IN THE DISTRICT COURT
AT WAITAKERE

CIV: 2657/04

BETWEEN	CLIVE STRUAN STANDEN & ANNE MARGARET STANDEN Plaintiffs
AND	WAITAKERE CITY COUNCIL First Defendant
AND	DAVID MICHAEL FRANK ASHWELL Second Defendant
AND	DAVID MICHAEL FRANK ASHWELL & ANNE MAUREEN ASHWELL Third Defendants
AND	LITTIN, LITTLE & ASSOCIATES Fourth Defendants

Hearing: 15 - 18 January 2007 23 - 24 April 2007

Appearances: G B Lewis counsel for the Plaintiff
Ms Divich counsel for First Defendant
Mr G Denholm counsel for the Second and Third Defendants
Fourth Defendant in person

Judgment: 24 April 2007 at 5.00 pm

RESERVED DECISION OF JUDGE G V HUBBLE

---

[1] In February 2001 the plaintiffs (the Standens) purchased, from the third defendants, a 1950's brick and tile home situated at 114 Cliff View Drive, Green Bay.

[2] The third defendants ("The Ashwells") had owned the property since 1992 and in 1998 they carried out extensive alterations in accordance with plans and specifications drawn by the fourth defendant, (Mr Little), and approved by Council.

[3] The plaintiffs claim that they had purchased a "leaky home" and they have spent $115,869.84 in having it repaired. They are also seeking $10,000 diminution in value for a deck that they removed and $20,000 general damages for stress and anxiety.

[4] The Statement of Claim alleges negligence and negligent mistatement on the part of the Council, negligence against Mr Little, negligence, also, against Mr Ashwell who, as a builder, carried out work or supervised it himself and against Mr and Mrs Ashwell in breach of contract pursuant to their agreement for Sale and Purchase entered into on 10 February 2001.

BACKGROUND

[5] The Standens came to New Zealand, from England, in early 2001. They drove past the property at Green Bay and saw from a sign outside that it was for sale and subsequently made contact with the Ashwells to view the house. They learnt that the Ashwells had purchased the property 1992 and, subsequently, in 1998 they employed Mr Little to draw up plans for a two stage development with the ultimate intention that an additional bedroom structure would be placed on the existing house which had been completed to Stage 2. The Ashwells had carried out extensive alterations to complete stage one, based on Mr Little's plans.

[6] They viewed two artists' drawings, the first of which showed the house in its existing state completed to Stage 1 and the second artists' impression showed the house with Stage 2 completed. They were advised that the Council had given building consent for both Stage 1 and Stage 2. After further negotiation, an agreement for Sale and Purchase was drawn up by Ms Sandy Anderson, solicitor for the Standens, whereby they agreed to purchase the property for $500,000, subject to the obtaining of a LIM report and carrying out any further enquiries they deemed

necessary within a period of 12 working days from the date of the agreement. A valuation report was obtained which was complimentary of the house stating:

> "This is an attractively renovated building which is effectively a modern house and it is in good condition, both internally and externally, with no observed outstanding maintenance requirement. It has plans and potential for upward development involving a master bedroom and ensuite... Potential buyers would have the option of following up on these plans if they desired."

The valuation was for $515,000 including fixed chattels.

[7] On viewing a cross-lease plan, the Standen's identified a difference in the shape of the house from what was shown on that plan and, accordingly, Ms Anderson requisitioned the title, as per Clause 5.2 of the agreement for Sale and Purchase.

[8] Mr Foy, on behalf of the Ashwells, advised in a letter dated 21 February 2007, that they were unwilling to comply with the requisition because they considered that the Standens had indicated that they hoped to go ahead with Stage 2 of the development and when they entered into the agreement they had already seen the cross-leased plans. In any event, these would need changing again when Stage 2 was completed. Ms Anderson sought a compromise in her letter of 26 February suggesting that the Ashwells contribute $2,500 plus GST towards the surveying costs which were estimated to be between $4,000 and $5,000.

[9] Mr Foy, on behalf of his clients, advised that they would be prepared to contribute $2,000 towards the cost of rectifying the title "On the assumption that the property is purchased "As Is" and this letter forms the basis for the Ashwell's claim that the Standens purchased the property with all its defects at their own risk.

[10] It is clear, however, from the reply from Sandy Anderson's office, dated 27 February, that they did not accept the "As Is" suggestion. They were, however, prepared to settle the rectification requisition by a payment of $2,000. The letter then clearly indicates that rather than purchasing the property "As Is", the Standens were continuing with their enquiry to satisfy the LIM condition. The letter reads:

> "In respect of the LIM condition. I have today contacted the Waitakere City Council to find out when the LIM report would be ready. They have advised that there is one permit that is not final, they are sending an inspector to the property so that matters may be completed."

[11] Mr Foy then replies in his letter of 1 March.

> "So far as the LIM report is concerned, we received advice from Anne Ashwell yesterday that the report was being typed yesterday so if it is not already with you or your clients, it should be shortly."

