mrs Dickey transferred unit nine to their company Gydick Investments Limited. Mrs Dickey said that by that time no specific building problems had been identified. There was no reason for the directors at the time to make any inquiries about the soundness of the unit. They were not aware of any particular difficulties with it. While by this time they were aware that no code compliance certificate had issued, they understood that was because stage 2 was delayed. They had no reason to have any concerns in relation to their unit.

[351] Gydick was not contributory negligent either before or after the purchase.

[352] Gydick is entitled to recover its share of the wasted remedial work and the future remedial costs.

Ms Kim – Unit 10

[353] Ms Kim purchased unit 10 using an ADLS form of agreement in May 2005. Ms Kim is Korean. She was shown the unit by a Korean real estate agent and instructed a Korean lawyer to handle the purchase. Neither advised her to get a LIM. Ms Kim said she had not heard of the leaky building syndrome when she purchased the unit. She relied on the advice of the real estate agent and lawyer. After the purchase she obtained a building report which advised there were no problems.

[354] By May 2005 there was considerable publicity about the leaky homes problem. By then the Council had confirmed its refusal to issue a code compliance certificate. Even accepting that Ms Kim did not know of the issue generally or the problems with this specific unit, Ms Kim was contributory negligent. She signed an agreement for sale and purchase without taking any proper advice at all. She committed to the purchase without making any inquiries or taking any steps to protect her own position. Given her lack of knowledge, she can not be said to have purchased with knowledge of problems, but she took no steps at all to protect her own interests. Ms Kim's contributory negligence is also fixed at 25 percent.

Mr and Mrs McConville – Unit 11

[355] Mr and Mrs McConville bought unit 11 off the plans in March 1997 using the Byron form of agreement. They settled the purchase on 26 August 1998.

[356] There is no basis for suggesting Mr and Mrs McConville were contributory negligent in relation to this purchase. The units were in the process of being built. They were only to settle when a practical completion certificate issued. The principal of the development company was an architect. The building company was a well-established building company. Mr and Mrs McConville had no reason to suspect anything other than the building would be properly completed. In 1997 and 1998 there was not the same publicity about the leaky home issue as there was later in 2002 and 2003.

[357] No issue of intermediate inspection arises in Mr and Mrs McConville's case.

[358] Mr and Mrs McConville may recover for their share of the wasted remedial works and future remedial works.

[359] Mr and Mrs McConville also claim loss of rental and general damages.

Sue Bradley Properties Limited – Unit 12

[360] Sue Bradley purchased unit 12 in April 2003. She was working overseas at the time. On the advice of a financial adviser she purchased unit 12 when she was briefly in New Zealand on a visit. At the time of the purchase she was not aware of the significance of LIM's or code compliance certificates. On her accountant's advice she transferred the property to Sue Bradley Properties Limited in May 2004. By May 2004 Ms Bradley knew that remedial work was required. She was aware of the bill for the O'Hagan repairs. She had been told about the bill in late 2003. Her financial adviser told her it was for work needed to obtain a code compliance certificate. She contacted the vendor and he agreed to pay the account. In her evidence-in-chief Ms Bradley said that by the time the unit was transferred to the company, the repairs had been finished and she "thought the leaky building problems were behind us". In cross-examination she accepted that when her company bought the unit from her in May 2004 she made no inquiries as to the state of the property or to determine whether the property had received a code compliance certificate by then.

[361] But by 2004 Ms Bradley, who owned a number of rental properties, was aware that repair work had been required and also that the work was needed to obtain a code compliance certificate. Ms Bradley should have made an inquiry (as a director of the purchaser, Sue Bradley Properties Limited) from the Council whether the code compliance certificate had been issued. The company Sue Bradley Properties Limited is fixed with her knowledge at the time. If she had sought information from the Council in May 2004 she would have learnt that the Council had refused to issue a code compliance certificate and the reasons for that.

[362] While Ms Bradley may have expected the repairs to have resolved any problems, and so did not assume the entire risk, Ms Bradley should still have made

an inquiry of the Council. In failing to make the appropriate inquiries she was contributory negligent when acting as a director of Sue Bradley Properties Limited. In this case I fix the contribution at 25 percent.

