IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2012-404-1123
[2014] NZHC 475

BETWEEN	HITEX BUILDING SYSTEMS LIMITED First Appellant
AND	I C HOLYOAKE Second Appellant
AND	WILKINSON BUILDING AND CONSTRUCTION LIMITED First Respondent
AND	R A J AND C WILKINSON Second Respondents
AND	AUCKLAND COUNCIL Third Respondent
AND	R J & S K ZAGORSKI Fourth Respondents
AND	T BURCHER Fifth Respondent

Hearing: 9 - 11 July 2013

Appearances: A J Thorn for Appellant
M C Black for First Respondent
F M R Cooke QC & C D Boell for Second Respondents
P A Robertson for Third Respondent
S Robertson & E E Cowle for Fourth Respondents
Appearance for Fifth Respondent excused

Judgment: 14 March 2014

JUDGMENT OF KEANE J

This judgment was delivered by on 14 March 2014 at 4pm

pursuant to Rule 11.5 of the High Court Rules.
Registrar/ Deputy Registrar

Date:

[1] In May 2006 Mr and Mrs Zagorski, who had moved to New Zealand from Australia in mid 2004, purchased from the trustees of the Wilkinson Trust a property in Meadowbank, Auckland. They were told by the agent that it had been a leaky home but that the owners had resolved all damage and reclad the house. It was 'as new' and in 'excellent condition'.

[2] The Zagorskis were given a copy of a LIM report, dated 29 May 2006, showing that in 2004 the Auckland Council had issued a building consent for the remedial work and that on its completion in 2005 had issued a code compliance certificate. The Zagorskis also obtained a favourable pre-purchase report from Allied House Inspections Limited; a report which also stated 'moisture plugs noted throughout the house'.

[3] In February 2010 the Zagorskis decided to return to Australia. To assist in the sale of their property they obtained a further building report from a different assessor. This time the Zagorskis were advised to have readings taken from the moisture probes by their supplier, Moisture Detection Company Limited (MDCL). Also to obtain any earlier readings that had been taken.

[4] The Zagorskis then discovered that the house had been moisture tested on 18 May 2006, 10 days before they entered into the agreement for sale and purchase with the Wilkinson trustees; and that some moisture readings then taken had been as high as 80 per cent and one third had been at 18 per cent or higher. By February 2010, moreover, the moisture readings remained concerning.

[5] The Zagorskis were advised that, if they wished to sell their property in its then state, they would have to disclose that state to any potential purchaser. They were advised to lodge a claim with the Weathertight Homes Resolution Service, and to have their house assessed by an accredited building surveyor themselves.

[6] Before doing so they met Richard Wilkinson, one of the three Wilkinson trustees and the managing director of Wilkinson Building and Construction Limited (WBCL), which had been responsible for the 2004 – 2005 remedial work. Mr Wilkinson told them that the trust was not prepared to buy back the property.

Instead, he arranged a meeting with Ian Holyoake, the principal both of Hitex Building Systems Limited (Hitex), which had reclad the house in 2004 -2005, and of MCDL, which had installed the moisture probes. Mr Holyoake recommended further probes and further monitoring.

[7] The Zagorskis decided instead to lodge a claim with the Weathertight Homes Resolution Service against all three Wilkinson trustees, Mr and Mrs Wilkinson and their lawyer, Timothy Burcher; and Mr Wilkinson's company, WBCL, and the Auckland Council.

[8] They lodged that claim in June 2010 and in September 2010 the Service released the full assessment it had obtained. That report concluded that the exterior cladding of the Zagorskis' house was not weather tight, that there had been water ingress and actual and likely damage, and that a full reclad was needed at a likely cost of $508,044 (including GST).

[9] In November 2010, after the chief executive of the Service, or his delegate, had decided that their claim was eligible to be resolved under the 2006 Act, the Zagorskis took it to the Weathertight Homes Tribunal, which throughout this case comprised the Chair, Ms P A McConnell, and Ms M A Roche. Soon after, Hitex and Mr Holyoake were joined to the claim on the application of the Wilkinson interests. Mediation either did not take place or proved unfruitful.

[10] In a decision, dated 3 February 2012, after a conference on 11 October 2011 of the experts instructed for the various parties and a four day hearing in November 2011, the Tribunal held all respondents except Mr Burcher liable; the Mr and Mrs Wilkinson in contract as well as negligence, and the remaining respondents in negligence. It adjourned to a remedial scope hearing whether a full reclad or targeted repair was called for; an issue in part contingent on whether the Auckland Council would consent to a targeted repair. Hitex and Mr Holyoake immediately appealed.

[11] In its decision on remedial scope, dated 24 August 2012, after a second experts' conference on 19 April 2012 and a one day hearing on 31 July 2012, the

Tribunal held that a targeted repair was feasible, as long as Hitex carried it out. (Hitex 50, the cladding system in place, was incompatible with any other.) But, the Tribunal held, to ensure the consent of the Council, Hitex or Mr Holyoake would have to give a producer statement or warranty for the entire exterior cladding; and this, the Tribunal said, Hitex and Mr Holyoake were unwilling to do.

[12] Mr Holyoake had by then made it clear that he did not accept the Tribunal's decision on liability, then under appeal, and wished to assess for himself to what degree the existing cladding did need to be removed and repaired. He was only prepared to have Hitex complete and warrant work he considered justifiable. That meant, the Tribunal held, that a full reclad was unavoidable, almost doubling the damages award.

[13] In a third decision, dated 21 September 2012, made on submissions in writing, the Tribunal awarded the Zagorskis the estimated cost of the remedial work called for, $385,337, and $22,750 for loss of rent and $25,000 general damages; in all $433,087. It set the contribution that Hitex and Mr Holyoake were to make at 73 per cent, $316,154, apportioning the balance amongst the other respondents.

[14] In their appeal against those three decisions, and the costs award, dated 15 November 2012, Mr Holyoake and Hitex contend, first, that the Tribunal acted with procedural impropriety and in breach of its statutory duty. It denied them natural justice, in some instances contrary to its own directions and assurances. Secondly, they contend, the Tribunal made substantive errors of fact and law as to their liability, and as to remedial scope, quantum and contribution, and costs.

[15] As to the first of these grounds especially, which rests on a highly detailed critique of the Tribunal's conduct, Duffy J, in a decision dated 30 April 2012, granted Mr Holyoake and Hitex leave to adduce on this appeal limited further categories of evidence. To respond to that first ground critique I must, myself, begin by setting out in unusual detail how the case evolved, especially as it related to Hitex and Mr Holyoake.

[16] I need not refer in this decision to the cross appeal brought by the Zagorskis against the Tribunal's decision insofar as it excused Mr Burcher from any liability. Whether it proceeds is in part contingent on this decision.

EVOLUTION OF CASE

[17] This case required two conferences of experts, and two substantive hearings. It resulted in four substantive decisions. As it evolved it was the subject of 16 procedural rulings. How it evolved is instructive in itself.

Angell report

[18] The initial foundation for the Zagorskis' case before the Tribunal lay in the report of the WHRS assessor, Richard Angell, dated 26 August 2010, who first expressed the opinion that their claim was eligible for resolution under the 2006 Act; then itemised in considerable graphic detail, with photographs, the defects in the 2004 – 2005 remedial work that entitled them to relief, the resulting damage and the cost of repair.

[19] The house was built in the 1990s outside the 10 year limitation period. It had already suffered water damage once, and that had resulted in a claim under the 2002 Act. The Wilkinson trustees then purchased the property and in 2004 – 2005 WBCL was responsible for the remedial work called for, the principal part of which was carried out by Hitex, which reclad the exterior completely with its own unique proprietary product, Hitex 50.

[20] In ten places in the exterior cladding, Mr Angell said, defective detail design, or workmanship, had allowed in water compromising the timber framing actually or potentially. Some framing was moist or frankly wet. Some was already decayed. There was mould. Though some might already have been damaged in 2004, and left in place, the damage he saw was recent and, unless rectified, was likely to increase. It already called for a full reclad, on a quantity survey likely to cost $497,000, including GST.

Initial pre-trial orders

[21] On 30 November 2010 the Tribunal convened a preliminary conference. It directed disclosure to be made and privilege claimed by 17 December 2010. The Zagorskis were to file their own expert's report and any amended claim by 22 December 2010. On the application of the Wilkinson interests the Tribunal joined Hitex and MPCL on 11 February 2011 and Mr Holyoake himself on 21 April 2011.

[22] In these initial orders, the Tribunal required the Zagorskis to make their claim fully particular and the respondents to be equally explicit. The respondents had to identify the aspects of the claim they accepted and those they did not and the reasons why. They had to identify any affirmative defences and any issues as to mitigation or quantum. They had to file any evidence, and any schedule or breakdown of costs on which they relied.

[23] The Tribunal set the claim down for mediation for 16 June 2011, and also allocated to it a four day fixture to begin on 9 August 2011. The Zagorskis had to finalise their claim and file witness statements and other information by 8 July 2011. The respondents had to file their final responses and witness statements by 26 July 2011. Replies were to be in by 2 August 2011. There was to be a pre-hearing telephone conference on 3 August 2011:

> to confirm formal arrangements for the hearing and to identify which parties and witnesses are required to be available for questioning.

[24] On 2 June 2011, the Tribunal directed those respondents that had filed inadequate responses, or none at all, to remedy that immediately; or to face the possibility at mediation that they might be unable to rely on anything disclosed late.

[25] On 24 June 2011, in order 8, the Tribunal gave a direction that has figured in this claim, to which I will refer later. It required that the solicitors engaged by Hitex and Mr Holyoake, whom they had given as their address for service, Dawsons Lawyers, Howick, were to send and to receive any documents on their behalf. It also said this:

> The Tribunal will continue to copy Mr Holyoake into emails sent out to parties and will deal with emails and communications from him.

[26] On 4 July 2011, Mr Endean of Dawson Lawyers, then counsel for Hitex and Mr Holyoake, notified the Tribunal that Alan Light was to give expert evidence for Hitex, that Mr Holyoake was also to give evidence, and that a second expert witness was likely.

[27] Mr Endean said also that, when the experts met at the property on 29 June 2011, Mr Light had late notice and, when he arrived, the four exterior cladding points first opened up by Mr Angell, and re-opened that day, had already been closed. Mr Light wished to re-open those four areas. He wished to install 59 further moisture probes he considered should have been installed before. Also to redrill drill holes already made, to assess and compare timber extracts, because there was 'obvious decay left in place from the original failure'. Also to check lintels, and whether framing had been treated with Framesaver, and to have access to all Mr Angell's photographs.

[28] Mr Light considered all of this essential, Mr Endean said, to respond to deficiencies in Mr Angell's report. By opening up the cladding, Mr Little considered, Mr Angell had made it more difficult to identify framing already damaged in 2004, but left in place.

[29] Mr Endean confirmed that the witnesses for Hitex and Mr Holyoake were still to be Mr Light, Mr Holyoake himself, and one other witness. He proposed an amended timetable, but agreed that a four day hearing was called for.

[30] On 6 July 2011, in a further memorandum for the conference that day, Mr Endean again contended, any decay might already have been active or incipient in 2004. This was a 'second time round leaking home'. As to any such then existing damage, he said, the Zagorskis were time barred. The Tribunal would need evidence enabling it to decide whether the damage claimed for was recent or pre-existing.

[31] In order 9, dated 14 July, following a conference on 12 July 2011, the Tribunal directed Richard Maiden, the Zagorskis' expert, to re-open the four areas in issue on 22 July 2011 in front of any expert who wished to be there. It declined to allow Mr Light to install further probes. Second time claims, it said, were

uncommon but not unknown. Seventy one probes were already in place. More could have been installed earlier had that then been thought necessary. The Tribunal did accept that 'whether damage has been caused by the remedial work or by inadequately or non-remediated original construction' was in issue. It permitted Mr Light to re-drill the existing drill holes by 22 July 2011. If he wished to go beyond that he was to submit 'a reasonable proposal'.

[32] The Tribunal set down the hearing for the weeks of 17 October 2011, or 14 November 2011. The Zagorskis had until 19 August 2011 to amend their claim, if they wished, and to file witness statements. All respondents, except Hitex and Mr Holyoake, were to respond by 2 September 2011. Hitex and Mr Holyoake were to file their responses and witness statements by 16 September 2011. There was to be a telephone conference on 11 October 2011.

Witness statements

[33] On 18 August 2011, when the Zagorskis filed their amended statement of claim they also filed the witness statement of their expert witness, Richard Maiden, in which he agreed generally with Mr Angell's report as to the defects in the exterior cladding and as to the need for a full exterior reclad , and as to the cost.

[34] The Wilkinson's expert, Geoffrey Bayley, in his witness statement, dated 9 September 2011, questioned Mr Angell's conclusion that some of the damage might have been incipient in 2004. Also whether the exterior needed to be fully reclad. The 11 leak sites identified, he said, had specific causes. He thought the cost of repair likely to be closer to $232,190.

[35] The Council's expert, Clint Smith, in his witness statement, dated 12 September 2011, doubted that any damage was incipient before the reclad. The Council had required decayed framing to be removed and any left in place, which was already treated timber, to be recoated with Framesaver. He concluded that the cladding had leaked, not because Hitex 50 was inherently unsound, but because of poor workmanship. He agreed with a full reclad and questioned whether the Council would consent to a part repair. The apparent defects were too widespread and varied. His cost estimate was $385,337.

Further pre-trial directions

[36] On 27 September 2011 the Tribunal issued two procedural orders, 10 and 11. In the first it declined to strike out the third Wilkinson trustee, Mr Burcher. In the second, as to Mr Holyoake and Hitex, the seventh and eighth respondents, the Tribunal's Chair, Ms McConnell, said this:

> In procedural order 9 I directed the seventh and eighth respondents to file their final responses and witness statements by 16 September 2011. To date they have not been filed and the claimants are due to file any reply briefs by 28 September 2011.
>
> If the seventh and eighth respondents are intending to file witness statements they must do so by 5pm on Wednesday 28 September 2011. In order to file statements after this time they must formally seek leave and provide very good reasons why they have not complied with the timetable set on 14 July 2011.
>
> An extension will be granted to the claimants to file replies should further evidence be filed. If the claimants or any other respondent incur additional costs due to the late filing of any evidence they can apply for costs.

[37] On 30 September 2011 Hitex and Mr Holyoake said that their witness statements were late because WBCL and Mr Burcher had been late, and Mr Holyoake had been unwell for three weeks. On 3 October 2011 the Zagorskis sought an unless order, contending that Mr Light's evidence at least could have been filed on time. The experts were to convene on 11 October 2011. They needed to know what Mr Light's position was.

