

**IN THE WEATHERTIGHT HOMES TRIBUNAL**

**TRI-2011-100-000003  
[2012] NZWHT AUCKLAND 18**

BETWEEN	COLIN BRUCE PATERSON, JULIE ANNE MONAGHAN and WAIRAU TRUSTEE LIMITED (trustees of the Paterson Family Trust) Claimants
AND	WHANGAREI DISTRICT COUNCIL First Respondent
AND	HARMONY HOMES LIMITED (Company number 1651365) Second Respondent
AND	BRENT MORMAN Third Respondent
AND	FINE FINISH BUILDERS LIMITED Fourth Respondent
AND	IAN DENNIS Fifth Respondent
AND	GREENTREE N.Z. LIMITED Sixth Respondent (Removed)

Hearing: Monday 27 February 2012 to Wednesday 29 February 2012

Closing  
Submissions: Thursday 8 March 2012

Appearances: Mark Benvie for Mr Paterson and Mrs Monaghan and Wairau  
Trustee Limited  
Frana Divich for the Whangarei District Council  
Graham Kohler for Harmony Homes Limited and Mr Morman  
Ian Dennis representing Fine Finish Builders Limited and himself

Decision: 21 March 2012

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**FINAL DETERMINATION**  
**Adjudicators: R M Carter and K D Kilgour**

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## INTRODUCTION

[1] Colin Paterson and Julie Monaghan purchased a section at 4 Highland Lass Place, Lang Cove, Whangarei, in 1998. In 2001 they entered into a written building contract with Harmony Homes Limited (company number 616824) to build a holiday home on their section. After dealing initially with a salesperson, they discussed their proposals with Brent Morman, the managing director of Harmony Homes, who is the third respondent. Mr Morman came to their home in Auckland on several occasions to go over drawings and contract details. Mrs Monaghan says that Mr Morman emphasised that Harmony Homes was a family owned business which was trustworthy, and that Mr Morman assured them that their building experience and the house they would end up with would be second to none.

[2] Harmony Homes customised the plans for the house to Mr Paterson and Mrs Monaghan's specifications. They liked the Mediterranean look, and Mr Morman suggested they use the Harditex system to achieve that look. Mrs Monaghan says that Mr Morman's assurances about its efficacy convinced them to go with the Harditex system.

[3] Excluded by agreement from the contract with Harmony Homes were the landscaping and ground work, paths and driveways, the installation of the fireplace and flue, and the installation of the handrails to the balustrade at the front of the house. The claimants were to be responsible for those aspects. Building works started in June 2001.

[4] Mr Paterson and Mrs Monaghan met with Mr Morman on site to deal with various matters and by the end of 2001 the building work was largely completed. Mr Paterson and Mrs Monaghan made a list of issues that needed tidying up and were allowed to move into the

house in time for Christmas 2001, even though the final payment had not then been made.

[5] The front of the house consists of the main entrance, a balcony, and a garage. This elevation is two storied and faces west. There is a chimney on the left (north) side of the house, and the back of the house to the east faces a sloping bank. The back of the house is single storey. The Harditex cladding was installed in accordance with the BRANZ certified process.

[6] In 2004 there was a leak on the inside of a concrete block retaining wall in a rumpus room at the rear of the house downstairs and some months later, a second leak and a third leak appeared further along the wall.

[7] In 2004 the house was transferred to a family trust. In 2006 Mr Paterson contacted the Whangarei District Council and asked it to carry out a final inspection. Between the pre-line inspection in 2001 and the inspection in January 2006, the concrete driveway was laid, the landscaping was done, the front entrance was concreted and tiled, the metal handrails on the deck were installed and some plastering and painting was completed. Following the January 2006 inspection, the Council declined to issue a code compliance certificate as there were a number of matters that the Council was concerned about. These included cracks in the cladding, the ground level at the front entrance and the absence of a flashing at the chimney.

[8] In February 2006 a meeting took place between Council officers, Harmony Homes and others to agree on a plan to rectify some of the shortcomings the Council had identified. From late 2006 to late 2007 some remedial steps were taken, but in November 2007, the Council raised further concerns and sent a notice to fix to Harmony Homes. Mr Morman replied by letter on 6 December 2007, and the Council wrote again on 17 December 2007.

