IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA17/2022
[2023] NZCA 288

BETWEEN	BRIAN JOSEPH LINEHAN SHANNON JAMES WALSH AND ROSS DOUGLAS BLAIR AS TRUSTEES OF THE ELIZA TRUST Appellants
AND	THAMES-COROMANDEL DISTRICT COUNCIL Respondent

Hearing:	11 and 12 October 2022
Court:	Cooper P, Collins and Katz JJ
Counsel:	T J Rainey and V A Whitfield for Appellants D J Neutze and G E Hughes for Respondent
Judgment:	12 July 2023 at 10:30 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellants must pay the respondent costs for a standard appeal on a band A basis and usual disbursements. We certify for two counsel.

REASONS OF THE COURT

(Given by Katz J)

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Introduction

[1] In March 2003 the trustees of a trust settled by Dr Brian Linehan purchased a property near Whitianga.[1] A house had been constructed on the property in 1997. Dr Linehan was aware at the time of purchase that the house suffered from weathertightness issues that would have to be addressed at some time in the future, although he did not understand the issues to be major.

[2] In 2010, the house suffered a significant water leak through the ceiling of the garage. Extensive remedial work was carried out during 2010 and 2011 pursuant to a building consent issued by the Thames-Coromandel District Council (the Council). Further issues started to become apparent around Christmas 2014. Dr Linehan's evidence was that around this time:

> … we noticed that the tiles on the upstairs deck began to lift and the grouting was detaching. We later learned that this was due to the membrane under the tiles absorbing water. When the tiles began to lift, it became apparent that the problem was more serious than we had thought.

[3] In 2015 water began leaking through a light fitting in the lounge from the upstairs deck. Further remedial work took place in 2016 pursuant to a separate building consent, also issued by the Council.

[4] The trustees commenced proceedings against ten defendants in the High Court in 2017. The trustees sought to recover the costs of further remediation, involving an extensive redesign and rebuild of the house. By the time of trial, however, the only remaining defendant was the Council. The trustees claimed that the Council had been negligent in issuing the building consents for, inspecting, and issuing code compliance certificates for both the 2010/2011 and 2016 remedial works.

[5] In the High Court, Hinton J found that the Council was only liable in relation to defects in the tiling of the balconies of the house and that this limited the scope of

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[1] The property was originally purchased by the Hilldon Trust. On 28 March 2013 the property was transferred from the trustees of the Hilldon Trust to the trustees of the Eliza Trust, a related trust of which Dr Linehan was trustee. The Council takes no issue with this transfer in terms of its liability. We therefore use the term "trustees" to refer to the trustees of the Hilldon Trust up to 28 March 2013, and the trustees of the Eliza Trust after that date.

remedial work for which the Council could be held liable.[2] In addition, the damages awarded to the Trust were reduced by 50 per cent because of a finding of contributory negligence on the part of the trustees.[3] The trustees appeal. They say that the Council's liability is considerably greater than that found by the Judge and, further, the Judge erred in finding that they were contributorily negligent.[4]

Factual background

[6] The house is a three-level, monolithically clad, plaster home with a flat roof. The second and third levels have large balconies, each of which serves as the roof of the level below. These design features have become commonly associated with weathertightness issues.

[7] The trustees obtained a pre-purchase building inspection report (the pre-purchase report). Although the pre-purchase report can no longer be located, Dr Linehan's evidence at trial was that it identified problems with water ingress into the walls of the house, particularly around the front stairs and the easterly wall. Dr Linehan decided to purchase the house despite the issues raised in the pre-purchase report, which he believed to be relatively minor in nature.

The 2010/2011 remedial works

[8] In 2010, the house suffered a significant water leak through the ceiling of the garage. The trustees claimed on the insurance policy for the property. An insurance assessor attended the property to assess the damage, together with an experienced builder, Bernard Barber.

[9] The leak was identified as being associated with systemic weathertightness defects affecting the property. These defects were not covered by the insurance policy. The trustees therefore decided to engage Mr Barber directly to undertake the necessary remedial work. After discussions with Mr Barber, Dr Linehan (on behalf of the trustees) decided to undertake a complete reclad of the building to current building

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2 *Linehan v Thames Coromandel District Council* [2021] NZHC 3234 [High Court judgment] at [101]–[102] and [131].
3 At [180]–[181].
4 A cross-appeal by the Council, of limited scope, was settled prior to the hearing.

standards, along with other remediation work. A letter from Dr Linehan to Mr Barber dated 23 June 2010 records the terms of Mr Barber's engagement.

[10] Sherri Simpson of Simpson Design Service was engaged to prepare plans and specifications for the reclad and other remediation work. Based on those plans, on 19 July 2010 Mr Barber (on behalf of the trustees) applied to the Council for a building consent to remove the existing plaster cladding and joinery and construct new sections of flat roof. The Council issued a building consent on 20 September 2010 for the following work: recladding, replacing the windows with double glazed windows, adding to the existing deck and removing "high risk" quarter-round features.

[11] Ms Simpson's approved design required the deck tiles to be placed on "deck jacks" (raised platforms above the deck membrane) rather than directly on the deck membrane. During the remediation work, however, Mr Barber offered Dr Linehan two options — the deck jack option, or directly attaching the tiles to the deck membrane. Dr Linehan's preference was for the latter option, so that the deck would not be higher than the internal floor level. Dr Linehan's evidence was that he understood deck jacks were "a recommendation, rather than a requirement, of the Council". The failure to follow the approved design, however, subsequently contributed to the development of further weathertightness issues.

[12] The Council inspected the building work authorised under the 2010 consent and issued a code compliance certificate on 19 December 2011. Some further remedial work was carried out in 2014, the extent of which is not clear.[5]

The 2016 remedial works

[13] In December 2015 there was a significant leak into the lounge during a heavy rainstorm. Mr Barber was again contacted. He identified the source of the leak as the upstairs deck.

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5 High Court judgment, above n 2, at [24].

[14] Mr Brunton (who in 2010/2011 had been the building inspector who inspected the initial remedial work on behalf of the Council) was engaged to investigate the issue and to provide some advice as to the necessary remedial work. Mr Brunton was engaged on two occasions: first, in 2014, resulting in a defects report prepared in March 2014, and second, in 2016, resulting in a report in February and a follow-up report in May.

[15] Mr Brunton did not identify the direct fixing of the tiles to the deck membrane as being the source of the problem. In his 2014 report he identified an issue with the grouting. He recommended removing all the balcony tiles, adhesive and membrane, and assessing the substrate before retiling. In his February 2016 report, Mr Brunton identified the causes of the failure as adhesive failure (possibly due to the use of an inappropriate adhesive) and poor workmanship.

[16] On 13 May 2016, the Council issued a building consent for the further remediation work. The application was for the balconies to be repaired on a like-for-like basis. The tiles were therefore again directly attached to the deck membrane.

[17] In his May 2016 report, by which time the removal of tiles, adhesive and membrane had been completed on one level of the house and partially completed on another, Mr Brunton advised that he "[stood] by the findings of [his] previous report" from February 2016 and further noted that the grouting and expansion joints were not suitable for their intended use and had failed.

[18] The building work was completed by about 4 August 2016, when the Council carried out a final building inspection. A code compliance certificate was issued on 6 September 2016.

[19] The tiles then failed for a third time, and this contributed to further water leakage into the house. On further review, a number of other alleged defects were identified.

Scope of remediation work required

[20] In order to assess the appropriate quantum of damages, the parties' experts prepared several scopes of remediation works. Three possible options were identified:

(a) *Targeted repairs scope* — this scope of works was prepared by Mr Paykel,[6] who gave expert evidence for the Council. The targeted repairs scope focused on repairing the defects to the balconies in isolation. Mr Paykel summarised that the works required to remediate the defects were: removal of the ground and upper level balcony membrane and tiled surface finishes; removal of the balcony balustrades; removal of the lower ground staircase covering and cladding; removal of the surrounding wall elevations, cladding, parapets and joinery units; replacement of the decayed timber framing; installation of new plywood, membrane, tiles and cladding; temporary removal and reinstatement of the balustrades; and adaptation of the existing joinery. We refer to this as the "original targeted repairs scope". Subsequently, Mr Paykel advised that the works identified above should also include parapet flashings and replacement of the balustrades. We refer to this as the "increased targeted repairs scope".

(b) *Concept Plan scope* — this scope of works was prepared by Mr Laurent,[7] who gave expert evidence for the trustees. This is the most extensive scope, involving a substantial redesign and rebuild of the property, resulting in a house with a significantly different visual appearance to the current dwelling. As set out in Mr Laurent's brief of evidence, this scope includes: complete remediation of the balconies and associated membranes; complete remediation of the balcony stair structure, new balcony balustrades; resolution of basement leaks; replacement of the high-risk roof with longrun profiled metal roofing;

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6 As noted in his brief of evidence, Mr Paykel is a registered building surveyor with over 25 years' experience in the building industry, including experience of council practices.

7 As noted in his brief of evidence, Mr Laurent is an architectural designer and has worked in this field since completing his qualifications in 2001. Prior to that, Mr Laurent worked as a residential and commercial builder.

a complete reclad on the external wall structures; and new double-glazed aluminium joinery.

(c) *Like-for-like repair scope* — this scope of works was prepared by Mr Probett,[8] who gave expert evidence for the trustees. This scope was not limited to the balcony defects. It involved a like-for-like replacement of various features of the property (where possible).

