IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
KIRIKIRIROA ROHE

CIV-2017-419-000141
[2021] NZHC 3234

BETWEEN	BRIAN JOSEPH LINEHAN, SHANNON JAMES WALSH and ROSS DOUGLAS BLAIR as trustees of the Eliza Trust Plaintiffs
AND	THAMES COROMANDEL DISTRICT COUNCIL First Defendant
	BERNARD BARBER LIMITED Second Defendant
	BERNARD BARBER Third Defendant
	MARK TARRANT HOSKINS Fourth Defendant

.../intituling cont over

Hearing:	13–24 July 2020, 1 December 2020, 9 February 2021. Further submissions filed 18 October and 1 November 2021.
Counsel:	VA Whitfield, KI Bond and LHH Hunt for Plaintiffs DJ Neutze and C Robertson for Defendant
Judgment:	29 November 2021

JUDGMENT OF HINTON J

This judgment was delivered by me on Monday, 29 November 2021 at 4 pm pursuant to Rule 11.5 High Court Rules.

Registrar/Deputy Registrar

Solicitors/Counsel:
Brookfields Lawyers, Auckland.
Braun Bond & Lomas Ltd, Hamilton.
VA Whitfield, Cambridge.

CITY CERTIFYING CONSULTANTS LIMITED
Fifth Defendant

MURRAY SIEVERS
Sixth Defendant

MARK GORTON
Seventh Defendant

STRAIGHT EDGE EXTERIOR PLASTERING LIMITED
Eighth Defendant

PENINSULA ROOFING LIMITED
Ninth Defendant

PAULA MAREE HARVEY
Tenth Defendant

[1] This proceeding concerns a dwelling on the beachfront at 15 Wharekaho Crescent, Simpsons Beach, which has many features typical of a leaky building. The property was purchased by trustees of the Hilldon Trust, a trust settled by Dr Brian Linehan in March 2003, with the knowledge it was a leaky building. The property was sold in 2013 to the plaintiffs who are trustees of the Eliza Trust, also settled by Dr Linehan (the Trustees).[1]

[2] Dr Linehan carried out extensive remedial work on the house in 2011 and on the upstairs balconies (only) in 2016, in an effort to address the leaks. Some of the 2011 works and all of the 2016 works were themselves inadequate or defective. Weathertightness problems and risks remain. Dr Linehan also carried out more minor unconsented work on the upstairs balconies in 2014/2015.

[3] This proceeding is not about the original construction of the building. It relates solely to the 2011 and 2016 remedial works. The Trustees say that the first defendant, the Thames Coromandel District Council (the Council) was negligent in issuing building consents, inspecting, and issuing code compliance certificates in respect of both the 2011 and 2016 works. They note many defects, including defects in cladding, roofing, parapets and balconies, and seek compensation for all or substantially all such defects. Importantly, the Trustees claim that the Council is liable for the full cost of repairs even if its only breach was in respect of the balconies.

[4] The Trustees claim the cost of repairs, stigma, and associated damages in a total sum of $1,559,369. As the 2016 repairs failed completely, they also claim damages of $197,528 for the wasted cost of those repairs. Interest is claimed on all sums.

[5] The Council acknowledges it was negligent in 2011 in certifying balcony tiling that had been, contrary to the building consent and the Building Code, affixed directly to the membrane below. The tiles should have been installed on a suspended jack system where they are placed above and separate to the membrane. The Council also accepts it was negligent again in 2016, this time in issuing a building consent for

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[1] No mention was made of the other plaintiff trustees. I refer to the Trustees and Dr Linehan interchangeably.

direct-fixed tiling. It denies any other breaches and denies that it has any liability other than it accepts liability for the cost of targeted repairs for the 2016 balcony breach. The Council assessed that cost at $548,571, or at most $581,310. The Council says any award of damages should be reduced by at least 50 per cent for contributory negligence.

[6] The Trustees also claimed in negligence against their builder, Bernard Barber, and a number of others who had been involved in relation to the works on the property. I was advised that the claims against all defendants other than the Council had been discontinued. No cross-notices were served.[2]

Background

[7] The dwelling was built in 1997. It has many features typical of the houses built in that period that became known as "leaky homes". These included a wedding cake design, flat roofs, curved walls, and monolithic cladding.

[8] As noted, the trustees of the Hilldon Trust purchased the property in March 2003 and it was transferred to the trustees of the Eliza Trust in March 2013. The Council takes no issue over the change in ownership.

[9] Dr Linehan knew before the Hilldon Trust purchased the property that the building was leaky. Prior to the purchase he had obtained an expert opinion on the water ingress of the building. Surprisingly, Dr Linehan did not retain that report. The Trustees submit variously that he no longer had the report in 2010 when he was engaging Mr Barber, and that he did still have it but did not make it available to Mr Barber (nor presumably his insurers) because he considered its contents obvious. In any event, at least since 2010 Dr Linehan has not retained a copy. According to Dr Linehan the report showed the building had problems with water ingress into the walls, particularly around the front stairs and in respect of the eastern ocean-facing wall, it was based on a non-invasive inspection and the leaks at that point were minor. Dr Linehan says now that the report did not contain anything that would influence the way the work was carried out but there is an obvious difficulty in categorically stating

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2 As counsel continued to use the full intituling, I have done likewise.

now the contents of a report prepared in 2003, that Dr Linehan plainly had not read since 2010 or earlier, and that he did not bother to retain. The investigator may for example have not only reported on actual leaks but also on leak risks generally including risks inherent in fixed tiles.[3] A purchaser who obtains such a report prior to purchase would want to know everything they could about the house so that, with their eyes open, they were best able to negotiate that purchase.

[10] In any event it is clear that not only was Dr Linehan aware of actual leaks, but he was also aware of the general weathertightness risks inherent in the design and construction of the house and that it was only a matter of time before major works would be required. He said he knew he would need to address the issues but that once possession of the property was taken, there was little internal evidence of weathertightness issues such that he decided not to act on the 2003 report. Also, he decided the leaking noted in the 2003 report might have been caused by a screwdriver hole in a wall and a birds' nest in the guttering (both of which he fixed).

[11] According to Dr Linehan, weathertightness issues became apparent in 2010, with water collecting in the ceiling of the garage and bunk room. He resolved then to take steps.

[12] For reasons which are not clear, given his awareness that the house had weathertightness issues at the time of purchase, Dr Linehan contacted his insurance company, Medical Assurance Society. The insurer arranged for an assessor and Mr Barber, who was a local builder, to look at the house. Dr Linehan's evidence is that Mr Barber held himself out to be an expert in repairing leaky buildings and he was referred to him by the insurance company as having appropriate expertise. He says he therefore did not engage a building surveyor to advise on the scope of remedial works.

[13] As recorded in a letter dated 23 June 2010, Dr Linehan engaged Mr Barber[4] to identify all the leaking problems in the house, to repair or cause to be repaired those

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3 The problems with direct-fixed tiles were well-known at the time of the 2003 report. See brief of evidence of Andre Vernon Laurent dated 23 October 2019 at [27] and [28].

4 Trading as Bernard Barber Ltd but referred to throughout as Mr Barber.

leaks, to obtain all necessary consents and to ensure all legal requirements were met. Dr Linehan's oral evidence is that Mr Barber was engaged to re-clad the house, install new double-glazed aluminium windows, extend an existing deck, and remove high-risk (in terms of promoting water ingress) features of the dwelling related to its curved walls. He and Mr Barber also decided to replace all the tiles; including on the decks, and to change staircases and the entrance foyer. The engagement did not refer to any repairs of the roofs of the dwelling.

[14] There was no formal written agreement between Dr Linehan and Mr Barber for the 2011 works, nor any scope of works beyond that stated above. Rather, the engagement was primarily undertaken pursuant to a verbal agreement, with certain points recorded in the 23 June 2010 letter.

[15] Mr Barber engaged Ms Simpson of Simpson Design Services to draw up plans for Dr Linehan's purposes and for the purposes of obtaining the required building consent. It appears that Ms Simpson was an architectural designer, not a registered architect. Dr Linehan says he had only minor involvement in the design process. He appears to have been happy to trust Mr Barber with most aspects of the design. Dr Linehan described Ms Simpson's job as minimal and as being managed by Mr Barber.

[16] Neither Ms Simpson nor anyone other than Mr Barber appears to have been engaged to identify all the leaky problems, to determine the manner in which the house should be repaired, or to assess the likely cost. Dr Linehan acknowledges that he probably met Ms Simpson but says he could not recall her nor discussing plans with her.

[17] No project manager or architect was engaged to supervise the work. Mr Barber was to have, as recorded in the letter of 23 June 2010, "overall responsibility for the integrity of work" and for ensuring all work was "carried out in a proper tradesman-like manner conforming, where appropriate, to the relevant standards". Correspondingly, Mr Barber was engaged on a full-contract basis with all sub-contractors retained and paid for by his company.

[18] In mid-2010, Mr Barber commenced work without a building consent and apparently without having received plans from Ms Simpson. 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 the same date makes it clear that no building consent had then been applied for. Mr Barber advised the Council that Ms Simpson was "doing the plans". Mr Barber received a stop-work notice as a result of the investigation by the Council inspector. Dr Linehan must have been aware of this.[5]

[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 last item apparently relating to the removal of the dwelling's high-risk curved wall). The consent required a raised platform for tiled decking on the upstairs balconies, that having been specified by Ms Simpson.

