

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE**

**CIV-2020-404-0001235
[2023] NZHC 3203**

BETWEEN

BODY CORPORATE 462460
“NIKAU APARTMENTS”
First Plaintiff

JEETESH MISTRY AND USHA MISTRY
AND OTHERS
Second Plaintiffs

AND

AUCKLAND COUNCIL
[DISCONTINUED]
First Defendant

PRODESIGNERS ARCHITECTS
LIMITED [DISCONTINUED]
Second Defendant

TERRACON INDUSTRIES LIMITED
Third Defendant

Hearing: 13 November 2023

Appearances: S N Zellman and M J Cochrane for the Plaintiffs
No Appearance for the Third Defendant

Judgment: 14 November 2023

JUDGMENT OF VAN BOHEMEN J

*This judgment was delivered by me on 14 November 2023 at 3 pm
pursuant to r 11.5 of the High Court Rules 2016.*

Registrar/Deputy Registrar

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Counsel/Solicitors:
Grimshaw & Co, Auckland
Simpson Grierson, Auckland
Wotton Kearney, Auckland
Braun Bond & Lomas Limited, Hamilton

FIRE DESIGNS LIMITED
[DISCONTINUED]
Fourth Defendant

PETER CHARLES DUNKIN
[DISCONTINUED]
Fifth Defendant

[1] Body Corporate 462420 (the Body Corporate) and individual owners of units in the residential apartment complex at 136 Stancombe Road, Flat Bush, known as the Nikau Apartments (together, the plaintiffs), commenced this proceeding in 2020 against the Auckland Council (the Council) and parties involved in the design and construction of the Nikau Apartments, seeking damages for the costs of remediating alleged defects in the Nikau Apartments, as well as associated costs and general damages.

[2] The third defendant is Terracon Industries Ltd (Terracon), which carried out the waterproofing of the basement walls, roof decks and planter boxes at the Nikau Apartments.

[3] The plaintiffs have since settled and discontinued their claims against the Council and all other defendants except Terracon.

[4] Terracon was served with proceedings on 4 August 2020. It has not filed any defence or taken any other step in the proceeding.

[5] Accordingly, the plaintiffs' claim proceeds by way of formal proof pursuant to r 15.9 of the High Court Rules 2016.

Plaintiffs' claims against Terracon

[6] In their second amended statement of claim dated 21 November 2022, the plaintiffs say Terracon owed them a duty to exercise reasonable skill and care in waterproofing the roof, decks and planter boxes at the Nikau Apartments. The plaintiffs say Terracon breached this duty with the result that the Nikau Apartments were built with certain building defects and failed to comply with the Building Code .

[7] In particular, the plaintiffs say that Terracon breached its duty of care by failing to take the care that a reasonably skilled and prudent membrane installation company in the position of Terracon would be expected to take to ensure that the work carried out under its supervision and control was completed:

- (a) in accordance with the building consent for the development, including amendments to the building consent, and plans and specifications for the construction of the Nikau Apartments;
- (b) with reasonable skill and care; and
- (c) in accordance with the Building Code.

[8] The plaintiffs' claims against Terracon relate to the following three of six defects (the Building Defects) identified in the construction of the Nikau Apartments:

- (a) Water entry through the planter boxes and adjacent courtyards (Defect A);
- (b) Poor installation of the membrane roof (Defect B); and
- (c) Waterproofing to balcony decks which did not comply with consented plans and was incomplete (Defect E).

[9] The plaintiffs say they have suffered and or will suffer losses estimated at over \$5,067,108.69 (excluding GST) as a result of Terracon's breach of duty. This sum comprises:

- (a) The current estimated cost of remedying Defects A, B and E: \$4,868,409.00;
- (b) Consultant costs incurred in defect and damage investigation and advice regarding remedial scope: \$135,179.11;
- (c) Additional Body Corporate management costs incurred in relation to investigating and remedying the defects: \$36,445.42;
- (d) Interest in accordance with the Interest on Money Claims Act 2016: \$13,930.16; and

(e) Costs of this proceeding calculated on a 2B basis: \$13,145.00.

