IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2017-404-001772
[2023] NZHC 3034

IN THE MATTER OF	The Bianco Apartments
BETWEEN	BODY CORPORATE 406198 Plaintiff
AND	ARGON CONSTRUCTION LIMITED First Defendant
	AUCKLAND COUNCIL Second Defendant

Hearing:	1-5, 8, 10-11, 15-19, 22-26, 29-31 May and 1, 6-7, 19-20 and 22 June 2023
Appearances:	D R Bigio KC, R D Butler, S C I Jeffs, I J Stephenson, R J H Scott, H Chung and J C Wedlake for Plaintiffs W A McCartney and D A Cowan for First Defendant S C Price, M J Ferrier, C M Fairnie and S H Ji for Second Defendant
Judgment:	30 October 2023

JUDGMENT OF ANDREW J

This judgment was delivered by Justice Andrew
on 30 October 2023 at 3.00 pm
pursuant to r 11.5 of the High Court Rules 2016

Registrar / Deputy Registrar

Date …………………………….

TABLE OF CONTENTS

Introduction [1]
The parties [6]
Factual background [10]
Building consents [14]
Construction [17]
Auckland Council inspections [37]
Discovery of the defects by the plaintiffs [39]
Agreed defects [40]
The history of the claims and pleadings [41]
The pleadings [46]
The issues [47]
Defects and liability framework [50]
Scope and quantum [51]
Expert evidence [54]
The defects at issue [55]
Defect 1 – Cantilevered balconies [57]
Defect 2 – Podium [72]
The damage caused by the defects
Is the damage in respect of defect 1 of such a nature that the requirements of the Building Code are not met – is it actionable damage? [76]
Is the damage in respect of defect 2 actionable damage? [93]
Liability of Argon
Did Argon owe a non-delegable duty of care? [102]
Argon's responsibilities [115]
Conclusion – Argon's liability [120]
Liability of the Auckland Council
Standard of care [123]
Defect 1 [129]
Causation [163]
Defect 2 [166]
Conclusion on liability [169]
Reasonable remedial scope
Legal principles [170]
The plaintiffs' proposed scope of remedial works [180]
Interpretation of ss 17 and 112 of the Building Act 2004 [186]
Is the plaintiffs' scope reasonable? [203]
Evidence of the façade engineers – cladding [213]
Mr Earley's evidence – Auckland Council [237]
Mr Alexander's scope of repair [241]
The acoustic matting [254]
What will it cost to repair the defects?
The parties' positions [261]
Preferred approach [272]
Betterment [281]
Consultants' costs [283]
Consequential losses [287]
General damages [288]
Standing [296]
Contributory negligence [322]
GST [334]
Affirmative limitation defences [337]
Apportionment between defendants [340]
Other issues
The non-legally represented plaintiffs [343]
Former owners/assignees [345]
Result [351]

Introduction

[1] This is defective building litigation. It involves the 157-unit residential unit title development (comprised of two towers) known as the Bianco Off Queen Apartments (Bianco Off Queen).[1]

[2] The Body Corporate and individual unit owners sue in negligence. The defendants are the building contractor, Argon Construction Ltd (Argon), and the Auckland Council (i.e. the territorial authority).

[3] The remaining defects at issue are weathertight-related.[2] The plaintiffs say the building was built with cantilevered balconies that have defective waterproofing (defect 1). They also say that the waterproofing on the ground level (including the podium common areas) suffers from similar problems (defect 2). The overwhelming majority of the damages sought relate to the cost of remedying defect 1.

[4] The plaintiffs seek total damages of $40,739,870.[3] Their remedial scope (i.e. what is reasonably required to remedy the defects) involves wholesale/building-wide repairs including replacement of all cladding, joinery and balcony balustrades.

[5] The defendants deny liability. In particular, the Auckland Council contests virtually every element of the plaintiffs' claims, including the nature and extent of the defects. A central issue is the reasonable scope of repairs and the costs to carry out those repairs. There is also an issue of standing; the ability of the Body Corporate to sue for the costs of repairs. On the critical issues, the respective positions are very far apart.

The parties

[6] The first plaintiff is Body Corporate 406198. There are 93 second plaintiffs who constitute the current or former proprietors of 132 of the 157 legal units. I note

[1] The original name of the building was Turner Waverly.
[2] A number of claims against other defendants and third parties were settled on the eve of or during the early part of the trial. This removed the fire and hot water defects from the scope of the remaining claims as well as a significant number of parties.
[3] Plaintiffs' closing submissions – claim summary, dated 22 June 2023.

that there are 178 units in total if dual key units are counted as two units, where the second plaintiffs represented by Lane Neave in these proceedings own 147 of the 178 total units.[4] Some of the second plaintiffs own more than one unit.

[7] Two of the second plaintiffs are self-represented. They are Yinling Linda Wu and Haixin Wang. These two plaintiffs seek a discrete award of damages in favour of them individually, although their claims are based wholly on the expert evidence in the case generally advanced by the Body Corporate.

[8] Some of the units are rented out via the Residential Tenancies Act 1986 and some are used for temporary accommodation as part of a serviced accommodation business (Hotel Pool) that operates in the towers. The 147-total units owned by the second plaintiffs are comprised of the following:

(a) 67 units are rented out to tenants;

(b) 30 units are part of the Hotel Pool;

(c) 38 units are owned by Kāinga Ora; and

(d) 12 units are owner-occupied.

[9] A number of the second plaintiffs purchased their respective units in either 2016 or 2017. Most of these owners received pre-contract disclosure statements which referred to Body Corporate AGM minutes. Most of these owners also had solicitors acting for and advising them on their respective purchases.

Factual background

[10] Bianco Off Queen is located in central Auckland, between Symonds Street and Queen Street. Tower A consists of 14 storeys and 3 basement levels. Tower B consists

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4 As stated, Bianco Off Queen comprises 178 units in total if dual key units are counted as two units. There are 21 dual key units, so if counted as one legal unit, there are 157 legal units. Of the 178 total units, there are 21 studio units, 41 one-bedroom units, 115 two-bedroom units and one three-bedroom unit. 147 of these units are owned by second plaintiffs, of which 31 are one-bedroom units, 96 are two-bedroom units, one is a three-bedroom unit and 19 are studio units.

of 13 storeys, including one mezzanine level, and two basement levels. The basement levels include car parks.

[11] The above-ground units are individual apartments which, as stated, are a mix of rentals, short-term accommodation and owner-occupied units. The only exception is a unit on level 1 which is used as the hotel reception and hotel offices.

[12] A central podium and pedestrian walkway separate the two towers. These areas are covered with ceramic floor tiles over liquid-applied waterproof membrane.

[13] Each tower is served by a staircase and two lifts which extend to all levels, including basement levels. Above ground, the staircases are situated on external walls and are partially exposed to weather.

Building consents

[14] On 1 March 2007, Argon and the original developer, Bianco Limited, entered into a contract for the construction of Bianco Off Queen. The critical consents for the purposes of these proceedings are as follows:

(a) BLD 20041713901 – which concerned the super-structure and building services (this was referred to by the parties and their witnesses as the "901" consent.);

(b) BLD 20041713904 – which concerned a change of cladding.

[15] Argon completed construction around January 2009. The Auckland Council issued the relevant Code Compliant Certificates on 30 January 2009.

[16] The apartments were designed to be affordable and relatively low-cost. They were described by Mr Stephen Alexander, expert building surveyor witness for Argon, as "a low initial cost/high life cycle cost building".

Construction

[17] The building structure is reinforced concrete with steel frame infill sections to the external walls.

[18] The steel framing of the main structural exterior wall is designed to resist wind loads, hold the interior lining (plasterboard), contain the insulation, and hold the rigid air barrier (RAB). The purpose of the RAB is to prevent uncontrolled air infiltration through the wall and also to deflect any water that gets past the outer portion of the wall.

[19] The majority of the external walls are clad with a rainscreen cladding system, comprising of prefabricated "Moduclad" cladding modules. This system is denoted as a James Hardie ExoTec façade panel rainscreen and RAB (with James Hardie's rigid air barrier product being called RAB™ Board).

[20] The rainscreen portion (i.e. the outer portion of the wall) consists of narrow steel battens fixed over the outside of the RAB. The exterior cladding of the building is then fixed to these rainscreen battens. The purpose of the rainscreen is to resist water entry into the inner portion of the wall. Water that enters behind the exterior cladding should drain out the bottom of the rainscreen without causing damage to the other parts of the wall.

[21] Attached and marked 'Appendix A' is a copy of the structural drawings of the cladding system contained in the consent drawings by the manufacturer Jacobson Façade Systems Ltd.

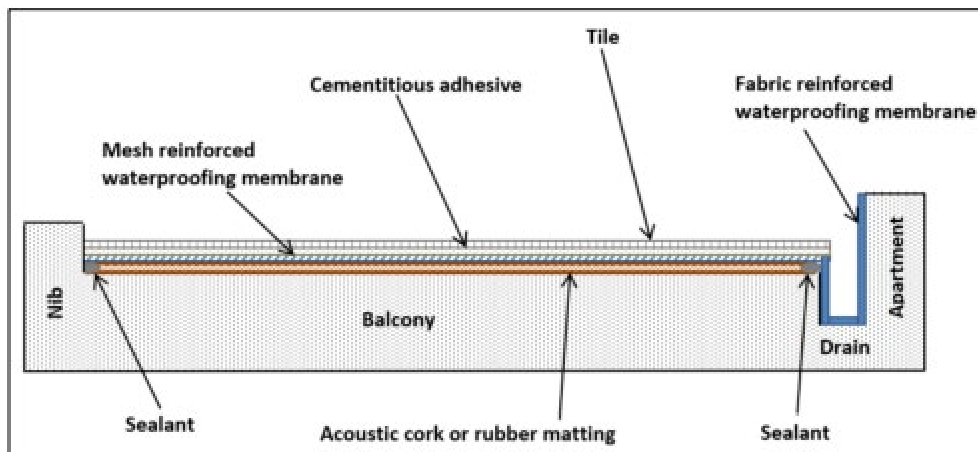
[22] Each of the 157 units have at least one balcony. The balconies to the apartments above ground-level are cantilevered. The balconies are covered with ceramic tiles, installed over liquid-applied waterproofing membranes and acoustic matting, with metal-framed railings providing fall protection.

[23] The structure and waterproofing of the balconies were designed by ADC Architects and Buller George Engineers Ltd. The initial drawings for the balconies specified that the concrete was to be poured off-site, with screed to be applied on-site

to provide the balconies with a slope towards the building. This included forming a drain into the pre-cast concrete slab prior to installation. However, Argon proposed, and the architects approved, an alternative construction methodology. That alternative provided for the entirety of the structure to be completed off-site using pre-cast concrete and installed on-site by Argon. No screed was applied in the construction of the balconies.

[24] Concretec New Zealand Ltd supplied the pre-cast balconies which Argon subsequently installed. TAL Ltd (TAL), the tiling sub-contractor, waterproofed and tiled the balconies. Argon placed grates (or grills) over the balcony drains. The Auckland Council carried out some inspections of the waterproofing of the balconies throughout the construction.

[25] A diagram showing the design elements of the cantilevered balconies, as they were built, is set out below.



[26] The balconies are constructed with one or more pre-cast concrete slabs. As constructed, the pre-cast slabs extend into the building by approximately 250 mm. The steel holding the balcony to the building is contained in the bottom of the slab (the slab itself is a 200 mm slab). The steel, that does all the work of holding the balcony to the building, is about 50 mm from the bottom. On the slab, there is a raised perimeter nib, also made of concrete. The nib is located on the exterior face of the balconies.

[27] The apartments situated on the corners of the towers have larger balconies. For these balconies, there is more than one pre-cast concrete slab, meaning that multiple slabs butt together to form joins or joints. Those joints are more vulnerable to ingress from moisture. This is one of the areas where there has been water ingress through the balconies.

[28] The waterproofing membrane was to be reinforced with mesh. A cementitious adhesive was to be applied on top of the waterproof membrane, to which the tiles were to be affixed.

[29] Once constructed, the balconies had a fall of 20 mm, with the higher part of the fall being located adjacent to the perimeter nib. Water, once it lands on the tiles of the balconies, runs towards the apartments, where it was designed to be diverted away from the apartments by a channel drain with a downpipe.

[30] A diagram demonstrating the "bottom of wall detail" and where the wall intercepts with the balcony drain on the interior face of the balcony is attached as 'Appendix B'.

[31] The consented drawings showed "Mapelastic Waterproofing on [Mapefonic] Acoustic System", a BRANZ-approved proprietary system including a waterproof membrane and an acoustic mat. However, as built on most balconies, the acoustic matting was made of cork. In some instances, a rubber matting was used instead of Mapefonic. Cork is absorbent and biodegradable.

[32] The specified Mapelastic membrane is a cementitious (two-part) liquid-applied membrane system produced by Mapei New Zealand Ltd. The consented drawings show that the membrane was to terminate around the perimeter by "sawcut to seal waterproofing membrane".[5]

[33] Changes to the original design, including the dispensing of the sawcut were agreed between Argon, Mapei and the architect. As part of the change process Mapei,

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5 In his evidence, Mr Gabriel, general manager for Argon (and site engineer during the construction of Bianco Off Queen), described this as follows "[t]he original design provided that the liquid applied membrane would terminate into the balcony chase, which is a slot cut into the balcony for this purpose" (i.e. a sawcut). He says that following discussions with Mapei it was decided that the liquid-applied membrane could be terminated at the up-stand without the need for a chase.

in an email to Mr Gabriel of Argon on 27 June 2007, stated "[a]s long as the membrane is allowed to turn up onto the up-stand, the sawcut is not a necessary." That email also stated:

> Mapei's Mapefonic System has been specified by the architects as the under-tile acoustic product. We would very much like this specification to stand. However, if acoustic cork is utilised, we can offer a system of adhesives, waterproof membranes, grouts and sealants that will be covered by a Mapei Product Performance Warranty.

[34] The products that would be covered by that warranty are then listed in the email and included alkali resistant fibreglass mesh "for reinforcing waterproof membrane over acoustic cork".

[35] As built, none of the balconies investigated by the plaintiffs' experts had membrane to the inside face of the nib. The membrane terminated on the horizontal surface of the balcony before the nib as shown in the drawing above at [25]. The plaintiffs say that the as-built detail was a high-risk detail.

[36] TAL issued two producer statements for the tiling and waterproofing. One was dated 21 November 2008 and covered tower A and the podium, and the other one was dated 12 December 2008. Mapei was a supplier to TAL. Argon did not have a direct contract with Mapei. Mapei issued a product performance warranty for their Mapelastic product on 29 October 2008.

Auckland Council inspections

[37] Between 6 and 8 November 2008, Mr Pulu from the Auckland Council inspected some of the balconies, including all of the balconies on levels 4, 5, 6, 7 and 8 in tower A. The waterproof membrane was given a pass and the overflow and discharge drain was regarded as "not applicable". At the time of these inspections, the "grill over [the] deck area[s]" had not been put in place.

[38] There was only one inspection of the podium area by the Auckland Council. That occurred on 12 November 2008 and resulted in a "pass". It appears that the inspector only inspected "2/3 of the north-west side of the podium area".

Discovery of the defects by the plaintiffs

[39] The possibility of defects 1 and 2 were first communicated to the unit owners at the 15 February 2017 AGM. A preliminary report from Maynard Marks, building surveyors and remediation specialists, was received by the Body Corporate in May 2017 which advised that there were enough concerns about aspects of the construction of the building, including balcony and podium waterproofing, that further investigation was necessary. The findings of this report and the prospect of litigation was communicated to the unit owners at an Extraordinary General Meeting on 21 June 2017.

Agreed defects

[40] At the experts' conferral for waterproofing, convened under r 9.44 of the High Court Rules 2016, the experts commenting on the defects to the cantilevered balconies agreed that:

(a) there are failures to the membrane which have allowed water underneath the waterproofing membrane;

(b) water ingress is causing damage to the cork acoustic layer;

(c) in respect of damage to the cork acoustic layer, clauses E2.3.2 and B2 of the Building Code have been breached; and

(d) water has also entered the exterior walls causing damage in some locations, resulting in further breaches of E2.3.2 and B2 of the Building Code.

The history of the claims and pleadings

[41] Maynard Marks Ltd began its investigations in 2016. It raised a lengthy list of matters they considered to be defects or issues with the building. The original statement of claim filed in July 2017 asserted 99 specific defects.

[42] The Maynard Marks building assessment report of November 2018 again raised numerous issues with the building. The report and enclosures comprise 997 pages and included a long list of scope items. An initial, preliminary scope of remedial works was also prepared by Maynard Marks in 2018. An eighth version of that scope, referred to as MMSOW8 was prepared and dated 20 September 2021. This is described by the plaintiffs as a "foundation document" and is an essential component of their claims.

[43] Many of the alleged defects fell away with the plaintiffs' sixth amended statement of claim of 1 July 2019. The ninth, and current, amended statement of claim dated 21 June 2022 contains four defects. As noted above, two of those have settled, leaving only defects 1 and 2 for me to determine. It is notable that despite the significant reduction in the number of defects pleaded, the plaintiffs' alleged scope of remedial works has changed very little. Mr Price, on behalf of the Auckland Council, described this as a curiosity and submitted that this case "has all the hallmarks of the plaintiffs and/or Maynard Marks getting in too deep and being unable to find a way out". A theme of the Auckland Council's case is that what has happened here is that the plaintiffs have identified a large number of issues of concern and have been advised as to a scope of works to address those concerns, which have now been "shoe-horned" into what has become defects 1 and 2.

[44] The ninth amended statement of claim seeks judgment against the first and second defendants in the sum of $60,024,824.60 (including GST), together with general damages of $1,575,000 and consequential losses of $5,545,000. The damages sought has since been revised. The sum now claimed is $40,739,870.

[45] At the time the plaintiffs served their evidence in relation to scope and quantum, namely in February 2022, the damages claimed were based on an estimated 79–90 weeks duration for the remedial works. Since then, and in part because of the settlement of the fire and hot water claims, the quantum sought by the plaintiffs has reduced considerably. The plaintiffs' expert programmer, Mr Gould, has also substantially revised his estimated duration of the remedial works to between 36 and 43 weeks. However, it remains the case that the vast majority of the plaintiffs' quantum now sought relates to assertions that they are entitled to a full re-clad, new

joinery, new balustrades, a better tile system, better drainage and a raft of other upgrades or repairs (that have nothing to do with the membrane issues). The defendants say that even if the pleaded defects are made out, the plaintiffs' scope is unreasonable and disproportionate; it is not recoverable damage.

The pleadings

[46] In the ninth amended statement of claim of June 2022, the plaintiffs claim that the defendants breached their duties of care in that Bianco Off Queen contains defects 1 and 2, as set out below:

(a) Defect 1 – cantilevered concrete balconies: failure to install or to ensure the balcony membrane was installed in accordance with the design and/or good trade practice, including failure to supervise contractors, failure to provide design details necessary to install proprietary waterproofing, and failure to inspect or call inspections of waterproofing.

(b) Defect 2 – Podium: failure to install or ensure the podium, truck dock, access ramps, and enclosed balconies had a waterproof membrane installed in accordance with the design and/or good trade practice, including failure to supervise contractors, failure to provide design details necessary to install proprietary waterproofing, and failure to inspect or call inspections of waterproofing.

The issues

[47] As noted, the defendants (particularly the Auckland Council) challenge and put the plaintiffs to proof on virtually every element of its claim. There are thus multiple issues. They include each of the elements of the tort of negligence which the plaintiffs carry the burden of proving. This includes: the nature and scope of the duties of care owed (and in Argon's case, whether it owed non-delegable duties), breaches of the standard of care, damage, causation, the scope of repairs, calculation of quantum, consequential damages and contributory negligence. A further issue is the standing of

the Body Corporate to sue for recovery of the remedial costs and the consequences of my finding on that issue for any proven contributory negligence.

[48] The physical realities of the building are not seriously disputed in the sense that there is no challenge to what the plaintiffs' building surveying experts (i.e. Maynard Marks) saw and photographed during the investigation of the building. However, the plaintiffs have presented a case based on the existence of systemic defects calling for wholesale/building-wide repairs. The defendants say that their evidence falls well short of establishing such systemic defects. The defendants say that Maynard Marks identified a small number of balconies which leak and then investigated the cause of those leaks; they did not investigate the workmanship on non-leaking balconies. The defendants say that the problems with such an approach are obvious.

[49] I will deal with each of the many issues in accordance with the following road maps.

Defects and liability framework

[50] I adopt the following approach in respect of each alleged defect (i.e. in relation to defect 1 and 2) to determine liability:

(a) What is the alleged defect and does it exist?

(b) Is there a "defect" – does it breach the Building Code and what is the extent of damage?

(c) Did Argon owe non-delegable duties of care in respect of the defect?

(d) Should it have been identified by the Auckland Council?

(e) Would it have been prevented by the Auckland Council?

Scope and quantum

[51] I will approach the scope and quantum issues (if liability is established) in accordance with the following road map:

(a) What is reasonably required to remedy the alleged defect and any damage it has caused?

