

**IN THE WEATHERTIGHT HOMES TRIBUNAL**

**TRI-2010-101-000028  
[2012] NZWHT AUCKLAND 11**

BETWEEN	RONALD ALOYSIUS WIHELMUS AND MARTINA HELENA MARIA HOOFT VAN HUIJSDUIJNEN Claimants
AND	EDWARD MERVYN JOHN AND LYNETTE ANNE CATHERINE WOODLEY First Respondents
AND	PORIRUA CITY COUNCIL Second Respondent
AND	ALAN GORDON MINTY ( <u>Removed</u> ) Third Respondent
AND	SAWREY CONSULTING ENGINEERS LIMITED ( <u>Removed</u> ) Fourth Respondent
AND	DONALD JOHN HAWINKELS Fifth Respondent

Hearing: 13 – 14 June 2011

Appearances: P Bremmer for the claimant  
M J Woodley, the first respondent  
P Robertson for the second respondent  
D Hawinkels the fifth respondent

Decision: 28 February 2012

---

**FINAL DETERMINATION**  
**Adjudicator: R Pitchforth**

---

## CONTENTS

<b>BACKGROUND FACTS</b> .....	<b>4</b>
<b>The claim</b> .....	<b>7</b>
<b>ALLEGED DEFECTS</b> .....	<b>7</b>
Claimants evidence of damage .....	8
Apron flashings.....	11
Cladding .....	13
Construction of joints .....	15
Sealing of edges.....	16
Bottom of cladding.....	16
Overhang.....	17
Ground Clearance .....	18
Rebated edge and capillary gap .....	20
Treatment of bottom edge .....	22
Quality of Painting .....	25
Battens .....	27
Corners.....	29
Fixings .....	31
Joinery .....	33
Family room door.....	33
Joinery – window head flashings .....	34
Sealant- top of windows.....	36
Windows – Jambs .....	37
Windows – sills .....	38
Decks and damage to columns .....	39
Drip edge .....	40
Membrane fixing .....	41
Top fixed balustrade .....	42
Deck wall junction.....	43
Foundation wall .....	43
Drainage board.....	44
Coating .....	44
Driveway.....	46
Conclusions on Defects.....	47
<b>Developers</b> .....	<b>47</b>
<b>WERE THE WOODLEYS Developers?</b> .....	<b>48</b>
<b>Breach of warranty in the contract</b> .....	<b>50</b>

Strict liability.....	51
<b>The council.....</b>	<b>57</b>
Inadequate specifications .....	57
Removal of architect.....	58
Lack of Council records .....	59
Issuing the consent.....	60
Inspections and code compliance.....	61
Quality of inspections .....	63
Differences between experts .....	65
<b>The Builder, Donald Hawinkels .....</b>	<b>66</b>
<b>Conclusion.....</b>	<b>67</b>

[1] Ronald and Martina Hooft Van Huijsduijnen are the owners of a leaky home at 1 Tombane Lane, Papakowhai, Porirua. At their request they are referred to in this decision as Mr & Mrs Hooft. They claim that Edward Mervyn John and Lynette Anne Catherine Woodley, the previous owners of the property, the Porirua City Council, the territorial authority and Donald John Hawinkels, the builder are liable for the problems that have arisen with their home.

[2] The Council and Mr Hawinkels denied negligence and liability. The Woodleys denied liability for both negligence and breach of contract. They all say that any defects that have caused leaks are not due to any negligence on their part.

[3] The issues I therefore need to decide are:

- a. What were the defects that have caused leaks?
- b. Has damage resulted from any of these defects?
- c. Did any damage from leaking defects arise from negligence by any party?
- d. Were the Woodleys, as the first owners of the property, developers?

- e. Did the Woodleys, as the vendors, breach their warranty on the sale of the property?
- f. Did the Porirua City Council negligently consent to the plans, inspect the progress of the building and issue a code compliance certificate?
- g. Was Mr Hawinkels negligent?
- h. Are the claimants entitled to damages and if so what?

## **BACKGROUND FACTS**

[4] The House was built by Mr Hawinkels in 1997-1998 as a turnkey contract for Mr and Mrs Woodley. The code compliance certificate was issued on 18 May 1998. Mr & Mrs Hooft purchased the house in January 2002 when it was less than three years old. They understood it was constructed by a master builder to a design by a well known architect. Prior to purchase Mr Hooft inspected the Council file and perused the consent documents. He noted that there was a code compliance certificate but did not notice that the file was deficient in any way. Despite this the claimants now allege that the file did not exist.

[5] In February 2002 Mr and Mrs Hooft discovered dampness in the area backed by a retaining wall. At the same time they noted that nails in the cladding were corroding and staining the house. In the winter of 2002 Mr Hooft found that there was a lot of water flowing onto the property. He engaged HBD Technic Ltd to design a field drainage system to drain the garden and keep water away from the foundation wall. Mr Hooft received engineering advice that field drains would not resolve moisture ingress into the house and that a tanking solution was required. There was no evidence that he took this advice.

[6] In 2003, Mr Hooft installed a patio with additional field drains to divert rainwater from the house.

[7] In August 2004 the Hoofds applied for an assessor's report which was issued on 7 December 2004. During the course of his investigations the assessor inspected the Council file. He made no comment as to omissions in the records of the inspection files which have since disappeared. He included parts of the Council file in his report.

[8] The assessor inspected the roof, the concrete tiles and in an unlined room could see that the building paper under the tiles was dry and there was no sign of water entry. He was of the view that although water entered through concrete tiles in heavy storms the building paper and the ventilation would ensure that it would quickly dry out. Although the question of roof leaks had been raised with him he found nothing that gave him concern.

[9] The assessor also looked at the nails and noted that the property was within one kilometre of the sea and that, as the house had not been painted after six years, rusting would be a normal occurrence in the salt air. The assessor also thought that the nails may not have been set into the timber at a great enough depth which might have increased the rusting. This was not seen as a weathertight issue. No other fixing fault was noted in his report.

[10] The assessor dug four holes at the rear of the dwelling to assess the problem with the foundation retaining wall. He found a retaining wall built from Styroform polystyrene blocks with a Mulseal membrane applied to the polyblocks and a 65 mm polystyrene drainage board to protect the membrane. The drainage board was nailed to the polyblocks. The soil was backfilled to ground level with no drainage metal. One investigation hole revealed no drainage board in the first 100 mm. Soil conditions varied from damp to dry.

[11] The assessor investigated the construction details and obtained material from the architect and engineer. His view was Mulseal, or similar products were commonly used at the time and that the materials used and method of construction was suggested by the manufacturer of the

polystyrene blocks when they were first introduced to the market. He concluded that although the coating work was undertaken to the specification in the plans the Mulseal coating was not providing the prescribed durability.

[12] Inside the retaining foundation wall he took a variety of readings; some indicated that moisture was entering. He concluded that regardless of the causes the construction and membrane were not sufficient to stop the entry of water into the dwelling. The damage at the time was assessed as minor being damage to the interior linings, minor staining to the carpet and swelling of skirting boards.

[13] The assessor said the remedial work needed would be to excavate behind the retaining walls and provide a new membrane as well as providing drainage below the slab levels of the adjacent living areas. The internal linings could then be repaired. The cost of this work was estimated to be \$31,800.00 plus GST.

[14] I note here, as it is relevant later, that other matters, now alleged to be obvious faults visible at the time of construction to any reasonable expert, were not commented on in this first report.

[15] After receiving the report Mr Hooft knew that he had a leaky foundation wall. He also knew from the earlier engineering report that it had to be excavated. Rather than repairing the wall as suggested by the assessor he elected to remove the water damaged materials and treat the interior surface against mould.

[16] Mr Hooft also took advice from a master painter as to possible remedial work to the nails. He tried punching, rust proofing and sealing the nails.

[17] The assessor returned to the house to provide an addendum report at the end of 2007. In that addendum report the assessor found that there had been no change to the retaining wall faults although the damage had

increased. He also found further defects in the exterior wall cladding, at the windows and deck.

[18] In May 2008 Mr Hooft contracted with Gijis van Rooijen to excavate the foundation wall at a cost of \$1,536.00. No further significant progress was made until a year later. The Hoofts appointed Mr Thurlow in November 2008 to collect evidence, effect repairs and manage the remediation process. Mr Thurlow was to prepare contract documents and obtain a building consent, call tenders, choose a contractor and coordinate and manage remediation work so that a code compliance certificate would be issued.

## **THE CLAIM**

[19] At the start of the hearing I was provided with the amended details of claim which amounted to \$494,824.76. The claimants sought further estimated remediation costs of \$40,056.65 and further other losses of \$45,162.22. Further claims were made for PFS tiling for tiling at doors and windows, contracting for driveway works and landscaping.

## **ALLEGED DEFECTS**

- [20] Before the hearing the claimant amended the details of claim and alleged that the defects were:
- a. The lower edge of the cladding did not extend below the bottom wall plate and bottom edge of cladding was not painted.
  - b. Cladding was not installed in accordance with the manufacturer's literature:
    - i. Laps and edges were not sealed: Carter Holt Harvey texture 2000 Shadowclad technical data p 9.
    - ii. Lack of adequate capillary gap: Carter Holt Harvey Texture 2000 Shadowclad technical data; figure 1 p 10.
  - c. The plywood cladding was not painted behind the battens fixed to the face of the plywood and rear face of the battens had not been primed.
  - d. Use of jolt head nails on treated plywood had caused corrosion to the fixings (contrary to the Carter Holt Harvey Ecoply Specifications p 7).

- e. Inadequate installation of the external cladding and waterproofing membrane to the deck at the junction where the deck interfaced wall structure.
- f. No drip edge detail to allow shedding water away from the timber fascia at the edge of the deck.
- g. No waterproof seal at the window sill or door jamb junction.
- h. Joinery head flashings installed over building wrap and outer edges of head flashings not sealed.
- i. No kick out flashing fitted to apron flashings.
- j. No back flashing to cladding.
- k. Cladding sheets not installed as per manufacturers' specifications.
- l. No capillary grooves machined in corner battens.
- m. Drainage board was fixed to the foundation wall with galvanised nails which penetrated waterproof membrane (contrary to E2/AS1 cl 5.2.).

[21] During the hearing the claimants claimed a number of additional defects which had allegedly created the need for a full reclad. Generally it is too late to add claims not considered by the other parties and the experts before the hearing. For the sake of completeness, and because they do not prejudice the respondents, I deal with them below. This has necessitated some resorting of the order in which the claims were made. Where allegations were made in the claim they are identified using the lettering in the paragraph above.

[22] An experts' conference was convened on 31 May 2011 which was attended by John Lyttle, the assessor, the council's expert Dr Garrett Butt and Ron Thurlow, the claimants' repairer. At that conference the experts largely agreed on issues with the property and agreed there were no other defects causing damage beyond those detailed in the schedule they signed.

### **Claimants evidence of damage**

[23] Mr Thurlow, the repairer, created a series of site reports. The damage reported during his inspections was not specifically related to the defects but was relied on by the claimants as proof of damage.



- Report 1 was in relation to the rear wall of the garage on the southern elevation. The moisture content was within acceptable limits and there was no degradation.
- Report 2 covered the lower levels of bedroom 4, northwest, northeast and southwest walls. There was minimal damage. Mention was made of the 25 mm overhang and dampness staining on the building wrap at the bottom plate line, at external corners and at the lintel above the north east facing window. The corner stud and outer lintel timber was to be removed.
- Report 3 covered the same area and found no decay in the timber framing or the floor joists.
- Report 4 covered bedroom 2 and ensuite at the lower level, kitchen and dining room, upper level. The trimmer stud and jack stud from the east of window W1 was sent for testing. The stud at the external corners on the columns supporting the deck outside bedroom 1 was affected by dampness with high moisture content. The top plate, dwangs and two westernmost studs on the westernmost column were to be replaced.
- Report 5 related to the north west elevation of the living room and deck off the living room. There was water staining at the window head, at the sill and the nail plate at the connection of the wall plate. The trimmer stud had deteriorated to failure. There was water staining at the bottom plate level. The boundary joists at the edge of the deck were saturated and water stained. The accompanying photographs included a reference to the window with the short head flashing without a turn-up. There was a photo of the corroded and failed nail plate at the trimmer stud/floor junction.
- Report 6 was in relation to the north western and north eastern elevations of the family room. Water staining was found on the building

wrap, trimmer studs between the doors, the sill and nail plates and at the north eastern wall below the deck wall junction. At the connection of the wall plate and trimmer stud the nail plates had deteriorated. Particle board flooring around the trimmer stud had been water damaged. There was damage to the ceiling of bedroom 4 below the westernmost window and door trimmer. Packing of 50 x 50 mm timber used to fill the gap between the underside of the plate and the deck substrate was decayed. On the northwest wall the building wrap was degraded and water staining found on the boundary joist at the return wall at the family room. There was a damp area behind a vertical sheet joint in the plywood cladding. However, with the exception of the last item the moisture sampling was within the expected equilibrium range.