[20] During the works there was a discussion between Mr Barber and Dr Linehan regarding the tiling on the upstairs balcony where Dr Linehan expressed a preference for the tiling to be fixed rather than on a raised platform. Construction proceeded that way, contrary to the Trustees' plans and the consent. Dr Linehan acknowledges he was told by Mr Barber that suspended deck tiling was the "preferred method", and "for some councils" that was compulsory. He says "I don't recall the exact words but my impression, in retrospect, was that it was a recommendation rather than a requirement of [this] Council". Dr Linehan says he personally was not aware of the exact building requirements in relation to the tiling issue and relied on Mr Barber to advise him of such matters. I presume this means Dr Linehan did not take steps to look at the plans or the building consent or to make any inquiries. Dr Linehan's evidence in chief was that his preference related to aesthetics and "the other option" was very expensive. He subsequently said this decision related more to aesthetics.

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5 The scope of pre-consent works is not clear but on 30 September 2010, Mr Barber sent invoice No 3 to Dr Linehan for $120,901.45. Given that he had undertaken to stop works until 20 September, this (and possibly earlier invoices) were presumably at least in part for work done prior to the date of the building consent.

[21] The works were carried out from mid-2010 (that is before the consent), until December 2011.[6] Dr Linehan advises that the total cost was about $1.4 million.

[22] The Council carried out inspections and eventually, on 19 December 2011, issued a code compliance certificate in respect of the 2011 works under s 95 of the Building Act 2004 (the Act). It seems the Council did not notice that the tiled decking was non-compliant with the conditions of the consent.

[23] After the 2011 works were completed, Dr Linehan became concerned about the visual appearance of the tiled decking on the upstairs balconies. By around Christmas 2014 the tiles had begun to lift. By December 2015, Dr Linehan noted water "pouring" into the lounge from the balcony above.

[24] In a manner that the Council submits to have been a materially intervening act, Dr Linehan arranged for some further repairs to be carried out in 2014/2015. He again retained Mr Barber to undertake such repairs. The exact timing and extent of these interim works is unclear. Dr Linehan considers them to have been minor. Those works appear to have involved at least two stages. No building consent was obtained, and the Council did not know of them. Nor were those works mentioned to Council subsequently, including when seeking building consent for the 2016 works.

[25] The only evidence of what was actually done in 2014/2015 was from Dr Linehan who says the tiles were lifted and re-laid by a different tiler, Mr Barber having blamed the previous tiler for the defects and been unable to get him to return. As Dr Linehan disclaimed any detailed knowledge of any of the other works, it is reasonable to conclude he would have had little knowledge of any detail of these interim works.

[26] The Council considers the interim works and the works carried out in 2016 to have been such that they removed all available evidence as to damage resulting from the 2011 non-compliance and that these interim repairs may even be the cause of some of the alleged defects associated with the upstairs balconies.

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6 I refer generally to the 2010/2011 works as being 2011 because that is how counsel describe them.

[27] In early 2016 Dr Linehan engaged Mr Barber again to address the issues with the tiles. Ms Simpson was not retained. One consequence of this is that Ms Simpson's knowledge about the need for suspended deck tiling was lost. (As noted, she had specified suspended tiling.) Paula Harvey was retained in her stead to draw up plans for obtaining the required building consent.

[28] The Trustees say that a Mr Brunton was retained to provide necessary expert advice. The Council submits that Mr Brunton was engaged primarily in relation to a dispute with the original tiler. Mr Brunton did not give evidence. There is insufficient evidence to conclude that Mr Brunton contributed materially to investigations, design solutions or supervision.

[29] On 13 May 2016 the Council granted Mr Barber's application for a building consent for works relating only to the balcony tiling issue, being replacement of the tiling and related waterproofing work. The plans as prepared by Ms Harvey provided for fixed tiles on the balconies, possibly reflecting the then reality of the balconies. It is accepted by the Council that the consented works were not in compliance with the Building Code. The work was carried out and the Council issued a code compliance certificate on 6 September 2016. The building consent had noted a "project value" of $49,000. The actual cost was $197,528, significantly less than the 2011 works, but the scope of the works was much more limited.

The experts

[30] Expert testimony was called by the Trustees and the Council.

[31] The Trustees called five experts. The Council called four.

The Trustees' experts

[32] *Andre Laurent.* Mr Laurent is a licensed architectural designer and a director of Creative Space Architectural Design Ltd. Creative Space has specialised in the remedial design and documentation of leaky buildings since 2004. Mr Laurent describes their role as finding "buildable and cost-effective solutions to any recognised damage area and the cause of damage as identified by a registered building surveyor

or weathertightness expert". Mr Laurent says it is his policy wherever possible to eliminate risk rather than manage it as many of the issues they find are actually designed to fail. His evidence extended to the plans and specifications submitted with the 2016 building consent and his opinion as to the remedial works required to rectify the defects with the house. Mr Laurent does not refer to any previous experience as an expert witness.

[33] *Paul Probett.* Mr Probett is a forensic building specialist with 14 years' experience in forensic building pathology and 47 years' experience in the building industry. His evidence related to the defects in the 2011 works, the defects in the 2016 works, the appropriate remediation scope, and betterment.

[34] *Stephen Flay.* Mr Flay is a building surveyor with over 39 years' experience in the building industry, including as a Council employee and contractor. His evidence related to the Council's responsibilities, including whether it should have identified defects and whether the Council should have done more than it did in 2011 in relation to the roofing.

[35] *James White.* Mr White is a registered quantity surveyor with almost 20 years' experience. His evidence related to the costs of carrying out repairs under various scopes.

[36] *Chris Coakley.* Mr Coakley is a registered valuer with extensive experience in the valuation of residential and rural properties. His evidence related to the loss in value associated with stigma from the failed 2011 and 2016 repairs.

The Council's experts

[37] *Simon Paykel.* Mr Paykel is a registered building surveyor with extensive experience of Council practices and 25 years' experience in the building industry. He has acted in a considerable number of weathertightness claims, representing clients at mediations, arbitrations and adjudications and giving evidence as an expert witness in the High Court, District Court and Weathertight Homes Tribunal. Such engagements have been on behalf of homeowners, bodies corporate, tradespeople, developers,

insurers and councils in both claimant and defendant capacities. His testimony was extensive. It included testimony as to Council liability and as to remedial solutions.

[38] *Craig Turner.* Mr Turner is a building consultant with over 40 years' experience in the building industry. He has extensive experience in the repair of dwellings damaged by excessive moisture ingress. Initially, he had been retained as an expert by the then ninth defendant.

[39] *Jake Woolgar.* Mr Woolgar is a chartered building surveyor with 20 years' experience in the building industry in New Zealand and overseas. Mr Woolgar had viewed the house in February 2016 prior to the Trustees' 2016 attempted remediation of the tiling issue. His evidence was in relation to what he then saw.

[40] *Greg Cutfield.* Mr Cutfield is a registered quantity surveyor. He has over 35 years' experience in the construction industry. His evidence related to the cost of carrying out repairs under varying scopes.

My observations on the expert testimony

[41] I consider the expertise of all these witnesses to have been appropriately established. Although counsel on each side sought to question the objectivity or the expertise of the other's experts, I considered their evidence to be of the standard that the Court requires.

[42] The Trustees particularly challenged Mr Paykel's qualifications to advance what is referred to as targeted remediation scopes. They say he is not a licensed designer, and he is not an expert in design matters. While Mr Paykel is not a licensed designer, I consider, based on his qualifications, broad expertise and extensive experience, he is sufficiently qualified as an expert in all the evidence he gave. I found Mr Paykel to be technically competent, measured and very practical. While accepting that he could not progress a building consent without using a licensed designer, I consider his evidence as to remediation measures to be well within his expertise.

Summary of the Trustees' case

[43] The Trustees produced a list of defects with the building and, at least initially, alleged that all such defects arose from failings on the part of the Council in 2011, or at least that the Council was liable to rectify them. There was, as I note has occurred in other cases,[7] generally some confusion between a defect and a breach, one almost being assumed to amount to the other. The Trustees' closing submissions began with a discussion of the appropriate scope of remedial works and subsequently turned to consideration of the alleged breaches.

[44] There was a substantial level of consensus between experts on the absence of Council negligence in relation to some matters. Cladding is the most significant such example. Sealing issues are another.

[45] The list of defects with brief comments on breach includes the following:

(a) *Balconies.* This is the tiling issue already noted, where the Council accepts breach.

(b) *Cladding.* The key issue is that the plaster applied in 2011 was too thick. The experts agreed the Council is not liable, which in context is an agreement that the Council had breached no duty in relation to the cladding.

(c) *Z Flashings.* The 2010 building consent contemplated that Z flashings would be used behind horizontal joints. They were not so used. Sealant had been used instead. The Trustees say the Council should have identified this on inspection.

(d) *Seal issues.* There were a large number of defects listed in the schedule. I will not detail them because the experts agreed that the Council had not breached any duties in relation to them.

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[7] See for example *Minister of Education v H Construction North Island Ltd* [2018] NZHC 871 and *Bates v Auckland Council* [2021] NZHC 2558.

