**IN THE WEATHERTIGHT HOMES TRIBUNAL**

**TRI-2010-100-000078**
**[2011] NZWHT AUCKLAND 40**

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| BETWEEN | JOHN JOSEPH FINN AND ANGELA MARGARET POYNTER AND SHANNON MARIE JONES as Trustees of the ANGELA POYNTER TRUST<br>Claimants |
| AND | YUE MIN WANG<br>(Deceased)<br>First Respondent |
| AND | XU DONG CHEN<br>Second Respondent |
| AND | AUCKLAND COUNCIL<br>Third Respondent |
| AND | COLIN HENRY THOMPSON & SALLYANN THOMPSON<br>(Claim Withdrawn)<br>Fourth Respondents |
| AND | PURE REALTY LIMITED<br>(Claim Withdrawn)<br>Fifth Respondent |
| AND | MELODY LOWE<br>(Claim Withdrawn)<br>Sixth Respondent |
| AND | LU ZHENG<br>Seventh Respondent |
| AND | ACR REROOFING LIMITED<br>Eighth Respondent |

Hearing: 28 and 29 June 2011

Closing Written Submissions: 7 July 2011

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| Closing Oral Submissions: | 8 July 2011 |
| Counsel Appearances: | Mr M Taylor, for the claimants<br>Ms F Divich, for the third respondent<br>Mr Xu Chen, the second respondent – self represented (Mr Daniel Fan appeared as Mandarin Interpreter for Mr Chen)<br>Mr Lu Zheng, the seventh respondent – self represented |
| Decision: | 22 August 2011 |

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**FINAL DETERMINATION**
**Adjudicator: K D Kilgour**

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## INTRODUCTION

[1] The claimants are the owners of a leaky home at 48A Queenstown Road, Onehunga. They purchased it in late 2006 when it was approximately five years old. Shortly after moving in they experienced leaks and subsequently filed a claim with the Department of Building and Housing. The assessor recommended the house be fully reclad with a cavity.

[2] The claimants are claiming the estimated costs of this work from Xu Dong Chen, the Auckland Council, Lu Zheng and ACR Reroofing Limited. Mr Chen was allegedly the developer of the property, Mr Zheng was the builder and the claimants understand that ACR Reroofing Limited installed the roof and the apron flashings. Auckland Council, the territorial authority that issued the building consent, carried out inspections and issued a Code Compliance Certificiate (CCC). Throughout the course of the adjudication the claimants settled with the fourth, fifth and sixth respondents and as such the claim against them, has been withdrawn.

### Factual Background

[3] When Mr Chen and his late wife purchased 48 Queenstown Road in 1999 it consisted of a large section with an old homestead. They lived in the homestead and subdivided the land into three sections. Mr Chen designed two houses to go on the empty sections. Mr Chen qualified as an architect in China and Japan but his qualifications are not recognised in New Zealand. After designing the house for 48A Queenstown Road Mr Chen applied for building consent which was issued in February 2000. He contracted Mr Zheng to build the house on a labour only contract and engaged other trades to carry out other construction work. The Council carried out 13 inspections during construction and issued a CCC in

November 2000. Mr and Mrs Chen sold the property after it was completed.

[4] On 1 December 2006 the claimants signed a sale and purchase agreement to buy 48A Queenstown Road from the fourth respondents. The agreement was subject to their solicitor's approval, obtaining a LIM, and the sale of Ms Poynter's existing home. The house was approximately 5 years old and newly painted. Before signing the agreement for sale and purchase Mr Finn asked Mr Thompson, one of the fourth respondents, whether the property had any leaking issues. Mr Thompson advised they had only experienced one leak caused by blocked drains on the deck which caused flooding into the garage. Mr Finn was also reassured that the parapets and balustrades had cap flashings and that there were no decorative external "dados". Mr Finn had experienced leaks in his previous property as a result of these issues.

[5] Prior to the agreement becoming unconditional the fourth respondents' real estate agent provided the claimants with a building report from Future Safe Building Inspections Limited which had been completed in 2002. The claimants however did not get an updated report or get any other building professionals to look at the property. The purchase of the property was settled in February 2007.

[6] In late March 2007, following a particularly heavy rain storm, the claimants noticed leaks in the ceiling of the study (directly below the upstairs deck). They contacted a contractor to inspect the damage and provide a verbal assessment of the condition and the cost to repair the room. That contractor identified concerns with the overall condition of the home, in particular the tiling of the upper deck and the design of the handrail round the parapet walls to the upper deck and adjacent to the entry steps. The claimants arranged for that building contractor to replace the handrails on the parapet walls and the entry step walls. Upon removing the handrails they

discovered that there was extensive rotting of the framing timber within the parapet walls requiring removal of the existing cladding.

[7] On 17 August 2009 the claimants engaged Richard Angell of Maynard Marks to undertake a building survey of the home. He found that the home had major water ingress defects and recommended it be reclad with a ventilated cavity. The claimants then lodged an application to the Weathertight Homes Resolution Service. Philip Crow, the WHRS assessor, identified significant defects with the home (similar to Mr Angell's report) and recommended a full reclad and replacement of a substantial amount of timber framing.

[8] The claimants do not have financial resources to complete the remedial work recommended by the experts. This claim is proceeding on the basis of estimated repair costs of $439,773.25. Mr Angell estimated remedial costs of $455,087.25 and Mr Crow $373,821.

[9] Mr Finn and Ms Paykel continue to reside in the home but once some finality is achieved following this proceeding, Ms Paykel intends to relocate to the Hawkes Bay. Mr Finn wants to continue to reside in the home, although that may prove financially impossible.

**ISSUES**

[10] The issues for determination by this Tribunal are:

- What has caused damage to the home?
- What is the appropriate repair option?
- Should the following claims succeed:
  - — The claim against the developer and designer?
  - — The claim against the Council?
  - — The claim against the builder?
  - — The claim against the roofer?

- What is the measure of damages; reasonable remediation costs or diminution in value?
- Were the claimants contributory negligent in entering into the purchase agreement in December 2006 without a pre-purchase inspection report?

**What has caused damage to the home?**

[11] Mr Angell had undertaken visual inspections and limited destructive testing. He reported before Mr Crow, in November 2009. Mr Crow undertook visual inspections, moisture readings and limited destructive testing during four visits to the property in January and February 2010. He reported on 16 March 2010.

