

IN THE WEATHERTIGHT HOMES TRIBUNAL

**TRI 2015-100-000009
[2017] NZWHT AUCKLAND 01**

BETWEEN **SIMON OVAN BROOME,
ELIZABETH ANN BAIRD AND
MATTHEW LANGLEY CARSON
AS TRUSTEES OF THE SO & EA
BROOME FAMILY TRUST**
Claimants

AND **AUCKLAND COUNCIL**
Respondent

AND **EQUUS INDUSTRIES LIMITED**
Second Respondent
(Removed)

AND **AQUASTOP LIMITED (IN
LIQUIDATION)**
Third Respondent

AND **BOSTIK NEW ZEALAND LIMITED**
Fourth Respondent
(Removed)

Site inspection 5 October 2016

Hearing: 5-6, 10 October 2016

Appearances: A Steele and K Narayanan for the claimants
D I Barr and A Stacey-Jacobs for the respondent

Decision: 19 April 2017

FINAL DETERMINATION
Adjudicator: G D Wadsworth

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BACKGROUND

[1] In September 1993 Simon Broome and Elizabeth Baird purchased the residential dwelling at 15 Awatea Road, Parnell, Auckland. The property was then transferred to Mr Broome, Ms Baird and Matthew Carson, as trustees of the SO & EA Broome Family Trust (the Trust).

[2] In 2004 Mr Broome and Ms Baird decided to carry out improvement and extension works to the property. These included removing a garage in the front yard and building a new garage with a swimming pool, deck and planter boxes above.

[3] Mr Broome applied for building consent on 14 December 2004. The application was accompanied by architectural and structural engineering drawings as well as a specification.

[4] Paragraph 2.6 of the preliminaries and a general section of the specification stated that where a specified product was not available or if a substitute product was considered by the owner to be equivalent or superior, a substitution may be proposed.

[5] A drawing (number WD36)¹ showed an enlarged section of the junction of the deck and the planter box walls above the garage. Notes on the drawing contained details of the membrane in this area.

[6] This was to be a torch-on waterproofing membrane (TOM) applied over the concrete slab on top of the garage roof. The membrane was to run over a timber fillet at the junction between the slab and the planter walls up to 300 mm where it was to be covered by a metal flashing on the wall.

[7] The Auckland City Council as it then was issued building consent 20041979201 for those works on 24 January 2005.

[8] During September 2005 Mr Broome applied to amend the January building consent so as to extend the planter boxes, change a

¹ Common bundle of documents at 123G. Page references are to the continuous pagination on the bottom right-hand corner of the common bundle.

pool fence, delete a water feature and add a spa and a pergola. On 23 November 2005 the Council issued building consent 20041979202 for those works.

[9] In March 2005 Mr Broome signed contracts with N & T Developments Limited for the construction of the new garage including decks and planter boxes, and with Exotic Pools Limited for the construction of the swimming pool. Those companies were owned and operated by Mr Norman Wilton.

[10] After the works began a Dampfix liquid applied membrane (LAM) made by Architectural & Structural Adhesives Limited (ASA) was substituted for the torch-on membrane above the garage roof slab.

[11] The works began in about April 2005 and were substantially complete by mid 2006. They were not finally completed until the end of 2006.

[12] On 1 December 2006 Mr Broome applied for a Code Compliance Certificate (CCC). On 14 December 2006 the Council issued two CCCs for the works carried out under the January and November 2005 building consents.

[13] In 2009 after Mr Broome and Ms Baird had noticed leaks in the garage roof and walls, they contacted Mr Wilton. During April and May 2009 Exotic Pools' employees removed tiles from the deck above the garage and found a crack in the concrete slab underneath the tiles which was ground out, sealed and re-waterproofed.

[14] After these works were completed Mr Broome and Ms Baird observed that the leaks into the garage were continuing. They were unable to obtain further assistance from either N & T Developments Limited, which had been placed into liquidation in July 2008, or Exotic Pools Limited which was placed into liquidation in August 2010. Mr Wilton was bankrupted in February 2011.

[15] In October 2010 Mr Broome and Ms Baird applied to the Ministry of Business, Innovation and Employment for an assessor's report.

Following his investigation and in an eligibility report dated 12 November 2010 the assessor, Mr Wiemann, determined that the property was suffering from damage as a result of water ingress and that the claim was eligible.

[16] On 16 December 2010 Mr Broome and Ms Baird were advised that their claim was eligible. On 10 March 2011 Mr Wiemann issued a full report in which he repeated his conclusion that the building was suffering from damage as a result of water ingress.

[17] In May 2013 the Trust applied for building consent to carry out work to the deck and the planters to remedy the defects identified by Mr Wiemann. After the Council issued a building consent the remedial works were completed during 2014 at a cost of \$158,897.71.²

[18] The Trust's expert Mr Turner was appointed before the remedial works were carried out. He inspected the property in February and March 2014 before producing a report in May 2014.³ Mr Turner also periodically inspected and photographed the 2014 remedial works.

[19] In May 2015 the Trust applied to the Tribunal for adjudication of the claim.

THE PARTIES

[20] When the claim was heard the Council was the only remaining respondent. During the course of the claim there were four respondents. These were:

- (a) Auckland Council, the territorial authority responsible for processing and issuing the building consents, inspecting the building work and issuing the CCCs after the work was completed.
- (b) Equus, which was joined by Procedural Order 2 following an application by the Council. It was removed by

² These costs are itemised in a schedule appended at page 12 of Mr Turner's brief of evidence, (29 July 2016).

³ Forensic Building Consultants Ltd report, common bundle of documents at 143.

Procedural Order 15 after the claimants advised that the claim against Equus had been settled and could be withdrawn.⁴

- (c) Aquastop, which was also joined by Procedural Order 2 following an application by the Council. On 28 June 2016 Aquastop was placed into liquidation.
- (d) Bostik New Zealand Limited, as the successor of ASA, which was joined by Procedural Order 6 following an application by the Council. After the Council advised that it no longer pursued its cross-claim against Bostik and when neither the Trust nor Equus pursued separate claims, Bostik was removed by Procedural Order 13.

ISSUES

[21] The issues that I need to determine in this claim are:

- (a) Are there weathertightness defects and did those defects cause damage?
- (b) What is the reasonable cost to repair those defects?
- (c) Is the Council legally liable for the Trust's losses?
- (d) What general damages should be awarded?
- (e) What interest is claimable?

ARE THERE WEATHERTIGHTNESS DEFECTS AND DID THOSE DEFECTS CAUSE DAMAGE?

[22] The property was the subject of two assessor's reports:

- (a) Mr Wiemann's eligibility report dated 12 November 2010.
- (b) Mr Wiemann's follow-up full report dated 10 March 2011.

[23] The reports concluded that:

⁴ Procedural Order 15 at [1](d) and (f).

- (a) There were weathertightness defects in the construction of the garage, the deck and the planters.
- (b) Those defects had allowed water and moisture to enter the garage.
- (c) Water entry had caused damage to the garage.
- (d) The estimated cost of repair work was \$90,032.33 including GST.

[24] Mr Wiemann's reports noted the following departure from the consented drawings and other defects:

- (a) The installation of the TOM below the tiled deck was inadequate.
- (b) The cap flashings on the planters were installed inadequately and directed water towards the junction to the concrete block walls.
- (c) The metal flashing that was to have been chased into the planter walls was absent.
- (d) The tanking membrane in the planters was adhered to the concrete block wall with no means of protection to the top edge and had likely resulted in water ingress behind the membrane.

[25] In his reports Mr Wiemann concluded that the membrane below the deck and in the planters had to be removed and replaced, metal flashings had to be chased into the block work and over a membrane edge, the planters had to be adequately waterproofed and new cap flashings had to be installed with adequate falls and junctions.

[26] Mr Turner gave expert evidence on behalf of the Trust. Mr Hubbuck gave evidence for the Council of the condition and appearance of the property when he inspected it in June 2012.⁵ The

⁵ Brief of evidence of Stephen Hubbuck (20 September 2016) at [10] - [19].