(b) What are the costs of the reasonable remedial scope?

[52] This assessment includes addressing the issue of whether the reasonable cost of carrying out the remedial works is to adopt the least expensive method. It also involves an interpretation of ss 17 and 112 of the Building Act 2004.

[53] At the conclusion of the judgment, I address a number of subsidiary issues, including the standing of the Body Corporate to sue, GST, general damages and contributory negligence.

Expert evidence

[54] Expert evidence was given by a range of experts, including the following:

(a) Building surveyors – Mr Richard Angell (plaintiffs), Mr Darryl August (plaintiffs) and Mr Stephen Alexander (Argon). Mr Angell and Mr Alexander participated in an expert conferral on waterproofing under r 9.44 of the High Court Rules and signed a Scott Schedule which was filed with the Court.[6] Mr Matthew Earley for the Auckland Council also participated in the conferral but was not called as a witness.

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6 "Scott Schedules" are frequently used in the Technology and Construction Court (TCC) in the UK. Their aim is to identify the main issues in dispute between the parties; they set out the defects alleged and the defendant's responses, as well as joint comments setting out points of agreement and disagreement. See *Napier City Council v Local Government Mutual Funds Trustee Ltd* [2021] NZHC 1477 at [143], n 79; see also *Emden's Construction Law by Crown Office Chambers* (online ed, LexisNexis) at [26.75]; and *Jones v Onyut* [2012] EWCA Civ 1816.

(b) Façade engineers – Mr Andrew Hakin (plaintiffs), Mr Matthew Paget (Argon) and Dr Gerrard Winter (Auckland Council). These witnesses also participated in an expert conferral under r 9.44 and filed a Scott Schedule.

(c) Quantity surveyors – Ms Heidi van Eeden (plaintiffs), Mr Clinton Brock (Argon) and Mr James White (Auckland Council). There was no expert conferral of the quantity surveyors.

(d) Engineering programmers – Mr Christopher Gould (plaintiffs) and Mr David Andrews (Argon). The Auckland Council had no expert programmer witness. There was no joint expert conferral. These witnesses address the estimated duration of the remedial works.

(e) Council practice – Mr Simon Paykel (plaintiffs) and Mr Anthony Hutt (Auckland Council).

(f) Property law/conveyancing expert – Mr Peter Nolan (Auckland Council).

(g) Consequential losses (including loss of rental and alternative accommodation costs) – Mr Bernard Wright (plaintiffs) and Mr Venkatakrishnan Dheenadayalan (Housing New Zealand Ltd).

The defects at issue

[55] The term "defect" is not defined in either the Building Act 2004 or the Building Code. Its meaning was discussed by Downs J in *Minister of Education v H Construction North Island Ltd*:[7]

> … I use the term in an untechnical way, and as meaning only some error, shortcoming or imperfection in relation to an aspect of construction.

[56] I adopt his Honour's definition as a reasonable working definition. I accept the Auckland Council's submission that such definition must be assessed through a

[7] *Minister of Education v H Construction North Island Ltd* [2018] NZHC 871 at [63].

2007–2009 lens (i.e. when the buildings were constructed). I begin by identifying the existence of each defect in accordance with the framework set out at [50] above.

Defect 1 – Cantilevered balconies

[57] In relation to defect 1 (the balconies) the plaintiffs' plead:

(a) a failure to construct membrane up-stands to the perimeter nib of the balconies;

(b) a failure to ensure that reinforcing mesh was encapsulated within the membrane;

(c) a failure to ensure the membrane was adequately lapped into and over the drainage outlets;

(d) a lack of Mapeband; and

(e) a failure to ensure the membrane was applied with sufficient thickness.

[58] The essence of the plaintiffs' claim (in relation to both defects 1 and 2) is that there has been the failure of an integrated system designed to keep the building weathertight. That failure is pleaded primarily as a failure in respect of the installation and performance of the membrane.

[59] The factual premise (i.e. the situational facts) of defect 1 is not really at issue. These agreed situational facts include:

(a) the membranes were not dressed into sawcuts and in many cases there was cork matting under the membrane rather than Mapefonic;

(b) the cork has become wet and/or decayed in the locations identified by the plaintiffs;

(c) the consented plans (as a matter of fact) required a chase/sawcut to the inside face of the balcony nib, but as built, there were no sawcuts;

(d) there was no membrane up-stand on the perimeter nib;

(e) on some balconies the membrane was poorly dressed into the outlet and in some cases not pressed into the outlet at all; and

(f) the thickness of the membrane was highly variable and on many balconies the mesh was not encapsulated within the membrane.

[60] However, the defendants do not accept that each of these factual state of affairs constitute an actionable defect; the extent of damage (if any) and whether there has been a breach of the performance and functional requirements of the Building Code are at issue.

[61] In addressing the critical issue of whether the matters pleaded are actionable defects for which the defendants might be liable, the Scott Schedule for the waterproofing defects (covering both defects 1 and 2) is obviously a helpful starting point.[8] The participating experts, which included Mr Earley, expert witness for the Auckland Council, agreed that there had been breaches of the Building Code including B2 (durability) and E2 (external moisture). However, in the relation to the truly disputed issues of the extent of damage and reasonable scope of remediation, there are substantial differences between the experts that I need to address.

[62] I generally agree with the submission of the plaintiffs that in addressing their contention that there has been a failure of an integrated system designed to keep the building weathertight, it is important not to focus unduly on individual specific defects in isolation. It is often not possible to determine with 100 per cent precision what contribution they individually have made to the problem of moisture ingress, particularly where the obvious remedial solution is to remove and replace the whole membrane or some equivalent. I also acknowledge that a plaintiff does not have to "wait for physical damage to occur" before it is regarded as having suffered loss or

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8 See [40] above.

harm.[9] The plaintiffs do not need to show the existence of leaks on every balcony leading to visibly manifested damage within every apartment. However, the plaintiffs do carry the burden of proving actionable damage, namely damage that is more than de minimis. They must also prove that their proposed scope of repairs is a reasonable and proportionate one having regard to the nature and extent of the defects and the damage or likely damage suffered.

[63] The practical application of the burden of proof is also important. As discussed by the Supreme Court in *Z v Dental Complaints Assessment Committee*, there is a single civil standard, the balance of probabilities, however the cogency of evidence required may depend upon the seriousness of the matters to be proved and the consequences of proving them.[10] This principle is of importance here. The plaintiffs' allegations are serious in the sense that if they establish the existence of the alleged defects and breaches of the Building Code, as well as their alleged remedial scope, then they say that the defendants are liable for tens of millions of dollars in damages. Those are of course serious matters and consequences, and the Court is entitled to expect the plaintiffs to adduce cogent evidence with sufficient probative force to prove them.

[64] Mr Alexander, Argon's expert building surveyor, was a model witness. His evidence was substantially helpful, presented in a coherent and well-structured manner, and his criticisms of the plaintiffs' experts was restrained and measured. I agree with his criticism. I accept Mr McCartney's submission that Mr Alexander's evidence was unassailable. I acknowledge the significant constraints that the plaintiffs' expert building surveyors were operating under, but by comparison their evidence falls short of the quality and standard adopted by Mr Alexander. I agree with and accept the problems he identifies, and his analysis of them, as well as his remedial scope.

[65] The plaintiffs' criticisms of Mr Alexander are misplaced. Mr Alexander is well qualified to speak about concrete balconies over non-habitable spaces and to place

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9 *Body Corporate 207624 v North Shore City Council* [2012] NZSC 83, [2013] 2 NZLR 297 [*Spencer on Byron*] at [45].

10 *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [112].

some emphasis on that fact in diagnosing the problems and proposing a solution. He has substantial and relevant experience in the New Zealand building industry. His company, Alexander & Co Ltd, has been investigating building failure and assisting with dispute resolutions since the beginning of 2000.

[66] I agree and accept Mr Alexander's analysis that there were two problems that arose with the balconies:

(a) Some of the downpipe connections leak where the downpipe connected to the channel drain in the balconies. Due to the downpipe being located very close to the exterior wall, this allowed some water to enter the wall.

(b) Many of the balcony joints allowed water to pass through due to voids in the concrete that had not flowed well into the joints. As the joint extended over the top of the exterior wall, some water damage has occurred in that local area, but this only happens on balconies that have joints.

[67] The plaintiffs' expert witnesses focus on the failure of the membrane as the main mechanism of failure. However, I agree with Mr Alexander that that is not entirely correct. As Mr Alexander stated, pre-cast concrete balconies on the outside of a building should not need any waterproofing membrane at all (except where that is required to protect an acoustic mat from water). The real problem is the fault under the membrane.

[68] In addressing (below) the critical issues of extent of damage and what might be a reasonable scope of repair, it is important to focus on these two specific pathways for water to get into the apartments (i.e. moisture ingress around the outlet pipes and the concrete joint between two sections of balconies). I note that Mr Angell in cross-examination accepted that these are the only two avenues for water to get in behind the cladding.

[69] Mr Alexander's evidence, which I accept and adopt, does however provide substantial support for the plaintiffs' contention that the matters pleaded are actionable defects and sufficiently widespread to be described as systemic. This includes a failure to use a Mapeband tape. Mr Alexander notes that the application of the membrane was not uniform across all 179 balconies but that the application was "typically" of poor quality. As with Mr Angell, he did not observe any Mapeband tape on any of the balconies that he investigated. I find that it is reasonable to infer from the technical literature that the use of Mapeband tape is an integral part of the waterproofing product.

[70] The Auckland Council responsibly accepts that the following matters are "patently defects": missing membranes over some outlet flanges, a lack of thickness with the membrane,[11] and the reinforcing mesh not being encapsulated within the membrane in accordance with the requirements of the technical literature. What of course is in dispute is whether these matters are ultimately of any consequence – are they systemic and what is the extent of any damage that has resulted? I discuss this below in the second stage of my analysis.

[71] I also find that, as pleaded, the failure to construct membrane up-stands to the perimeter nib of the balconies (or to construct an equivalent sawcut/chase) was a defect. As Mr Angell noted, for a waterproofing system to be effective it must be terminated in a way that prevents moisture from entering behind and under the membrane system. That is widely acknowledged in the contemporaneous literature, including the Mapei Mapelastic technical literature and the BRANZ Appraisal Certificate No 485 (2005).[12] I note also that Mapei, in its email to Mr Gabriel of Argon of 27 June 2007, expressly stated "[a]s long as the membrane is allowed to turn up onto the up-stand, the sawcut is not a necessary". There may have been a meeting subsequent to that fact and a design change, however that does not affect my finding that this was a defect.

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11 The Mapei Mapelastic technical literature and the BRANZ appraisal require the membrane to be a minimum of 2 mm thick. The undisputed evidence of Mr Keesing concluded that the thickness was highly variable, and only 2 out of the 28 membrane samples had a minimum thickness exceeding 2 mm across the entire membrane.

12 The Mapei Mapelastic technical literature notes that "special care" must be taken when waterproofing check joints and fillet joints between horizontal and vertical surfaces. In those locations either Mapeband or other specified products must be used.

Defect 2 – Podium

[72] It is agreed defect 2 was and is a much less significant issue than defect 1. The parties also agree that logically my findings in relation to defect 1 will be applicable to the conclusions that I reach in relation to defect 2.

[73] Defect 2 relates to defective waterproofing on the ground level, including ground floor balconies, the exterior podium, the adjoining walkways and stairs, vehicle access ramps, and the truck dock. The plaintiffs plead that there is moisture ingress beneath the waterproof membrane applied to these areas.

[74] There are two areas of alleged damage in relation to defect 2:

(a) At the podium or ground level, which is exposed, there are common walkways, a truck dock and a series of enclosed balconies. These balconies are distinct from those captured in defect 1 as they are at ground/street level and are "enclosed". They are not cantilevered as with defect 1.

(b) Below the podium level are two basement levels, "B2" and "B3", which are carparks. It is said that water has travelled beneath the podium levels (balconies, stairways and walkways) and into the basement levels.

[75] I accept that the plaintiffs have established the existence of defect 2. As with defect 1, however, the key issue in dispute is the extent of this defect and whether it is actionable damage. I, once again, will address this in the second step of my analysis.

The damage caused by the defects

Is the damage in respect of defect 1 of such a nature that the requirements of the Building Code are not met – is it actionable damage?

[76] As Gwyn J held in *Bates v Auckland Council*:[13]

[13] *Bates v Auckland Council* [2021] NZHC 2558 at [177]; citing *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479 (HC).

> [177] The plaintiff has the legal burden of proof as to alleged damage and also, as a matter of fact, has the power to investigate and prove damage. In *Sunset Terraces* [High Court decision] Heath J said:
>
>> … evidence must be weighed according to the proof which it was within the power of one side to have produced and in the power of the other to have contradicted.

[77] I also adopt the following principles set out by Downs J in *Minister of Education v H Construction North Island Ltd*:[14]

> (a) Clause E2.3.2 provides that roofs and exterior walls must prevent the penetration of water that "could" cause damage to building elements. Anticipation and prohibition of potential damage makes clear actual damage is not required for a breach of the Code.
>
> (b) As Tipping J held in *Spencer on Byron*:[15]
>
>> … A duty of care should be recognised in respect of pre-emptive expenditure as well as expenditure necessary to reinstate or repair physical damage which has actually occurred.
>
> (c) The Code does not contemplate "reasonable" damage in consequence of water ingress. Rather, it seeks to prevent damage.
>
> (d) The Building Code is clearly concerned with undue dampness and potential undue dampness. Consequently, not every instance of water ingress will breach the Code. Some water may be able to harmlessly escape. Or evaporate. However, the Code does not envisage dampness arising from leakage. Rather, and as with damage, it seeks to prevent just that.
>
> (e) The relevant objective of the Building Code is to "safeguard people from illness or injury that could result from external moisture entering the building".[16] As Tipping J held in *Spencer on Byron*, the "primary statutory purpose" of the Building Act 1991 was "the construction of

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14 *Minister of Education v H Construction North Island Ltd,* above n 7, at [116]–[121].
15 *Spencer on Byron*, above n 9, at [45].
16 Building Regulations 1992, sch 1 cl E2.1 [Building Code].

buildings that do not pose health and safety risks to their occupants".[17] That purpose is reflected in s 3 of the Building Act 2004.

[78] The question of whether there has been a breach of the requirements of the Building Code is ultimately a matter for me to determine. However, the agreed approach of the building surveyor experts is helpful in addressing that issue. They concluded that where there was water under the waterproofing membrane on the balconies inspected that this was a breach of cl B2 (durability) with respect to damage to the cork acoustic mat. They also agreed that there was a breach of cl E2.3.2 to the extent that water has entered and damaged the cork (being a building element) and also to the extent that water had entered the exterior walls causing damage in some locations.

[79] I find that the following breaches of the Building Code have been established: a breach of cl B2 with respect to damage to the cork acoustic mat, breaches of cl E2.3.2 to the extent that water has entered the exterior walls and caused damage in some locations and a breach of cl E2.3.7 where the balconies and membrane were constructed in a way that did not make due allowance for the consequences of failure. On the latter point, I agree with the submission of Mr Bigio KC that the location of the downpipe, being located in some instances very close to the exterior wall, created a risk that if it was not sealed and constructed properly and consequently failed, it could cause a breach of E2.

[80] Clause B2.3.1 of the Building Code sets out the required durability of building elements. "Building element" is defined broadly in cl A2 of the Code to be any structural or non-structural component and assembly incorporated into or associated with a building. I find that this definition encompasses cork acoustic matting. The required durability is either 5, 15 or 50 years depending on the characteristics of the particular building element, in particular how difficult it is to access or replace and whether the failure of the element would be detected during the normal use or maintenance of the building.

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17 *Spencer on Byron*, above n 9, at [50].

[81] Clause B2.3.1(b) provides that building elements must satisfy the performance requirements of the Building Code for at least 15 years where such elements are moderately difficult to access or replace, or failure to comply with the Code would go undetected during normal use of the building (but would be easily detected during normal maintenance). Clause 1.2.1 of Acceptable Solution B2/AS1 sets out some guidelines to evaluating the durability requirements of building elements and states that "moderately difficult to access or replace" applies to building elements where access or replacement involves the removal or alteration of other building elements.[18] To replace the cork acoustic matting, it would be necessary to remove the membranes and other parts of the balconies. Clause 1.3.1 refers to Table 1, which contains a list of nominated building elements and their durability requirements; the durability requirement for "surface mounted" acoustic elements is deemed to be 15 years.

[82] Based on this, I find that the cork acoustic matting has a durability period of 15 years (at minimum). On the evidence, this requirement has clearly been breached.

[83] Strictly speaking, a balcony is not a roof or an exterior wall for the purposes of cl E2.3.2. However, given the nature of the construction here, the balconies do, to some extent, perform a roof and exterior wall function.[19] Furthermore, it logically makes no sense to exclude balconies from the operation of cl E2.3.2 when, as here, the construction of the balcony and in particular the waterproof membrane system has failed to prevent penetration of water that could cause damage or undue dampness. Although 'balconies' are not expressly referred to, the failure of the waterproofing of the balconies has, at least to some extent, led to the penetration of water into the exterior walls (which is, of course, expressly referred to). There is no other subclause within cl E2 that deals specifically with balconies, and I find that the balconies here were constructed in breach of E2.3.2. In reaching that conclusion, it is important to have regard to the overall objective in cl E2.1 (i.e. safeguarding people from injury

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[18] See *Bates v Auckland Council,* above n 13, at [48], n 2: Acceptable solutions are documents that set out methods of complying with the Building Code. Anyone who complies exactly with the methods described in the acceptable solution for a Building Code clause is deemed to comply with the Building Code (see s 19(1)(b) of the Building Act 2004).

[19] Mr Alexander noted that the pre-cast balcony, built off-site, is incorporated on-site into the structure of the building. When the concrete floor is cured the balcony "becomes integral with the main structure". This is demonstrated at figure 05 of his evidence at [10.2] of his Brief of Evidence dated 28 October 2022.

that could result from external moisture entering the building) and the overall functional requirement in cl E2.2 of adequate resistance to penetration of water.

[84] In reaching those conclusions as to breaches of the requirements of the Building Code, I find that the damage at issue is more than de minimis. As noted above, actual damage is not required for a breach of the Code.

[85] There is, however, a real issue as to the extent to which the plaintiffs have established actionable damage (beyond the threshold of de minimis) and, in particular, in and behind the cladding. On that critical issue I agree with and adopt the findings reached by Mr Alexander, namely that water penetration "into and through the façade wall assembly" has been limited. I agree with Mr Alexander that to the extent that water has entered the inner part of the wall assembly then that would represent a breach of cl E2 (external moisture). I also find that there is some merit to his statement that water entry into the rainscreen cavity is not necessarily a breach of E2 because the purpose of the cavity is to collect rainwater and drain it back to the exterior (to protect the inner portion of the wall). However, in applying the principle of anticipation and prohibition of potential damage, where actual damage is not required, I ultimately consider that there has been a breach of E2.

[86] One of the fundamental difficulties with the plaintiffs' expert building surveyor evidence is their failure to provide an adequate scientific and reasoned basis to reach the conclusions for which the plaintiffs contend, namely that there has been significant water penetration, or the very real risk of it, into and through the façade wall assembly.

[87] I acknowledge that an assessment of the extent of damage, and in particular latent damage, can be a difficult exercise. I agree that a 100 per cent scientifically accurate approach, particularly with a building of Bianco's kind, cannot be achieved. I also accept Mr Bigio's submission that the standard destructive testing required in a case like this cannot be at such a level that it would effectively create an obligation on owners to repair first and sue later. In principle, Mr Bigio is correct that one will only ever know what the actual loss is after the remedial work is completed.

[88] I acknowledge that the extensive photographs taken by Mr Angell are a helpful starting point. However, it is not good enough simply to rely upon the photographs; some expert analysis, as carried out by Mr Alexander, needs to be done to squarely address the issue of extent of damage, including likely future damage if remedial action is not taken. Furthermore, as noted above, the cogency of the evidence required depends upon the seriousness of matters to be proved and the consequences of proving them.[20] Here, the allegations are very serious; the plaintiffs seek tens of millions of dollars in damages.

[89] In cross-examination, Mr Angell properly accepted that there was very limited evidence of corrosion to the steel battens. In my view, there is substantial merit to the criticism Mr Alexander makes of the plaintiffs' witnesses, including a failure to adequately appreciate that Bianco Off Queen, unlike other leaky buildings, was constructed with concrete cantilevered decks above non-habitable spaces, where there is in fact a cavity and where there is no untreated timber framing. I also agree with the general tenor of Mr Price's submission that if there is the degree of damage for which the plaintiffs contend, then after the extensive investigations undertaken and monies spent on these (beginning in 2016) the plaintiffs would surely have been able to provide more substantive and probative evidence as to moisture ingress.

[90] I accept and adopt the following findings made by Mr Alexander:

(a) a failure of both the waterproofing membrane and the sealant between pipe and concrete must happen at the same location for leaking to occur;

(b) the gutters do not drain large quantities of water;

(c) evidence of water damage to date is minimal; and

(d) the most vulnerable area is the rainscreen portion of the wall.

