IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

CIV-2012-425-000341
[2013] NZHC 559

BETWEEN	BODY CORPORATE 351522 First Plaintiff
AND	DAVID VICTOR CURRAN AND KIM NANCY CURRAN CIRCLE PROPERTY INVESTMENTS LIMITED ANUP NATHU AND SADHANA NATHU NOVACORP LIMITED LYNETTE JANICE DONALDSON JENNIFER CHRISTINE HAY AND STEPHEN ALEXANDER GREER BRUCE DONN MCNALLY MATTRIX INVESTMENTS LIMITED HAMISH IAN MUNRO AND MILLY MY LOI SIN and HAYBU LIMITED Second Plaintiffs
AND	QUEENSTOWN LAKES DISTRICT COUNCIL First Defendant
AND	ANDREW JOHN STEVENS Second Defendant
AND	MARK LAWRENCE HILLARY Third Defendant
AND	B F WHITHAM LIMITED Fourth Defendant
AND	PHILLIP STANLEY MORRISON Fifth Defendant

Hearing: 25 February 2013
with additional evidence received 7 March 2013 and memorandum received 11 March 2013
(Heard at Christchurch)

Appearances: A J Thorn for Plaintiffs/Respondent
H M Rice/A C Harpur for First Defendant/Applicant (Counsel for other parties not involved)

Judgment: 20 March 2013

JUDGMENT OF ASSOCIATE JUDGE OSBORNE
[as to application for orders for inspection and testing of property]

Introduction

[1] In this proceeding, the plaintiffs sue the defendants for weathertightness and other issues affecting a Queenstown apartment block.

[2] The plaintiffs sue five defendants. Apart from suing the Council, they sue the two developers/project manager/builders, one designer and one structural engineer.

[3] The plaintiffs allege that the apartment block has been constructed with design and/or construction and/or mechanical engineering defects.

[4] This is a judgment in relation to two interlocutory applications –

(a) The Council seeks orders as to inspection and testing of the property;

(b) Secondly, the Council seeks an order that the plaintiffs provide further and better particulars.

[5] I deal first with the inspection and testing application (at [7]–[56], with the orders at [57]) and then with the further and better discovery (at [58]–[148]), with the order at [149].

[6] I also deal at the conclusion of this judgment with the allocation of a trial date for this proceeding. The Registrar had been directed on 27 November 2012 to allocate a trial date. A date had not been allocated by the time of this hearing as counsel for the Council had opposed the offered date in September 2013 by reason of unavailability of counsel. I heard from counsel on the issue of trial allocation at the commencement of this hearing. I indicated that I was provisionally minded to allocate the trial to September 2013, but reserved my ruling on allocation until I heard and was able to take into account the submissions I was about to hear

particularly in relation to testing and inspection. Formal directions as to trial appear at the conclusion of the judgment at [150]-[152].

Inspection and testing of the property

The jurisdiction

[7] Rule 9.34 provides:

> Order for inspection, etc
>
> (1) The court may, for the purpose of enabling the proper determination of any matter in question in a proceeding, make orders, on terms, for—
>
> (a) the inspection of any property:
>
> (b) the taking of samples of any property:
>
> (c) the observation of any property:
>
> (d) the measuring, weighing, or photographing of any property:
>
> (e) the conduct of an experiment on or with any property:
>
> (f) the observation of a process.
>
> (2) An order may authorise a person to enter any land or do anything else for the purpose of getting access to the property.
>
> (3) In this rule, property includes any land and any document or other chattel, whether in the control of a party or not.

[8] The plaintiffs do not object to the making of an order. The issue between the parties is as to the terms on which an order should be made.

[9] There was no difference between counsel as to the general principles which apply in relation to the making of testing and inspection orders. A helpful summary is found in the judgment of Associate Judge Sargisson in *Tyco Flow Pacific Pty Ltd v Grant,*[1] which I adopt:

---

[1] *Tyco Flow Pacific Pty Ltd v Grant* HC Auckland, CIV-2003-404-4121, 18 March 2005 at [41]-[43].

> [41] An order for inspection will be made only where it is for the purpose of enabling the proper determination of any matter in question in the proceeding. In other words, the inspection must be relevant to the issues in dispute in that proceeding: *MacDonald v Hoggard* (HC AK, M 242/93, 11 April 1994, Master Kennedy-Grant).
>
> [42] Once this threshold jurisdiction has been established, exercise of the discretion in favour of an order is likely: *Wheelans v Hayes* (1986) 3 NZCLC 99,789.
>
> [43] Any orders are to be made on appropriate terms. In situations where the orders sought are as far-reaching as Anton Piller orders, the Court may require the same undertakings: *Overseas Containers Ltd v Geo H Scales Ltd* (High Court, Wellington CP 395/86, 22 September 1986, McGechan J).

The orders sought by the Council

[10] By its application, the Council sought orders that it be permitted to:

(a) Inspect the plaintiffs' property at 54 Fryer Street, Queenstown;

(b) Carry out testing, including invasive testing and taking samples; and

(c) Collate data from monitoring devices internally and externally at the property.

[11] The Council proposes that the orders be made on the following terms:

(a) Copies of the testing and monitoring data be provided to counsel for all parties on a monthly basis for the duration of the testing and monitoring;

(b) The start and end date of the testing and monitoring is to be advised to the plaintiffs before such testing and monitoring commences;

(c) The Council will use its best endeavours to carry out all testing and monitoring promptly, safely and efficiently;

(d) The Council is responsible for the cost of setting up and operating a telephone link in unit 5A;

(e) All testing and monitoring materials and equipment are removed by the Council promptly at the completion of the testing;

(f) The Council will indemnify the plaintiffs for any damage to their property caused by the testing and/or monitoring for which the orders are sought.

[12] By their notice of opposition the plaintiffs record that they are prepared to agree to testing and monitoring orders but on the basis that different terms or protocols would apply. The defendants put forward nine terms or protocols, with some overlap between those and the Council's suggestions.

The timing of this application

[13] I will deal first with the timing of the application as it has some background relevance.

[14] The Court directed, at the first case management conference in September 2012, that any interlocutory application as to further particulars be filed by 7 November 2012. In their notice of opposition the plaintiffs have incorrectly referred to the 7 November 2012 date as the deadline for the filing of all interlocutory applications. As it was, at the next conference (27 November 2012), the only outstanding interlocutory matters discussed by counsel were a specific issue as to the extent of the plaintiffs' discovery of relevant financial information and the allocation of hearing directions for a particulars application which had been filed and was set down to be heard today (but has since been resolved by agreement). Accordingly no further directions were made as to filing of interlocutory applications. The close of pleadings date was specified as 75 working days before the trial date. The setting down date specified in the context of comprehensive trial directions, with a direction to the Registrar to allocate a 10-day trial on the first available date after 1 September 2013. Then in late-January 2013 the counsel filed this application.

[15] Ms Thorn, for the plaintiffs, has submitted that the trial of this proceeding ought to be able to proceed at its earliest available date. She submits that it ought

not to be affected by the Council's late application for inspection orders. She says that it is relevant in this context that one, if not two, (Apartments 5A and, to a lesser extent, 4A) of the apartments are at present contaminated and it is possible that further apartments will be contaminated by the date of the fixture as they continue to deteriorate. She says that the impact of fungi, spores and rot in those apartments means that they are uninhabitable. She submits that any further delay of a fixture would cause the owners further prejudice.

[16] The Deputy Registrar initially proposed to allocate a trial to commence at Invercargill on 16 September 2013 (10 days). Before this hearing, the Deputy Registrar advised that it appeared that the plaintiffs and other defendants would accept the 16 September 2013 date but counsel for the Council have indicated that they have difficulty in accepting that date because of existing commitments to other trials already allocated around that period. Mr Rice gave more detail of those commitments at the hearing. The Deputy Registrar had also identified a possible trial date commencing 25 November 2013. Following the hearing she has received advice from the plaintiffs and all defendants other than the Council that such date would be accepted by them (the plaintiff nonetheless expressing a strong preference for the earlier September date). The Council's position is that intended Senior Counsel (Mr Heaney QC) is already committed to another trial which runs through the late September/early October period.

Period of testing

Background

[17] The building on the property was constructed in 2004 and 2005. It was the subject matter of proceedings which were before the Weathertight Home Resolution Service and/or Tribunal from July 2010 for almost two years before this claim was filed (in June 2012). The application for testing which the Council filed in the Tribunal in May 2012 was substantially reproduced in this application filed in January 2013. The major difference between the two applications related to the period during which the Council's experts proposed testing.

The evidence

[18] The Council's notice of application did not identify a specific period of proposed testing. But in his affidavit in support, Dr Nicholas Powell, a forensic scientist, deposed that it is important the monitoring period includes both summer months and winter months and "the longer ... the better". In a further affidavit in support, Trevor Jones, a building surveyor, deposed that he agreed with the scope of testing suggested by Dr Powell. Mr Jones said that it would be necessary to test during changes in seasons, with an envisaged minimum eight-month period of testing and a preferable 12-month period of testing. In other words, if an order were to be made now and testing set up by mid-March, Mr Jones' preferred testing regime would run to early March 2014.

[19] By their notice of opposition, the plaintiffs propose a completion date for testing and monitoring of 31 July 2013. The evidence in opposition on this point is from Dr Roger Feasey, a building science and fire engineer, who gives detailed reasons for the July cut-off. He deposes:

> 17(c) I note that Mr Jones deposes at paragraph 15:
>
> > It will be necessary to test during changes in seasons and is envisaged that a minimum eight months period of testing is required and up to twelve months is preferred
>
> Based on the physics of heat transfer processes which result in condensation it is my opinion that testing after 31 July 2013 makes no sense and will not provide any additional useful data. This is for the following reasons:
>
> i. At the Queenstown latitude of 45 degrees, in mid-winter the peak solar elevation will be 21.5 degrees above the horizon. Under these circumstances even north facing buildings in flat locations will receive much reduced solar radiation compared with the remainder of the year.
>
> ii. Given the specific geometry of 54 Fryer Street and the large topographical obstruction (hill) to the west, significant solar gain can only occur when the sun is in the east or north, i.e. morning to early afternoon.
>
> iii. Given the height and solid construction of the balustrades around all the east facing decks, no significant direct solar radiation would be received from the sun during the first few hours after rising over the winter period.

A. For example, the sun at half its maximum elevation in mid winter would be 10.75 degrees above the horizon. Under these conditions a 1.0 metre high balustrade would cast a shadow over 5.2 metres long, which is greater than the depth of each deck.

iv. Given that the decks receive minimal solar radiation during periods of low solar elevation, the temperature of the exposed concrete surface within the ceiling void underneath the deck will primarily be a function of the outdoor air temperature conditions (assuming nominally constant internal temperature conditions are maintained within the occupied spaces).

v. Minimum solar radiation occurs on or about 21 June each year. The month either side of this will provide the conditions under which minimum solar radiation is received by exposed concrete decks, i.e. the months of June and July. Specifically:

A. The mean daily global radiation for May, June, July and August are 6.3, 4.7, 5.7 and 8.6 megajoules per square metre respectively (Solar Water Heating Guidebook 2006, Energy Efficiency & Conservation Authority).

B. The mean monthly sunshine hours in Queenstown for May, June, July and August are 91, 75, 86 and 120 hours respectively (N.Z. Met. S. Misc. Pub. 177).

C. The mean monthly temperatures in Queenstown for May, June, July, and August are 7.0, 4.3, 3.7 and 5.4 degrees Celsius respectively (N.Z. Met. S. Misc. Pub. 177).

D. The mean monthly average daily minimum temperatures for May, June, July and August are 2.7, 0.3, -0.4 and 0.9 degrees Celsius respectively (N.Z. Met. S. Misc. Pub. 177).

vi. The months of June and July are the two months of the year with the lowest average solar elevation, the lowest mean daily global radiation, the lowest average sunshine hours, the lowest average monthly temperatures and the lowest average minimum daily temperatures.

vii. If condensing conditions are not observed by the end of July, there is no reason to expect the potential drivers of condensing conditions to worsen in later months, as the solar elevation, the mean daily global radiation, the mean monthly and mean daily minimum temperatures will all increase above their values in June and July and consequentially will progressively reduce the likelihood of the occurrence of condensation.