Relevant factual background

The Nikau Apartments

[10] The Nikau Apartments are a four level, multi-unit residential development. There are three levels of residential housing, with 11 apartments per floor, and one level of basement carparking. The apartments are all single level except for the four central apartments on the top level, which have a mezzanine floor. In unit title terms, the Nikau Apartments comprise 33 principal units, 34 associated accessory units and various common areas.

[11] The development was commenced by Mr Dan Li and Mr Guang Yu Zhao, who were the registered proprietors of the land on which the Nikau Apartments are situated. Mr Li and Mr Zhao transferred their interest in the development and in the land to MJZ Investment Limited (MJZ) after its incorporation in May 2012.

[12] In May 2011, the Council issued a building consent for the construction of the Nikau Apartments.¹ In May 2013 and March 2014, the building consent was amended. In this judgment, “Building Consent” means the consent issued in May 2011, as amended in May 2013 and March 2014.

[13] Construction work commenced around 21 November 2012 and was completed around 21 March 2014, when the final building inspection was conducted. On 10 April 2014, the Council issued Code Compliance Certificates in respect of all works authorised under the Building Consent.

[14] From as early as April 2014, the second plaintiffs became registered owners of their respective unit titles at Nikau.

[15] The Building Consent was granted on condition that the building owner supply various producer statements. These included an approved producer statement from

¹ The Building Consent was issued to Mr Zhao and Mr Li but was later transferred to MJZ following its incorporation and becoming registered proprietor of the land.

the waterproof membrane supplier or manufacturer for roof, decks and wet areas and an approved producer statement from the waterproofing membrane licensed applicator.

Relevant design aspects of the Nikau Apartments

[16] Three aspects of the design of the Nikau Apartments are relevant to the claim against Terracon:

- (a) All apartments have access either to an external concrete balcony or to a paved courtyard. A torch-on waterproof membrane is installed over the balconies, together with a floating deck system which comprises timber furrings and decking. The courtyards at ground level are also weatherproofed with a torch-on membrane system and have pavers installed over the bedding sand.
- (b) The metal roof to the complex has a trapezoidal profile that discharges water into externally mounted gutters and down pipes. The roof also incorporates a torch-on membrane roof installed over a plywood substrate. The membrane roof discharges water into sumps and through scupper outlets.
- (c) At ground level, there are planter boxes constructed with concrete blocks with a plastered finish. The planter boxes are weatherproofed with a torch-on membrane system and have been landscaped with a combination of shrubbery and other vegetation. As built, the planter boxes drain through outlets in the side of the planter box walls.

Terracon's involvement in the construction of the Nikau Apartments

[17] Terracon undertook the waterproofing works in the construction of the Nikau Apartments. Terracon's involvement is evidenced by:²

² In answer to my question at the hearing, counsel for the Body Corporate explained that the Body Corporate did not have access to documents evidencing the contractual arrangements with subcontractors and that, because Terracon has taken no part in the proceeding, the Body Corporate has had to rely on the documents available on the Auckland Council's files.

- (a) Mr Nigel Campbell of Terracon completing, on 5 February 2014, an Auckland Council “Producer statement construction (PS3) Waterproofing” form, as “the applicator who carried out the waterproofing work”, and confirming that the waterproof membrane had been applied in accordance with the manufacturer’s specifications and technical requirements and that all work had been carried out in accordance with the Building Consent and complied with clauses “B2 Durability and E2 External Moisture” of the Building Code (the Waterproofing Producer Statement).
- (b) Mr Campbell writing to Mr Mike Goedhart of MJZ “re 136 Stancombe Rd” on 3 March 2014 to confirm that:
- ... the screeds that have been installed to the above property and namely the decks on level one and level two do meet the minimum falls required.
- (c) Two product warranties issued on 3 March 2014 by Nuralite Waterproofing Limited (the Product Warranties) for the application by Terracon of:
- (i) Nuraply 3P to the decks and Nuraply 3PM to the box gutter/roof; and
- (ii) Nuraply 3PG to the planters.

[18] The Product Warranties were for 20 years except that the warranty for the decks and box/gutter roof stated that:

Due to the construction process the nib heights were less than 100mm and this area has no typical term bar. The warranty provided is for all subject areas but not to the effected nibs that are less than 100mm.