[38] On 4 October 2011 the Tribunal agreed but in the order it then made it allowed Mr Light's witness statement to be filed the following day, 5 October 2011, and Mr Holyoake's statement the day after, 6 October 2011, 'provided a medical certificate is also filed confirming that he has been unwell'. It extended to all other parties the right to respond by 10 October 2011.

[39] The Tribunal also required Hitex and Mr Holyoake to state, that day, whether they intended to call any other witness, and if so who that was to be. Any further expert witness statement was to be filed by 5 October 2011, and any other by the following day. The Tribunal added this:

> The Tribunal will not accept any evidence filed outside of the directions and timetable contained in this procedural order unless the seventh and eighth respondents have the consent of all other parties to a further extension in advance of the expiry of the dates provided.

Light - Holyoake witness statements

[40] In his witness statement, dated 5 October 2011, Mr Light questioned whether any water ingress since the reclad had caused damage to framing, whether any decay was active and ongoing, and whether there was structural damage requiring framing to be replaced. Discrete failures, he said, could be fixed discretely.

[41] Mr Light identified four conventional reasons for recladding, none of which he said figured: (i) to inspect the framing for damage and to remove structural damage; (ii) to treat framing to be retained to stop incipient and early decay and increase durability; (iii) to ensure that the cladding system had draining and drying capacity; and (iv) to remove systemic defects likely to cause future damage.

[42] Mr Light questioned how adequately Mr Angell and Mr Maiden had investigated the underlying framing. He put in issue the accuracy of Mr Angell's moisture readings. Mr Angell, he said, had failed to allow for the fact that framing treated by Framesaver gave elevated readings. Once corrected, he said, many fell within normal range.

[43] Mr Light also contended that Mr Angell and Mr Maiden had been unacceptably invasive. They had extensively damaged until then sound cladding and had contributed to the problem they were investigating. A level of recladding would be called for just to cope with the level of damage they had caused. In that sense the Zagorskis' claim had become academic.

[44] In his own witness statement, dated 6 October 2011, and in the formal response to the Zagorskis' amended claim filed for Hitex and for himself, Mr Holyoake said that when Hitex completed the 2004 – 2005 reclad, the timber framing was already covered with building wrap. Hitex was entitled to assume any decayed or damaged timber had been removed and replaced. Then, speaking from

his own expertise, Mr Holyoake responded in detail to the expert opinion evidence as it related to each defect identified in the Angell report.

[45] Mr Holyoake held Mr Wilkinson's company, WBCL, accountable for most defects identified; the Zagorskis accountable for not relying earlier on the MDCL moisture probes in place when they purchased; and Mr Angell and Mr Maiden for investigating the exterior cladding invasively.

Reply witness statements

[46] On 12 October 2011, in order 13, the Tribunal adjourned the hearing to 14 November 2011. The Zagorskis' counsel had become unexpectedly unavailable. The Tribunal required responses, reply briefs and written openings to be filed by 11 November 2011; the openings to 'cover the main elements of the claim or defence and address what each party considers to be the key issues in dispute'.

[47] In his reply brief, dated 20 October 2011, Mr Maiden disagreed with Mr Light's opinion that any existing framing that was showing some sign of actual or potential damage, but was apparently still viable, should remain in place. That, he said, was inconsistent with building science, with prudent construction and with the Building Code requirement that structural timber last 50 years.

[48] He also said that even if, as Mr Light maintained, Framesaver might have elevated Mr Angell's moisture readings, the extent could not be assessed and, in any event, the increase in moisture readings evident indicated that moisture was present. Mr Angell, he said, had found 'free water' and 'decay as a consequence'.

[49] In his reply brief, dated 10 November 2010, Mr Bayley put in issue how reliable the 2004 – 2005 probes were, contending that they were then experimental. Also what could be taken from a visual appraisal of timber extracted from the framing by drilling. He too considered, relying on the Angell and Maiden assessments and on his own inspection, that there was damage to the framing and that it had resulted from cladding leaks attributable to Hitex.

[50] Like Mr Maiden, Mr Bayley discounted any distorting effect of Framesaver on the Angell moisture readings. 'Visually', he said, 'there was clear evidence of decay and damage from both my inspections, from Mr Maiden's photographs and also from the WHRS assessor's photographs'.

[51] To Mr Light's four reasons for recladding, Mr Bayley added a fifth 'the imminent risk of cladding failure in similar areas'; and the defects already evident, he said, called for 'reasonably substantial remedial work'. He did not accept that Mr Angell and Mr Maiden had damaged 'perfectly good claddings'.

First experts' conference

[52] On 11 October 2011 Mr Angell and the four other experts convened. They assessed two issues. One concerned the scope of remedial works in 2004 – April 2005. The other concerned the extent of any existing damage and whether it had preceded the remedial work or was attributable to it.

[53] As to the former, all experts except Mr Light noted that the building consent, issued on 20 May 2004, required that any existing framing to remain in place be treated with Framesaver before recladding, and also that any windows and door flashings installed comply with a nominated standard.

[54] The majority then identified eight areas where, they considered, defective detail design or workmanship had allowed in water and resulted in actual or potential damage. They were: (i) defects in the design and fitting of the deck balustrades; (ii) ground clearances that were insufficient according to Hitex's own specification; (iii) fascias buried in the exterior cladding; (iv) defective inter-story cladding control joints; (v) exterior cladding that overlapped deck membrane; (vi) design or work defects in the retaining wall cappings; (vii) roof to wall flashings that were inadequate or ineffective; (viii) incorrectly installed door and window joinery.

[55] The majority saw the eighth defect they identified as the 'tipping point' that was likely to result in the Council declining consent for a targeted repair. A general repair was, they considered, inevitable. They agreed with Mr Smith's assessment of cost, though Mr Bayley contended for a slightly higher figure.

[56] The report concluded by noting the four reasons why Mr Light dissented from the majority opinion: (i) the extent to which water had got in had not been evidentially verified; (ii) the damage, if any, resulting from the 2004 work had not been reliably identified; (iii) 'if sil tray is not accepted as a defect then reclad is no longer justified'; and (iv) 'if Council consent is a driver for reclad then it should not be'.

[57] I take the third of these reasons to refer to a critical concern about the window joinery, the supposed absence of any sill tray; a defect I understand critical to the opinion of the majority that defects in the door and window joinery constituted the 'tipping point' compelling a complete reclad.

Liability hearing

[58] The hearing, which was intended to resolve all issues of scope and quantum as well as liability, extended over three days, 14 – 16 November 2011 with closing submissions five days later on 22 November 2011.

[59] At the outset Mr Endean, as counsel for Hitex and Mr Holyoake, contended that Mr Bayley's evidence concerning the accuracy of the moisture probes had emerged late and they wished to rebut it. WBCL contended that all he had done was to contest Mr Holyoake's evidence. However, Ms McConnell accepted that Mr Bayley's challenge might extend to the accuracy of the probes themselves.

[60] Each counsel then opened and, for Hitex and Mr Holyoake, Mr Endean contended that the case was unusual in four ways:

(a) The cladding system had not generally failed. It had worked perfectly well. In issue were some discrete areas.

(b) At their conference the experts had not reached complete consensus and the issues for the Tribunal were as Mr Light identified them in his dissent.

(c) The property had already undergone one remedial repair and the

framing left in place or introduced had been treated with Framesaver, suggesting that any damage might have preceded the remedial work.

(d) The moisture probes installed after the repair had not been used as they should have been. The Wilkinson trustees had not disclosed their pre-sale readings to the Zagorskis. The Zagorskis had not had timely readings made.

Mr Holyoake, Mr Endean said, was a director of Hitex but had not directed or supervised the reclad. His focus then was the moisture detection program.

[61] Mr Zagorski gave evidence first followed by Mr Wilkinson and Mr Burcher as to the Zagorski purchase. Then Mr Wilkinson resumed as to the state of the house on purchase and the remedial work by WBCL and Hitex. He was cross-examined extensively by Mr Endean, amongst other counsel.

[62] At 11.40 am on the second day Mr Holyoake was called and by 3 pm his evidence was effectively complete. He had been questioned by Ms McConnell, cross-examined, and largely re-examined. But Mr Endean remained concerned that he might need to give further evidence. He had not seen the witness statements of two Council witnesses still to give evidence, Mr Durand and Mr Van Beurden. He had not been cross-examined about what they were to say. He needed to review their witness statements.

[63] That was acceptable to the Council and Ms McConnell reserved that issue until the following day after the experts, then about to be empanelled following the afternoon adjournment, had completed their evidence. The Zagorskis' counsel asked the Tribunal to direct Mr Holyoake, who remained on oath in case of recall, not to speak to his counsel or anyone else and, though Ms McConnell did not reply, she must have intimated that order.

[64] At 3.16 pm, after the adjournment, the five expert witnesses were empanelled, they gave their opinions in summary, they were questioned by Ms McConnell, cross-examined by all counsel including Mr Endean, and re-examined.

Then, just before they completed their evidence at 10.43 am the following morning Mr Holyoake entered a protest. During the panel's evidence, he said, Ms McConnell's direction to him just before the panel began had denied him the ability to instruct Mr Endean.

[65] Ms McConnell asked why this had not been raised earlier. If it had been, she said, she would have allowed Mr Holyoake to speak to Mr Endean as long as they did not discuss any proposed evidence he was still to give. She gave Mr Holyoake and Mr Endean leave to confer during the morning adjournment. Then at 11.39 she adjourned any further questioning of Mr Holyoake until after lunch. She said, 'Mr Holyoake you can speak to Mr Endean about any issues to do with the Council evidence and things like that'.

[66] The two Council witnesses then in issue, Mr Durand and Van Beurden, gave their evidence next followed by a further Council witness, Mr De Leur. Mr Endean questioned all three. Then, at 2.54 pm the Tribunal adjourned and resumed at 3.06 pm when three valuers gave their evidence as a panel. After that there was one final Council witness as to the 2004 building consent and the 2005 code compliance certificate.

[67] At 4.35 pm there remained an issue about Mr Holyoake's recording of his meeting with Mr Wilkinson and the Zagorskis, before the Zagorskis made their claim. The Zagorskis wished it produced and were having a transcript made. Mr Endean said that Hitex and Mr Hitex saw no value in that but, if it were introduced, they had no issue to raise. Ms McConnell proposed that everyone listen to the tape before closing submissions. Any issue arising was to be identified then.

[68] On 22 November 2011 during closing submissions Mr Endean made no further reference to this recording. Rather he affirmed the position that Hitex and Mr Holyoake had taken, in main outline, throughout. Any damage to the framing must have been incipient and left unresolved by WBCL and the Council during the 2004-2005 repair. It could not be attributable to Hitex or Mr Holyoake. Some if not all of the damaged framing had remained dry.

[69] As to the extent of any repair, Mr Endean endorsed the consensus that had emerged during the liability hearing that a targeted repair was feasible and would attract Council consent. He contested the opinion evidence that, despite the fact that the windows did have sills, they were draining into the walls. The windows had performed for six years. A full reclad was unjustifiable.

Liability decision

[70] In its decision on liability, dated 3 February 2012, the Tribunal accepted with one exception the opinion of the majority as to the defects in the exterior cladding, as to the reasons for them, and as to the actual or potential resulting damage. By then, however, as it said, a majority of experts had discounted the window joinery, the eighth defect, originally seen as the tipping point.

[71] The Zagorskis, the Tribunal held, were not entitled to cancel the sale and purchase agreement on the ground of any misrepresentation by the Wilkinson trustees. They had entered the agreement on condition that the property passed inspection, and had relied on Allied's report. They had not relied on any warranty as to quality. They had enjoyed the property for six years, five before becoming aware of any problem.

[72] The Wilkinson trustees, the Tribunal held, were fully liable for breach of their vendor warranty that they had met all their obligations under the Building Act. (Mr Burcher only avoided liability because the Zagorskis had not required him to sign the agreement for sale and purchase.) Mr and Mrs Wilkinson had not, however, acted as developers. Nor had Mr Wilkinson or WBCL, as builders, breached their duty of care to future purchasers.

[73] WBCL, the Tribunal held, had only removed existing cladding and decayed timber, treated the remaining timber with Framesaver, put on building paper and installed the windows and parapet flashings over the curved roof and back deck. Neither WBCL nor Mr Wilkinson was liable for defects in the cladding attributable to Hitex subcontractors. Mr Wilkinson was liable for landscaping affecting the adequacy of ground clearances. Also for one defect in the wooden capping of a deck balustrade wall.

[74] Allied, the Tribunal held, was fully liable in negligence for failing in its pre-purchase report to advise the Zagorskis, before they purchased, of the purpose of the moisture plugs and for failing to ensure that readings were taken before the Zagorskis finally decided to purchase.

[75] The Council the Tribunal held, was negligent in issuing the building consent on inadequate plans and specifications, and for not taking issue with some departures from the consent. But neither was causative. The Council was fully liable in negligence for not noting that the wooden capping of one of the deck balustrades was enmeshed in plaster, or that the fascias were buried, or that the ground clearances were inadequate and inconsistent with the Hitex specification.

[76] Finally, the Tribunal held Hitex fully liable in negligence, though it found nothing defective in Hitex 50 as a cladding system. The defects in the exterior cladding, it held, were attributable to 'a poor standard of workmanship and several decisions made by Hitex officers, which gave rise to the creation of the defects'. It held Mr Holyoake liable for three defects, even though he was not site supervisor. He was involved in the related decisions.

[77] There was some possibility, the Tribunal held, that some of the damaged framing had been in place in 2004-2005 and may already then have been vulnerable to decay. But that was not significant. The 'current leaks' called for the house to be reclad wholly or partly and that, the Tribunal held, left two issues, the scope of remedial work and quantum.

[78] As to scope, the Tribunal said, while at the experts had originally agreed that the window and door joinery defects were the 'tipping point', and required a full reclad, only Mr Maiden and Mr Angell remained convinced that the windows were a source of likely future damage. The Tribunal found that this had not been established and said this:

> The finding that the windows do not need to be remediated raises the question of whether a full reclad is in fact required or whether a partial reclad or more targeted repairs will suffice. An important determinant of this is whether the Auckland Council will give consent for targeted repairs or a partial reclad. This question cannot be resolved on the evidence. The issue

> of targeted repairs arose late in the hearing and although experts gave ad hoc opinions about whether consent would be achievable, there is no proper basis for us to make a finding on this point.
>
> As it is uncertain whether the Zagorskis would be able to obtain building consent for targeted repairs, it is not possible to determine the scope of remedial work and the quantum of damages. In addition we are not prepared to make a determination on the quantum of any partial reclad or targeted repairs based on information one of the respondent's experts calculated during the course of the hearing.