- Report 7 again referred to the family room and the columns below. Some staining was identified but no degradation of timber found at the boundary joist at mid floor level. There was a saw cut but it is not known why or by whom it was made.
- Report 8 included the south western elevation of the living room and area above the entry porch. There was water staining on the building wrap and some slightly raised moisture levels (18% maximum) in the studs and dwangs. The second area was the north east elevation of bedroom 3 where water staining was found on the building wrap, the trimmer studs and bottom plate. Although there were raised moisture levels no degradation of timber was identified. Penetration results of moisture sampling were in the expected equilibrium range.
- Report 9 was of a series of inspections. On 3 May 2010 on the lower level on the north east elevation below the family room, laundry, bathroom and toilet, water staining was evident on the building wrap and bottom plate, but moisture was in the 10 – 12% range.
- On 7 May 2010 the north west gable wall above the garage doors had some evidence of water leaking from the roof flashing. Moisture

readings were 19-21% at the window trimmer studs but were otherwise as expected. No degradation of timber was identified.

- On 10 May 2010 in the south west wall of the garage there was water staining on the building wrap and bottom plate adjacent to the garage door at the gas meter. No degradation of timber framing was identified.
- On 17 May 2010 the south eastern wall was inspected and water staining found on the building wrap and at sill level on the window studs. There was decay in the boundary and outrigger joists at the flat roof over the toilet area. The damage was attributed to the lack of kick out flashings. Other readings were in the equilibrium range.

[24] Counsel for the claimants submitted that particular defects did not need to be established. He argued that it was well known that there were leaky homes at the time of the construction of the house, the house leaks, therefore I should infer that the respondents were negligent and award the damages set out in the claim. The difficulty with such an argument from the general to the particular is that it involves an assumption of negligence without the need for proof and cannot be a justification that the consequent remediation can include improvements that were not part of what should have been done at the time of construction. Such allegations must be proved.

[25] I therefore now consider each of the defects alleged at the hearing and determine whether they were defects and if so whether there is any evidence that they were causative of loss. I will then consider whether negligence has been established against any of the parties for established defects that have caused, or are likely to cause, damage.

### **Apron flashings**

[26] The claimant argued that the lack of a kick out flashing was an observable defect. The 2001 BRANZ Good Practice Guide<sup>1</sup> was an example

---

<sup>1</sup> Agreed Bundle of Documents 676.

of what should have been done in 1997-98. Due to there being no kick out to the apron flashing (allegation (i)) there was a leak and localised damage beside the wall of the porch at the front entrance and down to the bottom plate. The damage was as reported in report 9 with water staining and decay in the boundary and outrigger joists at the flat roof over the toilet area.

[27] Mr Hawinkels said that the flashing was installed by the roofing contractor in accordance with current practice at that time. Kick outs were only required from 2005. At the time lead flashings were always used on concrete tiled roofs. There would have been a flick out but he could not recall exactly how it was installed. There is no photograph of the flashing as installed, just as it was after the ply was removed. He was never made aware of a problem.

[28] The experts' conference report records that the experts agreed kick outs were not required at the time of construction but good building practice required water to be diverted away. Since construction, a revision to E2/AS1 in 2004, has provided that good building practice requires a kick out flashing. This later standard cannot be applied with hindsight to earlier construction work.

[29] The council also relied on *Body Corporate No 189855 v North Shore City Council, (Byron Ave)*<sup>2</sup>, and submitted that it has been accepted that:

... at that time a reasonable inspector would not be looking for kick out flashings so that the council would not be negligent in requiring them. They would be entitled to take the view that proper trade practices would be adopted to waterproof the intersection..

In that case investigations in 2000 did not raise kick out flashings as an issue. Accordingly, the council submitted that the lack of kick out flashings is not a defect at the time of construction.

---

<sup>2</sup> *Body Corporate No 189855 v North Shore City Council, (Byron Ave)*, HC Auckland CIV-2005-404-5561, 25 July 2008 at [154].

[30] I accept that kick outs were not required at the time and the claimants' allegation is as a result of hindsight and subsequent industry knowledge. Failing to supply an item that is not required is not a defect so neither the builder nor the Council was negligent in this regard. Neither is liable for any damage from this detail.

### **Cladding**

[31] The claimants made a number of allegations of cladding defects which caused damage, in particular defects (a), (b), (c), (j) and (k) noted above.

[32] There was considerable confusion regarding the cladding due to misidentification. The Ecoply Cladding Collection booklet issued by Carter Holt Harvey and current at the time provided details for four types of cladding Texture 2000, Shadowclad, AgSheathing and Ecoply Standard. The first three were band sawn with shiplap weathergroove. Ecoply was square edged. Parts of the claim were based on the assumption that the cladding was Shadowclad ply. The plans and specifications refer to band sawn Texture 2000 and Messrs Hawinkels (the builder) and Thurlow (the claimants' repairer) said Texture 2000 was installed.

[33] Having considered the evidence I find that the product installed was band sawn Texture 2000. Accordingly, the standards to be applied to an assessment of the building must be in light of the specifications applicable to Texture 2000. Any claim based on failure to follow the Shadowclad requirements must therefore fail, particularly if the Texture 2000 technical material was followed.

[34] It is therefore helpful to consider the relevant parts of the manufacturer's recommendations for Texture 2000 before dealing with the allegations. The booklet made the same general recommendations or specifications for all ply products with noted exceptions for individual products.

[35] The design and construction section provides:

Framing and details should comply with NZS 3604 or AS1684 or be specifically designed to NZS 3603 or AS 1720 or equivalent steel framing practices subject to the provisions below:

- Ground clearance and overhangs
- 100 mm clear above paving, 150 mm clear above soil
- 25 mm clear above paving under verandas and protected areas
- 25 mm minimum overhang under bottom plate (Cladding length 2440 gives 40 mm)
- 75 mm maximum sheet overhang from nail centres on any edge
- Roof overhang protect walls from rain and dust and offer shade
- Preservatives are described as:
  - Ecoply cladding products are H3 treated to the requirements of MP 3640 and AS 1604, either with LOSP for textured plywood or with CCA for standard Ecoply plywood. LOSP is a light organic solvent preservative containing a fungicide (TBTN) for rot protection, a mouldicide for short term mould resistance prior to coating, an insecticide and a wax water repellent to stabilise the surface fibres for painting. CCA is a water based treatment using copper (fungicide), arsenic (insecticide) and chrome to fix the chemicals in the wood.
- Under plywood preparation it provides:
  - Use normal woodworking tools
  - Seal all cut edges with a product like Metalex Clear, Napthox, Ensele or Protim XJ Clear
  - As far as possible, put cut edges uppermost
  - Prime or pre-coat bottom edges of sheets and inside shiplap joints if painting or staining, see painting recommendations.
- Under the heading flashings, battens and ant caps the relevant recommendations are:
  - Avoid details that trap moisture
  - Use flashings, battens or mouldings at corner joints and joints between square edge sheets
  - Use battens and mouldings with curved or bevelled edges and machined capillary breaks.
- Under fixings the specification provides:
  - In LOSP treated claddings use hot dip galvanised (or alloy with equivalent durability) flat head nails or equivalent countersunk screws....
  - Do not use jolt head nails.

Under finishing and durability the specification is:

- Finishes provide choices of colour and texture, and protect plywood from sun, rain, dust, dirt and surface wear. Plywood should not be left unpainted unless a weathered grey/black rustic surface with variable mould growth is desired and a lower durability (15 years) is acceptable, Stucco....
- Paints and stains include the recommendation.
  - Paints: a light coloured 100% acrylic latex paint system comprising one coat of 100% acrylic stain blocking primer and two coats of acrylic exterior is recommended as then best finish for exterior plywood. Good quality paints containing a mouldicide should be used and should last 10 years before recoating. Carter Holt Harvey Plywood expects the durability of 5 ply Ecoply textured cladding to be in excess of 50 years with a maintained (regularly recoated) three coat acrylic paint system.
- Under applying paints and stains:
  - Laps and edges should be sealed. Primer is sufficient for paints. With stains, darker edges can be avoided by pre-coating the whole panel before construction.
- Maintenance recommendations are:
  - Wash down walls regularly to remove surface dirt, debris or mould
  - Check surfaces once a year paying attention to joints, corners and bottom edges
  - Repaint as necessary in accordance with coating manufacturer's instructions
  - Ensure dirt, garden soil or leaf build up is at least 150 mm away from the plywood.

### *Construction of joints*

[36] The claimants alleged (allegation (b)) that dampness penetrated the vertical sheet joints in the plywood cladding because the joints were not constructed in accordance with the manufacturer's detail and no specific detail was supplied by the architect or builder. In particular there was a lack of a capillary gap as required for Shadowclad ply and sheets were fitted with no gaps for movement. There is however no evidence of failure to follow the details for Texture 2000. To the contrary Texture 2000 used has shiplap edges allowing for movement. Accordingly the lack of an expansion gap was not a defect and there can be no negligence in installing the sheets as they were installed as required.

### *Sealing of edges*

[37] The claimant further alleged (allegation (b) (i)) that the builder was negligent for constructing the cladding so that vertical joint edges were not sealed or primed allowing dampness to enter the joints, the structure and the wall framing below. The damage required the replacement of the cladding and the suitably damaged wall framing.

[38] Dr Butt said that the ply was treated to H3 LOSP standard and such a treatment is sufficient to allow the cladding to survive without any additional protection for the 15 years required by the Building Code. He considered that the state of the ply was such that it would have met the 15 year standard. Some gaps were covered by battens. Mr Thurlow took the battens off and found limited damage in the vicinity of the family room which he linked to other defects in the vicinity. Dr Butt said that there was no separate and distinct damage caused by this alleged defect. The experts' conference reported the only sign of leaking was in the north east by the family room where there was also internal corner leaking.

[39] The requirement for Texture 2000 was that *Laps and edges should be sealed. Primer is sufficient for paint.* At the time the house was constructed the owners did not paint the dwelling. Mr Hawinkels said that he sealed the edges with Metalex. I accept his evidence and note that Metalex was one of the alternatives recommended by the manufacturer.

[40] I accordingly find that the manufacturer's requirement was met and the one possible leak was as a result of other issues (see *internal corner*). Accordingly there can be no negligence on the part of the Council or the builder relating to this issue.

### *Bottom of cladding*

[41] The claimant alleged that the plywood cladding was not installed in accordance with the recommended details of the manufacturer of Ecoply cladding in that the lower edge of the cladding did not extend sufficiently



below the bottom wall plate and the bottom was not painted. As a consequence dampness had accumulated behind the cladding at the bottom plate level. The face of the plywood was showing signs of degradation on the face veneer of the plywood sheet. At the hearing the allegations were divided into subsets: overhang, ground clearance, rebated edge and capillary gap and treatment of bottom edge.

[42] The experts were of the view (Item 1 of their report) that:

- There was insufficient plywood over the bottom plate. There should have been a 50 mm gap/overhang whereas there were only 25 mm overhangs in places.
- The bottom edge was unpainted and untrimmed. The specifications required painting.
- The experts agreed that the bottom of the cladding was not spaced with a capillary gap between the rear face of the cladding and the concrete foundations. This was contrary to the manufacturer's recommendation.
- The defect allowed dampness and moisture up to 30% in the bottom plate all round the building leading to decay to the bottom of the cladding.
- The defect affected all elevations.

### *Overhang*

[43] This relates to allegation (a). Mr Thurlow<sup>3</sup> said that 25 mm was required as provided by the manufacturer's guide, *The Ecoply Claddings Collection, Texture 2000, Shadowclad, AgSheeting, Product range and technical specifications*<sup>4</sup> said:

Design and construction

...

Ground clearance and overhangs

- ....

---

<sup>3</sup> Witness statement, 7 April 2011, at [104].

<sup>4</sup> Published by Carter Holt Harvey in 1996, page 5.

- 25 mm minimum overhang under bottom plate (cladding length 2440 gives 40 mm),
- 75 mm maximum sheet overhang from nail centres on any edge.

[44] The experts' report said that the overhang was less than 50 mm but more than 25 mm. The technical requirement is for a 25mm overhang and as all the experts, including the claimants' repairer, agreed that there was more than 25 mm overhang, this is not a defect.

### *Ground Clearance*

[45] Although not included in the particulars of claim the claimants alleged at the hearing that damage had occurred to the bottom edge of the cladding and bottom plate from poor ground clearances. They say there was insufficient clearance between the lower edge of the cladding and the paving round the entrance to the garages and along the south-west elevation from the external corner of the garage to the retaining wall. This allowed dampness to enter the junction and structure.

