THE WEATHERTIGHT HOMES TRIBUNAL

TRI 2014-100-000026

[2016] NZWHT AUCKLAND 2

BETWEEN	**BU-RYE & JEOM-YOUL LEE** Claimants
AND	**AUCKLAND COUNCIL** First Respondent
AND	**GIL (2008) LIMITED** **(formerly Goodland Investments Limited)** Second Respondent
AND	**LAI FOOK CHOY** (Not Served) Third Respondent

Hearing: 28, 29, 30 October 2015

Closing submissions: 25 November 2015

Appearances: Ms Grant for the claimants
Ms Knight and Mr Fellows for the first respondent
No appearance for the second respondent

Decision: 14 April 2016

FINAL DETERMINATION

Adjudicator: M A Roche

Contents

[1] In November 2004 Bu-Rye and Jeom-Youl Lee bought a house at 28 Joy Street, Albany Heights from their friends, Jong Ho Choi and Hyo Ja Woun. In early 2012 the Lees discovered that the house had never been issued with a Code Compliance Certificate (CCC). In August 2012 the Lees applied for an assessor's report pursuant to s 32 of the Weathertight Homes Resolutions Services Act 2006 (the Act). The report concluded that the house had weathertightness defects and required extensive repair.

[2] Prior to purchasing the property the Lees took legal advice. Their lawyer did not advise them to request a LIM report from the Council. Had they done so, they would have learnt that the house had no CCC.

[3] The Lees claim against the Council and say that its inspection regime was inadequate and failed to prevent the house being built with defects. They also say the Council failed to issue notices to rectify on three occasions when it should have done so resulting in loss to them. The Lees also claim against the developer, GIL (2008) Limited (GIL), formerly known as Goodland Investments Limited, and say that GIL breached the non-delegable duty of care it owed to them as future purchasers to ensure the house was built properly.

[4] Lai Fook Choy was joined as a respondent to the claim following an application by the Council. Mr Choy installed the cladding on the house. It was alleged in the joinder application that he was negligent in doing so. Mr Choy was not served and therefore his liability will not be further considered in this decision.

Background

[5] On 28 March 2002 GIL was granted a building consent to build a plaster clad dwelling at 28 Joy Street. GIL had no previous experience in constructing residential houses. Construction commenced sometime after the building consent was issued then stopped.

[6] Mark Anderson was contracted by GIL to work on the partially completed building. Mr Anderson worked at an hourly rate fixing and finishing the house to get it to the point where it could proceed as a normal build. He started this work on 11 September 2002. When he started work, the house was in a "shocking state". At this stage the house consisted of wall framing and an unfinished roof. No one had worked on it for a month and it had been

left open and exposed to the weather. Some of the wall framing had twisted due to the effects of exposure to the weather.

[7] On 18 October 2002, the Council carried out its first inspection. This was a pre-line inspection which failed because the insulation was incomplete. The inspector noted that an EIFS cladding system was being installed rather than the solid plaster cladding specified in the building consent. He issued a field memorandum noting that amended drawings were required to reflect the change in cladding for approval by the Council.

[8] On 23 October 2002 the Council carried out a pre-line plumbing and drainage inspection which failed.

[9] On 25 October 2002 the Council approved amended plans showing a change in the cladding from solid plaster on batons to “Insulclad”. The amended plans consisted of the original plans with the notation, “wall cladding changed to Insulclad”. This was incorrect as the cladding being used was not Insulclad but another EIFS product, Styroplast.

[10] On 31 October 2002 a cladding inspection was requested. The inspection was not carried out and there is some uncertainty as to what occurred that day.

[11] On 18 November 2002 the Council carried out a pre-line plumbing and drainage recheck and a post-line inspection of the first floor. These inspections were passed.

[12] On 29 November 2002 the Council passed a post-line inspection of the ground floor. On the same date a producer statement for the Styroplast system (cladding and flashings) was signed by Lai Fook Choy on behalf of CFK Plasterers Ltd.

[13] On 22 April 2003 the Council failed the final inspection and issued a field memorandum noting items requiring completion. On 5 June 2003 the Council carried out a final inspection recheck which also failed. A further field memorandum noting items requiring completion was issued. None of the weathertightness defects identified by the assessor were noted.

[14] On 26 June 2003 GIL entered into a sale and purchase agreement for the claim property with Jacqueline Ratcliffe.

[15] On 13 November 2003 the Council carried out a second final inspection recheck which also failed.

[16] On 16 December 2003 the Council wrote to GIL (the letter was addressed to the "Consent Holder") advising that the house fell into the category of properties using monolithic cladding without a cavity that have not had specific inspections to deal with weathertightness issues. The letter advised that the property was being assessed by the Council's CCC resolution team to determine whether it met Building Code requirements.

[17] On 24 December 2003 the property was transferred from GIL to Jacqueline Ratcliffe, then to Jung-Jin Kim, then to Jong Ho Choi and Hyo Ja Woun.

[18] On 19 February 2004 the Council received an application from GIL to amend the plans to change the cladding from Insulclad to Styroplast (which was what had been installed). The application was accompanied by a producer statement from CFK Plasterers Limited stating that Styroplast had been installed in accordance with the manufacturer's requirements. The Council advised GIL that the change to the cladding system would not be approved.

[19] On 4 March 2004 the Council wrote to Mr Kim advising that it could not be satisfied that the cladding system as installed would meet the functional requirements of clause E2 External Moisture of the New Zealand Building Code and would therefore be unable to issue a CCC.

[20] On 16 November 2004 the Lees agreed to purchase the house from Mr Choi and Ms Woun. Prior to doing so they sought legal advice and had a friend who was an engineer walk around the property with them to ascertain its soundness. They were familiar with the property as they had socialised there on many occasions with Mr Choi and Ms Woun.

[21] After purchasing it, the Lees lived in the property until 2006. After that, they rented it out.

[22] The issues to be determined are as follows:

(a) What are the weathertightness defects, and resulting loss?

(b) Is GIL liable in negligence to the Lees?