[12] The evidence of Mr Angell and Mr Crow was heard concurrently at the hearing. They both stated that the parapet and balustrade walls were originally uncapped and that metal cappings had retrospectively been installed by a previous owner. Having lifted a section of the capping to the parapet wall they both discovered that the parapet wall tops were horizontal and finished with the texture coated fibre cement. Destructive testing confirmed that no form of underlining waterproofing membrane had been provided. As a consequence, the parapet wall tops (prior to the metal cappings being installed) were reliant upon a paint finish for waterproofing and this is a detail that lacks longevity. Due to the lack of fall to the parapet walls moisture would have been able to sit upon the horizontal surface and enter via any cracks or pinhole penetrations through the paint finish, causing decay of the underlying framing. The framing under the parapet and balustrades was visibly decayed. Mr Angell and Mr Crow both agreed that the main cause of water ingress to this home was the insufficiently weatherproofed horizontal surfaces, particularly with the parapets and balustrade walls as this defect alone required that the home be reclad with a ventilated cavity.

[13] Mr Angell identified that the door and window joinery units had been installed with head flashings solely. In addition the building paper does not extend over the head flashings and therefore it fails to deflect any unplanned moisture ingress from the defects above. The fibre cement cladding has also been taken hard down on to the head flashings which could trap any unplanned moisture ingress that may have entered above. Mr Angell also stated that the lack of cladding clearance and the lack of capillary break, may also enable moisture to wick up behind the cladding. He found that no sill flashings had been installed which is contrary to the manufacturer's details. Sill flashings are required to deflect any unplanned moisture ingress instead of tracking directly onto the timber below. Mr Crow confirmed this same finding in respect of the kitchen window. Mr Crow agreed that the provision of proper flashing around openings in the cladding such as windows and doors is essential if the cladding system is to provide adequate protection against moisture ingress. This defect also requires that the home be fully reclad with a ventilated cavity.

[14] Mr Angell stated in his report that there was insufficient termination with the roof apron flashings and the buried fascia gutters. Mr Crow agreed in relation to the buried fascia gutters but was less concerned with the apron flashing terminations. The metal gutters appeared to have been fixed to the building prior to the installation of the cladding and the metal fascias appeared to have been fixed over the gutter prior to the application of the texture coating. Both Mr Crow and Mr Angell stated that there are clear paths for moisture to ingress behind the gutters. Mr Angell stated that the drawings prepared by Mr Chen failed to show how the apron flashings or more particularly the gutter system, was to be installed and terminated.

[15] Mr Angell further stated that lack of cladding clearances to the adjacent ground was a defect and that the plans for the home did not include the recommended base details or specified clearances.

[16] Mr Angell found cracking of the fibre cement sheet cladding, mainly limited to the eastern and northern elevations has caused water ingress.

[17] The Council agreed that the lack of under flashings on the parapets and balustrades when originally constructed and the lack of ground clearances at the bottom of the cladding were defects allowing water ingress and necessitated the need to reclad the home.

[18] Mr Angell and Mr Crow agreed that the primary causes of water ingress causing material damage to the exterior perimeter of the home were:

- insufficiently constructed and waterproofed horizontal surfaces;
- installation of the windows;
- buried fascia gutters; and
- the lack of cladding clearances to the adjacent ground.

**What is the appropriate repair option?**

[19] Mr Angell, Mr Crow and the Council all agreed that the appropriate and only proper repair option for this home is that it be fully reclad with a ventilated cavity and that the external joinery be re-installed with not only head flashings but mechanical sill and jamb flashings. There was no disagreement expressed to the materially similar scope of remedial works produced by Mr Crow, Mr Angell and Mr Finn.

[20] I determine that the home to be properly remediated to code compliant standards needs to be fully reclad with a ventilated cavity.

**Claim against the Developer and Designer**

[21] The claimants submit that Mr Chen was at all material times the developer of the property as he was responsible for the design and building of the home.

[22] The Court of Appeal decision in *Mt Albert Borough Council v Johnson*[1] is authority for the proposition that a developer owes a non-delegable duty to an intended owner of a home to properly supervise the construction of the home. Cooke J, and with whom Somers J joined with Richardson J in agreement:[2]

> We would hold that it is a duty to see that proper care and skill are exercised in the building of the houses and that it cannot be avoided by delegation to an independent contractor.

[23] Harrison J in *Body Corporate 188273 v Leuschke Group Architects Limited* defined a "developer" as:[3]

> A developer, and I accept there can be more than one, is the party sitting at the centre of and directing a project, invariably for its financial benefit. It is the entity that decides on the builder and any other professional advisors. It is responsible for the implementation and completion of the development process. It has the power to make all the important decisions. Policy demands that the developer owes actionable duties to owners of the buildings it develops.

[24] It was apparent throughout this claim that Mr Chen was not aware of the legal consequences of his role as designer and developer, and whilst advised to seek legal representation at various stages of the proceeding he never did.

[25] He acknowledged that he commissioned the subdivision of the land and that he was responsible for and prepared the plans for

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[1] *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA)].
[2] At [241].
[3] *Body Corporate 188273 v Leuschke Group Architects Limited* (2007) NZCPR 914 at [34].

the home. He personally signed and submitted the application for the building consent and the two amended applications. Mr Chen acknowledged that he selected the various trades to build the home and negotiated with them in respect of the work that they were to perform and the price they were to be paid.

[26] During the building Mr Chen was living at the neighbouring property and exercised close oversight of the building work. Mr Zheng's evidence is that Mr Chen attended the building site regularly to oversee the work of the various trades.

[27] Mr Chen accepted that he arranged for the Council inspectors to attend the building site to undertake their inspections although he was prompted by Mr Zheng on a number of occasions to seek such inspections.

[28] Mr Chen and his late wife never lived in the new home. Mr Chen arranged the marketing and sale of the vacant allotment and the new home which was sold within months of receiving the Code Compliance Certificate.

[29] Clearly his knowledge and experience of the importance of weathertightness was lacking, but he had the knowledge and understanding to undertake the role of managing the house build. He sourced all the building materials and arranged for their delivery to the building site. It was Mr Chen and his late wife who stood to gain from the subdivision and building project.

[30] Mr Chen's response to the claim throughout was that he delegated to independent contractors and they were responsible for the build and they caused the defects.

[31] Ms Divich submitted that the test set down in *Mt Albert Borough Council v Johnson* includes changing the landscape (such

as was done at 48 Queenstown Road) and subdividing and building houses for return. She and Mr Taylor submit that that was exactly was Mr Chen did. I agree. Mr Chen fits the definition of "developer" the courts have adopted.

[32] Mr Chen had overall control of the building of the claimants' home. He owed the claimants a non delegable duty of care to discharge his responsibility as developer in a way that would ensure construction to the standards of a reasonable and careful person in his position, so as to prevent loss to subsequent owners. Mr Chen's building management was not competent. The experts were in agreement that the home was not constructed weathertight. It was not code compliant. For these reasons the claimants succeed in their claim against Mr Chen.

[33] I find that Mr Chen is jointly and severally liable to the claimants for the full amount of the established claim.