[9] Mr Paterson and Mrs Monaghan met with Mr Morman and his co-director. They recommended that Mr Paterson and Mrs Monaghan apply to the Department of Building and Housing for a determination that a code compliance certificate should be issued. Following an inspection, on 3 June 2008 the determination upheld the Council's view that work was required before a certificate could be issued. In September 2008 at Harmony Homes' suggestion Mr Paterson and Mrs Monaghan installed a moisture detection unit.

[10] It was at that point that direct communication between the parties stopped. In November 2008 Mr Paterson and Mrs Monaghan applied to the Department for an assessor's report, which found that the house was leaky. Mr Paterson and Mrs Monaghan engaged Prendos Limited to supervise remedial works. The trustees entered into a building contract with BDA Construction Limited which carried out those works in 2010.

## **THE CLAIM**

[11] In their amended statement of claim dated 12 August 2011, the claimants sought from each of the respondents, as a result of the alleged negligence of each, the cost of remedial works and all consequential costs amounting to \$493,084.46, general damages of \$25,000.00, and interest on money spent.

## **ISSUES FOR DETERMINATION**

[12] The issues the Tribunal has to determine are:

- Did Mr Morman assume personal responsibility to deliver a Code compliant home to the claimants? Is he personally liable for their loss?
- Do the claimants have a claim against Harmony Homes Limited (company number 1651365)?
- Did Fine Finish Builders Limited and Mr Dennis breach their duties of care to the claimants, resulting in loss?

- Did the Whangarei District Council breach its duty of care to the claimants and, if it did, did the breach cause damage and loss?
- Should the claimants be awarded general damages and interest?

### **WHAT ARE THE DEFECTS THAT HAVE CAUSED DAMAGE?**

[13] The experts giving evidence in this case were the WHRS assessor Simon Paykel, the claimants' expert Philip O'Sullivan of Prendos, the expert engaged by the Whangarei District Council Noel Flay, and Alan Light the expert engaged by Harmony Homes and Mr Morman.

[14] On the first day of the hearing, at the Tribunal's direction the experts met to see if they could reach agreement, and explain any disagreement, on the following issues:

- What were the material defects which caused the house to leak and be damaged?
- What was the location of those defects?
- What damage resulted from those defects?
- What was the repair option in each case?
- Did the combination of defects causing leaks and damage mean that the 'tipping point' had been reached whereby the only proper repair option was a full re-clad? and
- What were the requirements at the time the house was built in 2001?

[15] The experts agreed there were six key defects, which we accept. They were:

- Defect A - inadequate waterproofing and flashings at the junctions with vertical surfaces to the front deck area.

- Defect B – an inadequate kick-out to the chimney apron flashings including lack of waterproofing to the chimney shoulder.
- Defect C - a lack of or inadequate cap flashings at the chimney.
- Defect D - inadequate cladding and framing clearances to the columns at the front and rear.
- Defect E - the window sills installation, and
- Defect F - inadequacies at the rear retaining wall.

### **Defect A**

[16] The experts' recorded there was inadequate waterproofing and flashings at the junctions at the front deck area including the external walls and nib wall, the pergola columns, and the short solid balustrade columns. The columns had flat tops. There was elevated moisture and decay and surface corrosion to a steel beam. The balcony was an integrated part of the garage structure and the damage required a re-clad of exterior walls of the garage, a re-clad of the framing to the balcony area, a re-clad of the adjacent external walls and the installation of all associated flashings, and reconstruction of the balcony.

[17] Mr Paykel, Mr O'Sullivan and Mr Flay were of the view that James Hardie's literature could have been adapted by applying liquid membranes to sloping surfaces and extending up vertical faces, though the tops of the pergola post required a specific design and purpose made flashings. Mr Light said James Hardie's parapet details were not applicable to a balustrade and there was no technical literature available. We accept the three experts' view that the James Hardie techniques could have been adapted.

### **Defect B**

[18] The experts stated that the inadequate kick out to the chimney and lack of waterproofing to the chimney shoulder was isolated to the chimney elevation only. There was moisture and decay damage. Three of the four experts considered that a re-clad of the north elevation wall containing the chimney only was required, but Mr O'Sullivan said such works needed to extend to internal corners on the west and east elevations.