Mr Blackmore and Ms Sheehy – Units 13 and 14

[363] Mr Blackmore and Ms Sheehy bought units 13 and 14 off the plans in November 1997. At the time there was no reason for them to have been concerned about the prospect of the building not being completed satisfactorily. They were not contributory negligent when they purchased.

[364] Ms Thodey submitted that they were contributory negligent after purchase because Mr Blackmore had access to the 1999 Prendos Report and should have advised Mr O'Hagan of the detail of that report. I do not accept that submission. First, Mr Blackmore understood that the report had been given to the Body Corporate on condition it be kept confidential. The report had not been prepared for the purposes of the owners generally but rather for the purposes of the developer in the arbitration with Bracewell Construction. Whether that would have prevented Mr Blackmore using the report is not the issue. It explains why he, reasonably, took the view he could not disclose it or use it for any other purpose.

[365] Next, the individual owners and the Body Corporate were entitled to take the view that Mr O'Hagan as an experienced independent consultant would identify the work that needed to be done. Mr Blackmore and Ms Sheehy are not contributory negligent.

[366] Mr Blackmore and Ms Sheehy may recover their share of the wasted remedial work and the future remedial work.

[367] They also claim for lost rental and general damages.

The Body Corporate's claim

[368] The Body Corporate claims for the damage to common property. For the reasons set out earlier (at paras [68] – [69]) where the defendants have defences to the unit holder's claims, those defences may also be raised and applied to reduce the Body Corporate claim in relation to the common property on a proportionate basis.

[369] There is a further feature in this case. The owners of units 2 and 6 have not joined in the proceeding or sued for loss in relation to their individual units. But as the Body Corporate claim is in respect of all the common property, the fact the owners of units 2 and 6 have not sued in their individual capacity does not affect the Body Corporate's claim in relation to common property, even as to their undivided share in it. The Body Corporate is made up of the owners from time to time. The Body Corporate must act on the basis of majority decisions, in this case to pursue claims in relation to the common property. It is only if the defendants can make out a defence to a particular claim, including the claim brought by the Body Corporate in relation to common property, that the claim will be defeated or reduced. The onus is on the defendant. There is no relevant evidence about the circumstances of the purchasers of units 2 and 6 to support any such defence to the claim made by the Body Corporate in relation to those owners' share of the common property for the future remedial work. There was evidence that the units most recently changed hands in 2005, but there has been no evidence of the knowledge or circumstances of the purchasers at the time. Nor is there evidence about the position of the owner of unit 6 at the time the remedial work was carried out. There is no evidence of circumstances making out a defence to the Body Corporate's claim in relation to the common property insofar as it represents the interests of unit 6 at the relevant time. However, unit 2 was retained by Couldrey. Couldrey was the developer of the defective building at 45 Byron Avenue. Mr Smythe was its principal. As the developer had responsibility for and full knowledge of the defects, the defendants have a complete defence to the Body Corporate's claim for remedial work in relation to common property insofar as it represents unit 2's interest.

Quantum

[370] In a case of this nature "the measure of the loss will ... be the cost of repairs, if it is reasonable to repair, or the depreciation and the market value if it is not" *Hamlin* at p 526.

[371] Given the extent of the defects for which liability has been found against the Council, Mr Smythe and the plasterer, a full reclad is required. The issue of targeted repairs does not arise.

[372] The plaintiffs claim special damages falling into the following categories:

a) past remedial costs associated with the O'Hagan repairs including painting;

b) future remedial costs associated with the remediation of common property;

c) future remedial costs associated with the remediation of private property;

d) consequential losses – in the case of Ms Hough and Ms Kim;

e) consequential losses that may be suffered by owners of other units if tenants are required to vacate during the period of repairs.