[79] On that basis the Tribunal made this decision:

> The issues of remedial scope and quantum are accordingly adjourned to allow the Zagorskis to obtain further expert advice and if necessary make an application for building consent to carry out targeted repairs to correct the established defects and repair the damage they have caused. Once the outcome of this is known a further short hearing will be organised if the parties are unable to reach agreement on the scope of repairs and the quantum of damages.

[80] The Tribunal then held that Hitex, 'whose work is responsible for the majority of defects ... will have joint and several liability for the full amount of the Zagorskis' damages'. But to decide the liability of the other respondents it needed to know whether a targeted repair was feasible or not; and if it was feasible:

> ... it will be appropriate to make a location by location assessment to determine contribution and liability. It is anticipated that Mr Wilkinson's cross claim against Mr Holyoake will be resolved in this context. If a full reclad is required, it is more likely the three other parties with responsibility for defects will also be jointly and severally liable for the full amount.

Zagorski's immediate response

[81] On 14 March 2012, six days after Mr Holyoake and Hitex appealed the that decision to this Court, the Zagorskis filed a memorandum setting out their position on the basis of a report from Mr Maiden, in which he expressed the strong opinion that the Council was unlikely to consent to a targeted repair and recommended that the Zagorskis not apply.

[82] First, Mr Maiden said, under the Building Act 2004, all building work had to comply with the Building Code, whether a consent was required or not, and whether

it was new or remedial work;[1] and historically councils were only likely to grant a consent for remedial work if able to rely on a producer statement.

[83] Secondly, Hitex 50 was a unique product. It was not a cavity batten system. It was fixed directly to the timber framing. It could not be joined with another cladding system. Unless Hitex 50 was used, the exterior would have to be reclad entirely with a different product. In either event, the Council would require a warranty that the entire cladding was code compliant. A warranty for a part reclad was unlikely to be acceptable.

[84] Thirdly, there were existing specific risks of future failure, most obviously inherent in the embedded fascia boards; and, fourthly, the sill trays to the windows, though in place, only drained water away from their frames, not away from the window jambs. They directed water into the wall interiors and that carried a high risk of future failure.

[85] Mr Maiden accepted that the Tribunal had already decided this issue. But the Tribunal had asked whether the Council would consent to a targeted repair and, on the Tribunal's own finding, there were potential issues with one or more windows. Also, while the majority expert opinion had been that defective door and window joinery was likely to be the 'tipping point', the other seven defects called for a full reclad.

[86] To demonstrate that, Mr Maiden attached the house elevations that Mr Smith had earlier hatched to identify the known leak points and the likely water paths, in which he had extended the hatching by one metre beyond the identified areas of decay. Those enlarged hatched areas, the elevated moisture levels and the embedded fascias, he said, made a targeted repair untenable.

[87] Finally, Mr Maiden said, if the Zagorskis did apply for consent for a targeted repair the Council was sure to ask for further details and specifications; and, in any event, he said, to identify 'the true extent of all the damage caused' it would be necessary to remove the entire exterior cladding. Thus he concluded:

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1 Building Act 2004, s 17.

> I am of the firmest opinion that an application for a consent for targeted repairs would not be accepted by Auckland Council for this building and, as said above, you would not receive from Council a definitive statement requiring a full reclad consent application. The time and costs would essentially be wasted.

Order 14

[88] In Order 14, dated 29 March 2012, the Tribunal convened a further experts' conference for 19 April 2012. Mr Holyoake, who by that point was representing himself, applied for an order that the Zagorskis release Mr Maiden's original report to them . The Tribunal declined that order. That report, it held, was likely to be the subject of litigation privilege. It was also too late. Mr Maiden had given his related evidence at the first hearing.

[89] Then, in answer to Mr Holyoake's concern that Mr Maiden might be putting in issue the drainage capacity of Hitex 50 Ms McConnell, who issued the order, said that this was not so. What Mr Maiden had put in issue was whether the diagonal drainage grooves on new Hitex 50 panels could be exactly aligned with those in the existing panelling. The Tribunal added:

> ... other parties' experts are provided with the opportunity to comment on the issues raised by Mr Maiden and if appropriate provide further evidence in reply. Any relevant evidence as to the Hitex diamond back cladding system is only likely to be in relation to its use in targeted repairs or partial reclad situations. The key issue is not the integrity of the system as such but whether the defects in the Zagorskis' property can be appropriately remediated by anything short of a full reclad.

Second experts' conference - standing

[90] On 19 April 2012 the experts reconvened at a conference chaired by a Tribunal member, not one of the two presiding, Mr Kilgour, and there was an immediate issue. This was a conference of experts not of parties but Mr Holyoake, then representing himself, believed that as the designer and manufacturer of Hitex 50 he had a right to attend. He also wished to introduce at that conference as a further expert witness Mark Hazlehurst, a building surveyor.

[91] Mr Kilgour declined to permit either to attend. As a party, he apparently held, Mr Holyoake was disqualified from attending. Though Mr Hazelhurst was an

independent building surveyor, he apparently held, he could not attend either. He had not been a witness before the Tribunal at the liability hearing. Mr Holyoake did not accept either decision and immediately asked to speak to Ms McConnell, who met him in the office area.

[92] Mr Holyoake recorded their exchange, without disclosing to Ms McConnell that he was doing so, or seeking her consent, but that transcript was admitted on this appeal by Duffy J and I will return to it later. The immediate outcome was that Mr Hazelhurst was allowed to attend the conference as an observer only and Mr Holyoake was not permitted to attend at all.

[93] In their exchange, Mr Holyoake contends, however, Ms McConnell assured him that he would not be prejudiced. If the experts did agree on a targeted repair there would be a remedial scope hearing as to the extent and the cost. He would have the opportunity to apply to call fresh evidence. He contends, indeed, that she went further. Her 'clear message' to him was that he would be able to call that evidence.

[94] As a result, Mr Holyoake contends, once the majority at the second conference did agree a targeted repair was feasible, he obtained a further witness statement from Mr Light, and witness statements from Mr Hazelhurst and two others, Dr Adrian Spiers, a microbiologist, and Paul Probett, a further building surveyor.

Second experts' conference - outcome

[95] At this second experts' conference the majority, this time including Mr Light but excluding Mr Maiden, the Zagorskis' expert, joined in this statement:

> Each of the other experts agree, now that the defects and their location have been determined by the Tribunal decision of 3 February 2012, that a partial reclad is all that is required with a Hitex diamond back cladding system. The areas of remediation are shown on the attached elevation plans.

[96] Mr Maiden still considered that the Council would not consent to a targeted repair. But he did accept that, if Hitex 50 were used, it was compatible with the existing cladding. And all five experts joined in this qualification, referring back to

their conclusions at their first conference on 11 October 2011 before the liability hearing:

> None of the five experts named above resiles from their agreement on leak location and remedy of Tuesday 11 October 2011 now that there is a Tribunal finding that the doors and windows installation in item 7 is not a proven defect.

By that I take those in the majority at the first conference to have affirmed their conclusions then as to the defects they identified requiring a repair and Mr Light, at that first conference in dissent, to have affirmed his dissent.

Further scope directions

[97] On 27 April 2012, after the Tribunal had offered to allocate a one day fixture to the scope hearing, the Zagorskis accepted that the hearing would be confined to whether there was to be a complete or partial repair, but contended there were still three issues to resolve.

[98] The first the Zagorskis identified was this. In its liability decision the Tribunal had accepted that there were 'potential issues' with windows, which it did not identify. The Zagorskis considered that the Tribunal must have been referring to, and to have accepted the fact of, defects in two windows that Mr Angell and Mr Maiden had identified without challenge at the hearing. Those defects had not been referred to by the majority of experts at the second conference. The second issue was whether framing did need to be removed up to one metre beyond any identified decay in three instances on the southern elevation. The third was whether the cladding would have to be re-plastered completely, even if there were a partial repair.

[99] At about this time also, evidently, Mr Holyoake and Hitex, relying on material obtained under the Official Information Act, applied to have Mr Angell removed as WHRS assessor, and his foundational report for the Service declared inadmissible, on the ground of bias. On 7 May 2012, in order 15, Ms Roche declined this application. Mr Angell's evidence had already been received and relied on at the liability hearing.

Fresh evidence application

[100] On 26 July 2012, five days before the quantum hearing on 31 July, Mr Holyoake, also representing Hitex, filed the new evidence he contends he had Ms McConnell's assurance he was entitled to file as to scope and quantum: a supplementary witness statement from Mr Light and completely new witness statements from Mr Hazlehurst, Dr Spiers and Mr Probett.

[101] That day the Zagorskis responded by asking the Tribunal to confirm the focus of the remedial scope hearing. Liability had been determined, they said, and they understood the hearing to be confined to whether the reclad called for was to be complete or targeted. While a one day hearing had been allocated, only one hour would be needed. They applied to have Mr Holyoake's new evidence struck out as an attack on the Tribunal's liability decision.

[102] On 27 July 2012 Mr Holyoake replied that order 14 envisaged expert opinion evidence responding to the issues raised by Mr Maiden in his recent report proposing a full reclad. He relied on the basis on which the majority at the second conference had agreed on a targeted repair.

[103] That memorandum apparently crossed with a Tribunal email, also dated 27 July 2012, in which a Tribunal officer said that Ms McConnell had confirmed:

(a) The only issue at the hearing was to be that of remedial scope as discussed at the most recent experts' conference.

(b) The only witnesses that the Tribunal would hear were the experts who gave evidence at the substantive hearing and attended the last experts' conference.

(c) The Tribunal would nevertheless consider whether to allow additional witnesses on quantum following the scope hearing.

[104] In an immediate response that day, Mr Holyoake said, 'scope can only be defined with certainty in an unchallenged way if it is based on correct evidence

before the Tribunal'. Where there is no evidence, he said, a lack of evidence, doubtful evidence or incorrect evidence, the Tribunal could not decide scope accurately. His witnesses had 'worked hard to assess the evidence and determine from that what is required to be done to the green areas ... to determine scope'.

[105] In order 16, dated 30 July 2012, the Tribunal declined to receive the further evidence on the basis that it was inconsistent with the 27 July email and, furthermore, on this basis:

> At the time of the last experts' conference Mr Holyoake was personally advised that the Tribunal would not be allowing additional witnesses to be called in relation to the scope issue although additional evidence might be allowed on quantum depending on the decision made in relation to the remedial work.

[106] The Tribunal stated that it had already determined that there were defects in the exterior cladding that had led to damage, and liability, and had only left to be resolved whether those defects and that damage could be met by a targeted, as opposed to a full reclad. The Tribunal said:

> It was not intended, nor would it be appropriate, to provide a further opportunity for any of the parties to produce further or additional evidence on defects and damage. These issues have already been determined and a substantive decision made on these issues.

[107] The Tribunal accepted that the Hitex – Holyoake fresh evidence might go to the scope of repair 'if scope is given its widest definition', but held that this evidence was 'an attempt to re-open issues that have already been determined'. It admitted only one exception:

> Those parts of Mr Hazelhurst's brief where he proposes an alternative scope for at least parts of the remedial work, but that is challenged by Mr Light.

Response witness statement

[108] In his witness statement in response, on behalf of the Wilkinson interests, dated 30 July 2012, Mr Bayley said that when, as a result of order 14, the experts met on 19 April 2012 Mr Maiden's proposals were discussed in detail. All but Mr Maiden agreed on a targeted reclad and the points in the cladding where that was called for, together with any repair to the underlying framing.

[109] As to Mr Maiden's concern about the feasibility of a targeted repair, Mr Bayley said, a producer statement or warranty could only be for the new remedial work, not for pre-existing work. But if Hitex did that work it might be able to give a producer statement for the entire cladding. Joining new Hitex cladding with existing cladding appeared feasible, as Mr Light had demonstrated at the conference.

[110] As to Mr Maiden's extended hatched areas, he said, not all were supported by adverse moisture readings. He gave three instances. Furthermore, the hatched areas as they were before Mr Maiden had extended them, agreed at the second experts' conference, were very conservative. They required cladding to be removed beyond framing directly affected by adverse moisture content readings.

[111] Finally, Mr Bayley said, while Mr Maiden might have considered that the Council would not accept targeted repairs, the evidence was to the contrary; and in making these points in response, I understand, Mr Bayley spoke for the other members of the majority of the second conference except perhaps for Mr Light.

Remedial scope hearing

[112] On 31 July 2012, before the Tribunal heard the experts in a panel as to a complete or targeted repair, Mr Holyoake wanted to substitute Mr Hazlehurst for Mr Light as his witness, leaving Mr Light as witness for Hitex. The Tribunal allowed that, because Mr Hazlehurst had been at the second conference, if only as an observer, and it saw no prejudice arising. Mr Hazlehurst was mostly to comment on the evidence of the others.

[113] Once the panel had completed its evidence Mr Holyoake also gave evidence. He was asked by the Zagorskis' counsel whether Hitex would provide a producer statement, if Hitex 50 were used to make targeted repairs, and:

> the Council required a producer statement to confirm that the new sections of wall are appropriately installed and meet the durability requirements of the Building Code and other requirements.

[114] Mr Holyoake said that Hitex would not. His reason was this:

> I have been involved in 4000 houses getting consents, we do repairs all the time, dozens per year. This Tribunal has heard deficient evidence that has not got to the facts and you're wanting me to then go and repair to this particular process and issue a warranty. That won't happen. What will happen to this, is if it comes to me, we will then go and work out exactly what's wrong with this building and then we'll put a proper submission to the Council and then we'll do the work and then we'll give it a consent. But I certainly will not be giving it on the basis of what I've heard today.

[115] The Zagorskis' counsel then said that perhaps he had put the wrong question. He asked this: 'if the scope was a scope your contractors and Hitex agreed with, would a producer statement be provided?' Mr Holyoake answered 'yes'. Ms McConnell then asked, 'if the scope was involved a partial reclad would Hitex give the warranty required?' Mr Holyoake said, 'that's what we do all the time'.

[116] Mr Holyoake then added that, as he had earlier said in a memorandum, he had sold the Hitex brand. It was now owned by Exterior Finishing Limited, a company belonging to a former employee. He could only speak personally. But Hitex still existed, he still owned Hitex and it was solvent. Hitex could give a producer statement, because it was still 'part of the network'.

Final scope submissions

[117] On 3 August 2012 the Zagorskis filed their submission, still contending for a full reclad, maintaining that there was no prospect of a consent, and contending also that the areas for remediation identified by the experts at their conference on 19 April 2012 did not set out the true extent of the work called for. The Tribunal had accepted that there were issues with one or more of the windows.