(c) Was the Council negligent in issuing an amended building consent? If so what loss was caused by this?

(d) Was the Council negligent in its inspections? Was its inspection regime adequate? Was the Council negligent in failing to identify that the cladding installed was Styroplast rather than Insulclad?

(e) Was the Council negligent in failing to issue notices to rectify? If so, what loss flowed from this failure?

(f) What is the appropriate measure of loss? Is it the estimated remedial costs or the loss in value?

(g) What is the appropriate quantum?

(h) Was there contributory negligence on the part of the Lees and, if so, to what extent?

What are the weathertightness defects and resulting loss?

[23] The defects are outlined at [27] of the third amended statement of claim, as follows:

(a) Framing:

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

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

(b) Cladding:

(i) …

(ii) There is inadequate clearance between the cladding and the deck on the north and east elevations; and

(iii) Penetrations made in the cladding have not been flashed and rely on exposed sealant for waterproofing.

(c) Joinery:

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

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

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

(d) Garage:

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

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

(e) Balustrades:

(i) There was an inadequate fall on the top of the balustrades;

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

(iii) A handrail was fixed through the top of the plastered balustrades allowing water ingress; and

(iv) No saddle flashings were installed at the balustrade and wall junctions.

(f) The roof cladding junction:

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

(ii) The apron flashing installation was inadequate; and

(iii) The chimney cap was embedded in the plaster.

[24] At the hearing, the Council conceded the existence of these defects with the exception of the inadequate fall on top of the balustrades. The Council's expert, Simon Paykel, agreed that the slope was less than required in the manufacturer's literature. However he took the view that as it was not flat, water would still run off it, albeit not as quickly as if it had been at the correct slope. Therefore it was not a defect.

[25] The WHRS assessor, Andrew Brangwin, and the Lee's expert, Barry Gill, disagreed with Mr Paykel on this point. Their view was the textured surface required the 15 degree slope that had been specified to enable water to shed away. They considered that water could pond on the lesser slope. Both Mr Brangwin and Mr Gill considered the balustrade slope contributed to water ingress. This defect contributed to the water ingress caused by the other balustrade defects and resulted in damage. I accept the evidence of Mr Brangwin and Mr Gill and find that the inadequate balustrade slope is a defect.

[26] The experts agreed that the defects require extensive repair work including recladding and timber replacement.

Is GIL liable in negligence to the Lees?

[27] Prior to hearing, GIL filed a statement of defence and a will say statement of expert conveyancing lawyer, Peter Nolan. GIL advised that it would not appear at the hearing and would abide the decision of the Tribunal.

[28] GIL admits that it was the developer of the house. As developer, GIL owed a duty of care to the Lees, as future purchasers. This duty of care was defined in *Mount Albert Borough Council v Johnson*[1] as being a duty to see that proper care and skill are exercised in the building of houses that cannot be avoided by delegation to an independent contractor.

[29] Based on the evidence, I find that proper skill and care was not exercised in the building of the house. It was constructed with a large number of defects and with a type of cladding not authorised by the building consent. It requires extensive repair. GIL breached the duty of care that it owed to future purchasers and is liable for the damage caused to the Lees.

[1] *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA).

Was the Council negligent in issuing an amended building consent? If so, what was the loss caused by this?

[30] The Lees' position is that the amended plans were insufficient for the Council to be satisfied that the house would comply with the Building Code. The Council's position is that there was no causal link between the amended plans and the Lees' loss as the plans were not followed and a different cladding to that specified on the amended plans was used. The Council also argues that the plans met the standard of the day because the Insulclad literature included a detail for every junction constructed at the house.

[31] There was some dispute between the experts regarding the sufficiency of the Insulclad literature. In his brief Mr Paykel stated that Insulclad was BRANZ appraised and a well known cladding system with manufacturer's literature which contained all of the necessary details about how the Insulclad system was to be installed. The second defects expert for the Lees, Gregory O'Sullivan, gave evidence that reliance on the Insulclad literature was not a complete answer as there were details installed in the house which were not provided in the literature, for example the saddle flashing junctions.

[32] To the extent that detailing was provided in the literature, it was not necessary to require this detailing on the plans. I note the comments of Heath J in *Sunset Terraces*[2] (upheld in the Court of Appeal)[3] regarding the appropriateness of assuming that builders will refer to manufacturer's specifications.

[33] The Lees' position is that the Council's failure to carry out a proper assessment of the amended plans led to the house being constructed with defects. Ms Grant suggested that had further details been requested by the Council, GIL may have identified that Styroplast rather than Insulclad was being used and, at least, if the house had been specifically designed to accommodate EIFS cladding, it is likely that the cladding defects would not have arisen. This submission is highly speculative. It is speculative to suggest that had further details been requested, GIL would have identified that Styroplast rather than Insulclad had been, or was being, installed. This

[2] *Body Corporate 188529 v North Shore City Council (Sunset Terraces)* [2008] 3 NZLR 479 at [545]-[547].
[3] *North Shore City Council v Body Corporate 188529 (Sunset Terraces)* [2010] NZCA 64, [2010] NZLR 486 at [121].

submission also presumes that GIL was unaware what cladding was being installed.

[34] Even were I to find that the issue of the amended building consent was negligent, there is no causal link between any negligence in the issue of the amended consent and the construction of the house with defects. This is because the amended plans were not followed. The house was not constructed with Insulclad, it was constructed with a different system, Styroplast. In these circumstances, the sufficiency of the Insulclad literature is irrelevant.

[35] I reject the submission that if the plans had been designed to accommodate EIFS cladding, it is likely the defects would not have arisen. Again this is speculative. The cladding was installed by an experienced installer. Despite this, the house was constructed with defects that were contrary to technical requirements. I do not accept that there is a causal link between the construction of the house with defects and the amended plans. This aspect of the claim fails.

Was the Council negligent in its inspections? Was its inspection regime adequate? Was the Council negligent in failing to identify that the cladding installed was Styroplast rather than Insulclad?