[91] The Auckland Council was correct in pointing out that the failures associated with concrete joins are not pleaded defects. However, that is somewhat beside the

20 *Z v Dental Complaints Assessment Committee*, above n 10, at [112].

point. The membrane was supposed to protect the joins in the concrete as well as the internal gutter. The sealant that was applied to the underside of the concrete joins was purely cosmetic. Water got into these joins because, amongst other things, the membrane directly above the joins failed. The pleadings understandably focus on the failure with the membranes.

[92] In conclusion on the issue of defects and damage, I find that the plaintiffs have established actionable damage in respect of defect 1. However, to date, water penetration into and through the façade wall assembly has been limited. The plaintiffs' building surveyor experts overstate the risk of future water penetration. The consequence of these findings, namely the measure of the damage/loss established, is addressed below.

Is the damage in respect of defect 2 actionable damage?

[93] As set out above, the alleged damage in relation to defect 2 concerns two areas; the podium level (comprised of common walkways, a truck dock and a series of enclosed balconies) and the basement levels below.

[94] The Scott Schedule in relation to defect 2 records the agreement of Mr Angell and Mr Alexander that there has been moisture ingress from the podium to the carpark below and that this has caused breaches of cls B2 and E2.3.2 of the Building Code. However, Mr Alexander considered that any breaches are confined to fire collars and air-conditioning ducts.

[95] Messrs Angell and Alexander disagreed as to the primary cause of the water ingress. Mr Angell said it was one of a number of causes, all of which relate to the negligent installation of the membrane. Mr Alexander's view on the other hand is that the primary cause of damage was the inadequate use of waterproofing membrane associated with the services pipe, fire collars and ducting. He considered damage was localised to areas where pipes and ducts penetrate into the basement carpark. Mr Angell's view is that the membrane, as applied across the podium area, has failed and has led to damage beyond that associated with pipe and duct penetration.

[96] For the reasons given above, I prefer and accept the evidence of Mr Alexander on these issues.

[97] Mr Alexander investigated every penetration through the podium and identified which of them were leaking. In cross-examination, Mr August accepted that none of the plaintiffs' experts have carried out an exercise similar to Mr Alexander's investigation of the podium leaks. Mr August acknowledged that it "could be true" that Mr Alexander's solution of simply fixing the penetrations that are leaking would work.

[98] I note also that Mr Alexander was the only witness who established that the largest cause of leaking into the carpark was via the services duct.

[99] I find that the plaintiffs have established the following actionable damage with respect to the podium and the areas covered by alleged defect 2. My findings are based in large part upon the evidence of Mr Alexander:

(a) There is water leaking down the walls on either side of the external stairs between the podium of building A and building B into a cupboard below, partially due to the use of an unreinforced and very thin membrane on the stairs.

(b) Of the 35 podium drainage outlets across both towers, 11 were found to be leaking. These outlets are leaking for the same reasons as with defect 1, namely a poor connection between the concrete/membrane and the PVC drainpipe.

(c) As to the apartments at ground level with enclosed balconies, there was insufficient membrane to outlets in drainage pipes.

[100] I agree with Mr Alexander that it is also important to place the defects in context. The carpark was designed as a wet space. The perimeter walls that retain the earth have not been waterproofed. Some below-ground structures are waterproofed with the intention that groundwater will never enter the space, but that was not the

intention with this design. The exterior retaining walls of the carpark allow groundwater to enter and on the bottom level there are drains to collect water. This is a common and acceptable design choice.

[101] I also agree with Mr Alexander that efflorescence on the block work does not necessarily constitute damage. As Mr Alexander notes, efflorescence does not indicate any diminution of structural capacity and is a visual nuisance rather than damage. On the other hand, severe efflorescent left untreated for a long period would constitute damage, but that threshold has not been reached. I also agree that cars are not building elements and are therefore not protected by the provisions of the Building Code. Although it might have been arguable that any damage to cars is a reasonably foreseeable consequence of the actionable defects that I have identified, no such claim has been made and such damage cannot be established on the evidence before the Court.

Liability of Argon

Did Argon owe a non-delegable duty of care?

[102] The plaintiffs sue in negligence. They must establish on the balance of probabilities that the defendants owed them a duty of care, that the duty of care was breached (i.e. the standard of care was not met), that the breach(es) caused damage, and that the damages resulted in a loss to the plaintiff.[21]

[103] The case law is settled; builders and local authorities in the performance of their statutory functions relating to building work owe duties of care to owners and subsequent purchasers of buildings.[22] As the Privy Council held in the well-known case of *Invercargill City Council v Hamlin*:[23]

> In a succession of cases in New Zealand over the last 20 years it has been decided that community standards and expectations demand the imposition of a duty of care on local authorities and builders alike to ensure compliance with local bylaws.

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21 *Johns v Hamilton City Council* [2022] NZHC 379 at [69].
22 *Johns v Hamilton City Council*, above n 21, at [70].
23 *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC) at 521.

[104] Builders owe a duty to take reasonable care to prevent damage to persons reasonably expected to be affected by their work, including purchasers.[24] The scope of this duty is to ensure compliance with the Building Code,[25] good trade practice,[26] and other relevant statutory requirements.[27]

[105] Argon does not dispute they owed duties of care to the plaintiffs. However, its primary defence is that it did not breach any duty of care. Argon contends:

(a) it was never its job to install the membrane, that was the job of the specialist sub-contractor, TAL;

(b) Argon had no duty to ensure TAL installed the membrane correctly because it did not have a non-delegable duty;

(c) as the principal, it had no vicarious/secondary responsibility for any negligence of the independent contractor, TAL;

(d) Argon had no duty to supervise TAL;

(e) the architect was inspecting TAL's work as it was done;

(f) TAL was a specialist water-proofer and Argon reasonably believed TAL to be competent in its specialist field; and

(g) Argon was also entitled to believe that the Mapei product would be fit for purpose.

[106] The critical issue for me to address is whether Argon owed non-delegable duties of care.

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24 *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 (CA) at 406 and 413; *Minister of Education v Econicorp Holdings Ltd* [2011] NZCA 450; [2012] 1 NZLR 36 at [55].

25 *Hotchin v New Zealand Guardian Trust Co Ltd* [2016] NZSC 24, [2016] 1 NZLR 906 at [198].

26 *Boyd v McGregor* HC Auckland CIV-2009-404-5332, 17 February 2010 at [60].

27 *Findlay (trustees of the Lee Findlay Family Trust) v Auckland City Council* HC Auckland CIV-2009-404-6497, 16 September 2010 at [33].

[107] *Todd on Torts* describes non-delegable duties as follows:[28]

> The concept of a non-delegable duty is problematic… However, the category is well established, if indeterminate, and is generally associated with relationships which give rise to a duty of care **“of a special and ‘more stringent’ kind, namely a ‘duty to ensure that reasonable care is taken’”.**
>
> (emphasis added)

[108] The classic case and the starting point for the analysis is *Mount Albert Borough Council v Johnson*. There, the Court of Appeal imposed, for the first time, a non-delegable duty of care on a development company.[29] Since then, it has been held in some cases that a builder (i.e. a construction company), as head contractor, has a non-delegable duty of care.[30] Where a principal owes a non-delegable duty of care they will also be liable for breaches by independent contractors they have hired.[31] A head contractor who had a primary duty of care would, therefore, be liable for the acts of sub-contractors.

[109] The nature of the builder’s role and responsibilities are key to determining whether it owes a non-delegable duty, as opposed to being liable solely for its own independent acts and/or omissions. Whether non-delegable duties are owed must be decided on the facts of each individual case. It is necessary to address whether the builder is in substance the “head contractor” and the extent to which it controlled and supervised the building work. The label is not always helpful. It is also apparent from *Mount Albert Borough Council v Johnson*, that public policy factors inform the ultimate conclusion.[32]

[110] In *Morton v Douglas Homes Ltd*, Hardie Boys J framed the duty of care owed by a builder to purchasers as a duty to “observe the bylaws and the permit conditions, and to take reasonable care to prevent loss or damage from defective construction”.[33]

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[28] Stephen Todd “Vicarious Liability” in Stephen Todd (ed) *Todd on Torts* (9th ed, Thomson Reuters, Wellington, 2023) at [21.9.2] (footnotes omitted).

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

[30] *Body Corporate 346799 v KNZ International Co Ltd* [2017] NZHC 511 at [79]; citing *Carrington v Easton* [2013] NZHC 2023 at [80]; *Lee v Ryang* HC Auckland CIV-2011-404-2779, 28 September 2011 at [20].

[31] *Body Corporate 346799 v KNZ International Co Ltd*, above n 30, at [80]; citing *Cashfield House Ltd v David and Heather Sinclair Ltd* [1995] 1 NZLR 452 (HC) at 463–464.

[32] *Mount Albert Borough Council v Johnson*, above n 29.

[33] *Morton v Douglas Homes* [1984] 2 NZLR 548 (HC) at 589.

His Honour held that the builder's duty to observe the bylaws and the permit was a non-delegable duty and the fact that the company engaged someone else to assist it in discharging this duty could not excuse it for noncompliance.[34]

[111] In *Carrington v Easton*, the responsibility of two sub-contractors, who carried out defective building work under the head contractor, was in issue. While Venning J considered that the sub-contractors may have, in fact, carried out some of the defective work, his Honour found they did not owe the homeowners a duty of care. Venning J considered the head contractor to be in control of the site; the sub-contractors were working under his direction and supervision.[35] It was the head contractor who directly contracted with the homeowners, and it was his obligation to observe the relevant building codes, regulations and plans and specifications. In reliance on *Morton v Douglas Homes Ltd,* Venning J considered this to be a non-delegable duty.[36]

[112] In *Body Corporate 346799 v KNZ International Co Ltd* (*Victopia Apartments*), the developer (KNZ) entered into a contract with Multiplex (a construction company) for it to "design, construct, complete, deliver and remedy defects" in the works described in the contract.[37] The special conditions required Mulitplex to exercise reasonable skill, care and diligence in the construction. Multiplex was also required to "provide all necessary supervision during the contract" and all work was to be carried out under the supervision of Multiplex's representative. Multiplex engaged various consultants to provide specialist design services, including fire engineering design, and a contractor to supply and install the cladding systems.

[113] Thomas J held that Multiplex was solely in control of the aspects of design and construction in respect of which the defects occurred.[38] Her Honour noted that Multiplex made the stage two and stage three building consent applications on behalf of the developer and had issued a producer statement to the Council in respect of the building work undertaken. As a result of its role and responsibilities as described,

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[34] *Morton v Douglas Homes*, above n 33, at 592.
[35] *Carrington v Easton*, above n 30, at [79].
[36] At [80]; citing *Morton v Douglas Homes,* above n 33, at 592.
[37] *Body Corporate 346799 v KNZ International Co Ltd*, above n 30, at [83].
[38] *Body Corporate 346799 v KNZ International Co Ltd*, above n 30, at [86].

Thomas J held that Multiplex owed a non-delegable duty of care in respect of the defects.[39]

[114] Gilbert J's decision in *Body Corporate 326421 v Auckland Council* (*Nautilus*) is particularly relevant.[40] His Honour concluded that the head contractor was liable in tort for the creation and existence of all defects within the building despite not having designed or built all of them itself.[41] This included the waterproofing carried out by a sub-contractor. The head contractor was jointly liable with the waterproofing company for the failure to comply with the manufacturer's technical specifications, specifically a failure to allow the waterproofing membrane to cure sufficiently.[42] The same finding was made in relation to membrane which had not been dressed into outlets and for a failure to ensure the membrane was continuous at balcony nibs. Gilbert J considered the head contractor to have "overall responsibility for the works",[43] including the responsibility of ensuring that the works met the requirements of the code.[44]

Argon's responsibilities

[115] Argon was the head contractor and the builder at the centre of the construction work. It had project management functions. It was a key party with significant control over and capacity to influence the quality of the construction and its adherence to Building Code standards. It entered into the construction contract, dated 1 March 2007, with the developer, Turn & Wave Ltd, to "construct, complete, deliver and remedy defects" in the contract works and do all things described in the contract documents (Construction Contract). Argon further agreed, as a matter of contract, to be responsible for the acts or omissions of sub-contractors or sub-contractor's agents under cl 4.4 of the special conditions.

[116] The terms of the Construction Contract are significant; the "contract price" is described as $28,726,987. Under cl 2.2.7 of the special conditions (attached as the

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39 At [89].
40 *Body Corporate 326421 v Auckland Council* [2015] NZHC 862 [*Nautilus*].
41 At [316]; see Thomas J's description in *Body Corporate 346799 v KNZ International Co Ltd*, above n 30, at [90].
42 *Nautilus*, above n 40, at [183].
43 At [206].
44 At [227].

first schedule), Argon agreed to review certain aspects of the design or specification of the contract works. The purpose of that review was "to reduce the construction cost and increase efficiency of the construction". Under cl 5.1.5, Argon took full responsibility for the "adequacy, stability and safety of all [s]ite operations and methods of construction". Under cl 5.4.1, Argon was responsible for programming the contract works and in accordance with cl 5.17.1 was required to provide a documented quality management system. Under cl 6.1 of Appendix 2: Scope of Contract Works, Argon was also responsible for "complying with all necessary permits, consents and approvals under the Building Act 2004 for the construction of the Contract Works."

[117] Argon was responsible for engaging TAL and was privy to all relevant communications between the architects (ADC), the engineers, Mapei and TAL. It identified issues with the consented plans and played a role in the design change to dispense with the sawcut. Argon was also responsible for the last step of the building-related work that took place on the balconies, giving it an opportunity to observe the work that had been carried out by TAL (Argon placed a grate, or grill, over the internal gutters on each of the balconies).

[118] I acknowledge that the design change that Mr Gabriel was involved with did result in an improved design. However, there were still defects, as I have identified. I also note that Mr Gabriel himself conceded that the termination of the membrane at the base of the exterior nib was not a design that he had seen before.

[119] The terms of the sub-contractor's agreement between Argon and TAL are also informative; the sub-contractor, TAL, was required to comply with all instructions from the contractor [Argon] and was specifically prohibited from having any direct communications with or taking instructions from the architect. Furthermore, TAL indemnified Argon against any loss or liability arising out of TAL's failure to comply with cl 19.1. That clause required TAL to comply with the provisions of all legislation and bylaws, which must include the Building Code. The sub-contract expressly contemplated that Argon might be liable for the acts or omissions of TAL with respect to the Building Code.

Conclusion – Argon's liability

[120] In considering the particular role of Argon in the construction of Bianco Off Queen and having regard to the relevant contractual documents, I conclude that Argon did owe non-delegable duties of care to the plaintiffs (as subsequent purchasers). Argon's claim that it is not liable for the acts or omissions of TAL is rejected. I find that Argon is liable for each of the pleaded defects (i.e. defects 1 and 2). The fact that the architect and/or TAL might also bear some responsibility for the defects does not absolve Argon from its liability as head contractor and builder. There are also important public policy reasons of accountability and loss distribution which point firmly in favour of the imposition of a non-delegable duty of care in this case.

[121] In relation to defect 1, Argon breached the standard of care required of a builder/head contractor to construct Bianco Off Queen in a code-compliant manner and in accordance with good trade practice. It is responsible for the failures with the installation and performance of the balcony membranes and associated defects. The negligent acts and omissions of Argon have caused the plaintiffs' loss. The issue of loss, including its measure and calculation, is addressed below.

[122] I also find that Argon is liable in negligence for the defects I have identified in relation to alleged defect 2. As I have held above, Argon owed non-delegable duties of care to the plaintiffs. Its contention that it is not responsible for poor design or poor workmanship by others is rejected. Argon cannot, in law, rely on having engaged a specialist water-proofer or upon the Auckland Council inspecting the water-proofer's work or the water-proofer issuing a PS3.

Liability of the Auckland Council

Standard of care

[123] It is well settled law that local authorities owe a duty of care to building owners when performing their inspection and certification functions under the Building Act.[45] The Supreme Court has held that this duty of care "marches in step" with,[46] and is

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[45] *North Shore City Council v Body Corporate 188529 (Sunset Terraces)* [2010] NZSC 158, [2011] 2 NZLR 289 [*Sunset Terraces*] at [51]; *Spencer on Byron,* above n 9, at [6] and [73]–[97].

[46] *Spencer on Byron*, above n 9, at [71].

limited to, a local authority's statutory functions under the Act.[47] All building work must comply with the Building Code.[48] Therefore, the duty imposes no higher obligation than the exercise of reasonable care with a view to ensuring compliance with the Code.[49] Heath J, in the High Court *Sunset Terraces* decision, held as follows:[50]

> [183] In carrying out its inspection role, it is plain that the Council ought not to be regarded as a clerk of works or as a project manager. Even before the Building Act was passed, the Council's duty to third parties was "to exercise reasonable care, not an absolute duty to ensure compliance". The Council's role is to provide an appropriate degree of oversight for public policy reasons. Its performance must be judged against the standards of the day and knowledge of the quality (or otherwise) of particular products used in the construction process. It does not take on any responsibility for ensuring, in fact, that all completed work complies with the [Building] Code.

[124] The standard of care to be applied is that of a reasonable skilled Council at the time "but common industry practice is not determinative."[51] A court might appropriately conclude that the standards of a Council at the relevant time fell below the standard required by law.[52]

[125] The test for, or standard of, a reasonable inspector has been referred to in many decisions dealing with leaky buildings. Ronald Young J held in *Body Corporate 90247 v Wellington City Council*:[53]

> [156] I accept, in part, the Council's criticism of his [one of the plaintiff's experts'] evidence. Mr Wutzler sets a "gold" standard in the identification of building trouble spots. Mr Wutzler's expectation of what a competent building inspector should see is, I consider, set at his own standard of knowledge of leaky buildings in 2013. Council building inspectors could not be expected to have reached this advanced level of knowledge in 2000/2001. Any assessment of what a building inspector could be expected to identify is to be tempered by taking into account reasonable standards of the day. I stress the word "reasonable".
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> [157] However, it is not enough for an inspector to simply say "that's how we did it in those days". If what the inspectors were doing was inadequate,

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47 At [146] and [193].

48 Building Act 2004, s 17.

49 Section 18(1); and *Spencer on Byron*, above n 9, at [193].

50 *Body Corporate 188529 v North Shore City Council*, above n 13.

51 *Johns v Hamilton City Council*, above n 21, at [74].

52 At [74]; citing *McLaren Maycroft & Co v Fletcher Development Co Ltd* [1973] 2 NZLR 100 (CA) at 102 and 108; *Body Corporate 90247 v Wellington City Council* [2014] NZHC 295 at [157]; and *Dicks v Hobson Swan Construction Ltd (in liq)* (2006) 7 NZCPR 881 at [76].

53 *Body Corporate 90247 v Wellington City Council*, above n 52.

> judged by a reasonable standard of the day, then it is no excuse to simply say "that's how we did it then". There was a significant element of this approach in Mr Tait's evidence as to his inspections of the building work.

[126] Ultimately it is for the Court to determine the question of negligence as a matter of fact in all the circumstances of the case.[54] As the Court of Appeal held in *McLaren Maycroft & Co v Fletcher Development Co Ltd*, the Court may come to the conclusion that the standards deposed to by witnesses as to general practice of a profession do not reach the standard required by law.[55]

[127] Equally, it is important to have regard to s 94 of the Building Act 2004. Section 94(1) provides that a building consent authority must issue a code compliance certificate if it is satisfied on reasonable grounds that the building work complies with the building consent (s 94(1)(a)). I agree with the submission of the Auckland Council that the scheme of the 2004 Act, including s 94, was not intended to bring about a change in the territorial authority's role and responsibilities. As Whata J held in *Body Corporate 160361 v BC 2004 Ltd and BC 2009 Ltd* (*Fleetwood Apartments*), the Council's obligations under the Building Act 2004 are not materially different from those under the 1991 Act,[56] therefore the authorities referred to above that were decided under the 1991 Act continue to apply.

[128] I further note that inspection is defined in s 90(3) of the 2004 Act to mean the "taking of all reasonable steps to ensure that building work is being carried out in accordance with a building consent".

Defect 1

[129] The evidence and dispute in this case in relation to defect 1 focused very much on the inspections carried out by the Auckland Council and whether there was, indeed, an obligation to inspect the balconies at all. There is also an issue as to whether the Auckland Council was entitled to rely on the PS3 statement from TAL.

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54 *McLaren Maycroft & Co v Fletcher Development Co Ltd*, above n 52, at 107–108.

55 At 107–108; citing *Sulco Ltd v Redit & Co Ltd* [1959] NZLR 45. See also *Auckland Council v Ryang* HC Auckland CIV-2011-470-2570, 28 September 2011 at [24]; and *Northern Farm Services Ltd v Codylan Farms Ltd* [2015] NZCA 567 at [16]–[18].

56 *Body Corporate 160361 v BC 2004 Ltd and BC 2009 Ltd* [2015] NZHC 1803 [*Fleetwood Apartments*] at [142]; citing *Spencer on Byron*, above n 9, at [217].

