IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV 2011-409-000392
[2013] NZHC 1923

BETWEEN	KEITH FRASER GAULD Plaintiff
AND	WAIMAKARIRI DISTRICT COUNCIL Defendant

Hearing: 15-18 April 2013

Counsel: K W Clay for Plaintiff
F P Divich and A C Harpur for Defendant

Judgment: 31 July 2013

JUDGMENT OF WHATA J

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[1] Mr Gauld built a large house with monolithic cladding in 1993. His house was inspected by building inspectors on a number of occasions without any notice of weathertightness defects until 2009. Mr Gauld could not then obtain a code compliance certificate (CCC) when he wanted to sell his home until he had fully reclad his home at great expense.

[2] Mr Gauld now claims for the costs of the recladding from the Council. He alleges (in summary) that the Council was obliged to take all reasonable steps to certify compliance or to notify him of any defects. He says further that a CCC should have issued after an inspection on 10 March 2005 when all then remaining code compliance issues were apparently resolved with the building inspector. He also claims that had he been notified about the cladding problems subsequently found on 22 March 2005, he could have then undertaken targeted repairs at a substantially lesser cost than he subsequently incurred to achieve compliance with the code. Finally he says that the building inspector said "pleased to get that out of the way,"

referring to the inspection process. He contends that this amounted to negligent misstatement.

[3] The central issues are therefore:

(a) Did the Council owe Mr Gauld a duty of care to take all reasonable steps to certify code compliance or to notify him of defects?

(b) Did the Council negligently fail to perform this duty?

(c) Did the negligence cause Mr Gauld to suffer loss (and if so on what basis should loss be calculated) and

(d) Whether there was any negligent misstatement and if so any loss arising from it.

Facts

[4] Mr Gauld built a large home with monolithic cladding in 1993. At various times since various "final" inspections were undertaken for code compliance purposes. Following one such inspection in 2002 a notice of inspection was produced. A box relating to weathertightness was ticked, but a producer statement for the cladding was required. It also recorded three items, unrelated to weathertightness that needed to be followed up. A copy of the producer statement relating to the cladding was faxed to the Council.

[5] The Council then wrote to Mr Gauld in 2004 foreshadowing a change in the law affecting building consents and that the new regime would apply from February 2005. Mr Gauld sought a CCC and on 10 March 2005 another "final" inspection was undertaken by Prime Consultants, a firm of building inspectors retained by the Council. The three matters identified in the previous inspection were checked and approved. The notice for this inspection was handed to Mr Gauld who was present for the inspection. It recorded that no further re-inspection was necessary. A copy of this notice is attached as Appendix 1.

[6] Meanwhile on the same version of the notice, but unknown to Mr Gauld, a Council consultant had written on the Council inspection notice that the cladding needed to be inspected before a CCC could be issued. A copy of this version of the notice is attached as Appendix 2.

[7] The property was inspected again on 22 March 2005, this time without Mr Gauld. The resulting notice of inspection recorded various matters in relation to the cladding but without specifying what needed to be done. The notice was left on the premises. This notice is attached as Appendix 3.

[8] Mr Gauld thought nothing of it and assumed his house had obtained a CCC. However when he tried to put his house on the market in 2009 he discovered that he had not obtained a CCC.

[9] Mr Gauld then applied for a Department of Building and Housing report and a determination was issued that a CCC could not be approved. A notice of fix was issued, but without any fixed recommendations as to what was needed. Mr Gauld obtained a report which made several recommendations as to targeted repairs. However, ultimately Mr Gauld made an application for a full reclad. Mr Gauld says that in order to achieve the CCC he spent about $147,000 recladding his property.

The claims

[10] The plaintiff claims that the Council breached a duty of care to inspect and to notify by:

(a) Failing to take steps to issue a CCC between 23 March 2005 and April 2009;

(b) Failing to follow up on advice from the Council's building consultants in terms of the cladding requirements;

(c) Failing to action the request for a CCC within 20 working days (being the time period required under the Building Act 2004);

(d) Failing to undertake any further inspection beyond the March inspections;

(e) Failing to notify the plaintiff of the position with the result that Mr Gauld was denied the opportunity to have a CCC issued in 2005.

[11] There is a further claim which is based on negligent misstatement. The plaintiff says he was led to believe that a CCC would issue in 2005 because the building inspector said words to the effect that he would "be pleased to get that [the building inspection] out of the way", and the notice of inspection recorded that no re-inspection was needed.[1] Mr Gauld says he acted in detrimental reliance on that representation and would not have needed to incur the $147,000 costs had the Council correctly stated the position in 2005.

[12] Related claims based on equitable estoppel or breach of statutory duty were not pursued by the plaintiff.

Evidence

Plaintiff

[13] Mr Gauld emphasised that on receipt of a letter from the Council in 2004 foreshadowing a regime change, he was eager to obtain a CCC. He made himself available for final inspection which occurred on 10 March 2005. He says that he was advised by the building inspector from Prime Consultants that he would be pleased to "get that out of the way", referring to the inspection. He says he was left with the clear impression that there was nothing substantive to follow up and this was confirmed, in his view, by the notice of final inspection left with him. He says that there was no notation on it recording the need to check the cladding. He also recalls receipt of the notice of inspection relating to a 22 March inspection done without him. Under cross-examination he did not concede that this notice highlighted concerns about the cladding. He confirmed that when he did not hear

[1] Brief of evidence of Keith Fraser Gauld at [10].

further from the Council he assumed that there were no further issues of substance regarding the CCC and that it had issued. He did accept under cross-examination that the notice of inspection did not say that he would obtain a CCC but he said that by this stage he had been led to believe that he would get a CCC. He was also pressed on why it is he did not request a CCC and he responded that he simply expected that it would be on the Council file.

[14] Overall I am satisfied that Mr Gauld genuinely believed that following the inspection on 10 March 2005 he understood that no further substantive work was needed and that a CCC would follow. As I will explain below, a problem for Mr Gauld is that his failure to follow up on the 22 March notification was not reasonable in the circumstances.

Other evidence for plaintiff

[15] Mr Gauld's claim was supported by evidence from Roger William Cartwright, a building consultant, Mr Bruce Milsom, a building surveyor and Mr Noel Casey, a quantity surveyor.

[16] Mr Cartwright is an expert on building assessments, council processes and weathertightness liability matters. He was asked to provide an opinion on Council processes and whether or not the Council should have followed up on the notice of inspection. Based on his experience, he expressed the view that the building inspector must have been reasonably satisfied that compliance had been achieved as a result of his inspection of the property on 10 March 2005. He says that given the contents of the notice of inspection the Council should have issued the CCC, providing there were no outstanding administrative matters. It follows that the CCC should have issued immediately following the 10 March visit. He accepted that the Council was obliged to make sure that the work was done in accordance with the building consent documents and then with the CCC. The relevant code was (and remains) E2. He accepted also under cross-examination that the Council may refuse to grant a CCC until it is satisfied that the house was built in accordance with E2. He noted, however, under re-examination that when a Council does final inspection, it measures the building against the documents in play at the time and it is not

possible to fail because of a subsequently developed standard. In cases where there was some evidence of the cladding failing he would normally seek confirmation from an independent expert as to whether or not it had failed and would continue to perform its key function. It was also his experience that if a building complied with the consent, it meant that it complied with the code as well.

