Colleen Maria Dicks v Hobson Swan Construction Ltd (in liquidation); Robert Henry McDonald, Waitakere City Council.

JUDGMENT OF BARAGWANATH J : High Court, New Zealand, Auckland Registry. 22nd December 2006.

Introduction

[1] Mrs Dicks contracted with the first defendant builder Hobson Swan Ltd to buy a section of land at Hobsonville and a house upon it in the course of construction. The Waitakere City Council issued a building consent, made some visits to the property during the construction process, and ultimately issued a certificate of compliance with the Building Code made under the Building Act 1991. Mrs Dicks in the meantime settled the purchase of what has proved to be a leaky home; it must at least be totally re-clad and the most economical means of restoration is by demolishing and rebuilding the house. She sues Hobson Swan and its director, Mr McDonald, both in negligence for the state of the house and also in contract for breach of a settlement agreement. She also sues the Council in negligence.

[2] Since the decision of the Court of Appeal in ***Bowen v Paramount Builders*** [1977] 1 NZLR 394 there has arisen in New Zealand and other jurisdictions an extensive jurisprudence based partly on common law and partly on legislation. The relevant New Zealand law is stated in the decisions of the Court of Appeal and the Privy Council in ***Invercargill City Council v Hamlin*** [1994] 3 NZLR 513; [1996] 1 NZLR 513 and in the Building Act and Code (since replaced by the Building Act 2004).

[3] For the purposes of the present claim only, the Council admits that it owed Mrs Dicks a duty of care to exercise reasonable skill and care to ensure that the house complied with the Building Code, including its conduct in connection with the issue of a building consent and its inspections in the course of construction.But it denies that the facts in the present case entitle Mrs Dicks to relief against it.

Background facts

[4] On 6 March 1994 Mr McDonald on behalf of Hobson Swan applied to the Council for a building consent.[1] The consent was issued on 9 April 1994 and Hobson Swan, by Mr McDonald who performed the physical building work apart from concreting, began construction. On 28 May 1994 Mrs Dicks entered into the agreement to buy the completed house and paid an initial $2000 deposit to Hobson Swan. The agreement required Hobson Swan to complete construction of the building in a good and workmanlike manner and to obtain a Code Compliance Certificate. It became unconditional in late June 1994 and Mrs Dicks paid the balance of the deposit, $16,000. On 9 July 1994 Mrs Dicks took possession. Soon after she encountered water coming down the inside windows of her front entrance. Mr McDonald came to the property at her request and she thought that the problems had been rectified. Title issued in her name on 27 October 1994 and on 9 December 1994 she settled the purchase by paying the balance of the contract price, $164,000, to Hobson Swan.

[5] Between December 1994 and January 1995 Mrs Dicks' son-in-law carried out paving in and around the property. On 21 February 1995, the Council issued the Code of Compliance Certificate recording that it was satisfied on reasonable grounds that the building work complied with the Building Code.[2]

[6] In 1995-1996, Mrs Dicks encountered a series of floods which were progressively dealt with as insurance claims. In 2003 she became aware that her house might be suffering from systemic leak problems and on the Council's recommendation retained Prendos Ltd to advise her. Mr Williams of Prendos reported in December 2003 and the present proceeding was commenced on 5 March 2004.

[7] On 20 May 2005 following a judicial settlement conference Mrs Dicks, Hobson Swan and Mr McDonald entered into an agreement that Hobson Swan and Mr McDonald would carry out various restorative works. They were not performed properly and in January 2006 Mrs Dicks cancelled the settlement agreement. Hobson Swan is now in liquidation and Mr McDonald is impecunious.

Underlying physics

[8] At the heart of the problems in this case is the well-known fact that wood exposed to water will tend to rot. It is not disputed that the entry of water into this house resulted in large-scale rot of such significance that Mrs Dicks is faced with the alternatives of expending repair costs exceeding the value of the house or having it demolished and completely rebuilt. The issue is whether Mrs Dicks can show how and why that happened and whether she has established breach of legal duty against the respective defendants.

[9] The building was constructed of a wooden framework on which was laid Triple-`S' rigid wood fibre insulating board. It had been designed and supplied for many years by Fletcher Wood Panels Ltd and had a current BRANZ Appraisal Certificate. It was described as water repellent; its authorised uses included rigid backing for solid plaster. On top of the Triple-`S' was placed mesh wire, commonly known as chicken wire, the function of which is to serve as the effective skeleton of a thickness of concrete, known as stucco, which was laid over it. Once painted the stucco became impermeable but it was necessarily penetrated by window gaps and doorways. At its top there are joints with the roofing and at the bottom an interface with a concrete pad on which the wooden frame is set and a gap from the ground. Potential areas of water entry are therefore:

a) At the window and door surrounds;
b) At the roof junction;
c) At or near ground level.

[1] Under s 24 of the Building Act.
[2] Under s 43 of the Building Act.

[10] The consequences of entry of water into wooden framed houses are self-evident. The whole weight of the building is carried by the wooden frames. If they rot and collapse the building will ultimately do likewise. The combination of water entry that has caused fungus and rot, together with uncompleted work undertaken by Hobson Swan and Mr McDonald which opened up the building to gain access to the rotten frame beneath for the purpose of repairs, has made the building uninhabitable.

The former practice and the change

[11] Stucco buildings have been in use for many centuries.[3] In Auckland, stucco houses of the 1940s present no problems of water damage. That is because they were constructed with either metal flashings around the window frames, or a cavity between the exterior concrete wall and the interior wooden frame, or both.

[12] Metal flashings wrap around the wood of the window in the manner shown in the diagrams reproduced at para [17]. Cavities are created by providing separation of the backing on which the stucco is laid from the wooden framework behind.

[13] With such safeguards any water that gains entry will run down either the metal flashing or the inside of the concrete wall separated by the cavity from contact with the wood of the frame, before it is carried by gravity to the ground and channelled outside.

[14] But in this case neither flashings nor cavities were either specified in the plans and specifications or required by the Council. The plans showed no detail concerning the sealing of the metal windows when installed in the stucco. The specifications were not directed at a stucco building at all but had been prepared for a weatherboard house.

The Building Code

[15] The Building Code emphasised the sensible obligation of making and keeping a building weather-proof. It provided as to durability:[4]

> **B2.1**
> The objective of this provision is to ensure that a building will throughout its life continue to satisfy the other objectives of this code.
>
> **FUNCTIONAL REQUIREMENT**
> **B2.2.2**
> Building materials, components and construction methods shall be sufficiently durable to ensure that the building, without reconstruction or major renovation, satisfies the other functional requirements of this code throughout the life of the building.
>
> **PERFORMANCE**
> **B2.3**
> From the time a code compliance certificate is issued building elements shall with only normal maintenance continue to satisfy the performances of this code for the lesser of, the specified intended life of the building, if any, or:
> (a) For the structure, including building elements such as floors and walls which provide structural stability: the life of the building being not less than 50 years.
> (d) For linings, renewable protective coatings, fittings and other building elements to which there is ready access: 5 years.

And to ensure protection against the entry of water the Code provided:

> **E2.1**
> The objective of this provision is to safeguard people from illness or injury which could result from external moisture entering the building.
>
> **FUNCTIONAL REQUIREMENT**
> **E2.2**
> Buildings should be constructed to provide adequate resistance to penetration by, and the accumulation of, moisture from the outside.
>
> **PERFORMANCE**
> **E2.3.2**
> Roofs and exterior walls shall prevent the penetration of water that could cause undue dampness, or damage to building elements.

Statements of good practice:

(1) The Good Stucco Guide

[16] There was surprising difference of opinion on the simple and fundamental point of how these general requirements should be given effect.