[373] There is little dispute between the parties over the calculation of the costs relating to the above heads of loss with the exception of the future costs associated with the remediation of private property. Ms Thodey submitted that there was no evidence before the Court as to the losses suffered by the second-named plaintiffs in relation to the future remedial costs. When each second plaintiff was giving evidence they were asked whether there was any agreement as to the basis upon which the costs of future remediation were to be dealt with. The plaintiffs acknowledged that there was no such agreement. Ms Thodey submitted that in the

absence of agreement there could be no loss sustained by the individual plaintiffs until the remediation work was carried out and the Body Corporate then levied them in whatever proportion it chose to do. Against that, however, the plaintiffs' evidence, consistently, was that they expected they would contribute towards the cost of the repairs in a proportionate way and referred to the way that the costs of the initial repair work had been apportioned between the various units. The expectation and understanding of the plaintiffs, whilst not amounting to any formal agreement, was that such a process would be followed in relation to the future remedial costs. In my view that provides a sufficient evidential basis for this Court to make an award of damages in relation to the individual unit holders claims for the costs of the future remediation in those proportions.

Betterment

[374] It is accepted that units such as these would require repainting at least once every eight years. Taking July 1999 as the start date, repainting would not normally have been required until July 2007. The units were, however, repainted following the O'Hagan remedial work in 2004. Once the substantive remedial work is carried out the units will be repainted once again. The cost of repainting is included as part of the claim for future remedial works. There must be an allowance for betterment as a result because the owners would in the normal course of events have been required to repaint the units themselves in July 2007. Put another way they cannot recover for the cost of a repaint they would have had to incur even if the building was sound.

[375] An affidavit by Mr Ewan, a quantity surveyor, was filed by consent on the issue. Mr Ewan confirmed the quantum of betterment in relation to painting (including scaffolding costs) was $63,815.00 inclusive GST. The parties agree as to quantum, but differ as to how to deal with the betterment figure. The plaintiffs submit it should be deducted from the proposed remedial works. But Ms Thodey submitted that it should be apportioned between the O'Hagan remedial works and the proposed remedial works.

[376] I agree with the plaintiffs' approach to betterment in this case. In my judgment it is somewhat artificial to apportion the betterment in part to the earlier remedial work. That may have been appropriate if the remedial work was entirely successful. It was not, however. The cost of the remedial work is itself a head of damage. The cost of repainting during the course of that remedial work is part of that head of damage. Despite that remedial work the units will have to have further and substantial remedial work carried out on them. As a consequence of that the units will be repainted. The betterment in practical terms only arises on the completion of the proposed remedial work to be undertaken following this judgment. I propose to deduct the agreed betterment figure of $63,815.00 from the cost of that proposed remedial work.

The initial remedial work

[377] I take the total cost of the initial remedial work on 45 Byron Avenue from the evidence of Ms Atkin at $176,508.00. That is made up of the sum of $3,414.00 paid to Mr O'Hagan, $148,685.00 paid to R D Wells Building Limited and $24,409.00 being the amount claimed for the painting component of the repairs.

[378] Forty-five percent or $79,429.00 is attributable to the common property leaving a balance of $97,079.00 attributable to the individual units.

[379] However, it is not simply a matter of spreading those sums between all units. First, the owners of units 2 and 6 do not pursue a claim for the cost of remedial repairs. Next not all of the second plaintiffs incurred the remedial costs and can not recover for them. Finally, for the reasons given earlier, where individual owner's claims are to be reduced for their contributory negligence then the Body Corporate's claim in relation to the common property must also be rebated in the same proportion. On that issue however, the Body Corporate has perpetual succession and is made up of the owners of the units from time to time. It may pursue claims in relation to common property for remedial costs, even where owners of individual units do not pursue a claim. The claim will only be defeated if the defendant is able to make out a positive defence against the unit owner at the relevant time. Where there has been a change in ownership, that does not of itself affect the Body

Corporate's ability to claim in relation to the common property. Where the work has been carried out and previous owners levied for it, the Body Corporate may still pursue the claim in respect of the common property – if successful then the Body Corporate may recover. It will then be for it, as a matter of administration of the Body Corporate how it accounts for that part of the recovered sum.