**Claim against the Council**

[34] The statutory background to these claims is now well understood. Section 7 of the Building Act 1991 (the Act) requires that all building work for residential properties, such as the subject dwelling, is required to comply with the Building Code which is part of the regulations enacted under the Act. As the home was constructed before 2004, the Building Act 1991 was the applicable Act at the time of construction. Section 32 of the Act requires building work to be done in accordance with a building consent and the Council, in terms of section 43 of that Act shall only issue a Code Compliance Certificate if it is satisfied on reasonable grounds that the building work complies with the Building Code.

[35] The Council inspections in this case were carried out by Council officers pursuant to section 76 of the Act. That section defines inspections as, amongst other matters:

> [The] taking of all reasonable steps to ensure –
>
> a) That any building work is being done in accordance with a building consent; ...

[36] The law is quite clear. A territorial authority can be liable to owners and subsequent purchasers of residential properties for defects caused or not prevented by its building inspector's negligence.[4]

[37] The claimants alleged that the Council's inspections failed to detect the building defects and this negligence has caused the claimants' losses.

[38] Ms Divich accepted that the Council owes the claimants a duty of care when issuing the building consent and when it carries out inspections during the construction of the home. She further submitted the Council breached its duty of care owed when it carried out its inspections in that it failed to detect the lack of under flashings on the parapets and balustrades and the lack of ground clearances at the bottom of the cladding, and that these defects alone necessitated the need to reclad the property.

[39] I conclude that because of these failings the Council's inspections were negligent. I determine that the Auckland Council is jointly and severally liable to the claimants for the full amount of the established claim.

**Claim against the Builder**

[40] Mr Zheng was a labour-only builder. Mr Chen stated that Mr Zheng told him he had been building houses in New Zealand since 1998. Mr Zheng's evidence was that he had built four or five

[4] *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC); *Bowen v Paramount Builders (Hamilton) Limited* [1977] 1 NZLR 394 (CA).

monolithic clad homes before this home, but that he had never built a home with parapets and balustrades. However, he was familiar with the Harditex manual applicable at the time. Mr Chen's plans called for Harditex monolithic cladding to be installed on this home. The evidence was that Mr Chen had sourced monolithic cladding from a Mt Roskill supplier and that what was erected by Mr Zheng was a similar product to Harditex known as "Eterpan". Mr Chen, Mr Zheng and the experts, stated that installation of Eterpan was a similar process to Harditex. In his closing submissions Mr Chen stated that the cladding was in fact a product known as "duratex". In any event the cladding erected by Mr Zheng was a face fixed monolithic cladding and nothing turned upon its actual "brand name".

[41] Mr Zheng said in his written brief of evidence that he had no "eterpan" technical literature on site during construction. His evidence changed to there possibly being the "harditex" or "eterpan" technical literature on site.[5] Mr Chen's evidence is that he provided the harditex installation literature to Mr Zheng. In any event Mr Zheng had ready access to the designer, Mr Chen. He should have had any queries regarding various aspects of the build clarified or determined by Mr Chen.

[42] The evidence establishes that Mr Zheng installed the cladding[6] and the exterior joinery (windows and doors).[7] The experts' agreed that there were clear departures from the Harditex installation literature in relation to both.

[43] Mr Zheng's defective building work included:

a) the erection of horizontal parapets and balustrades not constructed in accordance with the Good Texture Coating Practice Guide or the Harditex Technical Literature;

[5] Mr Zheng's notes of evidence page 18 lines 5 to 10.
[6] At 3 lines 38 to 40, pages 4 lines 1 to 12.
[7] At 3 lines 23 to 36.

b) gutters installed prior to the cladding;
c) the external joinery, doors and windows were installed contrary to the manufacturer's recommendations. In particular the building paper was incorrectly applied, there were no mechanical sill flashings and the cladding was hard down onto the head flashings.

[44] The claimants also allege that Mr Zheng was responsible for the incorrectly constructed cladding base detail which included the lack of clearances to the adjacent ground. I am not satisfied that the Mr Zheng had any responsibility for this defect. The party primarily responsible for the lack of ground clearances was the landscaper, driveway, pathway installer. This work was completed subsequent to Mr Zheng's building work. However, Mr Zheng's building work is directly responsible for the lack of ground clearances on the deck/balcony over the first floor.

[45] Mr Zheng was self-represented throughout the proceeding. His response to the claim and his submissions during the hearing were that he had no responsibility for the waterproofing, that he was solely a labour-only contractor and that Mr Chen was responsible for all defects.

[46] Mr Zheng throughout was under the mistaken impression that because his contract with Mr Chen was "labour-only" it obviated the implicit requirement for the building work to be done competently, to a weathertight standard and Code compliant.

[47] Mr Zheng had a written contract with Mr Chen which established that Mr Zheng was responsible for constructing the parapets and the balustrades, installing the windows and doors. All such construction and installation was faulty and such faulty work

was the prime cause of the home leaking together with the lack of ground clearances.

[48] The law is clear. In *Bowen v Paramount (Hamilton) Limited*, the Court of Appeal held that "contractors, architects and engineers are all subject to a duty to use reasonable care to prevent damage to persons who may should reasonably expect to be effected by their work."[8] Chambers J stated:

> The law in New Zealand is clear that if a builder carelessly constructs a residential building and thereby causes damage, the owners of the residential building can sue the builder in negligence...
>
> In short, there is nothing in principle preventing a builder owing a duty of care to subsequent owners of the building. Of course, in the present case, Mr Taylor did not 'build' the villas on his own. Others would have helped. But that would not prevent Mr Taylor from being liable in negligence. It is enough if his conduct 'is a contributory cause'; [it does not need to be] in some sense a major or primary cause.

[49] The situation is no different where the builder involved is a labour-only contractor such as Mr Zheng. Support for this opposition is readily found in the cases of *Riddell v Porteous*[9] and *Boyd v McGregor*[10] where the courts rejected the submission that a builder who is engaged on a labour-only basis somehow has diminished responsibility for his defective building work.

[50] The Court in *Boyd v McGregor* dismissed the submission that a label, such as labour-only, applied to a building party should determine their legal liabilities. The "labour-only" epithet does not in any way reduce a builder's liability. The Judge in *Boyd v McGregor* referred to the Court of Appeal's decision in *Riddell v Porteous* which

[8] *Body Corporate 202254 v Taylor* [2008] NZCA 317 at [125] and [128] per Chambers J.
[9] *Riddell v Porteous* [1999] 1 NZLR 1.
[10] *Boyd v McGregor* HC Auckland CIV-2009-404-5332, 17 February 2010.

held that while the contractual terms of the builder's contract is relevant, a labour-only builder is still required to meet the requirements of the New Zealand Building Code and good building trade practice. Based on these authorities, I accept that the law in New Zealand is very clear. If a builder (whether on a full contract or labour-only) carelessly constructs a residential building and thereby causes damage, the owners, whether original or subsequent purchasers, can sue the builder in negligence. Mr Zheng, as a labour-only contractor to Mr Chen, was engaged to undertake the building work for the house and thereby owed a duty of care to the present claimants in carrying out that work. Mr Zheng carried out significant aspects of the defective building work which has allowed water ingress. Mr Zheng's lack of experience, particularly in the construction of the parapets and the balustrades, coupled with his lack of enquiry as to the means of complying with Mr Chen's design resulted in a breach of Mr Zheng's obligations. Mr Zheng should have made an enquiry of an expert or of Mr Chen directly concerning the parapets and balustrade construction and its required waterproofing but that hardly explains Mr Zheng's failure to call for flashings for the external joinery and to install them with the windows and doors.