[130] There were substantial differences between the expert witnesses on these issues. The focus of Mr Paykel's evidence on behalf of the plaintiffs was on specific defects with the waterproofing membrane that Mr Paykel says the Auckland Council inspectors should have identified during their inspection(s). Mr Hutt, for the Auckland Council, on the other hand, gave evidence of a more generalised kind; he obviously lacks the familiarity with the Bianco Off Queen apartments that Mr Paykel has. The ultimate test in assessing the admissibility and probative value of expert opinion evidence is whether it offers "substantial help" in determining matters at issue.[57]

[131] I accept and agree in principle with Mr Hutt's view that the Bianco Off Queen balconies, being concrete and over non-habitable areas, could properly be regarded as less risky than other types of construction and, in particular, cantilevered balconies with timber framing over habitable spaces. However, I reject the Auckland Council's contention that there was no obligation to inspect the balconies at Bianco Off Queen. The Auckland Council did in fact inspect the balconies; it assumed a responsibility to do so. The notifiable inspection schedule issued by the Auckland Council as part of the building consent (where a total of 300 inspections were estimated) expressly contemplated an inspection of the membranes on the decks. This was a significant inner-city high-rise apartment block and at the relevant time, there was a heightened awareness of general problems and failures with waterproofing membranes generally, as shown in the Council's practice note from the relevant time on external and internal membranes.[58] The Auckland Council itself appears to have set a higher standard of inspections than Mr Hutt would have personally.

[132] I also note that the BRANZ Appraisal Certificate No 485 (2005), which relates to Mapelastic external waterproofing membranes (as well as Mapegum WPS), expressly contemplated that there would be inspections of the membrane installations using the Mapelastic product. Clause 17(1) of the appraisal certificate states that the technical literature must be referred to during the inspection of membrane installations

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57 Evidence Act 2006, s 25.

58 See Auckland Council's Practice Note on external and internal membranes – alternative solutions (BLD-142-PN). Auckland Council's technical objections to the admissibility of that practice note (including its relevance) are overstated. This is, after all, an internal Council document which expressly deals with membrane failures on decks. The general heightened awareness of problems with waterproofing membranes cannot credibly be denied. Furthermore, the practice note does not make a clear distinction between timber and concrete substrate.

by building consent authorities and territorial authorities. Clause 17(2) notes that critical areas of inspection for waterproofing systems include installation of the membrane to the correct thickness (according to manufacturer's instructions) and membrane curing and integrity prior to the installation of tiles.

[133] I accept that Mr Hutt has significantly more experience as a Council officer than Mr Paykel. However, the Auckland Council's criticism of Mr Paykel's evidence, contending that he lacks expertise, is misplaced. Mr Paykel may have been a Council officer for a relatively short period of time, but he has substantial experience as a building surveyor and generally in the construction industry. He has previously given evidence as an expert witness for the Auckland Council on matters of Council practice. Generally, I found his evidence to be substantially helpful.

[134] Mr Hutt was also a professional witness. However, in my view he tended to downplay the responsibility of territorial authorities in the discharge of their regulatory functions. His perspective is inevitably informed by his very long period of employment with the Christchurch City Council. That does not, of course, disqualify him as an expert witness but it is a factor here which goes to the weight that I attach to his evidence.

[135] Mr Hutt noted that the Building Code is a minimum standard, "often lower than the industry recommendations (e.g. BRANZ) or what is considered best (or even good) trade practice, or indeed even the published Acceptable Solutions". He noted that the benchmark that the Council must apply is the Building Code, "nothing more". I agree that the Building Code, a performance-based code, imposes minimum standards, but the differences between this and good trade practice should not be overstated. In this case, poor and unacceptable workmanship is a principal cause of the systemic membrane failure and the key reason why there have been breaches of the Building Code. I accept that the Council inspectors are not "clerks of works" or specialists of every element of building construction. However, it is essential that the regulatory regime has integrity, and that the inspection regime is sufficiently robust so that public confidence in its effectiveness is maintained. One of the public policy reasons for the Council providing an appropriate degree of oversight is to promote

good trade practices with a view to avoiding breaches of the requirements of the Building Code.

[136] Like Harland J in *Johns v Hamilton City Council*, I have reservations about whether the kind of general evidence given by Mr Hutt is ultimately substantially helpful to the Court.[59] As her Honour noted, even if such general evidence can be given:[60]

> … what is more significant is what actually happened, and the best evidence of that is the evidence of those who approved the consent, undertook the inspections and/or approved the code compliance certificate.

[137] Harland J, in commenting on the general rather than specific nature of Mr Hutt's evidence (and why it was not substantially helpful), observed that Mr Hutt did not know whether the Hamilton Council's technical library included relevant technical literature, in particular the literature that Mr Hutt had referred to in his evidence.[61]

[138] The Auckland Council submitted that Council officers in this case would not have been familiar with the Mapelastic product and how it was to be applied. However, the evidence suggests an awareness by the relevant Council inspector at the time of the Mapei membrane that was being applied. In my view, it is reasonable to expect the Council officer to have some familiarity with products of this kind, or at least to familiarise himself/herself with the technical literature.

[139] The Auckland Council contends that it has a complete answer to the issue of liability, namely its request and receipt of, and reliance upon, the PS3 producer statement from TAL, who installed the membrane.[62] It says that the plaintiffs' case relies on the evidence of Mr Paykel, including his assertions that:

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59 *Johns v Hamilton City Council*, above n 21, at [101]–[102] and [261].

60 *Johns v Hamilton City Council*, above n 21, at [101].

61 *Johns v Hamilton City Council*, above n 21, at [261].

62 There are four types of producer statements in use: design (PS1), design review (PS2), construction (PS3) and construction review (PS4). Although the Building Act 2004 (unlike the 1991 Act) does not expressly provide for the general use of producer statements, the Supreme Court held in *Spencer on Byron*, above n 9, at [311], that there is nothing in the 2004 Act to prevent territorial authorities from relying on them and they are regularly used. As Whata J noted in *Fleetwood Apartments*, above n 56, at [165], it makes practical sense for a territorial authority to rely on independent expert verification that the installation of the works have been undertaken in accordance with plans and specifications.

(a) the Council did not request nor rely upon a producer statement from the exterior membrane installer;

(b) the Council therefore chose to carry out its own inspections of the exterior membranes, yet had "failed" to so inspect; and

(c) if the Council had carried out membrane inspections on the balconies and podium, it would have identified the alleged defects.

[140] The evidence of Mr Hutt for the Council on the other hand was that the membrane application was specialised work carried out by an approved applicator and was being applied to concrete balconies that were not above habitable spaces, and that the Auckland Council would rely on those facts to be satisfied on reasonable grounds that the works complied with the Code even without a producer statement.

[141] The Auckland Council further argues that this difference in opinion became academic when it came to light (during cross examination of Mr Gabriel) that the Council had requested producer statements be provided by the applicator, TAL, in respect of both the balconies and the podium. The relevant PS3s were in fact provided, and the Council says that the evidence therefore "incontrovertibly establishes" that the application of Mapelastic is a specialised exercise (only to be done by an approved applicator) and that the Auckland Council did not undertake substantive inspections of the exterior Mapelastic membranes (consistent with Mr Hutt's evidence).

[142] The Auckland Council contends that in all these circumstances it did exactly what Mr Paykel considered it could permissibly have done in the circumstances: it sought, received and relied upon producer statements from the membrane applicator rather than carrying out its own inspections of specialist work.

[143] I reject the submission that the Auckland Council has a complete answer to the liability issue. It is regrettable that Mr Paykel, at the time of serving his evidence in chief, was unaware of the particular circumstances of the producer statements. That is not fatal to the plaintiffs' claim.

[144] As Gilbert J held in *Nautilus*, it is not appropriate for a territorial authority to accept any producer statement without question:[63]

> The extent to which a particular producer statement should be relied on in considering whether code requirements have been met would depend on all relevant circumstances. This would include, for example, the skill, experience and reputation of the person providing the statement, the independence of the person in relation to the works, whether the person was a member of an independent professional body and subject to disciplinary sanction, the level of scrutiny undertaken and the basis for the opinion. The territorial authority would also need to consider any other information relevant to whether the works had been carried out to an appropriate standard and could be expected to meet code requirements.

[145] Gilbert J described the relevant producer statement in that case, from a Mr McEvoy of Façade Technologies (who manufactured and installed the exterior cladding), as follows:[64]

> Mr McEvoy simply completed a pre-prepared form confirming that he was a duly authorised representative or agent of Façade Technologies and believed on reasonable grounds that it had completed all building works in accordance with its contract …

[146] His Honour further noted that Mr McEvoy made no reference to the Building Code and his statement was "not even addressed to Council".[65]

[147] Gilbert J rejected the Council's "blind acceptance" of the PS3 from Façade Technologies and stated:[66]

> Whether or not it was common for councils to accept PS3s from installers at the time the Nautilus was built does not mean that it was appropriate to rely on the certificate provided in this case. What will be sufficient in one case may not be in another. It obviously depends on the particular circumstances. I accept Mr Rainey's submission that the process for determining code compliance is not simply a matter of collecting pieces of papers, judgment is required.

[148] The *Nautilus* case is similar to the facts here. In this case, TAL's PS3 did not do more than state that a representative of TAL "believes on reasonable grounds" that TAL's work was carried out "in accordance with the contract". The Council did not

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63 *Nautilus,* above n 40, at [115].
64 *Nautilus,* above n 40, at [121].
65 *Nautilus,* above n 40, at [121].
66 At [125].

have a producer statement from TAL which certified that its work complied with the Building Code. The Council's own code of practice for building inspections, in force at the relevant time (first printed 1 November 2008), noted that:

> [PS3s] are usually issued by contractors stating their view that part (or) all of the building work as described on nominated plans and specifications has been constructed and meet certain performance requirements of the Building Code and/or conditions of building consent.

[149] In essence, compliance with the Code and/or building consent is what matters. Compliance with the contract is in my view insufficient and should not have been accepted by the Council.

[150] Furthermore, the Council's code of practice made it plain that:

> Producer statements can only be accepted from people who have applied to be included on the Council's producer statement register and have had their competence assessed. All producer statements must be completed in full and be signed and dated. Photocopies will not be accepted.

[151] Mr Hutt did refer to a register of approved producer statement authors. However, no such register was produced in evidence. Whether TAL (or its representative) was on the register is unknown.

[152] In any event, TAL could not accurately have given the declaration of compliance with the contract in this case because the balconies, as built, did not comply with the plans and specifications in the building consent. As is clear, the sawcut/chase had been dispensed with and so had the ACO drain (or similar).

[153] I further note that Argon's standard form PS3 expressly provided for a declaration that the building work "has been completed to the extent required by [the] building consent and complies with the building consent. I understand that this producer statement, if accepted, will be relied on by [Auckland Council] for the purposes of establishing compliance with the building consent." Both Mr Gabriel, of Argon, and Mr Hutt, of the Council, gave evidence that a producer statement is a statement of professional opinion confirming that building work will or does comply with the Building Code.

[154] Having disposed of Auckland Council's "complete answer" submission, I now address the particular allegations of negligence against the Council that the plaintiffs make.

[155] The plaintiffs contend that when Auckland Council officers were inspecting the construction of the cantilevered balconies, they should have identified:

(a) That the membrane at the perimeter:

(i) was not terminated in accordance with the consented sawcut detail; and

(ii) was not terminated with an up-stand.

(b) That the membrane was not lapped into the drain.

(c) That the Mapefonic system was not used as the acoustic layer.

[156] In relation to the final point, I apprehend from the plaintiffs' closing submissions that they no longer claim that the Auckland Council is liable for the cost of installing replacement acoustic matting. I discuss this point in greater detail below in relation to the reasonable remedial scope.

[157] The plaintiffs say that upon identifying the remaining issues, the Auckland Council should have failed the inspections and required further information in order to be satisfied that the waterproofing system would comply with the Building Code. They say that the Auckland Council should not have issued a code compliance certificate (CCC) covering the cantilevered balconies until it was reasonably satisfied of such.

[158] The Auckland Council accepts that the lack of an up-stand would be physically observable if an inspector had carried out such an inspection. However, it says that an inspector checking the consented plans would see that no up-stand was expected. Rather, a sawcut was to be used. It further says that there is no evidence to support

the plaintiffs' contention that a council inspector ought to have identified the lack of a sawcut.

[159] The Auckland Council also accepts, in relation to inadequately lapped membrane into the outlets, that "missing membrane" in some areas was sufficiently obvious to even a lay person as being physically observable and falling short of acceptable workmanship. The Council similarly accepts that the lack of mesh encapsulation in certain locations would be physically observable and would be considered to fall short of acceptable workmanship.

[160] As noted above, a territorial authority's duty is to exercise reasonable care in performing its relevant regulatory functions. That includes inspecting premises to ensure compliance with the building consent and certification of compliance with the Building Code. In discharging its inspection functions in this case, I find that the Auckland Council breached its duties of care in failing to check and observe that the balconies were constructed without the consented sawcut detail. The Council's own internal publications at the time reinforced the expectation that Council officers should be viewing and ensuring compliance with the consented plans. Had the non-compliance with those plans been observed and then addressed, a Council officer, properly directed, should then have turned his attention to the issue of a membrane up-stand.[67] This should have directed the Council inspector's attention to the waterproofing of the membranes generally.

[161] I further find that the Council inspectors failed to sufficiently observe and identify the poor workmanship associated with the lack of mesh encapsulation and the failure of the membrane to adequately to lap into the outlets. Both Mr Angell and Mr Alexander observed that the lack of mesh encapsulation was widespread. There was a clear breach of the standard of care. I also find that the Council inspectors were negligent in failing to observe during inspections that no Mapeband tape or gaskets had been used. I reject the Auckland Council submission that this alleged failure is

[67] The BRANZ Appraisal Certificate No 485 referred to above referred to the use of up-stands at cl 12.8: "Penetrations and up-stands of the membranes must be raised above the level of any possible flooding caused by blockage of deck and balcony drainage."

unproven. As noted above, a reasonable reading of the Mapei technical literature is that Mapeband tape or gaskets are an integral part of achieving a watertight function.

[162] As to the lack of thickness of the membrane, a failure to meet the thickness requirement specified by the Mapei technical literature is obviously (and accepted by the Auckland Council) unacceptable workmanship. I accept the evidence of Mr Paykel that in instances where the membrane has been poorly applied and has the appearance of a thin paint-type coating, concrete substrate imperfections are visible. In those circumstances, an inspector would have been able to assess that the membrane had been inadequately applied.

Causation

[163] In relation to each of the defects, the Auckland Council raises the issue of whether causation has been established, both factual and legal.

[164] I am satisfied that in this case the plaintiffs have proven causation, both factual and legal. I find that the Council's omissions were a substantial and material cause of the loss suffered by the plaintiffs, as required for legal causation to be established.[68] The plaintiffs are not seeking here to hold the Auckland Council liable for something more than protection against non-compliance with the Building Code. I agree with the conclusion reached by Mr Paykel as follows:

> Had the Council undertaken inspections of the balcony waterproofing [at the time the membrane was applied], as required by their own list of notifiable inspections, the Council would have been able to identify the work that didn't conform with the approved building consent and the balcony membrane related defects. The [C]ouncil officer should have then failed the inspections. A subsequent re-inspection should have been required to ensure the work had been completed in a compliant manner. A code compliance certificate should not have been issued unless all relevant inspections had been passed.

[165] I conclude therefore that the Auckland Council is liable in negligence to the plaintiffs for defect 1.

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[68] *Price Waterhouse v Kwan* [2000] 3 NZLR 39 (CA) at [28]; *Party Bus Co Ltd v New Zealand Transport Agency* [2017] NZHC 413, [2017] 3 NZLR 185 at [72].

Defect 2

[166] It appears there was only one inspection of the podium area, enclosed balconies and truck dock by the Auckland Council. That occurred on 12 November 2008 and resulted in a "partial" pass.

[167] There was no challenge to Mr Paykel's conclusion that the defects in this area would have been observable at the time and either would have been identified by a competent Council officer during this inspection or should have been identified had a further inspection been undertaken of this area as indicated on the checklist.

[168] I find that there was a breach of the standard of care by the Auckland Council in relation to its inspections and the subsequent decision to issue a code compliance certificate. The plaintiffs have also established both factual and legal causation and damage.

Conclusion on liability

[169] I find that Argon and the Auckland Council are liable as concurrent tortfeasors for the damage caused by defects 1 and 2 (except for the acoustic matting for which Argon is solely liable). Apart from the acoustic matting, both defendants are liable in full for the entire indivisible damage and subsequent loss.[69]

Reasonable remedial scope

Legal principles

[170] The guiding principle for compensatory tort damages is the sum required to put the plaintiff in the position it would have been in had the wrong not occurred.[70]

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[69] *Chee v Stareast Investment Ltd* [2010] BCL 300 at [134]–135]; see also *Morton v Douglas Homes Ltd*, above n 33, at 613; and *Hotchin v New Zealand Guardian Trust Co Ltd,* above n 25, where the majority of the Supreme Court adopted a broad approach to the meaning of "same damage" in s 17(1) of the Law Reform Act 1936.

[70] Bill Atkin "Remedies" in Stephen Todd (ed) *Todd on Torts* (9th ed, Thomson Reuters, Wellington, 2023) at [24.2.1].

[171] The orthodox position in relation to property damage, as recently addressed by the Court of Appeal in *Leisure Investments NZ Ltd Partnership v Grace*, is as follows:[71]

> (a) The basic measure for compensatory damages for physical damage to land and improvements was traditionally the amount by which the value is diminished, rather than the usually higher cost of reinstating the property to its former state.
>
> (b) In more recent times, the courts have taken a more flexible, pragmatic approach and will award the cost of reinstatement where the plaintiff intends to restore the property and it is reasonable to do so. In *Chase v de Groot* it was held that the plaintiff "must" intend to reinstate before such an award may be made and therefore the fact the plaintiffs had already sold the damaged property meant they were only entitled to the reduction in value.

[172] The court must ascertain the amount required to rectify the defects,[72] and damages should reflect the extent of the loss actually and reasonably suffered by the claimant.[73]

[173] In this case, there is no dispute that the plaintiffs intend to repair the building. The controlling question is whether the remedial scope proposed, and the costs of implementing that remedial scope, are reasonable in all the circumstances.

[174] I agree with the Auckland Council's submission that the appropriate measure of loss is the reasonable cost of bringing the defective building work up to Building Code compliance – i.e. the reasonable cost of carrying out the remedial works reasonably required to be carried out to repair the specific defects for which a party is liable. However, I reject its submission that the reasonable cost is automatically to be equated with the least expensive method.

[175] In support of its position, the Auckland Council relies upon the Supreme Court decision *Spencer on Byron,* where Tipping J held that loss should be measured by "the cost of bringing the building up to the standard required by the code and thereby

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71 *Leisure Investments NZ Ltd Partnership v Grace* [2023] NZCA 89, [2023] 2 NZLR 724 at [176] (footnotes omitted). See also *Johnson v Auckland Council* [2013] NZCA 662 at [110].

72 *Johnson v Auckland Council*, above n 71, at [110]; citing *Warren & Mahoney v Dynes* CA49/88, 26 October 1988 at 22.

73 *Leisure Investments NZ Ltd Partnership v Grace*, above n 71, at [184(c)].

removing the potential for physical damage and the associated health and safety concerns."[74] The Auckland Council also relies on the decision of Fisher J in *J & B Caldwell Ltd v Logan House Retirement Home Ltd*, a contract case where his Honour referred to the "least expensive method" of remedying loss.[75]

[176] I agree with the Council that *Spencer on Byron* makes it clear that a local authority's duty of care is directed at code compliance and that a plaintiff's loss is therefore measured by the cost of bringing the defective works up to Code. However, the above comment of Tipping J was made in the context of an argument that the Council's duty of care should not extend to protecting economic loss (rather than physical injury or damage). This finding does not stand for the proposition that the remedial works reasonably required, and the reasonable cost of carrying out those remedial works, always requires adopting the least expensive method. As I have noted, the controlling question is reasonableness in all the circumstances. It is thus wrong to rigidly conflate reasonableness with the least expensive method.

[177] In assessing that critical question of reasonableness, the most cost-effective manner is obviously relevant and important, but not determinative. As already stated above, courts are approaching the measurement of loss in an increasingly flexible and pragmatic way.

[178] There is clear support for this approach in the decision of Gilbert J in *Nautilus*. In that case, his Honour held that an enduring solution was required.[76] He held that the plaintiffs should not have to accept makeshift repairs and be left with the risk that this would not be effective or durable. His Honour accepted the plaintiffs' claim in relation to wall cladding which although was not based on the lowest tender, had been recommended by the plaintiffs' experts because of its proven track record in New Zealand.[77] Gilbert J considered that it was reasonable to proceed with the more proven system in accordance with expert advice and therefore awarded damages on this basis.[78]

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[74] *Spencer on Byron,* above n 9, at [45].
[75] *J & B Caldwell Ltd v Logan House Retirement Home Ltd* [1999] 2 NZLR 99 (HC) at 105.
[76] *Nautlilus,* above n 40, at [39].
[77] At [256].
[78] At [257].

