



# Duty to warn of concerns?

*Fleetwood Apartments claim raises questions.*

**BUILDER NOT LIABLE?  
TRUE OR FALSE?  
A BIT OF BOTH.**

The decision of *Andrews Property Services Limited v Body Corporate 160361 & Ors* [2016] NZCA 644 was an appeal of a High Court decision. The case concerned a second generation claim for a leaky 40-unit apartment building in central Auckland called Fleetwood Apartments.

In the High Court, the apartment owners' claim arose out of defective remediation work undertaken by the builder, Andrews Property Services Limited (APS), and overseen by architectural consultants, Babbage Consulting Limited (Babbage) and the Auckland Council (council).

The remediation involved an overlaid using new exterior cladding, Eterpan, over the existing steel framing and underlying cladding. The High Court found that the overlaid remedial solution had been designed inadequately.

It also found that the overlaid system had been installed incorrectly in that no clearance holes for the screw fixings had been used when fixing the cladding resulting in cracking of the Eterpan and moisture ingress.

In the High Court, the apartment owners succeeded against APS, Babbage and the council.

APS appealed the High Court decision.

The grounds of the appeal relevant to the matters of interest for the purposes of this article were as follows:

1. Did APS have an obligation to the apartment owners to be satisfied that a proper survey had been undertaken by Babbage before commencing the overlaid work?
2. Did APS fail to comply with a contractual obligation concerning the method of fixing the Eterpan sheets?

The High Court had found APS liable to the apartment owners for not ensuring Babbage had undertaken a proper survey of the underlying structure to which the overlaid was to be fixed.

The Court of Appeal overturned the High Court's finding. It took into account that APS

was a contractor which was the recipient of instructions by, and approvals from, Babbage in its capacity as architect and specialist engineer.

The court found the relationship between Babbage and APS was "legally subservient". The Court of Appeal held APS to not have sufficient power or ability to exercise the necessary control over Babbage to ensure a proper survey was done.

Fundamentally, the issue came down to whether APS owed the apartment owners a duty to warn them about Babbage's performance.

The Court of Appeal recognised that in some circumstances a contractor could have an obligation to warn but on the facts of this case it was not reasonable to find APS owed such a duty.

Accordingly, APS was not liable to the apartment owners for the consequences of a proper survey not having been carried out by Babbage.

In relation to the High Court's finding that APS was liable to the apartment owners for failing to use clearance holes when affixing the Eterpan sheets, the Court of Appeal endorsed the High Court's finding.

Accordingly, APS was found liable for the consequent cracking and moisture ingress caused by the method of fixing the cladding sheets.

The Court of Appeal's decision is notable for the finding of no liability on the part of APS for not ensuring Babbage had undertaken a proper survey.

While the legal responsibilities of those involved in construction will always be dictated by the facts of each individual case, this decision could potentially extend to apply to circumstances where, for example, a labour-only builder completes non-standard building work defectively having been directed to do so by a supervising architect, engineer or building product manufacturer.

Builder not liable? True or false? A bit of both. **LG**