The High Court judgment

[21] The trustees claimed at trial that the Council was negligent in issuing building consents, inspecting, and issuing code compliance certificates in respect of both the 2010/2011 and 2016 remedial works. The trustees asserted that, as a consequence, the Council was liable in respect of a number of defects, including defects in the cladding, roofing, parapets and balconies. As for quantum, the trustees' position was that the Council is liable for the cost of remediating the property based on the Concept Plan scope of repairs. The trustees said that targeted repairs to address only those defects directly linked to the Council's negligence (on the Judge's analysis, the balcony defects) are not feasible.

[22] In the High Court, the Council accepted that:

(a) It was negligent in 2011 in issuing a code compliance certificate for the 2010/2011 works, as the deck tiling had been directly fixed to the deck membrane, contrary to the approved design, the building consent and the Building Code (the 2011 certification breach).[9]

(b) It was negligent in issuing the 2016 building consent, because the consent application was for direct-fixed tiling (the 2016 consenting breach).[10]

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8 As noted in his brief of evidence, Mr Probett is a forensic building specialist with 14 years' experience in forensic building pathology and 47 years' experience in the building industry.

9 High Court judgment, above n 2, at [5], [55] and [69].

10 At [5], [58] and [69].

(c) It should meet the costs of targeted repairs in respect of the 2016 consenting breach, reduced by at least 50 per cent to reflect contributory negligence by the trustees.[11]

The Council otherwise denied any breaches, or any further liability for damages.

[23] The Judge found that the only actionable breaches by the Council were the two breaches that the Council admitted (namely, the 2011 certification breach and the 2016 consenting breach).[12] The Council had not breached any duties in relation to the other alleged defects.[13]

[24] In relation to the 2011 certification breach, the Judge's view was that the appropriate measure of damages was the "wasted costs" incurred in 2016 when the trustees attempted to remediate the defective 2010/2011 tiling work by retiling on the same basis (fixing the tiles directly to the membrane). The Judge accepted that the 2016 remediation works were "a complete waste of time and money".[14] The quantum of the 2016 wasted costs was assessed at $197,528 (subject to the Judge's findings on contributory negligence).[15]

[25] As for the 2016 consenting breach, the Judge observed that the Council was liable for the cost of putting the trustees in the position they would have been in "but for" the Council's negligent consent to the 2016 works. In other words, the trustees should be put back in the position they were in at the point of making the application for consent in 2016. At that time, however, they owned a house that, on their case, was already suffering from the defects and breaches they now claimed.[16] The loss to the trustees flowing from the 2016 works was that they had wasted the costs involved, along with any proven consequential losses, including interest. However, the "wasted costs" had already been found to be recoverable as flowing from the 2011

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11 At [5], [58]–[59], [122] and [173].
12 At [69].
13 At [72], [73], [74], [80]–[81], [88], [94]–[95], [98] and [101]–[102].
14 At [106].
15 At [111].
16 At [127].

certification breach (and, obviously, could not be recovered twice). The Judge found that there was no evidence of other consequential losses beyond interest.[17]

[26] Put another way, immediately prior to the 2010/2011 remedial works being (wrongly) certified by the Council as compliant in 2011, the trustees owned a home which, through no fault of the Council, was defective in a number of respects. A key defect was the direct fixing of the balcony tiles, which was the result of a decision made by Dr Linehan and Mr Barber (with no input from the Council) to adopt a method of fixing the tiles which was contrary to the plans approved by the Council.[18] Then, in 2016, the Council issued a building consent for works on the balconies which provided for directly fixed tiles.[19] If the "wasted costs" of the 2016 remedial works were refunded to the trustees, then they would be put back in the position they were in before either breach had occurred.[20]

[27] It is apparent from the judgment that the Judge would have limited damages to the costs of the 2016 remedial works, save for one factor. At trial, the Council had argued for a different approach to the assessment of damages to that ultimately taken by the Judge. The Council denied liability for the 2016 wasted costs, but instead accepted responsibility for the reasonable costs of a targeted repair of the balcony defects, based on the targeted repairs scope prepared by Mr Paykel.[21] The Judge was concerned that, but for that concession by the Council, the trustees might have argued their case differently. As a result of the Council's concession, the Judge found the Council liable for not only the 2016 wasted costs, but also the costs of repairing the balcony defects. This liability was subject only to her finding on contributory negligence.[22]

[28] The Judge therefore went on to consider the reasonable costs of repairing the balcony defects, with reference to the competing scopes of works advanced by the parties. Ultimately, the Judge found the Council liable for the reasonable costs of repairing the balcony tiling, based on the increased targeted repairs scope proposed by

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17 At [127]–[128].
18 At [19]–[20].
19 At [29].
20 At [125]–[128].
21 At [57]–[58] and [129]–[130].
22 At [129]–[130].

Mr Paykel, with some adjustments as to cost.[23] The Judge assessed the cost of targeted repairs as being $598,610.[24] In addition, she awarded $15,000 as general damages for stress and anxiety.[25] The trustees' claim for stigma damages was rejected.[26] The Judge also rejected a claim for resource consent, removal and storage costs.[27]

[29] Finally, the Judge found that the trustees had been contributorily negligent and reduced the damages award by 50 per cent on this basis.[28]

Approach on appeal

[30] This appeal proceeds by way of rehearing.[29] The appellant is "entitled to judgment in accordance with the opinion of the appellate court, even where that opinion is an assessment of fact and degree and entails a value judgment".[30] As this Court noted in *Green v Green*, the onus is on the appellant to identify the alleged errors in the judgment under appeal and to persuade the court to reach a different conclusion. When deciding the appeal, the court will consider "any particular advantages enjoyed by the trial court". In the context of factual questions, particularly those involving assessments of credibility and reliability, the trial judge has the advantage of seeing and hearing the witnesses and is "able to evaluate the strength of the evidence as it progressively unfolds within the context of the trial as a whole".[31]

[31] We therefore note at the outset that the trial was a lengthy one. In reaching her factual conclusions, the Judge was required to assess a significant body of evidence, much of which was expert evidence. The Judge carefully summarised that evidence and found the Council's main expert witness, Mr Paykel, to be "technically competent, measured and very practical", observing that "his evidence as to remediation measures [was] well within his expertise".[32] The Judge preferred Mr Paykel's evidence to that of the trustees' experts on a number of issues. She did not rely solely on Mr Paykel's

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23 At [136], [142]–[143].
24 At [162].
25 At [170].
26 At [167].
27 At [168]–[169].
28 At [179]–[181].
29 Court of Appeal (Civil) Rules 2005, r 47.
30 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [16].
31 *Green v Green* [2016] NZCA 486, [2017] 2 NZLR 321 at [30]–[32].
32 High Court judgment, above n 2, at [42].

evidence, however. Mr Paykel's evidence relating to the alleged roofing, parapet and tanking defects was supported by Mr Turner (another expert witness for the Council)[33] and in relation to the balcony defects was supported by Mr Woolgar (also an expert witness for the Council),[34] who was the only expert witness who had viewed the house in February 2016, prior to the 2016 works.

[32] It is possible, of course, that the Judge erred in preferring Mr Paykel's evidence on some (or all) issues. We have accordingly reviewed his evidence (and that of all other expert witnesses) critically and carefully, while also having due regard to the advantage the Judge had of assessing the performance of each expert over the course of a lengthy trial.

Issues on appeal

[33] The trustees' grounds of appeal are that the High Court erred:

(a) in finding that the only defects for which the Council was liable were the defects in the construction of the balconies;

(b) in finding that the Council's concession on liability for the remedial work to the balconies (based on the targeted repairs scope proposed by Mr Paykel) limited the extent of the Council's liability;

(c) in finding that the defects for which the Council was liable could be repaired by targeted repair (as opposed to a full reclad);

(d) in finding that the Council's negligence in 2016 was not a substantial and material cause of any loss arising from the need to undertake remedial work to the property;

(e) in dismissing the trustees' claim for stigma damages;

(f) in finding that the trustees had been contributorily negligent; and

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33 As noted in his brief of evidence, Mr Turner is a building consultant who has worked in the construction industry for over 45 years, including extensive work in costing and overseeing repairs for dwellings damaged by excessive moisture ingress.

34 As noted in his brief of evidence, Mr Woolgar is a chartered building surveyor who has worked in the building industry in New Zealand and overseas for twenty years.

(g) if the trustees were contributorily negligent, in finding that it was appropriate to reduce damages by 50 per cent.

Issue one: Was the Judge correct to find that the only defects the Council was liable for were the defects in the construction of the balconies?

[34] The trustees submitted that the Judge erred in finding that the trustees had failed to prove that the Council had breached any duties in relation to various other alleged defects said to have occurred in 2010/2011. These included alleged defects in the cladding, parapets and saddle flashings, tanking, and roofing. Mr Rainey, counsel for the trustees on appeal,[35] acknowledged that this was "a harder aspect of the appeal" for the trustees, given the highly factual nature of the issues and the fact that "there is evidence that goes both ways". Nevertheless, he submitted, the Judge should have found the Council liable in respect of additional defects.

Did the Judge misunderstand the scope of the duty of care owed by the Council?

[35] As an overarching argument, Mr Rainey submitted that the Judge misunderstood the scope of the duty of care owed by the Council in the performance of its building control functions, and that her finding that the Council was only liable for the balcony defects was due in large part to this error. Specifically, Mr Rainey submitted that:

> The High Court was wrong to suggest that all building work did not need to comply with the building code. While it is correct that where building work has been undertaken to an existing building the Council cannot require parts of the building which are not being worked on to be upgraded to comply with the current building code, where any building work is being undertaken that building work must comply with the building code whether a consent is required or not.
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> (Footnotes omitted.)