[179] Similarly, in *Minister of Education v H Construction North Island Ltd* Downs J favoured the plaintiffs' "tried and true", and more expensive, method despite it not necessarily being the only Code-compliant method.[79] The defendant's proposed scope attracted heightened risk to the plaintiffs to which Downs J considered they should not be exposed to in consequence of the defendant's negligence.

The plaintiffs' proposed scope of remedial works

[180] A scope of works document was produced following the investigation process undertaken by Maynard Marks in 2018. The plaintiffs say that revision 8 of the scope of works (MMSOW8) dated 20 September 2021 is the "foundation document" for their remedial scope. That document was audited by Mr August. It is to be read together with the "Trade Breakdown Scope of Works 8 Estimate" dated 15 November 2021. That trade breakdown is the work of the plaintiffs' expert quantity surveyor witness, Ms van Eeden. The plaintiffs say that updates to the scope of works required to remedy defect 1 have been particularised, with the works set out and incorporated into a trade report dated 16 May 2023. That trade report is said to be the product of discussions between Mr August, Ms van Eeden, Mr Angell and Mr Reddin.

[181] The plaintiffs' case is that the defects identified require the removal and replacement of the waterproof membrane. They say that their experts and the Council's expert, Mr Matt Earley (who participated in the experts' conferral), agree on this. The plaintiffs describe the required replacement of the joinery, balustrades and cladding as "consequential works" that arise from the requirement to replace the waterproof membrane and say that both defendants are liable for this. They say that building-wide repairs are required in order to obtain building consent.

[182] As Mr August notes "the scope proposed by Maynard Marks is, broadly, replacing the waterproof membrane system and then consequential works to the balustrades and other building junctions and materials required in order to obtain a building consent and code compliance." The consequential works of the proposed scope includes the removal and replacement of all joinery units with new ones, and a complete replacement of the cladding across the entire building. That cladding work

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[79] *Minister of Education v H Construction North Island Ltd,* above n 7, at [273].

would include the entirety of the cladding system, including metal battens, the RAB board, and the building paper to be removed and disposed of. The re-cladding, in accordance with MMSOW8, would also include alteration of the steel framing, including replacement of corroded sections. The replacement of all of the cladding and the joinery, with both new cladding and new joinery, is a substantial part of the total quantum sought by the plaintiffs.

[183] In relation to these consequential works, i.e. replacement of the joinery, balustrades and cladding, the plaintiffs submit:

(a) These are "consequential" works in the sense that in order to obtain a building consent and to complete the direct remedial works, other works must be completed, even though they relate to building elements that are not necessarily defective themselves.

(b) There is no real dispute between the experts about the need for consequential works. The Scott Schedule for waterproofing defects acknowledges that "[b]alustrades, joinery and cladding are consequential dependent on the need to replace the membrane".

(c) Once it is accepted that the waterproof membrane must be replaced, then the extent of any consequential works must be determined.

[184] The plaintiffs submit that removal and replacement of the membrane will require these other building elements, namely the joinery, balustrades and cladding sheets, to be removed for access. They assert that putting these elements back into the building must be done in the way that meets current Building Code requirements, and that this will require the upgrading of the balustrades, joinery and cladding. They rely on s 17 of the Building Act 2004 for this.

[185] In assessing the plaintiffs' proposed remedial scope, I will first address the legal requirements of the Building Act 2004. I will then consider the evidence and factual basis of their scope and assess whether they have proven that their scope is a reasonable one that the Court should adopt.

Interpretation of ss 17 and 112 of the Building Act 2004

[186] The parties filed an agreed joint statement dated 11 May 2023 regarding the proposed replacement of the balustrades pursuant to s 9(1)(b) of the Evidence Act 2006. It records that:

> [4] The plaintiffs, Council and Argon agree that:
>
> …
>
> (e) These results mean that:
>
> (i) As installed, the balustrades on the building complied with (and still comply with) the standards used at the time of construction to establish compliance with the building code.
>
> (ii) If the balustrades need to be removed for any remedial works to the balcony membranes, and were to be reinstalled after such works, they would continue to comply with those standards.
>
> (iii) However, the balustrades would not meet the standards used now to establish compliance with the building code if installed as new balustrades now.
>
> [5] The parties further agree that the question of whether the balustrades can be reinstalled, if they need to be removed for the remedial works to the balcony membranes, is a legal question for your Honour to determine in light of ss 17 and/or 112 of the Building Act …

[187] While that joint memorandum is confined to the issue of balustrades, the same issue, namely the interpretation of ss 17 and 112 of the Building Act 2004, applies equally to the joinery and cladding, which the plaintiffs say requires replacing.

[188] 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.

[189] The defendants dispute the plaintiffs' interpretation of the legislation. They rely on s 112 of the Building Act. That section provides that a building consent must not be granted for the alteration of an existing building, or part of an existing building, unless the overall building, following the alteration, will continue to comply with the Building Code to at least the same extent as before the alteration.

[190] The question I must determine is as follows: is removing and reinstating such balustrades, joinery and/or cladding sheets to carry out work to the balcony membranes, and then putting the same back afterwards, "building work" as defined in the Building Act 2004?

[191] The defendants say that this issue should be answered "no". They rely upon *Determination 2009/60* of the Department of Building and Housing dated 4 August 2009.[80] In that case the issue for determination was whether the local authority was correct to refuse to issue a building consent that allowed for the re-use of existing balcony barriers in their current form.

[192] The decision-maker held that the reinstatement of the balcony barriers did not fall within the definition of "building work" (for the purpose of s 17). Section 112 therefore applied. The decision-maker reasoned as follows:[81]

> - The barriers were incidental to the remedial work being undertaken.
> - The barriers themselves are only subject to minor alterations to accommodate the recladding works.
> - The barriers are to be reinstated in exactly the same location as before.
> - The barriers comply with the Building Code to the same extent as before the alteration.
>
> My opinion may have been different had the decks themselves been altered or extended.

[193] A similar approach was adopted in a subsequent determination, namely *Determination 2018/009* of Ministry of Business, Innovation and Employment (Building and Housing) dated 23 March 2018, which involved remedial work carried out to eight decks of a building.[82] The balustrades were removed in order to carry out the remedial works to the decks. The balustrades, as an existing building element, were then reinstated to the same position and at the same height as they were prior to

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80 *DepBH Determination 2009/60*, 4 August 2009: Refusal to issue a building consent that incorporates the re-use of existing barriers for a house at 2/7 View Road, Campbells Bay, North Shore City.

81 At [6.6].

82 *MBIEBH Determination 2018/009*, 23 March 2018: Regarding the refusal to issue a code compliance certificate in respect of remedial work to the decks to Units 220, 221, 224, 225, 228, 229, 232, and 233 at Terrace Downs Villas, Lake Coleridge Road, Darfield.

the remedial works being carried out. The decision-maker held that their removal and re-use was incidental to the remedial work being undertaken.[83]

[194] The decision-maker ultimately considered that the building work undertaken, as detailed and approved in the building consent was the installation of suitable fixings to re-position the balustrades in place. The removal and re-use of the balustrades was not in itself building work.[84]

[195] I agree with the approach adopted in those two determinations. In my view, they correctly interpreted the provisions of the Building Act.

[196] The approach adopted in these two determinations is consistent with the following decisions of this Court.

[197] In *Bates v Auckland Council*, Gwyn J held that s 112 means that the proposed alteration(s) to a building "must make the existing building no worse (subject to the limited exceptions referred to in s 112 itself) and":[85]

> … there is no obligation – either for the owner to do, or for a council to require – to improve an existing building's performance against the Building Code, even where the existing building does not comply with the Building Code pre-works.

[198] In *Wheeldon v Body Corporate 342525*, Muir J approved the following summary from *Building Law in New Zealand* summarising the interaction between ss 17 and 112:[86]

> In other words:
>
> - Any new work must comply completely with the Building Code subject to any waiver or modification granted by the territorial authority (for example, if a shower compartment made of ordinary glass is being replaced, then the replacement must be made of safety glass as required to comply with the Building Code); and
>
> - After the alteration, the whole building must comply with the Building Code to the extent specified by s 112.

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83 At [6.5.11].
84 At [6.5.12].
85 *Bates v Auckland Council*, above n 13, at [83].
86 *Wheeldon v Body Corporate 342525* [2015] NZHC 884, (2015) 16 NZCPR 829 at [160]; referring to *Building Law in New Zealand* (online ed, Thomson Reuters) at [BL112.02].

[199] Gendall J, in *Fitzgerald v IAG New Zealand Ltd*, considered the application of s 112 in relation to the repair of an earthquake-damaged house. His Honour held that:[87]

> … the [Building Act] only requires the aspects of the house that are being repaired to be brought up to current compliance levels. Elements that are not repaired may be left at the same level of compliance as they were originally.

[200] In applying all these principles to the facts of this case, I agree with the submissions of the defendant and find that the legal question set out at [190] above is to be answered "no". The proposed removal and reinstating of balustrades, joinery and/or cladding sheets to carry out work to the balcony membranes is not "building work". The position is as follows:

(a) Replacement of the membrane must comply with the Code (i.e. that is "building work" for the purpose of s 17); but

(b) Removal and reinstatement of the balustrades, joinery and cladding sheets:

   (i) are incidental to the replacement of the membrane;

   (ii) these elements need not be altered (at least not significantly) to effect replacement of the membrane;

   (iii) they can be reinstated in exactly the same location as before; and

   (iv) doing so will not worsen the extent to which they complied with the Building Code before the alteration.

[201] To put this another way, the "new work" is the replacement and removal of the membrane. It is governed by s 17 (all building work must comply with the Building Code). The balustrades, joinery and cladding sheets are all "part[s] of an existing

[87] *Fitzgerald v IAG New Zealand Ltd* [2018] NZHC 3447 at [50].

building" governed by s 112 and therefore must continue to comply with the Code at least to the same extent as before.

[202] In my view, this approach is entirely consistent with the stated purposes of the Building Act 2004. The Act's stated purposes at s 3 are directed at regulation of building work and the setting of performance standards for buildings to ensure (primarily) the healthy and safe use of buildings. This is reflected by the comments of the Supreme Court in *Spencer on Byron*.[88] The Building Act does not require existing buildings to be upgraded to comply with the Code (other than in relation to fire and accessibility, and in other certain circumstances), even if existing buildings are altered.

Is the plaintiffs' scope reasonable?

[203] In considering a reasonable scope of repairs, it is important to place this building in context. It is a low-cost building with high maintenance requirements, with the cladding nearing the end of its 15-year minimum durability life cycle. The fundamental problem relates to concrete cantilevered balconies over non-habitable spaces. There is no evidence that the concrete is failing and there was very limited evidence of water ingress in and behind the cladding. I accept that the evidence of Dr Wakeling, biodeterioration consultant, records detection of the toxigenic mould *Stachybotrys*, but his evidence is confined to cork samples taken from beneath the balcony membrane and tiles. This is not a timber-framed building, and it has a rain-screen cavity which appears to be in general workable order. The Maynard Marks proposed scope of works (i.e. MMSOW8) would require substantial expense and inconvenience to the residents (on the plaintiffs' own evidence, up to 43 weeks of construction works). This is a wholly disproportionate and unreasonable response to the defects for which the defendants might properly be held to be responsible.

[204] No party in this case contends that the measure of the plaintiffs' loss should be diminution in value; the critical issue is the reasonable scope of repairs. Having said that, were I to accept the plaintiffs' scope of repairs and the significantly increased costs associated with that scope, the appropriate measure of loss, whether diminution

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[88] *Spencer on Byron*, above n 9, at [44], [163]–[165] and [171].

in value or cost of reinstatement, may become a live issue. In total, the plaintiffs seek damages of $40,739,870. The total construction cost portion of that sum is $33,376,240.[89] In evidence, Ms van Eeden, the plaintiffs' expert quantity surveyor, accepted that to demolish and re-build the Bianco Off Queen towers from scratch might actually be less expensive than her original remedial costs estimate (where it was roughly in the range of $50m to demolish and re-build). I acknowledge that Ms van Eeden has not actually carried out the necessary exercise to reach a clear and definitive view, but that evidence does tend to suggest that the plaintiffs' scope is a disproportionate and unreasonable response to the actionable defects established. As noted, this is a low-cost, high-maintenance building with a cladding system nearing the end of its 15-year minimum durability requirement. There are relatively few residents for whom Bianco is a permanent home.

[205] As recorded above, the plaintiffs have faced some formidable challenges in preparing for this hearing. As a result of the late settlement of the fire and hot water claims, the remaining pleaded defects (i.e. defects 1 and 2), and what therefore remains of the appropriate scope of repairs, have inevitably changed. Those changes have also inevitably impacted the quantum of damages that the plaintiffs can appropriately claim. Immediately prior to and in the early stages of the trial, I granted considerable indulgences to the plaintiffs to file supplementary evidence to address these significant changes. However, even allowing for all of these factors, I find that there are still substantial problems with the plaintiffs' proposed scope of repairs.

[206] As the defendants submitted, none of the plaintiffs' witnesses, including those from Maynard Marks, accepted that they were the author of the scope of works (MMSOW8). Ms van Eeden, formerly of Maynard Marks, was the author of the trade breakdown of 15 November 2021, but she is a quantity surveyor and not a building surveyor. The hearsay objection that the Auckland Council adopts is a red herring; I heard from at least three Maynard Marks witnesses and the MMSOW8 is clearly a Maynard Marks product and document. The real problem is the incomplete nature of MMSOW8 and the fact that it is not adequately and sufficiently tailored to the pleaded defects.

[89] The balance is general damages, consequential losses, consultant costs and professional fees.

[207] As stated, the previous Maynard Marks building assessment report of 2018, together with its enclosures, comprises 997 pages. It includes a long list of scope items which bear remarkable similarity to what is now before the Court in MMSOW8.

[208] Mr August, a building surveyor, but not associated with Maynard Marks, gave expert opinion evidence on the scope of repair. His evidence addresses whether the scope will achieve a building consent and certificate of code compliance and whether there is a less costly or more efficient alternative. Mr August inspected the site as part of a peer-review of the Maynard Marks investigations. There are, however, significant limitations with Mr August's evidence. He responsibly acknowledged as such. At the commencement of his evidence, he states that he would require a full detailed design review and input from various external consultants in order to be assured that a design scope would be "very likely" to obtain building consent. In cross-examination, Mr August accepted that MMSOW8 is a "broad scope" that outlines the remediation of the project; "it is not a detailed scope, and it is not a detailed design". He accepted that MMSOW8 is addressed at fixing "all of these defects in the round", as opposed to identifying what is required for any one specific issue. Mr August was ultimately unable to say that the plaintiffs' proposed scope could achieve a building consent. He described it as hypothetical.

[209] I accept the plaintiffs' submission that the vast majority of cases of this nature are taken by bodies corporate before remedial work is undertaken; the simple reason is that owners are not in a financial position to fund the cost of the remedial work without a contribution from the responsible defendants. In such cases, a scope of work is proposed without knowledge of the full extent of the damage. Assumptions must be made as to the scope of work required to remediate the building. The scope needs to be costed by quantity surveyors unless it reaches the point of being converted into a set of drawings, which are then the subject of tenders from contractors.

[210] I also accept that the plaintiffs were not required to produce a full and comprehensive set of drawings and/or a draft building consent application – albeit that ultimately will be required. However, it is for the plaintiffs to prove causation and damage, and sufficient evidence with structure and coherence is required so that the Court adequately can assess whether the alleged loss is proven. As Mr Price

submitted, in this case the plaintiffs have put "all their eggs in one basket"; they have not provided an alternative methodology or basis for the Court to find in favour of an alternative and reduced scope of works.

[211] In support of their claim for a full and complete replacement of the cladding (as part of the scope), the plaintiffs rely on an expert façade engineer, Mr Andrew Hakin. Mr Hakin participated in a joint expert conferral with Dr Winter (Auckland Council's façade engineer expert) and Mr Paget (Argon's façade engineer expert). There is very little agreement between Mr Hakin on the one hand and Dr Winter and Mr Paget on the other. The Scott Schedule is notable for its extensive recording of disagreements.

[212] Mr August, for the purposes of his evidence on scope, accepted that the cladding requires complete replacement. He says his view is based on the evidence of Mr Hakin. I agree with the Auckland Council submission that Mr August relies substantially on Mr Hakin in support of the view that the cladding is unsuitable. The critical evidence therefore on the cladding issue is that of Mr Hakin.

Evidence of the façade engineers – cladding

[213] Mr Hakin's evidence is that the ExoTec cladding system used on Bianco Off Queen was not suitable (and never was) and should be removed and replaced with high-density fibre cement cladding. Mr Hakin did not recommend a partial re-clad of the building and says that a partial re-clad of Bianco Off Queen using medium-density fibre cement cladding (i.e. the current ExoTec panels) would not be granted a building consent. In Mr Hakin's view, as set out in the Scott Schedule, a reasonable façade engineer would not provide a PS1 or PS2 for a partial re-clad or for any re-clad using ExoTec panels. Mr Hakin identified the following reasons for his opinions:

(a) The current panels are medium-density panels that are unsuitable for a building like Bianco Off Queen (i.e. high-rise towers in contrast to a "beach house" where such panels might be appropriate).

(b) ExoTec has high maintenance requirements that will not be met on this building.

(c) The building does not have the required thermal break for the use of ExoTec.

(d) Existing studs are at centres that are not in accordance with the technical documents and do not comply with design requirements.

(e) The RAB board may be damaged during the removal of ExoTec panels or may be of inferior condition.

(f) Light gauge galvanised steel battens have been used that are unlikely to meet the criteria of clause B2 of the Building Code.

[214] The defendants' experts, Dr Winter and Mr Paget, take issue with virtually all of these reasons. The defendants say that the costs of what Mr Hakin proposes "would be enormous". They say that it cannot be the reasonable cost of repair unless the consent for the balcony remedial works (if that is made out) would only be granted on the basis that Mr Hakin proposes.

[215] I agree with Mr Bigio that Mr Hakin was "a passionate professional". The issues that he and the other façade engineer witnesses address are complex and difficult. However, Mr Hakin's evidence, as he candidly acknowledged, reflects his professional engineering judgement. It is a conservative, risk averse approach and I apprehend that it is based in part on what appears to be a philosophical objection to the low-cost/high-maintenance model of the Bianco kind. Ultimately, of course, it is for the Court to determine how the Building Code is to be interpreted and applied; the Court's role is not to re-shape or amend that Code.[90]

[216] A fundamental premise of Mr Hakin's evidence is his opinion that "the existing cladding system", which in his view is a medium-density painted fibre cement board, was not a suitable choice for the cladding of Bianco Off Queen. He emphasised the onerous maintenance requirements of the James Hardie technical specifications for ExoTec, which he considers inherently unlikely to be carried out on a building like Bianco Off Queen. He explained that "the whole point of [his] evidence is that we

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90 There is no suggestion that the Building Code (i.e. delegated legislation) is ultra vires.

must use appropriate products that limit the risk of non-maintenance related failure early on, on a product's life".

[217] As the Auckland Council submits, Mr Hakin's evidence presents the plaintiffs with a significant causation problem. If Mr Hakin is right, and the cladding system is defective and the building requires a full re-clad regardless of the works to the balcony membranes, then the proposed full re-clad fails the "but for" causation test (or at least raises a significant issue of betterment). The plaintiffs' reliance on the "egg skull" principle and the judgment of Downs J in *Minister of Education v H Construction North Island Ltd* is misplaced.[91] There is no pre-existing vulnerability; the status quo of the cladding system is not non-compliant with the Building Code. The plaintiffs do not plead that the cladding system was defective, and the as-built situation is that Bianco Off Queen's cladding system, as approved by the building consent and accepted as part of the code compliance process, is code compliant. There is no evidential foundation for me to reach any other conclusion.

[218] Mr Hakin is on sound ground when he contends that Bianco Off Queen is a high-maintenance building. I note that Mr Alexander shares that view. Again, however, that is the "as-built" situation and the cladding system was, and remains, code compliant. In any event, the evidence is far from clear that the onerous maintenance requirements on this building have not been met. The Janus Façades report of 2018, commissioned by Maynard Marks, describes the cladding as being "in good condition", although I accept that the report also identified some deferred maintenance issues and is now some five years old.

[219] I agree with the defendants that much of Mr Hakin's evidence is premised on his engineering judgement that exceeds the minimum requirements of the Building Code and rather than what the Building Act 2004 and Building Code actually require. I respect Mr Hakin's professional judgement but as noted, I must apply the existing legal framework. That includes the application of s 18 of the Building Act 2004, which provides that a person who carries out building work is not required to "achieve performance criteria that are additional to, or more restrictive than, the performance

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[91] *Minister of Education v H Construction Ltd*, above n 7, at [292].

criteria prescribed in the building code in relation to that building work." See also *Spencer on Byron*.[92]

[220] I agree with the Auckland Council submission that the density issue is a red herring. The critical question is whether the cladding sheets comply with the relevant performance requirements of the Building Code and not the label attaching to them. As Dr Winter explained, the relevant New Zealand (and comparable international) standards do not classify fibre cement sheets based on density. Rather, Australian/New Zealand Standard (AS/NZS) 2908.2:2000, which Mr Hakin agrees was the relevant standard both at the time of construction and now, classifies sheets into type A and type B. It provides that "type A sheets are intended for external applications where they may be subjected to the direct action of sun, rain and/or snow". ExoTec is classified as a type A sheet.