Council's expert evidence was given by Mr Paykel, who acknowledged that he had been brought in at a late stage, had only visited the site on the pre-hearing inspection and that his assessments were based on that inspection and looking at the photographs.⁶

DEFECTS

[27] Following the settlement of the claim against Equus the defects remaining in issue were listed in a schedule of key issues that was modified at the start of the hearing. During the hearing the parties agreed to changes to the description and the order in which the defects should be addressed.

[28] Taking these changes into account, as well as a separate suggested defect outlined by the Council during the hearing, I deal with the defects in the following order.

The Grayson Wagner report

[29] Mr Turner's report recorded that samples of the LAM were sent for analysis to Grayson Wagner, consulting chemists. Grayson Wagner's May 2014 report was appended to Mr Turner's report.⁷

[30] The Council submitted that Grayson Wagner's report suggested a different reason why the LAM had leaked, which contradicted the reasons that the Trust had proposed for the leaks. It also said that Mr Turner's evidence had not addressed this separate reason.

[31] Mr Turner acknowledged that Grayson Wagner's analysis identified the presence of materials which may have created holes allowing water to pass through the LAM sample and that it suggested that the LAM may have been prepared and installed inadequately. He accepted that this defect in the LAM was not addressed in either his brief of evidence or his supplementary brief.

[32] Mr Turner said that Grayson Wagner's analysis was based on a single LAM sample from the property which may have been affected

⁶ Transcript of Proceedings at 173, 16 - 21.

⁷ Common bundle of documents at 253.

when he had used a knife to remove it from the deck surface. He did not consider that the analysis could be applied to all of the installed LAM.

[33] Mr Wiemann said that Grayson Wagner's analysis indicated that the composition of the LAM material may have been inferior. But he considered that it was difficult to remove a membrane sample once installed in such a way that it could be accurately tested. Consequently he doubted whether the analysis could be relied on to show that the waterproof quality of all the LAM was inferior.

[34] I do not accept that the defects identified by Grayson Wagner show that all of the LAM installed on the deck was similarly defective. I accept that the physical removal of the tested LAM sample may have resulted in damage which led to the defects identified by Grayson Wagner. I also consider that if all of the installed LAM had the same type and extent of defects identified by Grayson Wagner the leaks which did occur are likely to have been much more widespread.

The source of the leaks

[35] The Council criticised the methodology leading to Mr Turner's conclusion that the LAM terminated at the deck/planter junctions. This led to a comparison of the staining on the garage timber ceiling and the layout of the deck and planters above.

[36] When Mr Wiemann inspected the property in January 2011 he prepared a plan of the deck which is at section 8.1 of his report.⁸ This shows four grey areas recording the stains on the garage ceiling. When Mr Turner inspected the property in 2014 he observed that those stains had spread as well as fresh staining in other areas of the ceiling.

[37] When the experts discussed the stains on the garage ceiling they referred to several documents recording the location of the 2009 deck repairs and the stains. The Trust produced a plan of the deck and planters which showed the stains as recorded by Mr Wiemann and

⁸ Assessor's full report, 10 March 2011, common bundle of documents at 36.

Mr Turner. The plan was coloured, added to the common bundle⁹ and termed the Agreed Leaks Plan.

[38] As a result of this plan and after discussion of the correlation between the deck/planter junction and where staining was recorded on the garage ceiling, Mr Broome was recalled to give evidence on the extent of the remedial work carried out to the deck in 2009.

[39] Mr Broome said that there was a fine crack in the concrete base and the membrane below the deck which correlates with the green area number 2 of the Agreed Leaks Plan. He observed remedial work to this area and described how tiles were removed from the planter near the top-right-hand side of photograph 9 in Mr Wiemann's report¹⁰ over to and including the discoloured tiles on the left-hand side of that photograph.

[40] Mr Broome also said that before this work was carried out he had observed stains on the garage ceiling which corresponded to the mark in the middle of the plan at section 8.1 of Mr Wiemann's report. After the work was completed in 2009 he subsequently observed leaks and other stains which corresponded to the separate marks on that plan nearer the planters. In his words the leaks moved to another part of the garage or 'switched cars'.

[41] Mr Turner said that the six green areas numbered 1 to 3 and 4 to 7 in the Agreed Leaks Plan, recording stains on the garage ceiling that he had identified in 2012, occurred because of leaks at the deck/planter junctions above. He acknowledged that the green area numbered 2 correlated with that part of the deck which had been repaired in 2009.

[42] Mr Turner said that water entering at the deck/planter junctions may have spread along the screed below the deck and possibly penetrated the concrete slab at the weaker Stahlton beam joints¹¹ before appearing below as staining on the timber ceiling. Alternatively he suggested that any penetrating water may have spread through the slab,

⁹ Common bundle of documents at 558.

¹⁰ Above, n8 p14, common bundle of documents at 86.

¹¹ Common bundle of documents, detail F-F/S1, figure 1 in the drawing at page 123D.

particularly at places where the density of the concrete was lower than other places, before leaking through and appearing as staining.

[43] Mr Paykel said that the water penetration which resulted in staining to the garage ceiling occurred as a result of two primary defects. The first defect was the mixture and quality of the LAM as identified in the Grayson Wagner report. The second was the crack that had been repaired in 2009. Mr Paykel considered that this crack could have been either in the screed or in the underlying concrete and that it would have caused the underlying LAM to rupture, allowing water to pass through.

[44] Mr Paykel said the stain shown in the green area number 2 on the Agreed Leaks Plan was located where this crack had been repaired. By comparing the increase in and movement of that stain recorded by the circled mark in 2011 with that recorded by the green shading in 2014 Mr Paykel considered that the leak from this area was continuing and spreading towards the bottom planter wall shown in the plan.

[45] Mr Wiemann considered that there was a correlation between the stains shown in green areas numbered 1, 5, 6 and 7 and the deck/planter junctions. He said that water leaking into concrete from above does not necessarily emerge at the same point below the concrete and suggested that water which he had observed ponding on the deck where repairs had occurred in 2009 may have penetrated through the damaged membrane below that area and caused the green area number 2.

[46] I consider that six of the seven stains shown in green on the Agreed Leaks Plan occurred as a result of leaks at the junction between the garage roof slab and the planter walls for the following reasons:

- (a) The repairs carried out in May 2009 were to an area of the deck that is separate from the deck/planter junctions. One of the seven stains recorded correlates to that leak but I do not consider that the leaks as a result of that defect resulted in the other six recorded stains.

- (b) By comparing Mr Wiemann's 2009 records and Mr Turner's 2014 records it is evident that four stains recorded in 2009 had increased in size and that the number of stains had also increased.
- (c) Mr Turner's view that the stains shown in six green areas of the Agreed Leaks Plan are due to leaks at the deck/planter junctions through the planter walls is supported by Mr Wiemann who considers that four of those six areas correlate to leaks at the deck/planter junctions.
- (d) Mr Turner's view that leaks may spread through the concrete before reappearing as leaks below the concrete is shared by Mr Wiemann. It may explain the origin of the green areas numbered 3 and 4 in the Agreed Leaks Plan which are separate from the planter walls.

The failure to return the LAM up the planter walls

[47] The Trust says that the LAM above the garage roof slab terminated at the edge of the slab instead of continuing up the outer wall of the planters to create an upstand. Alternatively it says that any upstand which was built was not high enough. As a result there was no or insufficient protection against water entry at the deck/planter junctions.

[48] This defect is depicted in Mr Turner's May 2014 report,¹² his brief of evidence¹³ and in his supplementary brief of evidence.¹⁴ He says that when he inspected the deconstruction preceding the remedial works he observed that the LAM terminated at the edge of the deck instead of continuing up the outside planter walls.

[49] Mr Turner considered that the edge of the deck was the most likely failure point and the most significant cause of water ingress. His evidence was that this was contrary to:

- (a) New Zealand Building Code (NZBC) clause B2.2.

¹² Above n 3, at 156(ix) to 158, photograph 12 at 171.

