

IN THE WEATHERTIGHT HOMES TRIBUNAL

**TRI 2020-100-001
[2022] NZWHT AUCKLAND 01**

BETWEEN

**ROSEMARY ALICE ALCHIN and
SIMON FRANCIS SCOTT**
Claimants

AND

HAMILTON CITY COUNCIL
Respondent

Hearing: 6 and 7 May 2021 and 21 October 2021

Closing submissions: Claimants 11 November 2021
Respondents 25 November 2021
Claimants reply 2 December 2021

Appearances:

Scott McKenna and Amin Osama for the claimants

Paul Robertson and John Tian for the first respondent

Decision: 4th February 2022

FINAL DETERMINATION

Adjudicator K D Kilgour

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Introduction

[1] In November 1997 the owners of 29 Caversham Drive, Rototuna applied to Hamilton City Council for building consent. This was issued on 8 December 1997.

[2] They built a house completed in or around June 2000. The house did not receive its code compliance certificate until 29 September 2004.

[3] They marketed the property for sale in 2006 and acquired a Land Information Memorandum (LIM) for that purpose.

[4] The claimants, Rosemary Alchin and her co-trustee, Simon Scott, bought the property from those owners on 26 June 2006. The property was purchased as Ms Alchin's residence.

[5] On 26 November 2010 Ms Alchin filed with the Department of Building and Housing an application for an assessor's report under the Weathertight Homes Resolution Services Act 2006 (the Act).

[6] The assessor, Mike Gilling, reported on 2 September 2011. He determined that the built date for the house was 16 June 2000. This date was more than 10 years from the date of application. He found for limitation purposes that the claim was not eligible. His built date determination was made before the Supreme Court decision in *Osborne*.¹

[7] Following the *Osborne* decision, which defined the built date as the issue of a code compliance certificate, the Department of Building and Housing, now the Ministry of Business, Innovation and Employment (MBIE), instructed Mr Gilling to undertake a further inspection of the property and to produce a full report. This he did on 5 January 2017. His report stated that the house met the criteria set out in the Act, that Ms Alchin was an affected claimant in terms of s 165, and the claim was now eligible. Mr Gilling opined that the house was built with weathertightness deficiencies which have caused widespread repetitive

¹ *Osborne v Auckland Council* [2014] NZSC 67 at [26].

damage to the timber framed structure of the house. He summarised the deficiencies as leaking windows and door perimeters, cladding cracks and leaking apron flashing/cladding junction.

[8] He found the weathertight deficiencies were widespread to the cladding on all elevations and considered the most effective remediation would be to reclad the entire house.

[9] The claimants filed for adjudication before this Tribunal in February 2020. Their particulars of claim allege that the sole respondent, Hamilton City Council, as the territorial authority negligently failed to ensure that the build was in accordance with the Building Code and that it negligently permitted construction with the assessor's stated weathertightness deficiencies.

[10] The respondent acknowledges that it granted building consent and issued the code compliance certificate. Its response to the claim is that the alleged weathertight deficiencies do not exist, or, that they have not caused damage and such deficiencies are only actionable where they cause damage.

[11] In a letter dated 17 April 2000 the respondent invited the owner to obtain additional information about construction of the house to enable the respondent to consider issuing a code compliance certificate.

[12] On 19 December 2003 the respondent received a letter from a building surveyor, Joyce Group Limited (Joyce Group), confirming that based on its inspection it was appropriate to issue a code compliance certificate. On the strength of this assurance the respondent did on the 29 September 2004, issue a code compliance certificate.

Material facts and background to hearing

[13] The house was built between 1998 and 2000. This building work was then governed by the Building Act 1991.

[14] The house was constructed using light timber framing, clad in solid plaster direct fixed to the framing. Mr Gilling's full report stated that his biodegradation expert, Dr Robin Wakeling, said that the timber framing samples he received for qualitative preservative analysis suggested that the framing timber was either untreated perishable radiated pine or may have lost boron due to leaching.² The consented specification with the submitted drawings³ specified the timber framing to be treated to H1 standard.⁴

[15] The respondent received the application for building consent on 12 November 1997. On 19 November 1997, it asked for further information.⁵ This requisition is the first notification of the ground level reference, which Mr McKenna in his opening, admits becomes important in this case,⁶ and is also noted by Mr Robertson in his opening submission.⁷

[16] The owners' architect responded to the respondent's requisition satisfying the respondent on the ground clearance issue, and building consent was issued on 8 December 1997.

[17] Mr Gilling, in his eligibility report of 2 September 2011, states the building of the house was completed in a timely manner from the issue of consent. The national electricity registry shows connection was made on 16 June 2000 and the building construction was likely completed at this stage.⁸

[18] The respondent advised the owner on 17 April 2000, that certain items needed rectification before it would issue a code compliance certificate. These included ground levels needing to comply with NZ

² Assessor's report (5 January 2017); Bundle of Documents (BoD), Vol 1, Tab 7, p 78.

³ The panel of experts complemented the standard of detail in the drawings: Notes of Evidence (NoE), pp 142–143.

⁴ BoD, Vol 2, Tab 19, p 336.

⁵ BoD, Vol 2, Tab 13, p 294.

⁶ NoE, p 4.

⁷ NoE, p 17, where he submits that ground clearance is not the issue that is troubling the parties and that the requirement is actually met on this house.

⁸ Assessor's Eligibility Report (2 September 2011) at [3.3]; BoD, Vol 1, Tab 6.

Standard 3604 and a written notation stating that the respondent required an independent report on the cladding. The respondent recommended Joyce Group.⁹

[19] The respondent's property file illustrates that Joyce Group sent a letter to the owners on 19 December 2003. This stated, amongst other matters, that it would be the writer's opinion (Johnny Aitken, whom Mr Robertson described as a well respected building surveyor) that "...if the Hamilton City Council has inspected and approved all other inspections it would be reasonable grounds for a code compliance certificate to be issued".¹⁰

[20] The respondent's property file illustrates¹¹ that it issued a code compliance certificate on 29 September 2004 with no evidence of site inspections after April 2000.

[21] The claimants purchased the house on 26 June 2006. The claimants' conveyancing lawyer's file was not disclosed, on the grounds it no longer existed.

[22] Ms Alchin indicated that she had owned property before purchase of this house. Earlier properties were weatherboard clad and were older houses.¹² Ms Alchin mentioned in paragraph 5 of her brief of evidence,¹³ that she had a builder look over the property prior to purchase. It was simply a visual inspection, including some non-invasive moisture readings and no weathertightness issues were identified. Ms Alchin stated that the house looked "...pretty new, freshly painted. It looked great. I liked it".¹⁴ She mentioned that nothing has changed since she owned it, and she hasn't done anything to the house but paint it.¹⁵

⁹ BoD, Vol 2, Tab 23, p 381.

¹⁰ BoD, Vol 2, Tab 25, p 405.

¹¹ BoD, Vol 2, Tabs 26–29.

¹² NoE, pp 45–46.

¹³ Statement of Evidence to be given by Rosemary Alchin (19 January 2021); BoD, volume 1, Tab 3.

¹⁴ NoE, p 31.

¹⁵ NoE, p 32.

[23] Ms Alchin's evidence¹⁶ is that she thinks her joint owner, Simon Scott, was her conveyancing lawyer. She expected that she or her lawyer would have obtained a LIM. Mr Cory Lang, the respondent's officer, stated that a LIM was obtained by the vendor.¹⁷

[24] Ms Alchin was not able to recall the identity of the builder who inspected the house before purchase. The claimants' conveyancing lawyer did not provide evidence. I am unable to ascertain what salient information, if any, the claimants could have considered from their lawyer's inspection of the property file and the LIM. Both would have included the Joyce Group letter, the quality assurance checklist and the respondent's inspection sheet.

[25] Mr Gilling's full report of 5 January 2017 indicated that the house had weathertightness deficiencies which had caused repetitive damage to the timber framed structure of the building. This meant the house met the criteria set down in the Act.

[26] At the hearing, it was revealed that Ms Alchin made application on 13 March 2017 to MBIE for the Financial Assistance Package (FAP) under part 1A of the Act.

[27] The respondent has not agreed to be a contributing party.

[28] Part way through 2018 Ms Alchin engaged Strata Architects Ltd to prepare remedial drawings for her FAP application. When completed Ms Alchin instructed her solicitors on 28 August 2019 to make demand on the respondent. This prompted the parties to pursue settlement negotiations, but none was reached. The claimants filed an application for adjudication with the Tribunal on 27 February 2020.

