THE WEATHERTIGHT HOMES TRIBUNAL

TRI 2014-100-000024
[2016] NZWHT AUCKLAND 1

BETWEEN	**MANCHESTER SECURITIES LIMITED** Claimant
AND	**AUCKLAND COUNCIL** First Respondent

Hearing: 7, 8 and 24 September 2015

Closing submissions: 24 September 2015

Further written submissions: 2 February 1016

Appearances: Mr Ho for the claimants
Ms Parker, Ms Harpur and Ms Mitchell for the first Respondent

Decision: 1 March 2016

FINAL DETERMINATION
Adjudicator: M Roche

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[1] The level 12 penthouse apartments at 196 Hobson Street were leaky. The owner, Manchester Securities Limited, (Manchester) has sued Auckland Council for the cost of repairs. Manchester claims as an assignee of the former owner, Sage Securities Limited (Sage), and, in the alternative, in its own right. Robert Cummins is the sole director of Manchester. Mr Cummins worked as a property consultant for Sage prior to Manchester's purchase of level 12.

[2] The Council has conceded that it was negligent in respect of its inspections and the issue of a Code Compliance Certificate (CCC) in respect of work carried out pursuant to a building consent issued in respect of level 12 (the 0818 consent). It has also conceded that this negligence caused the need to completely re-clad level 12. It defended the claim on the basis that the assignment was invalid, the assigned claim was limitation barred and, with respect to the alternative claim, that its actions were not the cause of Manchester's loss.

Chronology

[3] I set out the chronology of events.

1994	Building consent 9808 issued for the construction of levels one to 11 of the apartment building.
1995	Building consent 9809 issued for the construction of level 12.
19 November 1999	Notice to rectify issued under building consent HC/94/9809. The notice stated that the level 12 decks have not been constructed and weather sealed as per the consent drawings and directed waterproofing to the upper floor decks to be installed in 14 days. Mr Cummins was given a copy of the notice to rectify and asked to liaise with the Council on Sage's behalf with respect to it.

8 March 2000	The Council wrote to Sage advising that until the problem of water penetration from level 12 to level 11 had been resolved, 'all code compliance certificates relating to your apartment and that of the whole apartment complex will be held up'.
March 2000	Mr Cummins ceased his involvement with the property.
28 July 2000	Building consent 4926 issued for work on level 12 (for internal residential fit out of the master bedroom).
19 February 2002	Building consent 0818 issued for work on level 12 (for internal reconfiguration and window installation).
26 April 2002	Limitation period commences. (Claim commenced 26 April 2012).
20 March 2003	CCC issued for consent 4926.
28 March 2003	Sonoguard applied to level 12 decks
6 August 2003	CCC issued for consent 0818.

[4] In May 2005 the Joyce Group condition report on Hobson Apartments was published. This report was prepared for the building's Body Corporate in respect of levels one to 11 and did not specifically examine level 12. It identified the inappropriate use of Harditex cladding (giving rise to wind loading issues and associated cracks) and the lack of saddle flashings at balustrade wall junctions.

[5] In June 2005 the Covekinloch report to the Body Corporate advised the balustrades could be rebuilt as targeted repairs but that to obtain code compliance the building had to be reclad.

[6] In August 2005 the Body Corporate issued proceedings against Auckland Council in the High Court in respect of levels one to 11.

[7] In March 2006 the director of Sage, Philip McGaveston, approached Mr Cummins about buying level 12. Mr McGaveston provided Mr Cummins with a copy of the Joyce Group report (which recorded, erroneously, that the level 12 deck leak had been resolved) and the two CCCs that had been issued in March 2003 and August 2003 in respect of level 12.

[8] Mr Cummins provided the Joyce Group report to Seagar and Partners whom he engaged to prepare a valuation for the property.

[9] It is worth noting that there has been some confusion concerning the status of level 12 and in particular whether a CCC was ever issued for the level as a whole (including the exterior cladding). The two CCCs issued in 2003 were issued in respect of the work carried out under consents 4926 and 0818. A CCC was never issued for level 12 as a whole.

[10] The Seagar report noted in error that level 12 had code compliance while the remainder of the building did not. The Seagar report also failed to note that the Harditex cladding issues affecting levels one to 11 also affected level 12 and recorded that level 12 was clad with stone panelling and colour steel sheeting and that the surrounding deck had been resealed to a watertight standard. Seagar recommended a valuation of $1,800,000 which took into account the lack of a CCC for the lower levels of the building.

[11] On 9 May 2006 Manchester entered into a sale and purchase agreement for level 12. The purchase price was $1,800,000. The agreement was conditional on finance being arranged within ten working days from the date of the agreement (23 May 2006).

[12] On 26 May 2006, Mr Cummins and Mr McGaveston signed a memorandum recording that the agreement was unconditional on the basis that Sage agreed to assign to Manchester its legal rights against the Auckland City Council in respect of the property (the assignment).

[13] On 21 August 2006 the purchase settled. In consideration of the purchase price Manchester transferred to Sage its shares in a property

company in which it and Sage were each one third shareholders. The balance ($800,000) was paid in cash.

[14] On 13 October 2011 Manchester applied for an assessor's report in respect of level 12 pursuant to s 32(1)(a) of the Weathertight Homes Resolution Services Act 2006 (the Act). The assessor found that the eligibility criteria of the Act were not met as there was no evidence of water damage to the parts of the building that were not limitation barred.

