IN THE COURT OF APPEAL OF NEW ZEALAND

CA506/2008
[2010] NZCA 65

BETWEEN	PATRICK JAMES O'HAGAN Appellant
AND	BODY CORPORATE 189855 First Respondent
AND	PAULINE LOUISE HOUGH & ORS Second Respondents
AND	NORTH SHORE CITY COUNCIL Third Respondent
AND	STEPHEN FRANCIS SMYTHE Fourth Respondent
AND	CENTRE OF ATTRACTION LIMITED (IN LIQUIDATION) Fifth Respondent
AND	JOSEPH WALDEN & STACK NZ LTD Sixth Respondent
AND	STACK NEW ZEALAND LIMITED Seventh Respondent
AND	ANDREW PLASTERING CO (1994) LTD Eighth Respondents

CA507/2008

AND BETWEEN	NORTH SHORE CITY COUNCIL Appellant
AND	BODY CORPORATE 189855 First Respondent
AND	PAULINE LOUISE HOUGH & ORS Second Respondents

	AND	PATRICK JAMES O'HAGAN Third Respondent
	AND	STEPHEN FRANCIS SMYTHE Fourth Respondent
	AND	CENTRE OF ATTRACTION LIMITED (IN LIQUIDATION) Fifth Respondent
	AND	JOSEPH WALDEN & STACK NZ LIMITED Sixth Respondent
	AND	STACK NEW ZEALAND LIMITED Seventh Respondent
	AND	ANDREW PLASTERING CO (1994) LIMITED Eighth Respondent

Hearing: 7-11 September 2009

Court: William Young P, Arnold and Baragwanath JJ

Counsel: M E Casey QC for Appellant in CA506/2008
G B Lewis and M C Josephson for First Respondent in CA506/2008
D J Goddard QC, S A Thodey and S B Mitchell for Third Respondent in CA506/2008
M A Gilbert SC for Fourth Respondent in CA506/2008
H M Macfarlane for Sixth Respondent in CA506/2008
G Andrew for Seventh Respondent in CA506/2008
D J Goddard QC, S A Thodey and S B Mitchell for Appellant in CA507/2008
G B Lewis and M C Josephson for First Respondent in CA507/2008
M A Gilbert SC for Fourth Respondent in CA507/2008
H M Macfarlane for Sixth Respondent in CA507/2008
G Andrew for Eighth Respondent in CA507/2008

Judgment: 22 March 2010

JUDGMENT OF THE COURT

This judgment may be cited as *Byron Avenue* [2010] NZCA 65.

CA506/2008

The judgments against Mr O'Hagan are set aside and the appeal by him and cross-appeal against him are dismissed by consent.

CA507/2008

A **The Council's appeal is dismissed.**

B **The cross-appeals by the second respondents against the trial Judge's finding of contributory negligence are dismissed.**

C **The awards to the second respondents of general damages are varied as set out in the reasons for judgment at [127] – [129].**

D **Leave to apply to this Court for further directions or clarifications is reserved in terms of [130] of the reasons for judgment.**

E **Costs are reserved.**

REASONS

BARAGWANATH J

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[1] This judgment on appeal from a decision of Venning J concerns leaky apartments in the Byron development at 45 Byron Avenue Takapuna and is a counterpart of the *Sunset Terraces*[1] decision also delivered today. The principal appeal, CA507/2008 by the North Shore City Council (the Council), is against a judgment against it in favour of the first respondent, Body Corporate 189855 (the Body Corporate) and the second respondents who bought apartments in the development. It raises the same question of liability of a council for careless performance of its duties under the Building Act 1991 in respect of residential apartments, which we have answered in *Sunset Terraces*.

[2] Employing the numbering in the *Sunset Terraces* decision at [6] further questions include:

(f) May a council which has not issued a code compliance certificate be sued?

(g) What is the appropriate outcome when there is fault on the part of purchasers, and what is the effect of the attribution of knowledge of problems to purchasers?

(h) May a body corporate under the Unit Titles Act 1972 sue?

(i) What is the effect on claims of the Local Government Official Information and Meetings Act 1987?

[3] An appeal CA506/2008 by Mr O'Hagan, the principal of Centre of Attraction Ltd which designed and performed restorative work on the apartments, against a personal judgment against him by the Body Corporate and the purchasers was settled before the hearing in this Court began. So too was an appeal against him by the Council in CA507/2008. The judgments against Mr O'Hagan are set aside and the appeal and cross-appeals against him are dismissed by consent.

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1 *Sunset Terraces* [2010] NZCA 64.

Context of appeal

[4] The Council issued a building consent on 13 January 1998 and Council officers inspected the development at various stages of its construction and approved aspects of it. But it declined to issue a code compliance certificate for the development.

[5] Venning J found that the Council was not relevantly negligent in issuing the building consent even though the plans lacked detail. That was because it was entitled to expect that the builder would comply with the specifications which required compliance with manufacturers' specifications and with the Building Code. But the Judge found that the less the detail required at the consent stage the greater the onus was on the Council to ensure compliance at the inspection stage. He held that, in failing to notice and respond to deficiencies requiring attention the Council's inspector had breached a duty of care owed to purchasers of apartments. Judgment was entered against the Council in favour of ten purchasers of 11 apartments. The Council appeals against that judgment.

[6] The Council does not challenge on appeal the finding of carelessness on the part of its inspector or the further conclusion that carelessness on the inspector's part was causative of the need to reclad the development. In *Sunset Terraces* we have rejected the Council's primary argument. But the further issues remain.

Factual setting

[7] Stephen Smythe, an architect and developer, was a shareholder and director of two companies. One, Couldrey Properties Ltd (formerly Byron Developments Ltd), retained the other, Smythe Grant Architects Ltd, and later Mr Smythe personally, to design a 14 unit block of residential apartments to be built on Couldrey's land at 45 Byron Avenue, Takapuna, Auckland.

[8] On 13 January 1998 the Council, acting under s 43 of the Building Act, issued a building permit to Couldrey. Couldrey engaged Bracewell Construction Ltd

to construct the development and Stack New Zealand Ltd as an architectural representative and later as project manager.

[9] On 30 January 1998 the Council began its process of inspection, which entailed nearly 100 visits in all. The Judge found that there was carelessness in inspection during these visits.

[10] On 2 December 1999 and 30 November 2000 Prendos Ltd, experts who had been engaged to investigate water ingress into the building, reported to Couldrey identifying a number of defects and recommending recladding. Venning J later found that a full reclad was required to deal with the results of entry of water into the units.

[11] Venning J held that the Council had "largely approved the construction of work at 45 Byron Avenue and was at the point of issuing a code compliance certificate" when on 19 March 2002 Mr Smythe wrote to it on behalf of Couldrey drawing attention to:

> ... clear evidence of efflorescence on the exterior plaster cladding. Prendos have confirmed that this is caused by water ingress around the windows.

[12] The Council contends that in the absence of a code compliance certificate there was no basis for the conclusion underlying the judgment that the owners had relied upon it.

The individual claims

[13] I consider the claims in the sequence of the purchases or salient later events.

Mr and Mrs McConville – unit 11

[14] Mr and Mrs McConville contracted in March 1997 to buy unit 11 off the plans. The agreement provided for payment of a deposit of $5000 on execution of the agreement, a further $25,000 after pouring of the foundations and the balance, $219,000, upon issue by the vendor's architect or quantity surveyor of a certificate

that the unit was complete and capable of use for the purposes for which it was intended. They settled the purchase on 26 August 1998.

[15] No enquiry was made by Mr and Mrs McConville of the Council prior to purchase. So their claim rests on the proposition that the carelessness of the Council inspector in inspecting the development breached a duty of care owed to them before any code compliance certificate was issued. Because I accept that proposition their claim should succeed.

Mr Blackmore and Ms Sheehy – units 13 and 14

[16] Mr Blackmore and his wife Ms Sheehy contracted in November 1997 to buy units 13 and 14 off the plans and settled in August 1998. Their position is similar to that of Mr and Mrs McConville.

Mr Jupp – unit 4

[17] Mr Jupp, who bought unit 4 off the plans in January 1998 and settled in December 1998, is also in a similar position.

Gydick Investments Ltd – unit 9

[18] The directors of Gydick Investments Ltd, Mr and Mrs Dickie, contracted on February 1997 to buy unit 9 in their own names. Settlement was in August 1998. Had they retained ownership their position would have been the same as that of Mr and Mrs McConville. In December 1999 they transferred the unit to Gydick Investments Ltd. The Judge accepted the evidence of Mrs Dickie that, while they knew there was no code compliance certificate, the reason was that none could issue until completion of other units; they had no reason to have concerns about their unit.

[19] I do not regard Gydick's position as different from that of Mr and Mrs Dickie.

Mr Kennett and Ms Blakie – unit 3

[20] By the time Mr Kennett and Ms Blakie entered an agreement on 19 June 2001 to buy unit 3, Couldrey had received the Prendos reports of 2 December 1999 and 30 November 2000 identifying a number of defects and recommending recladding. There is no suggestion that they saw the reports. Their agreement was conditional on their being satisfied with the Council records on the property and they made enquiry of a Council officer. He said the Council could issue approvals for individual units. They advised the land agent that they would not go unconditional unless the Council signed off the unit.

[21] On 21 June they received an email from Bracewell advising of work required to obtain a code compliance certificate. On 29 June the Council provided to the vendor's solicitor a letter stating:

> A final building, plumbing and drainage inspection was carried out [at unit 3]. The inspections confirm that all work has been completed as per the approved plans… A final code of compliance certificate will be issued when all units comply.

Having received it Mr Kennett and Ms Blakie confirmed that the agreement was unconditional and proceeded to settle.

[22] So unlike other purchasers they relied quite directly on the Council's assurance. The Judge held that they could recover not only on the same basis as the others but also for negligent misstatement. I agree.

Ms Hough – unit 1

[23] On 1 March 2002 Ms Hough contracted on a Real Estate of New Zealand/Auckland District Law Society form to buy unit 1 and settled on 22 March. The form contained on its front page "LIM [land information memorandum] required: Yes/No" and she deleted the "Yes". She had been told by the vendors that the apartment was only three years old and was well built. She knew that a code compliance certificate had not been issued. That was, she was told, because of problems with ground levels in front of the unit and damage to paving

caused by trucks but these had been fixed and it was just a matter of time before the Council issued a code compliance certificate. She had signed the agreement before seeing a solicitor and did not obtain a LIM from the Council. Her solicitor obtained a set of body corporate rules before settlement.

[24] The Judge found that had she made enquiry of the Council she would have been told that the Council had reinspected on 5 March 2002 and approved the outstanding work. While the Council changed its position on 22 March, following receipt of Mr Smythe's letter of 19 March, since the settlement occurred on that day we consider that a search prior to settlement would not have disclosed it. So the failure to secure a LIM is therefore immaterial.

[25] So Ms Hough is in the same position as the earlier purchasers who did not make enquiry of the Council.