[17] While produced after the building was erected I accept as stating good practice at the time the Good Stucco Guide para 3.7.1:

[3] See Sita Ram, Cultural History of Nepal, Anmol Publishing 1993, 71 describing a stucco building associated with a classical stone Buddha near relicts of the 9th century.

[4] The following emphasis is added.

The provision of proper flashings around openings in the cladding is essential, with windows having both head and sill flashings (see Figs. 4 and 5).

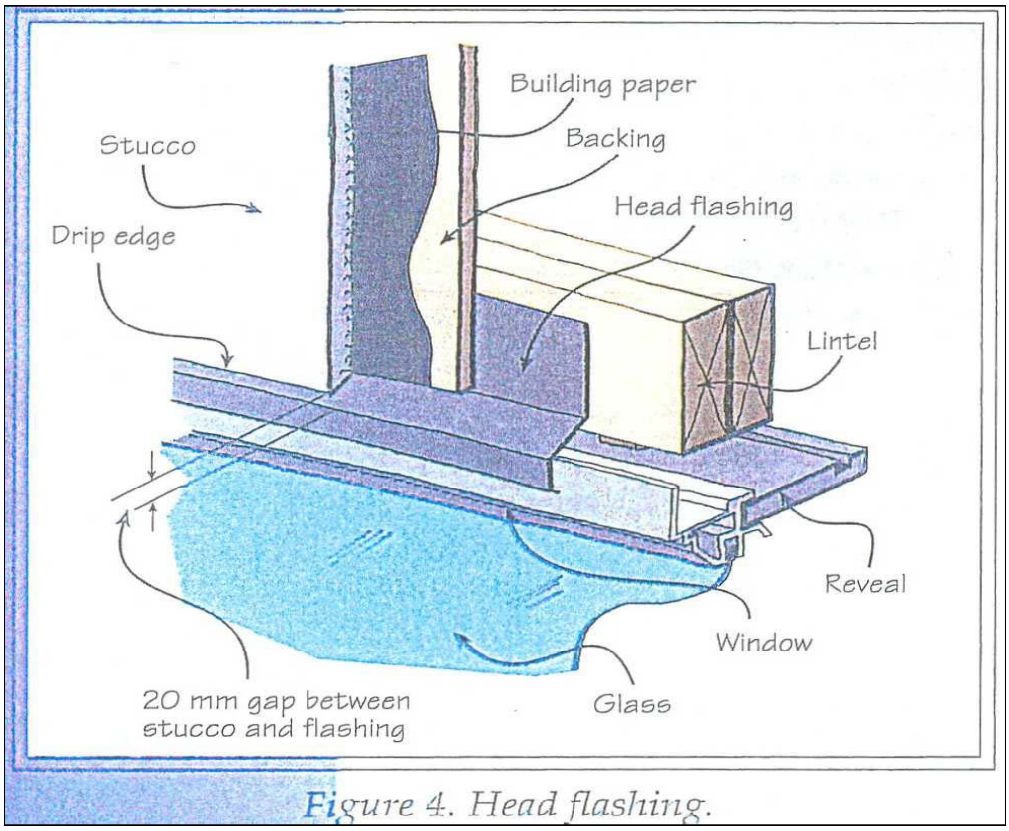

Figure 4. Head flashing.

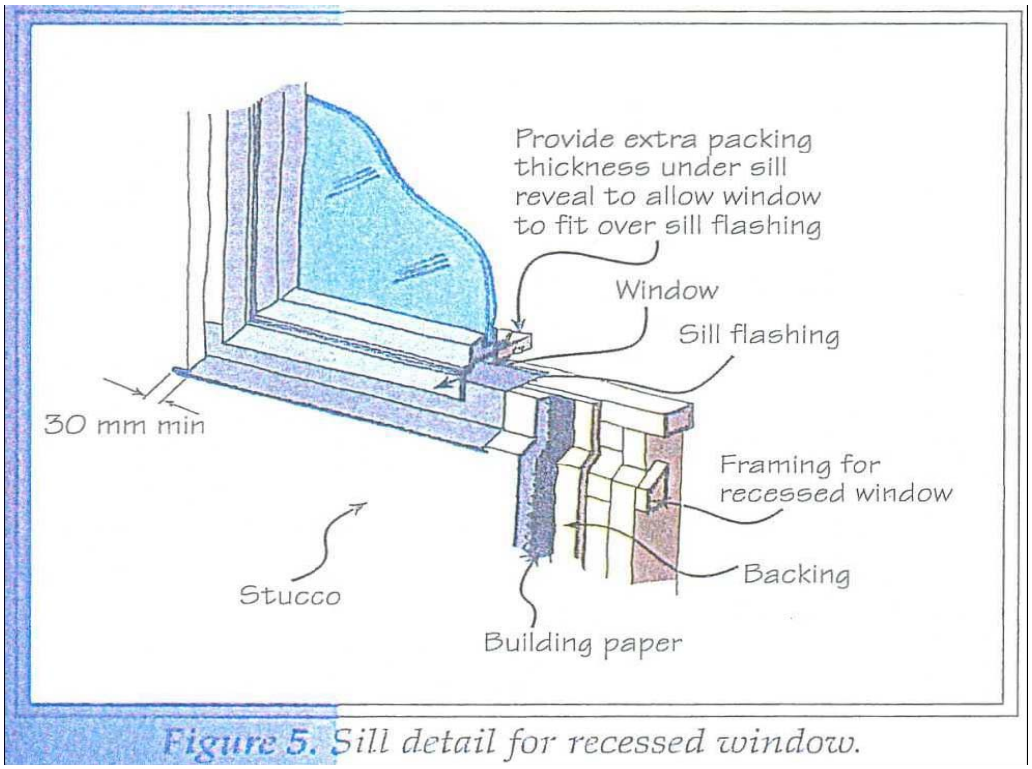

Figure 5. Sill detail for recessed window.

Head flashings must project horizontally at least 30 mm beyond each side of the opening to ensure that water dispersed from each end does not enter any possible gap between the cladding and window or door jam.

[18] An example of a suitable side flashing is shown in figure 9:

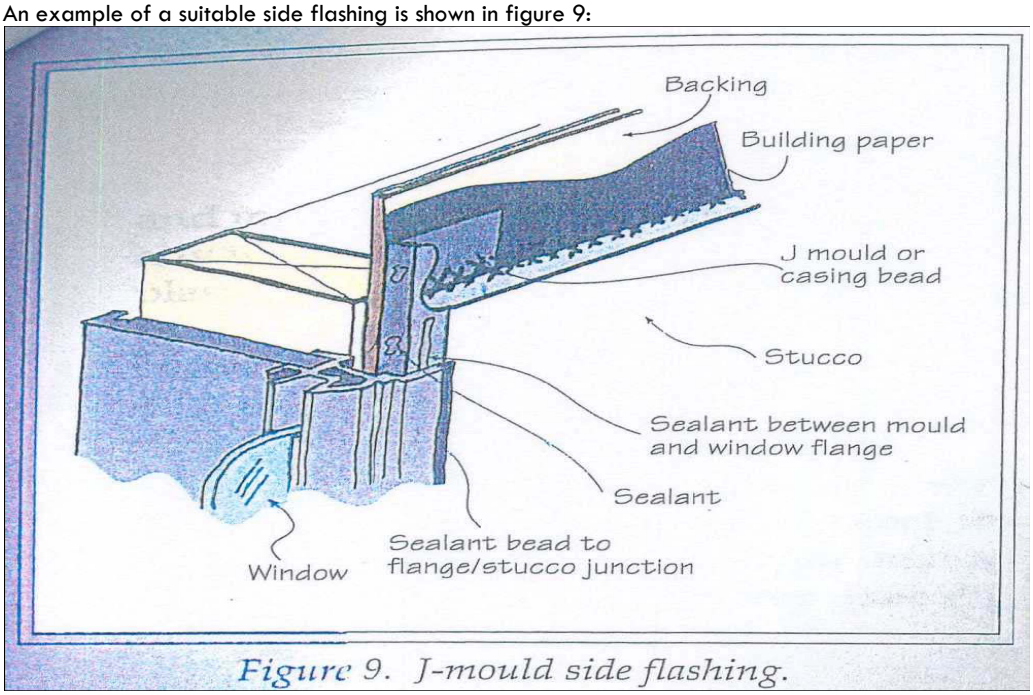

Figure 9. J-mould side flashing.