[46] Mr Thurlow noted inadequate ground clearances and said that the bottom plate was wet in places. This was illustrated in the manufacturer's details<sup>5</sup> which show that there is a gap behind the cladding closed off by the bottom plate. Insufficient clearance can allow water to splash up to the plate. Wetness would not be as a result of water coming down. The manufacturer's guide said:-

Design and construction

.....

Ground clearance and overhangs

- 100 mm clear above paving, 150 mm clear above soil.
- 25 mm clear above paving under verandas, porches and protected areas.

[47] The assessor did not report any concerns with the ground clearances

---

<sup>5</sup> The *Ecoply Claddings Collection, Texture 2000, Shadowclad, AgSheeting, Product range and technical specifications* Carter Holt Harvey in 1996 (Figure 1).

when the first inspection was made in 2004. In his addendum report in 2007 however he reported varying ground clearances round the dwelling. None of the clearances were adequate. Clearances above grass varied from 100 to 140 mm, 70 mm over pavers installed by the claimant, 235 mm over dirt and negative to 55 over asphalt. At one point the asphalt was over the edge of the cladding. The clearance requirement cited by the assessor is a version which postdates construction but is said to be similar to the earlier version which required 150 mm below the slab on the ground floor.

[48] All the experts agreed that inadequate ground clearances were causing a problem to the paved area in front of the garage and along the south western elevation of the garage. However the respondents denied liability as they submitted changes had been made to the ground clearances since construction was completed. Mr Hawinkels could not recall what final clearances were provided by the driveway contractor but assumed that there was minimal or no clearance at the front of the garage or at the front door as the architect's drawings 406.6 and 406.10 required level entry. That was what was built. While he arranged for the driveway to be installed the work was not done until after he had left the site. In all other places the required clearances were achieved at the time he left the site. He thought it was about 200 mm.

[49] It is clear that work has been done on the property since construction that has changed the extent of the cladding clearance. This has included landscaping and paving to the back yard. Mr Hawinkels' recollection of adequate clearances is the only evidence as to the state of the ground when the building contract was completed and the code compliance certificate issued. There was no indication at the first inspection by the assessor that the ground clearances were a problem so it is possible that they have been changed in the intervening period. Apart from Mr Woodley's evidence concerning doing work with the Bobcat and Mr Hooft's evidence of ground work he had done there was little evidence as to when there has been a change, and if so, who was responsible. Fourteen years have elapsed since the house was built and in the course of that time there have been activities which may have altered the clearances.

[50] Having reviewed the evidence I accept that inadequate ground clearances have caused decay to the ply and dampness in the bottom plate. It is also possible that wicking has occurred when the cladding touched the ground. However, the claimants have not established that the respondents were responsible for the lack of ground clearances round most of the dwelling. It is not clear who laid the drive, or when, and whether it was part of the work included in the building inspections or code compliance certificate. In relation to other areas changes could well have been made since construction.

[51] The builder having followed the approved architect's plans was not negligent and there being no evidence that the council had negligently allowed inappropriate ground clearances when inspecting or issuing a code compliance certificate, this claim fails.

*Rebated edge and capillary gap*

[52] Mr Hawinkels cut a 25 mm x 6 mm rebate in the bottom of the cladding to create a capillary gap with 6 mm clearance from the concrete which the claimants allege was a fault causing damage. This was not claimed as a defect in itself but it was considered to be part of allegation (b) (ii). They alleged that the builder was negligent in cutting the ply and the council for not noting the cut. The claimants say that the cut reduced the thickness of the plywood sheet at the bottom edge which would have compromised the strength and preservative quality of the ply.

[53] Mr Thurlow said he had done no testing to see if the sheet would have been more durable if it had not been cut. He could not say that there was scientific evidence of its inability to achieve 15 year durability. He considered the cut had resulted in the accumulation of dampness behind the cladding at the bottom plate level and dampness had penetrated the cladding through wicking or capillary action and had penetrated into the wall framing behind causing saturation.

[54] The Council submitted that there is a capillary gap which was both visually adequate and would also work in a building sense and the Metalex Clear seal would have provided the required sealant. It also suggested that the ply may not have been well treated with preservative during manufacture. It is also possible that Metalex does not preserve ply as well as was expected at the time of construction. The ply was rated for 15 years from the time of construction where it was not preserved. The back of the sheet is showing signs of deterioration.

[55] The second issue in relation to the capillary gap was that it was alleged that it was not in accordance with the Carter Holt Harvey technical data;<sup>6</sup> (Claimants' defects b. ii). Figure 1 shows a gap between the cladding and the concrete foundation. 25 mm above the bottom of the cladding the cladding is attached to the bottom plate. This would appear to be preventing moisture coming down from above.

[56] When asked whether the rebate in figure 1 was different in kind to the capillary gap cut by the builder some experts said that the sheets were hard against the concrete even though there was a rebate. Dr Butt accepted that there was a capillary gap which would do the job. Mr Thurlow agreed that it formed a capillary gap but perhaps on ten occasions the cladding was still against the concrete slab. An overhang would be more reliable but it would still be variable depending on how it was fixed to the foundation. He agreed both capillary gaps would work depending on the footings. It was finally agreed by the experts that there was an insufficient gap in some places.

[57] The claimants further alleged that wind driven rain would go up behind the cladding. The expert evidence was that it would not as it would need an opening at the top above to allow rain to drive up. There would be more moisture from insufficient clearance. Mr Thurlow, the repairer, gave evidence that moisture would be drawn up through the cladding to the bottom

---

<sup>6</sup> Agreed Bundle of Documents, 617 figure 1.

plate where it would be saturated as well as moisture from inadequate ground clearances and from above.

[58] Dr Butt noted that as Mr Thurlow said it was damaged all round the perimeter the ten or so contact points would be irrelevant and were not causative of damage. Other methods of water ingress would be more likely. The assessment by Beagle of the ply indicates that moisture was wicking up and this is more consistent with water damage all round the house.

[59] Mr Hawinkels said that he had used wet-grade timber for the framing and that there would be shrinkage. The bottom plate is not tested so there may have been more shrinkage than in the frame. This may be the cause of the ten contact points. He did not accept that it would have shrunk 6 mm on each side. He had, therefore, provided a rebated edge of 6 mm as a capillary gap,<sup>7</sup> Mr Hawinkels said was that there were no manufacturer's requirements for the bottom of the board so he came up with the rebate solution. There are always complications with the concrete so it is necessary to have a capillary gap. The solution improved the 25 mm gap.

[60] I accept the evidence that the rebate worked as a capillary gap so did not lead to ingress of water. Although there were up to ten places where the cladding touched the concrete slab the decay was uniform around the perimeter. Therefore the occasional touching is not likely to be the source of an even band of decay. It is more likely to be the ground clearances as discussed above. That being the case there is then no proof of negligence by the Council or builder in relation to the creation of the gap or damage as a result.

#### *Treatment of bottom edge*

[61] Mr and Mrs Hooft allege decay damage due to the treatment, or lack of treatment, to the bottom edge of the ply leading to wicking sufficient to require a complete recladding of the house. The negligent acts relied on

---

<sup>7</sup> Agreed Bundle of Documents 499 and 504.

were the lack of paint on the edges, a lack of preservative and the already discussed rebate. In particular they say that the builder was negligent for failing to paint the bottom edges and the Council was negligent in failing to notice the lack of paint and in not requiring an application for departure from the consented plans. Even if the rest of the house was not painted the Council should have required the area of the rebate to have been primed and painted.

[62] The manufacturer's documents for ply (page 6) urge painting but do not require it. As discussed elsewhere, although the plans specified painting, the painting requirement was removed from the building contract. The then owners however changed their minds and asked for the property to be painted after the battens had been affixed. The outside was painted to the bottom edge (but not behind).

[63] The claimants' repairer noted that as moisture accumulated behind the cladding at the bottom plate level the degradation of the cladding would have been inevitable regardless of whether the bottom edge had been painted. The painting would only have slowed the penetration of dampness, but it would not have prevented it.

[64] There is no evidence that the accepted practice was to paint a line round the bottom of unpainted ply exteriors or that paint was the only preservative technique. As the house was painted prior to the issuing of a code compliance certificate, the Council cannot be negligent in failing to notice a lack of paint before issuing the certificate.

[65] The face of the ply is painted. While the bottom and back of the ply is not painted there is no proof that the lack of paint has caused damage. The manufacturer's requirements were for a sealed edge, if paint was not used. Metalex was one of the approved sealants. Mr Hawinkels said that the bottom edge was treated with Metalex Clear as per the manufacturer's

plywood preparation instructions.<sup>8</sup> No other witness could say that they could show it was not applied. No tests had been made.

[66] The claimants argued that first, I should not accept the evidence that Metalex was applied. I should infer from the decay that the Metalex was not applied. I was invited to draw an inference that it was the lack of Metalex which was the cause of the decay. Second, if it was applied I should ignore this as the architect's specifications required painting. Priming and painting would have prevented ingress of water whereas Metalex only serves to preserve the timber. Lack of paint was observable upon inspection. The claimants also alleged that Mr Hawinkels had departed from the consented plans, the manufacturer's specifications and the proper standards of building practice in coating the edge with Metalex.

[67] Mr Thurlow accepted that Metalex has some sealing capacity but was not as good as paint as part of a paint system. He however agreed that if the ply was not painted then the manufacturer's requirements had been met. The other experts agreed.

[68] The Council submitted that there was no evidence that Metalex was unsuitable for the sealing of the bottom of the sheets. To the contrary the manufacturer's literature recommends it.

[69] As already stated I accept that Metalex was applied. Even if I did not there is insufficient evidence for me to conclude that any decay was the result of the lack of Metalex rather than any other cause, for instance, the failure of the ply treatment, or the 15 year life for uncoated ply or the lack of ground clearances referred to by the assessor.

[70] If I found, as I have, that Metalex Clear was applied to the rebated edge, then I was invited by the claimants to ignore the Metalex evidence on the basis that the architect required the building to be painted. I do not accept

---

<sup>8</sup> Agreed Bundle of Documents 613.



this submission. The application of Metalex was one way recommended by the manufacturer of treating the ply.

[71] There was no item of evidence to show that the decay was linked to the lack of applied preservative as opposed to the other causes. The ply was sealed in accordance with the manufacturer's specifications. If the ply was sealed and decayed despite the sealant, the builder who used the specified materials and the Council which approved them cannot be responsible.

[72] For completeness, I agree that whatever the cause of the decay the assessor's recommendation that the bottom 200 mm of the ply cladding to the entire perimeter of the dwelling be cut off and replaced was good advice. A reclad was not required to address this issue.

### **Quality of Painting**

[73] The claimants claimed that the plywood cladding was not painted behind the battens and the rear face of the decorative battens had not been primed allowing dampness to enter the plywood cladding and the structure. This was item (c). At the hearing the claimants widened the claim and alleged the builder was negligent for failing to paint the building during construction, the Council for negligently allowing this to occur and the Woodleys for breaching the agreement for sale and purchase by failing to ensure that painting occurred during construction.

[74] I accept that the specifications required the building to be painted and it was painted after the application of the battens. As a consequence, the cladding was not painted behind the battens. Mr Woodley said that it had originally been intended to paint the house but during construction Mrs Woodley had asked that it be not painted. He understood that this was still an accepted way of cladding the house. As the house neared completion the request was reversed. Mr Hawinkels confirmed that the painting was removed from his contract in 1997 and reinstated in 1998. Instead, all cut and on-site machined edges were treated with Metalex Clear as required by the manufacturer's instructions.

[75] Page 8 of the manufacturer's requirements discusses finishing and durability of the cladding. It states:

- i. Finishing and durability
- ii. Finishes provide choices of colour and texture, and protect the plywood from sun, rain, dust, dirt and surface wear. Plywood should not be left unpainted unless a weathered grey/black surface with variable mould growth is desired, and a lower durability (15 years) is acceptable. .... uncoated plywood has limited mould resistance and is difficult to clean

[76] The experts agreed that there was no requirement to paint the battens if the cladding is not painted. If it is, then the battens should be painted too. Unpainted ply was, and still is, acceptable; however, painting does provide increased weatherproofing. Failure to prime and paint the underside of the battens did not reduce the weathertightness of the dwelling. There is no evidence that damage has resulted from failure to paint either the cladding behind the battens or their undersides. There is also nothing to show that the ply would not have performed for the 15 years specified for unpainted ply.