[29] As earlier stated, other than having the house painted, Ms Alchin has done nothing to the house since purchase.

¹⁶ NoE, p 34.

¹⁷ NoE, p 38.

[30] The house has undergone a sequence of paint jobs. Prior to purchase by the claimants, it was first painted following installation of the cladding in 1998. The vendors then painted again in 2003. Ms Alchin mentioned that the vendors told her that they had recently painted the house. The Joyce Group letter also indicated that it looked as though it had been recently painted. This meant that within three years of the house first being painted (approximately 1998 following installation of the cladding), it was painted again.¹⁸

[31] Steven Andrew Cornes, a house painter of some 25 years' experience, gave evidence for the claimants that he painted the house for Ms Alchin in 2013.

[32] Mr Cornes said that he had painted about a dozen plastered houses. When he saw the house in 2013, he observed extensive cracking of the plaster: "... and the sheer amount of cracks was greater than what I would usually see on a property of this age. ...".¹⁹ When asked by Mr Robertson whether it seemed about right that three years after the house was initially painted, it might need to have a touch up paint again, Mr Cornes answered "no".

[33] Mr Cornes said that he observed a severe amount of cracking around the windows and across the walls and that there was far greater cracking than on other houses he had painted of a similar age. Mr Cornes said that the earlier cracks painted over in 2003 were evident, notwithstanding the house having been painted 10 years earlier. This is consistent with Mr Gilling's observation during his 2011 site visit. When Mr Cornes painted in 2013, he stated that he spent time in remediating the cracks and applying four coats of paint so that his finished paint job meant that the cracks were no longer visible to someone observing the house. The amount of paint that he was required to apply to remedy the cracks around most of the windows and on the eastern and northern sides of the

¹⁸ NoE, p 46.

¹⁹ Steven Cornes' brief of evidence (3 May 2021) at [4], point A.

house was greater than usual. And on the bigger cracks he applied an expandable gap filler.²⁰

[34] The hearing occurred over three days. At the conclusion of the second day, on 7 May 2021, it became apparent that further investigation from the assessor and an updated estimate of his costings would assist proceedings. I directed that the assessor Mr Gilling, undertake site visits to reopen at his discretion, existing invasive testing sites and to gain information from further invasive testing sites of his choosing. I directed that the claimants' and the respondent's experts accompany Mr Gilling on the site visits, the purpose being to produce an addendum report from the further information gathered and to update his estimate of costings. Indeed, MBIE also required an addendum report to assist the claimants' financial assistance package application.

[35] Mr Gilling produced his report on Friday, 11 June 2021. Due to High Court commitments of counsel, the third day of the hearing was delayed until 21 October 2021.

[36] I accept the qualifications and expertise of the claimants' expert, Glen Bodger. He gave comprehensive evidence on the building defects identified by Mr Gilling and also identified a further, in his opinion, defect of insufficient ground clearance. His evidence addressed the damage caused by these alleged defects and how best to remedy them. Mr Robertson objected to Mr Bodger's evidence, criticising the respondent's various construction inspections and alleged that Mr Bodger had no experience in local authority practises. I accepted Mr Bodger's expertise to give evidence on building defects, damage and remedial action. Each of these limbs were a material part of Mr Bodger's evidence.

[37] The respondent's defects expert was Richard Angell, an experienced building surveyor, weathertight assessor and defects expert. He gave evidence in respect of the alleged defects, whether they had

²⁰ Steven Cornes' brief of evidence (3 May 2021) at [4], point E.

caused damage and the appropriate remedial work. I accept his qualifications and expertise to give evidence in the areas mentioned.

[38] The respondent engaged Graeme John Calvert to give evidence on local authority processes. I accept Mr Calvert's qualifications and expertise to give evidence on the respondent's process and assessment and whether it acted reasonably when issuing the building consent, undertaking construction inspections and issuing the code compliance certificate.

[39] Mr Robertson's introduction involved asking Mr Calvert for his opinion on the alleged building defects. This was outside of Mr Calvert's instructed expertise, however, I allowed the questions to be asked. The responses he gave to such questioning was not substantially helpful.

[40] Mr Calvert's expertise in council processes was essentially confined to the period of time he was a building inspector and building control officer for the Christchurch City Council from 2002 to 2007. By his own admission, he had no knowledge or experience of the respondent council's methodology and practises.²¹

[41] The respondent did not call evidence from any of its council officers.

[42] When the respondent issued its building consent for the claimants' property on 10 December 1997, it created a document to record the dates of various construction inspections.²²

[43] Apart from this document, the respondent's evidence did not produce any further inspection checklist and there was no information about the construction inspections, how they were carried out and what the council inspector observed.

²¹ NoE, p 65.

²² BoD, Vol 2, Tab 27, p 414.

[44] This document does evidence that there were three construction inspections undertaken:

- (a) A “Pre-Lining” inspection on 23 and 28 April 1998. No evidence was produced as to who undertook the inspection, what was inspected or what was observed;
- (b) a second inspection on 31 July 1998 again gives no information as to what this inspection involved; and
- (c) a code compliance inspection occurred on 12 April 2000 and in handwriting on this document, the inspector’s comments appear to read:

12/4/00 CCC insp No siting, fou[illegible] or pre floor inspection, ground levels to be 3604. [Signature] —

[45] Refer JOYCE REPORT—The respondent’s evidence is that on 17 April 2000, shortly after the Code Compliance Certificate (CCC) inspection, it sent a letter to the then owners of the claimants’ property declining the issue of a code compliance certificate.²³ Near the foot of this letter, the writer, building inspector Ed Wilkins, hand wrote:

Also require an independent report on the cladding system. We recommend the Joyce Group PH: 8393940.

[46] The then owners of the claimants’ property followed the respondent’s advice and engaged the Joyce Group, which produced a letter dated 19 December 2003 which they forwarded to the respondent.²⁴ No evidence was produced indicating the brief of instructions given to the Joyce Group nor of the expertise of the writer of the letter, Mr Aitken, other than Mr Robertson’s submission that Mr Aitken was an experienced building surveyor. It is also evident from the letter that the Joyce Group had not inspected the respondent’s file on the property, for the letter mentions that the claimants’ house had been constructed “...circa 1996...”.

²³ BoD, Vol 2, Tab 23, p 381.

²⁴ BoD, Vol 2, Tab 25, p 404.

[47] The respondent's property file and its inspection checklist does not record anything happening between receipt of the Joyce Group letter and the issue, some nine months later, of the code compliance certificate. There is no evidence of any further site inspections or enquiries made of the Joyce Group and I accept the submission of Mr McKenna that it appears from the respondent's file and evidence produced, that the code compliance certificate was issued solely in reliance on the Joyce Group letter.

[48] During the period from completion of building on or about 16 June 2000²⁵ and the issue of the code compliance certificate in September 2004, there were changes to the building industry of relevance to this claim. From 2002, some local authorities were refusing consent on buildings constructed of monolithic cladding unless they were built with a drained cavity. On 9 February 2004, the acceptable solution "had been amended to require a cavity behind both rigid and non-rigid backings". The Building Industry Authority (BIA) decision dated 18 March 2004, before the code compliance certificate was issued for the claimants' house, states:²⁶

The acceptable solution, E2/A51, which covers stucco constructed over a rigid backing sheet, has recently been amended to require a cavity.

[49] Accordingly, it is evident that by September 2004, the acceptable solution had changed. Also prior to 2004, the "Triple S" product, used in the claimants' house, had been removed from the market.

[50] It has been accepted by the parties that because the nature of the claim is in negligence, proof of damage is essential. A defect is only a defect if it has caused or contributed to weathertightness issues or water ingress and damage has resulted. I advised at the end of the three day hearing that the role of the Tribunal in this claim is to determine whether each of the alleged defects exist, whether they have caused damage and the liability of the council for the defects. I cannot consider the

²⁵ Assessor's Eligibility Report (2 September 2011) at [3.3] confirms that this was the likely built date; BoD, Vol 1, Tab 6, p 51.

²⁶ BIA determination no. 2004/02 (18 March 2004) at [5.17]; BoD, Vol 4, p 162–163 at [5.17].

responsibility of the council until I have determined that the defects exist and have caused damage.

[51] The alleged defects, the subject of this claim, are the three identified by Mr Gilling as I have set down in [7], and the fourth, identified by Mr Bodger, being lack of adequate ground clearance to the base of the cladding.

[52] It is trite to state that the local authority's duty is to ensure compliance with the minimum requirements of the Building Code²⁷ and that liability is limited to failure to meet those minimum standards of the Building Code.