[12] Council's LIM report was dated 1 March. It disclosed to the Standens the history of the development whereby the Ashwells had applied in 1992 to build two extra units on the site and that these had been completed. It disclosed that the 1998 application for alterations to the brick and tile dwelling were "Not finalised". The reason for this is set out in the letter dated 28 February from the Waitakere City Council to Mr Ashwell. This letter advised as follows:

> "In response to a request for a Land Information Memorandum relating to this property, it has been established that the following permits-consents were issued but no record of a final exists. Consent number 98001989 for alteration to dwelling."
>
> An inspection made on 27 February 2001 revealed that the following requirements are outstanding in respect of the building work.
>
> (i) Upper master bedroom and ensuite (with stairway) still to be built. Note upper floor Buttynol decking completed.
>
> (ii) Fit handrail to entry stairway.
>
> (iii) Fit safety glass to bathroom window.
>
> (iv) Ensure bathroom vent is discharged to outer air.
>
> Once the work is complete a further inspection will be necessary. Please arrange this by presenting this letter and the invoice to Council with the prescribed fee. Please quote the above consent/permit numbers. Should you wish to discuss this matter, please contact the building surveyor, Mr Walker, on extension 8654 for items one to four. Yours faithfully, Keith Walker, Building Surveyor."

[13] Other than that the LIM report states that there is no record of unauthorised work on this property.

[14] Ms Anderson raised with Mr Foy the incomplete nature of the consents (as shown in the LIM report) and in her letter of 2 March, indicated that the LIM report

condition could only be confirmed "once this matter has been satisfied". Mr Foy is clearly becoming impatient with the situation and on 6 March he replies inter alia:

> "You can see from that page that Resource Consent has been granted and that that is the property your clients are purchasing from our clients in its present state.
>
> Our clients have done their best to help with the limited information that has been supplied. They appreciate that no extension of time was granted in respect of the LIM and no notice was given to them by 2 March, pursuant to Clause 8.2 (ii) of the contract.
>
> Whilst our clients are quite happy to help with any queries that your client's may have, if they can help them, they regard the contract as becoming unconditional on 2 March and that settlement will take place on 30 March next."

[15] Ms Anderson clearly does not accept that situation and in her letter of 6 March replies:

> "In order to clarify matters, we enclose a letter from the Council and reconfirm that we are still relying on Clause 8.2(ii). The question of any extension does not arise as we didn't formally seek and extension to the LIM condition but advised on the fifteenth working day, after the date of the agreement, that our approval was withheld until certain matters were attended to."

[16] Ms Anderson remained concerned at the absence of any final certificate or consents from Council in respect of the work carried out and was advised by Council that they could not guarantee that all conditions of the Resource Consent had been complied with and that the Council's Monitoring Officer would need to visit the site and inspect the works. With considerable reluctance, it appears that Mr Foy's letter of 8 March acknowledges that although he regards the contract as unconditional, he accepts that there is a desire for both parties to proceed with the settlement and offers to pay the costs of the Council's Monitoring Officer carrying out an inspection. It is then evident from Ms Anderson's reply of 8 March that, on behalf of her clients, she is still anxious to establish that the Ashwells are not in breach of any of their warranties under the agreement and that the inspection should proceed to ascertain this. In my judgment, at this stage there is no acceptance by the Standens that the contract was unconditional.

[17] It is not clear whether any inspections, in fact, were carried out but Mr Standen says that he had discussions both with the Ashwells and with the Council who confirmed that provided the items (ii) to (iv) of Council's letter were completed, then they would be able to get a "final sign off" from the Council. As it appeared these four items were easily satisfied, Ms Anderson then confirmed that the contract was unconditional and settlement took place on 30 March 2001.

[18] After taking possession in early April, the first thing the Standens did was to get a costing on the completion of Stage 2 and engage their own architects to make some minor alterations to the Stage 2 put forward by the Ashwells. The costings, however, were too high and they elected, at that stage, not to proceed with Stage 2.

[19] Towards the end of 2001 the Standens noticed some cracking in the plaster, particularly at the junction of the new work with the old brick and tile building. They employed a building consultant, Mr Alexander, to look at the problem and after some delays they arranged an inspection. They received his report, dated 25 March 2002, which was the first indication that there were quite serious problems with the additions to the house and he recommended that further investigation and repairs should be carried out within the next six months in order to protect their asset.

[20] In accordance with that advice they asked Mr Alexander to carry out a detailed inspection and make a full report and they also sought from Hybrid Construction Limited an estimate of the cost of carrying out the recommended repairs. The sixty page specification and plans prepared by Mr Jones detailed serious deficiencies in the building and a visual estimate which could only be detailed once cladding had been removed, was in the region of $36,000.

[21] By July of 2002 the Standens had completed the four items mentioned by Council in their letter of 28 February 2001, and asked the Council to carry out a final inspection so that a final sign off could be obtained. The Standens had advised the Council they did not intend to proceed with Stage 2. The visual inspection was carried out by the Council in August 2002 and apparently it was then immediately obvious to them that the stucco finish had many of the faults which had been

outlined in the Alexander report. The Council "recommended that an independently qualified person be engaged to identify all remedial work required."