[51] Mr Zheng failed to ensure proper standards of workmanship and breached his duty of care to the claimants which has caused widespread damage and loss resulting in the need for the home to be fully reclad.

[52] I find that Mr Zheng is jointly and severally liable to the claimants for the full amount of the established claim.

**Claim against the Roofer**

[53] ACR Reroofing Limited, was joined to this claim in October 2010 after Mr Chen stated that the roofer, according to his recollection, was Auckland Commercial Roofing Maintenance

Limited. There is no record on the Companies Register of a company by that name, but ACR Reroofing Limited was previously called Auckland Commercial and Residential Maintenance Limited (company no. 386330). The eighth respondent has not participated in this proceeding although it did file an early response to the claim through its sole director and principal shareholder, Mr Brendan McLoughlin. Mr McLoughlin stated in his response to the Tribunal on 2 November 2010 that the company records do not contain any paperwork concerning the roofing installation for 48A Queenstown Road. Mr McLoughlin stated that he drove by the property after being served with these proceedings and that he does not remember ever doing the roofing work on the home.

[54] Mr Chen has not resiled from his recollection of the roofer. He stated that in 2000 he found the roofer from the yellow pages. He further stated during the hearing that he never engaged the roofer on a subsequent contract and Mr Chen has developed a number of properties since his development of this home. Mr Zheng said that he does not recall who the roofer was.

[55] The sole defect with the roofer's work was the short termination of the apron flashings. Mr Crow's evidence did not express any concern with this alleged defect. It was Mr Angell alone who impugned such work. The evidence of Mr Chen, Mr Zheng, Mr Crow and Mr Angell was that it would have been the roofer who erected the apron flashings at the junction of the roof and the wall cladding. Mr Angell's evidence is that the damage resulting solely from the short terminations of the apron flashings has not alone resulted in the need to reclad the home.

[56] I am not satisfied from Mr Chen's unsatisfactory recollections of many aspects of this development that his naming the roofer as ACR Reroofing Limited is sufficiently sound. Mr Taylor in his closing submissions has not pursued the claimants' claim against the eighth

respondent and he confirmed this at the oral closing submissions. The claim against ACR Reroofing Limited is dismissed.

**What is the measure of damages; reasonable remediation costs or diminution in value?**

[57] The High Court decision of *Lester v White*[11] is authority for the position that a successful claimant is not entitled to any more than the costs of the cheapest remedy for the damage caused. Mr Taylor submitted that if a claimant intends to continue to occupy and to repair then the costs of restoration is the correct measure.[12] Mr Taylor also submitted that if the cost of repair is more expensive to the respondents than diminution in value then they have no one but themselves to blame. An excess of repair costs over loss in value does not of itself make the award of repair costs unreasonable.

[58] The correct test for determining whether damages should be assessed on the basis of remedial costs or loss in value was correctly set out in this Tribunal by Adjudicator McConnell:[13]

> Legal authorities support the proposition that a successful claimant is not entitled to more than the value of the most appropriate remedy for the damage or loss caused. When assessing loss the Tribunal should not apply a fixed rule as there is no *prima facie* rule as to whether diminution of value or the cost to reinstate or restore defects is the most appropriate measure of loss. Each case must be judged on its own mixture of facts both as they affect the claimants and the other parties.[14] The Tribunal should also select the measure of damages which is best calculated to fairly compensate the claimants for the harm done while at the same

[11] *Lester v White* [1992] 2 NZLR 483 (HC).
[12] *Dodd Properties (Kent) Limited & Ors v Canterbury City Council & Ors* [1980] 1 ALLER 928, at 938.
[13] *Cao & Ors v Tony Tay & Associates Ltd (in Liquidation)* [2010] NZWHT Auckland 26.
[14] *Dynes v Warren & Mahoney* HC Christchurch, A252/84, 18 December 1987; *Warren & Mahoney v Dynes* CA 49/88, 26 October 1988; *Bell v Hughes* HC Hamilton, A110/80, 10 October 1984.

> time being reasonable as between the claimants and the other parties.[15]

[59] Andrews J in the recent High Court decision on appeal from that Tribunal determination stated that the Tribunal correctly stated the test.[16]

[60] Ms Divich cited Justice Andrews' decision in *Cao v Tony Tay & Associates Limited (in Liquidation)* in support of her submission that the facts of this case suggest that diminution in value is the appropriate award. Ms Divich stated that Andrews J's judgment where it was stated that:[17]

> T]here may be a different measure of damages in each particular case. Which measure is ultimately chosen in each case is the one that is reasonable and makes the most sense in that case.

[61] Ms Divich submitted that while not determinative for this matter, the facts considered relevant by Andrews J are illustrative:[18]

> ...[I]n determining the appropriate measure of damages, the Tribunal should have considered the evidence that this is the appellant's family home, bought because it satisfied their particular requirements and that they have always intended and wished to remedy the defects so that they can continue to live there. The Tribunal should also have considered the evidence, both from the appellants and from Mr Gamby, that there is no other similar property on the market at a price the appellants can afford.

[62] Ms Divich submits that in this claim, Ms Poynter and Mr Finn have separated and no longer live together at the home. Ms Poynter is intending to move to the Hawkes Bay. Ms Divich mentions that whilst Mr Finn intends to repair the property and remain living there, this will prove financially difficult because his evidence is that he will

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[15] *Cao v Tony Tay and Associates Ltd (In liquidation)*[2010] NZWHT Auckland 26.
[16] *Cao v Auckland City Council* HC Auckland, CIV-2010-404-7093, 18 May 2011.
[17] At [30] – [31].
[18] At [52].

need to purchase Ms Poynter's equity share in the home. She says he has exhausted his savings, there is a large mortgage on the property already and that the claimants could not afford to repair the property prior to initiating proceedings. Ms Divich concludes that it would be difficult for Mr Finn to be able to financially manage retention of the property. Ms Divich continues that the need for a family home of this size to accommodate two groupings of people and their furniture is no longer applicable.