¹³ Above n 2 at [6], [13], [15] and [17.2]

¹⁴ Supplementary brief of evidence of Craig Turner at [7], [8] and [17].

- (b) NZBC clauses E2, E2.3.2, E2.3.3, E2/AS1 Figures 57, 58 and 62.
- (c) A requirement in the Dampfix data sheet that the membrane should be returned up the vertical upstand to a minimum height of 150 mm.
- (d) The detail in the drawing WD36¹⁵ which showed the vertical membrane on the deck continuing up the outer wall of the planter to a height of 300 mm.
- (e) Clause 2.5.4 of the Branz Good Membrane Roofing Guide November 1999 edition, which states that at junctions with walls membranes should rise up the wall surface for at least 150 mm.

[50] Mr Paykel said that the 300 mm upstand specified in the drawing 123G was for a TOM and was higher than 100 to 150 mm which he thought would ordinarily be specified for a TOM upstand. He considered that because the TOM had been substituted by a LAM the height of the upstand could be lower.

[51] The experts' discussion focussed on photograph 525Q of the common bundle which showed the clearest picture of a deck/planter junction after the tiles and screed had been removed in 2014.

[52] In cross-examination Mr Turner conceded that the shading on the bottom of the planter wall labelled 'white tide mark' in photograph 525Q was a different colour to the rest of the wall. He agreed that there was a shape in the fourth numbered column which could have resulted from a membrane having been torn from the wall but said that the LAM sample which he had removed had been taken from the pool edge.

[53] Mr Turner did not accept that the tide mark indicated that the LAM had been continued up the planter wall. Instead he thought that the tide mark was created when the deck tiles were laid above the

¹⁵ Above n 1.

membrane to a height of approximately 40 mm up to and against the planter walls before they were painted.

[54] Mr Paykel initially said that there was no evidence from the photographs and documents which he had seen of any LAM upstand on the planter walls. But when referred to photograph 525Q he said that the white tide mark was indicative of a membrane and that the rectangular mark was consistent with a tear in that membrane.

[55] In cross-examination Mr Paykel said that he believed that a very thin LAM with pinholes in it had been applied to the deck and up the planter walls. He acknowledged that he could not determine the upstand height on the walls correctly from the photograph 525Q but believed that it was above the level of the tide mark and the level of the deck tiles.

[56] Mr Wiemann said that any LAM had to have a vertical upstand which had to be above any level where surface water might reach it. He referred to LAM upstand heights of between 100 mm and 150 mm.

[57] Mr Wiemann believed the tide mark on the wall in photograph 525Q was a LAM residue and estimated its height at less than 40 mm. He thought the tide mark showed that a membrane material on the deck had been roughly applied by brush strokes up the planter wall and was not the result of grout having been applied when the tiles were laid.

[58] I consider the evidence establishes that there was a LAM upstand on the planter walls at the junction with the deck. As a result I do not accept the Trust's contention that the LAM terminated at that junction.

[59] I accept a LAM upstand did not need to be 300 mm high. But for the following reasons I find that the LAM was not adequately installed because its upstand was too low and that this was one of the causes of the leaks:

- (a) Taking into account the details in the Dampfix data sheet, the Branz Good Membrane Roofing Practice Guide and

Mr Wiemann's evidence, the upstand should have been at least 100 mm and preferably 150 mm high.

- (b) If the upstand was present at all then it is shown as the white tide mark noted on photograph 525Q.
- (c) I accept Mr Wiemann's view that the height of this mark was about 40 mm and that the height of the upstand was approximately 40 mm.
- (d) 40 mm is less than half the 100 mm minimum height for the upstand and was insufficient.
- (e) The tiles laid over the LAM up to and against the planter walls were approximately 40 mm high.
- (f) As a result water running from the deck tiles would have come into contact with the planter walls at or possibly above the top edge of the upstand, thus creating a pathway for water penetration and leaks.

Lack of protection to the membrane edge

[60] The Trust says that when the LAM was installed it should have had a protective flashing where the top edge or ridge of the LAM upstand met the planter wall. It says that there was no flashing or that any flashing was insufficient.

[61] The Council accepted¹⁶ that no metal flashing was installed on the planter walls, and that such a flashing would have been visible if it had been installed. The Council said that no separate flashing was required for the LAM upstand.

[62] This defect is depicted in Mr Turner's May 2014 report and his brief of evidence.¹⁷ He says that when he inspected the deconstruction that preceded the 2014 remedial works he observed that no flashing was installed at the top of the surface of the planter walls and the LAM.

¹⁶ Transcript of Proceedings at 218, 5.

¹⁷ Above n 2, at [15] and [18.2]

- [63] Mr Turner's evidence was that this was contrary to:
- (a) New Zealand Building Code (NZBC) clause B2.2.
 - (b) NZBC clauses E2, E2.3.2, E2.3.3.
 - (c) The detail in the drawing WD36 which showed a metal flashing between the TOM and the painted plaster bagging on the planter wall.

[64] Mr Turner acknowledged that the TOM was substituted by a LAM but said that a flashing was still required to protect the ridge of the LAM which should have been similar to the metal flashing specified for the TOM. He considered that it was difficult to achieve an effective flashing by painting out or 'feathering' the ridge of a Dampfix LAM because the material of that membrane contained reinforcing fibres.

[65] Mr Paykel said the purpose of the metal flashing specified in drawing WD36 was to prevent the thicker TOM shown in that drawing from delaminating. Evidence of such delamination could be seen in Mr Turner's photographs of the inside of the planters.¹⁸

[66] Mr Paykel did not consider that a metal flashing was required because the TOM had been substituted by a LAM. He said that the liquid LAM bonds and adheres to a substrate which gives the same protection as a flashing and that it could be effectively flashed by feathering the edge where the LAM ridge met the substrate.

[67] In cross-examination Mr Paykel was referred to the instructions in ASA's September Dampfix data sheet and the following excerpt from the heading 'Application - External Decks & Roofs':¹⁹

After priming and joint sealing, apply Dampfix 3 to wall/floor junctions and sheet flooring joints using a brush, extending at least 100mm either side of the joint ... Sufficient Dampfix 3 must be applied onto the surface to achieve a minimum 1 mm thick dried film. Ensure Dampfix 3 is applied underneath existing cover flashing or install an appropriate flashing over the membrane ...

¹⁸ Common bundle of documents at 170, (photographs 7 and 8) and 171, (photograph 10).

¹⁹ Common bundle of documents at 546.

[68] He acknowledged that the excerpt required Dampfix to be applied under a flashing but said that he had never seen a metal flashing where a LAM was applied over a masonry substrate.

[69] Mr Wiemann said that in many cases a LAM did not require a metal flashing. As the TOM had been substituted by a LAM he did not consider that a metal flashing was necessary here.

[70] But Mr Wiemann considered that it was good practice to have some form of flashing at the ridge of a LAM, which could be achieved either by creating an overhang in the upstand or by protecting the ridge where it met the material underneath. He opined that the top of the tide mark on photograph 525Q appeared to be a roughly applied upstand which had been created by feathering the ridge of the LAM.

[71] I do not accept that the LAM upstand installed on the planter walls required the metal flashing which Mr Turner advocated. I accept Mr Paykel's view which is shared by Mr Wiemann that, due to the different nature of the LAM sufficient protection would have been achieved by applying a different form of flashing.

[72] Mr Wiemann identified an upstand in photograph 525Q but described it as apparently roughly applied. This assessment is consistent with Mr Turner's view that it was difficult to feather the top edge or the ridge where Dampfix met a substrate.

[73] The excerpt from the ASA data sheet requires Dampfix to be installed under a flashing. The term 'appropriate' in that excerpt is vague but I consider that the data sheet shows an intention by the manufacturer for Dampfix to be protected by another material. This interpretation is supported by clause 2.5.4 of the BRANZ Good Membrane Roofing Guide,²⁰ which refers to the membrane terminating either behind wall cladding or an over-flashing.

