IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2008-100-000038
[2011] NZWHT AUCKLAND 39

BETWEEN	CLEARWATER COVE APARTMENTS BODY CORPORATE NO. 170989 Claimant
AND	AUCKLAND COUNCIL First Respondent
AND	THE FLETCHER CONSTRUCTION COMPANY LIMITED Second Respondent
AND	NICHOLAS VAN DIJK and NORMAN PALMER as Trustees of the LIVI TRUST Third Respondent
AND	BRIAN AITKEN Fourth Respondent

Hearing:	28 February 2011, 1-4 March 2011, 14-15 March 2011
Closing Oral Submissions:	21 March 2011
Counsel:	L Ponniah, C Orton for the claimant S Thodey & R Karalus for the first respondent G Christie & M Harrison for the second respondent G Collecutt, P Grimshaw & G Beresford for the third respondent J Bierre, for the fourth respondent.
Decision:	18 August 2011

FINAL DETERMINATION

Adjudicators: K D Kilgour and S Pezaro

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BACKGROUND

Property description

[1] The claimant in these proceedings, Body Corporate 170989 (Clearwater Cove), claims $1,533,245 (incl GST) as the estimated cost of repairing weathertightness defects in 12 residential units. Three of these units are owned by Nicholas Van Dijk and Norman Palmer as trustees of the Livi Trust (the Trust). Seven units are owned by West Harbour Holdings Limited (WHH), a company of which the Livi Trust is the sole shareholder. One unit is owned by Norman Palmer and Marilyn Palmer as trustees of the Palmer Family Property Trust and the other by Petil Holdings Limited. These units are in a marina development which includes two commercial units, a restaurant and a bar (units F and G) and four other residential apartments.

[2] In the early 1990s the land was owned by the Waitakere City Council (the Council) and leased to Westpark Marina Limited. The Council issued a building consent to Westpark Marina Limited for a club house however this construction was abandoned partially completed.

[3] On 15 July 1993 a report prepared by Holmes Consulting Group (Auckland) for the Council identified areas of the unfinished building that required remedial work in order to comply with the Building Act. This report is relevant to the question of what caused water ingress and which work was carried out by the respondents. The Holmes report described the existing structure as follows:

> **3.1 BUILDING DESCRIPTION**
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> The building is a two storey structure of approximately 900 square metres per floor. The floor construction, including the ground floor, consists of a "traydek" composite concrete floor spanning between steel composite

beams supported on steel RHS columns. The roof construction consists of long run colour steel cladding spanning between galvanised steel purlins supported on steel frames. The lateral load resistance of the structure is provided by steel cross bracing.

The internal and external walls consist of non load bearing timber framed walls. **Most of the framing has been constructed but no linings are in place.** No finishing work to the steelwork or timber has been started.

3.2 ROOF CLADDING AND PURLINS

Most of the roof cladding is in place and appears to be in good condition. Not all of the flashings have been installed and this will need to be done to complete the roof. The lack of flashings, especially at the ridge, is presently allowing water to ingress into the body of the building.

The galvanised steel purlins appear to be in good condition and show no signs of corrosion.

3.3 CONCRETE SLABS

The concrete slabs at the ground and first floors consist of 100mm thick concrete acting compositely with a "Traydek" galvanised metal deck. The galvanising on the metal deck has not corroded and appears to be in a good condition. The slab has some minor cracking due to shrinkage of the concrete which is a normal phenomenon and does not affect the structural integrity of the slabs and hence it can be left untreated.

3.4 STRUCTURAL STEEL

All of the structural steel above the ground floor slab has never been painted and has rusted over the last two years. All steel work used on any project has some rust, it is the amount of rusting especially pitting of the steel that is important. (emphasis added).

[4] The report writer recommended certain remedial work but concluded that:

> Overall the partially completed structure appears to be in good condition with only a moderate amount of remedial work required....

[5] In 1994 Brent Ivil, the settlor of the Trust, met with the Mr Van Dijk and Mr Palmer to propose that the Trust acquire the land and convert the existing structure into a residential apartment complex and boat club. The Trust then entered into an agreement with The Fletcher Construction Company Limited (Fletcher's) whereby Fletcher's would design, build and fund the development of the Clearwater Cove apartments and commercial premises. The Trust appointed Fletcher's as its attorney to complete the construction. Fletcher's took a first mortgage over the property and the agreement provided for Fletcher's to be paid once the units were sold.

[6] On 6 June 1995 the Trust applied for an amended building consent. This application was granted on 17 July 1995 and the construction took place over 1995/1996. Inspections for the purpose of issuing a Code Compliance Certificate were carried out by the Council and an Interim Code Compliance Certificate (ICCC) was issued on 2 April 1996. No final Code Compliance Certificate has been issued.

PARTIES

[7] This claim was originally filed on 18 April 2008 by 14 unit owners against the Council as first respondent and Fletcher's as second respondent. The owner of Unit 16R, John Garea, and the owner of Unit 2B, Petil Holdings Limited, filed individual claims under the Weathertight Homes Resolution Services Act 2002. The Petil Holdings claim was consolidated with that of the Body Corporate however Mr Garea's claim was struck out for want of prosecution.

[8] On 20 August 2008, pursuant to section 111 of the Weathertight Homes Resolution Services Act 2006 ("the Act") the Trust was joined as the third respondent on the ground that it was the developer.

[9] On 12 January 2009 Brian Aitken was joined as fourth respondent on the application of the Council. Mr Aitken, of Peddle Thorpe Aitken, was engaged by Fletcher's as the certifying architect and he issued the Sectional and Practical Completion Certificates.

[10] On 10 November 2009 the first, second and fourth respondents filed applications for strike out. The applications to strike out the claims in respect of Units 4D, 9K and 10L were granted unopposed. The claim by Body Corporate 170989 therefore proceeded to adjudication in respect of the following units:

Unit No	**Name of Owner**
1A	Norman and Marilyn as trustees of the Palmer Family Property Trust
2B	Petil Holdings Limited
3C	West Harbour Holdings Ltd
5E	Nicholas Van Dijk and Norman Palmer as trustees of the Livi Trust
6H	West Harbour Holdings Ltd
7I	Nicholas Van Dijk and Norman Palmer as trustees of the Livi Trust
8J	Nicholas Van Dijk and Norman Palmer as trustees of the Livi Trust
11M	West Harbour Holdings Ltd
12N	West Harbour Holdings Ltd
13O	West Harbour Holdings Ltd
14P	West Harbour Holdings Ltd
15Q	West Harbour Holdings Ltd

THE CLAIM

The claims against each Respondent

The Council

[11] The claim against the Council is that it breached its duty of care in issuing the building consent, carrying out inspections and

issuing an interim Code Compliance Certificate. In closing the claimant confirmed that it did not continue to rely on its claim of negligent inspection or negligent issue of the building consent but did rely on these events for the evidential foundation of its claim that the interim CCC was negligently issued.[1]

Fletcher's

[12] The claim against Fletcher's is that it was negligent as the designer, builder and head contractor. The claimant alleges that Fletcher's obligation to supervise the building works and identify and rectify construction defects or omissions continued either to the date of issue of the Practical Completion certificate on 21 March 1996 or to the expiry of the 90-day maintenance period on 15 June 1996.

Livi Trust

[13] The claimant alleges that the Trust is the developer and as such it owed the claimant a non-delegable duty to ensure that proper skill and care was exercised in the construction of the property. The claimant submits that this duty arose because the Trust owned the land, engaged Fletcher's and liaised with the Council.

Brian Aitken

[14] At the hearing the claimant and the Trust withdrew their claims against Mr Aitken. The only claim against Mr Aitken is therefore the Council's cross-claim for contribution, should it be held liable to the claimant.

[1] Claimant's closing submissions, at [58].

The conduct of proceedings between the claimant and the Livi Trust

[15] The conflict for the Trust in being both claimant and respondent was exacerbated at hearing by the manner in which these parties presented their case. When the Trust was joined as a respondent it was represented by David Smyth. Mr Smyth filed a Statement of Defence for the Trust on 27 September 2010 submitting that Fletcher's and not the Trust was the developer. Shortly before the hearing Mr Smyth advised he was withdrawing as a result of a conflict.

[16] The Trust was represented at hearing by Grant Collecutt. However, Paul Grimshaw appeared on the sixth day to open for the Trust. Contradicting the defence filed by Mr Smyth, Mr Grimshaw accepted that the Trust was the developer and owed a non-delegable duty of care to the claimant and acknowledged that: "In reality Messrs Van Dijk and Palmer directly or indirectly own 10 of the 12 units as West Harbour Holdings Limited is owned by the Livi Trust."[2] Mr Grimshaw then left the hearing and Geoffrey Beresford of Grimshaw's remained, apparently to assist Mr Collecutt. Mr Grimshaw appeared again to make closing submissions.

[17] In its amended statement of claim, the claimant alleged negligence by the Trust as developer however it was then stated, apparently in defence of the Trust, that 'Neither the Livi Trust nor any of the claimant owners carried out any physical work or supervision or have (sic) any control in respect of the works'.[3] The Trust did not raise any affirmative defences and its only defence to the claim at hearing was that the Mr Van Dijk and Mr Palmer had no building experience or knowledge and were not personally involved in the construction, and that the Trust had a full turn-key contract with Fletcher's.