(e) *Parapets.* The Trustees claim that the paint on the upper parapet bands is porous and inadequately coated, the saddle flashings have failed and are allowing moisture entry. They say the required layer of ProtectoWrap EIFS tape was not installed over the top of the parapets and that there is plaster shearing in parapet caps. The Trustees allege the Council should have identified the missing ProtectoWrap.

(f) *Roof.* The defects schedule notes inter alia a lack of falls (and some ponding) on the first-floor roof and on other roofs. It also notes waterproofing issues with the membrane on the first-floor roof. The Trustees claim that the Council is liable for these defects because the 2010 building consent process contemplated work would be done to the roofing in a manner that required the Council to insist upon full compliance with the requirements of the Building Code (especially as to falls, ponding and membranes). They also claim that, even if this was not the case, the Council should have noticed the extent of works actually carried out in 2011 and then required such full compliance. They say that as a consequence the Council should have required the roof to be replaced. (The Trustees accept that this would mean the roofing should have been addressed by them in 2010 or at least that they should not get a "free roof" from the Council. To adjust for this, they say it is appropriate to assess the cost of such works as at 2010/2011 applying CPI adjustments retrospectively against current costings and to include a credit for that, plus interest, against the currently assessed costs.)

(g) *Tanking.* The Trustees allege that, in installing a new retaining wall, an excavation in the 2011 works cut through a pre-existing membrane in order to tie the walls together and that the return wall should not have been connected as that results in moisture migrating into the house. They say the Council failed to pick this up on inspection.

[46] The Trustees' final position as to the extent of the Council's actual 2011 breaches was not always easy to determine, their focus being on the defects rather than

the nature of any breach, and also on their argument that even with regard to the one accepted balcony tiling breach, the same quantum of damages followed. The Trustees' closing submissions strongly suggest that claims of direct breach regarding cladding and sealing defects are not maintained but, in the absence of clear confirmation of that I make formal rulings below regarding each of the listed "defects".

[47] In terms of the 2016 works, which were limited to an attempt at repair of the balcony, the Trustees say the Council breached its duty of care because it issued a building consent that contemplated directly fixed balcony tiles. (The Trustees also pleaded that the Council breached its duties in relation to inspection and certification of the tiling but that would not change the extent of the Council's liability.

[48] Other than in their very recent submissions, the Trustees did not specifically address the question of causation. They say that the consequence of a breach by the Council is that it is liable for the cost of repairs; namely the amount required to rectify the defects. They also say, as noted, that in this case the Council is liable for the full repair cost even if its only breach is the accepted breach regarding the tiling. The Trustees acknowledge that the measure of damages can alternatively be diminution in value, but say that would have to have been pleaded by the Council and in any event the Council accepted the "cost of repairs" approach.

[49] It is important to note that in their additional submissions filed on 18 October 2021, the Trustees make it clear their claim for costs of repair is *not* based on the Council's negligence in 2011 regarding the balcony. They say rather that "the costs of repair now claimed arise out of the Council's negligence with the 2016 works (being balcony-related only) and the non-balcony related defects from the 2011 works".

[50] The Trustees submit that the cost of repairs should be assessed having regard to what they refer to as Concept Plan repairs. These Concept Plan repairs are the repairs that one of the Trustees' experts, Mr Laurent, says are necessary. They involve not only new decking but also a new roof, new cladding and a substantial re-design of the house. Mr Laurent advises that because the house has a very high level of weathertightness risk, a "specific design" is called for to remove risk factors and incorporate protective design elements where possible. The proposed works are

clearly extensive. The photographic and pictorial evidence is such that there is no obvious similarity between the existing house and that proposed by Mr Laurent. Mr Laurent rejected any lesser scope of works. He was particularly critical of the repairs proposed by the Council to which I will refer soon.

[51] The Trustees accept that there is some betterment in the works they propose, presumably because the Concept Plan repairs would completely re-fashion the house, but they say betterment has been allowed for in the claim they have made. They appear to consider betterment arises only to the extent they are better off than they would be if the house complied with the Building Code. I consider this analysis to be incorrect but ultimately I do not need to consider betterment issues as such.

[52] In addition, the Trustees claim the sum of $197,528.85 being the wasted costs they incurred in the 2016 work. They say the 2016 work was a reasonable mitigating action flowing from the 2011 breach and therefore they should be entitled to recover the full wasted cost.

[53] The Trustees deny any contributory negligence, primarily on the basis that there has been no "negligent" action on their part that was causative of the loss.

[54] Finally, the Trustees submit that the onus is on the Council to establish betterment or contributory negligence or to propose that damages might be assessed on the basis of diminution in value as opposed to the cost of repairs.

Summary of the Council's case

[55] The Council accepts that it breached its duties in 2011 regarding certifying of the balcony tiles. The 2010 plans, as approved, correctly showed the tiles as being on a raised platform, not fixed, but the tiles were fixed by Mr Barber/his tilers and the Council failed to pick that up. The Council denies any breach in terms of inspection in respect of the 2011 works.

[56] As to whether the Council also breached any duties in relation to other defects, it says:

(a) *Cladding.* Experts agreed that the Council has no responsibility for this defect or at least did not breach any duty in relation to cladding per se.

(b) *Z Flashings.* The Council accepts that the building consent stipulated that Z flashings must be used and that they were not. It denies negligence. The basis for this is not clear but it can only be that the Council could not reasonably have been expected to pick this up. However, it says that, if the non-use had been noted, it would have resulted in a minor variation permitting the use of the sealant instead of the Z flashings. The Trustees' expert Mr Flay agreed with this. The Council also says that the non-use has not been shown to have caused any damage and that the Trustees' expert Mr Probett agreed it had not caused significant damage.

(c) *Sealant.* Again, the experts agreed that the Council had breached no obligation in relation to this defect.

(d) *Parapets.* The Council denies breach in relation to allegedly defective works on the parapets. Mr Flay and Mr Paykel agreed that the Council had not breached any obligation in this regard. Subsequently, Mr Flay altered his position based on further investigations by Mr Probett, which the Council says did not justify the change in position. Further, the Council claims that Mr Probett's testing was supportive of its claim that there was no evidence of damage.

(e) *Roof.* The Council says the building application did not seek any consent as to roofing on the upper-level roof or the level two low-pitch roof surfaces (nor was any carried out). There was no reason for the Council to address those roofs. There was some relatively minor work on upstands on the first-floor roof and replacement of a small section of membrane, but the plans recorded that the existing roof membrane was to be retained. The Council says the Trustees elected not to carry out any roof works other than what amounted to maintenance or minor works as necessitated by other works for which consent was granted.

In those circumstances the Council was not under any obligation to bring the roof into full compliance with the Building Code. The Council also denies that the lack of falls and any ponding were matters the Council should have noted or acted upon in 2010/2011, submitting there is no, or insufficient, evidence to that effect. In these circumstances, the Council was not under any obligation to require the Trustees to re-roof. The Council also says that the roof has not been shown to have failed in 2011 nor at the current time. There may now be what it considers to be a relatively minor amount of ponding, but any ponding concerns can be rectified with minor works and without a completely new roof. So too, while still denying liability, the Council notes the experts agreed that any waterproofing failures could be repaired in isolation with targeted repairs.

(f) *Tanking.* In this regard the Council says the relevant excavation in 2010 was not included in any building consent because it did not need to be. Nor was it embraced by the relevant code compliance certificate. The Council submits there is no evidence of the alleged defect, but that, even if it exists, the Council has breached no relevant duty.

[57] The Council argues that the Trustees cannot establish any loss from the 2011 balcony tiling breach because the subsequent 2014/2015 interim works and the 2016 works mean there was a different set of circumstances by the time the claim was made, such that the chain of causation cannot be demonstrated, and damages cannot be assessed. There were no photographs able to be provided or measurements made of the consequences in 2011 of the wrongly fixed tiling, that is there was nothing to link the breach to the 2014 (and later) leaking problem. The Council also argues that the Trustees' loss in 2011 was complete before its breach. However, these arguments ultimately go only to the 2016 wasted costs issue because the Trustees have made it plain that apart from the 2016 wasted costs, they do not otherwise claim damages flowing from the 2011 balcony tiling breach.

[58] The Council accepts that it breached its duties in 2016 when issuing a building consent that did not require the proposed balcony works to comply with the

Building Code and that it has to rectify that breach. The Council accepts that targeted repairs, at a cost assessed by its expert Mr Cutfield at between $548,571 and $581,310,[8] are required and appropriate.

[59] The Council submits that the damages to be awarded should be discounted by at least 50 per cent to reflect the Trustees' negligence in terms of the Contributory Negligence Act 1947.

[60] It also claims that damages should be adjusted so as to remove any potential betterment, or assessed so as to exclude betterment.

Extent of Council's duty and breach

Legal considerations

[61] There is no question but that the Council owed a duty of care to the Trustees or their predecessor trustees when issuing building consents, inspecting, and issuing code compliance certificates in respect of both the 2011 and 2016 works. Those duties are propounded by the Trustees and accepted by the Council. They are based on principles of negligence and on s 49 of the Act.

[62] The Trustees have the burden of proof to establish both duty and breach.

[63] Section 49(1) of the Act provides:

> A building consent authority must grant a building consent if it is satisfied on reasonable grounds that the provisions of the Building Code would be met if the building work were properly completed in accordance with the plans and specifications that accompanied the application.

