IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2011-404-4890
[2015] NZHC 1803

BETWEEN	BODY CORPORATE 160361 First Plaintiff
	BODY CORPORATE 160362 Second Plaintiff
	FONG HONG YUEN & OTHERS Third Plaintiffs
AND	BC 2004 LIMITED AND BC 2009 LIMITED First Defendants

continued over…./

Hearing:	9, 10, 11, 12, 13, 16, 17, 18, 19, 20, 23, 24, 25, 26, 27 February, 2, 3, 10, 11, 12, 13 March 2015 Further submissions filed 7, 11, 21 and 29 May 2015
Appearances:	M C Josephson, G B Lewis, M L Gibson for First, Second and Third Plaintiffs D A Cowan and J D McBride for Second Defendant (Andrews Property Services Ltd) S A Thodey, K M Parker and T C Wood for Third Defendants (Auckland Council) Fourth Third Party in Person
Judgment:	31 July 2015

JUDGMENT OF WHATA J

This judgment was delivered by Justice Whata on
31 July 2015 at 4.00 p.m., pursuant to
r 540(4) of the High Court Rules

Registrar/Deputy Registrar
Date:

ANDREWS PROPERTY SERVICES LIMITED
Second Defendant

AUCKLAND COUNCIL
Third Defendant

PBS DISTRIBUTORS LIMITED
First Third Party (In Liquidation)

FAÇADE DESIGN SERVICES LIMITED
Second Third Party

RONALD CHARLES HANLEY
Third Third Party

JOHN LUKASZEWICZ
Fourth Third Party

Solicitors:
Grimshaw & Co., Auckland
Rainey Law, Auckland
Heaney & Partners, Auckland
Copy to:
J Lukaszewicz, Blockhouse Bay, Auckland

Table of Contents

PART ONE: INTRODUCTION

[1] The Fleetwood Apartments leaked. On the advice of Babbage Consulting Limited[1] (Babbage) the owners approved the installation of an "Overclad" rain shield cavity system to protect the apartments from water damage. Andrew Property Services Limited (APS) was retained to undertake the works. The Auckland City Council (as it then was) granted building consent for the installation. APS then installed the Overclad, with assistance from Babbage and Cladding Systems Limited (CSL). Messrs Lukaszewicz and Hanley were then directors of CSL. Mr Hanley was also a director of Façade Design Limited. They provided advice that the Overclad system complied with building code. The Council granted code of compliance in September 2006. By August 2011 cracks in the Overclad sheets were noted and a report from Prendos identified underlying weather tightness damage. It recommended complete removal of the Overclad, pre-existing cladding and steel framing. The remediation works are just about to be completed.

[2] The Bodies Corporate 160361 and 160362 (BC1 and BC2) together with the past and present owners of the apartments (the Plaintiffs) sue Babbage, APS and the Auckland Council for the full cost of the latest round of remediation together with general damages.

The defects

[3] The pleadings allege specified defects in the following terms:

> 16. The Remedial Works to the Fleet Street apartments were constructed with deficiencies including but not limited to the following:
>
> (a) the use of the overclad fibre cement cladding system as a repair solution was inappropriate as:
>
> (i) The overclad system was not suitable for use over an unsound lightweight substrate;

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[1] In the period 2005 – 2010, Babbage was formally incorporated under the name BC 2004 Limited and then BC 2009 Limited from 31 March 2005. In 2010 Babbage was incorporated simply as Babbage Consultants Limited.

(ii) The repair solution did not fully identify and remediate the existing damage.

(b) The fixing of the overclad fibre cement cladding system was inadequate in that:

(i) There were an insufficient number of fixings.

(ii) The rails distorted upon the installation of sheet screw fixings.

(iii) The rails deflected excessively between supports.

(iv) The method of fixing caused the Eterpan sheets to crack.[2]

(c) The direct fixed fibre cement cladding to the deck columns on the northern elevation was installed in contact with or having inadequate clearance from horizontal deck surfaces.

("The defects")

[4] "Remedial Works" refers to the Overclad fibre cement cladding system used to remediate the apartments.

The live issues

[5] By the conclusion of the hearing the live defects issues were:

(a) Whether the Overclad system should have been recommended, approved, installed and certified given the severely corroded steel substrate;

(b) Whether the Overclad Eterpan sheets were correctly affixed by APS.

[6] I will address these issues in terms of the respective claims against each defendant and the third party, Mr Lukaszewicz.

[7] The balance of the defects claims can be dispensed summarily:

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[2] This particular was inserted by amendment at the conclusion of the hearing. I address the application for leave to amend at [89].

(a) The pleaded defects about the number of fixings, rail deflection and rail distortion were only minor contributors to any cracking and were not causative of the Plaintiffs losses;[3] and

(b) The fibre cement cladding to the deck columns on the northern elevation was not installed with appropriate clearance to the decks.[4]

PART TWO: BACKGROUND

[8] In order to properly understand the nature of the claims it is necessary to narrate the background facts in detail.

Investigation, tender and recommendation

[9] The Fleetwood Apartments comprise 40 units overlooking the north-western motorway. In 2003 water damage was identified. Babbage was retained to provide a review of the building and advised that substantial remediation works were required to repair the water damage. Babbage was then engaged to recommend a remediation plan and issue a tender for the remediation works.

[10] The tender specification included three options, including the Overclad rain shield system that would overlay the existing structure. It referred to BC1 as the "Principal". Babbage is referred to as the "Architect". The specification anticipates that a building consent may be required. Any conditions of consent are to be referred to the "Principal/Architect" and "(n)o such condition shall become a Variation unless confirmed in writing by the Principal/Architect". It states that the Contractor "shall be responsible for ensuring that all work and materials executed are in accordance with requirements." The specification then included the following clause:

> **SW1-A-1 SCOPE OF WORK**
>
> The work in this contract includes:-

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[3] The Plaintiffs' engineering expert, Thomas Donald, conceded under cross examination that the pleaded defects were only minor contributors to the damage to the Overclad cladding.

[4] Mr McBride conceded in closing that the failure to ensure adequate separation caused the water damage to these columns.

1.0 Exterior Walls

> In conjunction with Babbage Consultants Limited inspect all external and associated walls to establish moisture content. A moisture content of 18% or less is required. Remove areas of the exterior cladding to front and block ends to access effected timbers/steel studs to determine level of deterioration. The deep balcony side facing Dominion Road, shows no signs of deterioration due to protection. If timbers have started to decay, then they will need to be replaced with H3.2 treated timbers for studs and H3.2 treated timbers for bottom plates. Steel studs need to be treated for rust and primed. Significant rusting may require replacement. This operation may pop nails out of the internal Gibraltar board lining. The other timbers should be treated with a 20% bleach solution to neutralize mould spores, reducing the risk of future mould. Treat the existing exposed timbers with Protim Timber Saver. Reline with matching Gibraltar board for fire rating and fibre cements sheets and install 'overclad' system with 9mm fibre cement sheets and paint to match existing colour schemes. Extent of new painting shall be whole walls that are effected by builders works, to the nearest corner.

[11] Clause SW1-A-11 also stipulated that the intent of the contract is to rectify all construction that leaks. Particular specifications dealing with the fixing of the Overclad included:

(a) Clause SW6-12.3 – Specific directions given for framing and masonry anchors. Other materials to be "fixed as detailed on the drawings or as recommended by the manufacturers of the product."

(b) Clause SW6-17 – "Fix exterior cladding types scheduled, as specified in the Particular Section."

(c) SW6-A-10 – "Pre-drill, allow screw fixings for counter sunk screws. The compressed sheets shall be fixed in accordance with Cladding Systems Specification."

[12] APS won the tender and BC1 approved the installation of the Overclad system on Babbage's recommendation. Notably, APS' tender proposal included the following comments:

> 3. Full survey on structural repairs needed.

4. Open up failed areas from survey, remove insulation, treat/repair timber.

[13] Further, in a section headed "Notes and Conditions that apply to our tender costing", the APS tender proposal records:

> 10. For the cladding system option, the following is noted:
>
> - Existing cladding is not removed and all repairs are reliant on the initial Babbage consultant's survey when the scaffold is erected. However, additional repairs found or needed, can be achieved from the interior once the cladding is in place at extra cost.
>
> - Fire rating is to be retained due to the existing cladding remaining and any repairs will have original cladding reinstated.

[14] It also notes:

> - Details provided on this system do not show how the cladding is fixed to the grid. We have assumed screw fixing using stainless steel screws. Two options are possible:
>
> (a) Countersunk screws, flush top and paint over.
>
> (b) Capped screws sitting proud of the surface and therefore an architectural detail.
>
> The disadvantages of Option A are that you possibly could see stop patches in certain light and the sheets will have to be damaged to remove.
>
> There is no difference in cost for both options as Option B requires more labour and set out and cap screws are more expensive.

[15] A further note records;

> A three year workmanship warranty is provided for all work only. No weather tightness guarantee is provided as two systems are unproven and all three are not BRANZ approved. (**note** - all work will be inspected by Babbage Consultants as well as product suppliers for materials warranties along with photographic data collection so chances of failure are small).

[16] The tender document concludes with APS claiming extensive experience in the required work and that they "have full knowledge of all systems and alternatives available."

[17] The APS tender cost for the Overclad system was $752,315.

[18] Formal confirmation of instructions is recorded in a letter from Babbage dated 15 November 2004. In particular this letter notes:

> On behalf of the Fleet Street Body Corporate No.160361, the tender dated 14 July 2004 is accepted amounting to $752,315 plus GST. This is based on the Babbage plan's details and the methodology noted. Babbage has received a building consent from Auckland City Council. The Body Corporate has a number of construction issues and the costs may be increased, as they are proposing to carry the remedial works out in stages. Would you please provide us with your insurance details and I will obtain a copy of the Body Corporate insurance for remedial works for your records. We look forward to working with you on this project.

Onsite works commence and approach to rust

[19] The exact start date of the remedial works is not clear. The works were due to commence in March 2005, but it appears did not get underway in earnest until early April. In any event, in a letter dated 19 April, Mr Boyle project manager for APS wrote to John Dale seeking clarification as to how he would like APS to treat rust discovered on the bottom plates of window sills of the steel framing. Mr Dale responded:

> Following a visit to the above property to inspect the extent of rusting to the lightweight steel framing, the rusting is obviously indicating that moisture has entered through the existing cladding sheets. Once the moisture is eliminated no further rusting will occur. Therefore the areas that are exposed at present need to be sanded back and a rust inhibitor applied to all visible metal surfaces.

Application for building consent

[20] An application for building consents had by this stage been lodged on 23 March 2005. The project details are described as "Overclad existing structures, replace roof cladding like for like and repaint entire façade". The drawings, specifications and other documents according to which the building is to be constructed were attached to the application (at least according to the application's terms). The plans included a site plan, elevations and alternative cladding details. The specifications included SW 1-A-1.

Processing of application

[21] The application for building consent was processed by Mr Campbell Thatcher. Having considered the documentation supplied with the application, Mr Thatcher wrote to Babbage with a number of queries. Of particular relevance the following matters were raised:

> 1. The drawings show the existing cladding still in place. The cladding should be removed to inspect the existing framing and to treat the framing if the existing is found to be chem. free. Any decay or rust found in specifically designed members should be inspected by an engineer. The ventilated cavity should be open to allow air movement around the framing.
>
> ….
>
> 12. The eterpan manufacturers are to provide a producer statement to approve the use of their product with the overclad system. The manufacturer is also to approve methods of fixing and means of achieving durability.

[22] Mr Dale responded to the letter on 25 May 2005. The response included the following:

> 1. As stated the existing cladding is to remain in place and the new aluminium frame is to be attached directly over the top, therefore there is no need to remove the existing cladding. The existing framing is lightweight steel framing throughout with concrete intermediate floors. Where rusting is found at the underside of the sill areas, these will be sanded back and a rust inhibitor applied.
>
> …
>
> 12. Etepan [sic] was tested with the overclad system, find attached a copy of the Producer statement from PBS. All fixing are to be stainless steel screws at 25mm centres, with the sheets predrilled and countersunk. Once the sheets have been fixed the fixing are filled with epoxy filler prior to painting. Refer to producer statement attached.

[23] The producer statement attached to Mr Dale's letter was signed by Mr Hanley of Façade Design Services Ltd. It is addressed to PBS Distributors Ltd. It stated:

> *To:* PBS Distributors Ltd
>
> *In relation to:* Overclad – cladding system; mounting of eterpan 9mm MD board on the overclad grid.

In respect to: Requirements of clause B1, B2, E2 of the first schedule of the building regulations 1992

Verification: This design has been verified in accordance with AS/NZ4284 "Testing of building façades" WEC report No.1375.

Documents: Work must be carried out in accordance with Cladding Systems Ltd. Drawings & specification.

As a designer I have taken all reasonable steps to verify design assumptions. I am satisfied on reasonable grounds that in relation to the building work specified above the provisions of the building code would be met if the building work were properly completed in accordance with the drawings specifications and other documents according to which the building is proposed to be constructed.

[24] The WEC report referred to in the producer statement appears to have been received at the same time. I deal with the significance of this report below at [145]-[153].

Consent granted

[25] On 16 June 2005 the Council issued a building consent for the remedial works numbered BLD2005-0323801. The building consent authorised the following building work:

Overclad existing structure, replace roof with like and repaint entire façade.

[26] The conditions of consent included:

3. CONSTRUCTION REQUIREMENTS

The proposed work in this consent has been designed to a specific design, and must be constructed accordingly. Any variations in the specific design must be notified to council for assessment prior to being undertaken.

4. INSULATION REQUIREMENTS

All insulation must be re-instated if it is removed during construction.

5. CLADDING

Provide the following documentation for the cladding elements.

- Producer Statement Construction Review from R.C. Handley of Façade Design Services Ltd. The construction review is to ensure that the construction is carried out in accordance with the design and that the building work will meet the requirements of clause B1, B2, E2 of the first schedule of the New Zealand Building Regulations 1992.

- Producer Statement Construction Review from an ACE registered cladding expert (e.g. R.C. Handley) for the existing gutters, flashing, and rain water systems. These systems are not part of the consent but there[sic] durability could affect the weather tightness of the building.

- Producer Statement Construction Review of the existing joinery from the window manufacturer, or a suitably qualified person. This person is to review the condition of the existing exterior joinery and its elements. Although the upgrade of the window joinery is not part of this consent, it does form a part of the cladding system.

- Producer Statement Construction from the main contractor for the installation of the cladding and all other associated cladding elements. This is to include all sub-contractors. All sub-contractors to provide separate Producer Statements of Construction.

6. FLASHINGS AND MEMBRANES

Particular care is to[sic] taken to ensure that all flashings and membranes are installed correctly. Special care should be shown when installing flashings or membranes that the upstands behind cladding materials are adequate. This will assist in ensuring that the building will be weathertight. These areas are to be inspected prior to installing any covering materials.

7. INSPECTIONS

Council is required to inspect all work before being covered up. It is the building owner's responsibility to call for inspection.

[27] The certified plans included annotations, including annotations by Mr Thatcher. For example, he noted on drawing A601 - Revision A "existing exterior joinery to be reviewed as condition of consent" in respect of the exterior wall. Mr Thatcher also handwrote on the specification the following items:

(a) In respect of clause 1 exterior walls "steel framing"; and

(b) In respect of clause 2 joinery "flashings over existing".

[28] The following notation was stamped over clauses 1 and 2 of SW1-A-1:

Revised – endorsements on superseded plans transferred to this document.

[29] A copy of annotated version of Plan A601 is attached as **Annexure C.**

The Overclad installation

[30] CSL contracted with APS to supply and deliver the Overclad extrusions, brackets, bracket to Overclad fixings for over cladding selected external elevations and parapet as shown on a sketch dated 10 July 2004. A quote was also provided for optional extras including for detailing grid layout, to elevations and relevant sectional details. The proposal was accepted excluding the optional extras.

[31] The installation was completed over three stages. CSL supplied the grid components, while APS sourced the Eterpan cladding sheets directly from the manufacture, PBS. The plans supplied by Babbage provided some details as to the fixing of the Eterpan sheets to the grid. The grid layout was based on drawings obtained from another Overclad system installed at the Embassy Apartments. The Eterpan sheets were fixed to the grid using a combination of pan-head screws on the perimeter and countersunk screws through the middle of the sheets.

[32] A builder, Mr Thompson, who contracted with CSL from time to time, was also retained in the final stage of works to assist in installing the Overclad at Fleetwood, though not under contract with CSL. Mr Lukaszewicz also attended the site while delivering components. He also undertook three inspections of the installation in May, August and September 2005. From these inspections he provided one page reports on matters he noted from his inspections. He was not formally retained for these inspections or the reports. I come back to their significance below.