[36] The Council undertook six building inspections of the house during construction as follows:

Date of the inspection	Inspection type	Result
18 October 2002	Pre-line building inspection	Failed – insulation incomplete
18 November 2002	Post-line inspection first floor	Passed
29 November 2002	Post-line building ground floor	Passed
22 April 2003	Final inspection	Failed – 10 items outstanding
5 June 2003	Final inspection recheck	Failed – nine items outstanding
13 November 2003	Second final inspection recheck	Failed

[37] Although not recorded as an inspection, the events of 31 October 2002 received considerable attention at the hearing.

[38] On 31 October 2002 GIL requested a cladding inspection. This inspection was not carried out. The Council inspector (Paul Yansen) recorded "cladding inspection requested (Insulclad). Phoned Justin De Silva – confirmed Council do not carry out inspection, informed installer to provide a PS3 Certificate from Plaster Systems". It is unclear whether Mr Yansen attended site or carried out his communications solely by telephone.

[39] Ms Grant advanced the theory that the cladding inspection was not carried out because Mr Yansen attended site and identified that Styroplast had been used rather than Insulclad. In response, Mr Paykel commented that the PS3 certificate would not in that case be requested from Plaster Systems as recorded in the file note as, unlike Insulclad, Styroplast is not a Plaster Systems product.

[40] It is not established that Mr Yansen attended site. It is certain that he did not carry out a cladding inspection. The decision on the part of the Council to request a producer statement rather than carry out an inspection of the cladding was lawful.[4] Because cladding systems are installed by experts and because their various components get covered up along the way and may not be capable of inspection on any given day, it is reasonable in certain circumstances for the Council to rely on producer statements to establish the correct installation of a cladding system. There is an insufficient factual basis for a finding of negligence arising out of the Council's actions on 31 October 2002.

The balance of the inspections

[41] I turn now to the six inspections that actually took place. It remains to be determined whether in the course of the six recorded inspections, the Council breached the duty of care it owed to the Lees.

[42] There was a difference between the Lees and the Council concerning the approach to be taken to determine whether the Council was negligent in its inspections.

[4] Building Act 1991, s 43(8) and s 56(3)(a).

[43] The Lees did not identify negligent actions or omissions in relation to particular defects on the occasion of particular inspections. Rather, they looked at the inspection regime as a whole and the failure of the Council to identify, at any time, the weathertightness defects that have resulted in damage to the dwelling with particular emphasis on the cladding. While some of these defects were concealed, others were not. These included the kick-out defect, the balustrade slope defect and the balustrade handrail defect. The Lees' submission is that the Council had their "hands off the wheel" in respect of their inspection regime and that there was an abdication of responsibility in the manner described by Baragwanath J in *Dicks v Hobson Swan Construction Limited.*[5]

[44] Ms Grant was particularly critical of the failure by the Council to provide an independent check of the work carried out by the cladding installer and suggested that the Council failed to discharge its obligations in terms of its inspections in each of the areas of the house where defects exist. Ms Grant suggested that because of failings in the inspection regime, the Council allowed the house to be built with defects. She also submitted that in the course of the inspections, the Council should have detected that Styroplast rather than Insulclad was being installed and, ultimately, prevented the Styroplast being installed.

[45] Ms Knight took a different approach to the issue of negligent inspections. Her position was that in assessing the inspections, precision is required and that in respect of each of the occasions when an inspection was carried out, the claimant must establish what exactly the Council did or omitted to do that caused loss. She cautioned that the Lees' approach came close to suggesting a regime of strict liability so that the presence of defects automatically establishes negligence on the part of the Council.

[46] Evidence as to what state the cladding installation had reached at the date the various inspections were carried out was examined at length during the hearing. It was the Lees' position that, when on site, the inspector should have observed deficiencies in the cladding installation and should have identified that Styroplast rather than Insulclad had been installed. It is not suggested that the post-line inspections were passed negligently, rather that the inspector should have done more and identified problems that were outside the ambit of those inspections.

[5] *Dicks v Hobson Swan Construction Ltd* (in liquidation) (2006) 7 NZCPR 881 (HC)

[47] The building defect experts gave evidence about the visible differences between the Styroplast and Insulclad systems. Both systems use polystyrene sheets. The assessor, Mr Brangwin gave evidence that Styroplast sheets were 60 mm thick and Insulclad sheets were 40 mm thick. Mr Paykel stated that while Insulclad sheets were predominantly 40mm thick, there were also 60 mm Insulclad sheets. The experts were in general agreement that the most distinctive visual difference between the Styroplast and Insulclad systems is the window trims. It was established that prior to being plastered, the appearance of the window trims, when installed, would have distinguished the two systems.

[48] Mr Anderson gave evidence that the work he commenced on 5 November 2002 included rebating the windows so that trims or flashings could be installed. The producer statement for the Styroplast installation is dated 29 November 2002. It follows that the trims were installed and plastered between 5 and 29 November 2002. The only inspection that took place between 5 and 29 November 2002 was the post-line inspection on 18 November 2002.

[49] Mr Anderson's diary had a number of entries in November 2002 relating to the work at 28 Joy Street. On Monday 18 November he noted "plasterer is not here" and on 20 November 2002 he noted "still no plasterers". On 21 November he noted "plasterers turned up". It is unclear whether some of the trims were in place but un-plastered on 18 November 2002 when the post-line inspection took place.

[50] Even if they were, the purpose of a post-line inspection is to ensure that internal wall linings have been correctly fixed in place. There is no suggestion that the post-line inspection should not have been passed. It is not established that the inspector, who was examining internal building linings, should have noted that the window trims or flashings on the exterior of the building were of a different type to the system specified on the consented plans.

[51] It is not established that on any particular inspection, the Council should have detected that the Styroplast system rather than Insulclad had been installed. In carrying out its inspection role, the Council ought not to be regarded as a clerk of works or project manager.[6] In any case, it is the

[6] *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479 (HC) at [183].

defective installation itself which has resulted in defects rather than the type of cladding. It does not follow that had Insulclad been installed rather than Styroplast, the building would have been built without defects.