[118] The Zagorskis accepted that the window damage might have been the legacy of the original construction. But, they contended, during the 2004 – 2005 work any defect should have been recognised by WBCL and the Council and Hitex. That negligent omission, they contended, brought any such defects within the 10 year limitation period.

[119] Their main concern, they made clear, was to avoid a targeted Hitex repair. If the Tribunal ordered one, they would be held to ransom. Mr Holyoake would refuse to carry out any repair until he had tested and monitored moisture levels to his own

satisfaction. He had declined to give a producer warranty. Indeed he had sold the brand and the fact that he had done so after June 2012 had to be concerning.

[120] In his final submission, Mr Holyoake again put in issue whether there needed even to be a targeted reclad. There was no evidence, he said, that framing left in place during the 2004 – 2005 repair was unsound. Anything defective then should have been removed. The old and the new framing was treated with Framesaver. It should resist decay under moderate levels of water entry. The moisture probes had proved accurate and showed that moisture levels within most of the framing were normal.

[121] To the extent that there were gaps allowing water in, Mr Holyoake said, all that needed to be done was to stop them up and allow the Hitex 50 system to work. Any water behind the cladding would then drain away and any wet framing would then dry out with ventilation. To the extent that a repair did need to be made, it could be highly targeted and, as to two points identified, he relied on the evidence he would have called from Dr Spiers and Mr Probett.

[122] Mr Holyoake went on to say that there had been some confusion at the end of the remedial scope hearing about the issue of a Hitex warranty. If the cladding was repaired using Hitex 50 installed by an approved Hitex contractor, Exterior, which now manufactured and installed Hitex, would give a 15 year warranty.

[123] In its final submission, dated 6 August 2012, the Auckland Council agreed that a targeted repair was feasible. Hitex 50 had not failed and any defective sections could be replaced. But a targeted repair would need the approval of a building surveyor, and a producer statement. The Wilkinson interests promoted targeted repairs within the area agreed by the majority of experts. The Zagorskis had no right to betterment.

Remedial scope decision

[124] In its decision, dated 24 August 2012, the Tribunal said that after the Zagorskis decided not to pursue anything less than a full reclad the parties agreed at the 22 March 2012 case conference that the scope of repair should be settled at a

second experts' conference or, if need be, at a hearing on remedial scope. The majority agreed on a targeted repair, though Mr Light contended for a less extensive repair.

[125] At the 31 July 2012 hearing, the Tribunal then said, it had allowed Mr Holyoake to call Mr Hazelhurst but not his two other proposed witnesses, having earlier said that it would not allow this to happen. But, in his closing submissions, Mr Holyoake had effectively tried to introduce that evidence and had asked the Tribunal to allow it in. That, the Tribunal said, was the first thing it had to decide

[126] The Tribunal adhered to its decision. The further evidence, it held, was inconsistent with the agreement at the 22 March 2012 case conference that the claim would proceed on the evidence of the then experts; a point again made clear at the beginning of the second experts' conference on 19 April 2012. Yet two working days before the reconvened hearing Mr Holyoake had attempted to introduce his further evidence.

[127] In main part, moreover, the Tribunal held, the new evidence concerned not scope and quantum but the defects and damage already determined. Dr Spier's evidence on the condition of the framing involved a critique of the methods of the expert witnesses and raised a question about the reliability of specific moisture readings. Mr Hazelhurst's evidence, while it went more to remedial scope and quantum, relied on the evidence of Dr Spiers and Mr Probett.

[128] The Tribunal affirmed its order, dated 30 July 2012. The hearing the day after that order, it again said, was not intended to provide a further opportunity for any party to produce further evidence on defects and damage. Though Dr Spiers and Mr Probett were well qualified, their evidence should have been given at the initial hearing. Mr Holyoake's recourse lay on appeal.

[129] As to the scope of the remedial work called for, the Tribunal began by saying 'this is not a typical leaky home claim' because of the 2004 – 2005 remedial repair, which was meant to be a complete answer. But the defects and leaks that it was satisfied existed were not systemic or widespread. There were relatively few high

moisture readings. There were discrete failures and the framing timber had been treated, and in some cases doubly treated, with Framesaver or its equivalent. The Tribunal agreed equally with the second conference majority that Hitex 50 could be used to make a targeted repair in the hatched areas they had agreed, shown on the elevations marked up by Mr Smith (not those extended by Mr Maiden).

[130] In the result, the Tribunal concluded that something short of a full reclad would be feasible and that it was likely that the Council would consent to one as long as Hitex were willing to provide a warranty or producer statement. But there remained this difficulty. Mr Holyoake was unwilling to have Hitex complete and warrant work the Tribunal had found to be necessary but with which he disagreed.

[131] If Mr Holyoake had considered that the repair called for was wider than it had found to be necessary, the Tribunal said, there would be no problem. But the converse was the case. He contended for 'far less extensive repairs' than it had held to be essential. He had sold the Hitex brand to Exterior. He would have to give any warranty himself and he refused to do so. The Tribunal said, 'we do not consider it appropriate for the claimants to be held to ransom by Mr Holyoake in this way'.

[132] Furthermore, the Tribunal noted, when the Zagorskis and Mr Wilkinson met Holyoake before they made their claim he did not accept any deficiency in the cladding. He offered more moisture probing and more monitoring, and a retrospective maintenance plan that might have exposed the Zagorskis to the charge that they had failed to mitigate. At the hearings he had dismissed the expert evidence, that there were defects to the cladding, as emanating from his 'ferocious competitors'.

[133] In the result the Tribunal said this:

> As Mr Holyoake will not give a warranty for the remedial work that either the Tribunal or the majority of other experts considered to be appropriate, it is unlikely that the claimants would be able to obtain building consent for targeted repairs or a partial reclad. In these circumstances we conclude that the only reasonable way for the claimants to remedy the defects with their dwelling is for the property to be completely reclad.

[134] The Tribunal added that, even if Mr Holyoake were to offer to carry out the work and warrant it, his position had been so uncompromising that there would have to be a question whether any such offer could be relied upon. In then issuing its directions going to quantum and contribution, the Tribunal added that Mr Holyoake's stance had almost doubled the damages it would otherwise have awarded.

Quantum determination

[135] On 21 September 2012 the Tribunal issued its decision resolving: (i) the likely cost of the remedial work, (ii) what other damages should be awarded, (iii) whether damages should be assessed on the basis of loss of value or the cost of remedial work, (iv) whether all liable respondents should be liable for the full amount of established damages, (v) whether contractual claims should take precedence over claims in torts and, finally, (vi) what contribution each party should make.

[136] The Tribunal found that the Zagorskis' claim proven to the extent of $433,087 and made a series of orders holding all parties except Mr Burcher fully liable but subject to rights to recover from the others specified sums by way of contribution. The effect was that Mr Holyoake and Hitex became liable for 73 per cent, $316,154, WBCL and Mr Wilkinson, and the Auckland Council, for $43,308.50 each, the Wilkinsons $21,654 and Allied $8,662.

Costs award

[137] On 15 November 2012 the Tribunal determined the three applications for costs made against Hitex and Mr Holyoake, under s 91 of the 2006 Act, which normally requires that parties carry their own costs and expenses. It had to decide whether Mr Holyoake and Hitex had caused unnecessary costs either by acting in 'bad faith' or by making allegations or objections without 'substantial merit'.

[138] The Zagorskis contended that Hitex and Mr Holyoake had pursued interlocutory applications without merit and put in issue their conduct during the hearing. WBCL contended that Mr Light's conduct had required them to have Mr

Bayley at the hearing longer than necessary. The Council contended that Mr Holyoake and Hitex had pursued points without substantial merit.

[139] As to the Zagorskis costs claim, made under six headings, the Tribunal declined the claims made under three: delay in filing briefs of evidence; Mr Light's unauthorised site inspection; and applying to undertake further moisture testing. It awarded costs under the other three.

[140] The Tribunal held the application to strike out Mr Angell's report after the first hearing lacked substantial merit and caused the Zagorskis unnecessary cost. It held that Mr Holyoake filed the fresh evidence before the remedial scope hearing in bad faith despite having been advised that the Tribunal would not relitigate liability. It held that in his quantum submissions on 7 September 2012, Mr Holyoake very belatedly asserted that he, Mr Zagorski, and Mr Wilkinson had settled the claim at their meeting before it was lodged.

[141] As to the last of these points the Tribunal said that, as it had found in its decision on quantum, this was an attempt to introduce new evidence and a new defence. Mr Holyoake had not provided the transcript before or at the hearing. No witness had been able to be questioned about it. Further, if anything, the transcript showed that no agreement had been reached. In advancing it Mr Holyoake had acted in bad faith and it lacked substantial merit.

[142] In awarding costs in favour of the Zagorskis the Tribunal found that Mr Holyoake was familiar with the Tribunal's procedures and jurisdiction, having appeared as a witness and been an advocate himself. He could 'fairly be described as having acted in the absence of common sense'. In the two instances he had taken interlocutory steps, contrary to advice and directions. It awarded $3,582 costs.

[143] The Tribunal awarded WBCL $1,581.25 for the time Mr Bayley had to spend reviewing the additional evidence Mr Holyoake had filed contrary to the order of the Tribunal. The Tribunal declined to make any greater award. It said:

> Mr Holyoake was entitled to vigorously defend the claim against him. Although there may have been difficulties arising from the manner in which

> Mr Holyoake and Mr Light conducted the defence to the claim, we do not consider that the matters complained of constitute either bad faith or allegations without substantial merit. Neither are we persuaded that the behaviour of Mr Light and Mr Holyoake significantly increased the attendances required by Mr Bayley.

[144] As to the Council's application for costs arising from the remedial scope evidence, the Tribunal said that whether a complete or targeted repair was called for ultimately rested on whether a producer warranty was given which the Council could accept. The repair itself could be a series of discrete repairs. It was the producer statement that counted. The Tribunal then said this:

> Mr Holyoake was then asked to give evidence as to whether he would be willing to provide such a warranty on behalf of Hitex. He said he would not and explained he would not give a warranty unless he was able to carry out further investigations and would only give a warranty for work he considered was necessary. He said he would not give a warranty for what the experts or the Tribunal determined was necessary, if he considered that it was more than what was required to remedy the defects that he accepted.
>
> As a consequence of Mr Holyoake's stance, we concluded that it was unlikely that the Zagorskis would be able to obtain a building consent for targeted repairs or a partial reclad. We concluded therefore that the only reasonable way for the Zagorskis to remedy the defects with their dwelling was for the property to be reclad.

[145] The Tribunal was sympathetic to the Council's submission that Mr Holyoake's position led to the scope hearing becoming a wasted exercise and that he had then raised issues without substantial merit causing unnecessary cost. They said this:

> While we are sympathetic to the Council's view, we are not convinced that even if Mr Holyoake's position had been sought and communicated in advance, the parties would have agreed that a full reclad was warranted and that matters would have been resolved without a hearing. Furthermore, the stance taken by Mr Holyoake was factored into the contribution apportioned to him and Hitex in our quantum determination. The Hitex/Holyoake contribution was increased because of its refusal to warrant targeted repairs. This represents a sanction of sorts.

STATUTORY REGIME

[146] There are three aspects of the statutory regime to which I now need to refer. The first is as to the nature of the right of appeal from decisions of the Tribunal that the 2006 Act confers. The second is as to the nature and role of the tribunal itself;

and its duty to be speedy, flexible and cost-flexible. The third is as to the extent of the Tribunal's duty to act in accord with the principles of natural justice.

Right of appeal

[147] The right of appeal from decisions of the Tribunal is conferred by s 93(1) of the 2006 Act, which says 'a party to a claim that has been determined by the tribunal may appeal on a question of law or fact that arises from the determination'. In this instance that appeal lies to this Court because the award appealed from exceeded $200,000.

[148] Under s 95(1) this Court may 'confirm, modify or reverse the determination or any part of it' and 'exercise any of the powers that could have been exercised by the tribunal'. This Court's decision has effect 'as if it were a determination made by the tribunal for the purposes of (the) Act' and it is a 'final determination of the claim'.[2]

[149] The appeal proceeds by way of rehearing under Part 20 of the High Court Rules. [3] That being so this Court may come to its own conclusion based on the material presented before the Tribunal, and any further evidence admitted.[4] Furthermore, as the Supreme Court said in *Austin Nichols & Co Inc v Stichting Lodestar*:[5]

> Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate Court, even where that opinion is an assessment of fact and degree and entails a value judgment. If the appellate court's opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the only sense that matters, even if it was a conclusion on which minds might reasonably differ.

[150] Equally, the Court said, an appellant must demonstrate that the decision under appeal is wrong; the appeal Court is not otherwise entitled to substitute its own opinion.[6] Also, it must be mindful of any advantage the tribunal under appeal had that it does not share, like 'technical expertise or the opportunity to assess the

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2 Section 95(2).
3 *Coughlan v Abernethy* HC Auckland CIV-2009-004-2374, 20 October 2010 at [26].
4 *Pratt v Wanganui Education Board* [1977] 1 NZLR 476 (NZSC).
5 *Austin Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [116].
6 At [4], [13].

credibility of witnesses, where such assessment is important'. In such a case it ought rightly to hesitate before concluding that the tribunal appealed from is wrong.[7]

[151] On an appeal from the Weathertight Homes Tribunal, I agree with White J in *Coughlan v Abernethy*, there are two interrelated features of the 2006 Act which should inhibit this Court from concluding that the Tribunal is wrong unless the grounds of appeal are compelling.[8] The first is the purpose of the Act itself, 'to provide owners of leaky homes with access to speedy, flexible, and cost effective procedures for the assessment and resolution of their claims.'[9] The second is that, in managing and deciding claims, the Tribunal must act in accord with that purpose; and, concomitantly, has wide and flexible powers.[10]

[152] I agree also with White J that, when, in deciding a claim, the Tribunal exercises a discretion, as where it apportions damages under s 17 of the Law Reform Act 1936 and under s 3 of the Contributory Negligence Act 1947, or decides on the amount of a general damages award, an appellant faces a higher threshold.[11] An appellant must demonstrate that the Tribunal erred in law or principle, or took into account an irrelevant consideration, or failed to take into account a relevant consideration, or was plainly wrong.

Duty to be speedy, flexible and cost-effective

[153] In one sense, the Tribunal is indistinguishable from any Court of law. It is able to give any remedy open to a Court of law.[12] It may award general and special damages for damage, loss of value, and 'deficiencies that are likely in future to enable the penetration of water into the building concerned'. But in another sense it stands distinct. As Ellis J said in *Yun v Waitakere City Council*,[13] while the Tribunal's process may be partly adversarial, it is itself 'primarily inquisitorial in nature'.

