IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2021-100-002
[2023] NZWHT AUCKLAND 01

BETWEEN	**HELEN BERNADETTE O'SULLIVAN, FIONA CHERIE WHITE & ANDREW RODGER WILTON as trustees of the WILTON FAMILY TRUST** Claimants
AND	**DEANE FLUIT BUILDER LTD** First Respondent
AND	**TAB DESIGN LTD (Removed)** Second Respondent
AND	**TILING SOLUTIONS WANAKA LTD** Third Respondent
AND	**QUEENSTOWN LAKES DISTRICT COUNCIL** Fourth Respondent
AND	**HEMPEL (WATTYL) NEW ZEALAND LTD formally called VALSPAR PAINT (NZ) Ltd** Fifth Respondent
AND	**WILTON JOUBERT LTD** Sixth Respondent

Hearing: 22–26 May 2023

Closing submissions:

Claimants 21 June 2023

Fourth respondent's cross claim closings 28 June 2023

Respondents' closings and respondents with cross claims 5 July 2023

Sixth respondent's closings responding to fourth respondent's cross claim 10 July 2023

Claimants' and respondents' reply to cross claims 20 July 2023

Appearances:

Juliet Eckford and Michael Parker for the claimants

Richard Johnstone for the first respondent

Kristy Rusher for the third respondent

Rebecca Saunders and Abigail Collin for the fourth respondent

Amy Davison for the fifth respondent

Don MacRae for the sixth respondent

Decision: 26 October 2023

FINAL DETERMINATION

Adjudicator K D Kilgour

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Introduction

[1] The building constructed during 2010 at 65 Forest Heights, Peninsula Bay, Wanaka is an impressive standalone home comprising two stories. The claimants, Fiona White, Andrew Wilton and Helen O'Sullivan own the home. They are trustees of the Wilton Family Trust. Mr Wilton and Ms White reside in the home with their children.

[2] The home is constructed of a concrete panel substrate with an Exterior Insulation Finish System (EIFS) cladding comprising polystyrene sheets and a plaster render overlay on 3 elevations. With the exception of the western parapet, the home was designed with no cavities. The cladding and concrete structure essentially provides the insulation.

[3] There is no disagreement that the home leaks. It is situated in a high wind zone. The liability experts agree that a reclad of the EIFS cladded elevations is necessary to repair the water ingress damage and ensure the home becomes weathertight

[4] Ms White and Ms O'Sullivan, late in proceedings, informed the Tribunal that as trustees and claimants, they were fully aware of and supported the claim. All evidence from the claimants has been provided solely by Mr Wilton. This sole source of claimants' evidence will impact on the consequential costs claim.

[5] The home was designed by registered architect, Tony Bennett, of TAB Design Ltd and by Mr Wilton himself, as a structural engineer and director of Wilton Joubert Ltd, the sixth respondent. The design work, plans and specifications were undertaken in 2009. The architect, as agent for the claimants, made application for building consent which was granted on 28 January 2010. The built date has been determined as 2 September 2011.

[6] Cracking to the exterior plaster and paint finishes was first noted on the north exterior wall in 2012,[1] and again in 2013 "small cracks in the paintwork" were observed.[2]

[7] The EIFS cladding system proposed in the consented plans was Rockcote. This cladding system was substituted to a Wattyl Granosite Nu-Therm EIFS system. The change was made without informing the local

[1] Andrew Wilton's Brief of Evidence ("BoE") (17 February 2023) at [13].
[2] Andrew Wilton's BoE at [14].

authority. Both cladding systems were BRANZ approved and utilised comparable fixing methods.

[8] The cracking to the EIFS cladding was due to moisture ingress and resulted in repairs to the home being undertaken during April and May 2019 but failed to solve the problem. The claimants filed their claim with the Ministry of Business, Innovation and Employment (MBIE) on 1 May 2020 and with the Weathertight Homes Tribunal on 12 March 2021.

[9] Following numerous interlocutory matters, the parties to the claim proceeded to a mediation in November 2022. Mediation failed to settle the claim. The mediation process was not helped by the fifth respondent's failure to attend, a decision it did not communicate to the Tribunal or the parties until just before the scheduled start time for mediation.

[10] The claimants have advanced claims against:

(a) Deane Fluit Builder Ltd (Deane Fluit Builder), the builder;

(b) Tiling Solutions Wanaka Ltd (Tiling Solutions), which installed the EIFS cladding;

(c) Queenstown Lakes District Council (the Council), which granted building consent, inspected construction and issued the code compliance certificate; and

(d) Hempel (Wattyl) New Zealand Ltd (Wattyl), which supplied and warranted the EIFS cladding.

[11] Deane Fluit Builder advances cross claims against Tiling Solutions and Wattyl. It no longer pursues its cross claim against the Council. Tiling Solutions advances cross claims against Deane Fluit Builder, Wattyl and Wilton Joubert Ltd (Wilton Joubert). The Council advances cross claims against Deane Fluit Builder, Tiling Solutions, Wattyl and Wilton Joubert. Wattyl advances cross claims against Deane Fluit Builder, Tiling Solutions, the Council and Wilton Joubert.

[12] Section 72 of the Act states:

> **72 Matters tribunal may determine in adjudicating claim**
>
> (1) In relation to any claim in respect of which an application has been made to the tribunal to have it adjudicated, the tribunal can determine—

> (a) any liability to the claimant of any of the parties; and
>
> (b) any remedies in relation to any liability determined.
>
> (2) In relation to any liability determined, the tribunal can also determine—
>
> (a) any liability of any respondent to any other respondent; and
>
> (b) remedies in relation to any liability determined.

In *Minister of Education v Warren and Mahoney Architects Ltd*,[3] Bell AJ said:[4]

> ... All those facing claims under [the WHRS] act are respondents, whether they are cited by the claimants at the outset or added later under s 111 on the application of other respondents. All respondents, including those joined by other respondents, may be held liable to the claimants and accordingly all have solidary liability. In *Body Corporate 85978 v Wellington City Council* the court said:
>
> > Certainly conceptually, the joinder of further claimants increases the size of the claims, whereas joinder of additional respondents introduces the prospect of spreading the same extent of liability between a greater number of liable parties.

[13] The Associate Judge did not cite s 72 of the Act, but presumably had s 72(1)(a) in mind, giving the Tribunal the power to determine any liability to a claimant of "any of the parties". In respect of any such liability, the Tribunal may then determine the liability of "any respondent to any other respondent".

[14] The claims went to a five-day hearing in Queenstown from 22 to 26 May 2023.

[15] The causation and liability questions are complicated by the intervention of the ineffective repairs undertaken in 2019.

[16] The claimants have not remediated their home. The claims proceed on proposed remedial solutions and costing estimates.

Material facts and background to hearing

[17] I now will address the background to the claim, making factual findings where appropriate, as many of the facts are material to determining the homeowners' claims.

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[3] *Minister of Education v Warren and Mahoney Architects Ltd* [2015] NZHC 2724.
[4] At [60].

[18] This is a residential building project that has failed. By the time of the hearing, Mr Wilton had lost his friendship and confidence with Deane Fluit and Tony Bennett.[5] At [45] of Mr Fluit's brief of evidence he explains that following service of this claim he engaged experts to develop what he described as a workable remedial solution. In late 2022 he approached Mr Wilton with the reclad proposal. Mr Wilton rejected that solution as he was not prepared to allow the first respondent on site to carry out the repair work.

[19] Mr Wilton is a director and experienced structural engineer at Wilton Joubert Ltd, the sixth respondent. Mr Wilton operated from Auckland through to June 2010. Mr Fluit explained that he and Mr Wilton worked on a building project at Mt Aspiring Road in Wanaka and that established their relationship. He said that he suggested Mr Wilton bring his structural engineering business south to central Otago as there were very few structural engineers operating in the Wanaka/Queenstown region. Following that project, they kept in touch and Mr Wilton moved part of his business to Wanaka in June 2010.

[20] Mr Wilton's evidence is that the sixth respondent is a firm of residential consulting engineers. The supply of structural design seldom warranted onsite work. Only if there was a local authority requirement to provide what is called a Producer Statement 4 (PS4) would Mr Wilton and his business be required to attend the building site prior to and during construction.[6]

[21] The claimants purchased the land at 65 Forest Heights, Wanaka in December 2008.

[22] Mr Wilton and Mr Fluit had for some time been discussing the build of the claimants' home. Mr Wilton had discussed concept drawings for the home with Tony Bennet at TAB Design.

[23] Deane Fluit Builder Ltd was engaged by the claimants in late 2009 under a casual, non-specific oral agreement to build a new dwelling for them at the building site both were now familiar with in Peninsula Bay in Wanaka. The evidence illustrated that both Mr Wilton and Mr Fluit never clearly addressed between themselves their respective building roles and obligations for a well-managed construction. And this is more extraordinary given that both were experienced building practitioners.

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[5] Andrew Wilton's BoE at [26] and [27].
[6] Notes of Evidence ("NoE"), pp 17 and 18.

[24] Mr Fluit's evidence is that the discussions occurred over a series of meetings and phone calls during 2009.[7] The informal verbal agreement although friendly, impacted on what was expected by both. The evidence of both indicated that neither was clearly aware of, or in any way over the expected role each party was obligated to undertake. Additionally, Mr Wilton's evidence suggests he never conferred with Mr Bennet after January 2010. Mr Wilton said, with no supporting evidence, that he expected Mr Fluit to "project manage" the build. Mr Fluit understood his role was to build the home and engage the contractors, including the block layer, but not to project manage. That was Mr Wilton's role.

[25] The home was designed by Tony Bennett, also engaged under a verbal agreement. Tony Bennett's company prepared the architectural drawings and specifications with Mr Wilton, through his business, Wilton Joubert Ltd, drafting the structural engineering drawings and specific engineering design for the ground floor and first floor floorplates and block work. As it was an oral agreement the terms of the contract were never in evidence, meaning lines of responsibility were not clear, nor what consideration was given to the property being sited in a high wind zone. Strong winds apply high pressure and wear away plaster finishes. The design of the home was probably a significant factor in the lack of weatherproofing.[8]

[26] After receipt of updated concept drawings from Tony Bennett in May 2009, Mr Wilton engaged Rawlinsons, quantity surveyors, seeking their budget estimate for the build. Wilton Joubert completed its structural drawings and the PS1 design required by the local authority in November 2009, and TAB Design Ltd finalised its drawings and specifications in December 2009.

[27] Mr Wilton's evidence is that the sixth respondent simply undertook structural engineering design to accompany Mr Bennett's plans and specifications and that there was no requirement for a PS4. The agreement between Mr Wilton and the sixth respondent did not involve onsite engineering inspections during construction. Mr Wilton's evidence is that he saw Deane Fluit as project managing the build.[9] Mr Fluit did not agree that he was the project manager. The lack of evidence of the "terms" of the oral agreement does not assist the Tribunal.

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[7] Deane Fluit's Statement of Evidence (31 March 2023) at [3].
[8] Mark Ward's BoE (30 March 2023) at [35] and [36].
[9] NoE, p 18, lines 12–14.

[28] Mr Wilton explained that in undertaking the design of the home, he worked up the insulation calculations as part of what he determined was needed. This involved, amongst other things, the thickness of the polystyrene. The polystyrene cladding was designed to be directly fixed to the substrate and when asked who suggested it would be a direct fix, Mr Wilton said "that's probably come through the architect with the Rockcote system".[10]

[29] Mr Wilton's involvement in the insulation calculations was beyond the role of the structural engineer and the structural design. Mr Wilton's evidence is that he wanted to achieve sufficient insulation that required, on his calculations, a 60mm polystyrene thickness to achieve his calculation value. He was aware of the Rockcote cladding system and that Rockcote specifications provided a 60mm polystyrene thickness. He stated that on concrete homes, external insulation allows a thermal mass to be exposed inside so external polystyrene is desirable from a performance perspective.

[30] Mr Fluit's evidence is that Mr Wilton and Mr Bennett worked closely on the design for the home. The concept design involved masonry blockwork and concrete floor slabs at both levels. These were chosen to act as a heat sink so that the direct fixed EIFS cladding system was integral to achieve the necessary insulation values that Mr Wilton had calculated.

[31] It was Mr Fluit, Mr Hardaker and Mr MacDonald's evidence that Mr Wilton wanted a clean face and lines on the exterior appearance, both vertical and horizontal, and this was illustrated with Mr Wilton's direction that there be no control joints on the exterior plaster system.

[32] Mr MacDonald's evidence is that Mr Wilton wanted a monolithic finish to the claimants' home. Mr MacDonald understood that to mean no breaks or structural features such as control joints. He understood the claimants wanted a smooth and impervious finish from the bottom all the way to the top. Mr MacDonald remembers Mr Wilton specifically stating that he did not want a band appearing around the middle of the building as it would ruin the design and appearance. Nor did Mr Wilton want drip edges in the plaster finish.

[33] The evidence merely suggests that Mr Wilton compromised on aspects of waterproofing the claimants' home. This is illustrated by his desire

[10] NoE, p 18, line 25.

for no control joints, no drip edges, allowing face-fixed cladding and no water proofing such as Mulseal membrane to the blockwork.

[34] Mr Johnstone's examination of Mr Wilton showed that Mr Wilton's brief to Mr Bennett on the desired design and layout of the home, included a picture from a national masonry magazine in the United States of America. Mr Wilton asked Mr Bennett whether he could make this work with four bedrooms. Mr Wilton's insistence on monolithic cladding and design emerged once he had done his insulation calculations which determined the need for a 60mm polystyrene EPS Panel cladding.[11]

[35] Control joints, or lack of them, involved a great deal of evidence and discussion throughout this proceeding. Regarding the structural engineering design and its lack of control joints, I accept the evidence of Mr Wilton and the sixth respondent's expert, Dr Jacobs. The need for and absence of control joints in the cladding is a matter I will return to, but which Mr Wilton engaged on, albeit briefly, with Tony Bennett.[12]

[36] Dr Jacobs' evidence is that the architect is usually the lead consultant in the design of a home and the structural engineer decides what is needed structurally for the home to stand in various loads and performance stressors e.g., wind, earthquake, gravity. With the claimants' home, Dr Jacobs says the design involved a concrete suspended floor involving structural and calculating aspects of an engineer's design. That must be engineered because it is holding the building up for natural loads as well as gravity loads. Dr Jacobs explained that Mr Wilton's engineering design for the claimants' home was a specific design. He was confident that the architect would be clearly aware that no control joints were in the block work for Mr Wilton's design. Dr Jacobs said, looking at the elevations in the drawings, the description clearly illustrates all its length and height and there's no reference to expansion, contraction or necessary control joints. Dr Jacobs' evidence clearly stated that the structural engineer does not get involved with the cladding and its requirements, especially waterproofing. Both are out of the structural engineer's field, so the scope of services provided by a structural engineer does not involve designing the cladding.

[37] Dr Jacobs says that as soon as the structural engineer's design involves a concrete floor in the home, there is no need for control joints because

[11] NoE, p 32, lines 1–25.
[12] Common bundle ("CB") 01.0131.

they would have no effect at all as the concrete floor is rigid. Dr Jacobs responded to a question from Ms Rusher[13] regarding the effect of thermal movement to be considered by the structural engineer in his or her design. Dr Jacobs said that thermal movement would not be a consideration of the structural engineer because the block work is covered by an insulating material on the outside which would stop the daily change in temperature being felt by the block work. Dr Jacobs' opinion is that most engineers try and limit control joints because once a control joint is designed and put into a wall, it becomes a place where moisture can enter, and the builder/owner is relying on sealants to stop the water ingress. It is Dr Jacobs' practice to eliminate control joints unless necessary. His evidence supports the absence of control joints in the sixth respondents' structural engineering design. Dr Jacobs' site visit illustrated to him that there didn't appear to be any movement in the building structure itself.

[38] Mr Wilton's evidence, when examined by Ms Rusher,[14] is that the structure has not moved and the reason being the lack of cracking in the GIB board. It was Mr Wilton's experience that illustrated to him that there was no evidence of movement in the structure. Mr Wilton's evidence is that he was completely comfortable with his decision not to include control joints. Mr Wilton's evidence was equally unshakeable when cross-examined by Ms Saunders.[15] Mr Wilton was very confident on ruling out movement of the masonry block work and substrate. Dr Jacobs' evidence corroborated Mr Wilton's as he did not detect any movement in the building structure during his site visit. Having looked at the inside walls, the GIB board did not have any cracks.[16] Dr Jacobs was surprised at the cracking in the cladding which he said was extensive and the cracks followed all the joints in the polystyrene panels.

[39] Dr Jacobs' view was that the sixth respondent's design did not need to conform with New Zealand Standard 4210. It was Dr Jacobs' evidence that Mr Wilton's specific design did distribute movement evenly along the walls. Because the design had a rigid floor on the top which was going to restrict a lot of the movement that was going to potentially occur in that wall from the foundation to the first floor, the design did not require any tolerance allowing for movement.[17] I accept Dr Jacobs' evidence where he stated that the floor slab,

[13] NoE, p 495.
[14] NoE, p 82, line 5.
[15] NoE, p 138, line 14.
[16] NoE, p 497.
[17] NoE, p 502, line 30.

once built, will not move. He is confident that there was no differential settlement, no evidence of movement due to settlement or thermal movement. Dr Jacobs was most confident that movement of the masonry has not created stress in the plaster cladding system. His evidence ruled that out completely.[18] Mr McLeod supports the finding that there has been no movement in the blockwork substrate, and he said neither were the defect expert's panel expressing any concern that the substrate might have moved.[19]

[40] Having considered the evidence of Mr Wilton and Dr Jacobs, I conclude that the Wilton Joubert structural engineering design was correct to omit control joints as they were unnecessary. A lack of control joints in the block work has not impacted on the cause of the cladding cracking.

[41] The claimants' amended Particulars of Claim seeks damages for stigma.[20] The claimants' opening submissions quantified stigma damages of $100,000.[21] I indicated to the claimants' counsel that their stigma claim could not proceed because they provided no supporting evidence to the Tribunal. Early on the second day of the hearing, Mr M Parker indicated the claimants had withdrawn their claim for stigma.

[42] Paragraph [42] of the claimants' amended Particulars of Claim dated 17 February 2023 indicated claims for interest, expert expenses and legal costs. Similarly, no evidence or quantum has been provided to the Tribunal for these costs and they too are struck out.

Build budget

[43] Mr Wilton was clearly working to a budget, although his evidence was somewhat evasive as to how or whether he communicated this to the respondents. Mr MacDonald and Mr Hardaker's evidence indicated they clearly understood that the build was to a budget. In June 2009, Mr Wilton had approached Rawlinsons, quantity surveyors of Dunedin. Having supplied them with concept drawings Rawlinsons responded with an estimate of costs. The preliminary budget estimate was $1,124,471.00, excluding professional fees, GST, site works and other items, which Mr Wilton seemed to indicate was acceptable.[22] Mr Wilton approached Mr Fluit in September 2009, requesting

[18] NoE, p 507, line 25 onwards.
[19] NoE, p 524 line 9.
[20] Claimants' further amended Particulars of Claim (17 February 2023) at [42(e)].
[21] Claimants' opening submissions (12 May 2023) at [38(b)].
[22] NoE, p 41.

that he get quotes and estimates from sub-contractors and material suppliers so that Mr Wilton could put together a more informed budget. Mr Bennett's email to Mr Wilton on 13 May 2009[23] clearly indicated that the designer was working to a budget and Mr Wilton's email of 20 July 2010[24] also illustrates an underlying build budget. Mr Fluit provided Mr Wilton with a preliminary cost estimate schedule on 3 February 2010.[25]

[44] Mr Johnstone asked Mr Wilton whether he wanted to see all quotes and estimates and approve them. Mr Wilton responded that he didn't give any such directive but on further questioning, indicated that it was a reasonable expectation that Mr Fluit would first get approval before engaging contractors.[26] The clear understanding from the verbal build contract between the claimants and Mr Fluit was that Mr Fluit would select and engage all sub-contractors, including a block layer and concrete build contractor. Mr Wilton provided the blockwork and concrete material for construction of the substrate.

[45] When questioned by Mr Johnstone, Mr Wilton confirmed his email dated 13 January in which he stated, "Deane's got all the prices so I'm going through those with him next week and he can start any time".[27]

[46] I accept Mr Fluit's evidence that Mr Wilton was working to a budget. Although there was no final contract price or a fixed costing for the build in the verbal contract between the claimants and Mr Fluit. Mr Fluit's evidence was that Mr Wilton personally checked all the quotations, estimates and material prices that Mr Fluit obtained, and approved them before Mr Fluit proceeded to accept. On occasion Mr Wilton checked with Rawlinsons.

[47] Mr Fluit's evidence, which I accept,[28] was that he approached a Rockcote plaster system contractor in September 2009 for a quote, which came in at over $53,000, excluding GST. The original Rawlinson's allowance was $24,900, excluding GST.[29]

[48] Mr Wilton had some, albeit brief, familiarity with the Rockcote and the Sto cladding systems and was also familiar with Wattyl as a paint and, I determine, as a cladding provider, notwithstanding Mr Wilton's denial.