Mr Wilson and Ms Stewart – unit 7

[26] Mr Wilson and his wife Ms Stewart contracted on 2 March 2002 to buy unit 7. They deleted the "Yes" against the reference to LIM. But they later instructed their solicitor to obtain a LIM. That document was dated 21 March 2002 and stated "final inspection not recorded". Their solicitor advised them that the only outstanding matters were the repair of the footpath and dealing with the exterior wall of another apartment which was below ground level. Seeing a *New Zealand Herald* article about leaky buildings they made enquiry of the land agent. He said there had been no history of leaky building problems at Byron Avenue and that it had been differently constructed from classic leaky buildings.

[27] On 4 March they received from a member of the agent's firm a fax saying "… sending you copy of: Final Inspection for Unit 7 …" Attached was a copy of a Council memorandum dated 30 October 2001 and signed by its Development Building Officer recording that inspections of unit 7 had been performed; that all work had been completed as per the approved plans; and that "unit 7 has now been cleared".

[28] On 8 March the agent sent a further fax attaching the Development Building Officer's Field Memorandum recording as at 18 January 2002 that further work was required on unit 2 and stating "All remaining units have been finalised". It further recorded that on 5 March 2002 unit 2 work had been completed.

[29] I interpolate that the document had been sent to Couldrey on 6 March 2002 by Bracewell with a letter stating:

> We are pleased to confirm that all works on the above development have now been completed to the Council's satisfaction.

It recorded Bracewell's belief that it had discharged its obligations. Given that the document was dated the previous day we infer that the Council had provided the document to Bracewell.

[30] Following its inspection on 22 March the Council advised Couldrey that it was not in a position to issue a code compliance certificate. But that information was not conveyed to Mr Wilson and Ms Stewart.

[31] Wishing to be fully sure, they then engaged a builder to examine the unit. He reported on 17 April that the unit was near new and in good condition. They settled two days later.

[32] Counsel for the Council cross-examined Mr Wilson on another document from its file and identical to the memorandum of 30 October 2001, but with the addition of "internal", which counsel suggested meant that the signoff was restricted to internal parts of the unit. The Council officer who had prepared the document confirmed that it had been prepared for a former owner of unit 7 and confined to the internal aspects. The agent who provided the similar document to Mr Wilson and Ms Stewart was not called.

[33] The officer also gave evidence as to the Field Memorandum that by "All remaining units have been finalised" he intended that there would be a further "full overview" of the exterior. Cross-examined, he was unable to point to any record of outstanding items as at 5 March 2002.

[34] The Judge found that there was nothing to put Mr Wilson and Ms Stewart on notice or enquiry about the state of the unit. While aware that the code compliance certificate had not issued they left that in the hands of their solicitor. Given the documents they had received they had no reason to doubt that there had been proper inspections which would lead to the formal code compliance certificate.

[35] I agree with this conclusion as to liability and will return to the question of contributory negligence.

RCA Investments Ltd – unit 5

[36] On 14 November 2003 Mr and Mrs Coulthard signed an agreement to buy unit 5. They nominated as purchaser their company RCA Investments Ltd. The land agent said that there was no code compliance certificate but there would be one within 12 months. Mr and Mrs Coulthard learned that $8752 was owing to the body corporate for repairs, which they understood from the agent was by way of general maintenance work. So a clause on the agreement required that cost to be borne by the vendor. They employed a qualified conveyancer rather than a solicitor.

[37] No enquiry was made on behalf of RCA of the Council or of the Body Corporate. A LIM request or other enquiry of the Council would have alerted RCA to the decision to decline a code compliance certificate for the units, even though the repairs had been carried out. Mr Coulthard was not cross-examined about the failure to make enquiry of the body corporate and what consequences that would have had.

[38] Venning J reduced RCA's award by 25 per cent for contributory negligence.

[39] The failure to seek a LIM is not in my view a deficiency of such magnitude as to constitute a bar to the claim. Parliament did not so state despite affording by s 41[2] protection as to a LIM's contents. In my view the failure goes to contributory negligence to which I will return.

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[2] Local Government Official Information and Meetings Act 1987, s 41.

Sue Bradley Properties Ltd – unit 12

[40] Ms Bradley bought unit 12 in April 2003. She was working overseas and made the purchase while in New Zealand on a visit. The agreement was subject to solicitor's approval and she left the matter to her solicitor. She was then unaware of the significance of LIMs or code compliance certificates. The agreement form did not refer to LIMs. Following purchase she learned of an outstanding account for some $18,000 for work required to secure a code compliance certificate. She obtained payment from the vendor. I agree with Venning J that the Council is liable on the basis of general reliance subject to the question of contributory negligence.

[41] In May 2004 she sold the unit to her company. Her knowledge at that time must be imputed to it.[3]

[42] While aware of the past work, which had been completed, she thought that the problems had been dealt with. She made no enquiry of the Council.

[43] Venning J deducted 25 per cent for contributory negligence.

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

[44] Ms Clark had bought unit 8 by an agreement of 20 March 1999. The price was $275,000. Nothing had occurred at that time to put her on enquiry. Apart from the cautious withholding of $2,000 because the code compliance certificate had not yet issued there is nothing to distinguish her personal position from that of the other early purchasers. I do not regard the withholding of $2,000 as material. But in 2002 she learned that Prendos had disclosed serious problems with the unit. She supported the instruction of Mr O'Hagan to identify the cause and deal with it. She paid for the completed repairs. She then, in October 2004, transferred the unit to herself and her solicitor Mr Cockcroft as trustees of her family trust. The price was $352,000.

[45] Venning J found for Ms Clark and did not find contributory negligence. I agree with both conclusions.

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[3] *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 NZLR 7 (PC).

[46] The Council argues that the trustees cannot claim under *Hamlin v Invercargill City Council*[4] because they acquired the unit:

(a) after a cause of action had accrued to owners at latest in July 2002;

(b) with knowledge that there had been trouble with the building and that there was no code compliance certificate.

[47] Mr Goddard submitted that once a cause of action has accrued in favour of one owner there can be no claim by a later owner. But there is no authority or principle that supports the contention. I have disposed of this argument in *Sunset Terraces*.[5] Citation of *Hamlin* at 528 of the Privy Council decision, that a cause of action accrues when defects are reasonably discoverable, is beside the present point. That statement concerned when a limitation period for a claim in tort starts running under s 4 of the Limitation Act 1950. It says nothing about whether a subsequent owner has a cause of action. Ms Clark was aware that there had been problems. But she believed that the repairs she had paid for and seen performed had rectified the problem. There is no basis to believe that she and her co-trustee had any inkling of the underlying problem.

[48] Since she had reason to believe that the work had rectified the problem there is no basis for claiming the trustees acted unreasonably in not making enquiry of the Council, whose recent knowledge of the conditions of what had been her apartment could scarcely be expected to exceed hers.

[49] But the Council's argument fails for a further reason. Unlike a company, which is a different legal person from its shareholders, Ms Clark's legal status as owner of the unit did not alter when she transferred it to herself and her co-trustee.

[50] In *NZHB Holdings Ltd v Bartells* it was stated:[6]

> [34] Recent experience in more than one case suggests that the concept of trust is used more often than it is understood. Unlike a company or an

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4 *Hamlin v Invercargill City Council* [1994] 3 NZLR 513 (CA); [1996] 1 NZLR 513 (PC).
5 *Sunset Terraces* [2010] NZCA 64 at [78]-[79].
6 *NZHB Holdings Ltd v Bartells* (2004) 5 NZCPR 506 (HC).

> incorporated society a "trust" is not a legal person recognised as distinct from the humans who direct their affairs…
>
> ...
>
> [37] … [T]he Court of Appeal in *In re Graham; Pitt & Bennett ex parte Nolan & Skeet* (1891) 9 NZLR 617, 621 held that
>
> > There is no such thing recognised as that the trustees have an identity different from themselves individually, and that they themselves do not become liable when acting for the trust estate, unless there is an express contract to that effect.

That principle underlay *Muir v City of Glasgow Bank*,[7] which turned on whether the liability of a person sued as trustee was limited to the assets of the trust estate. It was held that the answer is no unless the contract expressly so provides. In that case Lord Cairns LC stated:[8]

> … whether, in any particular case, the contract of a … trustee is one which binds himself personally, or is to be satisfied only out of the estate of which he is the representative, is … a question of construction, to be decided with reference to all the circumstances of the case; the nature of the contract; the subject-matter on which it is to operate, and the capacity and duty of the parties to make the contract in the one form or the other. I know of no reason why [such a person] … entering into a contract for payment of money with a person who is free to make the contract in any form he pleases, should not stipulate by apt words that he will make the payment, not personally, but out of the assets of the [trust property].

The speeches of Lord Cairns and four of the other Lords who gave reasons turned on the fact that the bank had no power to accept shareholders save on terms of personal liability. Accordingly the description of the appellants as "the trust disponees of [a beneficiary]" was construed so as to impose personal liability upon them.

[51] The judgment in *Bartells* continued:

> [39] In the Court of Appeal of New South Wales in *Helvetic Investment Corporation Pty Ltd v Knight* (1984) 9 ACLR 773 both Gleeson QC and Meagher QC for the competing parties accepted (at 774) the following propositions:
>
> > A trustee who enters into a contract will normally incur unlimited personal liability unless by appropriate language or express stipulation such liability is restricted.

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7 *Muir v City of Glasgow Bank* (1879) LR 4 App Cas 337 (HL).

8 At 355.

> A mere description of the capacity in which he contracts as that of trustee is insufficient to exclude full personal liability.
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> …
>
> [42] So in New Zealand law, and in that of England and of New South Wales, in the absence of more limiting language the description of a contracting party simply as "trustee" renders that party personally liable. There is a presumption in favour of personal liability which must be refuted if a person contracting as "trustee" is to be relieved of liability beyond the extent of the trust assets.

[52] The fruit must accompany the rind. Just as a trustee is presumptively liable on contracts, because there is no difference in legal status between the individual as trustee and in his or her own right, so also for the purpose of the law of tort that status does not alter when the person transfers an asset to him or herself as trustee. Both liability for tort and entitlement to sue in tort remain unaltered.

Ms Kim – unit 10

[53] Ms Kim, who is Korean, bought unit 10 in May 1995. After signing the agreement she instructed a lawyer to handle the purchase and was not advised about LIMs, of which she had never heard. The agreement form did not mention them. She made no enquiry of the Council.

[54] Venning J reduced the damages by 25 per cent for contributory negligence, to which I will return later ([75] below).

Discussion

(f) May a council which has not issued a code compliance certificate be sued?

[55] The *Hamlin* cause of action is at common law rather than for breach of statutory duty. But it must during the term of the Building Act be premised on carelessness by a council officer in the performance of the obligations imposed on it by that Act.