(2) The Code of Practice for Solid Plastering

[19] Mrs Dicks' experts Mr Jordan and Mr Williams referred to and relied upon NZS4251: 1974 Code of Practice for Solid Plastering 7.4.2 which provides: [5]

> *All surfaces to receive metal reinforcement except masonry or concrete shall be covered with waterproof building paper or felt of the breather type weighing not less than 0.5 kg/m2, free from holes or breaks and complying with NZS873. Each strip shall lap the strip below and the adjacent strips at least 75mm.* ***Flashings of corrosion resisting materials shall be provided to prevent water penetrating behind the plaster. All flashings shall be in place before the application of metal reinforcement or plaster.***

That suggests there should be both head and sill flashings and that flashings are mandatory.

(3) Building Industry Authority approved document "External Moisture: E2"

[20] But the Building Industry Authority issued in August 1994 an approved document "External Moisture: E2" which provided:

> ***3.0 EXTERIOR JOINERY***
>
> *3.0.1 Windows and doors, and the joints between them and cladding materials, shall be as weather-proof as the cladding itself.*
>
> *3.0.2 Windows and doors shall have head flashings, and scribers or seals between proprietary facings and the building cladding.*[6]

[21] The Council's expert Mr Gillingham said:

> There appears to be some conflict within the interpretation of these two documents and for a building consent application the "acceptable solution" E2/AS 1 was preferred.
>
> The comment on flashings is not specific and does not state that flashings are required around window and door openings. The Code of Practice further advises within the previous clause 7.4.1 "metal reinforcement shall be used wherever plaster is to be carried over flashings". This statement suggests that flashings should be concealed within the plaster... even if a flashing were installed this would not have avoided the issue of flashings no longer being visible at the pre-line inspection.

[22] I have concluded that head flashings are required but that elsewhere, as an alternative to flashings, "proprietary seals" were permissible in accordance with accepted practice.

[23] The concept of "seal" is shown in the following sketch. The sealant, shown as hatched, needs to be flexible to accommodate differential movement between the window and its stucco surround.

[5] Emphasis added.

[6] There was no evidence that clause 3.0.2 was in different form at the time of erection of the building. "Scribers" were not mentioned in evidence and may be disregarded.

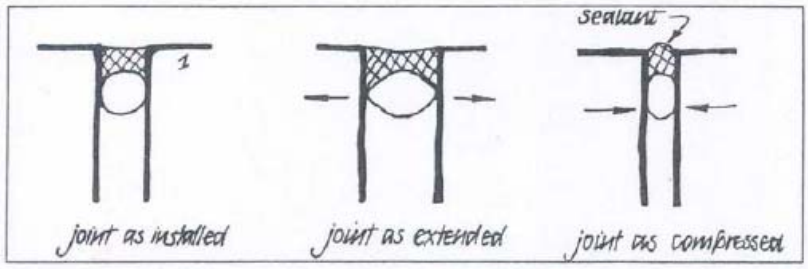

Fig 1a: Working Joints: Butt Joint

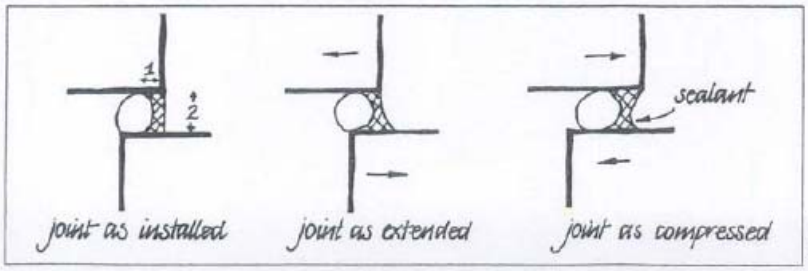

Fig 1b: Working Joints: Lap Joint

[24] There was a difference between the experts as to the meaning of "proprietary seals". The plaintiff's expert, Mr Jordan, described "proprietary seal" as effectively a custom built prefabricated item which would fill a gap between the aluminium window and the stucco surround. But none was in fact available. Mr Williams for the plaintiff however accepted, as the Council's experts asserted, that the use of sealants rather than metal flashings on the sides and on the sill at the bottom of the window would conform with the standards specified. I accept the predominant opinion that proper use of suitable silicone sealant would satisfy the criterion of "proprietary seals".

Hobson Swan's failure to install side flashings or seals

Causation of the damage

[25] While Hobson Swan installed head flashings at the windows it wholly failed to install any form of sealant at the joints. It was not disputed by the Council's experts and I find that such failure entailed breach of ordinary standards of good practice.

[26] The "Good Stucco Guide" states:

2.3 Stucco Failures

2.3.1 Unfortunately, failures of stucco have occurred...

2.3.2 From BRANZ Investigations, the following are the main causes of failure:

• Poor design detailing (particularly flashings and control joints)...

The Guide further states:

3.1 General

3.1.1 [An]... essential criteri[on] for designing stucco-clad buildings [is]:

• Control of moisture to prevent damage to the structure or building interior.

3.1.2 Moisture control should be tackled on two fronts - firstly, by trying to eliminate moisture entry and secondly, by providing for the disposal of any moisture which does enter the cladding, in a way that causes no damage.

[27] A complicating feature of the case is that in addition to the absence of any proprietary or other seals (let alone the provision of side or sill flashings) the use of Triple-`S' has itself proved to be a deficiency. It has been found to fail when subjected to water and has been taken off the market. It was not however suggested that any party could be negligent in respect of the use or certification of Triple-`S' in the mid-1990s.

[28] But I am satisfied that the failure of the Triple-'S' without negligence on the part of Hobson Swan cannot relieve Hobson Swan of the responsibility for causation of the damage. That flows from the absence of seals. That is because the "water resistant" Triple-`S' was not intended as the primary protection against the incursion of water. The Building Code required the external envelope to be weather-proof and the absence of either side flashings or seals meant that it was not. Whether the water having entered encountered the Triple-`S', or by a capillary action flowed around it, is beside the essential point. This is that the water should not have entered but did.

The result of Hobson Swan's failure to create seals is that water was able to penetrate behind the aluminium joinery past the plaster and gain entry to the wood behind. The water has then rotted the frame of the house to a degree that has made it uninhabitable.

[29] The evidence of Mr Williams' careful and systematic moisture readings established elevated levels at points where there had been leaking through the unsealed junctions between the plaster stucco and the aluminium window frames. The problem was encountered regularly about the building. Mr Williams concluded that the real damage was not due to the early episodes of flooding but to continuous wetting, especially at the unsealed joints, where the water has been unable to drain away. The result has been breach of the Code's weather-proofness and durability requirements.

[30] There were other causes of water entry apart from the defective window frames. There was poor workmanship on the roof which led to the initial floods. There was also damage as a result of water entry from the ground resulting in part from the building up of the ground level by the use of concrete blocks by Mrs Dicks' nephew for which Hobson Swan was not responsible.

[31] I am however satisfied by the evidence of Mr Williams that the lack of seals by itself was causative of the building's becoming uninhabitable. It is therefore unnecessary to lengthen this judgment by reciting the whole of the defects. Since the work responding to the flooding was not in areas causative of the need to reclad or replace the house, the awareness of those problems on the part of Mrs Dicks and her insurers and those whom carried out that work did not start time running for limitation purposes.