[64] Although somewhat unclear, I believe that the Trustees seek to go further. They submit that the Act requires all building work to comply with the Building Code, regardless of whether a building consent is required or sought for the work. They refer

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8 Mr Cutfield's initial assessment was $490,318. The sum of $581,310 reflects a possible increased scope of targeted repairs and both sums reflect the need for balustrades which had been overlooked by both parties.

to *Wheeldon v Body Corporate 342525*,[9] *Fitzgerald v IAG New Zealand Ltd*,[10] and s 17 of the Act, in support. Section 17 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".

[65] Effect must be given to the words italicised above. Section 112 of the Act is relevant in this context. Section 112(1)(b) provides with regard to *alterations* to existing buildings:

> (1) A building consent authority must not grant a building consent for the alteration of an existing building, or part of an existing building, unless the building consent authority is satisfied that, after the alteration,—
>
> …
>
> (b) the building will,—
>
> (i) if it complied with the other provisions of the Building Code immediately before the building work began, continue to comply with those provisions; or
>
> (ii) if it did not comply with the other provisions of the Building Code immediately before the building work began, *continue to comply at least to the same extent as it did then comply*.
>
> (Emphasis added)

[66] Schedule 1 of the Act is also relevant. That schedule provides for building work for which building consent is not required and where exemptions may be granted, as follows:

> **1. General repair, maintenance, and replacement**
>
> (1) The repair and maintenance of any component or assembly incorporated in or associated with a building, provided that comparable materials are used.
>
> (2) Replacement of any component or assembly incorporated in or associated with a building, provided that—
>
> (a) a comparable component or assembly is used; and
>
> (b) the replacement is in the same position.

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[9] *Wheeldon v Body Corporate 342525* [2015] NZHC 884, (2015) 16 NZCPR 829 at [160].
[10] *Fitzgerald v IAG New Zealand Ltd* [2018] NZHC 3447 at [48].

(3) However, subclauses (1) and (2) do not include the following building work:

(a) complete or substantial replacement of a specified system; or

(b) complete or substantial replacement of any component or assembly contributing to the building's structural behaviour or fire-safety properties; or

(c) repair or replacement (other than maintenance) of any component or assembly that has failed to satisfy the provisions of the building code for durability, for example, through a failure to comply with the external moisture requirements of the building code; or

(d) sanitary plumbing or drainlaying under the Plumbers, Gasfitters, and Drainlayers Act 2006.

2. Territorial and regional authority discretionary exemptions

Any building work in respect of which the territorial authority or regional authority considers that a building consent is not necessary for the purposes of this Act because the authority considers that—

(a) the completed building work is likely to comply with the building code; or

(b) if the completed building work does not comply with the building code, it is unlikely to endanger people or any building, whether on the same land or on other property.

[67] It is clear from s 112 and sch 1 that to the extent the Trustees might contend that all building work must comply with the Building Code, regardless of whether a building consent is required, then that is incorrect. So too is any suggestion that a building consent may not be issued if, after the proposed works, the building does not comply with the Building Code. 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. Contrary to the Trustees' submission, I do not consider *Wheeldon* or *Fitzgerald* contradict these basic propositions and if they do, I respectfully disagree.

[68] For completeness, I accept that there may often be circumstances where a council has duties that extend beyond ensuring that the works specifically

contemplated by a building consent application are compliant with or exempted from compliance with the Building Code. This may arise for example where an application that does not extend to certain works is patently inadequate, or as a result of onsite inspections. But this cannot be taken so far as to place such a burden upon councils that they become underwriters of past work or of all consequences of owner oversight. A council is clearly not able to turn a blind eye towards or otherwise ignore works brought squarely to its attention even though outside the scope of a consent application but, where there is a suggestion that a consent should have extended to other external elements of a building beyond those expressly stated, the onus must be firmly on the owner to establish the existence of a duty or breach of a duty on the part of the council.

Breach as to balcony tiling defects?

[69] The Council has not denied negligence in failing to notice the direct fixing of the tiles when it certified in 2011 or when it granted consent in 2015/2016. It seems reasonably clear, and I so find, that the Council breached its duties in these respects.

[70] The Trustees also pleaded that the Council breached its duty when undertaking inspections of the balcony tiling in 2010, or otherwise prior to the issuance of the code compliance certificate. Little was made of this in closing submissions and I have insufficient evidence on which to conclude that the Council did so breach. At most, in re-examination, Mr Flay said that the defective methodology should have been noticed on 20 December 2010. Mr Paykel's evidence was to the effect that the non-compliance could not reasonably have been identified by the Council.

[71] The Council did receive a producer statement with a membrane that differed from what was on the approved plans. However, this is not per se advice as to the direct fixing of the tiles and, even if it were, it is possible that a council would only look at such statements when considering the issuance of a compliance certificate. On the evidence I am not satisfied as to the precise nature of or the timing of any such negligence.

[72] I therefore further find that the Council did not breach any duty in inspecting the balcony tiling during the 2011 works or in any other respect prior to the issuance of the compliance certificate.

Breach as to cladding?

[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.

Breach as to seal issues?

[74] The same applies in relation to seal issues. The experts agreed the Council has no liability. To the extent necessary to determine the matter I find the sealing issues not to have resulted from or to suggest any negligence on the part of the Council.

Breach as to ProtectoWrap on parapets?

[75] As has been noted, the Trustees allege the Council is liable for defects in relation to the parapets around the roof and the saddle flashings. A second layer of EIFS tape (also called ProtectoWrap), that was required to be installed over the top of the Graphex over the parapets and at the saddle flashing junction, was not present.

[76] Also as noted, at the experts' conference in April 2020, Mr Flay and Mr Paykel agreed that the Council had breached no duty in this regard. Mr Probett investigated further and, on the basis of photos he produced from the Council file, two in particular, Mr Flay said the Council must have known or should have been on notice of the missing second layer. He said one photo demonstrated inability to install the tape where the abutting wall had been completed. His stance became that the Council should therefore have confirmed the presence of the second layer on top of the parapets.

[77] Mr Paykel responded by saying that works were still ongoing at the time of inspection and the Council could reasonably have assumed, tape having been in evidence, that the builders would continue in a compliant manner. He disputed Mr Flay's change in evidence. He said the Council had acted reasonably based on its observations during the staged construction. More particularly, Mr Paykel interpreted

the photographic evidence differently to Mr Flay. He considered the evidence to be consistent with his view that a second layer of ProtectoWrap either could still reasonably be expected to be installed or had in fact been installed.

[78] Mr Flay acknowledged that in at least one photo a second layer of ProtectoWrap could have been installed.

[79] Mr Paykel noted also that two layers of ProtectoWrap were being installed in other locations, that the installers were licensed and that a producer statement was provided. For all these reasons, he did not consider that the Council had been negligent in its inspections.

[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.

[81] I find that the Council did not breach its duties in 2011 and is not liable for these defects.

[82] In the circumstances I do not need to address a further submission by Mr Neutze to the effect that there must be evidence of parapet failure to establish breach. If this had been relevant, I would not have agreed with his submission. While possibly relevant to an assessment of damages, I do not consider that actual damage must be demonstrated to establish breach. In this respect I agree with Downs J's view in *Minister of Education v H Construction North Island Ltd* that there is no meaningful distinction between acceptable and unacceptable damage.[11] It suffices if it is established that damage could result from a breach.[12] I note though that the absence of damage is often relevant to assessment of damages. It does not follow from the

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11 *Minister of Education v H Construction North Island Ltd* [2018] NZHC 871.

12 See too *Carter Holt Harvey v Minister of Education* [2016] NZSC 95, [2017] 1 NZLR 78 at [66].

decision in *Minister of Education* that defects must always be removed. It was a given in that case.

[83] For completeness, if I had found the Council negligent in relation to the parapets, I would be satisfied that the capping solution proposed by Mr Paykel would appropriately rectify the defect. The evidence of actual failure was insufficient and the cappings would remove any potential for failure as might otherwise have resulted from the breach. I particularly do not accept the Trustees' submission that the rectification exercise should be influenced by considerations of aesthetics. There is no evidence that aesthetics were of particular concern with regard to the house. In fact I would conclude otherwise. I consider the aesthetics of the capping solution to be acceptable and commensurate in the context of the overall building. (I am not aware of evidence as to the cost of the capping solution but understand it to be relatively minor.)

Breach as to tanking?

[84] As to tanking, the allegation is that in installing a new retaining wall in 2011 a pre-existing membrane had been cut through in order to tie the walls together and the return wall should not have been connected as that results in moisture migrating into the house. This allegedly should have been identified by Council on inspection. Again, the Trustees' position in this respect by the end of the trial is a little unclear. The point did not seem to be specifically addressed in counsel's closing submissions. But I am not aware that the claim has been withdrawn.

[85] Mr Paykel said he saw no evidence of any membrane being cut "let alone cut as a result of the retaining wall installation". He also said any damage might have been caused following the Council's inspection or in areas not contemplated by the 2011 works. Mr Flay said the defect was in only one location and that it was not a consenting issue because it was not in the plans.

[86] The retaining wall was not part of the building consent, and no code compliance certificate was issued in relation to it. As stated, councils may still have liability in circumstances where they are aware of unsatisfactory workmanship or even

where they should be so aware. But I am not persuaded that there was any breach of duty here.