[52] It is not established that any of the six inspections that were carried out were performed negligently. Neither is it established that a reasonable inspector would have detected the use of Styroplast rather than Insulclad while the differences between the two were still visible. For the reasons noted at [40] above, it was reasonable for the Council not to have been performed a specific cladding inspection. The three final inspections failed following which the Council referred the house to its CCC resolution team for an assessment for compliance with the Code. Ultimately, no CCC was ever issued for the house.

[53] Cladding defects were not identified in the three failed inspections. I do not accept Mr O'Sullivan's evidence that this amounted to an endorsement of the cladding by the Council as the Council declined to inspect the cladding and requested a producer statement instead. Subsequent to the inspection and before receiving the producer statement the Council also, as noted above, referred the house to a specialist team for assessment for compliance with the Code. The Council did not, expressly or impliedly, endorse the cladding as weathertight or Code compliant. Mr O'Sullivan was concerned that flashings were ticked as installed at the first final inspection but accepted that they would not have been visible at this stage so that neither the deficiencies in their installation, nor the fact that they were part of the Styroplast system could have been observed.

[54] It has not been established that there was negligence in respect of any particular inspection. However visible defects (the kick out defect, the balustrade slope defect and the balustrade handrail defects) were not detected in the course of any inspection. The balustrade defects were associated with the cladding installation for which a producer statement was requested. It was not unreasonable for the inspectors not to have, for example, measured the balustrade slope when they were intending to rely upon a producer statement in this regard.

[55] The kick out defect was not picked up on the final inspection or re-inspections. Had a satisfactory producer statement been received by the Council and a CCC issued the Council may have had liability for this defect.

However, there was no re-inspection and signing off of the property following the November 2003 final inspection re-check as on or around 16 December 2003, a decision was made that the house be assessed by the Council's CCC resolution team to see if it met Building Code requirements.

[56] In any case, the failure to identify the kick out defect, the balustrade slope defect and the balustrade handrail defect did not cause loss to the Lees. The Council did not issue a CCC. As Woolford J stated in *Aldridge v Hamilton City Council,*[7] the Council did not endorse the house as weathertight.

[57] The producer statement for the cladding system (which included flashings) was outstanding when the final inspections were carried out. I accept the evidence of Mr Paykel that before issuing a CCC the Council would have done a reconciliation of the outstanding paperwork and a CCC would not have been issued without a producer statement for the cladding.[8]

[58] The producer statement which was eventually filed identified the cladding installed as Styroplast. As noted earlier, it was filed with an application from GIL to amend the plans to reflect the change in the cladding from Insulclad to Styroplast. The Council declined this application, advising GIL that this change would not be approved. The Council then wrote the letter of 4 March 2004 advising that it could not be satisfied that the cladding system as installed would meet the functional requirements of clause E2 External Moisture of the New Zealand Building Code and therefore would not issue a CCC.

[59] It is not established that the inspections that passed were passed negligently. It is not established that any identified defect should have been observed during the pre-line and post-line inspections. Neither is it established that the use of an alternative cladding system and the defective installation of that cladding should have been identified at these inspections. The balance of the inspections failed and, as noted above, the Council ultimately refused to issue a CCC because it was not satisfied that the dwelling was watertight. I find that the actions of the Council in respect of its inspections did not cause loss to the Lees.

Was the Council negligent in failing to issue notices to rectify? If so, what loss flowed from this failure?

[7] *Aldridge v Hamilton City Council* [2013] NZHC 1784.
[8] Transcript of Hearing at 514.

[60] There are three occasions when the Lees say the Council should have issued notices to rectify. The first of these is following the 18 October 2002 inspection when the Council inspector observed that a type of cladding, other than that specified in the building consent, was being or had been installed.

[61] There was a difference of opinion between the experts concerning the appropriate response of the Council when the use of a cladding system, different from the one approved, was identified. In his brief, Mr Gill expressed the opinion that the Council ought to have stopped any further installation work until an application to amend the consent had been lodged and processed. Mr Gill states that had the Council followed the correct process the defects, damage and loss in connection with the need to repair the dwelling could have been avoided. Mr Paykel gave evidence that at the time, Councils did not issue notices to rectify in these circumstances but rather typically gave the developer or the builder the opportunity to satisfy the Council and allowed works to continue.

[62] Section 42(1), (2) of the Building Act 1991 provided:

> **42 Notices to rectify**
>
> (1) The territorial authority may issue to the owner or to the person undertaking any building work a notice to rectify, in the prescribed form, requiring any building work not done in accordance with this Act or the building code to be rectified.
>
> (2) A notice under this section may also direct that all or any building work shall cease forthwith until the territorial authority is satisfied that the persons concerned are able and willing to resume operations in compliance with this Act and the regulations.

[63] The power to issue a notice to rectify under s 42 of the Building Act 1991 was discretionary in the circumstances of 18 October 2002. Ms Grant suggested to Mr Paykel in cross-examination that the house would have still been "in a bit of a state" by 18 October 2002. Mr Paykel did not accept this and commented that work on the house had progressed to the point where a pre-line inspection had been called for. Although Mr Anderson gave evidence that the house was in a "shocking state" when he commenced work on it on 11 September 2002, there is no evidence before me regarding its condition on 18 October 2002. Mr Anderson was not asked about this in his evidence. It is

not established that anything about the condition of the house would have put a Council inspector on notice of more than the fact that the wrong cladding was being installed. I accept the evidence of Mr Paykel that it was Council practice at the time to give builders an opportunity to continue work while an amended building consent was being sought. I am not persuaded that, in the circumstances, it was negligent not to issue a notice to rectify at this point.

[64] I note in any case that Mr Gill's position was that the work should have been stopped until the application for an amended consent was lodged and such consent was issued. This took place on 25 October 2002. There is no evidence that any loss was caused to the Lees by a failure to prevent further work being carried out between 18 October 2002 when the installation of the wrong cladding was identified and 25 October 2002, when an amended consent for a different cladding was issued.