[56] It is to be noted that Parliament particularly contemplated that council liability would "arise out of the issue of a building consent, [or] a code compliance certificate" for which explicit provision is made in s 91(3):

> **91 Limitation defences**
>
> (1) Except to the extent provided in subsection (2) of this section, the provisions of the Limitation Act 1950 apply to civil proceedings against any person where those proceedings arise from—
>
> (a) Any building work associated with the design, construction, alteration, demolition, or removal of any building; or
>
> (b) The exercise of any function under this Act or any previous enactment relating to the construction, alteration, demolition, or removal of that building.
>
> (2) Civil proceedings relating to any building work may not be brought against any person 10 years or more after the date of the act or omission on which the proceedings are based.
>
> (3) For the purposes of subsection (2) of this section *if*—
>
> (a) *Civil proceedings are brought against a territorial authority*, a building certifier, or the Authority; *and*
>
> *(b) The proceedings arise out of the issue of a building consent*, a building certificate, *a code compliance certificate*, or an Authority determination—
>
> *the date of the act or omission is the date of issue of the consent or certificate or determination.*
>
> (Emphasis added.)

[57] There is no explicit reference to a negligence claim based on careless inspection prior to the date of the code compliance certificate. But such negligence is covered by the general language of s 91(2). It is in my opinion to be inferred from both *Hamlin* and the inclusion of negligence both at the first stage, issue of building consent and at the third stage, issue of code compliance certificate, that Parliament contemplated a general common law liability for *Hamlin* negligence. There is no policy to be inferred from s 91 that there could be liability only for consents and compliance certificates and not for negligence in performing the vital work of

inspection which is what gives rise to a claim for issue of issue of a de compliance certificate. I repeat the citation of *Dicks v Hobson Swan* from *Sunset Terraces*:[9]

> … Parliament conferred on the Council:
>
> > (1) The obligation within ten days to grant or refuse a building consent;
> >
> > (2) The power to charge for the cost of doing so;
> >
> > (3) The power to defer its decision until necessary information was provided;
> >
> > (4) The power to take all reasonable steps to ensure that building work was performed in accordance with the consent;
> >
> > (5) The duty of issuing a certificate of compliance if satisfied on reasonable grounds that the work complied with the Building Code, such compliance including conformity with its weather-proofness and durability provisions; and
> >
> > (6) The duty in the event of non-compliance to issue a notice to rectify.
> >
> > [75] In order to be able to be satisfied as to compliance in relation to work that would be covered during of construction the Council must obviously make periodic inspections. The number and intensity of such inspections would be determined by application of the proportionality provisions of s 47.
>
> That statutory scheme places responsibility firmly on the shoulders of councils.

[58] In this case the Judge acquitted the Council of negligence in issuing a building consent but found it liable for careless inspection. The Council argues that it could not reasonably be relied upon until the code compliance certificate stage, which was never reached.

[59] I agree with the Judge's decision. I consider that the *Hamlin* principle imposes on councils in respect of residential apartments a duty of reasonable care when inspecting work that is going to be covered up and so becomes impossible to inspect without destruction of at least part of the fabric of the building, even before issuing a code compliance certificate (or advice serving the same function). The effect of carelessness in the inspection phase was to lock in a defective condition

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[9] *Sunset Terraces* at [35], citing *Dicks v Hobson Swan Construction Ltd* (2006) 7 NZCPR 881 (HC).

which was not reasonably detectable by purchasers. They were entitled to rely on due performance by the Council of its inspection function, whether performed by itself or by an expert. That entitlement arose from the concept of general reliance described by Richardson J in *Hamlin*[10] and by Lord Hoffmann in *Stovin v Wise*[11] and discussed in *Sunset Terraces*.[12]

[60] But there is need to examine the extent of the right of general reliance. I agree with the Judge that, in the period prior to issue of a code compliance certificate, failure to seek a LIM which would have disclosed problems or alternatively to make other enquiry of the Council goes to contributory negligence rather than constituting a bar to claim.

[61] The Council's failure to inspect was a wrong with consequences which would continue to operate until either a purchaser acquired the property with relevant knowledge of the defects or the limitation period cut in. That period would run for six years[13] from the date a plaintiff knew that the unit was seriously defective or should have known that to be the case; and, even without such actual or imputed knowledge, at ten years from there could be no further claim.

[62] It was once the law that a plaintiff who had the so-called "last opportunity" and carelessly failed to avoid the consequences of the defendant's carelessness was debarred from claiming. In *Joint Torts and Contributory Negligence* Glanville Williams argued that the so-called last opportunity rule had been abolished by the contributory negligence legislation, in New Zealand the Contributory Negligence Act 1947. [14]

[63] If contributory negligence is sufficiently great the reduction will be of 100 per cent, which may take the case into the zone embraced by voluntary assumption of risk.

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10 At 526.
11 *Stovin v Wise* [1996] AC 923 (HL) at 924.
12 At [72], citing *Dicks v Hobson Swan Construction Ltd* at [74] – [75].
13 Limitation Act 1950, s 4.
14 Glanville Williams *Joint Torts and Contributory Negligence* (Stevens, London, 1951) at 279.

(g) What is the appropriate outcome when there is fault on the part of purchasers, and what is the effect of the attribution of knowledge of problems to purchasers?

[64] I have numbered and emphasised four essential elements in the Contributory Negligence Act:

> **3 Apportionment of liability in case of contributory negligence**
>
> (1) Where any person suffers damage (i) *as the result* partly of (ii) *his own fault* and partly of (iii) *the fault of any other person* or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in (iv) *the responsibility* for the damage:
>
> (Emphasis added.)

"Fault" is defined:

> Fault means negligence, breach of statutory duty, or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence.

[65] Williams argues that in (i) "result" introduces the notion of causation (in the ordinary or scientific sense of that word) and also the law of remoteness of damage.[15] He reasons that "fault" in (ii) has a different meaning from in (iii). There is a signal difference between the fault of the tortfeasor, who carelessly injures someone to whom he is said to owe a duty of care, and that of the injured person who fails properly to look after his own interests.[16]

[66] The "duty of care" concept has its problems. It is commonly said that a duty of care is imposed on a defendant who is liable in damages for breach of that duty. The formulation is convenient but can mask the truth exposed by Professor Buckland,[17] see also Hepple,[18] that "duty" is a fifth wheel: if a defendant injures a plaintiff carelessly and the injury was a foreseeable consequence and of a kind that the law regards as actionable there is liability. It is unnecessary to add that there was a duty and that it was breached. "Duty" is no more than an expression that there is legal liability if injury is caused. The real point in the present context is that

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15 At 317.
16 At 318.
17 Professor Buckland "The Duty to Take Care" (1935) 51 LQR 637.
18 Bob Hepple *Negligence: The Search for Coherence* (1997) 50 Current Legal Problems 69.

a defendant has intruded on the life of the plaintiff, even in this class of case where the care by the council to which the plaintiff is entitled is withheld; the plaintiff by contrast has had to respond to unlawful conduct by the defendant.

[67] In common with most judges, Williams rejects the view of Hilbery J in *Smith v Bray*[19] that "responsibility" means that damages are to be apportioned on the basis of causation and not on the respective degrees of negligence of the parties.[20] Rather, as Denning LJ said in *Davies v Swan Motor Co Ltd*:[21]

> Whilst causation is the decisive factor in determining whether there should be a reduced amount payable to the plaintiff, nevertheless the amount of the reduction does not depend solely on the degree of causation. The amount of the reduction … involves a consideration, not only of the causative potency of a particular factor, but also of its blameworthiness.

It was common in pre-Accident Compensation Act damages claims for juries to be directed when considering contributory negligence to take account both of causative potency and moral blameworthiness. With their considerable experience in this sphere the Australian courts have rejected the test of moral blameworthiness and preferred "the degree of departure from the standard of the reasonable person".[22] Since the test is objective, subject to the point that the reasonable person is, in general, attributed with the characteristics of the plaintiff ([79] below), the Australian test has obvious appeal. I incline to the view that the formulations express the same point in different language.[23] It is unnecessary in this case to choose between them; here they lead to the same result.

[68] Of course departure from the standard of the reasonable person/moral blameworthiness is not something altogether distinct from causation; it is taken into account when causation and not only contributory negligence is under discussion.

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19 *Smith v Bray* (1939) 56 TLR 200.

20 At 157.

21 *Davies v Swan Motor Co Ltd* [1949] 2 KB 291 (CA) at 326.

22 *Pennington v Norris* (1956) 96 CLR 10; *Melbourne & Metropolitan Tramways Board v Postneck* [1959] VR 39; JP Bourke "Damages: Culpability and Causation" (1956) 30 ALJ 283.

23 See for example *Pennington v Norris*, where the High Court of Australia, despite rejecting moral blameworthiness as the criterion in apportioning damages, relied at 16 on the plaintiff's not having endangered the life of any other person in increasing the overall award against the defendant. The Court stated that "the fact that the conduct did not endanger the defendant or anybody else is a material consideration", which might be thought to be the same as a "moral blameworthiness" test.

As Hart and Honoré argue,[24] an act may be blameworthy (one may add, in the sense of entailing such departure) because it has caused harm to others. A broad judgment embracing both elements is required. There is a further question about application of the objective standard, which is more conveniently discussed in the specific context of Ms Kim's claim.[25]

Mr and Mrs McConville – unit 11; Mr Blackmore and Ms Sheehy – units 13 and 14; Mr Jupp – unit 4; Gydick – unit 9; Ms Hough – unit 1;

[69] Here I agree with Venning J that there was no contributory negligence and, a fortiori, no relevant voluntary assumption of risk on the part of Mr and Mrs McConville. They were owed the general duty of care; it was breached by the Council; they did not fail to take reasonable care for their own safety. They must recover in full.

[70] The same is the case with Mr Blackmore and Ms Sheehy, Mr Jupp, Gydick Investments Ltd and Ms Hough.

Mr Kennett and Ms Blakie – unit 3

[71] The position of Mr Kennett and Ms Blakie is even stronger. They succeed not only on the ground of general reliance but on the specific advice from the Council which sustains in full their claims both in negligence and for negligent misstatement.

Mr Wilson and Ms Stewart – unit 7

[72] I agree with the Judge that Mr Wilson and Ms Stewart acted reasonably. Although deleting the "Yes" against the reference to LIM in the agreement they later instructed their solicitor to obtain a LIM ([26] above). While that stated "final inspection not recorded" they later received a document, which we infer was provided by the Council, stating that all works had been completed to its satisfaction

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[24] HLA Hart and Tony Honoré *Causation in the Law* (2nd ed, Clarendon, Oxford, 1985) at 59 and 271.

[25] [75] below.

([29] above). So Mr Wilson and Ms Stewart not only relied on legal advice, as did Ms Kim, and also secured a builder's report but, vitally, received what must be treated as a Council's assurance on which they could rely. Their position is therefore distinguishable from that of Ms Kim ([75] below) who relied only on her solicitor. It is unnecessary to consider what would have been their position had they not received the Council assurance.