[53] Mr McKenna's closing submissions and reply submissions argue the relevance of compliance with the consented plans and the absence of a drainage cavity as defects. I determine that both of those matters are relevant to the duty and liability of the respondent, and so to the second issue I am to determine.

Issues for determination

[54] The issues that I need to address are:

- (i) Do the alleged weathertight deficiencies exist and have they caused damage to the house?
- (ii) Did the respondent have reasonable grounds to issue the code compliance certificate, relying on the Joyce Group letter for issuing the code compliance certificate on 29 September 2004, given that its property file was empty of salient inspection notes from April 2000?

²⁷ *Body Corporate 207624 v North Shore City Council* [2012] NZSC 83, [2013] 2 NZLR 297 at [193] & [194].

Weathertightness defects

Leaking windows and door perimeters

[55] Mr Gilling undertook numerous site visits which formed the basis of his findings. The visits involved visual investigations and non-invasive moisture meter readings, and invasive testing was undertaken in areas of concern. His findings are well explained in the follow-up full report of 5 January 2017. His moisture content readings are tabled in paragraph [9.2].²⁸

[56] Mr Angell and Mr Bodger also undertook numerous site visits, some with Mr Gilling.

[57] Mr Angell was initially critical of Mr Gilling's minimal invasive investigations. After it was explained to Mr Angell that minimal invasive testing was requested by Ms Alchin, Mr Angell stated that his view was absolutely altered.

[58] Mr Angell did not undertake any invasive testing or moisture meter readings. When accompanied by Mr Gilling and Mr Bodger, a number of invasive testing spots were opened up for the benefit of Mr Angell but otherwise his opinions are based on his site observations and the findings of Mr Gilling and Mr Bodger. Mr Angell stated that while he did not disagree with the approach of Mr Gilling, he voiced some concern over reliance on moisture content readings. I am satisfied and accept the response from Mr Gilling who stated that he places reliance on moisture readings as accurate. Mr Bodger did not doubt Mr Gilling's moisture reading testing and was satisfied with his own findings. Mr Gilling did express that the amount of testing he undertook was "...a little bit less than what I would normally do..."²⁹ but he was satisfied his investigations were reliable, found extensive decay and had not in any way compromised the reliability of his findings.

²⁸ Page 13.

²⁹ NoE, p 134.

[59] Mr Gilling stated that from his vast experience relying on moisture readings, subsequent cladding removal on the basis of his moisture readings always found the damage indicated.

[60] I therefore dismiss Mr Angell's concerns that Mr Gilling's findings are too heavily reliant on invasive moisture content readings.

[61] Mr Angell also expressed concern that confirmed decay damage to the framing of the exposed sill/jamb junction of the master bedroom may have been caused by inadequate sealing of an earlier destructive investigation.

[62] Mr Gilling explained that during the site visit for his eligibility report on 12 August 2011, he opened up that cutout which revealed timber decay and damage.

[63] I find no basis for Mr Angell's suggestion that a lack of adequate sealing of previous cutouts may have contributed to the findings of moisture content and damage.

[64] Mr Gilling confirmed his findings that water entry was detected at the base of the windowsills and door perimeters and that laboratory testing confirmed timber framing under the sills and along bottom plates under the windows was decayed.

[65] Mr Bodger found no fault with this defect initially identified by Mr Gilling.

[66] Mr Bodger's evidence is that Mr Gilling's findings that the drawings do not show any metal flashings is not correct. Mr Bodger's opinion is that the building consent documents clearly detail flashings into the sill and jamb areas as required and that the documentation shows the lapping methodology of the flashings to protect the "Triple S" substrate from moisture. Mr Bodger's evidence is that on his site visit on 3 February 2021 with Mr Gilling, further destructive testing was undertaken and although it found that the galvanised sill flashings had been installed, they

had not been constructed or installed in accordance with the building consent documentation. A similar finding related to the jamb flashing.

[67] Mr Gilling's moisture content table illustrated high readings concerning the windows and door perimeters of the master bedroom, kitchen window and kitchen door.

[68] All experts are of the opinion that moisture content readings of 20, 24, and 34 per cent from the water ingress at the window and door perimeters are high. Moisture content readings taken by Mr Gilling at the dining room window sill, master bedroom left window sill corner, master bedroom right window sill corner, bottom plate below the garage window, bottom plate below the right side of the kitchen window and the left exterior kitchen door head all returned concerning moisture readings. Destructive testing found damage to timber framing and that the sill flashings and jamb flashings whilst installed were incorrectly constructed.

[69] I agree with Mr Gilling's opinion that there are often multiple defects contributing to a leak resulting in the overall damage and it is difficult to conclusively identify the exact damage that may be attributed to any particular building component without unreasonable and greatly extensive destructive investigation.

[70] I am satisfied on the balance of probabilities that Mr Gilling found moisture was soaking through the cladding/window junctions, particularly on the dining room, and showed high moisture readings. The majority of moisture readings found under window and door sill corners and other places was low, but timber shavings extracted from such locations did illustrate decaying timber and that the Triple S solid plaster backing was wet, which it should not have been. I do concede however that Mr Gilling agreed with Mr Angell that cracks between the cladding and the aluminium window joinery was also a cause of water ingress.

[71] All experts accepted that the standard and detail of the consented drawings was very impressive for the time. I accept the evidence of Mr Gilling and Mr Bodger that the as-built window and door perimeters

were not constructed in accordance with the consented plans and contributed to framing timber damage. Mr Gilling's opinion is that the manufacturer's instructions and the New Zealand Standards detail metal flashings and that the Triple S rigid sub sheeting system needs to be constructed to provide resistance to moisture penetration and must be kept dry. Mr Gilling's findings were that the base of the windowsills on the master bedroom, bedroom 2 windows and the dining room windows confirmed moisture entry and the Triple S solid plaster backing was wet.

[72] Mr Gilling, in his addendum report of 11 June 2021, stated that he reopened the cutout location of 4 February 2021 on the left sill corner of bedroom 2 and observed rusted metal reinforcing and confirmed that flashings were identified but that the framing was heavily stained and decayed and the meter reading finding was 32 per cent. He stated that a new cutout was opened at the right hand head at the back of the garage and, whilst the metal jamb flashing behind the plaster cladding appeared to be functioning as it should, the plastered coating along the top of the window was finished hard down on the metal head flashing without a gap. A further cutout at the left kitchen door head also showed the plastered coating was finished hard down onto the top of the metal head flashing. This resulted in damage of rusted metal flashing, lath reinforcing and heavily decayed timber framing. In relation to the laboratory findings concerning the left kitchen door head, fungal remnants were discovered but no well-established growths. Again, Mr Gilling believed that cladding cracks were contributing to these defects.

[73] It's worth mentioning at this juncture of my determination, what I understand to be a building defect or construction deficiency. The term "defect" means "some error, shortcoming or imperfection in relation to an aspect of construction".³⁰ Mr Gilling's follow-up full report observed fine cracking at the base of the aluminium windows, above the plastered sills and up the window and door jambs. He recorded his investigations as showing elevated moisture readings and a dye test he undertook found

³⁰ *Minister of Education v H Construction North Island Ltd* [2018] NZHC 871 at [61]–[63].

water was penetrating the cladding. On page 13 of the follow-up full report dated 5 January 2017, item NW1 (Master bedroom left window sill corner (old cut-out reopened)) and NW2 (Master bedroom right window sill corner) showed moisture readings of 34 per cent and 24 per cent respectively and were therefore the worst of the windowsills examined. I am satisfied that the lab reports he included in his report revealed rot and recommended replacement of the framing timber. I accept his conclusion that water was entering through the sills and was travelling down and accumulating at the base plate. In a number of his investigations from chosen sites where moisture readings were from 15 per cent to 18 per cent, lab results showed there were traces of soft rot.

[74] As earlier mentioned, the sill flashings did not comply with the consented drawings. The flashing was buried, and the sill flashing was terminated over the outer lower edge of the sill supporting timbers, instead of lapping down over the “Triple S substrate”. Mr Bodger’s evidence is that this left the bottom of the sill supporting timber exposed and subject to water ingress and the timber gets wet because there’s no barrier between the timber and the plaster. I accept the evidence of Mr Gilling and Mr Bodger on this matter and dismiss Mr Angell’s response. The sill flashing being buried was clearly in breach of the consented plans and the BRANZ Good Stucco Practice Guide. Mr McKenna stated that the BIA guidance document stressed the importance of adherence to consented plans. I agree with his submission that failure to comply with the Good Stucco Guide and the consented plans means that the “as built design” did not comply with requirements of the Building Code.