[74] Taking into account these requirements and Mr Wiemann's observations I am unable to accept that the feathering of the LAM ridge

²⁰ BRANZ Good Membrane Roofing Guide, common bundle of documents at 261.

advocated by Mr Paykel, or the ridge depicted in photograph 525Q, provided a satisfactory flashing or sufficient protection to the LAM ridge on the planter wall. I consider that the LAM upstand had no sufficient flashing and that this was one of the causes of the leaks.

No coving at the junction of the concrete slab and the planter walls

[75] The Trust says that the junction where the garage roof slab met the planter wall was a critical area of the LAM. It should have, but did not, contain a coving that would have lessened the right angle at this junction and so reduced the potential for the LAM to stretch and break.

[76] This defect is depicted in Mr Turner's May 2014 report²¹ and his brief of evidence.²² He says that when inspecting the deconstruction that preceded the 2014 remedial works he observed that no coving was installed at this junction.

[77] Mr Turner's evidence was that this was contrary to:

- (a) NZBC - clause B2.2.
- (b) NZBC - clauses E2, E2.3.2, E2.3.3.
- (c) The detail in the drawing WD36 which showed a timber fillet where the Bituprime on the deck met the planter wall.
- (d) The detail in the ASA Dampfix data sheet.

[78] The section in drawing WD36 shows a timber fillet at this junction. The ASA data sheet says that corners should be rounded off with a silicone application. The experts referred to the fillet as a bond breaker or a coving.

[79] Despite the change from a TOM to a LAM, Mr Turner said that a coving or something similar was required to reduce the strain on the membrane and the chance that it would crack at this junction. He said

²¹ Above n3, photograph 11 at 171.

²² Above n 2, at [15] and [17.1].

that the practice when installing a LAM was to apply a silicon bead along the joint between the horizontal and vertical planes of the LAM.

[80] Mr Turner said that when he inspected the works after the tiles had been removed in 2014 he did not recall seeing any coving in this area. He referred to two photographs²³ taken at that time.

[81] Mr Turner said that if a silicone coving had been applied at the deck/planter junction the first photograph would not have shown the indentation in the deck surface and the second photograph would not have shown the sharp corner visible between the deck and the wall.

[82] Mr Paykel said that the Dampfix data sheet required a bond breaker which was different from the angle fillet shown in drawing WD36. He said that the bond breaker would have been a flexible sealant bead applied at the corner and rounded before the LAM was installed.

[83] Mr Paykel criticised Mr Turner's investigation and his photographic record of this phase of the remedial work. He said that although Mr Turner's photographs did not show a silicone bead this did not mean that it had not been installed as it could have been removed when the tiles and screed were taken up in 2014.

[84] Mr Wiemann said that despite the substitution of a LAM for a TOM there was still a need to install some form of protection at the junction of the horizontal and vertical planes which could be achieved by installing either a silicone bead or a plaster fillet.

[85] Mr Wiemann was unable to tell whether either of the two photographs relied on by Mr Turner showed that any bead or fillet had been present at or removed from the junction. But because he considered that the white tide mark on photograph 525Q appeared to be a roughly applied membrane he doubted whether the membrane installer would have carefully installed a silicone bead below that membrane.

[86] For the following reasons I find that there was no fillet or silicone bead at the junction between the slab and the planter walls:

²³ Common bundle of documents at 525Q and 556.

- (a) Mr Turner was present when the deconstruction work including the removal of the tiles and screed occurred in 2014.
- (b) He stated clearly and consistently that he did not observe any such fillet or bead and the photographic evidence which is available generally supports his view.
- (c) His evidence was also supported by Mr Wiemann who opined that photograph 525Q showed apparently rough application of the membrane upstand and doubted whether this level of workmanship would have included the application of a silicone bead.

Prior notice to the Council

[87] The Council said the Trust failed to advise it of the 2014 remedial works. Had this advice been given the Council says that it would have appointed experts who would have been able to attend and record those works. The Council submitted that this would have resulted in clearer photographs of the areas containing defects and allowed its experts to respond to Mr Turner's evidence.

[88] In response to this criticism the Trust's solicitors produced correspondence beginning with their 14 May 2012 email to Heaney & Co, a firm of solicitors which frequently act for the Council. The email attached the assessor's report and announced the Trust's intention to carry out remedial work before bringing a claim against the Council.

[89] Heaney & Co promptly responded, confirming that they had forwarded the email to the Council for instructions. This apparently led to Mr Hubbuck's inspection of the property on 1 June 2012.

[90] Having arranged that inspection it was open to the Council to establish contact with the Trust's solicitors. This would not have been an expensive or a difficult exercise. The Council did not take this step. Nor did it explain or justify its failure to do so.

[91] Had the Council contacted the Trust's solicitors I am satisfied that it would have been informed of the 2014 remedial work. In that case it would have been able to arrange for its experts to attend those works.

[92] Due to the Council's failure to take this step I do not consider its criticism that the Trust failed to give it prior notice of the remedial works is well founded.

Summary on defects

[93] Having considered the evidence in relation to the defects in this claim, I conclude that the Trust has established that:

- (a) The leaks which Mr Broome observed after the 2009 remedial works had been completed occurred at the junction where the garage roof slab met the planter walls.
- (b) The majority of the stains shown on the green areas in the Agreed Leaks Plan occurred as a result of leaks at this junction.
- (c) The LAM was installed inadequately because:
 - (i) The upstand was not high enough.
 - (ii) The upstand ridge was not adequately protected.
 - (iii) There was no fillet or silicone bead at the roof slab/planter wall junction.
- (d) The defects described at paragraph [1](a), (b), (d), (e) and (f) of the agreed schedule of issues were present.
- (e) Those defects were the effective cause of the leaks into the garage below.
- (f) The defects amounted to breaches of the Building Act, the Building Code and the relevant technical literature.

WHAT IS THE REASONABLE COST TO REPAIR DAMAGE CAUSED BY THE DEFECTS?

[94] The cost including professional fees of the remedial works to the planters and the deck was \$158,897.61. This sum comprised \$102,616.38 in respect of the deck and \$56,371.13 in respect of the planters.

[95] Following the settlement with Equus the Trust advised that its claim against the Council no longer included the cost of the remedial work to the planters.²⁴ As a result the parties accepted that the Trust's claim against the Council was reduced to the \$102,616.38 claimed for the remedial work to the deck.²⁵

[96] At the start of the hearing I recorded the Council's acceptance that if any one of the alleged defects was found to have existed because of an error or omission by the Council, the Trust would be entitled to an award for the full amount claimed for remedial work to the deck.²⁶

[97] As a result of this concession it was unnecessary to consider whether the extent of or the amount paid for the remedial work to the deck was reasonable or to apportion that amount between the individual defects recorded in paragraph [2] of the schedule of key issues.

[98] In the event that the claim against the Council succeeds I find that the Trust is entitled to judgment in the sum of \$102,616.38 for the remedial costs to the deck together with any related damages and interest.

IS THE COUNCIL LEGALLY LIABLE FOR THE TRUST'S LOSSES?

[99] The Trust seeks judgment against the Council on the grounds that it owed a duty of care to it when:

- (a) Inspecting and certifying the work carried out pursuant to the January and November 2005 building consents.

²⁴ Procedural Order 15 at [1](b); Trust's opening submissions (28 September 2016), [1] - [5].

²⁵ Transcript of Proceedings at 28, [24] - [27].

²⁶ At 7, [15] - [22].

- (b) Issuing the CCCs for all work under the building consent.

[100] The claim alleging the existence of the duty of care is orthodox. The law is settled that a Council owes such a duty of care when carrying out its statutory and regulatory functions.²⁷

[101] The Trust alleges that in breach of that duty of care the Council:

- (a) Passed inspections of the deck membrane;
- (b) Passed the final inspection;
- (c) Failed to appreciate that the specified deck membrane had been changed from a TOM to a LAM;
- (d) Failed to identify the defects in the course of its inspections;
- (e) Failed to take reasonable steps to ensure the defects were rectified;
- (f) Issued the CCC notwithstanding the defects and that there were not reasonable grounds for it to be satisfied that the work complied with the Building Code;
- (g) Failed to ensure that the property was built in accordance with the Building Code.