[36] We accept the Council's submission, however, that the Judge's consideration of the relevant provisions of the Building Act 2004 and the Building Code[36] does not disclose any error.[37]

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35 We note that Mr Rainey was not trial counsel.
36 Building Regulations 1992, sch 1.
37 As set out at [61]–[68] of the High Court judgment, above n 2.

[37] The Judge found that there was "no question" that the Council owed a duty of care to the trustees when issuing building consents for, inspecting, and issuing code compliance certificates for the 2010/2011 and 2016 works.[38] The Judge also correctly observed that s 17 of the Building Act provides that all building work must comply with the Building Code "*to the extent required by this Act*, whether or not a building consent is required in respect of that building work".[39] In relation to alterations to existing buildings, the "extent required" is set out in s 112. Section 112(1)(b)(ii) provides that the building will "continue to comply at least to the same extent as it did then comply".[40] As the Judge observed, this is clearly a reference to the building as a whole.[41]

[38] Accordingly, where building work is undertaken to an existing building the elements of the existing building which are not the subject of the building work do not need to be upgraded except to the extent required by s 112(1)(a) (which relates to fire escapes and access for persons with disabilities). This is reflected in the Judge's conclusion that:[42]

> I am satisfied that s 112(1)(b)(ii) provides for the lawful issuance of building consents provided the new works are compliant or exempted from compliance and there is otherwise no reduction in the level of compliance. It also follows that a Council may issue a code compliance certificate where contemplated works are completed notwithstanding that other aspects of a building will not be brought fully up to Code.

[39] In our view the Judge did not misinterpret s 112, and consequently did not misunderstand the Council's obligations in relation to key defects in building work undertaken under the 2010 building consent. She expressly acknowledged that any new works must be compliant, unless exempted from compliance.

[40] Our view is further reinforced by the Judge's analysis of the evidence relating to each of the alleged defects and her analysis of the proper scope of repairs (both of which are addressed in further detail below). For example, when considering the

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38 At [61].

39 At [64], citing Building Act 2004, s 17 (emphasis added by Hinton J).

40 At [65], citing Building Act, s 112(1)(b)(ii) (emphasis omitted).

41 At [67]. See also *Wheeldon v Body Corporate 342525* [2015] NZHC 884, (2015) 16 NZCPR 829 at [160]–[161]; *Fitzgerald v IAG New Zealand Ltd* [2018] NZHC 3447 at [47]; and *Bates v Auckland Council* [2021] NZHC 2558 at [84].

42 High Court judgment, above n 2, at [67].

proper scope of repairs the Judge accepted that "to achieve the basic outcomes required … other costs may be incurred and recoverable"[43] and stated that:

> [139] The key question is whether the necessary repairs also reasonably necessitate other works. I use the term "reasonably necessitate" because I consider that nothing less is appropriate. I do not consider that the Council should be liable for the cost of other works to make the house fully compliant with the Building Code (bearing in mind the provisions of s 112 of the Act); or that may be "desirable", "prudent" or even extremely "advisable". If the breach can be remedied in isolation, then that is the full extent of the Council's obligations.

[41] Hence the Judge expressly recognised that if repairing the balcony defects reasonably necessitated other works (for example, to ensure that the balcony repairs complied with the Building Code) then the Council would be liable for the costs of those other works.

Alleged breach as to the ProtectoWrap on parapets

[42] When undertaking the 2010/2011 remedial works the plasterer had failed to install one of the two required layers of ProtectoWrap on some of the roof parapets. This was contrary to the conditions of the building consent. The trustees claimed that the Council had breached its duty of care by not discovering this issue during the inspection process.

[43] At an experts' conference in April 2020, Mr Flay[44] (an expert witness for the trustees) and Mr Paykel agreed that the Council had not breached any duty in relation to the parapet defects. Following the conference, however, Mr Probett (another expert engaged by the trustees) undertook further investigations that, in his view, confirmed that the saddle flashings and parapets had failed due to the lack of ProtectoWrap. On the basis of Mr Probett's investigations and photographs of the site, Mr Flay changed his earlier view. His final position was that the Council must (or should) have known of this defect.

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43 At [138].

44 As noted in his brief of evidence, Mr Flay is a building surveyor with over 39 years' experience in the building industry, including as a Council employee and contractor.

[44] Mr Flay's revised view was strongly disputed by Mr Paykel, whose opinion was that the Council had acted reasonably based on its observations during the staged construction. At the time of inspection, in Mr Paykel's view, those cladding works were "compliant, but 'on-going'". He stated that, based on his review of the Council file:

> I do not believe this was a defect that the Council could have reasonably identified and [the Council was] entitled to rely on the Producer Statement … from the installer that verified the cladding had been installed as per the manufacturer's literature.

[45] Having analysed the evidence, the Judge found that it had not been proven that the Council had been negligent in relation to this issue. The Judge stated:

> [80] Councils are not underwriters of defects regardless of whether they ought reasonably to have been discovered. Reasonable discoverability for inspection purposes should be a robust exercise. Given Mr Flay's earlier agreement with Mr Paykel that there had been no breach, their different interpretations of the further photos (both of which seemed to be available) and the other factors Mr Paykel notes, I am not satisfied that the Council was negligent in this regard.

[46] We find no error in the Judge's analysis.

Alleged breach as to roofing defects

[47] The Judge found this aspect of the trustees' claim to be "difficult to follow" and poorly pleaded. She summarised it as follows:[45]

> Essentially the Trustees say the falls on the roofs and the roofing membrane are non-compliant with the Building Code and that the Council is responsible for those defects because it should have required a new roof [as part of the 2010/2011 remedial works], which in turn would have removed the defects. It is not suggested that the Council could or should have taken any steps short of requiring a new roof.

[48] The Judge found that:

> [92] Prima facie the Council is not liable for these defects because, whatever the extent, the defects were present in the roofs before the 2011 works and were not made any worse by those works. The Council does not have a duty to see to it that an applicant for consent remedies pre-existing defects, as is clear from s 112(1)(b)(ii) of the [Building] Act.

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45 High Court judgment, above n 2, at [90].

> [93] Furthermore this was not a situation where the Council should have been on notice that more needed to be done. The Trustees had not sought consent for a new roof. To the contrary, the consented plans state the roof and roofing membrane were to be retained. …

[49] The Judge concluded that "the Council had no obligation to require the Trustees to build a new roof, and I would doubt it even had the right to do so".[46] The Council did not therefore fail to take reasonable care by "failing" to require the Trustees to construct new roofing.[47]

[50] In summary, the experts' views on this issue were as follows:

(a) Mr Probett's view was that the roof falls were inadequate (leading to ponding in some areas) and that this was apparent during an inspection he undertook in 2017.

(b) Mr Flay noted that the existence of ponding on the roof in 2017 did not prove that there was an issue with the roof falls at the time of the 2010/2011 remedial work.

(c) Mr Turner did not accept Mr Probett's evidence on the roof falls and challenged the methodology he had used to measure the falls. Further, in his view the evidence did not establish that the Council "should have been concerned and raised the requirement for remedial works increasing the fall" to the roof.

(d) At the experts' conference, Mr Paykel and Mr Turner were of the view that the roof should continue to be maintained in accordance with the manufacturer's instructions. Mr Probett's view was that the appropriate course was to re-fall the first-floor roof. All experts agreed that if repairs were required, "In isolation, targeted repairs would be acceptable."

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46 At [94].
47 At [95].

[51] Mr Barber, who was retained by the trustees to advise on remediation options in 2010, and who subsequently undertook the remediation work, does not appear to have identified any issue with the roof falls. Nor is there any evidence that the tiler engaged to undertake the 2010/2011 retiling had any concerns in relation to this issue.

[52] In our view the evidence does not establish to the required standard that the alleged roof defects existed prior to the 2010/2011 remedial works being undertaken. In any event, even if such defects did exist, there is no evidence that the Council was aware of any roof defects (or should have been so aware) when it issued the building consent or code compliance certificate for the 2010/2011 remedial works. The plans presented to the Council did not identify any issues or concerns with the roof falls that needed to be addressed. On the contrary, they stated that the existing roof and roof membranes were to be retained. Mr Flay acknowledged that there was nothing on the Council file which suggested there was a problem with the falls on the roof. It follows that the Judge was correct to find that the Council did not breach its duty of care by failing to require the trustees to construct new roofing to correct the alleged roof fall defects.

Alleged breach as to tanking defects

[53] As we understand it, "tanking" is a term used for creating a seal or membrane to protect walls against water penetration. As part of the building work carried out under the 2010 building consent, a new masonry retaining wall to the existing house was constructed. The new retaining wall joined onto an existing wall. The trustees claim that the junction between the new retaining wall and the house was not properly waterproofed and has been leaking.

[54] In the High Court, the trustees alleged that when the new retaining wall was installed a pre-existing membrane must have been cut through in order to join the walls together, and that the return wall should not have been connected as that resulted in moisture migrating into the house.[48] The trustees argued that this defect in the tanking should have been identified by the Council when it inspected the works.

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[48] At [84].