[87] In terms of the alleged defect, the Trustees appear to rely upon one photograph.[13] That photograph does seem to show that the wall is intended to abut an existing structure, but it is a photograph of footings only and not evidence of non-compliance. Mr Flay appeared to accept this. When shown the photograph he said, "I can't comment on whether any of the steel penetrates that block wall or [compromises] that membrane". Mr Probett said that the evidence clearly showed an area of bituthene tanking, which had no reason to be there unless it was to provide a protective layer. I think he is correct, but I do not see how this justifies a conclusion that the Council failed in its duties. I certainly do not accept that the Trustees have established breach as a result of the absence of details or information in relation to this matter on the Council files.

[88] Overall, I find that the Council did not breach any obligations in relation to the tanking defect. At the least there is insufficient evidence to make any finding of breach.

Breach as to roofing?

[89] I consider the Trustees' argument with regard to the roof defects to be misconceived. It was difficult to follow, not helped by the Trustees' statement of claim which simply pleads defects and Council liability based on the duties to take reasonable care in granting consent, inspecting and certifying. That does not sufficiently identify the Trustees' case in this respect at least.

[90] Although counsel regularly referred to "the roof", the house in fact has a number of roofs. The Trustees point to the alleged roofing defects, being insufficient falls and excessive ponding across the roofs (defect 20-10) and waterproofing failures mostly near sheet joints on the first-floor roof (defect 21-10). 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

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13 At 790 of the Council's file, vol 2.

have required a new roof, 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.

[91] Mr Probett gave extensive evidence as to the inadequacies of falls, the risks inherent in liquid applied membranes, and the exclusion of such membranes from the application of E2/AS1 of Acceptable Solution E2/AS1 of the Building Code. The extent of these defects was materially disputed by the Council's experts.

[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 Act.

[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. I note further:

(a) The experts agreed that relevant works were only on the first-floor roof. There were no works on the top roof or the level two low-pitch roofs (and in fact no defects on the top roof). Where no works are carried out, the Council generally would have no duty to inspect in any event.

(b) The works on the first-floor roof were relatively minor and involved replacement of a small area of membrane on the flat surface of the roof and the addition of a small section of membrane lapping the horizontal surface of the roof and against the vertical surface where the roof abutted the upper wall area. Even this was barely noted on the drawings. There was also a minor amount of additional work carried out that was not referred to in the plans.

(c) It may well be that the work carried out to the first-floor roof either did comply with the Building Code (for example the falls in that area were adequate) or it amounted to maintenance or repair using comparable materials, and was work which fell under cl 1 of sch 1 of the Act. That is, no building consent was required. Alternatively, an exemption from obtaining a building consent would have been available under cl 2 of sch 1 of the Act if necessary. Mr Paykel noted that the cost of seeking a building consent might be $25,000–$30,000 for a repair that might cost $500–$600, which he considered disproportionate and inconsistent with the Act. He considered that the infilling of the roof that was required as a result of other non-roof works would also have been exempted if necessary.

(d) I am not persuaded that cl 1(3)(c) of sch 1 precluded reliance on cls 1 and 2 of that schedule. The Trustees have not established that it applies. As the Council submits, there is no or insufficient evidence, photographic or otherwise, to support the submission that the roof had failed as contemplated by cl 1(3)(c) above, or that the Council was or should have been on notice of failings in 2010/2011 such that it should have required full compliance with the Building Code. Mr Flay for the Trustees accepted, although he considered ponding at least at one location was "pretty obvious" when he inspected in 2020/2021, there was no evidence suggesting a failure by the Council to notice ponding (the lack of falls) in 2010. The evidence is that as at 2010 the roof was performing and had done so already for 13 years.

[94] In these circumstances 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. The Council could possibly, if it considered it had the right, which is doubtful, have refused to consent the work applied for under s 49(1) of the Act. But there was nothing to indicate that would have resulted in a new roof. It may have simply meant that no work was carried out (or an exemption sought). Either way, it would not have removed the alleged defects which it is agreed went back to the original construction.

[95] I therefore reject the Trustees' claim in this regard. The Council did not fail to take reasonable care by "failing" to require the Trustees to construct new roofing.

Breach regarding failure to use Z flashings?

[96] It is clear that the 2010 building consent stipulated for the use of Z flashings. It is also likely that the manufacturer of the Graphex cladding product required such usage. That manufacturer did not give evidence but the Trustees' assertion to this effect did not appear to be seriously challenged by the Council. It is also clear that Z flashings were not in fact used.

[97] Mr Paykel maintained that the Council could not reasonably have been expected to notice the non-use during its inspections. He also says that, even if the Council should have noticed the non-use, there was no breach or at least that there was no damage because, had the Council noticed, it could and properly would have issued a minor variation permitting the use of sealant instead of the Z flashings. The Trustees did not appear to dispute this (in fact Mr Flay appeared to concur) but Ms Whitfield contended that minor variations had to be recorded in writing, and none was recorded.

[98] I accept that a minor variation was probably required. But it does not follow that non-compliance with procedure in this respect results in a finding of breach of duty. Where a deviation from a building consent stipulation would likely have been effectively waived by a variation, I do not consider the Council to have failed to take reasonable care. I therefore reject the Trustees' claim in this regard also.

[99] Even if there had been a breach, damages would be nominal. Here, I note that, even after changing his stance as a result of changed evidence (with which I take no issue), Mr Probett for the Trustees still accepted that this breach had not caused significant damage.

Summary as to breach

[100] The Trustees have the burden of proof to establish breach. I have considered carefully each alleged defect. I have clearly been influenced by agreements or near agreements reached by the experts, but I have also reviewed the evidence submitted

and had regard to what I have said above about the extent of Council duties in these circumstances.

[101] For the reasons noted, I am not satisfied that there have been any actionable breaches by the Council other than the issuance of a compliance certificate in 2011 notwithstanding the non-compliance of the balcony works, and the issuance of a building consent in 2016 when it provided for fixed tiling.

[102] To the extent the Trustees allege other breaches, I have not been satisfied that they exist. Specifically, I have not been satisfied that the Council breached any duties in relation to cladding, seal issues, ProtectoWrap, tanking, roofing or Z flashings, all of which are alleged to have occurred in 2010/2011.

What is the appropriate measure of damages in relation to the tiling breaches?

[103] The two "balcony tiling" breaches above having been established, (neither of which was denied by the Council), the next step is to consider what damages flow from those breaches.

Are the wasted costs in 2016 an appropriate measure of damages for the 2011 certification breach?

[104] In respect of the 2011 certification breach, the Trustees claim a loss in terms of the wasted costs of the 2016 work. I repeat, as they have, they do not claim for loss in terms of the cost of rectification work flowing from this breach. (For completeness I comment further on this point below.)

[105] The Trustees say that the 2016 wasted costs were incurred in mitigation of damage and that the burden of proof falls on the Council to disprove that. I do not agree with that analysis. I consider that the standard test for causation applies. That is, the Council is liable for the cost of putting the Trustees in the position they would have been in "but for" the Council's certification of the 2011 works. And it is for the Trustees to prove on the balance of probabilities that the wasted 2016 repair works fall into that category. The Council's negligence has to have been a material cause of or contributor to the loss in terms of subsequent wasted costs.

[106] However, in terms of the end result in this case, the difference in approach makes no difference to the outcome. I am satisfied that the wasted costs in 2016 do reasonably flow as a consequence of the 2011 certification breach. There is no evidence the Trustees became aware of the Council's breach in the interim. It would have been material to the Trustees' decision to repeat the fixed tiling in 2016 that the Trustees had the Council's sign-off to that methodology in 2011. Clearly also the 2016 rectification works were a complete waste of time and money.

[107] As discussed earlier, the Council says the wasted costs have not been proven to flow from the 2011 breach. They rely on a novus actus interveniens in terms of the 2014 work or alternatively on their argument that because the Council's breach came after the negligent work in 2011, the Council's breach did not cause a loss in terms of the cost of repairs. The Council could have given a notice to fix as Mr Flay acknowledged. In that event the Council says it would have had no liability for the cost of repairs.

[108] The simple answer to the latter point in the context of the wasted 2016 costs is that the Council had not given a notice to fix. The Trustees were not carrying out rectification work as would have followed from a notice to fix and are not claiming the cost of that work based on the 2011 breach. They are claiming the wasted 2016 costs. I consider that does flow from the certification breach.

[109] As to whether the 2014 works broke the chain of causation, the Council says it is possible those works caused the 2011 works to fail and brought on the necessity for the 2016 works. The interim works also meant that any photographic or other evidence of the state of the building as at the date of application for the 2016 consent could not be relied on as proof of what flowed from the 2011 works.

[110] The evidence on the Council's novus actus point was thin, which is understandable given the Council knew nothing of the 2015 works at the time. The only evidence came from Dr Linehan and comment by Mr Paykel. I believe that the interim works were superficial. The evidence of Mr Paykel, which I considered throughout to be pragmatic and impartial, did not go so far as to realistically suggest that those works would have been a novus actus.

[111] I therefore find, subject to issues of contributory negligence, that the Council is liable for the 2016 wasted costs of $197,528.

[112] I do not have to consider whether the Council would have been liable for damages based on the cost of balcony (and other) repairs following on from the 2011 breach because the Trustees expressly base their claim in this respect only on the 2016 building consent breach. I do not have to consider the Council's arguments in this regard.

[113] I note though, inter alia, that there may have been difficulties with proving that the appropriate measure of loss flowing from the 2011 breach was the cost of repair. That is not to say that the Trustees would not have had a claim for damages flowing from the 2011 breach beyond the wasted costs on a different basis, but the case was not advanced in that way.