[17] Mr Milsom gave evidence about a report he had provided to Mr Gauld as to the repairs to make the house compliant with the code as at 2005. In that report he made several recommendations as to targeted repairs. The cost of these repairs was estimated at $61,300. He also referred to moisture findings and that there was a 70% chance of the moisture findings being within acceptable levels in 2005. If so, he would have in fact recommended less works. He also provided estimates of the likely costs of these works.

[18] Under cross-examination Mr Milsom was pressed on quantification of the likely cost of his repair work. He accepted that the $4,000 estimate he had given for joinery work was probably a little bit low. He also accepted that he was not a quantity surveyor and that any specific assessment would need to be undertaken by a person with those qualifications.

[19] He was also questioned on whether or not he thought the new cladding was necessary and he said it was not required, but would be a wise investment. He accepted that if the repair work needed consent after February 2005 then E2/AS1 would demand a ventilated cavity. He did not accept that the cladding had a life span of 15 years only. Rather, with maintenance it could last forever. He accepted when taken to Mr O'Sullivan's table that some of the identified defects were present when the building was constructed and would have been visible in 2005 (as well as 1993). He accepted that the issues identified would need to be rectified. As to his "70% chance" of moisture readings being lower he accepted that he had no research or data to support it, but that it was based on his experience. He also accepted that under the 2004 Act any work to the exterior envelope would have required a building consent.

[20] Mr Casey is a quantity surveyor of some substantial experience. He narrates the background including the contents of notices of inspection on 10 March and 22 March 2005. Based on the estimates supplied by Mr Milsom, he identifies that targeted repairs to meet the items of concern raised in the notice of inspection 31762 would be in the order of $18,260.87. Mr Casey also provided a detailed analysis of the costs of the 2009 remedial works and how much the equivalent works would have cost in 2005, having regard to betterment. In the result, he and Mr White (an expert for the defendant) agreed that the difference in cost overall would be in the order of $9,212.85. A table generated by them detailing their respective assumptions has been reproduced as Table 1.[2]

[21] Mr Casey also gave evidence dealing with Council processes as at 1993, 2005 and 2009. He says that the house had to be assessed by reference to standards set in 1993, not 2004, in which case no "matrix" would be applied and no cavity required. He says that Prime did not act reasonably when refusing to issue a CCC as early as November 2002. He also considered that the 3 items noted by the Council in 2005 were targeted repairs that could have been done without further consent under Schedule 3 of the Building Act 1991. This meant that an assessment under the then E2/AS1 standard would not have been necessary.

[22] He conceded nevertheless that had consent been required, E2/AS1 would have applied. He also accepted that if the building did not comply with E2 and B2 it should not be given a CCC and he also accepted that the identified items did not reflect the full scope of works required.

Defendant's evidence

[23] Mr O'Sullivan is a weathertightness expert. He stated that the identified defects demanded a full reclad under E2/AS1 and/or under E2. He accepted that as at 2005, the identified defects could be repaired as "like for like" works under the third schedule, but in his experience there would normally be some discussion with the Council as to the most appropriate way to proceed. The process would normally

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2 At para [30].

involve a full report, sharing that report with the Council, and undertaking the repairs usually with a new consent. CCC would then be obtained for new and old works.

[24] Under cross-examination Mr O'Sullivan did not accept that the standard for compliance was materially different between 2005 and 2009. E2 remained constant. E2/AS1 changed the perception of what was needed, not the underlying requirement to comply. He did not accept that Mr Milsom's recommendations were sufficient and he said that a cavity is key to compliance with E2. He also noted that the cladding did not comply with the manufacturer's recommendations and did not comply with E2 as at 1991.

[25] Mr Bithray was the building inspector in 2005. He gave his account of the inspection and subsequent process based on the Council files. He has no clear recollection of the actual inspection. This is not surprising given that he performs 50 – 60 inspections a week. He doubts that he would have suggested that Mr Gauld would be pleased that was "out of the way". He was certain that he would not have said a CCC would issue. However under cross-examination he accepted that he would not have been expecting to re-inspect the house after the March 10 visit with the three outstanding items approved. He also said that "I thought the [CCC] box was ticked." He also noted that he did not have E2/AS1 in mind on the March 22 inspection, because it did not apply. But the items identified on the 22 March visit were significant matters that needed to be addressed. He could not say whether targeted repairs would have been sufficient at the time, but he was alive to leaky home issues by then.

[26] Mr Taylor is currently the Building Unit Manager for the Council and was the general manager for Prime between 2000-2009. He confirms that he instructed Mr Bithray to inspect the cladding after the 10 March inspection. By this time he was well aware of the issues surrounding leaky homes and monolithic cladding. He was clear after the March 22 visit that a CCC could not issue and advised the Council, who did not take any further action. He could not explain why the council did nothing. He then describes the 2009 dealings with the property. He stated that Mr Gauld applied for a Department of Building and Housing report and a determination was issued that a CCC could not issue. A notice to fix was issued, but

without any fixed recommendations as to what was required. Mr Gauld then made an application for a full reclad. Consent to do so was granted and when the works were complete a CCC followed.

[27] Under cross-examination he accepted that as at 10 March 2005 it appeared that the Council was in a position to issue a CCC. He added however that his experience alerted him to the need to check the cladding. He also accepted that there was no requirement for a cavity until after 2005 and that the Council would have insisted on a full reclad in 2009.

[28] Mr Calvert is a building surveyor. He gave evidence about the cladding defects, the Council's inspection process, the scope of works to remedy the defects in 2005 or 2010 and betterment. He lists the defects identified in a Department of Building and Housing report, including the fact that the cladding did not comply with the manufacturer's recommendations. It was his experience that owners applied for CCC using a standard Building Act form before a CCC could issue, and that a final review is undertaken prior to issue of a CCC to ensure compliance with the code. He considered that the requirement for an inspection of the cladding was a prudent step given knowledge of potential weathertightness issues by 2005. He said inspection records are not a scope of works and that it is left to the owners to put forward a proposal for fixing identified problems. Based on a 3D model of the house, the risk matrix assessment resulted in a score of 18, well above the requirement for a reclad. This compares to the assessment of Mr Milsom and Mr O'Sullivan of 8. He also identifies the betterment resulting from the new works.

[29] Under cross-examination he accepted that a notice to fix should have been issued earlier and that a four year delay was not acceptable practice. He noted also that his own risk matrix assessment of the house resulted in a score of 9-10, but he did not accept that targeted repairs were acceptable. He maintained that the AXIS report recommendations were not adequate. In a response to a question from me, he said that the 3D modelling was based on the design plans, not on the flaws identified through the inspections.

[30] The defendant's case concluded with the evidence of Mr James White, a quantity surveyor. He provided a table setting out the costs of the works to achieve code compliance. He identifies what he considers to be betterment, and provides assessment of the costs in 2010 and 2005. As noted he has reached agreement with Mr Casey as to the difference between build costs in 2010 and 2005 excluding betterment. Helpfully they also produced the following table summarising their outputs and differences is reproduced here as Table 1.