Breach of legal duty

[32] Hobson Swan owed to Mrs Dicks in both tort and contract and breached a duty to exercise reasonable care to achieve a sound building: as developer (***Mt Albert Borough Council v Johnson*** [1979] 2 NZLR 234), and as builder (***Bowen v Paramount Builders (Hamilton) Ltd*** [1977] 2 NZLR 394 (CA); ***Invercargill City Council v Hamlin***).

[33] Mrs Dicks is entitled to judgment against Hobson Swan for its failure to maintain proper standards of workmanship in breach of its duty of care to her which caused the need for restoration or demolition of the house.

[34] She is also entitled to judgment against Hobson Swan for breach of its contractual undertaking following the settlement conference that it would make good the deficiencies.

Mr McDonald

[35] Mr McDonald is also liable for breach of the contract to make good the deficiencies.

Personal liability of a director in tort?

[36] A more difficult question is whether he was a joint tortfeasor with Hobson Swan so as to be liable personally for that company's negligence.

[37] In cases where the victim of a tort has had no prior nexus with the person who has inflicted it there is often no defence for the latter of being employed as an agent by a principal or being the director of a company. It does not matter that the principal is vicariously liable [7] or that the company has the director's conduct imputed to it.[8]

[38] Equally, where directors expressly direct the commission of tortious conduct they are liable for having procured the wrong: ***Rainham Chemical Works Ltd v Belvedere Fish Guano Co*** [1921] 2 AC 465, 476 per Lord Buckmaster.[9] And a fraudster cannot plead as a defence that he was acting as agent for a principal: ***Standard Chartered Bank v Pakistan National Shipping Corporation*** [2003] 1 AC. 959.

[39] But the position can be different where the plaintiff knows that the person committing the conduct relied upon as a tort, is the employee of a company and elects to deal with that person. As Winfield & Jolowicz on Tort (16th ed) state:

> *... a liberal approach to director's liability will have the effect that the limited liability which is the main object of incorporation for a small "one man" company will be set at naught."* [10]

[40] In the negligent advice cases ***Trevor Ivory v Anderson*** [1992] 2 NZLR 517 (CA) and ***Williams v Natural Life Health Foods*** [1998] 1 WLR 830 (HL) the director of a company was held not to be liable for the negligent act he had committed that imposed liability on the company. Those cases were distinguished in Standard Chartered Bank as depending upon the assumption of liability by the company alone and not by the director personally. In ***Winchester International (NZ) Ltd v Cropmark Seeds Ltd*** CA226/04 5 December 2005 para [50] there was cited Lord Cooke's observation[11] that if the plaintiff:

> *...had reasonably thought that it was dealing with an individual, the result [in Trevor Ivory Ltd v Anderson] might have been different.* [12]

[41] The law adopts a similar policy in the sphere of inducement of breach of contract, where a director does not risk personal tortious liability for conduct which is attributed to the company: ***Said v Butt*** [1920] 3 KB 497; ***Henderson v Kane*** [1924] NZLR 1073; ***Root Quality Pty Ltd v Root Control Technologies Pty Ltd*** (2000) 177 ALR 231.

[42] The high authority that claims in tort for breach of a duty of care can coincide with claims for breach of contract[13] is, as Winfield & Jolowicz point out,[14] the root of the present problem.

[43] There are competing policies which need to be identified:
(1) The public interest in separate legal identity of a company expressed in s 15 of the Companies Act 1993;
(2) The public interest in providing incentives against wrongful conduct and compensating those injured by it;
(3) The hierarchy of wrongs from wilful conduct to strict liability;
(4) The law's greater protection of persons than property and property than merely economic interests.[15]

7 See for instance ***Lister v Romford Ice & Cold Storage Co Ltd*** [1957] AC 555.
8 In accordance with the principles stated in ***Meridian Global Funds Management Asia Ltd v Securities Commission*** [1995] 2 AC 500.
9 Cited by Speight J in ***Callaghan v Robert Ronayne Ltd*** (1979) 1 NZCPR 98 at 109.
10 At 838.
11 In his 1997 Hamlyn lecture "Turning Points of the Common Law".
12 "Taking Salomon Further" at 18 note 51
13 ***Henderson v Merrett Syndicates Ltd*** [1995] 2 AC 145 (HL). 14 At 839 fn 61.
14 At 839 fn 61
15 ***Naysmith v Accident Compensation Corporation*** [2006] 1 NZLR 40 at [80].

[44] As to the first I respectfully agree with the analysis by Professor Watts of ***Trevor Ivory Ltd v Anderson*** in [1992] NZ Recent Law Review 219 and in NZLawyer 15 December 2006 10: there is no reason why mere servants should be personally liable for conduct rendering their employer liable in tort and directors of companies should be exempt in the same circumstances. I add that equally if it is reasonable to impute to the plaintiff an acceptance that his or her relationship is with the company alone it may be appropriate to exempt the employee or director personally.

[45] The second policy is significant but needs to be evaluated against others.

[46] The third is of particular importance.

[47] Consideration in the present case of the fourth policy requires recognition of the fact that New Zealand law has found the categories "physical damage" [16] and "economic loss" [17] each too simple to accommodate the case of a structural failure of a residential building. The point is elaborated later. The members of the Court of Appeal in Hamlin charted a different route from that previously and later adopted in England. Parliament and the Governor-General in Council adopted under the Building Act and Code the concept that the building should have a fifty year life and be given a certificate of compliance. The advantage of that course was to provide an assurance of reasonable quality which is actionable in tort by a later purchaser without the need to perform structural examination of portions inevitably covered up in the course of construction. The policy considerations are analysed by Kirby J (dissenting) in ***Woolcock St Investments Pty Ltd v CDG Pty Ltd*** (2004) 216 CLR 515.

[48] In my view the tort cause of action in this case consists in carelessly creating a defective house. ***Stieller v Porirua City Council*** [1986] 1 NZLR 84 (CA) at 95 emphasised:

> *lack of opportunity... to inspect the premises... in respect of such items as foundations and drainage work*

as the policy reason for the Courts to impose liability or to set a high standard of care in respect of such items. And the Privy Council in ***Hamlin*** at 519 rejected the need for "specific" rather than merely general reliance on the Council. What is said of councils must apply a fortiori to both head contractors and actual builders.

[49] The advice cases are distinctive as turning on the specific identity of the (legal) person on whom reliance is placed and thus the limited scope of the duty assumed under the relatively new tort of negligent misstatement, the limits of which were kept narrow in **Hedley Byrne & Co Ltd v Heller & Partners** [1964] AC 465 and ***Mutual Life and Citizens' Assurance Co Ltd v Evatt*** [1971] AC 793. The economic tort of inducement of breach of contract has also been kept narrow. They are far removed from intentional torts. The present class of case lies between.

[50] So the question is where on the spectrum to place the conduct of being party to the creation of a leaky home. The fact that Mrs Dicks contracted with Hobson Swan is a pointer to her reliance on that company rather than Mr McDonald personally. The position can be said to be different where the claim is by an unsuspecting subsequent purchaser of a house which because of the carelessness will be uninhabitable well before the end of its statutory life.

[51] The opposing argument is that New Zealand law has been developed by Parliament and the courts in a way that gives effect to the reasonable expectations of members of the community. It is not to be expected that those whose expertise and experience lies in other directions should have ascribed to them a capacity to protect themselves against carelessness on the part of builders and developers which infringes Parliament's policy that houses be weather-proof and durable.

[52] In ***Callaghan v Robert Ronayne Ltd*** Speight J found that there was no proof of individual acts of neglect on the part of directors whose company had created a leaky building. Their defective work was in all cases done by workmen or sub-contractors. Speight J considered that had there been evidence of personal control and instruction by a director then in respect of such failure by him in the role of controller, which might be proved to have led to defects, liability might have been established.