[2] Opening Submissions of the Third Respondent, 14 March 2011, at [2].
[3] Amended Statement of Claim, 26 February 2010, at [32].

[18] In the course of the hearing counsel for the Trust and counsel for the claimant made submissions which were indistinguishable. The Trust did not call any witnesses although the Mr Van Dijk and Mr Palmer gave evidence for the claimant and Mr Palmer was cross-examined by counsel for the Trust. At times counsel for the claimant and the Trust referred to the Trust as if it was synonymous with the Body Corporate/claimant.

[19] In closing the claimant relied on the Trust's submissions on defects however, as the Trust adduced no evidence, the Trust's submissions were based on the claimant's evidence. The Trust therefore accepted the claimant's quantum and submitted that a full re-clad was required.

[20] There was further confusion in relation to which version of the Harditex manual was operative at the time of construction. Mr Earley asserted that it was the July 1995 edition and assessed the defects accordingly. However in closing the claimant adopted the submissions of the Trust on defects and quantum[4] and the Trust accepted that the 1994 Harditex literature applied at the time of construction. When we asked Mr Orton whether the claimant now accepted that the 1994 Harditex manual was operative, he advised that the claimant did not make that concession.[5]

[21] Although it seemed to us that the claimant was not pursuing its claim against the Trust, Mr Orton confirmed at the conclusion of the hearing that this claim was not withdrawn.

ISSUES

[22] The issues that we need to decide are:

[4] Claimant's closing submissions, at [38].
[5] Hearing 21 March 2011 at 11.52a.m.

- whether the fact that Clearwater Cove is a mixed commercial and residential development affects any duty of care owed by the Council to the claimant;
- whether the garages are part of the residential units such that any cost of repairing the garages can be claimed in this Tribunal;
- what defects are causative of weathertightness issues;
- what is the cause of these defects;
- whether the claims by any of the unit owners are time barred;
- whether the Council and Fletcher's owe a duty of care to the Livi Trust and West Harbour Holdings Limited as unit owners;
- whether any of the unit owners purchased with knowledge and, if so, whether the chain of causation is broken or they have been contributorily negligent;
- whether Fletcher's breached any duty of care and, if so, whether the settlement reached between the Livi Trust and Fletcher's in October 1996 defeats any of the claims by the Livi Trust and/or West Harbour Holdings Limited;
- whether the Livi Trust breached its duty of care as developer;
- if the Council is found liable to any other party whether Mr Aitken is liable to the Council for contribution.
- what is the appropriate measure of any loss by the claimants;
- if any loss is proved, what, if any, amounts claimed represent betterment;
- liability for any loss suffered by the claimants;

DOES THE COUNCIL OWE A DUTY OF CARE TO RESIDENTIAL UNIT OWNERS IN A MIXED USE DEVELOPMENT?

[23] Ms Thodey submitted that the Council did not owe a duty of care to residential owners in a mixed commercial/residential development. However, since this claim was heard the Court of Appeal considered this issue in *North Shore City Council v Body Corporate 207624* (*Spencer on Byron*).[6]

[24] In *Spencer on Byron* the application for building consent referred to the "Byron Avenue hotel" and described it as a hotel/apartment building with 232 hotel rooms and suites and four apartments. The residential units were a non-complying activity in the commercial 3D zone. The Court of Appeal recorded that the parties agreed that the outcome must be "all or nothing" in terms of whether a duty was owed by the Council.

[25] The Court held that neither the owners of commercial hotel units nor the owners of the six residential apartments were owed a duty of care by the Council because the complex was predominantly commercial and the building consent had been sought on this basis. The majority of the Court did not consider that the Council ought reasonably to have foreseen that purchasers of residential apartments located in a predominantly commercial complex would place reliance on the Council.[7]

[26] We conclude that whether a duty of care is owed by a territorial authority to residential owners in a mixed-use complex is appropriately determined on the basis of the predominant use for that complex, and that the Building Consent provides a guideline for determining the intended use. In Clearwater Cove the building consent was granted to convert the partially completed building into apartments, garages and a club house. The residential units are the

[6] *North Shore City Council v Body Corporate 207624* [2011] 2 NZLR 744
[7] At [104]

majority of the units and therefore we are satisfied that the Council owed the same duty of care to the owners of residential apartments in Clearwater Cove as it does to any owner of a residential property.

ARE THE GARAGES PART OF THE RESIDENTIAL UNITS?

[27] The Clearwater Cove residential apartments each have a garage as an ancillary unit. There are four garages attached to the main building where the residential units are located and another 12 garages form a separate and distinct L-shaped structure. The Council submits that none of the garages fell within the jurisdiction of the Act[8]. For the reasons that follow we found that the claimant has only proved the existence of weathertightness defects in three of the attached garages. The claimant has not proved that there are any weathertightness defects in the 12 L-shaped garages. Therefore we have not been required to determine conclusively whether the 12 detailed garages are properly considered as part of this claim however our preliminary view is that for the purposes of the Act they should be treated in the same way as the attached garages.

The Attached Garages

[28] The Council acknowledges that the question of whether the four adjoining garages are within the jurisdiction of this Tribunal is less clear than the position of the 12 completely detached garages. The Council and Fletcher's however submit that the garages are not necessary, essential or fundamental to the building as a whole because they are a separate structure from the main building. Mr Homes' evidence is that the Council required these four garages to be separated from the main building and that this separation was achieved by the creation of an air gap between the framing of the main building and the adjoining garages. The Council relies on the definition of dwelling house in section 8 of the Act for its submission

[8] Submissions of First Respondent, at [186].

that the garages are excluded and submits that in order to come within the Act the garages must be an integral part of the building.

> **Dwellinghouse** -
>
> (a) means a building, or an apartment, flat, or unit within a building, that is intended to have as its principal use occupation as a private residence; and
>
> (b) in the case of a dwellinghouse that is a building, includes a gate, garage, shed, or other structure that is an integral part of the building; and
>
> (c) in the case of a dwellinghouse that is an apartment, flat, or unit within a building, includes a door, gate, garage, shed, or other structure that—
>
> (i) is an integral part of the building; and
>
> (ii) is intended for the exclusive use of an owner or occupier of the dwellinghouse; but
>
> (d) does not include a hospital, hostel, hotel, motel, rest home, or other institution

[29] Fletcher's submits that although the garages are on the Certificate of Title they are not necessary to the completeness of the whole because the apartments could function without the garages. Fletcher's suggests that while there was some argument between the experts about whether the cladding went to the ground at the rear of the four garages so that they would be weathertight on their own, the cladding of the main building goes down to the ground and would function independently of the garages.

[30] The claimant submits that Mr Earley's evidence that the garage roof membrane is lapped up behind the external wall cladding of the main building indicates that the garage and the main building would not be independently watertight. Further it is submitted that it is in keeping with the purpose of the Act for attached and standalone garages which are affected by weathertightness issues to be the subject of damages under the Act.

[31] It is our view that it would be contrary to the purpose of this Act to conclude that where a separate garage is affected by weathertightness issues, the claimant must pursue any available remedies in another jurisdiction. We are not aware that this issue has been raised in relation to dwelling houses where the garage is separated from the main dwelling to the same extent as the four adjoining garages in these proceedings. It would seem wrong that, as a result of a dwelling house being on a unit title, as opposed to a standalone or fee simple, that the owner of a dwelling house on a unit title development cannot claim the cost of repairs to their garage. We think that any attempt to treat the garages separately for the purposes of jurisdiction under the Act is artificial and introduces a complexity that is disproportionate to the proceedings.

[32] For these reasons we conclude that the attached garages are properly within the jurisdiction of the Act. As stated if we had been required to consider the position of the detached garages we would be inclined to reach the same conclusion.

WHAT ARE THE DEFECTS THAT CAUSED WATER INGRESS?

[33] The experts' conference on 3 February 2011 was attended by the WHRS assessor, Paul Probett; Mathew Earley, the claimants' expert on defects; Dr. Nicholas Powell, the claimant's expert on the cause of cracking in the cladding; Neil Summers, for the Council; and Peter Homes,[9] for Fletcher's. The outcome of the conference is recorded in the agreed defects schedule that was signed by the experts.

[34] The experts agreed on the following defects:

[9] Not the author of the Holmes report.

1) There was universal cracking of the cladding joints. They did not agree on whether this was a significant cause of water ingress or a consequence.
2) Balconies and wing walls need replacing as a result of cladding taken down to the deck level.
3) The four garages on the front (North West) elevation need re-cladding as a result of lack of ground clearance. Mr Probett and Mr Earley said that the L-shaped garages had the same issues but there was no destructive testing of those garages.[10]
4) There are some windows where there has been inadequate sealing of joinery to wall cladding. There was no agreement as to how widespread this defect is.
5) On Unit 8J the pergola posts, which were not on the consented plans, penetrated the flat topped balustrade causing leaks. However the balustrade has other weathertightness issues.[11]
6) There are some defects as a result of roof flashing to cladding junctions resulting in damage to Unit 6H, and 11M.
7) The concrete floors allowed no separation between the internal and external levels of the decks. Sill flanges on full height joinery are buried into the tiled decks preventing drainage. There was no agreement on what damage was caused by this defect.