[221] In any event, the actual density of the board is 1552 kg/m³ or 97 per cent of Mr Hakin's definition of high-density. Dr Winter would not expect any material difference in the performance between sheets which are 1600 and 1552 kg/m³ respectively.

[222] On the critical issue of whether a façade engineer would approve a partial re-clad of the building and whether a building consent would thus be granted, I prefer the evidence of Dr Winter and Mr Paget. Their opinions are premised on what, in my view, is the correct legal premise, including a minimum durability requirement of 15 years under the Code for the ExoTec product.

[223] In his supplementary brief, Mr Hakin expresses the view that the absence of a thermal break is a further reason why the cladding is unsuitable. In his oral evidence he described this as a "fundamental reason" why he considers the cladding system fails to meet the performance requirements of the Code. However, for the reasons submitted by Auckland Council, I prefer the evidence of Dr Winter on this issue.

[224] Clause E3.3.1 of the Code provides that "an adequate combination of thermal resistance, ventilation, and space temperature must be provided to all … spaces where

92 *Spencer on Byron*, above n 9, at [193].

moisture may be generated or may accumulate”.[93] There is no evidence that establishes that this requirement has been breached, despite the fact that the building is now towards the end of the 15-year durability period for the building envelope.

[225] As explained by Dr Winter in his supplementary brief, “a thermal break can be used to prevent the dew point for condensation occurring within the framing such that condensation will not form on the steel studs.” The in-service performance apparent from the plaintiffs’ investigations shows that after nearly 15 years the as-built construction is performing adequately in terms of the E3 performance requirements.

[226] Mr Hakin agreed that any problems with the absence of a thermal break or an inadequate thermal break would have manifested by now. I note that Dr Winter’s opinion in this respect was not challenged by the plaintiffs in cross-examination.

[227] Both Dr Winter and Mr Paget considered that the RAB board is a thermal break (and Mr Paget noted that the RAB is a wood fibre insulating board). In addition to the RAB, Dr Winter refers to the air gap and isolation created by the shim packers shown on the extract from the structural drawings set out in Mr Hakin’s reply brief. Dr Winter was of the view that this isolates the steel battens from the RAB and the steel framing in terms of the transfer of heat.

[228] I accept the opinion of Dr Winter and Mr Paget. The presence of a thermal break is a complete answer to Mr Hakin’s evidence on that point, where the relevant Acceptable Solution (E3/AS1) simply calls for a thermal break (rather than requiring a particular type of thermal break).

[229] On the remaining issues of the existing stud centres, including applicable wind loads, damage to the RAB board during removal of ExoTec panels and the durability of the steel battens, I also prefer the evidence of Dr Winter. The plaintiffs have not established that the existing stud centres are not in accordance with the original James Hardie technical documents or that the RAB board may be damaged during removal of the ExoTec panels. As Dr Winter noted, if any damage does occur, it “should be relatively simple to remediate”.

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93 See also cl E3.2, the functional requirement element.

[230] I also agree with the defendants that the 15-year durability period in cl B2.3.1(b) of the Building Code expressly applies to the cladding system here, as well as the steel battens. Clause B2.3.2 effectively provides that "hidden" elements (such as the battens) must have the same durability as those elements which hide them (the cladding). I note also that the 15-year durability for the battens is made expressly clear in Acceptable Solution B2/AS1.[94] Clause 1.0.1 of B2/AS1 provides that it applies to "materials and components required to satisfy the performances as specified in other NZBC clauses." Clause 1.3.1 states that "table 1 is an acceptable solution establishing the durability requirements of nominated building elements." Table 1 then provides that:

(a) For non-structural cladding systems, such as the ExoTec system used at Bianco Off Queen, the minimum durability period is 15 years; and

(b) For cavity battens for wall cladding systems, the minimum durability period is 15 years where the wall cladding durability is 15 years.

[231] As a matter of engineering judgement, there may be some merit to the views of Mr Hakin about the durability standards in the Building Code. However, it is not the role of the Court to decide what are ultimately policy decisions about the merits of the standards and content of the Building Code.

[232] On the final issue of whether a PS1 or PS2 from a façade engineer would be required for the cladding remedial works (and whether it would likely be issued), I prefer the evidence of Dr Winter. I also agree with the submission of the Auckland Council.

[233] Dr Winter, who has over 50 years' experience as a civil/structural engineer, with a particular focus on façade engineering, says he is not aware of any situation in which a PS1 or PS2 has been sought, let alone required, by a building consent authority for the removal and reinstatement of cladding sheets. Dr Winter notes that that is a very different situation from one of targeted repairs or a partial re-clad, where only the

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94 In accordance with s 19(1)(b) of the Building Act 2004, compliance with an acceptable solution establishes compliance with the Building Code.

defective parts of a cladding system are repaired/replaced, where the concern might arise that not all weathertightness problems will be identified and further similar problems might develop in the future. Dr Winter says that he would expect a façade engineer to be comfortable providing a PS1 or PS2 if one was sought for removal and reinstatement of cladding sheets. He notes that he would be comfortable himself providing either a PS1 or a PS2.

[234] As the Auckland Council submits, there is no dispute that the Council would need to be satisfied that a proposed new external envelope would comply with the Building Code as new "building work". However, Dr Winter and Mr Paget do not, as noted, propose a "new exterior envelope". The cladding sheets can simply be removed and replaced.

[235] I also agree with the Auckland Council's submission that there could be no suggestion that the Council could require the Body Corporate to apply for a full re-clad or refuse a consent for the balcony remediation if the Body Corporate did not propose a full re-clad, based on the unsuitability concerns that Mr Hakin raises. The Auckland Council is statutorily obliged to issue a building consent for proposed works if those works will comply with the Building Code (subject to s 112 of the Building Act 2004, for existing buildings).[95]

[236] In conclusion on the façade engineering expert evidence, I find that the plaintiffs have not established that there is a need for a full replacement of the cladding.

Mr Earley's evidence – Auckland Council

[237] The Auckland Council elected not to call expert building surveyor evidence on either the defects or scope of remedial works. Instead, it sought to challenge and put the plaintiffs to proof. It did brief and serve a witness statement from Mr Matthew Earley, building surveyor. However, and presumably for tactical reasons, the Council elected not to call him to give evidence. Mr Earley did participate in the expert

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95 See *DepBH Determination 2012/023,* 30 March 2012: The exercise of the powers of an authority in refusing to grant an amendment to a building consent for remedial work to a house at 107 Realm Drive, Paraparaumu.

conferral for waterproofing defects and to that limited extent there is some evidence from him before me.

[238] Mr Earley agreed, as set out in the Scott Schedule, that removal of the balustrades, joinery and cladding would be dependent on the need to replace the membrane. He expresses no view on whether the balconies required a membrane, noting that that depends on whether concrete requires protection from water. Mr Earley is of the view that instead of the jack-tile system, a reasonable repair option is a direct-fixed tiling system by Ardex, which involves an exterior membrane and drainage mat and has acoustic properties. Based on the evidence of Dr Winter, Mr Earley is of the view that the cladding replacement could be limited to one sheet either side, and above, the balcony door openings. He is also of the view that the removed panels could then be replaced with new ones (using the same or similar product). Mr Earley states that without a waterproofing membrane, the existing balustrades, joinery and cladding would not need to be removed.

[239] That limited evidence from Mr Earley does not constitute a comprehensive and sufficiently detailed scope of remedial works for me to adopt in this case. It does, however, provide some support for the scope proposed by Mr Alexander.

[240] I find that Mr Alexander's scope of repairs is the appropriate, reasonable scope of repairs to address the proven defects in this case.

Mr Alexander's scope of repair

[241] I accept and adopt the alternative scope of repair prepared and proposed by Mr Alexander. As Mr Alexander notes, the key to the repair of the building is to address the two very specific points of leaking rather than the substantive replacement of components as proposed by the plaintiffs.

[242] Mr Alexander's proposed scope of works, in relation to defect 1, includes the following:

(a) removing the failed membrane;

(b) removing the cork acoustic layer;

(c) fixing any visible hairline cracks in the balcony concrete with an epoxy;

(d) filling the construction joint, where it exists, with an epoxy mortar so that water cannot track to the building wall;

(e) moving the outlet hole further from the building wall, and sealing into the hole a new downpipe fitting so that water cannot track to the building wall;

(f) leaving the balustrades in place;

(g) leaving the aluminium joinery in place (the old membrane that extends under the joinery does not need to be removed because it is not being replaced);

(h) waterproofing the balcony concrete with Aquaron 2000, as an extra layer of protection; and

(i) installing a new under-flashing as designed by Mr Alexander.

[243] As Mr Alexander notes, the balconies are entirely outside the exterior wall of the building except for the portion where the exterior wall butts to the underside of the balcony, a width of about 150 mm. I accept his evidence that there is no possibility of liquid water leaking into the interior beyond the outside face of the concrete beam (as shown by the red line in the drawing at figure 24 of his brief of evidence). That means, as Mr Alexander explains, the only at-risk area is the portion of balcony shaded pink in figure 24.

[244] A detailed scope of remedial works prepared by Mr Alexander is set out at Appendix D to his brief. That includes a remedial scope for defect 2 which is split into three parts: part 1, podium to building A (2 White Street); part 2, podium to building B (8 White Street); and part 3, services duct building B (8 White Street). In

respect of parts 1 and 3, this involves the application of Aquaron 2000 to the entire area.

[245] I find that the plaintiffs' criticism of Mr Alexander's proposed scope is misplaced. It is not, as contended, a "lab experiment". It may have novel elements to it but that does not, of itself, mean that it will not obtain the necessary building consent or that it is somehow unreasonable. I find that Mr Alexander's scope is a viable and realistic means of repairing this building. I also accept Mr Alexander's evidence on the proposed application of Aquaron 2000 and the associated verification method.

[246] I reject the plaintiffs' submission that Mr Alexander's evidence is somehow tainted by the involvement of Argon in the development of his scope. Argon clearly has an interest in minimising the cost of any remedial scope, but it was not wrong of Mr Alexander to test aspects of his scope with Argon, the party with, after all, the best first-hand knowledge about these buildings. Ironically, if I were to accept the plaintiffs' criticisms of Mr Alexander and reject his evidence, then there would be no scope before the Court that could be accepted. Ultimately, it is for the plaintiffs to prove their case, including a reasonable scope of repairs for which the defendants might properly be responsible.

[247] Mr Alexander responsibly acknowledged that aspects of the plaintiffs' remedial scope were commonplace. He described the jack-tile system as popular and part of an industry-wide response to concerns with bonding tiles directly to the membrane. He also accepted that the Auckland Council had recognised the jack-tile system was one way of achieving a maintainable membrane system. However, none of those factors support a finding that Mr Alexander's scope is unworkable or not viable.

[248] Mr Alexander's proposed scope requires none of a number of problematic elements contained in the plaintiffs' proposed scope. This includes the following:

(a) In cross-examination Mr August accepted that the plaintiffs' proposed scope would involve an increase to the height of the nib walls and that this would add weight to the balconies. In his original evidence,

Mr August said that this was not recommended by the structural engineer. In his amended brief of evidence, he said instead that this would need to be reviewed by the structural engineer. In cross-examination, Mr August was unable to explain why these statements differed.

(b) The plaintiffs' proposed new nib wall would be higher than the apartment floor level. That creates an obvious flooding risk. In cross-examination, Mr August accepted that if both the proposed new "overflow hole" and the adjacent new outlet hole became blocked, the apartment would flood because the water would enter the apartment before it could overflow the balcony.

(c) The plaintiffs' proposed raised tile system would make the relative height of the existing balustrades too low, requiring new higher balustrades, which would add weight.

(d) The plaintiffs' proposed new balcony channel would be twice as wide as the existing channel and would run the length of the balcony. This would therefore involve removing a lot more concrete than Mr Alexander's proposal. That is an obvious stress point, so the less concrete removed the better.

[249] Mr Alexander's scope requires none of these problematic elements. The nib walls would remain as they are, as would the balustrades. The tiles would not be raised. There would be no additional weight. There would be minimal removal of concrete.

[250] Mr August accepted that a competently installed sealant around a new outlet pipe, as proposed by Mr Alexander, would prevent leaking. He also accepted that if the outlet hole is moved away from the building, as (again) proposed by Mr Alexander, then even if it did leak, water running down the pipe could not physically enter the building wall.

[251] Furthermore, Mr August accepted that proper filling of the construction joint with epoxy mortar, as included in Mr Alexander's scope, would prevent water entering the building wall. I accept the submission that Mr Alexander's flashing detail is easily buildable, and that his overall scope provides several layers of protection.

[252] I accept that Mr Alexander's statement that he was 100 per cent confident that his proposal would obtain a building consent is a little surprising. However, as I have noted, he was an impressive witness whose evidence is unassailable. I have no doubt that Mr Alexander expressed that view fully aware of the reputational consequences for him if it proved not to be correct. It is not a reason to reject his evidence.

[253] I agree that ordinarily it would be good trade practice to remove all of the membrane including that extending under the joinery. However, as agreed by the experts, that would require removal of all or most of the joinery which, in my view, would be a wholly unreasonable and disproportionate approach. I accept Mr Alexander's evidence that the existing membrane will need to be cut in line with the bottom of the joinery.

The acoustic matting

[254] The relevant evidence about acoustic matting was given by Mr Jon Styles. That brief was admitted by consent. It addresses the issue of whether the Building Code imposes any acoustic attenuation requirements relevant to the balconies of Bianco Off Queen.

[255] Argon and the plaintiffs agreed that it was not necessary to call Mr Styles to give evidence on the basis that the plaintiffs could submit that Mr Styles' opinion that the Building Code imposes no acoustic continuation requirements relevant to the Bianco Off Queen balconies is applicable only after Determination 2015/007.[96]

[256] The plaintiffs take the position that the acoustic layer was part of the original design of Bianco Off Queen. They contend that an acoustic matting layer is a

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[96] *MBIEBH Determination 2015/007*, 2 March 2015: Regarding the authority's exercise of powers in refusing to issue a modification of clause G6 for an apartment block at 105–109 Apollo Drive, Rosedale, Auckland.

reasonable cost of repair in order to restore the plaintiffs to the position they would be but for the negligence of Argon.

[257] They also accept that the Auckland Council will not likely require acoustic matting on the balconies in order to comply with the Building Code. As stated above, the plaintiffs accept that the Auckland Council cannot be liable for the cost of replacement acoustic matting.

[258] This issue was given relatively cursory attention throughout the hearing and in closing submissions.

[259] Argon was clearly negligent in installing cork matting instead of the proposed Mapefonic acoustic matting. It was reasonably foreseeable that if a membrane failed, the cork matting would be particularly vulnerable to rotting. I find that Argon is liable for the replacement cost of the acoustic matting ($111,628) on conventional negligence principles. It owed the plaintiffs a duty of care, it breached that duty, and the plaintiffs have suffered loss caused by the defendant's negligence. It is reasonable to require Argon to restore the plaintiffs to the position they would have been but for the negligence of Argon.

[260] I conclude that the plaintiffs' claim in respect of the acoustic matting is made out.

What will it cost to repair the defects?

The parties' positions

[261] The plaintiffs seek total damages of $40,739,870 calculated as follows: [97]

(a) Total construction costs – $33,376,240;

(b) Total professional fees – $2,114,871;

[97] The sub-total figures are those which I have taken from the plaintiffs' closing submissions – claim summary dated 22 June 2023.

(c) Consultant costs incurred to date (investigations) – $576,699;

(d) Consequential losses (relocation costs, alternative accommodation costs, loss of rent, etc) – $3,332,060;

(e) General damages – $1,340,000.

[262] In support of their claim for construction costs of $33,376,000, the plaintiffs rely on their expert quantity surveyor, Ms van Eeden. The estimate for those costs is based on a 43-week construction duration. The largest items of expenditure in Ms van Eeden's estimate relate to a full re-clad and replacement of all the joinery units and associated costs. This includes rainscreen and cladding costs of $7,497,704, joinery unit costs of $3,858,869 and internal linings and services costs of $2,685,792. Ms van Eeden's total cost for the replacement of the balcony membrane, namely $7,130,921, includes costs of $1,656,690 for supplying and installing new powder-coated aluminium cap flashing to the nibs and $844,550 for supplying and installing a new jack-tile system. It also includes costs of $771,750 for constructing new reinforced concrete nibs to raise the height of the existing nibs on the outer edges of the cantilevered balconies. Of the total site set-up and general work items estimate of $5,903,005, Ms van Eeden estimates scaffolding costs of $1,476,000. That is, of course, based on a 43-week construction duration.

[263] Mr Brock, the expert quantity surveyor witness for Argon, estimates that Mr Alexander's scope of remedial works would cost in the region of $4.5 – $4.7 million plus GST (i.e. total budget estimate of $5,776,000 plus GST, minus the fire protection remedial work (settled) of $805,000 plus P&G).[98]

[264] The Auckland Council position on quantum is as follows. If I accept, as I have done, the Council's s 17 Building Act 2004 interpretation and also conclude (as I have done) that there is no need to replace the joinery units and balustrades, then the cost of any reasonable repair scope, even with the addition of margins and contingencies, is in the order of "about $2m." In support of its position, the Auckland Council has

98 In his evidence in chief Mr Brock stated that "ball park" it would cost $4.5 million plus GST. His handwritten notes on his brief of evidence, recorded during the presentation of evidence, record $4.7 million.

filed a comprehensive cost estimate and cost calculation schedules containing lowest common numbers as between the expert quantity surveyors.

[265] As Mr White of Auckland Council stated, the first step in any methodology for assessing the value of a scope of works and preparing a detailed cost estimate is to understand the scope of what is being costed; "[w]ithout a reasonable understanding of the scope of works, a quantity surveyor cannot reasonably cost the works".

[266] The plaintiffs submit, correctly, that the "departure point" for the quantity surveyors is the scope of works.[99]

[267] My rejection of the plaintiffs' proposed scope of remedial works and acceptance and adoption of Mr Alexander's scope presents challenges and difficulties for the plaintiffs' case and my calculation of quantum. I have rejected the "foundation document" upon which Ms van Eeden for the plaintiffs bases her estimates. In light of my findings on scope, the critical factual premise of many of her calculations, which involve a 43-week construction duration, are simply not relevant. That is particularly the case for those "big ticket" items relating to rainscreen cladding and joinery. Further important estimates, including Auckland Council fees, scaffolding requirements, architect's fees, quantity surveyor costs and contract administration and project management costs, while of relevance to the scope I accept, were developed for a particular design and scheme of works that I have rejected. A substantial adjustment to those figures would obviously be required to quantify the cost of those particular items for Mr Alexander's scope.

[268] In making these findings, I do not criticise Ms van Eeden's integrity or her professional approach. She obviously did her best in difficult circumstances with the scope of works evolving and lacking coherence. She also responsibly accepted that she would need to further revise her costs estimate in light of the plaintiffs' expert

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99 In the case of Mr White, his replacement brief of evidence addresses Ms van Eeden's trade breakdown provided with her February 2022 brief of evidence, and a subsequent trade report provided with her May 2023 evidence, referred to as her "supplementary trade report". In his original brief of evidence, Mr White had addressed a revised scope of works that Mr Matthew Earley had intended to give evidence about. As noted, Mr Earley was not ultimately called to give evidence. In cross-examination, reference was made by Mr White to the revised scope of Mr Earley. In contrast to Argon, the Auckland Council did not produce an alternative scope of works.

programmer, Mr Gould, revising his construction duration estimate. In her original brief of evidence Ms van Eeden estimated costs of $62,698,000 (inclusive of GST) based on a 90-week construction duration and a scope of works that included claims (i.e. fire and hot water) that have now been settled. In her supplementary brief of evidence of 16 May 2023, Ms van Eeden estimated costs of $45,972,972.70 based on a reduced scope and a reduced construction duration. Ms van Eeden further accepted that if a different construction duration was required, then she would again have to adjust her costs estimate.

[269] The only expert quantity surveyor witness who squarely and directly addresses Mr Alexander's scope is Mr Brock. He presented his evidence in a professional and competent manner. His evidence is the obvious starting point for my costs of repair determination.

[270] I reject the Auckland Council's submission that I should, on a line-by-line basis, determine each individual scope item that is reasonably required to address the defects for which I have held the defendants responsible for – and then determine costs in accordance with the least expensive estimate based on the comparison schedule that the Auckland Council has provided. While there is undoubtedly overlap with the items that Mr Brock has costed, neither Mr White nor Ms van Eeden has costed Mr Alexander's scope. That is, of course, a matter for expert evidence and as noted above, the quantity surveyor undertaking the exercise must have a reasonable understanding of the particular scope at issue. There is a real danger, were I to adopt the Auckland Council's approach, of determining items and quantifying their cost in an uninformed and unscientific manner. There are simply too many variables. Furthermore, as Mr Price submitted, the plaintiffs' evidence does not provide a clear methodology or mechanism for applying Ms van Eeden's various cost items to the much more limited scope (i.e. Mr Alexander's) that I have accepted.