Requirements for formal proof

[19] Rule 15.9 of the High Court Rules 2016 provides for the formal proof of claims where a defendant does not file a statement of defence and the plaintiff seeks judgment by default for other than a liquidated demand.

[20] Under r 15.9(4), the plaintiff must file affidavit evidence establishing, to a Judge's satisfaction, each cause of action relied on and, if damages are sought, providing sufficient information to enable the Judge to calculate and fix the damages.³

[21] Although the plaintiff is still required to prove their claim, the requirement that each cause of action be established "to a Judge's satisfaction" does not import notions of the burden of proof or the setting of any particular standard of proof – rather, the Judge must make up their mind.⁴

The plaintiffs' evidence

[22] In support of their claim, the plaintiffs' have filed affidavits sworn or affirmed by:

- (a) Graham Durkin, a chartered building surveyor, who worked for AS Jacobs, the company engaged in 2019 to investigate and provide an independent expert opinion on the defects and damage at Nikau, and to provide repair recommendations. Mr Durkin's evidence includes a series of photographs that illustrate the Building Defects and the damage caused by the Defects.
- (b) Jacob Woolgar, a chartered and registered building surveyor and director of AS Jacobs, who assesses Terracon's responsibility for Defects A, B and E and the scope of remedial work reasonably required to rectify each defect.
- (c) Paul Ranum, a registered quantity surveyor and director, who was engaged to provide quantity surveying advice and assessments in respect of the claim against Terracon.
- (d) Stephen Plummer, former managing director of Scope Strata Management Limited, the body corporate manager for the Nikau Apartments between November 2020 and August 2022. Mr Plummer

³ High Court Rules 2016, r 19.4(4).

⁴ *R v Leitch* [1998] 1 NZLR 420 (CA) at 428.

summarises the history of the development of the Nikau Apartments, the discovery of water leaks into the basement carpark, the level 2 ceiling and some of the apartments, and the steps taken to address the leaks. Mr Plummer has also calculated the second plaintiffs' respective shares of the remedial costs to fix the Building Defects according to each unit's utility interest.

- (e) Jeanette Dick, Chairperson of the Body Corporate Committee for the Nikau Apartments, who provides evidence of the expert and consultant costs incurred by the Body Corporate in investigating the Building Defects and damage and the additional administration costs incurred by the Body Corporate in relation to the Building Defects. Ms Dick also provides a schedule showing the shares of the apartment owners in meeting those costs.
- (f) Michelle Arnott, an information technology manager employed by the plaintiffs' solicitors, who provides evidence of the current registered owners of the apartments.

Did Terracon owe the plaintiffs a duty of care?

[23] As set out in the submissions of counsel for the plaintiffs, it is well established that a contractor owes a duty to take reasonable care to prevent damage to persons whom they should reasonably expect to be affected by their work.⁵ The duty includes ensuring compliance with the Building Code,⁶ good trade practice,⁷ and other relevant statutory requirements.⁸ The duty is owed to owners of properties affected by the contractor's work and to subsequent purchasers of such properties who the contractor should reasonably expect to be affected by their work.⁹

⁵ *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 at 406 .

⁶ *Hotchin v New Zealand Guardian Trust Co Ltd* [2016] NZSC 24, [2016] 1 NZLR 906 at [198]; *Body Corporate No 207624 v North Shore City Council* [2012] NZSC 83, [2013] 2 NZLR 297 at [47].

⁷ *Boyd v McGregor* HC Auckland CIV-2009-404-5332, 17 February 2010 at [60].

⁸ *Findlay v Auckland City Council* HC Auckland CIV-2009-404-6497, 16 September 2010 at [33].

⁹ *Bowen v Paramount Builders (Hamilton) Ltd*, above n 5, at 418.

[24] It has also been established that completion of producer statements is “building work” in terms of the definition of that term in s 7 of the Building Act 2004.¹⁰

[25] As counsel also submit, there is no requirement for an owner to have relied on a producer statement for liability in negligence to be established. A sufficient causal connection between an owner and an author of a producer statement will arise if a Code Compliance Certificate is issued by the relevant territorial authority in reliance on that producer statement.¹¹

[26] I am satisfied therefore that, in undertaking the waterproofing work at the Nikau Apartments, in completing producer statements in relation to that work, and in making representations to the developer, Terracon had a duty to the apartment owners to take reasonable care to prevent damage to the principal units, associated accessory units and common areas making up the Nikau Apartments complex.