[77] The claimants argued that there were requirements that the Council did not apply. However, the guides referred to were either not related to this product (rather than ply generically) or were not shown to be relevant to the Council's inspection regime. The experts on council procedures accepted that there was a lack of primer, but lack of paint had little material effect on the overall weathertightness of the dwelling. Mr Saul, the claimant's expert on council procedures, in cross examination, agreed that no one would expect the builder, at the time of painting, to remove the battens and cladding to paint the joints and behind the battens.

[78] I conclude that the actions by the builder and the Council were not negligent in this regard and in any event no related damage has been established.

## Battens

[79] Decorative battens were affixed to the outside of the ply at a distance of 200 mm between centres. If they covered a joint, it was a coincidence. Mr Thurlow attributed damage to both the lack of grooves (item l) and lack of paint behind the battens, (item c). As a result he said the ply was showing signs of degradation (rot and water staining) at the face of the veneer of the plywood cladding.

[80] It was not contested that the decorative battens fixed to the cladding did not have weather grooves. The claimant alleged that battens without grooves had corroded fixings that would have failed in a short space of time, produced rust stains on the painted exterior and ingress of water through the cladding behind the battens into the framing behind. The battens and cladding were damp. The claimants' witnesses were of the view that weather grooves on external battens were essential to allow water penetrating behind the battens to track down the grooves.

[81] The claimants referred to the manufacturer's recommended installation of grooves as did the BRANZ Good Timber Cladding Practice 1997 (at the time of construction recently published) and the CHH manufacturer's specification. The BRANZ Good Timber Cladding Practice provides, at 8.2 in relation to the installation of Sheet Plywood Cladding:

### 8.2.1 BRANZ recommends

For the installation of sheet plywood cladding:

*(n) For vertical joints in square edge sheets (other than at corners), use ex 75 x 25 mm H3 treated battens (photo 54) with weathergrooves of no less than 6 x6 mm on the back face (jointers or sealant may be used as an alternative but will require more regular maintenance).*

*(o) At external corners on square edge sheets, use battens (with weathergrooves) to form a corner box (photo 55) and (Figure 52).*

[82] I note that the sheets in this case were not square edged (they were shiplapped) and that the photos refer to battens used to cover joints in

square edged ply rather than for decoration at 200 mm intervals. Further, this does not relate to this cladding's preservative properties.

[83] The experts (item 3 of their report) found that the battens fixed to the cladding did not have weather grooves, the cladding was not painted behind the battens and the rear face of the battens was not primed. They agreed that there was no requirement to paint behind the battens if the cladding was installed without being painted but, if painted, the rear of the battens should be painted. They found raised moisture readings but no damage.

[84] The assessor had obtained a report from Mr Wakeling of Beagle Consultancy who said that the amount of moisture behind the battens would not differ if there had been grooves.<sup>9</sup>

[85] Mr Hawinkels, the builder, said he asked the suppliers, Placemakers, to provide band sawn battens, (the battens specified by the architect), with grooves on the back face. Placemakers advised that it could not be done on rough sawn battens. He thought that there would have been little difference in performance with band sawn faced ply and band sawn battens. He pointed out that the assessor's expert adviser in his first report had said that there would have been little difference if they were provided. In any event there was no damage.

[86] At most, the inference I could draw is that although the architect did not require it, Mr Hawinkels had a preference for using grooved battens. However, on learning that they were not available he accepted the un-grooved rough sawn battens. I don't accept that this establishes negligence on the part of Mr Hawinkels. Texture 2000 sheets were shiplapped so that the requirement for square edge sheets is irrelevant. It was also agreed that the decorative battens were not intended to, and did not, cover all the joints. Accordingly there is no weight in a submission that the BRANZ recommendations were not followed.

---

<sup>9</sup> Agreed Bundle of Documents 292.

[87] There were no grooves in the architectural plans, the battens were installed as drawn, and were either in accordance with the recommendations of the manufacturer or as amended by the registered architect. There was no evidence of damage leading to loss as a result of the lack of weather-grooves. The claim in this regard is therefore dismissed.

### **Corners**

[88] The claimants alleged negligence in installing the internal corners leading to water ingress and damage. This was not directly stated in the list of defects but was implied in (j). On each internal corner two battens were installed (see Assessor's photo NW7). The architect's plans 406-8A provided for one batten. The experts said that the construction as built was better than what was drawn.

[89] The claimants alleged negligence because there was no drainage gap provided by either a coved back or bevelled battens and there were no back flashings. It was claimed that as a result there was dampness, primarily in the north east facing at the family room where the joint was not sealed. At the hearing dampness was also alleged by the bathroom but no other corners were identified. The photos did not show any damage.

[90] Mr Thurlow said that there was dampness in the plywood cladding at some internal corners where no back flashing had been fitted and sealant was used to provide the weatherproofing. He came to his view on the source of the water by a process of elimination rather than a positive identification of the source. The battens were not fitted with a bevel. Water entered at the junction where the joint was not sealed. He said that there was water staining and slightly raised moisture levels of 18% in the boundary joists at the family room corner.

[91] The claimants referred to the need for galvanised steel flashings from joints at vertical corners, (BRANZ Good Timber Cladding Practice 8.2 (l) and figure 52) showing steel flashing and an optional corner mould. I was also referred to the Ecoply instructions for internal corners which provides for

choices; flashing behind an internal corner moulding with the EcoPLY abutted; flashed corner with no moulding or unflashed corner with corner board with the back corner chamfered to allow free drainage.

[92] The specifications do not require the installation of all three choices. The only relevant diagram is that for the third choice showing that a batten should have a bevelled edge. Omitting the other choices was not negligence. I was further urged to consider that best practice as indicated by BRANZ should have been followed rather than either the architect's plans or the manufacturer's specifications.

[93] The assessor had not noted this defect in his report and the experts agreed that there was no damage apart from some dampness at the north east of the family room. Mr Hawinkels said that he installed the internal corners as required by the architect's drawing, 406.8. It did not have a coved back as sawn battens were used and the architect provided for square edged battens in the corners. The builder followed the plans provided and, on this occasion, added a batten so that, as the experts agreed, built better than specified. I do not accept that a builder is required to consider the plans, the multiple choices in the manufacturer's specifications and BRANZ publications and decide which of them is correct. Each of these is written by experts to assist the builder, not to set an impossible test.

[94] Dr Butt, explained that the sheets at the corner do not meet so there is a gap behind the batten for the water to run down between the sheets. There would not be that much water going through. The Council also said that the dampness did not amount to damage and as there was no penetration, the tribunal may not have jurisdiction to consider this defect.

[95] I accept that there was some dampness between the ply and the batten by the family room but that there is no proven damage to the structure of the house from this detail. There was, as noted, no visible damage in the photograph of the bathroom corner. There is therefore no liability.

[96] On the external corners the battens lacked capillary grooves. This was a variation on claim (l).The claimant said that the only damage was at the north east corner by the family room and the column at the western side of the door to the family room, (photo 527 of internal corner from the Agreed Bundle of Documents). It is possible that this defect contributed to the damage to the columns to the deck off the lounge. Any damage was remedied during the reclad. Mr Thurlow did not detail any specific damage solely from this alleged defect.

[97] Mr Hawinkels said that the external corners were installed as required by the architect's drawings 406.8 and 406.11. The specifications at vol 1 p 97 also show that square section battens were specified. I accept that this element of the house was built as designed. There was, therefore no negligence on behalf of the builder or the Council. No damage has resulted from this alleged defect. There is no liability under this head.

### **Fixings**

[98] This matter related to item (d) in the claimants' list of defects in which it was alleged that it was negligent to affix the ply cladding with jolt head nails. It was accepted by all at the hearing that jolt head nails had not been used on the ply so that there was no negligence on this issue. The claimants consequently widened the claim to say that the builder was negligent in using jolt head nails on the battens rather than stainless steel nails and for failing to punch them below the surface. The batten fixings have corroded. It was claimed that the damage was the degradation and staining of the plywood cladding.

[99] The claimants relied on the manufacturer's advice not to use panel pins or jolt head nails on the ply which had been treated to H 3.1. However the manufacturer does not specify what fixings should be used on decorative battens which were treated differently at H3.2, CCA treated requiring different fixings.

[100] The claimants also said that the hot dipped galvanised jolt head nails used were not punched below the surface thus exposing the head of the nail contrary to the manufacturer's specifications. The claimants' repairer thought that the nailing was not in accordance with proper building practice and was easily observable during inspections. He referred to the Carter Holt Harvey Ecoply Specification p 7 which excludes the use of jolt head nails on LOSP treated plywood. This however related to the ply and not the battens. He also relied on NZS 3604:1999 Section 4 Durability table concerning the use of nails with CCA preservative however this document was published after the house was built and therefore cannot relate back to the construction time.

[101] The other experts did not agree that these requirements related to the battens and in any event they said the nailing of the battens had not caused any leaks. The claimants submitted that the future damage was the failure of the nails and the detachment of the cladding.

[102] Mr Hawinkels said that he used hot dipped galvanised nails in the ply following the manufacturer's instructions. He used jolt head nails in the battens. He thought that it was only a cosmetic problem and should have been dealt with during the 2005 repainting. The 2004 Assessor's report did not show it as a weathertightness problem. The assessor in the second report states (5.4.4.1; 6.4.4.1 etc):

This dwelling is approximately 700 m away from the Porirua Lagoon, this would normally put it outside the sea spray area. It is my opinion that this dwelling is subjected to sea spray blown in by the strong north-westerly winds. This would be accentuated by its open and exposed position. I believe it would have been prudent to use stainless steel fixings in the fixing of the cladding on this dwelling rather than the galvanised ones used.... It is my view that the nails [in the battens] are rusting from the moisture in the battens and ply more than from the effects of the corrosive external atmosphere.

[103] The experts agreed that there had been staining on the battens and ply from rusting nails. There was also black staining around nail holes where corrosion affected ply and timber framing. The experts thought that the rust



may in part be from sea spray. The corrosion of the nails may also be a consequence of moisture in the plywood.

[104] I conclude that although the fixings produced unsightly marks this is to be expected in a marine environment. Dealing with such corrosion is a matter for maintenance. There was no damage to the battens causing leaks and accordingly there is no liability.

### **Joinery**

[105] There were a number of defects alleged in relation to the installation of the joinery. I will consider each separately.

#### *Family room door*

[106] This was not specifically alleged in the claimants' list of defects but at the hearing the claimants said that the side of the door to the family deck lacked a weatherproof seal at the window sill/door jamb junction. The door leaked at the jamb and water ran down to damage the ceiling in the bedroom below. It was noted that the flashing could not extend further as it would interfere with the door. It was conceded by the claimant that it was sheltered by the eaves.

[107] Mr Thurlow said that a weatherproof seal had not been made at the window sill/door jamb junction (photo 509 of Agreed Bundle of Documents). There was no stop end on the head flashing (not unusual at the time) but also no sealant as an alternative. The flashing butted into the ply and batten. The ply went behind the window head and the flashing comes over the top of it. It was probably sealed but when he looked at it there was inadequate sealant and it was damaged. There was dampness entering at the jambs between the door and the window and flowing through the structure to damage the ceiling below in bedroom 4. This would not have happened if the sealant had been adequate. He found timber decay to the studs and the bottom plate below and said that the sill had also been damaged. At the hearing he said the damage

was also as a result of the finishing of the deck membrane at the door level. This defect was, he thought, an example of the deck membrane issues.

[108] The experts' conference agreed that the door was leaking at the head and jamb junction and water was running down to the base of the deck into the room below.

[109] Mr Hawinkels said that he would have expected any water to run down the cover flashing to the bottom if the membrane continued up the wall as intended by the designer. If water entry was apparent early on he was not notified to conduct a repair.

[110] Alleging that this was a difficult junction that has been damaged does not amount to proof of negligence. I accept that any direct damage was limited and any water ingress was a membrane issue. There is no specific action that was alleged or proven on which I can find negligence.

#### *Joinery – window head flashings*

[111] This related to item (h) of the claimants' list of defects. The alleged defect leading to moisture ingress was that head flashings were installed over the building wrap and outer edges of the head flashing were not sealed. The head flashing does not extend beyond the window frames so water is not projected away from the jamb.<sup>10</sup>

[112] The head flashings were installed as required by the architect's drawing 406.10. Parties could only speculate as to the manufacturer's requirements. There was no requirement at the time to provide sealant in the flashings. All the windows the assessor had checked had a bead of sealant in the flashing.<sup>11</sup> The claimants therefore relied on the Code as the basis for establishing negligence.

---

<sup>10</sup> Assessor's report 5.1.6 b; 6.1.6. b Agreed Bundle of Documents 153.

<sup>11</sup> Assessor's report 5.1.6 a; 6.1.6. a. etc. See assessor's photo NW 24 and 25 Agreed Bundle of Documents 513 and 266-267.