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[23] CB 01.0139.
[24] CB 01.0005.
[25] CB 01.0039 to 01.0043 and CB 01.0108 to 01.0114.
[26] NoE, p 45.
[27] NoE, p 45.
[28] Deane Fluit's BoE (31 March 2023) at p 3–4.
[29] June 2009.

[49] I accept Mr Fluit's evidence that when he discussed the Rockcote price with Mr Wilton, he was asked to get a second quote for a comparable cladding system.[30]

[50] Mr Fluit said he cannot remember who suggested the Wattyl Granosite cladding system. I accept Mr Fluit's evidence when he says that Mr Wilton mentioned that he was aware of the Wattyl Granosite product on another project.

[51] Mr Fluit approached Paul Hardaker of Tiling Solutions for a cladding quote as he had worked with him on other projects. He knew that Mr Hardaker was a licensed Wattyl Granosite cladding installer and applicator. Given the relationship between Mr Fluit and Mr Wilton at the time along with close cooperation and discussions over pricing quotations and estimates, I do not accept Mr Wilton's evidence, when questioned by Mr Johnstone, that the first time he saw Tiling Solutions' quotation[31] was when questioned about it on day one of the hearing.

[52] I accept Robert MacDonald's evidence[32] when he said he was present at a site meeting between Mr Fluit and Mr Wilton regarding plastering quotes. At that meeting they were discussing plastering quotes which Mr Fluit had emailed to Mr Wilton as a cladding contractor had not yet been selected by Mr Wilton. The meeting was at a time when the block laying contractors were on site. It was important at that stage of construction that a cladding contractor be engaged to enable the build to be completed by the Christmas 2010 deadline. Mr MacDonald said this was the build time all contractors were working towards. The claimants wanted occupation by Christmas 2010.

[53] Mr Hardaker's Tiling Solutions' price provided for a 60mm H grade polystyrene panel which conformed with Mr Wilton's requirements for insulation. The quote was for a direct fix onto the masonry block walls and the quotation also allowed for precoating of the windowsills with two coats of Wattyl GranoImpact waterproofing membrane.

[54] Mr Hardaker's quotation for the Wattyl Granosite plaster system coating finish conformed to Mr Bennett's specifications for the Rockcote system. Both cladding systems were BRANZ approved.

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[30] Deane Fluit's BoE (31 March 2023) at [19].
[31] CB 03.1097.
[32] Robert MacDonald's BoE (12 May 2023) at [31].

[55] I accept the evidence of Mr Fluit that he approached Mr Hardaker for a cladding quote only following discussions with Mr Wilton who was surprised at the cost of the Rockcote contractor's price. I accept Mr Fluit's evidence when he said he showed Mr Wilton the Tiling Solutions quotation. Mr Wilton had travelled down from Auckland for a pricing meeting. Mr Wilton told Mr Fluit he was happy to accept the Wattyl Granosite system. He said he'd had experience with it on another North Island job and remembered that Wattyl Granosite had good "elasticity".[33]

[56] It is probable that Mr Fluit and Mr Wilton did not discuss that a change in the cladding system would require a council consent amendment. Mr Wilton did not approach Mr Bennett to discuss the cladding change and its implications. Mr Bennett was not approached by Mr Wilton or Mr Fluit to seek Council approval for the change in cladding. The law expected in terms of the Building Act 2004 Mr Wilton to have known that it was his obligation to first seek Council approval for the cladding change. He did not do so.

[57] It was apparent that Mr Wilton, once building consent was achieved, never consulted Mr Bennett for advice regarding control joints or the need to install a waterproof membrane on the exterior of the blockwork. It is worth mentioning that in the lead up to the hearing, it became apparent that Mr Wilton had not put in the hearing preparation that was obvious from Mr Fluit, Mr Hardaker and Mr MacDonald, notwithstanding that the onus of proof rested with the claimants. They had clearly refreshed their memories of events and steps taken leading up to and during the build project from the many documents disclosed as part of this proceeding. Mr Fluit and Mr MacDonald no longer had their own documents of the build. Mr Fluit had given Mr Wilton all his documents following completion of the build. Mr Wilton's recall of the leadup to the build and post-build matters was poor relative to other witnesses.

[58] The block layer, Mr Allison was engaged by Mr Fluit to undertake the masonry blockwork. At a meeting with Mr Fluit, Mr MacDonald, and Mr Wilton, Mr Fluit asked about the need for a sika Mulseal coat or similar membrane to be applied over the blockwork. Mr Wilton's subsequent direction was that no coating was to be applied. Mr Fluit passed this directive on to Mr Hardaker. Mr Wilton made that direction without reference to Mr Bennett or any other expert. Mr Wilton denied receiving enquiries about waterproofing the blockwork and the need for control joints in the cladding. His evidence is that

[33] Mr Fluit's BoE (31 March 2023) at [24].

knowledge of cladding and waterproofing were outside his area of expertise. I find it probable that he received both enquiries and gave both directions. Mr Wilton said that he had not seen the Tiling Solutions quotation or the Wattyl "guarantee". Given his response that such matters were outside the scope of his experience, one would have expected Mr Wilton, a professional structural engineer, to seek expert advice. It is no excuse that he says he would have been guided by Mr Fluit or other trade persons' opinions as to what was necessary. Mr Fluit, Mr Allison, Mr Hardaker and Mr MacDonald went to Mr Wilton for direction.

[59] Mr Wilton had some awareness or familiarity with the Rockcote and Sto cladding systems. He was also, from a previous employment, familiar with Wattyl products, especially its paint and its elasticity. Mr Wilton expressed that as a structural engineer, he'd had no involvement with cladding for a building (other than when the weight of the cladding might have an effect).[34] Mr Wilton stated that when he accepted the Tiling Solutions quotation, he was agreeing to a different paint supplier only. Mr Wilton's evidence that he did not understand that the Wattyl product was a cladding system, is not tenable. He accepted Tiling Solutions' quotation to provide and install a Wattyl Granosite plaster finish EIFS cladding structure. He knew by accepting the quotation that a cladding system different from Rockcote was to be bought and installed. He had instructed Mr Fluit to obtain a quotation for a different cladding system, given his concern at the cost of the Rockcote cladding. Mr Fluit's evidence is that Mr Wilton was aware of the Wattyl Granosite cladding system.[35]

[60] The fourth respondent's evidence is that both cladding systems were BRANZ approved, were like-for-like cladding products and, had the Council been approached for approval as the law required, approval would likely have been granted.

[61] Mr Wilton's evidence[36] is that his co-trustees had no authority over negotiating the build or to discuss pricing.

Exterior paint and its colour

[62] Mr Wilton saw an Auckland property and admired its paint colour which he learned to be a Dulux Product called Grey Tweed. He discussed this colour

[34] NoE, p 495, line 3.
[35] NoE, p 298, line 25.
[36] NoE, p 52.

with a design consultant Marilyn Webb he was then engaging with.[37] She suggested a darker colour, Dulux "Grey Squirrel". Mr Wilton maintained his preference for the Grey Tweed. With the change in cladding agreed by Mr Wilton, he understood that the exterior paint finish could not be a Dulux product or Grey Tweed. He understood[38] that Mr Hardaker was applying a Wattyl Granosite cladding finish and would be using Wattyl paint. He understood when Mr Hardaker explained that he would need to apply a Wattyl paint finish, and that various cladding systems had their own paint colours and systems.[39]

[63] Mr Wilton met Mr Hardaker on site some days after Tiling Solutions had commenced work. He was informed by Mr Hardaker that he was a Wattyl applicator and would be applying a Wattyl Granosite plaster and paint system, so could not use the Dulux Grey Tweed paint. Mr Wilton instructed Mr Hardaker to match a Wattyl colour with Grey Tweed. Although Mr Wilton did not know Mr Hardaker, he learned that he had worked on previous jobs with Mr Fluit and at that time he trusted Mr Fluit to engage only competent tradespeople. Mr Wilton left that discussion with Mr Hardaker, confident that Wattyl's colour matching would produce an identical Grey Tweed colour.[40]

[64] Mr Hardaker approached the Wattyl depot in Dunedin and asked that Wattyl to produce a paint colour equivalent to Gray Tweed and that the light reflective value (LRV) needed to be 40 per cent. According to Mr Hardaker the resulting colour match was liked by the claimants.[41]

[65] Mr Wilton, throughout this proceeding, has not expressed any disappointment with the Wattyl-produced paint colour and so confirms Mr Hardaker's evidence that the claimants liked what Wattyl produced colour-wise. Mr Wilton's evidence is that he did not ask for or receive a sample of the colour from Mr Hardaker before its application.

[66] Wattyl produced an acceptable paint colour equivalent, but what later transpired, and will be addressed in this determination, is that the Wattyl colour matched to Grey Tweed paint, had a LRV of just 20 per cent, which was not acceptable for the claimants' home. The expert evidence does not impugn the

[37] CB 01.0024.
[38] NoE, p 64.
[39] NoE, p 65.
[40] NoE, p 70, line 25 onwards.
[41] NoE, p 355, line 5.

paint's LRV error as necessarily causative of the water ingress and damage suffered by the claimants' home.

2019 failed repairs

[67] Mr Wilton and his wife took occupation of the home in January 2011. The code compliance certificate was issued on 13 February 2012, Mr Wilton noticed efflorescence appearing under an ensuite bathroom window on the northern exterior wall. He thought that the paint was cracking over the plaster. Additionally, he mentioned that wind could be heard in the roof space above the western elevation balconies.

[68] He expressed these concerns to Mr Hardaker. On examination Mr Hardaker discovered that the wall cladding was not properly fixed on the western wall. Tiling Solutions refixed the cladding at its own cost.

[69] Mr Wilton was familiar with the cause of efflorescence from previous employment. He knew that efflorescence was the result of salts coming out of a cementitious material, usually caused by moisture getting into it.[42] Mr Wilton was aware that the moisture may have come from the rain hitting the cladding or entering the cladding through minor cracking.

[70] He did what any other homeowner would do with such a concern. He contacted the cladding and painting applicator, Mr Hardaker. He expressed his concern to Mr Hardaker and expected he and his company to remedy the issue.

[71] Further on in 2013, Mr Wilton noticed leaks in the bedroom and kitchen on the northern side of the home. He said he could see small cracks in the paintwork and thought that the water was coming into those rooms through cracks in the exterior paint.

[72] Again, he contacted Mr Hardaker about the cracks. Mr Hardaker's response was that it was probably an issue with the paint.

[73] Mr Wilton said that on that basis, he contacted Wattyl to see what it could do about the cracking and the leaks. From that moment on, Tiling Solutions had nothing further to do or any further involvement with what I am calling the 2019 repairs.

[42] NoE, p 119.

[74] Mr Wilton made contact with the South Island manager of Wattyl, Andy Campbell. Mr Campbell visited the home on 17 December 2013. It appeared that both determined from that meeting that the paint coat had failed due to the application of the paint before the plaster coat had cured sufficiently and the remedy was as simple as another coat.[43]

[75] By the end of January 2014, Mr Wilton was concerned that Mr Campbell and Wattyl were not giving the issue the urgency it required, and Mr Wilton was attempting to pin down Wattyl as to when it would repaint the home.[44]

[76] However, Mr Wilton explained that in 2014 that there was further construction work taking place on a nearby section and was concerned that the dust from that construction would affect any repaint. He agreed with Wattyl to await completion of that construction before undertaking rectification work.

[77] By October 2015, the neighbouring construction work was completed. Mr Wilton contacted Mr Campbell to say that Wattyl could now continue with its rectification works.[45]

[78] By 2016, with no timetable for Wattyl's proposed work, Mr Wilton's patience was wearing thin.[46]

[79] In May 2016, Mr Campbell for Wattyl, expressed concern that the plaster had cracked in a way that he described as very unusual.[47] Wattyl needed to understand what was happening under the polystyrene before it could come up with a repair strategy and sought permission from Mr Wilton to remove a 30cm by 30cm section of the polystyrene where it had cracked to see what was happening with that area of cladding.

[80] Correspondence from Mr Wilton to Wattyl was copied to Mr Hardaker, who was not participating but, in any event, would have had no greater success with Wattyl's timeliness than Mr Wilton was experiencing.

[81] The difficulty Wattyl has had with this proceeding is that none of its officers or experienced operators are still employed by Wattyl. As such, there

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[43] Andrew Wilton's BoE (17 February 2023) at [15].
[44] CB 01.0013.
[45] CB 01.0009.
[46] CB 01.0330.
[47] CB 01.0331.

was no evidence from Mr Campbell or Mr Wilson, both Wattyl employees who engaged with Mr Wilton through 2015-2016 and beyond.

[82] What is apparent however, is that by 2016, Wattyl had taken "ownership" of the cladding cracking and paint problem expressed by Mr Wilton.

[83] By February 2017, Wattyl had arranged with one of its plastering contractors (JAJ Plastering),[48] to remedy the failed cracking by applying a skim coating and repainting the northern, eastern, and western elevations.

[84] Mr Wilton continued pressing Wattyl through 2017 to take remediation action. In March 2018, Jade Wilson from Wattyl advised that Mr Campbell had left the company. He informed Mr Wilton that the warranty from Wattyl and for Wattyl products was void as the home was painted in a colour that did not meet the required LRV. Mr Wilton has maintained that he never received a copy of the warranty, either from Wattyl, Mr Fluit or Mr Hardaker. Little turns on Mr Wilton's insistence of not receiving a copy of the warranty. Later in this determination I find that Wattyl was aware it had issued the warranty but that it was void ab initio. Wattyl was aware that the paint it provided its applicator had an LRV of just 20 per cent and the exclusion, clearly presented on the face of the Wattyl guarantee, expressed that it was ineffective if the paint's LRV was less than 40 per cent.

[85] In any event, it became obvious that Wattyl did own the problem being expressed by Mr Wilton and undertook preparation for remedial work. However, we never learned the outcome of Wattyl's investigation from the invasive cladding sample it obtained in 2016.

[86] Mr Wilton explained that repairs were finally undertaken by Wattyl and its contractors in April and May 2019 but the EIFS cladding again presented cracking within two months of those repairs.

[87] Mr Fluit was not involved in Wattyl's design of its remediation strategy. His involvement ceased with providing scaffolding to facilitate what emerged as a repaint.

[88] Mr Fluit did expect Wattyl, which had formulated the scope of repair strategy and the paint selection without recourse to Mr Fluit or Mr Wilton, to

[48] CB 01.0328 and CB 01.0329.

undertake a remediation which would not be simply a repaint but would involve at least a remesh of panel joints and cracks.[49] Along with some form of overlay method which Wattyl had earlier discussed. What Wattyl undertook with its remediation, was simply a skim plaster coat that clearly did not address the underlying cracking to the original plaster coating. According to Mark Hadley, it was bound to fail in short order.[50] All of the defects' experts, apart from Kevin McLeod, agreed that the proposed overlay system if it had been applied, would likely have remedied the EIFS cracking. But the 2019 repair which occurred was ineffective and has made the repair needs worse so that an overlay system cannot be used and a full reclad of all EIFS elevations is required.

[89] The people Wattyl engaged to undertake the repair were, it seems from the paucity of information from Wattyl, insufficiently experienced to address the claimant's problem. The evidence suggests that Wattyl never engaged a building surveyor or a defects expert to advise it what exactly the underlying defect causative of the problem was. Or what its remediation strategy and scope of repairs should be. And yet, as a recognised cladding supplier it must have been aware of the "leaky home" problem then well known in New Zealand.

Issues for determination

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

(a) Why does the home leak, what is the required scope of remediation and the cost of remediation?

(b) The liability for such failure as between the respondents.

(i) Deane Fluit Builder Ltd as the builder.

(ii) Tiling Solutions Wanaka Ltd, which installed the EIFS cladding.

(iii) Queenstown Lakes District Council which inspected the home's construction.

[49] Mark Hadley report (7 July 2022) at appendix: advice of Mr Richards for Stoanz Ltd (10 June 2022).
[50] NoE, p 530.

(iv) Hempel (Wattyl) New Zealand Ltd, which supplied salient aspects of the EIFS cladding; and

(v) Wilton Joubert Ltd, which supplied and warranted the structural engineering design for the home.

(c) Liability for the unsuccessful repairs in 2019.

(d) The scope and cost of remediation; and

(e) Whether the principal claimant involved, Mr Wilton, has in any way contributed to the claimants' loss.

Why does the home leak and what is the required scope and cost of remediation?

[91] On receipt of the claim on 1 May 2020, MBIE engaged Kurt Downie, an experienced building surveyor, as the assessor to undertake an independent assessment of the home and to report, as defined in s 31 of the Weathertight Homes Resolution Services Act 2006 (the Act). Mr Downie's full report, dated 23 July 2020, established eligibility for the process and further provided a detailed assessment of the causes, damage, and estimated repair cost for effective remedial work.

[92] Mr Downie determined the built date for the home as 2 September 2011. This was the date that the home passed its final Council inspection. Mr Downie's report identified the weathertightness defects causing current damage.[51] He summarises the salient weathertightness defects causing current damage as:

(a) inadequate installation of the EIFS exterior wall cladding to the northern elevation; and

(b) inadequate installation of the EIFS wall cladding to the eastern, southern and western elevations, likely to cause future damage.

[93] Mr Downie's investigation and reporting was undertaken after the mitigation repairs of 2019. Mr Downie's report states that:

> Considering the current extent of cracking that exists to the building, damage observed to date, as well as the fact that recent mitigation

[51] Kurt Downie's assessor's full report, Part 9, pp 15–23.

> repairs in 2019 to the EIFS cladding were unsuccessful in remedying cracking. I consider that the remedial works required to achieve long term weathertightness and compliance with the New Zealand Building Code generally comprises the following:
>
> - Removing and replacing the EIFS clad elevations.
> - Removing and replacing existing double-glazed powder coated aluminium joinery.
> - Adjustment of the weatherboard cladding adjacent to EIFS clad wall faces to achieve a weathertight connection.
> - Adjustment of the roof perimeter/parapets, as required, to facilitate the installation of new EIFS wall cladding.
> - Consequential works internally and to the surrounding timber decking, adjoining carport and glass balustrade.

[94] Mr Downie's justification for his opinion is clearly laid out in paragraph [10.3] of his report. Mr Downie's proposed like-for-like remedial solution is explained in paragraph [12] of his report. He concludes that this remedial solution is but one potential means of achieving compliance with the New Zealand Building Code.

[95] He does recommend alternative remedial repair solutions be explored by suitably qualified designers and building surveyors. Having had the benefit of the experts' conference report and having heard the experts' evidence, the Tribunal accepts the alternative remedial repair solution which Deane Fluit, Steven Charles Humpherson, Mark Thomas Flewellen and Kevin John Simcock proposed, supported by Mark Hadley.

[96] Mr Downie did conclude that, considering the location of the home, its high wind zone and to reduce the weathertightness risk, a cladding system over a drained and ventilated cavity is strongly recommended on the basis that adequate thermal resistance is achieved. Such a recommendation has not been explored in this proceeding. It would be a more costly remedial solution but something the claimants may consider at their cost. Mr Wilton's consented plans designed a cladding system face fixed to an unsealed blockwork substrate. The repair option Mr Downie proposes in his report is a like for like remedial solution to gain compliance with the New Zealand Building Code. Mr Downie's scope of works is a repair option to an existing building. The home need only be repaired to the same standard as it was when built, so long as those repairs meet the New Zealand Building Act and Code.[52]

[52] Section 112, Building Act 2004.

[97] The Tribunal has been greatly assisted in this proceeding by leading experts engaged by the parties. Grant Parker, building surveyor, engaged by the claimants; Kevin John Simcock, a practising structural engineer, engaged by the first respondent; Robert Mark Hadley (Mark Hadley), a well-recognised registered building surveyor, engaged by the fourth respondent; and Kevin McLeod, another well-recognised building surveyor, engaged by the fifth respondent. Mr Parker, Mr Simcock, Mr Hadley and Mr McLeod all agreed that the building leaks to the extent identified in Mr Downie's report. The home has evidence of leaking on the northern, eastern and western elevations and this was confirmed by dye testing prior to the destructive investigation undertaken by the assessor in June 2020, which confirmed water dye leakage and ingress. Some water damage has been noted internally within the master bedroom and on the northern elevation into the kitchen. Mr Hadley disagrees that the master bedroom is leaking and has reservations as to the causative effect of all of the defects identified by the assessor. However, I prefer the opinions of the assessor, Mr Parker, Mr Simcock and Mr McLeod.

[98] Mr McLeod and Mr Hadley presented comprehensive briefs of evidence and leaks lists that clearly give their opinions of where the home leaks and why. Mr McLeod opines that the leaks are limited to those identified in Mr Downie's report and confirms that a cause of the leaks was the design and in particular, the lack of any drainable cavity. He is clearly of the view that the home's design was defective given that by 2009/10, the building industry knew the advantages of a drainage cavity. He is further of the view that leaks also appear to have been caused by failings related to joinery, waterproofing, joinery flashings and penetrations which allowed water ingress and so, even if the cladding was completely remediated, there would still be ongoing water ingress failings and damage arising from joinery waterproofing, joinery flashings and penetrations inadequately sealed. He does agree that another cause of leaks is likely to be inadequate fixing of the EPS sheeting to the concrete block walls by using a not fit for purpose adhesive product. That being expandable foam and minimal mechanical fixings, which should have been installed at 600mm centres and the expandable foam used as an adhesive being applied to concrete block walls which were still wet. He concludes that the installation was inadequate. Otherwise, he supports the findings of Mr Downie.