The Building Defects

Defect A – Planter boxes and adjacent courtyards

[27] On the basis of the evidence of Mr Durkin and Mr Woolgar, I am satisfied that the planter boxes and associated courtyards were constructed with the following defects:

- (a) The sloped concrete capping was not installed to the top of the planter block wall in accordance with the consented plans.
- (b) Installation of the planter membrane did not follow the consented plans. The membrane upstand predominately finishes midway up the planter wall beneath the blockwork plaster. The membrane does not terminate beneath the concrete capping as shown on the consented plans. No termination cover flashing has been installed to provide protection at the top of the membrane upstand and to prevent water entering behind the membrane.

¹⁰ *Kwak v Park* [2016] NZHC 530 at [49]–[50].

¹¹ At [65].

- (c) The top of the membrane upstand has varying height finishes, and some sections of the membrane upstand terminate well below the plastered finish, meaning there is no protection to the top of the membrane upstand.
- (d) The membrane upstand has extensively debonded from the wall and water has been able to enter behind the membrane.
- (e) There are incomplete sections of membrane which has meant that the planter wall is not waterproof.
- (f) The planter soil barrier protection system was not installed as required by the Nuralite membrane system and consented details and has resulted in blocked drainage outlets.
- (g) The drainage outlets in the planter boxes were not installed in accordance with the consented plans, with floor penetrating outlets substituted with wall penetrating outlets. The membrane was not correctly dressed into the outlets. Water has entered behind the membrane at these outlet junctions.
- (h) The membrane on the courtyards was incorrectly dressed into the outlets, causing water entry. In some locations the membrane on the courtyards terminates short of the drainage outlets.
- (i) The chased flashing terminating Unit GA's courtyard membrane is butt jointed with no soakers at the joints. The membrane upstand could not adhere to the aggregate tilt panel wall surface. Water has entered behind the membrane upstand at the butt joints in the flashing and at the exterior corner of the building where the membrane and chased flashing are incomplete.

[28] I accept the evidence of Mr Durkin and Mr Woolgar that, as a result of the membrane installation, the planter boxes and the courtyards as constructed do not

comply with the Building Code, in particular cls E2.3.1, E2.3.2 and B2.3.1 and have not been constructed in accordance with the Building Consent or with plans and specifications for the construction of the Nikau Apartments. I also accept that the planter boxes and the courtyards were not constructed in accordance with industry standards or good trade practice.

[29] I am satisfied that the poor installation of the waterproof membrane in the planter boxes and courtyards has caused water ingress into the basement level and into ground floor apartment GA. I also accept that, in the long term, it is likely that water will damage the reinforcing steel in the masonry block walls and will affect the structural integrity of the building if repairs are not carried out.

[30] On the basis of the Waterproofing Producer Statement and the Product Warranties, as well as the evidence of Mr Woolgar, I am also satisfied that Terracon is responsible for the poor and incomplete installation of the waterproof membrane in the planter boxes and courtyards.

Defect B – Poor installation of membrane roof

[31] On the basis of the evidence of Mr Durkin and Mr Woolgar, I am satisfied that the membrane roof was installed with the following defects:

- (a) The membrane leaked around the ventilation units;
- (b) There are large gaps between the jointed sections of the metal chase cover flashings. The gaps between the cover flashing joints have been filled with and are reliant upon sealant which has failed and has allowed water entry.
- (c) The chased cover flashings over the membrane are butt jointed and were installed with no under soakers at the flashing joints so that water can enter at these joints.