Table 1

	JAMES VINCENT COLIN WHITE		NOEL JAMES CASEY	
	2010	2005	2010	2005
Repair cost		**134,321.23**		**134,321.23**
Betterment deduction		**46,667.48**		**34,134.18**
Cladding		*26,003.24*		*13,469.94*
Painting		*11,615.63*		*11,615.63*
Roof		*9,048.61*		*9,048.61*
Revised repair cost		**87,653.75**		**100,187.05**
Adjusted revised repair cost to reflect 2005 rates		11,999.80		13,024.32
Subtotal		75,653.95		87,162.73
Add back 50% painting		5,807.82		5,807.82
Adjust painting to reflect 2005 rates		795.09		755.02
TOTAL A		**80,666.68**		**92,215.54**
Consultants fees as claimed		12,989.99		12,989.99
Adjust consultancy fees to reflect 2005 rates		1,778.33		1,688.70
TOTAL B		**11,211.66**		**11,301.29**
GRAND TOTAL (TOTAL A + TOTAL B)	**100,643.82**	**91,878.34**	**113,177.04**	**103,516.83**
	91,878.34		103,516.83	
Difference in cost between 2010 and 2005	8,765.48		9,660.21	
We have agreed to average our two total and the agreed sum is:	**9,212.85**			

Statutory Frame

[31] It is common ground that the Building Act 1991 (as opposed to the equivalent 2004 legislation) is the applicable legislation. There can be little doubt that the 1991 Act set up a relationship of sufficient proximity between the Council and building owners to give rise to a duty of care.[3]

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[3] Refer *Body Corporate No 207624 v North Shore City Council* [2013] 2 NZLR 297 (SC) at [10], Elias CJ.

[32] The frame for this duty commences with the purpose and principles of the Act as contained in ss 6-9. Of most relevance here is s 7 which provides:

> **7 All building work to comply with building code**
>
> (1) All building work shall comply with the building code to the extent required by this Act, whether or not a building consent is required in respect of that building work.
>
> (2) Except as specifically provided to the contrary in any Act, no person, in undertaking any building work, shall be required to achieve performance criteria additional to or more restrictive in relation to that building work than the performance criteria specified in the building code.

[33] In furtherance of this purpose, a territorial authority is specifically empowered:

> **24 Functions and duties of territorial authorities**
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> Every territorial authority shall have the following functions under this Act within its district:
>
> ..
>
> (d) To determine whether an application for a waiver or modification of the building code, or any document for use in establishing compliance with the provisions of the building code, should be granted or refused:
>
> (e) To enforce the provisions of the building code and regulations:
>
> (f) To issue project information memoranda, code compliance certificates, and compliance schedules:
>
> (g) Any other function specified in this Act.

[34] The performance of these functions is achieved through an application process for building consents and then an assessment process for CCC all directed to providing assurance that the built work complies with the building code.

[35] Section 33 thus provided that:

> **33 Applications for building consents**
>
> (1) An owner intending to carry out any building work shall, before the commencement of the work, apply to the territorial authority for a building consent in respect of the work.
>
> ...

[36] Section 34 then stated that:

> **34 Processing building consents**
>
> (1) The territorial authority shall grant or refuse an application for a building consent within the prescribed period.
>
> ...
>
> (3) After considering an application for building consent, the territorial authority shall grant the consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work was properly completed in accordance with the plans and specifications submitted with the application.
>
> ...

[37] Section 34(4) also contemplated that there may be dispensation from strict compliance with the building code subject to such conditions as the territorial authority considers appropriate. In formulating any such conditions the territorial authority was required to have regard to the provisions of the building code in the manner set out at s 47 of the Building Act.[4] Section 47 sets out matters for consideration by territorial authorities in relation to exercise of their powers, including for the purposes of the issuance of a building consent and a CCC. The territorial authority was then empowered under s 35 to issue the building consent.

[38] As to compliance, s 43 provided:

> **43 Code compliance certificate**
>
> (1) An owner shall as soon as practicable advise the territorial authority, in the prescribed form, that the building work has been completed to the extent required by the building consent issued in respect of that building work.

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4 Section 34(4) and (5).

...

(3) Except where a code compliance certificate has already been provided pursuant to subsection (2) of this section, the territorial authority shall issue to the applicant in the prescribed form, on payment of any charge fixed by the territorial authority, a code compliance certificate, if it is satisfied on reasonable grounds that-

(a) The building work to which the certificate relates complies with the building code; or

(b) The building work to which the certificate relates complies with the building code to the extent authorised in terms of any previously approved waiver or modification of the building code contained in the building consent which relates to that work.

....

(8) Subject to subsection (3) of this section, a territorial authority may, at its discretion, accept a producer statement establishing compliance with all or any of the provisions of the building code.

[39] Section 43(5) and (6) then dealt with refusal to issue a CCC in the following terms:

(5) Where a building certifier or a territorial authority refuses to issue a code compliance certificate, the applicant shall be notified in writing specifying the reasons.

(6) Where a territorial authority considers on reasonable grounds that it is unable to issue a code compliance certificate in respect of particular building work because the building work does not comply with the building code, or with any waiver or modification of the code, as previously authorised in terms of the building consent to which that work relates, the territorial authority shall issue a notice to rectify in accordance with section 42 of this Act.

[40] While s 42 by itself is directed to rectification of works being undertaken while the building consent is operative, s 43 plainly concerned work that has been completed and for which a final CCC is sought. There is no specific time requirement specified for a notice to rectify. But s 9 required the Council to act "as promptly as is reasonable in the circumstances".

[41] A Council was then empowered at s 76 to undertake an inspection, meaning the taking of all reasonable steps to ensure that any building work has been done in accordance with a building consent.[5]

[42] Emphasising the importance of compliance with the code, s 80 provides that it is an offence to intentionally do any act, other than specified exceptions that is forbidden to be done by the Act *or by the building code*. It is similarly an offence to intentionally fail to comply with any direction given by a person authorised to give that direction by this Act or by the building code.

[43] The overarching significance of the code and compliance with it was summarised by Elias CJ in *Body Corporate No 207624 v North Shore City Council*:[6]

> [16] The code, with which the Council certified compliance, is a minimum standard, as the legislation makes clear. Building work which is not code-compliant is contrary to the Act. The Act sets up an interlocking system of assurance under which all undertaking building work or certifying compliance with the code are obliged to observe the standards set in it. The principal mechanism of the Act for checking for code compliance is the building consent and certification undertaken here by the Council (but which, at the option of owners could be undertaken by private approved contractors engaged by the owner). Functions performed by the Council are explicitly recognised by the Act to be amenable to liability in tort and the statute sets no limits to such liability.

[44] Chambers J also observed:

> [105] Indeed, the 1991 Act can be seen as having *strengthened* the argument that local authorities should be liable if they performed their supervision tasks negligently. One of the concerns often expressed about *Anns*-type thinking was that local authorities were not under a duty to inspect but merely empowered to do so. Was it fair for the courts to impose a duty of care on councils which chose to exercise the powers conferred while councils which chose not to were immune from claims for compensation? Lord Wilberforce provided an answer to that, but not all found it convincing. Parliament when enacting the 1991 Act removed that as an issue as the need for building plan approval and the need for supervision became mandatory. The only choice was as to who was to carry out those functions: the relevant local authority or a building certifier.