[75] The sill flashing being buried was contrary to the Good Stucco Practice Guide and this was accepted by Mr Angell’s brief of evidence.³¹ The sill flashing was not installed on top of the cladding which was required to provide a protective element and prevent moisture getting into the Triple S and the structural elements of the house. Mr Angell’s evidence did accept that this was against the Good Stucco Guide. Mr Angell’s

³¹ BoD, Vol 2, Tab 10, p 256 at [40].

evidence was that the cause of entry was the cracks around the windowsills and caused by the differential movement between the plaster and the joinery rather than anything to do with the sill flashing. Mr Gilling and Mr Bodger did not disagree with such also being a possible water entry point. For it is difficult to isolate water entry issues with the windows and door openings from the possible defects of the stucco itself. I accept Mr Gilling's and Mr Bodger's evidence over Mr Angell's because even if water was entering through cracks at the window and door junctions, Mr Gilling clearly established that it was also coming in through the incorrect installation of the flashing. I find that the claimants have succeeded in proving this building element as a defect and have established that damage has resulted from incorrect installation and construction.

Leaking apron flashing/cladding junction

[76] Mr Bodger confirmed Mr Gilling's opinion concerning this defect. Mr Gilling stated that there was a large hole located below the apron flashing turnout above the gutter. The flashing does not extend out past the line of the plaster cladding and therefore the apron flashing turnout does not prevent water entry and does not direct water into the adjacent gutter. Further, the timber fascia below the gutter has been installed prior to the application of the plastered cladding and is imbedded into the plaster. The lack of adequate turnout flashing at the roof/cladding junction and the unsealed hole are allowing water entry below the cladding and framing. No treatment was found in the timber samples and the framing samples contained early stages of decay and suspected insipient brown rot.

[77] A further cutout was made by Mr Gilling for his addendum report. It confirmed that the metal apron flashing imbedded into the plaster turns up behind the Triple S sheathing but does not extend past the line of the cladding and divert water into the gutter. There is nothing preventing moisture getting between the apron flashing and the plaster coating and on to the Triple S sub-sheathing at the turnout point. Mr Bodger also

opines that the gutter has been installed hard against the plaster system and this means it cannot be maintained or sealed to be watertight. He says that it is important that the base of the plaster system is sealed against splashback from rain on the roof and that he and Mr Gilling's inspection on 3 February 2021 found no evidence of the base of the plaster system being sealed.

[78] Mr Angell stated that at the time the house was designed and the cladding installed, there was very limited guidance on the required finishing of roof to wall junctions and stated that this alleged defect was a minor workmanship issue and unlikely to be causative of moisture ingress. He indicated that Mr Gilling did not record any elevated moisture readings but agreed that cracking to the cladding exists above and adjacent to the roof/wall junction and that this would have potentially caused damage.

[79] I agree with Mr Angell's finding that the unsealed hole is certainly a workmanship issue but prefer the evidence of Mr Gilling and Mr Bodger that it is likely to be causative of moisture ingress. I do not agree with Mr Robertson's submission that no evidence of damage has been established. The lab results confirmed decay in various timber samples. No treatment was found in those samples and toxic mould was also found on some of the samples. Any minimum recommended repairs would involve replacing decayed framing and installing appropriate flashings and wall to roof junctions.

[80] At the hearing when examined by Mr McKenna, Mr Gilling explained that he identified the leaking apron flashing/cladding junction as a building deficiency and a definite source of water ingress leading to damage to the framing timber.³² Mr Gilling disagreed with Mr Angell's oversight findings of his report. Mr Gilling's evidence is quite clear, there was a gap and a hole and because of both, he did the testing to consider the deficiency of that junction. The laboratory confirmed the sample illustrated framing damage. Mr Bodger said that what was relevant was

³² Photo 12: E1 of the assessor's full report with relevant moisture content readings, at p 13 of the report.

the position of this junction at the base of the roof. He said there were three metres of roof above the hole that was allowing water to run down and the junction was collecting water and terminating at this point so it illustrated the water ingress risk. Mr Gilling's point, clearly expressed, was that water was coming down into the hole and then tracking straight down on to the top of the doorframe. Mr Gilling's evidence is that he did a further test on the left-hand side of the door head and this showed a high moisture reading. I accept the clear evidence of Mr Gilling that water was entering at this junction and moving down the side of the door frame from the back kitchen door to the bottom plate, because at that point it couldn't move any further and was decaying the framing. Mr Angell, when examined by Mr McKenna, indicated that the hole could possibly have been opened up in 2011 and caused water to enter from that date. Mr Gilling's evidence, in response to Mr Angell's suggestion, was that he could confirm that he saw decayed timber framing in that hole in 2011. His instruction at that time for his eligibility report was not to take a moisture reading. I accept Mr Gilling's evidence.

[81] I find on the civil standard of proof that the apron flashing/cladding junction is an established defect, it has allowed water to enter and this has caused damage. I do concur however that cracking to the cladding above and adjacent to the junction would have also been causative of damage.

Cladding cracks

[82] Mr Gilling's evidence was that widespread cracking of the solid plastered exterior cladding was due to there being no visible control joints in the solid plaster or below the window and door openings. His evidence is that the manufacturer's instruction, the New Zealand Standards and the BRANZ Good Stucco Practice Guide of 1996 required control joints to be formed to minimise cracking. Mr Bodger's evidence confirms Mr Gilling's. Mr Bodger stated that the consent drawings clearly show vertical control joints in the plaster to each side of every window, required additional control joints from the apex of the house on the gable ends and required 54 control joints in total of various lengths. Mr Bodger stated that the

control joint allows for expansion and contraction of the plaster system and the absence of these would significantly contribute to cracking.

[83] Vertical, horizontal and some diagonal cracking has been present in the cladding as early as 2003 when the then owners repainted the house as evidenced from the Joyce Group letter. Mr Gilling observed cracking on his site visit in 2011 and Mr Cornes stated that in 2013, the cracking was extensive and was greater than what he would usually have expected from a property of its age. He said the worst cracking he observed was around most of the windows and the eastern and northern sides of the property. It can be both a cause and a symptom of water ingress because, when water enters through these cracks into the Triple S substrate, it will cause it to swell and will then cause more cracking which in turn leads to more swelling. His evidence is that cracking is inevitable but his inspection of the claimant's house indicated more extensive cracking than he would have expected. Mr Angell indicated that he could not definitely confirm that there were no control joints. I accept the evidence of Mr Gilling and Mr Bodger that their investigations showed no evidence of any control joints being present.³³

[84] Control joints would have reduced cracking and this would have reduced the risk of water entering. Mr Gilling's and Mr Bodger's evidence is that control joints, if they were present, would have reduced the risk of the house leaking. Mr McKenna's closing submission's reference to BIA's determination no. 2004/16 (18 May 2004) where it stated "...the lack of control joints should have been identified in the final inspection report..." supports my finding later in this determination of the respondent's inadequate inspection/certifying regime.

[85] Mr Gilling's evidence is that in cutouts he made near the bottom plate level on the corner between the kitchen and office windows at the front of the house, cladding cracks were visible and stained and decayed timber framing were found inside. The interior wall between the kitchen

³³ NoE, p 1–8, p 146 and p 147.

and office is decayed at the base of the stud and again, repaired cladding cracks were visible at various locations on all elevations. His investigation established that the Triple S backing sheet at the bottom of the internal wall between the kitchen and the study was damaged as a result of water entry which he concludes was from cladding cracks. Whilst Mr Gilling accepts that a contributing defect was the leaking window perimeters, his evidence is that cladding cracks caused decayed timber framing. His evidence is that the laboratory sampling confirmed decay in the various timber samples and that testing indicated no treatment was found in the timber samples. Toxic mould was also found on some of the samples he submitted to the laboratory.

[86] Mr Angell's evidence is that he did not undertake any independent inspections himself. He made observations on the findings of Mr Gilling and Mr Bodger. I conclude that Mr Angell's evidence can be characterised as simply his expert (and I acknowledge his extensive expertise) comments on the findings of Mr Gilling and Mr Bodger. Mr Angell's evidence is not supported by independent investigations he observed or invasive cutouts he independently undertook.