The then relevant E2/AS1<sup>12</sup> provided in relation to exterior joinery:

3.0.2 Windows and doors shall have head flashings, and scribes or proprietary seals between facings and the building cladding.

[113] Mr Hawinkels said the flashings were built as designed. He put the sealant in the ends of the flashings where they butt into the battens. He could not see where the detail had failed. He did not recall applying the other sealant now present. The architect had provided a different detail to the usual Z flashing<sup>13</sup> Mr Skimming agreed that it would not be done like that today but at the time it was not an observable defect.

[114] There was conflicting evidence as to whether boxed in short head flashings as designed were common practice at the time. Mr Skimming thought that they were and would not excite attention. Many buildings at the time would have only had seal so this was a superior detail. Others would have flashing length limited by the structure, e.g. when recessed. With the battens the end effect was as if it was recessed. Mr Saul, though he had initially agreed, disagreed while giving evidence that it was a matter of good trade practice. He thought the Council officer should have rejected the flashing as built and required the extension of the flashings past or through the battens. The water would then go down the face of the battens. Dr Butt said that could possibly provide a point of water entry.

[115] On balance I prefer the evidence of the Council's expert and the builder that the flashings were standard for the time. Until the claimants' expert raised the issue neither the architect, builder or consenting and inspecting officials had ever indicated that this was not standard practice. Following standard practice, even if later proven inadequate, is not negligence. To take later information into account and show that in hindsight there would be a leak is not proof of negligence at the time of construction.

---

<sup>12</sup> Agreed Bundle of Documents 661.

<sup>13</sup> Agreed Bundle of Documents 37 Sheet 406-10 lower left quadrant.

*Sealant- top of windows*

[116] The claimants claimed that the gap between the head flashing and the plywood was sealed on a number of windows inhibiting moisture drainage from above. Water ran down the back of the jambs and contributed to damage from other causes. This was not an item in their list of defects. The evidence relied on was in the assessor's report. However, he provided no information as to when the sealant was applied and he did not find any damage.

[117] The claimants also relied on the experts' report for proof of damage requiring the removal of the windows, replacement of the damaged joinery and framing of walls and windows as well as the cladding. However the report from the expert's conference in the damage column only notes that it was a contributing factor to damage from other causes as it stops water draining out. In final submissions the claimants modified the allegation and argued that the system relied on sealant above the horizontal batten which sat above the head flashing, the architect provided instructions for sealant, sealant was absent and the flashings therefore failed. They relied on the experts' agreement for proof that the sealant was missing but the experts commented only on the lack of seal to joinery jambs.

[118] Dr Butt said that the assessor's photo relied on<sup>14</sup> shows signs of sealant where the architect required it. The builder would have put on a bead of sealant and then put on the batten, squashing the sealant. There was obviously water above the sealant but no link between that moisture and the damage to the lintel. Others thought that it showed dampness in the ply.

[119] The Council's expert evidence was that the Carter Holt Harvey literature for the cladding was silent on the proper installation of exterior joinery in ply cladding. Sealant had only been applied to some windows which raised issues as to whether it was applied by the builder or someone subsequently. The Council's expert also noted that the claimant referred to

---

<sup>14</sup> Assessor's Photo NW 19 in Agreed Bundle of Documents 264.

the assessor's photographs<sup>15</sup> which show the head flashing. The photographs show decay in the ply cladding which may be another indication of insufficient treatment. He noted that the damage only appeared to the ply cladding and not the framing behind.

[120] The experts agreed that the sealant prevented internal water from above escaping at the top of the window to run down the outside. Mr Thurlow did not think that there was a source of water above the windows. He considered the water entered at the head of the window and decayed the lower level windows. (Upper level windows were protected by the eaves.) The other view was that as there was only damage on the lower windows the water came from the upper windows, not the flashing. As it is not a cause of water ingress the Council submitted that there are jurisdictional reasons for not focussing on this defect.

[121] I accept that this sealant is not a cause of leaks however it may have contributed to the damage by not allowing moisture from other causes to escape. There is however no evidence that the gap at the head flashing was sealed in this way at construction. It is just as likely it has been done subsequently. Therefore there is no evidence of negligence of any of the respondents for this defect.

#### *Windows – Jambs*

[122] The claimants alleged leaks at the exterior joinery jambs on the south east, north and north east faces were due to a lack of sealant when the windows were face fixed into the plywood. They say that as a result there was damage at all elevations which required refitting of joinery and replacement of timber. In addition they say the jambs were ineffective and the batten was holding the water in the junction between the window and frame. The windows were not affected and were reused.

---

<sup>15</sup> Assessor's Photos NW21 to NW 24 in Agreed Bundle of Documents 265-266.

[123] Mr Thurlow referred to the dampness entering down the window jambs and the saturation of the wall framing below. In his view the defect was that the plywood cladding next to the window and the rear faces of the battens were not primed before the battens were fixed.

[124] The assessor considered that a small bead of sealant had been applied once the face fixed windows were installed. He agreed that there was a lack of a complete seal down the windows but he had not seen any evidence of resulting damage. He noted that the sealant was covered by a batten which makes it difficult to maintain the junctions if the sealant breaks down. Some damage could be from the mitres of the window as the damage is at the corner by the sill.<sup>16</sup> If the mitre joins open up over time this is primarily a maintenance issue and is unlikely to be the responsibility of the builder or the Council.

[125] All the experts agreed (item 13 of their report) that at the time there were no manufacturer's details and the only requirement was a sealant bead. Mr Hawinkels said that he had put a small bead of sealant with a sealant gun down each window before the batten went on. This could still be seen in the photographs. The missing sealant was possibly removed when the batten was taken off. Dr Butt noted that photos 58 and 59<sup>17</sup> showed a bead of sealant had been applied against the jamb to the windows.

[126] I accept on the evidence that the window jambs were constructed in accordance with the standards and practices of the time. The subsequent failure of the sealant, or the opening of the mitres, is insufficient to establish negligence on the part of the builder or the Council and is more of a maintenance issue.

#### *Windows – sills*

[127] The claimants alleged that there was no weatherproof seal at the window sill or door jamb junction and that this was a defect causing damage,

---

<sup>16</sup> Assessor's photos NE 14, 259 NW 10 537 at Agreed Bundle of Documents 250.

<sup>17</sup> Agreed Bundle of Documents 556 and 557.

(allegation (g)). The assessor noted (5.1.6.e) that the base sill of the windows were not sealed or fitted with sill flashings. Without flashings the mitred joints can break down and allow entry into the framing cavities and not be drained away.

[128] All the experts however accepted that, at the time of construction, sill flashings were not required. It was not known at that time that this was a weatherproof factor and there is no evidence to suggest the windows were not installed in accordance with the plans and the practices of the day. Consequently, the builder and Council were not negligent and are not liable.

### **Decks and damage to columns**

[129] The claimants alleged the damage to the columns and deck structure was the result of the top down fixing of the balustrade and a board fixed over the outside face of the membrane (items (e) and (f) in the claimants list of defects). As a result water got trapped between the board and the membrane and soaked into the cladding below causing decay. It was clarified at the hearing that there was no alleged defect in relation to the columns themselves and that Liquid Applied Membrane (LAM) issues did not cause damage.

[130] There had been alterations to this part of the dwelling after construction. The assessor noted at 5.3.5.1 of his report:

... the deck has a liquid applied membrane coating applied over a ply substrate. This does not look like to have been recoated since it was originally constructed. I did not find any evidence of moisture entry at this deck. Paving stones have been recently applied up against the most north western section of the deck. I would suggest that these be removed so that the pavers do not allow the transfusion of moisture into the membrane and substrate. The deck should be recoated as soon as possible.

### *Drip edge*

[131] The claimants alleged that there was no drip edge provided for the outer edge of the deck, (allegation (f)). They say the approved detail was defective and as a result dampness entered the junction and the structure and saturated the wall framing below. Mr Thurlow, said that the poor design was part of the cause of the leak. Installation was completed, in part, as per the design detail on sheet 406.6 with the waterproofing membrane turned down over the edge of the deck and batten fixed over the lower edge of the membrane. Plywood cladding was substituted for the Vila board detailed. There was no drip edge detailed to allow the shedding water away from the fascia timber fitted at the edge of the deck. The inner face of the batten and the exposed face of the plywood cladding were not primed to prevent water entry.

[132] In cross examination however Mr Thurlow accepted that there was a drip edge for the deck but not the batten. The experts' report should be amended accordingly. He thought the substitution of the Vila board was a problem as the ply could get wet and it could be damp at the top. It was not however linked to the damage.

[133] The experts noted (item 5 of their report) that there were no standard requirements at the time. In relation to the substitution of ply for Vila board the architect's plans were not followed. The plans however showed a drip edge on the board on the edge of the deck but not the batten and in this regard the work was carried out in accordance with the plans. While the experts accepted that water entry and damage necessitated the rebuilding of the decks and columns they did not agree the lack of drip edge to the batten caused the damage.

[134] Mr Hawinkels said that he built the decks as required by the architect's drawings, 406.5, 406.6, 406.7 and 406.8. The subsequent tiling was not part of his contract. The balcony detail in the plans provided for a 10



mm drip on the Vila board on the edge of the balcony. There was no change in the weatherproofing as a result of the substitution of the ply.

[135] The Council agreed that there was no drip edge installed on the batten. The drawn detail shows no drip edge on the batten but a drip edge on the board on the edge of the deck. There was no evidence that a prudent council officer would have required a drip edge over and above what was consented. There was no evidence that an absence of a drip edge to the batten had caused damage.

[136] The claimants further alleged that the damage from the batten affixed to the deck edge was the result of the Council's negligence in failing to require proper detailing during construction. The Council was also negligent in failing to conduct sufficient inspections during construction or in not inspecting the construction of the decks.

[137] The Council responded that the deck was constructed in accordance with the consented design. As the registered architect was removed from the proceedings the claimants are estopped from claiming defects arising from the same design. If the edge was not constructed in accordance with the design then at the time of approval the Council could not have known that the builder would construct the detail differently, so there cannot be a consequence from this alleged error.

[138] The Council and the builder relied on the plans. It was built as designed with the exception of the substitution of the ply for the Vila board. The claimant did not think that the use of Vila board would have prevented the leak so it is not a material factor. I find that the deck edge was built as designed. The reliance on the architect's plan is not negligence by the Council and the builder.

#### *Membrane fixing*

[139] The claimants added an allegation that there were leaks caused by the membrane being installed behind the batten. Mr Hawinkels thought that

the batten was purely decorative when he followed the design. The batten was chamfered on top so that the water would run down the face of the batten. It was sealed against the LAM. He considered that there would be no weatherproofing difference if it was not installed.

[140] Both the builder and Council relied on the plans as drawn. Mr Skimming's expert evidence for the Council was that a council officer both when considering the consent and inspecting the site was entitled to believe that the detail would work. Neither had any reason to consider that the building as planned would not work. Mr Skimming said that the batten on the deck edge detail<sup>18</sup> was a trim for aesthetic purposes to cover the end of the mesh in the Traffiguard.

[141] The design issues have already been dealt with. It was not negligent to accept or build in accordance with the plan. Neither the Council nor the builder can be responsible for damage which may have occurred when they were not negligent.

#### *Top fixed balustrade*

[142] As a result of the way the membrane was fixed and the top down fixing of the balustrade the claimant alleged that the decks and walls below and the adjacent cladding and framing were damaged. As a result the decks, columns, walls and faces of the decks were rebuilt. This was not part of the original list of defects and although the claimants raised it during the hearing they did not pursue this topic in closing.

[143] Mr Hawinkels said that the balustrade was built exactly as required by the architect's drawings 406.5, 406.6, 406.7 and the balustrade manufacturer's instructions. The balustrades were not fixed by Mr Hawinkels, but by a specialist contractor who used a sealant to form a weathertight seal. Most of the experts accepted that top down fixing was appropriate for the time

---

<sup>18</sup> Shown on Agreed Bundle of Documents 32.

and that the construction in this regard was in accordance with good trade practice at the time.

[144] While the damage from the top fixed balustrades has required the rebuilding of the decks and columns with replacement walls round affected areas it has not been established that the damage was as a result of negligence by any of the parties included in this claim.

#### *Deck wall junction*

[145] The claimant alleged that there had been moisture penetration into the structure at the deck wall junction at each side of the two decks on the north west elevation allowing saturation of the wall framing. This was item (e) on the list of defects. The cause of this was the alleged inadequate installation of the external cladding and waterproofing membrane to the deck at the junction where the deck interfaced the wall structure.<sup>19</sup> It related to the turn-up of the LAM.