[20] A supporting affidavit in opposition was also filed by Noel Casey, a building surveyor, who (having read Dr Feasey's affidavit) deposes that he agrees that if condensation has not been recorded by July, it is unlikely to occur. Mr Casey deposes that he does not see any basis for testing to extend beyond the end of July 2013.

[21] In an affidavit in reply, Dr Powell refers to the evidence in opposition and responds:

> 15. Testing from May through to July as proposed by Dr Feasey is in my view not sufficient. Weather factors are only one part of the equation. Factors related to occupancy of the units are just as important. The use and type of indoors heating is an important factor and this is likely to change as the seasons change from autumn to winter to spring.
>
> 16. It is important to note that the units are subjected to firstly external moisture and secondly internal moisture from human occupancy. In order to gauge the impact of external moisture as opposed to interior moisture due to human occupancy through the colder winter months, when the difference in external and internal temperature is likely to be at its highest, as well as during the change in seasons when heat sources are likely to change, it is crucial for comprehensive data to be obtained over a 6-8 month period, as a minimum.
>
> 17. I would recommend a testing period from late March/early April 2013 through to the end of October 2013.

[22] I observe, in relation to Dr Powell's reference to a six-to-eight month period, that a six-month period from late-March would end in late-September and that an eight-month period would end in late-November. Mr Jones, in a second affidavit, says that he agrees with the opinion of Dr Powell that the period of testing should span from late-March/early-April 2013 to the end of October 2013 for the reasons set out in Dr Powell's affidavit.

[23] Thus, the Council now seeks a right of inspection and testing lasting to 31 October 2013 whereas the plaintiffs seek a cut-off date of 31 July 2013.

[24] The difference in suggested timing is driven by the views of Dr Powell and Mr Jones as to the need for testing as the seasons change (from autumn to winter to spring) and as the difference in external and internal temperatures peaks in the coldest winter months and then lessens.

The admissibility of the evidence

[25] Ms Thorn formally objected to those parts of the evidence of Dr Powell and Mr Jones which deal with the allegations of condensation arising from engineering or mechanical causes (rather than water intruding from an exterior source). A particular emphasis of the objection was upon evidence as to the period reasonably needed for testing.

[26] Ms Thorn noted the evidence of the plaintiffs' expert, Dr Feasey. Dr Feasey, having stated his qualifications as an expert, deposed that the proposed testing for condensation must be guided by the physics of the thermo-dynamics and heat transfer processes which are occurring, matters within the expertise of a mechanical engineer who specialises in heat transfer and fluid mechanics. Dr Feasey deposed that most professional engineers do not have to deal with matters of thermo-dynamics or heat transfer and that he was not aware of other experts carrying out any modelling of the likelihood of condensation. Dr Feasey deposes that he has carried out such modelling. In short, Dr Feasey, while deposing to his own qualifications, was challenging both the relevant expertise and the conclusions reached by the Council's witnesses.

[27] I regard the key evidence which had been adduced by the Council in this regard as that of Dr Powell. Dr Powell's evidence had not contained an express statement as required by Item 3(c) of Schedule 4 of the High Court Rules to the effect that the extent of his evidence is within his area of expertise.

[28] I indicated to counsel that I regarded the fundamental issue in this aspect of the application (the testing of property) as too important to be determined upon the basis that the evidence of either party was frozen at the date of the hearing of the interlocutory applications. I considered it appropriate that the parties have the opportunity to have their deponents specifically deal with any issues that go to admissibility. I regarded the issue of the respective expertise of the various experts as a matter on which the experts were perfectly able to confer from their own depth of understanding of the relevant areas. It appeared to me to be an appropriate case to

require the experts (Dr Powell and Dr Feasey) to confer in terms of Item 6(a) of Schedule 4 of the High Court Rules.

[29] Accordingly, I issued a Minute to counsel after the hearing in which I directed that counsel arrange for Dr Powell and Dr Feasey to confer as to any degree of recognition of expertise and to report back by 8 March 2013. I gave leave for the filing of additional evidence as to expertise. I recorded that s 25 Evidence Act 2006 reinforces the fact that the Court may rely only upon the general body of knowledge which makes up the expertise of an expert. Those considerations apply as equally to evidence at an interlocutory hearing as at a trial.

[30] Dr Feasey and Dr Powell subsequently met and conferred as directed. It is reported to me that they were unable to reach a common position on Dr Powell's expertise. In accordance with my directions, Dr Powell has provided an additional affidavit in which he confirms in accordance with Item 3(c) of Schedule 4 High Court Rules that the evidence he has given in his earlier affidavits is within his area of expertise. He provides some detail including activity in paleoclimate research which requires an understanding of climate processes and atmospheric chemistry. He adds that the science which governs atmospheric and climatic processes also underpins processes controlling condensation inside buildings.

[31] There is thus a difference between the parties as to the measure of Dr Powell's expertise.

[32] The Council has, in addition to arranging the conference between experts, taken the additional step of retaining an additional expert, Robert John Nelligan, a consulting engineer who specialises in mechanical design for building services. Dr Powell has exhibited to his new affidavit a letter from Mr Nelligan dated 7 March 2013. The short point is that Mr Nelligan agrees with the testing program proposed by Dr Powell, both in terms of scope and duration. Dr Powell concludes his new affidavit with the statement:

> ... I remain of the view that testing until 31 October 2013 is essential.

[33] In the evidence relied on by the Council at the hearing. Dr Powell's opinions as to testing were supported by the evidence of Mr Jones. Mr Jones has similarly filed an additional affidavit in which he has also confirmed that the evidence which he has given in his previous affidavits is within his area of expertise. He refers to experience since 2002 as a building surveyor/expert witness assisting in the technical analysis of building defects. He deposes that that work is required in understanding of movement and accumulation of moisture into and within buildings which is within the reach of his particular area of specialist expertise.

[34] The Court accordingly now has the required statements from the Council's two experts to the effect that the evidence they have given is within their areas of expertise.

[35] Ms Thorn has filed a memorandum, in which responsibly she does not seek to challenge those recent statements from Dr Powell and Mr Jones respectively. She does however challenge the content of Dr Powell's affidavit to the extent that it refers to the report of Mr Nelligan and also to Dr Powell's exhibiting of Mr Nelligan's report. Ms Thorn submits, correctly, that Mr Nelligan's opinion is not before the Court in admissible form. I accept that submission.

Discussion

[36] The need for testing is established. There remains dispute as to the period required for the testing to be truly meaningful or informative. The Council's evidence suggests in some aspects (particularly Mr Jones's second affidavit and Dr Powell's new affidavit) that testing to the end of October 2013 is essential. On the other hand, Dr Powell himself had earlier referred to a required testing period of six to eight months, with six months meaning that the earlier ending would be in late September whereas the later ending would be in late-November. It appears that he has chosen the middle date. The evidence for the plaintiffs, through Dr Feasey, is that testing to the end of July 2013 would deliver the relevant information.

[37] The Court in this interlocutory context cannot resolve the differences between the experts and, to some extent, within the evidence of Dr Powell.

[38] The Court is left to balance the reasonable and predictable needs of evidence-gathering with the reasonable expectations of the parties in relation to the conclusion of their litigation.

[39] Having regard to the Deputy Registrar's confirmation that a trial commencing on 27 November 2013 is available, in my judgment the fair needs of all parties in relation to preparation of their evidence for trial and in the commencement of trial can be accommodated by selecting a November date. Approximately two months before that date (end-September), Dr Powell's lower estimate of six months for testing will come to an end. If the Council's experts at that point consider an additional month of testing is called for, there is as a result of additional information flowing from October testing sufficient time remaining with the ability to update briefs of evidence if required.

[40] To reinforce the submission that the Council ought not to be allowed to effectively cause delay by obtaining a lengthy period of inspection, Ms Thorn took me to the history of an earlier proceeding in the Weathertight Homes Tribunal. The subject matter of this litigation was first taken to the Tribunal. In the Tribunal, the Council filed a testing application in March 2011. The proceeding then went through disclosure and interlocutory stages. After the Tribunal allocated a hearing date of 13 August 2012, the Council applied for an inspection order on almost identical terms to the testing application. The inspection order application was dated 25 May 2012. It was at that point that the plaintiffs (as claimants in the Tribunal) decided to move their claim from the Tribunal to the High Court. While the matter was still before the Tribunal, some detailed consideration occurred of what would be appropriate conditions or protocols on any testing order and Ms Thorn filed for the claimants on 7 June 2012 a proposal for protocols of considerable detail.

[41] The Council's May 2012 application to the Tribunal for a testing order was upon the basis that the Council would be granted immediate access to the units to carry out the testing and monitoring. Ms Harpur stated in the application that the additional testing and monitoring would not impact on the hearing date set, that is to say 13 August 2012 (a date at that point slightly under three months away). At that point, the Council anticipated testing of three to five weeks.

The conditions to attach to the order

[42] I will discuss those specific conditions to which counsel for the plaintiffs has addressed submission in opposition.

Provision of information

[43] The Council seeks an order that copies of the testing and monitoring data (by implication being the testing and monitoring data obtained from the ordered tests and monitoring) be provided to counsel for all parties on a monthly basis for the duration of the testing and monitoring.

[44] The plaintiffs propose that copies of all testing and monitoring results and all information relating to methodology be provided to counsel for all parties on a fortnightly basis for the duration of the testing and monitoring.

[45] The Court is accordingly required to consider two matters, namely the subject matter of disclosure and the timing of disclosure.

[46] The only difference as to subject matter lay in the plaintiffs's suggestion that copies of all information relating to methodology be provided along with testing and monitoring results. In her written submissions, Ms Rice raised a query as to what information would be encompassed by "methodology".

[47] Turning to the time at which information was to be provided the deponent, Mr Jones, responded to the suggestion of fortnightly reporting. He deposed that it would increase the cost to the Council which is already substantial. He added that for a testing period lasting several months collating and distributing the data once a month is, in his view, appropriate, when considering that the frequency of the testing will be set for specific intervals to record readings on a daily basis. The information will be held in the monitoring units. It is intended to draw down that data from the monitoring units by remote activation but, if that is not feasible, it will be necessary to visit the building.

[48] The appropriate direction is that the Council provide the required information promptly upon its collation into table form and/or reports (whether written or electronic) and in any event no later than at calendar monthly intervals commencing one month from the date of commencement of testing. The purpose of the provision of reports to other parties is to ensure that they have promptly what the Council has, and can prepare on an even footing. That includes an explanation of methods, processes and formulae used or followed. It is not intended to provide the other parties with a professional service which goes beyond that which the Council intended for itself. It is not appropriate to impose upon the Council an additional financial burden other than to promptly provide such tables and reports as are prepared.

Nomination of units for testing

[49] The Council wishes to carry out testing on five units:

(a) One unit on the top floor (Unit 6A or 6B)

(b) One unit low down: Unit 1 as that unit is on both the north and south side and occupies one floor level, whereas the other floors have two units

(c) One unit on the south-side: either Unit 2A, 3A or 4A

(d) One unit on the north side: either Unit 2B, 3B, 4B or 5B

(e) An unoccupied unit: Unit 5A.

[50] The Council's proposal draws on the evidence of Dr Powell in a second affidavit. In that affidavit he was responding to the proposal by the plaintiffs, in their notice of opposition, that the Court should define the apartments for testing as Units 1A, 2A, 3A, 4A, 5A and 6A on the basis that they would provide a better representative or fair sample, with testing required of both occupied and unoccupied apartments. Dr Powell deposes that the units which he (and the Council) identifies

are more representative of the different types of units at the complex than those proposed by the plaintiffs. He accepts that it is useful to test both occupied and unoccupied units, so he has included the unoccupied Unit 5A.

[51] Ms Thorn did not refer me to any case in which the Court has effectively overridden the opinion of the applicant's expert and required an applicant to test different units. One can envisage such an order if, other things being equal, a different identification of subject matter would cause less interference or indeed damage to an occupant or owner. There may also be other specific situations where the applicant is required to depart from its preferred focus. On the evidence, this is not such a case. The Council has taken expert advice and is, in the identification of the units to be tested, acting on that advice. It is not appropriate in these circumstances to impose upon the Council an alteration of preferred units for testing. Nothing in the orders to be made will cut across the right of the plaintiffs to have testing carried out themselves or indeed to confer with the Council's solicitors and experts as to additional testing at the expense of the plaintiffs.