[65] The second occasion when the Lees say a notice to rectify should have been issued was on 31 October 2002. In cross-examination Ms Grant suggested to Mr Paykel that the reason the cladding inspection did not proceed on 31 October 2002 was because the inspector had concerns about the cladding. She suggested that the Council should have issued a notice to rectify at that point and in that notice, could have directed work to stop.

[66] It is not established that a Council inspector attended site on 31 October 2002. The proposition that the inspector attended site and became concerned about the type of cladding or manner or its installation leading to the decision not to carry out an inspection, is speculative. The established facts relating to this event are that an inspection was called for, it was not carried out, and a request was made for a producer statement. It is not established that the Council should have issued a notice to rectify following the events of 31 October 2002 (whatever they were) or that its failure to do so was negligent and causative of loss.

[67] The final occasion when the Lees argue a notice to rectify should have been issued was on 4 March 2004 when the Council wrote to Mr Kim advising that because it could not be satisfied that the cladding system as installed will meet the requirements of the Building Code, it was unable to issue a CCC. Section 43(6) of the Building Act 1991 provides:

> **43 Code compliance certificate**

…

> (6) Where a territorial authority considers on reasonable grounds that it is unable to issue a code compliance certificate in respect of particular building work because the building work does not comply with the building code, or with any waiver or modification of the code, as previously authorised in terms of the building consent to which that work relates, the territorial authority shall issue a notice to rectify in accordance with section 42 of this Act.

[68] The provision in s 43(6) is that that the territorial authority shall issue a notice to rectify in accordance with s 42 of the Act. Section 42 provides that a territorial authority may issue a notice to rectify requiring any building work not done in accordance with the Act or the Code to be rectified.

[69] Mr Paykel gave evidence that there were many houses caught up in the changing approach to monolithic cladding in 2004 that were being refused CCCs and that the Council worked actively with the owners and did not, as a rule, issue them with notices to rectify. He believed in these circumstances that the issue of a notice to rectify remained discretionary.

[70] Mr O'Sullivan's evidence was quite different. He stated that a notice to rectify should have been issued after it was decided not to issue a CCC and that it was normal Council practice to do so. In his brief he referred to a number of Building Industry Authority determinations considering houses without CCCs in respect of which notices to rectify had been issued.

[71] I accept Mr Paykel's evidence reflects his understanding of Council practice at the time. However, on a plain reading of s 43 of the Building Act 1991, the issue of a notice to rectify was mandatory following the decision made in respect of the Lees' house on 4 March 2004. It follows that a notice to rectify should have been issued although I note that no time frame for the issue of such notice is prescribed in s 43.

[72] It is necessary to consider what loss, if any, flowed from this failure.

[73] It will be recalled that on 4 March 2004 the Council wrote to Mr Kim (the second purchaser of the house) and advised that as it could not be satisfied that the cladding system as installed on the house met the requirements of the Building Code it was unable to issue a CCC.

[74] Ms Grant submitted that had a notice to rectify been issued on 4 March 2004, the vendors who sold to the Lees, Mr Choi and Ms Woun,

would have been on notice of the Council's concerns regarding the cladding. The Council's conveyancing expert, Timothy Jones, gave evidence that vendors were required to disclose the existence of such notices under the vendor warranty in agreements for sale and purchase.

[75] It does not follow that had a notice to rectify been issued on 4 March 2004, it would have been issued to Mr Choi and Ms Woun. Section 42 provides that a notice to rectify can be issued to the owner or to the person undertaking any building work. Given that GIL applied for an amended consent in February 2004, it seems likely that the notice to rectify would have been directed to GIL.

[76] I am not persuaded that had a notice to rectify been issued, it would have been brought to the attention of future purchasers other than through an examination of the LIM report which the Lees did not undertake. GIL breached both the original and amended building consents. It appears that it breached its vendor warranty regarding obtaining a CCC when selling the property to the first purchaser, Jacqueline Ratcliffe. The contention that had the notice to rectify been issued, it would have been brought to the Lees' attention prior to purchase is speculative. It is not established that the Council's failure in this regard caused loss to the Lees.

QUANTUM ISSUES

What is the appropriate measure of loss? Is it the estimated remedial costs or the loss in value?

[77] The Council and the Lees disputed the appropriate measure of loss. The Lees contend that the cost of repair is the appropriate measure. They say that the dwelling is their family home which they love and where they intend to live for the foreseeable future. The Lees' quantity surveying expert, James White, estimated the cost of repair to be $383,351.56 while the Council's expert estimated the cost of repair to be $338,329. The Council's position is that loss of value is the appropriate measure. The Council submitted that the Lees' claim of their attachment to the dwelling, and their intent to repair it and to reside there is not credible and that the house has no unique features that make it particularly suited to the Lees' needs.

[78] The Lees and the Council are also in dispute regarding the methodology that should be employed in calculating the loss of value. This

dispute is significant. The methodology employed by the Lees' valuation expert, Matthew Taylor, for calculating the loss of value results in a figure of $370,000, not significantly different from the claimed repair costs. The methodology of the Council's valuation expert, Michael Gamby, results in a figure that is significantly less, at $40,000.

[79] The resolution of the dispute between the valuation experts is important. This is because there is no *prima facie* rule as to whether diminution of value or the remedial cost is the most appropriate measure of loss. Each case must be judged on its own mixture of facts as they affect the Lees and other parties. The Tribunal should also select the measure of damages which is best calculated to fairly compensate the Lees for the harm done while at the same time being reasonable as between the Lees and other parties.[9] A significant monetary difference between the alternative measures of damages would be a factor to be considered in assessing what measure fairly compensates the Lees.

[80] One of the matters to take into account when assessing loss is the nature of the property and the Lees' relationship to it.[10]

[81] Mrs Lee gave evidence that the dwelling is their family home which they love and are looking forward to living in again. She claimed that she and her husband do not intend to sell it, that the property is their dream home, and they intend to continue to live there for the foreseeable future. She spoke of her love of the dwelling's kitchen and garden and her pride in its high quality fittings and finishing.

