



Defective properties

Contributory negligence or no claim?

**ONLY IN THE VERY
CLEAREST OF CASES
WILL A CLAIMANT
BE FOUND TO HAVE
CAUSED THEIR OWN
LOSSES SO THAT
THEIR CLAIM FAILS IN
ITS ENTIRETY.**

The Weathertight Homes Tribunal and the courts have leant towards findings of contributory negligence on the part of claimants where claimants have purchased property which they know is defective or is potentially defective. These findings have been made rather than findings that the claimants caused their own loss and did not rely on the council's involvement with the property.

Most recently in the Weathertight Homes Tribunal decision of *Manchester Securities Limited v Auckland Council* [2016] NZWHT Auckland 1, the Tribunal found the claimant contributorily negligent and reduced the damages awarded to the claimant by 50 percent.

The claim was over the penthouse apartments on level 12 in a multi-unit building on Hobson Street in Auckland. Level 12 was built under a separate building consent to levels 1 to 11.

Before purchasing the property, the claimant knew the following:

- A notice to rectify had been issued by the council for the level 12 decks as they were leaking;
- Defects had been identified in a Joyce Group report for levels 1 to 11 including inappropriate use of Harditex cladding and lack of saddle flashings. Level 12 was constructed similarly to levels 1 to 11;
- The body corporate had issued a High Court proceeding in relation to the building defects for levels 1 to 11 claiming a full reclad;
- The apartment building, including level 12, did not have a code compliance certificate.

In addition, the claimant did not obtain a LIM report and did not obtain a report from a building surveyor which, respectively, would have advised that the property had been issued with a notice to rectify and did not have a code compliance certificate and that the property had building defects.

The authority for the argument that the claimant's claim should not succeed at all is contained in the Supreme Court judgment in *Sunset Terraces and Byron Avenue*. This case stated that where a purchaser obtains a LIM which discloses a moisture problem, before committing to the purchase, it is unlikely any claim could ever be taken against the council.

Additionally, the Supreme Court noted a purchaser may fail to obtain a LIM which, if requested, would have given notice of potential problems. The Supreme Court said that that could amount to a new and independent cause of loss or in the alternative a deduction for contributory negligence.

As noted above, the Tribunal in the *Manchester* case did not find that the claimant caused his own loss given his knowledge about the property and nor because he failed to obtain a LIM report or building surveyor's report. Instead the Tribunal went down the contributory negligence path.

What we can take from this decision and others that have proceeded through the courts is that only in the very clearest of cases will a claimant be found to have caused their own losses so that their claim fails in its entirety. **LG**



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