[22] Mr Standen said that within a few months of entering the property he cleaned out all the spouting and continued to do this at approximately three-month intervals. He also filled the cracks which had appeared and painted over them in order to prevent the ingress of water. The issue then came back into the hands of Ms Anderson who put the Council on notice that a claim against them would be pending. The basis for this was that Mrs Standen had spent some time at the Council enquiring about obtaining a final Certificate of Completion before the LIM condition was made unconditional. Her evidence was that she discussed with Council the possibility of not proceeding with Stage 2 of the development, in which case she was assured that provided the four other items in the letter of 28 February were completed, then a Code of Compliance certificate could issue. It was now apparent that the Council had resiled from that position.

[23] Various site meetings then took place between the Standens and Mr Anderson and their builder and Mr Ted Donaghy, the building inspector with the Waitakere City. It was agreed that the report of Alexander and Co indicated a need to proceed with the remedial work and if this was done in accordance with the specifications outlined by Alexander and Co, then Waitakere City would be prepared to carry out a final inspection and issue any necessary certificates.

[24] The Standens and their advisors considered that Mr Ashwell, as the original builder of the alterations ought to be afforded the first opportunity to carry out the repairs as required by Council and as outlined by the Alexander report. This offer was made to Mr Ashwell in the letter dated 12 May 2003 and, not surprisingly, he sought further particulars of the requirements and shortcomings alleged against him. The essential allegation against Mr Ashwell was that he failed to meet the requirements of the Building Code and failed to build in accordance with the Building Act. The Ashwells succinctly clarified their view of the matter in a letter of 24 August 2003 in the following terms:

> "Mr and Mrs Standen were well aware before they signed the contract to buy our property that they were purchasing a part completed home. Even after

> the contract was signed we reduced the price a further $2000 only on the condition that the Standens purchased the property "As Is".
>
> We refute and deny all allegations in your correspondence and will strenuously defend any steps Mr and Mrs Standen choose to take against us."

[25] The repairs were then carried out between November 2003 and March 2004 at a total cost of $115,869.84. Provided the remedial work carried out was necessary there has been no real challenge to the quantum of the various invoices presented and there is agreement on both sides that serious water damage has occurred as a result of water entering the walls of the house in various areas. The main issues outstanding are:

i) Did the Standens purchase the house "as is".

ii) Did the damage arise because the Standen's failed to clean out the gutters with sufficient regularity, thus resulting in an overflow of water and ingress of that water into the walls of the house.

iii) Was the delay in carrying out the remedial work a contributory cause of the loss.

iv) Are there issues of betterment to the house by the use of weatherboard cladding and an $8,000 repaint.

v) Was it necessary to remove all the underlying plywood or should it have been reused.

vi) Was the expense of an additional foundation under the front doorway and the lifting of the front doorway entrance a necessary expense.

vii) If the claims or any of them are appropriate in what proportion should the Council, the Ashwells, or the architect, Mr Little, share the cost.

viii) Should there be an award of damages for distress and inconvenience, and

ix) Should there be an allowance for up to $10,000 for diminution in value relating to the removal of the side deck.

[26] When all the work was carried out, Council inspected and issued a Code of Compliance certificate. The Standens then resold the property on 6 October 2004.

DAMAGES

[27] The plaintiff is claiming damages under three heads. First, it is accepted by all parties that the extensions to this house had a very serious water ingress problem. The plaintiff has appropriately claimed for the "cost of cure" of this problem. This, however, may not be the appropriate measure of loss when considering, for example, the foundation and uplift at the entranceway and on the decks. Generally, the Court will contrast assessments calculated on a diminution value basis or a cost of cure basis and by comparing the relevant calculations, would be able to decide what, in the circumstances, is reasonable. ***Warren & Mahoney v Dynasty Way*** (CA49/88) 26 October 1988, ***Watts v Morrow*** (1991) 1 WLR 1421, ***Gardner v Marsh v Parsons*** (1997) 1 WLR 4H9, ***Farley v Skinner*** (2001) 3 WLR 899 and ***Harvey Corporation v Baker*** (2002) 2 NZLR 213 illustrate that balancing process.

[28] Secondly, the plaintiffs are claiming diminution in value of $10,000, arising from their choice not to replace the side deck which was completely removed and the original entrance way and staircase restored. The defendants quite rightly point out that there is no evidence at all to demonstrate any such diminution in value and, accordingly, that claim must fail.

[29] Thirdly, the plaintiffs claim general damages for stress and anxiety. This is now a well-recognised basis for claim but awards are generally modest, depending on the particular circumstances.

SOME GENERAL ISSUES

(a) Cleaning the Spouting

[30] All parties agree that serious damage has been caused to this house by the ingress of water into the walls. Mr Ashwell, himself, described the situation as "a tragedy" showing "horrendous damage". His explanation, however, is that all or most of this damage has been caused by the Standen's failure to regularly clean out the spouting. As a result, the spouting has overflowed either at the down pipe or at the back of the spouting where it attaches to the house and, thus, down into the walls. Mr Jones, the expert witness called for the plaintiffs, disagreed that this was possible and I accept his evidence on that point. Furthermore, the evidence presented was that Mr Standen did regularly clean out the spouting. In any event, spouting on any house will, from time to time, encounter such volumes of water that some overflow will occur, whether they are cleaned and maintained or not. A house should be constructed in such a manner that it caters for this occasional excess of water. The original brick and tile house, for instance, did not apparently have this problem. Furthermore, the photographic evidence shows that some of the worst areas of internal rot were in areas where there was no spouting, for example, the east balcony and the areas shown in photographs at page 340, 325, 332 and 333.