[82] The Lees have owned the property for 11 years. They lived in it for less than two years from December 2004 to a date in 2006. In her brief of evidence, Mrs Lee stated that when their daughter left home in 2006, "the house felt too big for us so we moved into a rental property in the city". In 2009, the Lees moved to Korea. In 2011, they returned to New Zealand. They did not move back into the claim property which was tenanted. In 2012, the Lees moved to Te Puke where Mr Lee had obtained employment. In 2012 they also negotiated the sale of the house to their tenant which fell through when he obtained a LIM report which revealed the house did not have a CCC.

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[9] *Cao v Auckland City Council* HC Auckland, CIV-2010-404-7093, 18 May 2011.
[10] *Dynes v Warren and Mahoney* HC Christchurch, A252/84, 18 December 1987, and *Warren and Mahoney v Dynes* CA 49/88, 26 October 1988.

[83] Shortly afterwards the Lees applied for an assessor's report. They have been obliged to retain ownership of the house since then because section 55 of the Act provides that a claim terminates upon change of ownership.

[84] Having heard Mrs Lee and having considered the facts of the case I reject the claims that have been made regarding the Lees' attachment to the home, their intention to repair it, and their intention to live there as a family again.

[85] I am not persuaded that the Lees intend to repair the property or that they have a significant attachment to it. Their lack of attachment to it is demonstrated by their long absence from it. It has not been their home since 2006. I do not therefore consider that the cost of repairs is the appropriate measure of damages. I find instead that diminution of value is the appropriate measure.

Appropriate measure for diminution of value

[86] Expert valuation evidence was provided by Mr Gamby and Mr Taylor. Both experts provided assessments of the difference between the unaffected value of the property and the "as is" value of the property. Although these valuations were provided for three time periods (the present, 2012 and 2004) it was agreed at the hearing that the current value should be used.

[87] The chief difference between the two experts was the effect of the absence of a CCC on the "unaffected" value. Mr Taylor did not consider that the lack of a CCC affected the value because, in his view, a CCC is meaningless when a property is leaking and requires significant repairs to then obtain a fresh CCC. Mr Taylor took the view that the proper unaffected value would assume the property had been properly constructed and not leaking.

[88] Mr Gamby discounted his "unaffected" value by 25 per cent to reflect the lack of a CCC. He took the view that the market significantly discounts monolithic buildings and that the absence of a CCC meant that purchasers would require a significant discount to remedy any potential issues. He said that there is no conclusive market evidence regarding the extent of the discount and acknowledged that the discount he made of 25 per cent was subjective. This figure builds in an assumption that the house is leaking and would therefore need to be significantly discounted to purchasers.

[89] There is some circularity in Mr Gamby's assessment of "unaffected value" given the assumption that he has built in, that the house would be leaking. Mr Gamby's comparison seems to be between the value of a leaky home with unknown and known costs of rectification. The cost of rectification is factored into both. This accounts for the relative similarity between Mr Gamby's "unaffected" and "as is" values (only $40,000 difference).

[90] In the Council's opening submissions it is submitted that loss in value is the difference between what the Lees purchased (an apparently sound house not affected by defects but with no CCC) and what they actually purchased (a house affected by weathertight defects and with no CCC). Mr Gamby's "unaffected" valuation is not of an apparently sound house.

[91] I prefer the approach of Mr Taylor to unaffected value to that of Mr Gamby. I accept therefore the unaffected value figure he has arrived at of $1,030,000. I note that this is close to Mr Gamby's estimate when his 25 per cent discount is removed.

What is the "as is" value?

[92] Mr Taylor prepared calculations for two alternative measures of the loss of value. One calculation involved deducting the estimated repair costs from the unaffected value together with allowances for contingency and lost rental during repair. This exercise resulted in a figure of $460,000 which is less than the calculated land value. His alternative figure was based on the premise that, given the land value and the cost of repair, it was most likely that the house would be demolished following a period of rental occupancy. Mr Gamby used a similar methodology to calculate his figure for loss of value. The difference between the two expert witnesses was that Mr Gamby's value reflected a period of five years rental occupancy while Mr Taylor's was based on a three year period, he being of the view that the dwelling would not be habitable for 5 years given evidence concerning the presence of the toxigenic mould Stachybotrys in the dwelling's cladding, building paper and framing.

[93] Having heard the evidence of Mr Gamby and Mr Taylor concerning the methodology for the "as is" valuation and the dispute between them regarding the appropriate rental period to factor into this calculation I accept that the "as is" value should reflect the rental and eventual demolition of the dwelling rather than its repair. I also accept Mr Taylor's view that three years

is the appropriate rental period for this calculation because of the Stachybotrys issue.

[94] The other difference between the two calculated "as is" values was in respect of the land value. Mr Taylor estimated this value at $620,000 while Mr Gamby estimated the value at $600,000. Both experts conceded that both estimates were within a reasonable range. I find the land value to be $620,000 as determined by Mr Taylor.

[95] The "as is" value is therefore:

Land value	$620,000.00
Rental value	$85,400.00
Demolition	-$45,570.00
As is value	$659,830.00

[96] The difference between the unaffected and "as is" value is $370,000 calculated as follows:

Unaffected value	$1,030,000.00
Less "as is" value	$659,830.00
Difference between the two	$370,170.00

[97] Given the measure of loss that has been used, the issue of loss of rent during the repair period does not arise.

[98] General damages of $15,000 have been claimed which is the typical award for non owner occupied properties. The claim for general damages was not challenged at the hearing. I accept that finding themselves the owners of a leaky home has been a source of great stress to the Lees. I consider that the award of general damages sought is appropriate.

Conclusion as to Quantum

[99] The claim has been established to the amount of $385,000 which is calculated as follows:

Loss of value	$370,170.00
General damages	$15,000.00
TOTAL	**$385,170.00**

Was there contributory negligence on the part of the Lees and, if so, to what extent?

[100] The Council and GIL raised an affirmative defence of contributory negligence against the Lees. They argued that the Lees' failure to obtain a LIM report was the real and effective cause of their loss or, alternatively, constituted contributory negligence to a high degree.