[87] I reject Mr Angell's opinion that, whilst accepting the importance of control joints, the Good Stucco Practice Guide only required control joints every four meters, thereby indicating that the 57 control joints required by the consented plans was unnecessary. Because the Good Stucco Practice Guide clearly states that if the architect designer determines what details are to be used and where control joints are to be located, then the designer's determination should be followed. It is the designer's role to place control joints on the plans and that should be adhered to. I accept Mr Gilling's and, in particular, Mr Bodger's point, that placement and the adherence to the required control joints is particularly important with stucco, for its inherent cracking needs best practices to be applied. The as built finish of this house failed to comply with the consented plans.

[88] I find that lack of control joints contributed to the cracking in this house and has resulted in cracking becoming far more extensive. I find that the cracking has resulted in water ingress. Mr Gilling's investigation and evidence has established that damage has resulted.

[89] I conclude that the claimants have established their claim that lack of control joints is a building defect causative of water ingress resulting in framing timber damage.

[90] Mr Bodger opined that the building consent documentation required building paper as a further mitigation against water ingress, and particularly over the Triple S substrate. I accept the evidence of Mr Angell and the submissions of Mr Robertson that there is no evidence that any damage has resulted directly from the lack of building paper or that it has contributed to the cladding cracks. Furthermore, Mr Bodger's evidence is that the consented plans show a drip edge to be formed. It was not formed in the as built plaster system. I accept Mr Angell's evidence that the drip edges were decorative and not a design element to protect the windows from water ingress.

[91] Finally, Mr Bodger stated that there were no "Z" flashings installed to the heads of the six ventilating cedar louvers on the gable ends, which is required by the consented plans. I accept Mr Angell's evidence that there was no destructive testing above the cedar louvers to confirm whether there are "Z" flashings present or not. Mr Gilling did not identify this as a defect. I have heard no evidence of any water ingress at the cedar louvers locations.

Insufficient ground clearance

[92] The claimants have consistently alleged lack of ground clearance as a clear and obvious defect. Mr McKenna highlighted in his submissions that the respondent was aware of this "defect" at the building consent stage. In its letter of 19 November 1997 at [7], it sought amendments to the plans to conform to its ground level clearance requirements. The

respondent's letter of 17 April 2000 to the then-owners of the house identified that before a code compliance certificate could be issued, ground levels needed to comply with NZS3604. Despite the notices from the respondent concerning the importance of ground clearance, Mr Gilling and Mr Bodger agree that the cladding goes into the ground all around the house and they are of the view that this is a clear breach of the Building Code. All experts agree that ground clearance was important for two reasons: to provide drainage and to prevent water from wicking up and causing damage to the framing.

[93] The Good Stucco Practice Guide illustrates that under no circumstances should stucco be carried down to ground level,³⁴ and the Triple S manufacturer's documentation requires a minimum clearance of 150mm between the plaster drip edge and the ground line. As previously mentioned, the consented plans required clearance and the BIA determinations referred to at the hearing held a lack of adequate clearance to be a defect.

[94] The focus of the further investigation by Mr Gilling for the addendum report concerned the ground clearance issue. His observations and analysis are found at [9.3] of his addendum report (11 June 2021), pages 17 and 18. Invasive testing was completed to the base of the cladding of the house in six locations which included a variety of situations, both paved and unpaved ground existing adjacent to the destructive testing.³⁵ Locations E3, 56 and N9 were also completed away from joinery openings.

[95] In all six locations, Mr Gilling stated that there was no clear, visible evidence of water uptake due to the construction of the as built situation. Mr Bodger and Mr Angell agreed with these observations and Mr Angell referenced his agreement to his supplementary photographs.³⁶

³⁴ BoD, Vol 3, Tab 40, p 627.

³⁵ See the laboratory testing results for locations N2, N9, S4, S6, S12 and E3 of his observations and analysis, at p 17 of the addendum report.

³⁶ Photographs 8–24, pp 140–148.

[96] Timber samples were collected by Mr Gilling from each of the destructive test locations. They showed superficial rot and rusted fixings. Mr Gilling's observations clearly confirmed that plaster coating along the bottom edge was keyed to the foundation preventing any moisture from escaping. But at each location there was no clear visible evidence of water uptake occurring from the ground to the framed bottom plate structure of the house.

[97] Mr Gilling and Mr Bodger were in agreement that the as built situation failed to allow moisture to drain. Mr Bodger's updated evidence provided a clear description of the as built situation's non-compliance with the Building Code. His concern with lack of a bond break meant it would not let water escape the building and it did not comply with the intended design and function of the Triple S system as based on the technical literature. Mr Angell does not agree with Mr Bodger's evidence. Mr Gilling did agree. Mr Angell says that the type of cladding system on the house was never designed to allow for draining once moisture had entered into the system.

[98] I am satisfied from the evidence of Mr Gilling and Mr Bodger, the as built situation is not compliant with the Building Code and is therefore an established defect.

[99] However, I also accept the evidence of Mr Gilling that there is no conclusive evidence of water wicking up from below the ground level and therefore causing damage. I accept too, Mr Angell's updated evidence that, from the varied locations where invasive testing was undertaken, there is no evidence of weathertightness failure from moisture wicking up from the ground into the cladding causing damage.

[100] It is Mr Gilling's opinion that his identified damage was attributable to the leaky windows and door perimeters and lack of control joint deficiencies. He states that at location N2, early soft rot was detected and at this location (N2), a window joinery perimeter exists above. Mr Gilling's

findings confirmed water entry from this window more likely caused the timber decay at the bottom plate level.

[101] I find from the evidence of Mr Gilling, Mr Bodger and Mr Angell, that insufficient ground clearance is a weathertight deficiency, it exists on this house, but it has not caused damage to the house. Mr Angell does agree with Mr Gilling and Mr Bodger that remediation of the house, as a consequence of the other three defects, will necessitate repairing the ground clearance defect so that the ground clearance requirements of the Building Code be complied with.

Repair options and reasonable cost to remediate

[102] Mr Gilling's evidence is that, having considered the four deficiencies identified regarding the installation of the cladding and the risk of likely future damage, his recommendation as the repair option to achieve long term weathertightness and compliance with the Building Code, is a full reclad of the house.

[103] Mr Bodger and Mr Angell agree with Mr Gilling's scope of remedial works.³⁷

[104] I determine that the remediation required to achieve weathertightness, is Mr Gilling's updated repair proposal set down in his addendum report.

[105] The claimants sought to defer any quantification of the claim until repair work is finished and the actual costs are known. If they wanted to achieve this outcome the proper approach would have been to undertake repairs before prosecuting their claim.

[106] Mr Gilling's addendum report has updated his estimate of remedial costs from his full report. He has also broken down the costs attributable to the current damage. On page 32 of his addendum report,

³⁷ The Updated Repair Proposal at [12], pp 23–26 of his addendum report (11 June 2021). [12.2] of that report illustrates the damage and remedial works.

Mr Gilling estimates the remedial costs at \$468,471.87. This remedial cost estimate has been calculated by Mr Gilling's contracted quantity surveyor. Mr Angell agrees with Mr Gilling's estimate of costs. Mr Bodger, in his updated evidence of 3 August 2021, has expressed concern over three of the estimates relating to the ground level adjustments and suggests that his estimate of remedial costs of \$480,000 is more accurate.

[107] Mr Bodger has not provided any expert evidence on quantum to support the cost increases to accommodate his three concerns relating to the ground level adjustments. The claimants can be entitled to no more than the repair costs of the cheapest remedy for the damage caused.³⁸

[108] I accept the submission of Mr Robertson that Mr Gilling's estimate of costs, calculated by an experienced quantity surveyor ought to be the accepted remedial costs.

[109] I therefore determine that the reasonable cost to repair the established defects is \$468,471.79, inclusive of GST.

[110] The remedial costs claimed by the claimants have not taken account of the claimants' successful FAP application to MBIE. Ms Alchin acknowledged in her evidence that MBIE has told her that her claim is eligible for 25 per cent of the repair costs. Mr McKenna, in answer to my enquiry said that if there is a liability finding, any award of damages will be minus the FAP contribution.³⁹

[111] Accordingly, repair costs of \$468,471.79 are to be reduced by \$117,117.94 (being 25 per cent reduction taking into account FAP eligibility) leaving a total award of damages of \$351,353.85.

[112] I determine that the claimants have established their claim to the amount of \$351,353.85, inclusive of GST.

³⁸ *Lester v White* [1992] 2 NZLR 483 (HC) at 499.

³⁹ NoE, p 43.

Did the respondent have reasonable grounds to issue the code compliance certificate?