(b) Experts

[31] Generally, I prefer the evidence of Mr Jones, which was thorough and detailed, and he had the advantage of seeing the damage at all phases, namely, on initial visual inspection, with the cladding removed and at completion. Mr Wilson did not have the advantage of these inspections and tended to adopt the role of an advocate on behalf of the Ashwells.

(c) The Archictect - Mr Little

[32] With regard to the architect, Mr Little, I accept Mr Jones's criticism of the plans but what that fails to take into account is that Mr Little had a considerable history of working with Mr Ashwell and, at least in the case of these alterations, he

was employed merely to supply sufficient plans for the grant of resource and building consents. He was neither asked for, nor required to produce detailed drawings of, for example, water proofing on the deck balustrades. He was entitled at that restricted level of employment to expect that any competent builder would adopt a system of construction that was waterproof. His fee for doing these drawings (approximately $4000) was a fraction of what it would be if he was a supervising architect called upon to provide full working drawings. The Council had no problems with what he presented and the consents were granted without any request for further detailing. Mr Little was of the view that he also presented the Council with a specification but that did not come to light at the trial and it seems likely that a specification was never presented to Council with the plans. There is nothing in the plans, as drawn, which could be said to have caused the leaking into the walls. These plans show a Colorsteel roof, Hardiflex cladding and aluminium joinery. There is nothing improper in variations to these items by arrangement between the builder and Council but it does illustrate that Mr Little's function was to provide a general outline, sufficient only for obtaining consent. It was possible for the house he designed to have been built waterproof and he was entitled to expect that methods would be adopted by the builder with the approval of Council that would produce this result. In my judgment, therefore, Mr Little does not share any of the responsibility for the problem which has arisen.

(d) Failure to complete Stage II

[33] The next general matter relates to the argument of the defendants that the whole situation would have been different if the Standens had gone ahead and completed Stage 2, resulting in a Colorsteel roof, replacing the existing tile roof. The argument is that the original consent required the completion of this second stage and that the Standens were contributory negligent in failing to complete that second stage. I do not, however, accept that there is any merit in this argument. From the time Mr and Mrs Ashwell obtained the original consent, it was always possible that they would never complete Stage 2. Nor was there any obligation on the Standens to complete Stage 2. In my judgment, the house completed to Stage 1 was required to be leak proof, in its own right, without any dependence on the future possible construction of the upper story and Colorsteel roof. I accept Mr Jones's

evidence, the existing tile roof, though old, remained completely water tight. Furthermore, in the majority of areas where there was serious rot within the walls (for example the balustrades on the decking) the Colorsteel roof had no relevance. I do not accept, therefore, that the Standens purchased this property as a "work in progress". They purchased it as a complete dwelling and had the right to expect that it was competently built and waterproof and appropriate to be lived in. The completion of Stage 2 was nothing more than a possible, though desirable future addition.

(e) Purchase "as is"

[34] The next general matter is that, as already indicated, I do not accept that the Standens agreed to buy this house "as is". Not only does the correspondence demonstrate that they did not accept this situation but also I accept the plaintiff's argument that the reference to "as is" was confined to the issue of location of the house on an appropriate plan.

(f) Purchase without CCC

[35] I accept that the Standens must accept some responsibility for entering into the contract when a Code of Compliance certificate had not actually issued. I accept that they obtained assurances both from the Ashwells and from the Council that the letter of 28 October required just four matters to be attended to. It is, however, clear from the letter itself that a further inspection would then follow. In assessing the appropriate level of contribution, it is also relevant that even if the Council had issued a Code of Compliance certificate prior to the discovery of the real problems, the same issues would still be before the Court.

(g) Lapse of Time

[36] The next general issue relates to the alleged failure of the Standens to carry out timely repairs. Thus, it is said, that the house had to endure at least two winters before the problems were attended to and, accordingly, the damage was very much worse. I do not, however, accept that there is any merit in this argument. In the first

place, the Standens did make an attempt to seal and paint cracks where they appeared in the cladding. Furthermore, I accept Mr Jones's evidence that the real problem was not ingress of water through these cracks, but rather from the method of construction which did not comply with the building code or reasonable standards of practice. It is a reasonable assumption that the leaking problem existed from the time these extensions were completed in 1998. It is likely, therefore, that the quite extensive damage had already occurred when the Standens bought the house. A plaintiff is not required to be measured by too rigid a standard when assessing appropriate steps to be taken in mitigation and it is not surprising that the need to carry out such extensive repairs was a gradual process of realisation.

[37] The defendants must assume a burden of proving that the delay caused additional damage and I am not satisfied that they have been able to do this. In my judgment it is a reasonable assumption that even if the Standens had removed all of the cladding within a month of purchasing the property, they would have been faced with the same cost of repair.