[99] Mr Hadley disagrees with this. He believes a reason for the home leaking is a lack of traditional and robust design detail due to the home's modernistic architecture. Mr Hadley and Mr Eddie Saul, an expert on local

authority inspection procedures, engaged by the fourth respondent, both agree that the specifications and detailing of Mr Bennett's consented designs were standard.

[100] Mr Hadley's helpful observations from his site inspection are noted at paragraphs [5.6]–[5.7] of his brief of evidence dated 31 March 2023.

[101] Mr Hadley disagrees with Mr Parker's evidence, suggesting it is insufficient as it does not link the alleged defects to the damage. Although he does agree with Mr Parker's evidence that the damage to the home consists of cracks in the EIFS cladding caused by poor workmanship and subsequent moisture damage. Mr Hadley is strongly of the view that the cause of the plaster failing in the cladding includes workmanship and weather conditions during construction. To be more definitive, he is of the view that the exact cause of the cracking is not conclusive and to find this requires more extensive testing. However, Mr Hadley opines that the weather conditions during installation of the exterior cladding system is likely to be a key contributing factor of the failure. He would like to have seen plaster samples being sent for forensic analysis to determine if the performance of the plaster was affected by being applied in weather conditions that were too cold (meaning the plaster did not achieve its intended performance) but concludes that even that may be difficult. It is unfortunate that Wattyl, who did take a sample of the plaster and apparently sent it to its Auckland laboratory, was unable in its evidence to give any findings of its forensic testing.

[102] Mr Hadley emphasises that what caused the defects is likely to be a combination of poor workmanship and weather conditions during installation. He agrees with Mr Parker who opines that the EIFS system was poorly installed; the polystyrene sheets were fixed to bareface concrete using intermittent application of expandable foam, the EIFS panels were not all close butt joined and the joints were not suitably filled.

[103] Whilst Mr Hadley has reservations as to the conclusive cause of the cladding cracking, he accepts the damage exists and requires remediation. Mr Hadley's view is that, had the EIFS Wattyl cladding system been installed correctly in accordance with its specifications, it should not have failed as it has. It is Mr Hadley's opinion that the primary defect is the cladding cracking that has allowed water ingress which has caused the damage. I agree with Mr Hadley's view that the cladding system change from Rockcote to Wattyl is not determinative of the cladding cracking, although as Mr Simcock opined the

cladding substitution has affected the outcome through the lack of clear cladding installation instruction for use by the applicator and other contractors.

[104] As mentioned, several of the defects' experts agree with the assessor's findings. All agree that there are certainly indications of a poor installation process, that damage exists, and it requires remediation. As mentioned, I prefer the opinion of the majority of the defects' experts. Given that damage does exist, the experts agree that remediation is required.

[105] The experts were to be panelled on the morning of Thursday 25 May 2023. The hearing had not completed factual evidence that morning and accordingly I directed that the experts, including Mark Andrew Ward, appointed by the third respondent and Dr Murray Jacobs, be included and that they be caucused in a room provided by the Court, chaired by Mr Downie. When the hearing was ready to panel the experts, Mr Downie reported in a brief document, the findings of the experts' conference.[53] That document summarised the conclusion of the experts that the home leaks because of systemic cracking to the northern, eastern and western elevations and water is entering via the cracks. Environmental conditions have accelerated the cracking damage. Whilst earlier mentioned that there are somewhat differing views, the experts were agreed that water/dye ingress testing by Mr Downie illustrated water entering the cracking and tracking back to the concrete block face in some locations.

[106] Whilst the experts disagree on the cause of the internal moisture damage to the master bedroom and kitchen, they agree that systemic cracking damage has occurred in the EIFS cladding to the northern, eastern and western elevations.

[107] All experts agree that recladding the EIFS cladded walls is required as well as consequential works with that recladding.

Repair options

[108] As mentioned earlier, Mr Downie concluded that, given the home is situated in a high wind zone on a Wanaka Peninsula, there is a need to reduce the weathertightness risk. A cladding system over a drained and ventilated cavity is strongly recommended because in his view, adequate thermal resistance would then be achieved. Mr McLeod was also of the view that the

[53] CB 03.1580.

more expensive ventilated cavity cladding system is the suitable repair option. What the claimants are entitled to is a repair to their existing home with the standard of repair being the same standard as when the home was built. That is a clear monolithic exterior cladding face fixed to the blockwork substrate which meets Code compliance and prevents water ingress.

[109] The Tribunal has been presented with two alternative repair options: Mr Downie's, as set down in his report, which is a like-for-like remedial solution which he believes will achieve compliance with the New Zealand Building Code. And Mr Fluit's, which is detailed in his brief of evidence and more fully explained in the statements of evidence of Steven Charles Humpherson and Mark Thomas Flewellen. Partly as preparation for this hearing, Mr Fluit took the pro-active step of engaging an architectural designer, a structural engineer and a monolithic cladding specialist to design and document to building consent standard, a full remedial solution. The claimants chose not to accept that solution.

[110] Both solutions provide for a full reclad of the EIFS cladding to the claimants' home. The difference is whether the reclad can be accomplished with the windows and joinery in situ or removed and if so, whether replacement windows are required, or the existing joinery can be reused. Removal and replacement of the windows adds considerable cost. Both proposals are a repair to an existing home.[54] The home only needs to be repaired to the same standard as it was when built. For the claimants' home, this means repair solution double-glazed windows are only required. I agree with Mr McLeod's opinion that there is no reason as to why the existing joinery cannot be retained.

[111] Ms Phillippa Goodman-Jones', the claimants' quantum expert, raised late in the proceedings that new insulation guidelines come into effect in May 2023. She mentioned that there is a requirement to upgrade both the wall and window insulation to the new Codes. It is her view that the windows will require upgrading to the thermal insulation standard. The claimants introduced this point by adding a report to the common bundle just prior to the hearing and raised it again on the last day of hearing. The fourth respondent was unable to provide evidence in reply due to the claimant's late introduction of this issue. Ms Saunders, counsel for the fourth respondent submitted that after enquiries were made of the territorial authority, it is most unlikely that an upgrade of the

[54] *Fitzgerald v IAG New Zealand Limited* [2018] NZHC 3447 at [47] and [50]; and *Bates v Auckland Council* [2021] NZHC 2558 at [84].

joinery would be necessary because the repair solutions are an alteration or repair to an existing home. The home needs only to be repaired to the same standard as when it was built which requires only double-glazed windows.[55] The Deane Fluit proposal enables the reclad to occur with the windows in situ. I accept Ms Saunders submission and dismiss Ms Goodman-Jones' opinion.

[112] I mentioned in the proceeding, and particularly in directing the defects experts and quantum experts, that a claimant can only be entitled to no more than the costs of the cheapest remedy for the damages caused.[56]

[113] However, I agree with Mr M Parker's submission that the most effective cost of repair needs to be reasonable and comprise a repair. He accepts that if there are two equal remedies, then the law is that the claimants would only be entitled to the lower cost remedy.

[114] His submission is that the proposed repairs are not equal. He submits that one is tried and tested and the other is a complete unknown. I disagree after considering the totality of the evidence of Mr Humpherson, Mr Flewellen, Mr Simcock and the defects experts when panelled.

[115] I agree with his submission that a Court or Tribunal would not be concerned with the relative costs of the remedies unless it was satisfied that the lower cost remedy would perform to the necessary standard, which in this case is to accomplish Building Code compliance.

[116] Mr Humpherson's evidence and the attachment to his brief clearly explains the Deane Fluit repair solution. His and Mr Flewellen's evidence and answers to their examination satisfy me that their solution has in various forms been accomplished before and is a workable repair. They had no reservations, although little experience with a face fixed EIFS reclad.

[117] All experts agreed that the remedial scope requires recladding of the EIFS cladded walls as well as consequential works and that both repair options would achieve this. Mr G Parker initially endorsed Mr Downie's repair option.

[118] During the hearing, Mr G Parker and Mr Downie endorsed, along with Mark Hadley, Kevin Simcock, Mark Ward and Kevin McLeod, the Deane Fluit repair option. This subject to the repair being supervised by an independent

[55] Section 112, Building Act 2004, *Fitzgerald v IAG New Zealand Limited*, above n 54; and *Bates v Auckland Council*, above n 54.
[56] *Lester v White* [1992] 2 NZLR 483 (HC).

quality assurance inspector and of course, building consent being achieved from the fourth respondent along with the necessary warranties on the cladding installation and repair trades and ultimately, a Code Compliance Certificate for the remedial works.

[119] Mr Downie's repair option must also be subject to building consent and the repair solutions supported by the necessary warranties. Both these conditional matters are beyond the role of the Tribunal because the claimants have chosen not to repair before the hearing and are prosecuting their claim on scope and costing estimates.

[120] After enquiry of the fourth respondent, Ms Saunders is of the view that the fourth respondent may not require the Deane Fluit repair solution to be supervised by an independent qualified building surveyor. Mark Hadley had expressed a willingness to assume the role as the specialist third party quality assurance inspector. He provided an estimate of his costs for such an exercise which appeared modest in the context of the overall remedial costings. I am of the view, as expressed by all the experts, that the Deane Fluit repair option should include an independent quality assurance inspection. Necessary assurance to address the risk aspect regarding the proposed in-situ window membrane repair for the benefit of the claimants was adequately addressed during the examination of Mr Hadley, Mr Ward, Mr McLeod and Mr Downie.[57] Mr Hadley stated that once the new paint is on and completed, the joinery is water tested to ensure it performs as required. Mr Hadley does not expect any quality assurance person to sign off the QA task until water testing is accomplished.

[121] Mark Hadley, Kevin Simcock, Mark Ward, Kevin McLeod and ultimately Kurt Downie and Grant Parker, all agreed that the Deane Fluit repair solution is reasonable and will comprise a full repair of the weathertight deficiencies agreed. The Deane Fluit repair solution involves the full replacement of the existing exterior cladding with a Resene Construction 60mm EPS panel masonry overlay direct fixed to the masonry block walls, together with a Resene Construction 40mm EPS façade system with a 20mm cavity, installed along the outer face of the West elevation over the existing girder truss at roof level and existing timber packing to the one-metre-wide concrete blockwork walls. Mr Humperson's evidence is that his drawings and specifications will apply for a building consent for the replacement cladding

[57] NoE, pp 549–554.

system specified is essentially the system that was shown on the original TAB design drawings, for which building consent was granted. As Mr Simcock stated, it is the windowsills which are the sole area of risk because the remainder of the repair is a recladding exactly the same as when the home was first built.[58] There are 16 windows in the EIFS-clad elevations. There is no material evidence of any leaks to those windows. But, to meet the design instructions of Mr Humpherson and Mr Flewellen, the windows will need inspection to reveal which need membrane recoating of the sills and jambs.

[122] Mr Parker and Mr Downie endorsed the repair solution, and it was agreed that this would need the oversight of an independent quality assurance inspector. They and the remainder of the defects panel also agreed the usual requisite assurance warranties are achievable from the builder and cladding applicator.

[123] Mr Flewellen's evidence satisfied me that a Resene Construction Systems Quality Assurance Audit during application and at completion of the reclad will provide the necessary warranties. I've mentioned earlier that the risk of obtaining building consent remains with the claimants, although the defects panel and Mr Flewellen expressed no reservations about the repair solution obtaining building consent.

[124] Mr Fluit, with a mock-up demonstration recorded in a video presentation, explained his proposed method of affixing the necessary waterproof membrane to the windowsill and jams with the windows in situ. This demonstration satisfied the defects panel it is achievable and workable. Mr Simcock has seen it done and is comfortable with it. Mr Downie is of the view that there needs to be strict quality assurance processes in place to ensure weatherproofing around the window openings is successful and I detect that Mr Hadley's evidence is similar. Mr Simcock expects a number of windows will need the in-situ membrane application, but it is uncertain how many windows might require such a methodology because only two have been inspected to date. It will be easier to accomplish than Mr Fluit's mock-up test which had a 3mm gap because Mr Simcock says the laundry window, and he expects all other windows to have the same, has a 5mm gap. He says it is potentially going to be easier.

[58] NoE, p 540, lines 24 and 25.

[125] The evidence satisfies me that both repair solutions are equal, both will require building consent and that risk remains with the claimants, having not yet undertaken repairs. The Deane Fluit repair option is a reasonable repair solution to adopt. The evidence satisfies me that it will achieve a repair to meet the necessary standard of weathertightness and Building Code compliance at a relatively lesser cost.

[126] Mr Humpherson, Mr Flewellen, Mr Simcock, and Mr Fluit's evidence on proper design, specifications and supervision would be prepared to certify and warrant the work to satisfy the claimants as owners.

[127] Having the benefit of all the evidence, which includes expert evidence that Local Authorities would rely on in deciding whether to approve a building consent for remediating weathertightness deficiencies, I determine the necessary remediation can be achieved by adopting the Deane Fluit repair solution.

Cost of Deane Fluit repair option

[128] The claimants engaged Phillippa Goodman-Jones as their quantum expert and the third respondent engaged Karsten Pederson. During the hearing I directed that Deane Fluit be included in the quantum panel for his experience as a licensed Wanaka building practitioner and familiarity with local costings. The respondents agreed with this direction, but the claimants disagreed.

[129] Mr Fluit added valuable input as was seen from his objection and reasoning to certain pricing items illustrated in the spreadsheets provided by Ms Goodman-Jones and Mr Pederson. I did take note of Mr Fluit's brief explanatory notes but tended to favour the experts on most disagreements.

[130] The hearing ran out of time to panel and examine the two quantum experts and Mr Fluit. Instead, they caucused amongst themselves and filed their spreadsheets and tabular summaries the week following the hearing. Mr Fluit's agreement and/or disagreement was noted on the spreadsheets of both quantum experts.

[131] For my costing determination, I have ignored both experts' costings of the Kurt Downie repair option. I have solely concentrated on the Deane Fluit repair solution.

[132] My costing determination is a measurement as at the time of hearing. There is no allowance for future cost escalation.

[133] In reaching my conclusion, I have adopted the third column of the experts' summary report which is headed KPKO. This constitutes an adjustment of the Rawlinsons costings presented with Mr Fluit's evidence. There is significant consensus between Ms Goodman-Jones and Mr Pederson which has assisted in achieving my measurement. I comment and make some adjustments adopting the headings used by the quantum experts.

[134] I agree with both when neither includes any allowance for retrofitting control joints to the existing blockwork substrate.

[135] There is no disagreement between Ms Goodman-Jones and Mr Pederson with the items under the heading *Enabling work; window and door joinery; internal works; services; building consent fees*.

[136] They differ under the heading *Exterior Wall Cladding*. Mr Parker's report identified the cost of painting weatherboards. Ms Goodman-Jones' figure is $605 more that Mr Pederson's. Mr Pederson's spreadsheet records that his estimate is the sum agreed at the meeting of the quantum experts on 26 May 2023. Ms Goodman-Jones' difference is the additional cost of painting the chimney weatherboards. Mr Humpherson's design is to the plaster coated elements solely and proposes no work to the linear board cladding sections, such as the chimney cladding and the western elevation cladding. I determine that the additional cost suggested by M Goodman-Jones is on the cusp of betterment and no evidence has been presented to the Tribunal that this aspect is a result of the first respondent's building work. I prefer Mr Pederson's weatherboard cladding amount of $950.

[137] The next difference is under the heading *Roof*. Ms Goodman-Jones has estimated the cost of work to the Butynol gutters. These are internal gutters. They have not been identified as weathertightness defects and, more importantly, are not part of the Deane Fluit repair solution as designed by Mr Humpherson and Mr Flewellen. Again, I adopt Mr Pederson's estimate.

[138] Ms Goodman-Jones' estimate has allowed for removal of the glass balustrades. There is no EIFS cladding work being undertaken in or adjacent to the deck area on the western elevation. Mr Fluit maintains that removal of the balustrades is not required on that elevation. He agrees with Mr Pederson

for an allowance of $500 to protect the balustrades but not to remove them. I adopt Mr Pederson's estimate of $500.

[139] I adopt Mr Pederson's estimate for the fibre cement soffit repairs which is the estimate that both experts agreed at their caucus meeting on 26 May 2023.

[140] The experts disagree on the cost estimates for scaffolding. Ms Goodman-Jones' estimate is for a scaffolding hire cost for a full 10 weeks which both experts agree on. Mr Pederson's figure is adopting a four-week discount which Mr Fluit obtained when he sought a quotation for the balustrading. I am not confident that the special price allowance of four weeks free would be available to the contracting party that the claimants engage. I prefer Ms Goodman-Jones' estimate of $13,070.

[141] Both experts include a total for added items of $4,009. It appears to involve removal then reinstatement of external electric lights. Rawlinson's costings make mention of moving 5 lights and allows a cost of $425 and plumbing of $170. Ms Goodman-Jones has allowed an additional $3600. She explains her reasoning which includes removal of all exterior and some internal light fittings. This matter is a good illustration for the inclusion of Mr Fluit. His familiarity with the home suggests the removal of all the lights indicated by Ms Goodman-Jones is a category of works which will not be necessary. I prefer his scope of works and make an allowance of $759.

[142] I accept Mr Pederson's estimate of $14,018.99 for Preliminaries. Both quantum experts presented an allowance of 10 per cent and the difference reflects build cost assessments. I prefer Mr Fluit's input principally for his local knowledge, and Mr Pederson's estimate.

[143] I accept a builder's margin of 10 per cent on which Ms Goodman-Jones and Mr Pederson agree. I prefer Mr Pederson's estimate which again reflects the different aggregate build cost assessments of both experts.

[144] The quantum experts differ on their respective estimates for contract work insurance. Both are a percentage estimate from a different variance. I accept Mr Pederson's.

[145] Both experts agree on a 15 per cent contingency. Mr Fluit disagrees. However, I prefer the consensus of the quantum experts and also the final

estimate of Mr Pederson, again reflects the different aggregate build cost assessments both have made.

[146] I agree with Mr Johnstone and Mr Fluit's argument against the professional fees estimate. The evidence of Mr Humpherson provides a full set of designs, specifications, and documentation to support an application for building consent. Mr Humpherson's evidence clearly states that his design solution is appropriate to repair the claimants' home and he is prepared to record that to the fourth respondent.[59] These are already available to the claimants and consistent with Deane Fluit's repair solution which I have adopted. I therefore exclude an item for professional fees. It is still possible that there may be some professional costs, albeit minor in the scheme of costings that need to be incurred but I have no evidence to consider these.

[147] I have agreed that the claimants are entitled to the costs of independent quality assurance input from a building surveyor.

[148] Mr Johnstone, in his final submission, suggested that Mr Hadley's fee could be reduced for flight and travel times if such a building surveyor could be located locally. The evidence before the Tribunal, however, is that the fourth respondent's building surveyor expert is available and has provided an estimate of costs. I adopt the structure of Mr Hadley's estimate of costs. I therefore add an allowance of $6,000, which I have rounded from Mr Hadley's.

[149] Therefore, by my calculation Deane Fluit's repair solution will have a cost estimate of $243,040.21.

[150] I set down below a schedule of my determined cost measurements:

Deane Fluit Repair Solution Estimate

Enabling Work	**Costs**	**Sub Total**
Exterior	945.00	
Carport	350.00	
Landscaping	6861.00	
Protection	1053.00	
Electric & Manual blinds	280.00	**9489.00**
Exterior Wall Cladding		
Plaster cladding	102440.04	
Weatherboard cladding	950.00	

[59] NoE p 178.

Fibre Cement Soffit	900.00	**104290.04**
Window & Door Joinery	1493.10	
Roof	5077.50	
Internal Works	6799.30	**13369.90**
Services		
Electrical Services	750.00	
Plumbing Services	1000.00	
Glass Balustrade	500.00	
Scaffolding	13070.00	
Added Costs	759.00	
Preliminaries	14419.79	**30498.79**
Total		**157647.73**
Builders Margin - 10%	15764.77	
Professional Fees	0	
Consent Fees	3943.42	**19708.19**
Total		**177355.92**
Contingency - 15%	26603.39	
Contract Work Insurance	1380.00	
Building Surveyor Supervisor	6000.00	**33983.39**
Total		**211339.31**
GST 15%	31700.90	
Estimate of Repair Costs		**$243,040.21 (including GST)**

The liability of Deane Fluit Builder Ltd

[151] Deane Fluit Builder was engaged by the claimants to build their home. There was no written contract. Mr Wilton engaged both their architectural draftsman, the sixth respondent, and the builder informally by oral instructions.