[63] As mentioned at paragraph [8] above, this claim is brought on the basis of estimated remedial costs tendered by Reliant Limited, at $439,773.25.

[64] In *Cao* Andrews J stated that there was little practical difference between Tipping J's approach in *Dynes v Warren & Mahoney*[19] and the Court of Appeal's decision in that same case whereby both accept that there may be a different measure of damages in each particular case and which measure is ultimately chosen is the one that is reasonable and makes most sense. Andrews J stated:[20]

> The primary concern of the Court in each case should be to ascertain remedial costs but, as with any "prima facie rule", that is not inflexible; the Court must always be satisfied that remedying defects is a reasonable course to adopt.

[65] Andrews J accepted that the factors set out by Tipping J in *Dynes* are appropriate for considering what is the reasonable course to adopt in ascertaining the appropriate measure of damages in any particular case. This claim, consistent with such authorities must be considered on its own particular facts as they affect the claimants and as they affect the respondents. I heard evidence from two expert valuers. Their evidence was heard concurrently. Michael Gamby gave evidence for the Council and Gavin Broadbent

[19] *Dynes v Warren & Mahoney* HC Christchurch A242/84, 16 December 1987.
[20] At [31].

responded for the claimants. Both valuers were close in relation to the land value applicable, Mr Gamby ascertained the value to be $270,000 and Mr Broadbent $290,000.

[66] Both valuers were asked to value the property "as is" with defects. Mr Gamby said that there was some value in the property in addition to the land value and his calculation of the unaffected value was $330,000. His valuation gained support from a letter from Ray White Real Estate, introduced by Mr Taylor during the hearing, which stated that the rule of thumb that real estate agents use to apportion value is 60% of the current market value of the property if it was to be sold as is in its affected state.

[67] Both valuers then gave evidence of the value of the property without defects. However Mr Broadbent did not value the property "as is" without defects on the same basis as Mr Gamby. He valued it on the basis that it was repaired, with new cladding and a cavity. Also he did not factor in the market stigma attaching to monolithic clad homes. Both Mr Broadbent and Mr Gamby agreed that there is a stigma attached to unaffected monolithic clad homes; Mr Broadbent says the stigma is between 5-10% and Mr Gamby says it is higher, between 10-15%.[21]

[68] Mr Broadbent said that the property's value, but on the basis that the remedial work was completed with a ventilated cavity, would be $690,000. However, in my view that is not the correct approach to adopt. He should have assessed the capital value of the property as if it was unaffected by leaks as Mr Gamby had done.[22]

[69] Mr Gamby did value the property (capital value) in its unaffected state and his assessment was $600,000. However both valuers were unanimous in suggesting that the remedial option (they

[21] Notes of evidence page 34 lines 1-6.
[22] Donaldson LJ in *Dodd Properties (Kent) Limited v Canterbury City Council* [1980] 1 ALLER 928 at page 938.

were aware of the estimate of repair costs) was not an economic use of the land. To remediate the property they said would far exceed the value of the property whether in its unaffected state (Mr Broadbent conceded that if he valued on the same basis as Mr Gamby then his valuation would be closer to Mr Gamby's $600,000 factoring in the stigma discount) or even in its repaired state of $690,000.

[70] Mr Gamby's diminution in value was $330,000. Mr Broadbent's valuation, if calculated on the same basis as Mr Gamby's for an unaffected building would be closer to $621,000. So, taking Mr Broadbent's value for the land of $290,000 from $621,000, I am left with $331,000 as Mr Broadbent is diminution in value amount.

[71] Mr Gamby gave evidence of a number of comparable properties on the market with similar features and in a similar locality to the property. Mr Broadbent also gave evidence of other properties presently on the market different to Mr Gamby and at a higher value. Both Mr Finn and Ms Poynter did not think that the properties suggested by Mr Gamby were similar for they were not brand new properties. However, the claimants' home was not brand new when they purchased. I am satisfied that Mr Gamby illustrated a number of alternative properties of a similar price and age which could serve as an appropriate replacement.

[72] Having considered the evidence of the experts I am satisfied that remedying the defects in this home is not the reasonable course to adopt. The home is no longer the claimants' family home as Ms Poynter is not intending to live in the home. Mr Finn, on the evidence I have heard, will find it financially difficult to continue to own the home. There are comparable properties on the market for, or near to, the unaffected value which collectively the claimants could afford but because of their changed circumstances that is not an appropriate option for them now.

[73] I determine from the evidence I have considered that the sum which will fairly compensate Mr Finn and Ms Poynter while at the same time being reasonable between the claimants and the respondents is the loss in value of the property which I conclude is $331,000.

**Were the Claimants contributory negligent in entering into the purchase agreement in December 2006 without a pre-purchase inspection report?**

[74] The defence of contributory negligence has been specifically pleaded by Ms Divich for the Council. The onus is on the respondents to establish affirmatively the defence of contributory negligence. The standard of care required is the ordinary degree of care that is reasonable in the circumstances. *Jones v Livox Quarries Limited*[23] established that the essence of contributory negligence is a failure on the part of claimants to take reasonable care to protect their own interests where they are, or ought to have been, known to the claimant and reasonably foreseeable. Claimants who fail to take reasonable care in looking after their own interests and thereby contribute to their own loss, may be confronted with the defence of contributory negligence.[24] When considering responsibility for the loss in question, the concepts of causal potency and relative blameworthiness must be taken into account.[25]

[75] Ms Divich submits that the claimants caused or contributed to their own loss arising from their conduct at the time of purchase in early December 2006 when they failed to make the agreement for purchase conditional on obtaining a satisfactory building report which, if obtained, would reasonably have identified the defects which the claimants now allege. Ms Divich further submits that if an

[23] *Jones v Livox Quarries Limited* [1952] 2 QB 608 (CA) at [615].
[24] Stephen Todd (ed) The Law of Torts in New Zealand (5th ed, Brookers, Wellington, 2009) at 994.
[25] At 996.

adverse report had been obtained then the claimants could have extracted themselves from the purchase.[26] The claimants were not unconditionally committed to the purchase until 19 January 2007 so the Council's argument is that the claimants had ample time if not before entering into the conditional agreement then certainly up until early January 2007 to obtain a building report.

[76] Mr Taylor submitted that the question of fault is to be determined objectively and that there is no expectation in New Zealand property transactions for buyers to commission pre-purchase inspection reports from experts before buying.[27] Mr Taylor referred to the decision *Sunset Terraces*[28] in which Baragwanath J noted that the opportunity for intermediate inspection by a potential buyer in New Zealand is very limited compared to the rights of inspection which building inspectors have during the course of construction.