RCA Investments Ltd – unit 5

[73] The sum of nearly $9,000 owing for repairs was substantial. The company's failure to make any consequential enquiry of the Council was both morally blameworthy, as a failure to take care and causatively potent, since enquiry would have revealed that the Council had reason to withhold its code compliance certificate because the repair work had not cured the problem. But it does not in my view exceed the 25 per cent fixed by the Judge.

Sue Bradley Properties Ltd - unit 12

[74] Like the Judge, I see Sue Bradley Properties Ltd's position as similar to that of RCA's. I agree with the 25 per cent deduction.

Ms Kim – unit 10

[75] Ms Kim did not personally examine the LIM which would have drawn problems to her attention. It was submitted for her that as a relative newcomer to New Zealand she should be treated more leniently than someone who is familiar with New Zealand conditions and might have know about LIMs. There is an interesting and important further question: is she vicariously liable for her solicitor's negligence and thus, for purposes of contributory negligence, within the concept of "his own fault" and liable for that reasons to have her damages against the Council reduced?

(i) Unfamiliarity with New Zealand conditions

[76] The first issue concerns her unfamiliarity with New Zealand conditions. There is high authority that:[26]

> The standard required of a defendant (in determining original negligence) is that of the reasonable man, which means at least that of the average man; there is now considerable authority for saying that the standard is an ideal or ethical one which is not necessarily kept down to the level of the mass. In theory the same standard should be required of a plaintiff (in determining contributory negligence), but one cannot help feeling in reading the cases that the actual standard required has often been lower, and has rarely exceeded an average level of care. In a word, the reasonable defendant is not allowed to have lapses, but the reasonable plaintiff is. This indulgence is particularly found in master and servant cases ... but is not confined to them. Now that contributory negligence is no longer an absolute defence, the courts may feel themselves freer to register disapproval of slight departures from the norm on the part of the plaintiff.

The High Court of Australia in *Astley v Austrust* stated:[27]

> The standard of care required of a plaintiff is determined objectively by reference to what a reasonable person would have done in all the circumstances of the case. As Lord Denning MR pointed out in *Froom v Butcher* [1976] QB 286 at 294:
>
> > In determining responsibility, the law eliminates the personal equation. It take no notice of the views of the particular individual or of others like him. It requires everyone to exercise all such precautions as a man of ordinary prudence would observe.

[77] Later in *Joslyn v Berryman* the High Court applied an objective test to an intoxicated passenger who travelled with a drunken driver and because of his condition failed to discern her incapacity. In that case McHugh J stated:[28]

> Contributory negligence, like negligence, eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question.

An objective test, that of a sober passenger, was applied.

[78] Lord Denning's statement in *Froom v Butcher* was in the context of a decision that failure to wear a seatbelt constitutes contributory negligence. Judgments are to be read according to their circumstances. In cases like *Froom* and

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[26] Glanville Williams Joint Torts and Contributory Neglidence (Stevens, London, 1951) at 353 – 354.

[27] *Astley v Austrust Ltd* (1999) 197 CLR 1 at 16.

[28] *Joslyn v Berryman* [2003] HCA 34, (2003) 214 CLR 552 at [32].

Joslyn v Berryman, where the Court is concerned with the commonplace of behaviour on the road, the policy of the law should impose common standards for plaintiffs as for defendants. That is because, as Lord Denning emphasised, of practical reasons for avoiding the need to appraise the questions afresh in every case. Even so, it may be noted that he exempted pregnant and fat people from that requirement.[29]

[79] The principle requires an objective test but expressed in terms of the person's own general characteristics.[30] In the related sphere of damages a defendant must take the plaintiff as is and pay greater damages to someone who possesses a thin skull than to another who does not. In principle, there should be a finding of no or reduced departure from the relevant standard/"moral blameworthiness" on the part of someone who, without any or much personal fault, acts in a manner that would be held careless in the case of another plaintiff. I consider that to be a better justification for the kinder view that is conventionally taken of the conduct of children who may be morally blameless where an adult would not. So in *Daly v Liverpool Corporation* Stable J observed:[31]

> The plaintiff in this case is an elderly woman. She was trying to cross the road, and I think that she was doing her best. For one of that age, I do not think that it was at all a bad best, but it was not good enough. Although her inability to see the bus and to think as quickly as younger people could have done, and to take the necessary action, would not occur in younger men and women, what she actually did was the best, she could. I cannot believe that the law is quite so absurd as to say that, if a pedestrian happens to be old and slow and a little stupid, and does not possess the skill of the hypothetical pedestrian, he or she can only walk about his or her native country at his or her own risk. One must take people as one finds them. There is no hypothetical standard of care. We must all do our reasonable best when we are walking about.

[80] Certainly anyone who comes to New Zealand and engages in what in any society is a relatively sophisticated engagement with local legal norms should be required to take such reasonable steps to discern what they are. But given her precaution of instructing a solicitor I see no basis for ascribing moral blame to Ms Kim (or departure from the standard of a reasonable person with her characteristics).

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29 At 295.

30 These, like characteristics in the former criminal law partial defence of provocation, (the former s 169 of Crimes Act 1961, repealed by s 4 of the Crimes (Provocation Repeal) Amendment Act 2009), do not extend to specific characteristics such as indolence.

31 *Daly v Liverpool Corporation* [1939] 2 All ER 142 at 143.

(ii) Vicarious fault

[81] The remaining issue is: what content should the courts ascribe to the expression "his own fault" in s 5 of the Contributory Negligence Act? Should vicarious liability be imposed on Ms Kim because of negligence on the part of her solicitor in failing to obtain a LIM? For reasons that follow in my view the answer is yes.

[82] In summary, I would resolve this issue by the analysis:

(a) the LIM regime was introduced by the 1991 amendment introducing s 44A of the Local Government Official Information and Meetings Act as a means of disclosing material facts of which the council is aware.[32]

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[32] Section 44A, as in force at the time of the Council's negligent inspections and Ms Kim's purchase, provided:

Land information memorandum

(1) A person may apply to a territorial authority for the issue, within 10 working days, of a land information memorandum in relation to matters affecting any land in the district of the authority.

(2) The matters which shall be included in that memorandum are—

(a) Information identifying each (if any) special feature or characteristic of the land concerned, including but not limited to potential erosion, avulsion, falling debris, subsidence, slippage, alluvion, or inundation, or likely presence of hazardous contaminants, being a feature or characteristic that—

(i) Is known to the territorial authority; but

(ii) Is not apparent from the district scheme under the Town and Country Planning Act 1977 or a district plan under the Resource Management Act 1991:

...

(d) Information concerning any consent, certificate, notice, order, or requisition affecting the land or any building on the land previously issued by the territorial authority (whether under the Building Act 1991or any other Act):

(e) Information concerning any certificate issued by a building certifier pursuant to the Building Act 1991:

(f) Information relating to the use to which that land may be put and conditions attached to that use:

...

(3) In addition to the information provided for under subsection (2) of this section, a territorial authority may provide in the memorandum such other information concerning the land as the authority considers, at its discretion, to be relevant.

(4) An application for a land information memorandum shall be in writing and shall be accompanied by any charge fixed by the territorial authority in relation thereto.

(5) In the absence of proof to the contrary, a land information memorandum shall be sufficient evidence of the correctness, as at the date of its issue, of any information included in it pursuant to subsection (2) of this section.

(6) Notwithstanding anything to the contrary in this Act, there shall be no grounds for the territorial authority to withhold information specified in terms of subsection (2) of this section or to refuse to provide a land information memorandum where this has been requested.

(b) The courts should give effect to the policy of that measure by requiring a purchaser who wishes to escape contributory negligence to perform or have performed the relevant search. So a person who undertook personally the significant task of handling a property purchase would commit relevant "fault" in terms of s 3 of the Contributory Negligence Act by failing to ascertain that a LIM is needed and by failing to obtain the LIM.

(c) The policy considerations underlying (a) include that of limitation of a council's liability when a LIM would reveal relevant information. Those considerations would not receive adequate weight if the plaintiff were exonerated from deduction because a lawyer had been instructed but carelessly failed to obtain a LIM.

(d) It must follow that, exceptionally, the plaintiff is not entitled to rely upon her unfamiliarity with New Zealand conditions to resist deduction for contributory negligence. Her prudent act of instructing a solicitor cannot be permitted to remove the Council's entitlement to such limitation. Rather the solicitor's error must be attributed to her as her "fault" for the purposes of s 3 of the Contributory Negligence Act. Her remedy is against the solicitor.

Discussion

[83] It is difficult to find either principle or authority to assist in determining whether the lawyer's negligence can be attributed to Ms Kim as contributory negligence. There is no case closely in point. One aspect of the common law of England which at first sight could be relevant was stated by the House of Lords in *The Bernina*. A collision between two ships was caused by negligence on the part of the master and crew of each. The issue was whether the negligence on the part of those navigating the vessel, because of which a crew member and passenger were drowned, should be attributed to those victims so that claims by the estates of the

deceased against the owners of the other vessel would fail. The answer was no. Lord Herschell distinguished the case from one in which: [33]

> ... there is contributory negligence on the part of any third person standing in such a legal relation towards the deceased men as to cause the acts of that third person, on principles well settled in our law, to be regarded as their acts, as, eg, the relation of master and servant, or employer and agent acting within the scope of his authority.

[84] Lord Watson stated:[34]

> ... an ordinary passenger by an omnibus, or by a ship, is not affected, either in a question with contributory wrongdoers or with innocent third parties, by the negligence, in the one case, of the driver and in the other of the master and crew by whom the ship is navigated, unless he actually assumes control over their actions, and thereby occasions mischief. In that case he must, of course, be responsible for the consequences of his interference.

[85] The Law Lords adopted what has become known as the "both ways" test: negligence of an agent is imputed to a plaintiff as contributory negligence – "his fault" in the language of s 3 – only if the agent's conduct could give rise to vicarious liability if the plaintiff were sued as a defendant.

[86] On facts such as *The Bernina* no case has been found across the common law jurisdictions of New Zealand, England, Australia, Canada and the United States which has departed from the two way test, which applies the same rule to a claim by a defendant of contributory negligence by a *plaintiff*.[35]

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33 At 5 – 6.

34 At 16 – 19.

35 See P S Atiyah *Vicarious Liability in the Law of Torts* (Butterworths, London, 1967):

> Nor does there appear to be any case in which a person employing an independent contractor, in circumstances in which the employer would be liable to third parties for the contractor's negligence, has been held to be identified with the contractor for purposes of contributory negligence. If there really is a general principle to the effect that vicarious responsibility for contributory negligence is co-extensive with vicarious liability then it would no doubt follow that a person employing an independent contractor could be vicariously responsible for his contributory negligence in certain circumstances, and it would not be surprising if a court so held. But it is really doubtful whether this would be satisfactory for it is hard enough to justify all the existing cases in which a person is held liable for independent contractors without this additional complication.
>
> It seems clear from the dicta in *The Bernina* that there can never be vicarious responsibility for contributory negligence where there is not also vicarious liability, although, as stated above, it is not yet clear whether there can be vicarious liability but no vicarious responsibility.