[19] Apron flashings were installed but were ineffective. This was a workmanship defect. The shoulder to the chimney required a liquid applied membrane which was not installed. This had the potential for minor damage.

### **Defect C**

[20] Defect C was the lack of adequate cap flashings at the chimney. These should have been installed when the fireplace and flue were installed. The experts were of the view the flue installer would have put them in. The cap flashings would be purpose made to accommodate the flue diameter and width of the chimney structure. The fireplace was never installed. A temporary cap should have been and was constructed to make the chimney weathertight until the fireplace flue was installed.

### **Defect D**

[21] The experts stated that the cladding and framing clearances were inadequate at the timber framed column at the front entrance and the H5 post columns on the rear elevation. There was decay to the framing, and to the timber packing and Harditex fixed to the H5 posts. The majority of experts said replacement of these elements was required. Mr Light disagreed.

[22] There was no evidence the construction parties were responsible for the ground clearances because the claimants were responsible for the ground work.

### **Defect E**

[23] Three of the four experts said that there was moisture ingress with isolated damage at the window sill areas and moisture was penetrating at the junctions. It had not caused extensive damage to date, but damage was likely in future. Mr Light said it was necessary only to remove the decorative polystyrene bands which had been affixed beneath some windows, and there was no damage. The other three experts said that this defect meant there had to be a full re-clad (as there were windows on all elevations).

[24] The experts agreed that the windows had been installed in accordance with the BRANZ approved James Hardie Harditex technical information construction manual and literature, so that the installation could not be found to be negligent.

### **Defect F**

[25] The experts noted that the defective retaining wall at the rear of the house had given rise to decay to the carpet, internal linings, and timber wall strapping. Moisture had ingressed due to blocked inadequate drainage which had caused an increase in pressure applied to the membrane. It was possible the membrane was defectively applied. To rectify this, the deck at the back and the back-fill needed to be removed, the wall re-coated, the base of the wall drained to an approved outlet, and the carpet and internal linings repaired. The back-fill could be replaced, but in the event this option was not adopted.

[26] The experts stated that these works could have been completed in isolation as they are separate from the Harditex

cladding issues. This was a below ground defect. At the time of construction the requirements were to have a drain coil at the base of the foundation, and a cloth filter over the drain coil, with a discharge to an approved outlet/cesspit. These were not constructed properly and there were no provisions made for cleaning and no slope to the soil at the top of the wall.

### **WAS A TOTAL RECLAD JUSTIFIED?**

[27] All the experts agreed that defect D (the unsatisfactory clearances at the columns) and defect F (the retaining wall) could be dealt with in isolation. The majority of experts considered that defects A to C (at the front wall and chimney) would require remediation and a re-clad of the north and west elevations, with Mr O'Sullivan saying these would need to extend to internal corners. The majority stated that defect E, the defective windows, was the tipping point meaning the remaining elevations also needed to be re-clad. Mr Light agreed that defects A-C meant there needed to be considerable remediation to the west and north walls but in his opinion, the tipping point was because the Harditex direct fixed to untreated timber framing was the problem. Therefore the opinion of the experts was that a total re-clad was justified.

[28] Mr O'Sullivan said the re-clad of the west and north walls gave rise to the preponderance of the costs. The Tribunal also heard evidence from Mr O'Sullivan justifying the costs overall but taking into account some betterment. Mr O'Sullivan stated that the cost of repairs after betterment was \$316,026.00 added to which were costs to be paid directly by the claimants. This gave a total of \$359,561.00, exclusive of betterment. In his statement of costs Mr O'Sullivan set out the costs of repairing various sections of the house.

[29] The Council engaged Mr John Warde, who is an expert quantity surveyor. Mr Warde stated that his estimate of the total remedial cost, of \$287,845.00 GST inclusive was based on the

assessor's scope of remedial works. He said that his estimate allowed for generous margins. It was not based on what was found when the house was deconstructed. Mr Light estimated a total remedial cost of \$149,420.00 GST inclusive. He estimated a betterment figure of \$166,580.00 and stated that expert fees were excessive to the extent of \$10,390.33.

[30] We believe that there needs to be some further deduction for betterment from the total amount claimed but not to the extent indicated by Mr Light in his written evidence. However because of our findings below, it is unnecessary for us to make a decision on the total costs of repair.