Only limited repairs undertaken

[33] No detailed survey of underlying existing water damage was undertaken during the installation of the Overclad. Rather, Jon Dale appears to have only examined specific areas cut out for the installation of the grid. Furthermore APS, under specific instruction from Babbage, largely limited its repair works to rust treatment to areas exposed under sills. There is some evidence that areas of steel

framing were removed and replaced, though that is not accepted by the Plaintiffs. APS however recommended removing and replacing the cladding and framing on the northern columns, and this was done as a variation to the existing contract.

Inspections

[34] The Council inspectors were not called to site until six weeks after grant of consent. It appears that they did not inspect any of the areas cut out by APS (though that is not accepted by APS). In any event, there is no record produced by an inspector of any significant water damage or repair, or that a survey report of damage was produced to them at any time.

Code compliance process

[35] A request to issue a Code Compliance Certificate (CCC) was made in late April 2006. Ms Christine Watkinson processed the application for code compliance. She was not satisfied with the information on file about the Overclad system. Further information was sought about the cladding and the compliance with consent conditions. In response APS supplied a producer statement recording that the Overclad was installed in accordance with:

> (a) The standards specified in the contract documents;
>
> (b) All standards and specification from the suppliers (cladding systems);
>
> (c) A good workman like manager (sic);
>
> (d) All building acts and regulations current.

[36] APS also supplied a letter from CSL dated 3 August 2005 recording among other things that Mr Lukaszewicz had inspected the construction and identified various matters that needed to be addressed. The letter noted:

> The following is not meant to be QA of the whole job and applies to those areas randomly inspected, the comments are meant to aid APS in the use of Overclad.

[37] The Council was not satisfied with this material. Babbage then lodged a second application for code compliance certification on about 15 August 2006

following a discussion with Council officers about what was required to achieve code compliance certification. Additional information was supplied, including:

(a) correspondence from Babbage recording that it had performed a supervisory role and that the cladding had been installed as per the manufactures technical information; and

(b) a report from Mr Hanley that the new cladding work meets the requirements of B1, B2 and E2 of the Building Code.

[38] A subsequent request from the Council that Mr Hanley provide a construction review producer statement was refused by him. This triggered a further information request. In response Babbage produced, among other things, the WEC report, approximately 40 construction photographs, an updated producer statement from APS, three faxes from CSL recording that inspections had been undertaken by Mr Lukaszewicz and a letter from him recording:

> Further to receipt of a letter 25/9/06 from Craig Boyle of APS (attached) confirming all defects listed in my correspondence have been attended to, we can confirm that the installation of the Overclad as inspected by the undersigned on the 13/5/05, 3/8/05 and 5/9/05 is installed to our recommendations.
>
> Overclad complies with B1, B2 & E2 of the first schedule of the NZ building regulations 1992.
>
> Overclad has been tested to AS/NZS 4284 in an IANZ accredited laboratory (report attached).
>
> If you have any queries please do not hesitate to contact the undersigned or Ron Hanley.

[39] A copy of a letter from APS letter confirming that APS undertook to correct the defects identified by Mr Lukaszewicz was attached.

[40] Ms Watkinson was satisfied that this information collectively meant she could issue a CCC and did so on 27 September 2006.

Settlement of original claim with the Council

[41] In early 2007 BC 1 and the owners of the apartments commenced proceeding against the Council. The original proceedings alleged that the Council had been negligent in the issue of a permit permitting the construction of the Fleetwood apartments. However, it appears that there was no CCC issued as the building works were undertaken under the pre 1991 Act regime. The then Plaintiffs nevertheless alleged the Council had failed to detect a number of defects that had led to significant moisture ingress resulting in the need to carry out significant remedial work. The second amended statement of claim set out detailed particulars of the remedial works. There is no mention of removal of cladding or steel framing, except cladding around windows and door openings in conjunction with balconies and in relation to the non structural columns on the northern elevation.

[42] The then Plaintiffs also pleaded that if the provisions of the Building Act 1991 and the building code applied to the construction of Fleet Street, then the Council failed to ensure that the building work complied with building code, and in particular clause E2.2, E2.3.2 and clause B2.2 and B2.3.1 dealing with moisture ingress and durability of the building. The total amount of the claim was in excess of $2.4 million.

[43] The claim was settled following mediation on 5 April 2007. The agreement records:

> D. The parties have agreed to settle the proceedings and any and all claims arising directly or indirectly out of the proceedings.

[44] The Council paid the owners $250,000 under the agreement.

Prendos review

[45] In about August 2011 BC 1 and BC 2 engaged Prendos to investigate the Fleetwood apartments, and in particular cracking to the Eterpan sheets.

[46] Prendos identified widespread cracking to the Overclad sheets and significant damage to the underlying lightweight steel framing on the southern elevation and

return walls on the northern elevation. Prendos recommended a rebuild of these elevations. Prendos also identified the columns to the northern elevation did not have sufficient clearance between the base of the cladding and the concrete decks and recommended that these be re-clad.

[47] In 2012 the Body's Corporate engaged Prendos to prepare designs for the necessary remedial work, obtain building consent and to seek tenders from contractors for the work. The proposed remedial work including removing the Overclad, the pre-existing cladding and steel framing. Ultimately Prendos undertook negotiations with the preferred tenderer, Teak Construction Ltd who were retained to undertake the remediation works. Consent for the works was then issued on 18 June 2013. As at mid-February 2015 the remedial works were largely complete.

PART THREE: LIABILITY

The Claims against Babbage

[48] The primary claim against Babbage is that it breached a duty to take reasonable care, in contract, tort and under the Consumer Guarantees Act 1993 (CGA) when it:[5]

(a) Recommended a repair solution that was not fully designed and tested;

(b) Failed to obtain a suitable appraisal of the Overclad system;

(c) Failed to ensure that the existing damage was identified and removed; and/ or

(d) Failed to supply necessary design details to APS.

[49] This claim triggers the following issues:

(a) Who is Babbage?

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5 The Plaintiffs' claim based on Building Act 2004 warranties was withdrawn.

(b) Was the Overclad system conceptually sound?

(c) Were the design details adequate?

(d) Was Babbage obliged to survey the existing structure for water damage prior to the installation of the Overclad?

(e) Did Babbage fail to secure the proper survey of the building?

(f) Did Babbage undertake to repair and or remove all damaged elements?

(g) Did Babbage properly assess the suitability of the structure?

(h) Was there structural failure?

(i) Was the Prendos remedial solution justified?

(j) Did Babbage fail to secure the proper installation of cladding on the Northern Elevation?

(k) What losses are attributable to Babbage's failures (if any)?

Who is Babbage?

[50] A confirmation of instruction dated 14 July 2003 to conduct a building review for moisture damage was issued by "Babbage Consultants Limited". It appears that at that time Babbage was formally incorporated as BC 2004 Ltd and described as a multi disciplinary architectural and engineering company. BC 2004 Ltd ceased trading business on 31 March 2005 and was replaced by BC 2009 Ltd until 31 March 2010. Babbage has since then operated as Babbage Consultants Limited. In this judgment the first two entities are collectively referred to as Babbage.

Was the Overclad solution conceptually sound?

[51] The "Overclad" system is a proprietary external building cladding system designed to create a drained, vented (pressure equalised cavity) behind the cavity line. The drained and ventilated cavity is designed to allow water penetrating the outer building skin to be drained to the exterior and allow controlled air movement in the cavity. The Overclad aluminium railings form a support grid for the cladding and manage air and water movement at the panel joints. As the name suggests, the "Overclad" aluminium support grid is affixed to an existing structure and acts like a rain shield preventing further water ingress into that structure.

[52] The Plaintiffs contend that Babbage should never have recommended the Overclad system for the Fleetwood Apartments. But the independent façade and engineering experts ultimately agreed that the Overclad was an appropriate system for remediation, assuming the substrate was in good condition. Furthermore, the conceptual soundness of the Overclad system was confirmed by Mr Gerald Winter, an expert façade engineer of at least 25 years specialist experience called by APS. Similarly, Mr Peter Lalas, an expert in façade engineering of more than 34 years specialist experience called by the Council, opined that the Overclad was an appropriate method for eliminating the water penetration problem from the Fleetwood apartments, provided that the substrate wall was in good condition.

Were the design details inadequate?

[53] Yes. The design details for the purpose of construction were inadequate, especially as they related to the fixing of the Eterpan sheets to the Overclad grid. Both the specification (at clauses SW6-12.3, 6-17 and 6-A-10) and Mr Hanley's producer statement referred to the need to install the Overclad system and the mounting of the sheets in accordance with manufacturer and CSL design specifications. The conditions of the building consent envisage active involvement of Mr Hanley in the construction phase, further emphasising the importance of correct design. While it appears that the plans supplied by Babbage were based on CSL drawings, it is not clear that they were obtained directly from CSL for the Fleetwood project. In any event, those drawings provide no or sparse detailing as to, among other things, method of screw fixing the Eterpan sheets to the Overclad grid.

It also appears that no additional manufacturer's detailing was supplied with the Eterpan sheets for the specific purpose of fixing the cladding to the Overclad grid. Furthermore, APS did not accept CSL's proposal to supply specifications for the Fleet St project. Instead, APS obtained CSL design drawings from another project and relied on ad hoc recommendations from Mr Lukaszewicz. As a consequence, the express requirements for compliance CSL design specification were not adequately met or secured by Babbage.[6]

Was Babbage obliged to survey the building for water damage prior to the installation of the Overclad?

[54] Yes. Babbage agreed with BC1 to supervise the remediation works, including the survey of existing water damage prior to the installation of the Overclad system in accordance with clause SW1-A-1 of the specification.[7] This gave rise to a reasonable expectation in contract that the survey will be undertaken with reasonable care and skill. Babbage also assumed responsibility in tort to BC1 and the existing and future owners of the apartments in a broader sense to supervise the remediation project to the same standard. My reasons are:

(a) Babbage is an engineering consultancy specialising in repair of buildings affected by water damage;

(b) Babbage was retained to identify moisture damage at the Fleetwood Apartments and having done so, to provide advice about remediation of that damage;

(c) Babbage produced three reports identifying extensive water damage to various elements of the Fleet Street building;

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6 The cross examination of Mr Lalas reinforced this basic proposition – he observed: "Q: Because without seeing those drawings and specifications, [there is] just no way of independently verifying whether or not the requirements of the Building Code are met or not? A: Well if I only had this document and the WEC report then I don't have enough information for myself about the system unless I am familiar with the system, which I was, knowing what PBS do, but I would want to see those drawings and specifications in any event."

7 APS disputes that breach of SW1-A-1 is pleaded against APS. I address that below at [77].

(d) Babbage issued a tender for remedial works, including a specification requiring a survey and repair of water damage to the cladding and the framing;

(e) The specification included an "Overclad" option;[8]

(f) Babbage was the designated architect under the specification;

(g) John Dale of Babbage provided a recommendation that the tender by APS should be accepted by BC1;

(h) Babbage issued the formal instruction to APS to undertake the remediation works and installation of the Overclad;

(i) Babbage assumed managerial responsibility for the remediation works, including obtaining building consent, supervising the remediation works from time to time, liaising with the Council and managing the works and payment programme;

(j) Babbage must have known that BC1, the current and future owners would rely on Babbage to secure the performance of the remediation works in accordance with the specification, including a survey of the water damage as specified at SW1-A-1.

[55] I am also satisfied that BC 1 reasonably expected that a detailed survey of existing damage would be undertaken prior to the full cost of the Overclad installation having been incurred:

(a) The APS tender was considered by BC 1 prior to the approval of the tender.

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[8] The evidence on this was sparse, but Mr Boyle, project manager for APS testified that the Overclad option was not promoted by APS. Mr Grigg also noted that the Babbage plans were based on CSL drawings.

(b) The APS tender refers to "full survey of structure repairs needed" and "open up failed areas from survey, remove insulation, treat/repair timber."

(c) The APS tender expressly stated that APS would not undertake the survey, but it nevertheless proceeded on the basis that it would be done by Babbage.

(d) BC 1 accepted Mr Dale's recommendation to approve the APS tender.

(e) The recommendation noted that existing damage would be removed as the Overclad was installed.

Did Babbage fail to secure the proper survey of the building?

[56] Yes. While Babbage undertook some moisture investigation as part of its review process, a detailed survey was not undertaken in accordance with clause 1 of SW1-A-1. It is reasonably clear from the available evidence that Mr Dale made a unilateral decision to depart from the strict requirements of SW1-A-1 and not require a detailed survey of the building. Instead, Mr Dale assumed that that the rust process would stop once the Overclad was installed and no further repair was required beyond those areas exposed for the purpose of the installation of the Overclad.

[57] The extent of Babbage's "survey" is at best illustrated by a photographic essay of the building spanning the period July 2003 to August 2007 produced by Mr Grigg, a director of Babbage. These illustrate that specific areas of existing water damage under sills, cut-outs at floor level, around the entrance door and around the base of balustrades and in some unidentified areas were "surveyed". These specific areas largely coincide with the locations for fixing the grid and flashings. This may have involved up to 47 cut outs under the sills. But there is only meagre evidence of a substantive survey or assessment into the required repairs beyond the cut outs under the sills.[9] Mr Grigg also conceded that Babbage did not perform a full survey of damage in terms of SW1-A-1. Mr Boyle (project manager for APS) and Mr Peri

[9] Neither Mr Grigg nor Mr Boyle (project manager for APS) identified other areas that were cut out for remedial investigative purposes.

(an onsite foreman) also noted under cross examination that they could not recall any detailed survey of damage having been undertaken by APS or Babbage.

[58] Unfortunately the owners were not made aware of the fact that a detailed survey foreshadowed in the specification was not undertaken. Indeed, a record of BC1 minutes of a meeting dated 12 September 2005 states:

> The question was asked what damage did you (Mr Dale) find behind the cladding. Corrosion was found this was treated and new cladding installed.

[59] It is now clear that had the survey been done properly, additional extensive areas of moderate to severe corrosion would have been identified, together with damp and mouldy gib lining. An elevation illustrating the extent of severe corrosion is attached as **Annexure A**. The accuracy of this elevation was accepted by the engineering and cladding experts. Mr Marshall also produced extensive photographic evidence of the water damage, including severe rusting to the steel frame and water staining to fire rated plasterboard.

[60] Accordingly, I am satisfied on the balance of probabilities that Babbage was obliged to, but did not secure the proper survey of the underlying damage prior to installation of the Overclad in accordance with SW1-A-1.

Did Babbage undertake to repair and or remove all damaged elements?

[61] No. Babbage did not undertake to ensure removal of "all damaged building elements" as pleaded. The promise to remove was conditional on the outcome of the survey and an assessment of what was necessary to remove in order to remediate the building to a suitable standard. Notably SW1-A-1 only refers to "significant rusting may require replacement". Furthermore, the cost of any repair was not included in the APS tender and needed to be invoiced separately. BC1 could not therefore reasonably expect that all rusted elements would be removed or that all water damaged components replaced without further cost. However, it could reasonably expect that Babbage would exercise all reasonable care to ensure that damaged elements were properly identified and that any significant damage would be repaired or removed prior to the installation of the Overclad. It transpires that BC1 was only invoiced for partial repairs and rust treatment. As noted, Mr Dale appears to have

concluded that no significant repairs were required once it was confirmed that the substrate comprised steel framing.

Did Babbage properly assess the suitability of the structure?

[62] No. The façade and engineering experts agreed that:

(a) It was necessary to assess the sufficiency of the existing structure in terms of its ability to support the Overclad; and

(b) The condition of the existing structure should have been checked by means of an engineering survey prior to acceptance of the design.

[63] No such detailed structural assessment or engineering survey was done, as my findings on compliance with SW1-A-1 reveal. Rather, a judgment was made that the existing steel frame could remain in place without a comprehensive survey of the structure and with relatively minor rust treatment and (at most) piecemeal replacement of some framing. Mr Grigg also suggested that it was not needed because the Overclad was to be bolted to concrete floors and by its very nature concrete is a sound substrate.

Was there structural failure?

[64] No. The engineering experts agreed that:

(a) The underlying substructure had no material effect on the performance of the Overclad;[10] and

(b) "At the present time, the corrosion has a minimal effect on the structure".

[65] Three (of four) experts (Messrs Winter, Brown and Lalas) also agreed that extent of the compromise to the structural adequacy of the gib-lining is minimal. Mr Donald (the structural engineer called by the Plaintiffs) considered that the

[10] Mr Donald maintained the view that structural unsoundness may have been a minor contributor to the Overclad cracking. I prefer the view of the specialist façade engineers on this issue.

compromise to the gib lining is moderate, though when pressed on the issue of the overall structural integrity he identified a potential only for failure at specified locations. Mr Brown, a structural engineer with 35 years experience, also maintained that the panel with the linings acts as a sandwich panel so that the effect of corrosion is reduced.