[102] The issues to be addressed in this part of the inquiry are listed at paragraph [4] of the schedule of key issues. During the hearing the description of those issues as well as the order in which they were addressed changed. I deal with them in the following order:

The Council's attitude to LAMs and Dampfix

[103] The Trust says that when the works were carried out the Council had become increasingly concerned about membranes in wet areas and was unwilling to accept the Dampfix membrane as suitable for such

²⁷ *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479 (HC) at [220].

locations. It also says that the Council was obliged to inspect the membrane and failed to do so or to observe the defects.

[104] The Trust submitted that the Council would have refused to accept the substituted Dampfix LAM had it observed this membrane on inspection or been informed of the substitution at any time during the works. It said that the Council was hostile towards Dampfix.

[105] Mr Turner described two remedial building projects which he had been involved in during 2003 and 2005. He said that by 2005 the Council had significant concerns about the performance of LAMs on balconies and decks.

[106] The Trust said that the development of the Council's attitude to and concerns about membranes in wet areas was reflected in the changes to the second building consent. It contrasted a condition in the January 2005 consent that said:

8. MEMBRANES IN WET AREAS

Where membranes are being installed in wet areas, an inspection is required before applying the covering materials, i.e tiles, shower trays ...

[107] With a new condition in the November 2005 consent that said:²⁸

7. FLASHING AND MEMBRANES

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

[108] The Trust referred to a letter dated 17 January 2006 in which the Council declined ASA's application for approval of a Dampfix LAM as an alternative solution when issuing building consent. It also referred to ASA's August 2006 complaint that, despite the Council's earlier interim acceptance of its products, Council inspectors were still refusing to sign off work carried out with Dampfix and that Dampfix was not on a list of accepted products.

²⁸ The significance of this condition only became apparent during closing submissions and was addressed by the parties in memoranda filed subsequently on 14 October 2016.

[109] Mr Turner produced a typewritten document which he said had copied from one of the Council's inspectors on 30 November 2006.²⁹ It contained two sections headed Internal Wet Area Products and External Wet Area Products, below each of which brands of membrane are listed.

[110] The listed products under the Internal Wet Area Products heading include a handwritten note 'Dampfix Du'. The listed products under the External Wet Area Products list do not include Dampfix. Mr Turner said that this was because the Council inspectors were then still unwilling to accept Dampfix as suitable in external wet areas.

[111] The thrust of Mr Turner's evidence was that the Council inspectors did not look at LAMs with a friendly eye. He considered that there was an outright ban on Dampfix until mid 2006 and after that time the Council's inspectors were still unwilling to accept Dampfix as a suitable waterproofing membrane in external wet areas.

[112] Mr Paykel was employed as a team leader by the Council during the events in question. He said that during 2004 the Council maintained a cladding register in Excel format, which was periodically updated by Council employees.

[113] After Mr Woodger became responsible for the register it was expanded to include other products, including waterproofing membranes. He said that in 2005 the Council had concerns about the installation or workmanship of these membranes but that this did not extend to specific membrane products.

[114] Mr Paykel said that after the July 2005 Building Code amendments the Council sent requests similar to its January 2006 letter to ASA to other product suppliers and manufacturers. He said those requests were also made because the expansion of the register meant the Council required information to assist its Quality Assurance process.

[115] This led to the inclusion of membranes in the register. By at least 14 September 2006 the Council had included Dampfix on its

²⁹ Supplementary brief of evidence of Craig Turner at [15].

register. An extract from the Council's LAM register³⁰ named ASA-Dampfix II as suitable for internal and external waterproofing.

[116] The second and third columns of the external waterproofing page of the register listed suitable applications, which included external decks and suitable substrates.

[117] The fourth column contained the following instructions:

Building consent conditions

At the completion of the works and prior to the issue of the Code Compliance Certificate, the applicant shall provide to Auckland City Environment the following documentation to assist Council in establishing compliance with the Building Code.

- Copy of Applicators Approval Certificate from ASA Ltd.
- Copy of Workmanship Statement from the applicator in the Auckland City Environment format.

Copy of manufactures [sic] warranty.

[118] Mr Paykel said that he did not recall the Council banning LAMs or refusing to accept them. He did not recognise the Products list dated 31 October 2006 which Mr Turner had produced and doubted whether it was a Council document.

[119] I consider that the introduction of Condition 7 in the November 2005 consent reflected the Council's developing experience of membrane performance in wet areas. On any membrane inspection pursuant to Condition 8 the Council's inspectors would have been obliged by Condition 7 to check and ensure that the membranes and flashings were correctly installed and that upstands behind cladding were adequate.

[120] However I do not consider that these conditions on their own, or the introduction of Condition 8 in late 2005, demonstrate that the Council was reluctant to accept LAMs generally or Dampfix in particular.

³⁰ Liquid Applied Waterproof Membrane Register, common bundle of documents at 487 and 488.

[121] I do not consider that the Council's 17 January 2006 letter to ASA was a generic request for information. Its purpose was to decline ASA's request for approval of Dampfix as a waterproof membrane. It stated that until the requested information was received and satisfied the Council's requirements, Dampfix was not approved.

[122] Mr Turner has given evidence of the Council's attitude to LAMs. There is independent evidence to show that during 2005 and 2006 the Council and its inspectors may have been unwilling to accept Dampfix as a suitable exterior waterproofing membrane. This is made clear in the Council's January 2006 letter. It is also recorded in ASA's August 2006 correspondence with the Council and the list which Mr Turner copied in October 2006.

[123] The ASA correspondence shows that between January and June 2006 the Council had given interim acceptance to Dampfix, for which approval continued until August 2006. The extract from the membrane register shows that by September 2006 the Council was willing to accept Dampfix as an internal and an external waterproofing membrane provided the requirements listed in the fourth column were met.

[124] Although the extract shows that Dampfix had temporary approval until 15 October 2006 there is no evidence that this approval was continued after that date. The list which Mr Turner copied in October 2006 appears to be the document referred to in ASA's 23 August 2006 facsimile. This suggests that the Council's continued approval of Dampfix may have been limited to internal wet areas.

[125] Having considered this material I am satisfied on the balance of probabilities that the Council would have declined to approve Dampfix had it been initially specified in the 2004 building consent application. I also consider that up until early 2006 the Council would have declined any application to substitute Dampfix for the TOM.

[126] The ASA correspondence records that at some time between January and June 2006 the Council gave interim approval to Dampfix. It

is not recorded whether this covered internal and external wet areas but the September materials register extract suggests that it covered both.

[127] The list dated 31 October 2006 suggests that the inspector who allowed Mr Turner to copy that document may have only been willing to accept Dampfix in internal wet areas. It is not apparent whether this document represented Council policy or the attitude of one or more of the Council's inspectors. However, there is no evidence of any further complaint by ASA regarding non-acceptance of Dampfix after August 2006.

[128] I am not satisfied that the evidence demonstrates that the Dampfix approval recorded in the September 2006 membrane register extract expired in 2006. Instead I proceed on the basis that this approval remained in place and applied to internal and external wet areas, but that some inspectors may have continued to be unwilling to accept Dampfix in external wet areas.

The requirement to inspect membranes

[129] The December 2004 building consent application contained information including drawing WD36 which showed that the works would include installation of a membrane in a wet area.

[130] The Council apparently recognised this by including Condition 8 in the January 2005 consent which required a membrane inspection. This was supplemented by Condition 7 in the November 2005 consent, even though the amended building consent application submitted in September 2005 did not involve any waterproof membrane works.

[131] The Council accepted³¹ that the consent required an inspection before the membrane was covered. It says that the obligation to call for such an inspection lay with the owner and that it was never called to carry out this inspection. As a result the Council says that it was never given the opportunity to detect the substitution or the defects in the LAM.

³¹ Transcript of Proceedings at 258, 24 to 259, 21.