[55] The Judge recorded that, by the end of trial, the trustees' position on the tanking issue was "a little unclear," and that this defect did not seem to have been specifically addressed in counsel's closing submissions.[49] She noted that the retaining wall was not part of the building consent, and that no code compliance certificate had been issued in relation to it. While acknowledging that "councils may still have liability in circumstances where they are aware of unsatisfactory workmanship or even where they should be so aware", the Judge was not persuaded that the evidence established any breach of duty in relation to the alleged tanking defect.[50]

[56] There is only one photograph showing the construction of the relevant wall. It shows the footings only, however, and does not show the membrane having been cut through, as alleged by the trustees. Mr Flay appeared to accept this when cross-examined on the issue at trial. Mr Probett, however, inferred that the relevant membrane must have been cut through from a moisture reading he took inside the house. Mr Paykel and Mr Turner considered there was insufficient evidence to support the inference drawn by Mr Probett, with Mr Turner noting that there were other possible causes for the relevant moisture reading.

[57] In our view the evidence falls short of establishing that the existing membrane had been cut through in order to join the walls together, let alone that the Council was aware (or should have been aware) that this had occurred. The Judge was therefore correct to find that this aspect of the claim had not been proved.

Alleged breach as to cladding defects

[58] The trustees did not address this issue in any detail in their oral submissions. In their written submissions it was addressed only briefly, as follows:

> The High Court concluded that the only issues for which the Council had liability were related to the tiling of the balconies. It is important to note that the agreed position of the experts included party exposure for the Council for defects in the cladding created during the 2010/11 works. In particular: defect 12-10, defect [13-10] and defect 5-16.
>
> (Footnotes omitted.)

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49 At [84].
50 At [86]–[88].

[59] The relevant finding by the Judge is that:

> [73] With respect to the cladding, the experts have agreed that the Council has no responsibility resulting from the key alleged defect, incorrect cladding thickness. As stated, the Trustees' final position in relation to a negligence allegation in this respect is unclear but, to the extent they maintain that allegation, I find it not to have been established.

[60] Mr Neutze noted that defect 5-16 does not relate to the 2010/2011 works, but to the 2016 works. Defect 12-10 is described in the experts' schedule as "[i]nadequate thresholds … to entry and balconies." The location of this defect is identified as the upper-level balconies on the east elevation. Mr Paykel agreed with Mr Flay that this defect exists, that the thresholds were not constructed in accordance with the building consent, and that this should have been identified during inspections. Mr Probett stated in the experts' schedule that the "[e]ntry door is well protected and does not require a substantially raised threshold".

[61] Defect 13-10 also relates to the balconies. The schedule describes this alleged defect as being that "[t]he required 35mm clearance between the cladding and the top of the tiles is not present" on the upper-two-level balconies on the east elevation. Mr Flay and Mr Paykel agreed that the detail was not constructed in accordance with the building consent, and that the Council should have identified this during inspections. Mr Probett repeated his comment that the entry door is well protected and does not require a substantially raised threshold.

[62] The evidence therefore establishes that defects 12-10 and 13-10 existed, and that the Council should have identified these defects during their inspections. However, there is no evidence that the Council's failure to identify these defects has given rise to any loss. Further, these defects would be remediated under the targeted repairs scope adopted by the Judge.

Conclusion

[63] In conclusion, the Judge was correct to find that the trustees had only proved their negligence claim against the Council in respect of the balcony defects.

Issue two: What was the scope and effect of the Council's concession on liability?

[64] The trustees submitted that the Judge erred in finding that the Council's concession on liability for the remedial work to the balconies (based on the targeted repairs scope proposed by Mr Paykel) limited the extent of the Council's liability.

[65] The trustees' submissions on this issue were somewhat difficult to follow. In essence, Mr Rainey sought confirmation that if what is needed to properly repair the house is greater than Mr Paykel's targeted repairs scope, the Council is liable for that, and such a finding will not be constrained in any way by the Council's concession.

[66] Mr Neutze confirmed that the Council's concession was based on Mr Paykel's acceptance that the balcony repairs needed to be done properly and did not limit the Court to solely considering the targeted repairs scope. In addition, although the Council had denied liability for the wasted costs, as the Judge observed,[51] its concession was not conditional on a finding that the Council had no liability for them.

[67] In our view, the Judge did not err in the manner alleged. Nothing turns on the issue however, as it is common ground on appeal that the concession does not limit the scope of the Council's liability.

Issue three: Is the targeted repairs scope the appropriate basis for assessing damages?

[68] The measure of the economic loss suffered when a homeowner discovers latent building defects is generally the cost of repairs, if it is reasonable to repair, or the depreciation in the market value of the property if it is not.[52] The assessment is a factual one and it is necessary to do fairness between the parties.[53]

[69] Here, the trustees pursued a cost of repairs approach to damages. At trial, they submitted that the defects for which the Council was liable (which on their case were

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51 At [129]–[130].

52 *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC) at 526; and see also *Johnson v Auckland Council* [2013] NZCA 662 at [110]–[111].

53 *Johnson v Auckland Council*, above n 52, at [110]–[114].

more extensive than the balcony defects) could not be repaired in isolation, and that the cost of repairs should be assessed with reference to Mr Laurent's Concept Plan scope.[54] Mr Probett supported the Concept Plan scope, which he described as "wise, reasonable and appropriate to address defects and mitigate further risk".

[70] Mr Paykel firmly rejected the proposition that damages should be assessed with referent to the Concept Plan scope. He expressed concern that the "the proposed [Concept Plan] repairs represent significant betterment works" and "a significant and in part unnecessary upgrade to the external envelope of the dwelling". In Mr Paykel's view, the Concept Plan scope included works "to a number of areas of the dwelling where there has been no evidence of failure". His evidence was that the more limited targeted repairs scope was more appropriate.

[71] In their reply briefs, Mr Laurent and Mr Probett strongly maintained the view that the Concept Plan scope was the best approach. Nevertheless, Mr Probett stated, he had been asked to prepare a further scope of works "as if the house was repaired on a 'like-for-like basis[']" although, in his view a like-for-like repair "cannot be strictly achieved because there are certain design features … that could never be implemented again" because they were non-compliant. Mr Probett's proposed like-for-like scope was heavily qualified, however, as evidenced by the following introductory note:

> This is a hypothetical like-for-like only. It is considered very unwise or even unacceptable to Council, designers, builders, roofers, cladding contractors etc. to let it remain at such a high risk matrix level. **Incodo [Mr Probett's firm] does not recommend the approach that follows at all**. To be very clear a like-for-like option should NOT be considered as an actual remediation approach
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> (Emphasis in original.)

[72] At trial, Mr Laurent and Mr Probett maintained the position that the appropriate basis on which to assess repair costs was the Concept Plan scope.[55] Indeed, the Judge recorded that Mr Laurent was adamant that anything less than the full Concept Plan scope was not feasible or reasonable and that a like-for-like approach to repairing the

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54 High Court judgment, above n 2, at [50].

55 The Judge noted that neither party advocated for a like-for-like approach at trial: at [133] and [136].

property would be "unworkable".[56] Given that neither party advocated for Mr Probett's like-for-like repair scope, the Judge's choice was effectively between the Concept Plan scope and the targeted repairs scope (unless, of course, she were simply to find that the trustees had failed to adequately prove their damages claim).

[73] The Judge rejected the Concept Plan scope:[57]

> … for the key reason that I am not persuaded the Trustees' experts have properly focussed on the test that has to be applied here. I am not persuaded that their expansive scope of works is reasonably necessary. It is focussed on delivering a house that is defect-free. That falls well outside the present exercise.

[74] The Judge found that the targeted repairs scope provided a more appropriate basis for assessing damages.[58] She acknowledged, however, that repairing the balcony defects could make it necessary to undertake other ancillary works:

> [138] … I accept at least that to achieve the basic outcomes required (in this case delivering balconies that comply), other costs may be incurred and recoverable. … But the Court would need to be satisfied that the additional costs are reasonably necessary.
>
> [139] The key question is whether the necessary repairs also reasonably necessitate other works. I use the term "reasonably necessitate" because I consider that nothing less is appropriate. I do not consider that the Council should be liable for the cost of other works to make the house fully compliant with the Building Code (bearing in mind the provisions of s 112 of the [Building] Act); or that may be "desirable", "prudent" or even extremely "advisable". If the breach can be remedied in isolation, then that is the full extent of the Council's obligations.
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> …
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> [144] In my view Mr Paykel had carefully considered how rectification should proceed and his approach best reflects the legal test I must apply.
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> [145] I accept Mr Paykel's evidence that the targeted repair works would be consented (or more relevantly, I have not been satisfied that they would not be consented) and in particular that the cladding could be joined and did not require complete replacement …

[75] On appeal, Mr Rainey accepted the Judge's finding that the Concept Plan scope does not provide an appropriate basis for the assessment of damages. He submitted,

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56 At [133] and [141].
57 At [142].
58 At [131], [143]–[144] and [148].

however, that this Court should remit the issue of damages to the High Court with a direction that damages be assessed based on Mr Probett's like-for-like repair scope.

[76] The Council opposed this aspect of the appeal on its merits, but Mr Neutze also submitted that this Court should decline to consider this aspect of the appeal on the ground that the trustees are now seeking to advance their damages claim on a basis that they disavowed at trial.

[77] We accept that submission. In this context it is relevant that:

(a) The trustees carried the burden of proving their damages claim at trial. They elected to do so based on the Concept Plan scope.