- (d) Sections of metal chased flashings are missing. In some locations the top of the membrane upstand relies solely on adhesion to the masonry wall.
- (e) There is no sealant to the parapet chased cap flashing.
- (f) The membrane has been lapped incorrectly within the dropped catchment section of the internal gutter adjacent the scupper outlets. The installation of dropped catchment sections to every outlet appears to be a departure from the consented details. Water has ponded in dropped catchment sections of internal guttering due to the lack of fall.
- (g) The membrane has been incorrectly dressed into the sump outlets.
- (h) The scupper outlet has been incorrectly installed and has allowed water ingress. The scupper is not a pre-formed singular piece but has been cut in two pieces and joined together.
- (i) The overflow outlet installation is a departure from the Nuralite system. The overflow size diameter is too small. If the primary outlet blocks, the overflow does not have sufficient capacity for the volume of water.
- (j) Roof edge barrier rails have been directly bolted through the top of the membrane, creating a path for water entry.
- (k) Membrane roof vents have not been installed to vent the roof space void, as detailed on the drawings and manufacturer specifications.
- (l) There are inadequate falls in parts of the roof, resulting in water ponding.
- (m) Critical roof wall junctions are reliant upon exposed sealant and are leaking.

- (n) At least one cross lap in the membrane gutter has caused water to accumulate and has been restricting water discharge off the roof.

[32] I accept the evidence of Mr Durkin that the above defects have resulted in:

- (a) water ingress resulting in damage and mould growth to internal linings;
- (b) damaged timber framing, plywood substrate and insulation beneath the water ingress locations;
- (c) premature deterioration of the membrane, including cracking and splitting, particularly at corner junctions and within the dropped catchment areas adjacent to the scupper outlets;
- (d) corrosion of the concrete tilt panel angle brackets which were corroding where they had been subjected to regular water exposure; and
- (e) potential condensation damage to the underside of the plywood substrate and timber furrings due to lack of membrane ventilation installation.

[33] I accept the evidence of Mr Durkin and Mr Woolgar that the membrane roof as constructed does not comply with the Building Code, in particular, cls E2.3.2, and B2.3.1, and has not been constructed in accordance with the Building Consent or with plans and specifications for the construction of the Nikau Apartments. I also accept that the membrane roof was not constructed in accordance with industry standards or good trade practice.

[34] On the basis of the Waterproofing Producer Statement and the Product Warranties, as well as the evidence of Mr Woolgar, I am also satisfied that Terracon is responsible for the poor installation of the waterproof membrane roof.

Defect C – Waterproofing to balcony decks

[35] In his affidavit, Mr Woolgar says that, as a result of invasive investigations to the balconies, significant issues were found with the installation of the balcony membrane and widespread discrepancies with the “as-built” construction compared to the Building Consent details.

[36] On the basis of the evidence of Mr Durkin and Mr Woolgar, I am satisfied that the balcony decks were constructed with the following defects:

- (a) The falls to the balcony decks do not meet the minimum requirements set out in the Building Consent details; some parts of the decks have been measured at zero-degree falls, which increases the likelihood of water entry.
- (b) Only one layer of torch-on membrane has been installed to the deck surface when the consented details specified a minimum of two layers.
- (c) The membrane has not been dressed up the wall or to the perimeter of the deck. Instead, the membrane terminates at the base of the wall, which has allowed water entry.
- (d) There is no cover flashing or chased flashing to prevent water from entering beneath the membrane. A large volume of gravity fed moisture has entered underneath the membrane and into the building.
- (e) In some locations, the membrane has not been dressed up underneath the weatherboard cladding, which has allowed water entry.
- (f) Critical flashings at deck/wall junctions have not been installed.
- (g) The membrane has lost adhesion with the deck surface and in some areas has started to peel back from the deck surface, allowing water entry.

- (a) In some instances, off cuts of the fibre cement wall cladding were used as furrings to pack the timber decking off the balcony surface. The consented details specified H3.2 treated timber furrings. Some of the deck fixings have come loose within the fibre cement furrings.

[37] I accept the evidence of Mr Durkin that the above defects have resulted in:

- (a) widespread water entry resulting in damaged carpets, skirting boards, and interior linings;
- (b) corrosion of structural steel beams and the steel seating angles for the floor system;
- (c) framing timber decay and *Stachybotrys* mould growth as confirmed by laboratory analysis; and
- (d) water and efflorescence staining on the underside of the concrete balcony floor slabs and water staining on walls directly below the balconies.