### **THE CLAIM AGAINST BRENT MORMAN**

[31] Mr Paterson and Mrs Monaghan's claim against Mr Morman lies at the heart of these proceedings. Mr Paterson and Mrs Monaghan believe that Mr Morman undertook to oversee the construction of their house personally, and that he guaranteed their house would be second to none. They gave evidence about their early meetings with him, about some meetings on site and about his involvement when the leaks appeared in the rumpus room wall and when he took part in the meeting in 2006 and sketched some drawings to try and find a solution to problems the Council had identified with the deck.

[32] Mr Morman's counsel, Mr Kohler, drew Mrs Monaghan's attention to a series of emails from Mrs Monaghan during construction, only four of which were addressed to Mr Morman. There were emails from Mrs Monaghan to and from various officers of the company. Mrs Monaghan said that she was working for Microsoft New Zealand at the time the house was being built and that not all the emails she sent were included in the emails which were available and referred to at the hearing.

[33] Mr Benvie referred to the High Court decision in *Trevor Ivory Ltd v Anderson*<sup>1</sup> and submitted that the claim against Mr Morman fits within the situation outlined in that case where a person has personal control over a project so that a duty of care arises and the person becomes liable if the duty is breached.

[34] For his part Mr Morman denied that he gave a personal undertaking, or that he gave a personal guarantee, to see that the house was properly constructed. He gave evidence about the company structure and personnel which he said the claimants were aware of. He said Harmony Homes employed a number of personnel with distinct responsibilities for different aspects of the company's operations. In his evidence Mr Morman listed the functions and positions and the people who filled those positions at Harmony Homes. The positions were:- managing director and sales and marketing manager; contracts manager – director; quantity surveyor; drafting manager; two draftspersons; two site project managers; three sales consultants; sales hostess; secretary; colour and electrical consultant; labourer; and cleaner. He said he met Mr Paterson and Mrs Monaghan on site on a limited number of occasions at weekends. He had a holiday home at Lang's beach too.

[35] Mr Morman's evidence was that he does not personally guarantee the company's obligations, even to banks. We observe that for Mr Morman to have personally guaranteed the project, he would have to have signed a guarantee in writing for it to be enforceable, which he did not do. The Property Law Act 2007 and the former Contracts Enforcement Act 1952 require any guarantee in relation to property to be in writing. The level of evidence in this claim falls short of meeting the exceptions to that general rule.

[36] More to the point perhaps Mr Kohler submitted that it was difficult to see what the legal duty was that Mr Morman was said to

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<sup>1</sup> *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517 (CA).

have assumed or more precisely, that should be imposed upon him. Mr Kohler relied on Priestley J's judgment *Body Corporate 183523 v Tony Tay & Associates Ltd*.<sup>2</sup> He submitted that in fact Mr Tay (in that case) did many more things than Mr Morman did, but still the Court found that he was doing no more than acting as a director on behalf of the company.

[37] The effect of incorporation of a company is that the acts of its directors are usually identified with the company and do not give rise to personal liability. However, the courts have for some time determined that while the concept of limited liability is relevant it is not decisive. Wylie J in *Chee v Stareast Investment Limited*,<sup>3</sup> concluded that limited liability is not intended to provide company directors with a general immunity from tortious liability.

[38] In *Morton v Douglas Homes Ltd*,<sup>4</sup> Hardie Boys J concluded that where a company director has personal control over a building operation he or she can be held personally liable. This is an indicator of whether or not his or her personal carelessness is likely to have caused damage to a third party. In *Dicks v Hobson Swan Construction Ltd (in liq)*,<sup>5</sup> Baragwanath J concluded that as Mr McDonald actually performed the construction of the house he was personally responsible for the defects which resulted in the dwelling leaking and therefore personally owed Mrs Dicks a duty of care.

[39] In *Hartley v Balemi*,<sup>6</sup> Stevens J concluded that personal involvement does not necessarily mean the physical work needs to be undertaken by a director but may include administering the construction of the building. The Court of Appeal in *Body Corporate 202254 v Taylor*<sup>7</sup> has also more recently considered director liability

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<sup>2</sup> *Body Corporate 183523 v Tony Tay & Associates Ltd* HC Auckland CIV-2004-404-4824, 30 March 2009.