[380] That leads to the following result in relation to the remedial work:

Unit	**Proportion**	**Body Corporate (45%) ($79,429)**	**Individual Second Plaintiffs (55%) ($97,079)**
1	.077044275	6,119.55	7,479.38
2*	.105633311	-	-
3	.055602498	4,416.45	5,397.83
4	.077044275	6,119.55	7,479.38
5*	.055602498	4,416.45	580.21
6*	.077044275	6,119.55	-
7	.055602498	4,416.45	5,397.83
8*	.077044275	6,119.55	7,479.38
9	.055602498	4,416.45	5,397.83
10*	.077044275	6,119.55	-
11	.055602498	4,416.45	5,397.83
12*	.077044275	6,119.55	-
13	.077044275	6,119.55	7,479.38
14	.077044275	6,119.55	7,479.38
		$71,038.65	

[381] To clarify the amounts relating to the starred units, the owner of unit 2 has not joined in the claim. Notwithstanding that, the Body Corporate is entitled to bring a claim in relation to the common property. But at the relevant time the unit was owned by Couldrey. As noted at para [369] a claim cannot be pursued in relation to unit 2's interest in the common property.

[382] RCA Investments Limited did not have to pay for the remedial costs other than a contribution towards painting. It is entitled to recover its share of the painting

costs which, when the 25 percent reduction is taken into account for contributory negligence leads to a recovery by RCA Investments Limited of $580.21 ($1,406.57 x .55 x .75). However, the previous owner of unit 5 did pay for the repairs and the Body Corporate can maintain a claim in relation to the common property for that.

[383] The owner of unit 6 does not pursue a claim. The Body Corporate is however entitled to pursue a claim in relation to common property. The claim can only be abated or reduced if there is evidence of a defence to any such claim. There is no such evidence.

[384] In relation to unit 8, the moneys are payable to Ms Clark, not the trustees of the Clark Family Trust. It is Ms Clark who incurred the cost of the repairs.

[385] Ms Kim, the owner of unit 10 is not able to recover anything for the remedial repair costs. She did not incur any such costs. The Body Corporate is however able to recover for the costs of the remedial work in relation to the common property.

[386] Sue Bradley Properties Limited, the owner of unit 12, is similarly not able to recover anything for the repair costs. That company did not pay for the repair costs. It purchased after the repairs had been effected. But again, the Body Corporate may recover.

[387] The plaintiffs who are entitled to damages for the wasted repair costs are also entitled to interest on those sums. In some cases the payment for the painting was not made until during 2004 and in three cases even into 2005. The substantial costs, however, related to the remedial costs being Mr O'Hagan's fee and primarily the R D Wells Limited's account. They were all paid by the end of 2003 with the exception of the payment by Ms Clark for unit 8. That was not paid until November 2004.

[388] The costs in relation to units 1, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13 and 14 are to carry interest from 1 January 2004 at the judicature rate. The costs payable in relation to unit 8, in this case Ms Clark, are to carry interest from 1 January 2005.

Cost of the future remedial work

[389] The cost of the repair work is agreed at $2,150,447.00 made up of:

- The construction tender $1,933,419.00
- The consultants' costs $205,933.00
- Consent fees $11,095.00

[390] From those sums must be deducted the betterment figure of $63,815.00. The total cost of remediation for the entire development at 45 Byron Avenue, taking account of the deduction for betterment is $2,086,632.00. That is to be divided as to 45 percent to common property, namely $938,984.00 and as to 55 percent to the individual units within the development, namely $1,147,648.00. Again using the calculations provided by Ms Atkin, the secretary of the Body Corporate that leads to the following result:

Unit	**Proportion**	**Body Corporate (45%) (less contributory negligence where applicable)**	**Second Plaintiff (55%) (less contributory negligence where applicable)**
1	.077044275	72,343	88,420
2*	.105633311	99,188	-
3	.055602498	52,210	63,812
4	.077044275	72,343	88,420
5*	.055602498	39,158	47,859
6*	.077044275	72,343	-
7	.055602498	52,210	63,812
8*	.077044275	54,257	66,315
9	.055602498	52,210	63,812
10*	.077044275	54,257	66,315
11	.055602498	52,210	63,812
12*	.077044275	54,257	66,315
13	.077044275	72,343	88,420
14	.077044275	72,343	88,420
		$871,672	

Consequential losses

[391] A number of the plaintiffs also claim consequential losses. In most cases the claim is for lost rental. The evidence is that tenants will have to move out for eight weeks. Ms Hough gave evidence that she will be required to move out of her unit and also will need to arrange storage and alternative accommodation costs.