[66] That being the case, I am unable to find on the balance of probabilities that the existing corrosion had caused material structural failure prior to the Prendos remediation.

Was the Prendos remedial solution justified?

[67] The façade and engineering experts are divided on whether Prendos' remedial solution was justified. Mr Brown and Mr Winter maintain that it was not necessary given that the existing corrosion was having only a minimal effect on the performance of the Overclad and that the Overclad has in fact kept the building weather tight. Mr Brown also opined that further structural testing was required before removing the Overclad and steel substructure.

[68] By contrast, Mr Donald and Mr Lalas consider that the condition of the substrate, including the gib lining, warranted the Prendos solution. Mr Donald observed that the nature of the damage was such that the structure could not satisfy code requirements in terms of structural safety and durability. Mr Lalas also concluded that when it became clear that the substructure was extensively damaged by rust, mould and other water damage, the full re-clad option was the practical solution.

[69] I prefer the evidence of Messrs Donald[11] and Lalas (and Marshall).[12] The relevant threshold requirements for present purposes are clauses B1 and B2 of the

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[11] I observe for completeness that Mr Donald was forced to concede that he was wrong about the effect that the rusted steel frame was having on the Overclad in light of the evidence of the other special cladding experts. But I consider that his concessions were appropriate having regard to their specialist input and did not undermine my confidence in his residual expert opinion about the remedial requirements in light of the evidence of rust and gib board damage.

[12] Mr Marshall addressed the relevant provisions of clauses B1 and B2 in his brief of evidence dated 20 February 2015. I endorse his assessment, including the requirement to take a holistic view of the damage.

building code dealing with structural integrity and durability. The stated objective of clause B1 is:

> (a) Safeguard people from injury caused by structural failure;
>
> (b) Safeguard people from loss of amenity caused by structural behaviour; and
>
> (c) Protect other property from physical damage caused by structural failure.

[70] This objective is achieved via the functional requirement at B1.2:

> Buildings, building elements and sitework shall withstand the combination of loads that they are likely to experience during construction or alteration and throughout their lives.

[71] Clause B2 records the following objective:

> To ensure that a building will throughout its life continue to satisfy the other objectives of this Code.

[72] The corresponding functional requirement is:

> 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.

[73] There is now extensive photographic evidence of perforation and other severe rust damage at various locations. There is also evidence of widespread water damage to the gib lining. A Council properly informed of this water damage could not be reasonably sure that substructure conformed to these requirements without a comprehensive engineering survey. Even with the level of the analysis undertaken for the purpose of these proceedings, the façade and engineering experts limited their agreement about the effect of the corrosion to a "present time" assessment and concluded that the single load test undertaken by Mr Brown was valid only for mild/moderate corrosion and that future testing was required. A corollary of all of this is that the Council property files would need to alert prospective purchasers about the underlying damage, effectively blighting the apartments for resale purposes.

[74] In these circumstances, Prendos was justified in taking a prudent and cautious approach to a remedial solution for a building that had already been subject to large scale remedial works.[13]

Did Babbage fail to secure the proper installation of cladding on the Northern Elevation?

[75] Yes. The fibre cement cladding and supporting timber framing to the deck columns on the northern elevation were installed in contact with the horizontal deck surfaces. Babbage failed to identify this simple error.

Summary of findings on supervision

[76] In light of the foregoing, I am satisfied that Babbage failed to exercise reasonable care and skill in the supervision of the works for the following reasons:

(a) Babbage failed to ensure that a proper survey of the building was undertaken in accordance with the specification clause 1 of SW1-A-1 (or advise BC1 that it was not undertaking a comprehensive survey);

(b) Babbage failed to ensure that the installation works were undertaken generally in accordance with the correct design specifications;

(c) Babbage failed to properly assess the suitability of the substructure to accommodate the Overclad; and

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[13] The underlying issue, not explored at any depth by the parties, is whether the Prendos remediation package broke the chain of causation. As stated by the Court of Appeal in *Sherwin Chan & Walshe Ltd (in Liq) v Jones* [2012] NZCA 474; [2013] 1 NZLR 166 at [59]: "[t]he inquiry must be directed towards the conduct of the wronged party which is forced to take remedial steps in consequence of the wrongdoer's negligence. While it will frequently seek and act on advice in an area of specialist knowledge, the test remains whether the wronged party itself has foreseeably taken an unreasonable risk at the wrongdoer's cost. If so, the loss is not the natural and probable result of the wrongdoer's originating negligence; if not, the chain of causation remains unbroken" (citations omitted). The matter was not argued on an attribution basis, i.e. that Prendos' error (if any) is attributable to the Plaintiffs (in contrast to *O'Hagan v Body Corporate 189855* [*Byron Avenue*] [2010] NZCA 65, [2010] 3 NZLR 445 at [99]), but rather, simply on the basis that the remediation package was not reasonable. In case there is any doubt about this, the evidence fell well short of showing that the Plaintiffs actions were unreasonable.

(d) Babbage failed to check that there were adequate clearances between the cladding and timber framing to the deck columns on the northern elevation and the horizontal decks surfaces.

[77] For completeness, I reject Mr McBride's contentions for APS that:

(a) Breach of SW1-A-1 was not specifically pleaded;

(b) The decision not to survey the building was not unreasonable and or in breach of duty (assuming it existed) given that the building frame remained structurally sound; and

(c) The repairs were not needed for consent purposes given the effect of s 112 of the Building Act – I come back to this below at [162].

[78] First, the pith and substance of the claim by BC1, BC2 and the owners is that Babbage was engaged to supervise the remedial works in accordance with the specification approved by BC1. Babbage failed to secure the performance of those works in accordance with SW1-A-1 (among others) of the specification. The framing of the cause of action in terms of breach of an implied duty to supervise with due care fairly covered this failure, including the pleaded failure to "identify" all damaged elements.

[79] Second, all of the experts agreed that structural investigations should have been undertaken prior to recommending the Overclad system. The failure to do so prior to the repair was not properly explained in the evidence.

[80] Third, the installation of the Overclad was premised on the survey contemplated at SW1-A-1, reflecting a prudent approach to the significant water damage highlighted in the previous reports.[14]

[81] Fourth, the expert agreement about the structural soundness of the building frame does not vindicate Babbage's unilateral departure from the express

[14] A conclusion also reached by Mr Sean Marshall of Prendos.

requirements of SW1-A-1. In my view that outcome is simply fortuitous. The failure by Babbage to undertake a comprehensive survey or assessment as to structural soundness not only breached SW1-A-1, it carried the unacceptable risk of potential structural failure and long term non-compliance with, among other things, the durability requirements of the Code. It also carried the risk that subsequent assessment might result in a different view, namely that the steel framing did need replacement, as happened when Prendos investigated the building.

[82] Fifth, Babbage took an inattentive approach to the Fleetwood Apartments project. This is aptly illustrated by the post construction scramble by Babbage and APS to provide sufficient information to persuade the Council to issue CCC. Babbage endeavoured to shore up the gaps in information by recording the following to its letter to APS of 15 August 2006 when it stated:

> Following a conversation on the 15 August 2006 with you and Auckland City Council, regarding the Code Compliance Certificate for the re-cladding of the above works.
>
> We undertook a supervisory role in the re-cladding project have undertaken several site inspections while the works were undertaken, we are satisfied that the cladding has been installed as per the manufacturers technical information. This has also been reviewed on site by the cladding manufacture.

[83] But the cladding was not installed "as per the manufacturer's technical information". Mr Hanley refused to give a construction review producer statement as required by the consent and Mr Lukaszewicz only provided a qualified approval of the installation for code compliance purposes (discussed further below at [120]). Ultimately, Babbage fell well short of achieving compliance with the specifications approved by BC1.

What are the losses attributable to Babbage's failures?

[84] It is clear that Babbage's failures caused the following losses:

(a) The owners at the time of the remediation works would not have incurred the majority of the expense of the installation of the Overclad;

(b) Significantly damaged elements would have been removed in 2005 not in 2014;

(c) The purchasers of the units after the remediation works would not have paid an inflated value for them (i.e. on the assumption that the units were safe and healthy);

(d) The vendors of the units after the Overclad cracking was identified would not have sold their units at a deflated value (i.e. had the remedial works been properly undertaken prior to the installation of the Overclad); and

(e) The costs of repairing the northern elevations twice would not have been incurred.

[85] I do not accept however that the full cost of repair of pre-existing damage per se is attributable to Babbage's failures. Contrary to the claim made by the Plaintiffs, Babbage did not undertake to repair and replace the damaged elements without further cost to BC1. Rather the tender approved by BC1 stipulated that the cost of repairs would need to be invoiced separately.

Result on Babbage's liability

[86] In the result, Babbage breached an implied contractual duty and negligently failed to properly supervise the remedial works so that they were undertaken in a tradesman like manner and or with reasonable care and skill. For these reasons, Babbage also breached the guarantee affirmed by s 28 of the Consumer Guarantees Act 1993 (the CGA) to exercise reasonable care and skill. The specific failures are noted at [76]. These failures are materially attributable to the wasted costs incurred with the installation of the Overclad, any additional cost incurred by deferring the removal and repair of significantly damaged elements to 2014 and any loss arising from the inflated purchase price or deflated sale price of units. This leaves the questions of concurrent liability, contributory negligence and quantum of damages to be resolved. I address these issues commencing at [177].

The Claims against APS

[87] The Plaintiffs claim that APS breached a duty to take reasonable care, in contract, tort and under the Consumer Guarantees Act 1993 (CGA) when it:[15]

(a) Installed the Overclad system which was not an appropriate repair solution;

(b) Failed to identify and remove all damaged building elements;

(c) Constructed the remedial works with the Defects; and

(d) Issued a producer statement dated 27 September 2006 when it did not have reasonable grounds to do so.

[88] I will address the claim against APS in terms of the following issues:

(a) A preliminary pleading issue;

(b) The nature and content of APS' duty to the Plaintiffs;

(c) Did APS install an inappropriate remedial system?

(d) Did APS undertook to BC1 to identify and remove all damaged elements?

(e) Did APS fail to identify or fail to advise Babbage of any obvious defects?

(f) Was APS obliged under the Building Act 2004 to require a survey of the building in accordance with SW1-A-1?

(g) Did APS install the Overclad with incorrect screw fixings?

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[15] The plaintiff withdrew their claim based on the Building Act 2004 warranties and APS did not pursue a contributory negligence defence.

(h) Did APS fail to comply with SW6-A-10?

(i) Did APS breach of an implied duty to install the cladding in a workmanlike manner?

(j) Did the failure to comply with SW6-A-10 (if any) make a material difference;

(k) Did APS issued a flawed producer statement?

(l) Is APS liable for the poor workmanship on the northern columns? and

(m) What losses are attributable to APS's failures (if any)?

A preliminary pleading issue

[89] At the close of the evidence the Plaintiffs sought to amend the statement of claim to include the following in the list of pleaded defects:

> The fixing of the overclad fibre cement cladding system was inadequate in that:
>
> ...
>
> (iv) The method of the fixing caused the Eterpan sheets to crack.

[90] Mr McBride objects to this amendment on the basis that it is too late and prejudicial to APS. He says that had the issue been raised earlier he would have marshalled evidence to respond to it, including as the whether there was a viable counterfactual alternative to mitigate the effects of the cracking at the time. He notes that he challenged the Plaintiffs to amend their pleading to properly reflect their evidence prior to trial, but the Plaintiffs were content to proceed with the claim as then framed.

[91] I have some sympathy for APS. Prior to the hearing APS raised concern about the inadequacy of the pleading but the Plaintiffs remained steadfast that an amendment was not necessary. Nevertheless, while the request was late, the defect

issue was raised in the experts' evidence exchanged as early as March 2014. Indeed, APS's expert Mr Brown highlighted the issue about the screw fixing in his evidence. Mr Lalas for the Council also raised this aspect in a detailed way in his evidence, including the opinion that the Eterpan literature should have been used.[16] The central claim by the Plaintiffs was always that "the fixing of the Overclad fibre system was inadequate" and the latest particular emerged through the evidence more than 12 months out from the hearings. I therefore see no prejudice to any of the defendants in this amendment.[17] They have had ample time to respond to it. APS saw it coming, because it commenced its own claim against the manufacturer of the cladding, PBS, for failure to provide appropriate guidance on the screw fixing. That claim was effectively discontinued on the liquidation of PBS, but the defect issue remained to be resolved.

The nature of APS's duty of care to the Plaintiffs

[92] APS accepts that it was required to undertake the Overclad installation with due care and skill/good workmanship. But it does not accept that this extended to works beyond the express terms of the tender proposal accepted by BC1 and Babbage. A central issue then is whether APS is subject to a duty in contract, tort or pursuant to the CGA to take care in relation to matters that extend beyond its tender proposal.

[93] APS tender proposal included the "Cladding system" or Overclad option based on the specifications supplied by Babbage. The APS tender specifically excluded however the survey work contemplated by SW1-A-1 and repair work, except on an additional instruction and invoice basis. This is recorded in the "Notes" to the APS tender proposal which state:

> 10. For the cladding system option, the following is noted:
>
> - Existing cladding is not removed and all repairs are reliant on the initial Babbage consultant's survey when the scaffold is erected. However, additional repairs found or needed, can be achieved from the interior once the cladding is in place at extra cost.

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16 I come back to their evidence below at [123].

17 *Carter Holt Harvey v Genesis & Rolls Royce* Auckland HC CIV-2001-404-001974, 29 August 2008 at [21] and [31]; *Steen Bros. Ltd v Youth Hostels Association of New Zealand Incorporated* CA3/86 17 April 1986 at 8.

[94] Against this background, Mr McBride contends that APS's duty of care (whether in contract or tort) does not extend to responsibility for design of Overclad or the survey and repair of damaged elements (unless specifically instructed to repair), subject to a duty to warn (in this case) BC1 or Babbage about instances of obvious unsuitability.[18] As to the duty to warn, Mr McBride contends that this was not pleaded, Babbage was aware of the condition of the building, there were no glaringly obvious deficiencies, APS did in fact warn Babbage of the rust issue, and in any event the underlying substrate was suitable.

[95] Mr Lewis responds that the real question is whether an ordinary reasonable and competent builder ought to have appreciated that there would be a real risk of danger if he proceeded on the basis of the design provided to him.[19] He cited various authorities for the basic proposition that a competent builder will operate in accordance with good building practice rather than slavish adherence to plans.[20]

[96] Regrettably, as counsel engaged on this key issue by reference to different authority (and conversely did not appear to respond directly to opposing counsel's argument), I have found it necessary to examine APS' duties by reference to first principles.

[97] A builder must do the building work in a good workman like manner, must take care to use good materials,[21] and that the nature of contractual duties between owner and builder cannot limit the duty of care owed to third parties.[22] But this does not address the a priori issue raised in these proceedings, namely the effect of the express allocation of risk by APS to Babbage in terms of the survey of the building.

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18 Citing *Hudsons Building and Engineering Contracts* (12th ed, Sweet & Maxwell, London, 2010) at [3-095].

19 Citing *Bowen v Paramount Builders (Hamilton) Ltd* [1997] 1 NZLR 394 (CA).

20 Citing *Boyd v McGregor And Ors* HC Auckland CIV-2009-404-005332, 17 February 2010; *Findlay Family Trust v Auckland Council & Anor* HC Auckland CIV-2009-404-6497, 16 September 2010. Mr Lewis also cited *Auckland City Council v Grgicevich* HC Auckland CIV 2007-404-6712, 17 December 2010 where Brewer J rejected a claim against the defendant for failure to repair defects that were not within his contract. Mr Lewis sought to distinguish this case on the basis that APS's role specifically included remediation. He further emphasised that APS held itself out as having specialist expertise in the repair of water damaged buildings.

21 *Stieller v Porirua City Council* [1986] 1 NZLR 84.

22 *Bowen v Paramount Builders,* above n 19. See also discussion in Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Brookers Ltd, Wellington, 2013) at 312 –313.

[98] Glazebrook J stated in *Rolls Royce New Zealand Limited v Carter Holt Harvey Ltd* that the ultimate question when deciding whether a duty of care should be recognised in New Zealand is whether, in light of all the circumstances of the case, it is just and reasonable that such a duty be imposed. [23] This involves a two staged inquiry, first as to the degree of proximity or relationship between the parties and second whether there are other policy considerations that tend to negative or restrict or strengthen the existence of the duty in the particular class of case. In that case, the terms of the contract between the Electricity Corporation of New Zealand (a head contractor) and Rolls Royce (a subcontractor) was said to point clearly against any duty to Carter Holt (the owner) being recognised.[24] Relevant to this case, Glazebrook J observed:[25]

> The presence of a limitation clause in the contract between a head contractor and subcontractor signifies clearly, if known to the owner, the subcontractor's unwillingness to do the job otherwise than subject to the limitation. The owner's acquiescence can then be deemed an acceptance of the terms under which alone the subcontractor is prepared to enter into a relationship defining its duty to the owner – see John Fleming "Tort in a Contractual Matrix" (1995) 33 Osgoode Hall LJ 661, at p 665. As Jane Stapleton says in "Duty of Care and Economic Loss: A Wider Agenda" (1991) 107 LQR 249, at p 286, a plaintiff should not be allowed to circumvent either a contractual bargain between the plaintiff and defendant or even a non-contractual but clear understanding between parties as to where the risk would lie.

[99] The Court in *Rolls Royce* recognised that the clauses limiting contractual liability did not exclude liability in tort, but they were significant in that the "allocation of risk" was with the knowledge of the Carter Holt. In that context, and given the commercial character of the parties, the Court found that there was no duty of care to Carter Holt to take reasonable care to perform the contract.

[100] The two step proximity/policy inquiry was adopted by the Supreme Court in *North Shore City Council v Attorney General (The Grange).*[26] APS was plainly sufficiently proximate to the Plaintiffs to be subject to a duty to take reasonable care in the installation of the Overclad. The remaining threshold issue is whether it is just and reasonable to extend the duty of care to works that were specifically assigned to

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23 *Rolls Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA) at [58].
24 At [103].
25 At [110].
26 *North Shore City Council v Attorney General (The Grange)* [2012] NZSC 49 at [156].

Babbage to perform and or were conditional on Babbage's advice, namely the survey of existing damage.

[101] The clearest statement of the effect of contractual terms was made by Chambers J in *Body Corporate No 207624 v North Shore City Council (Spencer on Byron)* namely:[27]

> No one can be a party to the construction of a building that does not comply with the building code.

[102] Tipping J also observed:[28]

> I accept that in circumstances where the parties have allocated, or have had the opportunity to allocate, risks by contract, tort law should be slow to impose a different allocation from that expressly or implicitly adopted by the parties. But because of the way the Act is framed I do not see that proposition as being a significant feature of the present case.

[103] While *Spencer on Byron* concerned the liability of inspecting authorities, as noted in Todd:[29]

> It could hardly be right that a council is potentially liable as regards the negligent exercise of its inspection and approval functions but that those responsible for the actual creation of any defects are not.

[104] But the *Spencer on Byron* the Council's duty in tort was in focus, and this "marche[d] hand in hand with its statutory obligation", namely to ensure that the entirety the works were code compliant.[30] There was no room for exclusion of liability by way of contract. By contrast, the scope of any works undertaken by APS is informed, as a matter of fact, by the scope of the contracted works and the detailed features of the relationship between Babbage, BC1 and APS and the works in fact undertaken by APS. I have come to the view therefore that whether it is just and reasonable to impose a duty on APS to take care in relation to specific works is determined by reference to the precise nature of their relationship with BC1 and Babbage and the role played by them.

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27 *Body Corporate No 207624 v North Shore City Council* **[**2012] NZSC 83, [2013] 2 NZLR 297 [*Spencer on Byron*] at [193] per Chambers J delivering majority judgment on behalf of McGrath J and himself.

28 At [40].

29 Todd, above n 22 at 316.

30 *Spenser on Byron* above n 27 at [194].

[105] Given the foregoing, I proceed on the basis that:

(a) The terms of the contract (if there is one) provide the initial frame for the obligations of the builder in terms of the scope of expected works;[31]

(b) The builder must always perform the contracted works in accordance with accepted work practices and in a proper workman like manner;[32]

(c) The builder must advise the architect or principal of any obvious problems or defects with the design or the building;[33]

(d) The standard of care in relation to building works is, as a minimum, compliance with the Building Code. [34]

(e) Whether APS assumed responsibility to take care in respect of specific works depends on a precise nature of the relationship with Babbage and BC1 and the role played by it in the installation of the Overclad.

[106] I will now examine the substantive issues arising in light of this frame.

Did APS install an appropriate remedial system?

[107] Yes. The Overclad was conceptually sound for the purpose of providing a rain shield, assuming the substrate was in good condition – refer [51] – [52]. Furthermore, APS reasonably relied on Babbage as specialist engineers in water damage remediation to determine whether the Overclad system was appropriate for the Fleetwood Apartments. While APS held itself out to be very experienced with remedial works,[35] they were not the designers or architects of the remedial system and, at the time of the installation, Babbage was recognised as a specialist in the

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31 *Rolls Royce*, above n 23. See also Peter Blanchard (ed) *Civil Remedies in New Zealand* (2nd ed, Brookers, Wellington, 2011) at [1.5.3], citing *Riddell v Porteous* [1999] 1 NZLR 1 (CA) at 9.

32 *Bowen v Paramount Builders*, above n 19.

33 *Hudsons Building and Engineering Contracts*, above n 18.

34 *Spencer on Byron*, above n 27 at [193].

35 Refer [95] above.

field. Overclad was also promoted by recognised cladding specialists, Mr Hanley in conjunction with Mr Lukaszewicz, with the former providing a producer statement in support of the system.

Did APS undertake to BC1 to identify and remove all damaged elements?

[108] No. The salient facts are recorded at [61]. APS transferred the burden of securing a survey of damage pursuant to clause 1, SW1-A-1 to Babbage and then offered to repair damage on an as needed basis. BC 1 was aware of the terms of the APS tender proposal, with email correspondence recording that they had reviewed it and taken advice from Babbage about it.

[109] Contrary to Mr Lewis' contention, Babbage's letter of confirmation did not change the basis of APS's involvement. The letter accepted the tender proposal and the tender price.[36] The letter refers to Babbage's plan's details and methodology. But this can be read consistently with the APS' tender conditions, namely that the repair is reliant on Babbage's survey. An implied contractual duty to identify and remove the damage without further instruction from Babbage is not available on these facts.

Did APS fail to identify or fail to advise Babbage of any obvious defects?

[110] Mr Marshall (an experienced building surveyor called by the Plaintiffs) opined that a prudent builder in APS's position would have been concerned to ensure that potentially affected elements were identified and remediated, especially on discovering corroded framing beneath window sills. Mr Powell (another experienced building surveyor) also expressed the view that APS should have insisted on further investigation, given that the prospect of significant damage to the framing and cladding, including fire gib, should have been evident to APS. Reference is also made to the fact that APS sought further instructions as to how to remediate the water damage to the northern columns. This is said to show what a prudent builder should do irrespective of the strict contractual terms. Mr Grigg also suggested that

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[36] See [18].

APS should have advised Babbage of the extent of the damage and sought further instructions.

[111] But much of this, as Mr McBride suggests, belies the contractual arrangements. APS stated that "all repairs are reliant on the initial Babbage consultant's survey when the scaffold is erected." This is not a case where the contract is silent on the scope of works to be undertaken by the builder. Rather it is a case of express exclusion by APS of responsibility for identifying the damaged elements needing repair. Furthermore, APS sought instruction from Babbage, a specialist engineer in remediation of water damage, as to how it should manage rust. It was given a clear direction from Mr Dale to sand back and treat rust in exposed areas – refer to [22]. There is also evidence that Mr Dale was regularly on site and was well placed to provide further instructions to APS if he considered that was necessary. In reality, by the time of the installation, Babbage was aware that there was no timber framing and Mr Dale had clearly formed the view that the Overclad rain-shield would stop the rust process.[37] It also transpires that in terms of structural soundness for the purpose of affixing the Overclad, Mr Dale's direction was not obviously flawed. All experts agree that the rust process stopped with the installation of the Overclad. There was therefore no obvious reason for APS to undertake its own survey or to advise Babbage of obvious defects.

[112] I also do not accept the further contention that the advice given by APS in relation to the northern columns illustrates what APS should have done with the balance of the works. In contrast to the installation of the Overclad, APS simply assumed additional responsibility for that part of the repair by identifying the repairs needed and providing a scope of works which was ultimately accepted by Babbage.

[113] Given the foregoing I am not satisfied that APS failed to properly identify or to advise Babbage of any defects.

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[37] Mr Grigg (who supervised Mr Dale) presented the same basic opinion in his evidence (though he did not endorse or know about Mr Dale's coarse approach to rust remediation).

Was APS obliged under the Building Act 2004 to require a survey of the building in accordance with SW1-A-1?

[114] I have come to the view that APS was nevertheless obliged to be satisfied that a proper survey of the building had, in fact, been undertaken prior to or during the installation of the Overclad. APS was the builder responsible for the Overclad installation works. It had extensive experience in remediation projects. APS should have known that Overclad could not be installed in a manner that did not comply with the Building Code and with the building consent, including the relevant plans and specifications.[38] Relevantly, it was also obliged under the contract for tender to ensure that all work was executed in accordance with requirements. It also knew that a full survey needed to be undertaken – refer [10]. It therefore needed to be satisfied that a proper survey had, in fact, been undertaken in accordance with SWI-A-1, in order to achieve compliance with the Building Act 2004. Significantly, this requirement does not alter or materially affect the allocation of risk to Babbage to perform a proper survey. Rather APS simply needed to ensure Babbage performed that task when the scaffolding was erected (as it anticipated in its tender proposal).

[115] Based on the evidence given by APS representatives, they were aware that Babbage had undertaken some moisture testing prior to the tender process, but could not recall whether a survey was undertaken at all during the installation of the Overclad. It is clear from this that APS did not take any active steps to be satisfied that a survey had been undertaken. Accordingly, APS did not ensure conformity with the Building Act requirements and so did not meet the requisite standard of care in relation to the installation of the Overclad.

[116] Even if I am wrong about SW1-A-1 forming part of the conditions of the building consent (an issue addressed below at [154]), I still consider that APS's failure to be satisfied that a survey in fact occurred fell below the standard required of a competent builder for the purpose of achieving Code compliance. The conditions of the Building Consent did not vary the specification as between APS and BC1 and APS knew that a full survey was required. By not taking any steps to

[38] As required by s 40 of the Building Act 2004.

be satisfied that a survey was undertaken in accordance with clause 1 SW1-A-1, APS could not be reasonably satisfied that Code compliance was achieved.

[117] In fairness to APS it is necessary to recall, for the purpose of apportionment, that APS was acting on instruction and reliant on Babbage for direction as to what was necessary for the purpose of the structural integrity of the substructure.

[118] Accordingly, I reject the general claim by BC1 (and the owners at the time of the works) that APS should have identified the damage or advised Babbage of the risk of damage. I accept however that APS needed to be satisfied that a proper inspection and survey of the building took place. It failed to require such a survey.

[119] For completeness I reject Mr McBride's contention that the failure to require compliance with SW1-A-1 was not properly pleaded for the reasons stated at [77]-[83] dealing with Babbage's liability. I also observe that APS stated in its statement of defence that it carried out the building work with due skill and care and "in accordance with the Council consented plans and specifications." The matter therefore was plainly in issue.

Did APS install the Overclad with the incorrect screw fixings?

[120] Yes. The experts agree that inappropriate screw fixing is likely to be the cause of the cracking to the Eterpan. More specifically the experts agree that the cracking was caused by moisture effects leading to in plane movement in the Eterpan sheets and that a clearance hole (i.e. a hole bigger than the screw) was needed to mitigate this effect. No clearance holes were used (it appears) in relation to the screws fixing at the periphery of the sheets.

Did APS fail to comply with SW6-A-10?

[121] Yes. SW6-A-10 states:

> Timber frame moisture content must not exceed 18% prior to fixing the overclad system.
>
> Pre-drill, allow screw fixings for counter sunk screws.

> The compressed sheets shall be fixed in accordance with Cladding Systems Specification.

[122] In my view APS did not obtain any design details from CSL. Rather APS relied on the Babbage plans and the plans for the Embassy Apartments and Lord Nelson projects supplied by CSL to APS during the tender process, together with ad hoc advice from Mr Lukaszewicz during the construction. But the Babbage plans provided only coarse information about the screw fixing, while the Embassy and Lord Nelson plans did not provide details as to the type of screw fixing at all. Mr Lukaszewicz's recorded advice only briefly touched upon the screw fixing requirements, with the observation made on 8 August 2005 (about the time APS was cutting the sheets for affixing to the grid) that:

> We recommend 10g screws to fit the sheet because of the larger head size. I also mentioned that we used c/sk screws and s/s cup washers on the Embassy where the fixings were exposed – an option to just pan head screws

[123] This is to be compared with the screw fixing required by the Eterpan literature attached as **Annexure B**. As Mr Lalas pointed out, the requirement for clearance holes is indicated in this literature. While this figure relates to a different system, it clearly signals the requirement and method to avoid the effects of movement. In addition, it appears that Mr Lukaszewicz's recommendation was not followed in any event.

Did APS breach an implied duty to install the cladding in a proper workmanlike manner?

[124] Yes. APS's primary obligation was to construct the Overclad in accordance with CSL design specifications. It did not do this. APS chose not to engage CSL for the purpose of a specific design for the affixing of the sheets. This failure was not mitigated by the plans provided by Babbage or the other information and piecemeal advice obtained from Mr Lukaszewicz. I will address the latter's involvement in more detail when dealing with the claim against him, but for present purposes it is sufficient to observe that he was not retained to provide specific design advice. His review of workmanship was strictly limited to the parts of the installation viewed by him. APS could not reasonably expect that this limited role satisfied or supplanted the clear requirement to obtain site specific CSL specification for the fixing of the

cladding. Indeed, it was poor workmanship to rely on Mr Lukaszewicz's piecemeal involvement and to work off plans for different developments in other locations.

[125] APS maintains nevertheless that it could rely on Babbage as the architect to supply the correct details on the plans provided by it. But this is cannot be reconciled with the express requirement at SW6-A-10 to obtain CSL specifications.

Did the failure to comply with SW6-A-10 (if any) make a material difference?

[126] Mr McBride contends that there is no evidence to suggest that obtaining CSL specifications would have made any difference. He says that the evidence supports the inference that an alternative method with clearance holes would likely fail. But the experts agreed that if the substrate was compliant, it would have been possible to remove and replace the cladding provided that that oversized holes and washers were used for the screw fixing. In addition, both Mr Brown and Mr Lalas considered that this method of screw fixing to be suitable.

[127] It transpires that clearance holes were used at Lord Nelson, and countersunk screws with cup washers at Embassy. I am satisfied that something similar could have been used by CSL had it been properly instructed by APS to prepare a site specific specification. Notably, Mr Lukaszewicz referred to a device used on the Lord Nelson construction that drills a combined countersunk and clearance hole for the screws.

[128] Mr McBride emphasised however that the Lord Nelson apartments has also experienced cracking problems. The full cause for this was not a matter detailed in evidence and I cannot reasonably conclude that the screw fixing caused that cracking.

Did APS issue a flawed producer statement?

[129] The Plaintiffs submit that a prudent contractor would not have issued a producer statement stating that the contract works were supplied and installed in accordance with:

(a) The standards specified in the contract documents;

(b) All standards and specifications from the suppliers (Cladding Systems Ltd);

(c) A good workmanlike "manager" [sic];

(d) All building acts and regulations current.

[130] The Plaintiffs further submit that in the absence of the producer statement the Council would not have issued a CCC.

[131] Mr McBride responds that the errors with the producer statement were not properly pleaded, and in any event the statement is not wrong. He also submits that the producer statement, even if wrong, was not causative of loss.

[132] I do not consider that the pleading is deficient. The substance of the claim is that the producer statement should not have been issued as APS could not assert the matters claimed. The statement was wrong in two clear respects. For reasons already explained there was no survey or substantial repair of existing damage and the cladding was not affixed in accordance with CSL specification. I also accept that the Council may have refused to issue a CCC had APS been clear about this, though Babbage's advice assumed prominence. I return to this issue below at [191] – [192].

Is APS liable for the poor workmanship on northern columns?

[133] Yes. APS concedes that the work on the northern columns did not have sufficient clearances between the cladding and the deck. APS seeks to shift responsibility to Babbage for this poor workmanship. But APS assumed responsibility for the repairs to the columns and is liable, with Babbage, for the cost of remedial works to the columns.

What losses are attributable to APS's failures?

[134] I acknowledge that it would have been difficult for APS to refuse to undertake the installation until satisfied that a proper survey was undertaken. I also find that Babbage would have been unlikely to complete a comprehensive survey given the approach recommended by Mr Dale. But, APS's failure to be satisfied that a proper survey was undertaken meant that the issue was not escalated to the owners so that they could make an informed decision as to how to proceed. APS's insistence

on a survey would have, as a minimum, contradicted Mr Dale's misleading representation to them that damaged components had been removed and the cladding repaired. The extensive cross examination of the owners, including former members of the BC1 committee, reveals that they assumed that the remediation would include a survey and repair of the existing damage, albeit on a piecemeal basis as set out in the APS tender proposal. Even accepting the self serving nature of such evidence, I find that had APS required a proper survey, the owners would have insisted on it.

[135] Accordingly, APS's failure to insist on a survey in accordance with SW1-A-1 materially contributed to the losses associated with the Prendos remediation, inflated purchase price and any deflated sale price of units after the works were completed.

[136] APS's failure to adhere to SW6-A-10 and the use of incorrect screw fixings was causative of the cracking of the Eterpan sheets. Similarly, APS's flawed producer statement as it relates to the affixing of the Eterpan sheets may have materially contributed to these losses insofar as the Council would have refused Code Compliance pending rectification of the defective screw fixing. But it transpires that the Overclad panels needed to be removed (and not replaced) in any event to repair the pre-existing damage irrespective of APS's affixing failures. It cannot be said therefore that but for these failures that the Plaintiff owners at the time of the remediation works suffered the loss or damage in suit.[39]

[137] APS's failure to secure appropriate clearance of cladding for the purpose of the northern column repair was causative of the loss incurred by the Plaintiffs to repair those columns a second time.

Result on APS's liability

[138] APS did not take reasonable care to ensure that the building was properly surveyed as required by SW1-A-1. In so doing, APS also breached the guarantee affirmed by s 28 of the CGA to exercise reasonable care and skill in terms of this failure. It is materially attributable to the costs incurred with the installation of the Overclad, any additional cost incurred by deferring the removal and repair of

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39 *Johnson v Watson* [2003] 1 NZLR 626 (CA) at [18].

significantly damaged elements to 2014 and any loss arising from the inflated purchase price or deflated sale price. This leaves the questions of concurrent liability, Fair Trading Act claims, contributory negligence and quantum of damages to be resolved. I address these issues commencing at [177].

The Claims against the Council

[139] The allegations against the Council focus on the alleged failure to be properly satisfied that:

(a) The Overclad was suitable for the purpose of grant of building consent;

(b) The works were properly inspected to ensure that they were undertaken in accordance with consent conditions; and

(c) There was sufficient information to be able to issue a Code Compliance Certificate.

[140] I will examine these allegations by reference to the following key issues:

(a) What was the nature and content of the Council's duty to the Plaintiffs?

(b) Did the Council have a proper basis to issue building consent?

(c) Was a survey of existing damage required by the building consent as granted?

(d) Did the Council have the power to impose a condition requiring a survey?

(e) Were the works properly inspected before the Council was satisfied that the work was Code compliant?

(f) Was it reasonable to rely on producer statement process?

(g) Did the Council have sufficient information to issue a Code Compliance Certificate?

(h) Did the Council's failures materially contribute to the Plaintiffs' losses?

What was the nature and content of the Council's duty to the Plaintiffs?

[141] For more than 30 years Councils have owed a duty to take reasonable care to the Plaintiffs during the construction process, including at consent, inspection and code compliance stages.[40] The duty extends to the original and subsequent owners,[41] and protects the habitation interest as well as the economic interest of the owners.[42]

[142] The Council's common law duty of care is informed by legislative policy. For present purposes, I do not consider that the obligations under the Building Act 2004 are materially different from the obligations under the 1991 Act:[43]

(a) The purpose of the Act remains the same, namely to bring about safe and healthy buildings.[44]

(b) The role of building consent authorities is to issue building consents, inspect building work for which it has granted consent, issue notices to fix and issue Code Compliance Certificates.[45]

(c) All building work must comply with the building code to the extent required by the Act, whether or not a building consent is required in respect of building work.[46]

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40 *Spencer on Byron,* above n 27 at [3], [61].
41 At [72].
42 At [163] – [164].
43 At [217].
44 At [171]; see the Building Act 2004 s 3 and the Building Act 1991 s 6(1)(a).
45 See the Building Act 2004 s 12.
46 See s 16.

(d) A person must not carry out any building work (including construction, alteration, demolition or removal of a building) except in accordance with a building consent.[47]

(e) Before granting a building consent, the building consent authority must be satisfied on reasonable grounds that the provisions of the building code would be met if the building work were properly completed in accordance with the plans and specifications that accompanied the application for consent.[48]

(f) Every building consent is subject to the condition that the building consent authority is entitled during normal working hours to inspect building work and inspection means taking all reasonable steps to ensure that the building work is being carried out in accordance with the building consent.[49]

(g) The owner of the building must apply for and the building consent authority must issue a Code Compliance Certificate within 20 working days[50] if it is satisfied on reasonable grounds that the building work complies with the building consent.[51]

(h) The building consent authority may issue a notice to fix to a person carrying out or supervising the building work if there are reasonable grounds they are contravening or failing to comply with the Act.[52]

[143] Ultimately however the key issue is whether the Council exercised reasonable care to ensure compliance with the building code and the building consent.[53]

[144] I turn then to examine each of the key allegations in light of this frame.

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47 See s 40.
48 See s 49.
49 See s 90(2) and (3), and see s 222.
50 See s 93(1)(a), but note the building consent authority may request further information – s 93(4).
51 See s 94(1)(a).
52 See s 163.
53 *Spencer on Byron*, above n 27 at [193].

Did the Council have a proper basis to issue building consent?

[145] A summary of the information supplied with the application for building consent is noted at [20]. The experts agreed that the Overclad was conceptually sound (refer also [52]). Nevertheless the Council was heavily criticised by most of the independent experts about the inadequacy of the information supporting the application for a building consent.

[146] Mr Jordan is a building assessor of more than 50 years' experience in the building industry. He stressed that an independent appraisal, a wind assessment and a structural report from an engineer should have been provided prior to the building consent stage.

[147] Mr Hodge is a building surveyor of 18 years experience. He noted that the producer statement provided by Mr Hanley did not verify that the design and specifications relating to the work at Fleet Street project would comply with the Code.

[148] Mr Brown is a structural engineer and building assessor of more than 35 years experience. He stated that the WEC report verifying the Overclad system should not have been relied on given the design differences between the WEC tested system and the system to be installed.

[149] Mr Winter, an expert in façade design joined this chorus, stating that the WEC testing was not applicable to the Fleet Street apartments.

[150] By contrast, Mr Lalas, who has extensive experience with independent testing of façade systems,[54] concluded is that further independent testing was not necessary. Or as he put it under cross examination:

> There's nothing wrong with the Overclad system as it is and an independent verification would just say yes its okay

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[54] He was, for example, invited by the Commonwealth Scientific Industrial Research Organisation of Australia to document their system of testing façades. He is also on the code committee helping to write the applicable standard and some of the words used are his words. Over 35 years he has done about 120 or so various tests of façades.

[151] In my view, the council did not have a proper basis for accepting Babbage's recommendation to use it, given:

(a) There was no engineering assessment of suitability of the substructure to accommodate the Overclad for the full 50 year life of the building;

(b) Mr Hanley, who provided the design producer statement, was not an independent expert as his company was the supplier of the Overclad system;

(c) There was no review by an independent qualified expert of the system in terms of its suitability at the Fleetwood apartments;

(d) Careful review of the WEC report supplied with Mr Hanley's producer statement would have revealed, among other things, that screw fixing of the Eterpan sheets was not fully tested;[55]

(e) Detailed design details relating specifically to the Fleetwood site were not included with the information supplied with the application, with the result that, at the time of the grant, the Council could not be reasonably satisfied that the design was suitable.

[152] I acknowledge Mr Lalas' evidence that further independent testing would not have revealed any material flaw in the system and that ultimately the system performed its rain shield function. But the Overclad was not an approved system for building code purposes. Surety, in the form of an independent review of the information provided, was needed in order to be properly satisfied for the purpose of grant of building consent in accordance with s 49 of the Building Act 2004.

[153] Accordingly, in the absence of an assessment of the structural integrity of the building, detailed design and an independent assessment of the Overclad system, the Council did not have a proper informational basis to grant building consent. I agree, however, with Mr Flay (a building surveyor called by the Council), that the

[55] For completeness I reject the criticism that the absence of a BRANZ assessment was significant. BRANZ had no capacity to test the system at the time.

specifications requiring a survey and repair (if operative), and detailed design input from CSL substantially mitigated the inadequacies of the information provided. The further requirement to provide producer statements, including in relation a construction design, provided additional reasonable surety. Overall therefore, the causative potency of the informational inadequacies could have been avoided provided that strict conformity with the grant of the consent in accordance with the plans and specification was achieved.

Was a survey of existing damage required by the building consent as granted?

[154] APS contends that the Council's revision stamp deleted clauses 1 and 2 of SW1-A-1 when it granted building consent. If so, there was no express requirement to survey and repair existing damage.

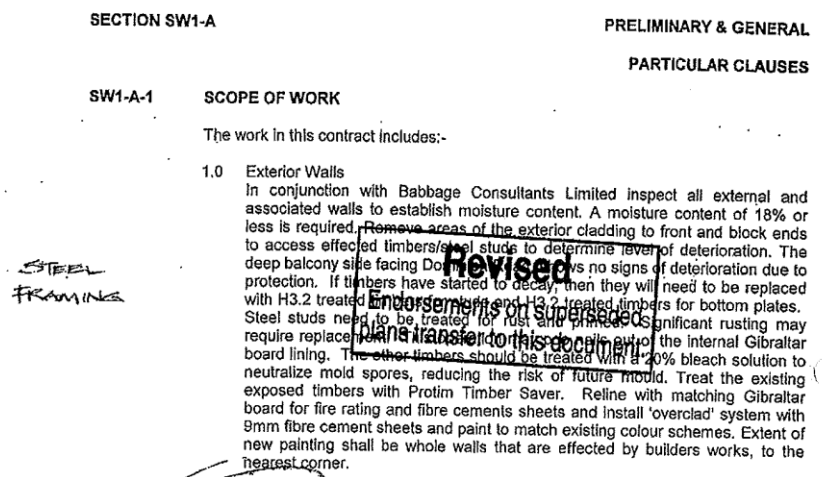
[155] Relevant background facts include:

(a) The application for building consent included the specifications at clauses 1 and 2 of SW1-A-1;

(b) Immediately prior to grant of consent, Babbage advised Mr Thatcher (Council consenting officer) that:

> As stated the existing cladding is to remain in place and the new aluminium frame is to be attached directly over the top, therefore there is no need to remove the existing cladding. The existing framing is lightweight steel framing throughout with concrete intermediate floors. Where rusting is found at the underside of the sill areas, these will be sanded back and a rust inhibitor applied.

(c) The Building Consent is issued by Mr Thatcher with notation stamped over clause 1 of SW1-A-1 so that it reads as follows:



SECTION SW1-A — PRELIMINARY & GENERAL

PARTICULAR CLAUSES

SW1-A-1 SCOPE OF WORK

The work in this contract includes:-

1.0 Exterior Walls

In conjunction with Babbage Consultants Limited inspect all external and associated walls to establish moisture content. A moisture content of 18% or less is required. ~~Remove~~ areas of the exterior cladding to front and block ends to access effected timbers/steel studs to determine level of deterioration. The deep balcony side facing Do[illegible] shows no signs of deterioration due to protection. If timbers have started to decay, then they will need to be replaced with H3.2 treated timber lintels and H3.2 treated timbers for bottom plates. Steel studs need to be treated for rust and primed. Significant rusting may require replacement. Remove all damaged plaster and the internal Gibraltar board lining. The other timbers should be treated with a 20% bleach solution to neutralize mold spores, reducing the risk of future mould. Treat the existing exposed timbers with Protim Timber Saver. Reline with matching Gibraltar board for fire rating and fibre cements sheets and install 'overclad' system with 9mm fibre cement sheets and paint to match existing colour schemes. Extent of new painting shall be whole walls that are effected by builders works, to the nearest corner.

STEEL FRAMING

Revised
Endorsements on superseded plans transfer to this document

(d) The plans included the following endorsements:

(i) on drawing A601 - Revision A "existing exterior joinery to be reviewed as condition of consent" in respect of the exterior wall;

(ii) on drawing A601 – Revision A "Note: Ensure when hole [sic] are made in error they are sealed over".

(iii) on drawing A606 – Revision A "Fixing to be reviewed on site by Babbage Engineering Consultants for suitability (fixing into steel framing and cantilever of steel canopy (Babbage to supply detail to Council".

(e) The specification also has "steel framing" and "flashings over joinery" noted in the margin of clauses 1 and 2.

(f) Condition 4 and 7 of the consent referred to reinstatement of insulation if it was removed and that all work was to be inspected before being covered up.

(g) Condition 5 also refers to the review of the condition of the existing joinery.

[156] Mr Thatcher maintained that he issued the consent with clauses 1 and 2 of SW1-A-1 largely unaltered so that a survey was still anticipated. Mr Grigg also assumed that a survey was to be undertaken and that it was in fact undertaken to the extent reasonably necessary.

[157] I agree with Mr McBride that the subjective view of a Council Officer in granting the consent on the effect of a revision stamp is not probative of the legal effect of the conditions of the consent.[56] As stated by the Privy Council in *Opua*

[56] *Opua Ferries Ltd v Fullers Bay of Islands Ltd* [2003] 3 NZLR 740 (PC) at [20] citing *Slough*

Ferries Ltd v Fullers Bay of Islands Ltd: "[m]embers of the public, entitled to rely on a public document, ought not to be subject to the risk of its apparent meaning being altered by the introduction of extrinsic evidence." [57] The test then adopted by Their Lordships was simply: what would an ordinary member make of the information contained in the public document?[58] I propose to adopt that test, subject to one refinement to reflect the legislative context. The persons ordinarily expected to rely on specifications are qualified builders and building inspectors, not ordinary members of the public. The proper test is therefore, in my view, what would the ordinary builder or inspector make of the revised stamp?

[158] Turning then to the interpretation, the stamp states "Revised" and "Endorsements on superseded plans transferred to this document". The central issue is whether the revised stamp deleted or merely modified this clause. The placement of the stamp directly over the clause suggests that it is no longer operative. But, in my view, a builder or building inspector would not simplistically assume that the revision statement deleted a requirement to identify and repair existing water damage. Rather, I consider that he or she would immediately look to the superseded plans to understand how and in what way the specification was affected, bearing in mind that the superseded plans may be more or less onerous than the unmodified specification. The only directly relevant notation to clause 1 SW1-A-1 is the reference to steel framing on one of the plans. This coincides with the annotation on the modified specification which states "STEEL FRAMING" – see [154(c)]. This suggests that the requirement to treat timber cladding in clause 1 SW1-A-1 is likely to be redundant. But the remaining requirements of clause 1 specifically relating to the identification and repair of the steel framing are not obviously affected by the endorsement. I am, therefore, satisfied that the revised stamp did not delete or otherwise render inoperative clause 1 SW1-A-1. Rather, the revised stamp simply modifies clause 1 by alerting the reader to the type of framing.[59]

Estates Ltd v Slough Borough Council [1971] AC 958 (HL) at 962 per Lord Reid.

57 At 749-750; see also *Attorney-General v Codner* [1973] 1 NZLR 545 (SC).

58 *Opua Ferries*, above n 56 at [22].

59 Mr McBride placed some emphasis on the reference to "Existing Cladding System Remains" on the plans. But this was not a new endorsement.

[159] I am fortified in this view by reference to the application and the correspondence leading up to the grant of the building consent.[60] The application is framed as including the specification attached (including SW1-A-1) so, objectively assessed, Babbage intended the building works to be undertaken in accordance with it. The subsequent correspondence between Mr Dale and Mr Thatcher does not state that clause 1 SW1-A-1 is to be deleted. It is not specifically mentioned at all. The reference to the cladding remaining in place in that correspondence accords with the application to install an Overclad system and so does not materially advance matters. I accept that one inference to be drawn from Mr Dale's letter is that the scope of the repairs to the framing involved treatment of rust under sills. But Mr Dale's letter falls well short of seeking the deletion of clause 1 SW1-A-1 and in particular the requirement to investigate the extent of the water damage and consider whether significant rust damage needs to be repaired. Furthermore, the reference in Mr Dale's letter to "steel framing throughout" reinforces that the purpose of the revised stamp was to reflect this advice. Completing the picture, the residual references at conditions 4, 5 and 7 to reinstatement of insulation and review of joinery reinforce the proposition that repair of existing damage was contemplated.

[160] I acknowledge Mr McBride's submission that the placement of the stamp over the clause creates legibility concerns. But the ordinary builder or building inspector could be expected to obtain a copy of the unmodified specification and would usually find it on the property file if as occurred here, it was attached to the application for building consent. I understand that the specification filed with the application in this case could not be located. This surely cannot be the norm.

[161] In summary, the revision stamp did not render clause 1 SW1-A-1 inoperative. It served to alert the reader that the framing was steel framing not timber framing. While not relevant to the interpretative exercise, this outcome accords with the ongoing contractual obligations to perform SW1-A-1 in any event.

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[60] Reference to these matters accords with the approach taken by the House of Lords in *Slough Estates*, above n 56 cited with apparent approval in *Opua Ferries*, above n 56. In *Slough Estates* Lord Pearson said at 968: "[I]n the present case the purported planning submission was not complete or self contained on the face of it, because it incorporated by reference 'the plan submitted' … I think it was right in the circumstances to examine the correspondence leading up to the grant of the planning permission … with a view to ascertaining what the application was and how the plan was submitted and what function it was intended to perform."

Did the Council have the power to impose a condition requiring survey?

[162] APS and the Council belatedly argued that there was no power to impose a requirement for a survey of existing damage as there is no statutory power to require such repair except pursuant to Part 6 of the Building Act which does not apply (dealing with dangerous, earthquake prone and insanitary buildings). A basic premise of the argument is that s 112 permits the grant of a building consent for any alterations provided that the building will:

> (a) comply, as nearly as is reasonably practicable, with the provisions of the building code that relate to –
>
> (i) means of escape from fire; and
>
> (ii) access and facilities for persons with disabilities…and
>
> (b) continue to comply with the other provisions of the building code to at least the same extent as before the alteration.

[163] I am not convinced that a Council cannot require remedial works for existing non compliant building elements as part of the grant of consent pursuant to s 112. It seems to me that where the building components are interdependent, the Council must be satisfied that they are individually and collectively code compliant. Moreover, it is unnecessary for me to resolve the jurisdictional issue with finality. All the experts agreed that the Council needed to be sure that the substructure was structurally sound before the Overclad could be safely installed. The Council therefore could not properly grant consent for the alterations without either engineering advice as to structural soundness or alternatively the repair of damaged structural elements. The Council took the latter approach and having done so was obliged to secure its performance.

Were the works properly inspected before the Council was satisfied that the work was Code compliant?

[164] No evidence was given by an inspector as to the nature and scope of the inspections. In fairness to the Council, it was first invited to inspect the works after part of the Overclad grid had been already affixed to the building. Indeed, the works plainly had begun prior to the issue of consent. The Council cannot be criticised for failing to inspect non-consented works. But there is no direct evidence to show that

the building inspectors sought or obtained a survey of damage undertaken pursuant to SW1-A-1 or inspected the damage or repairs at any time. Ms Thodey in her submissions states that "the simple answer is that the Council was not aware that an inadequate survey had been carried out." But this rather misses the key complaint by Mr Jordan that the Council was required to ensure that the conditions of consent, including specification SW1-A-1 were met in order to be satisfied that the building work was Code compliant. It should have been a relatively simple task to request evidence of a survey of the relevant repair. It did not do this in breach of its duty to take reasonable care to ensure that the building work was code compliant.

Was it reasonable to rely on the producer statement process?

[165] The producer statement process is not expressly envisaged by the Building Act 2004.[61] But it makes practical sense for the Council to rely on independent expert verification that the installation of the works having been undertaken in accordance with plans and specifications. In cases like the present where the person providing the producer statements has a direct commercial interest in the outcome, it would be prudent for the Council to engage a suitably qualified expert to peer review the producer statement. But there is nothing inherently flawed in requiring the owner to provide producer statements to assist in the assessment of code compliance.

Did the Council have sufficient information to issue code compliance?

[166] The Plaintiffs claim that the Council issued a CCC without reasonable grounds to be satisfied that the apartments complied with the Building Consent. The Plaintiffs submit that there was no proper basis to conclude that the survey and repairs had been undertaken in accordance with clause 1 of SW1-A-1 and or that the documents relied upon by the Council verified compliance with the conditions of

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[61] As Gilbert J recently observed in *Body Corporate 326421 v Auckland Council* [2015] NZHC 862 [*Nautilus*] at [116] producer statements fall into four categories: "Producer statements fall into four categories: (a) PS1 design – a statement from a design professional in relation to the design and intended for use in connection with the issue of a building consent. (b) PS2 design review – a statement from an independent design professional who has reviewed the design. This is also intended for use in connection with the issue of a building consent. (c) PS3 construction – a statement from the party that carried the construction works and intended for use in connection with the issue of a code compliance certificate. (d) PS4 construction review – a statement from an independent design professional confirming that construction has been carried out in accordance with the design. This is also intended for use in issuing a code compliance certificate."

consent. They say that the Council should have required confirmation of compliance with SW1-A-1 or refused to issue code compliance. This would have meant that the underlying damage would then need to be properly surveyed and remedied.

[167] The Council responds that Ms Watkinson took all reasonable steps to satisfy her that compliance with the conditions of consent had been demonstrated. In particular, Ms Watkinson:

(a) Specifically enquired into the condition of the substrate and was given an assurance by Babbage that it was suitable;

(b) There was some information that the building substrate had been surveyed;

(c) Assumed that given Babbage's expertise and supervisory role, a suitable survey would have been undertaken; and

(d) While Mr Hanley did not provide a producer statement, his letter, together with the APS producer statement and Mr Lukaszewicz correspondence, provided reasonable surety that the Overclad had been installed in accordance with CSL specification.

[168] The salient background facts are essayed at [35] – [40]. Strict adherence to the conditions of the building consent was necessary given the inadequacies of the information supplied with the application for consent noted at [153].

[169] To her credit Ms Watkinson demanded answers about the condition of the substrate, but regrettably assumed (like APS) that Babbage would have undertaken a thorough assessment of structural integrity. Furthermore, on the limited information supplied to her, Ms Watkinson could not have been sure that a suitably comprehensive survey of the condition of the framing had been undertaken. There was no report detailing a survey of existing damage and what repairs had been completed. In the absence of any pre-construction testing of structural suitability, the Council fell below the requisite standard of care when issuing the CCC.

[170] As to the installation of the Overclad, the reliance by Ms Watkinson on correspondence from Mr Lukaszewicz was unreasonable. As Mr Hanley had refused to provide a construction review producer statement as required by the consent condition 5 (because he was not retained to review the construction process), the letter from Mr Lukaszewicz (recorded at [38]) assumed significance. But it did not come close to providing surety that the Overclad had been installed strictly in accordance with CSL design specification. His letter is subject to key explicit assumptions and limitations, including:

(a) All defects listed in his correspondence have been attended to by APS; and

(b) Only that part of the Overclad as inspected by Mr Lukaszewicz on 13/5/05, 3/8/05 and 5/9/05, was installed to his recommendations.

[171] Plainly Mr Lukaszewicz was not providing direct surety that all the defects had been attended to or that those parts of the Overclad not inspected by him on the three days in question were installed in accordance with his recommendations. There is certainly no confirmation that the Overclad was installed in accordance with CSL's specifications. In short, there was nothing akin to a proper producer statement as to the quality of the installation of the Overclad as required by the conditions of consent.

[172] Ms Watkinson was given a copy of the three letters from Mr Lukaszewicz to APS about his inspections of the works. They expressly do not provide "quality assurance" except in relation to the works inspected by Mr Lukaszewicz. They could never satisfy Condition 5 of the consent in terms of the requirement to provide a construction review producer statement. The APS producer statement could not and did not remedy this clear breach of the conditions of the consent.

[173] Given the foregoing, I am satisfied that the Council did not have a proper basis for issuing a CCC as the Council could not be satisfied as to the structural soundness of the existing framing and could not be sure that the Overclad as installed complied with requisite specifications.

Did the Council's failures materially contribute to the Plaintiffs' losses?

[174] I am satisfied that:

(a) Had the Council secured a proper survey of the building prior to and/or during the build process, an inspector acting prudently would have required either that the significantly damaged elements be repaired or replaced or insisted on an engineering assessment as to structural integrity;[62]

(b) Had Ms Watkinson been fully informed as to the nature and spread of the water damage, she would have refused to issue Code Compliance; and

(c) The failure to insist on strict compliance with the conditions of consent prior to issuance of a CCC meant that subsequent purchasers were not alerted to the potential that the Overclad did not achieve a structurally secure and safe weather-tight building.

[175] Taken together, the council's failures materially contributed to:

(a) The Plaintiffs' losses associated with the installation and removal of the Overclad and the belated repair of the pre existing damage;

(b) The deflated price for units sold with subsequent knowledge of the defects;

(c) The inflated price paid for the units (if any) by subsequent purchasers.

Summary of outcome of claims against the Council

[176] Given the foregoing I find:

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[62] The engineers agreed that the latter was required: refer [68] above.

(a) The Council did not have sufficient information about structural integrity and or design detail to grant building consent;

(b) The Council did not properly inspect the building works insofar as concern the requirement at clause 1 of SW1-A-1 to survey and repair existing damage (though this was partially due to the construction commencing prior to the issue of building consent);

(c) The Council did not have sufficient information to issue a CCC – it could not be sure that the building was properly surveyed, or that the installation of the Overclad strictly accorded with the specifications and plans.

(d) The Council's failures materially contributed to the Plaintiffs' costs on the installation and removal of the Overclad, the additional costs associated with the repair of existing damage in 2014 instead of 2005 and any deflated or inflated price paid for units subsequently sold or purchased.

The Cross and Other Claims

[177] Each of the defendants brings cross claims against the other as joint/concurrent tortfeasor. Furthermore, if the Council is held to be liable to the Plaintiffs, the Council brings a direct claim against Babbage and APS for negligent advice and for Fair Trading Act breaches. It says that Babbage and or APS (in short):

(a) Failed to ensure that an adequate survey was carried out before the remedial works were undertaken;

(b) Failed to ensure that any part of the damaged substrate was removed/replaced and remediated before the Overclad was installed.

[178] Claims are also made that Babbage misrepresented to the Council that an adequate survey would be carried out, remedial works undertaken and that the Overclad system was suitable. Similar claims are made against APS.

[179] The Council further claims that Mr Lukaszewicz misled the Council into issuing a CCC given his assurance that the "Overclad" complied with code.

Joint / concurrent tortfeasor

[180] The joint/concurrent tortfeasor claim is not without some complexity. Section 17(2) of the Law reform Act 1936 provides that the contribution recoverable from any person shall be such as may be found by the Court to be just and equitable having regard to the extent of the person's responsibility for the damage. The accepted allocation in the defective building context is 80% to the architect/builder and 20% to the Council.[63] But that allocation in my view would not fairly reflect the relative responsibility for the damage as between APS and the Council. The Council was negligent every stage of the process. By contrast, APS allocated the contractual risk of the survey to Babbage. While this did not absolve APS of it duty in tort to secure code compliance, the causative potency of its negligence is no greater than that of the Council's overall, both of whom relied on Babbage to secure a safe and habitable building.

[181] I am satisfied that the proper allocation of responsibility is as follows:

(a) Babbage companies – 60 per cent

(b) APS - 20 per cent

(c) Council – 20 per cent

The direct claim by Council: the flawed producer statements from APS

[182] In closing the Council focused on its claim against APS. It refers to producer statements APS provided to the Council certifying that the works subject to the

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[63] Todd, above n 22 at 1231.

consent had taken place in accordance with the contract plans and specifications and in accordance with NZBC. Ms Thodey submitted that APS did not, however, inform the Council:

(a) That it did not participate in a survey;

(b) A survey more limited to that set out in the specification had taken place; and

(c) It had not installed the Eterpan sheets to the rails in the manner specified by Eterpan or indeed anticipated by the producer statement provided by Ron Hanley at the time of the application for consent.

[183] APS responds that the requirement to undertake a survey was removed and that Babbage specifically told Mr Thatcher what was going to happen. I rejected this ground for the reasons expressed at [156]. APS also says that Ms Watkinson did not rely on APS's producer statement. Rather, she specifically sought further information to establish compliance with the terms of the consent. It also says that the producer statement did not cause any defects.

Negligent Misstatement and the FTA framework

[184] The elements of a negligent misstatement are:[64]

(a) a false or misleading statement;

(b) made in circumstances where a duty of care is owed to the plaintiff;

(c) reasonable reliance on the statement by the plaintiff; and

(d) with resulting loss to the plaintiff.

[185] Section 9 of the Fair Trading Act 1986 also provides:

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[64] *Carter Holt Harvey Ltd v Minister of Education & Ors* [2015] NZCA 321 at [112]; *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL) at 486 and 502 – 503; *Attorney General v Carter* [2003] 2 NZLR 160 (CA) at [22] – [32].

Misleading and deceptive conduct generally

> No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

[186] That section is:[65]

> … directed to promoting fair dealing in trade by proscribing conduct which, examined objectively, is deceptive or misleading in the particular circumstances.

[187] It is not necessary to show that the defendant had any intention to mislead or deceive anyone.[66] Whether any conduct is misleading or deceptive is assessed objectively, that is by whether a reasonable person in the claimant's situation would likely have been misled or deceived.[67]

[188] If the conduct is objectively misleading, the next question is whether the conduct was a material cause of the loss. As the Supreme Court observed in *Red Eagle Corporation Ltd v Ellis*:[68]

> The impugned conduct, in breach of s 9, does not have to be the sole cause, but it must be an effective cause, not merely something which was, in the end, immaterial to the suffering of the loss or damage. The claimant may, for instance, have been materially influenced exclusively by some other matter, such as advice from a third party.

[189] If the claimant's action contributed to the loss, then this may be relevant to the apportionment of loss.

Were the statements misleading?

[190] APS supplied producer statements stating that the Overclad had been constructed in accordance with the standards specified in the contract documents and with the building code. It is not clear that the Council was aware of the terms of any contractual standards and or their content. In any event, the logical implication of this statement is that the contract specifications, including the survey envisaged by

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65 *Red Eagle Corporation Ltd v Ellis* [2010] 2 NZLR 492 (SC) at [28].

66 *Red Eagle*, above n 65 at fn 14 which states "It is not necessary to show that the defendant had any intention to mislead or deceive anyone: *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216 at 228; *Neumegen v Neumegen and Co* [1998] 3 NZLR 310 (CA) at 317."

67 *Red Eagle*, above n 65 at [28].

68 At [28]; *Goldsbro v Walker* [1993] 1 NZLR 394 (CA) at 401.

clause 1 of SW1-A-1, were followed as required by building consent. But an adequate survey was not undertaken in accordance with clause 1 SW1-A-1. In fact, Messrs Boyle and Peri said that they were not aware of a survey having been done. Objectively assessed, therefore, the producer statements were misleading and a person in Ms Watkinson's position was likely to have been misled into thinking that a survey had been undertaken.

Did Ms Watkinson in fact rely on the statement?

[191] Unlike the 1991 Act, the Council is not statutorily deemed to rely on a producer statement under the 2004 Act. Nevertheless, I am also satisfied that Ms Watkinson took into account the information supplied by APS in forming the view that an appropriate survey had been undertaken. In short, the abovementioned statements formed part of the bundle of information Ms Watkinson took into account when deciding to issue code compliance. I also consider that she was in fact misled by those statements to the extent that APS did not make it clear that no comprehensive survey and repair was undertaken. [69]

[192] I accept however that the APS producer statement played a minor role only in leading Ms Watkinson to issue a CCC in respect of SW1-A-1. Notably, in disagreeing with Mr Jordan's criticism about the failure to ensure compliance with SW1-A-1, Ms Watkinson referred only to Babbage's letter of 15 August 2006 confirming that it had supervised the installation and that it had been installed in accordance with manufacturer's technical information. Ms Watkinson broadened her reliance to the APS producer statement under cross examination, but the role played by Babbage plainly assumed prominence.

Were the statements causative of the claimed loss?

[193] I am satisfied that the misleading producer statements contributed to the losses caused by the issuance of the CCC (i.e. the losses incurred by purchasers who purchased their units after code compliance issued). But, for reasons that I have expressed above, the Council failed at each step of the regulatory process to be properly satisfied that the installation of the Overclad could be undertaken in

[69] As noted at [131].

compliance with the Building Code, particularly as it related to the condition of the substructure. In those circumstances, the statements were not the only cause of these losses.

[194] It is also unclear to me that had APS specifically advised the Council that it was not aware of a survey having been undertaken, the Council would have acted differently. As she said in her evidence in chief, while the producer statements were of assistance, "as Babbage was responsible for overseeing the entire process some type of compliance certification was required from Babbage".[70]

What is the proper apportionment of the losses for misleading conduct?

[195] Section 43 of the Fair Trading Act confers a broad discretion for the purpose of apportionment of loss for misleading conduct.[71] It is a matter of doing justice to the parties in the circumstances of the case and in terms of the policy of the Act.[72] Relevant to this case, as Richardson J stated in *Goldsboro v Walker*, the culpability of third parties, the gross carelessness of the consumer, and the minor role of the contravener of s 9 may lead to the conclusion that the justice of the case does not require that the full loss sustained by the consumer be visited on the contravener.[73]

[196] In light of this broad frame,[74] I consider that Babbage must carry the greatest responsibility for the associated losses as it occupied centre stage in terms of the decision not to undertake a detailed survey as required. By comparison, APS' statements simply added to Babbage's negligence and misinformation by suggesting that the works complied with the contract specifications.[75] The Council was also

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70 Ms Watkinson intimated in re examination that she placed some reliance on the APS producer statement, but the stronger inference I draw from the evidence overall is that she plainly placed substantive reliance on Babbage's role and advice.

71 *Goldsbro v Walker*, above n 68; *Premium Real Estate Ltd v Stevens* [2009] NZSC 15, [2009] 2 NZLR 384.

72 *Goldsbro v Walker*, above n 68 at 404.

73 At 404.

74 I have also considered the approach taken by the Court of Appeal in *Wellington City Council v Dallas* [2015] NZCA 126. In that case the Court found that the Council contributed to the loss through its negligence, resulting in a 50 per cent discount in loss recoverable from the misleading party. A further discount may have been made had other causes of loss been established. While leave to appeal has been granted to the Supreme Court on the issue of apportionment, the focus on "doing justice" is a longstanding mantra.

75 It was also argued that the producer statement related only to the "Overclad" and not to the existing building. But the application for the installation included the specifications and so included the requirement to survey.

plainly negligent at prior stages. It should have been vigilant throughout the build process to ensure that the substructure was suitable, and or that clause 1, SW1-A-1 was implemented and it should have specifically sought information to show compliance with clause SW1-A-1. In this context, I am satisfied that Babbage should account to the Council for 60 per cent of the losses accrued by the purchasers of the units after the issuance of the code compliance. APS should also account to the Council for 20 per cent of those losses. The Council must carry the balance of the losses given its incompetence.

[197] For completeness, I do not consider it is necessary to consider the claim based on negligent misstatement. It was barely argued and is problematic. [76] It is not clear, for example, whether APS owed a duty of care to the Council when it was not the applicant for the building consent and did not, objectively assessed, assume responsibility for the survey. In these circumstances, the FTA provides the superior route for redress.[77]

Did Mr Lukaszewicz mislead the Council?

[198] I am not satisfied that Mr Lukaszewicz misled the Council. The short point is that all of the statements made by him were clearly qualified by reference to the inspections undertaken by him and the correspondence referring to those inspections clearly limits their scope – refer [36] – [38]. It was not reasonably available for the Council to infer from them that a comprehensive review of the entire Overclad construction had been undertaken in accordance with Cladding Systems specification. At best, his statements suggested that the parts viewed by him were compliant. But this was never going to be a sufficient basis to issue code compliance in terms of the conditions of the consent.

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[76] See *Carter Holt Harvey Ltd v Minister of Education*, above n 64 at [119] – [122] and [123] – [128].

[77] Todd, above n 22 at 238 where the learned authors stated that the broad provisions under the Fair Trading Act "ha[ve] the capacity to cover much of the ground already occupied by the law of torts, as well as to bypass other established legal principles" and in particular "the law as to negligent misstatement"; See further the comment made by Tipping J in *Murray v Eliza Jane Holdings Ltd* (1993) 5 TCLR 272 (CA) at 279 where he said "The Fair Trading Act has the potential, subject to its terms, to circumvent the ordinary rules of contractual privity, tortuous duty of care, and corporate structure."

[199] I also accept Mr Lukaszewicz's evidence that he provided advice primarily on the installation of the Overclad rail system rather than the cladding. This coincides with the bulk of the content of his letters to APS. The singular reference to the type of screw fixings used by him on another project could hardly provide confirmation that he approved the installation of the cladding. His references also to the WEC report were accurate insofar as concerned the Overclad rail system. The WEC report defines the "Overclad" in terms of the aluminium railing. It is plainly addressing the suitability of the railing as a system rather than the suitability of specific cladding types.

[200] Furthermore, I reject Mr Lalas' suggestion that Mr Lukaszewicz placed himself in a position of assumed responsibility to the Council for the quality of the Overclad installation. Mr Lukaszewicz was clear throughout as to the basis he might be involved in the project. He offered comprehensive services, but these were rejected. He then offered to supply the relevant materials and did so. He offered an opinion on specific aspects of the installation, but no more, and was very clear about that. Objectively assessed, this does not support a basis for an assumption of responsibility to the Council whose statutory duty was to ensure that the works fully complied with the conditions of consent.

[201] Furthermore, the Plaintiffs' losses arise from the need to remediate the existing damage. Mr Lukaszewicz letters have nothing to do with the existing damage. To the extent therefore that he misled the Council it has no causative potency except to the extent that the council may have required rectification of the screw fixing prior to issuing code compliance.

[202] Accordingly this claim must fail.

The limitation issue

[203] It is unnecessary for me to address the issue of limitation. However, as the parties have expended some considerable energy on it,[78] I make the following brief observations.

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[78] Including after the hearing with leave sought by the Third Defendant to reply to Mr

[204] Mr Lukaszewicz pleaded a limitation defence on 28 August 2014. He claimed that the claim made against him on 6 August 2014 was made three years after the alleged loss. No reply was filed and served through oversight. An application for leave to file was lodge after the hearing closed on 6 May 2015. Plainly this is outside the usual period for pleading (10 working days) but the Council submits any prejudice to Mr Lukaszewicz can be remedied by, for example, further time being provided to Mr Lukaszewicz to complete discovery.

[205] Mr Lukaszewicz opposes leave because he says that he relied on the Council's omission to file a reply to "not seek discovery on the limitation defence, issue interrogatories or cross examine witnesses".

[206] Had it been necessary to resolve this issue I would have been inclined to grant leave to reply. I do not consider that Mr Lukaszewicz has been materially prejudiced. The substantive issue is whether the Council's claim is out of time. All council's documents have been produced, and I doubt interrogatories or cross examination would have elicited any information not already documented in the Council files.

[207] As to the merits, s 43(5) of the FTA states that "an application may be made at any time within three years after the date on which the loss or damage, or the likelihood of loss or damage, was discovered or ought reasonably to have been discovered."

[208] The evidence given by Mr Lalas for the Council was that the cracking to the Eterpan sheets would have been observable in about 2010. Mr Jones also called by the Council noted that upon receipt of the 2009 AGM minutes, he would have expected a purchaser to enquire further with the vendor about reported water ingress at units J7 and J6. He also records in his evidence the following:

> [99] I note from the evidence provided by the Council's expert building inspector, Mark Powell, that certain defects now complained of would have been discoverable by a reasonable and competent building inspector from approximately 2008 onwards.

Lukaszewicz's limitation defence.

> [100] Given the 2009 AGM minutes and the evidence of Mark Powell as to what a reasonable building inspector would have identified as at September 2010 (four years since the CCC was issued) and the requirements of the ANZ National Bank Limited regarding a weathertightness declaration, my opinion is that the conduct of the purchaser and possibly also the purchaser's solicitor (as I have not been given access to solicit/client advice) is not typical of what I would have expected of a purchaser of an Auckland unit or possibly their solicitor, for the reasons I have already given.

[209] That being the evidence for the Council, the claim against Mr Lukaszewicz would have been timed barred.

The Council's affirmative defences

[210] The Council maintained the following affirmative defences in closing:

(a) Accord and satisfaction – the Council says it paid $250,000 in full and final settlement of the claims in relation to the (pre)-existing damage;

(b) Contributory negligence – William Dobson (apartment E3), Lisa Seto (apartment E5) and Andrew Peterson (apartment G5) failed to carry out the requisite due diligence;

(c) Limitation – the claims in respect of the substrate are time barred by virtue of s 4 Limitation Act 1950 (six years) and the long stop in the Building Act 2004;

(d) Discount on sale – owners of 3 apartments (Mr Mair of A5, Mr Lim of C4 and D4) have not shown that there is a causal link between the Council's actions and their loss, that they have failed to mitigate their loss and the quantum should reflect the lesser of costs of repairs or loss on sale;

(e) BC's right to sue – claims are only as good as the owners, and as the owners of A3,C4 and D4 cannot make a claim as they bought those units on notice of the defects; and

(f) Betterment – the repairs include replacement of existing windows and doors and internal wall finishes/repaint and any compensation should reflect the benefit to the owners of this.

[211] I can deal with each defence briefly.

Was there accord and satisfaction?

[212] There is no accord and satisfaction defence as the loss suffered by or on behalf of owners of the units at the time of the remediation works does not relate to the existing damage per se, but to the additional costs incurred as a result of flawed installation of the Overclad. Furthermore the claim by subsequent purchasers is not time barred because the cause of action in respect of their losses only arose on the acts of negligence in 2005 and 2006.

[213] If I am wrong about this, and the loss is properly characterised as the cost of repair of existing damage per se, then that loss must be subject to the settlement reached in 2007 (absent fraud or misrepresentation which is not pleaded). The then owners agreed to settle on the following basis:

> D. The parties have agreed to settle the proceedings and any and all claims arising directly or indirectly out of the proceedings.

[214] The proceedings claimed $2.4m in damages relating to the existing water damage. In any event, I see little room for a claim in relation to the same damage now, particularly as the experts concluded that the water damage has not worsened since the installation of the Overclad.

Is the present claim time barred?

[215] As to limitation, the Council's failures contributed to the owners' misapprehension that the existing damage was repaired during the remediation works. These are fresh acts of negligence and had there been no settlement in relation to the existing damage, I would have inquired into the extent to which these acts contributed to the owner's continuing and or fresh losses.[79]

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[79] As stated in *Johnson v Watson*, above n 39, the Plaintiffs would have had the onus of showing

Contributory negligence

[216] I preface this discussion expressing a preference for the evidence of Mr Eades to that of Mr Jones (both very experienced property lawyers) on the reasonableness of the conduct of the purchasers under scrutiny. In particular I agree with Mr Eades that a LIM would not have revealed adverse information. I also adopt the following passage from Mr Eades' evidence:

> [46] The repairs to Fleet Street were undertaken in 2005/2006 at a time when Councils could be expected to have become familiar with leaky building problems and the repairs necessary to rectify them. Since then, many purchasers and their lawyers would be satisfied that the Council had issued the code compliance certificate for the remedial work and would not see the need to obtain a building report which would necessarily involve an investigation that could be seen as inferior to the Council's consent, inspection and certification process.

[217] And I also agree that lawyers and their clients are not (ordinarily) building experts and could not be expected necessarily to construe minutes referring to isolated incidents of water damage as indicating that Fleet Street generally had significant problems.

[218] Against these general observations, I turn to the individual apartments under challenge.

Mr Dobson E3

[219] I do not accept that Mr Dobson contributed to his loss. He purchased his apartment on 25 November 2009. He took several steps by way of due diligence, including obtaining a LIM, a building report a moisture detection report and securing the minutes of previous body corporate meetings. There was nothing in that information that put him on notice of ongoing weathertightness defects. The LIM identified that building consent had been issued for the installation of the Overclad and the two building inspections did not identify any ongoing weathertightness issues. One of the minutes refers to water damage in two apartments in relation to a different part of the building. It was a minor reference only with nothing to suggest

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how much of their loss is attributable to the Council's failures in relation to the Overclad is attributable to their total loss as distinct to the non actionable original construction defects.

a major more widespread water damage issue. A reasonable person in the shoes of Mr Dobson would not have suspected an ongoing weathertightness issue.

Mr Petersen G5

[220] I do not consider that Mr Peterson materially contributed to his losses. He purchased his apartment in December 2009. He did not undertake any due diligence of his building. But I do not think such due diligence would have revealed any material water damage or leaky building risk. Mr Dobson's thorough investigation only two or so weeks prior did not expose any ongoing weathertightness issue and the prospect of a different evaluation must have been very small at the time.[80]

Ms Seto E5

[221] I consider that Ms Seto contributed to her loss by taking no steps to protect her position. Her unit was under agreement dated 28 September 2010 and settled on 8 October 2010. Mr Lalas' evidence was that the cracking would have been evident by this time. She is therefore not in precisely the same position as Messrs Anderson and Dobson. Balanced against this, she purchased the apartment from her parents without any evidence of weathertightness damage at the time of purchase and as noted the LIM and the minutes of the body corporate meeting would not have alerted her to any significant issues. I also note that it is not clear that the cracks in the cladding would have resulted in further investigation. In these circumstances, I find that Ms Seto contributed to her losses in a minor way and by no more than 15 per cent.

Discount on sale

[222] By the close of the hearing the parties agreed that the loss on sale for the owners of A3, C4 and D4 was $175,000, $127,500, and 127,500 respectively. The Plaintiffs have also signalled that only 52.66 per cent of the remedial work costs is claimed against the Council, with the result that they have modified their claim so that it is now based on a pro rata cost basis resulting losses of $92,155, $67,142 and $67,142 respectively.

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[80] A similar result was reached in similar circumstances in *Byron Avenue*, above n 13 at [15], [16] and [25].

[223] The Council objects to these losses essentially on the basis that:

(a) In relation to A3, that Mr Mair had no reason to sell at a discount that is three times the cost of repair. But this is benefit of hindsight reasoning. I accept that (a) he was not clear on how much would have been required to repair the damage and (b) his decision to sell, and not incur further debt, was reasonable.

(b) In relation to C3 and C4, Mr Lim only had limited information upon which to make his decision to sell the apartments (namely his daughter's advice that it would costs about $120,000 per apartment) and that in light of the actual repair cost ($60,000 per apartment), the loss on sale was unreasonably incurred. But this too is benefit of hindsight reasoning. Given the information available to Mr Lim, there was nothing unreasonable with his decision to sell.

[224] Subject to what I have to say about the proper quantification of the losses, I consider that a pro rata claim based on the actual loss suffered is an appropriate approach to quantum in this case.

PART FOUR: QUANTUM

[225] There are three types of damages claimed:

(a) General damages;

(b) Consequential losses;

(c) Compensatory damages.

[226] I propose to first address the prima facie measure for each category and then to examine the proper quantum payable to each class of plaintiff. In this regard, the Plaintiffs fall into three camps:

(a) BC1 and BC 2 and the unit owners at the time of the remediation works and remains owners of the units ("the 2005/2006 owners");

(b) The owners who sold their units with knowledge of the defects, who seek compensation on a loss of sale value approach ("the vendors");

(c) The purchasers who purchased their units without knowledge of the defects ("the purchasers").

General damages

[227] The claim in relation to general damages can be dealt with summarily. The Plaintiffs claim general damages for each of the Plaintiffs. Helpfully the parties provided a detailed schedule identifying the basis for the general damages claim in relation to each plaintiff. It is unnecessary to burden this judgment by repeating its contents here. The distress caused by the need to remedy the defective works was substantial. Applying guiding authority,[81] I am satisfied that the owner-occupiers are entitled to $25,000 for the distress caused by the negligence. I am also satisfied that the other owners are entitled to $15,000 for the distress caused to them.

Consequential losses

[228] The amount claimed for consequential losses is $358,160.48. Of this, $143,349.48 is attributable to delays in the completion of the works. The Council submits that this latter amount should not be included as it should be recovered from the contractor not the defendants. But I agree with Mr Lewis that the defendants carry the burden of showing that wasted expenditure should not be recovered by the Plaintiffs.[82] On the scant information available to me additional costs were incurred because of delays. The Plaintiffs are entitled to recover those costs unless they have acted unreasonably. The Council has not pointed to any particular unreasonable conduct, other than the capacity for the Plaintiffs to sue the contractor. But that provides only a speculative basis for recovery of losses deriving from the defendant's wrongdoing.

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81 *Byron Avenue*, above n 13 at [110]-[115], [127]-[129].

82 See Blanchard, above n 31 at 89.

[229] The individual claims in respect of consequential losses were not seriously challenged and I accept that they are reasonable.

Compensatory damages

[230] Mr Lewis submits that claim that the Plaintiffs are entitled to expectation losses as the contract measure and costs arising from the additional set of repairs in 2013/14 with adjustment for collateral benefit in 2005/2006 as the tort measure. The collateral benefit is said to be the difference between what the full works would have cost in 2005/2006 dollars ($1,263,375.32) and the actual cost in 2005/2006 dollars ($1,208,414.29). The $54,961.13 difference is to be further reduced by 65.8 per cent to take into account that 14 of the Plaintiffs bought after the 2005/2006 works. No authority is cited in support of such an approach in relation to tort damages. The Plaintiffs also submit that a wasted costs approach would not properly compensate purchasers of units after 2005/2006.

[231] By contrast, the Council contends that the existing owners as at 2005/2006 may recover their wasted costs and subsequent purchasers may claim their proven reliance losses.[83]

The proper measure of compensatory damages

[232] The guiding principle for contractual damages is the quantum necessary to place the aggrieved party in the position he or she would have been had the contract been performed.[84] In building contract cases, the cost of reinstatement is the presumptive measure, provided this is necessary to produce conformity with the contract and it is reasonable for the owner to undertake it.[85] The orthodox measure for compensatory tort damages is the sum required to put the plaintiff in the position he or she would have been had the wrong not occurred.[86]

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83 Babbage and APS did not engage on the issue of quantum. APS however submitted that the proper approach was a wasted costs approach based causation principles.

84 *Newmans Tours Ltd v Ranier Investments Ltd* [1992] 2 NZLR 68 at 94; Blanchard, above n 30 at 20.

85 Blanchard, above n 31 at 31, citing *Bevan Investments Ltd v Blackhall and Struthers (No2)* [1978] 2 NZLR 97 at 129.

86 Todd, above n 22 at 113; Blanchard, above n 31 at 91, citing *Attorney General v Geothermal Produce NZ Ltd* [1987] 2 NZLR 348 (CA).

[233] Relevant to both types of measure, the APS tender approved by BC1 anticipated remediation of existing damage and a weather-tight building, but clearly states that the costs of the repair of the exiting damage will be additional to the cost of installing the Overclad. BC1 (and the existing owners as at 2005/2006) could not have reasonably expected to be put in a situation where the repairs were (or would be) undertaken without incurring the cost of those repairs. Therefore the prima facie measure of their loss is a wasted cost measure as framed by James White (an expert quantity surveyor called by the Council), namely:

(a) The wasted cost of the installation of the Overclad;

(b) The cost of the removal of the Overclad;

(c) The increased cost of securing a safe weather-tight building in 2014.

[234] The vendors who subsequently sold their units at a discount occupy the same position as the 2005/2006 owners. As foreshadowed at [84], their loss is the difference in value they would have achieved had the remediation works been effective and the sale price less the costs of repair they would have had to incur in any event.

[235] The purchasers who were not aware of the existing defects at the time of purchase are in a different position, to the extent that they purchased the units on the assumption that they were safe and habitable. They are prima facie entitled to be compensated for the loss of value on purchase price and or the cost of repair.

The 2005/2006 owners: standing to sue

[236] There is a residual issue as to the status of BC1 and BC2 to sue. The parties appear to agree that the Unit Titles Act 2010 did not affect the affect the standing of a body corporate to sue.[87] Mr Thodey submitted however that it would be helpful to address this issue. But that would add unduly to an already lengthy judgment. I simply observe that the bodies corporate own the common property (s 54(1)) and the

[87] *Byron Avenue*, above n 13*; North Shore City Council v Body Corporate 188529* [2010] NZSC 158, [2011] 2 NZLR 289 [*Sunset Terraces*].

owners of the units are beneficially entitled to the common property as tenants in common shares proportional to their ownership interests (s 54(2)). The bodies corporate have all the powers of a natural person (s 72). This logically includes the right to sue in respect of damage to common property. These factors in combination support the basic proposition that the bodies corporate stand in the shoes of the unit owners for the purpose of these proceedings about the common property.

Quantum of loss

Compensatory damages

[237] Unfortunately only Mr White assessed the quantum of compensatory damages on the basis of a wasted costs analysis. Ms Thodey also sought leave to provide further submissions and evidence in the event that I get to this point. I propose to grant leave to the parties to address me on final quantum, but on the basis that I endorse the Mr White's methodology and subject to my findings in subsequent paragraphs. My expectation is that any final quantification should be a matter for expert agreement.

The wasted costs

[238] The cost wasted on installing the Overclad was $1,208,414.29.

[239] The cost of the removal of the Overclad was $14,710.97. Mr White based this figure on a 50 per cent discount on actual costs, given the assumption that the Plaintiffs would have always had to remove the cladding. I agree with this logic.

[240] The total amount wasted therefore was $1,223,125.26.

The repair bill

[241] Turning then to the assessment of the repair bill, the experts helpfully agree that the cost of the building repairs (including repair/removal of existing damage and re-cladding) less betterment is $1,725,617.[88] From this figure I propose to subtract

[88] A memorandum of the parties filed on 12 May 2015 records an agreement reached on the repairs costs for the southern elevation and the northern return walls at [3].

the sum representing the unit entitlements for the loss on sale of the three units, A3, C4 and D4. The parties agree this amount should be 7.768 per cent. Their claim is addressed separately below.

[242] The Council also claims that the sum of $93,819.41 for external windows and doors, internal wall finishes and repaint under ceiling should be subtracted from the repair bill. Mr Ewen and Mr White are quantity surveyors called by the Council. They opine that the external windows and doors were half way through their life when replaced so their cost should be depreciated by 50 per cent. They also say that the painting is an improvement. Mr Woolgar is a quantity surveyor called by the Plaintiffs does not respond to approach taken by Messrs Ewen and White to the external windows and doors, but disputes that the painting is an improvement.

[243] The relevant test for betterment is whether the after completion of the works, the property would be more valuable than a property that complied with the contract.[89] The measure of this value must however take into account the loss on the use of money to the extent that any improvement is a premature investment.[90]

[244] I am not satisfied on the evidence that the painting was an improvement on the contract. I accept however that the external window and door joinery is an improvement, adding value to the property. There is however no evidence on the use of money cost. The parties will need to address this issue for the purpose of finalising quantum.

The increased costs

[245] The increased costs are measured by the difference in the actual costs in 2014 and the cost of the same works in 2005. Mr White assessed this at $1,263,375 by applying a deflating percentage of 24.66 per cent based on a starting point of $1,718,726. I see no reason to doubt this formula. But given the agreement reached by the experts on the repair cost less betterment, the start point is no longer apposite. A revised figure will need to be provided by the experts based on the agreed repair bill and adjusted to take into account deductions noted at [241] and [244].

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89 See *La Grouw v Cairns* (2004) 5 NZCPR 434 (HC) at [48].

90 *J & B Caldwell v Logan House Retirement Home* [1999] 2 NZLR 99 (HC) at 107.

The net sum

[246] The net sum payable to the 2005/2006 owners by way of compensatory damages is the combination of the wasted costs assessed at [238] and the increased costs referred to at [245].

Northern column and elevation repair

[247] The quantum of the costs for the northern column and elevation repair is:

(a) Northern column: $106,430.67; and

(b) Northern elevation: $77,317.74.

Body corporate fees

[248] The parties agree that the amount that ought to be paid for body corporate fees is $6,925.

General damages

[249] The owner-occupiers are entitled to general damages in the sum of $25,000 and the other owners are entitled to $15,000.

Losses on units A3, C4 and D4

[250] The agreed adjusted loss on sale of the three units is (in terms of the Council's liability):[91]

(a) A3: $92,155

(b) C4: $67,142

(c) D4: $67,142

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[91] This is based on the Plaintiffs noting that only 52.66 per cent of the remedial work cost is claimed against the Council. A reference is made in the agreed memorandum as to quantum that the percentage of remedial work cost claimed against Babbage and APS are 58.27 per cent and 55.91 per cent respectively. The significance of this will need to be addressed in submissions dealing with final quantum.

[251] I assume that these amounts do not factor in an adjustment to take into account the wasted costs measure. This will need to be addressed in fixing final quantum.

The purchasers' losses

[252] Fourteen Plaintiffs who purchased their units after the issuance of code compliance are entitled to a pro rata sum derived from the repair bill referred to at [241] – [244].

[253] There must be a 15 per cent deduction from the amount payable to the owners of E5 for contributory negligence.

Consequential losses

[254] The Plaintiffs are entitled to consequential losses of $358,160.48 to be allocated as per the schedule provided by the Council and the Plaintiffs.

PART FIVE: OUTCOME

[255] I make the following findings as to liability and quantum.

Babbage liability

[256] I am satisfied that BC2004 Limited and BC2009 Limited are jointly and severally liable for the Plaintiffs' losses. The specific failures are summarised at [76].

[257] As between the Babbage entities, APS and the Council, the entities are plainly the primary tortfeasors. They should be liable for 60 per cent of the losses suffered in respect of the installation of the Overclad. My reasons are summarised at [180].

[258] Babbage and APS are equally liable in relation to the cost of the northern column and elevation repairs.

[259] Babbage misled the Council and is separately liable for 60 per cent of the sum payable by the Council to purchasers of units after the issuance of the CCC. My reasons are summarised at [195] – [196].

APS liability

[260] I am also satisfied that APS is liable to the Plaintiffs directly for their losses. My reasons are summarised at [138].

[261] As between the defendants, APS is liable for 20 per cent of the Plaintiffs' losses. My reasons are summarised at [180].

[262] APS and Babbage are equally liable in relation to the cost of the northern column and elevation repairs.

[263] APS also mislead the Council and is separately liable for 20 per cent of the sum owed by the Council to the purchasers of units after the issuance of the CCC. My reasons are summarised at [195] – [196].

The Council

[264] The Council is also liable for the Plaintiffs' losses, except in relation to the northern columns and elevation repairs. My reasons are summarised at [176].

[265] As between the Council, the Babbage companies and APS, the Council is liable for 20 per cent of the losses.

[266] As foreshadowed at [195], Babbage and APS are separately liable to the Council for their misleading conduct.

[267] By way of clarification, the Council is not entitled to double payment for the liability arising in respect of the same loss.

Mr Lukaszewicz

[268] The Council's claim against Mr Lukaszewicz failed for the reasons commencing at [198].

Final quantum

[269] The final quantification of the losses will now need to be assessed using the wasted cost framework employed by Mr White, taking into account the agreements reached between the experts as to the cost of repair, and any adjustments to reflect my findings. Final schedules allocating the damages to the Plaintiffs, including in respect of general damages and consequential losses should be updated at the same time.

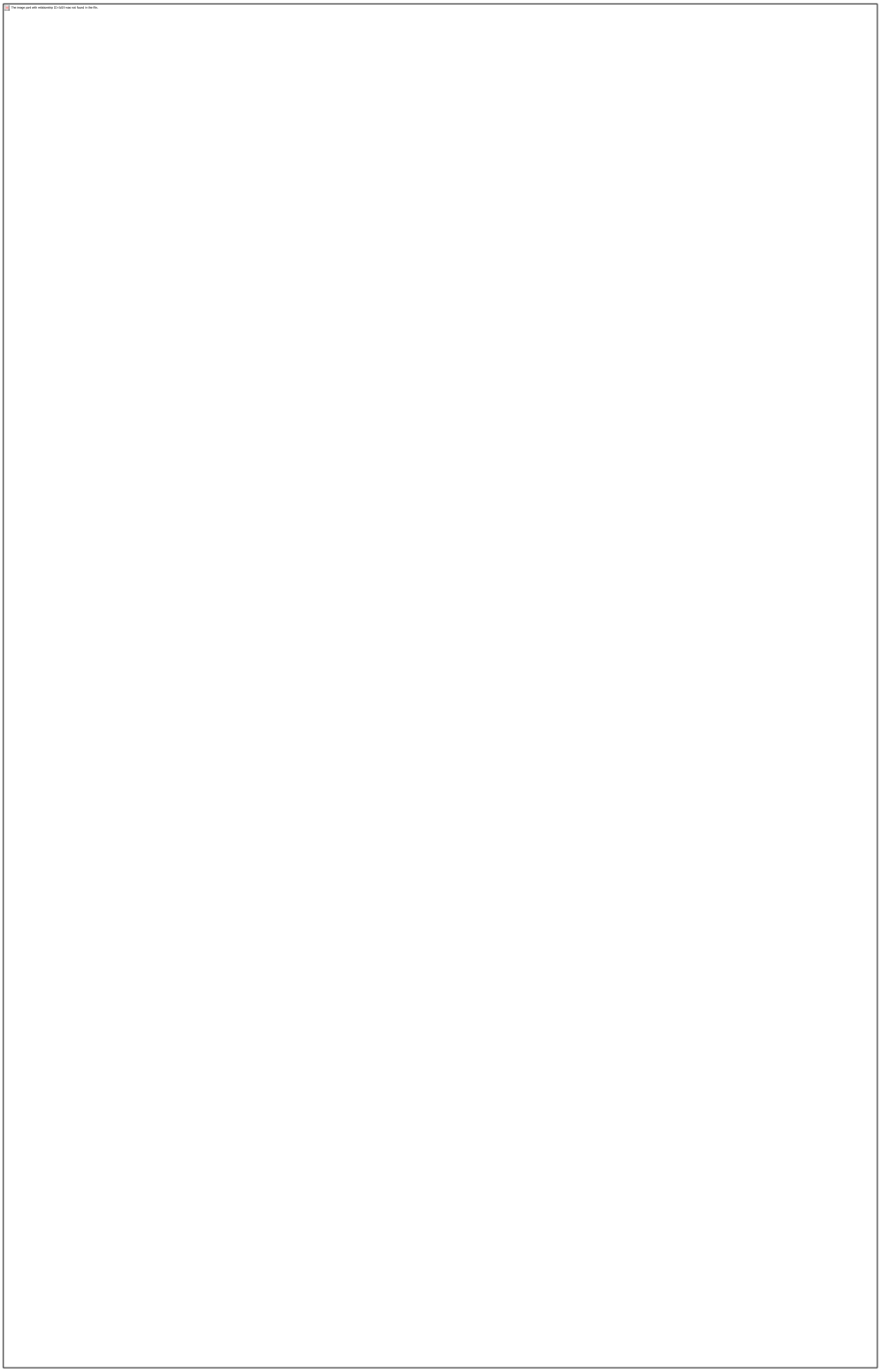
[270] As anticipated by the parties in their joint memorandum on quantum, the parties will also need to address the interest payable on the remedial costs (including in respect of the payments made on the wasted costs), expert remedial costs and other consequential losses.

[271] If the parties cannot agree these matters, leave is reserved to seek further assistance of the Court. Leave is also reserved to the parties to submit to the Court on the issue of apportionment in the event that it transpires that the Babbage companies or APS is insolvent.

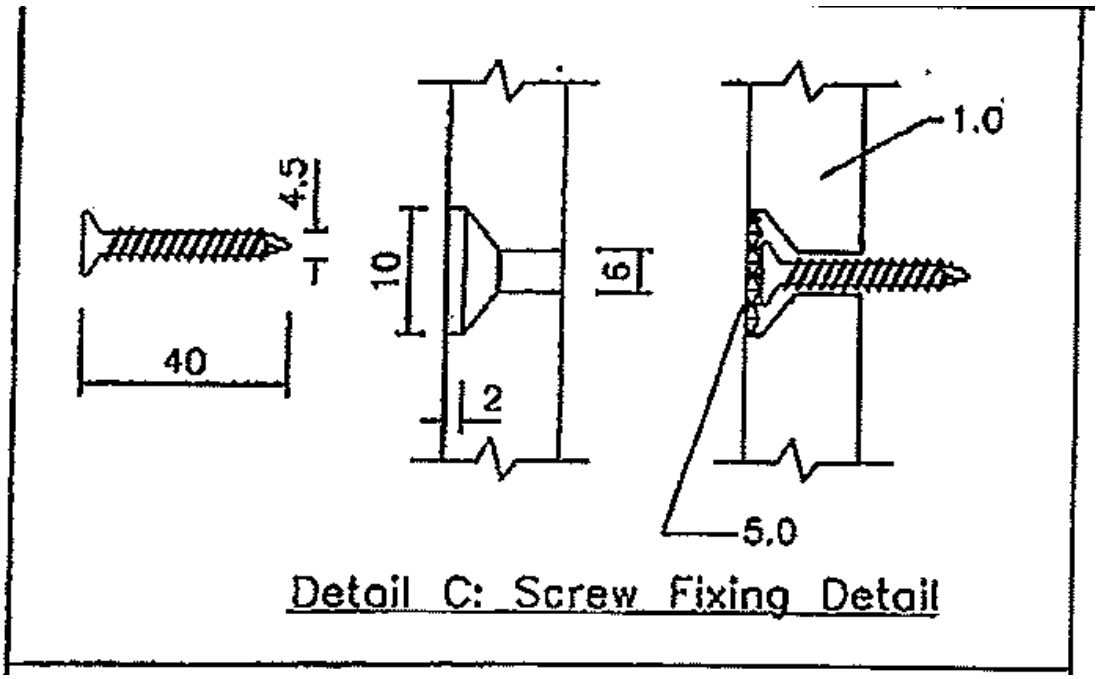
Costs

[272] The parties may file memoranda as to costs.

Annexure A – Observations at 3 September 2014



Annexure B – The Eterpan Literature



Annexure C – Plan A601