<sup>3</sup> *Chee v Stareast Investment Ltd* HC Auckland, CIV-2009-404-5255, 1 April 2010.

<sup>4</sup> *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548 (HC).

<sup>5</sup> *Dicks v Hobson Swan Construction Ltd (in liquidation)* (2006) 7 NZCPR 881 (HC).

<sup>6</sup> *Hartley v Balemi* HC Auckland, CIV-2006-404-2589, 29 March 2007.

<sup>7</sup> *Body Corporate 202254 v Taylor* [2008] NZCA 317, [2009] 2 NZLR 17 (CA).

and analysed the reasoning in *Trevor Ivory Limited v Anderson*.<sup>8</sup> It held that the assumption of responsibility test promoted in that case was not an element of every tort. Chambers J expressly preferred an “elements of the tort” approach and noted that assumption of responsibility is not an element of the tort of negligence.

[40] If an element of torts approach is adopted in this case what needs to be considered in relation to Mr Morman is whether the elements of the tort of negligence are made out against them. In *Hartley v Balemi*, Stevens J observed:

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

[41] Mr Morman was acting as managing director and sales director of the company. We accept that Mr Morman engaged in sales talk at the outset about the quality of the building experience that the claimants could expect, as well as the quality of the house that would result. However there is no evidence that Mr Morman controlled or in any way personally supervised the building process.

[42] Peter Moore, who was one of the two project managers Harmony Homes employed, was in charge of on-site quality control of all contractors’ and subcontractors’ work. Mr Dennis said Mr Moore visited the site for several hours every two or three days and carefully went over the work that had been done, and discussed the work that was to be done.

[43] The Tribunal rejects the allegation that a personal duty of care arose in this case because Mr Morman was not in control of the

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<sup>8</sup> *Trevor Ivory Limited v Anderson* above n1.

building process or the site. Even if a duty did arise, there is no evidence as to the particular breaches, giving rise to defects and leaks and damage that he could be held responsible for. The Tribunal does not accept that it has been proven that Mr Morman behaved in a way such that a duty of care arises in the first place.

[44] We find that Mr Morman did not, in his individual capacity, contract to design and build the claimants' holiday home. Those things were done by Harmony Homes. While Mr Morman was the managing director and a shareholder of that company, and the claimants saw him as the "go to" person with their building contract, we are satisfied that all of the functions he carried out were those of a managing director and were of a kind that are usually identified with the company and do not give rise to personal liability.<sup>9</sup>

[45] In his closing submissions Mr Benvie said that his clients did not design the house, they did not apply for the building consent, they did not build the house, and they did not certify it. Yet they ended up with a leaky home. Mr Benvie stated that the claimants were sincere in their belief that Mr Morman undertook personally to see that the house was constructed properly.

[46] However this does not establish negligence on Mr Morman's part. While it is true that Mr Paterson and Mrs Monaghan are not responsible for the losses that have arisen (except in respect of some defects arising from building works they took upon themselves) the fact that they are innocent purchasers does not make Mr Morman personally liable.

[47] The Tribunal is not persuaded that Mr Morman assumed a duty personally to see that the house was properly built or that such a duty in tort should be imposed upon him. The evidence pointed to a well managed company but no underwriting of the company's

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<sup>9</sup> *Body Corporate 202254 v Taylor* above n 7; *Lake v Bacic* HC Auckland, CIV-2009-004-1625, 1 April 2010; *Body Corporate 183523 v Tony Tay and Associates Ltd* above n 2; *BOAC v Auckland Council* [2011] NZWHT Auckland 50 at [81] and [84].

operation was ever given and nothing Mr Morman did was purposely negligent. The claim against him fails for the reasons we have set out.

### **THE CLAIM AGAINST HARMONY HOMES LIMITED (COMPANY NO. 1651365)**

[48] The company called Harmony Homes Limited which constructed the house ceased trading in 2005 after a shareholding re-structuring. It was liquidated and struck off the register in 2008. The company currently called Harmony Homes Limited was incorporated in 2005. It is the third respondent. It succeeded to and took over the operations of the first Harmony Homes Limited in 2005. The claimants were not aware that the companies had changed.