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7 At [5].
8 Above, n 3, at [29].
9 Weathertight Homes Resolution Services Act 2006, s 3(a).
10 Above, n 3, at [29].
11 *Coughlan v Abernethy*, above n 3, at [27].
12 Weathertight Homes Resolution Services Act 2006, s 50.
13 *Yun v Waitakere City Council* HC Auckland CIV-2010-404-5944, 15 February 2011 at [29].

[154] That this is so is first evident from the fact that the Act creates a two phase process to ensure that claims are resolved speedily, flexibly and cost effectively, and in the initial phase the Tribunal has no part to play. Claims are brought under the Act by applying, not for relief to the Tribunal, but instead to the Weathertight Homes Resolution Service[14] for an assessor's report, which may either be a report as to eligibility or a full report.[15]

[155] A report as to eligibility goes to whether, as it must, the claim concerns a dwelling house built or altered before 1 January 2012, but within the 10 years immediately preceding the claim; a claim which asserts that water has penetrated the house because of some aspect of its design, construction or alteration, or the materials used; a claim which asserts that this has resulted in damage.[16]

[156] A full report, by contrast, is not confined to eligibility in that sense. It must contain the assessor's own opinion as to why water has penetrated the dwelling, as to the nature and extent of any damage caused, and as to the work needed to repair the damage and to make the dwelling weather tight. It must give an estimate of the cost of repair. It must identify those who should be parties to the claim.[17]

[157] Once a report has been completed in either of those forms the chief executive must decide whether the claim is eligible.[18] And, quite independently, the chief executive has the ability to assist and guide a claimant;[19] and that may include assistance and guidance on:

> (a) Assessors' reports, the advantages of early repair, the informal dispute resolution process, or the mediation and adjudication process:
>
> (b) Other possible means of resolving a particular dispute:
>
> (c) The implications for the claim concerned if the dwelling house concerned has damage or deficiencies not related to weather tightness.

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14 Section 10.
15 Weathertight Homes Resolution Services Act 2006, s 9.
16 Section 14.
17 Section 42(2).
18 Section 41.
19 Section 12(1).

[158] It is only in those cases where a claim is not declined or resolved in the first phase that a claim will proceed to the second phase for mediation and, if need be, adjudication by the Tribunal; and it is at that point that the claimant must make a specific application for relief.

[159] The application, which is in a form prescribed by the Tribunal itself under s 62, must be highly particular and documented. It must set out a chronology, construction details, how any leaks came to the claimant's attention, how they have been investigated and how addressed. It must be supported not just by the WHRS assessor's report, but also by any other expert reports, or information, on which the claimant relies.

[160] This, as Ellis J said, immediately distinguishes the Tribunal from a Court of law in which a claim is made by pleaded allegation. Right at the outset, as she said, the Tribunal has the complete claim and its essential basis, often in considerable detail; [20] and, as she said also, once the Tribunal has that claim, it comes under the immediate duty that s 65 imposes:

> As soon as the tribunal thinks practicable ... it must call a preliminary conference of the parties to consider making, and (if possible) make, procedural and other decisions under this Act to try to ensure that the claim is dealt with in the manner best suited to—
>
> (a) its particular circumstances and those of the parties; and
>
> (b) its speedy and cost-effective resolution.

[161] At that conference and in managing and resolving the claim the Tribunal is subject to s 57, which was central to the case before the Tribunal and is no less so on this appeal. It says this:

> (1) The tribunal must manage adjudication proceedings in a manner that tends best to ensure that they are speedy, flexible, and cost-effective; and, in particular, must—
>
> (a) encourage parties where possible to work together on matters that are agreed; and
>
> (b) use, and allow the use of, experts and expert evidence only where necessary; and

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[20] *Yun v Waitakere City Council*, above n 13, at [23].

(c) try to use conferences of experts to avoid duplication of evidence on matters that are or are likely to be agreed; and

(d) try to prevent unnecessary or irrelevant evidence or cross-examination.

(2) In managing adjudication proceedings, the tribunal must comply with the principles of natural justice.

(3) Subsection (2) does not require the tribunal to permit the cross-examination of a party or person; but the tribunal may in its absolute discretion do so.

[162] At this early point also that the Tribunal begins to exercise its extensive powers under s 73(1), the most fundamental of which is to 'conduct the proceedings in any manner it thinks fit, including adopting processes that enable it to perform an investigative role.'[21] The Tribunal can itself inspect the dwelling house to which the claim relates, subject to consent of the owner or occupier.[22] It can consider the evidence or orders in any preceding adjudication, as long as it allows the parties to comment.[23] It can, as long as it notifies the parties beforehand, appoint an expert to report on specific issues.[24] It can consent to a referral to mediation and set a timeframe. It can call conferences and issue directions 'as long as they are reasonable to enable the claim to be determined effectively and completely'.

[163] The remedies that may be claimed and granted under the Act are as extensive as any in a Court of competent jurisdiction.[25] And so, though the Tribunal must set out to be speedy, flexible and cost-effective, it must do so in accord with the principles of law that apply.[26] (As against that the nature of its jurisdiction may mean that it is not strictly bound by the Evidence Act 2006.[27]) It is also, under s 57(2), obliged to comply with the principles of natural justice.

[164] The Tribunal must determine a claim by giving a decision in writing setting out its reasons.[28] Clearly the Tribunal must set out its reasons in sufficient detail to be intelligible. It need not be overly elaborate. Apart from the fact that it must be

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21 Weathertight Homes Resolution Services Act 2006, s 73(1)(a).
22 Section 73(1)(h).
23 Section 73(1)(d).
24 Section 73(1)(f).
25 Sections 50, 72, 90(1).
26 Section 90(1).
27 *Chee v Stareast Investment Ltd* HC Auckland CIV-2009-404-5255, 1 April 2010 at [77] – [79].
28 Weathertight Homes Resolution Services Act 2006, s 92(1).

speedy, flexible and cost-effective, it is under a time constraint. It must issue its determination within 35 working days of the last mediation if there has been one, or the last date for response by the respondents, subject always to any agreement.[29]

Duty to accord natural justice

[165] Underpinning the duty to comply with the principles of natural justice that s 57(2) imposes is the right to justice accorded by s 27(1) of the NZBORA:

> Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

[166] Natural justice, as the Privy Council said in *Furnell v Whangarei High Schools Board*,[30] is 'fairness writ large and judicially'. It is a right to a fair process in which each party affected is entitled to adequate notice and an opportunity to be heard. It secures, if less directly, the right to a disinterested and unbiased decision maker.[31]

[167] On a claim before the Tribunal the issue is not whether that principle in its extended sense applies. Section 57(2) declares that it does. The issue is as to the extent to which it applies when set against the Tribunal's duties and powers. Section 57(3), for instance, says that it does not oblige the Tribunal to permit cross-examination. As to that the Tribunal has 'complete discretion'. But, even there, this Court has twice held that natural justice has been unacceptably denied when the ability to cross-examine has been denied or significantly curtailed.

[168] In *Taefi v Weathertight Homes Tribunal (No 2)*[32] the Tribunal made a procedural order prohibiting the parties from attending an experts' conference, from giving evidence, and from cross-examining, unless they filed and served reports and witness statements by a specified date. That order was quashed as being in breach of

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29 Section 89(1).
30 *Furnell v Whangarei High Schools Board* [1973] 2 NZLR 705 (PC) at 718.
31 *Laws of New Zealand, Administrative Law* at 58.
32 *Taefi v Weathertight Homes Tribunal (No 2)* HC Auckland CIV-2008-404-6709, 10 October 2008.

their right to natural justice under s 27(1) NZBORA. The Court held that such orders could only have been made as a matter of last resort.

[169] In *Chee v Star East Investment Ltd*,[33] there were two breaches of natural justice. One lay in the Tribunal effectively denying the claimant, a lay litigant, the ability to test the expert evidence as to quantum. The other lay in the Tribunal receiving further evidence, after the hearing, without express consent, denying the claimant the ability to test it.

[170] As these two cases illustrate, whether Hitex and Mr Holyoake were denied natural justice calls for an inquiry of fact, taking into account the Tribunal's duty to be speedy, flexible and cost effective and its related powers.

NATURAL JUSTICE GROUNDS

[171] According to Mr Holyoake and Hitex, the Tribunal did not accord them a fair hearing. There is fortuitous evidence, they say, of its apparent if not actual bias. In five primary instances, they say, they were denied natural justice; and at the quantum hearing especially, where he appeared on his own behalf, Mr Holyoake was unacceptably curtailed.

Tribunal's actual or apparent bias

[172] The Tribunal's bias against them, whether actual or apparent, Mr Holyoake contends, emerged fortuitously in an exchange of emails before the quantum hearing, when Mr Holyoake wished to call for Hitex, and on his own behalf, the further evidence from Mr Light, and fresh evidence from Mr Hazelhurst, Dr Spiers and Mr Probett.

[173] On 27 July, at 8.27 am, a Tribunal officer, 'Kate', Kate Bishop I understand, a temporary manager, acting on behalf of the case manager, sent to Mr Holyoake and counsel the email to which I refer in paragraph [103]:

> Ms McConnell confirms that the only issue for the hearing on Tuesday 31 July is the issue of remedial scope that was discussed at the most recent

[33] *Chee v Star Investment Ltd*, above n 27.

> experts' conference. She further advises that the only witnesses that the Tribunal will hear on Tuesday are the experts who gave evidence at the substantive hearing and attended the last experts' conference.
>
> The Tribunal will consider whether additional witnesses on quantum will be allowed following Tuesday's hearing on scope. We will not however allow new evidence on any other issues.
>
> The additional briefs Mr Holyoake is seeking to file will not be accepted at this stage as they do not primarily address scope. Nor does the introduction of new witnesses comply with the agreement on the way outstanding issues will be addressed.

[174] At 10.03 am Mr Holyoake responded to that email and at 10.21 am Ms Bishop sent him this reply:

> Hi
>
> Another FYI – and I currently have him crying down the phone ...
>
> He has gone away a bit happier and will turn up on Tuesday.

Then, at 10.52 am, Ms Bishop sent a further email to Mr Holyoake saying 'apologies you were inadvertently sent an email not intended for you.'

[175] The 10.21 am email Mr Holyoake received was only addressed to him. The 10.52 am email did not say for whom it had been intended. As to that there is no evidence on this appeal. But Mr Holyoake and Hitex contend that the 10.21 am email exhibits apparent bias in two ways. To say that Mr Holyoake was 'crying down the phone' was plainly derogatory and to say 'another FYI' is to confirm that there had been earlier such emails exchanged within the Tribunal.

[176] Thus, Mr Holyoake contends, on the two phase inquiry *Muir v Commissioner of Inland Revenue*[34] calls for, the 10.21 am email alone must suffice to lead a fair minded lay observer to apprehend reasonably that the Tribunal might not bring an impartial mind to his case and that of Hitex.

[177] It is immaterial, Mr Holyoake says, that the email was sent by Ms Bishop, a Tribunal officer, and not a Tribunal member, and that it was not in the context of a hearing. It related to the forthcoming hearing and the very fact that Ms Bishop felt

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[34] *Muir v Commissioner of Inland Revenue* [2007] NZCA 334 [2007] 3 NZLR 495; *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 122, [2010] 1 NZLR 35.

able to send such an email within the Tribunal must be evidence of the attitude of the Tribunal itself.

[178] As a statutory Tribunal, not chosen by the parties, Mr Holyoake contends, the Tribunal was obliged to be scrupulously fair. Despite the fact that the email was administrative, it has to give rise to the appearance of bias on the part of the Tribunal on the 'rotten apple in the barrel' principle.[35]

[179] This submission necessarily assumes that Ms Bishop intended the email for the presiding members of the Tribunal. It further assumes that she would only have sent it if she was confident that they shared her apparently adverse opinion of Mr Holyoake. To resolve this point, and despite the absence of any evidence, I will assume the former. I see no justification for assuming the latter.

[180] In this email Ms Bishop does no more than say what was in any event predictable, that Mr Holyoake was unhappy with the 8.27 am email stating that, to be able to call any part of his proposed further evidence, he would have to convince the Tribunal at the hearing that it was relevant to remedial scope. But, as she also said, he did still intend to appear. These were things the Tribunal were entitled to know. Had Ms Bishop been more neutral Mr Holyoake could have no complaint.

[181] By itself, moreover, the email says nothing about the attitude of the Tribunal, even apparently. As the 8.27 am email demonstrated, the Tribunal remained willing to allow Mr Holyoake to submit at the hearing that his further evidence was relevant to remedial scope. The only issue there can be is whether, in the ways Mr Holyoake and Hitex then complain of, the Tribunal denied them natural justice.

Failure to send evidence contrary to direction

[182] Mr Holyoake contends that the Tribunal first denied them natural justice by failing to comply with its own order 8, dated 24 June 2011, to which I refer in paragraph [25], in which it held them to their address for service, Dawsons Lawyers,

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[35] *Paki v Maori Land Court* [1999] 3 NZLR 700 (HC); *McGovern v Ku-Ring-Gai Council* [2008] NSWCA 209; (2008) 72 NSWLR 54; *IW v City of Perth* [1997] 191 CLR 1.

but went on to say 'the Tribunal will continue to copy Mr Holyoake into emails sent out to parties and will deal with emails and communications from him'.

[183] Mr Holyoake contends that the Tribunal failed to comply with its own direction when it did not send to him, in particular, 375 photographs taken by the WHRS assessor, Mr Angell, on 25 July 2011. He says that he did not learn of these photographs, in their entirety certainly, until 23 January 2012, after the liability hearing. He was denied the ability to prepare his case in response.

[184] If this complaint had any basis in the evidence Mr Holyoake might indeed have been denied natural justice, but I am unable to accept that it does. Order 8 required the Council's solicitors, Heaney and Co., to serve the Council's witness statements, including Mr Angell's photographs in whatever form. Their duty was to serve Dawsons Lawyers, not Mr Holyoake.

[185] Also, in order 9, dated 14 July 2011, the Tribunal directed Mr Angell to distribute his photographs in electronic format. There is no issue that Dawsons Lawyers received them. At the liability hearing Mr Endean put to Mr Angell a photograph Mr Holyoake himself had taken. During that exchange Ms McConnell said she had directed that all Mr Angell's photographs be produced and circulated. As to that, Mr Endean took no issue.

[186] There is then no reason to suppose the Tribunal ever failed to comply with its own order by omitting to send to Mr Holyoake the photographs he complains he was denied. Nor is there any for saying he was unaware of those photographs at the liability hearing. Mr Endean clearly had them and could have used them. It is highly unlikely that he and Mr Holyoake did not review them together.