Costs

[52] Understandably, having regard to the nature of the application, the Council did not seek an order for costs or disbursements (including the fees of experts) when making its application.

[53] By the conditions which the plaintiffs ask to be attached to any order made, the plaintiffs seek the actual fees and disbursements of the plaintiffs' experts (named as including Dr Feasey and Mr Casey) in attending to the present application and the application made in the Tribunal. (Ms Thorn has made it clear that the costs in question would be confined to dealing with the Court applications and would not relate to testing and monitoring results or data).

[54] It is not jurisdictionally open to this Court to consider the costs incurred by experts in relation to proceedings in the Tribunal even where the subject matter is the same or very similar.

[55] That leaves the attendances of the plaintiffs' experts in relation to this application itself. I do not view it as fair and reasonable that the costs in question be fixed now and ordered to be paid by the Council. If the plaintiffs ultimately succeed in this litigation, it is likely that they will obtain a costs order against unsuccessful defendants to the full extent of the plaintiffs' experts' fees. While their involvement in the present application is as experts, the reality is that an aspect of their contribution has been to protect the interests of the plaintiffs by seeking to reshape the orders to what the plaintiffs' experts, would prefer as against what the Council seeks. Costs remain in the Court's discretion. This application of the Council was necessary if the Council was to be able to lead evidence on testing at trial. The appropriate course is that the costs of the experts be determined upon the outcome of trial.

Outcome

[56] The Council, as the plaintiff accepted, is entitled to an order under r 9.34 of the nature it seeks. The conditions I attach to that order follow from the previous conclusions.

Orders

[57] I order:

(a) The plaintiffs are to permit the first defendant through its retained experts and tradesmen, to inspect and carry out the observation and sampling of five units of the plaintiffs' property at 54 Fryer Street, Queenstown ("the property") being:

(i) One unit on the top floor (Unit 6A or 6B)

(ii) Unit 1

(iii) One unit on the south-side (either Unit 2A, 3A or 4A)

(iv) One unit on the north-side (either Unit 2B, 3B, 4B or 5B)

(v) Unit 5A.

(b) The testing may include invasive testing and taking of samples;

(c) The first defendant's experts may cause monitoring devices to be placed both internally and externally at the property;

(d) The first defendant's experts may collect and collate data from the monitoring devices during the period of inspection and testing;

(e) The above rights of inspection, and related attendances are subject to the following conditions:

(i) The first defendant's experts are to have access to the property for the purposes of the testing and monitoring from Monday, ***25 March 2013***;

(ii) The first defendant is to cause its experts to have finished all testing and monitoring and to have removed all introduced material no later than ***31 October 2013***;

(iii) The first defendant will not be entitled to dates of testing and inspection outside those dates but is to give the plaintiffs' solicitors no less than ***48 hours notice*** if either the start-late date is to be later or the end-date is to be earlier;

(iv) The first defendant shall use its best endeavours to carry out testing and monitoring promptly, safely and efficiently;

(v) The first defendant may set up and operate a telephone line in Unit 5A and is to be responsible for all costs associated with such telephone line;

(vi) The first defendant shall indemnify the plaintiffs for any damage to the property caused by the testing and/or monitoring carried out pursuant to this order;

(vii) The first defendant is to provide copies of all testing and monitoring data to each solicitor's firm representing other parties at intervals of no less than one calendar month commencing ***30 April 2013***;

(viii) At the time of providing the April 2013 testing and monitoring data, the first defendant shall provide a written report from its experts explaining the methodology associated with the testing and monitoring of the property in such terms as will reasonably explain the methodologies used to an informed reader of the reports.

Further and better particulars

The jurisdiction

[58] High Court Rule 5.21(3) authorises the Court, where a pleading is defective or does not give particulars properly required by a notice, to order a more explicit pleading to be filed.

[59] I adopt these as principles applicable to the consideration of an application for further and better particulars:

(a) The primary purpose of pleadings is to define the issues and thereby to inform the parties in advance of the case they have to meet and of its parameters and so enable them to take steps to deal with it.[2]

---

[2] This statement of principle is derived from the frequently applied formulation of Lord Edmund-Davies in *Farrell v Secretary of State for Defence* [1980] 1 All ER 166 (HL) at 173.

(b) The statement of claim should state the claim in each case so that the Court has sufficient clarity and detail to understand the issues it has to rule on, and the defendant knows the case which is to be met and is able to prepare its briefs against the plaintiff's pleadings.

(c) Specifically required by r 5.26(b) are such particulars "... of time, place, amounts, names of persons, nature and dates of instruments, and other circumstances as may suffice to inform the Court and the party or parties against whom relief is sought of the plaintiff's cause of action".

(d) The pleading must set out the facts or circumstances relied upon as giving rise to each cause of action alleged and the relief claimed as a consequence.

(e) The nature and level of particulars will depend on the facts of the individual case.

(f) The distinction between particulars and interrogatories is important – particulars are matters of pleading, designed to make plain to the opposite party the case to be raised whereas interrogatories are sworn statements of fact, procured by the opposite party to assist that party in proving his or her case.

(g) There is not a bright-line distinction between facts (to be pleaded) and evidence (for trial) – the two merge into each other. But the statement of claim is not a full statement of evidence – rather it is an abbreviated statement of basic facts.

(h) In more complex commercial litigation, detailed particulars may be required. But this is to be balanced against the possibility that over-pleading may obscure, rather than clarify the issues.[3]

---

[3] *BNZ Investments Ltd v Commissioner of Inland Revenue* (2008) 23 NZTC 21,821 (HC).

[60] For these principles I draw heavily on the Court of Appeal judgment delivered by McGechan J in *Price Waterhouse v Fortex Group Ltd.*[4] His Honour referred to the role of pleadings in a case of any complexity, if not in all cases, as "an essential road map for the Court and the parties".[5]

[61] Ms Thorn, for the plaintiffs, sought to draw on certain passages in the judgment of the Court of Appeal in *Fortex* – for instance, that "the role of pleading is put as defining fact, not evidence" and "there is no need to plead a specific dollar connection to a specific breach". But the passages cited by Ms Thorn do not form a part of the Court's statement of principles – those principles come at pp 18-19 of the judgment. Instead, the passages relied on by Ms Thorn represent extracts quoted by Fortex's counsel in support of his submissions as to the requested particulars being beyond recognised limits.[6] They were not statements adopted by the Court of Appeal.[7]

[62] A final point is in relation to the Court's approach to particularisation, and its relationship to evidence. It has been judicially recognised that the modern arrangements for sequential exchange of written briefs of evidence does not alter the need for, or the pleading of particulars. That said, the Court when considering particulars will be making a decision which involves matters of degree and judgement. Where the parties have exchanged (even on a without prejudice basis) their detailed experts' reports, the Court may legitimately take into account the availability of such detail to the other side when determining the extent of detail to order by way of further particulars.

---

4 *Price Waterhouse v Fortex Group Ltd* CA 179/98, 30 November 1998 at 17-19 per McGechan J.

5 At 17.

6 At 13 (derived by Fortex's counsel from earlier judgments of the Court of Appeal in *Sew Hoy & Sons Ltd (in rec. and liq.) v Coopers Lybrand* [1996], 1 NZLR 392), relied upon by the Master in *Fortex* at first instance when refusing to order particulars, a decision overturned by the Court of Appeal in *Fortex.*

7 At 18-19, the principles as adopted in *Fortex* are to be found specifically identified by McGechan J.

The orders sought by the Council

[63] The Council served a notice requiring further and better particulars. The plaintiffs largely refused to comply with the notice. The Council seeks the same particulars as specified in the notice.

[64] Attached to this judgment are:

- Schedule 1 – the plaintiffs' statement of claim (26 June 2012)
- Schedule 2 – the Council's Notice (20 August 2012)
- Schedule 3 – the plaintiffs' answers (11 October 2012)
- Schedule 4 – the Council's application (7 November 2012) (without notice of 20 August 2012 – already in Schedule 2)
- Schedule 5 – the plaintiffs' notice of opposition (19 November 2012).

The submissions

[65] Ms Rice explained the Council's request for further particulars as falling into four broad categories namely: defects, breach, damage and quantum.

[66] Ms Rice then identified by reference to the current statement of claim, the paragraphs in the plaintiffs' pleadings which deal with the different categories:

- defects are dealt with in [22]-[23], and are the subject of a more detailed schedule of defects in Schedule 3 to the statement of claim;
- damage is dealt with at [24];
- quantum or loss is dealt with at [25], with a prayer for general damages at [26];

- breach of the first defendant's duty of care is pleaded at [29] in light of the duty of care as pleaded at [27] and [28].

[67] The statement of claim by reference incorporates, in addition to those pleadings and schedules, paragraph 15 of the report of the Weathertight Homes Resolution Service Assessor dated 8 July 2008. That report carried conclusions as to the following questions:

- Does the Multi-unit Complex leak?
- Where and why does it leak?
- What damage has been caused to the Multi-unit Complex?
- Where and why might the Multi-unit Complex leak in the future?
- What damage might be caused by a leak in the future?
- What remedial work is required to [specified units and other property]?

[68] The report contained a summary of costs broken down to current damage and future likely damage and an estimated total cost of repairs (including GST) of $779,457.

[69] Ms Rice then took me to differences between the plaintiffs' claim (including as to amount) as it had previously stood in the claim before the Tribunal, and as it now is represented in the statement of claim. First, although the plaintiffs adopt by reference the Assessor's conclusions (which involve the $779,457 assessment of damage) the particulars given of rectification in paragraph 25 of the statement of claim indicate an estimated cost of $820,481. The measure of increase is not particularised or otherwise explained.

[70] Secondly, the statement of claim in this Court, through paragraph 22, adds to the allegations as to design (raising weathertightness issues) which were before the Tribunal. The plaintiffs now allege that there were also various construction defects

and/or mechanical engineering defects. Paragraph 25 of the statement of claim identifies the costs of rectification of structural issues as estimated at $300,000 (to be fully particularised once further details are available and prior to trial), and the cost of rectification of mechanical engineering and condensation issues as $500,000. The statement of claim makes no reference to that latter head of loss being further particularised and detailed prior to trial, but that appears to be implicit.

[71] One thrust of Ms Rice's submissions was that it would be inappropriate for this Court to assume that a full understanding of the detailed nature of the plaintiffs' claim is to be found in the developed documentation (including the Assessor's report) that was previously in place when the proceeding before the Tribunal was discontinued. The plaintiffs' claim since that time has changed its shape both in terms of the type and range of defects alleged and the amount of the claim in its various components.

[72] Ms Rice noted the absence of the often-agreed arrangement whereby plaintiffs in particular agree to the early provision of their expert reports on a without prejudice basis, so as to assist the defendants in understanding the specifics of the plaintiffs' claim. Ms Rice submitted that the absence of that arrangement in this case makes it imperative the Court not regard the future exchange of briefs of evidence as a panacea for the plaintiffs' failure to adequately particularise their claim. Ms Rice noted the importance of relevant experts in leaky building cases, their relative scarcity and commitment, and the potential for their availability to be limited at the point preparation for trial and preparation of evidence is taking place. This underscores, in her submission, the importance of early particularised pleadings as a proper signpost for the defendants' experts.

[73] Ms Rice noted the important role played by alternative dispute resolution (and judicial settlement conferences) in assisting the parties to resolve their litigation short of trial. Those resolution processes are integral to the system of justice as it now stands. Ms Rice submitted that appropriate particulars are therefore not important simply for the "strict Court process" but also for the broader processes which bring about resolution in litigation. Ms Rice referred to the "front-ended" modern approach to case management, as reinforced by the High Court's case

management note in relation to leaky building claims in the High Court at Auckland. Under the heading "issues" that note observes:

> Identifying the essential issues of fact and law that require resolution at trial is important if the resolution process is to be efficiently conducted. A broad-brush approach to this is not satisfactory. There needs to be enough detail so that, ultimately, the briefing of witnesses of fact is directed specifically to the problem areas and, in the case of experts, they are directed to matters which are in their field of expertise …[8]

[74] Ms Rice submitted that these observations are as relevant to the requirements for particularisation of pleadings as they are to the first case management conferences and issues conferences provided for under the High Court Rules with effect from February 2013.[9]

[75] Ms Rice then discussed the specific particulars requested in the notice of application. I will return to those shortly.