[49] The new Harmony Homes Limited company did not take over the liabilities of the former company. Further, the experts all agreed that the repair work to the deck the new company undertook in 2007 did not worsen the damage caused by the original defects. So it is impossible to see how the claimants might have a claim against the current Harmony Homes Limited. The original company no longer exists, and in law there is no liability on the part of the existing company number 1651365 towards the claimants. It did not exist when the house was built. It did not contract with the claimants, and it did not build the house or create any of the proven defects. For those reasons the claimants do not succeed in their claim against the third respondent.

### **THE CLAIMS AGAINST FINE FINISH BUILDERS LIMITED AND IAN DENNIS**

[50] Mr Dennis is the director of Fine Finish Builders Limited. His company was contracted by Harmony Homes to undertake the carpentry of the dwelling on a labour only basis. He said this was the

first job that he undertook for Harmony Homes. He has built 49 homes for Harmony Homes since.

[51] Mr Dennis stated that he was on site with another employee of his company from Monday to Friday, sometimes staying over until Saturday. Mr Dennis said that he was closely supervised by Mr Moore. He said it was more like a master / servant relationship, such was the closeness of supervision Mr Moore provided.

[52] Mr Morman stated that Mr Moore had been trained by James Hardie in the application of Harditex, and Mr Dennis said that he too had received instruction from James Hardie in the application of Harditex on two previous jobs. He said that the Harditex was applied in accordance with the James Hardie directions. This was unanimously confirmed by the experts. He addressed the particular defects which the experts identified at the Tribunal's request. Mr Dennis denied that any of the defects which the experts identified were his fault. The only issue where any of the experts suggested Mr Dennis was at fault was the insufficient clearances at the columns and posts which Mr O'Sullivan suggested he was responsible for. However Mr Dennis said that the ground levels were much lower when he installed the cladding and he constructed the cladding levels under instructions from Mr Moore. We accept Mr Dennis's evidence and therefore this allegation against him is not proven.

[53] Mr Dennis said that he had nothing to do with laying of the waterproofing membrane or underlay. Mr Dennis said that is a field in itself. He said that all the metal flashings were done by the trades concerned. They had nothing to do with him. He said that apron flashings on the roof around the chimney area would have been done by the roofer at the time. He agreed that he put the timber barge boards on. He stated that again, the roofer would probably have installed the metal cap flashings, though he was not sure. He thought that the person who would have done that would have been the person who installed the metal roof over the garage.

[54] Mr Dennis stated that he installed the windows on all elevations in accordance with the James Hardie installation material and under the observation of Mr Moore. It was agreed that the plasterer would insert the silicone seal and so he left the junction between the cladding and the window sill and jamb for the plasterer to seal before he applied the plastering coat. Mr Moore agreed to the plasterer applying the sill and jamb silicone sealant.

[55] All the experts apart from Mr Sullivan agreed with Mr Dennis that it was difficult if not impossible to install the suggested mechanical sill flashing that was a recommendation of James Hardie but not a mandatory requirement at the time.

[56] Mr Dennis said he had nothing to do with the drainage, or the construction of the retaining wall, its waterproofing or drainage. He did install the steel rods as the block workers put the blocks up.

[57] Concerning the insufficient cladding and framing clearances, to the column at the front entrance and the columns supporting the kitchen area, he said that he would have put the cladding on but the heights would have been determined by Mr Moore. Mr Dennis said he remembered Mr Moore giving him the heights for those. The ground was substantially lower at that stage. The concreting would have been done after Mr Dennis left the site completely, as would all the landscaping. It was a bare site when he left. He was not involved in back filling the wall.

[58] While Mr Dennis and his company owed the claimants a duty of care, after considering all the evidence we have concluded that there was no breach of that duty, so the claims against the fourth and fifth respondent fail.

## **THE CLAIM AGAINST THE WHANGAREI DISTRICT COUNCIL**

[59] The claimants assert that the Whangarei District Council was negligent and caused the claimants loss. Through its counsel, Ms Divich, the Council acknowledges that it owed the claimants a duty of care when it issued the building consent and carried out inspections. The essence of the Council's response is that it did not breach its duty of care and that no loss had arisen from its actions.