(b) Seemingly in response to criticism of the Concept Plan scope by Mr Paykel, Mr Probett set out the details of a possible like-for-like repair scope for the entire house as an appendix to his *reply* brief (served only a matter of weeks before trial, and more than three years after the proceeding had been filed). There was no suggestion, however, that the trustees intended to seriously advocate for such an approach to the assessment of damages at trial, and, as the Judge recorded, they did not do so.[59]

(c) If Mr Probett's like-for-like scope had been advanced at trial as the trustees' primary or preferred approach to assessing the costs of repair, this could well have impacted on the Council's approach to both evidence (including cross-examination of the trustees' experts) and submissions.

(d) Due to the way matters proceeded at trial, we do not have the benefit of any detailed assessment of Mr Probett's like-for-like repair scope by the Judge.[60]

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[59] At [133] and [136].
[60] At [133] and [136].

[78] For completeness, had it been necessary to determine the issue, we would have dismissed this aspect of the appeal in any event. Our key reasons for this view are as follows:

(a) Having presided over the trial, the Judge was well placed to assess the weight to be given to the evidence of the various expert witnesses, including Mr Paykel, Mr Laurent and Mr Probett.[61]

(b) The Judge's findings that the balcony repairs could be completed in isolation by a targeted repair, and that it would be possible to join the new cladding to the existing cladding,[62] were open to her on Mr Paykel's evidence, which included that:

> [T]he area where works will be required to rectify the defective balcony … is marginally larger than the works completed in 2016, which demonstrates repairs can be completed in isolation because the cladding has been constructed over a cavity. The Graphex system is still commercially available so integration between the old and new areas of cladding is achievable.

And that:

> The junction between the 2010 Graphex system and the repairs I proposed would be a repair using the same system, being Graphex. A comparable repair to the cladding was undertaken during the 2016 works.

(c) Both the targeted repairs scope and Mr Probett's like-for-like repair scope are hypothetical, given the trustees' evidence that they intend to rebuild the house in accordance with the Concept Plan scope (and have obtained a resource consent to proceed on that basis).

(d) In any event, the Judge's factual finding that it would be possible to obtain a building consent for the targeted repairs scope appears to be correct and open to her on the evidence presented, including:

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61 See generally *Green v Green*, above n 31, at [30]–[32].

62 High Court judgment, above n 2, at [145].

(i) Mr Paykel's unequivocal opinion that such a consent could be obtained, subject to appropriate detail being provided to the Council.

(ii) The fact that the Council granted building consents for targeted repairs to the balcony in both 2011 and 2016. While those works failed, the evidence is they failed because of repeated direct-fixing of tiles to the membrane, not because of the targeted nature of the repairs.

(e) On the other hand, there appears to be no evidence that Mr Probett's like-for-like scope would obtain a building consent. As noted above, Mr Probett qualified his like-for-like scope with a statement that it should "NOT be considered as an actual remediation approach" and that he considered such an approach to remediation to be "very unwise or even unacceptable to Council …". He also said, when being questioned about the alleged roofing defects, that:

> I cannot concede that the like-for-like option can, should and would fly and the fact that I really struggled with the concept of thinking that Council would allow it to go through and, "Same again please for the third time," with a lot of the same elements it's – I think the Council should have learned something and currently Councils tend to send drawings for high-risk matrix places to, they ask for an independent report …

(f) We do not accept Mr Rainey's submission that this is a case where the trustees have suffered a single and indivisible loss caused by multiple defendants who are each liable for the full costs of recladding and remediating the house. As the Judge found, the Council's negligence did not cause or contribute to the trustees' entire loss. The Council's negligence in relation to the balcony defects is a divisible cause of loss. Other parties (who were not ultimately pursued) are likely liable for other aspects of the trustees' loss.

[79] In conclusion, had it been necessary for us to determine the issue, we would have found that the Judge did not err in adopting the targeted repairs scope as the

appropriate approach to damages, particularly given her recognition that this extended to ancillary works that were reasonably necessary. Such an approach was both open, and appropriate, on the evidence.

Issue four: Was the Council's negligence in 2016 a substantial and material cause of the need to undertake further remedial work to the property?

[80] Mr Rainey submitted that the Judge erred in finding that:

> [127] The Council is liable for the cost of putting the Trustees in the position they would have been in "but for" the Council's negligent consent to the 2016 works. That would put them back in the position they were in at the point of making application in 2016, which was that they had a house already suffering from the defects and breaches now claimed. The loss to the Trustees flowing from the 2016 works was that they had wasted the costs involved, along with any proven consequential losses, including interest.

[81] Mr Rainey submitted that the Judge's reasoning was overly simplistic, and that the Court needed to consider the 2011 negligence and 2016 negligence in totality. He argued that it was the combined effect of both sets of acts and omissions that resulted in the need to carry out further remedial work to rectify the defects and accordingly the loss associated with those repairs. Mr Rainey accepted, however, in his oral submissions that if the Judge was correct in finding that damages are properly assessed on the basis of targeted balcony repairs, this issue becomes academic.

[82] Mr Neutze submitted that the Judge did not make the alleged error and, further, nothing turns on the issue in any event because, despite the Judge's own views on causation, she held the Council to its concession and went on to consider the appropriate scope of remedial work.

[83] For the reasons set out in the preceding section, we have concluded that the Judge was correct to find in favour of the targeted repairs approach to remediation. It is not therefore necessary for us to decide this issue. However, if it had been necessary to do so, it is our view that the trustees have failed to establish that the Judge erred in the manner alleged.

Issue five: Should the trustees have been awarded stigma damages?

[84] Damages for the stigma associated with failed building work can be recovered, in addition to the cost of repairing building defects.[63] The trustees sought stigma damages in relation to both the 2010/2011 works and the 2016 works.

[85] The Judge rejected the claim for stigma damages, for the following reasons:

> [165] Leaving to one side the question of whether trustees of a trust can ever be said to suffer stigmatic losses in a context like this, I am not persuaded that the Trustees have suffered material additional stigma from the Council's failings. The Trustees of the Hilldon Trust, the original Linehan purchaser, were prepared to foot the stigma of a building they knew to be leaky and that had the obvious characteristics of such a building. They lived with that stigma for eight years before taking action. That stigma is obviously significant even on their own valuers' evidence. I accept there would be some additional stigma from two lots of faulty repairs but consider it artificial and strained to try to apportion that against the considerable stigma that would be attached to this building anyway. Importantly here, the Council is arguably not liable for the fact the 2011 works were defective, all of that work having been completed prior to certification. At best it is only liable in small part for the 2011 defective works, being that which relates to the balcony tiling breach. The Trustees' list of defects requiring repair is considerably wider than the liability I have found on the part of the Council. I also note that while there is precedent for a stigma award for faulty original construction, no case has been cited where damages have been awarded for additional stigma resulting from repairs.
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> [166] For these higher-level reasons, I do not allow the claim. Also, while not questioning Mr Coakley's qualifications as an expert valuer, his stigma analysis is not sufficiently probative. He relies on material that strays from the usual hard data comparatives used by expert real estate valuers, including hearsay conversations with vendors and real estate agents. Ultimately there is no reliable data to support his percentage breakdown of the total stigma from which he says the house will suffer even after full repair, into the components of stigma from the original construction, and from each separate bracket of work. In all, I do not find his evidence or this claim persuasive.

[86] On appeal, Ms Whitfield (junior counsel for the trustees) submitted that the Judge was wrong to reject Mr Coakley's expert evidence on the issue of stigma damages, and that stigma damages should have been awarded.

[87] Mr Coakley assessed stigma damages based on several different scenarios. Given the Judge's key factual findings (which we have upheld), Mr Coakley's

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[63] See generally Bill Atkin "Remedies" in Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) 1313 at 1322–1323.

"Scenario 1" is the most relevant. That scenario is "based on the dwelling having issues as outlined in the Defects Schedule … [and] is further based on the dwelling having had repairs as proposed in the brief of evidence of Mr Paykel" (that is, the original targeted repairs scope). Mr Coakley assessed stigma arising from the failed 2010/2011 works alone, the failed 2016 works alone, and the combination of the failed works in 2010/2011 and 2016. In respect of the combination of the failed works, Mr Coakley identified the key issue as:

> With the failure of the 2011 remedial works and the 2016 remedial works and with the house being subject to the repairs proposed [in Mr Paykel's evidence] … what is the loss in value (if any) to the Property that arises as a result of the failure of both the 2011 remedial works and the 2016 remedial works?

[88] Mr Coakley first provided "a benchmark market value for the property as if there had never been any weathertightness issues". This "as if complete" valuation assumed that the repairs had been completed in accordance with the original targeted repairs scope, but otherwise ignored all previous weathertightness issues, associated repairs, and the stigma that may be associated with the previous issues. On this basis, Mr Coakley assessed the market value of the property as $2,460,000 including GST.

[89] Mr Coakley then assessed the market value taking into account "the stigma from previous weathertightness issues".[64] To complete this assessment, Mr Coakley "analysed sales ranging from dwellings that are still deemed to have weathertightness issues through to those that have been remediated and on-sold", comparing the sale price in each case "to what we would expect the properties to have sold for as if there were never any weathertightness issues". With reference to this comparative data, Mr Coakley assessed the market value of the dwelling "accounting for all stigma" from the previous weathertightness issues and the failed repairs in 2011 and 2016. He concluded that if the dwelling had "only had the one event [the original construction] that required the full reclad" stigma damages would be 10 per cent. However, the failed remediation attempts in 2011 and 2016 "will have a cumulative negative impact on the markets perception of the dwelling and its market value". Mr Coakley assessed

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[64] Mr Coakley elaborated that the overall assessment included "stigma from the original design and construction materials and associated weathertightness issues and stigma from the two subsequent failed repairs"; the assessment was then broken down to "identify the loss in value from each event".

the total discount to the market value "from all three events" at 20 per cent. He then stated that:

> We break this down into 10% for the initial failure of the original build because this will have the largest impact on market value, 8% for the second, 2011, failure and 2% for the third, 2016, failure.