[38] I accept the evidence of Mr Durkin and Mr Woolgar that the balcony decks as constructed do not comply with the Building Code, in particular, cls E2.3.2, and B2.3.1, and have not been constructed in accordance with the Building Consent or with plans and specifications for the construction of the Nikau Apartments. I also accept that the balcony decks were not constructed in accordance with industry standards or good trade practice.

[39] On the basis of the Waterproofing Producer Statement and the Product Warranties, as well as the evidence of Mr Woolgar, I am also satisfied that Terracon is responsible for the poor installation of the waterproofing elements of the balcony decks.

Terracon's liability

[40] For all the above reasons, I find that, with respect to the waterproofing of the planter boxes and courtyards, the membrane roof and the balcony decks, Terracon has breached its duty of care to the plaintiffs by failing to take the care that a reasonably skilled and prudent membrane installation company in the position of Terracon would be expected to take to ensure that the work carried out under its supervision and control was completed:

- (a) in accordance with the Building Consent and plans and specifications for the construction of the Nikau Apartments;
- (b) with reasonable skill and care; and
- (c) in accordance with the Building Code.

Council liability

[41] It is relevant to note that, in his evidence, Mr Woolgar states that:

- (a) A Council officer inspecting the construction of the planter boxes:

... should have identified that the works were not constructed in accordance with the approved plans.
- (b) The deficiencies in the installation of the membrane in the courtyard:

... would have been observable to a Council building inspector during an inspection of the courtyard membranes and was something that a competent inspector would have looked at.
- (c) The qualification on the Product Warranty for the decks and box gutter/roof:

... should have been a warning to the Council officer who was processing the application for the code compliance certificate to investigate further and not simply accept the Producer Statement from Terracon Industries Ltd. The product supplier was not prepared to give a warranty for its product because the waterproof membrane had not been terminated correctly in accordance with the Nuraply details.

[42] Because the Body Corporate has settled with, and discontinued this proceeding against, the Council and the other defendants, it is unnecessary for me to take this question any further. However, given that the Body Corporate's claim was that the Council, Terracon and some of the other defendants were jointly and severely liable in relation to Defects A, B and E, it is appropriate to record that counsel for the Body Corporate assured the Court that no issue of double recovery arises.

Quantum of damages

[43] Mr Woolgar discusses the scope of works required to remedy Defects A, B and E. Mr Woolgar also says it would be appropriate to include provisional sum allowances to deal with unforeseen defects and to include a contingency sum in the remedial cost estimate. Mr Woolgar states that:

Overall, the Nikau Apartments require extensive remedial work to comply with the Building Code. This includes a full replacement of the waterproof membranes to unit balconies, planters and courtyards and the membrane roof, as well as wall framing remediation to affected areas, full recladding of weatherboard areas and widespread passive fire work.

[44] Mr Ranum states that:

In my opinion, the total cost the plaintiffs will likely incur in carrying out the remedial works to fix all of the defects and damage to the Nikau Apartments complex and obtain a code compliance certificate for the remedial works will be approximately \$6,986,121 plus GST. This is based on a start date onsite of 1 December 2023 and the owners vacating their apartments for the duration of the works.

[45] Mr Ranum says this sum includes:

- (a) a five per cent contingency sum to allow for unresolved aspects of the remedial design;
- (b) a 10 per cent construction contingency sum to account for the inherent risk of remediation projects;
- (c) an inflation rate of 2.98 per cent adjusted by half to reflect the mid-point of the project on the basis that the costs expended in the first part

of the project will not attract inflationary pressure but the costs in the latter part of the remedial project will;

- (d) professional fees of \$256,655, which are roughly 3.7% of the overall anticipated construction cost, which accords with other projects of this nature and size; and
- (e) an estimate for building consent fees and insurance charges of about 0.3 per cent of the recommended total budget which, Mr Ranum says, is reflective of current market premiums for similar construction projects in his experience.

[46] Mr Ranum has excluded from this sum the one item of betterment or deferred maintenance in its remedial scope of work for the Nikau Apartments, which is painting of the external cladding of the building.

[47] I am satisfied that Mr Ranum's estimate of the remedial works to fix all of the defects and damage to the Nikau Apartments complex and obtain a code compliance certificate for the remedial works is reasonable and appropriate.