[60] The Whangarei District Council issued the building consent in May 2001. The Council has advised that it carried out inspections on 27 July 2001, 31 July 2001 and 7 August 2001 (foundations); 8 August 2001 (floor slab); 17 October 2001 (pre-line); 1 November 2001 (bracing); and 30 January 2002 (retaining wall). There were some additional plumbing and drainage inspections. A final inspection was carried out in January 2006, and an inspection of repair work took place in November 2007.

[61] Mr O'Sullivan stated that there was insufficient detail in the consented plans in one or two respects. Mr Flay is an expert who has had relevant experience of the councils' role in issuing consents, carrying out inspections and issuing code compliance certificates. Mr Flay said that the plans and specifications which the Council approved were sufficient to enable the house to be properly built. The majority of the experts were of the opinion that the plans were more detailed than the average submitted for approval at that time. They also stated that the James Hardie directions could have been adapted to deal with the aspects Mr O'Sullivan referred to.

[62] In our view there was insufficient expert or technical evidence for us to conclude that the Council acted negligently when it approved the plans drawn up for the house. The preponderance of the evidence was that it acted properly in approving the plans.

[63] The Council also denied that it was in breach of its duty of care to the claimants in the inspections it carried out. Mr Dennis said that at the time of the pre-line inspection, the inspector walked around the house to ensure that the cladding was properly nailed, and the Council's records show this. Mr Dennis said that the pre-line inspection was essentially an inspection of the interior of the house.

[64] There was no evidence of inadequate inspections by the Council, except in respect of the retaining wall at the rear of the house. We deal with that aspect below. In respect of the other defects, after the inspections of late 2001 and January 2002, the Council was not called upon to conduct a final inspection until 2006. There is no evidence that would lead us to conclude that defects were subsequently covered up after 2001 and missed in later inspections. When the Council was called back in 2006, it issued a warning about the chimney, the ground clearances and the deck. It raised concerns after the 2006 inspection about matters that would not have been seen at the pre-line, and it issued a notice to fix after the 2007 inspection.

[65] The Council's decision not to issue a code compliance certificate was upheld in the determination of June 2008, and the Council never issued a code compliance certificate for the original build. Further, where a house leaks but those aspects have been built in accordance with the instructions approved by BRANZ, it is unlikely the building or inspection parties will be found negligent. We have concluded that the claimants have not established any negligence on the Council's part in its inspections in relation to Defects A to E in the inspections in 2001, or later.

[66] The purpose of inspections was because the Council was required under the Building Act 1991 to satisfy itself of compliance with the Building Code. Earth was piled against the wall, and the drain that was installed was above the floor level instead of below the floor level, as it needed to be, and there was no mechanism to

prevent it clogging up, which it did. All the experts including Mr Flay stated that the requirements of the time were not complied with. Clearly the drain was non-compliant.

[67] Harmony Homes' specifications stated that all drainage works had to be inspected and tested by the local authority drainage inspector. Upon approval, all drainage trenches were to be carefully backfilled, ensuring all minimum gradients were maintained.

[68] The Council's Project Information Memorandum stated that *"An as-built plan is to be given to the Council Officer at final inspection of completed drainage work."* There is a field advice notice dated 29 November 2001 stating that the following aspects were OK: bedding, level, pipes, grade, as built (noted as 'taken') and test. The As Built Services Plan, and the Private Utility Service As Built Record also dated 29 November 2001, recorded the storm water and wastewater pipe diameters, materials and connections. This plan referred to the retaining walls at the property but while the plan itself is not dated, it is attached to the notice and record dated 29 November 2001, before the retaining wall inspection of 30 January 2002.

[69] Mr Flay said the Council's inspection regime was in keeping with the practice of the time. He stated that typically what happened was that the structural part of the concrete block walls were inspected and councils were not called back until the pre-line stage. By that stage if building was to take place above the wall, the wall would have been back filled and the drainage would be in place. The inspector can see whether waterproofing had been applied by looking at the top edge of these types of walls and then has to be satisfied as to the drainage. The drain layer would supply an as built plan to say he had put the drainage in correctly. Some councils were asking for producer statements around this time from drain layers.

[70] Councils would check the steel in the block work before the concrete was poured. The concrete needed a reasonable time before any waterproofing was applied, and councils do not normally come back to look at the waterproofing as it was not reasonable for the council to watch three coats being applied over the course of a day. If it was a proprietary product the inspector might ask for a producer statement. The other experts' evidence was that the Council should have obtained a producer statement from the contractor and drain layer to satisfy itself of Code compliance.