[35] Mr Earley and Mr Probett agreed that the cumulative effect of the defects and damage mean that a full re-clad is required. Mr Homes and Mr Summers believed that targeted repairs are appropriate because there is insufficient evidence of systemic window failure. However Mr Summers and Mr Homes accepted that if there was evidence of significant timber damage around a

[10] Transcript of hearing, 14 March 2011, at 77.
[11] At104.

significant number of windows on all faces of the building the "tipping point" for a re-clad would be reached.

The cause of cracking in the cladding

[36] The claimant pleaded that the cladding was cracking due to defective installation, in reliance on the briefs of evidence of Mr Earley. However Dr Powell also gave evidence for the claimant on the cause of cracking in the cladding. His evidence focused on the quality of the texture coating and the nature of the cladding materials used. Dr Powell is a forensic scientist who analysed samples of the cladding and compared the samples with the manufacturer's specifications. We are satisfied that he is qualified to provide an expert opinion on these issues.

[37] In Dr Powell's opinion there were no significant defects affecting the weathertightness of the coating system on the cladding. He said that, although there was uneven coverage and inadequate thickness of the texture coat on the samples, they had been over-coated with low sheen acrylic which provided good water shedding properties. Dr Powell said that based on his examination of the coatings on three Harditex samples, the coating system was likely to give very good weathertightness.[12]

[38] Dr Powell concluded that the defects in the joints between the cladding sheets were caused by the different expansion rates of the framing timber and the fibre cement sheet (Harditex) attached to it. Mr Summers agreed with Dr Powell that water entry caused cracking in the cladding and that the water had not entered through the joints.

[39] Mr Earley, in his brief of evidence dated 26 February 2010 and his updated brief dated 23 September 2010, attributed failures in

[12] At 54-55.

the cladding to incorrect installation. However, he gave evidence that he thought that the cracking in the cladding was more a result of moisture coming in from other defects.[13] When asked by the Tribunal whether there was any one major cause of cracking, such as sheet layout or the way the joints were installed, Mr Earley responded that while those elements may have resulted in mild cracking, other defects were letting in water which made the cladding worse.[14] He later confirmed that he agreed with Dr Powell that the most significant cause of cracking in the cladding was the result of timber swelling rather than water entering through defective joints.

[40] Mr Probett said that as a WHRS assessor he had inspected some 350-400 dwellings and observed that Harditex cracked more when exposed to the heat of the day and the afternoon sun, particularly when it was a darker colour.[15] Mr Probett noted that the shaded end of Clearwater Cove had few cracks whereas the dark areas facing the sea and exposed to the afternoon sun had more cracking. In his opinion Harditex was an 'intolerant' material.[16]

[41] On the basis of the expert evidence we conclude that the application of the texture coating has not contributed to water ingress and that the primary cause of cracking in the cladding is the incompatible expansion rates between the timber framing and the Harditex cladding. We further conclude that any cracking caused by the manner in which the cladding was installed is minor and has not caused any measurable damage. As the claimant has not demonstrated any causative link between any acts or omissions by the respondents and the incompatible expansion rates between the timber framing and the cladding, the claim for damage arising from this defect must fail.

[13] At 22.
[14] At 21.
[15] At 16.
[16] At 15.

Defects on the balconies and wing walls

[42] The experts agreed that there was demonstrable damage in these areas as a result of cladding taken down onto the decks and in some cases the base of the cladding being sealed to the decks. Mr Probett said that the 1994 literature required a 50mm clearance. In his opinion, although NZS3604 only referred to ground clearance and not deck clearance, this is an omission and common sense would dictate that the same principle applied to a balcony.[17] There was no requirement in the 1994 Harditex specifications for the parapet tops to have a slope at the time of construction. Mr Probett confirmed that the James Hardie 1994 literature did not illustrate the need to waterproof the junction between the parapet and the balustrade walls and main cladding.[18]

[43] The cladding was installed by July 1995 and Mr Earley has not explained how the July 1995 manual could apply when the building consent and installation of the cladding pre-dated this manual. We prefer the opinions of Mr Probett, Mr Summers and Mr Homes which are consistent and logical and conclude that the August 1994 Harditex manual was operative at the time of construction.

[44] In addition to the lack of slope on the parapet and the lack of clearance between the cladding and the deck, Mr Homes said that replacement of the screws on the balustrades had caused damage.[19] Mr Probett commented on the lack of clearance between the internal floor level and the decks. In his opinion an upstand should have been created on the existing concrete decks. Mr Probett and Mr Earley agreed that the damage caused to these decks was a result of a combination of defects that were hard to isolate.[20]

[17] At 17.
[18] At 58.
[19] At 56.
[20] At 92 and 94.

[45] The experts agreed that lack of clearance, combined with the flat tops on the parapet and balustrade walls, caused the need to repair the balconies and wing walls of Units 6, 7, 12, 13, 14 and 15.

Cladding to Ground Level (Four adjoining garages)

[46] The experts agreed that water ingress in the four garages on the north-west elevation was a combination of lack of ground clearance and the flat parapets above the garage. Mr Earley suggested that all garages in the complex would have the same defect.[21] However, as there was no destructive testing or evidence adduced of cladding defects on the detached garages we conclude that this defect has been proved to affect the following 3 garages only (Unit 10L was struck out, removing any claim for Garage Unit 16):

- Garage Unit 14 (apartment unit 3C – West Harbour Holdings);
- Garage Unit 15 (apartment unit 11M – West Harbour Holdings);
- Garage Unit 17 (apartment unit 2B – Petil Holdings Limited).

Windows

[47] The Trust submits that there is widespread damage as a result of defective window installation and that every unit is affected, necessitating a full re-clad of each unit.

[48] In evidence Mr Earley stated that he had tested five windows.[22] He accepted that there were some 70 windows at Clearwater Cove but said that some of these were in commercial

[21] At 77
[22] At 33.

areas and some were ranch sliders.[23] Mr Summers however said that there were 70 windows in residential areas. Mr Probett said that he had noted cracks at the corners of 13 windows and believed that sufficient testing had been done to conclude that a full reclad is required.

[49] However Dr Powell said that he would require testing at representative localities and a repeatable pattern of test results before he would place much weight on any results. He would place some reliance on a single observation if he was sure that the detail of each location was identical but would test 10-15% of the localities of interest. In the case of Clearwater Cove such a testing regime would have required a minimum of 7 windows to be tested on representative locations.

[50] We are not satisfied that the limited testing by the claimant and the results produced demonstrate that defects in window installation necessitate a full re-clad. The Primaxa and Beagle Timber Testing reports indentified only three timber samples from the windows and only one, DT13 in the Primaxa report, had any damage. In the opinion of Mr Summers and Mr Homes there is insufficient evidence to show any systemic window failure or to justify a re-clad.[24]

[51] The Trust (and therefore the claimant) submits that two aspects of the window construction are defective – the insufficient sealing of the jambs and the inadequate application of texture coating around the head flashings.[25] The claim is that the sealing was inadequate, not that there was no sealing. With regard to the installation of the head flashings, the third respondent and the claimants rely on Mr Earley's evidence.[26] However Mr Earley's opinion was that the 1995 Harditex manual was operative and he

[23] At 34.
[24] Transcript of hearing, 15 March 2011.
[25] Third Respondent's closing submissions, at [99].
[26] At [108].

maintained this view throughout the hearing. On this basis, he gave evidence that the windows had been inadequately sealed, there were gaps around the head flashing and the building paper lapped behind the head flashing rather than in front of it. He said that the combination of these defects and the exposure to wind combined to cause significant failure.[27]

[52] The report from the experts' conference identified inadequate sealing of joinery to the wall cladding as a defect in respect of some windows. Mr Summers stated[28] that all windows at Clearwater Cove are face-fixed whereas Mr Earley's opinion on how the windows should be sealed was based on the 1995 Harditex literature and referenced to recessed windows.[29] Mr Summers and Mr Homes were of the view that inadequate sealing on some windows could not be extrapolated to all windows without more extensive investigation. In Mr Summers' opinion there was no evidence that the defect in the textured fibre cement cladding around the head flashing was a systemic defect.[30]

[53] We conclude that there is no evidence that any failure to apply adequate sealant around the windows has caused systemic damage. Damage caused by defective window installation was proved in only one out of the three windows tested, in Unit 11.

The pergola on Unit 8J

[54] The experts agreed that there was inadequate weatherproofing between the flat-topped balustrade and the cedar pergola posts that penetrate the balustrade on Unit 8J. Mr Probett said that the pergola required a very effective sealant and Mr Homes

[27] Transcript of hearing, at 33.
[28] Brief of evidence of Neil Summers, 16 August 2010, at [141].
[29] Brief of evidence of Mathew Earley, 26 February 2010, at 54.
[30] Brief of evidence of Neil Summers, 16 August 2010, at [145].

unchallenged evidence was that the pergola had not been painted since it was installed.