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5 Section 76(1)(a).

6 *Body Corporate No 207624 v North Shore City Council* [2013] 2 NZLR 297 at 315.

[45] And further:

> [222] The code compliance certificate regime is nonetheless of relevance in this case. Parliament clearly initiated this scheme so that everyone with an interest in a particular building, whether as owner, prospective owner or user, could check the extent to which the erection of the building was undertaken in compliance with the building code. Mr Goddard submitted the certificate was provided only for the benefit of Charco. We do not accept that submission. The certificates have a continuing purpose of providing information on how a building was constructed, a matter not easily ascertained once a building is completed. One of the primary purposes of code compliance certificates is to provide assurance to building users that the building was built properly and accordingly does not have hidden defects. ...

Assessment

[46] I will deal first with the claim in negligence and then negligent misstatement.

[47] As noted, the plaintiff's claims based on equitable estoppel and breach of statutory duty were not pursued.

Negligence - A Duty of Care?

[48] I have had some difficulty precisely framing the plaintiff's claimed duty of care. The plaintiff submits that the Council owed a duty of care to take reasonable steps when carrying out inspections and to be satisfied on reasonable grounds that compliance should be certified.[7] But that is no more than a restatement of the general principle. In reality, the plaintiff's claim does not rest on the failure to be satisfied on reasonable grounds that code compliance should have been certified. Rather the plaintiff relies on the combined refusal first to certify and then to notify Mr Gauld of weathertightness defects within a reasonable timeframe. For the purposes of a negligence claim, it is premised, as the defendant suggested, on the existence of a duty to take care to notify the affected owner to rectify defects.

[49] Given the somewhat novel nature of the asserted duty, I must first identify and examine the salient features of a claim to determine whether the relational conditions (proximity) exist to establish a duty to take care *in the manner sought*. In this context, the ability to foresee damage is a useful screening mechanism to

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[7] Citing *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC).

exclude claims which must obviously fail because no reasonable person could have foreseen the loss.[8] If damage was foreseeable, I must then assess whether there was a sufficient connection between the parties so that the defendant assumed a responsibility to take care, in the manner claimed, to secure the avoidance of damage to the plaintiff.[9] Furthermore given that the sole basis for proximity or connection is the performance of a statutory function, conflicting public duties may preclude the requisite proximity.[10]

[50] If I am satisfied that the requisite proximity exists, I must then decide whether it is fair, just and reasonable to impose a legal liability for its breach (assuming there is one).[11] This final stage of the assessment brings into account bigger picture considerations, namely "the effect on non-parties and on the structure of the law and on society generally".[12]

Step 1 - Salient features of the claim

[51] The plaintiff claims, in short, that there was a positive duty to take reasonable steps to notify Mr Gauld of the alleged defects so that he could either challenge or rectify them.

[52] Mr Clay then says that the Council then failed to take the following otherwise reasonable steps:

(a) Any step between 22 March 2005 and April 2009;

(b) To follow up with Prime the advice said it was to give in the inspection notice (31762) (doc 44);

(c) To action the request for a CCC within a reasonable time (the statutory requirement under s 93 of the 2004 Act is 20 working days);

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8 *North Shore City Council v Attorney-General ("The Grange")* [2012] NZSC 49 at [157].
9 Ibid at [158] and [188] and at [220] (per Tipping J). See also my conclusions in *Swordfish Co Limited v Buller District Council* [2012] NZHC 2339.
10 *R v Imperial Tobacco Canada Ltd* [2011] 3 SCR 45 at [47], per McLachlin CJ for the Court, cited with apparent approval in *The Grange* at [166].
11 Refer *The Grange* at [156].
12 Ibid at [156] and see also [159].

(d) To carry out a further inspection after 22 March 2005;

(e) To notify Mr Gauld that the certificate had not issued.

[53] These failures are said to mean that Mr Gauld was unaware that CCC had not issued, was led to believe it had issued and was denied the opportunity to have it issued in 2005.

Step 2 - Proximity?

[54] As noted above, the building inspection function performed by the Council in this case is an aspect of the general regulatory function performed by Councils under the Building Act 1991. The Supreme Court has recently affirmed that this function attracts a duty of care in relation to both residential and commercial owners of buildings.[13] In general terms, the same proximity considerations apply, with the same class of persons potentially affected, namely house owners and subsequent purchasers. Furthermore, the Council is engaged on payment of a fee by the home owner to assess whether the building is compliant with the code, and if not, the Council will notify the home owner of the relevant defects within a reasonable timeframe.[14]

[55] But it is difficult to see how a council could be expected to foresee that home owners would suffer loss as a consequence of the refusal to issue a CCC. Home owners must know that obtaining a CCC is a statutory requirement and that they carry the burden of correcting any non compliance with the code. There might however be circumstances where the failure to issue a notice to rectify, at least within a reasonable period, might lead to a foreseeable loss. An obvious example is where a defect is identified by the council but not notified to the home owner, and the home then suffers physical damage because of the unrectified defect. The statutory scheme contemplates, and a home owner might expect notification of

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13 *Body Corporate no. 207624 v North Shore City Council* [2013] 2 NZLR 297 (SC).

14 Refer [36]-[39] above. Consider by analogy the duty of care in providing information on a Land Information Memorandum (LIM) and the liability of a Council for the loss caused by providing negligent information; see *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] 2 NZLR 726 (SC) at [86]-[90] Tipping J (and see Elias CJ at [8], Blanchard J at [67], McGrath J at [181], and Anderson J at [243]).

material non compliances with the building code within a reasonable period. While the lack of notice does not convert a non compliant building into a compliant one, without a notice to rectify, the home owner has no reason to suspect or respond to the fact that the building is defective in a way that might lead to physical damage. I am not suggesting that a claim for such loss would necessarily be successful. Rather, given the foreseeability of preventable damage, it cannot be said that a claim based on the failure to provide notice to rectify must fail.

[56] The position is more complex in relation to a claim based on economic loss. Unlike the orthodox Building Act negligence claim, a home owner or purchaser cannot say that he or she relied on the issuance of the CCC for the purpose of assessing the fitness of the building. On the contrary, a home owner and purchaser must proceed on the basis that there could be no surety about this until compliance is certified. Therefore it will be difficult for a plaintiff to demonstrate how a Council could foresee a home owner or purchaser would suffer pure economic loss from the failure to give notice to rectify.

Step 3 – Policy / Just and Reasonable

[57] There is however nothing obvious in the policy framework that I can see that would automatically preclude the imposition of liability for failure to issue a notice to rectify involving foreseeable loss. The corpus of the duty of care remains the same statutory scheme that the Supreme Court has recently affirmed contemplates tortious liability for breach of a duty of care in the exercise of inspectorial functions. I would nevertheless qualify this in one important respect. I think there is substantial difference between liability for negligent failure to carry out inspection functions leading to a flawed CCC, and liability for refusal to issue a CCC. In my view it would be discordant with a Council's regulatory function and powers under the 1991 Act to expose Councils to liability in circumstances where they have refused to certify compliance, provided the Council had a good faith basis for doing so. In short, any potential liability must not depend on the power to refuse, but from the exercise of another function, as in this case the failure to notify.