[53] The observation of Speight J in ***Callaghan v Robert Ronayne Ltd*** was however obiter and made without the benefit of the negligent advice cases. It did not distinguish between a direction by a director to an employee of the kind discussed in Rainham Chemical Works Ltd and a mere omission in breach of contract, as with the failure to create seals in this case.

[54] In **Morton v Douglas Homes Ltd** [1984] 2 NZLR 548 Hardie Boys J found the directors of a building company liable because of the control they exercised over the building work. He reasoned:

> *The relevance of the degree of control which a director has over the operations of the company is that it provides a test of whether or not his personal carelessness may be likely to cause damage to a third party, so that he becomes subject to a duty of care. It is not the fact that he is a director that creates the control, but rather that the fact of control, however derived, may create the duty. There is therefore no essential difference in this respect between a director and a general manager or indeed a more humble employee of the company. Each is under a duty of care, both to those with whom he deals on the company's behalf and those with whom the company deals insofar as that dealing is subject to his control.* [18]

[16] ***Anns v Merton London Borough Council*** [1978] AC 728.
[17] ***Murphy v Brentwood District Council*** [1991] 1 AC 398.
[18] At 595

[55] In Trevor Ivory v Anderson Hardie Boys J referred to his first instance decision in Morton v Douglas Homes Ltd with apparent approval. Cooke P however distinguished it on the grounds that on the particular facts there was an assumption of responsibility. He said:

> *Clearly the judgment was not intended to lay down a general rule in building negligence cases...*[19]

The third judge, McGechan J, focussed sharply upon the nature of the case before him and on the degree of implicit assumption of personal responsibility with no doubt some policy elements also applying. He reasoned:

> *Mr Ivory made it clear that he traded through a company, which was to be the legal contracting party entitled to charge. That structure was negotiated and known... There was no representation, express or implicit, of personal involvement, as distinct from routine involvement for and through his company. There was no singular feature which would justify belief that Mr Ivory was accepting a personal commitment, as opposed to the known company obligation. If anything, the intrinsic high risk nature of spray advice, and his deliberate adoption of an intervening company structure would have pointed to the contrary likelihood. On the present facts, I see no policy justification for imposing an additional duty of care. In this particular one-man company situation, and against the established trading understandings, I would not view such as just and reasonable.*[20]

[56] The notion of "assumption of responsibility" is used in more than one sense. In Trevor Ivory Ltd v Anderson the issue was one of fact as to whether Mr Ivory as well as his company had assumed responsibility for giving advice that proved to be negligent. In Attorney-General v Carter [2003] 2 NZLR 160 at [23] the Court of Appeal used "assumption of responsibility" to refer to something quite different - the result of the Court's decision to impute responsibility: see Rolls Royce New Zealand Ltd v Carter Holt Harvey Ltd [2005] 1 NZLR 324 (CA) at [99]. These and related concepts are discussed by Professor Coote in a recent essay.[21]

[57] Cooke P in Trevor Ivory was endorsing Morton Homes only on the footing that there was an assumption in the former sense.

[58] Having the advantage of the decision in Trevor Ivory I am of the respectful view that insofar as Morton Homes in fact turned on the second sense of assumption of risk it is not supported by the decision of Cooke P or indeed that of McGechan J. It is accordingly my responsibility to decide whether to follow it.

[59] I have considered the essays by Neil Campbell "Leaking Homes, Leaking Companies?" (2002) CSLB 101, Samuel Carpenter "Directors' liability and leaky buildings" [2006] NZLJ 117 and Grey Seagar and Caroline Eric "Affirmation and Clarification of Trevor Ivory" [2006] NZLJ 268 and the judgments there cited: ***Carter v Auckland City Council*** HC AK CIV-2004-404-2192 14 October 2004 (Associate Judge Christiansen); ***Drillien v Tubberty*** (2005) 6 NZCPR 470 and ***Body Corporate No. 202254 v Approved Building Certifiers Ltd*** HC AK CIV-2003404-3116 13 April 2005 (Keane J) in which the foregoing issues are debated.

[60] In this case factors pointing towards director's personal liability are:
(1) In New Zealand law the protected interest is classified as more than merely economic;
(2) Imposition of personal liability on the director would tend to add incentives to performance;
(3) Since there is no contract with later purchasers, they would be able to sue unencumbered by the present point;
(4) To permit the company to sue or seek contribution from its careless director in the same way it can sue a careless employee in terms of ***Lister v Romford Ice***;
(5) Henderson v Merrett has overtaken ***McLaren Maycroft & Co v Fletcher Development Co Ltd*** [1973] 2 NZLR 100 (CA) and permitted concurrent claims in contract and tort.

[61] Factors pointing away are:
(1) The tort is closely connected with the contract by which Mrs Dicks and Hobson Swan formulated their legal relationship;
(2) There is no practical difference between the contractual and tortious breaches of duty;
(3) The wrong, being of omission, is well removed from the wilful end of the spectrum;
(4) While in point of New Zealand law the conduct is tortious that is not the case in England; in moral terms it is, as it were, only just a tort.

[62] The point can be argued either way. While a New Zealand appellate court might choose to take a different approach Morton v Douglas Homes has stood for two decades. It cannot be said that the decision is so lacking in principle that litigants should be subjected to inconsistent judgments of first instance.I have therefore decided to follow Morton v Douglas Homes on the present point. It applies a fortiori: Mr McDonald did not merely direct but actually performed the construction of the house and was personally responsible for the omission of the seals. His carelessness is, on the Morton v Douglas Homes analysis, a breach of a duty of care owed by him to Mrs Dicks. He is therefore personally a tortfeasor (as well as having his conduct attributed to Hobson Swan as its tort).

[63] I therefore hold that Mr McDonald is personally liable to Mrs Dicks in tort as well as for breach of contract.

The Council

[64] There is no denial that the Council owed Mrs Dick a duty of care. But there is a dispute as to the nature of that duty and whether it has been breached. Because Parliament has spoken the starting point is the Building Act and Code which require more elaborate consideration at this stage.

[19] At 523.
[20] At 532.
[21] "Assumption of responsibility and Pure Economic Loss in New Zealand" [2005] NZLRev 1.

The Building Act and Code

[65] A 1990 report (Reform of Building Controls) by the Building Industry Commission to the Minister of Internal Affairs recommended the introduction of what was termed "a performance based" scheme to replace the regulatory scheme.[22] The report exhibited a high level of confidence that a combination of light handed regulation and the mechanisms of a market would produce better results than the existing scheme. The Commission considered that judicial decisions of the 1970s and 1980s holding councils liable for building defects had led councils to impose increasingly onerous requirements on those engaged in building works and had produced costs which were higher than the private owner would have chosen.[23]

[66] On 1 July 1992 the Building Act replaced the former regulatory scheme which had been criticised as overly prescriptive and stifling of innovation. While it is now seen to have possessed the distinct advantage of requiring adherence to proven building techniques and procedures that would ensure weather-proofness, hindsight must be stripped out of the present exercise. The Act has been repealed as from 31 March 2005 by the Building Act 2004 which has no application to this case.