[132] A Council form titled 'Notifiable Inspections'³² is marked with the January 2005 consent number 2004 1979201 and was prepared after the Council reviewed the building consent application and determined what work stages needed to be inspected. It recorded whether the Council was to be notified of specific works, what work was to have been completed and the location of the relevant inspection.

[133] The form contains square boxes under the 'No Insp' column. The 'No' is an abbreviation for Notifiable. The purpose of the handwritten ticks in those boxes is to show which work stages were to be notified to the Council so that they could be inspected.

[134] One of the tasks listed in the form was 'Membranes, decks/showers/walls'. The corresponding description of the inspection next to the membrane stage was 'Prior to cover up by wall cladding and floor cladding'.

[135] No tick appears in the box next to the Membrane task. This suggests that when a Council employee completed the form they failed to either recognise that the membrane work had to be notified for an inspection or to appreciate that the work included installation of a membrane under a deck in an external area.

[136] As a specific membrane inspection did not occur it is necessary to see whether the membrane was or should have been observed during other inspections. Another Council form titled 'Inspection Records'³³ also marked with the January 2005 consent number contains the dates when the Council carried out inspections and which stage or part of the works was inspected. I was informed that two such inspections were relevant.

[137] The first was on 24 August 2005. The Council accepted that this was of the garage roof slab and that its inspector would have been able to see the LAM laid over the screed on top of the slab but did not do so because the membrane had not been installed by that date.

³² Common bundle of documents at 292.

³³ Common bundle of documents at 289

[138] The outstanding work described in Exotic Pools' 2 November 2005 letter included footings and block work to the planters. This had to be completed before the membrane could be installed above the roof slab. As a result I consider that installation of the LAM could not have begun before or been visible during the inspection on 24 August 2005.

[139] The second inspection was on 5 November 2005. It is recorded as ISF, which Mr Paykel advised is an abbreviation for In Situ Floor.

[140] The Council and the Trust accepted that the LAM was installed during November 2005.³⁴ Mr Turner and Mr Paykel could not agree how long this work would have taken but the parties accepted that either preparation or installation work may have begun by 5 November 2005, and would have been visible at the date of the inspection.

[141] The garage floor can be seen in photograph 1 of Mr Wiemann's report.³⁵ It is one level below the roof slab where the LAM was installed.

[142] The Council says that the scope of the November inspection was limited to the garage floor and did not require its inspector to inspect the roof slab above. It also says that there is no evidence to suggest that the inspector did so. The Trust did not challenge the Council's explanation.

[143] In the absence of any evidence which suggests or shows that the inspector was then either obliged to or did examine the garage roof I do not consider that the Trust has established that the Council ought to have discovered or in fact identified the defects in the LAM installation as a result of the 5 November 2005 inspection.

Was the LAM upstand visible?

[144] Mr Turner said that the LAM upstand together with overlying plaster bagging or paint after installation would have been about 2 mm thick and visible as a ridge on the vertical surface of the outer planter wall. He produced a sample of an Aquadex membrane manufactured by

³⁴ Transcript of Proceedings at 291, 10 to 292, 8.

³⁵ Above, n8 p60, common bundle of documents at 82.

Jaydex that was approximately 1.5 mm thick which was admitted as an exhibit.³⁶

[145] Mr Turner also said that he did not see any such ridge when he inspected the planters before the 2014 remedial works. He relied on photographs taken during those works³⁷ showing horizontal and vertical joints in a planter wall blockwork. He said that those visible joints indicated that, when the walls were built in 2006 they were not plastered.

[146] As a result Mr Turner considered that if a LAM upstand had been built up the planter wall, the joint where the top edge of that upstand met the planter wall would not have been covered and so would have been visible. He said that the joint between the three-layer Jaydex TOM and flashing applied to the planter walls as part of the 2014 remedial works was not visible during the site inspection because of the thickness of the paint and other layers applied to the planter wall.

[147] Mr Paykel did not accept that the junction between the upstand and the wall would have been visible after the works were completed in 2005. Mr Hubbuck's evidence³⁸ was that when he inspected the property in June 2012 he could not observe the height of the LAM upstand as it was covered by the painted planter walls.

[148] Mr Paykel considered that the upstand would have been about 1.5 mm thick, its top edge would have been feathered thus reducing the thickness of the top edge and that after the upstand had been built it would have been concealed by plaster or paint applied to the planter walls. In support of this theory he said that a 3 mm thick TOM upstand had been similarly covered by a plaster coat when he inspected the remediated planter wall during the site visit.

[149] Having considered the evidence and Mr Turner's and Mr Paykel's opposing views I consider that had the LAM upstand conformed to the height requirements it would have been visible on any

³⁶ Exhibit 1.

³⁷ Common bundle of documents at 500, 554 – 556.

³⁸ Above n 5, at [19].

inspection. I consider that it would have been sufficiently thick not to be masked or hidden by any overlying paint or plaster.

[150] However, in view of my finding that the upstand was no higher than the tiles on the deck I consider that it would not have been visible on any inspection. This does not however explain the failure to observe and comment on the presence of the upstand during the final inspections.

Final inspections

[151] The Trust says that during the final inspections the Council ought to have become aware that a LAM had been substituted and observed some of the defects. It says that the Council is liable because it failed to then observe or realise that a LAM had been installed.

[152] There were two final inspections. The first was on 31 October 2006 and failed. The second was on 1 December 2006 and passed. Both inspections involved two separate inquiries.

[153] The first required collecting information and documents which the Council needed to satisfy itself that the building consent conditions had been complied with and that a CCC could be issued. The steps in this process are recorded in the Council's pre-CCC findings form.

[154] A pre-CCC findings form for this property was typed. Mr Paykel said that it would have been prepared by a Council employee after any necessary documents had been identified. This appears to have been Christine Watkinson of compliance monitoring, whose details are recorded next to the date 30 October 2006.³⁹

[155] The first column of the Documentation section of the form listed information, producer statements and certificates. The second to fifth columns are headed Received, Required, N/A and CCC. Typewritten crosses are marked in different columns for each of the listed documents

[156] One of the documents listed was titled 'Material & Proprietary Products Installers certificate for waterproof membrane - tanking to

³⁹ Common bundle of documents at 267.

blockwork' (sic). A cross was typed in the Required column next to this certificate.

[157] The second inquiry required physical inspection of the property. The steps in this process are set out in the Council's Residential Final checklist which records the date and time of the inspection and lists a series of areas to be examined during the inspection.

[158] The first final inspection was carried out by Mr Bellam who made entries on the pre CCC findings form and completed a Residential Final checklist.⁴⁰ He dated both documents 31 October 2006 and recorded on them that the final inspection had failed. He also issued site instruction 16218⁴¹ to Mr Broome requiring work to be carried out to a cess pit, stairwell and handrail and to be completed by 31 November 2006 (sic).

[159] The Council was unaware that a LAM had been substituted when Mr Bellam carried out this inspection. But Mr Bellam had the opportunity to observe that a TOM had been specified for the deck, that the consent required a membrane inspection and that no such inspection had been carried out.

[160] When he inspected the deck and the planters Mr Bellam would have been expecting to see evidence that the TOM had been installed. The tiles would have prevented him from confirming the type of membrane under the deck. But he would have been able to observe whether the upstand and metal flashing shown on drawing WD36 were present on the planter walls.

[161] Mr Bellam should have then observed that there was no 300 mm upstand or metal flashing on the walls. The documents do not suggest that he made such an observation or if he regarded their absence as significant. His site instruction did not contain any direction concerning the membrane or the flashing. His checklist did not record any issue relating to the membrane or the flashing.

⁴⁰ At 299 - 301.

⁴¹ At 302.

[162] Step 8 of his checklist covered the inspection of decks and balconies and includes a line titled 'Waterproof Membrane'. The boxes next to this line do not say that the membrane inspection passed or failed. Instead a tick appears in the box under the column headed N/A.

[163] Step 12 covered the inspection of the exterior and includes a line titled 'Flashings'. The boxes next to this line do not say that the flashing inspection passed or failed. Instead a tick appears in the box under the column headed N/A.