[90] This resulted in a value of $246,000 being attributed to the combined weathertightness stigma from the 2010/2011 and 2016 failed repair attempts.

[91] We have several concerns regarding Mr Coakley's stigma valuation analysis, including that:

(a) When cross-examined, Mr Coakley acknowledged that there were two separate issues with the dwelling prior to the 2010 works:

(i) it had the *appearance* of a leaky building prior to the commencement of the 2010/2011 works (decreasing its value due to appearance stigma, regardless of whether it was actually leaky); and

(ii) the building was actually leaking prior to the commencement of the 2010/2011 works (this would decrease its value further, independently of any appearance stigma).

Mr Coakley's report, however, fails to make this distinction. It proceeds on the basis that the initial stigma associated with the property arises solely (or primarily) from "the original failure" of the building, and the two failed repair attempts. Appearance stigma, which is independent of any negligence by the Council, is not directly addressed.

(b) Mr Coakley's benchmark market valuation appears to assume that the house would have no defects following the completion of repairs in accordance with the targeted repairs scope. However, the trustees' case was (and is) that the dwelling has numerous defects other than those the Council has been held liable for. The benchmark valuation should

logically take these into account, rather than assuming that following the completion of the targeted repairs to the balconies the trustees would own a defect-free house.

(c) As the Judge pointed out, the Council is arguably not liable for the fact the 2010/2011 works were defective, all of that work having been completed prior to certification.[65]

(d) Mr Coakley's speciality is in rural valuations. He acknowledged that he had never valued stigma associated with a premium beachfront property.

(e) Mr Coakley's reliance on most of the comparator "leaky" properties referred to in his report was misplaced, as became clear during his cross-examination. The reasons for this included:

(i) Some of the properties were of a very different nature (for example, low-value suburban properties in Hamilton).

(ii) A number of the comparator properties had not been remediated at the time of sale, depressing their market value as purchasers would need to factor in remediation costs (whereas the trustees' property will have been remediated).

(iii) Mr Coakley relied heavily on anecdotal and hearsay evidence from unqualified third parties, including real estate agents, vendors and purchasers.

(iv) The *land* value of the trustees' beach front property (which is not impacted by stigma) makes up a significantly greater proportion of the overall market value of the property than is the case with many of the comparator properties.

(f) Mr Coakley has made no attempt to apportion the alleged stigma loss from the 2010/2011 and 2016 works across the various alleged defects

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65 High Court judgment, above n 2, at [114] and [165].

(principally the alleged defects with the roof, cladding and balconies). On our findings, however, the Council, is only liable for any stigma associated with the two failed attempts to repair the balconies.

(g) Mr Coakley's key conclusion on Scenario 1 is that the total stigma value of 20 per cent should be allocated as follows: 10 per cent for the initial failure of the original build, 8 per cent for the failed 2010/2011 works, and 2 per cent for the failed 2016 works. No reasons are provided to justify such an allocation, however, other than that the initial failure "will have the largest impact on market value". This apportionment is unsupported by the evidence, and speculative. In the absence of evidence to the contrary, common sense would suggest that the majority of the stigma rests with the design and appearance of the property and its original defective construction. The Council has no liability for any stigma associated with these factors.

[92] Taking these various matters into account, it is our view that the Judge was entitled to conclude that the claim for stigma damages had not been proven.

Issue six: Were the trustees contributorily negligent?

[93] The Judge found that the Council had proved its affirmative defence of contributory negligence and reduced the damages award by 50 per cent on this basis.[66]

[94] On appeal, the trustees submitted that the Judge had erred in her factual findings and had misunderstood the applicable legal principles. The trustees submitted that contributory negligence was not made out, and in the alternative, if contributory negligence were made out the reduction in damages should not exceed 25 per cent.

[95] It is not necessary to address the alleged inaccuracies in the Judge's summary of the relevant legal principles in any detail, given that on appeal the parties were largely agreed as to the key principles. We therefore assess this aspect of appeal on

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66 At [179]–[181].

that basis. For example, it was common ground that the following passage from *Todd on Torts* accurately summarises the key test:[67]

> Whether conduct constitutes contributory negligence is a question of fact and is determined by whether the plaintiff acted reasonably in all the circumstances. The defendant simply needs to show that the plaintiff did not, in his or her own interest, take reasonable care of himself or herself and contributed by this want of care to his or her own injury. This is judged by the familiar test of reasonable foreseeability. "A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckonings he must take into account the possibility of others being careless". The principle involved is that where a man is part author of his own injury, he cannot call on another to compensate him in full.

[96] The Judge found, in effect, that the trustees had failed to act reasonably (and thereby failed to protect their own interests) in seven key respects:[68]

(a) Dr Linehan knew that Mr Barber was someone who "cut corners".[69]

(b) Dr Linehan was involved in the decision to direct-fix the tiles in the 2010/2011 works.[70]

(c) Dr Linehan failed to retain the pre-purchase report prepared when the house was originally purchased.[71]

(d) The trustees had failed to take steps to remediate weathertightness issues until 2010.[72]

(e) Dr Linehan had failed to undertake sufficient due diligence when engaging Mr Barber.[73]

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67 Stephen Todd "Defences" in Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) 1151 at 1159–1160 (footnotes omitted), quoting *Jones v Livox Quarries Ltd* [1952] 2 QB 608 (CA) at 615 per Denning LJ.

68 High Court judgment, above n 2, at [177(a)]–[177(j)].

69 At [177(f)].

70 At [177(h)].

71 At [177(a)].

72 At [177(b)].

73 At [177(d)].

(f) Dr Linehan failed to have regard to the plans prepared by Ms Simpson for the 2010/2011 works.[74]

(g) Dr Linehan had failed to obtain appropriate expert advice, and had continued faith in Mr Barber even when the remedial work failed.[75]

Each of these failures was found to be broadly causative of the trustees' loss, although the Judge did not address causation issues in any detail.[76]

Did Dr Linehan know that Mr Barber was someone who cut corners?

[97] The Judge found that Dr Linehan failed to take appropriate steps in circumstances where he knew that Mr Barber was someone who cut corners.[77]

[98] In our view, this was the Judge's most significant finding of contributory negligence. It is closely interlinked with several of the Judge's other findings of contributory negligence.

[99] It was not in dispute on appeal that, in late June 2010, Mr Barber had commenced remediation work without a building consent. As a result of a complaint from a resident in the area, the Council visited the site on 7 July 2010. The Council's file note of that visit records that no building consent had been issued, and that Mr Barber advised the Council that Ms Simpson was "doing the plans". The Council directed Mr Barber to stop work (the stop work notice). The Judge found that Dr Linehan must have been aware of this.[78] The Judge further found that:

> [19] Mr Barber applied for a building consent after the stop-work notice issued. The application estimated a cost of works of $100,000, a sum well below 10 per cent of the final cost of the works (about $1.4 million) and possibly below the cost of works already carried out. On 20 September 2010, the Council granted a building consent for the re-cladding of the building, replacement of aluminium windows with double-glazed joinery, adding to the existing deck and removing certain high-risk quarter-round features … The

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74 At [177(g)] and [177(j)].
75 At [177(i)]–[177(j)].
76 At [178].
77 At [177(d)] and [177(f)].
78 At [18]. In making this finding, the Judge appears to have relied on invoice(s) sent by Mr Barber to Dr Linehan that "were presumably at least in part for work done prior to the date of the building consent".

> consent required a raised platform for tiled decking on the upstairs balconies, that having been specified by Ms Simpson.

[100] Against the background of these factual findings, the Judge made the following finding of contributory negligence:[79]

> Dr Linehan failed to take any steps when he should have known quite quickly that Mr Barber was someone who cut corners. Dr Linehan would have known of this from the outset when Mr Barber carried out significant works without a building consent and was ordered to stop work. It is likely Dr Linehan would have known the plans were not even available. When Mr Barber finally made [an] application for building consent he estimated costs at a fraction of the final cost. This indicates either a complete lack of preparation or a lack of forthrightness. Again Dr Linehan should have been aware of this. Dr Linehan should also have been concerned, again at an early point, at Mr Barber's preparedness to direct-fix tiles when he said (at the least) that was not preferable and not allowed by at least some councils. That this was too cavalier an approach for works such as this would have been evident to the reasonable owner.

[101] The trustees did not challenge the Judge's finding that Mr Barber had undertaken remediation work prior to the obtaining of a building consent. Rather, their focus was on Dr Linehan's knowledge of this, including whether he knew that a building consent was required. Evidence that is relevant to the extent of Dr Linehan's knowledge includes the following:

(a) Dr Linehan wrote to Mr Barber on 23 June 2010 setting out the basis on which Mr Barber was retained, which included that obtaining necessary consents was Mr Barber's responsibility. The letter further stated that:

> 3. The scope of the repair work will be by mutual agreement. You will not undertake any work without my agreement. You will obtain quotes as necessary and provide me with regular progress reports.

Dr Linehan confirmed in cross-examination that if he was going to pay for the work, he "wanted to know what was going to be done".

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[79] At [177(f)].