[67] The purposes and principles of the Building Act were stated in s 6. They included provision for:

> *necessary controls relating to building work and the use of buildings, and for ensuring that buildings are safe and sanitary...*

To achieve the purposes of this Act, particular regard was to be had to the need to:

> *safeguard people from possible injury, illness, or loss or amenity[24] in the course of the use of any building...*

[68] As already noted, it provided [25] for regulations to be known as the Building Code prescribing functional requirements for buildings and the performance criteria with which buildings must comply in their intended use. Such code was promulgated by the Building Regulations 1992. Territorial authorities were given the functions of administering the Act and regulations; receiving and considering applications for building consents; approving or refusing any application for a building consent within the prescribed time limits, and enforcing the provisions of the Building Code and regulations.[26]

[69] It was unlawful to carry out any building work except in accordance with a building consent issued by the Council in accordance with the Act.[27] An owner intending to carry out any building work was required before the commencement of the work to apply to the Council for a building consent in respect of the work.[28] The application was to be accompanied by a charge fixed by the Council:

> *and by such plans and specifications and other information as the [council] reasonably requires.*[29]

[70] The Council was required to grant or refuse an application for a building consent within the ten day period. It might within that period require further information, in which event the timetable was suspended until the information was provided.[30] By s 34(3):

> *After considering an application for building consent, the [council] shall grant the consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work was properly completed in accordance with the plans and specifications submitted with the application.*

Consent might be granted subject to conditions; in that event the Council was to have regard to the Building Code.[31]

[71] Section 43 provided:

> *43. Code compliance certificate*
>
> *(1) An owner shall as soon as practicable advise the [council], in the prescribed form, that the building work has been completed to the extent required by the building consent issued in respect of that building work.*
>
> *(3) ...the [Council] shall issue to the applicant in the prescribed form, on payment of any charge fixed by the [Council], a code compliance certificate, if it is satisfied on reasonable grounds that*
>
> *(a) The building work to which the certificate relates complies with the building code;...*
>
> *(5) Where ... a [council] refuses to issue a code compliance certificate, the applicant shall be notified in writing specifying the reasons.*
>
> *(6) Where a [council] considers on reasonable grounds that it is unable to issue a code compliance certificate in respect of particular building work because the building work does not comply with the building code, or with any waiver or modification of the code, as previously authorised in terms of the building consent to which that work relates, the [Council] shall issue a notice to rectify..* [32]

22 See ***Attorney-General v Body Corporate No 200200*** [2007] 1 NZLR 95 at [7].

23 That problem remains. A recent report records that the average cost of a house has increased from three times the national income to 6.5 times: speech by Hon Chris Carter to the Affordable Housing Forum 30 October 2006 The Capital Letter 14 November 2006 29/43 p 8.

24 Defined by s 2 as "an attribute of a building which contributes to the health, physical independence and well being of the building's users but which is not associated with disease or a specific illness."

25 Section 48.

26 Sections 24(a), (b), (c) and (e).

27 Section 32.

28 Section 33.

29 Ibid.

30 Section 24(2).

31 Section 34(4) and (5).

32 A procedure provided by s 42. ss Section 76.

[72] The Council was empowered to take all reasonable steps to ensure that any building work was being been done in accordance with a building consent and to enter to inspect any building or building work.[33]

[73] Proportionality of response was contemplated by s 47:

47. Matters for consideration by [councils] in relation to exercise of powers

In the exercise of its [foregoing] powers... the [Council] shall have due regard to...

(a) The size of the building; and

(b) The complexity of the building; and

(c) The location of the building in relation to other buildings, public places, and natural hazards; and

(d) The intended life of the building; and

(g) The intended use of the building, including any special traditional and cultural aspects of the intended use; and

(h) The expected useful life of the building and any prolongation of that life; and

(k) Any other matter that the [Council] considers to be relevant.

The relevant provisions of the Building Code as to weather-proofness and durability have been cited ([15] above).

[74] So 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.

Legal obligations under the Act

[76] Liability for negligence was plainly contemplated by s 91 which provided builders and councils with a limitation defence expressed in relation to building work and the exercise of functions under the Act relating to the construction of a building, including the issue of a building consent or a code compliance certificate. The test was stated by the Court of Appeal in ***Askin v Knox*** [1989] 1 NZLR 248 as the exercise of reasonable care. The common law measures the standard of reasonable care in the first instance against the practice of other councils but always subject to the determination of the Court that "independently of any actual proof of current practice common sense dictated" particular precautions: ***McLaren Maycroft & Co v Fletcher Development Co Ltd*** at 102 per Turner P.

[77] Counsel for Mrs Dicks submitted that the Council owed duties to Mrs Dicks:

a) To exercise reasonable care and skill to ensure that the house complied with the Building Code when issuing a building consent, carrying out inspections, and issuing the Code of Compliance Certificate;

b) To have in place a system of inspections designed to ensure that the house was constructed in accordance with the Building Code;

c) To carry out inspections in accordance with that system;

d) To exercise reasonable skill and care to take whatever steps were necessary to ensure compliance with the Building Code.

[78] Despite the concession referred to at [3] above, Ms Thodey submitted:

Mrs Dicks does not fall within the category of plaintiffs afforded protection by the Hamlin decisions because:

- she could have made enquiry of the Council by applying for a Land Information Memorandum, but did not do so;
- she could and did protect herself contractually;
- she did not specifically rely upon the Council;
- her house was neither constructed nor purchased in the socio-economic circumstances referred to in the Hamlin decisions.

[79] There is no reason to believe that a LIM report would have made any difference. This is not a case of building over a hazard that such report would have disclosed. The other points taken are the subject of authority helpful to Mrs Dicks that is binding on this Court.

[80] Ms Thodey submitted in the alternative that the Courts since Hamlin have adopted a more limited approach in imposing tortious duties where a clear contractual plan exists and there is no warrant for imposing a tortious duty of care. The allusion is to ***Three Meade Street Ltd v Rotorua District Council*** [2005] 1 NZLR 504 where in a case concerning a commercial investment this Court, following the majority decision in ***Woolcock St Investments Pty Ltd v CDG Pty Ltd***, distinguished Hamlin. But since Hamlin is not distinguishable in this case there is no purpose in revisiting the Three Meade Street decision.

[33] Section 76

[81] Ms Thodey further argued that the submission for Mrs Dicks, that the Council ought to have carried out further inspections than were in fact performed, seeks to establish the existence of a novel duty of care which should not be countenanced. She submitted:

- The duty is limited to:
  (1) the exercise of reasonable care and skill when issuing the consent;
  (2) the exercise of reasonable care and skill when carrying out any inspections that were performed.
- There is no relevant New Zealand authority supporting:
  (3) a duty to carry out further inspections than it elected to perform, which is a policy rather than an operational decision.
- Nor is there authority supporting liability in damages for breach of:
  (4) a duty to exercise its power to issue a notice to rectify and to pursue court action against the builder, which is again a policy rather than an operational decision;
  (5) a duty to exercise reasonable care and skill on the issue of a code compliance certificate: Three Meade, citing ***Attorney-General v Carter*** [2003] 2 NZLR 160 (CA), is against the argument.

[82] Mrs Thodey acknowledged that a duty of care may be imposed on a council to carry out inspections. But before such duty is imposed, there must be taken into account a number of considerations including an awareness that a further inspection might be appropriate, an awareness that a failure to carry out that inspection might cause a loss to a subsequent owner, and that there are sufficient resources available in terms of both finance and personnel to make it just and appropriate that the inspection be carried out.

The facts and issues as to Council conduct

The issue of the building consent

[83] It is striking that although the building was to be stucco, as the plans showed, the specifications related to wooden weatherboard construction. The Council approved the specifications which, being prepared for a weatherboard house, said nothing about the fitting and sealing of aluminium windows in stucco so as to avoid the obvious risk of leakage. Nor did the plans provide any detail on that topic.

[84] Mrs Dicks' expert Mr Williams described the risks of that omission as including the absence of sealant which manifested itself in the damage in this case.

[85] The Council elected not to call the officers responsible for approving the plans and specifications and for carrying out the inspections, let alone the officers responsible for laying down and maintaining proper systems. The conclusion is irresistible that the Council staff responsible for approving the specification were either untrained or simply careless, treating the approval of the specifications as a mere formality.

[86] In the opinion of the Council's experts the installation of "proprietary seal" entailed no more than the purchase and application of silicone from a tube; something which was reasonably to be expected of anyone holding himself out as a builder and did not require stipulation by the Council.