[58] Given the foregoing, I am prepared to proceed on the basis that the general duty to take care affirmed by the Supreme Court extends to the duty to take reasonable steps to notify an affected owner of the need to rectify defects within a reasonable period. Two critical issues nevertheless remain, namely whether the failure to provide notice to rectify was negligent and caused loss to the plaintiff.

[59] Before turning to those issues I want to respond to the defendant's objection (to the extent that it remains live) that the pleadings did not raise the specific duty of care now in focus. I accept that the pleadings do not specifically claim that there was a duty of care to take reasonable steps to notify. But, while that is so, the Council was plainly on notice that its failure to notify Mr Gauld that he had not achieved compliance was the foundation stone of his claim. The key facts, including the failure to notify Mr Gauld of the reasons why he had not achieved compliance were put in issue. I therefore see no reason to decline to resolve the claim based on the existence of a duty to take care to notify an affected owner of and to rectify building defects.

Negligence and causation

[60] The defendant admitted that it was obliged under s 42 to issue a notice to rectify and did not do so. This failure, spanning a period of 4 years since the last inspection, and 19 years since construction, remains unexplained and was plainly unreasonable. I have little doubt that the Council's inaction failed to meet the requisite standard of care to be expected in the discharge of its duties. Indeed the inaction was entirely discordant with the purpose of the Act to ensure that buildings were constructed in accordance with the code. It was therefore, in my view, a negligent and actionable failure to discharge the duty to take care.

[61] As to causation and loss, Mr Clay submitted[15] that the plaintiff must only show on the balance of probabilities that he would have acted differently and that it is an all or nothing inquiry.[16] Mr Clay contended:

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[15] After hearing the closing argument I sought further submissions specifically dealing with causation and the assessment of loss.

(a) But for the failure by the Council to issue a notice to rectify in March 2005 Mr Gauld would have had brought to his attention the work that was needed to be carried out; and

(b) Had the Council issued the notice to rectify in March 2005, the plaintiff would have undertaken targeted repairs; or

(c) But for the failure to issue a notice to rectify, the plaintiff would not have incurred the increased repair costs later incurred in 2009; or

(d) The Council had no jurisdiction to require repairs to meet the standards set by the Building Act 2004 as the building had a building consent from 1993 and was subject only to the standards applicable under the 1991 Act.

[62] Mr Clay then posits an alternative scenario, based on loss of chance. He says Mr Gauld might have persuaded the Council to grant him a CCC without additional works, or based on fixing the three identified defects in the notice of inspection or by undertaking the targeted repairs or finally by undertaking the full reclad at 2005 prices. Mr Clay maintains though that the Council did not have the jurisdiction to require the standard of works later expected in 2009. He noted also that there was no evidence that the cladding had in fact failed in 2005.

[63] Mr Clay thus quantifies the loss under each scenario according to the two limbs of *Benton v Miller & Poulgrain*, namely either:[17]

(a) The plaintiff is entitled to his full damages if I am satisfied on the balance of probabilities the plaintiff would have acted differently; or

(b) On a loss of chance basis, depending on whether the plaintiff could have persuaded the Council to issue a CCC without further works, or on fixing the three specified items, or on a targeted repair basis, or if

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16 Citing Geoff McLay and David Neild "Torts" in the Rt Hon Sir Peter Blanchard (ed) *Civil Remedies in New Zealand* (2nd ed, Brookers, Wellington, 2011) 87 at 104; *Craig v East Coast Bays City Council* [1986] 1 NZLR 99 (CA).

17 *Benton v Miller & Poulgrain (a firm)* [2005] 1 NZLR 66 (CA).

the Council acted outside its jurisdiction, on the basis that the reclad was unnecessary.

[64] The defendant approaches the resolution of the claim on a different basis. Ms Divich says that there are four possibilities:

(a) The plaintiff would have obtained advice to repair, and the repair would have required a consent, with the proposed works assessed under the third edition E2/AS1 and a full reclad required;

(b) The plaintiff would have obtained advice to undertake targeted repairs without a building consent and taken the risk that no CCC would have been issued;

(c) The plaintiff would have done nothing until he sold the house;

(d) The plaintiff would have obtained advice to undertake targeted repairs, and obtained a building consent, following which a CCC would have issued.

[65] The defendant's position is that the first and third scenarios should be assessed on the balance of probabilities and resolved on an all or nothing basis in favour of the Council. It considers that the second and fourth scenarios are highly unlikely and should be dismissed, with the result that the plaintiff's claim must fail.

Resolution

[66] I have found the various scenarios provided by the parties very helpful. But I think though that the evaluative exercise requires three steps, in light of *Benton*. First, I must assess, on the balance of probabilities, the response of the plaintiff to a notice to rectify in 2005. Second, I must assess whether there was a substantial chance of the Council accepting the plaintiff's response. Third, if I get that far, I must assess the level of damages in light of my assessment of that chance, to the extent I can on the evidence available to me.

[67] For the purpose of this assessment I make two preliminary findings. First, the inspection notice left with Mr Gauld on 22 March 2005 did not alert him to the need to rectify defects. Subjectively assessed, the notice did not specify with sufficient clarity the requirement to repair defects. While an expert on such matters may have been alert to the need for action, Mr Gauld did not appreciate the significance of the matters noted. For reasons that I will specify below, that did not mean that Mr Gauld did not contribute to his own loss.

[68] Second, had the Council properly discharged its duty, it would have issued a notice to rectify based on the inspection notice completed on 22 March 2005. This would have required rectification of the following matters (there being no other basis I can reasonably find that other defects would have at that time been notified to the plaintiff):[18]

> Cladding at patio level
> Main vent embedded in cladding
> Pergola beams into cladding dropping away @ 35°

Step 1 – the plaintiff and independent advice

[69] I accept that had the plaintiff been notified of the problems he would have acted to rectify them in 2005. I therefore reject the defendant's do nothing scenario. He was by 2004 plainly keen to secure a CCC as soon as possible and had worked to secure that with the Council. I also accept that he would have sought independent advice on the most appropriate course to take because that would have been the logical thing to do, and something requested by the Council. I consider therefore that the focal point for this part of the assessment is in fact the likelihood of an independent expert recommending anything less than the full reclad ultimately undertaken by the plaintiff (less betterment).

[70] Before making those assessments, I reject the plaintiff's claim to full reimbursement for the following reasons. First, the duty to comply with the building code rested with the plaintiff. The decision or not to give notice to rectify or later to fix does not alter the basic duty to comply with that code. At best, the failure to

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[18] Refer Figure 3.

notify delayed the steps needed to comply. Second, I accept as at March 2005 the plaintiff was required to rectify or fix the cladding to at least a standard that achieved weathertightness as stated in E2. Third, I consider that it is highly likely that an independent expert and a Council inspector confronted with a home with clear cladding defects would be cognisant of the requirements of E2 and E2/AS1 even if they did not technically apply. By this time the dangers of failing to ensure weathertightness were well known to experts and to the inspectors. Taken together, the prospect of the plaintiff being enabled to do nothing and still obtain a CCC was remote in all scenarios.