[152] Counsel for Deane Fluit Builder admitted in his opening submissions that the first respondent was obliged to carry out all building work in compliance with the Building Code.[60] Mr Johnston submitted that Deane Fluit Builder's tortious duty was to take reasonable care in performing the building work and the applicable standard was in compliance with the Building Code.[61] Deane Fluit Builder understood one of its roles was to select and instruct

[60] Building Act 2004, s 17.
[61] *Hotchin v New Zealand Guardian Trust Co Ltd* [2016] NZSC 24; *Minister of Education v H Construction North Island Ltd* [2018] NZHC 871; and *Palmer v Hewitt Building Ltd* [2021] NZHC 1460.

subcontractors. Deane Fluit Builder instructed the blocklayer to undertake and build the sixth respondent's substrate design.

[153] Although there was no written contract between the claimants and Deane Fluit Builder, this does not negate Deane Fluit Builder from owing the claimants a tortious duty of care. It is well established that a person who is primarily responsible for the proper construction of a home owes the homeowners a duty of care in tort.[62] It is clear that Deane Fluit Builder owes a duty of care in tort to the claimants in the sense that it is reasonably foreseeable that the claimants are likely to suffer loss arising from any negligent work that results in a building defect in the home over the course of its construction.

[154] Deane Fluit Builder engaged Tiling Solutions to install the Wattyl Granosite cladding system to the home and the evidence suggests to me that it remained largely uninvolved with the cladding installation thereafter. Wattyl's specifications for its cladding relevantly stated:[63]

> The person/s to whom the applicator is contracted (hereafter called the "main contractor"), shall ensure that the applicator implements the appropriate quality assurance system for the surface preparation, application of coatings, curing, handling, storage and protection of all WATTYL® products.
>
> …
>
> It is the responsibility of the main contractor to ensure that all parties have a full understanding of what the specification requires.
>
> …
>
> It shall be the responsibility of the main contractor to ensure the substrate to which the coating system is to be applied is of a fit standard to permit the desired finish.
>
> …
>
> It shall be the responsibility of the main contractor to provide adequate protection to the coating against freezing … against direct impingement of water or other liquids … and against abrasive contact…

[155] Mr Fluit admitted at the hearing that he does not remember reading Wattyl's specifications.[64] He said that he knew of his obligations in relation to the surface preparation of the substrate, but that he also relied on Mr Hardaker

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[62] *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479 (HC) (No 3) [Sunset Terraces] at [125], citing *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 (CA) at [407].
[63] CB 03.1296–03.1297 and 03.1299.
[64] NoE, p 263, lines 29–30 and p 275, line 12.

knowing how to install the cladding system.[65] I find that Mr Fluit acted erroneously in failing to read the specifications and fully relying on Mr Hardaker to install the cladding system properly. It was Mr Fluit who, on instruction from Mr Wilton, sought an alternative cladding system.

[156] I agree with the expert evidence of Mr Simcock when he states that the substitution of the cladding from Rockcote to Wattyl Granosite has affected the outcome through the lack of clear installation documentation for use by the applicator and, importantly, others involved in the building process, including Deane Fluit Builder.[66]

[157] At the hearing, Mr Hardaker admitted that he departed from the Wattyl specifications by using a foam adhesive,[67] was aware that the specifications lacked detail,[68] and did not read them because they were the same and he was "sick of reading them" and was already familiar with the terms in them.[69]

[158] Given Mr Fluit's years of experience in the building industry, his lack of understanding of the cladding system he presented to Mr Wilton and his instruction and communication with Mr Hardaker regarding its installation is rather concerning. As the main contractor, I find that Deane Fluit Builder ought to have known to at least confer with the cladder as to the builder's own role and what the cladding specifications would require of the builder. Again, there was no written engagement between Deane Fluit Builder and Tiling Solutions. The evidence suggests he failed to do so and left Mr Hardaker to install the cladding without getting further involved.

[159] Furthermore, contrary to the Wattyl specifications, Mr Fluit did not ensure the substrate was under the appropriate conditions before allowing Mr Hardaker to install the cladding system on the home. Mr Fluit was aware construction had been delayed due to the weather, and that Tiling Solutions would begin its work installing the cladding during the cold and damp winter. Mr McLeod said in his brief that the materials used in installing the cladding, such as glue, plaster and paint, required temperatures of higher than 10 degrees Celsius to reach their expected performance.[70] The actual temperatures in Wanaka during the time of the cladding installation were in the

[65] NoE, p 264, lines 1–2.
[66] Statement of expert evidence by Kevin John Simcock (31 March 2023) at [35]–[38].
[67] NoE, p 359, lines 7–12.
[68] NoE, p 353, lines 7–10.
[69] NoE, p 365–366.
[70] Kevin McLeod's BoE (31 March 2023) at [22]–[23].

range of -8 degrees to 11 degrees Celsius.[71] Mr Simcock further said that it is possible to apply plaster in cold temperatures if the building is fully cloaked and heated inside.[72] For the claimants' construction, there was no protection for the building at any time.[73] Mr MacDonald gave evidence that placing a tent over the building was a sensible practice to protect the substrate from the elements. However, he understood that in Mr Wilton's case, there was no budget for this to be achieved.[74] The substrate was left exposed to the elements and there are photographs clearly illustrating the substrate was wet.[75] At the hearing, Mr Wilton and Mr Fluit agreed that the wetness was probably due to rain.[76]

[160] Because the temperatures during cladding installation were cold and the substrate was wet, Deane Fluit Builder ought to have stopped Mr Hardaker from starting work on the cladding until the weather became warmer and the substrate had properly cured and dried. Mr Fluit should have notified Mr Wilton (who was placing a time constraint on the construction as the claimant's required occupation by Christmas 2010) that there would be delays in completing construction. With his years of building experience, Mr Fluit would be expected to know that installing cladding in such conditions could cause issues, including weathertightness issues. However, the evidence illustrates that he allowed Tiling Solutions to commence work on the cladding without properly checking if the substrate was in an appropriate condition for installation. This was a negligent act that has been causative of damage. Mr Hadley,[77] Mr Simcock,[78] Mr G Parker,[79] and Mr McLeod[80] agree that weather conditions have been a contributing factor towards the cladding cracking which has allowed moisture to enter the home.

[161] The home was built on instructions from Mr Wilton, without drip edges, cladding control joints and waterproofing sealant on the concrete substrate. Deane Fluit Builder submits that Mr Wilton gave express instructions that control joints were not to be installed in the cladding in response to a specific enquiry by Mr Fluit. Deane Fluit Builder also submits that Mr Wilton told Mr Fluit and Mr MacDonald that he did not want drip edges, or a waterproof

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[71] At [24].
[72] At [25].
[73] NoE, p 106, line 24 and p 307, line 18.
[74] NoE, p 307, lines 18–19.
[75] CB 01.0301–01.0305.
[76] NoE, p 110, lines 1–2 and p 236, lines 1 and 13.
[77] Mark Hadley's BoE (31 March 2023) at [9.14]–[9.18].
[78] Kevin Simcock's statement of evidence (31 March 2023) at [22].
[79] Grant Parker's reply BoE (28 April 2023) at [4] and [22].
[80] Kevin McLeod's reply BoE (21 April 2023) at [19].

membrane applied to the concrete. I have already found in this determination that Mr Wilton made those decisions, without consultation with the architectural draftsman or any other expert and so instructed Mr Fluit, Mr MacDonald and Mr Hardaker accordingly. Mr Wilton believed that there was no point in installing control joints in the cladding when not in the concrete masonry. Mr Saul disagreed with this view[81] and said control joints should have been installed in the cladding and would have improved the performance of the plaster surface. Mr Wilton's opinion is not plausible given his lack of knowledge of cladding. I prefer Mr Saul's opinion.

[162] It is negligent for a builder to carry out instructions that the builder knows to be wrong and perhaps negligent. Similar circumstances arose in the weathertight claim *Heng v Walshaw*,[82] where the cladder was instructed to carry out the installation of the cladding in a way that breached the Building Code. It was determined that the cladder ought reasonably to have appreciated those instructions as likely to cause such a breach, and therefore it was still liable for the negligently created defects in the cladding and the damage that resulted.[83] I agree with the adjudicator's finding in that decision, that it is "no defence to a claim in negligence for a subcontractor to say that it was asked to do its work negligently".[84] Agreeing with that determination, I apply the same reasoning for the circumstances in this claim. With his years of building experience, it would have been known to Mr Fluit that an absence of these waterproofing building attributes in 2010 would carry a risk of weathertightness issues. Notwithstanding, I find that Deane Fluit Builder followed Mr Wilton's instructions without objection and continued the building work which Mr Fluit's experience should have suggested could cause weathertightness issues. I find that Deane Fluit Builder has been negligent in this regard.

[163] In addition to the carrying out of negligent instructions, I also find that Deane Fluit Builder had a duty to warn the claimants of the possible issues that could arise if Mr Wilton's instructions were carried out. In *Carter Holt Harvey Ltd v Minister of Education*, the Court of Appeal held that Carter Holt Harvey had a duty of care to warn of the characteristic risks of cladding system products.[85] This duty to warn arose from the imbalance in the information held by a manufacturer as compared with the consumer about the risks or dangers

[81] NoE, p 464–465.
[82] *Heng v Walshaw* WHRS claim no. 734, 30 January 2008.
[83] At [481].
[84] At [481].
[85] *Carter Holt Harvey Ltd v Minister of Education* [2015] NZCA 321.

inherent in the use of the product.[86] This reasoning was upheld by the Supreme Court, which said that the existence of a duty of care for failure to warn will depend on all the circumstances and facts.[87] Mr Fluit admitted that he did not warn Mr Wilton of the risks associated with omitting drip edges, control joints in the cladding system and weathertight protection to the substrate.[88] Mr Fluit's explanation was that he relied on Mr Wilton's professional expertise as a residential structural engineer and that Mr Wilton would know more about the thermal movement that the building would produce.[89] This explanation is not sufficient to discharge Deane Fluit Builder of its duty to warn the claimants. Mr Fluit's many years of building, especially in Wanaka, should have enabled him to confidently warn the claimants about the weathertight risks with their design for Peninsula Bay.

[164] Mr Wilton's evidence, notwithstanding his experience as a structural engineer in the residential market, said that the scope of his professional experience did not extend to knowledge of cladding. That specifically would be something that Mr Fluit, an experienced residential building practitioner, would know more about. Using the words of the Court of Appeal in *Carter Holt Harvey*, there was an imbalance of information held by the builder as compared with the owner/structural engineer in relation to the cladding and specifically the importance of control joints and drip edges in the cladding. I find therefore, that Deane Fluit Builder did have a duty to warn Mr Wilton of the risks associated with omitting control joints in the cladding but breached this duty by failing to do so.

[165] These omissions and breaches have been causative of damage. Mr McLeod, in his brief of evidence, says that one of the major causes of the damage to the home included a lack of drip edges to the upper levels of the recessed cladding surrounding joinery locations.[90] Mr G Parker also agreed that because there are no drip edges on the window reveal, there is a higher risk of moisture penetration.[91] In relation to control joints in the cladding, Mr G Parker is of the view that because much of the cracking occurs at the weakest point of the building (such as the sheet joints and around the windows and doors) control joints in the cladding would have allowed for thermal and

[86] At [130].
[87] *Carter Holt Harvey Ltd v Minister of Education* [2016] NZSC 95 at [77].
[88] NoE, p 245, lines 11–16.
[89] NoE, p 244, lines 23–25 and p 245, lines 6–8.
[90] Kevin McLeod's BoE (29 March 2023) at [29.3].
[91] Grant Parker's BoE (20 February 2023) at [23].

moisture movement to be absorbed by the cladding without damage.[92] Mr Simcock in his evidence said that control joints should have been installed in the cladding and would have benefitted the performance of the plaster surface significantly.[93]

[166] I do not find that the decision to omit a waterproofing membrane to the masonry was causative of damage. The experts' panel, except for Mr McLeod, agreed that there were no issues with the polystyrene bonding to the masonry.[94] Mr Simcock, in his brief of evidence, explained that there is no evidence that moisture travelling from the masonry substrate through to the EPS panels had caused debonding of the polystyrene from the masonry,[95] meaning the absence of waterproofed concrete block has not contributed to the failure of the cladding.

[167] Another important building defect was waterproofing the window frames. Deane Fluit Builder engaged Tiling Solutions to install the windows, but also undertook some of this work itself before Mr Hardaker arrived on site to waterproof the window frames in the substrate.[96] It is unclear as to exactly which windows were installed by Deane Fluit Builder at the time Tiling Solutions gained access to the building site.

[168] Mark Andrew Ward, a Queenstown plastering expert giving evidence for the third respondent, said the windows can only be waterproofed prior to the windows being installed.[97] Nevertheless, the number of installed windows made it difficult for Tiling Solutions to waterproof the window frames in the substrate when the windows were in situ. Mr Downie undertook inspection of two windows and found that they were not waterproofed. In Mr McLeod's opinion, a major cause of the damage to the home was the lack of a waterproofing membrane to the surrounds of blockwork windows.[98] This illustrates Deane Fluit Builder's breach of its duty of care in installing some of the windows before the frames could be waterproofed, which I find has been causative of damage to the home.

[169] I conclude that Deane Fluit Builder has been negligent, has breached its duty of care to the claimants and is liable for the damage to the home through

[92] At [17(b)].
[93] Kevin Simcock's statement of evidence (31 March 2023) at [31] and [33].
[94] NoE, p 525, lines 6–9.
[95] Kevin McLeod's BoE (31 March 2023) at [28].
[96] NoE, p 279, lines 31–33.
[97] Mark Andrew Ward's BoE (30 March 2023) at [42].
[98] Kevin McLeod's BoE (31 March 2023) at [29.1].

its multiple failures and omissions and due to it carrying out of instructions that it knew to be wrong and negligent. These collectively constitute a breach of its duty of care to the claimants and I have found have been causative of damage.

[170] The claimants have proven their claim against Deane Fluit Builder.

The liability of Tiling Solutions Wanaka Ltd

[171] Tiling Solutions was engaged as a cladding subcontractor by Deane Fluit Builder to install the EIFS cladding system on the home. It is not disputed that the Wattyl Granosite EIFS cladding system was installed instead of the consented Rockcote. No amendments to the building consent were sought with Council in respect of this change. Tiling Solutions also plastered and painted the exterior of the home with paint supplied and made up by Wattyl.

[172] The claimants alleged that Tiling Solutions was negligent and breached its duty of care to the claimants by failing to, amongst other things, install the EIFS cladding system in accordance with the designs and specifications of the manufacturer, the building consent, the Building Code and with adequate quality assurance measures in place. And to install the EPS such that no movement of the sheets could occur to prevent cracking and to provide a secondary means of weathertightness by directly fixing the cladding to the timber infill wall and to provide a PS3 for the EIFS installation.

[173] The claimants submit that Mr Hardaker of Tiling Solutions had a cavalier attitude to best building practice when installing the cladding at the claimants' home. It is clear from the evidence that Mr Hardaker did not read the designs and specifications that were part of the building consent documents when he admitted he did not know the Rockcote specification was consented by the Council. He did not ask to see a copy of the consented plans, which were kept on site.[99]

[174] At the hearing, Mr Hardaker admitted that Wattyl's specifications for the cladding did not have sufficient detail and was generic.[100] He also did not read the Wattyl specifications in detail because they were "all the same" and he was "sick of reading them" and believed he was familiar with the terms in them.[101] His evidence is that he only wanted the specific project number stated

[99] NoE, p 382, lines 13–19.
[100] NoE, p 353.
[101] NoE, p 365–366.

on the front page of the Wattyl specifications.[102] It is clear from the evidence that Tiling Solutions did not install the cladding in accordance with Wattyl's specifications.

[175] Tiling Solutions did not install control joints in the cladding as required by the specifications and Mr Hardaker admitted that Tiling Solutions used a Hilti foam adhesive product instead of the adhesive mortar coarse product required by the specifications.[103] Mr Hardaker stated during the hearing that Tiling Solutions purchased all but a few of the components required for the Wattyl Granosite cladding system from Wattyl's Dunedin Trade Centre. This included acquiring such materials as plaster, primers, paints, mesh, flashings, and some fixings.[104] The EPS panels, expanding foam, fixings and fasteners were sourced from elsewhere.[105]

[176] It is not disputed that control joints were not installed in the cladding. Mr Hardaker, for Tiling Solutions, states that he was acting under Mr Wilton's instructions as the home was to have a smooth and monolithic appearance with no breaks or joins.[106] Mr Hardaker also stated that he was told by Mr Wilton not to put the sealant on the concrete blockwork.[107] According to Mr Hardaker, Tiling Solutions adhered to Mr Wilton's instructions as Mr Hardaker considered Mr Wilton to have superior expertise and knowledge due to his structural engineering background, whereas Mr Hardaker was a "subbie" on the "bottom of the food chain".[108]

[177] Like Deane Fluit Builder, Tiling Solutions had a duty to warn the owner when omitting to advise on the merits of, or install, control joints as specified and did not seal the concrete blockwork on the instructions of Mr Wilton. I determine on the evidence that Tiling Solutions had a duty to warn Mr Wilton of the weathertightness risks, and it was negligent for it to carry out instructions that were known to be wrong and negligent. Mr Hardaker admitted that applying sealant to blockwork usually forms part of the scope of his work,[109] yet Tiling Solutions did not do so. Mr Hardaker and Tiling Solutions should have known that following Mr Wilton's instructions would give rise to a risk of weathertightness issues, but the evidence suggests Tiling Solutions chose not

[102] NoE, p 366, line 4.
[103] NoE, p 359, lines 7–14 and p 367, lines 20–28.
[104] NoE, p 346, lines 9–11 and p 379.
[105] NoE, p 347, line 29, p 379, lines 11–15, p 385, lines 1–6 and p 395, lines 15–16.
[106] NoE, p 378, lines 1–6.
[107] NoE, p 387, lines 19–24.
[108] NoE, p 387, lines 26–28.
[109] NoE, p 387, lines 29–30.

to question Mr Wilton's instructions or raise any concerns with the claimants. I accept the claimants' submission that it was not sufficient for Mr Hardaker and Tiling Solutions to simply undertake the plastering without reference to the wider available manufacturer's guidance, such as the Wattyl specifications providing for control joints in the cladding.

[178] Tiling Solutions submits that control joints in the EIFS cladding would be ineffective because there were no corresponding control joints in the masonry. Mr MacDonald and Mr Hardaker gave evidence to the effect,[110] and Mr Wilton agreed in cross examination, that control joints in the EIFS would not necessarily have functioned properly as he had already excluded control joints in the masonry.[111] I agree, however, with Mr Saul's evidence. His evidence is that Tiling Solutions should have installed control joints in the EIFS cladding as the specifications called for them, notwithstanding that control joints were absent in the masonry construction.[112]

[179] I mentioned earlier that the defects experts all agree with Mr Downie that there are indications of a poor installation process in relation to the cladding and that this poor workmanship allowed the cladding to crack which enabled moisture ingress.

[180] Mr Simcock agrees with Mr Saul that control joints should have been installed by Tiling Solutions as the specifications provided and, if so, would have significantly increased the performance of the plaster surface.[113] Mr G Parker states that it is not the usual practice to only install control joints in the cladding if they are provided in the substrate.[114] He says in his evidence that this is contrary to best building practice, specifications and guidance from other sources.[115]

[181] Mr Hadley also agreed that had the cladding been installed correctly and in accordance with Wattyl's specifications, it would not have cracked as it did.[116] Furthermore, Mr McLeod, Mr Hadley and Mr G Parker all agreed that one of the causes of the cracked cladding was the fact that the polystyrene

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[110] NoE, p 311, lines 20–23, p 378, lines 30–33 and p 379, line 1; and Paul Hardaker's BoE (31 March 2023) at [77].
[111] NoE, p 31, lines 8–13.
[112] NoE, p 422, lines 25–31 and p 464, lines 18–24; and Eddie Saul's BoE (31 March 2023) at [8.18]–[8.21] and [8.24].
[113] NoE, p 387, lines 29–30 and experts' BoEs (31 March 2023) at [31] and [33].
[114] Grant Parker's reply BoE (28 April 2023) at [50].
[115] At [50].
[116] Mark Hadley's BoE (31 March 2023) at [8.17].

sheets were face fixed to the concrete using intermittent application of expanding foam. I accept their evidence and find that Tiling Solutions was negligent in failing to adhere to Wattyl's specifications in relation to control joints and the specified adhesive product to be applied to the EPS polystyrene sheets.