Denial of ability to test expert witnesses

[187] Mr Holyoake next contends that during the expert panel evidence at the liability hearing he was denied natural justice because he remained under oath and forbidden to speak to his counsel. He was denied the ability to have put to the panel his own power point as to the disputed cladding defects. When he raised this issue at

the end of the experts' evidence and was allowed to speak to Mr Endean, that proved too late. When they returned to Court the Tribunal had released the panel.

[188] Mr Holyoake was unquestionably subject to the embargo he complains of while the experts gave their evidence. But, as he accepts, the Tribunal did not intend this. It was the unintended consequence of the conventional order it must have made, or intimated, just before the experts gave their evidence. Furthermore, as Ms McConnell said, when Mr Holyoake eventually complained, had Mr Endean raised the issue during the panel evidence, the order could have been relaxed. The fact is that Mr Endean had not raised it.

[189] There are also two related questions and the first is whether, despite the order, Mr Holyoake was in fact constrained. Mr Zagorski, and his then junior counsel, have given affidavit evidence putting that in issue. Both say he engaged freely with Mr Endean during the panel evidence and, though I am unable to resolve this definitively on the transcript and affidavit evidence alone, that appears to me to be credible.

[190] Soon after the panel began, and Mr Maiden was speaking about whether Mr Angell's moisture readings were elevated by Framesaver, Mr Holyoake intervened. Ms McConnell told him that he could not at that moment produce exhibits or refer to them. When he persisted she reminded him he was not then giving evidence. She invited Mr Maiden to continue.

[191] If Mr Holyoake had any concern during the panel evidence about his inability to instruct Mr Endean, one would have expected him to say so then. He did not. Also Mr Endean questioned the panel vigorously and at no point advised the Tribunal he was handicapped by a lack of instructions. Here too, if there were any difficulty of that kind, one would have expected him to say.

[192] Finally, when Mr Holyoake did complain at the end of the panel evidence, Ms McConnell gave him an ample opportunity to speak to Mr Endean and identify any further issue for the panel. This opportunity extended into the afternoon, as I set

out in paragraphs [65] and [66]. Yet Mr Endean did not ask the Tribunal to allow him that further opportunity.

[193] In the same vein, there has to be a question how central to Mr Holyoake's critique of the expert witnesses his power point was. When he himself gave evidence Ms McConnell asked Mr Endean, soon after he was sworn, whether he wished to use the projector. Mr Endean said that it might assist, when Mr Holyoake was cross-examined, if he could refer to his exhibit electronically. That never happened.

[194] On this second natural justice argument, just as on the first, Mr Holyoake implicitly puts in issue the conduct of his counsel, Mr Endean without waiving privilege and calling him as a witness to confirm his account, or allowing other parties to speak to him. That suggests that Mr Endean's evidence might not have assisted Mr Holyoake on this appeal. I put it no higher.

[195] In the round, I can only conclude that on the totality of the evidence bearing on this issue, despite the fact of the embargo, the Tribunal did not intentionally deny Mr Holyoake natural justice, and swiftly redressed any such unintentional denial; and there is nothing in the evidence to suggest that Mr Holyoake was in any sense prejudiced.

Further evidence denial at scope hearing

[196] Mr Holyoake next contends that by order 16, dated 30 July 2012, Ms McConnell denied him the ability to produce further evidence at the remedial scope hearing on 31 July 2012, in breach of her assurances to him at the time of the second experts' conference on 19 April 2012. As to the fact of those assurances, he relies on his recording of their conversation, a transcript of which is in evidence.

[197] In that conversation, as Mr Holyoake says, Ms McConnell did say that if the experts agreed that day on a targeted repair there would need to be another hearing as to their extent and cost. That is what they did agree and there was that hearing. What Ms McConnell did not say is that, if there were that hearing, Mr Holyoake

would be entitled to call further evidence. As he accepts, all she said was that he could apply for leave; and that the other parties would have a right to be heard.

[198] In this Ms McConnell did no more than acknowledge that Mr Holyoake had the right to apply. She did not assure him implicitly that if he applied his application would be granted. Or if she did give him any such implicit assurance, that can only have been that he might be permitted to call further evidence strictly relevant to scope and quantum.

[199] The second conference, just then beginning, had been convened for that very confined purpose only during the telephone conference on 2 March 2012 in which Mr Endean participated. It was the subject of order 14, dated 29 March 2012, in which Ms McConnell had said that the key remaining issue was, speaking of the Hitex system:

> … not the integrity of the system as such but whether the defects in the Zagorskis' property can be appropriately remediated by anything short of a full reclad.

[200] During their conversation, Ms McConnell had no reason to relax that essential focus. Nor did Mr Holyoake have any right to ask her to. His interest and that of Hitex was represented at the conference by Mr Light, their expert. As a party Mr Holyoake had no right to attend, however expert he was. Mr Hazelhurst, an independent building surveyor, could have given admissible opinion evidence at the liability hearing but had not then been called. Other parties had every right to oppose him playing any part during the scope phase of the claim.

[201] Mr Holyoake's related complaint, that Ms McConnell saw him improperly in the absence of other parties, is equally without merit. Any right to complain lies rather with them. It lies also with Ms McConnell herself. She accommodated Mr Holyoake first by speaking to him at all, as she thought informally, and by then allowing Mr Hazelhurst to attend the conference as an observer. Yet Mr Holyoake recorded what she said to him without telling her, or asking her consent. As it happens his recording does not assist him. It vindicates her.

[202] I should also add this. The further extensive further evidence Mr Holyoake wished to call at the scope hearing concerned scope only to a small degree. Mostly it was an attempt to revisit the issue of liability and it was not suggested otherwise on this appeal. But at the scope hearing, Ms McConnell again indulged Mr Holyoake by permitting Mr Hazelhurst to join the panel as a witness.

[203] By contrast, Mr Maiden's evidence at the scope hearing, as to the state of the windows, served an intelligible purpose. It went to an apparent lack of correspondence between the Tribunal's liability decision and the opinion of the majority of experts at the first conference and hearing.

Denial of right to cross-examine

[204] Mr Holyoake next contends that at the remedial scope hearing, when he was representing himself and Hitex, the Tribunal was under a positive duty to minimise his disadvantage so as to ensure a fair hearing.[36] Instead the Tribunal denied him his right to cross-examine the panel. The Tribunal may have an inquisitorial role, but he was denied natural justice. The Tribunal's conduct must reasonably create an apprehension of bias.[37]

[205] In the many instances Mr Holyoake complains of, his essential complaint is that he was prevented from pursuing the extent to which, if at all, the timber framing underlying the cladding was decayed or damaged. His questions were wrongly characterised as submissions. He was constantly interrupted and challenged.

[206] On my own review of the evidence I find, however, that the Tribunal did strike a fair balance between its duty to be fair to Mr Holyoake, and its duty to other parties.[38] He may have acted on his own behalf and that of Hitex. He is not to be equated with the lay litigant in the *Chee* case. He had real expertise in the subject matter and experience before the Tribunal. He was only curtailed when he attempted to revisit the Tribunal's conclusions as to liability. One example will suffice.

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36 *Lee v Composite Cladding and Signage Manufacture and Installations Ltd* HC Whangarei CIV-2009-488-828, 16 December 2010 at [38]; *Wordtel NZ Ltd v Cho* HC Auckland CIV-2009-401-1818, 9 December 2011 at [41].

37 *Re Refugee Review Tribunal, ex parte H* (2001) 179 ALR 425 (HCA).

38 *Lee v Composite Cladding & Signage Manufacture & Installations Ltd*, above n 36.

[207] When at the scope hearing the Council's expert, Mr Smith, gave evidence as to the scale of repair he envisaged, and had hatched out in green on a set of the elevations, Mr Holyoake asked him what evidence he had that the underlying framing was decayed or damaged and needed to be repaired or replaced.

[208] Mr Smith confirmed he had not assessed the underlying framing by moisture readings, or timber samples, and had in part relied on Mr Angell's assessment. But, he said, he had also relied on his own site visits and on Mr Maiden's further destructive testing. He added, as to the scale of repair he envisaged, that it was 'pragmatic'. It was a scale that he was confident would achieve an effective repair and attract Council consent.

[209] Mr Holyoake then put to Mr Smith one Tribunal finding with which Mr Smith plainly disagreed. The Tribunal had found that a wooden handrail needed to be repaired. But Mr Smith, himself, had said that there was no evidence of any related damage. Mr Holyoake asked Mr Smith, analogously, why in the areas where there was no evidence of underlying damage he considered that the cladding needed to come off.

[210] That was necessary, Mr Smith replied, because the underlying framing was assumed to be damaged or decayed. Mr Holyoake again asked Mr Smith whether there was any evidence of that, as say in the form of a timber sample. At this point Ms McConnell intervened. She said:

> Mr Holyoake, you're going back – Mr Smith has said he's based it on the Tribunal determination. So he actually disagrees with the determination so its no use asking him where the evidence is. So he's agreed to this scope because he's gone on the basis of what has been decided and we're not here to re-decide what's already been decided whether its right or wrong.

[211] Mr Holyoake responded that his point went to scope only. If the cladding had to be removed, and there was no underlying damage, did that mean that it was to be immediately put back on? To that Mr Smith replied 'if there were damaged framing that would obviously need to be repaired'. Again, Mr Holyoake said, there was no sample showing damage, and, again, Ms McConnell intervened. She said:

> If you look into the determination, the determination concluded that there were elevated moisture readings. He may disagree with that, you may disagree with that, but that's the basis on which Mr Smith's proposing the remedial scope. He can't take it beyond that. I don't think that the questions you're asking are particularly helpful in terms of progressing the issue ...

[212] As this exchange illustrates, at the remedial scope hearing Mr Holyoake effectively ignored the Tribunal's liability decision. His opinion remained that there was no evidence that the framing underlying the cladding was damaged at any point. All that was needed, he considered, was to stop up any gaps in the cladding and to monitor the underlying moisture levels.

[213] In the face of that the Tribunal was entitled, indeed obliged, to hold that it had already decided there were seven cladding defects allowing in water that had caused some damage with the potential for more; and that the related cladding had to be removed to identify the extent of the framing and other materials calling for repair. The Tribunal was entitled, indeed obliged, to confine the remedial scope hearing to the sole clearly identified issue, whether a full reclad was called for, or a targeted reclad would serve. Mr Holyoake and Hitex had already appealed the liability decision, and that was their remedy.

[214] I should also add that Mr Holyoake was allowed a fair opportunity to test the panel on the issue of a full or targeted repair. Whenever the Tribunal limited Mr Holyoake, I consider, it did so legitimately. In some instances it actively assisted him. As it said in its own cost award, it recognised his right to advance his case, even to the extent that other parties found excessive. But not, as a matter of justice, at their expense.

Refusal to admit evidence of settlement

[215] Mr Holyoake next contends that the Tribunal denied him and Hitex natural justice when in its quantum decision, and in a letter, dated 10 September 2012, it declined to allow him to produce as evidence at that hearing the recording and transcript of his discussion with Mr Wilkinson and the Zagorskis before they brought their claim.

[216] That discussion, he contends, gave rise to an agreed settlement inconsistent with the Zagorskis' claim, or gave him and Hitex a defence founded on estoppel by representation. It was also relevant to contribution, when damages were assessed, as between himself and Hitex and the Wilkinson interests.

[217] The first difficulty that Mr Holyoake faces in this context is that order 9, before the liability hearing, required him and Hitex to make their response to the Zagorski claim and any related issues raised by the Wilkinson interests, by 16 September 2011. He and Hitex did not raise this issue then. Nor did they raise it at any point before or during the liability hearing. His attempt to introduce the recording at the quantum hearing came too late.

[218] That apart, the transcript does not assist Mr Holyoake or Hitex. The conversation was, as Mr Holyoake confirmed at the outset, 'without prejudice'. Mr Zagorski did not commit himself and his wife to anything. He expressed clear reservations. Nor did Mr Wilkinson commit his interests or Mr Holyoake his. No agreement ensued. On any view the Tribunal made no error.

LIABILITY REVISITED

[219] Mr Holyoake next contends that the Tribunal found him and Hitex liable for the majority of the defects identified without adequate evidence; and conversely failed to find the other respondents liable for their several parts. He also contends that the Tribunal was wrong to hold that the Zagorskis were not contributorily negligent.

Hitex liability

[220] In its liability decision, as it relates to Hitex, Mr Holyoake contends, the Tribunal effectively abdicated its function to the then majority of experts. It merely summarised the defects they had identified. It held Hitex accountable merely on the basis that it was 'associated with' design detail and workmanship failures. That could not be enough.

[221] The Tribunal, Mr Holyoake contends therefore, failed to make a comprehensive appraisal of the evidence. It failed to analyse the extent to which the original construction had leaked and had caused timber framing to decay as the primary cause of any damage. Without having done so the Tribunal was wrong to dismiss this as a possibility.

[222] The Tribunal had also to analyse the extent to which any failure to apply Framesaver to the framing, before it was reclad, had allowed or caused further damage, even where the framing was dry and protected by the new cladding. It should have considered whether those defects were caused, or contributed to, by failures on the part of WBCL especially. It should have required a further independent investigation.

[223] In advancing these arguments Mr Holyoake necessarily assumes that the Tribunal's decision relating to Hitex was confined at most to the three paragraphs in which it responded to its own question: 'Is Hitex liable for the creation of defects?'

> The Hitex cladding was installed by specialised subcontractors under the supervision of David Bedwell and later, Clint Aitken. Mr Holyoake, in his capacity as the Hitex managing director, also had some oversight and made some decisions that have been associated with defects.
>
> Several significant defects are associated with workmanship failures by the Hitex installers. These are:
>
> - the balustrade wall junctions;
> - the timber capping on the northern deck where cracking is allowing moisture ingress;
> - the deck surface cladding clearance defects;
> - the control joint defect; and
> - the defect described above under the heading 'Buried Fascias' which encompasses the defects at the roof to wall junction.
>
> Although there was some suggestion that the Hitex system itself failed resulting in the moisture ingress that has occurred, this is not established on the evidence. We find that the problems that have occurred are a result of the Hitex system being installed with a poor standard of workmanship and several decisions being made by Hitex officers which have given rise to the creation of the defects.

[224] In these three paragraphs, however, the Tribunal crystallised its conclusions as they related to Hitex. They must be set against the whole of the Tribunal's preceding decision, most especially its analysis of the seven defects on which the majority of experts agreed, but as to which Mr Light held a contrary view. They must be set against the Tribunal's prior and complementary conclusions as to the parts played by Mr Wilkinson and WBCL.

[225] As the Tribunal narrated in its decision, the defects in the cladding were not evidence of a systemic failure. They were evidence of poor workmanship or poor detail design; and, as to that, the Tribunal was entitled, as it did, to rely on the experts' majority consensus at the first conference, more especially after having questioned the experts and heard them cross-examined and re-examined.