[77] The claimants submit they made their own assessment of the soundness of the property which was presented in very good condition, and as it was only five years old and the exterior had been freshly painted, there was no cause for concern. Mr Taylor submitted that the Tribunal is not at liberty to consider Mr Finn's experiences with his former property in determining whether he and Ms Poynter, who is familiar with building survey reports as prudent purchasers. But, I am permitted to consider the circumstances of this purchase and how prospective buyers would ordinarily manage the risk with the purchase of such a home. Ms Poynter stated that she was not familiar with the leaky home problem in New Zealand but I did not find that admission credible given the vast publicity from 2003 onwards and her knowledge of Mr Finn's problems with his Howard Hunter property. In any event the Court of Appeal in *Byron Avenue*

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[26] *Property Ventures Investments Holdings Limited v Regalwood Holdings Limited* [2010] NZSC 47.
[27] *Body Corporate 188529 & Ors v North Shore City Council & Ors* [2008] 3 NZLR 479 (HC).
[28] *Sunset Terraces* [2010] NZCA 64.

dismissed the notion that unfamiliarity with New Zealand conditions alters the level of care required of claimants.[29] In that same decision Baragawanth J stated that a finding of contributing negligence requires an objective test expressed in terms of the person's own general characteristics.[30]

[78] Mr Taylor submitted that for a pre-purchase inspection report to be useful it has to involve invasive testing and that is most unlikely to be permitted in a pre-purchase situation. Mr Angell and Mr Crow agreed the BRANZ publication on pre-purchase inspections (February 2002) sets out what a reasonable pre-purchase inspector should consider[31] and lists what a pre-purchase inspector should cover.[32] Mr Angell and Mr Crow agreed that many of the alleged defects were patent and would reasonably have been identified on a visual inspection in December 2006. Such defects would have included:

- insufficient ground clearance to external cladding;
- buried fascia/gutters inadequately terminated apron flashings;
- retro-fitted parapet caps;
- handrails installed through the flat balustrades; and
- a lack of control joints.

[79] The Council submits that had the claimants obtained a building report, they would have been aware of the significant risk factors and costs which they now seek to recover.

[80] Ms Divich states that the authority most commonly cited when considering allegations of contributory negligence is the High Court decision of Justice Venning in *Body Corporate 189855 v North*

[29] *Byron Avenue* [2010] NZCA 65, at [80] per Baragwanath J.
[30] At [79].
[31] Common bundle of documents,at 498.
[32] At 501 and 502.

*Shore City Council,*[33] which was upheld by the Court of Appeal. Justice Venning made the general comment that these arguments raised "the issue of the application of principles of intermediate inspection for examination and contributory negligence".[34] He noted that in building defect cases the availability of a contributory negligence defence has been discussed in cases for many years.[35] Further he stated that:[36]

> The differing circumstances of the various purchasers mean that the principles of intermediate inspection and contributory negligence are not to be applied in a general way. They must be considered and applied to the particular circumstances of each plaintiff...

[81] That gives further authority to my view that I am entitled to, notwithstanding the application of an objective test, consider the particular circumstances of Mr Finn and Ms Poynter as buyers regarding this particular purchase. Justice Venning took into account a number of various evidential issues in reaching his conclusion in *Byron Avenue.* In applying those general principles he reduced the claims of four unit owners by 25%.

[82] Another decision of Venning J, *Jung v Templeton,*[37] concerned an allegation of negligence involving a pre-purchase report that advised that although the residence was in good condition it required remedial work which was then described in the two following pages. Venning J concluded that the report, whilst noting that the residence was in a good condition, commented on a number of significant issues and that as such Dr Jung should have investigated further. He concluded that the report ought to have

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[33] *Body Corporate 189855 v North Shore City Council* HC Auckland, CIV-2005-404-5561, 25 July 2008, Venning J.
[34] At [35].
[35] At [49].
[36] At [42].
[37] *Jung v Templeton* [2010] 2 NZLR 255 (HC).

been discussed with the building surveyor and Dr Jung's conveyancing solicitor. Venning J concluded:[38]

> The purchaser of a building who later complains of defects in it can be guilty of contributory negligence either by failing to avail themselves of the opportunity of an inspection or, having availed themselves of an inspection, by failing to act reasonably in response to it...

[83] His Honour went on to say that:[39]

> In the circumstances, I have no doubt that if this case had proceeded to trial the Council would have successfully raised claim of contributory negligence against Dr Jung.

[84] On appeal from the Court of Appeal's decision in *Byron Avenue* the application of those principles was considered by the Supreme Court in *North Shore City Council v Body Corporate 188529 (Sunset Terraces)*[40] though it was not a point on appeal. Whilst the Court was concerned with how a Council might manage its risk the Court also contemplated the corollary; how a prospective buyer may manage his or her risk and ordinarily protect him or herself in purchasing a residence.

[85] The Council submits that the claimants have contributed to their own loss for the evidence establishes that:

- Mr Finn and Ms Poynter, without legal advice or an expert building surveyor's report entered into a conditional agreement to buy on 1 December 2006; and
- Mr Finn's Howard Hunter property was monolithically clad and had water ingress issues identified by his buyer's pre-purchase report which enabled him to pay particular attention, although without any building experience, to the capping of the parapets and to the dados.

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[38] At [61].
[39] At [61].
[40] *North Shore City Council v Body Corporate 188529 (Sunset Terraces)* [2010] NZSC 158.

[86] Whilst the agreement was not made conditional on obtaining a satisfactory building report it was conditional upon solicitor's approval. However, the claimant's evidence is that they did not discuss the solicitor approval clause or matters to be addressed to satisfy that condition with their property lawyer.

[87] Mr Finn and Ms Poynter did not give any consideration to obtaining a building report prior to entering into the agreement. When Ms Poynter received a four year old building report on the property, she did not show it or discuss it with her lawyer. The buyers of Mr Finn's Howard Hunter property made that agreement conditional upon a satisfactory building report which identified defects that required Mr Finn to attend to before settlement, and as settlement of that sale was in December 2006, whilst the property purchase was still conditional there was still time for Mr Finn and Ms Poynter to obtain a building surveyor's report.

[88] The purchase went unconditional on 19 January and settled in late February 2007. The claimants identified water ingress issues with their property approximately two months later. Moisture readings and other such non-invasive testing methods carried out by a pre-purchase inspector acting in accordance with the BRANZ recommendations would more than likely have identified some underlying concerns. After considering the evidence of Mr Crow and Mr Angell on the readily observable weathertight risk factors with the home, I am satisfied that a suitably qualified building surveyor conducting a non-invasive pre-purchase inspection would have observed the retro-fitted parapet and balustrade cap flashing, the lack of ground clearances, the lack of mechanical sill flashing and top fixed handrails.[41]

[89] Mr Tim Jones, the conveyancing expert called by the Council gave evidence that from 2003 onwards buyers were requiring

[41] Support is gained from the judgment of Lynch J in the High Court of Ireland; *O'Connor & Ors v First National Building Society & Ors* 3 July 1990, 1989m 6350p.

conditions in agreements for sale and purchase that a satisfactory building report be obtained. He stated that it was increasingly done on the buyer's own volition from 2003 onwards. Mr Bob Eades, a conveyancing expert called by the claimants, agreed with that statement. Mr Jones stated that a conveyancing solicitor would have recommended inserting a condition that a satisfactory building report be obtained.