[146] None of the experts considered this was a defect that resulted in damage. Mr Hawinkels said that the waterproof membrane went up behind the cladding. It would have been done by the installer who was a specialised applicator. The only photograph is on p 508 but the membrane has been damaged. Mr Hawinkels could not remember how far up it went before it was damaged.

[147] There is accordingly no evidence from which I could conclude that this was a defect.

#### **Foundation wall**

[148] The foundation wall was made of polystyrene blocks filled with concrete and covered with a paint-on membrane. As discussed above, this

---

<sup>19</sup> Agreed Bundle of Documents 513.

defect was identified by the assessor in his first report in 2004 and confirmed in the 2007 report.

### *Drainage board*

[149] This relates to item (m) in the claimants' list of defects. The claimants alleged that the foundation wall defect was the drainage board affixed to the foundation wall with galvanised nails which penetrated the waterproof membrane allowing dampness and damage to the timber framing in the wardrobe in the lower bedroom, the wall and the carpet.

[150] The use of a foam layer to protect the membrane from sharp objects in the backfill is standard. The evidence was that it was affixed with nails as was the common practice. The experts on council matters confirmed this. They also said the matter was trivial. Mr Hawinkels said that there was no evidence that the drainage board had caused a problem; the evidence points to a failure in the coating rather than leaks through nail holes.

[151] A recent BRANZ guide<sup>20</sup> (an exemplar of good practice) approves of nails being used in this way. It illustrates the placement of the foam and the nails along the top. I am not persuaded that a recommended current practice can be seen, with the benefit of hindsight, as a defect at the time of construction.

### *Coating*

[152] This allegation was raised by the claimant during the hearing and was not an item on the list of alleged defects. Water has passed through the foundation wall. Resultant damage was water penetration along the south eastern and south-western elevations into the internal lining.

[153] The claimants alleged that the builder was negligent in using Mulseal on the wall or by failing to apply it properly and the Council was alleged to be

---

<sup>20</sup> *Building Basics (Weathertightness)* BRANZ guide published in July 2010 (Exhibit: Skimming 1).

negligent in allowing its use and not supervising the sealing of the wall. They say Mulseal was the wrong product for the situation as it would never be able to bridge gaps.

[154] Mr Thurlow was not willing to say that the coating was inadequate at installation. He was more concerned about gaps between the blocks. He referred to the 2000 and 2006 Mulseal guides<sup>21</sup> and the instructions for preparation. He neither knew what the requirements were at the time of construction nor whether the product was the same. He was not able to say why document 559 of the Agreed Bundle of Documents was inadequate compared with the recommendation in Ex Saul 2 p 5. He thought that the Mulseal application thickness on p 6 of Ex Saul 2 of 15 mil per coat was unachievable. He thought that document 560 of the Agreed Bundle of Documents was consistent with the drainage board pulling off the Mulseal rather than deteriorating Mulseal. He thought the wrong product was specified.

[155] The claimant's expert on council procedures, Mr Saul thought the membrane product, Mulseal, was not acceptable for use on polystyrene block. He thought it unlikely that any brand of liquid applied membrane product would be capable of bridging the gaps in the foundation wall. He produced a modern version of the Mulseal specifications which recommended two full coats. He considered that his views were supported by a recommendation that it may be reinforced by embedding a layer of bitumen saturated glass fibre in the first full coat. The application thickness should have been 15 mil (dry) application.

[156] The experts (Item 12 of their report) noted water leaking along south east and south western elevations and considered that there had been an application problem in terms of preparation before the application of the membrane. They considered the coating inadequate. Mr Hawinkels however said that he had personally applied four coatings of Mulseal with particular attention to joints. He was following the plans and specifications. Some joints were filled with foam before the coating was applied. (The experts identified some substance which may be the remnants of the foam.) He disagreed with

---

<sup>21</sup> Brief of Evidence Edward Saul dated 19 April 2011 Exhibit Saul 2.

later views that not enough sealant was used. When asked if he knew it was the wrong product to be used on polystyrene blocks he said that he was led by the manufacturer of the blocks to believe that it was the correct product.

[157] Mr Hawinkels agreed that the industry now knows that there is a problem with Mulseal Coatings and drainage boards. The coating appears to break down over time and when exposed after some years appears to be non-existent. This is not confined to polyblock but applies to concrete block as well. Mr Hawinkels became aware of the problem in 2003 when he saw a block wall which had been covered with Flintcoat fitted with a drainage board and back filled. If Mr Hawinkels had been told of the problem he would have known how to fix it.

[158] As an aside, although it is not evidence of the standard expected at the time of construction, the 2010 BRANZ Weathertightness document<sup>22</sup> shows an illustration remarkably similar to the protection provided to the Hooff's house as a recommended method of waterproofing.

[159] Mr Hawinkels followed the plans and specifications. He and the experts agreed that it has now been shown that the coating did not perform as expected. This was not known at the time and the manufacturer approved its use and application. In these circumstances I conclude that neither the builder nor the Council were negligent in relation to this issue.

### **Driveway**

[160] The claimants have sought damages for repairs to the driveway. The accounts show that the work done was to remove the old driveway and asphalt the drive and provide base course, curbing and a sump. There was no evidence that the former driveway was the cause of leaks or damage. The claim is declined.

---

<sup>22</sup> Building Basics: Weathertightness, BRANZ, July 2010 at 151.

## **Conclusions on Defects**

[161] In summary I have found that water entry has occurred and water damage has been caused by the lack of a kickout flashing near the front entrance, inadequate ground clearances, moisture running down from the family room door bypassing the membrane and damaging the ceiling below, some entry at the head flashings or sealant preventing egress of previously trapped water, failure of sealant or mitres at the jambs and lack of flashings at the sills. The deck and columns were damaged by water entry through the top fixed balustrade, the way in which the membrane was fixed or the decorative batten detail. There was water ingress through the foundation walls. In addition there is some dampness between the ply and the batten by the family room.

[162] Other allegations related to details where there was no water entry or the defects have either not caused or contributed to damage or I do not consider them to be issues that will result in likely future damage.

[163] As I have explained, each of the items where there are leaks and damage are not as the result of negligence by the parties to these proceedings. In some cases the claimants could not establish that these issues were a result of the original construction work. For instance, the Hoofts themselves have carried out landscaping, drainage work and also laid tiles which have altered the ground levels. Hindsight provided by later building standards is not proof of negligence before the standards were established. Lack of knowledge that materials would not perform as expected by manufacturers and professional experts such as architects cannot be negligence at the time the work was done.

## **DEVELOPERS**

[164] The claimants alleged that Mr & Mrs Woodley were negligent developers and in breach of contract relating to the warranties relating to building code compliance in the agreement for sale and purchase. Both claims were denied.

[165] The Woodleys instructed counsel at the commencement of the process but then chose to represent themselves. Mr Woodley provided an affidavit. Mr Woodley did not attend the complete hearing for health reasons but gave evidence by telephone conference by way of cross examination on his affidavit. Mrs Woodley took no part in the hearing process.

[166] In their response the Woodleys denied they were developers and outlined the construction history using an architect, consulting engineers and a builder. They also noted that the Council had consented to the construction, inspected progress and issued a code compliance certificate. They lived in the property for three years and sold due to reverses in fortunes and family issues.

### **WERE THE WOODLEYS DEVELOPERS?**

[167] The claimant alleged that the Woodleys were negligent residential property developers. The claimant referred to the principle in *Mount Albert Borough Council v Johnson*<sup>23</sup> and submitted that the Woodley's were therefore developers. The claimant also referred to *Body Corporate 188273 v Leuschke Group Architects Ltd.*<sup>24</sup>

[168] The Woodleys purchased the land, engaged an architect, engineer and builder, made site visits lived there for some years and sometime later sold the dwelling. I was invited to draw the inference from these facts that the Woodleys owed a duty of care as developer and were negligent in allowing deficiencies in construction. The Woodleys' evidence was that they did these things so that they would have a home.

[169] Although the Building Act 2004 was not in force when the construction occurred it is useful as a statement of what was understood about that time as the meaning of 'a residential property developer'. In s 7 the terms is defined:

---

<sup>23</sup> *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA).

<sup>24</sup> *Body Corporate 188273 v Leuschke Group Architects Ltd* (2007) 8 NZCPR 914 (HC) at [31]-[32].



**Residential property developer** means a person who, in trade, does any of the following things in relation to a household unit for the purpose of selling the household unit:

- (a) builds the household unit; or
- (b) arranges for the household unit to be built; or
- (c) acquires the household unit from a person who built it or arranged for it to be built

[170] In *Body Corporate 188273 v Leuschke*<sup>25</sup> Harrison J. said:

[31] The word ‘developer’ is not a term of art or a label of ready identification like a local authority, builder, architect or engineer, whose functions are well understood and settled within the hierarchy of involvement. It is a loose description, applied to the legal entity which by virtue of its ownership of the property and control of the consent, design, and control of the consent, design, construction, approval and marketing process qualifies for the imposition of liability in appropriate circumstances.

[32] The developer and I accept there can be more than one, is the party sitting at the centre of and directing the project, invariably for its own financial benefit. It is the entity which decides on and engages the builder and any professional advisors. It is responsible for the implementation and completion of the development process. It has the power to make all important decisions. Policy demands that the developer owes actionable duties to owners of the buildings it develops.

[171] The Woodleys had no long term plans for further developments or to build the house for sale and profit. In *Findlay v Auckland City Council*<sup>26</sup> Ellis J concluded that organising the building of a house in which to live does not make someone a developer. The Woodleys had even less involvement in the construction than Mr Findlay.

[172] In *Body Corporate 187820 v Auckland City Council*<sup>27</sup> Doogue AJ concluded, after an analysis of the New Zealand cases concerning the liability of developers, that there were two essential considerations that give rise to a non-delegable duty. They were the direct involvement or control in the building process, for instance by way of planning, supervising or directing the work. In

---

<sup>25</sup> At [31]–[32].

<sup>26</sup> *Findlay v Auckland City Council* HC Auckland, CIV-2009-404-6497, 16 September 2010.

<sup>27</sup> *Body Corporate 187820 v Auckland City Council* (2005) 6 NZCPR 536 (HC).

this regard he noted that if the role of the defendant was not to direct or control the quality of the building then it was difficult to see how his actions would result in foreseeable harm to the subsequent purchasers. The other element was the developer being in a business of constructing dwellings for other people for profit.

[173] There was no evidence that the house was built for the purposes of profiting from the process. There was no evidence that the Woodleys were in trade. There was no evidence that the Woodleys had any form of expertise or exercised any supervision. I therefore conclude that the Woodleys were not residential property developers and do not owe the claimants a duty of care.

## **BREACH OF WARRANTY IN THE CONTRACT**

[174] The claimants alleged a breach of contract by the Woodleys based on the agreement for sale and purchase. In that agreement dated 25 October 2001, the standard clause read:

### 7.0 Vendor's warranties and Undertakings

...7.2 The vendor warrants and undertakes that at the giving and taking of possession...

... (5) Where the vendor has done or caused to be done on the property any works for which a permit or building consent is required by law:

- (a) the required permit or consent is obtained; and
- (b) the works were completed in compliance with that permit or consent; and
- (c) where appropriate, a code compliance certificate was issued for those works; and
- (d) all obligations imposed under the Building Act 1991 were fully complied with

[175] The Woodleys accept they had caused or permitted work to be done on the property. The claimants alleged that even though there was a code compliance certificate the works were not in compliance with the building consent and that the building work did not comply with the Building Code. As a consequence it was alleged that the Woodleys were in breach of contract.

## **Strict liability**

[176] The claimants submit that if they establish that at the date of the settlement of the purchase there was any non-compliance with the Building Code there was a breach of warranty.

[177] The primary evidence for the breach of warranty at the time of sale was not direct evidence of the breach of the Code but the expert's acceptance of the need for remedial works amounting to a full reclad. It was argued that it is implicit in such acceptance that the original construction did not comply with E2 external moisture or B2 durability. The claimants submitted that, if the inference that the reclad was as a result of a failure to comply with E2 or B2 is valid, it establishes the breach of warranty. Therefore they are entitled to the cost of putting them in the position that they would have been in had the contract been performed.

[178] This submission relies on a series of inferences which must be examined.

[179] First, when asking the experts to accept that there was no cost differential in the tenders between a full reclad and the assessor's recommended partial reclad of the bottom 200 mm it was also clear that at the time of tendering the type of cladding intended was different to the ply cladding then on the house or, later, actually used in remediation. The acceptance of the experts was not, therefore, a matter of whether the existing cladding met the Building Code but rather that if a different cladding was used and there were no differences in the cost between partial and full recladding the sensible thing was to reclad.

[180] Second, the submission based on the cost of recladding dealt with consequences rather than cause. It was also the basis of a further submission that *any* non compliance with the Building Code at any time is a breach of the warranty justifying all repairs claimed for. I deal with that issue below.