[392] Ms Hough gave evidence confirming the costs of storage, relocation and alternative accommodation costs for two months. The alternative accommodation, however, was for a two bedroom apartment. While Ms Hough currently has a flatmate, there would be no need for her to arrange alternative accommodation for the flatmate. A more realistic claim for loss is a figure closer to the rental that other unit owners are achieving in the development. That averages out at approximately between $300 and $310.00 per week. A figure of $310.00 is appropriate. I fix Ms Hough's consequential losses at $3,720.00.

[393] Ms Kim did not give any evidence to support a claim for relocation or alternative accommodation.

[394] The other consequential losses claimed are for the lost rental. The plaintiff does not take objection to the claims in principle. The figures provided by the plaintiffs in evidence updated the sums the Council was prepared to concede to.

[395] In summary, the consequential losses amount to the following sums:

		Less CN	*Net*
Unit 1 – Hough	$3,720.00		3,720
Unit 3 – Kennett and Blakie	$2,800.00		2,800
Unit 4 – Jupp	$3,200.00		3,200
Unit 5 – RCA Investments	$3,120.00	780	2,340
Unit 7 – Wilson and Stuart	$2,480.00		2,480
Unit 8 – The Clark Family Trust	$3,360.00	840	2,520
Unit 9 – Gydick Investments Limited	$2,200.00		2,200

Unit 10 – Kim	No evidence		
Unit 11 – McConville	$2,480.00		2,480
Unit 12 – Sue Bradley Properties Ltd	$2,160.00	540	1,620
Units 13 and 14 – Blackmore and Sheehy	$5,720.00		5,720

General damages

[396] In addition to the claims for special damages, the individual unit owners that are not trustees or corporates also claim for general damages. A sum of $25,000 is sought in each case. Where there are two owners a combined figure of $50,000 is sought.

[397] While accepting that general damages could be appropriate in relation to certain specific claimants Ms Thodey submitted that the award of $25,000 would be seen as at the top of the scale. Counsel referred to Todd *Law of Torts* New Zealand 4th ed and a number of other authorities, the most relevant being *Dicks v Hobson Swan Constructions Ltd (in liquidation) & Ors* ($22,500.00); *Battersby v Foundation Engineering Limited* HC AK CP26/97 5 July 1999 Randerson J ($20,000.00); *Chase & Anor v De Groot & Ors* HC DUN CP141-90 6 September 1993 Tipping J ($15,000.00); *Bronlund v Thames Coromandel District Council* CA190/98 26 August 1999 ($20,000.00) upheld.

[398] Given the nature and extent of the problems associated with this development, the distress and anxiety would be worse for those living with the problems day by day. They are Ms Hough and Ms Kim. The figure of $20,000.00 would be appropriate in their case (subject to an adjustment for contributory negligence on the part of Ms Kim.)

[399] I accept that other individual owners, even though they may have rented out the units, will be affected by the distress and anxiety associated with the defects in the dwelling. In the case of individual unit owners in that category the appropriate figure (again subject to any adjustment for contributory negligence) would be $12,500.00 to take into account they are not living at the property, but will still be

affected by anxiety about it. In the case of joint owners, a global figure of $20,000.00 for the two is appropriate given they share the burden. I note that none of the joint owners live in the units.

The result – judgment

The Body Corporate's claims in relation to common property

[400] The Body Corporate is to have judgment in relation to the common property against the Council, Mr Smythe, Mr O'Hagan, Centre of Attraction Limited (in liquidation), and Andrew Plastering for the sum of $71,038.65 for the past remedial works. That sum is to carry interest from 1 January 2004.