[90] Had the claimants obtained a building report which was unsatisfactory then Mr Jones stated that they would have been able to avoid the agreement if it was conditional upon an unsatisfactory report, or, if the agreement at that stage had become unconditional, or, was conditional on another matter it would have provided leverage to enable the buyer's lawyer to possibly negotiate, if not an exit from the contract, then a price reduction.

[91] In giving evidence Mr Eades said[42] that whether a buyer needed to obtain a report depended on their individual circumstances.[43] He set out some of the matters to be considered:

a) the nature and condition of the building;
b) whether there was knowledge of the leaky homes issue;
c) what information was available;
d) what representations were made and what warranties would be available from the vendor or others; and
e) the cost and worth of a report and the scope of the report.

Because of the general circumstances of the claimants regarding their purchase of this home, I find that each of the above listed matters should reasonably have been considered by them. And objectively, a reasonable buyer considering the risk factors surrounding this purchase and wanting to protect their position would

[42] Paragraph [28].
[43] At paragraph [29].

have sought independent advice and requested a pre-purchase inspection.

[92] The evidence before me establishes that if a building surveyor report had been obtained even if it was limited in its disclosure, it would have provided sufficient information (readily observable risk factors identified by the experts) that would have had the effect of raising real concerns to a reasonable purchaser. The evidence establishes that the "leaky home problem" was well known by December 2006 and the claimants were concerned with weathertight integrity with this home. Denning L J (as he then was) in *Jones v Livox Quarries Limited* stated that it is clear that reasonable foreseeability of the risk of harm by a claimant is a prerequisite to a finding of contributory negligence.

[93] The consistent theme throughout the case law on contributory negligence is that the test is a question of fact, not of law, and is generally determined by whether the claimants acted reasonably in the circumstances.[44] Baragwanath J in *Byron Avenue* noted that contributory negligence requires, as a condition of liability, a higher degree of fault than the degree of fault necessary to render liable a tortfeasor and whilst it is an objective test it is expressed in terms of the persons own general characteristics.

[94] Upon evaluating the evidence discussed earlier I am satisfied that the Council has affirmatively established that a contributing cause of the claimants' losses was their failure to take reasonable care to protect their own interests and in failing to take such reasonable care they contributed partly to their own loss.[45]

[95] I do not accept Ms Divich's submission that the conduct of Mr Finn and Ms Poynter was such as to amount to a new and

[44] *Hartley v Balemi* HC Auckland CIV-2006-404-02589, 29 March 2007, at [113] per Stevens J.

independent cause of their loss removing all causal potency from the acts and omissions of the other respondents to this claim. The information a building report would have revealed are those observable risk factors identified by the experts.[46] The facts of this case, however, are distinguishable from my earlier decision in *Malik v Auckland Council*[47] because in that case the contract was unconditional once the buyers learnt of the possible problems with the home. In the Tribunal decision of *Crosswell v Auckland City Council*[48] there was a finding of contributory negligence and a reduction of 20% to the damages awarded to the claimants was made as the claimants were on notice of defects prior to the purchase of the property. Here the claimants were not on notice of any defects. However, considering all the circumstances regarding this purchase which a reasonable buyer would take notice of, their failure to seek independent advice after viewing the property can objectively be said partly contributed to the loss now complained of. Certainly after being denied access shortly after signing, given that the "leaky home problem" was well known by late 2006, the home had readily observable weathertight risk factors and it was recently painted.[49] I accordingly determine that a reduction of 10% to the amount of damages awarded for contributory negligence is fair and appropriate.

## GENERAL DAMAGES AND CONSEQUENTIAL LOSSES

[96] The claimants submit that they are entitled to an award of $25,000 each for general damages as a result of the stress and anxiety of owning and living in a leaky home. Ms Poynter and Mr Finn both provided evidence of the stress and anxiety that they have incurred. Further, they stated that owning and living in a leaky home contributed greatly to the break up of their relationship.

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[45] Omitting to get a building report in late 2006 I find to be a departure from the standards of a reasonable buyer of the time with the claimants general characteristics.
[46] At [94].
[47] *Malik v Auckland City Council* [2011] NZWHT AUCKLAND 7.
[48] *Crosswell v Auckland City Council* WHT TRI-2008-100-107, 17 August 2009.

[97] General damages are awarded to claimants in leaky home cases to compensate for stress, inconvenience and the suffering caused from their leaky home. As the two claimants have been residing in the property as individuals since discovering the defects in late 2009 it is appropriate that an award of $25,000 per person be made said Mr Taylor. Mr Taylor cited a number of authorities which he contends support his submissions. Ms Divich acknowledged that if the claimants succeed in their claim then they are entitled to an award of general damages. However she submitted that the maximum amount awarded could not exceed $25,000.[50]

[98] The Court of Appeal's decision in *Byron Avenue* confirmed the availability of general damages in leaky building cases held that in general the usual award was $15,000 per unit for non-occupiers and the usual award for occupiers was $25,000 per unit.[51] This approach was affirmed by Ellis J in *Findlay* and by Andrews J in the recent decision of *Cao v Auckland City Council.* Andrews J stated that the judgments since the Court of Appeal's decision in *Byron Avenue* have awarded general damages on a "per unit" basis and that was what was intended by the Court of Appeal as general guidance.

[99] I am satisfied from Ms Poynter and Mr Finn's evidence that the stress to their relationship caused by having a leaky home and the health issues suffered by Ms Poynter justifies an award of general damages near the upper limit. I accordingly determine that the claimants are entitled to general damages of $25,000.

**Consequential Losses**

[100] The claimants claim for remedial costs expended to assess their home, and to prepare a design and scope of remedial works

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[49] *O'Hagan v Body Corporate 189855* [2010] NZCA65 (*Byron Ave*).
[50] *Findlay v Auckland City Council* HC Auckland CIV-2009-404-6497, 16 September 2010.
[51] *Byron Avenue* [2010] NZCA 65, at [153].

and costings are a proper cost preparatory for this hearing notwithstanding my finding of diminution in value as the fair and proper compensatory measure. I determine that the claimants are entitled to their claim for remedial expert expenses of $12,983 and the cost of applying for the WHRS assessor's report of $400.

[101] I decline their claim for pet accommodation because it is a theoretical cost. Ms Poynter's evidence is that she will be relocating to the Hawkes Bay with her pets once this claim is determined. The claimants' circumstances have changed. I am also of the view that such a claim is not sufficiently forseeable as a consequence of the respondents' tortious acts.