[271] Mr Price's submission was that the "line-by-line" approach was the only way that I could credibly address the quantification of scope issue, were I to reject the Council's primary defence that the plaintiffs have failed to prove scope and quantum (on the basis that they are, in essence, seeking an all or nothing scope).

Preferred approach

[272] The better approach, which I adopt, is as follows. I accept Mr Brock's calculation as the starting point. It is based on Mr Alexander's scope, which I have accepted as the reasonable scope of repairs. To the extent the evidence allows, I will then make factual findings on issues such as construction duration which impact on Mr Brock's calculations. I will then call for further submissions from the parties (but not evidence) as to whether and what further adjustments ought to be made to Mr Brock's calculations in light of my findings. Alternatively, it may be that the parties could reach agreement on some final calculation without my involvement.

[273] A similar approach was adopted by Whata J in *Fleetwood Apartments*.[100] In that case, his Honour determined that the proper measure of loss (for compensatory damages) was a "wasted cost" measure. However, only the Auckland Council's expert, Mr White, had assessed the quantum of compensatory damages on that basis; the plaintiffs had sought costs arising from repairs with adjustments for collateral benefit as the tort measure. Whata J granted leave to the parties to address him on final quantum on the basis that he had endorsed the methodology of the Council expert and subject to certain factual findings set out in the judgment.[101]

[274] A broadly similar approach was also adopted by Tahana J in *Body Corporate 207624 v Grimshaw & Co*.[102] In the substantive judgment, and following the determination of liability, her Honour reached a conclusion on what the Body Corporate plaintiff was generally entitled to recover (i.e. the costs of the interpleader proceedings and the repair costs that arose as a consequence of the 18-month delay). Her Honour then prepared a summary table of her conclusions on each head of loss.[103] Some heads of loss required further calculations to be undertaken in accordance with the relevant methodology her Honour had determined earlier in the judgment. Tahana J directed the plaintiff to undertake the calculations of damages in accordance with the methodologies prescribed in the judgment and to confer with the

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[100] *Fleetwood Apartments,* above n 56.
[101] At [237].
[102] *Body Corporate 207624 v Grimshaw & Co* [2023] NZHC 979.
[103] At [525].

defendants.[104] She then made separate orders on the papers as to the quantum of damages following the filing of a joint memorandum.

[275] I turn to address the details of Mr Brock's evidence. His quantum assessment is based on a full scaffolding of the building. It is also based on the construction duration estimate of Mr Andrews, the expert programmer for Argon, of 116 working days (or 164 calendar days). This is the gross estimated construction period, including contingency. Mr Andrews' evidence is of course the only expert programming evidence that directly addresses the issue of construction duration for Mr Alexander's proposed scope of works.

[276] I find that there should be some adjustment to the estimated duration figure for which Mr Andrews contends. Having heard from the expert witnesses generally on this issue I find, based on the more practical experience of Mr Gould with local Auckland conditions (and the particular disruptions caused by inclement weather), that Mr Andrews' figure should be increased by 10 per cent.

[277] Mr Brock's estimate includes a 'project contingency' sum of 10 per cent. There seems to be little dispute amongst the experts on that percentage figure, regardless of the nature of the scope.

[278] Mr Alexander's scope does not require any of the unit owners or tenants to move out of their apartments during the construction period. I generally agree with that assessment. However, in terms of quantum I find that some modest allowance should be made to account for a small number of apartment owners having to move out. It seems likely that in respect of a small number of apartments, the disruption caused by the remedial works to particular unit owners and/or tenants will be such that it is reasonable to make some allowance for this. I stress that this contingency would be of a modest kind.

[279] I further find that some adjustment should be made to Mr Brock's quantum assessment to account for project escalation costs. On the issue of project escalation costs, I generally prefer the evidence of Ms van Eeden. She has an economics

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104 At [591(b)] and [592(a)].

background and stated in evidence that her original project costs escalation estimate is proving in fact to be “fairly on track”. Ms van Eeden calculated an escalation factor for the period March 2023 to completion of construction at 6 per cent per annum.

[280] I accept Mr August’s evidence that even with limited replacement of cladding, a design will need to be prepared for a weathertight detail between the existing cladding and any new cladding. This does not appear to have been provided for in Mr Brock’s estimate and some allowance also needs to be made for that.

Betterment

[281] The defendants have pleaded that any damage recoverable by the plaintiffs ought to be reduced to such extent as the Court thinks just and equitable to account for the betterment the plaintiffs would otherwise receive at the defendants’ cost.

[282] I have already addressed above the competing interpretations of ss 112 and 17 of the Building Act 2004 in relation to the joinery, balustrades and cladding. In particular, by reaching the conclusion that the plaintiffs have not established that there is a need for a full replacement of the cladding, the main issue with regard to betterment has been dispensed with. There is no further betterment issue for me to address.

Consultants’ costs

[283] Defects 1 and 2 have resulted in the plaintiffs incurring consultants’ costs with respect to the investigation of the defects.

[284] The plaintiffs claim for consultants’ costs the sum of $576,699 (exclusive of GST).

[285] I accept that consultants’ costs are properly recoverable. I also accept that the plaintiffs have made reasonable and genuine efforts to calculate the amount properly claimable, taking into account the settlement of the fire and hot water defects and excluding costs such as litigation work.

[286] My assessment is that the amount claimed is somewhat excessive. I have to proceed, of course, on the evidence that is available. I conclude that the plaintiffs are entitled to consultants' costs of $450,000, exclusive of GST. That amount is to be awarded to the Body Corporate.

Consequential losses

[287] It follows from my finding that I should adopt Mr Alexander's scope of repairs that the plaintiffs' claim for loss of rent, cost of alternative accommodation and moving and storage costs must be dismissed. There is no requirement for any of the plaintiffs (except to a very limited extent and as addressed above) to move out of the apartments in order for the remedial works to be carried out.

General damages

[288] General damages are a form of compensatory damages. They compensate for losses that cannot be objectively quantified in monetary terms.[105] They cover, for example, pain and suffering, indignity and humiliation and mental distress. *Todd on Torts* explains:[106]

> Mental suffering that is insufficiently severe or permanent to qualify as a recognisable psychiatric illness may be compensated by an award of general damages if it is a consequence of other actionable damage that makes the tort complete, or the claim is brought under a tort that is complete without proof of actual damage.

[289] Where the plaintiff has a cause of action in negligence, general damages will be available for distress, vexation, inconvenience and the like if a reasonably foreseeable consequence of the breach of duty.[107] As Richardson J noted in *Mouat v Clark Boyce (No 2)*:[108]

> … where there is a duty of care to the plaintiff, the scope of the damages recoverable is essentially a question of remoteness of damage which turns on whether the particular harm was a reasonably foreseeable consequence of the particular breaches of duty which have been established.

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105 *Body Corporate 346799 v KNZ International Co Ltd*, above n 30, at [104].
106 Atkin, above n 70, at [24.2.9(2)].
107 *Mouat v Clark Boyce (No 2)* [1992] 2 NZLR 559 (CA) at 568 per Cooke P.
108 At 573.

[290] The second plaintiffs who claim general damages are those who are natural persons and whose causes of action have not been assigned. Unit owners who are companies cannot claim general damages as a company does not suffer mental stress.[109]

[291] In *Victopia Apartments*, the Body Corporate and unit owners of a 203-unit complex successfully sued for defects relating to the cladding, balconies, podium and passive fire protection of the building.[110] The defendants were held to be liable for approximately $41 million for the remediation of the defects. In addressing the issue of general damages, Thomas J considered that a "tariff style" analysis with adjustments for inflation was not appropriate.[111] Rather, her Honour adopted a "holistic assessment" of the impact on the individual claiming general damages. I agree with and adopt that approach.

[292] In *Victopia Apartments*, the remedial works required meant that all those living in the apartments had to relocate, causing significant inconvenience and stress to those individuals.[112] In awarding general damages, Thomas J acknowledged that the plaintiffs had not been required to live in an uncompleted building with actual leaks and that the damage to the plaintiffs' apartments had not, for the most part, caused any actual health risks to the occupants.[113] Her Honour then made awards for general damages as follows:[114]

(a) $15,000 for single non-resident owners;

(b) $25,000 for joint non-resident owners;

(c) $25,000 for single owner-occupiers; and

(d) $35,000 for joint owner-occupiers.

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109 Harvey McGregor *McGregor on Damages* (19th ed, Sweet & Maxwell, London, 2014) at [5-014]; *O'Hagan v Body Corporate 189855* [2010] NZCA 65; [2010] 3 NZLR 486 at [153].

110 *Body Corporate 346799 v KNZ International Co Ltd*, above n 30.

111 At [117]; referring to *Johnson v Auckland Council*, above n 71, at [118]–[120]. See also *Weaver v HML Nominees Ltd* [2015] NZHC 2080.

112 At [121].

113 At [120].

114 At [127].

[293] The main impact suffered by unit owners in this case has been financial and associated stress. These owners have experienced considerable uncertainty and distress for a lengthy period; the diagnosis for Bianco Off Queen has clearly not been an easy or simple exercise. In some cases, there has been exacerbated stress and inconvenience as a result of some unit owners, being non-New Zealand residents or nationals, having no familiarity with the local circumstances. I accept that the damage has not, for the most part, caused any actual health risks to the occupants, although there has clearly been stress associated with the ongoing uncertainty about potential health risks. I must also assess general damages here on the basis that none of the unit owners will have to move out or the remedial works (except for a small number for a very limited period as analysed at [278] above).

[294] I find that general damages are to be awarded as follows:

(a) $10,000 for single non-resident owners;

(b) $16,500 for joint non-resident owners;

(c) $16,500 for single owner-occupiers;

(d) $23,000 for joint owner-occupiers.

[295] There is to be no award of general damages to the six second plaintiffs who were assigned their causes of action.[115]

Standing

[296] The defendants do not dispute that the Body Corporate has standing to sue on behalf of the owners of the apartments in respect of common property. In this case, that is the property the subject of defect 2. However, the Auckland Council challenges the standing of the Body Corporate to sue as a representative agent of the owners in respect of the individual units (i.e. defect 1).

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[115] Those six second plaintiffs are named at [597] of the plaintiffs' closing submissions. The plaintiffs acknowledge that no general damages are claimed for these six assignees.

[297] This standing issue is of some significance because the Auckland Council advances the affirmative defence of contributory negligence against some of the individual second plaintiffs. The Auckland Council submits that it does not owe the Body Corporate duties of care in respect of individual units. It further argues that each unit owner must claim and authorise the Body Corporate to claim on their behalf in respect of damage to their individual unit. The plaintiffs on the other hand, and in reliance on s 138 of the Unit Titles Act 2010 (UTA 2010), contend that the duty of care in respect of the relevant unit property is owed to the Body Corporate and that the affirmative defence of contributory negligence does not apply to the losses at issue; those are the losses of the Body Corporate. The plaintiffs dispute the Auckland Council's contention that each unit owner must claim and authorise the Body Corporate to claim.

[298] The starting point is the Unit Titles Act 1972 (UTA 1972) and the foundational authorities that address the issue of standing under that now repealed legislation. In *Sunset Terraces,* the Supreme Court held that unit owners were owed duties of care and a body corporate's status as plaintiff was essentially pursuant to a statutory agency created by s 13 of the UTA 1972 and limited to the common property.[116]

[299] Accordingly:

(a) A unit owner could sue for the loss that they suffered as owner of the unit (and thus, via operation of the UTA 1972, a joint owner of the common property, managed by the Body Corporate), such loss not requiring any consideration of delineation between unit versus common property; and

(b) The body corporate could sue as the unit owners' statutory agent under the UTA 1972 but only in respect of common property (and, as agent, the claim was only as good as each unit owner's – including as to affirmative defences such as limitation, causation, contributory negligence and volenti).

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116 *Sunset Terraces*, above n 45, at [57]–[58]: "The subsection is obviously intended to enable bodies corporate to sue on behalf of unit owners who, as tenants in common, own the common property".

[300] The UTA 2010 imposes duties on bodies corporate to repair and maintain building elements and infrastructure that relate to or serve more than one unit.[117] Those provisions, including s 138 which the plaintiffs rely upon, distinguish the UTA 2010 Act from its predecessor, the UTA 1972.

[301] Section 138(1) of the UTA 2010 reads:

> **Body corporate duties of repair and maintenance**
>
> (1) The body corporate must repair and maintain –
>
> (a) the common property; and
>
> (b) any assets designed for use in connection with the common property; and
>
> (c) any other assets owned by the body corporate; and
>
> (d) any building elements and infrastructure that relate to or serve more than 1 unit.

[302] In *Body Corporate 199380 v Cook*, van Bohemen J referred to the mandatory requirements of s 138 and held:[118]

> [67] Sections 84(1)(p) and 138 are new provisions that take the UTA 2010 into territory – namely the maintenance and repair of unit property – that the UTA 1972 dealt with only in the context of schemes approved under s 48 or pursuant to rules where the repairs could fairly be seen as incidental to the body corporate's duty to maintain and repair common property. Under ss 84(1)(p) and 138, not only can the body corporate maintain and repair unit property, it is required to repair and maintain unit property where it is either building elements or infrastructure that serve more than one unit. Under s 5, "building elements" specifically includes roofs, balconies, decks and cladding systems, while "infrastructure" includes all of the utilities and services to the development.

[303] These provisions were seen as important in overcoming difficulties that had arisen under the UTA 1972. This was particularly the case in relation to leaky buildings where bodies corporate had been unable to step in to remedy defects that may have been present in individual units but which adversely affected common

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[117] Unit Titles Act 2010, ss 84(1)(p) and 138(1)(d).

[118] *Body Corporate 199380 v Cook* [2018] NZHC 1244, (2018) 19 NZCPR 522.

property, other units or the building as a whole.[119] It is apparent that the UTA 2010 shifts to place more emphasis on the Body Corporate as a whole rather than the individual rights of owners. That is apparent from Parliamentary discussion introducing the Unit Titles Bill,[120] as well as the purpose sections of the Act.

[304] The Court of Appeal in *Body Corporate S73368 v Otway*, referred to the intention of s 138 as follows:[121]

> [45] In our view, the legislative policy is clear and s 138(4) can be interpreted in a manner consistent with it. We reach this conclusion for reasons relating directly to the legislative purpose of Parliament in passing the UTA 2010. In addressing the mischief to which this enactment was directed, the legislature sought to address difficulties that had arisen when defects within a unit affected other units or the common property. It did so by assigning to bodies corporate responsibility for building elements and infrastructure found within units and limiting owners' rights and obligations accordingly. The legislation permits a body corporate to act to prevent harm that has the potential to harm the common property, or any building element or any other unit. In s 126 the legislature created the necessary corollary, a flexible mechanism to recover from owners the costs of remedial work done by the body corporate: an owner who benefits in a substantial way must pay, and in other cases those owners who derive a substantial benefit must pay rateably according to the utility interest …

[305] In *Body Corporate 324525 v Stent (No 2)*, Associate Judge Bell held that a body corporate has standing to sue for damage to unit property where the damage is within the body corporate's responsibilities under s 138, even in the situation where the unit owners are not joined as plaintiffs in leaky building proceedings.[122] That case was an application for summary judgment by the Body Corporate against the owners of five apartments seeking unpaid levies. His Honour held that it should matter little to a tortfeasor whether the plaintiff is the Body Corporate or a unit owner, stating:[123]

> [147] Under the 2010 Act the body corporate has repair and maintenance responsibilities both for common property and for building elements and infrastructure in principal units. In *Wheeldon 1* Muir J and the Court of Appeal held that those responsibilities extended to work on the defendants' apartments. The body corporate must be able to fund its work under s 138. Where it has incurred or will incur expenses for that work, it ought to have the means to recoup those expenses from those responsible for causing damage, including by suing for recovery. It would short change a body corporate to

[119] At [68].
[120] See (30 March 2010) 661 NZPD 10216.
[121] *Body Corporate S73368 v Otway* [2018] NZCA 612, [2019] 3 NZLR 759 (footnotes omitted).
[122] *Body Corporate 324525 v Stent (No 2)* [2017] NZHC 2857 at [150].
[123] *Body Corporate 324525 v Stent (No 2)*, above n 122, at [147] (footnotes omitted).

> give it repair and maintenance powers and duties under s 84(1)(p) without also recognising that it may recoup its expenses, including by suing tortfeasors.

[306] In a subsequent decision, *Body Corporate 207624 v Grimshaw & Co*, Associate Judge Bell confirmed his earlier finding that unit owners are required as plaintiffs only for unit property that is not covered by the Body Corporate's repair responsibility.[124]

[307] In assessing the plaintiffs' submissions on standing, it is first necessary to address the issue of whether the cantilevered balconies of Bianco Off Queen, the subject of defect 1, fall within the scope of s 138(1)(d) of the UTA 2010. It cannot seriously be contended that the Body Corporate has standing to sue in respect of loss or damage that falls outside its responsibility under s 138. The Body Corporate does not have repair responsibility for unit property, except as provided in s 138.

[308] As stated above, under s 5 of the UTA 2010, balconies are a "building element". Muir J, in *Wheeldon v Body Corporate 342525*, addressed the issue of whether balconies related to or served more than one unit for the purposes of s 138(1)(d). His Honour held that the requirements of s 138(1)(d) will be satisfied if the relevant building element or infrastructure:[125]

> (a) naturally attaches to another unit (as in physically adjoining units); or
>
> (b) is causally relevant to another unit whether physically or economically (as in non-adjoining units); or
>
> (c) is referable to another unit whether physically or economically (as in both adjoining and non-adjoining units); or
>
> (d) is concerned with another unit whether physically or economically.

[309] Furthermore, Muir J held that the inclusion of "aesthetics" in the definition of building elements and the emphasis on "integrity of the development as a whole" in s 3 (the purpose section) meant that the economic relationship should include those factors.[126] The Court of Appeal confirmed this approach.[127]

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124 *Body Corporate 207624 v Grimshaw & Co* [2020] NZHC 34 at [18].
125 *Wheeldon v Body Corporate 342525*, above n 86, at [85].
126 *Wheeldon v Body Corporate 342525*, above n 86, at [86].
127 *Wheeldon v Body Corporate 342525*, [2016] NZCA 247, (2016) 17 NZCPR 353 at [55].

[310] One of the issues in *Wheeldon* was whether decks located within individual units could be considered to relate to or serve more than one unit. There were “ingress risk factors” present by virtue of the building’s design which meant that the decks created, or were very likely to create, a risk of water ingress into adjoining units. The Court of Appeal upheld Muir J’s conclusion that every deck affected more than just the unit of which it formed a direct part, thereby bringing the decks within the scope of s 138(1)(d).[128] The Court of Appeal’s rationale for bodies corporate undertaking these repair and maintenance obligations is that it is not realistic for unit owners to arrange such repair work individually; building-wide repairs that have implications for the structural integrity and aesthetics of the development require co-ordinated and professional management.[129]

[311] When applying the principles of *Wheeldon* to this case, I find that the cantilevered balconies of Bianco Off Queen, the subject of defect 1, fall within the scope of s 138(1)(d) of the UTA 2010. Given the widespread nature and extent of the defects, the construction of this building and the location of the balconies, I find that every balcony affects more than just the unit of which it forms a direct part. That conclusion is entirely consistent with the rationale for bodies corporate undertaking building-wide repairs of the kind at issue here, as identified by the Court of Appeal in *Wheeldon*. This is the very sort of case where it is not realistic for unit owners to arrange the repair work individually. The necessary building-wide repairs require coordinated and professional management.

[312] I find that the Body Corporate here does have standing to sue for damage to unit property in these circumstances. In my view, its status goes beyond the role bodies corporate had as statutory agents under the UTA 1972 in respect of common property. The Body Corporate, under the UTA 2010, is entitled to sue in its own name and to recover in its own name damages that fall within the scope of its s 138 responsibilities. That is entirely consistent with the legislative policy of assigning responsibility to bodies corporate for building elements and infrastructure that relate to or serve more than one unit and limiting owners’ responsibilities accordingly. It is not necessary for all individual owners to agree to that course of action, provided of course that the

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[128] *Wheeldon v Body Corporate 342525*, above n 127, at [67].
[129] *Wheeldon v Body Corporate 342525*, above n 127, at [68].

damage at issue is properly within the scope of s 138. This finding is consistent with the Court of Appeal's conclusion in *Otway*; s 138 was intended to limit owners' rights and obligations.[130]

[313] There are sound policy reasons, aside from obvious efficiency, in support of my conclusion on standing. The nature of the loss here, being economic loss arising from physical damage, falls on the general body of owners, no matter when they bought their unit, whether their own unit has damage, and whether or not they took proper care when buying or not. It falls on them generally because of the Body Corporate's responsibility under s 138 and its power to collect levies fixed by ownership interests.