APPORTIONMENT OF RESPONSIBILITY

THE STANDENS

[38] As already indicated, I do not accept that the Standens caused any of this loss by failing to clean out the guttering. Nor do I accept that they failed to mitigate their loss. It is easy, in retrospect, to argue that they ought to have obtained a building report and also a Code of Compliance certificate before purchasing. On the other hand, it was not unreasonable for them to accept the word of Council and the Ashwells that there appeared to be only four relatively minor items to be completed before the building would be "signed off". There remained, however, a risk that this would not follow. It was not unreasonable for them to have accepted that the house was well constructed and in good condition because they believed Mr Ashwell was a master builder and to all outward appearances, the house showed no signs of the hidden problem. The full impact of the "leaky homes" problem had not emerged at the time they purchased. They did, however, assume some risk in purchasing without the Council carrying out a final inspection and issuing a Code of

Compliance certificate. In my judgment, the percentage of that risk should be fixed at 10%.

WAITAKERE CITY COUNCIL

[39] The plaintiff's case is that the Council owed them the duty of care in the following respects:

a) To ensure, before issuing the Building Consent, that the plans and specifications were of a sufficient standard for it to be satisfied on reasonable grounds, that the provisions of the Building Code would be met for the alterations were properly completed in accordance with the plans and specifications.

b) To have in place a system of inspections designed to reasonably ensure that the alterations were constructed in accordance with the Building Code.

c) To carry out the inspections with reasonable skill and care in accordance with the system referred to above.

d) In the event that any building worked failed to comply with the Building Code, to take such steps as were necessary to ensure compliance with the Building Code at a sufficiently early stage.

[40] Council admits that it owed the plaintiffs a duty of care to:

a) Exercise due care and skill on the processing and issue of Building Consent, and

b) Exercising due care and skill on the inspections carried out of works undertaken pursuant to the Building Consent.

THE LAW

[41] The leading authority on the extent of a Council's duty to a homeowner is ***Hamlin v Invercargill City Council*** (1996) 1 NZLR 513 (PC). The Hamlins had obtained consent from the Invercargill City Council to erect a dwelling on a particular piece of land in 1972. Subsequently, the building cracked because the foundations were sinking due to the unstable nature of the land. It was held that the losses suffered by the Hamlins, correctly analysed, was pure economic loss and, as such, it was necessary for the plaintiff to establish the existence of "reliance" as a necessary pre cursor to the existence of a duty of care. "Reliance" in Hamlins case was found to arise from community standards and expectation:

> "In a succession of cases in New Zealand, over the last 20 years, it has been decided that community standards and expectations demand the imposition of a duty of care on local authorities and builders alike to ensure compliance with local bylaws." (Lord Lloyd)

Ms Divich argued that the "community reliance" which was readily found in the Hamlin case relating to a situation in 1972 may not necessarily exist today. The situation then existing was that:

(i) The Hamlin's were individuals of modest means.

(ii) The dwelling was constructed under a regime of Government support and funding.

(iii) The Hamlins were unable to protect themselves contractually by virtue of the Sale and Purchase agreement, and

(iv) The Hamlins could not be expected to obtain a pre purchase survey. These were not available at the time and there wasnt the practice of future home owners to obtain them.

The Court noted:

> "The bylaws and the question of whether it was just and equitable for a local authority to be under a duty of care to the owner (successors in title) in discharging responsibilities in relation to the inspection of houses under

> construction has to be considered against that background which was special to New Zealand, of the times."

However, in ***Three Mead Street Limited & Ors v Rotorua District Council & Ors*** High Court, Auckland, 37/02 11 June 2004, Venning J stated:

> "The current position in New Zealand is this. Hamlin is authority for the proposition that a Council has a Duty of care to houseowners and subsequent owners and will be liable to them for economic loss arising out of defects caused by a Council's negligence in the course of the building process."

[42] It appears to have been accepted by the Court that the community reliance referred to in Hamlin's case remains.

[43] In any event, with regard to the Standen's position, it is clear that they had many conversations with Council to ensure that the building complied and their efforts to gain confirmation that the only hindrance to "signing off" the house was the completion of four items in the letter of 28 February. In my judgment the Standens placed actual reliance on the Council that they had discharged the duty "to ensure compliance with the local bylaws."

INSPECTIONS

[44] In addition to the duty of care outlined above, in relation to the issue of building consent, the Council does have duties in relation to inspections. Ms Divich for the Council argues that a firm distinction should be drawn between allegations that a Council has performed an operation in a way that may be considered negligent as opposed to where it is alleged that a Council had a power to act but did not do so.

[45] The duty recognised in ***Hamlin v Invercargill City Council*** (supra) is, in general terms, "to ensure compliance with local bylaws".

[46] Section 76(1) of the Building Act 1991 provides:

> "For the purposes of this part of the Act "inspection" means the taking of all reasonable steps to ensure –
>
> (a) That all work is being done in accordance with the building consent, and

(b) In respect of any building for which a compliance schedule is issued, the inspection and maintenance provisions of that compliance schedule are being complied with… etc."