[181] Third, the acceptance of the practicalities of recladding in the new style of cladding rather than a mix of old and new is not proof that the original construction did not comply with E2 external moisture or B2 durability. Accordingly, it is not the basis of an inference that there was a breach of warranty.

[182] It was submitted that there is strict liability under the warranty clause for any non complying defect. That being the case the Woodleys cannot say that they did not intend to breach the warranties nor had no knowledge of the breach. There is no defence. It is argued that the warranty is a guarantee of quality for 50 years (but for the limitation which prevents recovery after 6 or 10 years.) This is a more extreme argument than the original proposition that the vendors are liable for breaches of the Code at the time of sale. To succeed the claimants' submissions must show that this warranty applied in that sort of way.

[183] The following were cited in support of that proposition:-

- a) *Ford v Ryan* ;<sup>28</sup>
- b) *Yoon v Ahn*<sup>29</sup>;
- c) *Miller-Hard v Stewart* ;<sup>30</sup>
- d) *Widdowson v Bekx*; <sup>31</sup>and,
- e) *Wilson v Welch*. <sup>32</sup>

[184] *Ford v Ryan* also concerned an alleged breach of contract for the sale of a property in Whitby. Factual differences included the vendor taking part in the building or supervising parts, a clause in the contract providing for a builder's report, the vendors' failure to obtain a resource consent (later obtained retrospectively) and no code compliance certificate. The Council had listed in its inspection report matters which did not comply with the Building Code.

---

<sup>28</sup> *Ford v Ryan* HC Wellington, CIV-2005-485-845, 13 December 2007 at [47].

<sup>29</sup> *Yoon v Ahn* WHRS 02437, 20 September 2007.

<sup>30</sup> *Miller-Hard v Stewart* WHRS 00765, 26 April 2004.

<sup>31</sup> *Widdowson v Bekx* WHRS 0092, 15 September 2004.

<sup>32</sup> *Wilson v Welch* WHRS 04734, 28 March 2008.

[185] McKenzie J read the warranty paragraph as a whole in considering the meaning of the clause. At [21] McKenzie J said that the combined effect paragraphs (c) and (d) so far as that part of the works carried out by the vendors for which a building consent was required is concerned, is that:

(a) The lack of a code compliance certificate constitutes a breach of paragraph c; and

(b) A failure to comply with any part of the Building Code, which would prevent the issue of such a certificate, constitutes a breach of paragraph (d).

[186] I agree that the obligations imposed under the Building Acts are, as McKenzie J says, to obtain consent and complete the works in accordance with the consent. The way in which the Building Act recognises these obligations have been undertaken (and therefore compliance with the obligation) is to obtain a code compliance certificate.

[187] I was referred to decisions of adjudicators under the 2002 Act. I note that these are not binding on me, but persuasive. In many cases the factual background was different.

[188] *Yoon v Ahn* was a decision in which the adjudicator assumed the warranty applied without the benefit of evidence or argument from an absent vendor who was also the director of the development property that built the property.

[189] In *Miller-Hard v Stewart*, the adjudicator did not discuss the clause but found that the roofing and exterior cladding was not constructed in accordance with the building consent and did not comply with the standards set by the Building Code. He accepted, without discussion, the inference that a current breach of E2 – external moisture, E 3 - internal moistures and B1 Structure and B 2 durability was a breach of the contract clause.

[190] In *Widdowson v Bekx* a vendor who did much of the work and departed from the consented plans was found to be in breach of the clause.

[191] In *Wilson v Welch & Ors* the owner subcontracted to a labour only contractor and contracted directly with all sub-trades, leading to inadequacies.

[192] Since the hearing there have been two more decisions which have referred to similar clauses. In *Body Corporate 208191 v Holl*<sup>33</sup>, Woolford J was mainly concerned with the issue of tortious negligence on the part of the director of the developer company. Having found the director personally liable he then considered his liability as vendor as he had bought the property from the developer. The issues were whether the director personally did or caused or permitted the work to be done and that there was no requirement that the work had to be done while the vendors were owners. (In that case the builder/vendor had completed the unit before it was owned by the vendors.) In this matter the argument concerning the vendors' status is not relevant as the Woodley's were clearly the people who had the work done. Woolford J said at [76]:

[76] The warranty in clause 6.2(5) is a personal guarantee of the vendors that any works on the property caused or permitted to be done by them complied with the relevant permits, building consents and obligations under the Building Act. It does not bind the vendors on any actions outside of their control.

The owner vendor, having undertaken the work (as he was the director of the building company before the purchase) was liable. His wife who had done no building work was not.

[193] *Holl* seems consistent with *Ford*.

[194] In *Aldridge v Boe*<sup>34</sup> there were discussions as to whether the vendors, the Boes, had misrepresented the situation, were liable under the warranty or were head contractors. This was a house which had never

---

<sup>33</sup> *Body Corporate 208191 v Holl* HC Auckland, CIV-2006-404-5373, 16 December 2011.

<sup>34</sup> *Aldridge v Boe* HC Auckland, CIV-2010-404-7805, 10 January 2012.

received a code compliance certificate. In the contract that was being considered the similarly worded clause was 14.2 and third and fourth paragraphs were omitted. However, the judge acknowledged that the strict reading was not enough. Potter J said at [243]:

[243] the Tribunal continued however:

...to make a determination solely on the words of cl 14.2, would ignore the reality of the agreement's constitution and also the intentions of the parties to the agreement

[244] The Tribunal then looked at the evidence in order to inform its interpretation of cl 14.2 in the context of the agreement.

[195] The judge examined the principles of contractual interpretation and accepted the five principles in *Investors Compensation Scheme Ltd v West Bromwich Building Society*<sup>35</sup> and adopted by McGechan J in *Pyne Gould Guinness Ltd v Montgomery Watson (NZ) Ltd*<sup>36</sup>.

[196] The judge also considered the statutory provisions and definitions of *Building Code*, *building consent* and *code compliance certificate*. She concluded that;

...a building consent is issued only where the territorial authority is satisfied that the plans and specifications comply with the Building Code, so that building work completed in compliance with such permit or building consent would comply with the Building Code. A CCC is issued when and if the territorial authority confirms that the building work does comply with the building code.

[197] She went on to say:

[266] It follows from the above that a warranty that the building works were completed in compliance with the building consent includes a warranty that the works comply with the Building Code because the consent has been issued on that basis. The issue of a CCC is simply a confirmatory step and provides evidence by the territorial authority that the works do in fact comply with the Building Code.

---

<sup>35</sup> *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR, 896 at [912]-[913] and adopted by the Court of Appeal in *Boat Park Ltd v Hutchinson* [1999] 2 NZLR 74 (CA) at [81]-[82].

[198] At [268] she said:

...that the meaning given to cl 14.2 has to be informed by the intention of the parties in entering into the contract taking into account all the surrounding circumstances and the factual matrix. Accordingly the knowledge of the parties at the time they entered into the contract was relevant.

[199] In the present case claimants knew that a code compliance certificate had been issued as Mr Hooft had been to the council offices to view it. To take the agreement in context clause 7.2(5) means no more than, to paraphrase McKenzie J in *Ford* above, that the parties agreed that the vendors warranted that the house had been constructed in a way that would not have prevented the issuing of a code compliance certificate and that a certificate had been issued.

[200] In view of the variations in factual backgrounds and the availability of a High Court decision, I prefer to follow McKenzies' J judgment in *Ford* which is consistent with the most recent decisions. In each of the other cited cases the parties had failed the *Ford* test as the liable parties had either failed to obtain a code compliance certificate as a result of their own actions or had done something which would have prevented the issue of such a certificate.

[201] Accordingly, I find that the Woodleys, having fully contracted the whole of the work to a competent builder to construct the building in accordance with consented plans prepared by an architect, having obtained a code compliance certificate and having done nothing to fail to comply with any part of the Building Code which would prevent the issue of such a certificate, did not breach paragraph (d). They are not liable under the warranty. The claimants have not persuaded me that the clause is an absolute guarantee of quality for the life of the building (save for the limitation provisions) such that any leak from whatever cause renders them liable for the complete cost of repairs.

---

<sup>36</sup> *Pyne Gould Guinness Ltd v Montgomery Watson (NZ) Ltd* [2001] NZAR 789 (CA) at [29].



## THE COUNCIL

[202] It was alleged that the Council was negligent in carrying out its statutory functions causing loss. The claimants relied on *Invercargill City Council v Hamlin*,<sup>37</sup> *Sunset*<sup>38</sup> and *Byron*<sup>39</sup> as authority that the Council has a duty to take reasonable steps to ensure compliance with the statutory regime. In particular the Council's duty is to take reasonable care to ensure that the plans and specifications show a building that, if properly completed in accordance with those plans and specifications will comply with the Building Codes<sup>40</sup>. When plans were incomplete there was an increased onus was on the building inspector to ensure that the building as built complied with the plans and specifications. It was also argued that the less detail required at the consent stage the greater the onus to ensure compliance at the inspection stage.<sup>41</sup>

[203] The claimants alleged first, there is expert evidence that the plans and specifications were inadequate. Second, the Council has not been able to produce a full set of plans and specifications.

### *Inadequate specifications*

[204] The claimant argued that the Council had a duty to take reasonable care when issuing building consents to ensure that the plans and specifications show that if the building is properly completed in accordance with those plans and specifications it will comply with the Building Code. They submitted that in issuing the building consent there was an expectation that there would be further construction drawings. If there was such an expectation, this increased the onus on the inspector to ensure that the building was built in compliance with the plans and specifications.

---

<sup>37</sup> *Invercargill City Council v Hamlin*, [1996] 1 NZLR 513 (PC).

<sup>38</sup> *North Shore City Council v BC 188529 (Sunset Terraces)* [2010] NZSC 158.

<sup>39</sup> *Body Corporate No 189855 v North Shore City Council, (Byron)* HC Auckland CIV 2005-404-5561, 28 July 2008.

<sup>40</sup> *Byron* at [74].

<sup>41</sup> *Byron* at [97].

[205] However there was no evidence either of further drawings or who had the expectation. The architect did not undertake any work after the consent was obtained. No negligence was disclosed in relation to not receiving further drawings.

#### *Removal of architect*

[206] The Council argued that the effect of the removal of the architect is that it is no longer open to the claimant to allege that there were design issues, that acceptance of the plans and specifications by the builder in building and the Council in consenting or inspecting the dwelling could therefore not be negligence.

[207] Reliance was placed on the discussion on estoppel in *Body Corporate 344862 (Wellington) v E-Gas Ltd*<sup>42</sup> and s57 (2) of the Act which requires the tribunal to apply the principles of natural justice.

[208] The test in *E-Gas* was:

- a) Was the issue raised by the defendants' current pleading distinctly put in issue in the (interlocutory) application which was determined?
- b) If so, was the issue fundamental to the decision? and
- c) Did the judgment finally determine the issue raised in the defendants' pleading?

[209] In this case there was a final determination made when removing the architect as to whether the plans were sufficient to allow consent and to allow the building to be built in accordance with the Code. If the claimants wanted to challenge that decision they should have appealed the removal order rather than attempt to re-litigate the issue in the absence of the architect. Further, the removal of the architect has prevented other parties from making a claim for contribution against the architect if the plans were deficient.

---

<sup>42</sup> *Body Corporate 344862 (Wellington) v E-Gas Ltd* HC Wellington, CIV 2007-485-2168, 8 July 2010.

[210] The second test related to estoppel. If the parties had relied on the decision to their detriment then the estoppel applies. In this matter parties have proceeded on the basis that the architect was properly removed as the plans were adequate for consent and building purposes.

[211] The adequacy of the plans for consent purposes was dealt with by another adjudicator in Procedural Order 3. There was expert evidence as to the adequacy of the plans. The evidence proffered at this hearing was not given at the earlier hearing. There was no appeal. The matter is now decided and the claimants are estopped from raising the quality of the plans for consent purposes.

#### *Lack of Council records*

[212] The claimants did not comment on inadequacies in the Council records in the initial stages of the claim. Neither Mr Hooft nor the assessor who looked at the records in 2002 remarked on gaps in the Council file. In more recent times the records have become incomplete. There is no evidence as to when part of the file went missing.

[213] The assessor's original report reproduces parts of the Council file including the building consent, copies of the consented drawings<sup>43</sup>, and the specifications attached to the building consent. He noted in the addendum report 4.1.6.1 that on his original visit to the Council he had obtained copies of all the plans they had on the building file but, on revisiting, he could not find either the scanned or the physical building plans on the file.

[214] The claimants said that as the Council is not now able to supply a full set of plans and specifications conclusions can be drawn that the details and specifications were inadequate for a consent to be issued or for the Council to conclude that the building would comply with the Building Code.