Apportionment of remediation costs

[48] Mr Ranum has allocated the total project costs across the defects identified in the second amended statement of claim and has calculated that the remediation costs with respect to Defects A, B and E comprise 69.73 per cent of the total or \$4,868,409.00.

[49] On the basis of the evidence of Mr Woolgar and Mr Ranum and Mr Ranum's expertise as a quantity surveyor, I accept Mr Ranum's allocation of costs to the remediation of Defects A, B and E.

Other costs

Body Corporate management costs

[50] Mr Plummer's affidavit describes the work undertaken by the Body Corporate management in response to the Building Defects. Ms Dick's affidavit provides invoices relating to and a schedule of the costs incurred by the Body Corporate in dealing with Defects A, B and E. Ms Dick says the costs of dealing with the other Building Defects has been excluded from the Schedule costs.

[51] As updated by counsel for the Body Corporate at the hearing on 13 November 2023, the total Body Corporate management costs attributable to Defects A, B and E are \$36,445.42. I agree that those costs are properly recoverable from Terracon.

Interest via the Interest on Money Claims Act 2016

[52] The plaintiffs also seek interest of \$13,930.16 in accordance with the Interest on Money Claims Act. As set out in a schedule to counsels' submission, the interest is calculated on the basis of the invoices received by the Body Corporate for work undertaken in relation to the identification and remediation of Defects A, B and E. Counsel advised that the interest has been calculated as at 13 November 2023, the date of the hearing.

[53] I agree that interest in the amount sought is properly recoverable from Terracon.

Costs of proceeding

[54] I agree that Terracon is liable for the costs of the proceeding and that those costs should be assessed on a 2B basis. I also agree with counsels' calculation of those costs: \$13,145.00.

Result and orders

[55] The plaintiffs' have succeeded in their claim against Terracon.

[56] I order Terracon to pay the plaintiffs the sum of \$5,067,108.69, which comprises the amounts that I have held to be recoverable for:

(a)	Repair costs for Defects A, B and E:	\$4,868,409.00
(b)	Consultant costs:	\$135,179.11
(c)	Body Corporate management costs:	\$36,445.42
(d)	Interest on costs to date:	\$13,930.16
(e)	Costs of this proceeding:	\$13,145.00

[57] I further order that the judgment sum of \$5,067,108.69 is to be paid to the second plaintiffs on a utility interest basis as recorded in Mr Plummer's affidavit and as set out in sch 4 to counsels' submissions, a copy of which is attached to this judgment.

G J van Bohemen J

Updated Schedule 4: Judgment sums sought⁷⁰

Unit	Utility Interest	Sum sought
GA	2.95%	\$149,479.71
GB	2.87%	\$145,426.02
GC	3.08%	\$156,066.95
GD	2.69%	\$136,305.22
GE	2.69%	\$136,305.22
GF	2.69%	\$136,305.22
GG	2.92%	\$147,959.57
GH	2.95%	\$149,479.71
GI	2.92%	\$147,959.57
GJ	2.92%	\$147,959.57
GK	2.95%	\$149,479.71
1A	2.95%	\$149,479.71
1B	2.92%	\$147,959.57
1C	2.92%	\$147,959.57
1D	2.75%	\$139,345.49
1E	2.75%	\$139,345.49
1F	2.75%	\$139,345.49
1G	2.95%	\$149,479.71
1H	3.04%	\$154,040.10
1I	3.00%	\$152,013.26
1J	3.00%	\$152,013.26
1K	3.25%	\$164,681.03
2A	3.16%	\$160,120.63
2B	3.21%	\$162,654.19
2C	3.21%	\$162,654.19
2D	3.43%	\$173,801.83
2E	3.43%	\$173,801.83
2F	2.79%	\$141,372.33
2G	3.00%	\$152,013.26
2H	3.25%	\$164,681.03
2I	3.68%	\$186,469.60
2J	3.68%	\$186,469.60
2K	3.25%	\$164,681.03
Total excl GST	100%	\$5,067,108.69

⁷⁰ Each unit's utility interest was recorded in the affidavit of Stephen Douglas Plummer (sworn 8 September 2023) at [36] exhibiting NIKA.01.0007.