[182] I find Tiling Solutions to be negligent when it failed to wait until the weather and substrate conditions were appropriate before installing the cladding system. The substrate had not been tented and was left exposed to the weather. The evidence is that rain occurred during and after construction of the concrete substrate. There are photographs showing the wet substrate. Mr Hardaker, in his brief of evidence, says that he was not aware of the limitations of foam adhesive and that foam adhesive could fail if the substrate was wet. In response to this, Mr McLeod gave evidence that a reasonable installer at the time would have understood the substrate needed to have sufficient drying and curing time, and that applying foam adhesive to wet concrete would carry a risk of the foam not adhering properly.[117] I agree with Mr McLeod's evidence and do not agree with Mark Ward's evidence in support of Mr Hardaker. Mr G Parker says that the base coat or a cement-based adhesive compatible with the polystyrene should probably and typically have been used.[118]

[183] I agree with the experts' evidence and further note that Wattyl's specifications state that all products within its system must not be applied to wet surfaces and must be applied in temperatures between 10 and 34 degrees Celsius.[119] As I have mentioned earlier, the temperature in the Wanaka area during the period of installation of the cladding was not in the appropriate range for the materials that were used by Tiling Solutions in the installation of the EIFS cladding. The defects experts agree that the weather conditions were not suitable for the cladding to be installed and likely contributed to the cause of the damage to the home. As a licensed cladding installer, Tiling Solutions ought to have known that it was necessary to wait until weather conditions were appropriate, yet it proceeded to install in those adverse conditions.

[184] Tiling Solutions was also tasked with waterproofing the window frames at the claimants' home. Mr Downie's report establishes that Tiling Solutions failed to do this. Mr Downie's evidence is that where the windows had already

[117] Kevin McLeod's reply BoE (21 April 2023) at [6].
[118] Grant Parker's reply BoE (28 April 2023) at [32].
[119] CB 03.1298.

been installed, the application by Tiling Solutions of waterproofing membrane paint could not be applied to the full depth of the window reveal as the window was blocking the area. His view is that it is unlikely that any window openings are fully waterproofed, and windows should be removed to allow waterproofing to take place.

[185] Mr Hardaker, in his brief of evidence, says he could not apply the waterproofing membrane into the full depth of the window reveal because the windows had already been installed.[120] The evidence is clear that some windows were installed by Deane Fluit Builder. Despite this, I find that Tiling Solutions was negligent in failing to waterproof the windows as required by the specifications and the role of the installer. I find that Tiling Solutions should have, and ought to have, required Deane Fluit Builder to remove the windows already installed so that Tiling Solutions could properly waterproof the window frames. It is not an excuse for Tiling Solutions to omit waterproofing of the windows simply because they had already been installed.

[186] This omission has, according to Mr Downie's evidence, been causative of damage. Mr McLeod, in his brief of evidence, says that a major cause of the damage to the home was the lack of waterproofing membrane to the surrounds of blockwork windows because it allowed a direct path of moisture to enter internal locations of the home.[121] Mr Hadley visited the home and examined the windowsills that had been tested by Mr Downie. Mr Hadley found that the waterproofing was only partially taken up the face of the rebated sill.[122] These experts' observations were consistent with Mr Hardaker's evidence that Tiling Solutions could not fully apply the waterproofing membrane.[123] Mr Hadley explains that this partial waterproofing allows any leaking at the plastered window junctions to bypass the waterproofing membrane and saturate the masonry causing potential moisture damage to the plasterboard linings.[124] Failure to adequately repair the waterproofing to the blockwork window surrounds is a clear potential source of future likely damage.

[187] I find that the claimants have proven their claim against Tiling Solution's 2010 installation of the EIFS cladding.

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[120] Paul Hardaker's BoE (31 March 2023) at [25].
[121] Kevin McLeod's BoE (31 March 2023) at [29.1].
[122] Mark Hadley's BoE (31 March 2023) at [9.2].
[123] At [9.4].
[124] At [9.3].

2019 repairs

[188] Deane Fluit Builder and Tiling Solutions had limited involvement in the 2019 repairs. Mr Wilton did initially make contact with Mr Hardaker asking for an explanation as to the cause of the cladding cracks and leaking. Mr Hardaker largely referred Mr Wilton to Wattyl for the repairs and had no further involvement, although Mr Wilton did continue to copy Mr Hardaker in many of his email communications with Wattyl and others. The evidence suggests to me that Tiling Solutions is in no way causative of the failed 2019 repairs.

[189] In its defence, Tiling Solutions submits that it is not responsible for the full cost of the repairs which the home requires to ensure its weathertightness going forward. It says the defective repairs carried out in 2019 broke the chain of causation between its initial installation of the cladding in 2010 and the now current state of the claimants' home.

[190] Tiling Solutions refers to the findings of the experts' conference and panel during the hearing, where it was agreed that the failure of the 2019 repairs may have exacerbated the deterioration of the cladding and that a full reclad of the home is now required.[125] Tiling Solutions submits that this failure is an intervening act that terminates its liability. It had no involvement in the diagnosis of the defects in 2013 or any decisions concerning what were the appropriate remedial works at the time. It had referred Mr Wilton to Wattyl in relation to repairing the defects. Wattyl had carried out the defective repairs. Therefore, it says the principle of *novus actus interveniens* applies as the actions of Wattyl have overtaken and exacerbated the originating cause of action.

[191] The generally accepted test in relation to a *novus actus interveniens* is to look at the scope of the defendant's (respondent's) duty or the risk created by its conduct and see if it extends to the further damage caused by the intervening event.[126] Stephen Todd has suggested looking at a *novus actus interveniens* in the following way:[127]

> Expressed in terms either of the scope of the defendant's duty or of the cause of the harm, an inquiry into whether a damaging intervention is within or outside the scope of the risk or risks created by the defendant's conduct can help identify a link between the conduct and the damage in appropriate cases and can provide a satisfactory rationale for many of the decisions. Admittedly, determining the

[125] NoE, p 522, lines 5–11.
[126] Stephen Todd *Tort – A to Z of New Zealand Law* (online looseleaf ed, Westlaw NZ).
[127] At [59.20.3.01].

> question must to some extent be a matter of impression about which opinions may differ, yet the inquiry certainly provides a focus that is not found in empty phrases like "breaking the chain of causation" or similar invocations.

[192] In *Waitakere City Council v Smith*, the District Court found the term "chain of causation" to be limited and misleading as causation should not be seen as a simple and linear concept.[128] It preferred to describe causation as "more often like a web than a chain".[129]

[193] In *Scandle v Far North District Council*, the Court of Appeal applied the test of causation from *Price Waterhouse v Kwan*.[130] In *Price Waterhouse v Kwan*, the Court of Appeal said:[131]

> There is a material, indeed a crucial difference between causing a loss and providing the opportunity for its occurrence. … Plaintiffs in this field must show that the defendant's act or omission constituted a material and substantial cause of their loss. It is not enough that such act or omission simply provided the opportunity for the occurrence of the loss. The concept of materiality denotes that the act or omission must have had a real influence on the occurrence of the loss. The concept of substantiality denotes that the act or omission must have made a more than de minimis or trivial contribution to the occurrence of the loss. Looking at the question in this dual way is both a reminder of the difference between opportunity and cause, and a touchstone for distinguishing between them. In some instances, the words used have been material or (as opposed to and) substantial. It is preferable, for the reasons just mentioned, to focus on both concepts for they are each relevant to causation issues. No form of words will ultimately provide an automatic answer to what is essentially a question of common-sense judgment.

[194] The Supreme Court has held that an intervening act or cause that removes all causal potency from the original negligence and becomes the real cause of the damage will be a *novus actus interveniens*.[132] In *Johnson v Watson*, the Court of Appeal was faced with a situation where the original build works were outside the limitation period, but subsequent defective repairs that may have caused further damage were within the limitation period:[133]

> [18] We return to the question of causation in the present case. There can be no doubt that if the original workmanship was faulty it was a cause of the total damage in a "but for" sense. Had the original work not been faulty there would have been no damage capable of being increased by ineffective prevention work. The fact that the original work was on this basis causative of the total damage does not

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[128] *Waitakere City Council v Smith* [2005] DCR 300 at [35].
[129] At [35].
[130] *Scandle v Far North District Council* [2012] NZCA 52 at [25]–[34].
[131] *Price Waterhouse v Kwan* [2000] 3 NZLR 39 (CA) at [28].
[132] *North Shore City Council v Body Corporate 188529* [2010] NZSC 158, [2011] 2 NZLR 289 at [83].
[133] *Johnson v Watson* [2003] 1 NZLR 626 (CA) at [1]–[6] and [9].

> mean that there cannot in law be any additional and concurrent cause of part of the total damage. It is not unusual to find that certain consequences have more than one cause. To be recognised as a cause in law, the allegedly causative circumstance does not have to be the cause. It is enough if it is a cause which is substantial and material: ... Substantial in this sense means more than trivial or de minimis. Material means that the alleged cause must have had a real influence on the occurrence of the loss or damage in suit.
>
> [19] Here negligence in carrying out the prevention work, be it act or omission, if established, is a concurrent cause of the damage which it failed to prevent. Its purpose was to prevent such damage and it would be unrealistic to take the view that it was not a substantial and material cause of that damage. In such circumstances as these it is not the law that because the further damage could not have occurred without (but for) the originally faulty workmanship, such workmanship must be regarded as the sole cause of that damage. A concurrent cause, such as the ineffective prevention work, is in a sense the opposite of a *novus actus interveniens*. It is in reality a *novus actus causans*, or in other words a new default which runs with the earlier default so as to cause, or at least materially contribute to, the further damage which it was its purpose to prevent.
>
> …
>
> [24] As a cause of action for faulty prevention work is separate and distinct from a cause of action for faulty original workmanship, it must follow that, in pursuing the former, the Johnsons have the onus of establishing what loss or damage they have suffered on its account. That means the Johnsons have the onus of showing, on a reasonable basis, how much of the total loss or damage is properly to be attributed to the failure of the prevention work. The Johnsons must therefore show, on the balance of probabilities, how much of their total loss derives from actionable prevention work as opposed to non-actionable original construction work or non-actionable prevention work.

[195] In my view, the original defective installation of the cladding by Tiling Solutions in 2010 remains a substantial and material cause of the damage to the home. As said by numerous authorities, causation is not as simple as a linear chain where the tortfeasor last in time, or last in the chain, bears full responsibility for the damage caused by multiple parties. The original defective installation of the cladding made more than a de minimis or trivial contribution to the damage – it had a real influence on the occurrence of the loss. All but one of the experts at the defects panel agreed that the original defects could have been remedied by a synthetic overlay such as Rockcote RMaxx,[134] not an inexpensive repair. Had it required simpler and cheaper repairs, it may have been regarded as a trivial cause.

[196] The circumstances of this case are not dissimilar to that in *Johnson v Watson*. Both the original building works (2010) and subsequent repairs (2019)

[134] CB 03.1580.

were defective and causative of damage. In *Johnson v Watson*, it was said that the repairs were a concurrent cause of damage that it failed to prevent. It was a new default that ran with the earlier default so as to materially contribute to further damage. The same can be said in this case – the original installation of the cladding and the repairs in 2019 are concurrent defaults that both materially contributed to the damage of the home.

[197] Applying the Supreme Court's test, I am not persuaded that the 2019 repairs became the real cause of the damage and removed all causal potency from the original defective installation of the cladding by Tiling Solutions in 2010. Therefore, Wattyl's unsuccessful repairs undertaken in 2019 did not act in my view as a *novus actus interveniens* for Tiling Solutions' installation of the cladding. However, I do agree that Tiling Solutions is not responsible for the full cost of the recladding that is now required as a result of further damage caused by Wattyl's 2019 repairs. As was stated in *Johnson v Watson*, a cause of action for faulty repairs is separate and distinct from a cause of action for faulty original workmanship.

[198] Tiling Solutions' liability for the cost of repairs will be apportioned to reflect the extent of damage caused by its faulty installation in 2010 of the EIFS cladding. Had Tiling Solutions' original building work not been faulty, there would have been no damage capable of being increased by ineffective prevention work, as was done in 2019 by Wattyl. The fact that the original work was on this basis, causative of the total damage, does not mean that there cannot be in law any additional and concurrent cause of part of the total damage. This case is one where certain consequence have more than one cause.

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

[199] The law is well established regarding the task of a local authority's legislative duties concerning a building inspection regime. The task of the certified 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:[135]

[135] *Sunset Terraces*, above n 57 at [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.

[200] Gwyn J in the recent decision, *Bates v Auckland Council*,[136] 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*,[137] 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.
>
> …

[201] The Council, as fourth respondent, issued a code compliance certificate for the claimants' home on 13 February 2012.[138] In issuing the certificate, the Council certified that it was satisfied on reasonable grounds that the claimants' home had been built in accordance with the building consent and otherwise complied with the provisions of the Building Code.

[202] The claimants allege that the Council failed to identify that the home did not comply with the approved plans and could not have been satisfied that there were reasonable grounds that the provisions of the Building Code had been met. It was therefore negligent in the issue of the code compliance certificate. The claim relies on the Council's failure to have established an inspection regime capable of ensuring compliance with the building consent and that construction proceeded in accordance with and complied with the Building Code. No Council officer involved with granting consent and administering the inspection regime was called by the claimants or by the Council.

[203] I accept Mr M Parker's submission that by 2010, the Council would have been aware of weathertightness issues regarding residential construction

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[136] *Bates v Auckland Council* [2021] NZHC 2558.
[137] *Body Corporate 160361 v BC 2004 Ltd* [2015] NZHC 1803.
[138] CB 01.0147 and CB 02.0814.

generally in its territory. On 28 January 2010, when the Council issued building consent for the home, the Council knew or ought to have known there were many weathertightness issues confronting the construction of the claimants' home.

[204] The design drawings and specifications clearly illustrated that the home was to have a monolithic cladding face fixed to the substrate. At that time, all local authorities would have been fully aware of their obligations under the Building Act 2004 and of the Hun Report of 2002 which illustrated the weathertightness issues of monolithic cladding material, especially being face fixed to the substrate.

[205] The fact that there were no control joints in the concrete masonry structure, or overlay monolithic insulated cladding, that the cladding was face fixed and that the home was being built in a high wind zone were all factors that should have signalled to the Council to take special care in its building consent application process for possible weathertightness issues. The respondent did not produce evidence from any of its Council officers. However, the lack of Council evidence of what was observed or considered at the building consent issue stage or at such construction inspections is not the correct approach in adjudicating this issue.

[206] It is for the claimants to prove that the Council failed to take the necessary action to enable it to have reasonable grounds to have issued the code compliance certificate.

[207] The claimants' case is that when issuing the code compliance certificate, the Council breached its established duty of care to them as owners, alleging that there were no reasonable grounds for the Council to be satisfied that the provisions of the Building Code had been met.

[208] The Council undertook 14 inspections of the home during the period between 25 February 2010 and 2 September 2011. A plumbing pre-line and building pre-line inspection was carried out on 17 August 2010, when the cladding was being installed by Tiling Solutions. According to Mr Hardaker, the Council's inspection officer would have seen sheets of EPS on the elevations.[139] Mr Saul also agreed that it would have been obvious to the officer that the EPS was being applied to the substrate.[140] This was an opportunity for

[139] NoE, p 347, line 27.
[140] NoE, p 438, lines 10–26.

the Council to inspect the individual layers of the coating/cladding system. I can only conclude from the evidence that the Council's inspection system was so inflexible that it did not allow its officer on that day to also conduct a cladding inspection.

[209] The first final inspection carried out on 13 April 2011 found the work to be unsatisfactory.[141] In the inspection notes is written, "Provide certificates for … cladding". The next final inspection carried out on 2 September 2011 says, "Final issues have been addressed".[142]

[210] In *Sunset Terraces*, the High Court found North Shore City Council to be negligent when it failed to have an inspection regime capable of identifying waterproofing issues in relation to the walls and decks of the home.[143] In *Broome v Auckland Council*, this Tribunal found that the Auckland Council had developing experience of waterproofing membrane performance in wet areas, so it was obliged to ensure membrane and flashings were correctly installed.[144] Mr Saul's evidence is that inspections are undertaken to ensure the building is constructed in accordance with the consented documents,[145] which would include specifications for the cladding.[146] He further said that Council inspectors lacked the specific expertise to understand whether a proprietary cladding system had been installed in accordance with the specifications.[147] However, Mr Saul accepted that, given the widely publicised knowledge of weathertightness issues as the time of the claimants' home build, the Council would be "aware of its liability if it … couldn't be satisfied on reasonable grounds", and that he would expect the Council to have had an inspection of the cladding to discharge this duty.[148]

[211] I determine that, given the Council's knowledge of weathertightness issues in homes in general during the time of the claimants' build, it should have had an inspection regime capable of identifying waterproofing defects with cladding installation. If the fourth respondent's inspection officer did not have the necessary expertise to identify waterproofing defects in cladding, that officer could have simply asked Mr Hardaker, who was onsite installing the cladding, to illustrate how it was being installed in accordance with Wattyl's

[141] CB 02.0812.
[142] CB 02.0813.
[143] *Sunset Terraces*, above n 57, at [450].
[144] *Broome v Auckland Council* [2017] NZWHT Auckland 1 at [119].
[145] Eddie Saul's BoE (31 March 2023) at [9.7(b)].
[146] NoE, p 437, lines 11–15.
[147] NoE, p 437, lines 18–22 and 30–31,
[148] NoE, p 450, lines 20–28.

specifications and, more importantly, the consented plans and specifications. Even without the necessary expertise, the officer would have been able to perceive at least that the substrate was not under the proper or ideal conditions at that time for the cladding to be correctly applied. The temperatures in Wanaka at the time were well below the recommended temperatures for the cladding materials to be applied and it would have been visually perceptible that the substrate was wet, as evidenced by the produced photographs. I find therefore that the Council has been negligent in failing to identify several defects regarding the cladding which include the lack of control joints, the fact that its insulation departed from the Wattyl and consented specifications and that the substrate was not under ideal weather conditions for installation.

[212] I find, based on the evidence presented, the Council was onsite when Tiling Solutions was applying the cladding and had undertaken at least one inspection of it. Nevertheless, it failed to notice that the cladding was being face fixed to the substrate and that the cladding was a different system to the Rockcote cladding system which the Council approved as having been specified in the building consent application.

[213] The courts are clear in their judgments as to the construction inspection processes required of Councils in order for the Council to determine whether building work is being carried out in accordance with the building consent issued by the Council.[149] On the evidence of Mr Hardaker, the Council's construction inspection system, which was on site during his cladding installation, was not capable of enabling it to determine that all relevant aspects of the code and consent had been complied with or identifying waterproofing issues involving the installation of the cladding.

[214] The express purpose of a council's construction inspection system, as clearly stated in s 90 of the Building Act 2004 is to ensure that the building work being inspected complies with the building consent, that ensures that, at each stage of the building process, that building consent has been implemented, allowing a code compliance certificate to issue when the work is completed.[150] The building consent included the installation for insulation and waterproofing purposes, a EFIS cladding. Part of the Council's duty was to inspect installation of the proposed/consented cladding. The evidence suggests it did not do so

[149] *Dicks v Hobson Swan Construction Ltd (in Liq)* (2006) 7 NZCPR 881 (HC) and *Sunset Terraces*, above n 57.
[150] *Bates v Auckland Council* [2021] NZHC 2558; and *Reeves v Lakes Environmental Ltd* [2014] NZHC 2760 at [64].

adequately. In the absence of such an inspection system, I find the Council was negligent.

[215] The Council submits that it had in place and carried out an inspection process that was standard at the time.[151] However, bad practice, or an inadequate inspection regime, is still bad practice and an inadequate inspection regime, even though it is arguably the generally followed industry practice at the time.[152]

[216] The High Court has stated in *Blincoe*:[153]

> … 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.

[217] Heath J in *Sunset Terraces* clearly establishes a responsibility of Councils in carrying out inspections when he stated:[154]

> … [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. …

[218] 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.

[219] I am satisfied, on the evidence presented and which I have considered, that the Council has been negligent in failing to identify in its inspections that the EIFS cladding was not the Rockcote system as specified in the building consent, that the cladding was being correctly face fixed to the substrate and whether the substituted cladding system was installed in accordance with the Wattyl cladding manufacturer's specifications.

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[151] 4th Respondents Closing Submissions 5 July 2023 [1.5 (c)]
[152] *Edward Wong Finance Co Ltd v Johnson Stokes and Master* [1984] 1 AC 296 (PC); and *Tsai v Upper Hutt City Council* [2018] NZWHT Auckland 1.
[153] *Auckland Council v Blincoe* [2012] NZHC 2023 at [38].
[154] *Sunset Terraces*, above n 57, at [450].

Reliance on Council's QA checklist and/or warranty as a producer statement in issuing a code compliance certificate

[220] I accept that the Council is not a clerk of works. Its evidence shows that it conducted the ordinary building pre-line inspections. I have earlier found it to be negligent in not taking the opportunity to inspect the actual application of the cladding on that inspection visit as it could have on the evidence of Mr Hardaker. However as there are details that a council inspector would not be able to observe during inspections, it is normal practice for a council to rely on the licenced cladding applicators warranty and installers producer statement to determine if it can reasonably consider the work has been completed in line with the Building Consent and the Building Code. Its evidence suggests that this is what it sought to do in this matter by relying upon the Wattyl warranty as a PS3.

[221] The claimants submit that it was not reasonable for the Council to rely on the Wattyl warranty as a PS3. A PS3 is a statement as to workmanship.