[55] The pergola is not on the plans submitted for building consent however because the paint and texture on the balustrade and pergola were of the same age Mr Probett concluded that the pergola was installed at the time of construction.[31] Mr Probett and Mr Earley agreed that the balustrade could not be repaired in isolation and that the main wall would also need to be repaired. In Mr Summers' view about a metre either side of the balustrade would need to be repaired.

[56] Mr Summers said that the Building Code required that the installation of the pergola should not cause leaks. There is no evidence of how the decision to install the pergola was made but it must have been with the knowledge and approval of the Trust, as developer. There is no evidence to suggest that there was any formal variation to the plans or the contract between the Trust and Fletcher's in respect of the pergola. Based on the evidence of Mr Probett we conclude that it was likely to have been constructed by Fletcher's. Fletcher's, the Trust and the Council had an obligation to ensure that any variation from the consented plans met the requirements of the Building Code and therefore are potentially liable for the damage resulting from this defect.

Roof Flashing / Cladding Intersection

[57] The experts concluded that there was some damage to Units 6 and 11 as a result of failure to install a kick-out at the end of the apron flashing at the junction between the roof and the wing wall of the decks on these units.

[31] Transcript of hearing, at 102.

[58] The Holmes report on the condition of the partially completed structure recorded that most of the roof cladding was in place and appeared to be in good condition but that not all of the roof flashings were installed. The report noted that the lack of flashing, especially at the roof, was allowing water to ingress into the body of the building. Mr Earley concluded that, at the time of the Holmes report, some cladding was installed and some flashings were not because the report referred to water entering the body of the building.[32]

[59] Mr Earley was not qualified to comment on what was required at the time in terms of flashing installation. Mr Summers' view was that until 1 April 2005 it was not mandatory to install kick-out flashings and that the method of finishing apron flashings evident in Mr Earley's photographs was trade practice.[33] In the opinion of Mr Homes and Mr Summers there was not sufficient testing to conclude that this defect was systemic and necessitated a full re-clad.

[60] We conclude that some of the flashings were installed prior to the purchase of the partially completed structure by the Trust. However we have no evidence on which we could reasonably conclude that those flashings which have been identified as causing water ingress to Units 6 and 11 were installed during the construction of Clearwater Cove. Therefore, even if we accepted that this defect was systemic and affected all units in this claim, we have no basis for assessing the contribution of any of the respondents to the resulting damage.

[61] The claim for damage arising from defective installation of the flashing to cladding junction therefore fails.

[32] At 110.
[33] At 101.

Summary of defects

[62] The claimant has proved that the following defects caused weathertightness issues:

a) The incompatible expansion rates between the timber framing and the Harditex cladding;
b) The lack of ground clearance between the cladding and the decks and the internal and external levels on Units 6, 7, 12, 13, 14 and 15.
c) The lack of ground clearance at the garages described as auxiliary units 14, 15 and 17 belonging to Units 3C, 11M and 2B respectively.
d) Defective window installation in Unit 11M.
e) The installation of the pergola on Unit 8J.

[63] We note that in closing the claimant submitted that the evidence of Fletcher's expert, Mr Homes, ought to be declared inadmissible or given little weight because Mr Homes was not suitably qualified as a building expert. As the claimant did not challenge Mr Homes' evidence prior to hearing his evidence cannot be challenged in closing. We record, however, that on the basis of Mr Homes' qualifications and experience we accept that he is appropriately qualified to give evidence as an expert on those matters addressed in his briefs.

AFFIRMATIVE DEFENCES

Limitation

[64] The Council and Fletchers have raised limitation as an affirmative defence. Section 91 of the Building Act 1991 provides that:

> **91 Limitation defences**
>
> (1) Except to the extent provided in subsection (2) of this section, the provisions of the Limitation Act 1950 apply to civil

proceedings against any person where those proceedings arise from—

(a) **[**Any building work associated with the design,**]** construction, alteration, demolition, or removal of any building; or

(b) The exercise of any function under this Act or any previous enactment relating to the construction, alteration, demolition, or removal of that building.

(2) Civil proceedings **[**relating to any building work**]** may not be brought against any person 10 years or more after the date of the act or omission on which the proceedings are based.

(3) For the purposes of subsection (2) of this section if—

(a) Civil proceedings are brought against a territorial authority, a building certifier, or the Authority; and

(b) The proceedings arise out of the issue of a building consent, a building certificate, a code compliance certificate, or an Authority determination—

the date of the act or omission is the date of issue of the consent or certificate or determination.

[65] There is no material difference for the purpose of this claim between this provision and Section 393(2) of the Building Act 2004.

[66] The filing of an application for a WHRS assessor's report with the Department of Building and Housing marks the date on which the proceedings were issued in respect of each unit.[34] The ten year limitation period is therefore calculated from the following dates in respect of each unit:

Date	**Units**
7 February 2006	3C, 6H, 7I, 8J, 11M, 12N, 13O, 14P and 15Q
8 February 2006	1A, 5E
27 February 2006	2B

[34] *Kells* v *Auckland City Council* HC Auckland, CIV-2008-404-1812, 30 May 2008.

[67] In order to determine if any claims are time barred it is necessary to identify the acts or omissions on which the claimant relies and determine whether the act or omission is causative of the claimant's loss. The issues that need to be addressed are:

a) What is the relevant act or omission in respect of the respondent on which these proceedings are based?
b) On what date did the act or omission occur?
c) Is that date outside the limitation period?

The Council

[68] Any liability by the Council potentially arises from:

a) the final inspection on 7 February 1996 of units 1A, 2B, 3C and 5E and garages (auxiliary units) 14,15 and 17;
b) the re-inspection on 5 March 1996; and
c) the inspection and the issuing of the interim Code Compliance Certificate on 2 April 1996.

[69] The Council accepts that the events on 5 March and 2 April 1996 are within time but argues that neither the inspections on those dates nor the issuing of the ICCC are causative of the claimant's loss. Further it submits that these events cannot serve to recapture the earlier actions of the Council and therefore, unless the Council is found to owe a continuing duty of care, the claims against it must be time-barred.

[70] The claimant submitted that the Council was under a duty when conducting the inspections within time and issuing the ICCC to:[35]

> ...have identified and ensured remedy of any defective works. If any works had been covered over such that the Council could not have visually inspected them, there is an obligation on the Council

[35] Claimants' opening submissions, 28 February 2011, at [51].

> to request that the works be uncovered for inspection or demand a producer statement to be issued.

[71] However in closing Mr Orton stated that:[36]

> "...the claimant does not continue to rely on, as part of the claim, the cause of action of negligent inspection or negligent issue of the building consent.

[72] For the Trust, Mr Beresford accepted that the Council can only be held liable for any negligent acts or omissions after February 1996 but submitted that the Council could have identified all of the visible defects during the inspections which were within time.

[73] The claimant relies on *Campbell v Auckland City Council*[37] as authority for its proposition that the Council was obliged to consider its prior inspections during subsequent inspections and when issuing the ICCC. *Campbell* concerned an application by the Council for summary judgment on the grounds that the issuing of the building consent and the inspections were time-barred; that the concept of general or community reliance did not extend to certificates; and that there was no specific reliance by the plaintiffs who settled prior to the issue of the CCC.

[74] The plaintiffs in *Campbell* conceded that they could not pursue causes of action alleging negligent issue of the building consent or negligent inspection because these acts were time-barred.[38] However Christiansen A.J. concluded that, s393 of the Building Act 2004 expressly provides for acts or omissions relating to the issue of a CCC therefore the Council's submission that the issuing of the CCC was a formality must fail. His Honour concluded that certification gives certainty that a territorial authority's obligations throughout have been attended to and does more than simply

[36] At [53].
[37] *Campbell v Auckland City Council,* HC Auckland CIV 2009-404-01839 , 10 May 2010.
[38] At [8].

confirm that previous inspections have occurred.[39] His Honour concluded that there was an arguable case that the issuing of the CCC was negligent.

[75] In this case we therefore conclude that the issuing of the ICCC on 2 April 1996 brings the claim against the Council within time. In order to succeed, the claimant will need to prove either negligence in the conduct of the inspections that were conducted within time, on 5 March and 2 April 1996, or that the ICCC was negligently issued.

Was the Council negligent in carrying out the inspections on 5 March or 2 April 1996?

[76] The final inspections for the relevant building work for units 6-16 occurred on 21 January 1996 and the final inspections for units 1-5 and garages 1-4 on 7 February 1996. On 5 March 1996 the Council re-checked the earlier final inspections of 21 January 1996 and 7 February 1996.

[77] The Council inspectors in assessing compliance with the Code are required to exercise the standard of care expected of a reasonably prudent building inspector in the same circumstances. The Council was required to have in place an inspection regime that would have enabled it to determine on reasonable grounds that all relevant aspects of the Building Code had been complied with.[40] In determining whether there were reasonable grounds to issue the ICCC it is relevant to review what was known by Council inspectors at the time.[41]

[39] At [11].
[40] *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479 (Sunset Terraces) at [450], per Heath J.
[41] At [454].