Todd at [21.2.06] cites *The Bernina*'s "both ways" test as being of general application.

[87] But there is greater reason to apply the two-way test to a bus or ship passenger than to a house buyer. It is easier to give instructions to one's solicitor than to a bus driver or ship's captain. Regard must also be had to the specifics of s 44A. Does the *Bernina* rule as stated to date cover the present case? If not should the rule be extended to do so? There is a range of possible approaches.

(i) The Bernina *rule*

[88] The *Corpus Juris Secundum* states what is essentially the rule in *The Bernina*: [36]

> ... the general rule is that negligence in the conduct of another will not be imputed to the person injured if he or she neither authorized such conduct nor participated therein nor had the right or power to control the conduct of such person.

[89] A bus or ship passenger does not authorise or participate in carelessness in its operation nor have any right or power to control the conduct of the driver or master. The passenger is not liable for loss caused by the manner of operation. There is good reason to apply the two ways rule. But what of a solicitor's client? The client's relationship with the solicitor is a mixture of convention and specific agreement. Here the retainer was to handle the purchase of the apartment. It was open to the client to adopt a standard package embracing all services conventionally provided or to widen or narrow its scope. So the case may be said to lie nearer the edge of the general rule than do the facts of *The Bernina*.

[90] The *Bernina* rule applies to contributory negligence the test as to a defendant's vicarious liability for tort. It is conventionally stated that, with the exception of cases of borrowed employees and ultra hazardous activities, a *defendant* is vicariously liable in negligence only for the acts of his or her officers or employees and not for the acts of the employees of his or her independent contractor: a recent statement is that of the Court of Appeal of England and Wales in *Biffa Ltd v Machinenfabrik Ernst Hese GmbH*.[37] So why not adapt the *Bernina* two ways approach and apply it to a *plaintiff's* vicarious liability for contributory negligence?

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[36] *Corpus Juris Secundum* (2000) vol 65, § 268.

[37] *Biffa Ltd v Machinenfabrik Ernst Hese GmbH* [2008] EWCA Civ 1257, [2009] QB 725 at [2].

[91] Such approach would be convenient but blinkered. It does not analyse whether the situations are in reality the same.

(ii) Sir Owen Dixon's approach

[92] A more nuanced approach was taken by Dixon J in *Colonial Mutual*[38] and adopted by *Bowstead and Reynolds on Agency*:[39]

> There should be vicarious liability for the tort of an agent "when the function entrusted is that of representing the person who requests his performance in a transaction with others, so that the very service to be performed consists in standing in his place and assuming to act in his right not in an independent capacity."

There is however much authority that the term "agent" should not be used in relation to the law of tort.[40] I am attracted to the view that performance of a LIM search is the task of the purchaser; that Dixon J's analysis in *Colonial Mutual* should make the search (or failure to search) conduct attributable to Ms Kim personally; and that the "both ways" rule can and should be applied to cast on her responsibility for the failure.

(iii) The policy approach

[93] The President at [144] adopts the policy argument, that the local authority should be no worse off where the representative of the plaintiff, the solicitor, has carelessly failed to make a search. Arnold J at [189]-[190] endorses that argument to which he adds the factors that requiring the council to seek a contribution from the solicitor involves some procedural awkwardness; and that the purchaser selects the solicitor.

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38 *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Cooperative Co of Australia Ltd* (1931) 46 CLR 41.

39 FMB Reynolds *Bowstead and Reynolds on Agency* (18th ed, Sweet & Maxwell, London, 2006) at [8-182] citing *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Cooperative Co of Australia Ltd* (1931) 46 CLR 41 at 48-49 per Dixon J.

40 *Bowstead and Reynolds* at [8-176]; Jane Swanton "Master's Liability for the Wilful Tortious Conduct of his Servant" (1985) UWA Law Rev 1 at 16-17.; DJ Stevens "Vicarious Liability of the Principal for the Unauthorised Conduct of his Agent" [1974] CLP 59 at 61. In *Morgans v Launchbury* [1973] AC 127 at 135 Lord Wilberforce stated: " ...'agency' in contexts such as these is merely a concept, the meaning and purpose of which is to say , 'is vicariously liable'".

(iv) Extension of the Bernina *rule*

[94] Another possible approach is to reason there is advantage in extending the *Bernina* rule so long as there is no injustice. The cost and uncertainty of abandoning the clarity of the settled rule are considerations of importance. So too is abandonment by New Zealand of the international jurisprudence. Such a course might be thought undesirable unless the present simple rule produced such injustice as to warrant the complications of that course. In this case it does not.

[95] That is because a defendant council can plead that the plaintiff failed to take proper advice when undertaking the purchase. Since the relevant facts are within the knowledge of the plaintiff the Court will presumed such failure unless the plaintiff pleads and proves the contrary: [41]

> It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.

[96] If the plaintiff failed to do so there would be a finding of contributory negligence. If the plaintiff could show that legal advice was taken the council could join the solicitor as a third party.

[97] If a plaintiff declined to identify the solicitor or the advice given, even though the legal privilege cannot be overridden there is a principled reason for imposing contributory negligence. In *R v E*[42] this Court discussed the case where a criminal appellant alleges miscarriage of justice by reason of incompetence of trial counsel but declines to provide a waiver of privilege to permit the Crown to interview such counsel. Citing *Blatch v Archer* it stated:

> [43] In [that] situation, the appellant should be made aware that, in the event that trial counsel claims that privilege prevents the giving of evidence, the Court has no power to compel this. If the Crown indicates that it is unable to respond to the ground of appeal in the absence of assistance from trial counsel, the Court will consider how it should respond. It is bound to determine the case. While the deep-seated principle of legal professional privilege prohibits it from compelling evidence from the appellant's former

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41 *Blatch v Archer* (1774) 1 Cowp 63, 98 ER 969 at 971 cited with approval by the Supreme Court of Canada in *Snell v Farrell* [1990] 2 SCR 311 at 328, and by Lord Bingham in *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32 at 13.

42 *R v E* [2009] NZCA 554.

> counsel, it is fully entitled to take into account that the appellant, who had the means of permitting such evidence to be called, has declined to do so.

[98] The decision must apply a fortiori in a civil case. On such an approach Ms Kim would not be contributorily negligent.

(v) Staturory support for Sir Owen Dixon's approach: the policy of s 44A

[99] Despite these arguments I have concluded that the finding of contributory negligence must stand. That is because s 44A of the Local Government Official Information and Meetings Act is the pivot on which the present issue should turn. It is now commonplace that in developing and applying the common law the Court should take its lead from Parliament on matters of public policy.[43] Parliament having made the LIM procedure available for the disclosure of council information, it is appropriate for the courts to fashion the answer to the present issue in its light. There can be no good reason to visit on the council total liability where a s 44A search would have brought to light relevant information which would have reduced the Council's share in the responsibility for this loss. The case falls within Dixon J's category that a plaintiff cannot escape the consequences of failure to avail herself of that facility by delegating the responsibility. We must apply even to a newcomer to New Zealand the principle that everyone is presumed to know the law[44] and must accept the consequences of failure to do so.

[100] It follows that Ms Kim is to be identified with the solicitor's conduct and is to be attributed with relevant "fault" in terms of s 3. Although she took the precaution of instructing a solicitor and there can be no suggestion of personal fault on her part, I would dismiss her appeal.

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43 JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 535ff.

44 Legislation Advisory Committee *Guidelines on Process and Content of Legislation* (May 2001) at 32.

(h) The claim by the Body Corporate

[101] The Body Corporate sued in respect of damage to the common property. Venning J held that it should be treated effectively as agent for the several unit owners. I agree with that analysis.

[102] The Unit Titles Act states:

> **9 Common property**
>
> (1) The common property shall be held by the proprietors of all the units as tenants in common in shares proportional to the unit entitlement in respect of their respective units:
>
> Provided that nothing in this subsection shall affect the interests among themselves of the proprietors of a stratum estate in an individual unit.
>
> (2) While the same person is proprietor of all the units, subsection (1) of this section shall apply as if there were different proprietors for each of the units.
>
> (3) The proprietors of all the units may sell or lease part of the common property or may grant an easement over the whole or any part of it.

[103] That is a substantive provision setting out the relevant proprietary rights. It is true that other sections state:

> **12 Proprietors to constitute body corporate**
>
> (1) On the deposit of a unit plan the registered proprietor of the land to which the plan relates shall become a body corporate.
>
> (2) Thereafter the proprietor or proprietors for the time being of all the units comprised in the unit plan shall, by virtue of this Act, be the body corporate.
>
> (3) The body corporate shall have the designation "Body Corporate Number" (the registered number and Registry of the unit plan).
>
> (4) The body corporate shall have perpetual succession and a common seal.
>
> **13 Actions by and against body corporate**
>
> (1) The body corporate shall be capable of suing and being sued in its corporate name and of doing and suffering all that bodies corporate may do and suffer.
>
> (2) Without restricting the generality of subsection (1) of this section, the body corporate may sue for and in respect of damage or injury to the common property caused by any person, whether that person is a unit proprietor or not.

[104] Looked at away from the context of s 9 it is not difficult to read ss 12 and 13 as creating something like a limited liability company, independent of its shareholders, with the power to sue and be sued. But I agree with Venning J that the fate of the share of the Body Corporate proportionate to the interests of each unit proprietor is dictated by the fate of the proprietor. If an individual proprietor has the right to sue for damage to his or her individual unit the body corporate may pro tanto sue for that proportion of damage to the common property; if there is contributory negligence by the individual proprietor the claim for that proportion of damage to the common property is diminished accordingly; and if the individual proprietor is unable to sue the claim for that proportion of damage to the common property is extinguished.

[105] To the extent that the common property is injured it may bring a *Hamlin* claim but subject to the principles just stated.

(i) The interpretation and effect of s 41 of the Local Government Official Information and Meetings Act 1987

[106] Section 44A of the Local Government Official Information and Meetings Act 1987, establishing LIMs, derived from a bill which when introduced included what became the Building Act. Mr Goddard's argument that it goes to remove the *Hamlin* cause of action was considered and rejected in the *Sunset Terraces* appeal. But he also argued that s 41 of the same Act has present relevance.

[107] Section 41 states:

> **Protection against certain actions**
>
> (1) Where any official information is made available in good faith pursuant to Part 2 or Part 3 or Part 4 of this Act by any local authority,—
>
> (a) No proceedings, civil or criminal, shall lie against the local authority or any other person in respect of the making available of that information, or for any consequences that flow from the making available of that information; …

[108] He submitted that it would protect the Council against a *Hedley Byrne*[45] claim of the kind brought by Mr Kennett and Ms Blakie.