[226] The Tribunal was entitled to take into account also that while Mr Light dissented from the majority, he agreed that the cladding defects existed and that water had got in. His concern was as to evidence of active decay and that is why he proposed there be further investigation. Despite that, I consider, the Tribunal was entitled to accept the majority consensus that there was sufficient evidence of decay, or the potential for it.

[227] The Tribunal also made the pivotal finding that the single most significant defect identified by the expert majority at the first conference, the defects in window design and workmanship, did not have the overriding significance then ascribed. That finding may have reflected a shift at the hearing in the consensus of the majority. It also rested on the evidence as a whole, including that of Mr Light and Mr Holyoake.

[228] Finally, the Tribunal was entitled to rely, as the 2006 Act itself intends, on Mr Angell's foundational WHRS assessment. It was under no duty to obtain a further independent assessment. Nor did it have any need to. Whether the further evidence Mr Holyoake wished to call might have led the Tribunal to a different conclusion as to liability, had that evidence been called at the first hearing, can only be speculative.

Holyoake liability

[229] As to his own liability, Mr Holyoake contends, the Tribunal had an insufficient basis in evidence to conclude that he owed any duty of care to the Zagorskis, independent of Hitex itself. But, if he did assume personal responsibility, that can only have been for any particular decisions he made, or any advice he gave, that resulted in defects and loss.

[230] In developing this submission Mr Holyoake effectively repeats the Tribunal's own analysis, which began with this orthodox premise:

> The existence and extent of the duty of care owed by Mr Holyoake in respect of work carried out by Hitex is determined by a consideration of his role and responsibility on site. His liability must be determined by evidence of what he actually did. It must be established that Mr Holyoake had sufficient involvement in and control of the work to give rise to a duty of care.

[231] The Tribunal did not accept that Mr Holyoake was 'intimately involved' in the project, as Mr Wilkinson said he was, or that he designed the remedial work. But even if he did, it held, the fault lay not so much in the design (except as to some matters of detail) but in the workmanship. Nor did it accept that he had supervised the work. There was a Hitex project manager on site for much of the time.

[232] In the same vein, the Tribunal held that while Mr Holyoake had signed the advice of completion document, that was as an officer of Hitex. It only held him accountable for his part in respect of three defects, largely on a par with Mr Wilkinson. As the Tribunal said, Mr Holyoake had been to the house five times between 14 June – 1 September 2004, though twice to install MDU probes. It described his part in the three defects it attributed to him in part in this succinct way:

> These are the northern deck balustrade capping which he approved, the ground levels which he advised Mr Wilkinson on and the flashing/fascia board end detail about which he was consulted.

[233] Mr Holyoake challenges those findings but on my own review they were open to the Tribunal to make. If Mr Holyoake has any basis for challenge it lies against the Tribunal's decision fixing his contribution to the damages award.

Wilkinson interests liability

[234] Mr Holyoake next contends that in its assessment of the Wilkinson interests' culpability the Tribunal made a series of errors; the first by holding that the Wilkinsons were not liable as developers. They had bought four properties, including an investment property, within four years. The inescapable inference had to be that they did so for profit.

[235] The Tribunal did not consider that inference inescapable and neither do I. The Tribunal was alive to the Wilkinsons' four purchases within four years and that one purchase was of an investment property. But it held that this pattern in itself did not establish they were acting as developers. It held, and was entitled to hold, this:

> While they were clearly moving up the Auckland property ladder during this period, the evidence stopped short of establishing a pattern whereby the Wilkinsons have bought, remediated and sold properties for profit. It is not established that their intention and motive in purchasing and remediating Fancourt Street was profit. Fancourt Street was their family home for almost two years and we accept that their plans changed when it became necessary to accommodate Mrs Wilkinson's mother with their family.

[236] Nor do I consider that the Tribunal failed to distinguish between the parts that Mr Wilkinson and WBCL played in the 2004 – 2005 work and those played by Hitex and Mr Holyoake. It distinguished between them when discussing the buried fascias, the defective deck balustrades and the inadequate ground clearances. One example will suffice. The Tribunal held Hitex primarily responsible for the buried fascias. It also held that some responsibility lay with Mr Wilkinson and WBCL, and with the Council. It made this common sense finding:

> This defect is in the transition area between the original building work and the remedial work and results, in part, from inadequate attention to these areas in the remedial design and sequencing and extent of the remedial work. It is also a defect that should have been apparent from a visual inspection.

[237] Mr Holyoake's complaint that the Tribunal gave inadequate weight to WBCL's failure to remediate in 2004 – 2005 does not have a secure basis in the evidence. The evidence of Mr Wilkinson is that any defective framing was removed and any left in place or introduced was treated with Framesaver. The evidence of the Council inspectors was consistent. There was nothing to the contrary. The Tribunal had, by contrast, cogent evidence that the larger part of the remedial work lay with

Hitex and its subcontractors; and the majority of experts agreed on the defects for which the Tribunal held Hitex accountable.

[238] Mr Holyoake's complaint that the Tribunal underrated the Wilkinson trustees' failure to act on, or to alert the Zagorskis or the Council to, the high moisture readings obtained just before the Zagorskis purchased, does not assist him or Hitex either. As the Tribunal held, the Zagorskis did not rely on the Wilkinson trustees when deciding to purchase. They relied on their deficient Allied report. If the Tribunal underrated the Wilkinson trustees' omission to advise the Council that is an issue for the Council.

[239] Mr Holyoake's real complaint is as to the Tribunal's decision fixing the levels of contribution the Wilkinson interests were to make to the damages award, especially when compared with those imposed on him and Hitex.

Other respondent challenges

[240] Mr Holyoake then puts in issue the extent to which the Tribunal held accountable the remaining respondents, the Council and Allied, and also contends that Mr Angell, in his investigation, was so invasive that he contributed to the damage the Zagorskis suffered.

[241] As I set out earlier, essentially the Tribunal held the Council accountable for those defects that would have been apparent on inspection. As to this it made no error. The Council was entitled to rely on Hitex's own system representations. The Tribunal was equally entitled to hold that, while the Council may have granted consent on inadequate plans and specifications, and not taken issue with some consent departures, neither was causative.

[242] The Tribunal held Allied accountable for its failure to alert the Zagorskis to the moisture probes, and the need to have them read, especially as they had been installed after a remediation. Again Mr Holyoake's real complaint is against the levels of contribution the Tribunal fixed for Allied, and for the Council for that matter, when compared with those imposed on him and Hitex.

[243] Finally, the WHRS assessor, Mr Angell, was not a party to the claim. Nor is there any cogent evidence that he caused any damage. The evidence is that any cut outs he made, or any holes he drilled, were immediately and effectively repaired.

Zagorski contributory negligence

[244] The Tribunal, Mr Holyoake next contends, erred in fact and law in not making any finding that the Zagorskis were contributorily negligent.[39] The Tribunal should have asked itself what they did, or did not do, that contributed to the defects identified; to what degree they departed from the standard of a reasonable person, and with what causative potency.[40]

[245] The Zagorskis, Mr Holyoake contends, bought the property knowing that it had leaked in the past and that there had been remedial work. They were, or ought to have been, aware that there was a monitoring system in place. Mr Zagorski saw the probes before they purchased and the Allied report referred to the probes. They should have had readings taken at an early point.

[246] Had the Zagorskis done so, Mr Holyoake contends, they could have acted on any heightened readings by taking advice and undertaking any remedial work then called for. Their failure contributed to any damage beneath the cladding worsening. The Tribunal ought to have found them contributorily negligent, or at least reduced their damages award to reflect their failure.[41]

[247] I do not accept that the Tribunal did make any error. The Zagorskis were certainly aware that the house had leaked. But they were assured, and were entitled to assume, that it had been the subject of successful remedial work and no longer leaked. They had the Council' s consistent LIM report and Allied's positive report. They had the vendors' assurance in the agreement for sale and purchase that the property was code compliant; the misrepresentation the Tribunal found they could not rely on, because they had relied on the Allied report.

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39 *Coughlan v Abernethy*, above n 3; *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, NZLR 726 at [68].

40 *Findlay v Auckland City Council* HC Auckland CIV-2009-404-6497, 16 September 2010.

41 *Johnson v Auckland Council* [2013] NZHC 165, [127] – [145].

[248] As to that last report, the Tribunal noted, it was 22 pages long. It dealt with each room. It said once only, when speaking of the rumpus room, 'moisture plugs noted throughout the house'. It said nothing about what the 'plugs' were for. It did not recommend that they be read before purchase. The Tribunal was well entitled to conclude as it did:

> Given the placement of the single sentence noting the presence of moisture plugs in the middle of the report, on a page entitled 'rumpus room', we do not consider that the Zagorskis acted unreasonably by failing to inquire about the significance of the moisture plugs. There was no indication in the report that the plugs were important or could provide further information.

[249] I should also add that there is nothing the Zagorskis did about their property themselves, that could have alerted them to the possibility of cladding defects or any significant water ingress. In short, this is a very different case from *Johnson v Auckland Council*, where Woodhouse J reduced damages by 70 per cent on account of contributory negligence. The Tribunal was fully entitled to conclude that the Zagorskis were not negligent.

REMEDIAL SCOPE, QUANTUM AND COSTS REVISITED

[250] Mr Holyoake next challenges the Tribunal's related decisions on remedial scope and quantum in which he and Hitex are found equally liable to contribute the lion's share to the Zagorskis' damages award, 73 per cent. Also its costs decision.

Remedial scope revisited

[251] In his challenge to the Tribunal's remedial scope decision Mr Holyoake first relies on the final majority expert opinion, in fact shared by the Tribunal, that a targeted repair was feasible and all that was justifiable. He then challenges, as speculative, the Tribunal's finding that the Council was likely to deny consent to a targeted reclad, unless he or Hitex gave a producer statement or warranty.

[252] First, he points out, a producer statement or warranty has no status under the Building Act 2004. It is not mandatory. It is simply one way in which the Council can obtain 'reasonable grounds' to be satisfied that the work for which consent is sought is code compliant. Secondly, Mr Holyoake contends, the Tribunal took him

too absolutely. He did not refuse outright to have Hitex complete and warrant a targeted repair.

[253] As to his first point, Mr Holyoake is right to this extent. Producer statements were required by the 1991 Building Act. They are not under the 2004 Act. But, under s 94(1), the Council must be satisfied on reasonable grounds that the work for which consent is sought will be code compliant and as to that producer statements or warranties are material. The Council's own website contains producer statements able to be used to obtain a consent and says:

> The Building Act 2004 does not refer to the use of producer statements; however, they have continued to be utilised as a mechanism for establishing compliance with the New Zealand Building Code and are widely accepted by the industry.

[254] At the scope hearing, moreover, Mr Angell referred to the Council's Wall Cladding Register and the entry for Hitex Diamond and pointed out the Council's requirements:

> ... it states it must be installed in strict accordance with the manufacture's specification and goes on to say applicators approved by Hitex must provide certificates, producer statements obtained from the applicator and copies of manufacturers' warranties.

[255] In advancing his second point, Mr Holyoake contends, at the remedial scope hearing he could not offer a producer statement or warranty. He had appealed the Tribunal's liability decision. The Tribunal ought also, he says, to have asked him what work he was prepared to have Hitex do and warrant. Neither he nor Hitex could warrant any work carried out by others; Mr Angell's cut outs and drill holes, to take one instance, or any repairs to the flashings.

[256] In this, however, yet again, Mr Holyoake takes no account of the very confined purpose of the remedial scope hearing, to decide whether the seven defects for which Hitex had already been held liable could be met by a targeted, as opposed to complete, repair. Nor does he take into account the two dimensions to that question: whether a targeted repair was technically feasible; and whether Hitex, in reality he as its directing mind, would carry out and warrant that repair.

[257] There was then no issue that a targeted repair could only be made using Hitex 50. It is a unique cladding system incompatible with any other. The Tribunal also had evidence that unless Hitex, in reality Mr Holyoake, was prepared to supply a producer statement or warranty, the Council might well decline consent to a partial repair, as had been the Tribunal's experience in the *Chee* case.

[258] In effect, therefore, the decision as to the scope of repair lay finally not with the Tribunal but with Hitex and Mr Holyoake himself. As to any repair short of a total reclad, they had a power of veto; and Mr Holyoake does not acknowledge how adamantly opposed he was at the remedial scope hearing to Hitex repairing the defects the Tribunal had held it accountable for in the liability decision.

[259] Mr Holyoake dismissed the evidence on which the liability decision was based. He dismissed that decision. He reserved to himself alone the ability to decide whether, if at all, Hitex would carry out any repair, and give any producer statement or warranty, and when if at all that might happen. The Tribunal had no choice but to take him literally.

Quantum and contribution revisited

[260] The issue which then arises is whether in its quantum and contribution decision, holding Hitex and Mr Holyoake equally liable, jointly and severally, for 73 per cent of the award, the Tribunal made any error of discretion. I begin with the award itself.

Quantum and contribution award

[261] The Tribunal held, as I have said, that the likely cost of the remedial work called for, a full reclad, was $385,337 together with $25,000 general damages, $22,750 loss of rental, in all $433,087, and awarded the Zagorskis damages to that measure. It declined to award damages to a loss of value measure; a conclusion not in issue on this appeal.

[262] The Tribunal then held that all respondents should be held jointly and severally liable for the full measure of those damages, subject to the issue of

contribution. Mr Holyoake's refusal to have Hitex complete and warrant a targeted reclad, it held, had not broken the chain of causation in terms of loss. His refusal had not been the only factor determining the extent of the reclad required. It went rather to contribution.

[263] The Tribunal rejected Mr Holyoake's late contention that the Zagorskis and Mr Wilkinson had agreed a settlement before the Zagorskis claimed. It refused to receive the recording or transcript. It also held, having nevertheless reviewed the transcript, that no settlement had been agreed; an assessment as I have said with which I agree. It rejected Mr Holyoake's further attempt to revisit liability.