[78] The Council called evidence on the purpose of the re-inspections and the standard of inspections from Quentin Dagger, a team leader in the Building Consent Services Division of the Council. Mr Dagger gave evidence on the background to the claim from the Council's perspective and the details relating to the Council's standard practices at the time of construction.

[79] Mr Dagger said that the purpose of the re-checks (on 5 March 1996 and 2 April 1996) was to address the issue raised at the earlier inspections in respect of units 1-5 that contained bedrooms that had no direct access to natural air. He said that the final inspection on 5 March 1996 required the Council officer to look only at the interior of the units concerned and that the other issues which were re-inspected were safety glass in unit 7, a handrail in unit 9 and ventilation of a bedroom in unit 3 and mechanical ventilation and insulation of units 6-16.[42] The relevant inspection notes have been produced.[43]

[80] Mr Dagger confirmed that he contacted the Council officers who completed relevant inspections and are still employed by the Council and that they have no particular recollection of events. Mr Dagger stated that other individuals who were involved in the issue of the consent, inspections and issue of the ICCC no longer work for Council, are elderly, or have no specific recollection of what took place. It is Mr Dagger's evidence that the number and type of inspections was typical of the number and type of inspections that Council would have carried out for similar developments, taking into account that this was not a new build.

[81] Mr Orton suggested that Mr Dagger's evidence is entirely hearsay because he was not the inspector who carried out the inspections.[44] Mr Orton further suggested that the best evidence

[42] Brief of evidence of Quentin Dagger, 18 August 2010, at [21].
[43] Agreed bundle of documents, Vol 5, 1328 to 1311.
[44] Claimants' closing submissions, at [85].

would be available from the actual inspectors and that the Council had chosen not to call those inspectors.

[82] We are satisfied that the Council made a reasonable attempt to locate the Council officers involved with this file. However, even if those officers had given evidence, it is 15 years since the Council processed this file. As a result, the written records of the building consent application and the inspections are likely to be more accurate than the oral evidence of a witness who is likely to have worked on hundreds of similar files. For these reasons we accept that Mr Dagger is appropriately qualified to comment on the scope of each inspection and what was required of the officer carrying out that inspection. We conclude that the re-inspections which occurred on 5 March 1996 and on 2 April 1996 would not have required a reasonably prudent building inspector to consider or investigate those aspects of the construction which caused weathertightness defects.

[83] Noel Flay also gave evidence for the Council. Mr Flay was a team leader and weathertightness technical advisor in the Environmental Services division of the Council. Mr Flay's qualifications and experience are set out in his brief filed 16 August 2010. Mr Flay gave evidence on whether the Council carried out a similar number and type of inspections in relation to Clearwater Cove as other territorial authorities at the time and whether, at the time of inspection, a Council officer would have detected the defects now complained of and, if so, what that officer would reasonably be expected to do.

[84] It was Mr Flay's evidence that a Council officer would not typically have detected the defects alleged by the claimants. Mr Flay said that it was impossible to implement a system of inspections that would allow the Council inspector to be on site for lengthy periods at particular times; that Council officers understood the contractors

would perform their work in a certain way; and that there was a lack of awareness of weathertightness defects at the time of these inspections. Mr Flay concluded that the Council officers acted in the manner in which he would have expected most Council officers in New Zealand to have done.

[85] On September 2010 Mr Earley replied to Mr Flay's brief and purported to give evidence in relation to Council practices when issuing a Code Compliance Certificate. However that part of Mr Earley's evidence was ruled inadmissible. In closing, Mr Orton suggested that Mr Flay's evidence should be ruled inadmissible because he was not qualified to give evidence on Council practices during the period from 1995 to 1996 as he did not work for a council until November 1996. Mr Flay's witness statement was filed on 16 August 2010 and there was no challenge to its submission prior to the commencement of the hearing. The claimant therefore cannot challenge in closing the admissibility of Mr Flay's evidence.[45] As a result, the only evidence on the standard of the Council inspections and issuing of the ICCC is from the Council. We therefore accept the evidence of Mr Flay and Mr Dagger and their conclusions that the inspections carried out at Clearwater Cove by the Council and the issuing of the ICCC were done to the required standard.

Was the Council negligent such that it breached its duty of care when issuing the ICCC?

[86] We do not accept that each time the Council carries out an inspection, or re-inspection, the Council officer is required to review or reconsider the conclusions that were reached in earlier inspections, or the basis on which the building consent was issued, unless there are particular circumstances which require such consideration, for example failed prior inspections or an amendment to the plans. However, if at any inspection a defect is so obvious that

[45] At [54].

it should have been detected by a reasonably prudent council officer, then any failure to require such a defect to be remedied may attract liability for that defect. It is on this basis that we consider whether the Council breached its duty of care to the claimants.

[87] We concluded that the Council had no liability for the cracking in the cladding. The defects for which the Council is potentially liable are therefore those caused by the lack of clearance between the cladding and the decks (Units 6H, 7I, 12N, 13O, 14P); the cladding to ground level (3 garages); and the installation of the pergola on Unit 8J.

[88] We are satisfied that the lack of clearance to the decks, the ground level and the pergola installation were visible at the time of the final inspections and should have been detected by a reasonable inspector, even when not related to the purpose of the inspection. For these reasons we conclude that the Council was negligent when carrying out these inspections and is liable for the cost of remedying these defects, bar any affirmative defence or contributory negligence by the claimant.

Is the claim against Fletcher's time-barred?

[89] Fletcher's acknowledges that the ten year long stop period in relation to a builder or head contractor is often set from the date of practical completion but submits that the Building Act clearly provides that the ten year long stop period is to be calculated from the date on which an act or omission occurs. Fletcher's submits that therefore this claim is time barred because the issue of the Sectional Practical Completion Certificate on 2 February 1996 marked the date by which all allegedly defective elements of the construction - the cladding, the windows and the decks - were constructed.

[90] Fletcher's further submits that it was not under a continuing duty to the end of the defects liability period, as suggested by the claimant. Fletcher's argues that a defects liability, or maintenance, period confers a right on an employer to call for a contractor to return to the site in order to carry out any repairs or make good any defects for a limited period after the employer has entered into possession. It is submitted that the contractor has no right to return of its own volition and therefore cannot owe a duty to the employer.

[91] The claimant argues that the defects list generated by Mr Aitken when he certified practical completion was a list of work yet to be carried out to finish the construction and that Fletcher's had an ongoing duty until this work was completed. The claimant therefore submits that Fletcher's duties to carry out the construction came to an end, at the earliest, on the issue of the Practical Completion Certificate on 21 March 1996 but that Fletcher's had an obligation to supervise the works and identify and rectify any construction defects or omissions through to 31 October 1996, the date on which the settlement between Fletcher's and the Trust was recorded.

What is the relevant date?

[92] The Court of Appeal in *Gedye v South*[46] held that the limitation period in relation to a claim for negligent building work must run from the date of the negligent act or omission on which the proceedings are based.

[93] The claimant submits that *Johnson v Watson*[47] is authority for the proposition that claims are not statute barred if they arise from work done within the limitation period that was intended to rectify work that occurred outside the limitation period. However in *Johnson v Watson* the Court was considering a situation where it was not possible to identify when the relevant act or omission took place and

[46] *Gedye v South* [2010] 3 NZLR 271 (CA).
[47] *Johnson v Watson* [2003] 1 NZLR 626 (CA).

in that situation the Court accepted that there may be an argument that, where original building work is faulty, the builder is under a continuing duty to remedy work until the date of completion.

[94] However, even if work has been performed within the ten year period, the claim is not within time unless any faulty work that caused the damage is within time. There must be a causative link between the act or omission which is within time and the damage on which the claim is based. Therefore, an omission within the ten year period to repair earlier faulty work does not provide a cause of action because it is not the omission which has caused the damage.

[95] We now consider whether any act or omission by Fletcher's related to the installation of the cladding, the construction of the decks or the pergola occurred within the limitation period.

When was the relevant work completed?

[96] The unit title plans were completed by McKay & Associates, registered surveyors. On 17 November 1995 Keith Knarston, the principal of McKays, wrote to the Waitakere City Council enclosing the unit title plans for Council approval. [48] Mr Knarston recorded that:

> All internal and external walls and roof, which form principal unit boundaries, are constructed. All external decks and stairways are also constructed. The foundations and walls of garages shown as AU1 to AU13 are constructed ... We can thus confirm that the building is at the stage where you can complete the certificates under Section 223 of the Resource Management Act and 5(1)(g) of the Unit Titles Act.

And further:

> Our client has not significantly added to the structure but has merely redeveloped the interior.

[48] Agreed bundle of documents, volume 5, document 1390 (b).

[97] In order for the unit title survey plan to be deposited with the Land Transfer Office and the Council to issue the section 224(c) certificate, the residential units must have been externally complete with the cladding and windows installed.

[98] We therefore find that the installation of the cladding and the construction of all relevant external elements of the decks were complete by 17 November 1995. This finding is supported by Mr Aitken's evidence[49] that the cladding was substantially in place when he first attended the building site in July 1995 and that the display apartment (12N) was fully built by September 1995.[50] In his opinion a display apartment could not be fitted out until the cladding was in place.