[109] The point was not raised at trial and there was no examination of whether the information was in fact made available under the 1987 Act. I therefore make no comment on it. The topic is the subject of a forthcoming judgment *Marlborough District Council v Altimarloch Joint Venture Limited*.[46]

Damages for non-economic loss

[110] There is a cross-appeal in respect of the quantum of damages for non-economic loss. In addition to their claims for economic loss the plaintiffs claimed general damages of $25,000 in the case of a single owner and $50,000 where there were two owners. Counsel for the Council submitted that $25,000 should be regarded as the upper limit. Because they were resident in a leaky unit Venning J awarded Ms Hough and Ms Kim $20,000 each (reduced for contributory negligence in the case of Ms Kim). He awarded $12,500 to owners who did not occupy their unit to recognise that they would be affected by distress and anxiety associated with the defects in the dwelling. In the case of joint owners he fixed a global figure of $20,000.

[111] In support of the cross-appeal Mr Lewis cited the solicitors' negligence case *Mouat v Clark Boyce* where Cooke P said: [47]

> The Courts have stopped short of giving stress damages for breach of ordinary commercial contracts. Such damages may be foreseeable, but I think that the restriction may be seen as justified by policy. Stress is an ordinary incident of commercial or professional life. Ordinary commercial contracts are not intended to shelter the parties from anxiety. By contrast one of the very purposes of imposing duties on professional persons to take reasonable care to safeguard the interests of their clients is to enable the clients to have justified faith in them. In my view an award of stress damages to the present appellant was well warranted, whether in tort or contract or as equitable compensation. This does not mean that a commercial client could necessarily recover such damages. No discussion of that question is called for.

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45 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 565 (HL).
46 *Marlborough District Council v Altimarloch Joint Venture Limited* CA448/2008.
47 *Mouat v Clark Boyce* [1992] 2 NZLR 559 (CA) at 569.

> It is important that stress damages be kept within moderate limits. The award of $25,000 here is on the high side, and should not be seen as a precedent, but the Judge was entitled to find that, confronted with the threat of losing her home, the plaintiff here suffered, as he put it, "great stress and her enjoyment of life has been most seriously impaired". His award should stand.

[112] This Court will interfere with an award of general damages only if satisfied that the award is wholly erroneous.[48] That is for two reasons. One is that the trial judge, who has a feel for the case and the witnesses unattainable from reading briefs and transcripts, is better equipped than this Court to appraise their significance and the actual effect of stress resulting from the breach of duty. The other is the imprecision of the value judgment of how that effect can be expressed in money terms. While because of the number of pending claims there would be real benefit from the provision of guidelines to assist settlements, the emphasis of the present case was understandably upon aspects other than general damages. We do not have the evidence nor did we receive the argument needed to provide guidelines. A test case on such matters would focus sharply upon:

(a) the objective nature of the stress-inducing factors, including their character and duration;

(b) the evidence as to their effect on the plaintiff;

(c) in the case of occupants of leaky buildings the factors discussed in the report *Do Damp and Mould Matter? Health Impacts of Leaky Homes*;[49]

(d) assessment of how such injury and its results compares with that in other general damages awards.

[113] Without such information the assessment of the trial Judge must be accorded what elsewhere is termed margin of appreciation, and one of generous proportions.

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48 *Stieller v Porirua City Council* [1986] 1 NZLR 84 (CA).

49 Philippa Howden-Chapman, Julie Bennett and Rob Siebers *Do Damp and Mould Matter? Health Impacts of Leaky Homes* (Steele Roberts, Wellington, 2009).

[114] Counsel did cite a number of general damages awards in recent leaky building cases. They include $20,000 in this Court in *Bronlund v Thames Coromandel District Council*.[50] In that case the negligent issue of the wrong type of building permit resulted in a stopwork notice issued February 1993 to cease building the house. The application for the correct permit was opposed by the council but granted by a commissioner, against which there was an appeal by a neighbour. Work was permitted to resume in March 1994. The plaintiffs were forced in the interim for economic reasons to live in the uncompleted house with temporary cladding which leaked and was draughty and unpleasant, and there were initially no bathing facilities. Their children suffered more colds than usual. They were unable to entertain. The emotional impact placed strain on their marriage.

[115] High Court decisions include *Court v Dunedin City Council* ($6000);[51] *Chase v de Groot* (two years disturbance, $15,000;[52] *Birch v Palmerston North City Council* ($10,000);[53] *Battersby v Foundation Engineering Ltd* (total loss of cliff property to family with four children, $20,000 joint award to husband and wife);[54] *Dicks v Hobson Swan Construction Ltd* ($22,500);[55] *Sunset Terraces* ($25,000 per person);[56] *Body Corporate 185960 v North Shore City Council* ($25,000);[57] *Body Corporate 183523 v Tony Tay & Associates Ltd* ($25,000 per person).[58]

[116] The facts of these cases vary considerably but generally entailed occupancy of a leaky building for a significant period and the associated anxiety.

[117] In the present appeal there is a range of cases within two broad classes: those who occupied the apartment and those who did not.

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50 *Bronlund v Thames Coromandel District Council* CA190/98, 26 August 1999.
51 *Court v Dunedin City Council* [1999] NZRMA 312 (HC) per William Young J.
52 *Chase v de Groot* [1994] 1 NZLR 613 (HC) per Tipping J.
53 *Birch v Palmerston North City Council* HC Palmerston North CP 116/92, 22 July 1998 per Heron J.
54 *Battersby v Foundation Engineering Ltd* HC Auckland CP26/97, 5 July 1999 per Randerson J.
55 *Dicks v Hobson Swan Construction Ltd* (2006) 7 NZCPR 881 per Baragwanath J.
56 *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479 (HC) per Heath J.
57 *Body Corporate 185960 v North Shore City Council* HC Auckland CIV 2006-004-003535, 22 December 2008 per Duffy J.
58 *Body Corporate 183523 v Tony Tay & Associates Ltd* HC Auckland CIV 2004-4704-4824, 4 December 2009 per Priestley J.

[118] Ms Hough bought unit 1 in March 2002 and has occupied it ever since. Her unchallenged evidence described heavy pressures entailing constant stress.

[119] Ms Kim of unit 10 bought, more recently, in May 2005, having let the property until April 2006, she then moved in and has occupied it ever since. Having learned of the leaks problem in February 2006 she has been deeply concerned and subjected to worrying financial pressures.

[120] I would also place in the first class Ms Clark who bought unit 8 in March 1999 and moved in. For a time she was not concerned about the fact that the building needed attention which she attributed to teething problems, but as time went on she came to understand the extent of the defects and their consequences she experienced such stress as to aggravate a condition of tinnitus from which she suffers. With a mortgage of $55,000 she found it necessary to borrow over $180,000 for the repairs. She was forced for economic reasons to leave the unit and rent elsewhere with others so she could let the unit. She transferred the unit to herself and another as trustees of the Clark Family Trust in October 2004. For the reasons stated at [49] above the transfer has no legal effect upon Ms Clark's standing to sue and the transfer may be disregarded for present purposes. There can be no claim by the trustee who neither occupies the apartment nor has any personal economic interest in it.

[121] The fact that the unit has been able to be let at an unspecified rental distinguishes the case from others where a house or apartment is uninhabitable. Nor was there evidence focused on any medical consequences, a topic discussed in *Do Damp and Mould Matter? Health Impacts of Leaky Homes.*

[122] Straddling the two classes are Mr and Mrs Wilson of unit 7 who bought their unit in April 2002 and lived in it for four months after which they bought another house. They have tenanted the property ever since.

[123] The other plaintiffs have not occupied their unit. Mr and Mrs McConville of Unit 11 bought in July 1998. They are now retired and sustained high stress as a result of the financial implications.

[124] Mr Jupp of unit 4 bought in December 1998 while he was living overseas. He describes as extremely irritating that he will have to pay further significant sums of money because of mistakes made by others.

[125] Ms Bradley of unit 12 bought in May 2003 while she was living in London. She has had to pay a bill of $18,000. In May 2004 she transferred it to Sue Bradley Properties Ltd. Her unit is rented at $350 per week but cannot be sold at a realistic price. While one is sympathetic for Ms Bradley to whom in human terms the transfer to her company was simply a formal legal transaction, I see no escape from the fact that the company had no claim for stress. While Ms Bradley could in our view have sued following the sale to the company had she been in occupation, there is no basis on which she can pursue her general damages claim in relation to the period after May 2004.

[126] Mr Lewis urged upon us the fact that inflation which, while relatively low in recent years has tended to abate the value of currency. The Reserve Bank's New Zealand inflation calculator shows that from the first quarter in 1992 when this Court's judgment in *Mouat v Clark Boyce* was delivered and to the last quarter of 2009 the purchasing power of $25,000 has dropped to $17,000, so its present value would be a little over $36,000. The $20,000 awarded in *Bronlund* would now be worth $15,260 and an equivalent award in today's currency would require $26,200.

[127] I would not differ from the Judge's assessment that Ms Hough and Ms Kim are the worst off given the period of the stress, I would consider that the figure of $20,000 fixed from Ms Hough should be revised upwards to no less than $25,000. While Ms Kim has been exposed to the problem for a shorter period the Judge saw her vulnerability as warranting a similar award and I would award her also $25,000.

[128] While Ms Clark does not have the day to day exposure to the property, I consider that the overall stress she has sustained requires her to be treated differently from a simply absentee. I would set Ms Clark's award at $20,000.

[129] By a process of similar reasoning I would alter the figure of $12,500 set by the Judge to $15,000 in relation to the non-resident plaintiffs and the single sum where the burden is shared $20,000 to $25,000.

Conclusion

[130] The Council has essentially failed in its arguments. The claimants have essentially succeeded. But in case there are issues outstanding as to the consequences of this judgment we reserve leave to all parties to apply for further directions as to the formal orders to be made and as to costs.

WILLIAM YOUNG P

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Overview

[131] Many of the issues involved in this appeal are resolved by the *Sunset Terraces* judgment which is being released contemporaneously. In particular, the complex nature of the development, the involvement of an architect and the fact that some of the purchasers were buying to lease are not impediments to the claims of the purchasers. As well, I am of the view (as expressed in the *Sunset Terraces* judgment) that the existence of manifest defects at the time of purchase is not in itself a bar to a successful claim by a purchaser, albeit that it may be material to causation and contributory negligence. Further, and for the reasons given in that judgment, I am satisfied that the opportunities for intermediate inspection of the kind that characteristically arise in cases of this sort do not exclude liability.

[132] In this judgment I propose to discuss what I see as the remaining general issues:

(a) The significance of the absence of a code compliance certificate.

(b) Contributory negligence: the significance of a failure to obtain a LIM or body corporate minutes where this would have alerted the purchaser to likely problems with the building.

(c) Contributory negligence: the extent to which the negligence of a solicitor (or other person) engaged by a purchaser to provide advice in connection with a purchase can be attributed to the purchaser.

(d) Contributory negligence: whether a reduction in damages is appropriate where there is a transaction between related parties after damage becomes manifest? And

(e) Appropriate levels of damages for non-economic loss.

I will then discuss the particular claims.

Remaining general issues

The significance of the absence of a code compliance certificate

[133] A striking feature of this case is the fact that the Council never issued a code compliance certificate. It would probably have done so in March 2002 but for notification by Couldrey Properties Ltd in that month of problems with the building.