[102] Because I have determined that the proper measure of damages is diminution in value and not restoration, the claim for alternative accommodation and furniture removal are declined. The claimants are entitled to the costs already incurred and those that will be incurred in marketing the home for sale and the real estate agents selling commission. I estimate the marketing costs at $2,000 and the likely selling commission for a typical Auckland real estate agent at $14,116 (taken from a Barfoot & Thompson commission brochure produced by Mr Taylor) making a total of $16,116 inclusive of GST.

**CONTRIBUTION ISSUES**

[103] I have found that the second, third and seventh respondents have breached their duty of care each owed to the claimants. Mr Chen, the Council and Mr Zheng each is a tortfeasor or wrongdoer, and are liable to the claimants in tort for the claimants' losses to the extent outlined in this determination.

[104] Section 72(2) of the Weathertight Homes Resolution Services Act 2006 provides that the Tribunal can determine any liability of any respondent to any other respondent in relation to any liability determined. In addition, section 90(1) enables the Tribunal to

make any order that a court of competent jurisdiction could make in relation to a claim in accordance with the law.

[105] The approach to be taken in assessing a claim for contribution is provided in section 17(2) of the Law Reform Act 1936. In essence, it provides that the amount of contribution recoverable be such as maybe found by the court to be just and equitable having regard to the relevant responsibilities of the parties for the damage.

[106] As a result of the breaches referred to earlier in this determination, Mr Chen, the Council and Mr Zheng are jointly and severally liable for the entire amount of the claim. This means that the three respondents are concurrent tortfeasors and therefore each is entitled to a contribution towards the amount they are liable for from the other, according to the relevant responsibilities of the parties for the same damage as determined by the Tribunal.

**Summary of the Respondents' Liabilities**

[107] In making an apportionment I must have regard both to the causative potency of the respondents' conduct and to the relative blameworthiness of the parties.

[108] Ms Divich submitted that in the event that liability is established the Council's liability should be restricted to 15% of the losses claimed. She cited a number of authorities which clearly set down that primary responsibility must lie with the developer and building party.[52] Ms Divich also referred me to the Supreme Court decision in *Sunset Terraces* and *Byron Avenue* which considered whether duties ought to be owed by Councils to owners of residential units within developments that have been built by a large construction company with expert architects involved. It was

[52] *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA); *Morton v Douglas Homes* [1984] 2 NZLR 548; *Dicks v Hobson Swan Construction Ltd (In Liquidation)* HC Auckland, CIV-2004-404-1065, 22 December 2006; *Scott v Parson* HC Auckland, CP776/90, 19 September 1994; *Morton v Douglas Homes* [1984] 2 NZLR 548.

concluded that, rather than negating a duty of care that may otherwise be owed, the more appropriate outcome would be for the apportionment of liability amongst the building parties to reflect the lower liability of the Council. The acts and omissions of the developer and building parties are more causally potent having been the creators of the defects.

[109] I agree with Ms Divich that the principle is applicable in this case for Mr Chen was the designer, he oversaw the building of the home and is responsible for the ground clearance and roofing junction defects in the absence of those contractors. The authorities cited by Ms Divich clearly establish that there are very limited situations where the developer and builders combined responsibility will be less than 80%. Given the nature of Mr Chen's additional involvement in this build, in preparing the plans and being present on site to oversee it, I accept Ms Divich's submission that his responsibility combined with that of the builder must sit at a level above 80%.

[110] Upon considering the evidence, and based on the principles outlined above, I find that the third respondent, the Auckland Council, is entitled to a contribution of 85% from the second respondent, Mr Chen, and the seventh respondent, Mr Zheng, towards the amount that the Council has been found jointly liable for.

[111] I find that the seventh respondent, Mr Zheng (who as builder is responsible for the defects outlined in paragraph [42 & 43]) is entitled to a contribution of 45% from the second respondent, Mr Chen, towards the amount that Mr Zheng has been found jointly liable for. Mr Chen who designed and developed the home, oversaw its build and was responsible for the lack of ground clearances and roof junction defects should bear the greater share of responsibility, even more so than Mr Zheng who essentially built the horizontal flat

surfaces, parapets and balustrades, and installed the windows as designed by Mr Chen.

[112] To summarise the respondents' liabilities:

- Mr Chen is found liable for 45%;
- The Auckland Council is found liable for 15%;
- Mr Zheng is found liable for 40%.

**CONCLUSION AND ORDERS**

[113] The full amount of the established claim is to be reduced by $70,000 being the sum received by the claimants in their settlement with the fourth, fifth and sixth respondents.

[114] The claim of Mr Finn and Ms Poynter is proven to the extent of:

| | |
|---|---|
| Diminution in value of home | $331,000.00 |
| Expert's expenses | $12,983.00 |
| Assessor's report | $400.00 |
| Marketing and selling costs | $16,116.00 |
| General damages | $25,000.00 |
| | $385,499.00 |
| *Less 10% Contributory negligence* | *$38,549.90* |
| | 346,949.10 |
| *Less Claimants' settlement with fourth, fifth and sixth respondents* | *$70,000.00* |
| | $276,949.10 |

[115] The claim by John Finn, and Angela Poynter and Shannon Jones as trustees of the Angela Poynter Trust is proven to the extent of $276,949.10. Mr Xu Chen, the Auckland Council and Mr Lu Zheng are all jointly and severally liable for this amount. For the reasons set out in the determination I make the following orders:

i. Mr Chen is to pay the claimants the sum of $276,949.10 forthwith. Mr Chen is entitled to recover a contribution of up to $41,542.37 from the Council and from Mr Zheng the amount of $110,779.64.

ii. The Council is to pay the claimants the sum of $276,949.10 forthwith. The Council is entitled to recover a contribution of up to $124,627.09 from Mr Chen and from Mr Zheng the amount of $110,779.64.

iii. Mr Zheng is to pay the claimants the sum of $276,949.10 forthwith. Mr Zheng is entitled to recover a contribution of up to $124,627.09 from Mr Chen and from the Council the amount of $41,542.37.

[116] To summarise, if the three liable parties meet their obligations under this determination, this will result in the following payments being made by the liable respondents in this claim:

| | |
|---|---|
| Second Respondent, Mr Xu Dong Chen | $124,627.09 |
| Third Respondent, Auckland Council | $41,542.37 |
| Seventh Respondent, Mr Lu Zheng | $110,779.64 |

[117] If any of the parties listed above fails to pay his, or its, apportionment, then this determination may be enforced against any of them up to the total amount they are ordered to pay in paragraph [117] above.

**DATED** this 22nd day of August 2011

K D Kilgour
Tribunal Member