[99] We are not satisfied that the pergola on Unit 8J was constructed by November 1995. However, the sectional practical completion certificate issued on 2 February 1996 certified that all work associated with the interior fit out and finishes of ground floor units 1-5 and first floor units 6-16, including corridors and egress stairs and external garages, was complete. The attached remedial list prepared by Mr Aitken excluded only unrelated areas - the ground floor foyer, restaurant, kitchen, offices and exterior façade and decks. On the basis of this evidence, and the fact that the pergola was painted at the same time as the rest of the exterior, we conclude that the pergola was constructed at least by 2 February 1996

Was Fletcher's under an ongoing duty beyond 2 February 1996?

[100] The question of an ongoing duty was considered by the High Court in *Auckland Christian Mandarin Church Trust Board v Canam*

[49] Hearing 14 March 2011
[50] Remedial list at agreed bundle volume 5, document 137.

Construction (1955) Limited.[51] Priestley J concluded that Canam's contractual obligations came to an end on the date of practical completion, when the defects liability period began. The Court held that the provision of a defects liability period obliged Canam only to rectify any notified defective or incomplete work.[52]

[101] We conclude that Fletcher's had no obligation to identify or rectify any construction defects either beyond the issue of the Practical Completion Certificate or during the defects liability period unless requested to carry out any repairs by the Trust.

Did the defects list extend Fletcher's duty?

[102] The claimant submits that items on the defects list generated by Mr Aitken when he issued practical completion were required to finish the construction and therefore bring the claim within time. We considered whether the defect recorded by Mr Aitken as "joints and fixings to Harditex sheets are showing through textured finish" on the 26 February 1996 remedial list[53] constituted a defect in the cladding that would bring the claim within time. However Mr Aitken's evidence was that this was an aesthetic or cosmetic issue.[54] Mr Palmer also agreed under examination[55] that the appearance of the joints was cosmetic and insignificant as did Mr Ivil who described this defect as "cosmetic and not structural".[56] We conclude that any work by Fletcher's on the joints and fixings to the Harditex sheets was cosmetic and as such does not provide the basis of a claim that would be within the limitation period.

[51] *Auckland Christian Mandarin Church Trust Board v Canam Construction (1955) Limited* HC Auckland, CIV-2008-404-008526, 25 June 2010.
[52] At [52] per Priestley J.
[53] Agreed bundle of documents volume 5, document 1519.
[54] Hearing, 14 March 2011.
[55] Hearing 1 March 2011.
[56] Hearing 2 March 2011

[103] In evidence Mr Palmer confirmed that, as stated in his brief, apart from the walls in the hallways of the Clearwater Cove apartments, he had no other concerns with the construction.[57] He also agreed that the exterior issues to do with the external plaster finish and the visibility of the control joints were cosmetic issues.

[104] Although Mr Van Dijk said that he observed Fletcher's workmen on site, including plasterers, after February 1996, there is no evidence that any work causative of weathertightness defects was done after this time. Even if some plastering work was carried out within time, Dr Powell's evidence is that the plaster coating was of a satisfactory standard and there is no evidence that any plastering work caused weathertightness defects.

[105] In *Lee v North Shore City Council*[58] Associate Judge Bell rejected the suggestion that work which was not relevant to the building defects but required for the issue of the CCC could bring the claim within time.[59] Although it is arguable that an ongoing duty of care can be owed by a builder until practical completion is certified, we conclude that this duty does not continue beyond practical completion if the date on which the relevant acts or omissions occurred can be ascertained and any work that was not completed by this date is unrelated to the alleged defects.

[106] In summary, we are satisfied that no relevant act or omission by Fletcher's occurred within the limitation period for any of the units that form part of this claim. The claim against Fletcher's therefore fails.

[57] Hearing 26 February 2010.
[58] *Lee v North Shore City Council* HC Auckland CIV-2009-404-2091, 12 April 2010 at para [36] to [44].
[59] At para [41].

Accord & Satisfaction – the settlement between Fletcher's and the Livi Trust

[107] In the event that we are wrong in concluding that any claim against Fletcher's is limitation-barred, we have also considered the defence raised by Fletcher's that it reached a full and final settlement with the Trust in exchange for a significant discount of the final account from Fletcher's. Fletcher's argues that this settlement prevents any claim either by the Trust (for Units 5E, 7L or 8J) or by WHH (for Units 3C, 6H, 11M, 12M, 13O, 14P and 15Q).

[108] The claimant submits that, because the settlement meeting related solely to the Trust's claim that the finish in the hallways was unsatisfactory, the Trust did not abandon its rights to bring a future claim arising from latent defects. Mr Orton argues that because Fletcher's letter was not signed by the Trust and the settlement was not recorded in a deed, the letter only creates an inference as to what was agreed. Further it is submitted that, even if the settlement does bar any claim by the Trust, it does not affect the claims by WHH.

[109] We therefore consider whether this settlement excludes any claim for defects which neither party anticipated at the time they entered into the agreement.

The settlement

[110] Several letters from Fletcher's to Mr Ivil, and a file note, record the Trust's failure to pay accounts when due.[60] On 30 October 1996 Mr Aitken wrote to Fletcher's confirming that the remedial works were complete. Mr Aitken recorded the ongoing dispute between Fletcher's and Mr Ivil about the quality of the internal finish in the

[60] Letter from Roger Saville 17 May 1996 CBD: 1556A; File note of Roger Savill CBD: 1557; Letter from Roger Saville 19 August 1996 CBD: 1558A; Letter from Roger Saville September 1996 CBD: 1558B.

hallways of the residential apartment block. On the same day Mr Ivil, Mr Palmer, Mr Aitken, Mr Neven and Mr Saville met.

[111] On 31 October 1996 Mr Saville sent a letter to Mr Ivil recording the agreement reached. The letter confirmed that the following was agreed: [61]

1. Livi will pay Fletcher within 7 days of today, the sum of $80,000.00 inclusive of GST in full and final satisfaction of all of Fletcher's claims and charges on the above contract.
2. Fletcher will release all outstanding securities held by it upon receipt of the $80,000.00.
3. Livi will make no claim or charge against Fletcher in connection or arising out of the above contract.
4. The contract works have achieved final completion which, without limitation, includes the remedy of all defects such that the defects liability period has terminated with all associated works performed.

[112] The letter included Fletcher's invoice for the final contract sum ($2,731,667.11 plus GST) plus the agreed $80,000.00. Mr Ivil said that the letter was written in the context of the discussion on 30 October 1996 which was to resolve the remaining issues relating to the defects and finalise the contractual obligations of the parties.[62] The Trust paid the sum of $80,000 to Fletcher's and Mr Ivil confirmed that he did not respond or take issue with the 31 October 1996 letter at the time.[63] However Mr Palmer and Mr Ivil do not accept that the letter accurately recorded the agreement reached.

[113] Peter Neven was at the October 1996 meeting as an employee of Fletcher's. His evidence was that the settlement was full and final. He said that the meeting covered all issues and was

[61] Agreed bundle of documents, volume 5, document 1561.
[62] Brief of evidence of Brent Ivil, 28 February 2010, at [30].
[63] Hearing 2 March 2011.

not confined to the hallway finish.[64] He described the agreement reached at the meeting as:

> A complete wrap-up and in fact the monies due were discounted ... So in other words we considered that we had no liabilities from that point on and that's why that discount was given.

[114] Mr Neven further stated:

> You don't go and give away $40,000.00 for a defect or an alleged defect that might cost $5,000.00 to fix ... We wanted payment, Mr Ivil negotiated $80,000.00 and we said ok for that, that's it, we have no future liabilities in this contract whatsoever. It was a full and final settlement for all times.

[115] Mr Aitken, who was also at the meeting, stated: [65]

> There was agreement reached at that meeting too, for a full and final settlement of the contract amount and that covered everything in the contract ...The discussion that occurred at the meeting was a typical final account discussion that you get between a contractor and a client. And the contractor on the one hand obviously wants to have a full and final settlement to settle all outstanding matters with the client. And I could most probably summarise it that both parties walked away on that basis. That is, it was full and final.

Conclusion

[116] Accord and satisfaction is the purchase of a release from an obligation, whether arising under contract or tort, by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged. Satisfaction is the consideration which makes the agreement operative.[66] In return for waiving any possible claim it might have against Fletcher's, the Trust received a reduction of the

[64] Hearing 2 March 2011.
[65] Hearing 2 March 2011.
[66] *British Russian Gazette Limited v Associated Newspapers Limited* [1933] 2 KB 616, at 643-644

sum owed under the contract. In *Nixon v Richardson* Keane J held that where a claim is reserved the corollary is that any claim not reserved is abandoned.[67] The fact that parties were unaware of a particular claim does not exclude it from the scope of the release. The language used in this settlement letter was clear, unambiguous and unequivocal.

[117] For these reasons we conclude that the settlement prevents any further claims by the Trust against Fletcher's. Given the decision that follows that WHH purchased its units with knowledge of the defects, we are not required to determine whether the agreement between the Fletcher's and the Trust is binding on WHH.