[47] In my judgment the use of the word ensure in Hamlin and in s 76(1) requires a Council to provide

a) sufficiently qualified personnel to peruse plans and specifications and carry out inspections.

b) (b) An inspection system in place focusing on structural soundness of the building before that structure is covered up and of seals, flashings and construction systems to prevent water ingress.

The latter appears to be one of the main focuses of the recent case of ***Dicks v Hobson Construction Limited***, Unreported, High Court, Auckland 22 December 2006, Baragwanath J.

[48] I accept Ms Divich's argument that there may be a difference between a situation where a Council actually carries out an inspection and where they have elected not to carry one out but that is simply one factual issue in arriving at an assessment of whether the Council has taken reasonable steps to "ensure" compliance with the building code.

[49] Council is not a clerk of works, nor is it an ensurer of quality workmanship. It is, however, "he task of the Council to establish and enforce a system that would give effect to the building code" (Baragwanath J, ***Dicks*** case para 116) and the Council is under an obligation to ensure that an inspection process is, in fact, carried out (***Waipa District Council v Widowson***, unreported, District Court, Hamilton, 19 April 2006, para 27.

[50] The duty, during inspection was described by Heron J, in ***Birch v Palmerston North City Council***, unreported, 22 July 1998 as follows:]

"The Council are not being asked to supervise the building but they are required to be vigilant and to point out to owners, circumstances where structural requirements go unattended. Furthermore, it must be obvious to

> inspectors that early observations of structural requirements are far more satisfactory than later detection where further work may be done and the cost of remedial work increased (B7)."

[51] I agree with Ms Divich that it may be possible for the Council to limit its civil liability by a published policy decision but that policy decision could not circumvent the continuing duty to ensure compliance with consent, compliance with bylaws and compliance with the building code.

[52] The provisions of the Building Act 1991 that are irrelevant to the Council's duty and are as follows:

Section 7 –	All building work must comply with the building code.
Section 24 –	Territorial authorities charged with responsibility of administering the Act enforcing the building code.
Section 26 –	Territorial authorities are under a duty to gather information, carry out research as necessary "To carry out effectively its functions under the Act."
Section 28 –	The Territorial Authority may charge to recover its actual and reasonable costs.
Section 34 –	Processing Building Consents. If Council is to grant consent "If satisfied on reasonable grounds that the provisions of the code would be met." If building work is completed in accordance with plans and specifications.
Section 42 –	The Territorial Authority may issue notice to rectify.
Section 43 –	Council is to issue a Code of Compliance certificate once satisfied "On reasonable grounds that the building to work to which the certificate relates complies with the building code."

Section 76 - Inspections (supra).

[53] Ms Divich submitted that it needed to be taken into account that at the time this particular building consent and inspections were carried out, a much more informal system was in place in this Council and, indeed, most Councils throughout New Zealand. In addition, building authorities accepted construction methods and materials, which proved totally inadequate and gave rise to the catastrophic leaky homes problem.

[54] That, however, does not lighten the burden on Councils of ensuring systems are in place and levels adopted to produce a structurally sound building and one which is free from serious water ingress. In ***McLaren Maycroft & Co v Fletcher Development and Co. Limited*** (1973) 2 NZLR 101, the Court of Appeal stated, with regard to industry practice:

> "Henry J makes it clear that the Court is not necessarily bound by such evidence but a Court must retain its own freedom to conclude that the general practice of a particular provision falls below the standard required by law."

And in ***Dicks v Waitakere City Council*** (supra) Baraguanath J at p 26 observed:

> "The common law measures the standard of reasonable care in the first instance against the practice of other Councils but always subject to the determination of the Court that independently, of any actual proof of current practice, common-sense dictated particular precautions."

[55] The Court stated at para 112 "***Turner v P's*** test whether independent of any actual proof or current practice common-sense dictated particular precautions, requires consideration of both what risk is in prospect and the costs and difficulty of dealing with it."

THE CAUSE OF DAMAGE

[56] The principle failures which resulted in the extensive water ingress into the walls of this house were the method of construction adopted for the roof apron flashings, head flashings and balustrade flashings. In the south extension, diverter flashings were directed under the plaster and directly into the wall. All of these

factors caused the leaking from the top of the walls. In addition, plaster was taken down to ground level without clearance and this caused a degree of ingress of water from the ground upwards.

THE LIABILITY OF COUNCIL

[57] I would accept Ms Divich's submission that authority supports the view that to prove that a Council has been negligent in issuing a building consent on the basis of the drawings that were provided (in the absence of specifications) would require clear evidence of inadequacy as measured against the standards of the time. In this particular case it is, however, clear that the Council's own "building consent pack "required" cross sections with detailing on all aspects of construction, deck construction, hand rails and barrier infill details to be included."