[134] The absence of a code compliance certificate is an important contextual feature of a number of the particular claims which we have to address. Also important is what inquiries made of the Council during and after March 2002 would have revealed. However, I do not see the non-issue of a code compliance certificate as being of controlling significance. On the basis of *Hamlin*[59] and our judgment in the *Sunset Terraces* case,[60] the Council was under a duty of care in relation to the inspections. And the Judge, in a part of his judgment which is not under attack, concluded that the Council had conducted those inspections negligently. I accept that the ideas of general reliance which underpin the *Hamlin* duty are applicable in the present situation.

[135] On the other hand, difficult questions of contributory negligence arise in relation to those purchasers who agreed to buy after inspection of the Council files would have revealed difficulties and who failed to obtain LIMs.

Contributory negligence: the significance of a failure to obtain a LIM or body corporate minutes where this would have alerted the purchaser to likely problems with the building

[136] I accept that the *Hamlin* duty extends to inspections. I also accept that the notion of general reliance which underpins that duty does not require a purchaser to know (or even believe) that a code compliance certificate has been issued. On the other hand, the statutory powers of a local authority in the case of non-compliant structures are limited. The LIM system was introduced as part of the same statutory

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59 *Hamlin v Invercargill City Council* [1994] 3 NZLR 513 (CA); [1996] 1 NZLR 513 (PC).

60 Sunset Terraces.

package as the Building Act 1991 and was plainly intended to provide a simple mechanism by which potential purchasers can inform themselves as to potential property risks. For these reasons I am of the view that a failure to obtain a LIM may amount to contributory negligence and accordingly warrant a reduction in damages which might otherwise be recoverable.

[137] I also accept that, at least from now, failure to obtain body corporate minutes may also amount to contributory negligence.

[138] Whether a finding of contributory negligence and an associated reduction in damages are appropriate will, of course, depend on the circumstances, particularly what such inquiries would have revealed and what a prudent purchaser would have made of that information.

Contributory negligence: the extent to which the negligence of a solicitor (or other person) engaged by a purchaser to provide advice in connection with a purchase can be attributed to the purchaser

[139] On an extremely literal approach to the wording of s 5 of the Contributory Negligence Act 1947, it is only the fault of the plaintiff which is material and not the fault of others. But such a literal approach is plainly unsustainable.

[140] In the paradigm case of a collision between two commercial vehicles it is so obvious that it goes without saying that the negligence/fault of the employee/drivers is to be attributed to their employers who are the owners of the vehicles and that the damages payable by and to the employer/owners must be adjusted accordingly. This is an obvious example of what is referred to as "the both ways rule", see for instance the discussion by Bartlett,[61] a rule which goes back at least as far as the speech of Lord Watson in *The Bernina*.[62] So sometimes the actions of a third party will be attributed to the plaintiff and this is most obviously appropriate in cases where the plaintiff is vicariously responsible for the actions of the third party. I will revert to the both ways rule in a moment.

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61 Andrew Bartlett "Attribution of Contributory Negligence: Agents, Company Directors and Fraudsters" (1998) 114 LQR 460.

62 *Mills v Armstrong (The Bernina)* (1888) 13 App Cas 1 (HL) at 16.

[141] Also material is whether it is just to make an allowance for contributory negligence. This question sometimes arises where the alleged underlying policy of the law or the arrangement between the parties was to protect the claimant from a particular kind of loss. So in a case where an employee suffers injury as a result of an employer's breach of statutory duty, how rigid should the courts be in apportioning responsibility (given that it may be the policy of the law to protect employees from personal carelessness)? Should the auditors of a company which suffers loss from the breach of duty of its senior officers be permitted to attribute the breach of duty of the senior officers to the company and in this way secure a reduction in their liability for losses caused by their negligence (where protection from such breaches of duty was one of the reasons for securing their services)?

[142] These and other problems are discussed not only in the Bartlett article to which I have referred but also by Evans[63] and Murdoch.[64]

[143] The both ways rule provides some but not complete assistance in resolving attribution issues. Because a solicitor often acts as the agent of a client, a client will sometimes be bound by the actions of the solicitor, for instance under s 6 of the Contractual Remedies Act 1979 in respect of pre-contractual misrepresentations or if the solicitor confirms a conditional contract. But there must be, at most, a very limited number of situations in which a client will be vicariously responsible for the negligence of a solicitor. I have reservations whether attempts to postulate such circumstances provide a useful mechanism for deciding whether the negligence of a solicitor in not obtaining a LIM (or body corporate minutes) should be attributed to a purchaser.

[144] In the present context, it seems to me that a policy decision is called for.

[145] The obtaining of a LIM and, at least from now, the minutes of the body corporate are obvious precautions for a purchaser to take. It is difficult to see why the local authority should be worse off where a solicitor has failed to take these precautions than where the fault is simply that of the purchaser. As well, the

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63 Hugh Evans "Attribution and Professional Negligence" (2003) 19 Professional Negligence 470.

64 John Murdoch "Client Negligence: a Lost Cause?" (2004) 20 Professional Negligence 97.

practical result of holding that a client is not responsible for the fault of the solicitor is to require an extremely awkward circularity of action, with the local authority required to join the solicitor and seek contribution, a course which may run into difficulties over privilege between the purchaser and solicitor. In a case in which a solicitor had negligently failed to make appropriate inquiries, it is far simpler for the client to sue the solicitor.

[146] Accordingly, and for very pragmatic reasons, I am of the view that the fault of a solicitor who fails to make appropriate inquiries may be attributed to the client.

[147] I would, at least usually, take a different view where the person from whom the purchaser sought advice was a builder or architect (or like person) whose advice was directed to the soundness of the building. Such an adviser will hardly ever be an agent of the purchaser and there will thus usually be no scope for attribution based on the application of the both ways rule. As well the immense diversity of the circumstances which are likely to attend the giving of such advice means that an rule of thumb in favour of attribution would produce arbitrary outcomes.

[148] Of course, in cases where damage is manifest, there is always likely to be scope for an argument as to contributory negligence and in such a context obtaining a report from a third party may not insulate a purchaser from a finding of contributory negligence. Whether such a finding is justified will just have to be decided on the facts of the case at hand.

Contributory negligence: whether a reduction in damages is appropriate where there is a transaction between related parties after damage becomes manifest

[149] This question arises in respect of two of the units affected by this litigation and could have arisen in respect of one of the units involved in the *Sunset Terraces* case.

[150] On the strict approach favoured by the Council, there are distinct legal risks associated with such a sale. If the sale is at a discount (as it was in the case of Mr Devlin in the *Sunset Terraces* case), the Council is likely to say that the purchaser

took with knowledge of the defects and cannot sue. If there is no discount (as in the two instances in the present case), the Council will say that the purchasing entity was contributorily negligent. And if the sale proceeds along the basis of an assignment of the cause of action to the purchaser, this may give rise to the arcane issues as what can and cannot be assigned, which are discussed by Heath J in *Sunset Terraces*.[65]

[151] In the context of a sale between two related parties, I think that it will often be unrealistic to treat the natural person involved as, on the one hand, having driven a great bargain as vendor, but, on the other hand, as having been contributorily negligent in his or her different role as the guiding mind of the purchaser. This is not to exclude the possibility of contributory negligence in relation to such a transaction, particularly if the related party is not just the alter ego of the vendor. But, at least in general, I do not consider it fair to treat those who have acquired leaky or potentially leaky homes as practically precluded (on pain of adverse legal consequences) from making the sort of arrangements as to their affairs which are available to others in the community. Such an approach to contributory negligence would detract unfairly from their autonomy.

Appropriate levels of damages for non-economic loss

[152] I consider that this Court has a role in giving general guidance as to appropriate levels of compensation for non-economic loss in leaky homes cases. Rules of thumb would serve to reduce the cost of resolving litigation of this sort, and, as well would facilitate consistency. On the other hand, I agree with Baragwanath J that this is not an ideal case for such general guidance to be given, primary because, as he notes, the material before us was rather too limited for us to be confident that we have a reasonably complete grasp of all the relevant issues.

[153] For the reasons given by Baragwanath J, I support awards for non-economic loss in this case which proceed on the bases that:

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[65] *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479 (HC) at [372] – [373].

(a) Such awards should not made in favour of corporate owners;

(b) $15,000 is appropriate per unit for non-occupiers ; and

(c) $25,000 is appropriate per unit for occupiers.

As Baragwanath J points out, however, not all the claims can be neatly categorised in this way and some evaluative assessment may be required.

[154] This approach involves elements of rough justice. By way of illustration of this proposition, a purchaser with a phlegmatic disposition does as well as one who is more prone to stress and allowances for the length of time the purchasers have lived with the problem are broad-brush at best. On the other hand, there is a limit to the extent to which it is practical to go into fine detail on assessments of this kind.

The particular claims

Overview

[155] Given my general approach all I need to focus on is non-economic loss and contributory negligence.

The claims by the McConvilles (unit 11), Mr Blackmore and Ms Sheehy (units 13 and 14), Mr Jupp (unit 4) and Gydick Investments Ltd (unit 9)

[156] These purchasers acquired their units between March 1997 and December 1999. None of them could fairly be taken to have been on notice that there was anything untoward about the complex or the units they were acquiring. Accordingly, I have no difficulty with the fact that no contributory negligence was found against them.

[157] As to damages for non-economic loss I favour the following results:

(a)	Mr and Mrs McConville (non-occupiers)	$15,000
(b)	Mr Blackmore and Ms Sheehy (non-occupiers)	$15,000

(c)	Mr Jupp (non-occupier)	$15,000
(d)	Gydick Investments	Nil

The claim by Mr Kennett and Ms Blakie (unit 3)

[158] They entered the agreement to purchase unit 3 on 19 June 2001. By this stage Couldrey Properties Ltd had obtained reports from Prendos (of 2 December 1999 and 30 November 2000) which had identified defects and recommended re-cladding. But Mr Kennett and Ms Blakie did not see these reports.

[159] As to non-economic loss, Mr Kennet and Ms Blakie have tenanted the property and I see the appropriate award as being $15,000.

[160] As Baragwanath J has noted, their agreement was conditional upon them being satisfied with Council reports on the property. They made appropriate inquiry of the Council which duly recorded that inspections had confirmed that all work had been completed in accordance with the plans and that a code compliance certificate would be issued when all units complied. Accordingly, I have no difficulty with the the fact that no contributory negligence was found against them.

The claim by Ms Hough (unit 1)

[161] She agreed to buy her unit on 1 March 2002 and settled for it on 22 March 2002.

[162] As to non-economic loss, Ms Hough is an occupier and I see the appropriate award for her as $25,000.

[163] For the reasons given by Baragwanath J, I am satisfied that there was no contributory negligence. I would therefore uphold the rejection of the defence of contributory negligence.