[71] Turning then to the assessment of the prospect of independent advice in the counterfactual to do something less than that required in 2010. I put this at reasonably high. Mr Milsom, who gave measured evidence, did not resile from his evidence that he could support a targeted repair approach. He did not accept that a full reclad and cavity was necessary to address the defects identified in the last notice of inspection. Mr Milsom did however concede that if the works required consent after February 2004, then they would be assessed under E2/AS1 and a cavity would be required.

[72] In these circumstances, I find, on the balance of probabilities, that the plaintiff would have pursued a targeted repair approach similar to that promoted by Mr Milsom.

Step 2 - the Council's response

[73] The assessment of the likely response of the Council is more difficult. Both the Council inspectors (then working for Prime) were reasonably clear that they were familiar with the risks associated with weathertightness by 2005. However, Mr Bithray could not say whether he would have required more than targeted repairs. Mr Taylor said that he would have required a full reclad in 2005. The expert evidence for the Council was that a full reclad would have been necessary to comply with E2 (with or without E2/AS1). But I think it is also reasonably clear that Mr Taylor would likely have invited the plaintiff to obtain an independent report and I do not think he was so categorical as to preclude the potential for something less

than a full reclad, provided there was independent advice from a suitably qualified person.

[74] Overall therefore I am satisfied that the Council would have taken a cautious approach, and would have been strongly inclined to require a full reclad, including a cavity system, associated building consent, and compliance with E2 and most likely E2/AS1. But I cannot completely discount the potential for a targeted repair, provided it was based on independent advice and it was not otherwise a mandatory obligation to insist on a full reclad.

[75] As to whether there was a mandatory obligation as at 2005 to fully reclad, it is necessary to determine whether the Council was obliged by that time to require a fresh building consent for the repairs. If so, this would have required compliance with E2/AS1 as at 2005 with the result that the Council would have been obliged to insist on a cavity system.

[76] Mr Milsom said that the repairs necessary could be undertaken in conformity with the Third Schedule and without the need for building consent prior to the 2004 Act.[19] Mr O'Sullivan agreed that the identified defects could be repaired "like for like" under the 1991 Act, but that they still had to comply with the code.[20] Mr Milsom was however equally clear that by 2005, work to the exterior envelope required a building consent.[21]

[77] Given this somewhat confused experience, I propose to resolve this issue by reference to Schedule 3 of the 1991 Act, given that the Council accepts that the 1991 Act applied.[22] Schedule 3 states:

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19 See notes of evidence at 79, cf at 80, 84, 96, 97.

20 See page 151.

21 See page 97.

22 Section 436(2) of the Building Act 2004 states:

> **436 Transitional provision for code compliance certificates in respect of building work carried out under building consent granted under former Act**
>
> ...
>
> (2) An application for a code compliance certificate in respect of building work to which this section applies must be considered and determined as if this Act had not been passed.

Exempt buildings and building work

A building consent shall not be required in respect of the following building work:

(a) Maintenance in accordance with procedures specified in the compliance schedule (if any) for the building concerned:

(aa) ...

(ab) Any other lawful repair with comparable materials, or replacement with a comparable component or assembly in the same position, of any component or assembly incorporated or associated with a building, but excluding-

(i) The complete or substantial replacement of any system listed in section 44(1) or section 44(5) of this Act:

(ii) The complete or substantial replacement of any component or assembly contributing to the structural behaviour or fire-safety properties of the building:

(iii) The repair or replacement of any component or assembly that has failed to satisfy the provisions of the building code for durability.

...

[78] Mr Milsom's recommendation for the repair of the defects identified in the Council's inspection report was simply the installation of a drainage channel around the paved areas to achieve the 150 mm from finished floor level to the bottom of the channel, in accordance with E2/AS1 of the NZ Building Code.[23] In reality, however, I consider that Mr Milsom would have most likely undertaken his own assessment of what was required to secure weathertightness with the result that the recommendations he made in his April 2009 report and subsequently confirmed in evidence would have been promoted by him. I understand that these are the "like for like" repairs that Mr O'Sullivan considered could have been undertaken in accordance with Schedule 3 of the 1991 Act. Mr Milsom's key recommendations were:

(a) Removing 150 mms from the bottom of the wall framing and pouring a concrete nib under the walls and then repairing the wall framing and interior and exterior linings;

[23] At paragraph 20 of evidence-in-chief.

(b) Laying a 300 mm wide strip of concrete around the outside of the exterior walls 150 mm below the finished floor level;

(c) Fitting flashings around the aluminium joinery;

(d) Fitting cover steel over-flashings covering the timber jamb reveals and the junction, then forming an eyebrow over the garage door opening;

(e) Replacing the spouting with an external system;

(f) Removing the pergolas from the NE and NW corners of the building;

(g) Replacing the glass roof above the south entrance with a larger glass roof to cover all rafters and beam-to-wall connections and to provide protection to the timber beam by greater coverage. This included modification of the main drain vent pipe which was embedded into the cladding;

(h) Modifications to the storm water disposal around the skylight;

(i) Fitting a flashing over the range hood outlet and sealing all wall penetrations.

[79] At first blush, the above recommended works appear to extend beyond mere maintenance to include additional work designed specifically to achieve code compliance. Such works might, however, arguably constitute "replacement". Given also the consensus reached between the two key experts that the proposed repairs do qualify as "like for like" maintenance or repair, I am prepared to proceed on the basis that the recommended works could qualify as third schedule works, bearing in mind that any final decision in that respect requires a discretionary assessment by the Council's building inspectors.

[80] I am therefore prepared to proceed on the basis that obtaining a building consent was not a mandatory requirement with the result that a fresh consent was not

needed under the 2004 legislation. I should stress, however, that the decision to accept whether or not the works qualified as third schedule works, was a matter of discretion for the building inspectors. It remains far from clear then that the Council would have proceeded on that basis.

[81] The upshot of the foregoing two assessments leads me to the conclusion that the prospect of a targeted repair being accepted by the Council was substantially less than 50%, and no more than 20%. In summary, the substantial hurdles to the plaintiff are that, by 2005, Councils throughout the country were concerned about weathertightness issues exemplified by Mr Milsom's evidence that after 2004 any works to the exterior envelope would have required a consent. When I then overlay this with the expert evidence that by 2005 a full cavity system would have been required, the chance of proceeding on another basis was low.

[82] I note for completeness that the plaintiff placed much emphasis on the jurisdiction of the Council, or lack thereof, to assess his building by reference to post-1991 Act standards. As a matter of first principle, and as s 436(2) of the 2004 Act contemplates, a building constructed under the 1991 legislation should be assessed by reference to standards applicable under the 1991 Act, and not the 2004 Act. Some care therefore must be taken not to import subsequently developed standards and apply them for the purposes of code compliance. It needs to be recalled, however, as emphasised by the defendant, that the code E2 as at 1992 stated that:

> **E2 EXTERNAL MOISTURE**
>
> ...
>
> E2.1 The objective of this provision is to safeguard people from illness or injury which could result from external moisture entering the building.
>
> ...
>
> E2.2 Buildings shall be constructed to provide adequate resistance to penetration by, and the accumulation of, moisture from the outside.
>
> ...
>
> E2.3.2 Roofs and exterior walls shall prevent the penetration of water that could cause undue dampness, or damage to building elements.