[314] However, this finding on standing is not determinative of whether the Auckland Council can raise an affirmative defence of contributory negligence. Unit owners may, as in this case, have claims that fall outside the Body Corporate's s 138 repair responsibility, including such costs as alternative accommodation while remedial work is carried out and general damages for mental distress. In respect of heads of damage of that kind, and for which the Body Corporate has no claim, in principle damages in favour of unit owners could be reduced on account of contributory negligence. A critical and more difficult question is whether contributory negligence defences can be advanced, and consequential quantum deductions offset, in relation to damage to units that falls within the scope of s 138(1)(d).

[315] That question is answered, in my view, by analysing the nature of the duties of care, the type of loss at issue and the scheme of the 2010 Act, in the context of the broad discretion that arises under s 3(1) of the Contributory Negligence Act 1947.

[316] As van Bohemen J held in *Body Corporate 199380 v Cook*, s 3 of the UTA 2010 makes clear that the basic legal structure of unit title developments set out in the UTA 1972 is retained; so too, is the fundamental theme identified by Heath J in *Fraser v Body Corporate S63621* of the distinction between individual units owned by unit

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130 *Body Corporate S37668 v Otway*, above n 121, at [45].

owners and common property for which the body corporate is responsible.[131] However, as noted by the Court of Appeal in *Wheeldon*, the rights of unit owners are derived from the statute and are of a limited kind.[132] They are not akin to the ownership of fee simple in land. The unit owners do not enjoy a right to undertake repairs and maintenance and the rights conferred on them by ss 79(d) and 79(e) are limited.

[317] On the other hand, the scheme of the UTA 2010 and in particular ss 142 and 143, indicate that the legislation does not intend to cut across the general law of tort or to impact on general duties of care except to the extent expressly provided for.

[318] Against that background, I am of the view that the defendants owed concurrent duties of care to both the Body Corporate and the individual owners. The Body Corporate has sufficient interest in the units and is required to repair and maintain damage that falls within the scope of s 138, even if the individual owner does not agree. Its interest is more than contractual. It is only the Body Corporate which can undertake the necessary remedial action to which s 138 applies. Its pocket is damaged as a result of the negligence of the defendants, even if it can recoup expenses from the individual owners.[133] In principle, the affirmative defence of contributory negligence is available, and deductions can legitimately be made for contributory fault of either the Body Corporate or individual owners from any quantum sum awarded to the Body Corporate.

[319] The discretion under s 3(1) of the Contributory Negligence Act 1947 is, however, a wide one. The person suffering the damage can include both the body corporate and the individual unit owner. The ultimate test, once fault is determined, is what is just and equitable. This wide provision gives the Court sufficient flexibility to make the necessary adjustments in any individual case.

[320] In reaching the conclusion that the defendants owed concurrent duties of care, I reject the Auckland Council's submission that there is not the necessary element of

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131 *Body Corporate 199380 v Cook*, above n 118, at [64]; citing *Fraser v Body Corporate S63621* (2009) 10 NZCPR 674 (HC) at [34].

132 *Wheeldon v Body Corporate 342525*, above n 127, at [36].

133 See *Sunset Terraces*, above n 45, at [53].

reliance by the Body Corporate to support the imposition of a duty of care. Although the Body Corporate is a statutory construct, at its inception and the commencement of its s 138 responsibilities, it does rely, as do the individual owners, on the diligence and skill of those involved in the construction of the building and the certification of its status as code compliant. There are also sound policy reasons for the imposition of a concurrent duty of care. There is a clear level of efficiency in such an approach, but it also allows, in the exercise of the Court's broad discretion, to have regard to fault by individual owners.

[321] I do, however, accept that it does matter to the tortfeasor whether the plaintiff is the Body Corporate or a unit owner. I respectfully disagree with the contrary view referred to above, as expressed by Associate Judge Bell in *Body Corporate 324525 v Stent (No 2)*.[134] The status of the plaintiff does matter because not only are there potential GST implications, as well as the contributory negligence issue and issues of limitation and the like, but also what the Auckland Council describe as the risk of "double jeopardy" for defendants. The Council gives the example of where an owner sells their unit at a loss (due to impending remedial costs regarding defects for which the Council might be liable), allowing them to pursue a claim for that loss, yet (based on the plaintiffs' proposed approach) the Body Corporate could also sue for those impending remedial costs.

Contributory negligence

[322] Section 3(1) of the Contributory Negligence Act, as referred to above, provides for the apportionment of liability in cases of contributory negligence. It provides:

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

[323] "Fault" is defined to mean "negligence, … or other act or omission which gives rise to a liability in tort …".[135] This has been interpreted as a failure by the plaintiff

[134] *Body Corporate 324525 v Stent (No 2)*, above n 122, at [150].
[135] Contributory Negligence Act 1947, s 2.

to take ordinary care to look after itself and its property.[136] The question is whether the plaintiff acted reasonably in all of the circumstances in safeguarding his or her own interests.[137] The assessment of fault "requires an objective test but expressed in terms of the person's own general characteristics".[138]

[324] The damage that may be apportioned must be the foreseeable consequence of a lack of care on the part of the plaintiff and caused by such lack of care. As stated by the Court of Appeal in *Johnson v Auckland Council*:[139]

> [87] There is no dispute that in making the apportionment, it is necessary to consider both relative blameworthiness and causative potency. The question of the appropriate apportionment is a question of fact involving matters of impression and not some sort of "mathematical computation"…

[325] Given the nature of the apportionment exercise, comparisons with the figures in other cases are not particularly helpful.[140] As stated in *Todd on Torts*, it is sufficient that the plaintiff's conduct should contribute to the damage that he or she suffers. It is not essential that it should contribute to the event that causes the damage.[141] In the context of a building that is not weathertight, this means the plaintiff is not required to have contributed to the construction of the building itself for there to be contributory negligence.[142]

[326] There are 16 units in respect of which the Auckland Council asserts contributory negligence.[143] The Auckland Council says that the second plaintiff

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[136] *Invercargill City Council v Southland Indoor Leisure Centre Charitable* [2017] NZCA 68, [2017] 2 NZLR 650 at [136]; citing *Helson v McKenzies (Cuba Street) Ltd* [1950] NZLR 878 (CA) at 920; *Johnson v Auckland Council* [2013] NZHC 165 at [13]; and *O'Hagan v Body Corporate 189855*, above n 109, at [76]–[77].

[137] *Nautlius,* above n 40, at [294].

[138] *O'Hagan v Body Corporate 189855,* above n 109, at [79]; cited in *Lee v Auckland Council* [2016] NZHC 2377 at [67].

[139] *Johnson v Auckland Council*, above n 71 (footnotes omitted).

[140] *Johnson v Auckland Council*, above n 71, at [88].

[141] Stephen Todd "Defences" in Stephen Todd (ed) *Todd on Torts* (9th ed, Thomson Reuters, Wellington, 2023) at [20.2.3].

[142] *Johnson v Auckland Council*, above n 136, at [12(a)].

[143] The units and their respective owners are set out in Appendix 7 to the Auckland Council's submissions. This includes J Bodle 101 Ltd (in liquidation). The plaintiffs' instructing solicitors, Lane Neave, have confirmed that they do not have instructions from the liquidator to advance this claim. However, the plaintiffs continue to include this unit in their claim and quantum schedules appended to their opening submissions. The Auckland Council says that out of an abundance of caution it has included this unit in the assessment but maintains that a claim cannot be advanced without the consent of the liquidator.

owners of these units fell short of the standard of a reasonable purchaser. The Auckland Council contends that these second plaintiffs signed their agreements for sale and purchase without obtaining and/or reviewing the Body Corporate's annual general meetings (AGM) minutes for the past two to three years. The Council says that if they had done so, they would have been placed on alert that Bianco Off Queen was suffering from defects, or that there was a risk that it had defects requiring repair and that litigation was anticipated. This would have allowed them to avoid the purchase or, at the very least, allowed them to negotiate a suitable reduction in price.

[327] On an alternative basis the Auckland Council contends that if these owners did in fact obtain the minutes of the Body Corporate AGM, they knew prior to purchase that Bianco Off Queen had defects (or risks of defects) requiring repair and that litigation was anticipated. Accordingly, the Auckland Council contends that those second plaintiffs either:

(a) voluntarily assumed the risk that Bianco Off Queen had defects and that repairs were required;

(b) agreed to buy the unit based on their own judgement of the value of the abatement of the purchase price for those defects and associated risks; or

(c) did not safeguard their own interests by avoiding the purchase or seeking a reduction in the purchase price.

[328] Expert evidence was given on behalf of the Auckland Council by Mr Peter Nolan, retired lawyer, on the contributory negligence issue. Mr Nolan is a very experienced property and conveyancing solicitor. I find his evidence to be unassailable; he is extremely well qualified and presented his evidence in a professional and measured fashion. It was substantially helpful, and I adopt his conclusions.

[329] Of the 16 second plaintiffs in which the Auckland Council asserts contributory negligence against, 12 purchased their units after the 2016 AGM minutes became

available (but prior to the 2017 AGM minutes becoming available) and four purchased their unit after the date of the 2017 AGM minutes. The agreements to purchase these units were not conditional on obtaining Body Corporate minutes, except for unit 6A's agreement which contained a further term (cl 20) specifically drawing the second plaintiff's attention to the 2016 AGM minutes, with the owner accepting as read all matters contained therein. However, most of these owners received pre-contract disclosure statements which referred to or attached the relevant AGM minutes

[330] In his evidence, Mr Nolan provided a detailed review of the 2016 and 2017 AGM minutes. In respect of the 2016 minutes, Mr Nolan identified a number of "red flags" including the fact that the Body Corporate was obtaining a building condition report requiring consultant input from multiple disciplines. Mr Nolan was of the view that the minutes disclosed anticipated litigation.

[331] Mr Nolan was also of the view that the following "red flags" were raised in the 2017 AGM minutes:

(a) Maynard Marks had been engaged and attended the AGM to provide a progress update on the current building audit;

(b) Maynard Marks was looking at issues with the internal plumbing;

(c) Maynard Marks had identified issues in terms of general claddings e.g., corrosions, fixings and poppings;

(d) leaks were identified in the concrete deck;

(e) there were leaks through some glazed atrium rooves;

(f) there was corrosion to some decorative steel; and

(g) there was a need for additional consultants.

[332] Several second plaintiffs said that they had not been advised by either their lawyer (after having reviewed the 2016 AGM minutes) and/or by the real estate agent

that there were leaks, issues or defects at Bianco Off Queen. Mr Nolan was surprised that a lawyer would have come to that decision. He also noted that a real estate agent represents the vendor, but if they did have duties to the purchaser, he would have expected the agent to elaborate on the whole section on the building condition report contained in the minutes.

[333] In reviewing all this evidence, I conclude that there was a degree of carelessness by the second named plaintiffs which has contributed in some way to their loss. In the circumstances here, I find that the moral blameworthiness can properly be considered to be low, particularly in relation to those who purchased their unit after the date of the 2016 AGM minutes, but before the 2017 AGM minutes.[144] In the circumstances, I find that there should be a deduction of the sum of $7,500 from any award of general damages to those of the second plaintiffs who purchased their unit after the 2016 AGM minutes but before the 2017 AGM minutes. In respect of those second plaintiffs who purchased after the 2017 AGM minutes I find that there should be no award of general damages to them. In the circumstances and having regard to the broad discretion in s 3(1) of the Contributory Negligence Act, in particular the just and equitable threshold, I conclude that there should be no further deductions. That would be disproportionate to the level of fault I have identified. It would also not be just and equitable in this case to make any further deduction, given the nature and extent of the loss and the fact that it falls on the general body of owners.

GST

[334] The parties agree that any award to the Body Corporate should be on a GST exclusive basis.

[335] I record the parties' agreement that owners that use their units either for "personal use" or for "residential tenancy purposes" cannot receive GST input tax credits in respect of expenditure for their unit. Neither personal use nor residential tenancies are taxable activities. However, given my determination on the standing of

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[144] I note that the plaintiffs accept as a general proposition that the failure to obtain Body Corporate minutes may in some circumstances amount to contributory negligence; *O'Hagan v Body Corporate 189855*, above n 109, at [137]. It is also accepted that some reduction should be made to the claims of the four second plaintiffs who entered into agreements to purchase their unit after the 2017 AGM minutes were available.

the Body Corporate and my conclusion that the cost of repairs damages should be awarded to it, I apprehend that this is no longer a live issue.

[336] GST is not payable in respect of the general damages that I have awarded above.[145]

Affirmative limitation defences

[337] The defendants plead that the plaintiffs' claims are time-barred under s 4 of the Limitation Act 1950 to the extent that the alleged defects which are the subject of those claims were discovered or reasonably discoverable more than six years from the date on which the proceedings were commenced. The defendants also allege that pursuant to s 393(2) of the Building Act 2004, to the extent that any of the plaintiffs' claims are based upon acts or omissions which took place more than ten years before, these claims are also statute barred.

[338] Neither of these defences were pursued with any vigour by the defendants. Neither of them addressed limitation issues in their closing submissions.

[339] I find that the plaintiffs' claims are not time barred. No limitation defence has been made out.

Apportionment between defendants

[340] I accept the submission of the Auckland Council that the appropriate apportionment of liability between the defendants is 85 per cent for Argon and 15 per cent for the Auckland Council.

[341] It cannot be disputed that Argon had the primary responsibility to ensure that Bianco Off Queen was constructed without defects and was compliant with the

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[145] Grant Pearson, Mark Keating and Craig Macalister *Taxation – GST – A to Z of New Zealand Law* (online ed, Thomson Reuters) at [57.G.36.8.5]: Inland Revenue policy IS3387 expressly details that payments for general damages do not constitute taxable supplies. It states: "When a payment is made under a court award or out of court settlement and it is consideration for a taxable supply (or an adjustment to a consideration for a taxable supply) this will be taxable. If the payment is made for compensation or damages it is not taxable." See also *Case S77* (1996) 17 NZTC 7,483 (TRA).

relevant sections of the Building Code. The Auckland Council's role was secondary to Argon's primary acts and/or omissions.

[342] My conclusion on this issue is consistent with that of Thomas J in *Victopia Apartments*,[146] and *Body Corporate 324371 v Clark Brown Architects Ltd*.[147]

Other issues

The non-legally represented plaintiffs

[343] It follows from my finding on standing above, that the two non-legally represented second plaintiffs, Yinling Linda Wu (unit 4E/8 White Street) and Haixin Wang (unit 1A/8 White Street), are not entitled to a separate award of damages for the cost of repairs.

[344] These two plaintiffs are entitled to an award of general damages in accordance with my findings above.

Former owners/assignees

[345] There are six second plaintiffs who have assigned their causes of action.

[346] At a very late stage in the proceedings, the plaintiffs sought the following orders:[148]

(a) an order substituting the second plaintiff associated with unit 2A2 from Sarin Enterprises Ltd to Usar Investments Ltd;

(b) an order adding five new parties, being assignees who have purchased a unit and taken an assignment of the claim from former owners/second plaintiffs;

146 *Body Corporate 346799 v KNZ International Co Ltd*, above n 30, at [168].
147 *Body Corporate 324371 v Clark Brown Architects Ltd* [2021] NZHC 2379 at [96].
148 See memorandum of counsel for the plaintiffs seeking receipt of documents into evidence and addition/substitution of plaintiffs dated 18 June 2023.

(c) a direction that certain documents related to the assignment of claims be received into evidence; and

(d) leave under r 1.9 of the High Court Rules 2016 to amend Schedules A and E of the ninth amended statement of claim to add these new plaintiffs pursuant to these orders.

[347] The plaintiffs contend that the proposed assignee second plaintiffs are entitled to recover repair costs and consequential losses. No general damages are claimed for these proposed plaintiffs.

[348] The Auckland Council filed a memorandum (with my leave) subsequent to the hearing addressing the issue of assignment and addition/substitution of plaintiffs.[149] Those submissions raise complex issues which the plaintiffs have not adequately addressed.

[349] I wish to hear further argument from the parties on the issue of assignment, should that be necessary. It may be, in light of my findings on the standing of the Body Corporate, that I do not need to determine the assignment issue given that the repair costs are recoverable by the Body Corporate.[150] Again, however, I require further analysis of that issue before reaching a conclusion.

[350] The Court apprehends that the dollar value at issue in relation to the assignment issue is not significant. If the parties cannot resolve the issue, I reserve leave for the parties to address this issue further.

Result

[351] I enter judgment for the plaintiffs against the first defendant, Argon Construction Ltd, on liability in respect of the first cause of action (negligence).

[352] I enter judgment for the plaintiffs against the second defendant, the Auckland Council, on liability in respect of the second cause of action (negligence).

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149 Second defendant's submissions in response to the plaintiffs' application seeking receipt of documents into evidence in addition/substitution of plaintiffs dated 26 June 2023.

150 The Auckland Council submitted that if I decide that the claim is in the hands of owners (i.e. it is the unit owners who can recover losses for breach of duties owed by the Council to them) there will need to be an analysis of the relevant unit ownership interests.

[353] The two defendants are jointly and severally liable for damages. Those damages are to be calculated as follows:

(a) based on the factual findings already made in this judgment; and

(b) upon receipt of further submissions (if necessary) from the parties addressing the quantification of such damages based on the starting point of Mr Brock's estimate, based on Mr Alexander's scope of repairs.

[354] Liability is apportioned 85 per cent to the first defendant, Argon, and 15 per cent to the second defendant, the Auckland Council.

[355] I order that the defendants are to pay to the respective second plaintiffs general damages calculated in accordance with the determinations made at [294] above, with adjustments made as required based on my determination on the contributory negligence issue at [333]. Leave is reserved to apply for further directions and final orders as to the quantification of general damages and the named individual second plaintiffs to whom those awards are to be made.[151]

[356] I order that the first defendant, Argon, is to pay damages in the sum of $111,628 to the first plaintiff for the acoustic matting.

[357] I dismiss the plaintiffs' claims for consequential losses relating to alternative accommodation, loss of rent and moving and storage costs, except to the limited extent allowed for in the calculation process referred to in [278] and [287] above.

[358] Costs are reserved. The parties are to confer and to propose a timetable for the determination of costs. A memorandum is to be filed and served within 21 days.

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Andrew J

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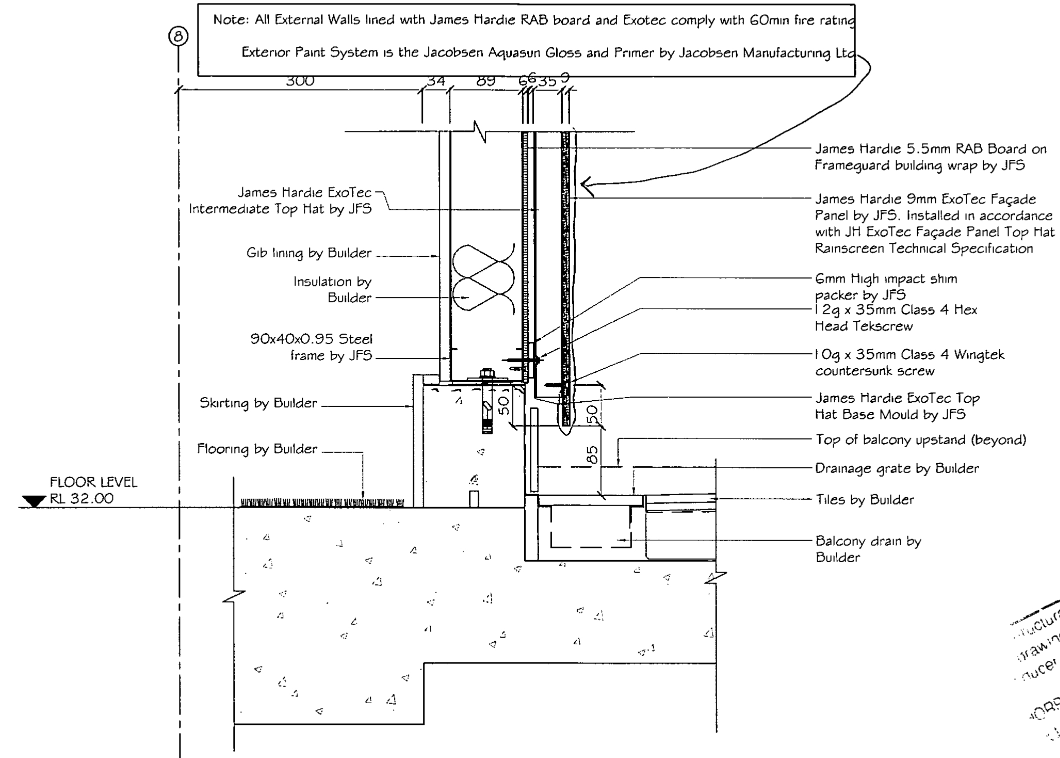
[151] This is a matter I expect the parties to be able to reach agreement on without the need for further court involvement.

APPENDIX 'A'



APPENDIX ‘B’