[164] The only reference in the two documents relating to the October final inspection which suggests that the Council regarded the membrane as significant is the cross in the Required column next to the installers' certificate in the pre-CCC findings form. This was apparently made when another Council employee prepared that form before that inspection.

[165] The second final inspection was carried out by Mr Durand a month later on 1 December 2006. Before then Mr Broome had supplied the Council with ASA's material guarantee for the Dampfix LAM and Equus' producer statement for the TOM installed in the retaining walls and inside the planters.

[166] Mr Durand completed a checklist which he dated 1 December 2006.⁴² This does not record any issue relating to the membrane or the flashing. Lines were drawn through the box headed N/A for the membrane inspection in Step 8 and for the flashing inspection in Step 12.

[167] Mr Durand made notes, including deletions and ticks on Mr Bellam's pre-CCC findings form and re-dated it 1 December 2006,⁴³ recording that the final inspection had passed. One deletion consisted of lines marked through the cross in the Required column and a tick marked in the Received column next to the membrane installer's certificate.

[168] Mr Paykel said that the ASA guarantee and the Equus producer statement both come within the pre-CCC findings form description of a

⁴² At 296 - 298.

⁴³ At 269 - 271.

membrane installer's certificate. He considered that their receipt caused Mr Durand to place the tick in the Received column.

[169] The Trust does not criticise the acceptance of the Equus producer statement as an installer's certificate for the TOM. But it says that Mr Durand was not entitled to accept the ASA guarantee as an installer's certificate for the LAM.

[170] The Trust says that the ASA guarantee disclosed for the first time that a Dampfix LAM had been substituted for the TOM. As a result it says that the Council should have requested details and supporting information to satisfy itself that the substituted membrane had been properly installed and was acceptable.

[171] The Trust says that the ASA guarantee was a manufacturer's warranty and was one of the three documents which the fourth column of the Dampfix membrane register extract required before a CCC could be issued. It says that the Council should have also required the two other documents listed in the column, namely an applicator's approval certificate from ASA and a workmanship statement from the applicator.

[172] Mr Paykel said that in late 2006 the Council had two options in a situation where it was faced with a completed project with the membrane concealed by covering materials. The first was to request deconstruction to enable a membrane inspection. The second was to assess building code compliance based on available information.

[173] Mr Paykel said that in the circumstances here the appropriate Council practice would have been to explore the second option and that the compliance assessment was often carried out after the provision of a producer statement. He also said that at the relevant time councils were accepting documents other than producer statements as evidence of compliance.

[174] Mr Paykel said that in late 2006 a reasonably competent Council officer was entitled to rely on the ASA guarantee as a producer statement when assessing whether the LAM complied with the Building Code. He said that the guarantee contained more information than he

would expect to see in a PS3 (construction producer statement) and could be treated as a PS4 (construction review statement) because it said that the manufacturer had inspected the membrane.

[175] It is appropriate to record here that at an earlier stage in the claim Bostik opposed the Council's application to join it as a party.⁴⁴ In his letter dated 17 March 2016 filed in support of Bostik's opposition, Mr Graham challenged the inspection provisions of ASA's certificate. He said that at no time did he ever inspect or certify the application of products and that he did not recall the Trust's property.

[176] It was acknowledged that in 2006 the Council was not aware of Mr Graham's challenge to this part of the certificate. I accept the Council's submission that it was entitled to treat ASA's certificate at face value and was not obliged to go behind or query the statements in the certificate.

Summary of Council liability

[177] The Council submitted that Condition 8 of the January 2005 consent, amplified by the new Condition 7 of the November 2005 consent required the Trust to notify the Council so that a membrane inspection could be carried out.

[178] Conditions 7 and 8 show that the Council identified the presence of waterproof membranes in the works and required an inspection before those membranes were covered. That requirement ought to have been recorded in the notifiable inspections form and so conveyed to the Trust.

[179] I consider that the Council is responsible for the failure to carry out the cladding inspection required in the building consent. I do not accept that the Council is entitled to pray in aid a circumstance, namely the failure to call for a membrane inspection, when it failed to require such an inspection in its Notifiable Inspections form.

[180] I consider that when Mr Bellam carried out the first final inspection on 31 October 2006 he ought to have observed and recorded

⁴⁴ See Procedural Orders 2 to 6.

the absence of the mechanical flashing and upstand shown on drawing WD36.

[181] Depending on whether Mr Durand believed that a TOM had been installed under the deck or had been substituted by a LAM I consider that he ought to have:

- (a) Observed and recorded the absence of the TOM metal flashing and upstand shown on drawing WD36; or
- (b) Observed and recorded that the LAM upstand was either absent or was too low in height.

[182] When Mr Durand carried out the second final inspection on 1 December 2006 the Council had received the ASA guarantee. Mr Paykel gave evidence as to the contemporaneous practice of Council officers and is the only independent expert who gave opinion evidence as to the approach which a reasonably competent Council officer could take in these circumstances.

[183] However, for the following reasons I do not consider that Mr Durand was entitled to accept the ASA guarantee alone as evidence that the substituted LAM complied with the consented documents or the Building Code:

- (a) In November 2005 the Council was refusing to accept Dampfix as an alternative solution and had recently introduced a specific clause in the consent requiring a membrane inspection to take particular care to check workmanship details.
- (b) The position had changed by late 2006 but the Council's inspectors' acceptance of Dampfix in external wet areas was not universal.
- (c) A reasonably competent Council officer ought to have been concerned to learn at such a late stage of the Dampfix

LAM substitution in an external wet area and the lack of any inspection of that membrane.

- (d) In the absence of the opportunity to carry out the detailed membrane inspection stipulated in Conditions 7 and 8 of the consents a reasonably competent Council officer ought to have required sufficient evidence to demonstrate that the Dampfix had been installed properly and was code compliant.
- (e) The scope of such an inquiry ought to have included reference to the Council's LAM register, and the appreciation that the Trust was required to provide the three documents listed in the fourth column of that register.
- (f) Those documents were: an ASA applicator's approval certificate, a workmanship statement from the applicator in a format approved by the Council and a manufacturer's warranty.
- (g) The ASA guarantee is a manufacturer's warranty. It is the last of the three required documents. It is not an applicator's certificate or a workmanship statement.
- (h) The ASA guarantee records Mr Graham's inspection and certification. It does not on its face say that Mr Graham inspected the installed membrane, although I accept that such an inference is possible.
- (i) The ASA guarantee clearly states that it is not a workmanship guarantee and that the applicator must provide a producer statement.
- (j) The membrane register required two other documents from the membrane applicator, not its manufacturer. One of those documents was to be a Council form, which suggests that the Council attached significance to how the applicator guaranteed his workmanship.

- (k) The Council was aware that the particular LAM was Dampfix. If it elected to rely on documents to demonstrate that the Dampfix workmanship met the requirements in Conditions 7 and 8 of the consents and was code compliant, it ought to have required all of the documents listed in the fourth column of the Dampfix register.
- (l) With due respect to Mr Paykel's opinion evidence, I do not consider that in the circumstances that existed here it was reasonable or competent for a Council inspector to interpret or conclude that the reference to Mr Graham's inspection meant that ASA's guarantee could be regarded as an installer's producer statement.
- (m) To the extent that Mr Paykel was suggesting a threshold for Council practices and standards when relying on documents to assess code compliance here, I consider that the decision to accept the ASA guarantee alone was not a reasonable or common sense step to take as recognised by decisions of this Tribunal⁴⁵ and the High Court⁴⁶.

Causation

[184] The Trust says that if the Council had identified the defects in the LAM either by inspections during the works or by requesting the necessary documents at the time of the final inspections there would have been sufficient opportunity to have the defects remedied. The Council says that it was unable to observe the defects during the inspections and that the options available during and after the final inspections would not have resulted in the defects being identified.

[185] The Trust says that had the LAM been installed properly the subsequent leaks and remedial costs would have been avoided. It says the Council ought to have observed and advised it of the LAM defects in which case it would have required the contractors to repair the defects.