Knowledge of Moisture Ingress Problems

Legal principles

[118] The Council and Fletcher's argue that the units owned by West Harbour Holdings Limited were purchased with knowledge of water ingress problems and that therefore any award to the claimant should be reduced significantly for contributory negligence. The Council further submits that the purchase by WHH broke any causative link between the actions of Council and the loss in respect of these units.

[119] In *Scandle v Far North District Council*[68] the High Court followed the two stage inquiry applied by the Court of Appeal in *Accident Compensation Corporation (ACC) v Ambros*[69] when determining the cause of loss from alleged negligence. The first step is a factual assessment to determine whether the loss would have arisen without the defendant's conduct and the second step considers causation in the legal sense. This inquiry requires an

[67] *Nixon v Richardson* HC Auckland, CIV-2010-404-001412, 1 September 2010, at [37].
[68] *Scandle v Far North District Council* HC Whangarei, CIV-2008-488-203, 30 July 2010.
[69] *Accident Compensation Corporation (ACC) v Ambros* [2007] NZCA 304, [2008] 1 NZLR 340.

assessment of the scope of liability for the conduct and an investigation into whether the conduct constituting a factual cause is a substantial and material cause of the loss. It is not enough that the conduct merely creates the opportunity for the loss to occur.[70] A cause which is substantial and material is one that has had a real influence on the occurrence of the loss or damage.[71]

The circumstances in which WHH purchased its units

[120] WHH owns seven of the units in this claim. The company has one director, Brent Ivil, and the shareholders is the Trust. The company was registered on 3 November 2003 and purchased its units in the following chronological order:

Unit	Agreement for sale and purchase	Agreement unconditional	Registration of transfer
6H	10.10.03	10.10.03	16.2.04
11M	11.11.03	19.12.03	18.5.04
13O	11.11.03	19.12.03	18.5.04
14P	11.11.03	19.12.03	18.5.04
15Q	11.11.03	19.12.03	18.5.04
3C	7.2.04	Unknown	18.3.04
12N	28.9.04	28.9.04	9.11.05

[121] On 29 November 2002 the body corporate secretary, Body Corporate Administration Limited ("BCA"), obtained a valuation of Clearwater Cove for insurance purposes from Sheldon's.[72] On 10 July 2003 BCA wrote to the unit owners enclosing the agenda for the AGM on 4 August 2003 and the front page of the Sheldon's valuation with the following notation:[73]

> Monolithic cladding (plastered fibre cement) showing signs of distress. Obvious cracks and in some cases separation. **Warning**

[70] *Scandle v Far North District Council,* at [37]-[40].
[71] *Johnson v Watson* [2003] 1 NZLR 626.
[72] In closing Mr Orton said that BCA may not have been the properly constituted body corporate secretary however this matter was not raised during the hearing.
[73] Agreed bundle of documents, volume 5, document 1565A.

> classic telltale signs of leaking building syndrome. See attached photos.[74]

[122] The minutes of this AGM record that all owners were represented, either in person or by proxy, and that there was discussion concerning cracks and leaks around the windows and flashings. The meeting agreed to instruct an expert, "such as Samson" as funding allowed.[75] There is no evidence that this occurred.

Unit 6H

[123] The owner of Unit 6H, Strathmore Park Property Investments Limited (Clive Raharuhi), was represented at the AGM by Mark Goodhew and raised the issue of flashing and windows as maintenance items. On 10 October 2003, two months after the AGM, 'Neville Suckling or nominee' agreed unconditionally to purchase this unit for $380,000. The purchase was settled by WHH on 16 December 2003 and registered the transfer on 16 February 2004. Prior to settlement, on 19 November 2003 a s36 certificate was sent to the purchaser's lawyer which stated: "Disclosure: please refer to the minutes of annual general meeting held on 4 August 2003".

Units 11, 13, 14 and 15

[124] The vendors of units 11M, 13O, 14P and 15Q were absentee owners living overseas. Their property manager, Christine Young of Bayleys Real Estate, attended the AGM with their proxy. The minutes record that Ms Young pointed out that there were quite a few leaks on the property and said that she believed they were coming from underneath the windows.[76] On 11 November 2003 West Harbour Holdings agreed to purchase these units conditional on

[74] Document 1562.
[75] Document 1566.
[76] Agreed bundle of documents, volume 6, document 1568.

finance. The agreement went unconditional on 28 November 2003 and settled on 7 May 2004.[77]

Unit 3

[125] Paula Beaton of BCA chaired the AGM and also held a proxy for the Cheah Family Trust as owner of Unit 3C. This owner therefore must have been aware of the water ingress issues.

[126] 'Neville Suckling or nominee' entered into an undated agreement to purchase this unit for $280,000 conditional on finance by 31 October 2003.[78] As there is nothing to suggest that the agreement was signed before the AGM we conclude that it was signed afterwards. On 3 March 2004 Graeme Atmore, lawyer, sent the following email to Mr Ivil:[79]

> Brent – Suckling has signed an agreement with Nic Van Dyk (sic) for $380K, National Bank will send us loan docs for Nic tomorrow. We will act for both parties. We need to get signed letter from Suckling authorising us to settle with Van Dyk for $100,000 less than the purchase price – Suckling and Van Dyk will make their own arrangements re the remaining debt.

[127] Unit 3C was subsequently transferred to Mr van Dijk for $380,000 on 12 July 2005 and transferred to WHH on the same date for $280,000.[80]

Unit 12N

[128] WHH unconditionally agreed to purchase this unit on 28 September 2004 for $345,000.

[77] Brief of Evidence of Brent Ivil, 28 February 2010.
[78] Agreed bundle of documents, volume 6, document 1676.
[79] Agreed bundle of documents, volume 6, document 1653.
[80] Agreed bundle of documents, volume 6, document 1753.

Valuation evidence

[129] Michael Gamby gave valuation evidence for the Council, the only party to call expert valuation evidence. Kenneth Gill gave evidence for the claimant on the price paid by WHH for Units 11M, 13O, 14P and 15Q however he is not qualified as an expert in the area of valuation. Mr Gill was a real estate agent at Bayley's, the agency acting for the vendors, at the time of the sale. His evidence was that the vendors' financial position had deteriorated as a result of what he called the 'Asian Financial/Credit Crisis'. No evidence was adduced in support of Mr Gill's opinion on the economy at the time however Mr Gamby gave evidence that there was no Asian crisis in November 2003 and that, in fact, there was a 7½ % increase in the GDP in the Chinese market.[81]

[130] Mr Gamby's evidence is that at the date of sale:

a) Unit 6 was worth $500,000 free of building defects and $437,500 subject to defects. The sale for $380,000 in 2003 was therefore some 24% below the unaffected market value.

b) Units 11M, 13O, 14P and 15Q were worth $1,680,000 free of defects and $1,477,000 with defects. The sale price of $1,070,000 was 36% below the unaffected market value and Mr Gamby concluded that these units were purchased effectively for their land value which was $1,100,000.[82]

c) Unit 3C was worth $480,000 unaffected by defects and $408,000 with defects. The actual sale price of $280,000 was some 41.7% below valuation.

[81] Hearing, 4 March 2011, at 4.05p.m.
[82] At 4.15p.m.

d) Unit 12N was worth $490,000 free of defects and with defects $428,750. The sale price of $345,000 was therefore some 29.6% below the unaffected market value.

What knowledge did the director and shareholders of WHH have of weathertightness issues prior to purchase?

[131] In his brief Mr Ivil said that Units 11M, 13O, 14P and 15Q had been on the market for some time and that the purchase price was not reduced on the basis that the units leaked.[83] However in evidence Mr Ivil stated that the bank required valuations in order to approve finance for the purchase of units 11, 13, 14 and 15.[84] Mr Ivil then said that he telephoned Sheldon's and one of its valuers told him that one of his colleagues had said that Clearwater Cove was "a classic leaky building, that is, Harditex." Mr Ivil did not give this evidence in his briefs, affidavits or replies to interrogatories even though his knowledge at the time of these purchases was an issue raised by the strike out applications. However, on the basis of his oral evidence we conclude that he must have received valuations, either written or oral, which identified potential water ingress issues in these units prior to purchase.

The AGM

[132] Mr Orton argues that there was no evidence that the Sheldon letter and valuation was received by Mr Ivil and that the focus at the August 2003 AGM was a dispute over levies and change of the Body Corporate Secretary. However, the Trust must have had knowledge of the Sheldon's valuation as the letter sent to Mr and Mrs Palmer, as owners of Unit 1A, has been produced. On it there is a note which Mr Palmer says he wrote: "David, copies for you. Regards, Norm". "David" referred to David Smyth, the lawyer instructed by Mr Ivil and the Trust to attend the AGM on behalf of the Trust. Not only did Mr

[83] Brief of evidence of Brent Ivil, 28 February 2010.
[84] Hearing on 1 March 2011.

Smyth receive the valuation but Mr Palmer must have seen this notice when he forwarded it to Mr Smyth. Therefore Mr Palmer as trustee, and subsequently as shareholder of WHH, knew about the valuation.

[133] Mr Ivil's evidence is that no one reported back to him after this AGM.[85] However the claimant did not call any evidence from Mr Smyth or Daniel Ivil who did attend the AGM and could have given supporting evidence.