[114] In particular, there is an issue as to whether the 2011 balcony breach, which I have found proven only at the date of certification, actually caused the Trustees' claimed loss in terms of the cost of repairs. The work had all been completed at the point of certification and the Trustees were in a position where, even if certification had not been given, the costs they now claim would have had to be incurred in any event at their own expense or the expense of their contractor. This goes without saying but is also consistent with the evidence of the Trustees' expert Mr Flay.[14] The Council would still be liable for the lost opportunity to repair as at and from 2011 and potentially the lost opportunity to require the builder to pay for that. And I have already found it liable for the wasted costs. But it would not necessarily be liable for costs of rectifying work that had already been negligently carried out prior to the Council's negligence.

[115] This is reflected in [38] of Ms Whitfield's latest submission where she says:

> If the Council had rejected the Code Compliance Certification in 2011 on the basis that the tiling work was defective, then the only reasonable inference is that the works would have been immediately remediated at no cost to the Trustees. *Because of Council's negligence, the opportunity to require the*

[14] Mr Flay did later say that the contractors' breach should have been identified earlier, but I have found that the breach was only at certification.

builder to comply with the Council's requirements in 2011, at the builder's cost, was not afforded to Dr Linehan.

[116] It does not follow though that damages should be assessed on the basis of the cost of repairs especially when there is no evidence that when Dr Linehan became aware of the issue the builder was unable to pay or unable to attend to the rectification work.

[117] I am not aware of a comparable case where the Council has been found liable for the cost of repairs where the claim is only in respect of negligent certification and where it is not either obvious or otherwise pleaded/accepted that the builder whose negligence preceded the Council's, could not have paid or been held liable.

[118] However, the point is academic and there is no need to take it any further.

Are repair costs the appropriate measure of damages for the 2016 consenting breach?

[119] The Trustees' claim for the cost of repairs (which they assess at about $1.36 million) is based on the alleged 2011 non-balcony breaches and the 2016 balcony breach. I have found against the 2011 non-balcony breaches. The claim for the full cost of repairs is therefore based solely on the Council's negligent grant of a building consent in 2016 with regard to balcony works only.

[120] The Trustees move from the conceded breaches to an argument as to the appropriate measure of damages. Ms Whitfield submits that the Council is liable for the full repair costs. She says that the measure of loss for defective building cases is the cost of repair if it is reasonable to repair and if not, then diminution in value. I accept that is frequently treated as the prima facie "rule". Ms Whitfield says it is irrebuttable in this context.

[121] The Council agrees with the prima facie rule but says it is not invariable or inflexible and the overriding approach should be to achieve fairness between the parties, relying on the statements of principle in *Johnson v Auckland Council*.[15]

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15 *Johnson v Auckland Council* [2013] NZCA 662.

[122] The Council's helicopter position throughout has been that it is prepared to accept responsibility for "reasonable repair costs for the balcony defects, based on the Paykel scope of targeted repair, but it is not liable for anything beyond that targeted scope of repair".[16] The Council accepts such liability as being consequent upon its 2016 breach.

[123] In defective building cases it is often not necessary to pause over causation because it is obvious that the defendant is liable for the full loss, and obvious that will be the cost of repairs even possibly to the point of a complete rebuild. That was the case, for example, in *North Shore City Council v Body Corporate 188529* where the Council had negligently failed to notice on inspection the defective foundations upon which a building had been built.[17] In that case the Supreme Court confirmed that the Privy Council's opinion in *Hamlin* was consistent with New Zealand law and that territorial authorities were liable to original and subsequent homeowners for loss caused by the failure of building inspectors to carry out their inspection functions with reasonable skill and care.[18] The Court noted the Privy Council's finding that in cases of latent structural defects which a Council by negligent inspection had failed to prevent, the owner's loss was not the physical defect in the structure, but loss either in the form of diminution of the market value of the property or the cost of repair, if that were reasonably possible. That explanation was based on the House of Lords decision in *Ruxley Electronics and Construction Ltd v Forsyth*.[19]

[124] But it is necessary to be satisfied as to what loss has been caused in each case and therefore what damages are appropriate. In *Ruxley* itself a swimming pool was negligently built to a maximum depth of six feet rather than seven feet, six inches. The only practicable method of achieving a pool with the required depth was demolition and reconstruction. The owner sought damages on that basis. The Judge was not satisfied the owner intended to build a new pool at that cost. It was considered wholly disproportionate to the disadvantage of having a shallower pool and therefore the Judge considered it would be unreasonable to carry out the works. On appeal the

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16 As recorded in the Council's latest submissions.

17 *North Shore City Council v Body Corporate 188529* [2010] NZSC 158, [2011] 2 NZLR 289 (Sunset Terraces).

18 *Invercargill City Council v Hamlin* [1996] 1 NZLR 513, [1996] AC 624 (PC).

19 *Ruxley Electronics and Construction Ltd v Forsyth* [1996] 1 AC 344, [1995] 3 WLR 118.

Court upheld the trial Judge's finding that the owner was entitled to damages based only on loss of amenity.

[125] I do not accept Ms Whitfield's proposition that it would not be permissible for me to consider causation in this context because the Council did not plead lack of causation as an "affirmative defence" and further that the burden would be on the Council to prove it as an affirmative defence. The Council denied causation in its statement of defence. Causation is one component of the cause of action on which the Trustees have the burden. They have to satisfy me that the Council's breach in granting building consent for the further work on the balcony in 2016 caused the loss for which they claim, namely the full cost of repairs, or at least that the Council is liable for those costs/losses.

[126] In my view the 2016 breach(es) did not have the claimed effect. Before the 2016 works the building was already, on the Trustees' case, in a state where it required the full Concept Plan repairs. The 2016 work was merely a failed attempt to remedy one aspect of the 2011 works. There is no evidence that the 2016 work made the building or even the balconies worse than was already the case before the beginning of the work. The 2016 work did not cause the Trustees loss in terms of the cost of rectification work. It failed to remedy already existing loss. The Trustees' own case is that the 2016 work was a waste of time and money.

[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.

[128] I have already found that the wasted costs are recoverable as flowing from the 2011 breach. Those costs cannot be recovered twice. There is no evidence of other consequential losses beyond interest.

[129] The Council, as recorded, accepts responsibility for reasonable repair costs based on the Paykel scope – but for nothing beyond that. Based on that concession and given that the Trustees might otherwise have argued their case differently, I am constrained to accept that the Council is liable for costs on that basis, subject to my finding on contributory negligence.

[130] There is then a difficulty as to whether the Council's concession and the fact their liability consequently exceeds the finding I would otherwise make, affects my finding as to wasted costs. The Council, although it accepted liability for the Paykel adjusted scope, expressly denied liability for the 2016 wasted costs. However, I consider my finding as to liability for wasted costs should stand alongside the Council's concession. That concession was not conditional on a finding that the Council has no liability for wasted costs.

If the Council is liable for repair costs how are they assessed?

[131] If I am wrong and the Council is liable for repair costs as a consequence of its 2016 breach, I nonetheless consider that the appropriate approach to assessing those costs is that taken by Mr Paykel for the Council, referred to as targeted repairs. I therefore would not come to any different conclusion than that reached on the basis of the Council's concession.

[132] As noted, at one end the Trustees seek damages at a level calculated to permit them to substantially renovate or re-build the house not only with new balconies but also with a new roof, new cladding, and substantially modified design (as mentioned, these are referred to as Concept Plan repairs). And at the other end the Council submits that its liability extends only to the cost of what it refers to as "targeted repairs", the scope evidenced by Mr Paykel. This involves the removal of the ground floor balcony membrane and tiled surface finishes, removal of balcony balustrades, removal of the surrounding wall elevations, cladding and joinery units. Mr Paykel notes that, once the decayed timber framing had been replaced, new plywood, membrane, tiles and cladding would be required. He considers it appropriate to look at repairing the tiling defects as if they appeared in isolation. He is confident that a building consent for such remediation would be forthcoming.

[133] In between are other scopes of work, being different forms of like-for-like repairs on which both parties have submitted but for which neither advocates. In fact Mr Laurent says any like-for-like repairs would be "unworkable". There are also various assumptions as to the period that the works will take and other variables.

[134] The various like-for-like scopes seek to rectify defects on, not surprisingly, a like-for-like basis. This invariably involves more cost than for targeted repairs both because the extent of work within any line item is greater (replacing a wall as compared to possibly only repairing it), and because some works are not included in targeted repairs at all. Roofing and site works are examples of the latter. Having said that, I do not perceive a significant difference between the cost of the proposed targeted balcony repairs and of a like-for-like repair of the balconies. The material differences arise as to other works that are included in the like-for-like scopes. These scopes originated as an alternative to the Concept Plan repairs and are not directed at repairing the balcony breaches solely.

[135] The range of costs for targeted repairs was between $490,318.26 and $594,648.79. The range of costs of the like-for-like scopes is between Mr Cutfield's estimate of $771,399.30 and Mr White's estimate of $1,127,970.14. The range of costs for the Concept Plan repairs is between $1,090,509.21 and $1,333,302.96.

[136] Given my finding that the Council is liable only for balcony-related breaches, and my subsequent findings, the like-for-like repair assessments fall away. Neither counsel argued that I should adopt these assessments in any event.