⁴⁵ *Hicks Family Trust v Morrison* [2011] NZHWT Auckland 27.

⁴⁶ *Dicks v Hobson Swan Construction* (2006) NZCPR 881; above n 27.

Drawing a parallel with Mr Broome's first observation of leaks into the garage and Exotic Pool's repair of the crack in the deck membrane in 2009, the Trust says that if the contractors had been asked to repair the LAM defects in 2005 or 2006 they would have done so.

[186] The Council's submissions did not address its failure to require the membrane work to be notified when it processed the January 2005 building consent. Instead it put causation in issue in respect of the steps taken after it received the ASA guarantee and before the CCC was issued.

[187] The Council says that the evidence does not lead to a conclusion that any refusal to issue the CCC would have led to the remediation of the LAM because:

- (a) It could only have refused to issue the CCC if it was concerned about the LAM product or its inability to inspect the installed LAM.
- (b) Any such refusal would have led to either a request for further information or a notice under s 43(5) Building Act 2004 that the CCC could not be issued due to the absence of the necessary further information.
- (c) If a producer statement had been requested, it may well have been provided.
 - (i) It was unable to issue a notice to rectify under s 43(6) Building Act 1991 because the installed LAM could not be inspected and so it could not say that it was not satisfied on reasonable grounds that the installation did not comply with the Building Code

[188] The Council's concern about membrane workmanship was sufficiently high to merit two conditions in the November 2005 consent. The documents record that up until early 2006 the Council refused to accept Dampfix. Its eventual approval for Dampfix in early 2006 was interim and extended on a piecemeal basis throughout that year.

[189] The basis on which the Council was able to issue a CCC for Dampfix is clearly set out in the September 2006 membrane register extract. This required receipt of three documents, two of them from the membrane applicator to establish compliance with the Building Code.

[190] At the time of the final inspections the Council was faced with a situation where it had been unable to inspect a LAM in an external wet area which at the time of installation the Council would have refused to accept had it been aware, either by inspection or advice, was Dampfix. In the absence of a membrane inspection the only option available for the Council was to establish compliance through the provision of documents.

[191] I am satisfied on the balance of probabilities that if the membrane work had been included on the list of notifiable inspections such an inspection would have occurred. Taking into account the specific conditions in the two building consents and the Council's attitude to Dampfix in 2005 I consider that its inspectors would have scrutinised the LAM before it was covered up and in so doing observed the defects.

[192] I find that the existence of those defects would have caused that membrane inspection to fail. The Council would have required a re-inspection which would have only passed if the defects were remedied. Had this occurred, the remedial costs would have been avoided.

[193] I do not accept the Council's submission either that it was unable to issue a notice to rectify. Nor do I accept that, had a specific request been made, the Council would have received an applicator's producer statement or that such a statement would have been sufficient to enable the Council to conclude on reasonable grounds that the Dampfix LAM complied with the Building Code.

[194] I find that there were sufficient grounds for the Council to reasonably conclude that the substituted LAM did not comply with the Code so as to issue a notice to rectify. I consider that these grounds were established by:

- (a) The Council's attitude to Dampfix in 2005 and early 2006.

- (b) The late revelation that, without its knowledge Dampfix had been substituted and installed in an external wet area.
- (c) The inability to inspect a Dampfix membrane at the time of its installation.
- (d) The particular significance which the Council attached to such inspections by the detailed conditions in the building consents.
- (e) The absence of any producer statement from the applicator or a statement from any other party containing information to satisfy the specific requirements in the fourth column of the Council's membrane register extract.

What general damages should be awarded?

[195] Section 50(2) of the Weathertight Homes Resolution Services Act 2006 specifically provides the Tribunal with jurisdiction to award general damages, including for relevant mental distress.

[196] Mr Broome in his evidence⁴⁷ and Elizabeth Baird in her evidence⁴⁸ set out in detail the distress and inconvenience caused by the discovery of the leaks and the impact of the investigations and the subsequent remedial work.

[197] There can be little doubt that the discovery of weathertightness defects and the disruption attendant upon investigation and, in particular, remedial work to cure those defects in a person's home is stressful. The Council did not take issue with Mr Broome's or Ms Baird's claim for general damages but submitted that:

- (a) Although they fall into the homeowner category recognised in *Byron Avenue*⁴⁹ the award of general damages is discretionary and should here be based on the fact that

⁴⁷ Brief of evidence of Simon Broome, (29 July 2016) at [23] - [27].

⁴⁸ Brief of evidence of Elizabeth Baird, (29 July 2016) at [4] - [7].

⁴⁹ *O'Hagan and others v North Shore City Council and others (Byron Avenue)* [2010] NZCA 65.

there was only damage to an ancillary structure at the property.

- (b) The nature of the distress and inconvenience described in Mr Broome's and Ms Baird's evidence is minor.
- (c) Mr Broome and Ms Baird had already received a payment of \$5,000 for distress and inconvenience as part of the settlement reached with Equus.
- (d) That sum was more than sufficient compensation for stress and inconvenience.

[198] Having considered the evidence of Mr Broome and Ms Baird and relevant authorities on the level at which general damages should be awarded to claimant owner occupiers of affected properties,⁵⁰ I award the sum of \$10,000 to the Trust by way of general damages.

[199] The quantum of this award includes the \$5,000 paid as part of the Equus settlement and takes into account:

- (a) Mr Broome's and Ms Baird's status as owner occupiers of the house where the remedial works were carried out.
- (b) The impact on Mr Broome's and Ms Baird's overall quality of life while they lived through the investigation and remediation of the defects. Although the works were not carried out to the main part of the house I am satisfied that they nonetheless caused Mr Broome and Ms Baird distress and inconvenience.
- (c) The distress, anxiety and inconvenience associated with the discovery and remediation of the leaks to an ancillary part of a home.
- (d) The length of time it took to achieve completion of the remedial project.

⁵⁰ Above n 49, at [129] and [153].

What interest is claimable?

[200] Interest at the discretion of the Tribunal is payable on losses incurred by the claimants. The rate of interest is not to exceed the 90-day bill rate plus 2 per cent per annum.⁵¹

[201] The amount that bears interest is the agreed costs of \$102,616.38 for the remedial work to the deck. I consider that the Trust is entitled to interest on its claim and see no reason why the rate should be reduced from that allowed under the Act.

[202] The Trust's opening submissions attached a schedule of interest accruing on each component of those costs to the first day of the adjudication calculated at 4.42 per cent per annum which was agreed by the Council.⁵² The interest accruing to 5 October 2016 is \$11,069.62.

[203] The Trust is entitled to interest on those costs from the second day of the adjudication, 6 October 2016 up until the date of this determination at 4.42 per cent per annum or \$12.43 per day.

[204] Interest accrued from the second day of the adjudication to the date of this determination is \$2,436.28. Total interest is, accordingly, \$13,505.90.

[205] The Trust is entitled to interest on the agreed costs from the date of this determination until payment. The 90-day bill rate at the date of this determination as published by the Reserve Bank is 1.97 per cent per annum.

[206] Accordingly interest accrues on those costs at 3.97 per cent per annum from the date of this determination to the date of payment at the daily rate of \$11.16.

⁵¹ Weathertight Homes Resolution Services Act 2006, Sch 3, pt 2, s 16(1).

⁵² Transcript of Proceedings at 304, 14 to 305, 25.

ORDERS

[207] Having heard the evidence presented at the hearing, the expert evidence and having considered the submissions of the parties I find as follows:

- (a) Auckland Council is liable to the Trust for the full amount of the claim.
- (b) The full amount of the claim established is \$121,022.84. That sum is comprised as follows:

Remedial Costs	\$102,616.38
General Damages (taking into account the Equus settlement)	\$5,000.00
Interest to date of determination	\$13, 505.90
TOTAL	\$121,122.28

[208] Auckland Council is ordered to pay to the Trust the sum of \$121,122.28 forthwith and to pay interest at the daily rate of \$11.16 until payment has been made.

DATED this 19th day of April 2017

G Wadsworth
Tribunal Member