[401] The Body Corporate is also to have judgment in respect of common property for the cost of the future remedial work against the Council, Mr Smythe and Andrew Plastering in the sum of $871,672.00.

Ms Hough – Unit 1

[402] Ms Hough is to have judgment against the Council, Mr Smythe, Mr O'Hagan, Centre of Attraction Limited (in liquidation) and Andrew Plastering for the wasted remedial costs in the sum of $7,479.38. She is to have interest on that sum from 1 January 2004.

[403] Ms Hough is also to have judgment against the Council, Mr Smythe and Andrew Plastering in the additional sum of $112,140.00. That sum is made up of:

- The future remedial costs $88,420.00 for unit 1
- Consequential losses $3,720.00
- General damages $20,000.00

Mr Kennett and Ms Blakie – Unit 3

[404] Mr Kennett and Ms Blakie are to have judgment against the Council, Mr Smythe, Mr O'Hagan and Centre of Attraction Limited (in liquidation) and Andrew Plastering for the past remedial costs in the sum of $5,397.83. That sum is to carry interest from 1 January 2004.

[405] Mr Kennett and Ms Blakie are also to have judgment against the Council, Mr Smythe and Andrew Plastering in the additional sum of $86,612.00 made up of:

- future remedial costs $63,812.00
- consequential losses $2,800.00
- general damages $20,000.00

Mr Jupp – Unit 4

[406] Mr Jupp is to have judgment against the Council, Mr Smythe, Mr O'Hagan, Centre of Attraction Limited (in liquidation) and Andrew Plastering in the sum of $7,479.38 for the past remedial costs. That sum is to carry interest from 1 January 2004.

[407] In addition Mr Jupp is to have judgment in the sum of $104,120.00 made up of:

- future remedial costs – unit 4 $88,420.00
- consequential losses $3,200.00
- general damages $12,500.00

RCI Investments Limited – Unit 5

[408] RCA Investments Limited did not have to pay for the remedial costs other than a contribution towards painting. Taking into account the 25 percent contributory negligence RCA Investments Limited is entitled to judgment against the Council, Mr Smythe, Mr O'Hagan, Centre of Attraction Limited (in liquidation) and Andrew Plastering in the sum of $580.21 for the past cost of painting associated with remedial works.

[409] In addition RCA Investments Limited is to have judgment in the sum of $50,199.00 against the Council, Mr Smythe and Andrew Plastering. That sum is up of:

- future remedial costs – unit 4 taking account of contributory negligence contribution $47,859.00
- consequential losses (taking account of contributory negligence) $2,340.00

Mr Wilson and Ms Stuart – Unit 7

[410] Mr Wilson and Ms Stuart to have judgment against the Council, Mr Smythe, Mr O'Hagan, Centre of Attraction Limited (in liquidation) and Andrew Plastering in the sum of $5,397.83 for the past remedial costs. That sum is to carry interest from 1 January 2004.

[411] In addition Mr Wilson and Ms Stuart are also to have judgment against the Council, Mr Smythe and Andrew Plastering in the additional sum of $86,292.00 made up of:

- future remedial costs – unit 7 $63,812.00
- consequential losses $2,480.00
- general damages $20,000.00

Ms Clark and the trustees of Clark Family Trust – Unit 8

[412] Ms Clark is to have judgment against the Council, Mr Smythe, Mr O'Hagan, Centre of Attraction Limited (in liquidation) and Andrew Plastering in the sum of $7,479.38 for the past remedial costs. That sum is to carry interest from 1 January 2005.

[413] The trustees of the Clark Family Trust are to have judgment against the Council, Mr Smythe and Andrew Plastering in the sum of $68,835 made up of:

- future remedial costs – unit 8 taking into account the contributory negligence contribution $66,315.00
- consequential losses (taking account of contributory negligence) $2,520.00

[414] I make no allowance for general damages for the trustees.

Gydick Investments Limited – Unit 9

[415] Gydick Investments Limited is to have judgment against the Council, Mr Smythe, Mr O'Hagan, Centre of Attraction Limited (in liquidation) and Andrew Plastering in the sum of $5,397.83 for past remedial costs. That sum is to carry interest from 1 January 2004.