[113] The law is well established regarding the task of a local authority's legislative duties concerning a building inspection regime. The task of the certifying local authority is to establish and enforce a system that is in line with the Building Code. Heath J in *Sunset Terraces* stated the responsibility of local authorities in carrying out inspections:⁴⁰

“...a reasonable council ought to have prepared an inspection regime that would have enabled it to determine on reasonable grounds that all relevant aspects of the code had been complied with”.

[114] Gwyn J in the recent decision *Bates v Auckland Council*⁴¹ endorsed the statement of law that local authorities need to take reasonable care in performing inspection functions, and said that Whata J in *Body Corporate 160361 v BC 2004 Ltd*⁴² usefully summarised a local authority's obligations under the Building Act as:

[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.

...

- (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.

...

[115] The respondent's response to the claim admitted that it owed the claimants a duty of care to exercise reasonable care when fulfilling its function under the Building Act 1991. Mr Robertson's closing submission in addressing the liability of the council tends to agree with the established law I set down above when he states at [11]:⁴³ “A council's duty is to ensure

⁴⁰ *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479 (HC) at [450].

⁴¹ *Bates v Auckland Council* [2021] NZHC 2558.

⁴² [2015] NZHC 1803.

⁴³ Closing submissions by respondent (29 November 2021).

compliance with the minimum requirements of the Building Code – nothing more.”

[116] A most surprising aspect of this case was the evidence which emerged through the discovery process and hearing about the respondent’s record keeping.⁴⁴

[117] The respondent did not produce evidence from any of its council officers. It did create a document to record the dates of the various construction inspections but apart from this there was no further inspection evidence, no information about the building inspections, how they were carried out and what the council inspectors observed at the three inspections undertaken.

[118] However, lack of council records and evidence of what was observed at such inspections is not the correct approach in adjudicating this issue.

[119] It is for the claimants to prove that the respondent failed to take the necessary action to enable it to have reasonable grounds to have issued the code compliance certificate, which it did on 29 September 2004.⁴⁵

[120] The claimants’ case is that when issuing the code compliance certificate the council breached its established duty of care to them, alleging that there was no reasonable grounds for the respondent to be satisfied that the provisions of the Building Code had been met.

[121] The claimants allege that the respondent’s inspection regime was insufficient to ensure that all aspects of the Code had been complied with or that the building work was carried out in accordance with the building consent it issued.

⁴⁴ See [42]–[47] above.

⁴⁵ *Auckland Council v Blincoe* [2012] NZHC 2023 at [39].

[122] The respondent called Mr Calvert to give evidence that its building inspection regime was established and gave effect to the Building Code, and that there were sufficient reasonable grounds to have issued the code compliance certificate.

[123] Mr Calvert's evidence is that when he was in building control with the Christchurch City Council, he had the opportunity to collaborate and discuss certifying methodologies with a large number of other building officials throughout New Zealand, was aware of the approaches taken by other councils and had little criticism about the respondent's certifying regime. When questioned at the hearing, he said that he had not spoken to any building officer at the respondent council, nor was he familiar with the respondent's certifying system.⁴⁶

[124] In other words, his testimony that most local authority building certifying systems are similar, is not credible. I find that the respondent's property file on the claimants' house describes a very different certifying system to that of Mr Calvert's experience at the Christchurch City Council, where he described a far more documented methodology of recording inspections. Mr Calvert's included a form for each inspection and notes with building officers' observations as well as any issues arising.

[125] Mr McKenna's submission is that the respondent's certifying system, with its lack of records and inspection observations, indicated an inadequate inspection regime.

[126] Mr Calvert's well-detailed evidence in his brief of 7 April 2021, concluded that the respondent did have reasonable grounds to issue the code compliance certificate.

[127] The early part of his evidence at the hearing, when responding to introductory questions from Mr Robertson, was that the Joyce Group letter of 19 December 2003⁴⁷ provided the respondent with sufficient independent evidence to enable it to form reasonable grounds for the issue

⁴⁶ NoE, p 65, lines 14-28.

⁴⁷ BoD, Vol 2, Tab 25, p 404.

of the code compliance certificate. His evidence at this early stage of the hearing was that he understood there was no other respondent documentation, no observation notes from site inspections, or enquiries of council officers or the writer of the Joyce Group letter. And there were no further site inspections following receipt of the letter. And notations why the certificate was issued some nine months after receipt of the letter with no explanation as to why. These concerns, which Mr McKenna put to Mr Calvert at this stage of the hearing, did not alter his opinion that the respondent did have reasonable grounds for the issue of the code compliance certificate.

[128] Later in the hearing when examined by Mr McKenna, I find that Mr Calvert's confidence in the Joyce Group letter, as providing reasonable grounds for the respondent to have issued the code compliance certificate, shifted.

[129] Mr McKenna's examination of Mr Calvert indicated that Mr Aitken, the writer of the Joyce Group letter, was not aware that the cladding system on the house was on a fixed backing. Mr Calvert eventually accepted the point that it was most unlikely that Mr Aitken had read the respondent's property file. I find that if Mr Aitken had actually seen the property file, he would not have mentioned in his letter that the house was constructed in 1996 when in fact it was built after 1997. Mr Calvert also accepted the Joyce Group letter was based solely on a visual inspection and the writer's observations relate only to those areas of construction that could be reasonably accessed.⁴⁸ Mr Calvert's response to further questioning from Mr McKenna was that, if he was the then building officer, before accepting the Joyce Group letter he would want to know the expertise of Mr Aitken, the brief that he had received from the owner and would have to make enquiries of Mr Aitken. Mr Calvert was then questioned as to whether his confidence in the Joyce Group letter as satisfactory evidence to be relied upon had changed. He said that it had.⁴⁹

⁴⁸ NoE, pp 96–99.

⁴⁹ NoE, pp 98–99.

[130] At the hearing on 21 October 2021, Mr Calvert was asked to confirm that his evidence in May was that, if he was the building inspector and required to rely on the Joyce Group letter, he would first make enquiries of the writer as to what his brief was and would also consult the council officer relying on that letter before issuing a code compliance certificate. He responded “yes” to both.⁵⁰

[131] Earlier to that moment in the hearing replying to questioning from Mr McKenna, he stated that, as local authorities needed to assess construction to the Building Code and that the letter indicated no concern with water ingress into the building, the local authority’s view was that the house’s construction would be performing and compliant. Mr Calvert then replied to Mr McKenna that today the local authority acting reasonably would want to know a great deal more detail than that which Mr Aitken provided in the Joyce letter.

[132] Furthermore, in answer to examination from Mr McKenna at the May hearing, many of Mr Calvert’s responses avoided direct answering of the questions. I find that the respondent’s certifying regime was clearly inadequate, notwithstanding Mr Calvert’s resolute responses that it seemed to conform with the standard of the day.⁵¹ I determined in *Tsai v Upper Hutt City Council*⁵² that bad practice or an inadequate inspection regime is still bad practice and an inadequate inspection regime, even though it was arguably the generally followed industry practice at the time.

[133] The High Court has stated in *Blincoe*.⁵³

...it is possible for a judge to reject the standard commonly adopted in a particular profession [council inspection regime] as failing to satisfy the legal standard of reasonableness. ...

⁵⁰ NoE, pp 256–257.

⁵¹ NoE, pp 97–116.

⁵² *Tsai v Upper Hutt City Council* [2018] NZWHT Auckland 01 and *Edward Wong Finance Co Ltd v Johnson Stokes & Master* [1984] 1 AC 296 (PC).

⁵³ *Auckland Council v Blincoe* [2012] NZHC 2023 at [38].

[134] Heath J in *Sunset Terraces* did clearly establish the responsibility of councils in carrying out inspections when he stated:⁵⁴

[450] ...[a] reasonable council ought to have prepared an inspection regime that would have enabled it to determine on reasonable grounds that all relevant aspects of the Code had been complied with. In the absence of a regime capable of identifying waterproofing issues ... the council was negligent...

[135] It is not an absolute obligation to ensure compliance, but the High Court is clear in its judgments, that local authority inspection processes are required to determine whether building work is being carried out in accordance with the consent.

[136] I am satisfied on the evidence I have heard and considered that the claimants have proven their claim that the respondent did not have reasonable grounds when, on 29 September 2004, it issued a code compliance certificate for the claimants' house.