[137] Also, given my finding that the Council is liable only for balcony-related breaches, a scope of work that targets and seeks to repair that breach would prima facie appear appropriate.

[138] The Trustees seek damages based on Concept Plan repairs regardless of my finding that there were no Council failures beyond the direct fixing of the tiles. Ms Whitfield submits that the evidence still leads to the conclusion that the reasonably necessary remedial works are the Concept Plan repairs. Whilst one might be surprised at a suggestion that the level of damages would be substantially unaffected by the level

of breach, I do not dismiss that possibility. 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. Indeed, Mr Paykel's targeted repairs include for example additional sections of replacement cladding. 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 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.

[140] I am not persuaded by the Trustees' claim for Concept Plan repairs. In my view, their evidence and in fact submissions do not focus on the correct test. In closing submissions Ms Whitfield says: "There is no betterment as the works required are reasonably necessary to put the plaintiffs in the position they should have been in but for the Council's negligence – having a house that complied with the Building Code". Similarly Mr Laurent regularly refers to addressing failure of the house as opposed to failures for which the Council is liable. As is clear, my task is not to assess the amount required to make the house fully compliant with the Code. That would well exceed the Council's liability.

[141] Even to the extent the Trustees refer to "reasonable necessity" they suggest a lesser standard than "necessity". Much of the evidence (especially from Mr Laurent and Mr Probett), addresses prudency or desirability or at least strongly suggests the additional works. Mr Laurent, for example, says that anything less than his full concept plan is "not feasible or reasonable". I consider all such evidence to be essentially irrelevant. My sole concern is as to reasonable necessity.

[142] I reject the Concept Plan approach 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.

[143] That essentially leaves the evidence of Mr Paykel in support of a targeted repair solution. For clarity, I am referring to targeted repairs under what is referred to as the increased scope plus replacement of the balustrade. The latter was agreed as a necessary addition. Mr Paykel's increased scope was in response to a number of points made by Mr Probett. It was not ultimately clear to me what position the Council took on the increased scope. As it makes only a small difference to the end result, I have decided to err in the Trustees' favour and adopt the increased target repair solution.

[144] In my view Mr Paykel had carefully considered how rectification should proceed and his approach best reflects the legal test I must apply.

[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. While Mr Laurent said that Resene would have to sign off on the cladding joinder and he doubted they would, I had no evidence from Resene.

[146] Ms Whitfield claims that the Council should have given evidence as to whether a building consent would be forthcoming for the targeted repairs. I do not accept that. Indeed, I consider the Council acted appropriately in remaining neutral as to its future regulatory role. Expert evidence suffices. I note, as Mr Neutze submits, that the Council granted consent for targeted works on the balcony in 2016. While those works failed, the evidence is they failed because of repeated direct-fixing, not the targeted nature of the works.

[147] Ms Whitfield also refers to Gilbert J's decision in *Body Corporate 326241 v Auckland Council*,[20] in support of a submission that a plaintiff should not have to accept "makeshift repairs" and be left with the risk that they will not be effective. I do not consider that decision to be helpful here. There, the works in question were required as a direct result of breach. The question was as to the nature of repairs. The

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[20] *Body Corporate 326241 v Auckland Council* [2015] NZHC 862.

defendant proposed (with little to support it) what the Court considered to be a makeshift solution with inherent ongoing risks. There is no suggestion by the Council here that the works for which it is responsible should be carried out in anything like a makeshift manner, nor do I consider that to be the case, and the scope has been properly evidenced.

[148] I accepted earlier that remedying one defect may sometimes require a much greater scope of work than repair to the immediate area, for which the party liable for the one defect has to pay. However, I am not aware of a case where that involves repairing significant defects for which other parties are solely liable. Where on the Trustees' own case, the greater scope of work is also remedying other defects at least as significant as the balcony defects, and which require contemporaneous remedy, but for which I have found the Council is not liable, the cost of that work should be apportioned in any event to achieve a fair outcome. This is analogous to the concept of betterment, at least in terms of principle. The Trustees would otherwise be receiving a windfall. On this basis I would again consider Mr Paykel's scope establishes the extent of the Council's liability, even if a building consent were not available for the targeted balcony repairs alone.

[149] There are two further points I consider relevant but on which I do not rely.

[150] The first is to consider what the Trustees would have done if they had been required at material times to comply with the Building Code in relation to the balconies. Although Dr Linehan may have changed his stance in the past few years and especially in the context of this litigation, I am satisfied that he would not have then proceeded with anything in any way similar to the Concept Plan repairs. There is, on the contrary, every indication that he would have either pursued a non-compliant outcome dispensation so that he could retain the fixed tiling and achieve the aesthetic outcomes he clearly preferred or that he would have himself proceeded with the targeted repairs that Mr Paykel has proposed.

[151] Secondly, the question of the likely issue of or the extent of work required to obtain a building consent may be somewhat artificial because, on the Trustees' own case, it seems it would be unreasonable for the Trustees to proceed with the repairs

(other than, perhaps, on a very limited basis) and that it is unlikely they would do so. The Trustees say it is imperative that they properly remedy all defects in their property, and that they implement Mr Laurent's Concept Plan. The cost of implementing that plan, as noted, is estimated by the Trustees at $1.36 million. But the Trustees' own valuer says that, following that work, the rectified building will still have significant stigma (in large part attributable to their original purchase) and the value of the rectified building (even after the full Concept Plan redesign) will be only $854,000. That is materially less than the claimed repair cost. Ms Whitfield says the Council cannot take the point that the work will not be carried out because Dr Linehan was not cross-examined on it. She says that the Trustees intend to proceed with the Concept Plan and the property has significant sentimental value as evidenced by the substantial sums they have already paid. I note it is doubtful the Trustees intended to pay anything approaching those sums given the estimates in the two building consent applications. But the point is that, as in *Ruxley*, it is clearly uneconomic to effect the Concept Plan repairs. The Council is not arguing that, as a consequence, the Trustees should be limited to diminution in value, but I agree with the Council, it may be relevant to a pragmatic and fair assessment of the reasonably necessary cost of repairs for which the Council is liable, that it would be unreasonable on the Trustees' own case to carry out the repairs on the basis claimed by them.

[152] In assessing damages, I have not considered the implications of the transfer of the house to the Trustees in 2013. The Council took no exception to this transfer per se. I note however that no evidence was provided as to the terms of transfer. While the Council clearly owes duties to purchasers, it is less clear that damages suffered and compensable to such purchasers should be at the same level as for prior owners. If a purchaser buys a leaky home for land value only (less any demolition costs) then one would struggle to see any basis for compensation. The correct plaintiff then would be the prior owner. No evidence in this respect was provided by the Trustees.

Quantum of "targeted repairs"

[153] I next consider how best to quantify damages based on the targeted repairs increased scope. Evidence was given by two quantity surveyors, Mr White for the Trustees and Mr Cutfield for the Council.

[154] Having determined that Mr Paykel's increased targeted repairs scope is the appropriate scope for the assessment of rectification damages and noting that the Council agreed that balustrades which were previously overlooked must also be replaced, the range of costs is between $581,310 (Mr Cutfield) and $652,902 (Mr White). Clearly the distance between the Trustees and the Council as to the appropriate rectification methodology is far greater than the distance between their experts as to the cost of such works.

[155] As a preliminary point, I agree with the Trustees that the Council has taken a "top down" approach under which Mr Cutfield critiqued the Trustees' costings and either adopted their costings or imposed his own. Consequently, Mr Cutfield did not suggest a cost item greater than that proposed by the Trustees but often suggested lower figures. The Trustees say that this was inconsistent with Mr Cutfield's duties as an independent expert. Mr Cutfield replied to the effect that he thought the approach he had adopted was most likely to assist the Court and that in a number of instances he had simply accepted the Trustees' figure even though it was higher than his own. I note the Trustees' concern and it is not without merit, but I have found it helpful to have a direct comparison.

[156] Further, I was impressed by Mr Cutfield's testimony. He presented as highly experienced. I did not consider him to have been partial or that the weight of his evidence was materially affected by his "top down" approach. That is not to be critical of Mr White (for the Trustees), but it is important to remember that the burden here is on the Trustees.

[157] The overall difference between the two quantity surveyors is $71,000 approximately. The key differences making up that sum are regarding external scaffolding ($28,222), rubbish removal ($9,109) and architect fees ($15,180). These three items total $52,000.

[158] In terms of the scaffolding, I find in favour of the Council's figure. I am not persuaded there is anything wrong with Mr Cutfield's approach, which was based on rates from other projects, a "quote" for an approximate rate and an extra allowance for

location. I also consider it reasonable, as he has allowed, that the scaffolding would not need to be in place for the entire construction period.

[159] I also favour Mr Cutfield's evidence regarding the labour cost of rubbish removal (or at least am not persuaded it is wrong). That is that most of the rubbish will relate to sub-contractors' works and will be covered by those costings.

[160] In terms of architect fees, I do not consider I have sufficient evidence to decide between the two figures. The burden is on the Trustees, and I note that Dr Linehan himself seemed to keep architect's fees to a minimum in all of the works carried out. I have decided however, to halve the difference between the two quantity surveyors on this cost item.

[161] As to the balance of the differences (that is a total of approximately $20,000), I adopt Mr Neutze's proposal, admittedly advanced on a narrower basis, to split that difference equally.