[76] Ms Thorn commenced her submissions in relation to particulars by referring to an approach which the plaintiffs were prepared to adopt in relation to providing additional, tabulated information. She proposes an amended Schedule 3 to the statement of claim which would provide particulars of the standard or statutory requirement allegedly breached – three pages from a sample provided by Ms Thorn are attached as Schedule 6 to this judgment and illustrate the manner in which the alleged breach of standard would be identified.

[77] In addition, Ms Thorn proposed in her oral submissions a further three columns (that is supplementary to the amended defects Schedule) which would have as three headings:

Construction Defects	Design Defects	Machinery Defects

[78] Ms Thorn added that most defects would qualify as being both design and construction defects, with only a "handful" in the machinery defects column. The

---

8 *The High Court Leaky Building List in Auckland* in The New Zealand High Court Management Regime Seminar (paper presented to New Zealand Law Society, Feb-March 2013) Authors Winkelmann, Asher, Fogarty and Miller JJ at 21.

9 See High Court Rules 7.3 and 7.5.

tabulated information, so completed, would then fit in with the categories identified in the defects allegation in paragraph 22 of the statement of claim and the quantum allegations in the three categories in paragraph 25(a) of the statement of claim.

[79] Ms Thorn submitted that once the request for particulars moved beyond those which would be covered in the newly tabulated approach, they were moving beyond the requirement to permit a defendant to understand the general nature of the case against it. The Court, she submitted, should recognise that although some requests on their face appear to be reasonable, compliance with all the requests would be hugely onerous and highly expensive for the plaintiffs.

[80] It was at this point of her submissions that Ms Thorn referred to passages from the judgment of the Court of Appeal in the *Fortex* case which I have previously discussed[10] – those passages in the judgment in fact recite, as I have said, the submissions for the plaintiff in *Fortex* and have to be treated with care. The Court of Appeal's actual statement in *Fortex* of the principles relating to particularity is that contained at pp 18-19 of the judgment.

[81] Ms Thorn submitted that caution is required in relation to the extent of any order as to particularisation. By reference to the judgment of Associate Judge Bell in *Helicopter Finance Ltd v Tokoeka Properties Ltd,*[11] Ms Thorn identified the particular needs of cases involving leaky building litigation (and other negligence cases involving allegations of negligent inspection certification) where it is the defendant which will know how it carried out its task, something which the plaintiff cannot know exactly.[12] As Associate Judge Bell indicated in such cases, it is futile to require a plaintiff to specify in what way a defendant allegedly carried out its task in breach of the duty of care. What the plaintiff can do is to prove the defects and the required standard of care, and to then show that the defects would not have occurred if the defendant had carried out its work to the required standard.[13] Associate Judge Bell distinguished the issues on which a plaintiff is able to call direct evidence as to a

---

10 Above at [61].
11 *Helicopter Finance Ltd v Tokoeka Properties Ltd* [2012] NZHC 686.
12 At [22].
13 At [23].

particular matter (such as the way in which a defendant carries out its inspections) from other issues, such as the identification of defects and the costs to be allocated for the remedy of particular defects.[14]

[82] Through these submissions, Ms Thorn accepted that there was a need for a proper focus on defects, in particular, but suggested that many of the other particulars sought were excessive and should be refused.

The particulars requested – discussion

Paragraph 22 (first issue) – request 1

[83] The Council seeks an order that the plaintiffs identify into which category or categories (design, construction or mechanical engineering) each defect in the statement of claim (Schedule 3) and in paragraph 15 of the Weathertight Homes Resolution Service report belongs.

[84] The plaintiffs no longer oppose this order. Ms Thorn, in her submissions, addressed the specific way in which the plaintiffs have it in mind to provide such detail.[15] The Court's order will require such particulars to be provided.

Paragraph 22 (second issue) – request 2

[85] The Council seeks an order that the plaintiffs identify in relation to design defects the plan(s) and/or the paragraph(s) from the specification which contains the defective detail.

[86] In request 13, the Council makes a parallel application in relation to paragraph 29(a) of the claim, seeking particulars of the alleged insufficiencies in the plan(s) and specification(s), and how each alleged insufficiency was contrary to the Building Code. In request 17, the Council has a further, similar application in

---

[14] At [21] and [26].
[15] Above at [54].

relation to paragraph 29(b)(v) of the claim, requesting particulars of how and when the design did not comply with the Building Code e)(3); g(4) and h(1).

[87] In response to request 2 (to state where the defect was in the plans or specifications) Ms Thorn submitted that the plaintiff should not be required to plead "where" as the plaintiffs's case is that the whole of the buildings do not comply. She submits that the level of the detail sought goes beyond what the Council needs to understand the case it has to meet.

[88] Ms Thorn's submission will be correct if the plaintiffs's only case is that the whole of the buildings do not comply. On the other hand, if it is to be part of the plaintiffs's case on which they adduce evidence from experts that there are particularly defective parts of the building, then the defendants do need to know where those particular defects are said to be in order to meet the plaintiffs' case. Ms Thorn's reference to how many documents are involved (27 plans that were approved by the Council and 17 pages of specification) is not a justification for avoiding particularisation. If particular defects are to be relied upon by the plaintiffs at trial, it is appropriate that they be identified now and not through the exchange and giving of evidence. The very fact that there are considered by the plaintiffs to be many pages of documentation may in fact be seen as an argument in favour of particularisation - other parties should not be impeded in their endeavour to understand the particular case they have to meet by the sheer volume of documentation they have to digest.

[89] None of this cuts across the plaintiffs's duty, if they have expert evidence to support it, to assert that an aspect of defective design arises in relation to the design of the buildings as a whole. But, if there is to be allegation that there are also particular defects, then particulars of those ought to be given. That will be directed in the order I make.

Paragraph 23(b) – request 3

[90] The Council seeks an order that the plaintiffs, in relation to each of the defects, give particulars of how the construction is said to be non-compliant with the

Building Code clauses stated in various sub-paragraphs of paragraph 23 of the statement of claim.

[91] In her submissions, Ms Rice illustrated the plaintiffs' concern and suggested a solution by reference to particular items in Schedule 3 of the claim. She referred for example to Item 8 in Schedule 3 (referring to an exterior cladding system defect said to be that the joint details of the sheet is a butt-joint with sealant without backing to the balustrades allowing moisture penetration into the timber at the joint line), Ms Rice asked rhetorically whether that is a breach of the Code, a breach of technical literature and/or a breach of the workmanship standards expected?

[92] Ms Thorn, for the plaintiffs, had responded to this request (and others) with her proposed amendment to Schedule 3 of the statement of claim, as illustrated by the three pages of the sample which are attached as Schedule 6 to this judgment. When completed, that amended Schedule would identify which standard or standards are alleged to have been breached.

[93] This, in my judgment, constitutes an appropriate provision of particulars and meets the reasonable needs of the particular examples given by Ms Rice in her submissions. It arguably does not go so far as explaining in terms of the express question in request 3 – "how the construction is said to be non-compliant" - in that it does not spell out precisely how the departure from the standard has occurred. To the extent it is possible to categorise some matters as essentially matters of evidence rather than pleading, I view any implicit request for anything beyond the identification of a standard breached as going into matters which can properly be left for evidence. The identification of the particular standard breached is sufficient to inform the defendants of the case they have to meet.

Paragraph 23(c) – request 4

[94] The Council seeks an order that the plaintiffs identify how each of the alleged defects does not comply with Provisions of the New Zealand Building Code Acceptable Solutions as pleaded in paragraph 23 of the statement of claim.

[95] In her submissions in relation to this request, Ms Rice used the same examples as she had used in relation to request 3.

[96] Ms Thorn's submissions in response were accordingly encompassed by her response to request 3 and referred to her proposed amended Schedule 3.

[97] For the same reasons as discussed in relation to request 3, I find the specific identification of three provisions in the New Zealand Building Code acceptable solutions as standards which have been breached as sufficient particularisation.

Paragraph 23(c)(iv) – request 5

[98] The Council seeks an order that the plaintiffs give particulars of the acceptable standards of good trade practice and workmanship at the time of construction applicable to each of those alleged defects said to represent construction contrary to the specified acceptable standards.

[99] Again, the submissions on this request paralleled those in relation to requests 3 and 4.

[100] I adopt my previous conclusion in relation to breaches to 3 and 4 that identification of the breached standard in the manner proposed in Ms Thorn's amended Schedule 3 will provide sufficient particularisation. The "how" aspect of the request, not covered by Ms Rice's two particular examples, is in this case appropriately a matter for evidence.

Paragraph 23(c)(v) – request 6

[101] The Council seeks an order that the plaintiffs give particulars of the various items of technical literature at the time of construction applicable to each of the defects and how those alleged defects are said to be contrary to the specified technical literature.

[102] Once again, the previous discussion in relation to requests 2, 3, 4 and 5 applies. Ms Thorn's proposed amendments to Schedule 3 are to appropriately identify the various technical literatures. Beyond that, it is not appropriate to order further particulars in relation to the "how" question.

Paragraph 24 – request 7

[103] This particular goes to the question of damage.

[104] The Council seeks an order that the plaintiffs give particulars of how and where each of the alleged defects is said to have resulted in water leaking into concealed framing causing severe decay of the timber framing and/or bottom plates and/or establishment of fungal infection and the location(s) of such severe decay and/or fungal infection.

[105] There is a parallel in the consideration of this request with that of request 2 (relating to design defects).

[106] For the Council, Ms Rice refers to the previous request by the Council that the owners specify how each defect is said to have caused physical damage to the building. She submits that, as the pleadings stand, it is not clear whether the plaintiffs's case is that the defects have caused physical damage (and, if so, to what extent). Ms Rice illustrates the point by referring to an allegation of "inadequate window flashing". Even if such inadequacy is proved, it may well not be relevant to damage if it has not in the past and will not in the future allow moisture into the building and is therefore performing in accordance with the weather tightness aspects of the Code.

[107] As with request 2, Ms Thorn's response was partly by reference to the proposition that the defects have comprehensively caused damage and partly by reference to the sheer volume of material relating to damage. In particular, Ms Thorn submitted that it was not possible for the plaintiffs to pinpoint each and every location where the defects have caused water to enter the concealed framing. She also submitted that it is not possible to specify which particular defect caused the

pleaded damage. She asserts that in many or most locations there are multiple causes. She notes that in terms of the extent of damage, it is the plaintiffs'case that all of the frame has decayed and that the apartments as a whole are contaminated, with Unit 5A being contaminated to such an extent that nobody has lived in it for approximately two years.

[108] Ms Thorn observed that the Council's experts may have carried out one dozen inspections to the apartments over the last two years. She submits that the request is more properly the subject of expert evidence to be exchanged prior to trial.

[109] For similar reasons to those I have given in relation to request 2, I do not consider that Ms Thorn's submissions cut across the plaintiffs' duty, if their expert evidence is to identify particular defects causing particular damage, to plead those particulars. On the other hand, if the plaintiffs' expert evidence is to be that a group of defects or all the defects contributed to, or may have contributed to the damage, then the plaintiffs are equally able to plead that assertion. In a sense, it is a matter of how particularly the plaintiffs' experts have been able to identify the cause of defects.

[110] The order I make in relation to this request will accordingly be parallel in relation to that request 2.

Paragraph 25(a)(ii) – request 8

[111] The plaintiffs, at paragraph 25, quantify their alleged losses.

[112] Under paragraph 25(a)(ii) there is reference to rectification of structural, tanking and membrane issues (the second of those being the subject of a typographical error in the claim as present stated). The cost of those three sets of issues is pleaded to be "currently estimated to be $300,000", but to be further particularised once further details are available prior to trial.

[113] By this request, the Council seeks particulars of the structural, tanking and membrane issues respectively.

[114] I will discuss this request in conjunction with the next.