[83] Certainly by March 2005, greater demands were being placed on owners of buildings to secure weathertightness in accordance with E2. While the subsequent standards developed in light of or following the 2004 Act may not be directly applicable, and enforceable as such, they were nevertheless relevant to the broad exercise of a discretion as to whether to grant a CCC. Accordingly, the jurisdictional objection is flawed. While it could be said that this might result in some unfairness to an affected homeowner, the responsibility for achieving code compliance sits with the homeowner until code compliance is achieved. He or she carries the risk that improved understanding of building techniques could require modification to a building for the purposes of code compliance.

Quantum of Damages?

[84] In *Benton* the Court of Appeal observed:[24]

> [50] In making a "loss of chance" assessment, broad judgments are called for. At one end of the spectrum, very low probabilities are unlikely to be reflected in an award of damages. So if the chance of avoiding an adverse event is as low as say one in ten, a Court will probably reject the claim rather than fix damages at ten per cent of the cost to the plaintiff associated with those adverse events.

[85] This case is on the borderline – as I have said the chance of the Council having granted a CCC based on targeted repairs is low and no more than 20%. There is then the added complication that the plaintiff's expert who quantified the targeted repairs, Mr Milsom, disqualified himself as an expert on such matters. I do not think his evidence was shored up by other experts for Mr Gauld. Nevertheless there was no evidence from such an expert contradicting the quantitative assessment made by Mr Milsom. On that basis I am prepared to complete the loss of chance assessment so as to gain a broad brush picture of the potential quantum of damages.

[86] Mr Gauld paid $134,321.23 for the full repair. Mr White estimated repair cost less betterment at $100,643.82 while Mr Casey put it at $113,177. The key difference between the two relates to the estimate for the cladding. I prefer Mr Casey's assessment as it is based, in part, on the actual cost of the linear weatherboard.

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[24] *Benton v Miller & Poulgrain (a firm)* [2005] 1 NZLR 66 (CA).

[87] Mr Milsom assessed the cost of targeted repairs at $61,300. He was cross-examined on some of his assumptions and he accepted that some of his estimates may have been low. There is also some suggestion in the evidence that other repairs were necessary. These are further reasons for caution.

[88] Nevertheless, applying a simple arithmetic, if I deduct the assessed targeted repair costs from the actual repair costs ($113,177 - $61,300) I arrive at a figure of approximately $51,877. When I then apply the loss of chance percentage, I arrive at a figure of $10,375.

[89] Given the inherent weakness of the evidence on this point, I am not able to conclude that the loss suffered is properly quantified at this sum. But when I then overlay it with the agreed position reached between the experts that had the rectification works taken place in 2005, the quantum saved would have been $9,212.85. It seems therefore that the two available points of reference, and subject to what I have to say about contributory negligence, suggest that a damages award in the sum of $9,000-$10,000 would remedy the negligent failure to notify Mr Gauld of the defects to his building.

Negligent Misstatement

[90] I am not going to dwell on this claim. While I accept that Mr Gauld thought that Mr Bithray said that "he would be pleased to get that out of the way", it was not reasonable, as the Council submits, for him to rely on that statement. At most it is evidence that Mr Gauld thought CCC would issue and so there was no subjective break in the chain of causation. But the statement was not and could never have been an assurance that a CCC would issue. The statement does not say that. At most it suggests that the inspection process was then complete. And, as Ms Divich submits, any reliance to that extent should have been broken when the subsequent notice was left. In that notice it is recorded, among other things, that 'Prime to advise'. That should have been a clear signal that the CCC process had not closed.

Contributory negligence

[91] This then links to the issue of contributory negligence. I have already resolved that Mr Gauld did not understand the technical significance of the 22 March notice of inspection. But that does not mean that the reverse was true, namely that Mr Gauld could assume that a CCC had issued and do nothing. A prudent and reasonable person in his position should have taken steps to clarify whether CCC had issued. This was not an immediate requirement. But by doing nothing for four years he contributed to his loss. To account for this, his claim to damages should be reduced by 25%.

General damages

[92] Mr Gauld has sought general damages. There is a paucity of evidence as to the basis for any claim to general damages. This case is also unlike the general run of leaky homes cases where owners have been granted general damages to reflect the additional harm done to them by virtue of the Council's negligence. But in this case, Mr Gauld carried throughout the duty to repair the defects. He is not the unwitting victim of the Council's failure to identify the defects. In those circumstances I see no proper basis for an award of general damages.

Other matters

[93] There were various other matters raised by the parties which for the most part do not bear on the final outcome. Nevertheless I respond to some of them for completeness.

[94] First, Mr Milsom gave evidence that there was a 70% chance of the moisture readings being less in 2005 with the result that less targeted repairs would have been recommended. I consider that this evidence is speculative and even if correct, is likely to be offset by the inevitably cautious approach that would have been undertaken by the Council.

[95] Second, there was evidence that the CCC should have in fact been issued earlier or at the latest on 10 March 2005. I do not accept this submission. A Council

is not obliged to issue a CCC until it is satisfied that the building is, in fact, compliant with the code. As I have said above, the owner or builder of a house carries the risk associated with any defects until a CCC has issued.

[96] Third, there was some suggestion that the loss caused resulted from a defective issuance of the building consent. It appears from the evidence that the design submitted for approval and in fact approved, was inherently flawed. That might be so, but the plaintiff did not commence its claim by reference to the decision to issue a building consent. I also see major difficulties with this claim, given the absence of evidence and obvious limitation issues.

[97] Fourth, I have not resolved whether or not the claim based on negligent misstatement is time barred. For my part, I prefer, as I have done, to proceed on the basis that the Council's negligence was ongoing, given that the failure to notify Mr Gauld of the defects was not remedied until 2009.

[98] Fifth, the defendant submitted that Mr Gauld would have taken a cautious approach (ie a full reclad) given that he would be exposed to losses suffered by future purchasers. I disagree. I consider it more likely that he would rely on independent advice and the Council's inspectors to deliver the necessary surety.

[99] Sixth, the defendant argued that this difference between the cost in 2009 and 2005 is just inflation or the changing purchasing power of the New Zealand dollar. Quite plainly the figures were adjusted to reflect different market conditions. However there was no direct evidence that the difference could be explained solely by inflation, and the experts did not seek to qualify their evidence in this way. I prefer therefore to proceed on the basis that the agreed figure represents the real difference.

Summary

[100] I find:

(a) The Council owned Mr Gauld a duty of care to notify him of the weathertightness defects known to it within a reasonable period;

(b) The Council negligently failed to notify Mr Gauld of the weathertightness defects within a reasonable period;

(c) The negligence caused foreseeable loss:

(i) Mr Gauld has shown on the balance of probabilities that he would have taken steps to rectify the defects in 2005 had he been given notice of them;

(ii) The loss to Mr Gauld should be calculated on a loss of chance basis, namely the chance that the Council would have accepted Mr Milsom's targeted repairs;

(iii) I put the prospect of this at no more than 20%.