[264] The Tribunal then considered whether it was able, in fixing contributions, to give priority to Hitex and Mr Holyoake, as tortfeasors, over the Wilkinson trustees for breach of contract by misrepresentation. I set out that aspect of the Tribunal's decision in full:

> Contribution between contract breakers and tortfeasors was recently considered by the Supreme Court in *Marlborough District Council v Altimarloch Joint Venture Ltd*[42] where a contract breaker and a tortfeasor were both liable for damages. The majority required the contract breaker to pay the damages first, effectively indemnifying the tortfeasor from its liability. The majority also found that the contract breaker had no right to contribution from the tortfeasor.
>
> Mr Robertson has submitted that the dicta in *Altimarloch* is that where a claimant is successful both against a contracting party and against parties in tort, the claimant should exhaust its contractual remedies first because the measure of tortious loss is the short-fall once those contractual rights have been exercised. As the Wilkinsons have been found liable in contract for the full amount of the established damages, acceptance of Mr Robertson's submission would result in all the remaining respondents being indemnified by the Wilkinsons.
>
> The assertion that *Altimarloch* requires contract breakers to pay damages first without contribution from tortfeasors overlooks two aspects of the decision. These are first, the qualification that fairness in the particular case required the contract breaker to pay first.[43] Secondly, the reason the tortfeasor was not required to contribute in *Altimarloch* is because of the absence of a common legal burden between the respondents. The majority held that the nature of the liabilities and of the resulting damage attributed to the tortfeasor and contract breaker were too different to be apportioned and that the tortfeasor could not be required to contribute to a loss of a character for which it had no liability.

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42 *Marlborough District Council v Altimarloch Joint Venture Ltd*, above n 39.

43 Above, n 4, at [72] – [73] Blanchard J.

> Applying these two aspects of *Altimarloch* to the present case, we see no reason why fairness requires the Wilkinsons to pay damages first. We consider that the Council is highly culpable for the damage to the house and its failure to comply with the building code. In *Altimarloch*, had there been no contract, the Council would not have had any liability. In this case, whether a contract containing a vendor warranty existed or not, the Council would still have been in breach of its duty of care to the owners of the house.
>
> Similarly, Hitex and Mr Holyoake are highly culpable. They were involved in the creation of defects that led to damage. The refusal by Mr Holyoake to warrant the targeted repairs agreed to by the experts has significantly increased the quantum of damages. There is no principled reason why the Wilkinsons should pay these increased damages ahead of Mr Holyoake and Hitex.
>
> Further, we consider the respondents in this case to be subject to a common legal burden. Although the origins of their liabilities are different, all are liable to the same extent for the same damage. The fact that the liability of the Wilkinsons and the other respondents arises from different legal sources is not determinative.[44]
>
> As Tipping J noted in *Altimarloch*, a conventional indicator of common legal burden is when satisfaction of the obligation by the obligee discharges, as a matter of law, other obligees.[45] Applying this test, which has been adopted in a number of jurisdictions,[46] the respondents in this case are under a common legal burden which is a pre-requisite for equitable contribution.
>
> We determine therefore that the contribution between all the respondents is permissible and equitable and we proceed to consider their relative contributions based on their levels of culpability.

[265] In fixing contributions the Tribunal exercised its power under s 72(2) of the 2006 Act, which enables it to determine liabilities between respondents and to give any related remedy. It invoked as well its ability, under s 90(1), to make any order open, in accord with law, to a Court of competent jurisdiction. It did so on the principle of fairness and equity, set against the overall justice of the case. This principle, it held, as it was entitled to, applies whether contribution is as between tortfeasors under s 17 of the Law Reform Act 1936, or as between tortfeasors and contract breakers in equity.[47]

[266] The Tribunal first held Hitex and Mr Holyoake primarily responsible for the defective cladding work, and then jointly and severally liable to pay the full award,

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44 *BP Petroleum Development Ltd v Esso Petroleum Co Ltd* [1987] SLT 345 at (OH) 348.

45 Above, n 4, at [132].

46 See *Burke v LFOT* [2002] HCA 17 (2002) (2009) CLR 282 at [46]; *Royal Brompton Hospital NHS Trust v Hammond* [2002] UKHL 14, [2002] 2 AUER 801.

47 *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234.

while allowing each of them to recover from the other liable respondents anything in excess of $316,154 up to a ceiling of $116,933. As to its reasons, the Tribunal said this:

> The parties primarily responsible for the defective work are Hitex and Mr Holyoake. Not only did they carry out or direct the impugned work but the Council and Mr Wilkinson relied on their expertise and advice. The CCC was also in part issued in reliance on the documents deemed to be a producer statement provided by Hitex and Mr Holyoake. Even without Mr Holyoake's refusal to consider the remedial scope as proposed by the majority of experts his and his company's combined contribution would have been more than 60 per cent and significantly greater than any other party to this claim.
>
> In the circumstances of this case however, due to Mr Holyoake's refusal to provide a warranty or producer statement, we consider it is fair and equitable to increase both his and his company's contribution. We set it at a combined total of 73 per cent.

[267] Conversely, in its other pertinent contribution orders against the Wilkinson interests, it required WBCL and Mr Wilkinson, as builders, to pay the full award but granted them a right to recover from other liable respondents anything in excess of $43,308.50, up to a ceiling of $388,778.50. As to Mr and Mrs Wilkinson, as vendor trustees under the agreement for sale and purchase, it confined their personal liability to half that, $21,654. It did so on this basis:

> The liability in tort of Mr Wilkinson and his company was in relation to the balustrade capping, buried fascias and ground clearances. Even in these areas we found that Mr Wilkinson consulted with Mr Holyoake and followed his advice. We accordingly set their contribution at 10 per cent. Mr and Mrs Wilkinson have also been found liable in contract for breach of the warranty under the agreement for sale and purchase. The contractual liability, however, is primarily in relation to the deck only. We therefore consider that their contribution should be assessed at 5 per cent.

Discretionary errors contended for

[268] In his challenge to the award and contribution orders the Tribunal made, Mr Holyoake begins by contending that the award itself assumes the necessity of a full reclad, and that is inconsistent with the evidence and the Tribunal's own finding that no more than a targeted reclad was justifiable. He then contends that in fixing contributions the Tribunal still further errors.

[269] First, Mr Holyoake contends, in holding him and Hitex primarily accountable for the defective cladding work, the source of the Zagorskis' primary loss, the Tribunal did not identify discretely how Hitex and he were responsible for each of those defects. Even on its own analysis, he contends, the Tribunal could not hold him as accountable as Hitex. It held Hitex responsible for all seven defects. It held him partly accountable as to three only.

[270] Secondly, he contends, the Tribunal erred in principle when it held that the Wilkinson trustees, as contract breakers, were entitled to equitable contribution from him and from Hitex and that is inconsistent with the *Altimarloch* decision, in which by a majority (Elias CJ, Tipping and Blanchard JJ) the Court held the tortfeasor not to be liable to contribute to the damages payable by the contract breaker for two reasons which apply equally here.

[271] The first of those reasons was that their liabilities as contract breaker and tortfeasor were not coordinate. As Tipping J explained in that case:[48]

> The vendors are liable for selling property without an attribute they claimed it had. The Council is liable for negligently informing the purchaser that it did have that attribute. The amounts for each party is liable are by no means the same. There is no one loss.

[272] In that case the purchaser had paid more than the property was worth as a result of the vendor's misrepresentation, which had the status of a term of contract. The vendor had been held liable to the contract measure; to meet the cost of bringing to the property the overstated attribute. The Council's liability was to the tort measure; to compensate the purchaser for the difference between the price paid, and the value of the land without the overstated attribute, a considerably lesser sum.

[273] The second reason was that such a contribution order would be unjust. If the vendor's liability had been the same as that of the Council, Blanchard J said, and had been confined to compensating the purchaser for the price paid at the misrepresented over value, any contribution from the Council would to that extent have restored to the vendor the excess in the purchase price to which it had no right.

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[48] *Marlborough District Council v Altimarloch Joint Venture Ltd*, above n 43, at [129].

[274] In this case, Mr Holyoake contends, it is irrelevant whether he and Hitex were liable in negligence to the Zagorskis for the cladding defects, irrespective of whether the Wilkinson trustees were liable for having misrepresented the condition of the property and sold at an over value. It is equally irrelevant that the Wilkinson trustees had paid Hitex for the recladding and founded their representation to the Zagorskis on the assumption that it was not defective.

[275] The fact is, Mr Holyoake says, that the Wilkinson trustees did represent to the Zagorskis that the property was code compliant and was weather tight when it was not. They sold at an over value and obtained a windfall. They should be wholly answerable to the Zagorskis for that over value. It would be unjust to require him and Hitex to contribute.

Conclusions

[276] The Tribunal was entitled, I consider, to hold each of the respondents jointly and severally liable for the cost of remedying the defective cladding, and any damaged or decayed underlying framing and materials, together with the two related heads of damage, as to which there appears no issue. It did not have to take, as the measure, the loss of value the property suffered because it was not code compliant and weather tight. As to that Mr Holyoake appears only to take issue obliquely as to contribution.

[277] The Tribunal was entitled to hold the Wilkinson trustees wholly liable, jointly and severally, but subject to contribution, for their breach of clause 6.2(5)(d) of the agreement for sale and purchase. As vendors they undertook to the Zagorskis that, as to the 2004 – 2005 remedial work, 'all obligations imposed under the Building Act 1991 and/or the Building Act 2004 were fully discharged.' It was equally entitled to hold the remaining respondents, all tortfeasors, accountable for their parts in causing the Zagorskis their primary and related losses.

[278] On the evidence, I consider, the Tribunal was plainly entitled to hold Hitex responsible for 60 per cent of the Zagorskis' loss. It had found Hitex accountable for all seven cladding defects. It was only entitled to hold Mr Holyoake personally

responsible, in this sense, for his part in three of those defects. Here he lay closer to WBCL and Mr Wilkinson.

[279] To hold Mr Holyoake jointly and severally liable, together with Hitex, for 73 per cent of the Zagorskis' loss, as it did, the Tribunal had rather to rely on his post loss conduct; his refusal at the remedial scope hearing to countenance Hitex completing or warranting a targeted repair, thereby doubling the Zagorskis' loss and the liability of all respondents.

[280] In principle, I consider, the Tribunal was entitled to take that conduct into account as between Mr Holyoake and Hitex and other tortfeasors certainly.[49] And, equally, to my mind to do so, as between them and the Wilkinson trustees as a matter of equitable contribution. I also consider that this was open to the Tribunal as a matter of discretion, to ensure that the outcome was just as between the Zagorskis and all respondents.

[281] Mr Holyoake, speaking for himself and on behalf of Hitex, may have been entitled at the remedial scope hearing to refuse to complete a targeted and warranted repair. But he and Hitex had equally to accept the corollary; that a full repair, carried out by someone else, was likely to be double the cost of the targeted repair they could have carried out. The other respondents ought not to be required to assume any part of that extra cost, let alone to indemnity Mr Holyoake and Hitex for their choice.

[282] The issue remains whether in the orders for contribution the Tribunal made, holding Hitex and Mr Holyoake equally primarily liable, it infringed the contribution principles the majority of the Supreme Court identified and applied in *Altimarloch*. I do not think it made any such error.

[283] In that decision the Supreme Court confirmed that a claim may be brought in a single action against a contract breaker and a tortfeasor and that issues of liability and contribution, as between them, are not to be resolved, as Tipping J said, 'on any

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[49] *Brian Warwicker Partnership v Hok International Ltd* [2005] EWCA Civ 962.

notion that contract has general primacy over tort', but are rather to be resolved on 'ordinary principles of causation and the concurrency of two causes of action'.[50]

[284] In that case the majority of the Court held the contract breaker, the vendor, to be primarily liable because it had overstated an attribute of the property, and thus sold at an over value, and that misrepresentation had the status of a term of contract. The tortfeasor council was only liable because in its LIM report it compounded the vendor's misrepresentation. But for that misrepresentation the Council would not have been liable.

[285] The second conclusion, which also influenced the majority decision that it would be unjust to require the tortfeasor Council to contribute, was correlative to its first conclusion, that the contract breaking vendor was primarily and wholly liable. To require the Council to contribute to the vendor, Blanchard J held, would restore to the vendor, to the extent of that order, part of the excess in the purchase price referable to the over stated attribute.

[286] In this aspect of the analysis, it made no difference that the vendor had been required to pay to the purchaser far greater damages, on the contractual measure; the cost of providing the purchaser with the over stated attribute. That only went to the fact that the measures of damage, as between contract breaker and tortfeasor in that case, were contrasting and incoordinate.

[287] In this case, by contrast, the Tribunal was entitled to hold Hitex and Mr Holyoake primarily liable as tortfeasors for the cost of remedying the cladding defects, subject to contribution not just from other tortfeasors, but also from the Wilkinson interests as vendors. As vendors, the Wilkinson trustees only became liable because the cladding defects for which Hitex and Mr Holyoake were accountable made a misrepresentation of the Wilkinsons' undertaking to the Zagorskis that the house was code compliant.

[288] The Wilkinson trustees obtained no measurable windfall from that misrepresentation at the time of sale. The extent to which the house was less

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[50] *Marlborough District Council v Altimarloch Joint Venture Ltd*, above n 43, at [108].

valuable than then represented is incapable of being assessed on the evidence. The only evidence that there is relates to the state of the house as it was some five years later. That apart, the Tribunal did hold them answerable for not responding responsibly to the heightened moisture readings taken before they sold to the Zagorskis, and in that they did not begin to compare with Hitex. Nor ought they to be held accountable for Mr Holyoake's stance as to a targeted remedial repair.

Costs revisited

[289] In the appeal against the costs award, dated 15 November 2012, Mr Holyoake and Hitex first rely on their challenge to the Tribunal's liability. Those grounds, given my own findings on this appeal, are unsustainable. The Tribunal's award under s 91 was confined in scope and modest in amount. In making that award the Tribunal made no error of principle.

CONCLUSION

[290] In the result, I find, throughout each phase of this protracted claim, the Tribunal accorded to Hitex and Mr Holyoake their rights as a matter of natural justice. To the extent that the Tribunal curtailed Mr Holyoake, and Hitex, it did so to oblige him to act consistently with its procedural orders and with its liability decision most especially. As to that the Tribunal had no choice. After its liability decision holding Hitex primarily liable Mr Holyoake effectively attempted to start his case, and that of Hitex, afresh.

[291] I conclude also that the Tribunal made no error in its liability, remedial scope, quantum and costs decisions. It was entitled, in particular, I find, to hold Mr Holyoake equally liable with Hitex for 73 per cent of the Zagorskis' damages award, even though he was not equally responsible for their primary loss. When he refused at the remedial scope hearing to have Hitex undertake and warrant a targeted remedial repair at a stroke he effectively doubled the Zagorskis' loss and the liability of all respondents.

[292] In that contribution order and in the others that it made, I find, the Tribunal fairly and accurately rated the culpability of each respondent and did so in accordance with law.

[293] I dismiss the appeal. The respondents are entitled to an award of costs. Their memoranda are to be filed and served within ten working days of the date of this decision. The memorandum for Hitex and Mr Holyoake is to be filed and served within the ten succeeding working days.

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P.J. Keane J

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