[137] As I earlier mentioned, there were significant changes to the building industry in the period from completion of construction of the house to the issue of the code compliance certificate in September 2004. Of importance is the Acceptable Solution alteration on 9 February 2004 which stated "...[the Acceptable Solution] had been amended to require a cavity behind both rigid and non-rigid backings".⁵⁵

[138] Mr McKenna's closing submission⁵⁶ made reference to the importance to eliminate water entry. He said that the Good Stucco Practice Guide acknowledged that it was inevitable that some moisture would enter the cladding system, primarily through cracking. Therefore, it was crucial to have a contingency plan that allowed for the dissipation of

⁵⁴ *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479 (HC).

⁵⁵ BoD, Vol 4, pp 162–163 at [5.17]: the BIA determination no. 2004/02 (18 March 2004), which is before CCC was issued for this building says: "The Acceptable Solution, E2/AS1, which covers stucco constructed over rigid backing sheet, has recently been amended to require a cavity". As such, by August 2004, the Acceptable Solution had significantly been changed.

⁵⁶ Synopsis of closing submissions for the claimant (11 November 2011) at pp 9–11.

moisture when it entered. Mr McKenna referred to support for this proposition in the Joyce Group letter which states:⁵⁷

Moisture should be controlled firstly by trying to eliminate its entry and secondly by allowing it to dissipate without causing damage to building elements...

[139] Mr Calvert also confirmed the importance of a drained cavity when he agreed that "...and in the absence of a drained cavity that allows moisture to dissipate that moisture is then going to get into the internal structure of the wall and cause damage".⁵⁸

[140] At the time of granting the code compliance certificate the Acceptable Solution for the subject house required a cavity behind both rigid and non-rigid backings. At the hearing all experts accepted the issue with fixed back cladding systems that lacked a drained cavity and that the then current cladding system on this house could not manage moisture once it penetrated through the plaster cladding. Mr Angell confirmed his acceptance of this issue when he stated "[t]he cladding system at the dwelling was never intended to manage moisture that has already entered due to the nature of the backing sheet and the detailing proposed".⁵⁹

[141] Mr Robertson and Mr Calvert referred to a series of BIA determinations. Mr Robertson claimed that the BIA determinations enabled the respondent to rely on the Joyce Group letter to issue a code compliance certificate. Mr Robertson submitted that in or around 2002, local authorities discovered that a number of houses partially built needed to have a drained cavity to comply with the Acceptable Solution. His submission was that if a local authority faced a house with a cladding system that lacked a drained cavity, then the BIA determinations meant that the local authority must grant a code compliance certificate unless

⁵⁷ Joyce Group letter (19 December 2003) at [2.03]; BoD, Vol 2, Tab 25, p 404.

⁵⁸ NoE, p 91.

⁵⁹ Mr Angell's supplementary brief of evidence (3 September 2021) at [31]–[32]; BoD, Vol 4, p 135.

there was real evidence of non-performance. Mr Calvert in his evidence summarised the BIA determinations.⁶⁰

That led to a series of decisions from MBIE directing that Territorial Authorities could only refuse to issue a code compliance certificate based on evidence that the absence of such a cavity was causing or was reasonably likely to lead to a failure of durability.

[142] I accept Mr McKenna's submission that both Mr Robertson and Mr Calvert misread findings from these determinations.

[143] Both parties produced a number of instances of BIA determinations all, except for 2004/74, pre-dating the 29 September 2004: BIA determination 2004/29, BIA determination 2004/74, BIA determination 2004/02, BIA determination 2004/09, BIA determination 2004/16 and BIA determination 2004/17.⁶¹

[144] Each of those determinations contain the comment at [4.3]:

[4.3] In several previous determinations, the Authority has made the following general observations about acceptable solutions and alternative solutions:

- Some acceptable solutions cover the worst case, so that in less extreme cases, they may be modified and the resulting alternative solution will still comply with the Building Code.
- Usually, however, when there is non-compliance with one provision of an acceptable solution, it will be necessary to add some other provision to compensate for that in order to comply with the Building Code.

[145] Mr McKenna submits that the BIA issued a guidance document in April 2004 to complement the BIA determinations and to provide guidance to local authorities when inspecting already completed work.⁶²

[146] Mr McKenna's submission is that these determinations appear to state that the lack of a drained and ventilated cavity was fine given the presence of compensating factors. To ascertain the presence of compensating factors, the local authority and/or the BIA required an

⁶⁰ Mr Calvert's brief of evidence at [65]–[66]; BoD, Vol 1, p 47.

⁶¹ BoD, Vol 4, Tab 47, 54, 55, 56 & 57.

⁶² BIA "Critical Requirements for the Assessment of 'Monolithic' Claddings" (April 2004) at "Inspecting Already Completed Work"; BoD, Vol 3, pp 807–808.

independent building surveyor's expert report in each instance. When looking at the absence of a drained cavity, the BIA would undertake a thorough analysis and ask whether an alternative solution was available. The only way that it would be compliant with the Code was if there were sufficient compensating factors.

[147] Mr Calvert agreed when questioned by Mr McKenna that the only compensating provision in the Joyce Group letter was mention of the findings of a moisture meter detecting no signs of moisture.⁶³

[148] I am satisfied from Mr Calvert's responses to Mr McKenna's questioning,⁶⁴ that the Joyce group letter contained no further mention of any compensating factors.

[149] I conclude from the totality of evidence surrounding this issue that the respondent should have applied for a BIA determination or required a building surveyor in 2004 to undertake an investigation and report on the presence of sufficient compensating factors to enable the respondent to have reasonable grounds for issuing a code compliance certificate for the claimants' house. This is because the respondent was aware that the house did not have a drained and ventilated cavity. This did not happen. I find the respondent negligent and the claimants' claim proven.

Future likely damage

[150] Mr Gilling gave evidence that the construction deficiencies he found are systemic. He states that unless they are remediated the house will suffer further damage to areas presently showing little or no signs of deterioration.

[151] At [50] I mentioned that damage is an essential ingredient of the negligence cause of action and thereby agreed with a submission of

⁶³ Joyce Group letter (19 December 2003) at [3.00]; BoD, Vol 2, Tab 25, p 405.

⁶⁴ NoE, pp 241–257.

Mr Robertson. However, that damage does not need to have occurred before recovery in tort is permitted.

[152] In *Hartley v Balemi* the High Court held:⁶⁵

[70] ...A local authority also owes a duty of care to ensure that houses are built in accordance with the local bylaws: *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA); [1996] 1 NZLR 513 (PC)...

[72] In order to breach that duty of care, the house must be shown to contain defects caused by the respondent(s). These must be proved to the usual civil standard, the balance of probabilities. Relative to a claim under the WHRS Act, it must be established by the claimant owner that the building is one into which water has penetrated as a result of any aspect of the design, construction or alteration of the building, or the materials used in its construction or alteration. This qualifies the building as a "leaky building" under the definition in s 5. The claimant owner must also establish that the leaky building has suffered damage as a consequence of it being a leaky building. Proof of such damage then provides the adjudicator with jurisdiction to determine issues of liability (if any) of other parties to the claim and remedies in relation to any such liability: see s 29(1).

[153] *Hartley v Balemi* was determined under the WHRS Act 2002. In *Ryang v Auckland Council*, I held in relation to the above passage from *Hartley*:⁶⁶

[42] The references are to WHRS Act 2002 but Ms Divich submitted the 2006 Act is to the same effect. Because of the nature of the claim which is in negligence, proof of damage is essential Ms Divich says. I agree with those submissions.

[154] As earlier mentioned, damage does not need to have occurred before recovery in tort is permitted. In *Body Corporate 328,392 v Auckland Council*⁶⁷ Bell JA in the High Court held:

[20] Second, the fact that damage has not yet occurred is not fatal to the council's claim. Under the Weathertight Homes Resolution Services Act, a home must have suffered damage by water penetration... But the relief may provide for deficiencies, matters that may cause damage in the future... Under s 50 the Weathertight Homes Tribunal can give relief to address defects that have not yet caused loss but may in the future ...

⁶⁵ *Hartley v Balemi* HC Auckland CIV-2006-404-002589, 29 March 2007 (Stevens J).

⁶⁶ *Ryang v Auckland Council* [2011] NZWHT Auckland 21.

⁶⁷ *Body Corporate 328,392 v Auckland Council* [2021] NZHC 2412.

[155] Support for the proposition that damage does not need to have occurred before recovery in tort is permitted is also obtained from Cooke J's decision in *Palmer v Hewitt Building Limited*.⁶⁸

[156] I have found that the claimants have proven their claim regarding the four building defects/deficiencies above. Damage has been proven concerning the first three defects addressed.