Paragraph 25(a)(ii) (second issue) – request 9

[115] The Council seeks particulars of the proposed scope of rectification of the structural, tanking and membrane issues respectively.

[116] Ms Rice identifies the particular concern of the Council as first defendant in this way:

> The Council may concede at or before trial that it is responsible for the existence of some defects but not others. Unless the Council is aware of the alleged quantification of the claim which arises specifically in relation to a particular defect the Council is unable to adequately identify the quantum of the claim that it might accept and that which it may deny.

Furthermore, submits Ms Rice, the apportionment of rectification costs between the different defects may impact upon matters such as an affirmative defence of betterment.

[117] Ms Thorn's submissions did not substantially take issue with the potential relevance and significance of the apportionment of costs. There were again two themes to her response. The first was that the three sets of problems are inter-related and that it is "not possible to separate costs" as between those three problems. The second theme of Ms Thorn's submissions was that provision of the requested detail is premature. She said, in relation to the scope of works, that such information is still to be provided by the plaintiffs's experts (including Dr Feasey and Mr Casey). She said that the experts have already provided some advice as to the general nature of the extent of rectification required, but not the precise scope or nature of how the rectification will be carried out. She says that the plaintiffs are not in a position to provide particulars of the specifics, even were the Court to order them.

[118] There is the likelihood, as has been the case with two earlier requests, that the plaintiffs's case may well involve the proposition that some rectification costs are to be attributed to all three problems. The plaintiffs are entitled to plead that in relation to the rectification costs in question. But where the plaintiffs's evidence is to be that

particular costs arise from only one or two of the three issues, then such particulars can and should be provided. It is likely to be the case that the scoping information and evidence of the plaintiffs will continue to evolve as evidence is exchanged. But the plaintiffs are coming to the point nine months after this litigation was commenced, and a full two years after their statement of claim was filed in the Tribunal, where they must be able to state at least the approximate quantification of rectification costs in relation to particular work. After all, they seek a trial and they have undertaken in their pleading that these rectification costs will be further particularised once further details are available prior to trial. This is the time, prior to trial, when all parties need to be preparing their briefs of evidence. The plaintiffs need to be providing the promised amended pleading so that the defendants' counsel can properly understand the issues for trial, the particular areas of expertise needed, and brief their experts in relation to the allegations.

[119] For these reasons, there will be orders as to the particulars sought. The Court does not look to the plaintiffs to provide precise figures, if the expert advice is that an approximation or a range must be given. But the information which can be particularised and ought to be provided in a pleading is information of the nature on which the plaintiffs are likely to base their case at trial. The plaintiffs will know that if their evidence remains generalised and unspecific at trial, then they are likely to succeed, if successful on liability, only at the lower end of their approximations.

Paragraph 25(a)(iii) – request 10

[120] In paragraph 25(a)(ii) of the statement of claim, the plaintiffs allege that the cost of rectifying the mechanical engineering and condensation issues (including remedial solution relating to condensation issues) is $500,000.

[121] By this request, the Council seeks particulars of the mechanical engineering issues and of the condensation issues respectively.

[122] I will discuss this request in conjunction with the next.

Paragraph 25(a)(iii)(second request) – request 11

[123] By this request, the Council seeks an order that the plaintiffs give particulars of the proposed scope of rectification for the mechanical engineering and the condensation issues respectively. These two requests in relation to paragraph 25(a)(iii) are directly parallel to the previous two requests in relation to paragraph 25(a)(ii). The same considerations arise. There will therefore be the same orders.

Paragraph 25(c) – request 12

[124] The Council seeks an order that the plaintiffs give particulars of the loss claimed by each second plaintiff in respect of:

(a) Loss of rental income and/or alternative accommodation;

(b) Cost of funding the repairs cost;

(c) Relocation costs;

(d) Furniture removal;

(e) Storage;

(f) Insurance relating to the repairs; and

(g) Cleaning and other miscellaneous costs.

[125] In the statement of claim these have been identified as consequential losses incurred by the plaintiffs and "not estimated to be less than $416,037", which I take to mean estimated to be not less than $416,037. As with paragraph 25(a)(ii), the plaintiffs plead that they will provide further particulars, once available, and prior to trial.

[126] Ms Thorn, for the plaintiffs, did not address submissions in opposition to this request.

[127] I recognise that with repairs yet to be effected, a number of the claimed consequential losses can only be provided as estimates. That said, some of the heads of loss may already be capable of precise quantification. Others must be capable of some measure of estimation given that the plaintiffs have already referred to such a specific figure as "$416,037".

[128] Further particulars are appropriate either on a specific or an estimated basis, broken down to each category of consequential loss. There will accordingly be an order to that effect.

Paragraph 29(a) – request 13

[129] The Council seeks an order that the plaintiffs give particulars of alleged insufficiencies in the plan(s) and specifications and how each alleged insufficiency was contrary to the Building Code.

[130] This request is parallel to request 2 (in relation to paragraph 22)[16] in which the Council sought an order in relation to alleged design defects.

[131] I adopt what I have said in relation to that request.[17]

[132] Particulars will accordingly be ordered.

Paragraph 29(b) – request 14

[133] The Council seeks an order that the plaintiffs provide particulars of the additional inspections which they allege the Council should have carried out.

[134] Ms Thorn succinctly submitted in response to this request that the plaintiffs' allegation is that the Council needed to carry out such inspections that the defects pleaded did not exist. In other words, it is the thrust of the plaintiffs' case that it is

---

16 Above at [85]-[89].
17 At [85]-[89].

the proper effecting of inspections rather than a particular number of inspections which would have prevented the existence or continuation of the defects and damage which resulted. When the references in paragraph 29(b) to the concept of "sufficiency" are considered, the Council has sufficient understanding of the plaintiffs' case to plead to it and to meet it. This is particularly so when the plaintiffs have provided their five particulars (at 29(b)(i)-(iv)) as to the extent to which the inspections were "insufficient".

Paragraph 29(b)(i) – request 15

[135] The Council seeks an order that the plaintiffs give particulars, in respect of each of the alleged defects, of what it is alleged a reasonable skilled and prudent inspector should have identified as being non-compliant with the Building Code and what date it is alleged such inspector would have made the identification in question.

[136] Ms Rice, in her written submissions, did not address this request specifically.

[137] Ms Thorn defended the pleading in the statement of claim upon the basis that the case the Council has to meet is clear – the Council should have identified the defects at the time the inspections were carried out and a prudent inspector should have identified all of the defects pleaded.

[138] I accept Ms Thorn's submission in this regard. The current pleading sufficiently identifies the issues for both parties to prepare for trial.

Paragraph 29(b)(ii) – request 16

[139] The plaintiffs allege as a particular of the insufficient inspections carried out by the Council that the Council failed during the course of its inspection to identify variations to the issued building consent and failed to request that such amendments be submitted for approval. The Council seeks an order that the plaintiffs give particulars of the alleged variations to the building consent and how and where each variation is said to have caused damage. Again, Ms Rice's written submissions did not address this request. I make no order in relation to it.

Paragraph 29(b)(v) – (first request) request 17

[140] At paragraph 29(b)(v), the plaintiffs particularised the allegation of insufficient inspections by pleading that the Council had failed to identify the design, could not comply with the Building Code in terms of E(3), G(4) and H(1) and that the Council knew, or ought to have known, that the design could not perform in terms of allowing for condensation in a residential building.

[141] The Council seeks an order that the plaintiffs provide particulars of how and where the design did not comply with the Building Code.

[142] I have examined two parallel requests (requests 2 and 13).[18] To the extent that the Council has sought particularisation of defects, I have found that it is appropriate that there be further particularisation, including by reference to the provision in the Code of the standard which has been breached.

[143] Ms Thorn submits that it goes too far in terms of pleading requirements to require the plaintiffs in addition to identify why or how the defective design does not comply with a particular provision of the Building Code. I accept that submission. The detailed explanation of how the non-compliance arises is reasonably a matter to be explained and developed in evidence. The defendants have sufficient detail of the basis of the plaintiffs' claim to meet it by pleading and to obtain evidence.

Paragraph 29(b)(v) (second request) – request 18

[144] By this request, the Council seeks particulars of how the design is alleged not to perform in terms of allowing for condensation. As with the previous request in relation to the same set of particulars, I find that this request goes beyond what is reasonably required by way of pleading. The Council knows from this pleading that it is the plaintiffs' case that the Council knew, or ought to have known, that the design could not perform in terms of allowing for condensation in a residential

---

[18] Above at [85]-[89] and [129]-[132].

building. The plaintiffs, in paragraph 29(b)(v), have already particularised the provisions of the Building Code which are alleged to have been breached. Further particulars to be provided by the plaintiffs will identify the relevant category of defect in relation to each breach of standard or code. The plaintiffs have sufficient in the pleading of paragraph 29(b)(v) to plead in response to the allegation made and to prepare their evidence as to the plaintiffs' allegation.

Prayer for relief C – request 19

[145] The plaintiffs plead that the Council has been negligent. They do not plead facts or circumstances of the nature required to be pleaded to give rise to a claim for exemplary damages. In particular, they do not plead outrageous wrongdoing or similar misconduct.[19] Yet at Prayer C of the claim against the first defendant, there is a claim for exemplary damages of $100,000. Responsibly, the Council (having sought a considerable number of other particulars) has chosen to deal with the plaintiffs' pleading in this regard by way of a request for further and better particulars, rather than a strike out of that aspect of the claim.

[146] The pleading as it stands is plainly deficient. There is nothing in the pleading itself to justify the prayer for exemplary damages.

[147] There will accordingly be a direction in relation to a further pleading in that regard, along with an unless order should there be filed no relevant amendment to support the claim for exemplary damages.

Costs

[148] The Council has had a significant measure of success in the application for further and better particulars. There is no reason not to deal now with the cost of this application. I leave it in the first instance to counsel to seek to resolve these costs, with leave to file memoranda (no more than three pages) if unable to agree. My

---

[19] As to which see, for instance, Stephen Todd (ed.), *The Law of Torts in New Zealand* (5th ed, Thomson Reuters, 2009) at 25.3.03(1).

provisional view is that costs should, following the event, be payable to the Council on a 2B basis with a certificate for the reasonable disbursements of travel (but no certificate for second counsel).

Order

[149] I order (references to "the claim" being to the statement of claim dated 26 June 2012) –

1. In relation to paragraph 22 of the claim, identify from the defects set out in schedule three to the claim (6 pages) and part 15 WHRS assessor's report 8 July 2008 [sic] 3 December 2010 (pages 46-63 inclusive) the alleged:

   (i) Design defects;

   (ii) Construction defects; and

   (iii) Mechanical engineering defects.

2. In the event the plaintiffs' case is to involve evidence that particular design defects have caused particular damage, identify with respect to the design defects pleaded in paragraph 22 and particularised in response to paragraph 1 above and with reference to the plan(s) and/or the paragraph(s) from the specification the defective details.

3. In relation to paragraph 23(b) of the claim, in respect of each of the alleged:

   (i) Design defects;

   (ii) Construction defects; and

   (iii) Mechanical engineering defects.

give particulars of how the construction is said to be non-compliant with the building code clauses stated at paragraph 23(b)(i), (ii), (iii), (iv), (v), (vi), (vii), (viii), (ix), (x), (xi), (xii), (xiii), (xiv), (xv), (xvi), (xvii), (xviii) and (xix) of the claim.

(The plaintiffs in providing these particulars may use the form of sample pages which appear as Schedule 6 to this judgment).

4. In relation to paragraph 23(c) of the claim give particulars of how each of the alleged:

    (i) Design defects;

    (ii) Construction defects; and

    (iii) Mechanical engineering defects.

    (The plaintiffs in providing these particulars may use the form of sample pages which appear as Schedule 6 to this judgment).

5. In relation to paragraph 23(c)(iv) of the claim give particulars of the acceptable standards of good trade practice and workmanship at the time of construction applicable to each of the alleged :

    (i) Design defects;

    (ii) Construction defects; and

    (iii) Mechanical engineering defects.

    (The plaintiffs in providing these particulars may use the form of sample pages which appear as Schedule 6 to this judgment).

6. In relation to paragraph 23(c)(v) of the claim give particulars of the various technical literatures at the time of construction applicable to each

of the alleged:

(i) Design defects;

(ii) Construction defects; and

(iii) Mechanical engineering defects.