[222] There is no mention of producer statements in the current Building Act 2004. However, the Council's obligation to exercise reasonable care in accepting producer statements remains.[155] There is nothing in the Act to prevent local authorities from relying on producer statements and they are regularly relied upon.[156]

[223] The Supreme Court has described producer statements as permitting a local authority to conclude that a building consent or code compliance certificate should be issued on a basis which does not depend on the building judgements of its own staff.[157] MBIE has also issued guidance in respect of producer statements. The guidance states:[158]

> A producer statement is a professional opinion based on sound judgement and specialist expertise. It is not a product warranty or guarantee of compliance.
>
> While producer statements are well-established and widely used, they have no particular status under the Building Act 2004. They are used as one source of information which the [authority] may rely upon to

[155] *Invercargill City Council v Southland Indoor Leisure Centre Charitable Trust* [2017] NZCA 68, [2017] 2 NZLR 650 at [135].
[156] *Body Corporate No 207624 v North Shore City Council* [2012] NZSC 83, [2013] 2 NZLR 297 [Spencer on Byron] at [311].
[157] At [313].
[158] Ministry of Business, Innovation and Employment (Producer Statements) (6 December 2022) retrieved from https://www.building.govt.nz/projects-and-consents/apply-for-building-consent/support-your-consent-application/producer-statements/.

> determine whether there are reasonable grounds to conclude that building work complies with the Building Code.
>
> In considering whether to accept a producer statement, [an authority] will normally assess the credentials of the author to ensure that person has the appropriate experience and competence in their particular field of expertise and make their own inspections of the building work.

[224] On balance, I find that the Wattyl warranty itself is not a producer statement. It is a warranty as to the quality of a product rather than an expert's opinion on compliance. The Wattyl warranty itself is titled "Warranty provided to support a construction producer statement". This is an express indication that the warranty by itself is not to be relied upon as a producer statement. In contrast, the Wattyl QA checklist states that "this form may be issued as an applicator producer statement, prior to receipt of the manufacturer's warranty".[159] The manufacturer's warranty presumably refers to Wattyl's warranty and further points to the warranty being a guarantee as to the quality of manufactured products.

[225] I accept the Council's submission that the warranty is based on the QA checklist (the checklist being a quality assurance as to work done). The Council also refers to the back page of the warranty which says it confirms recommended systems and procedures have been followed. This part of the warranty must be read in full to understand the appropriate context:

> These warranties are applicable where representatives from Wattyl (NZ) Ltd have an opportunity to provide site assistance during the course of application or where reliable evidence is presented that confirms that recommended systems and procedures have been followed.

[226] The use of "or" makes it unclear what the basis of issuing the warranty was – whether it was because a representative from Wattyl provided site assistance during application, or because there was reliable evidence that confirms that recommended systems and procedures were followed. Furthermore, it is not clarified what "recommended systems and procedures" refer to. Based on this sentence, it would be difficult to ascertain whether it was a quality assurance as to the work done or merely as to the products. Even if it was a quality assurance as to work done, the warranty provides no further detail on exactly what kind of work is being warranted. There is simply insufficient detail in the warranty for it to be considered as a producer statement as to work done.

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[159] CB 03.1204.

[227] The evidence before me is that Mr Lott was on site periodically during construction but never to undertake an installation inspection or to give advice to Mr Hardaker as to the proper application of the Wattyl cladding. Andrew Campbell attended site during the cladding installation. The reason for his site visits was not in evidence.

[228] Therefore, I consider that the warranty is only part of a group of relevant documents (including the Wattyl QA checklist) that would, only if read together, possibly form a PS3.

[229] Furthermore, I find that on the balance of probabilities, the Council did not receive the QA checklist. It did not have the document on its property file and did not disclose such a document in its discovery. Mr Saul agreed there was no evidence that it had been received by the Council.[160] Mr Hardaker said he did not provide a copy of the Wattyl QA checklist to the Council as a matter of course.[161] The Council received solely a Wattyl warranty. It relied on the warranty alone as a PS3. It should not have relied on the Wattyl QA checklist.

[230] On that basis, the Council should not have treated the warranty as a PS3. However, I will continue to discuss whether the warranty was reasonably relied upon by the Council in issuing the code compliance certificates.

[231] In a determination by the Department of Building and Housing,[162] several useful statements were made regarding the relevance of producer statements when considering whether to issue a code compliance certificate.

[232] In that determination, the local authority was cautioned to not rely on a producer statement to the exclusion of other evidence that demonstrates code compliance:[163]

> The authority should rely on evidence based on other means, including technical information provided such as drawings and specifications, the history of use of the materials, knowledge of the competency of the installer, and proven in service performance.[164]

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[160] NoE, p 446, lines 3–15.
[161] NoE, p 356, line 18.
[162] *The refusal to issue a code compliance certificate due to the lack of inspections or a producer statement for shower waterproofing in a house* Dep BH determination 2011/06, 1 April 2011.
[163] At [6.1.2]–[6.1.4].
[164] At [6.15].

[233] In another determination by MBIE,[165] the determination reversed the authority's decision to issue a code compliance certificate on the basis that there was insufficient information to be satisfied that a retaining wall complied with the Building Code, despite an application for a code compliance certificate being supported by a producer statement signed by the engineer. The determination noted the producer statement did not relieve the authority of the obligation to consider whether the PS4 was accurate and met the requirements of the building consent. The height difference between the base of the retaining wall and the house was significant and would have been readily observable to the authority on inspection. The determination was also critical of the wording of the PS4 that had been issued with a rider requiring the levels to be "confirmed on site" – the plan noted that this might be acceptable for documentation prior to and in preparation of construction documents but it was inappropriate for as built documents.

[234] In *Lee v Auckland Council*,[166] a producer statement presented to the Auckland Council, which relied on it without conducting any inspection, did not result in the Council being negligent. The High Court held:[167]

> … The exposure that the Council always faced by not supplementing the producer process with regular inspections is that a defect missed by the producer could have been reasonably picked up with a physical inspection. But that does not mean that a Council relying on the producer statement process for cladding installation was ipso-facto negligent when defects are later discovered. The Council is not … a clerk of works. Rather, the Council must exercise reasonable care to ensure compliance with the Building Code. The assessment of what is reasonable is a context specific exercise.

[235] In another MBIE determination, there is a summary of the IPENZ guidelines on producer statements:[168]

> (a) Producer statements signal the involvement of a competent practitioner and can assist authorities to establish compliance but they have no statutory status. A producer statement along with supporting documents is a means by which a professional opinion can be expressed.
>
> (b) The level of reliance and weight placed on producer statements depends on the work involved, the statement's form and context, and the author's competence.

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[165] *Regarding the issue of a code compliance certificate for a house and timber retaining wall* MBIE BH determination 2013, 006, 8 February 2013.
[166] *Lee v Auckland Council* [2016] NZHC 2377.
[167] At [50].
[168] *Regarding the refusal to issue a code compliance certificate for board piles to a stadium building* MBIE BH determination 2018/027, 15 June 2018 at [5.2.3].

(c) Although an authority can decide on the level of its reliance, a producer statement should not be the only means of establishing compliance as the authority remains responsible for its compliance decisions.

(d) Authors should consider what information is relied upon in reaching their opinion and clearly state any limitations that may apply as a result.

[236] The guidelines also state:[169]

> It is noted the sixth schedule of NS3910 "conditions of contract for building and civil engineering construction" is a fourth "form of producer statement" – construction which is also in common, current use by contractors and is typically referred to as a PS3. There are also many other variants of producer statements that are used by designers, applicators, contractors and suppliers who are not chartered professional engineers. This guide does not cover these alternative types of producer statements.

[237] In *Body Corporate 326421 v Auckland Council*, the High Court said:[170]

> It would not be appropriate for a territorial authority to accept any producer statement without question. The extent to which a particular producer statement should be relied on in considering whether code requirements had been met would depend on all relevant circumstances. These would include, for example, the skill, experience and reputation of the person providing the statement, the independence of the person in relation to the works, whether the person was a member of an independent professional body and subject to disciplinary sanction, the level of scrutiny undertaken and the basis for the opinion. The territorial authority would also need to consider any other information relevant to whether the works had been carried out to an appropriate standard and could be expected to meet code requirements. This would include the skill, experience and reputation of the party carrying out the works, the complexity of the works, the likely consequences of non-compliance and whether any concerns had arisen regarding the quality of the works. Ultimately, the territorial authority was only entitled to issue a code compliance certificate if it was satisfied on reasonable grounds that the building works complied.

[238] As discussed, even if the Wattyl warranty is considered a producer statement, it contains too little information on what kind of work it is warranting in order for it to be relied upon as an expert's opinion that the work was done to a satisfactory standard and certainly to the relevant Building Code requirement. Going further, on the face of the warranty, it notes certain exclusions that the warranty does not cover.[171] The warranty states that it will not cover paint film breakdown partially or wholly caused by "[h]eat absorption of a colour selected with an LRV of less than 40%". The actual paint used on

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[169] At [5.2.5].
[170] *Body Corporate 326421 v Auckland Council* [2015] NZHC 862 at [115].
[171] CB 03.1302.

the claimants' home had an LRV of 20 per cent, meaning that the warranty was on its face *void ab initio*.

[239] I accept that the Council's investigating officers are not experienced and not obligated to ascertain whether a warranty could be relied on as a producer statement. However, as stated by the High Court in *Lee*, the Council must exercise reasonable care to ensure compliance with the Building Code. If the warranty is relied on as a producer statement and informs the officers that there are certain exclusions that make the warranty/producer statement invalid, then they have an obligation to enquire into whether any of the exclusions apply. If they had enquired into the LRV value of the paint used on the home, they would have discovered that its LRV value was lower than 40 per cent and would not have relied on the warranty as a producer statement.

[240] The Council had an obligation to enquire into whether any of the warranty exclusions applied before relying on it as a producer statement. As the Council had not done so, it did not reasonably rely on the warranty in issuing a code compliance certificate.

[241] Furthermore, even if the Wattyl QA checklist was received by the Council and relied on as a producer statement, the Council must also have taken into account any information relevant to the works that had been carried out to an appropriate standard and could be expected to meet code requirements. If Council noticed that the paint applied had an LRV of 20 per cent based on the QA checklist,[172] and saw the exclusions in the Wattyl warranty, then it could not have reasonably relied on those documents in being satisfied that the work complied with the Building Code.

[242] The QA checklist on its face is just that: a simple box-ticking system. Despite being intituled as a quality assurance checklist, the document simply requires the builder and the applicator to check off what works they have done. There is nothing in the document that suggests Wattyl had carried out appropriate supervision or inspection of the cladding installation and whether the installation was done properly in accordance with Wattyl's specification. I determine that these comments regarding the QA checklist show that it is simply a document that cannot reasonably be relied upon by the Council as a

[172] See CB 03.1300. Note that the same QA checklist disclosed in discovery by Tiling Solutions (CB 03.1204) has left the LRV percent field blank.

quality assurance check regarding a proprietary cladding system being installed in accordance with specifications and consented documents.

[243] The fact that the Wattyl Granosite system was not as well documented as the Rockcote system,[173] would also have been a relevant consideration for the Council in determining whether to issue a code compliance certificate based solely on the QA checklist and no specific inspections, during construction and when issuing the code compliance certificate.

[244] On that basis, I find that even if the Council had received both the Wattyl warranty and Wattyl QA checklist, it was not reasonable for it to rely on both documents in issuing a code compliance certificate. The Council breached its duty to the claimants to take reasonable care in issuing a code Compliance Certificate as its inspection system did not enable it to have reasonable grounds to certify the build was Code compliant. The claimants have established their claim of negligence against the Council in this regard.

Liability of Hempel (Wattyl) New Zealand Ltd, the fifth respondent

[245] Wattyl's role in the construction of the claimant's home included providing the specifications and some of the materials for the Wattyl Granosite cladding system. In 2019, it was re-engaged to repair the leaks the claimants had complained of. The claimants allege that Wattyl was negligent and breached its duty of care to the claimants by failing to provide a robust quality assurance system in place for the installation of its Wattyl Granosite cladding system, and for failing to repair the defects in 2019.

[246] Wattyl was responsible for ensuring it had the correct quality assurance system in place when it was representing its cladding product. I do not accept Wattyl's submission that it is only a paint and coatings supplier and manufacturer, or that the cladding was solely a Nu-Age product. Mr Hardaker's evidence is that he purchased all but a few of the components required for the Wattyl Granosite cladding system from Wattyl's Dunedin Trade Centre. This included the materials, plaster, primers, paints, mesh, flashings and some fixings.[174] The EPS panels, expanding foam, fixings and fasteners were sourced from elsewhere.[175] Mr Harcourt gave evidence that although the plaster product is premixed by Nu-Age, it is supplied in a bag with the Wattyl

[173] Kevin Simcock's statement of expert evidence (31 March 2023) at [35].
[174] NoE, p 346, lines 9–11 and p 379.
[175] NoE, p 347, line 29, p 379, lines 11–15, p 385, lines 1–6 and p 395, lines 15–16.

brand.[176] He admitted the specification for the cladding was created by Wattyl (in conjunction with Nu-Age),[177] and I further note that it contains instructions on how to install parts of the cladding.[178] The Wattyl warranty document also includes a warranty as to "Granosite Nu-Age Cladding Systems".[179] On the evidence I disagree with Ms Davison's submission and Mr McLeod's evidence of Wattyl being solely a paint and coating supplier. I find that Wattyl was representing and marketing the Wattyl Granosite cladding system (albeit in some joint arrangement with Nu-Age) as its cladding product to the residential building market. It licenced appropriate applicators branded as Wattyl installers. Its literature indicated Wattyl responsibility over the entire cladding product.

[247] Wattyl's first negligent act with its quality assurance system was the improper preparation of its specification for the Wattyl Granosite cladding system. The specifications were prepared by Mr Lott,[180] who was a sales representative with limited technical knowledge of the products. In his brief of evidence, Mr Lott said he did not retain much of the training in the products he received from Wattyl.[181] He further stated that if he was asked a technical question, he would pass that on to Mr Campbell.[182] At the hearing, Mr Lott said he was able to deal with matters relating to paint, but not with cladding.[183] On the evidence, it is clear that the specification prepared by Mr Lott for the claimants home was negligently prepared. The Wattyl specification prepared for the claimants' home was undertaken by Mr Lott, a sales representative with limited technical knowledge of the cladding and of the home's specifications. Mr Hardaker's evidence is that the technical specification produced by Mr Lott was lacking detail and I agree with the claimants' closing submissions that there was limited appreciation by Mr Lott that the specification he provided had to be fit for purpose.[184]

[248] Mr Hardaker gave evidence that in order for Wattyl to produce a specification, a Wattyl representative would go on site to inspect the building, speak to the builder and arrange to get the building plans.[185] However,

[176] NoE, p 575, lines 17–19 and p 576, lines 7–14.
[177] NoE, p 578, lines 3–7.
[178] CB03.1110–1115.
[179] CB03.1210.
[180] NoE, p 398, lines 9–10.
[181] Trevor Lott's BoE (29 March 2023) at [5].
[182] At [8].
[183] NoE, p 419, lines 14–30.
[184] CB 03.1294, NoE, p 353, line 10 and NoE, p 411, line 19.
[185] Paul Hardaker's BoE (31 March 2023) at [44].

Mr Hardaker could not recall this procedure happening for the claimant's property.[186] Mr Ward's evidence is that Wattyl's specifications for the Granosite cladding system were inadequate and not fit for purpose.[187] He also said the specification had lacked detail in the drawings, and that all the writing in the specification was generic.[188]

[249] Mr Lott, when asked to explain why the diagrams of the home in the specifications did not match the physical shape and materials of the home, admitted that he made a mistake in preparing the specifications.[189] The specifications created by Mr Lott were not fit for purpose for the claimants' home because the diagram bore no resemblance to the layout of the claimants' home. This meant that Mr Hardaker was unable to rely on the specifications to understand how to correctly install the cladding system on the home.

[250] Furthermore, Wattyl represented in its specifications that its applicators of the cladding product would be trained in its installation.[190] Although Mr Hardaker's evidence is that he was provided training by Wattyl,[191] I accept the evidence of Mr Harcourt who admitted that contrary to the specifications, Wattyl provided no formal training to its applicators and had no structured training course.[192] He said there may have been unstructured training carried out by entities other than Wattyl.[193] He was unsure why the specification stated that the applicators would be trained.[194] He further said that there was no method of formally identifying who is recognised by Wattyl as an applicator and that it would sell its products to anyone who requests them regardless of whether they have been trained.[195]

[251] Mr Lott gave evidence that training was provided to its applicators but was unsure whether it was provided by Wattyl or "the other outfit".[196] On that evidence, I find that Wattyl itself did not provide training to its applicators, including Mr Hardaker. I find it more than likely that unstructured training was provided to Wattyl's applicators by a different entity, but it is very difficult to ascertain the quality of that training. However, given the workmanship of the

[186] NoE, p 385, lines 7–14.
[187] Mark Andrew Ward's BoE (30 March 2023) at [39].
[188] Paul Hardaker's BoE (31 March 2023) at [46]–[49]; and NoE, p 353, lines 7–10 and 24.
[189] NoE, p 412, lines 22–23, p 416, lines 15–16 and p 430, lines 27–31.
[190] CB 03.1296.
[191] NoE, p 384, lines 23–30.
[192] NoE, p 562, lines 11–18 and p564, lines 28–31.
[193] NoE, p 562, lines 26–33 and p 563, line 2.
[194] NoE, p 565, lines 28–31.
[195] NoE, p 563, lines 2–15.
[196] NoE, p 399, lines 10–13.

cladding, I find that Mr Hardaker was given very little training on how to install the cladding system, contrary to Wattyl's specifications.

[252] Wattyl's specifications also state that its representatives will visit the site to assist with advice on matters such as adequacy of preparation, special mixing requirements and standard of application, but that such site assistance should not be regarded as "supervision".[197] Mr Lott explained that this meant he would visit the site to give information if it was requested, but that any technical questions would be referred to Mr Campbell.[198] Mr Lott stated he visited the site on one or two occasions,[199] but that he only wandered around and chatted with Mr Hardaker about matters unrelated to construction.[200] He could not recall whether Mr Hardaker brought up any issues with construction (except for efflorescence appearing post-completion) or asked him to provide site assistance.[201]

[253] The specification also states that Wattyl may send a representative to the site to inspect the quality of surface preparation or application of its products, but that such inspections are not an indication of Wattyl's acceptance of the standard of workmanship.[202] Mr Lott explained that inspections on properties would be carried out by Mr Campbell, who was more knowledgeable on technical matters.[203]

[254] Mr Fluit gave evidence that Mr Campbell had attended the site while Mr Hardaker was installing the cladding, but could not recall discussing Mr Hardaker's work.[204] Mr MacDonald also gave evidence that Mr Campbell was walking around the site when the Wattyl coating and paint products were being applied to the home.[205] This is corroborated by Mr Hardaker's evidence that Mr Campbell came to site and observed his work.[206] Mr Hardaker further said that he received no site assistance from either Mr Lott or Mr Campbell in terms of his work.[207]

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[197] CB 03.1295.
[198] NoE, p 410, lines 14–24.
[199] Trevor Lott's BoE (29 March 2023) at [18].
[200] NoE, p 430, lines 16–19.
[201] NoE, p 430, lines 13–23.
[202] CB 03.1298.
[203] NoE, p 400, lines 5–9.
[204] NoE, p 243, lines 15–24, p 263, line 1 and p 276, lines 20–21.
[205] NoE, p 325, lines 8–14.
[206] NoE, p 354, lines 11–14.
[207] NoE, p 366, lines 26–32.

[255] I find that on the evidence, Mr Campbell's visits to the site were inspections as per Wattyl's specification. As Mr Campbell was not available to give evidence, it is unclear whether he found any issues with the cladding work of Mr Hardaker. However, given Mr Campbell's technical expertise, he should have picked up on issues with the installation, such as the omission of control joints. If he visited and inspected but stayed silent on defects observed, he should have spoken up. That was his role and that is why he was at the claimants' home during cladding installation.

[256] Wattyl's warranty states:[208]

> A … Warranty will only be issued … where representatives from Wattyl have had an opportunity to provide site assistance during the course of application or where reliable evidence is presented that confirms that recommended systems and procedures have been followed.

[257] The evidence shows that contrary to that statement, Mr Campbell had carried out inspections of the site but failed to pick up issues he ought to have found with the installation of the cladding system. Furthermore, the system by which the warranty was issued did not involve any proper method to confirm recommended systems and procedures were followed.

[258] Mr Lott's and Mr Harcourt's evidence was that the QA checklist is used as the basis for issuing a warranty.[209] Mr Lott explained that in order to issue a warranty, the applicator and main contractor would fill out sections of the QA checklist, send it to Mr Lott who would also fill out a section, then send it off to another Wattyl employee who would check the document and issue a warranty.[210]

[259] Mr Harcourt's evidence supports this, saying that Wattyl does not perform a technical analysis of the QA checklist and that Wattyl does not carry out site supervision, so it relies upon the applicator to have carried out their role and complete the QA checklist accurately.[211] At the bottom of the QA checklist is written "Proof of completion viewed by" followed by Mr Lott's signature. Mr Harcourt explained that this procedure could be completed over the telephone and is not confirmation that Mr Lott has been on site and viewed the construction.[212]

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[208] CB 03.1210.
[209] NoE, p 428, lines 13–14, p 429, lines 12–15, p 597, lines 28–31 and p 599, lines 10–11.
[210] NoE, p 418, lines 14–27.
[211] NoE, p 567, lines 4–10 and p 599, lines 25–27; and Ray Harcourt's BoE (31 March 2023) at [39]–[41].
[212] NoE, p 568, lines 29–31 and p 569, lines 1–8.