[101] In its memorandum dated 20 October 2015 GIL advised that it would not take part in the hearing and would abide by the decision of the Tribunal. GIL filed a statement of defence to the claim in which it raised the affirmative defences of lack of causation and contributory negligence. Both of these defences were based on the Lees' failure to obtain a LIM report. GIL also filed a will-say statement from a conveyancing lawyer, Peter Nolan. In Mr Nolan's opinion, a reasonably competent solicitor would have advised the Lees to make their purchase of the house conditional on satisfaction with a LIM report and a building report. Mr Nolan's opinion is consistent with the evidence of the expert conveyancing witnesses at the hearing. In these circumstances it is appropriate to consider this defence.

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

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

[103] Section 3 allows for the apportionment of damage where there is fault on both sides.[11] In assessing whether a plaintiff is at fault, the standard is that of the reasonable person although the person's own general characteristics must be considered.[12]

[104] The test for assessing the existence and extent of contributory negligence was helpfully discussed and clarified by Ellis J in *Findlay v Auckland City Council*.[13] After considering case law on the standard of care expected of plaintiffs in terms of protecting themselves from harm, she determined three questions to be answered. In the context of this case these questions are:

(a) What if anything did Mr and Mrs Lee do that contributed to their loss?

(b) To what degree were those actions or inactions a departure from the standard of behaviour expected from ordinary prudent people in their position?

(c) To what extent did Mr and Mrs Lee's actions or inactions contribute to their damage?

What if anything did Mr and Mrs Lee do that contributed to their loss?

[105] The LIM system has been described as a simple mechanism by which potential purchasers can inform themselves as to potential property risks.[14] It is well established that a failure to obtain a LIM may amount to contributory negligence.

[106] Had the Lees' obtained a LIM, it would have revealed that the house they proposed to purchase lacked a CCC.

[107] The expert conveyancing witnesses, Mr Timothy Jones for the Council, and Ms Joanna Pidgeon for the Lees, were both of the view that a

[11] Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Thomson Reuters, Wellington, 2013) at [21.2.02]; *Hartley v Balemi* HC Auckland CIV 2006-404-002589, 29 March 2007 at [101].
[12] *O'Hagan v Body Corporate 189855* [2010] NZCA 65, [2010] 3 NZLR 445 at [79].
[13] *Findlay v Auckland City Council* HC Auckland CIV-2009-404-6497, 16 September 2010 at [59]-[64].
[14] *O'Hagan v Body Corporate 189855* [2010] NZCA 65, [2010] 3 NZLR 445 at [136].

prudent solicitor when faced with a LIM identifying the absence of a CCC would have sought further information by examining the Council file.

[108] Ms Grant notes that no actual problems with the cladding were ascertainable from the file so that the most that could have been ascertained was that the Council had concerns regarding compliance with the requirements of E2 of the Building Code.

[109] Ms Grant argues that because the cladding defects were not detailed on the file, the failure to obtain the LIM was "sufficiently remote that it was not causally potent". I do not accept this. A search of the Council file would have revealed the letter of 4 March 2004. This stated that the Council cannot be satisfied the building will meet the functional requirements of the Building Code and is therefore unable to issue a CCC. The refusal to further amend the building consent for a different type of cladding would also have been revealed.

[110] Without the further details, that would have been sufficient to give purchasers with a LIM condition considerable pause and the ability, if they wished, to use the LIM condition to cancel the contract. The failure on the part of the Lees to examine the LIM report prior to purchase or to make their purchase conditional on satisfaction with a LIM report, was a failure to protect their own interests and contributed to their loss.

To what degree were the Lees' actions or inactions a departure from the standard of behaviour expected of ordinary prudent people in their position?

[111] The Lees took the prudent step of obtaining legal advice before entering in the agreement to purchase the house. Unfortunately, their lawyer failed to advise them to obtain a LIM. Mr Jones and Ms Pidgeon were in agreement that, at the time, a reasonably prudent solicitor would have advised that a LIM should be obtained.

[112] The evidence of Mr Jones was that at the time the Lees entered into the agreement to purchase the property:[15]

- There was a box on the standard agreement whereby this election could be made and a warning on the back page of the agreement that alerted purchasers to the need to apply for a LIM.

[15] Brief of evidence of Timothy Jones, 28 September 2015 at [35]–[38].

- That it was usual practice to obtain a LIM report before entering into an agreement as a condition of purchase.

- That a reasonably competent conveyancing solicitor should have advised them to elect to make the agreement conditional on a LIM report.

- That on obtaining a LIM, the absence of a CCC would have been a matter of significant concern.

- The LIM condition would have given them the option of cancellation (depending on whether the content of the LIM report was satisfactory or unsatisfactory to them as purchasers).

[113] Ms Grant's cross examination of Mr Jones touched on scenarios that would arise if there was no LIM condition in the sale and purchase agreement but a LIM search obtained subsequent to the agreement revealed the lack of a CCC.[16] This evidence has little relevance.

[114] The Court of Appeal in *Byron Avenue* found that the failure of a solicitor to obtain a LIM may be attributed to their client. In other words, the client is vicariously liable for the negligence of their solicitor in these circumstances.[17]

[115] Ms Grant has suggested that the Lees should not be vicariously liable for their solicitor's negligence. She relies on the decision of Ronald Young J in *Body Corporate 90247 v Wellington City Council (Manfrini)*[18] where it was held that plaintiffs would not be vicariously liable for negligence on the part of their solicitors. The *Manfrini* decision does not assist the Lees. The negligence considered in *Manfrini* related to the interpretation of a CCC. Ronald Young J discussed the finding in *Byron Ave* concerning vicarious liability including the policy reasons behind the finding. He commented that interpreting the content of a CCC is in an entirely different category than the obligation to obtain a LIM.[19]

[116] The Lees submitted that they acted prudently in obtaining legal advice. It is submitted that they were also prudent in that they had their

[16] Transcript of Hearing at 202-204.
[17] Above n12 at [143] – [146].
[18] *Body Corporate 90247 v Wellington City Council* [2014] NZHC 295.
[19] Above n18 at [293]

"builder friend" examine the property for them. I accept their evidence that they were familiar with the property which was the home of their friends and that being a one year old house with no apparent problems, there was nothing that would have put them on notice that there were weathertightness problems.