[416] Gydick Investments Limited is also to have judgment against the Council, Mr Smythe and Andrew Plastering for the sum of $66,012.00 made up of:

- future remedial costs – unit 9 $63,812.00
- consequential losses $2,200.00

Ms Kim – Unit 10

[417] Ms Kim has no claim for the past remedial costs.

[418] Ms Kim is to have judgment against the Council, Mr Smythe and Andrew Plastering in the sum of $81,315.00 made up of:

- future remedial costs – unit 10 taking account of contributory negligence $66,315.00
- general damages (taking account of contributory negligence) $15,000.00

Mr and Mrs McConville – Unit 11

[419] Mr and Mrs McConville are to have judgment against the Council, Mr Smythe, Mr O'Hagan, Centre of Attraction Limited (in liquidation) and Andrew Plastering in the sum of $5,397.83 for the past remedial costs. That sum is to carry interest from 1 January 2004.

[420] In addition Mr and Mrs McConville are also to have judgment against the Council, Mr Smythe and Andrew Plastering in the additional sum of $86,292.00. That sum is made up of:

- future remedial costs – unit 11 $63,812.00
- consequential losses $2,480.00
- general damages $20,000.00

Sue Bradley Properties Limited – Unit 12

[421] Sue Bradley Properties Limited did not incur any of the remedial costs.

[422] Sue Bradley Properties Limited is to have judgment against the Council, Mr Smythe and Andrew Plastering in the sum of $67,935.00 made up of:

- future remedial costs –taking account of contributory negligence for unit 12 $66,315.00
- consequential losses (taking account of contributory negligence) $1,620.00

Mr Blackmore and Ms Sheehy – Units 13 and 14

[423] Mr Blackmore and Ms Sheehy are to have judgment against the Council, Mr Smythe, Mr O'Hagan, Centre of Attraction Limited (in liquidation) and Andrew Plastering in the sum of $14,958.76 for the past remedial costs of units 13 and 14. That sum is to carry interest from 1 January 2004.

[424] In addition Mr Blackmore and Ms Sheehy are to have judgment in the sum of $199,160.00 against the Council, Mr Smythe and Andrew Plastering. That sum is made up of:

- future remedial costs – units 13 and 14 $176,840.00
- consequential losses $5,720.00
- general damages $20,000.00

The fifth and sixth defendants

[425] Mr Walden and Stack NZ Limited are to have judgment against the first and second plaintiffs.

Costs

[426] Costs are reserved to be dealt with by way of memoranda in the event that counsel are unable to agree. For the assistance of counsel I note that the costs were initially fixed on this file as category 2. In my assessment timeband C would be appropriate for a number of steps in the proceeding, including the initial issuing of proceedings and responding to them (in the case of the successful defendants) and to the discovery and inspection stages. Timeband B should apply to other interlocutory steps, including conferences and pre-trial hearings.

[427] If counsel are unable to agree on costs given that indication then they can exchange memoranda. In the event counsel are unable to agree on costs they are to

file a joint memorandum setting out a timetable for the exchange of costs memoranda.

Concluding observations

[428] This case shows that even where there are acknowledged defects that constitute breaches of the Building Code, the ability of individual plaintiffs to recover in relation to the defects that may affect their units will depend on a number of factors, including the circumstances in which the particular unit holder came to purchase the property. Each claim must therefore be fact dependent. That makes the predicted outcome of claims in relation to multi-unit developments difficult to assess.

[429] Further, although in cases of this nature the Courts routinely allocate the Council's responsibility (where the Council is found to have contributed to the defects in the building) at between 10 and 25 percent, the practical reality is that with the insolvency of others more directly responsible for the defects, such as developers, building companies and, in some instances, architects, the burden of meeting the entire judgment is likely to fall on Councils and through Councils, individual ratepayers. Whether that is a fair result given the limited responsibility for the defects and whether it is sustainable long-term is a matter that this Court is not able to address. But it is an issue that deserves discussion and further consideration in an appropriate forum.

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Venning J