[260] Mr Lott could not recall if he inspected the property before signing that section.[213] I consider that Wattyl's warranty statement and Mr Campbell's site inspections mean Wattyl had a duty to properly inspect whether the Wattyl Granosite cladding system had been properly installed. However, given Mr Campbell's failure to pick up on the defective installation and the lack of any inspection on the final work to "confirm that recommended systems and procedures have been followed", I find that Wattyl has breached its duty and has been negligent.

[261] Wattyl had also supplied Mr Hardaker with paint with a colour matching Gray Tweed. The paint had an LRV value of 20 per cent whereas Wattyl's warranty says it will only be valid if the paint has an LRV value of at least 40 per cent. Mr Harcourt accepted that paint with 20 per cent LRV is not acceptable for use on polystyrene.[214] Mr Lott agreed.[215] In the QA checklist produced by Wattyl, it notes the paint's LRV value as "20%".[216] Mr Harcourt gave evidence that Wattyl does not scrutinise such matters when issuing the warranty, even when the warranty does not "mean much".[217] He said that it is not uncommon to issue a warranty that was *void ab initio* because Wattyl had to supply a warranty whether it was valid or not.[218] Based on this evidence, I find that Wattyl supplied the paint knowing that it would be excluded from the warranty.

[262] On the evidence, Wattyl had liability over the cladding system which it represented and for which it provided materials, a specification and a warranty. Based on the words of the specification and the warranty, and the inspections undertaken by Mr Campbell, it had a duty to ensure proper procedures had been followed in relation to the cladding installation before it issued the warranty. It must have known that document could or would be relied on by the owners.

[263] However, Wattyl failed to do so because its quality assurance system in relation to its own product was lacking in multiple respects. This has been causative of damage as it contributed to the poor workmanship that caused the defects in the cladding and the subsequent leaking. Its specifications could not be relied on to properly install the cladding as it was not fit for purpose for the

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[213] NoE, p 403, lines 6–13.
[214] NoE, p 567, lines 24–25.
[215] NoE, p 424, lines 9–10.
[216] CB 03.1300.
[217] NoE, p 567, lines 28–32 and p 568, lines 1–6.
[218] NoE, p 586, lines 30–33 and p 587, lines 1–3.

claimants' home. It did not provide training to its applicators and carried out inspections that failed to pick up on defects. It issued a warranty knowing that it was *void ab initio* and did not maintain a proper system for ensuring its cladding system had been properly installed. I therefore conclude that Wattyl is liable for the defects in the original 2010 works in relation to its involvement with the cladding installation. The claimants have proven their claim against Wattyl for its 2010 involvement.

Wattyl's Liability for the failed 2019 repairs

[264] The claimants allege that Wattyl advised that its proposed repairs in 2019 would fix the cracking and leaking issues with the home. Wattyl claims that Mr Hardaker was the one who considered the issue to be with the paint and referred Mr Wilton to it. Mr Wilton simply informed it that there was an issue with the paint at the home,[219] and it did not have an obligation to investigate further in the circumstances.

[265] Wattyl says that it suggested to the claimants to carry out their own investigations and warned that if there was movement or issues with the substrate, a simple paint recoat would not remedy the cracking. In support, there are three emails sent from Mr Campbell:

(a) an email (dated 11 April 2016) to Mr Hardaker attaching photos of the cracks taken by Mr Wilton and asking for Mr Hardaker's thoughts on what the issue may be;[220]

(b) an email (dated 16 May 2016) to Mr Hardaker and Mr Wilton saying it did not know the cause of the cracks and that "if the movement had stopped and the plaster is stable, we could use the [paint] and encapsulate the mesh to bandage that wall …";[221] and

(c) an email (dated 16 May 2017) to Mr Wilton and Mr Fluit questioning whether there were any control joints in the concrete block and questioning whether, after repainting the home, cracks would reappear due to movement.[222]

[219] NoE, p 148, lines 24–26.
[220] CB 03.1189.
[221] CB 03.1191.
[222] CB 03.1199.

[266] Based on the evidence, Wattyl may not have directly advised Mr Wilton that a repainting of the home would fix the cracking. Mr Wilton has been included in Mr Campbell's emails which raise his own concerns about whether a repaint of the home would be a sufficient fix.

[267] However, I find that Wattyl is still the party responsible for the 2019 repairs because it had taken invasive samples of the cladding in 2016, took control over the diagnosis, made the repair decision, and undertook the repairs. It therefore had a duty to use reasonable care to prevent further damage from negligent repairs. This duty was owed to the claimants who would be affected by the repairs.[223]

[268] Mr Campbell sent an email to Mr Wilton and Mr Hardaker dated 23 May 2016 in which he said he will need to "see what is happening under the polystyrene, before we come up with a repair strategy".[224] He then suggested removing a section of the polystyrene where it had cracked to diagnose the problem. It is not known what the outcome of Wattyl's investigation was. Mr Harcourt said Wattyl had no record of the sample or any results of testing the sample.[225] Mr Harcourt gave evidence that Wattyl's technical team would develop a specification for the repair based on photographs or information given about the building.[226] He admitted that there was no record of a Wattyl employee being on site to investigate the defects from a technical point of view, so no such physical investigation had occurred.[227]

[269] However, weathertightness issues in the cladding of residential homes was widely known by 2016, let alone in 2019. Wattyl, as a provider of materials for cladding and as a representative of the Wattyl Granosite cladding system, would have known about such issues. Mr Campbell in his email regarding taking a sample of the cladding clearly indicates that he thought there may be issues with it. Mr Harcourt also admitted that the appearance of efflorescence would indicate there was an issue with something below the paint surface, and not an issue with the paint itself.[228]

[270] The evidence clearly indicates that Wattyl would have known the leaking was not caused by an issue with the paint. Therefore, when Wattyl was

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[223] *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 (CA) at 406, 417 and 422.
[224] CB 03.1193.
[225] NoE, p 571, lines 20–23.
[226] NoE, p 572–573.
[227] NoE, p 581, lines 1–6.
[228] NoE, p 581, lines 12–13, 31–33 and p 582, line 1.

approached by the claimants in relation to the leaks, one would have expected it to have engaged experts to inspect the defects and find what the true cause of the leaks was due to issues with the cladding. Instead, without consulting the claimants, it diagnosed the defects with simple photographs and unilaterally made the decision to instruct one of its own applicators to repaint the home. It had not sought an expert's opinion on what the best remedy would have been. On that basis, I find that Wattyl had acted negligently in diagnosing and attempting to repair the defects in 2019.

[271] It is also clear that Wattyl's failed attempt to repair the defects is causative of damage. All the defects' experts, apart from Mr McLeod, agree that the 2019 repairs have failed and have made the situation worse.[229] I conclude that Wattyl is liable for its failed attempt to repair the leaks in 2019.The claimants have proven their claim against Wattyl under this part of the claim.

Claims against Wilton Joubert, the sixth respondent

[272] Crossclaims are advanced by Tiling Solutions, the Council and Wattyl against Wilton Joubert. The claims against Wilton Joubert can be briefly described:

(a) Through Mr Wilton, Wilton Joubert was effectively acting as project manager throughout 2010 and made decisions that were causative of damage; and

(b) It was negligent in producing designs that omitted control joints and waterproofing sealant in the concrete blockwork.

[273] The engagement of Wilton Joubert by the claimants, essentially through Mr Wilton, appears to be verbal. There was no written contract between the claimants and Wilton Joubert. Accordingly, it is difficult to precisely ascertain the role Wilton Joubert had upon instructions from the claimants regarding construction of their home.

[274] It is clear, however, that Wilton Joubert's involvement with the design and construction clearly included producing structural design for the home. This would be consistent with the usual role of Wilton Joubert as a structural design engineering business. Wilton Joubert's involvement with the claimants

[229] NoE, p 521, lines 31–32 and p 522, lines 1–18.

concluded about 23 November 2009 when the sixth respondent issued a PS1.[230]

[275] Having considered the material facts and the evidence, it is difficult to say that project management was part of Wilton Joubert's role for the claimants. Wilton Joubert is a company specialising in structural engineering design. Mr Wilton's involvement with the build of the home after 2009 did not involve anything concerning structural design. The evidence of Mr Wilton's involvement from 2010 and on, regarded matters outside of structural design, such as the type of cladding to be installed, whether control joints should be included in the cladding, the installation of drip edges and waterproofing of the substrate. I address Mr Wilton's involvement, including these abovementioned matters, later in this determination. However, I conclude at this stage that Mr Wilton's continued involvement was not in his capacity as an officer of Wilton Joubert.

[276] I agree with Dr Jacobs' evidence that the communications between Mr Wilton and the suppliers and contractors and subcontractors relate to matters that a homeowner would make, rather than a structural engineering designer.[231] The evidence enables me to determine that Wilton Joubert had no supervisory or project management role post November 2009. Its role was only to the extent that it produced designs and drawings for the substrate construction. I conclude that Wilton Joubert cannot be held liable for Mr Wilton's personal continued involvement with the construction of the home over the course of 2010 and beyond. During this period Mr Wilton was not acting upon instructions from Wilton Joubert.

[277] In terms of Wilton Joubert's structural design, Mr Saul said it is unusual to design a building without control joints in the masonry, and that he had never seen a design for NZS4230 without control joints.[232] Mr Saul said that pursuant to s 14D of the Building Act 2004, the structural engineer must advise the Council that a non-standard design was produced (including the fact that no control joints were provided in the masonry) and must specifically design the alternative proposed.[233]

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[230] CB 03.1085.
[231] Murray Jacobs' BoE (28 April 2023) at [40]–[42].
[232] Eddie Saul's BoE (31 March 2023) at [8.13].
[233] At [8.14]. Note that there is an error in the citing of the relevant statutory provision as "section 14(d)".

[278] Further, Mr Saul said Wilton Joubert's decision to deviate from the standard structural design should have been communicated to all parties,[234] the suggestion being that if it had been, the architect should have amended its drawings accordingly. According to Mr Saul, Wilton Joubert's failure to notify its specific design led to confusion within the construction engineering sequencing.

[279] But, in cross examination, Mr Saul agreed that the words "engineer design" on the structural designed plans would indicate to him and the Council's building consent processing officer, that a specific design had been used by the engineer.[235] In cross examination he conceded that the Council knew, or ought to have known, at least that there was a specific structural engineering design,[236] and that the use of specific designs were not uncommon.[237]

[280] Dr Jacobs' evidence is that a structural engineer has no obligation to advise the local authority or other construction parties of its specific non-standard design and in his view, s 14D imposes no such obligation.[238]

[281] I accept Dr Jacobs' evidence and the concessions made by Mr Saul in cross examination and conclude that Wilton Joubert did not have an obligation to inform the Council of the specific design of its substrate. When observing the structural design plans and specifications from Wilton Joubert, the Council ought to have known that a specific design was being used. In any event, even if Wilton Joubert had been careless for failing to inform the Council of its specific design, it is unclear how this omission was in any way causative of the damage to the home. There is no evidence linking the omission to the cracked cladding and nothing has been put forward by any of the respondents. I conclude that Wilton Joubert cannot be held negligent in this regard.

[282] Mr Wilton's evidence is that due to his specific engineering design, control joints in the blockwork masonry were not required.[239] Dr Jacobs' evidence supported Mr Wilton's evidence.[240] Dr Jacobs further stated that the specific engineering design does not need to extend to consider control joints in the EIFS cladding.[241]

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[234] At [8.22].
[235] NoE, p 441, lines 14–31.
[236] NoE, p 475, lines 24–27.
[237] NoE, p 478, lines 27–29.
[238] Murray Jacobs' BoE (28 April 2023) at [28].
[239] NoE, p 136, lines 30–32 and p 137, lines 24–25.
[240] NoE, p 501, lines 25–27; and Murray Jacobs' BoE (28 April 2023) at [20].
[241] NoE, p 492, lines 21–24.

[283] I have determined earlier that Wilton Joubert was not negligent in producing a structural engineering design without control joints. The specific design did not require control joints. I also determined that the lack of control joints in the substrate was not causative of damage to the home. Mr Wilton gave evidence that he was confident the substrate building structure had not moved because the GIB board had not cracked.[242]

[284] Mr Wilton's evidence is supported by Dr Jacobs' evidence that he did not detect any movement in the building structure from his site observation and that the GIB board had not cracked.[243] Dr Jacobs' evidence further stated that the specific structural design of the building distributed movement evenly along the walls and restricted movement due to its rigid concrete floor.[244] Mr McLeod agreed that there had been no movement in the substrate.[245]

[285] Tiling Solutions submits that Wilton Joubert ought to have specified waterproofing sealant to be applied to the exterior of the concrete substrate. Dr Jacobs' evidence is that a design engineer has no experience in waterproofing this blockwork, so it falls outside of its scope of work.[246] His evidence is that waterproofing of the substrate is design work to be carried out by the architect.[247]

[286] I conclude that the claims made against Wilton Joubert are not made out. Wilton Joubert has not been negligent nor has any of its structural design work been causative of the alleged damage to the claimants' home.

[287] Wilton Joubert is not liable to contribute to any award of damages.

Limitation defences

[288] Limitation defences have been raised by Deane Fluit Builder, Tiling Solutions, the Council and Wattyl against the claimants claim and by Wilton Joubert against the crossclaims against it. I did mention that during the hearing that Limitation was a live issue, although later in this section I concur with the Tribunal's determination in Procedural Order 7.

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[242] Noe, p 82, lines 19–27.
[243] NoE, p 497, lines 20–25.
[244] NoE, p 502, line 30.
[245] NoE, p 524, line 9.
[246] NoE, p 492, lines 5–7.
[247] NoE, p 492, lines 9–10; and Murray Jacobs' BoE (28 April 2023) at [33].

[289] As the relevant building works span a period between 2009 and 2012, the Limitation Act 1950(the 1950 Act) and the Limitation Act 2010 (the 2010 Act) both need to be considered.[248]

[290] Dealing initially with the Limitation defences raised by Deane Fluit Builder, Tiling Solutions, and the Council. Tiling Solutions submits that Mr Wilton's conduct in calling Mr Hardaker in January 2013 after first noticing efflorescence and cladding leaks is consistent with Mr Wilton having sufficient knowledge to engage an expert. I reject that submission. I do not accept that Mr Wilton at that time was seeking more than mere advice as to treatment of the efflorescence and cladding cracking. He was simply requesting the assessment of one of the trades involved of an issue with the cladding that had manifested itself.

[291] The Council submits that Mr Wilton was aware of the leaks in 2012 because his solution to the appearance of efflorescence was to call Mr Hardaker to carry out an inspection. It relies on Mr Wilton's evidence at the hearing when he said, "Well in hindsight, when we get to where we are now, the start of the failure was [in 2012]".[249] The Council submits Mr Wilton considered the cladding started to fail in 2012 because he was aware of cracking in the cladding. I do not accept that submission. The appearance of some cracking in the cladding at that stage does not support the eventual seriousness of the cladding failure.

[292] The Council further submits that the limitation period commenced by 31 January 2014 at the latest when Mr Wilton sent an email to Mr Andrew Campbell of Wattyl saying, "My house leaks".[250] I accept Mr Wilton's explanation for this email, being the lack of response communication from Wattyl concerning how to address the initial cladding cracks and leaks and that Wattyl needed to be "aware that this is getting serious".[251]

[293] The claimants lodged their claim on 1 May 2020. The building works were completed by 2012, so the claimants have not brought their action within the primary period of the Limitation Act 1950 or the Limitation Act 2010. Therefore, the claimants must establish either that there was a latent defect

[248] See Limitation Act 2010, s 59.
[249] NoE, p 147, lines 25–26.
[250] CB 01.0013.
[251] NoE, p 147, lines 17–19.

(under the 1950 Act), or that they had late knowledge of the claim pursuant to the 2010 Act.[252]

[294] The Tribunal, with a different adjudicator presiding, dealt with the issue of limitation in deciding applications for the removal by Tiling Solutions and the Council, in Procedural Order 7. The Tribunal dismissed the submissions that the limitation period started running from 31 January 2014. The email Mr Wilton sent that day to Mr Andrew Campbell simply established that he was aware that the house had water ingress issues and he had spoken to the construction trades involved (Mr Fluit, Mr Hardaker and Mr Campbell). He was simply led to believe from those trades that the problem was cracked paint and a blotchy concrete floor that needed only drying out. He did not believe he had a larger weathertight problem. I agree with that finding.

[295] Instead, the Tribunal found that the limitation period started to run from about July 2019 when the 2019 repairs failed, and Mr Wilton then obtained the WHS assessor's expert report detailing the extent of the building defects.

[296] I conclude that the Tribunal's determination in Procedural Order 7 was correct. The respondent's arguments do not persuade me to depart from that determination. In addition to the findings made in that Procedural Order, Mr Wilton's email to Mr Campbell in 2014 is only addressed to Wattyl and further says, "the remedy is as simple as another coat". This suggests that Mr Wilton, after consulting several different trades involved with the construction, genuinely believed the paint was the cause of the leaks.

[297] Therefore, for the purposes of the Limitation Act 1950, Mr Wilton did not know of the wider weathertightness issues in 2014. The cause of action accrued later in 2019 when Wattyl's repairs failed. And it was discovered that there were serious defects in the cladding installation. For the purposes of the Limitation Act 2010, Mr Wilton did not have knowledge that the acts or omissions by the respondents, on which the claim is based, had occurred (such as negligent installation of the cladding and negligent construction and certifying inspections by the Council) until 2019 at the earliest. Therefore, the claimants would not have had knowledge of the essential facts set out in s 14(1) of the 2010 Act until 2019 when the extent of the defects were revealed. I determine that the late knowledge period applies pursuant to s 14(1) of the 2010 Act.

[252] Limitation Act 2010, ss 11(2) and 14.

[298] I conclude that the limitation period started running from July 2019 as determined in Procedural Order 7. The claimants lodged their claim on 1 May 2020. The claims were brought in time and are not barred by either the 1950 Act or the 2010 Act. The limitation defences raised by Deane Fluit Builder, Tiling Solutions, the Council and Wattyl fail.

[299] Moving onto the limitation defence raised by Wilton Joubert against the crossclaims, Wilton Joubert initially submitted that the crossclaims were time barred by virtue of the 10-year longstop provision under s 393(2) of the Building Act 2004. It said that its works were completed by 23 November 2009 when it had issued a PS1, and the claim had been brought more than 10 years later. Therefore, the claim was time barred.

[300] However, in Procedural Order 2, the Tribunal accepted the Council's application to join Wilton Joubert as a respondent to the proceedings. It accepted the Council's submission that the crossclaim against Wilton Joubert was not out of time, as the relevant limitation period is two years after the Council's liability to the claimants is quantified.[253]

[301] Later in its closing submissions, Wilton Joubert accepted that it no longer has its limitation defence. This is because the Court of Appeal recently confirmed in *Beca Carter Hollings & Ferner Ltd v Wellington City Council* that the Building Act longstop does not apply to claims for contribution made under s 17 of the Law Reform Act 1936.[254] That case was determined after this Tribunal issued Procedural Order 2, and strongly supports the Tribunal's position in that Order. That matter is currently undergoing an appeal in the Supreme Court.[255] However, for the purposes of this proceeding, I agree with Wilton Joubert that the current law is as set out in the Court of Appeal's decision. The applicable limitation period for contribution claims is two years after the liability of the respondents to the claimants have been quantified. As no such judgment has yet been entered, I conclude that the crossclaims against Wilton Joubert are not time barred by virtue of s 34 of the 2010 Act.

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[253] See Limitation Act 2010, s 34; and *BNZ Branch Properties Ltd v Wellington City Council* [2021] NZHC 1058.
[254] *Beca Carter Hollings & Ferner Ltd v Wellington City Council* [2022] NZCA 624 at [147].
[255] *Beca Carter Hollings & Ferner Ltd v Wellington City Council* [2023] NZSC 38.

Have the claimants been contributorily negligent?

[302] Deane Fluit Builder, Tiling Solutions, the Council and Wattyl submit that the claimants were contributorily negligent in part because the claimants failed to take steps to mitigate their losses. The respondents say the claimants failed to take appropriate action to remediate the damage in 2012 and 2014 and only began to take steps in 2019 when Wattyl attempted to repair the damage evident from the poor cladding construction.

[303] I do not accept the submissions. Since 2012, Mr Wilton continually made attempts to have the claimants' home repaired. In 2012, when Mr Wilton first noticed efflorescence appearing under the en-suite bathroom window on the northern exterior wall, he promptly contacted Mr Hardaker who attended site and refixed part of the cladding that was not properly constructed to that western wall.