(b) Dr Linehan's evidence was that he relied on Mr Barber to obtain building consents where appropriate and had "no experience in that area" and "little knowledge of either the requirements or the process" for obtaining consents. When it was put to Dr Linehan in cross-examination that both he and Mr Barber were cutting corners on the job by starting work before a building consent had been obtained, his response was that he had "nothing to do with the obtaining consent and wasn't really interested at that stage".

(c) Dr Linehan attended a meeting with Ms Simpson and Mr Barber on 5 July 2010 (after the remediation work had commenced) and subsequently emailed Ms Simpson commenting on the draft plans she had prepared for building consent purposes. He also made arrangements to attend a further meeting with Ms Simpson and Mr Barber the following Monday to discuss the plans.

(d) The Council undertook a site visit and issued the stop work notice on 7 July 2010. Dr Linehan appears to have acknowledged in cross-examination that he was aware that a neighbour had lodged a complaint about work being carried out at the property without consent (although his answer was somewhat ambiguous). He did not directly deny that he knew that there had been some issues with the works prior to the consent going through. Rather, he said he could not "recall the details of that".

(e) The building consent application was filed on 22 July 2010, based on the plans and specifications prepared by Ms Simpson. The application included Dr Linehan's contact details as the owner of the property, including his Hamilton postal address.

(f) The Council sent a letter to Mr Barber the following day confirming that the application had been accepted for processing and outlining the next steps. The Council letter stated on its face that it was copied to the Hilldon Trust, care of Dr Linehan's postal address.

(g) On 13 August 2010, Mr Barber submitted his first progress claim to Dr Linehan for payment, in the sum of approximately $59,000.

(h) A letter from the Council to Mr Barber dated 27 August 2010 requested further information in order to progress the building consent application. It also stated that "[t]he overall quality and clarity of the plans provided for in this application are very poor." The writer suggested "that if the plan quality does not improve then the applicant can expect further consent processing delays". That letter also records on its face that it was copied to the Hilldon Trust, at Dr Linehan's postal address.

(i) On 10 September 2010, Mr Barber issued an invoice for his second progress claim "for labour and material supplied on the above contract" in the sum of approximately $57,000 (of which almost $28,000 related to sub-trades).

(j) Dr Linehan and Mr Barber kept in regular contact as the project progressed. Dr Linehan made a number of site visits, often accompanied by his wife (who sometimes took notes of the discussions).

(k) The building consent was issued on or about 20 September 2010.

(l) Mr Barber appears to have received the consent on or about 27 September 2010. He emailed Dr Linehan on that date advising that the consent had gone through.

(m) Mr Barber sent Dr Linehan an invoice for a third progress payment in the sum of approximately $121,000 three days later, on 30 September 2010. It appears from notations on the progress payment invoices that Dr Linehan paid each one promptly.

[102] In our view this evidence, viewed as a whole, does not clearly establish that Dr Linehan knew that a building consent was required *before* Mr Barber first commenced work on the project in about late June 2010. In our view, however, the evidence does support the inference that Dr Linehan would have been aware that a building consent was required no later than 7 July 2010 (or within a day or two of that). By that time, he had met with Ms Simpson to go over the draft plans (which were required for the building consent application) and the stop work notice had been issued. It is simply not plausible, in light of the above evidence, that Mr Barber would not have informed Dr Linehan of the stop work notice and the reasons for it.

[103] It is also a reasonable inference from the evidence that Dr Linehan must have been aware, at a high level at least, of the progress of the consent application, culminating in Mr Barber's advice to him on 27 September 2010 that the consent had "gone through". However, by 30 September 2010 Mr Barber had already issued invoices for three progress payments for work on the remediation project, in the total sum of approximately $237,000. Obviously, most of that sum must have related to work that was undertaken prior to the building consent being issued (and, it appears, after the stop work notice was issued). Each invoice appears to have been promptly paid by Dr Linehan.

[104] Carrying out building work without a building consent is not a minor or trivial matter. Indeed, it is an offence.[80] Mr Barber's complete lack of regard for his obligations under the Building Act, demonstrated by him commencing work on the remediation project without a building consent, and apparently subsequently continuing work on the project without such a consent (despite having been required by the Council to stop work), would have caused a reasonable and prudent homeowner to have serious concerns as to Mr Barber's competence and willingness to meet critical regulatory obligations and requirements. In our view neither Mr Barber nor Dr Linehan can have mistakenly believed, after 7 July 2010 (or thereabouts) that a building consent was not required for the remediation work. Nevertheless, work continued on the project.

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80 Building Act, s 40.

[105] In conclusion, it is our view that the Judge's finding that Dr Linehan must have been aware that Mr Barber was someone who was willing to cut corners is supported by the evidence. A reasonable and prudent homeowner would have ensured that large-scale remediation work did not take place until after the building consent had been obtained.

[106] If, as happened here, Mr Barber did continue with the project in such circumstances it is our view that going forwards a reasonable and prudent homeowner:

(a) would have exercised a heightened degree of supervision over the project to ensure regulatory compliance (including compliance with the terms of the building consent);

(b) would have treated Mr Barber's advice with considerable caution, particularly where such advice was relevant to issues of regulatory compliance, including compliance with Ms Simpson's plans and/or the building consent; and

(c) would have sought appropriate expert advice on major issues.

What was Dr Linehan's involvement in the decision to direct fix the tiles?

[107] We now turn to consider the Judge's findings in relation to Dr Linehan's involvement in the decision to direct fix the tiles. Specifically, the Judge found that:[81]

> Dr Linehan was intimately involved in the most critical decision, namely the decision in 2011 to fix the tiles and not to suspend them. I consider this particularly relevant. It is clear that Dr Linehan knew at all material times at least that other councils required a suspended tiling solution and that this was the preferred solution (rather than direct fixing). He was or should have been aware of the risks. Having been approached by Mr Barber to make a decision on this, I consider a reasonable owner could have inquired more fully and that even the briefest of inquiries would likely have caused him to conclude that direct fixing was not only ill-advised but in fact contrary to the Building Code, contrary to the consent, and contrary to his own plans.

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[81] High Court judgment, above n 2, at [177(h)].

[108] In his brief of evidence, Dr Linehan stated that:

> At one stage, prior to the tiles being laid, I did discuss with [Mr Barber] whether the tiles should be fixed to the plywood deck or suspended on a raft above it.
>
> [Mr Barber] told me that the preferred method was to attach them to a raft above the plywood deck and for some councils this was compulsory. He said, however, that in this case it would not be necessary. I don't recall the exact words but my impression, in retrospect, was that it was a recommendation, rather than a requirement, of the Council. I personally, was not aware of the exact building requirements and relied on [Mr Barber] to advise me of such matters. I indicated that I preferred to have them fixed directly to the deck because of aesthetic reasons. If they were attached to a raft this would mean that the level of the tiled deck would be higher than the floor inside requiring a step up. I don't recall the exact words and my recollection of the conversation is somewhat blurred after this length of time, but I was left with the clear understanding that it was not necessary to have a raft i.e. it would still be waterproof and the building inspector would pass the work, provided that the tiles were properly laid on an appropriate membrane. I was familiar with this procedure in showers, so I had no reason to disbelieve the advice.

[109] Mr Barber sought a specific instruction on the tiling issue, informed Dr Linehan that the preferred method was to attach the tiles to a raft above the plywood deck, and further told him that for some councils this was compulsory. This should have put Dr Linehan on inquiry, particularly given his knowledge that Mr Barber was someone who cut corners. A reasonable and prudent homeowner would not have relied on Mr Barber's advice in such circumstances and would instead have made inquiries of Ms Simpson, another expert, or the Council, as to what was required.

[110] If Dr Linehan had taken this step, he would have discovered that direct fixing the tiles to the membrane was not in accordance with the approved plans and was a departure from what the consent required. This would likely have resulted in the tiles being affixed in accordance with the terms of the consent, likely avoiding the subsequent balcony failures (and the present claim against the Council).

What was the significance of Dr Linehan's failure to retain the pre-purchase report?

[111] The Judge also found the trustees to be contributorily negligent on the basis that Dr Linehan had failed to retain the pre-purchase report and provide it to Mr Barber:[82]

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82 At [177(a)].

> Dr Linehan failed to retain an expert weathertightness report he obtained when purchasing the property, or if he did, he did not show it to his builder or to the Council. The extent of that report is not known. At a minimum the report identified problems with water ingress into the walls, particularly around the front stairs and in respect of the easterly wall. The expert's report may have gone further and for example identified the problem with the deck tiling. In any event the report may have been of assistance to Dr Linehan and his builder and it may also have been possible to gather more information from the writer of the report.

[112] The Council submitted that if the pre-purchase report had been provided to Mr Barber, he would have realised that the home was a risky building in terms of potential weathertightness issues. As a result, he would have advised against the option of direct fixing the balcony tiles.

[113] We do not accept that submission. When he was engaged to advise on remediation options in 2010, Mr Barber would have been well aware that the home was a risky building in terms of weathertightness issues. There is nothing to suggest that being provided with a pre-purchase report prepared seven years earlier, identifying minor weathertightness issues, would have added materially to Mr Barber's understanding of the problems the building faced. Nor do we accept that seeing that report would have been likely to change his advice as to how the balcony tiles should be fixed.

[114] We therefore put this finding of contributory negligence to one side. In our view Dr Linehan's failure to retain the pre-purchase report, or provide a copy of it to Mr Barber, did not cause or contribute to the losses suffered by the trustees.