[87] A similar defence argument succeeded in Morton v Douglas Homes at 601 where Hardie Boys J acquitted the Council of negligence in failing to require more detailed information in the plans and specifications relating to piling, holding that the method proposed was sufficiently well known for a reasonably competent builder to be able to implement it.

[88] The operation of applying silicone sealant is not of any complexity. But the significance of failure to apply it properly is not as immediately obvious as a failure to provide adequate foundations. While an absence of directions would not constitute negligence if accompanied by an inspection process sufficiently robust to discern whether the work in critical areas was in fact up to standard, no such process was provided.

The inspections

[89] Council officers performed four inspections of the property. The first and second, of footings and bond beam and pre-floor, are not material. The third on 12 May 1994 was the "pre-line" inspection; a final inspection took place on 21 February 1995.

[90] "Pre-line" inspection occurs at the stage when the roof is in place, the wall framing has been completed and generally the thermal insulation has been installed. It includes the inspection of moisture content in framing, to ensure that it is below the level of 24%.

[91] Mr Jordan for Mrs Dicks was of the opinion that while it was not the practice of councils at the time to carry out in addition a "pre-plaster" inspection such inspection should have been carried out as it was only in that way that the Council could have reasonable grounds to know whether the house would comply with clauses E2 and thus B2 of the Building Code.

[92] The Council's expert Mr Gillingham found it difficult to imagine how a council officer could have inspected for the presence of sealant unless he was present when it was applied. He deposed that there was no practice in 1994 to arrange for a council inspector to be present at such a stage.

[93] The Council's expert Mr Jones considered that a council inspector would not have been concerned to inspect exterior cladding in any detail at the pre-line stage. He said that while at the final inspection the inspector would have checked for the presence of window head flashings and that the sides of the windows were sealed:

> *I would have expected sealant to be applied around the sides and bottom of the window although this would not have been fully visible to a council officer either at the time of a pre-line or final inspection.*

But he denied that a typical council would have recognised the defects at the time.

[94] Mrs Dicks' expert Mr Jordan by contrast said that he would have expected that any alternative to flashings would have been considered. He accepted that the practice of council inspectors at the time was not to consider windows and flashings at the pre-line stage, although that should in his view have been done. He also accepted that it was not then understood that the presence of a proper sealant was critical to the future weather-proofness of the junction between the windows and the stucco cladding.

[95] The Council relied on the evidence of Mr Jones who spoke of the small pool of experts, the Council's costs of employing the staff required to handle their new obligations. He said:

> *... as at 1994 the Act had been in force for just over a year [in fact in full for nearly 2 years - from 1 July 1992] and ...other councils in New Zealand were only beginning to develop systems that would specifically cope with the implementation of a performance based as opposed to a prescriptive based code...*

[96] His evidence that:

> *In 1994... many Council Officers would have approved the issue of the building consent on the basis of the information supplied in respect of the external cladding [viz that the specifications referred to weather-board when the plans showed stucco]*

indicates a systemic practice of treating the approval exercise as a mere formality.

Discussion

[97] The Council's case is that standards were so low that councils accepted in lieu of the well-proven cavity and flashing requirements of the previous regime:

- Perfunctory examination of the plans and specifications;
- Absence of any need for systematic response to the use of unproven techniques and materials; and
- Absence of any need to reason that any substitute for cavities and side-flashings, which were the subject of specific examination at final inspection, must require examination of no lesser intensity.

That is despite the well-known fact that wood exposed to water will rot.

[98] The importance of the issue may be discerned from the evidence of a Council witness that there are some 40,000 leaky homes. That statistic is of no particular relevance to the present case which must be determined according to its own facts. But it tends to suggest a wholesale failure by councils to face systematically and robustly the reality that without firm control of standards the temptation for developers to throw up cheap buildings of defective quality would be irresistible.

[99] The Council evidence of systemically low standards suggests systemic failure by councils to perform their obligations. While they may be relieved of liability once the ten year limitation period has expired, future purchasers during the ostensible fifty year life of the building may be unpleasantly surprised. Whether the 2004 legislation and the Weathertight Homes Resolution Service provide a sufficient response to the problems is for others to consider.

The principles

[100] The arguments take one back to the basics of:

(1) What is the rationale of the New Zealand law stated in Hamlin;
(2) What is to be inferred from the statutory regime;
(3) When does the Court intervene and reject general council standards as too low?

[101] As to (1), the courts have laid upon councils the obligation to act with care in issuing and administering building consents. It is a non-sequitur to assert that because there is a public law duty therefore there is no duty at private law. In England and Australia the cause of action against councils has been classified as merely economic. That low-level evaluation of the public law obligation may carry with it the consequence that breach of public duty carries no private law responsibility. But in ***Hamlin*** the New Zealand common law in relation to the public law duty of councils to safeguard the interests of home owners departed quite deliberately from what Lord Nicholls (dissenting) in ***Stovin v Wise*** [1996] AC 923, 931 called *"th[e] unacceptable yoke"* of ***East Suffolk Rivers Catchment Board v Kent*** [1941] AC 74. (The latter was not received with enthusiasm by the Court of Appeal in another context in ***Johnson v Watson*** [2003] 1 NZLR 626, 630-631.)

[102] As to (2), Parliament by the Building Act has endorsed the policy stated by the courts. It has endorsed "*performance based*" standards, meaning that the building must perform to the criteria of the Building Code. No sanctions are specifically provided for non-performance by councils; but the recognition by s 91 of the prospect of civil proceedings against councils and their exclusion from the s 89 defence accorded to their members and employees acting in good faith suggests that such liability was to provide an incentive to performance.

[103] In ***Ingles v Tutkaluk*** [2000] 1 SCR 298 at 311-2 Bastarache J stated for the Supreme Court of Canada:

> *...where inspection is provided for by statute, a [local] government agency cannot immunize itself from liability by imply making a policy decision never to inspect... To determine whether an inspection scheme by a local authority will be subject to a private law duty of care, [the] court must act in a reasonable manner which constitutes a bona fide exercise of discretion... we must bear in mind that municipalities are creatures of statute... a policy decision whether or not to inspect must accord with th[e] statutory purpose.*

[104] I have adapted and abbreviated the citation to make the point that for a New Zealand court the crucial task is to achieve a construction of our statute that will give real effect to it within the guidance of New Zealand appellate

authority. The Building Act is not within the class of statute described by Wilson J in ***Kamloops v Nielsen*** [1984] 2 SCR 2 at 11, adopting the policy/operational antithesis of Lord Wilberforce in ***Arms v Merton London Borough Council:***

> *... statutes conferring powers but leaving the scale on which they are to be exercised to the discretion of the local authority.. . [w]here there will be an option to the local authority whether or not to do the thing authorised but, if it elects to do it and does it negligently, then the policy decision having been made, there is a duty at the operational level to use due care in doing it.*

For the reasons stated at [74] above our statute imported a council duty to inspect.

[105] So what should be the limits of the Council's liability in tort? It should be responsive to Richardson J's list in ***Hamlin*** at 524 of the distinctive characteristics of New Zealanders' conception of their home, endorsed by the Privy Council at 521.

[106] In another area of the law of tort the House of Lords in ***Wilsons and Clyde Coal Company Ltd v English*** [1938] AC 57 decided that an employer must at common law take reasonable care and skill to provide and maintain proper equipment; to select properly skilled persons to manage and superintend the business; and to provide a proper system of working. That case concerned the high public interest of integrity of the person. But it is readily transferable to the simple obligation of a council to exercise reasonable care in discharging the task of implementing the statutory purpose of compliance with the Building Code. I see no principled reason why a New Zealand court should not utilise it in determining the nature and extent of councils' tortious liability.

[107] As to (3), while the standard is no more than that of reasonable care, the law is as stated in ***McLaren Maycroft***.