[58] I believe that Mr Lewis's submission that if the plans had included properly detailed cross sections of decks and deck barriers, they would have showed a sloped top (not a flat top), a break between the balustrade walls and the deck membrane and, in the case of the east deck, sub floor ventilation. It appears in this case that the previous history of other dwellings designed by Mr Little on behalf of the Ashwells had resulted in a confidence on the part of the Council, that a sound and leak proof building would be constructed. It appears in this case that there was no specification filed with the Council and changes were made to substantial matters such as cladding and window joinery without notice of variation on the Council file. If the builder had been in possession of plans with proper detailing of, for example, the water proofing in the parapets and control joints at the junction of the new building work in the old dwelling, much of the leak problem would not have arisen. In my judgment, therefore, the Council must accept some liability for issuing this building consent.

[59] With regard to the 12 inspections made, it is accepted by counsel that in a number of areas there were failures on the part of Council "to ensure" proper construction and compliance with the building code. For example, it is accepted by the Council that the architect was not asked for detailing in crucial areas, and subsequent inspections failed to ensure that the deck balustrades were probably waterproofed, there was no break at the base of walls to the decks, that there was

insufficient height differential between the internal and external decks and the ground and that there were no head flashings on the joinery in some areas. With regard to most of these items, Council says that the builder ought to share, at least, equal liability or perhaps as much as 80%.

BUILDER

[60] Builders owe a duty to take reasonable care in carrying out building operations to avoid foreseeable losses to others arising out of defective construction (***Bowen v Paramount Builders (Hamilton) Limited*** (1977) 1 NZLR 394. This duty cannot be avoided by delegation to an independent contractor. ***Mt Albert Borough Council v Johnson*** (1979) 2 NZLR 234.

[61] In the present case Mr and Mrs Ashwell accept that they jointly employed others to carry out much of the work but Mr Ashwell, as a builder, did some of the work personally. The main thrust of Mr Ashwell's defence is that he built in accordance with the plans and obtained the approval of Council for his work. Any damage that has been caused has been caused by the Standems themselves, failing to clear out the gutters and by their delay in completing the defective work. I have little doubt that Mr Ashwell is a very competent builder and has demonstrated this in other houses built on the same site. The alterations to this very different older dwelling have resulted in what Mr Ashwell, himself, describes as horrendous damage. This has all occurred because of a failure to comply with the NZ Building Code, Clause B2 and E2, second schedule to the Building Regulations 1992, and failure to adopt best practice under acceptable solution E2/AS1 in the New Zealand Standard NZS 4251, Part 1, 1998 and NZS 3604 1990. Mr and Mrs Ashwell must, therefore, accept a share of responsibility for what has occurred. Mr Ashwell resists the claim that he alone was builder. The admission that he and Mrs Ashwell controlled the building process renders his separate inclusion in the claim unnecessary.

APPORTIONMENT OF LOSS

[62] The Council accepts that a significant portion of the shortcomings of this building have resulted from breaches on their part. Mr Ashwell must also accept that in most of the individual cases, which have resulted in failure, he was the responsible builder whether supervisor or otherwise and breaches of the Building Code and good practice have occurred.

[63] I have had the benefit of over 150 pages of detailed submissions by counsel on individual issues of fact and thorough examination of case law. I have noted, in particular, Mr Denholm's submissions concerning defences of Volenti non fit injuria and "caveat emptor" but I do not accept that they have any application to the present circumstances. To all outward appearances this house appeared to be well constructed and attractive in its appearance. The Standens had no choice but to rely upon verbal or written assertions either from the builder or from the Council. As already indicated, I do not accept the Standens failed to maintain this building by cleaning out the gutters, nor do I accept that the delays that occurred and a failure by the Standens to attend the cracks as they appeared (although the evidence is to the contrary) had any relevance to this claim. The fact is that the building was seriously leaking because of the manner in which it was constructed. The Standens had no choice but to carry out all the work as suggested by the Alexander report because that is what the Council required. The degree of leaking was such that whether or not Mr Ashwell can claim that there was compliance with the bylaws, authorities which I have referred to are clear that even if there is compliance with this standard, and that standard does not measure up, the overall requirement of the building codes and the Council's duty to provide a reasonably leak proof house prevail.

[64] With reference to the key defects table produced by the plaintiff, Council accepts some responsibility for the failure to provide a waterproof deck balustrade. I accept Mr Jones's evidence that, this was contrary to good stucco practice and the James Hardy Technical manual and responsibility should be shared equally between builder and Council.

[65] With regards to the next item, the absence of a break at the base of the walls to the deck, again, I accept Mr Jones's evidence as to breaches of the New Zealand standard 3604 and the 1994 standard, 4251 and good stucco practice, and again responsibility should be shared by the Council and the builder. The third item was the insufficient height differential between the interior and external decks and ground. This is something the Council insisted upon but I do not accept that Mr Ashwell's construction was in any respect inadequate for this particular house, either as to the differential height or the foundation. This is something that should have been foreseen by the Council during the course of construction. It is a Council responsibility.

[66] With regard to the cladding imbedded into the ground; there is argument that this could have been a result of build-up from the driveway construction. It was a contributor, but not a large one, to the ingress of water. The Council, at one of its ten inspections, ought to have noticed this fault and equally the builder ought not to have allowed it to occur. The responsibility there is also equally shared. With regard to the poor detailing around the post penetrations of the deck, the absence of head flashing above the north west window, these, in my judgment, are entirely the responsibility of the builder. It was possible to create water tight joins at the post penetrations and the absence of head flashing above the north west window would not necessarily be obvious upon inspection. Both these items are builder responsibility.