(iv) Based on the evidence of Mr Milsom, the quantum of the loss to Mr Gauld is assessed at $10,375;

(v) Alternatively, the loss can be assessed at the difference between the cost of the full reclad in 2005 and 2009, namely $9,217.85;

(d) A deduction must be made for contributory negligence, which I estimate at 25%.

(e) In the result I find that Mr Gauld is entitled to a payment of between $6,913.39 and $7,781.25. I prefer the lesser figure, as it is based on firm evidence;

(f) Mr Gauld is entitled to interest on the award of damages from the date of the filing of the proceedings.

(g) The claim based on negligent misstatement is rejected.

Outcome

[101] Accordingly, there shall be an order for damages in favour of the plaintiff in the sum of $6,913.39 plus interest from the date of the filing of the proceedings.

Costs

[102] Mr Gauld has succeeded in establishing negligence. The Council has succeeded in establishing contributory negligence. On that basis, my tentative view is that Mr Gauld is entitled to costs on a 2B basis, less 25% to reflect the Council's partial success. I nevertheless invite submissions if costs cannot be agreed.

Solicitors:
Landley Law Limited, Christchurch
Heaney & Co, Auckland

Appendix 1

EXHIBIT NOTE
This is the annexure marked "E" referred to in the affidavit of Kevin Lamb
sworn at Rangiora this 3rd day of August before me:
[signature]
A Solicitor of the High Court of New Zealand
CHRISTOPHER LANE McPHAIL
Solicitor
Christchurch
30774

PRIME BUILDING COMPLIANCE

NOTICE OF INSPECTION

Building Act 1991 - Section 77 (1)

Owners Name: Soulo

Site Address: 61 Ennis Rd

Local Auth. Consent No. 95[illegible]

Prime Job No.

Officer: Lee Brown

How Notified
☑ Notified Direct ☐ Left on Site

To the Owner / Agent / Occupier / Contractor

Please take note that on the 10 / 3 / 05 at ___ am/pm this site was Inspected persuant to the Building Act 1991

The purpose of the inspection was ☐ Structure ☐ Plumbing ☐ Drainage

- ☐ Siting
- ☐ Foundation
- ☐ Slab / Sub Floor
- ☐ Mid Height Veneer
- ☐ Bond Beam
- ☐ Preline
- ☐ Pre Stop
- ☐ Drainage
- ☐ Effluent Disposal
- ☐ Compliance Schedule
- ☑ Final
- ☐ Warrant of Fitness
- ☐ Swimming Pool Fencing
- ☐ Dangerous Goods
- ☐ Complaint
- ☐ CCC Issue Y / N
- ☐ Other (Specify)
- ☐ Partial (Specify)

Heating Unit

Comments Owns Act Signed

Inspection Notes Electrical CCC N° 71807
HWC Strapped OK
Safety Glass To Bathrooms

REINSPECTION REQUIRED YES (NO)

Signature [signature]

PRIME BUILDING COMPLIANCE LTD 211 High Street, PO Box 387 Rangiora
Tel: (03) 311-8240 Fax: (03) 313-1645 Call Free 0800 724 2378 Email: info@primebc.co.nz

EXHIBIT NOTE
This is the annexure marked E referred to in the affidavit of Kevin Lamb sworn at Rangiora this 3rd day of August before me: 30774
A Solicitor of the High Court of New Zealand

PRIME BUILDING COMPLIANCE

NOTICE OF INSPECTION

Building Act 1991 - Section 77 (1)

CHRISTOPHER LANE McPHAIL Solicitor Christchurch

Owners Name: SOULO

Site Address: 61, KOMI RD

Local Auth. Consent No. 93/0019

Prime Job No.

Officer: LEO BITMEAD

To the Owner / Agent / Occupier / Contractor

How Notified: ☑ Notified Direct ☐ Left on Site

Please take note that on the 10 / 3 / 05 at ___ am/pm this site was inspected persuant to the Building Act 1991

The purpose of the Inspection was ☐ Structure ☐ Plumbing ☐ Drainage

☐ Siting	☐ Pre Stop	☐ Swimming Pool Fencing
☐ Foundation	☐ Drainage	☐ Dangerous Goods
☐ Slab / Sub Floor	☐ Effluent Disposal	☐ Complaint
☐ Mid Height Veneer	☐ Compliance Schedule	☐ CCC Issue Y / N
☐ Bond Beam	☑ Final	☐ Other (Specify)
☐ Preline	☐ Warrant of Fitness	☐ Partial (Specify)

Heating Unit

Comments OWNS ATT SAMOA

Inspection Notes ELECTRICAL CCC N° 71807.
HWC STRAPPED - OK.
SAFETY GLASS TO BATHROOMS.

Inspection of exterior cladding required B4 CCC issued 11/3/05

REINSPECTION REQUIRED YES (NO)

Signature

PRIME BUILDING COMPLIANCE LTD 211 High Street, PO Box 387 Rangiora
Tel: (03) 311-8240 Fax: (03) 313-1645 Call Free 0800 724 2378 Email: info@primebc.co.nz

EXHIBIT NOTE
This is the annexure marked "G" referred to in the affidavit of Kevin Lomas sworn at Rangiora this 3rd day of August 2010 before me:
A Solicitor of the High Court of New Zealand

PRIME BUILDING COMPLIANCE

NOTICE OF INSPECTION

Building Act 1991 - Section 77 (1)

Owners Name: Sould

Site Address: 61 Edens Rd

Local Auth. Consent No. 93/0014

Prime Job No.

Officer: Lee Bethell

To the Owner / Agent / Occupier / Contractor

How Notified
☐ Notified Direct ☑ Left on Site

Please take note that on the 22 / 3 / 05 at ___ am/pm this site was inspected pursuant to the Building Act 1991

The purpose of the inspection was ☐ Structure ☐ Plumbing ☐ Drainage

☐ Siting	☐ Pre Stop	☐ Swimming Pool Fencing
☐ Foundation	☐ Drainage	☐ Dangerous Goods
☐ Slab / Sub Floor	☐ Effluent Disposal	☐ Complaint
☐ Mid Height Veneer	☐ Compliance Schedule	☐ CCC Issue Y / N
☐ Bond Beam	☐ Final Cladding Final	☑ Other (Specify)
☐ Preline	☐ Warrant of Fitness	☐ Partial (Specify)

Heating Unit

Comments OWS AT SAME

Inspection Notes Poly Cladding
All Plastered + Sealed
Openings Finishes Appear OK
Cladding At Patio Lever
Main Vent Embedded in Cladding
Pergola Beams into Cladding Dagging Away @ 35°
Apron Flashings in Place
Photos Taken
Prime To Advise

REINSPECTION REQUIRED YES / NO

Signature

PRIME BUILDING COMPLIANCE LTD 211 High Street, PO Box 387 Rangiora
Tel: (03) 311-8240 Fax: (03) 313-1645 Call Free 0800 724 2378 Email: info@primebc.co.nz

Solicitors: