IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2016-404-970
[2016] NZHC 2377

	BETWEEN	BU-RYE LEE AND JEOM-YOUL LEE Appellants
	AND	AUCKLAND COUNCIL Respondent

Hearing:	10 August 2016 Further written submissions received 25 August 2016
Counsel:	G R Grant for Appellants J R Knight for Respondent
Judgment:	11 October 2016

JUDGMENT OF WHATA J

This judgment was delivered by me on 11 October 2016 at 4.00 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date: ……..

Solicitors:	Rainey Law, Auckland Simpson Grierson, Auckland

[1] Bu-Rye and Jeom-Youl Lee (the Lees) purchased a house from a friend. They did not seek a LIM before doing so. It is a leaky home. The Auckland Council (the Council) had not issued a Code Compliance Certificate (CCC) for, among other reasons, concerns about weathertightness.

[2] The Weathertight Homes Tribunal (WHT) awarded damages to the Lees against the developer, Goodland Investments Ltd (GIL), but refused to award damages against the Council, finding that:

(a) The Council's inspections and the inspection process were not negligent; and

(b) The failure of the Council to issue a notice to rectify (NTR) in respect of weathertightness issues did not cause loss to the Lees because it was not proven that the notice would have been brought to their attention.

[3] In fixing the quantum of damages, the WHT adopted a change in value approach with the loss fixed by reference to the unaffected value less the actual value. The WHT also found that the Lees contributed to their loss by failing to obtain a LIM. The damages quantum was reduced by 30 per cent. This resulted in a damages award of $269,619 against GIL in the Lees' favour. The claim against the Council was dismissed.

[4] The Lees claim that the WHT erred in fact and law:

(a) In finding that the Council did not breach its duty of care to the Lees in relation to its inspections of the dwelling during construction;

(b) In finding that, although the Council breached its duty of care to them by failing to issue a NTR on about 4 March 2004, that breach did not cause loss to the Lees;

(c) By not including the selling costs in the measure of loss.

[5] The Council cross-appeals, claiming that:

(a) The WHT erred in fact and law in fixing the level of contributory negligence at 30 per cent;

(b) The Lees were 100 per cent liable for their own loss; and

(c) The unaffected value of the property should take into account the absence of a CCC and the condition of the home, resulting in a damages quantum of $80,170, which is then to be reduced by 100 per cent to reflect the Lees' negligence.

Issues

[6] Against this backdrop I must resolve whether the WHT erred in respect of the following issues:

(a) Whether the Council's inspections and/or inspection process were negligent;

(b) Whether the Council's failure to issue an NTR caused the Lees' loss;

(c) Whether the Lees' failure to obtain a LIM caused more than 30 per cent of their loss;

(d) Whether the quantum of damages should include the costs of sale; and

(e) What is the proper measure of unaffected value?

Facts

[7] The construction of the house at 38 Joy Street was managed by GIL. It applied for building consent in March 2002. The plans attached to the application include the following notation:

> Non-rigid, solid plaster on exterior walls system, consisting of 21 mm plaster, metal lath, building paper 50 x 25 tanalised batons at 600 CRS building paper on timber studs.

[8] Building consent was granted requiring, among other things, that details of notations on the approved plans must be strictly followed. The consent also notes:

> (6) The Council will require a minimum of one working day's notice prior to the following inspections:
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> (i) Footing or foundation inspections.
>
> (ii) Pre-slab plumbing.
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> (iii) Concrete floor slabs.
>
> (iv) Prelining (building and plumbing) prior to fixing linings.
>
> (v) Postlining (prior to fixing trim, stopping or painting of linings).
>
> (vi) All drainage work before backfilling.
>
> (vii) Completion inspection (building and plumbing).

[9] Attached to the building consent is a document referring to the inspections required. No inspection is identified in relation to the solid plaster.

[10] Building work commenced in May 2002, but the Council was not called for an inspection until 18 October 2002. At this inspection various checks were made in relation to weathertightness, including moisture content in the framing and the checking of ground clearance between cladding and the adjacent ground. The Council also identified a number of actions that needed to be taken, including a requirement to provide amended drawings for changed cladding to be approved by the Council. These plans were provided and on 25 October 2002, the Council approved amended plans showing a change in the cladding from a solid plaster on baton to Insulclad.

[11] There remains a dispute as to whether the Council inspector observed the installation of the cladding at any time. The Council inspector's field inspection sheet dated 31 October 2002, includes the following notation:

> Cladding inspection requested (Insulclad).

Phoned Justin de Silva – confirmed.

Council do not carry out inspection.

I informed installer to provide a PS3 and certificate from Plaster Systems.

[12] A postline inspection of the first floor and plumbing and a postline inspection of the ground floor were undertaken by the Council on 18 and 29 November 2002. Both passed. This was followed by a failed inspection on 22 April 2003. A field memorandum was issued which noted a number of items requiring attention. An inspection recheck on 5 June 2003 also failed and a further field memorandum was issued noting nine items requiring completion. One item includes the following reference:

(7) Provide details when item 3 inspected on F/M 14222.

[13] Item 3 on F/M 41222 refers to:

Complete wall and ceiling insulation including block walls.

[14] A final building recheck was undertaken on 13 November 2003. It failed for reasons unrelated to the cladding.

[15] On 16 December 2003, the Council sent a letter addressed to the consent-holder at 28 Joy Street, noting that any type of monolithic cladding without a cavity that has not had specific inspections to deal with weathertightness issues will be reviewed on a case by case basis before determining whether a CCC can be issued.

[16] The property was then sold, on 24 December 2003, by GIL to Jacqueline Ratcliffe and then transferred to Jung Jin Kim, and who then on-transferred to Jong Ho Choi and Hyo Ja Woun. During and following the process of sale, the lack of a CCC was noted by Ms Ratcliffe's solicitor.

[17] It transpired that Styroplast, not Insulclad was installed, in breach of the amended building consent. In February 2004 the Council received an application from GIL to amend the plans to change the cladding from Insulclad to Styroplast systems wall cladding. The application was accompanied by a producer statement from CFK Plasterers Limited stating that Styroplast had been installed in accordance

with the manufacturer's requirements. This application was rejected by the Council and, on 4 March 2004, the Council wrote to Mr Kim stating:

> As your building is face fixed (monolithic) construction with no cavities we are unable to verify that it fully complies with the Building Code requirements, manufacturer's details application at the time and that it will remain durable for the required period.
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> …
>
> Council cannot be satisfied that the cladding system as installed on the above building will meet the functional requirements of Clause E2 External Moisture of the New Zealand Building Code and is therefore unable to issue a code compliance certificate.

[18] The Lees purchased the property from Mr Choi and Ms Woun on 15 December 2004. They then resided in the property until 2006 when they began renting the house to tenants. In February 2012, a tenant expressed interest in the property and obtained a LIM. This identified that the house does not have a CCC. On 3 August 2012, the Lees applied to the Department of Building and Housing to have the property assessed. That assessment revealed water damage and a subsequent itemised assessment of remedial work required estimates the cost of repair at about $338,478, including GST, plus $5,750 for a timber testing analysis.

[19] The defects were:[1]

(a) Framing:

(i) There is an inadequate clearance between the bottom plate and the ground on the north elevation of the Dwelling; and

(ii) The bottom plate was installed proud of, rather than flush, with the slab edge on the north elevation of the Dwelling.

(b) Cladding:

…

(ii) On the north and east elevations of the Dwelling, the clearance between the cladding and the deck is inadequate; and

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[1] The Council conceded at the WHT hearing that, except for the balustrade issue, these defects were proven. The WHT found that the balustrade defect was also proven. This has not been appealed.

(iii) The penetrations made in the cladding for the meter box and plumbing services have not been flashed and rely on exposed sealant to waterproof the penetrations.

(c) Joinery:

(i) The UPVC soaker was installed so that it finishes short of the depth of the cladding sheet. As a result, water is and has been directed behind the face of the cladding and the plaster into the vertical polystyrene sheet joints;

(ii) The UPVC sill that was installed was the incorrect width for the cladding sheet;

(iii) The UPVC soaker was incorrectly installed to the internal side of the sill/jamb flashing junction;

(iv) No waterproof membrane was installed to the polystyrene sill rebate.

(d) Garage:

(i) No jamb flashings were installed to the garage door; and

(ii) The head flashing over the garage door had been embedded in the cladding.

(e) Balustrades:

(i) There was an inadequate fall on the top of the balustrades on the northern and eastern elevations of the Dwelling;

(ii) A waterproof membrane had not been installed on the top of the plastered balustrades;

(iii) A handrail was fixed through the top of the plastered balustrade on the north and east elevations of the Dwelling; and

(iv) No saddle flashings had been installed at the balustrade and wall junctions on the north and east elevations of the Dwelling.

(f) The roof cladding junction:

(i) The fascia had been embedded in the cladding on all the elevations of the Dwelling;

(ii) The apron flashing installation was totally inadequate; and

(iii) The chimney cap has been embedded in the plaster.

[20] The Lees commenced the WHT proceedings on 12 September 2014.

The WHT decision

[21] The adjudicator, MA Roche, found that GIL was liable in negligence to the Lees,[2] but dismissed their claim that:

(a) The Council was negligent in issuing an amended building consent or that it was causative of loss;[3]

(b) The Council was negligent in its inspections and/or that the inspection regime was inadequate;[4]

(c) The Council was negligent in failing to identify that the cladding installed was Styroplast rather than Insulclad;[5] and

(d) The Council's failure to issue notices to rectify was causative of loss.[6]

[22] The adjudicator quantified the damages payable by GIL in the sum of $385,170 (including general damages of $15,000). A discount of 30 per cent was made to that sum, having regard to the Lees' failure to obtain a LIM report, resulting in a final damages award of $269,619.

[23] I will elaborate on the salient parts of the decision when I come to address the key issues raised on appeal.

Jurisdiction

[24] This appeal is brought pursuant to s 93 of the Weathertight Homes Resolution Services Act 2006 (WHRSA). In *Chee v Stareast Investments* Wylie J summarised the approach on appeal:[7]

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2 *Lee v Auckland Council* [2016] NZWHT Auckland 2, TRI 2014-100-26 at [27]–[29].
3 At [30]–[35].
4 At [36]–[59].
5 At [52]–[59].
6 At [60]–[67].
7 *Chee v Stareast* HC Auckland CIV-2009-404-5255, 1 April 2010.

> The WHRSA does not say that appeals from the Tribunal proceed by way of rehearing. The Court is, however, given wide powers in s 95 of WHRSA. It is implicit that such appeals should proceed by way of a rehearing under r 20.18 of the High Court Rules, and it follows that the approach outlined by the Supreme Court in *Austin, Nichols & Co Inc v Stichting Lodestar*[8] is apposite. The following principles can be derived from that decision:
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> a) the appellant bears the onus of satisfying the appeal court that it should differ from the decision under appeal;
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> b) it is only if the appellate court considers that the appealed decision is wrong that it is justified in interfering with it;
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> c) the appeal court has the responsibility of arriving at its own assessment on the merits of the case;
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> d) no deference is required beyond the customary caution appropriate when seeing the witnesses provides an advantage because, for example, credibility is important; and
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> e) the appellate Judge is entitled to use the reasons of the first instance decision-maker to assist him or her in reaching his or her own conclusions, but the weight the Judge places on them is a matter for the Court.

[25] I respectfully adopt this summary of principle in the present case.

Grounds of Appeal

[26] The grounds of appeal are summarised at [4]–[5] together with the issues at [6], to which I will now turn.

Issue 1: Whether the Council's inspections and/or inspection process were negligent

[27] Ms Grant for the Lees submits that (in summary):

(a) The Council had to be satisfied that the building was watertight, the cladding was fit for purpose and installed properly;[9]

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8 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 (SC).

9 Referring to *Dicks v Hobson Swan Construction Ltd (In Liquidation)* (2006) 7 NZCPR 881 (HC) at [113]-[117] and *Body Corporate 188529 v North Shore City Council & Ors* [2008] 3 NZLR 479 (HC) at [446]-[449].

(b) The Council never laid down a "road map" for the inspections of the house – there was no adequate programme of inspections that enabled the Council to ensure that the cladding was properly installed and Code compliant;

(c) The Council knew or must have known that a non-consented cladding, Styroplast, was being installed, having approved aspects of the cladding process (as recorded in inspection notes for 18 October and to be inferred from the notes for 31 October and 5 June 2003) and did nothing to stop it;

(d) The Council should have called the relevant inspector, Mr Yansen, so that he could give evidence on what happened and in failing to do so, an adverse inference should have been drawn – that is that he visited the site on 31 October 2003, observed that Styroplast was being installed and did nothing about it;[10]

(e) The adjudicator addressed the wrong question, namely whether the approach taken by the Council to rely on a producer statement was lawful – the proper approach was to check whether the producer statement process was suitable in circumstances where GIL was clearly not following good trade practice and had already breached the building consent; and

(f) Ultimately the cladding "sailed through" unchecked.

[28] Ms Knight for the Council responds that the WHT approached this issue in the correct way:

(a) The adjudicator's conclusion that the Council inspectors did not know about the Styroplast was available to her;

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[10] Citing *Dicks v Hobson Swan Construction Ltd (In Liquidation*), above, at [85].

(b) The Council was empowered to use a producer statement process to establish that the cladding was installed appropriately (rather than supervise the installation as if it were a clerk of works) and it was appropriate in the circumstances to do so;[11]

(c) The approval by the Council of Insulclad system is not challenged, and, in any event, it was not the type of cladding that caused the loss, but rather the defective way it was installed;

(d) The allegation that the Council inspected and approved parts of the cladding is contrary to the evidence given at the hearing.

Assessment

[29] There are two key complaints by the plaintiffs. First, the inspectors observed the non-consented Styroplast and did nothing. Second, the inspections process was wholly inadequate.

Observation of Styroplast

[30] Dealing with the first complaint. I find no error in the WHT's assessment of whether the Council was aware that a non-consented insulation, Styroplast, was being used. The WHT found that the council inspector, Mr Yansen did not attend the site on 31 October 2002 and did not inspect the cladding on that day.[12] Supporting this conclusion, the available record does not refer to a visit by him on that day and states that no inspection was made.[13] The expert opinion evidence suggesting that there was a site visit is based on an inherently rebuttable inference, namely that when Mr Yansen spoke to the "installer" about obtaining a PS3 it was reasonable to conclude that he was working on the site at the time.[14] But it might also be

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11 Referring to Building Act 1991, s 43(8) (now repealed)

12 *Lee v Auckland Council [NZWHT]*, above n 2, at [40].

13 This fact appears to have been assumed by Wylie J in the judgment setting aside the WHT's decision to remove the Council as a defendant: *Lee v Auckland Council* [2015] NZHC 1196.

14 Mr Gill interpreted the reference in the Council's inspection note that the officer spoke to the "installer" about obtaining a PS3 was a reference to Mr Choy who was present on the site and that it was reasonable to conclude that he was working on the site at the time. It was put to Mr Gill in cross-examination that the words could mean "Informed installer to provide a PS3 and

reasonably assumed that Mr Yansen was offsite when the cladding inspection was requested, there being no record of other onsite attendances that day.

[31] Calling Mr Yansen to give evidence may have resolved this issue with more surety. But there must first be a sufficient evidential basis to draw an adverse inference of the type sought by the Lees. In *Dicks v Hobson Swan Construction (In Liquidation)*, cited by Ms Grant, Baragwanath J found that the decision of the Council not to call the officers responsible for approving the plans and specifications and for carrying out the inspections led to the "irresistible" conclusion that the Council staff responsible for approving the specification were either untrained or simply careless, treating the approval of the specifications as a "mere formality".[15] But the "decision"[16] in this case not to call Mr Yansen (some 10 years after the event and no longer with the Council) does not logically lead to the irresistible conclusion that he must have visited the site on 31 October and observed the Styroplast. On the contrary, the available evidence is at best equivocal on this issue and a disputable basis only for drawing an adverse inference.

[32] Even had Mr Yansen visited the site on 31 October or subsequently, I am not satisfied there is a sufficient evidential basis for finding that he or any other inspector observed that Styroplast, not Insulclad, was being used.[17] The findings of the WHT on this were clearly available to it:[18]

(a) There is no record of the Styroplast having been viewed;[19]

(b) There is no reason to suspect that the Council's inspector would omit to record a change, having diligently recorded the need to gain approval for a change to the cladding on 18 October;[20]

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certificate from plaster system". Mr Gill accepted that this was a possible interpretation but, in his opinion, was not what the note meant (see Transcript of the Hearing at 135–136).

15 *Dicks v Hobson Swan Construction Ltd (In liquidation)*, above n 9, at [85].

16 Ms Grant says that the Council was unable to find him.

17 This fact also appears to have been assumed by Wylie J in the reinstatement judgment without the benefit of the full evidence.

18 Mr Paykel asserted in his brief of evidence that the cladding had been installed and cladding work finished by 18 October 2003, but that is demonstrably not the case given the builder's evidence that the trims were installed and plastered in November.

19 *Lee v Auckland Council [NZWHT]*, above n 2, at [36]–[40].

20 At [53].

(c) Both systems use polystyrene sheets with a thickness range of 40mm - 60mm making it difficult to identify that a different system was being installed;[21]

(d) The most distinctive visual difference is the treatment of the window trims and there is evidence that the window trims were not completed by 31 October;[22]

(e) The window trimming may or may not have been plastered over at the time of the November inspections.[23]

[33] The further proposition that the Council "should" have noticed that Styroplast was being used belies the context. The Council had only just approved the installation of Insulclad. The requirement then to produce a PS3 without any objection from GIL provided a rational basis for the Council to assume that Insulclad was in fact being installed and if not would be noted in the PS3.

Inadequacy - No road map

[34] The broader complaint that there was no road map or any inspections specifically directed to the installation of the cladding, has a stronger basis. There are six factors. First, the Council was on notice from 18 October 2002 that an alternative solution for securing compliance in terms of exterior was being used.[24] Second, no detailed information is recorded as having been provided as to the method of the installation. Third, no specific conditions or directions were made as to how the cladding should be installed. Fourth, there is nothing on the Council file to suggest that it turned its mind to the requirement for inspections of the cladding until 31

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21 At [47].

22 Above. This point came out during the cross-examination of Mr Anderson: see Transcript of the Hearing at 26.

23 At [48]–[49].

24 As Mr Gill explained in his evidence under the Building Act 1991, the building methods which were recognised as achieving compliance with the code under the Acceptable Solutions were not the only way of achieving code compliance. The Act allowed the use of different building materials and methods other than those prescribed under the approved building solutions. Other methods of construction not covered by the approved documents issued by the BIA were what was known as an "alternative solution". An applicant for building consent would have to demonstrate to the relevant territorial authority that the proposed building method would achieve compliance with the performance criteria set out in the code.

October, when it decided to rely on a producer process, and fifth, there were no inspections specifically related to the installation of the Insulclad (or Styroplast) at any time. Sixth, GIL did not have an exemplary track record in terms of failed inspections. All of this suggests that, subject to the requirement for a PS3, the Council had "their hands off the wheel" and allowed the cladding to "sail through".

[35] The critical issue therefore is whether it was unreasonable for the Council to rely upon the producer statement process, without inspections, for code compliance purposes. The evidence on this issue was provided by Messrs Gill and O'Sullivan for the Lees and Mr Paykel for the Council. All three were suitably qualified to express an opinion on the adequacy of the Council's approach to this issue. The Lees' witnesses were highly critical of the Council's decision to approve Insulclad, there being insufficient details, they say, as to how Insulclad could achieve code compliance. Mr Paykel opined that Insulclad was a well known alternative solution and BRANZ appraised system supported by manufacturers' literature that addressed every aspect of the Insulclad installation, so that no further details were required and a producer statement process was therefore sufficient for the purpose of securing code compliance.[25]

[36] The WHT addressed this factor in this way:

> [40] It is not established that Mr Yansen attended site. It is certain that he did not carry out a cladding inspection. The decision on the part of the Council to request a producer statement rather than carry out an inspection of the cladding was lawful.[26] Because cladding systems are installed by experts and because their various components get covered up along the way and may not be capable of inspection on any given day, it is reasonable in certain circumstances for the Council to rely on producer statements to establish the correct installation of a cladding system. There is an insufficient factual basis for a finding of negligence arising out of the Council's actions on 31 October 2002.

[37] And further:

> [51] It is not established that on any particular inspection, the Council should have detected that the Styroplast system rather than Insulclad had been installed. In carrying out its inspection role, the Council ought not to

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[25] Mr Paykel maintained this position during the hearing (see Transcript of the Hearing at 210 and 561).

[26] Building Act 1991, ss 43(8) and 56(3)(a).

> be regarded as a clerk of works or project manager.[27] In any case, it is the defective installation itself which has resulted in defects rather than the type of cladding. It does not follow that had Insulclad been installed rather than Styroplast, the building would have been built without defects.
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> [52] It is not established that any of the six inspections that were carried out were performed negligently. Neither is it established that a reasonable inspector would have detected the use of Styroplast rather than Insulclad while the differences between the two were still visible. For the reasons noted at [40] above, it was reasonable for the Council not to have been performed a specific cladding inspection. The three final inspections failed following which the Council referred the house to its CCC resolution team for an assessment for compliance with the Code. Ultimately, no CCC was ever issued for the house.

[38] The WHT then accepted that no cladding defects were identified and that visible defects (a kick out defect, a balustrade slope defect and balustrade handrail defects) were not detected in the course of any inspection. But the WHT observed that the balustrade defects were cladding defects and it was not unreasonable for the inspectors not to have, for example, measured the balustrade slope, when they were intending to rely on the producer statement. It was also noted that, in any event, the visible defects did not cause the loss because the Council did not issue the CCC and that the Council did not endorse the house as weathertight.

[39] The WHT concluded:

> [57] The producer statement for the cladding system (which included flashings) was outstanding when the final inspections were carried out. I accept the evidence of Mr Paykel that before issuing a CCC the Council would have done a reconciliation of the outstanding paperwork and a CCC would not have been issued without a producer statement for the cladding.[28]
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> [58] The producer statement which was eventually filed identified the cladding installed as Styroplast. As noted earlier, it was filed with an application from GIL to amend the plans to reflect the change in the cladding from Insulclad to Styroplast. The Council declined this application, advising GIL that this change would not be approved. The Council then wrote the letter of 4 March 2004 advising that it could not be satisfied that the cladding system as installed would meet the functional requirements of clause E2 External Moisture of the New Zealand Building Code and therefore would not issue a CCC.

[40] As Ms Knight submitted the producer statement process was specifically mandated by statute. Section 43(8) (now repealed) stated:

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27 *Body Corporate 188529 v North Shore City Council*, above n 9, at [183].

28 Transcript of Hearing at 514.

> Subject to subsection (3) of this section, a territorial authority may, at its discretion, accept a producer statement establishing compliance with all or any of the provisions of the building code.

[41] This section reflects a clear legislative policy that physical inspections of every aspect of building work were not required as at 2003. But the decision to use a producer statement for a particular type of building work in lieu of inspections must be reasonable in the circumstances. In addition, as stated by Gilbert J in *Body Corporate 326421 v Auckland Council*,[29] it would not be appropriate to accept any producer statement without question and the extent to which a particular producer statement should be relied on will depend on the relevant circumstances.[30]

[42] In the context of a cladding installation, a Council must be satisfied that:

(a) The cladding system is an appropriate system if properly installed;

(b) The installer is suitably qualified;

(c) The person providing the producer statement has the requisite expertise and independence in order to be able to provide surety in terms of code compliance; and

(d) The producer statement process provides reasonable surety for the purpose of achieving code compliance in the circumstances of the case.

[43] In the present case, the Council required a PS3 together with certification from Plaster Systems, the manufacturer. This required a statement from the installers that carried out the construction works that the installation accorded with manufacturer specifications, together with certification by Plaster Systems. The WHT had a proper basis for concluding that the Insulclad was a well known and BRANZ approved cladding system, manufactured by Plaster Systems and only allowed to be installed by trained and accredited Plaster System Installers, and that

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29 *Body Corporate 326421 v Auckland Council* [2015] NZHC 862.
30 At [115].

the manufacturer's literature contained all the necessary specifications.[31] Ms Grant did not claim that Insulclad was an inappropriate cladding system per se, that the specifications for installation were inadequate, particularly complex or difficult to implement or that the accredited installers and Plaster Systems were not sufficiently independent of the developer.[32] In those circumstances, the Council had a proper basis to adopt the producer statement process in terms of items (a), (b) and (c).

[44] As to (d) Ms Grant refers to *Dicks* and the High Court decision in *Sunset Terraces* as authority for the proposition that as a general rule, a comprehensive inspection process is required when dealing with weathertightness. Heath J in the latter case summed up the position in this way:[33]

> … The Council's statutory obligation, when it came to certify compliance with the Code, was to be satisfied, on reasonable grounds, that the building work complied with Code requirements. The inspection process, leading up to that certification, is designed to enable the Council to express that final conclusion and to incorporate it into the code compliance certificate required by the legislation.
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> Waterproofing of a building is a critical issue with which the Code deals. I have already referred to relevant parts of the Code contained, particularly, in cls E1 and E2. **The Council ought, in my view, to have prepared a schedule of inspections for this particular construction project and to ensure that inspections would, in fact, cover each of the aspects of the Code which required certification. If waterproofing of the decks and the tops of intertenancy and parapet walls could not be adequately checked in any other fashion, a precoating inspection was necessary.**
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> …
>
> I do not accept Mr Bayley's evidence that the Council was reliant on what the developer was doing on site, at any given time, in carrying out its inspection function. **The Council's obligation was to establish *its* inspection regime and to advise the developer of the stages at which its inspectors wanted to be present to ensure proper code compliance.** The obligation would then pass to the developer to advise the inspectors before each phase began and, if advice were not given, the developer could not have complained if the inspectors had required the work to be deconstructed and repeated; particularly, for example, if there were no other means of determining whether (by sampling or otherwise) waterproofing had been carried out to the required standard.
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> (Emphasis added).

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31 See the brief of evidence of Mr Paykel at [95], [103] and [123]–[125].

32 Mr Paykel for the Council opined that it was a BRANZ appraised system with known manufacturers' literature and that no further details were required. See his brief of evidence at [95].

33 *Body Corporate 188529 v North Shore City Council*, above n 9, at [446]–[447] and [449].

[45] But this direction is not an absolute rule given the express mandate afforded by s 43(8). To illustrate Gilbert J in *Body Corporate 326421 v Auckland Council*[34] rejected that contention that the Council was negligent in deciding not inspect the cladding during the course of installation, the Judge observing:

> [112] … It would not have been practical for Council officers to undertake any meaningful inspection regime for cladding installation. I consider that Council was entitled to anticipate this difficulty at the consent stage and determine that it would instead place reliance on a PS4 from Walker Architects certifying that it had overseen the cladding works and that these works complied with the code. …

[46] That case however highlighted the importance of tailoring the response to the particular circumstances. The Judge noted:

> [125] I consider that blind acceptance of the certificate provided by Façade Technologies to Brookfield Multiplex was not an adequate response by Council in this case. Whether or not it was common for councils to accept PS3s from installers at the time the Nautilus was built does not mean that it was appropriate to rely on the certificate provided in this case. What will be sufficient in one case may not be in another. It obviously depends on the particular circumstances. I accept Mr Rainey's submission that the process for determining code compliance is not simply a matter of collecting pieces of paper, judgment is required.

[47] The Judge then found that reliance on a PS3 was inappropriate for the purpose of issuing the CCC given that:

> [126] Council knew that the cladding system was not a proprietary system and had no service history. Only basic drawings were supplied at the building consent stage. It was clear from the specification that no final design had yet been developed, only a process for assessment and testing of any design before it was manufactured and installed. Council was not given shop drawings or the results of any testing. It should have been concerned when it received an application for an amended consent more than three months after installation of the cladding commenced. This is particularly so given that the cavity and drainage features of the original design were removed without explanation. Council should have made enquiries as to why no PS4 was available from Walker Architects. Having regard to the mandatory considerations under s 47 of the Act, including the size, location and complexity of this building, I consider that Council fell below the standard reasonably expected at the time in issuing the code compliance certificate simply on the basis of Mr McEvoy's statement and without making any other enquiries.

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34 Above n 29.

[48] It will be seen that there are similarities to the present facts – see my comments at [34]. But the material difference in this case is that the approved Insulclad system was well known and a BRANZ approved alternative solution and Plaster Systems were suitably qualified and independent to provide certification.[35] The Council could reasonably expect that any material departure from the specifications for installing such a system would be made known to it by the installer and/or Plaster Systems, and that the installer would refuse to issue a PS3 in the event of non-compliance. This, in my view, provided a clear and sufficient basis for the Council to allow the installation of the cladding to continue, bearing in mind that the Council retained a power to decline to issue a CCC if not satisfied with the PS3 or certificate from Plaster Systems.

[49] Accordingly, I am not persuaded that WHT erred in finding that the Council was not negligent for failing to undertake inspections according to a detailed road map. There was a sufficient and reasonable basis to adopt the producer statement process in lieu of inspections in respect of the Insulclad installation.

[50] Whether or not the producer statement, if presented, would have provided a proper basis for issuing a CCC raises a different issue. The Council would still have needed to be satisfied as to the qualifications of the installer and the robustness of the producer statement, and Plaster Systems' certification, in light of all of the information available to it. The exposure that the Council always faced by not supplementing the producer process with regular inspections is that a defect missed by the producer could have been reasonably picked up with a physical inspection. But that does not mean that a Council relying on the producer statement process for cladding installation was ipso-facto negligent when defects are later discovered. The Council is not, as Ms Knight submits, a clerk of works. Rather, the Council must exercise reasonable care to ensure compliance with the building code.[36] The

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[35] Messrs Gill and O'Sullivan for the plaintiffs opined that the Council should not have accepted the Insulclad based on the limited information supplied by the developer. But neither of them adequately responds to Mr Paykel's evidence that Insulclad was BRANZ approved and that all of the manufacturers' literature provided all the necessary details. There is also no evidence to suggest that Plaster Systems were not qualified or sufficiently independent to certify the installation. The WHT therefore had a proper basis for preferring Mr Paykel's evidence on this issue.

[36] *Body Corporate No 207624 v North Shore City Council [Spencer on Byron]* [2012] NZSC 83, [2013] 2 NZLR 297.

assessment of what is reasonable is a context specific exercise. The Council was told that an alternative, BRANZ approved cladding solution was installed or going to be installed and certified by Plaster Systems, and for the reasons already stated, I do not consider that the adjudicator erred in finding that it was reasonable to do so in the circumstances.

Issue 2: Whether the Council's failure to issue an NTR caused the Lees' loss

[51] Ms Grant submits that:

(a) The Council had the power to issue an NTR at any time during the construction process and was obliged to do so when the Council resolved not to issue a CCC.

(b) An NTR should have been issued on 18 October 2002 when the Council observed that the wrong cladding system was being installed, on 31 October 2002 when the Council must have known that another unapproved system was being used and on 4 March 2004 when the Council decided not to issue a CCC because of weathertightness concerns.

(c) The WHT was correct to find that the Council breached its duty to issue an NTR on 4 March 2004, but erred in declining to award damages on causation grounds (i.e. on the basis that the NTR may have gone to the developer).

[52] Ms Knight endorses the WHT finding that the failure to issue an NTR did not cause the Lees their loss, noting:

(a) GIL, as the developer, or Mr Kim, as the recipient of the March letter, were the most likely recipients of an NTR had it been issued;

(b) It is speculative to suggest that GIL, Mr Kim or the vendors would have brought the NTR to the Lees attention;

(c) The only other effect of the NTR would have been that a copy would have been noted on the LIM, which the Lees did not seek.

Assessment

[53] I endorse the WHT's findings that the Council did not err by not issuing an NTR on 18 October and 31 October 2002 for the reasons expressed in relation to the approach taken by the Council to the inspections. In short, the Council had a reasonable basis for allowing the development to continue.

[54] I also agree with the WHT that the Council breached a mandatory duty to issue an NTR on 4 March 2004. Section 43(6) stated:

> Where a territorial authority considers on reasonable grounds that it is unable to issue a code compliance certificate in respect of particular building work because the building work does not comply with the building code, or with any waiver or modification of the code, as previously authorised in terms of the building consent to which that work relates, the territorial authority shall issue a notice to rectify in accordance with section 42 of this Act.

[55] In submissions received following the hearing, the Council argued that the obligation in s 43(6) was not triggered because the Council was not aware of the specific defects and it was sufficient for the Council simply to refuse to issue a CCC pursuant to s 43(5), which provided:

> Where a building certifier or a territorial authority refuses to issue a code compliance certificate, the applicant shall be notified in writing specifying the reasons.

[56] The Council submitted that s 43(5) applied where the Council refused to issue a CCC. This could be either where the Council was simply not satisfied that the building work met the building code or where the Council was actively aware of defects in the building work. The Council argued that in the latter case, and only in the latter case, where the Council was aware of the defects, the duty in s 43(6) was also triggered. A similar argument was made before the WHT and was rejected by the adjudicator.[37]

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[37] *Lee v Auckland Council [NZWHT]*, above n 2, at [71].

[57] I am doubtful that a council was able dispense with the requirement to issue an NTR while at the same time refuse to issue a CCC under the 1991 Act. There must be an identifiable non-compliance with the code in order to be able to refuse certification. In addition, the mandatory nature of the obligation at s 43(6) is not obviously reducible to a mere discretion (unlike the 2004 Act notice to fix provisions).[38] In any event, it is unnecessary for me to resolve whether the requirement to issue an NTR is triggered only on identification of specific defects. In this case the Council specifically identified that the Styroplast monolithic cladding without cavities underlay the decision not to issue a CCC – see [17] above. That being the case, the Council was obliged to issue an NTR to install a code compliant cladding system. It was not sufficient to simply do nothing except refuse to issue a CCC. That inaction continued to expose the public to a non-compliant building, as in fact happened in this case.

[58] To elaborate, the object of s 43(6) is to secure rectification of defects.[39] That is evident from the plain language of the enactment in light of the purpose of the legislation and its context:

(a) Section 43(6) states that "where a Council considers … that it is unable to issue a code compliance certificate … the territorial *shall* issue a notice to *rectify*";

(b) The purpose of the Building Act 1991 is (among other things) to provide for "necessary controls relating to building work" to achieve safe, code compliant buildings;

(c) As the Chief Justice stated in *Body Corporate No 207624 v North Shore City Council [Spencer on Byron]*:[40]

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[38] See Building Act 2004, s 95A and subpart 8 (in particular, s 164). This may explain why the Chief Executive has determined that the decision to issue a notice to fix will depend on the circumstances: Determination 2013/08 regarding the refusal to issue a code compliance certificate and the issue of a notice to fix for a 10-year old house with monolithic cladding at 38 Pendennis Point, Porirua, 22 April 2013 at [9.5].

[39] See *Gauld v Waimakariri District Council* [2013] NZHC 1923 at [31]-[45].

[40] *Spencer on Byron*, above n 36, at [16] (per Elias CJ).

> The code, with which the Council certified compliance, is a minimum standard, as the legislation makes clear. Building work which is not code-compliant is contrary to the Act. The Act sets up an interlocking system of assurance under which all undertaking building work or certifying compliance with the code are obliged to observe the standards set in it. The principal mechanism of the Act for checking for code compliance is the building consent and certification undertaken here by the Council …

(d) Section 80 makes it an offence to intentionally fail to comply with any direction given by a person authorised to give that direction – this must include a direction pursuant to s 43(6); and

(e) Enforcement is to be expected:[41]

> The underpinning rationale of the duty of care in this area is the need to provide encouragement to those responsible for the construction of buildings to use reasonable care in their respective tasks within that overall undertaking. Councils, operating under the Building Act 1991, were under a statutory duty to enforce the provisions of the building code. The law of negligence stands behind this statutory duty by providing compensation should the Council contribute to breaches of the building code through careless acts or omissions in supervising construction.

[59] Given this clear statutory and policy frame, the extension of tortious liability to include the careless failure to issue a notice to rectify is a logical adjunct to the well established bases for liability for negligent inspection and/or negligent issuance of CCCs. They drive from the same basic starting point, namely that the Council must use reasonable care to ensure that a building is code compliant. Accordingly, a Council will be liable for reasonably foreseeable losses to an injured party caused by the careless breach of its duty to issue a notice to rectify defects.[42] If there has been a breach, it is not enough for the Council to show that the injured party did not take adequate steps to become aware of the breach or would not have become aware of the notice had it been issued.[43] Such an approach confuses liability for negligence

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41 At [162] (per Chambers J).

42 *North Shore City Council v Body Corporate 188529 [Sunset Terraces]* [2010] NZSC 158, [2011] 2 NZLR 289 at [51], [75] and [85] (per Tipping J). For a general statement of the elements of the negligence tort: see *Couch v Attorney General* [2008] NZSC 45, [2008] 3 NZLR 725 at [9] (per Elias CJ) and Stephen Todd "Negligence: The Duty of Care" in Stephen Todd (ed) *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, Wellington, 2016) 147 at 150.

43 In *Sunset Terraces* at [61] Tipping J noted that, "The absence of a CCC does not mean that the duty of care otherwise resting on an inspecting council is somehow retrospectively abrogated. The duty is owed and (if such be the case) breached at the time of the relevant inspection or its

simpliciter with liability for negligent misstatement.[44] The former does not require an act of reliance on the part of a prospective purchaser. Rather, it is enough to show that the Council did not perform its tasks to the requisite standard of care.

[60] The correct counterfactual analysis for causation purposes in the present context is to assume that the Council, properly cognisant of its statutory duty to encourage code compliant buildings, would issue an NTR to both the builder and the owners as the persons most directly affected by the defects. The failure to do so meant that it was liable for any reasonably foreseeable losses subject to proof of any intervening cause or contributory negligence.[45]

[61] As the Lees clearly fall within the class of foreseeably affected persons,[46] the only residual issues in this case are whether there were any intervening causes and/or whether the Lees contributed to the loss by failing to take reasonable steps to protect themselves.

[62] Returning to the facts, the Lees did not purchase the property until December 2004, several months after the Council became aware of the non-compliance with the cladding specification and notified Mr Kim (in error) that a CCC would not be issued. Contrary to the Council's submissions, this provided ample opportunity for the Council to insist on the rectification and for the builder or vendors to (at least) start the repairs or take other steps, including any appeal process against the refusal to approve the Styroplast system. The failure to do so was simply careless, there being no obvious reason not to do so. There is also no evidence to suggest that the Lees were aware of the weathertightness issues and the Council did not advance an argument that replacing the cladding system would not have remedied the defects.

[63] In those circumstances, I consider that the failure to issue an NTR was a material cause of the Lees' loss.

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absence." And at [62] the Judge said: "What the absence of a CCC cannot do is overtake the earlier duty and any breach of it".

44 See also *Johnson v Auckland Council* [2013] NZCA 662 at [101]-[108].

45 *Sunset Terraces*, above n 42, at [61] (per Tipping J).

46 At [51] (per Tipping J).

Issue 3: Whether the Lees' failure to obtain a LIM caused more than 30% of their loss

[64] Having identified that the failure to issue an NTR was negligent and materially causative of loss, the Lees' claim falls to be assessed within the orthodox contributory negligence framework, in the sense that the failure to issue an NTR exposed them to losses that could have been avoided had it been issued.

[65] Section 3(1) of the Contributory Negligence Act 1947 provides for the apportionment of liability in cases of contributory negligence. It provides:

> Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage: …

[66] As stated by the Court of Appeal in *Johnson v Auckland Council*:[47]

> [87] There is no dispute that in making the apportionment, it is necessary to consider both relative blameworthiness and causative potencies. The question of the appropriate apportionment is a question of fact involving matters of impression and not some sort of "mathematical computation".
>
> (Footnotes omitted).

[67] The assessment of fault "requires an objective test but expressed in terms of a person's own general characteristics".[48]

[68] The WHT's assessment at 30 per cent is correct insofar as it concerns the claim of contribution in relation to the primary tortfeasor, namely GIL.[49] But I do not think that it applies in relation to the relative blameworthiness and causative potency as between the Council and the Lees. The Council was not negligent in relation to the inspection of the building works and had refused to issue a CCC. The

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47 *Johnson v Auckland Council*, above n 44.

48 *O'Hagan v Body Corporate 189855* [2010] NZCA 65, [2010] 3 NZLR 445 at [79].

49 I agree with the WHT summary of the applicable authorities, including *Sunset Terraces*, above n 42, at [84]; *Auckland Council v Blincoe* [2012] NZHC 2023; *Manchester Securities Ltd v Auckland Council* [2016] NZWHT Auckland 1; *Johnson v Auckland Council* [2013] NZHC 165 at [141] and *Johnson v Auckland Council*, above n 44, at [87].

Lees failed to take the prudent step of obtaining a LIM.[50] This combination of facts is not similar to the circumstances in the leading authority on apportionment, *Body Corporate 189855 v North Shore City Council (Byron Avenue)*.[51] In that case Venning J (in the High Court) reduced the damages award by 25 per cent in a context where the Council had been a "major contributor" to the loss and the plaintiff knew that code compliance had not been issued. By contrast, the Council cannot be said to have been a major contributor to the losses in the present matter. Rather, it failed to issue an NTR in relation to the cladding while the Lees failed to make prudent inquiry. To my mind the relative blameworthiness and causal potency as between the Council and the Lees is evenly shared.

Issue 4: Whether the quantum of damages should include the costs of sale

[69] Ms Grant's central claim is that in order to remedy the loss the Lees would have been forced to sell the home and as such the quantum of loss should include the costs of sale. But this is a claim in tort. The proper measure of damage is to put the plaintiffs in the position that they would have been in had the negligence not occurred.[52] That will be achieved on the payment of sufficient compensation to remedy the loss, namely the cost of repair or, in this case, loss in value. Ms Grant included costs of sale to show the full loss of the plaintiffs in the actual sale value *versus* unaffected sale value. But as the plaintiffs are not required to in fact sell the house to be compensated for the difference between actual value *versus* unaffected sale value, they will not incur the cost of sale and so it is not a recoverable loss. This part of the appeal is dismissed.

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50 I agree with the WHT analysis that while the fault in not obtaining a LIM lay with their solicitor, they must nevertheless carry the burden of that failure in terms of contributory negligence: *O'Hagan v Body Corporate* 189855, above n 48, at [143]–[146].

51 *Body Corporate 189855 v North Shore City Council (Byron Avenue)* HC Auckland CIV-2005-404-5561, 25 July 2008 at [337], upheld on appeal to the Court of Appeal in *O'Hagan v Body Corporate 189855*, above n 48.

52 *Attorney-General v Geothermal Produce New Zealand Ltd* [1987] 2 NZLR 348 (CA) at 359 and 370; *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 (HL) at 39.

Issue 5 – what is the proper measure of unaffected value?

[70] The Council contends that Mr Gamby's approach to unaffected value is to be preferred, namely that the assessment of value should have included the fact that the property never had a CCC.

[71] I can deal with this summarily. The proper analysis of loss is based on a counterfactual assessment. For present purposes, the Lees' claim is based on the uncontroversial assumption in leaky building cases that the Lees would not have purchased the house had the Council performed its duty and with knowledge of the defects. The proper counterfactual comparison therefore is simply a house with and without the defects, less any discount for contributory negligence.

Outcome

[72] In terms of the five key issues:

(a) The Council's inspections and/or inspection process was not negligent – see [27]-[50].

(b) The Council's failure to issue an NTR was a material cause of the Lees' loss – see [51]-[63].

(c) The Lees' failure to obtain a LIM contributed rather than caused their loss and the quantum of damages is to be reduced by 50 per cent to reflect this – see [64]–[68].

(d) The quantum of damages should not include the costs of sale – see [69].

(e) The unaffected value is based on a house without the defects – see [70]–[71].

[73] In the result the appeal is allowed in part. The Council must pay damages in accordance with my findings at [72]. If they cannot be agreed memoranda are to be

filed within 10 working days. Costs submissions may be filed at the same time, but my current thinking is that the Lees are entitled to costs on a standard 2B basis, reduced by 25 per cent to take into account the Council's partial success on the cross-appeal.