Section 36 certificates

[134] Although the trustee shareholders, Mr Palmer and Mr Van Dijk, and Mr Ivil did not attend the AGM we consider that the section 36 certificate and disclosure issued was sufficient to warn a reasonably prudent purchaser to investigate further. WHH cannot rely on any failure by its lawyer to bring this notice to the attention of its director or shareholders as the fault of a solicitor who fails to make appropriate enquiries may be attributed to the client.[86] In addition, Mr van Dijk accepted that because his wife attended the AGM as the owner of Unit 12M he must have received a copy of the AGM agenda with the attached cover of the Sheldon's valuation.[87]

Knowledge of the time

[135] On 10 February 2004 Mr Palmer wrote on behalf of the Trust to Fletcher's stating that the Trust had received advice from a valuer that there were signs of leaky building syndrome.[88] Mr Ivil stated that the Sheldon's comments prompted him to talk to Mr Palmer about contacting Fletcher's.[89] However at the hearing when Mr Ivil was

[85] Hearing on 1 March 2011.
[86] *North Shore City Council v Body Corporate 189855* [2010] NZLR 486 (CA).
[87] Hearing on 3 March 2011.
[88] Agreed bundle of documents, volume 6, document 1588.
[89] Hearing on 1 March 2011.

questioned about the way in which this letter to Fletcher's was written he said that: [90]

> At that period of time there was quite a lot of publicity over Harditex... there was a lot of publicity about Harditex and leaky buildings and all that sort of stuff. People would walk in and they would go to the club house, into the restaurant – bar and oh Harditex, this is a leaky building. It wasn't once, it was twice, it was and West Harbour was full of Harditex places and it was, and then when a valuer said hey, it is harditex, it will be a leaky building, then that is when I wanted the assurances. If it is a classic leaky looking, being Harditex, I had better get it checked out and put things to rest... it was common knowledge Harditex, there were big problems with it. It was all over the newspapers simple as that. People were talking about it in the building.

[136] Mr Ivil stated that it was these "people talking" that caused him to make contact with Fletcher's and then talk to Mr Palmer. Mr Ivil denied that it was the Sheldon's valuation provided to the Body Corporate. However it was Mr Palmer's evidence that Mr Ivil gave him the information necessary, including the insurance valuation, to write the letter to Fletcher's.[91] Mr Palmer said that Mr Ivil discussed his concerns that the units were a leaky building and told him that he had phoned Fletcher's on numerous occasions but got no response.

Conclusion on knowledge

[137] There were several discrepancies between the evidence of Mr Palmer and Mr Ivil, in particular about when they became aware of the Sheldon's valuation, whether they got notice of the AGM, when Mr Ivil became aware of weathertightness defects and the circumstances under which the letter was written to Fletcher's. Mr Palmer and Mr Ivil said that they had not seen the Sheldon's valuation when the letter to Fletcher's was sent however the wording of that letter so closely matches the Sheldon's valuation that we do not accept their evidence. We therefore conclude that either Mr

[90] Hearing on 2 March 2011.
[91] Hearing on 28 February 2011.

Palmer or Mr Ivil or both had seen the valuation before the letter was written.

[138] We are satisfied that the notice of the AGM with the extract from the Sheldon's valuation, the minutes of the AGM and the s36 certificates were all received by either Mr Ivil as director of WHH or Mr Palmer and/or Mr Van Dijk as trustee shareholders.

[139] The strongest evidence however that the WHH director and shareholders knew that at the time of purchase the units were likely to have weathertightness defects is the evidence of Mr Gamby. No other satisfactory explanation has been given for the significant price reductions which brought the purchase price close to the value of the land alone.

[140] In *Byron Avenue* Venning J was of the view that by 2003, there had been a good deal of publicity about leaky buildings. Even though an owner had no actual knowledge of weathertightness issues in the unit he purchased, His Honour concluded that there was contributory negligence as a result of failing to get a LIM or make further inquiries when he was aware that the unit had no Code Compliance Certificate and there were outstanding levies for repairs.

[141] Given the circumstances in which WHH purchased its seven units, we conclude that the purchase was the substantial and material cause of any loss claimed by WHH. The decision by WHH amounted to more than contributory negligence and served to break the chain of causation between any act or omission by the respondents and the claimant's loss.

LIABILITY FOR THE CLAIMANT'S LOSS

The liability of the Council

[142] The Council does not owe a duty of care to the Trust because it was the developer.[92] The Council therefore has no liability for the damage caused to Units 7I or Unit 8J which have always been owned by the Trust.

[143] For the reasons given, the Council has no liability for the damage to the seven units owned by WHH. No damage has been proved to Unit 1A owned by the Palmer Family Property Trust.

[144] The only damage for which the Council is liable is therefore that caused by the lack of clearance around the garage belonging to Unit 2B, owned by Petil Holdings Limited.

The liability of the Trust

[145] As developer the Trust owes a non-delegable duty of care to the claimant.[93] The Trust is therefore jointly and severally liable with the Council for the damage and loss proven to Unit 2B.

[146] Although damage has been proved to Units 7I and 8J we have made no order in respect of this loss as the only liable party, the Trust, is also the owner.

The claim by the Council for contribution from Mr Aitken

[147] The claimant withdrew its claim against Mr Aitken during the hearing however the Council continued its cross-claim and argued that if it is found to have any liability Mr Aitken must also be liable for failing to identify any defective work.

[92] *Mt Albert Borough Council v Johnson*
[93] *Mt Albert Borough Council v Johnson*

[148] Thomas Dixon gave expert evidence on the role of a certifying architect and it was his opinion that the Practical Completion Certificate was not a certification of quality and did not certify that the building was defect free. The only opposing evidence was in Mr Summers' brief, however, in evidence Mr Summers said that he resiled from that evidence if Mr Aitken had no supervising role.[94] We are satisfied therefore that there was no negligence by Mr Aitken, as the certifying architect.

[149] Further, the only unit owner with a successful claim is Petil Holdings Limited which settled after sectional practical completion. This claim succeeded only in respect of the cladding to ground levels around the garage. The cladding was installed prior to Mr Aitken's appointment and the ground levels were not the subject of his inspection. For these reasons we find that Mr Aitken has no liability to the Council for contribution.

Quantum

[150] On the basis of the schedule prepared and agreed by the experts on quantum, the cost of repairing the damage proved to the garage of Unit 2B is $12,650 plus GST, a total of $14,547.50.

General damages

[151] In the amended statement of claim, the claimant sought general damages of $10,000 per unit ($120,000). However no evidence was adduced by any owner to support this claim nor did counsel make any submissions on damages. As we have no evidence of any distress or inconvenience to the owner of Unit 2B, the claim for general damages fails.

[94] Hearing on 15 March 2011 at 4.13p.m.

What contribution should each of the liable parties pay?

[152] Section 72(2) of the Weathertight Homes Resolution Services Act 2006 provides that the Tribunal can determine any liability of any respondent to any other respondent and remedies in relation to any liability determined. In addition, section 90(1) enables the Tribunal to make any order that a Court of competent jurisdiction could make in relation to a claim in accordance with the law.

[153] Under section 17 of the Law Reform Act 1936 any tortfeasor is entitled to claim a contribution from any other tortfeasor in respect of the amount to which it would otherwise be liable.

[154] The basis of recovery of contribution provided for in section 17(1)(c) is as follows:

> Where damage is suffered by any person as a result of a tort… any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is … liable in respect of the same damage, whether as a joint tortfeasor or otherwise…

[155] Section 17(2) of the Law Reform Act 1936 sets out the approach to be taken. It provides that the contribution recoverable shall be what is fair taking into account the relevant responsibilities of the parties for the damage.

[156] We conclude that the liability of the Council is 20% and the liability of the Livi Trust is 80%.

[157] If each party meets its obligation under this determination, this will result in the following payments being made to the claimant by the liable respondents to this claim:

The Council	$2,909.50
The Livi Trust	$11,638.00
Total	**$14,547.50**

ORDERS

[158] The Auckland Council and Nicholas Van Dijk and Norman Palmer as the trustees of the Livi Trust are jointly and severally liable to pay Body Corporate No: 170989 for the benefit of Petil Holdings Limited the sum of $14,547.50 immediately.

DATED this 18th day of August 2011

_____	_____
K D Kilgour	S Pezaro
Tribunal Member	Tribunal Member

RELEVANT CHRONOLOGY

2 February 1996	Sectional practical completion
7 February 1996	Council inspected units 1 to 5 and garages 1 to 4
21 March 1996	Practical completion certificate
5 March 1996	Council re-checked issues identified at its earlier inspections
2 April 1996	Further recheck by Council to of issues identified at inspections on 21 January 1996 and 7 February 1996.
2 April 1996	Interim Code Compliance Certificate issued.
31 October 1996	Letter of settlement from Fletcher's to the Livi Trust
29 November 2002	Sheldon's report issued to Body Corporate Administration Limited (BCA)
10 July 2003	BCA issues AGM agenda with Sheldon report
3 August 2003	AGM
10 February 2004	Letter from Livi Trust to Fletchers advising of valuer's advice that signs of leaky building syndrome
7 February 2006	WHH application filed in WHRS