[157] Mr Robertson's submits that this house, some 21 years old, has performed well in its "as built" state and future likely damage is not a concern. The Act at s 50(1)(c) allows me to consider future likely damage. I accept Mr Gilling's opinion that future likely damage from the proven four defects is probable. Mr Gilling having stated that the defects are systemic and the house will suffer further future damage to areas his investigations presently show little or no signs of deterioration, if not remediated. The house has a further 30 years to comply with the Code and therefore I disagree with Mr Robertson's submission.

[158] Cook J stated in *Palmer v Hewitt Building Limited*:

Recoverable loss

[42] A claim in negligence is a claim directed to loss that has been caused by a failure by the defendant to exercise reasonable care. With building negligence cases there has been debate about the need for the breach to have caused physical damage. In the present case, Ms Palmer does not sue to recover compensation for damage that has been occasioned to her property as a consequence of negligent building works. For example, there is no damage caused by it being a leaky building or having subsiding foundations. But as Tipping J emphasised in *Spencer on Byron*,⁶⁹ the law in New Zealand has not maintained a requirement for physical injury or damage before recovery in tort is permitted. Tipping J held:

[44] The purpose of the Act and the building code is to maintain minimum standards of construction. Those standards are designed to protect the interest society has in having buildings constructed properly. The minimum standards avoid the waste, inefficiency, economic losses and health and safety issues that might well be encountered if the only potential control was contractual. The Act and code are also based on the premise that non-compliance with the code necessarily

⁶⁸ *Palmer v Hewitt Building Limited* [2021] NZHC 1460.

⁶⁹ *Body Corporate No 207,624 v North Shore City Council* [2012] NZSC 83.

has a health or safety connotation; so that does not have to be established in addition to non-compliance.

[45] In cases where negligent inspection has given rise to the potential for physical damage but no such damage has yet occurred, it cannot be the law that you have to wait for physical damage to occur before you are regarded as having suffered loss or harm. It is not determinative whether the loss suffered at the outset is characterised as financial or physical. It is measured by the cost of bringing the building up to the standard required by the code and thereby removing the potential for physical damage and the associated health and safety concerns. A duty of care should be recognised in respect of pre-emptive expenditure as well as expenditure necessary to reinstate or repair physical damage which has actually occurred. In the present situation the line between economic loss and physical damage is far from bright. Even if one were to analyse cases such as the present as resulting solely in economic loss, there is no good reason for denying a duty of care. There is no risk of indeterminate liability; only a current owner can sue. And, in this context, there cannot be any logical distinction between residential premises and premises of other kinds.

[43] This approach applies to negligent building as well as negligent building inspection, and I accordingly apply it.

[159] I find established damage is attributable to the proven defects and if not repaired the house will suffer further probable damage to areas presently showing little deterioration.

General damages

[160] General damages are a form of compensatory damages. General damages compensate for losses that cannot be objectively quantified in monetary terms. They cover, for example, stress, humiliation and inconvenience.⁷⁰ In causes of action in negligence, general damages will be available for the stress, inconvenience and the like if reasonably foreseeable consequences of the breach of duty.⁷¹

⁷⁰ *The Law of Torts in New Zealand* (online edition, Thomson Reuters) at [59.25.2.09] and Thomas J in *Body Corporate 346799 v KNZ International Co Ltd* [2017] NZHC 511 at [104]–[106].

⁷¹ *Mouat v Clark Boyce (No 2)* [1992] 2 NZLR 559 (CA).

[161] The claimants claim an award of \$25,000 for general damages. Mr McKenna submits the award is appropriate and it is in line with the High Court tariff for a single dwelling concerning an owner-occupier.⁷²

[162] Mr McKenna, in support of his submissions, refers to the excerpt from Ms Alchin's evidence which he says reveals the impact that this proceeding and the ownership of a leaky house has had on her emotionally.⁷³ Having heard Ms Alchin's evidence I am satisfied that this proceeding and the ownership of a leaky house and its need for remediation has had significant impact causing her stress and inconvenience.

[163] I determine that the claimants have made out their claim for general damages. The amount sought of \$25,000 is in line with the High Court and Court of Appeal's guidelines to assist general damages settlements.⁷⁴ I determine the claimants are entitled to the sum of \$25,000 for general damages.

Consequential losses

[164] The claimants make a claim for consequential costs arguing that during remediation, which is likely to take six months, Ms Alchin will need to move to alternative rental accommodation.

[165] I accept that the claimants will suffer consequential losses arising from the remedial works comprising costs of alternative accommodation, moving, furniture storage and cleaning. I infer from Mr Robertson's closing submissions⁷⁵ that the respondent accepts that the claimants are proposing to renovate the house and that this will mean that Ms Alchin will be required to move out and will suffer disruption caused by the remediation.

⁷² See [193] of the claimants' closing submissions.

⁷³ Statement of Evidence to be given by Rosemary Alchin (19 January 2021) at [27]–[33]; BoD, Vol 1, Tab 3.

⁷⁴ *O'Hagan v Body Corporate 189,855* [2010] NZCA 65.

⁷⁵ At [106].

[166] However, I do not accept Mr McKenna's unsubstantiated claim of \$50,000.

[167] If the parties are unable to agree on evidentially based actual or estimated quantum for consequential losses then the claimants are to file submissions on quantum within 10 working days of the date of this determination and the respondent to file its response within 10 working days of the claimants' submissions. I will then determine an appropriate quantum for consequential costs.

Application for costs

[168] The claimants have made a claim which they characterise as special damages, under s 91 of the Act for legal fees incurred of \$48,488.90 (they have not filed copies of fee invoices substantiating such a quantum).

[169] This limb of their claim is best characterised as a claim for costs.

[170] The Tribunal has jurisdiction under s 91 of the Act to award costs.

91 Costs of adjudication proceedings

- (1) The tribunal may determine that costs and expenses must be met by any of the parties to the adjudication (whether those parties are or are not, on the whole, successful in the adjudication) if it considers that the party has caused those costs and expenses to be incurred unnecessarily by—
 - (a) bad faith on the part of that party; or
 - (b) allegations or objections by that party that are without substantial merit.
- (2) If the tribunal does not make a determination under subsection (1), the parties to the adjudication must meet their own costs and expenses.

[171] In *Trustees Executors*, the High Court gave guidance on the discretion to award costs in s 91:⁷⁶

⁷⁶ *Trustees Executors Ltd v Wellington City Council* HC Wellington CIV 2008-485-739, 16 December 2008 at [51]–[52].

[51] ... the scheme of the Act is that generally costs should lie where they fall. ...

[52] The issues that I see as important are whether the appellants should have known about the weakness of their case, and whether they pursued litigation in defiance of common sense.

[172] The Tribunal has discretion to award costs but in limited circumstances. In exercising its discretion, it should do so judiciously and not capriciously.

[173] The presumption which the claimants must overcome to successfully secure an award of costs is set down in s 91(2) of the Act, namely, that the parties must meet their own costs and expenses.

[174] The presumption is only overcome if the Tribunal finds that there has been either bad faith or allegations that are without substantial merit on the part of the party concerned which have caused costs and expenses to have been incurred unnecessarily by, in this case, the respondent.

[175] The claimants' submissions, on their face, do not make out an arguable case for a costs award. There is no evidence before me that the respondent has acted inappropriately, it did mediate the claim in good faith and it has not made any allegations that are unnecessarily unwarranted or advanced defences in bad faith or without merit.

[176] In the circumstances of the claim and after considering all the evidence and submissions, I cannot characterise any of the respondent's actions and defence arguments as improper or lacking in substantial merit at the time they were made.

[177] I do not find that the respondent pursued litigation in defiance of reason or common sense, did not deliberately delay proceedings, attempted to settle and gave careful consideration to the grounds of its defence.

[178] The claimants have failed to make out their claim for costs.

Conclusion as to quantum

[179] The claim has been established to the amount of \$376,353.85 which is calculated as follows:

Remedial costs of repairs	\$468,471.79
Less: claimants' eligibility to FAP which amounts to 25 per cent	\$117,117.94
	<hr/>
	\$351,353.85
General damages	\$ 25,000
	<hr/>
Total	\$376,353.85

Consequential damages to await
determination as explained in [166]

Orders

[180] The claim by Rosemary Alice Alchin and Simon Francis Scott is proven to the extent of \$376,353.85. For the reasons set out above, I order Hamilton City Council to pay Ms Alchin and Mr Scott the sum of \$376,353.85 forthwith.

DATED this 4th day of February 2022

K D Kilgour
Tribunal Member