[304] In 2013, Mr Wilton noticed cracks in the paintwork and again contacted Mr Hardaker who agreed that it was probably an issue with the paint. Mr Wilton then began a series of email communications with Mr Campbell of Wattyl in an attempt to diagnose and repair the problem.[256] Most relevantly, Mr Wilton's email to Mr Campbell dated 31 January 2014, points out the length of time that has passed since he alerted Mr Hardaker about the leaks and that no attempts to find a solution had been taken since.[257] I accept Mr Wilton's explanation that this email was sent due to the lack of communication from Wattyl concerning how to address the leaks.[258] The evidence is clear. Mr Wilton did take appropriate steps as a homeowner to repair the home and mitigate the damage.

[305] Deane Fluit Builder, Tiling Solutions, the Council and Wattyl claim that any award of damages should be reduced because the claimants were contributorily negligent. They say, that Mr Wilton acted for his claimants with such disregard on occasions for the claimants' interests, as to make their construction decisions a contributory cause of the damage that the claimants now have suffered. Mr Wilton's personal involvement with the build continued past Wilton Joubert's completion of its task.

[306] Section 3 of the Contributory Negligence Act 1947 provides:

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[256] CB 01.0009–01.0014.
[257] CB 01.0010.
[258] NoE, p 147, lines 18–19.

> (1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage: …

[307] Reading the full s 3, it clearly allows for apportionment of responsibility for the damage where there is fault on the part of the claimant or other party. The "fault" is defined by s 2 of the Contributory Negligence Act as meaning:

> …negligence, breach of statutory duty, or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence.

[308] *Jones v Livox Quarries Ltd*[259] established that the essence of contributory negligence is a failure on the part of the claimant to take reasonable care to protect his or her own interests where the risks are reasonably foreseeable or ought to have been.

[309] Contributory negligence is a person's carelessness in looking after his own interests.[260] In determining responsibility, the law eliminates the personal equation. Whether Mr Wilton's conduct for the claimants constituted contributory negligence is a question of fact to be determined objectively. The principles for assessing contributory negligence are straightforward. The causal potency of the claimants' actions needs to be viewed considering all possible causes to enable me to make a finding of fact as to the appropriate level of contribution.

[310] The respondents' submissions alleging contributory negligence, can be summarised as that Mr Wilton was clearly an experienced residential structural engineer designer with considerable experience in the residential construction business. In the matter of his own build, he failed to take reasonable precautions to protect the claimants' interests where risks should have been apparent after enquiry by Mr Fluit, Mr Hardaker and Mr MacGregor. Such failure did contribute to the claimants' loss and the respondents state that a contributory negligence finding would be justified.

[311] I find that Mr Wilton did carry out an informal role as project manager in some regards during construction. I find it difficult for Mr Wilton to argue that Mr Fluit acted as project manager. There was no written contract specifying

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[259] *Jones v Livox Quarries Ltd* [1952] 2 QB 608 (EWCA).
[260] *Badger v Ministry of Defence* [2006] 3 All ER 173 (EWHC).

precisely what role each construction party was to have in the build of the home. That is surprising, given Mr Wilton's years of experience as a structural engineer in the residential construction business. Given this experience, I would have expected Mr Wilton to have precise written contracts in place specifying the roles for each party involved in the build of the claimants' home.

[312] What happened is that Mr Wilton proceeded to informally engage his architect, his structural engineering design business and, specifically, the builder, Deane Fluit Builder. He did so without a written contract on the basis presumably of their friendly relationship and understanding. The evidence clearly illustrates a lack of definition of roles has contributed to the claims now being litigated.

[313] I do accept Mr Wood's evidence that Mr Wilton's involvement in the building of the home went on occasion, beyond what is typical for a homeowner.[261] It is usual and indeed typical for homeowners to take a passive but interested role in the construction of their home. Such a passive role would involve closely observing the design and costs but ultimately relying on the contractors and consultants for expert determinations.[262]

[314] However, in the build of the claimants' home Mr Wilton was on occasion actively involved with construction decisions, including making decisions on the design and construction beyond what a typical homeowner would make.[263] To illustrate, see [27], in addition I have found earlier in this determination that Mr Wilton made decisions to omit drip edges, control joints from the cladding, and waterproofing sealant to the concrete substrate. The directive for no control joints in the cladding had a causative impact on weathertightness defects. I have found that he instructed Mr Fluit, Mr MacGregor, and Mr Hardaker accordingly. From the evidence, I agree with Mr Wood that at times Mr Wilton's involvement in important building decisions stepped into the bounds of a project manager.[264]

[315] These decisions made by Mr Wilton were made by him unilaterally, without recourse to the design architect, the structural engineering firm, or to an expert involved in cladding and weathertightness issues. I agree with

[261] Jeffrey Wood's BoE (3 March 2023) at [5.2(a)].
[262] At [8.1].
[263] At [9.5].
[264] At [9.6].

Mr Wood when he says it is usual for a homeowner to focus on design and costings but to rely on the contractors for building decisions.[265]

[316] Mr Wilton said at the hearing that he is not an expert on cladding.[266] I do not accept Mr Wilton's evidence in this regard. Early in the hearing, Mr Wilton admitted he was generally aware of cladding systems such as Rockcote, Sto and to some extent Wattyl, when working for Firth Industries.[267]And, my comments at [27] further illustrate Mr Wilton had some knowledge of cladding and its insulation benefits.

[317] I have found that Mr Wilton expressly instructed Mr Fluit to find a cladding system cheaper than Rockcote and when shown the quote from Tiling Solutions, Mr Wilton made the decision to use the Wattyl Granosite system instead of Rockcote, which his design architect had agreed to and which the Council had consented.

[318] I conclude that the evidence establishes that Mr Wilton had at least a passing knowledge of cladding systems. I do find that this would not be sufficient knowledge to make substantial decisions in relation to cladding. Yet, despite having this limited knowledge, Mr Wilton unilaterally made decisions to not have drip edges, to not include control joints in the cladding and he made those decisions without seeking expert advice.

[319] He also made the decision not to apply waterproofing sealant to the masonry blockwork. As I have mentioned earlier, Dr Jacobs' evidence is that waterproofing the concrete block is outside the scope of a structural engineer's expertise. It is the role of an architect designer. Mr Wilton would therefore have been expected to consult TAB Design in relation to waterproofing the concrete block, but he did not do so and acted on his own accord.

[320] I find that Mr Wilton's actions in making those decisions with limited knowledge and without consulting the appropriate experts, to be negligent. Whatever his true state of knowledge, he took it upon himself to make those key decisions. Based on the evidence, the decisions by Mr Wilton to omit drip edges and control joints in the cladding have contributed to the water ingress damage suffered by the home. The absence of a waterproofing membrane on the concrete block has not been causative of damage.

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[265] Jeffrey George Wood statement of evidence (3 March 2023) at [8].
[266] NoE, p 105, lines 13–14.
[267] NoE, p 19, lines 24–26.

[321] Mr MacDonald, in his statement of evidence, said that in his 34 years of building work, he has never constructed a building without control joints.[268] He further said that on other projects including blockwork, an engineer has often supervised every step of construction and has inspected the work before cement is poured into the centre of the blocks.[269] A peculiarity in this claim is that Mr Wilton, as a principal officer of Wilton Joubert, acted as the structural engineer designer, but he also had another role in construction and that was as owner of the home. He was wearing two hats.

[322] Mr Wilton's experience could have involved project managing or supervising the construction of the blockwork. The evidence tells me, however, that Mr Wilton did not carry out any inspection of the blockwork or indeed engage anyone else to inspect it. Mr Wilton's evidence to that effect is clear. I have found that there is no causative effect emerging from the design or construction of the blockwork and supervision was not in Wilton Joubert's brief.

[323] In conclusion, I do find that Mr Wilton's involvement with construction of the home went beyond that of an ordinary homeowner. I agree with Mr Wood that Mr Wilton's involvement was at times akin to that of a project manager, including making decisions in respect of matters outside of the scope of structural design or decisions typically made by homeowners. Mr Wilton omitted to issue a written contract clearly specifying who was to be project manager and did not engage anyone to supervise construction. Nor did he provide that supervision himself.

[324] These acts or omissions along with Mr Wilton's unilateral decisions mentioned earlier, I find to be negligent, and, regarding lack of control joints in the cladding and the absence of drip edges, causative of damage. I accept Mr Simcock's evidence when he states that control joints would have assisted the plaster surface performance materially.[270] His view is that control joints should have been provided in the cladding system, as are proposed in the reclad remedial solution.

[325] Therefore, I conclude that the claimants, through the actions of Mr Wilton, were contributorily negligent as to 5% of the full amount of the loss.

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[268] Robert MacDonald's statement of evidence (12 May 2023) at [50].
[269] At [50].
[270] Kevin John Simcock's statement of evidence (31 March 2023) at [31-33].

General damages

[326] The claimants claim an award of $50,000 for general damages. General damages are a form of compensatory damages. They compensate for losses that cannot be objectively quantified in monetary terms. General damages cover, for example, stress, humiliation, and inconvenience.[271] In negligence claims, general damages will be available for the stress, the inconvenience and the like, if they are the reasonably foreseeable consequences of the breach of duty.[272] The claimants quantify the award they seek at $50,000. Counsel for the claimants submit that the starting point is $25,000, as set down in *O'Hagan v Body Corporate 189855 (Byron Avenue)*, as increased by inflation in *Bhargav v First Trust Ltd*.[273] The claimants counsel submits that this sum is now worth at least $34,030.71, as calculated by the Reserve Bank of New Zealand's online inflation calculator to the first quarter of 2023. The claimants' counsel submits that the award is appropriate and in line with the general damages awarded in *Carr v Gallaway Cook Allan*.[274]

[327] Supporting the claimants' claim, counsel refers to Mr Wilton's evidence explaining the stress and inconvenience that this proceeding and the ownership of a leaky home has had on him and his family.[275] I note that neither of the other two claimants, including Mr Wilton's wife, has given any evidence in support of the claim for general damages.

[328] The fourth respondent, in its closing submissions, denies that the claimants are entitled to general damages. It submits that if general damages are awarded, the award should be limited to $25,000. The fourth respondent says that *Carr* is distinguishable on the basis that it is not a leaky building claim. The loss suffered by the claimant in that case included losing the essence of his entire livelihood, coming close to bankruptcy and borrowing from friends and family to cover his debt. The fourth respondent also says that in *Bhargav*, an uplifted award of $30,000 was given because of the combination of inflation and a high level of stress and anxiety, rather than inflation alone. Finally, the fourth respondent submits that although the claimants suffered stress, they knew of water ingress issues as early as 2012 and delayed obtaining reports.

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[271] Stephen Todd *Tort – A to Z of New Zealand Law*, above n 120 at [59.24.2.09]; and Thomas J in *Body Corp 346799 v KNZ International Co Ltd* [2017] NZHC 511 at [104]–[106].
[272] *Mouat v Clark Boyce* [1992] 2 NZLR 559 (CA).
[273] Claimants' closing submissions (21 June 2023) at [117]; *O'Hagan v Body Corporate 189855* [2010] NZCA 65, [2010] 3 NZLR 486 [*Byron Avenue*] and *Bhargav v First Trust Ltd* [2022] NZHC 1710.
[274] *Carr v Gallaway Cook Allan* [2016] NZHC 2065 at [118].
[275] Andrew Wilton's BoE (17 February 2023) at [25].

Higher figures are awarded if there is evidence of significant internal leaks or toxic mould, which there was not in this case.

[329] The Court of Appeal in Byron Avenue confirmed the availability of general damages in leaky building cases and held that in general, the usual award for occupiers was $25,000 per dwelling.[276] In *Bhargav*, the High Court awarded $30,000 in light of inflation over the 12 years since Byron Avenue and the high level of stress and anxiety suffered by the plaintiffs.[277] In the *Bhargav* decision, the plaintiffs had to cope with the situation of the birth of their first child and the COVID-19 pandemic. The inability to have rooms available for boarders as intended also contributed to their stress.

[330] I do not consider that the level of stress and inconvenience suffered by the claimants is in any way comparable to the *Bhargav* factual matrix. Of the three claimants, only Mr Wilton has provided very brief evidence of stress and inconvenience suffered. It is also worth mentioning that with a background in structural engineering, Mr Wilton in particular is reasonably experienced in the tensions and stresses that are part of the building business.

[331] I accept the fourth respondents' submission that a general damages award should not be at the higher level. I dismiss the claimants' submissions that damages of $50,000 should be awarded in line with *Carr*. That case was concerned with the negligence of a law firm in relation to a failed property transaction.[278] That case was not a leaky home case. The High Court in that case distinguished general damages awarded in leaky home cases from those awarded in other negligence cases.[279] Furthermore, the stress and anxiety suffered by the plaintiff in that case included losing his family home and related properties and nearly becoming bankrupt.[280] The Court held that it "went beyond harm to those involved in leaky home cases".[281] For these reasons, *Carr* is not an appropriate case to consider in this claim and it cannot be said that the stress and inconvenience suffered by Mr Wilton reaches the level of that in *Carr*.

[332] Having read and heard Mr Wilton's evidence, I am nevertheless satisfied that this proceeding and the ownership of a leaky home and its need

[276] *Byron Avenue*, above n 264] at [153].
[277] *Bhargav v First Trust Ltd,* above n 264 at [84]–[85].
[278] *Carr v Gallaway Cook Allan*, above n 265 at [1]–[2].
[279] At [771]–[776].
[280] At [777]–[780].
[281] At [780].

for remediation has had some stressful impact causing Mr Wilton inconvenience. I note that the internal damage from the weathertightness defects is minimal. Hearing solely from Mr Wilton and having regard to other cases, I am of the view that I have insufficient evidence to justify an award of general damages at the upper level. I have given full consideration to the legal approach to general damages and having heard all the evidence, in my discretion I consider that $15,000.00 is the appropriate amount to properly compensate the claimants for general damages.

[333] I determine that the claimants are entitled to the sum of $15,000 for general damages.

Costs for alternative accommodation and removal expenses

[334] The claimants make a claim for consequential costs. The claimants seek awards of $37,859 for the costs of alternative accommodation and $11,040 for removal expenses when they say they need to vacate the home during its remediation.

[335] Mr Wilton explained in his brief of evidence that recladding the entire home would take two to three months and that he and his family would have to find alternative accommodation to avoid the attendant disruption occasioned by remediation. At the hearing, Mr Wilton said he investigated the costs of alternative accommodation by undertaking internet searches.[282] His evidence is that the figure of $37,859 covers eight weeks of renting alternative accommodation at $4,732 per week.

[336] No evidence was produced by expert witnesses suggesting that the remedial works would cause such disruption as to require the claimants to move out of their home during remediation. When asked if he had been advised by experts that remediation would require evacuation of the home, Mr Wilton replied, “This is my wife going she’s not going to live in a house when its scaffolded and there’s workers being around the place”.[283]

[337] Mr Wilton’s evidence is insufficient to establish that the claimants are required to vacate their home during remediation adopting the Deane Fluit scope of repairs. There is no objective or expert evidence in support of this claim. I determine that the claimants have failed to establish their claim and

[282] NoE, p 26, lines 15–18.
[283] NoE p 27, lines 3–6.

are not entitled to the costs of alternative accommodation and removal expenses.

Apportionments

[338] 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, s 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.

[339] Further, under s 17 of the Law Reform Act 1936, any tortfeasor is entitled to claim a contribution from any other tortfeasor in respect of the amount it would otherwise be liable for.

[340] The basis of recovery of contribution provided for in s 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…

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

[342] Contribution does not turn on the type of tortious cause of action: this case has allegations of negligence, breach of contract and breach of statutory duty.

[343] It is available between tortfeasors under s 17(1)(c) whenever the liability is in respect of "the same damage". In all causes of action, the damage was the same: lack of weathertightness causative of damage requiring remediation. The apportionment of responsibility requires an analysis of the roles of the parties. I do not believe in this case that it is simply a matter of adopting apportionments made in other cases.

[344] I have found the respondents liable in negligence. Each respondent is therefore a tortfeasor. Joint or concurrent tortfeasors are each liable for the full amount of the loss, known as liability *in solidum*.[284]

[345] Counsel for each of the respondents has submitted a claim for contribution, if found liable, with any other tortfeasor. I find those claims succeed.

[346] Now, to analyse the roles of the parties for apportionment of responsibility. It is well established that the parties undertaking the building work, include the cladding and/or overseeing the work of its applicator, should bear a greater responsibility than those certifying the building work. Essentially, this is because the local authority is not a clerk of works or a project manager.

[347] The first, third and fifth respondents' involvement in the 2010 build of the claimants' home which resulted in weathertightness defects have caused at the very least (before the 2019 repairs) what the experts panel stated would be the minimum of an overlay system to remedy the EIFS cracking followed by a full substrate audit by, for example, Rockcote and consenting approvals.

[348] The evidence suggests that Mr Fluit, Mr Hardaker, officers of Wattyl with necessary expertise and the Council during its respective oversight of the building work, had opportunity to prevent the workmanship deficiencies causative of the defects.

[349] But the significant cause of the claimants' loss from the 2010 building was poor building workmanship, inadequate cladding specification and oversight and cladding installation. Deane Fluit Builder, Tiling Solutions and indeed Wattyl owed a duty to ensure the construction work and cladding installation was carried out properly and therefore, between those parties and the Council, the first, third and fifth respondents are primarily to blame. I assess the liability of the first respondent and the third respondent on its liability at 20 per cent each of the full amount of the loss and Wattyl for its omissions in 2010 at 15 per cent of the full amount of the loss.

[350] I conclude that the Council, in failing to detect the defects and issuing a code compliance certificate, was negligent and the appropriate apportionment is 15 per cent of the full amount of the loss.

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[284] Stephen Todd *Tort – A to Z of New Zealand Law*, above n 120 at [59.23.2]; *Allison v KPMG Peat Marwick* [2000] 1 NZLR 560 (CA).

[351] Wattyl, with the 2019 repairs, should have had knowledge of the weathertightness risk factors of the home and particularly the serious defects with the cladding. Weathertightness risk factors especially with cladding was well known by industry operators by 2010 and certainly by 2019. Wattyl was a recognised cladding supplier. According to Mr Lott's evidence, Mr Campbell was seen on site occasionally during Tiling Solutions cladding installation. But the hearing heard no evidence from Wattyl officials involved in 2010 so we do not know what Mr Campbell did when on site.

[352] For Wattyl's 2010 omissions the appropriate apportionment is 15 per cent of the full amount. The evidence suggests that in 2019 it elected not to obtain expert advice or to further investigate the cladding defects, but instead to proceed with ineffective repairs. Those 2019 repairs have, according to the overwhelming evidence of the experts, made the situation worse such that an overlay system cannot now be used and a full reclad of all EIFS elevations is required. I determine Wattyl's culpability for the 2019 repairs to be 25 per cent and, together with its 2010 omissions, collectively 40 per cent of the full amount of the loss is appropriate.

[353] I determined that Mr Wilton for his minimal but salient construction involvement, not as an owner but as a project manager at different stages during the build, to have been contributorily negligent with critical project management decisions. I assess the appropriate apportionment of Mr Wilton is 5 per cent of the full amount of the loss., which equates to $12,902.01

Orders

[354] The claim by Helen Bernadette O'Sullivan, Fiona Cherie White and Andrew Rodger Wilton is proven to the extent of $243,040.21 for remedial work plus general damages of $15,000. The claimants are entitled to 95% of the total of $258,040.21. For the reasons set out above, I make the following orders:

1. Deane Fluit Builder Limited is ordered to pay to the claimants the sum of $51,608.04 forthwith. Deane Fluit Builder is entitled to recover a contribution from the third, fourth and fifth respondents up to $193,530.16 for any amount paid more than $51,608.04.

2. Tiling Solutions Wanaka Limited is ordered to pay to the claimants the sum of $51,608.04 forthwith. Tiling Solutions is

entitled to recover a contribution from the first, fourth and fifth respondents of up to $193,530.16 for any amount paid more than $51,608.04.

3. The Queenstown Lakes District Council is ordered to pay to the claimants the sum of $38,706.04 forthwith. The Council is entitled to recover a contribution from the first, third, and fifth respondents of up to $206,432.17 for any amount paid more than $38,706.04.

4. Hempel (Wattyl) New Zealand Limited is ordered to pay to the claimants the sum of $103,216.08. Wattyl is entitled to recover a contribution from the first, third and fourth respondents of up to $141,922.12 for any amount paid more than $103,216.08.

[355] To summarise the decision, if the first, third, fourth and fifth respondents meet their obligations under this determination, this would result in the following payments being made by the respondents to the claimants forthwith:

First respondent – Deane Fluit Builder Limited	$51,608.04
Third respondent – Tiling Solutions Wanaka Limited	$51,608.04
Fourth respondent – Queenstown Lakes District Council	$38,706.04
Fifth respondent – Hempel (Wattyl) New Zealand Limited	$103,216.08
Total Due to Claimants	**$245,138.20**

[356] If any of the respondents listed above fails to pay its apportionment, then this determination may be enforced against any of them to the total amount they are ordered to pay in paragraph [354] above.

DATED this 26th day of October 2023

K D Kilgour
Tribunal Member