[117] The Lees' position is that they did not fail to exercise the skill and care expected of a reasonably prudent person and that the Council has not proven that they failed to take the steps a prudent purchaser would have taken in 2004. In other words, the Council has failed to prove that the Lees were "at fault".

[118] The Lees took the prudent step of obtaining legal advice before entering into the sale and purchase agreement. However, based on the expert conveyancing evidence, I find that their failure to obtain a LIM prior to entering into the agreement or to make their purchase of the property conditional on their satisfaction with a LIM, was a departure from the standard of ordinary prudent purchasers in their position. While the fault appears to have been the responsibility of their lawyer, they are vicariously liable for this fault.

To what extent did Mr and Mrs Lee's actions or inactions contribute to their damage?

[119] Although a number of High Court and Court of Appeal cases consider the appropriate reduction to be made from damages for contributory negligence in weathertightness cases, none of these involve a purchaser who failed to obtain a LIM report prior to entering into a sale and purchase agreement where the LIM would have revealed adverse information.

[120] In *Byron Avenue*[20] Tipping J commented that if a prospective purchaser obtained a LIM which disclosed a moisture problem before becoming committed to the purchase, it is unlikely that proceedings could be taken against the Council. Tipping J also commented that where a prospective purchaser fails to request the LIM in circumstances where it would probably have given notice of actual potential problems, it is likely the purchaser's failure amounts to negligence and the question arises as to whether that negligence amounts only to contributory negligence, albeit

[20] *North Shore City Council v Body Corporate* 188529 [2010] NZSC 158, [2011] 2 NZLR 289 at [84].

probably at a high level, or whether the prospective purchaser's negligent omission amounts to a new and independent cause of the loss which removes all causal potency from the Council's original negligence.

[121] The comments of Tipping J noted above followed consideration in the High Court and Court of Appeal of the appropriate apportionment for contributory negligence in respect of one of the *Byron Avenue* unit owners, Ms Kim. In the High Court, Ms Kim was found to have failed to protect her own interests and her contributory negligence was set at 25 per cent. This finding was upheld in the Court of Appeal and did not arise for determination in the Supreme Court.

[122] In *Auckland Council v Blincoe*[21] Courtney J considered a case where a LIM would have notified a purchaser of a weathertightness claim in respect of an adjoining unit. Her Honour considered the comments of Tipping J in the Supreme Court (set out above) but expressed the view that the comments concerning a LIM removing all causal potency from earlier negligence were qualified by the words "depending on the circumstances". Her Honour considered that the failure of the purchaser to obtain a LIM was not sufficiently significant as to constitute a new cause of loss as the purchaser did take steps to assess her unit's weathertightness. The Court upheld the Tribunal's assessment of contributory negligence at 30 per cent.

[123] In *Body Corporate 326421 v Auckland Council* (*Nautilus)*[22] the High Court accepted that a LIM would not have contained information that would have alerted purchasers to defects. However Gilbert J accepted that one set of purchasers ignored clear warnings regarding global defects in a building report. A 75 per cent deduction for contributory negligence was made.

[124] In *Manchester Securities Limited v Auckland Council*[23] the Tribunal recently considered the deduction for failure to obtain a LIM report where the LIM would have revealed adverse information. The deduction was set at 50 per cent. The purchaser in that case had considerable familiarity with the property and had knowledge that a notice to fix had been issued by the Council in respect of the property's decks. He assumed that this matter had been resolved but made no formal enquiry in this regard.

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[21] *Auckland Council v Blincoe* [2012] NZHC 2023.
[22] *Body Corporate 326421 v Auckland Council* [2015] NZHC 862 at [310].
[23] *Manchester Securities Limited v Auckland Council* [2016] NZWHT Auckland 1.

[125] There is no clear precedent regarding the appropriate level of apportionment for the Lees' contributory negligence. The High Court noted in *Johnson v Auckland Council*[24] that assessments in other cases are unlikely to provide assistance as what is required is a determination of what is just and equitable in the particular circumstances of a case. On appeal, the Court of Appeal noted that in assessing apportionment, it is necessary to consider both relative blameworthiness and causal potency.[25] The Court also noted that the appropriate apportionment is a question of fact involving matters of impression and not some sort of mathematical computation.

[126] The Court of Appeal noted that the purchasers in *Johnson* were aware of potential problems prior to committing to the purchase and by failing to obtain a building report, contributed to their own loss. The apportionment for their negligence was set at 40 per cent. It is relevant that unlike in this case, the *Johnson* purchasers were aware of potential problems.

[127] In the present case, I accept that the lack of a CCC would have been revealed on the LIM report and that a consequent examination of the Council's files would have revealed that the Council was not satisfied that the cladding on the house met the E2 requirements of the Building Code. This reduces the respondents' share in the responsibility for the Lees' loss.[26] The question is by how much. Having considered the most analogous cases, in particular *Byron Avenue* and *Blincoe*, I find that the level of contributory negligence on the part of the Lees is appropriately set at 30 per cent.

Conclusion and orders

[128] The claim by Bu-Rye and Jeom Youl Lee against Auckland Council is dismissed.

[129] I have found that GIL (2008) Limited is liable for the full amount of the established claim. The quantum of $385,170 is reduced by 30 percent to $269,619 in accordance with my finding on contributory negligence.

[24] *Johnson v Auckland Council* [2013] NZHC 165 at [141].
[25] *Johnson v Auckland Council* [2013] NZCA 662 at [87].
[26] *Above* n 22 at [99].

[130] The claim by Bu-Rye and Jeom Youl Lee against GIL (2008) Limited is proven to the extent of $269,619. GIL (2008) Limited is to pay Bu-Rye and Jeom Youl Lee the sum of $269,619 forthwith.

DATED this 14 th day of April 2016

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M A Roche
Tribunal Member