(The plaintiffs in providing these particulars may use the form of sample pages which appear as Schedule 6 to this judgment).

7. In the event the plaintiffs' case is to involve evidence that particular defects have caused particular damage through water leaking, with respect to the defects pleaded in paragraph 22 and particularised in response to paragraph 1 above, give particulars of how and where each defect is said to have resulted in water leaking into concealed framing causing severe decay of the timber framing and/or bottom plates and/or establishment of fungal infection and the location(s) of such severe decay and/or fungal infection.

8. In relation to paragraph 25(a)(ii) of the claim, give particulars of the costs of:

(i) Structural issues;

(ii) Tanking issues; and

(iii) Membrane issues.

9. Further in relation to paragraph 25(a)(ii) of the claim, give particulars of the proposed scope of rectification of the:

(i) Structural issues;

(ii) Tanking issues; and

(iii) Membrane issues.

10. In relation to paragraph 25(a)(iii) of the claim, give particulars of the costs of the:

    (i) Mechanical engineering issues; and

    (ii) Condensation issues.

11. Further in relation to paragraph 25(a)(iii) of the claim, give particulars of the proposed scope of rectification of the:

    (i) Mechanical engineering issues; and

    (ii) Condensation issues.

12. In relation to paragraph 25(c) of the claim, give particulars of the loss claimed by each second plaintiff in respect of :

    (i) Loss of rental income and/or alternative accommodation;

    (ii) Cost of funding the repairs cost;

    (iii) Relocation costs;

    (iv) Furniture removal;

    (v) Storage;

    (vi) Insurance relating to the repairs; and

    (vii) Cleaning and other miscellaneous costs.

13. In the event the plaintiffs' case is to involve evidence that particular insufficiencies in the plan(s) and specifications and/or breaches of the building code have caused particular damage, give particulars of the

alleged insufficiencies or breaches as referred to in paragraph 29(a) of the claim.

14. No order.

15. No order.

16. No order.

17. In the event the plaintiffs' case is to involve evidence that particular non-compliance with the Building Code has caused particular damage, give particulars with respect to the non-compliance allegations in paragraph 29(b)(v) of how and where the design did not comply with the Building Code:

    (a) E(3);

    (b) G(4);

    (c) H(1).

18. No order.

19. If the plaintiffs propose to pursue exemplary damages, they are to provide within their pleadings proper (and not merely by reference in the prayers for relief) the factual allegations upon which they will rely to establish an entitlement to exemplary damages.

Allocation of trial date

Discussion

[150] In this case, the interest of the plaintiffs in a prompt trial does not arise simply out of an interest in prompt (or as r 1.2 High Court Rules puts it "speedy") resolution. The plaintiffs are dealing with the apparent contamination of at least one,

if not two apartments. In light of the objective of the proceeding – to obtain funds required for repair – they have a strong argument for some degree of acceleration of trial date. This legitimate interest is to be balanced against the Council's desire to conduct the testing which the Council's experts consider appropriately timed and thorough.

[151] In my judgment, the availability of a late-November trial (as against the plaintiffs' strongly-preferred September date) constitutes the appropriate means by which to balance the parties' interests –

(a) The Council's testing, to commence shortly, will have run for six months by late-September. That six-month period is at the lower end of the six-to-eight month period identified by Dr Powell in his second affidavit.

(b) The 25 November 2013 trial date suggests a pre-trial timetable of the following nature:

- Close of pleadings date – 16 August 2013
- Plaintiffs' briefs – 13 September 2013
- Defendants' briefs – 11 October 2013
- Conference of experts (if ordered by Trial Judge) – 4 November 2013

(c) The plaintiffs' expert evidence was to the effect that the only significant testing results will be those obtained up to the end of July.

(d) I am allocating a 25 November 2013 trial date (as preferred by the plaintiffs in preference to a 2014 trial) with a timetable date for plaintiffs' evidence of 13 September 2013, the plaintiffs' experts will have the results of the Council's testing well beyond the July date which those experts contended for. They will have the benefit (or

otherwise) of some extra months' results beyond July. At the same time, an 11 October 2013 timetable date for the defendants' evidence will mean that the defendants are likely to have the results for the first six months of testing (that is the results to late-September) when their briefs are completed. Assuming the Council's experts then elect to continue testing to the end of October, appropriate directions can be made for the updating of the experts' evidence to take supplementary results into account before trial.

(e) If the Trial Judge were to order a pre-trial conference of experts approximately three weeks before trial, the likelihood is that the experts would be conferring in light, not only of their respective briefs of evidence, but also in light of results to late-October.

[152] I acknowledge that upon the basis of the information as to the availability of counsel provided to the Deputy Registrar, the 25 November 2013 trial date may well mean that the Council is not able to have its preferred senior counsel appear at the hearing. I have balanced the competing interests. I do not consider that great weight can be attached to the Council's preference of counsel when compared to the implications of a trial approximately three or four months later than that which the Court can allocate. By having a trial in November rather than September, which was the first date which the Registrar could have allocated, the Council (and indeed, other parties) have eight months at this point in which to identify senior counsel available to lead on a two-week trial.[20]

---

[20] For an example of a case in which counsel's unavailability on an allocated trial date did not lead to adjournment, see *Fielding v Burrell* HC Auckland CIV-2007-404-000317, 11 July 2007 at [22]-[23] (Venning J noting the prejudicial effect of delay upon the other party).

Order

[153] I allocate a trial of this proceeding commencing ***10.00 am, 25 November 2013 (two weeks reserved).***

Associate Judge Osborne

Solicitors:
A J Thorn - Email: adina@adinathorn.co.nz
Heaney & Co - Email: hmr@heaneyco.com / ach@heaneyco.com
M L Hillary (in person) - Email: mjhillary@xtra.co.nz
Duncan Cotterill - Email: d.mcgill@duncancotterill.com /k.white@duncancotterill.com
P S Morrison - Email: Cairn9@xtra.co.nz

SCHEDULE 1

Defects

22. 54 Fryer Street has been constructed with various design and/or construction and/or mechanical engineering defects. Those defects include those defects set out in **Schedule 3** and are listed in part 15 WHRS Assessor's report 8 July 2008 (**the Defects**).

23. As a result of being constructed with the Defects, 54 Fryer Street does not comply with:

    (a) The Building Act 1991, the particulars of which non-compliance are:

        (i) Section 7(1) requires building work to comply with the Building Code, particulars of which non-compliance are described below at sub-paragraph (b) below.

        (ii) Section 32.1

    (b) The Building Code, the particulars of which non-compliance are:

        (i) Clause B2.2

Building materials, components and construction methods shall be sufficiently durable to ensure that the building, without reconstruction or major renovation, satisfied the other functional requirements of the code throughout the life of the building;

(ii) Clause B2.3.1

Building elements must, with only normal maintenance, continue to satisfy the performance of the requirements of this code for the lesser of the specified intended life of the building, if stated:

(iii) Clause B2.3.1a

The life of the building, being not less than 50 years, if:

(1) Those building elements (including floors, walls and fixings) provide structural stability to the building or

(2) Those building elements are difficult to access or replace or

(3) Failure of those elements to comply with the Building Code would go undetected during both normal use and maintenance of the building ...

(iv) Clause B2.3.1b

15 years if:

(1) Those building elements (including the building envelope, exposed plumbing in the sub floor space, and in-built chimneys and flues) are moderately difficult to access or replace, or

(2) Failure of those building elements to comply with the Building Code would go undetected during normal use of the building but would be easily undetected during normal maintenance ...

(v) Clause B2.3.1c

5 years if:

(1) The building elements (including services, linings, renewable protective coatings, and fixtures) are easy to replace, and

(2) Failure of those building elements to comply with the Building Code would be easily detected during the normal use of the building ...

(vi) Clause E2.2

Buildings shall be constructed to provide adequate resistance to penetration by, and the accumulation of, moisture from the outside;

(vii) Clause E2.3.2

Roofs and exterior walls shall prevent the penetration of water that could cause undue dampness or damage to building elements ...

(viii) Clause E2.3.3

Walls, floors and structural elements in contact with the ground shall not absorb or transmit moisture in quantities that could cause undue dampness or damage to building elements ...

(ix) Clause E2.3.5

Constructed spaces and cavities in buildings shall be constructed in a way which prevents external moisture being transferred and causing condensation and the degradation of building elements.

(x) Clause G4.2

Spaces within buildings shall be provided with adequate ventilation consistent with their maximum occupancy and their intended use.

(xi) Clause G4.3.1

Spaces within buildings shall have means of ventilation with outdoor air that will provide an adequate number of air changes to maintain air purity.

(xii) Clause G4.3.3

Buildings shall have a means of collecting or otherwise removing the following products from the spaces in which they are generated:

(1) Cooking fumes and odours; and

(2) Moisture from laundering, utensil washing, bathing and showering;

(xiii) Clause E3.2

Buildings must be constructed to avoid the likelihood of:

(1) Fungal growth or the accumulation of contaminants on linings and other building elements; and

(2) Free water overflow penetrating to an adjourning household unit; and

(3) Damage to building elements being caused by the presence of moisture.

(xiv) Clause E3.3.1

An adequate combination of thermal resistance, ventilation and space temperature must be provided to all habitable spaces, bathrooms, laundries, and other spaces where moisture may be generated or may accumulate.

(xv) Clause E3.3.6

Surfaces of building elements likely to be splashed must be constructed in a way that prevents water splash from penetrating behind linings or into concealed spaces.

(xvi) Clause H1.2

Buildings must be constructed to achieve an adequate degree of energy efficiency when the energy is used for:

(1) Modifying temperature, modifying humidity, providing ventilation, or doing all or any of those things.

(xvii) Clause H1.3.1

The building envelope enclosing spaces where the temperature or humidity (or both) are modified must be constructed to:

(1) Provide adequate thermal resistance; and

(2) Limit uncontrollable airflow.

(xviii) Clause H1.3.2E

Buildings must be constructed to ensure that their building performance index does not exceed 1.55.

(xix) Clause H1.3.3

Account must be taken of physical conditions likely to affect energy performance of buildings, including:

(1) The thermal mass of building elements;

(2) The building orientation and shape;

(3) The airtightness of the building envelope;

(4) The heat gains from services, processes and occupants;

(5) The local climate; and

(6) Heat gains from solar radiation.

(c) The New Zealand Building Code Acceptable Solutions, the particulars of which non-compliance are:

(i) E2/AS1:

Clause 2.0.1 Walls shall have:

(1) Claddings which are weatherproof;

(2) Joints in the cladding or between cladding and exterior joinery, which are weatherproof or constructed to allow penetrating water to drain to the outside;

Clause 3.0.1 Windows, doors, roof lights and hatches and the joints between them and cladding material shall be as weatherproof as the cladding itself.

Clause 3.1.1 Joints between windows and doors, and the cladding shall be made weatherproof by one or a combination of the following systems:

(1) Head jamb and sill flashings;

(2) Scribers;

(3) Proprietary seals;

(4) Sealants that are (i) not exposed to sunlight or weather, (ii) easy to access and replace;

Clause 4.2.5 the height of the finished floor level above adjacent ground shall be no less than:

for cladding other than masonry:

(1) 150mm if ground permanently paved

(2) 225mm if unpaved;

(ii) G4/AS1 (ventilation);

(ii) H1/AS1 (energy efficiency);

(iii) E3/AS1 (internal moisture);

(iv) Acceptable standards of good trade practice and workmanship at the time of construction.

(v) Various technical literatures – including the technical literature relating to Hardiflex Cladding system.

24. As a further result of the Defects, 54 Fryer Street has suffered:

(a) Water leaking into concealed framing causing severe decay of the timber framing and bottom plates;

(b) Establishment of fungal infection in the timber framing, building wrap and cladding including water damage and dampness to internal linings.

(**the Physical Damage**).

Loss

25. As a result of the Defects and the Physical Damage the plaintiffs have suffered (and continue to suffer) economic loss being:

(a) The **cost of rectifying the Defects and the Physical Damage**. Particulars:

(i) The cost of rectifying the Defects which is currently estimated to be: **$820,481.**

(ii) The cost of rectifying structural issues, taking and membrane issues currently estimated to be **$300,000** but to be further particularised once further details are available and prior to trial.