The claim by Mr Wilson and Ms Stewart (unit 7)

[164] They agreed to purchase their unit on 2 March 2002. After some vacillation, they obtained a LIM which was issued on 21 March 2002. This noted "final inspection not recorded". They also made the inquiries detailed by Baragwanath J.

[165] As to non-economic loss, as they are non-occupiers, I would award them $15,000 damages.

[166] For the reasons given by Baragwanath J, I am satisfied that there was no material contributory negligence.

The claim by RCA Investments Ltd (unit 5)

[167] The agreement was executed on 14 November 2003 by Mr and Mrs Coulthard who nominated RCA Investments Ltd as the transferee. They were on notice of repairs having been necessary (because they knew that $8,752 was owing to the Body Corporate for repairs). They also knew that there was no code compliance certificate although they believed (on the basis of what they had been told by the real estate agent) that one would be issued within 12 months. They made no inquiry of the Council or Body Corporate. An inquiry of the Council would have disclosed the Council's refusal to issue a code compliance certificate albeit that it is not clear what the Coulthards would have made of this given the repairs carried out by Mr O'Hagen.

[168] As RCA is a company I would award nothing for non-economic loss.

[169] I regard the contributory negligence finding against RCA as on the margin. They did not get a LIM but did find out that there was no code compliance certificate. More significantly they did not follow up the implications of the nearly $9,000 that was owing for repairs, this at a time when the leaky home problem was receiving a good deal of publicity. On the other hand they did have the property inspected by a builder.

[170] All of these issues were carefully evaluated by Venning J in his judgment which represented his evaluative assessment following a lengthy trial and in part what he made of the evidence of Mr Coulthard. On balance I am not prepared to disagree with him.

The claim by Sue Bradley Properties Ltd (unit 12)

[171] Ms Bradley acquired her unit in April 2003. She left the form of agreement to her solicitor who did not require a LIM. After she settled the purchase, she was aware of $18,000 which was outstanding for repairs and obtained payment for this from her vendor.

[172] In May 2004, she sold the unit to her company, Sue Bradley Properties Ltd.

[173] Because Sue Bradley Properties Ltd is a company I would make no award for non-economic loss.

[174] That then leaves the issue of contributory negligence and in particular:

(a) Ms Bradley's failure to obtain a LIM; and

(b) The knowledge of the company (via Ms Bradley) of the repairs which had been carried out and the fact that the company did not make any inquiry of the Council before purchasing.

Focussing primarily on the second of these considerations, the Judge found that Sue Bradley Properties Ltd was contributorily negligent.

[175] Because the sale was to a related party, I do not see the knowledge that Ms Bradley had acquired prior to that sale as material. On the other hand, the failure to obtain a LIM did amount, on my approach, to contributory negligence and I would therefore reduce the contributory negligence assessment to 12 ½ per cent.

The claim by Ms Clark and the Clark Family Trust

[176] Ms Clark bought unit 8 pursuant to an agreement which she entered into on 20 March 1999. At the time she was aware that there was no code compliance certificate and negotiated a price reduction (of $2,000) to cover the possibility that such a certificate might not issue. She later, in October 2004, transferred the unit to her family trust. She and her solicitor are the trustees. By this stage she was aware of the problems identified by Prendos with the complex and the repairs carried out by Mr O'Hagen.

[177] As to economic loss, in the particular circumstances of this case (in which Ms Clark has at time been an occupier) and as well has been faced with the personal stress associated with the problems, I agree with the $20,000 award for non-economic loss proposed by Baragwanath J.

[178] As to contributory negligence, I am satisfied that there was none. In the case of the 1999 purchase, this is for the reasons given by Venning J at [346]. In relation to the position of the trust, this is both for the reasons given by Baragwanath J at [52] and because I do not regard this related party sale as appropriately engaging the Contributory Negligence Act.

Claim by Ms Kim (unit 10)

[179] Ms Kim purchased her unit in May 2005. She is a Korean and had never heard of LIMs. She relied on a lawyer in relation to the transaction but for reasons given already, his or her negligence is to be attributed to her. Had a LIM been obtained it would have revealed the absence of a code compliance certificate and, indeed, an on-going debate as to whether such a certificate should issue.

[180] I would award Ms Kim $25,000 for non-economic loss.

[181] As to contributory negligence, I can see no escape from the conclusion that she was contributorily negligent in the manner found by the Judge.

The claim by the Body Corporate

[182] I agree with the approach favoured by Baragwanath J.

ARNOLD J

[183] I have read the judgments of William Young P and Baragwanath J in draft. At [132] above William Young P identifies five general issues for resolution in the present case (in addition to those determined in the *Sunset Terraces* appeals). I summarise my conclusions by reference to that list:

(a) I agree with the reasoning of William Young P in relation to:

- The significance of the absence of a code compliance certificate;
- The significance of the failure to obtain a land information memorandum (LIM) or the body corporate minutes;
- The extent to which the negligence of a solicitor engaged to advice and act on the sale and purchase can be attributed to the purchaser;
- Appropriate levels of damages for non-economic loss.

(b) I agree with Baragwanath J, who largely adopts the reasoning of Venning J, on the question whether a reduction in damages is appropriate where there is a transaction involving related parties after damage becomes manifest.

[184] Before setting out my conclusions on the individual claims I will comment briefly on two of these general points – attribution of solicitor's negligence and the effect of transactions between related parties.

Attribution of solicitor's negligence

[185] This issue arises in respect of Ms Kim, a Korean who was not aware of leaky building syndrome and who instructed a lawyer to act for her on the sale and purchase (May 2005). Her lawyer did not obtain a LIM or advise Ms Kim to obtain one. Like William Young P and Baragwanath J, I consider that, in the circumstances, this constituted negligence.

[186] The question of whether a plaintiff will be held to have been contributorily negligent as a result of a third party's negligent conduct is usually determined in accordance with the "both ways" or "identification" principle. That is, the fault of the third party will only be attributed to the plaintiff if the plaintiff would be liable to another for the third party's wrongful conduct: see for example the discussion in Bartlett "Attribution of Contributory Negligence"[66] and Todd *The Law of Torts in New Zealand*.[67] So a person may be held to have been contributorily negligent on the basis of an employee's wrongful conduct but not on the basis of an independent contractor's wrongful conduct.

[187] However, as Bartlett points out, the principle is not always articulated in this way in the cases, although it seems to explain most of them.[68] Bartlett argues that the principle can be justified as a matter of policy, although he acknowledges that its application in respect of agents is controversial.[69]

[188] As William Young P notes,[70] the position in relation to solicitors is complicated by the fact that, although a solicitor acting on (for example) a conveyancing transaction may bind his or her client, there will be limited situations where the client will be vicariously liable for the solicitor's negligence. Applying

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66 Andrew Bartlett "Attribution of Contributory Negligence" (1998) 114 LQR 460.

67 Stephen Todd (ed) *The Law of Torts in New Zealand* (5th ed, Brookers, Wellington, 2009) at [21.2.06].

68 At 464 – 465.

69 At 469 – 471.

70 See [143] above.

the "both ways" principle, this suggests that Ms Kim should not be held responsible for her solicitor's negligence in failing to obtain a LIM.

[189] However, I consider that there are strong policy reasons to attribute the solicitor's negligence to Ms Kim in the context of assessing whether she was contributorily negligence for the purposes of her claim against the Council, leaving it to her to sue her lawyer for loss resulting from his wrongful conduct.

[190] First, as noted by William Young P,[71] it is difficult to see why, as a matter of principle, a territorial authority should be in a worse position where a solicitor acting for a purchaser fails to make appropriate enquiries than it would be if the purchaser (acting for him or herself) failed to make those enquiries. Second, the purchaser is the party with the relationship with the solicitor. The purchaser selects the solicitor, deals with him or her and expects to benefit from his or her expertise. The solicitor is not simply an independent contractor, but is (for some purposes at least) the client's agent in the transaction, and the client will be bound even though the solicitor acts negligently. Accordingly it seems reasonable as a matter of policy that the client should bear the responsibility for the solicitor's default in the present context, and should seek to recover any resulting loss from the solicitor. Any other approach will involve difficult "line drawing" exercises as to the circumstances in which a solicitor's negligence in the conduct of a transaction will or will not bind the client. Third, as William Young P says,[72] requiring the territorial authority to seek a contribution from the solicitor involves some procedural awkwardness, and in cases such as the present is unlikely to be a realistic option.

[191] Accordingly, I would uphold the Judge's finding of contributory negligence in respect of Ms Kim.

Transactions between related parties

[192] This point is relevant to the claims by RCA Investments Ltd and Sue Bradley Properties Ltd. In these instances, the individual purchasers arranged for their companies to purchase the properties after the damage to their respective units became manifest. In the case of RCA Investments Ltd, the individuals involved,

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71 See [145] above.
72 Ibid.

Mr and Mrs Coughlan, nominated the company as the purchaser in the sale and purchase agreement. In the case of Sue Bradley Properties Ltd, Ms Bradley purchased her unit and subsequently transferred it to the company on the advice of her accountant, presumably for tax reasons. (I exclude Ms Clark and the Clark Family Trust from this analysis, for the reasons given by Baragwanath J).[73]

[193] I do not agree with William Young P's view that these related party arrangements should be ignored in this context.[74] To take Ms Bradley as an example, she entered into the sale and purchase transaction with her company intending that it have legal effect, and to obtain a benefit from it. In my view, it is wrong as a matter of principle that the legal effect of such a transaction should be ignored in the present context. I accept that because the individuals involved played dual roles – as individuals and as officers of their respective corporate entities – there is a degree of artificiality in the analysis, but consider that it is no greater than the artificiality commonly involved in analysing the operations of one person companies. Accordingly, like Baragwanath J,[75] I agree with Venning J's findings of contributory negligence in relation to RCA Investments Ltd and Sue Bradley Properties Ltd.

Conclusion

[194] In the result, then, like William Young P and Baragwanath J I consider that the Council is liable, without any reduction for contributory negligence, to Mr and Mrs McConville (unit 11), Mr Blackmore and Ms Sheehy (units 13 and 14), Mr Jupp (unit 4), Gydick Investments Limited (unit 9), Mr Kennett and Ms Blakie (unit 3), Ms Hough (unit 1), Mr Wilson and Ms Stewart (unit 7) and Ms Clark and the trustees of the Clark Family Trust (unit 8).

[195] I consider that the Council is also liable to RCA Investments Ltd (unit 5), Sue Bradley Properties Ltd (unit 12) and Ms Kim (unit 10), subject in each case to a reduction of 25 per cent for contributory negligence.

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73 At [49] – [52] above.
74 At [175] above.
75 See [41] above.

[196] As to quantum, I agree with the figures proposed by the other members of the Court.

[197] I also agree that the Body Corporate was entitled to sue for damage to common property but not for economic loss, for the reasons given by Baragwanath J.

Solicitors:
McVeagh Fleming, Albany for Appellant in CA506/2008
Heaney & Co, Auckland for Appellant in CA507/2008
Grimshaw & Co, Auckland for Respondents