---

<sup>43</sup> Assessor's report in Agreed Bundle of Documents 406 – 4A and 6A.

[215] I decline to draw such an inference. At the hearing there was no controversy as to the plans and specifications used. That information has been in the claimants' hands since 2004. Copies of the plans and specifications were available at the hearing. There was nothing to indicate that the plans and specifications available were at variance with the consented plans. There is nothing to show the claimant has been disadvantaged in having to use the plans available as the basis of their submissions. There is no connection between the loss of the plans and the leaks.

### *Issuing the consent*

[216] Despite the earlier Tribunal decision that the plans were adequate for consent purposes the claimant alleged that there were further requirements. They say that the Council unreasonably abdicated its role in this case and relied on the skills of the architect and the builder. They also alleged that there was no evidence from the Council as to a weathertightness assessment of the plans and specifications. They referred to *McLaren Maycroft & Co v Fletcher Development Co Ltd*<sup>44</sup> as authority for the proposition that even if the Council demonstrates that it complied with the industry standard it is still open for me to conclude that the standard was too low and the Council is therefore negligent.

[217] It submits that to consent to plans which contained defects in the balcony edge, the deck drip edge, the battens and the door to the family deck these features was negligent. I have already discussed these issues and concluded they were either not defects or there is no evidence of damage.

[218] Mr Skimming, an expert in council building procedures, gave evidence of the practice at the time. If, as in this case, an architect had designed the house, the Council would take the 'specific design' into account.

[219] The Council said the proper standard of behaviour is as accepted in *Sunset Terraces*<sup>45</sup> where Heath J at [394] ff said, when accepting that the

---

<sup>44</sup> *McLaren Maycroft & Co v Fletcher Development Co Ltd* [1973] 2 NZLR 100 (CA).

<sup>45</sup> *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479 (HC) at [394-5].

Council had a certain degree of reliance on the skills and competence of the builder and other trades to construct to Code requirements and manufacturer's specifications, that as a matter of law the Council must be satisfied on reasonable grounds that the provisions of the Code would be met if the building work was properly completed in accordance with the plans and specifications. The Council and designer were entitled to assume that a competent tradesperson would perform properly.

[220] In relation to the Council substituting its own views for those of an architect I accept the Council's argument that an architect's plans are a 'specific design' and are acceptable in the absence of major flaws. This, combined with the expectation that the tradespeople will carry out work competently, the view adopted by Heath J in *Sunset Terraces*, is enough to accept that the plans and specifications were sufficient to allow the house to be built in accordance with the Building Code.

[221] The claimants said that the producer statement from the structural engineer relating to the retaining wall would not have considered weathertight issues. In response to the Council's evidence that the Council would have relied on a producer statement from an engineer in respect of the retaining wall, a procedure that was common practice at the time, the claimants submitted that it is no defence if the practice was bad. There was, however, no evidence in support of the need for the engineers to make a weathertightness assessment. The claim against the engineers was withdrawn.

[222] There was no proven negligence in the consenting process. The Council acted reasonably in accepting the architect's drawings. There are no valid claims based on the quality of the consented plans.

### **Inspections and code compliance**

[223] There are now no records of council inspections on the Council file. The claimant submitted that the failure by the Council to call the Council inspectors as witnesses entitles a tribunal to draw adverse inferences, namely, that their evidence would not have helped the Council and that no inspections

took place. In the alternative I am invited to assume that any inspections carried out were negligent and failed to meet the standard in s 76 Building Act 1991. The claimants relied on *Jones v Dunkel*<sup>46</sup> as applied by Baragwanath J in *Dicks v Hobson Swan Construction Limited (In Liquidation)*.<sup>47</sup>

[224] I decline to draw such inferences. *Jones* requires an element of purposefulness which is absent here. Even if the Council had called the building inspectors or the staff directly involved it is unlikely, in the absence of the records, that they would be able to provide any more information as to the inspections or notes made at the time. If the claimant had thought this evidence was available they were entitled to summons those involved as witnesses. The documents available are sufficient to deal with any factual issues. There was no suggestion that the plans and specifications available to the Tribunal differed in any way from the original consented documents.

[225] Council procedure was the subject of extensive expert witness testimony. The experts on council procedure gave evidence of what would have been expected of the Porirua City Council at the time. It is unlikely that the records would have provided much more than completed checklists and field notes. Even if preserved, the records would not have obviated the need for the expert witnesses. No party was disadvantaged.

[226] The claimants submitted that as the Council now has no records there is no evidence of any inspections having been carried out and I should infer that the Council has failed to implement a proper inspection regime. The Council should not have issued a code compliance certificate as it had no grounds for being satisfied that the certified work complied with the Building Code.

[227] The Council agreed that the records were incomplete but submitted it was not purposefully refusing to bring forward evidence that is unhelpful. The evidence is just not available.

---

<sup>46</sup> *Jones v Dunkel* (1958 -1959) 101 CLR 298.

<sup>47</sup> *Dicks v Hobson Swan Construction Limited (In Liquidation)* (2006) 7 NZCPR 881 at [85].

[228] I am not prepared to infer from the loss of the file that there were no inspections or that the inspections were inadequate in number or thoroughness. A lack of evidence is not evidence of a lack of inspections. With respect, it is not possible to make inferences with no evidence. I do not find that the claimant has shown that there were an insufficient number of inspections. As the claimant's expert gave his evidence as to the inadequacies if the usual inspections had been conducted this does not disadvantage the claimants. I prefer to consider the evidence as to whether or not an inspector making an inspection should have seen the alleged defect

#### *Quality of inspections*

[229] The claimant alleged that the quality of the inspections was insufficient. The claimant alleged that the various defects should have been noted during a robust inspection.

[230] Before concluding whether the Council has any liability for the defects that have caused leaks it is appropriate to discuss the standards by which the Council's actions should be assessed. The Council accepted that it should be assessed against the standard of a reasonable competent council at the time. This standard includes carrying out an appropriate number of inspections which were appropriately thorough. Accordingly, if the experts agree that a defect would not be detected by a reasonably competent building inspector of the day, that is, the standard the Tribunal should apply.

[231] The Council referred to *Hartley v Balemi*<sup>48</sup> which required the Tribunal to decide the objective standard of care that the reasonable council, builder or tradesman should have taken at the time the work was done. In leaky buildings the claimant must show water penetration has caused the damage.

[232] The Council submitted that *McLaren Maycroft & Co*<sup>49</sup> relied upon by the claimant, is also authority for the proposition that negligence must be

---

<sup>48</sup> *Hartley v Balemi* HC Auckland, CIV-2006-404-2589, 29 March 2007 at [71]–[72].

<sup>49</sup> At [107]–[108].

established by the party asserting negligence, it cannot be inferred. The Council said that the standards which ought to apply are those in *Dicks v Hobson Swan Construction Ltd* and *Sunset Terraces*<sup>50</sup> where the High Court considered it needed evidence of actual inspections which were negligently undertaken or the need for additional inspections which ought to have been undertaken which would have confirmed the presence of the defects.

[233] In *Sunset Terraces* work was done so that there was no visible evidence available to the Council to determine whether work undertaken did, in fact, comply with the Code. When work was undertaken in the absence of the inspector he should obtain a producer statement to determine what had been done so it could be assessed for certification purposes. Heath J said:

[446] ...The Council's statutory obligation, when it came to certify compliance with the Code, was to be satisfied, on reasonable grounds, that the building work complied with Code requirements. The inspection, process, leading up to the certification, is designed to enable the Council to express that final conclusion and to incorporate it into the code compliance certificate required by the legislation.

[234] The headnote of *McLaren Maycroft* sets out the standards that should be applied:

The respondent had to prove either that the appellant had not conformed to the current practice of the engineering profession or independently of any such current practice that common sense dictated the use of certain methods which the appellant had not used.<sup>51</sup>

Notwithstanding proof that methods used comply with the current practice of the profession, the Court retains its freedom to hold that such general practice falls below the standard of care required by the law.<sup>52</sup>

[235] In applying these standards negligence generally needs to be established rather than inferred. As Heath J said in *Sunset* [446]:

---

<sup>50</sup> *Body Corporate 188529 v North Shore City Council* above n 45.

<sup>51</sup> At 102, 16; 108.



...The Council's statutory obligation, when it came to certify compliance with the Code, was to be satisfied, on reasonable grounds that the building work complied with Code requirements. The inspection process, leading up to that certification, is designed to enable the Council to express that final conclusion and to incorporate it into the code compliance certificate required by the legislation.

The claimants must show that the Council failed to meet that standard. They submit the evidence of the defects shows this.

### *Differences between experts*

[236] The claimant and the Council called witnesses to give evidence as to what would have been council practice at the time of construction. Those witnesses disagreed on some matters.

[237] Mr Saul, who was called by the claimants, was not involved in building inspections at the time of construction, having started his inspection career in 2000. He did not give evidence or know from his own experience about the changes which occurred prior to 2000. Prior to 2000 Mr Saul had experience of building with Ecoply. He gave evidence of what he would have done as a builder. This is not evidence of what a council inspector of the day would see. Venning J in *Byron Ave* par [77] and Duffy J in *Scandle v Far North District Council*<sup>53</sup> both indicate that it is not evidence of what the witness would have done which is important; it is evidence of what would have been the practice of a reasonably competent council officer.

[238] The Council's expert, Mr Skimming was an inspector at the time the house was built.

[239] As to those matters which are set out above, where I found that there were defects resulting in damage, I have already concluded that the Council was not negligent in failing to detect these defects during its inspection. In summary either the inspected work was carried out in accordance with what was then accepted to be good practice or the issues were ones that could not reasonably have been inspected by a council officer.

---

<sup>52</sup>At 108, l 4.

<sup>53</sup>*Scandle v Far North District Council* HC Whangarei, CIV 2008-488-203, 30 July 2010.

## THE BUILDER, DONALD HAWINKELS

[240] There is no real dispute that as the builder Mr Hawinkels owes the claimant a duty. The claimants' argument was that there were defects; therefore Mr Hawinkels was negligent. This strict liability approach ignores the other elements of the tort of negligence, in particular the need to show that the builder did the work negligently causing the leak and the subsequent damage.

[241] *Hartley v Balemi* requires that the standard is as at the time when the work was done. There was much discussion concerning what evidence should be relied upon as proof of achieving reasonable standards of construction or inspection. Varying standards were proffered in arguing that a party was negligent. All parties referred to then current manufacturer's instructions or the BRANZ good practice guide. In general, my starting point in considering the acceptable reasonable practice at the time of construction is to accept the contemporary specifications and recommendations. Accordingly, I have noted that information as tendered in evidence where relevant.

[242] Some of the documents provided post-date construction and therefore cannot be a replacement standard for that which applied at the time. The version of E2/AS1 in force at the time was the 1st edition effective October 1994-27 February 1998. For consent purposes, neither BRANZ House Building Guide, 1993 nor the BRANZ Good Timber Cladding Practice Guide 1997 was a referenced document.

[243] As to those matters which are set out above, where I found that there were defects resulting in damage, I have already concluded that the builder was not negligent in the construction methods used. In summary either the building work was carried out in accordance with what was then accepted to be good practice or the issues were ones that could not reasonably have been foreseen by a competent builder at the time of construction.

## CONCLUSION

[244] The claimants have failed to establish that any leaks which have resulted in damage are as a result of negligence on the part of any of the parties. In addition they have failed to establish that the Woodleys breached the warranties in the agreement for sale and purchase. The claim is therefore dismissed.

[245] Even if I were to have concluded that there was some liability on the part of any of the parties I would not have found them liable for the complete cost of the work carried out. On the evidence the claimants have not established that the dwelling needed to be reclad in different materials in order to remedy any defects causing damage. Due to the nature of the cladding targeted repairs, as recommended by the assessor, would have adequately addressed the issues with this house.

[246] The claimant however wished to reclad the house in superior materials. It was accordingly not practical for them to partially reclad the house in superior materials which differed from the ply used in construction. The recladder quoted a similar price for both a partial reclad and a full reclad in those superior materials. To justify the recladding of the building in superior materials the claimant persuaded the experts that if there was little difference between the costs of a full or partial repair given the chosen reclad materials they should support a full reclad.

[247] The inference that a full reclad was justified is rejected. The ply used could have been replaced with similar materials. As the claimants desire for an upgrade or better cladding overall is not a justification for claiming for full cladding when partial cladding would have been sufficient. In the event, the reclad was made in the same materials and some areas were not changed.

[248] The claimant not having been successful in the allegations considered so far, there is no need for me to consider the consequential matters.

**DATED** the 28th day of February 2012.

---

**Roger Pitchforth**

Tribunal Member