(iii) The cost of rectifying the mechanical engineering and condensation issues (including remedial solution relating to condensation issues): **$500,000.**

Total: $1,620,481

(b) **Professional fees**, building consent fees, Building Code compliance costs and contract works insurance.

Not estimated to be less than **$200,000**. Further particulars are to be provided, once available, and prior to trial.

(c) **Consequential losses** including:

(iv) Loss of rental income and/or alternative accommodation;

(v) Cost of funding the repairs costs;

(vi) Relocation costs;

(vii) Furniture removal;

(viii) Storage;

(ix) Insurance relating to the repairs;

(x) Cleaning and other miscellaneous costs to be quantified prior to trial.

Not estimated to be less than **$416,037**. Further particulars are to be provided, once available, and prior to trial.

(d) **Stigma losses**:

Further particulars to be provided once available, but not likely to be less than **$412,000**.

(collectively "**the Economic Loss**")

29. In breach of this duty of care, the Council failed to exercise reasonable skill and care in that the Council:

(a) Issued the Building Consent when the Plans and Specifications were not sufficient to allow the Council to be satisfied on reasonable grounds that the Building Work would comply with the Building Code;

(b) Failed to ensure that sufficient inspections were carried out and/or that the inspections carried out were undertaken without sufficient thoroughness to enable the Council to be satisfied on reasonable grounds that the Building Work complied with the requirements of the Building Consent, associated technical information, and complied with the provisions of the Building Code, in that the Council further:

(i) Failed to identify all or any of the Defects in the course of its inspections when the Defects would have been apparent to a reasonably skilled and prudent inspector carrying out the inspections that were called for and carried out;

(ii) Failed during the course of its inspections to identify variations to the issued building consent and request that amendments be submitted for approval;

(iii) Failed to issue a notice to rectify, or require the builder(s) to rectify, all, or any, of the Defects in the course of its inspections;

(iv) Issued the Code Compliance Certificate notwithstanding that at the date of issue of the Code Compliance Certificate, 54 Fryer Street had the Defects and no reasonable grounds existed for the Council to believe that the Building Work complied with the Building Code;

(v) Failed to identify that the design could not comply with the Building Code in terms of E(3), G(4) and H(1) and knew or ought to have known that the design could not perform in terms of allowing for condensation in a residential building.

30. As a result of the Council's negligence:

(a) 54 Fryer Street has been constructed with the Defects and has the Physical Damage and the plaintiffs will be required to carry out the Repairs;

(b) The plaintiffs have suffered Economic Loss;

(c) The plaintiffs, other than companies, have suffered Distress.

31. The specified loss and damage suffered by the plaintiffs was reasonably foreseeable as not being unlikely as a result of the Council's negligence.

WHEREFORE THE PLAINTIFFS CLAIM FROM THE FIRST DEFENDANT:

A. Special damages for the Economic Loss particularised in paragraph 25.

B. Judgment of general damages of $15,000 for each and every second plaintiff (except companies).

C. Judgment for exemplary damages of $100,000.

D. Interest.

E. Costs.

SCHEDULE 2

NOTICE BY FIRST DEFENDANT REQUIRING FURTHER PARTICULARS OF STATEMENT OF CLAIM DATED 26 JUNE 2012

Take notice that, pursuant to rule 5.21 of the High Court Rules, the first defendant requires the plaintiffs to give further particulars of their statement of claim dated 26 June 2012 (**the claim**) as follows:

1. In relation to paragraph 22 of the claim, identify from the defects set out in schedule three to the claim (6 pages) and part 15 WHRS assessor's report 8 July 2008 [sic] 3 December 2010 (pages 46-63 inclusive) the alleged:

   a) Design defects;

   b) Construction defects; and

   c) Mechanical engineering defects.

2. With respect to the design defects pleaded in paragraph 22 and particularised in response to paragraph 1 above, identify with reference to the plan(s) and/or the paragraph(s) from the specification the defective details.

3. In relation to paragraph 23(b) of the claim, in respect of each of the alleged:

   a) Design defects;

   b) Construction defects; and

   c) Mechanical engineering defects.

   give particulars of how the construction is said to be non-compliant with the building code clauses stated at paragraph 23(b)(i), (ii), (iii), (iv), (v), (vi), (vii), (viii), (ix), (x), (xi), (xii), (xiii), (xiv), (xv), (xvi), (xvii), (xviii) and (xix) of the claim.

4. In relation to paragraph 23(c) of the claim give particulars of how each of the alleged:

   a) Design defects;

   b) Construction defects; and

   c) Mechanical engineering defects.

are alleged to not comply with:

i) E2/AS1 as alleged at paragraph 23(c)(i) of the claim and relevant at the time of the building consent;

ii) G4/AS1 (ventilation) as alleged at paragraph 23(c)(ii) of the claim and relevant at the time of the building consent;

iii) H1/AS1 as alleged at paragraph 23(c)(iii) of the claim and relevant at the time of the building consent.

5. In relation to paragraph 23(c)(iv) of the claim give particulars of the acceptable standards of good trade practice and workmanship at the time of construction applicable to each of the alleged :

   a) Design defects;

   b) Construction defects; and

   c) Mechanical engineering defects;

   and how each of those alleged defects are said to be contrary to the specified acceptable standards of good practice and workmanship at the time of construction.

6. In relation to paragraph 23(c)(v) of the claim give particulars of the various technical literatures at the time of construction applicable to each of the alleged :

   a) Design defects;

   b) Construction defects; and

   c) Mechanical engineering defects;

   and how each of those alleged defects are said to be contrary to the specified technical literature.

7. In relation to paragraph 24 of the claim give particulars of how and where each of the alleged :

   a) Design defects;

   b) Construction defects; and

c) Mechanical engineering defects;

is said to have resulted in water leaking into concealed framing causing severe decay of the timber framing and/or bottom plates and/or establishment of fungal infection and the location(s) of such severe decay and/or fungal infection.

8. In relation to paragraph 25(a)(ii) of the claim, give particulars of the:

   a) Structural issues;

   b) Tanking issues; and

   c) Membrane issues.

9. Further in relation to paragraph 25(a)(ii) of the claim, give particulars of the proposed scope of rectification of the:

   a) Structural issues;

   b) Tanking issues; and

   c) Membrane issues.

10. In relation to paragraph 25(a)(iii) of the claim, give particulars of the:

    a) Mechanical engineering issues; and

    b) Condensation issues.

11. ` Further in relation to paragraph 25(a)(iii) of the claim, give particulars of the proposed scope of rectification of the:

    a) Mechanical engineering issues; and

    b) Condensation issues.

12. In relation to paragraph 25(c) of the claim, give particulars of the loss claimed by each second plaintiff in respect of :

    a) Loss of rental income and/or alternative accommodation;

    b) Cost of funding the repairs cost;

    c) Relocation costs;

d) Furniture removal;

e) Storage;

f) Insurance relating to the repairs; and

g) Cleaning and other miscellaneous costs.

13. In relation to paragraph 29(a) of the claim, give particulars of the alleged insufficiencies in the plan(s) and specifications, and how each alleged insufficiency was contrary to the building code.

14. In relation to paragraph 29(b) of the claim, give particulars of the additional inspections it is alleged the council should have carried out.

15. In relation to paragraph 29(b)(i) of the claim, in respect of each of the alleged :

a) Design defects;

b) Construction defects; and

c) Mechanical engineering defects;

give particulars of:

i) What it is alleged a reasonable skilled and prudent inspector should have identified as being non-compliant with the building code; and

ii) On which date it is alleged a reasonably skilled and prudent inspector should have made the identification referred to in the preceding sub-paragraph.

16. In relation to paragraph 29(b)(ii), give particulars of the alleged variations to the building consent, and how and where each alleged variation is said to have caused damage.

17. In relation to paragraph 29(b)(v), give particulars of how and where the design did not comply with the building code:

a) E(3);

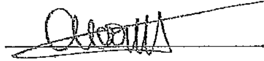
b) G(4); and

c) H(1).

18. Further in relation to paragraph 29(b)(v), give particulars of how the design is alleged not to perform in terms of allowing for condensation.

19. In relation to paragraph 31(c), give particulars of the basis for the claim for exemplary damages.

Date: 20 August 2012



A C Harpur

Counsel for first defendant

SCHEDULE 3

MAY IT PLEASE THE COURT:

1. Counsel for the plaintiffs provides this answer to the notice by first defendant (the Council) (dated 20 August 2012) requiring further particulars of the statement of claim dated 26 June 2012 **(the claim)**.

2. The paragraph numbering in the notice is adopted in answering the notice.

Paragraph 1

3. The request for the plaintiffs to categorise the Defects into design, construction, and structural is not a proper request for particulars pursuant to Rule 5.21 of the High Court Rules. The further particulars sought are matters of expert evidence rather than matters of pleading. The plaintiffs' expert briefs of evidence will be provided prior to trial. The level of precision requested by the first defendant is also not required: *BNZ Investments Limited v CIR* (2008) 23 NZTC 21, 821 **(BNZ)** and *Body Corporate 170812 v Auckland City Council* (HC Auckland, CIV 2003-404-7259, 29 August 2008) **(Body Corporate 170812)**.

Paragraph 2

4. The plaintiffs consider that this request does not properly fall within the ambit of a request for further particulars pursuant to Rule 5.21 of the High Court Rules. The further particulars sought are properly matters of expert evidence rather than matters of pleading. The plaintiffs' expert briefs of evidence will be provided prior to trial. The plaintiffs have already set out the defects in the statement of claim. The level of precision requested by the first defendant is also not required: BNZ and Body Corporate 170812.

Paragraph 3

5. The plaintiffs consider that this request does not properly fall within the ambit of a request for further particulars pursuant to Rule 5.21 of the High Court Rules. The further particulars sought are matters of expert evidence rather than matters of pleading. The plaintiffs' expert briefs of evidence will be provided prior to trial. The level of precision requested by the first defendant is also not required: BNZ and Body Corporate 170812.

Paragraph 4

6. The plaintiffs consider that this request does not properly fall within the ambit of a request for further particulars pursuant to Rule 5.21 of the High Court Rules. The further particulars sought are matters of expert evidence rather than matters of pleading. The plaintiffs' expert briefs of evidence will be provided prior to trial. The level of precision requested by the first defendant is also not required: BNZ and Body Corporate 170812.

Paragraph 5

7. The plaintiffs consider that this request does not properly fall within the ambit of a request for further particulars pursuant to Rule 5.21 of the High Court Rules. The further particulars sought are properly matters of expert evidence rather than matters of pleading. The plaintiffs' expert briefs of evidence will be provided prior to trial. The level of precision requested by the first defendant is also not required: BNZ and Body Corporate 170812.

Paragraph 6

8. The plaintiffs consider that this request does not properly fall within the ambit of a request for further particulars pursuant to Rule 5.21 of the High Court Rules. The further particulars sought are properly matters of fact and expert evidence rather than matters of pleading. The plaintiffs' briefs of evidence will be provided prior to trial. The level of precision requested by the first defendant is also not required: BNZ and Body Corporate 170812.

Paragraph 7

9. It is not feasible to provide this level of particularisation at this stage. These details will be incorporated into an amended statement of claim following the receipt of the plaintiffs' expert reports which will be available prior to trial.

Paragraph 8

10. The plaintiffs repeat their answers to paragraph 7.

Paragraph 9

11. The plaintiffs repeat their answers to paragraph 8 and also say that the scope of remediation has not been settled at this stage.

Paragraph 10

12. The plaintiffs repeat their answers to paragraph 7.

Paragraph 11

13. The plaintiffs repeat their answers to paragraph 9 and also say that the scope of remediation has not been settled at this stage.

Paragraph 12

14. The costs incurred to date (30 September 2012) and the estimated costs which make up the consequential losses are in the **attached** schedule.

Paragraph 13

15. The plaintiffs consider that this request does not properly fall within the ambit of a request for further particulars pursuant to Rule 5.21 of the High Court Rules. The further particulars sought are properly matters of expert evidence rather than matters of pleading. The plaintiffs' expert briefs of evidence will be provided prior to trial. The level of precision requested by the first defendant is also not required: BNZ and Body Corporate 170812.