What is the significance of the trustees' delay in addressing weathertightness issues?

[115] Dr Linehan acknowledged in his brief of evidence that, following receipt of the pre-purchase report identifying some weathertightness issues, he decided to go ahead with the purchase. He understood, however, that he would need to carry out remedial work at some stage in the future.

[116] The Judge criticised Dr Linehan's failure to undertake the necessary remedial work for a further seven years, until the weathertightness issues with the property became urgent and critical. Although the Judge acknowledged there was no evidence

that the delay in undertaking remedial work "contributed to or exacerbated the damage suffered", she considered that it resulted in a situation where:[83]

> Dr Linehan was facing urgent works where that should not have been necessary. He left himself with no time to conduct appropriate due diligence into the extent of work required and to secure appropriate expert assistance. He embarked instead on a rushed job.

[117] Mr Rainey submitted that there was no evidence of any causative link between the delay in addressing the weathertightness issues and the losses that resulted from the Council's negligence. We accept that submission. It is not apparent from the evidence that if remediation work had been undertaken sooner, a different (and compliant) approach to remediating the balconies would have been taken.

Did Dr Linehan undertake insufficient due diligence when engaging Mr Barber?

[118] The Judge's next finding of contributory negligence was that Dr Linehan had failed to engage a builder who was suitably qualified, thorough and compliant, or to take reasonable steps to do so. Rather, Mr Barber was retained "without appropriate due diligence into his qualifications and reliability".[84]

[119] Although it must have become apparent fairly quickly that Mr Barber was a person who cut corners (for the reasons we have set out above), the evidence does not support the conclusion that a reasonable homeowner in Dr Linehan's position would have done greater due diligence on Mr Barber prior to engaging him. Dr Linehan first met Mr Barber when he attended the property with an insurance assessor, suggesting that the insurance company had confidence in Mr Barber's expertise.

[120] We therefore accept the trustees' submission that the Judge erred in finding that a prudent homeowner in Dr Linehan's position would have undertaken further due diligence on Mr Barber before engaging him.

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83 At [177(b)].
84 At [177(d)].

Did Dr Linehan fail to have proper regard to Ms Simpson's plans?

[121] The Judge's next contributory negligence finding was that:[85]

> … Dr Linehan (and his builder) failed to take any account of the only expert he did engage. Dr Linehan had used Ms Simpson as a "technical exercise" to reflect the plans he and Mr Barber had discussed. He says he did not look at those plans. If that is true, he should have done so, or at least inquired of Ms Simpson or Mr Barber what the plans provided for regarding the balcony tiling. Instead, he and Mr Barber ignored the plans at least in that significant respect.

[122] The trustees submitted that Mr Barber rather than Dr Linehan had retained Ms Simpson, and that Dr Linehan was entitled to rely on Mr Barber to review the plans and ensure that they were followed.

[123] Consistent with the views we have expressed at [105] and [106] above, it is our view that a reasonable and prudent homeowner in the position of Dr Linehan would not have simply relied on Mr Barber's advice, but would have exercised a heightened degree of supervision. This would have included seeking input from Ms Simpson, as appropriate (including in relation to the affixing of the balcony tiles) in order to ensure that the terms of the building consent were being followed. Had he done so, Dr Linehan would have realised that direct fixing the tiles to the membrane was not in accordance with the approved plans and departed from what the consent required. The Judge accordingly did not err in making this finding.

Did Dr Linehan fail to obtain appropriate expert advice and instead simply rely on Mr Barber?

[124] The Judge's final two findings of contributory negligence are interrelated. She found that:

(a) Dr Linehan "failed to obtain expert advice that a reasonable owner would have obtained, and followed," in circumstances where he was the owner of a valuable property which had long been suffering from weathertightness issues.[86]

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85 At [177(g)].
86 At [177(i)].

(b) Despite the "sorry history of repairs", Dr Linehan continued in 2015/2016 "to use and to have almost complete faith in Mr Barber and to persist with a tiling solution that had failed by that stage twice". At this stage, the trustees should have engaged consultants with special expertise in remediation before taking any further steps. The Judge was not persuaded that Mr Brunton had provided the assistance needed.[87]

[125] We have found that Dr Linehan knew that Mr Barber was someone who cut corners. He therefore had little or no basis for his ongoing faith in Mr Barber and his belief that Mr Barber "would know how to make a watertight house".

[126] We note the trustees' submission that the further building work was undertaken by an independent licensed building practitioner (Dennis McLeod) with an independent tiling contractor who provided a producer statement for the waterproofing. However, by this time the house had suffered two major weathertightness failures. In our view the circumstances warranted a higher level of expert input, advice and oversight, possibly from an architect or building surveyor. The continued involvement of Mr Barber to oversee and manage the project was insufficient in the circumstances. It follows that the Judge did not err in making these findings.

Conclusion regarding contributory negligence

[127] We have found that the Judge erred in finding that the trustees were contributorily negligent in the following respects:

(a) failing to retain the pre-purchase report and provide it to Mr Barber when he was first retained;

(b) failing to take steps to remediate the known weathertightness issues prior to 2010; and

(c) failing to undertake appropriate due diligence regarding Mr Barber before retaining him.

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87 At [177(j)].

[128] We have upheld the Judge's other findings of contributory negligence. Of these, the most critical finding is that Dr Linehan must have become aware (prior to the decision regarding the affixing of the tiles) that Mr Barber was someone who cut corners (including in relation to issues of regulatory compliance) for the reasons outlined at [101]–[106] above. A reasonable and prudent homeowner in such circumstances would have sought expert advice regarding the method of affixing the balcony tiles, particularly given Mr Barber's indication that the Council's preferred method was to attach the tiles to a raft above the plywood deck, and that for some councils this was compulsory. A simple phone call to Ms Simpson or the Council would have clarified matters and likely resulted in the balcony tiling work being undertaken in a compliant manner.

[129] Similarly, Dr Linehan should also have engaged more comprehensive expert advice after the 2010/2011 remedial works failed, rather than (again) largely relying on Mr Barber's oversight of the project. This may well have identified that the tiles had not been affixed in accordance with the 2010 building consent, and that this needed to be remedied when further remediation work was undertaken.

[130] The Judge was accordingly correct to find that the trustees (through Dr Linehan) had significantly contributed to their own losses in a causative way.

Issue seven: What is the appropriate reduction in damages to reflect the trustees' contributory negligence?

[131] Having found the trustees to be contributorily negligent, the Judge was required to reduce the damages recoverable "to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage".[88] The Judge found that a 50 per cent reduction in damages would be just and equitable, having regard to the Trustees' own responsibility for the damage.[89] She stated that:

> [181] In fixing the percentage, I have not distinguished conduct in 2011 from subsequent conduct. The Trustees' claim and therefore quantum is based largely on the 2016 breach. If anything, I consider the percentage of contributory negligence in the 2016 works higher than 50 per cent, so 50 per cent is a fair overall apportionment of responsibility.

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88 Contributory Negligence Act 1947, s 3.

89 High Court judgment, above n 2, at [180].

[132] The apportionment is a discretionary exercise. The learned authors of *Todd on Torts* state that:[90]

> An apportionment at trial is regarded purely as a question of fact, and will not be disturbed by an appellate court unless that court is satisfied that the decision was one that could not reasonably be supported on the whole of the evidence. In the absence of an identifiable error, it is only a difference of view as to the apportionment of responsibility which exceeds the ambit of reasonable disagreement that warrants the conclusion that the court below has gone wrong.
>
> (Footnotes omitted.)

The issue, therefore, is essentially whether the Judge's apportionment is within a reasonable and appropriate range, having regard to the various findings we have made on appeal.

[133] In making the apportionment "it is necessary to consider both relative blameworthiness and causative potency".[91] The courts have characterised this as "a question of fact involving matters of impression and not some sort of 'mathematical computation'".[92] Mr Rainey submitted that the facts here do not support the conclusion that the relative blameworthiness and causative potency of the trustees' contributory negligence was at least as significant as the Council's negligence.

[134] We disagree. Although we have found that the Judge erred in relation to some of her particular findings of contributory negligence, these were relatively minor matters. The contributory negligence findings we have upheld had very significant causative potency. As the Judge observed:[93]

> Dr Linehan … personally made the decision to affix the tiles in 2011 even though he had been told it was not the preferred option. If Dr Linehan had taken appropriate advice and exercised more care in decisions about the works, it is likely that the 2011 building consent would have been complied with and this action would not have arisen. That was even more the case in 2016.

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90 Todd, above n 67, at 1166.

91 *Johnson v Auckland Council*, above n 52, at [87]; and *Gilbert v Shanahan* [1998] 3 NZLR 528 (CA) at 534.

92 *Johnson v Auckland Council*, above n 52, at [87], citing RFV Heuston and RA Buckley *Salmond & Heuston on the Law of Torts* (21st ed, Sweet & Maxwell, London, 1996) at [22-12]; and Glanville Williams *Joint Torts and Contributory Negligence* (Stevens & Sons, London, 1951) at 390.

93 High Court judgment, above n 2, at [179].

[135] In our view a reduction of the damages award by 50 per cent to reflect the trustees' contributory negligence remains well within range.

Result

[136] The appeal is dismissed.

[137] The appellants must pay the respondent costs for a standard appeal on a band A basis and usual disbursements. We certify for two counsel.

Solicitors:
Braun Bond & Lomas Ltd, Hamilton for Appellants
Brookfields Lawyers, Auckland for Respondent