[71] While the Council did receive a general as built drainage plan as above, the plan does not appear to have provided any reasons that would have enabled the Council to satisfy itself that the drainage and waterproofing associated with the retaining wall would be code compliant, and there is nothing on the Council file to show that the Council could satisfy itself of compliance. The Council could have requested a producer statement, or certificates, but it appears not to have done so.

[72] The inadequate drainage gave rise to damage from internal leaks and to likely future damage. The Tribunal has concluded that the Council breached its duty of care to the claimants when it accepted the construction of the retaining wall without ensuring there was adequate drainage at the wall (and possibly proper and effective waterproofing of it). Accordingly we find the Council is severally liable for the costs that resulted.

[73] Mr O'Sullivan stated that the total cost of repairs associated with this wall was \$60,676.00. Prendos' basic costs of remediation (as part of the \$60,676.00) were \$28,623.00 though that figure excluded some items.

[74] Mr Warde and Mr Light estimated repair costs associated with the retaining wall at \$28,755.00 and \$22,500.00 respectively, though Mr Warde's figure was net of contractor's margin,

contingency and GST. Mr Warde's estimate was similar to Prendos' figure.

[75] Having regard to the High Court's view that the cheaper replacement option sets the amount of damages, *Lester v White*<sup>10</sup>, we have decided to exclude from the \$60,696.00 claimed the sum of \$12,850.00 for cartage. The decision not to put the soil back against the wall after it was removed, and to take it away, was a choice the claimants made. We also exclude from the claim \$14,301.00 listed as paid to Paterson Sheet Metals (Mr Paterson) in respect of the retaining wall. No evidence was given as to what this amount was for and it was not included in any of the experts' estimates or Prendos' actual costs. We do allow some smaller amounts, including amounts for carpet replacement, council fees and landscaping, that Prendos listed in addition to the \$28,775.00.

[76] We consider a fair and reasonable sum to compensate for the costs of repairs to the retaining wall, the drainage, and the rumpus room and for the costs of rebuilding the deck at the rear to be \$35,000.00 inclusive of GST.

[77] We find that in respect of the other defects, the claim against the Council of negligence giving rise to damage and loss is not made out.

### **GENERAL DAMAGES AND INTEREST**

[78] The claimants have claimed \$25,000.00 general damages from the respondents. General damages are awarded for the worry and stress that owners of leaky homes suffer. The Court of Appeal has decided that \$25,000.00 per dwelling should be the guideline for such awards, \$15,000.00 where the claimants are not the occupiers of the house in question.

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<sup>10</sup> *Lester v White* [1992] 2 NZLR 483 at [499].

[79] We heard evidence from Mrs Monaghan and Mr Paterson about the stress and worry this house has caused them, and we agree that an award of general damages should be made. We believe the award should be in the amount of \$5,000.00 in this case. The leaks from the retaining wall were the first defects that caused Mrs Monaghan and Mr Paterson concern, so an award is justified. The house is the claimants' holiday home so this award reflects the fact that their house at Lang Cove is not their principal residence. It also takes into account that the award of special damages of \$35,000.00 (below) is well short of the amount of \$493,084.46 for remedial work and consequential costs claimed.

[80] The WHRS Act 2006 gives the Tribunal discretion to make an award of interest at such rate as the Tribunal thinks fit (not exceeding the 90 day bill rate plus 2%) on the whole or part of the money awarded for the whole or part of the period between when the cause of action arose and the date of payment. We consider that an award should be made and that appropriate award is \$2,632.29, being interest at the rate of 4.75% on the sum of \$35,000.00 for the period of nineteen months from August 2010 when the remedial work began until March 2012.

## **CONCLUSION AND ORDERS**

[81] The Whangarei District Council is ordered to pay the claimants the sum of \$42,632.29 forthwith, being \$35,000.00 special damages, \$5,000.00 general damages and \$2,632.29 interest, as above.

[82] The claims against the other respondents are dismissed.

**DATED** this 21<sup>st</sup> day of March 2012

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R M Carter  
Tribunal Member

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K D Kilgour  
Tribunal Member