Paragraph 14

16. The plaintiffs consider that this request does not properly fall within the ambit of a request for further particulars pursuant to Rule 5.21 of the High Court Rules. The further particulars sought are properly matters of expert evidence rather than matters of pleading. The plaintiffs' expert briefs of evidence will be provided prior to trial. The plaintiffs have already set out the defects and breaches. The level of precision requested by the first defendant is also not required: BNZ and Body Corporate 170812.

Paragraph 15

17. The plaintiffs consider that this request does not properly fall within the ambit of a request for further particulars pursuant to Rule 5.21 of the High Court Rules. The further particulars sought are properly matters of expert evidence rather than matters of pleading. The plaintiffs' expert briefs of evidence will be provided prior to trial. The plaintiffs have already set out the defects and breaches. The level of precision requested by the first defendant is also not required: BNZ and Body Corporate 170812.

Paragraph 16

18. The variations to the building consent include, but are not limited to, the following items:

    a. The cladding system - changed from horizontal coloursteel to fibre cement sheet;

    b. The deck balustrades - changed from selected wrought iron post, rail and baluster to a timber frame wall system clad in cement sheet;

    c. The ceiling linings - changed from 13mm Ultraline gibboard to standard 10mm gibboard;

    d. In ceiling insulation - changed from acoustic sound batts to plain insulation batts;

    e. Floor plan - changed levels 2, 3 and 4 from one unit per level to two and the changes to wall separations and entry doors; and

    f. A later document provided by the designer to satisfy the request notice from Civic Corp referenced Deck Junction Detail has not been followed to all of the complex deck junctions.

19. The details of how and where each alleged variation is said to have caused damage will be incorporated into an amended statement of claim following the receipt of the plaintiffs' expert reports which will be available prior to trial.

Paragraph 17

20. The plaintiffs consider that this request does not properly fall within the ambit of a request for further particulars pursuant to Rule 5.21 of the High Court Rules. The further particulars sought are properly matters of expert evidence rather than matters of pleading. The plaintiffs' expert briefs of evidence will be provided prior to trial. The plaintiffs have already set out the defects and breaches. The level of precision requested by the first defendant is also not required: BNZ and Body Corporate 170812.

Paragraph 18

21. The plaintiffs consider that this request does not properly fall within the ambit of a request for further particulars pursuant to Rule 5.21 of the High Court Rules. The

further particulars sought are properly matters of expert evidence rather than matters of pleading. The plaintiffs' expert briefs of evidence will be provided prior to trial. The plaintiffs have already set out the defects and breaches. The level of precision requested by the first defendant is also not required: BNZ and Body Corporate 170812.

Paragraph 19

22. Exemplary damages, being damages awarded to "punish" a defendant, are not quantifiable by parties to litigation.

Dated: 11 October 2012

....

A J Thorn/M Bullivant
Solicitor/Counsel for Plaintiffs

Cc: Civil Registry, Dunedin High Court
Defendants

CONSEQUENTIAL LOSSES

		Actual Losses – only to 30 September 2012			Estimated Losses			
Unit Number	Proprietors	Loss of Rent	Repair Costs	Interest on Borrowings (not claimed for purposes of mediation)	Loss of Rent (based on 6 months)	Storage and Transport Costs (based on 6 months)	Cleaning Costs	Total
1	David Victor & Kim Nancy Curran	nil	nil		$19,760	$1,447.50	$537.36	$21,745
2A	Circle Property Investments Limited	nil	nil		$10,465	$1,447.50	$537.36	$12,450
2B	Anup and Sadhana Nathu	nil	nil		$10,465	$1,447.50	$537.36	$12,450
3A	Circle Property Investments Limited	nil	nil		$10,465	$1,447.50	$537.36	$12,450
3B	Novacorp Limited	nil	$535.71		$10,465	$1,447.50	$537.36	$12,986
4A	Lynnette Janice Donaldson	$585	$12,862.23		$15,600	$1,447.50	$537.36	$31,032
4B	Stephen Alexander Greer & Jennifer Christine Hay	nil	$3,500		$10,465	$1,447.50	$537.36	$15,950
5A	Bruce Donn McNally	$60,215	nil		$13,650	$1,447.50	$537.36	$75,850
5B	Mattrix Investments Limited	nil	nil		$13,000	$1,447.50	$537.36	$14,985
6A	Hamish Ian Munroe & Milly My Loi Sin	nil	$6,000		$10,465	$1,447.50	$537.36	$18,450
6B	Haybu Limited	$36,200	$3,500		$18,200	$1,447.50	$537.36	$59,885
BC	Body Corporate	nil	$600		nil	nil	nil	$600
							Total:	$288,833

SCHEDULE 4

APPLICATION BY FIRST DEFENDANT FOR FURTHER AND BETTER PARTICULARS OF THE PLAINTIFFS' STATEMENT OF CLAIM DATED 26 JUNE 2012

MAY IT PLEASE THE COURT:

To: The Registrar, High Court, Invercargill

To: The plaintiffs

And to: The second, third, fourth and fifth defendants

This document notifies you that:-

1. The applicant, the first defendant, Queenstown Lakes District Council will on 27 November 2012 at 2:00 pm apply to the court for orders that:

   a) The plaintiffs provide the further and better particulars of the plaintiffs' statement of claim dated 26 June 2012 (**the claim**) attached to this application.

   b) The plaintiffs pay the first defendant's costs of and incidental to this application.

2. The grounds on which the orders are sought are as follows:

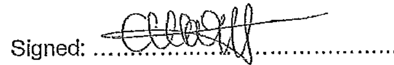
   a) The claim does not give fair notice of the negligence cause of action against the first defendant.

   b) The claim does not give sufficient particulars to inform the court and the first defendant of the plaintiffs' negligence cause of action.

   c) The plaintiffs' response dated 11 October 2012 fails to provide the further and better particulars sought by the first defendant.

   d) The first defendant requires the further and better particulars as the claim does not enable the first defendant to know what witnesses it will need to retain and enable the first defendant to start preparing evidence ahead of the formal exchange of evidence.

3. This application is made in reliance on the attached request for further and better particulars dated 17 August 2012 and the plaintiffs' response dated 17 October 2012; HCR5.21 and HCR5.26; *Pricewaterhouse v Fortex Group Limited CA 179/98, 30 November 1998, Tucker v Welch Construction (1998) Limited (In Liquidation) [2012] NZHC 514* and *Platt v Porirua City Council & Ors [2012] NZHC 2445.*

Signed: 

A C Harpur
Counsel for the first defendant

121030 QLD10B03 ACH App for f&b part

SCHEDULE 5

NOTICE OF OPPOSITION TO APPLICATION BY FIRST DEFENDANT FOR FURTHER AND BETTER PARTICULARS OF THE PLAINTIFFS' STATEMENT OF CLAIM DATED 26 JUNE 2012

To the Registrar of the High Court at Invercargill

and

To Queenstown Lakes District Council (first defendant) and all other defendants

This document notifies you that—

1. The first and second plaintiffs **(the plaintiffs)** intend to oppose the interlocutory application by the first defendant dated 7 November 2012.
2. The plaintiffs are opposed to the making of the orders numbered 1(a) and (b) in the application.
3. The grounds on which the plaintiffs oppose the making of the orders are as follows:
   a. The statement of claim gives fair notice of the negligence cause of action against the first defendant.
   b. The statement of claim gives sufficient particulars to inform the Court and the first defendant of the negligence cause of action.
   c. Insofar as the first defendant is seeking details of the design, construction and mechanical engineering issues and/or how these have caused damage, these amount to matters of evidence which the plaintiffs are not required to plead, but which will be the subject of fact and expert evidence exchanged prior to trial.
   d. Insofar as the first defendant is seeking details of the proposed scope of rectification of defects, the plaintiffs cannot provide such details because the scope of remediation has not yet been settled, but these will be the subject of fact and expert evidence exchanged prior to trial.
   e. The plaintiffs have otherwise already sufficiently answered the first defendant's request for further particulars by their answers dated 11 October 2012.
   f. It is not in the overall interests of justice to require the plaintiffs to provide the particulars sought.
4. The plaintiffs rely on:

a. The plaintiffs' answer to the first defendant's request for further and better particulars dated 11 October 2012.

b. Rules 5.21 and 5.26 of the High Court Rules 2009.

c. *BNZ Investments Limited v CIR* (2008) 23 NZTC 21.

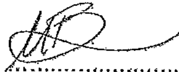
d. *Body Corporate 170812 v Auckland City Council* (HC Auckland, CIV 2003-404-7259, 29 August 2008).

e. *Price Waterhouse v Fortex Group Ltd* (CA 179/98, 30 November 1998).

f. *Broome v Cassell & Co Ltd* [1971] 2 QB 354 (CA).

g. Walker Dick & Associates v Best Pacific Institute of Education Limited [2012] NZHC 2149.

Dated: 19 November 2012



....

A J Thorn/M Bullivant
Counsel for first and second plaintiffs

SCHEDULE 6

SCHEDULE 3

DEFECTS

The defects include, but are not limited to:

Item No	Element	Defect	Breach of Building Act 1991	Breach of Building Code	Breach of New Zealand Building Code Acceptable Solutions	Breach of Acceptable Standards of Good Trade Practice and Workmanship (fitness for purpose)	Various Technical Literature
1	Concrete Decks	Substantial uncontrolled shrinkage cracking the concrete slab beam system in the topping layer allowing water to travel through the concrete decks into the timber boarding formwork between the pre-stressed concrete beams negating any effect of the waterproofing additive specified to the concrete topping.					
2	Concrete Decks	The decks have nominal fall and quite extensive areas of water ponding during rain periods.					
3	Concrete Decks	There is no tanking system or membrane coating to the concrete deck areas and the applied paint coating to the deck is degraded.					
4	Concrete Decks	The specified upstand flashing system to the junctions of the east walls of each unit have not been					

Item No	Element	Defect	Breach of Building Act 1991	Breach of Building Code	Breach of New Zealand Building Code Acceptable Solutions	Breach of Acceptable Standards of Good Trade Practice and Workmanship (fitness for purpose)	Various Technical Literature
		carpet, gibboard linings and skirtings.					
28	Resulting Damage	From units to 5 to 1, the ceilings throughout the units including the insulation and ceiling batten systems are failing due to the extreme levels of moisture within the ceiling cavity and the saturation of the formwork timber boards to the floor beam system from water entry above.		Yes (E2/ E3)		Yes (E2/AS1/ E3/AS1)	
29	Resulting Damage	There is no ventilation to any of the ceiling areas and as well as extensive decay and mould the ceiling batten support systems are failing.		Yes (G4)		Yes (G4/AS1)	
30	Resulting Damage	At the exterior concrete wall lines, in combination with the issues of the water entry from the decks above there is a high condensing level of moisture to the inside face of the precast panels high level to the extent that quite significant rusting is occurring and moisture is travelling down the polystyrene substrate sheets affecting the wall linings to exterior walls and discharging out on to the floor levels causing decay and		Yes (E2/E3)		Yes (E2/AS1/ E3/AS1)	

Item No	Element	Defect	Breach of Building Act 1991	Breach of Building Code	Breach of New Zealand Building Code Acceptable Solutions	Breach of Acceptable Standards of Good Trade Practice and Workmanship (fitness for purpose)	Various Technical Literature
		mould to carpet and skirtings.					
31	Resulting Damage	The east timber frame wall lines are allowing moisture entry, especially at the external north and south corner junctions again causing timber decay to the timber framing, a breakdown of the gib board linings and mould and decay to carpets and skirtings.					
32	Resulting Damage	The extent of moisture within the units driven by the travel of moisture into the ceiling space has provided an extremely damp climate throughout the whole unit causing quite significant spore fungal growth to wall surfaces, fabrics, curtains and the like. Stachybotrys is active and abundant.		Yes (E2/E3)		Yes (E2/AS1/ E3/AS1)	
33	Resulting Damage	Water entry into the walls in the north and south corners at the precast panel junctions is causing decay and damage to claddings, timber framing, insulation and building wrap.					
34	Resulting Damage	The water gaining entry into the construction of the balustrades and the uplifting of moisture from the					