[162] The end result is an upward adjustment to Mr Cutfield's increased targeted scope costing of $581,310.14, by $17,300, leading to a final rounded figure of $598,610 which I fix as the quantum of the cost of repairs.

[163] I referred above to the possibility that damages might need to be reduced by a contribution or credit from the Trustees to reflect costs they would have incurred if the Council had not breached or to reflect betterment. For completeness, I note that no such adjustments are required in the context of a targeted repair solution. If I had found in favour of a wider scope of works then such adjustments may well have been required.

Other heads of damages

Stigma

[164] The Trustees seek damages of $104,000 for stigma associated with the failed 2011 and 2016 works. They say that even after repairs are completed (which based on the Council's concession and my alternative finding is on a targeted basis), the

house will be worth materially less than it would have been because of the stigma attached to it and claim that $104,000 of that stigma relates to the two defective works.

[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.

[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.

[167] The claim for stigma is therefore rejected.

Resource consent costs

[168] The Trustees seek to recover $5,305, being their costs for a resource consent application that was submitted in relation to protruding eaves. I do not consider the Council to have any responsibility for the protruding eaves. They are not attributable to any breach by the Council and, to the extent the Council might be responsible for the cost of targeted repairs, are not necessary to progress those repairs. I therefore reject this claim.

Removal and storage costs

[169] These costs were assessed at $7,992 on the basis of the Concept Plan repairs. The Council is not liable for Concept Plan repairs. Nor is there any suggestion that the targeted repairs will require the removal and storage contemplated. The Trustees' claim in this respect fails.

General damages

[170] The Trustees claim $15,000 general damages for each of the two failed works. Their claim is premised upon their stance that the Council's breaches have caused them stress and anxiety. I have found that the Council has only breached its duties in relation to certifying the deck tiling in 2011 and consenting in 2016. Again, the defects went well beyond that. The 2011 work was defective in many respects, certainly on the Trustees' evidence. It is difficult in those circumstances to make any realistic assessment of the share the Council should bear, but I allow $15,000 in total for this head of damages.

Interest

[171] The Trustees claim interest under the Judicature Act 1908 at five per cent per annum from the date costs were assessed, or incurred, until judgment. Mr Neutze submits that interest should not apply. I disagree. The claim has been assessed, or costs incurred, as at stated dates and, but for the time required to litigate, sums were payable at those stated dates. The principle established in *Worldwide* is applicable.[21]

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[21] *Worldwide NZ LLC v NZ Venue and Event Management Ltd* [2014] NZSC 108, [2015] 1 NZLR 1 at [23].

Also costs, particularly of building works, are never static. Interest is to apply on damages as assessed.

[172] The Court has a discretion to assess interest at a lower rate than five per cent but that is not appropriate here.

Contributory negligence

Legal principles

[173] There remains the question of whether there has been contributory negligence on the part of the Trustees. The Council seeks to invoke s 3 of the Contributory Negligence Act 1947. It claims that any damage suffered by the Trustees for which the Council would otherwise be liable has resulted, at least partly, from the fault of the Trustees such that the damages recoverable should be reduced to such extent as this Court thinks just and equitable having regard to the Trustees' responsibility for the damage.

[174] Counsel for both the Trustees and the Council appear to be agreed on the applicable principles. Section 3 of the Contributory Negligence Act contemplates a reduction in the damages that would otherwise be recoverable to such extent as the Court thinks just and equitable having regard to a plaintiff's share in the responsibility for the damage. The pre-condition is that the damage in question must have been at least partly caused by the fault of the Trustees. Burden of proof issues are subtle but they are embraced or removed by the Court's assessment of what is just and equitable.

[175] Fault is akin to negligence but is a wider term. In particular, it is not necessary for the Council to prove that the Trustees owed it a duty of care. It is sufficient to show negligent failure to avoid being hurt by the Council or to take precautions that would have reduced the loss.[22] If there is a point of disagreement in principle here between counsel it is that there are some indications that the Trustees consider s 3 cannot apply unless the Council could prove negligence against them. I do not consider that is so and indeed if it were so then s 3 would add little if anything to a

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[22] Carolyn Sappideen and Prue Vines (eds) *Fleming's The Law of Torts* (10th ed, Brookers, Sydney, 2011) at [12.30].

simple cross-suit or to issues of causation. For that reason, I tend towards using the term "fault" rather than negligence. That fully accords with s 3.

[176] Contributory negligence must be assessed against the nature and extent of the relevant breaches. For example, if I had found that the Council had breached duties in relation to the roof, it is possible that there might be additional "fault" considerations in relation to that issue.

[177] I consider the matters broadly raised by Mr Neutze to be relevant to a s 3 assessment and address them below in chronological order. Also expressly referred to are specific points raised by Mr Neutze which I reject:

(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.

(b) Despite having obtained the report Dr Linehan took no steps in respect of the weathertightness issues until 2010 when there was "*a large bulge containing many litres of water protruding down from the ceiling in the garage*". There is no evidence that delay contributed to or exacerbated the damage suffered. However, it does mean that 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.

(c) I note at this point Mr Neutze's submission that Dr Linehan had found a screwdriver hole in the membrane in the easterly wall and determined that water ingress issues were caused by this despite his lack of qualifications to form that view and despite the original report. I consider this largely irrelevant, but it adds to the tapestry of an owner who it seems was avoiding taking steps to fully investigate the condition of his house.

(d) Dr Linehan retained Mr Barber without appropriate due diligence into his qualifications and reliability. He took Mr Barber's own word as to his expertise. As Mr Neutze said, Dr Linehan engaged Mr Barber on a handshake. I heard no evidence from the insurer, whose involvement was obviously minimal. Clearly Mr Barber was not thorough, compliant or sufficiently expert. Ms Whitfield correctly pointed out that a client is not responsible for ensuring that design or the finished building complies with the Code, referencing *Minister of Education v H Construction North Island Ltd*.[23] That is the responsibility of the professionals they have engaged and the client is reliant on advice given by those professionals. But an owner is still responsible for engaging expertise at an appropriate level especially with a house such as this. In this case Dr Linehan clearly failed to engage a builder who was suitably qualified, thorough or compliant, or to take reasonable steps to do so.

(e) The Council notes that Dr Linehan failed to enter into appropriate contractual arrangements with Mr Barber. I cannot see that this was causative.

(f) 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

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23 *Minister of Education v H Construction North Island Ltd* [2018] NZHC 871 at [334].

work. It is likely Dr Linehan would have known the plans were not even available. When Mr Barber finally made 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.

(g) Further in this regard, 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.

(h) 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. Again, I am not making any findings as to actionable negligence. I am considering "fault" solely for the purposes of s 3.

(i) Dr Linehan failed to obtain expert advice that a reasonable owner would have obtained, and followed, in the circumstances. An owner in Dr Linehan's circumstances with a valuable property, long suffering from weathertightness issues, must bear a degree of responsibility for ensuring the issues are understood, appropriate experts engaged, and their advice/reports followed. He recognised the need to engage experts before buying the house and again for purposes of this litigation. It is not fanciful to think that with a fraction of the expertise he engaged for this case before and during the 2011 building project, Dr Linehan would not have been in Court.

(j) Especially relevant is the fact that, 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, once in 2011 and again in 2014. Interestingly Dr Linehan still did not inquire of Ms Simpson and in fact engaged a different draftsperson. At this point it must have been even clearer that Dr Linehan needed to engage consultants with special expertise in remediation. I am not persuaded that Mr Brunton provided that assistance. It was not good enough, particularly given the terms of the contract with Mr Barber, under which he was liable for all subcontractors, for Dr Linehan to rely on Mr Barber, whether Mr Barber attributed blame to the tiler or not. The Trustees should have sought expert advice before taking any further steps.

[178] I consider each of the factors I have identified as relevant to have had causative potency and that Dr Linehan clearly contributed to his (the Trustees') own loss.

[179] Overall, having regard to the evidence, I am satisfied that Dr Linehan (and therefore the Trustees) as owners of a valuable property they knew to have material weathertightness issues materially failed to take such steps as they reasonably could to ensure the job was well done. They ought to have taken more advice both at the outset and over time and to have followed the advice they did receive from Ms Simpson and even Mr Barber as to the tiling. The further advice could reasonably

be expected to have extended to more thorough investigation, to more thorough design solutions, suitably expert builders and contractors and/or to supervision. Dr Linehan also 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.

[180] On the basis of the breaches by the Council and the scope of damages that I have found, I consider it just and equitable to reduce such damages by 50 per cent under s 3 of the Contributory Negligence Act, having regard to the Trustees' own responsibility for the damage.

[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.

Judgment

[182] Accordingly, I order the Council to pay damages to the Trustees as follows:

(a) 50 percent of the cost of increased targeted repairs of $598,610, being $299,305.

(b) 50 per cent of wasted costs of $197,528, being $98,764.

(c) 50 per cent of general damages of $15,000 being $7,500.

(d) Interest assessed under the Judicature Act at five per cent per annum from the date of Mr White's assessment in the case of (a) and from the date the costs were incurred in the case of (b), down to the date of judgment.

[183] Counsel wished to be heard separately as to costs. The plaintiffs are to file submissions within two weeks, the defendants to file submissions one week afterwards and the plaintiffs may file reply submissions if any within one further week. All submissions are to be limited to five pages.

Hinton J