[67] With regard then to the front entrance, it is my judgment that both the Council and the builder ought to share responsibility overall, 50% each.

[68] With regard to the south extension, poor connection of the parapet to the existing roof and the lack of kick out flashings was an obvious shortcoming and one created by the builder. I accept that a Council would not necessarily make a detailed roof inspection and the builder should accept the major responsibility for this shortcoming.

[69] The absence of head flashings above the timber joinery again, in my judgment, are responsibility that should be shared equally as is the fault in the

parapet tops which were only partly capped. This was a serious non-compliance with good stucco practice and the Brands Bulletin 345. Responsibility should be shared equally between the Council and the builder.

[70] With regard to the bathroom, Council accepts responsibility for the absence of head flashing over the window but this was also something the builder ought to have attended to. As to the gap between the butynol rubber roof and the fascia board. This, I agree, was a temporary measure and there is no real evidence that it was the cause of any water intrusion, however, as I have found, it is no answer of the problems in this building that the construction was a work in progress. The responsibility should be shared equally by the builder and the Council for this shortcoming though it is minor in nature.

[71] Concerning the failure to provide for horizontal movement and drainage over plaster between the old and new work, Mr Jones's view was that proper expansion joints should have been placed at the time the wire work was installed. The builder and the Council were of the view that these could be cut in later. Neither approach was adopted, however, and this undoubtedly contributed to the cracking. The process adopted was not in accordance with any standards, particularly, the "acceptable solution" E2/AS1 and New Zealand Standard 4251 1998, again, responsibility should be shared equally for this problem.

[72] Finally, there is the east balcony. This provided the most serious example of advanced rotting and again this arose through the deck balustrades being flat tropped and not being properly waterproofed, in breach of the good stucco practice in the James Hardy Technical manuals.

[73] The absence of a break at the base of the walls of the deck and the sub floor ventilation are all obvious faults and, again, liability ought to be shared equally between the builder and the Council for this occurring. The amount claimed in respect of this, however, is $10,000 for diminution in value but there is no evidence to support that claim. The assessment of $10,000 was for the replacement of the deck but, in fact, the property was sold before that could be carried out. Some

allowance should be made, however, for the demolition process, disposal of the timbers and the reconstruction of that area which has been claimed.

[74] It will be apparent from the foregoing that, in my judgment, the Council must accept a shared responsibility in almost every fault but the builder ought to be absolved from liability in respect of the front entrance up-stand and the foundation which were matters entirely within the control of the Council as the building was being constructed. The end result did not contribute to any of the damage sought, this was a relatively expensive item to attend to.

[75] The appointment of loss can at best be an assessment, in my judgement, the measure of responsibility should be shared in the proportion of 60% to Council and 40% to the builder, 10% to the Standens. The claim against the Council succeeds against the builder (which evidence demonstrated was both Mr and Mrs Ashwell) in negligence, both in respect of the approval of plans and the failure to "ensure" compliance with its own bylaws and good building practice and for negligent misstatement in encouraging the Standens to accept that a "sign off" or Code of Compliance certificate would, subject to further inspection, be issued if the items mentioned in their letter of 28 February had been attended to. The claim succeeds against the builder, which is Mr and Mrs Ashwell, for breach of their duty of care in tort and also breach of vendor warranties in the sale and purchase agreement.

GENERAL DAMAGES

[76] The claim for general damages for distress, anxiety and inconvenience has been well settled. In ***Chase v Degroot*** (1994) 1 NZLR 613 the sum of $15,000 was awarded. In ***Snodgrass v Hammington,*** CA 254/94 22 December 1995, again, $15,000 was awarded to one plaintiff and $5,000 to another for distress arising from subsidence on their property. In ***Battersby v Foundation Engineering Limited,*** High Court, Auckland, CP 26/97 5 July 1999, Randerson J awarded the sum of $22,500. In the present case I am making an allowance for the 10% contributing negligence I have found. With regard to the Standens, I allow general damages of $12,000 up to and including the present day so that the sum ought not to attract interest.

QUANTUM

[77] In addition to the sum of $12,000, awarded above, I accept Mr Jones's evidence that all of the work carried out was either essential or sensible. I mention sensible because although some of the sub surface plywood cladding could have been reused, this was only possible if considerable time was taken in an endeavour to dry it out. Furthermore, the destructive investigation required that substantial areas of this plywood needed to be removed. In my judgment, therefore, the plaintiffs are entitled to succeed to the full extent of their claim with a reduction of $10,000 for the unproved diminution in value and a further 10% for the reasonable contribution which would be accepted by the Standens, the balance being shared between the Ashwells as to 40% and the Waitakere City Council as to 60%. The plaintiff is entitled to costs in respect of which I invite memoranda to be filed if there is any argument to suggest that they ought not to be award on the scale 2B. The plaintiff is also entitled to interest at the rate of 7½ % from the date in which proceedings were issued to the present day.

Dated at……this……day of…….2007 at ……..am/pm

G V Hubble
District Court Judge