Application of the principles

[108] I turn to apply the principles. Messrs Gillingham and Jones and counsel essentially argued that standards were low at the time; councils had not completed the transition from the former prescriptive regime to the new permissive "performance-based" regime with its tight time-limits for approval of applications; the logic that they had an obligation to prepare themselves to handle new methods by providing staff with new skills was met by the response that the relevant decisions were of policy rather than operational; that other councils had no system for ensuring that seals were in place where cavities and flashings had been dispensed with; and that it is a simple misfortune for Mrs Dicks that she made her purchase before the logical consequences and deficiencies of the 1991 regime had been perceived by councils generally.

[109] But that is not what Parliament specified in s 34(3) ([70] above). I reject the notion that councils were permitted to pay lip-service to the legislation. Rather their task was to implement it. Hamlin decides that the courts will enforce that obligation by providing injured parties with a cause of action in negligence.

[110] The Council's power to charge fees and its duties to determine whether a Certificate of Compliance should be issued and, if not, to issue a notice to rectify point to a legislative policy the Council should carry any loss caused if it neglects its duty to inspect. Mrs Dicks should be able in accordance with the principles of Stieller and Hamlin to rely on it to perform that duty. For the Council to be able to cast on her the obligation to suspect that it had breached the duties it was bound to perform would be perverse.

[111] Sir Jack Beatson and Professor Taggart have castigated the 'oil-and-water' approach of ignoring the relationship between common law rights and their regulation by (in this case) both statute and Code. Professor Taggart adds:

> *Failure to view property rights and restrictions in a holistic way... is blind to the fact that property rights are socially constructed.*[34]

Hamlin exemplifies the approach for which Beatson and Taggart argue; to accept the Council's argument would infringe it.

[112] In point of simple logic the Building Code's "performance-based" criteria required any substitute for proven technology itself to be proven. Turner P's test, whether independently of any actual proof of current practice common sense dictated particular precautions, requires consideration of both what risk is in prospect and the cost and difficulty of dealing with it.

[113] As to risk, the need for the exclusion of water was well-known. Under the previous regime it had required the substantial precautions of cavities and/or side flashings.

[114] Nothing apart from inadequate foundations could be as insidious as entry into a house of water, which will ultimately have the same effect as inadequate foundations.

[115] What of dealing with that risk? The Council suggested that whether the presence of seals was detectable or not by the inspector depended on the fortuity of whether they had been painted when the inspector happened to arrive.

[116] While "proprietary seals" was accepted as an alternative to cavities and/or side flashings, it would have occurred to a reasonable council officer considering in a quiet office the significance of abandoning cavities and flashings that they could not simply be regarded as the equivalent of a coat of paint.[35] It was the task of the

[34] Private Property and Abuse of Rights in Victorian England: the story of Edward Pickles and the Bradford Water Supply (Oxford 2002), 197.

[35] Indeed a BRANZ bulletin of October 1991 recorded that a general rule painting over silicone sealants is not recommended: it is difficult to ensure compatibility between the paint system and the sealant and the cured paint film may lack the movement capacity of the sealant and hence crack and flake off.

Council to establish and enforce a system that would give effect to the Building Code. Because of the crucial importance of seals as the substitute for cavities and flashings it should have done so in a manner that ensured that seals were present. That was the standard required by Hardie Boys J in ***Morton v Douglas Homes*** in relation to foundations. The Council accepts that flashings warranted specific precaution to check to ensure their presence; so too must their substitute.

[117] I have concluded that the absence in this case of both any instructions and of any system to discern whether seals were in place infringes Turner P's test. There has been a simple abdication of responsibility by the Council. If there is need to apply an Anns operational test I accept Mr Jordan's explanation that it would be easy to do so simply by the use of a key to probe the joint. But while it is unnecessary for the decision of the present case, I am of opinion that like the respondent in Wilsons and Clyde Coal Company Ltd v English the Council should in addition be held liable at the organisational level.

[118] For these reasons it is unnecessary to consider the arguments as to a council duty to exercise its power to issue a notice to rectify and pursue court action against the builder and to exercise reasonable care and skill on the issue of a code compliance certificate, each of which raises issues of Hobson Swan's solvency and financial capacity to rectify so late in the process.

Claim by Council against Hobson Swan and Mr McDonald

[119] The Council did not pursue in submissions a pleaded claim for breach of a settlement contract. It claims contribution or indemnity against Hobson Swan and Mr McDonald as joint or concurrent tortfeasors.

[120] For the reasons already given I consider that both Hobson Swan and Mr McDonald are joint tortfeasors. As submitted by Mrs Thodey on the basis of ***MtAlbert Borough Council v Johnson*** [1979] 2 NZLR 235 (CA) I give judgment in favour of the Council against Hobson Swan and Mr McDonald for 80% of the amount of its liability to Mrs Dicks.

Damages, costs and disbursements

Cost of repair

[121] The plaintiff provided quotations for repair of $228,417.00 and for demolition and rebuilding of $206,081.00. The Council had an estimate of $135,788 and contended that either that figure or the evidence of loss of value if the house and garage were demolished, $185,000, should be adopted.

[122] I am satisfied that Mrs Dicks should not have to bear the worry and risk that the Council's estimate should be inadequate; indeed general damages would have to make allowance for the resulting anxiety. It was open to the Council to offer a guarantee that its estimate would be correct but it did not accept that option. Mrs Dicks is entitled to the peace of mind that results from a firm price and I fix the repair cost at $206,081. Mrs Dicks has accepted that that figure must be reduced by the sum of $21,000 already paid by the Council together with interest (which I fix at 7.5% from the date of payment) and $6,620 for betterment.

General damages

[123] Mrs Dicks has undergone distress from at least December 2003 when it was confirmed that this is a leaky home. While Hobson Swan would be liable for a longer period there is not expected to be significant recover from the liquidation and the point is really academic. I am not satisfied that the flooding prior to 1996 was the result of breach of duty by the Council. Awards of the order of $15-20,000 have been made in comparable cases, including ***Chase v De Groot*** [1994] 1 NZLR 613 (two years disturbance $15,000), ***Snodgrass v Hammington*** CA 254/93 22 December 1995 (distress from subsidence $15,000 to one plaintiff and $5,000 to another), ***Battersby v Foundation Engineering Ltd*** HC AK CP 26/97 5 July 1999 Randerson J (total loss of cliff top property of family with four children $20,000).

[124] Adopting an intermediate 1995 figure of $17,500 and adjusting it for inflation to 2005 figures ($17,500/93 x 113) yields a figure of $21,263. Making allowance for a further year general damages will be fixed at $22,500.

Costs

[125] Mrs Dicks is entitled to costs fixed on a 2B basis with allowance for second counsel.

Disbursements

[126] Mrs Dicks has paid Prendos $29,684.43. There is a difference of judicial opinion whether the full amount or only 2/3 is payable: compare ***Progressive Enterprises Ltd v North Shore City Council*** (2005) 17 PRNZ 919 not followed in ***Myers Park Apartments v Sea Horse Investment Ltd*** HC AK CIV 2004-404-007180, 24 October 2006, Venning J. The difference is under review by the Rules Committee. Because (1) of that unresolved difference; (2) it is indisputable that Mrs Dicks had no option but to retain Prendos; and (3) there can be no question of risk of the perverse incentive to bury legal costs under expert fees that lay behind Progressive, Mrs Dicks will recover the full amount plus interest at 7.5% from the date of payment.

Leave to apply

[127] There will be leave to apply to finalise the calculations if they cannot be agreed.

M C Josephson and G B Lewis for Plaintiff instructed by Grimshaw & Co, Auckland Heaney & Co, Auckland
No appearance for First Defendant Second Defendant in person
S A Thodey (25-29 September and 3-5 October) and D J Heaney (20 October) for Third Defendant
Copy to: R H McDonald, Auckland