[15] On 26 April 2012 Manchester obtained independent evidence of damage resulting from window joinery installation and re-applied for an assessor's report.

[16] In September 2012, the equitable assignment made on 26 May 2006 was perfected by way of a deed of assignment.

[17] In 2012, the Body Corporate settled its claim against Auckland Council and commenced the remediation of levels one to 11. This included the erection of scaffolding up to and over the level 12 parapets.

[18] On 7 March 2013 Manchester's claim was found to be eligible for the purposes of the Act following an application to the Chair of the Weathertight Homes Tribunal for reconsideration under s 49 of the Act.[1]

[19] On 21 March 2013, the Council issued a building consent to Manchester for work relating to the "closed in option". The closed in option involved closing in the level 12 decks by means of a glazed wall and a new roof over the decks. On 2 May 2013, the Council advised Manchester that it required the level 12 decks to be waterproofed before it would issue a CCC to the Body Corporate leading to the abandonment of the, now uneconomic, closed in option.

[20] On 11 August 2014, Manchester served notice of the assignment on the Council. On 15 August 2014, Manchester applied for adjudication of its claim.

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[1] *Manchester Securities Limited* [2013] NZWHT 04.

Legal and factual issues

[21] There are a large number of legal and factual disputes between Manchester and the Council. The issues that I need to address are:

(a) What were the weathertightness defects?

(b) Did Sage have a cause of action capable of assignment on 26 May 2006?

(c) Was the requirement to give notice of the assignment satisfied prior to the commencement of proceedings?

(d) If so, was the assigned claim limitation barred?

(e) If the assigned claim was not valid, has there been a break in the chain of causation or contributory negligence on the part of Manchester?

(f) Is the Council liable for Manchester's wasted expenditure on the closed in option?

(g) Did the lack of cooperation and coordination between Manchester and the Body Corporate in respect of repairs amount to a failure to mitigate?

(h) What are the quantum issues?

(i) Should interest be awarded and if so how should it be calculated?

WHAT WERE THE WEATHERTIGHTNESS DEFECTS?

[22] The experts were in general agreement regarding the identity of the defects. The main issue is when they became reasonably discoverable. A related issue is the overlap between defects that were created, and may have been discoverable, at different times.

[23] The Council has conceded that the work carried out pursuant to consent 0818 in respect of which a CCC was issued in August 2003 gave rise to the need to fully reclad the claim property. The 0818 defects concern the following installation defects in three windows installed to the Harditex and metal clad wall planes:

(a) No head flashing above lounge window to unit 12B allowing water to penetrate between window head and cladding.

(b) Head flashings to dome joinery units to Harditex walls are face fixed to cladding resulting in future likely damage.

(c) Harditex cladding installed hard down onto head flashings in some joinery units resulting in future likely damage.

(d) Jambs of the joinery units to Harditex cladding are ineffectively fixed and sealed against the cladding leaving a gap between the jamb and the cladding resulting in future likely damage.

(e) The head flashings installed to the joinery units to the profiled metal clad walls have not been fitted with stop ends. Water is able to penetrate behind the cladding at the ends of the head flashings.

[24] The 0818 defects have, of themselves, necessitated the complete re-clad of level 12 including the remediation of the decks. Another set of defects, not associated with the 0818 level 12 defects, have also necessitated significant remedial work. These defects are:

(a) Deck:

1. Failure of the butyl rubber planter liners.

2. Inadequate threshold height between deck level and internal floor level.

3. Inadequate fall/incorrect fall to the deck surface.

(b) Stone cladding:

1. Open joints between the stone panels.

2. Stone cladding installed hard down onto the decks.

3. No head flashing installed.

4. Unsealed gaps present between the joinery jambs and stone cladding.

5. No sill flashings installed below joinery units.

6. No stop ends to the window head flashings.

(c) Joinery:

1. Failed joinery units.

(d) Timber framing:

1. Inadequately sized and centred timber framing.

DID SAGE HAVE A CAUSE OF ACTION CAPABLE OF ASSIGNMENT ON 26 MAY 2006?

[25] After entering into the sale and purchase agreement but prior to settlement, Sage agreed to assign its legal rights against the Council to Manchester in respect of the exterior cladding system. Mr Cummins gave evidence that he took this assignment because the Joyce Group report had identified issues with the Harditex cladding on the building and he wanted to preserve the option of joining the Body Corporate litigation as an assignee of Sage, or otherwise to issue independent proceedings. The claim against the Council is brought pursuant to this assignment.

[26] It is noted above that the sale price of $1,800,000 was the figure recommended in the Seagar report which assessed the value of level 12. It is also noted above that in reaching this figure:

- The Seagar report erroneously recorded that level 12 had code compliance although the remainder of the building did not. The report noted that the building up to and including level 11 may require recladding to meet current Council requirements but that this would not directly affect level 12.

- The Seagar report failed to note that the Harditex cladding issues affected level 12 (the report recorded that level 12 was clad with stone panelling and colour steel sheeting).

- The Seagar report erroneously recorded that the surrounding deck on level 12 had been resealed to a watertight standard.

[27] Having sold for full value, the question arises as to whether Sage had a cause of action against the Council to assign.

[28] The Council's closing submissions raised an issue regarding the recovery of loss before the assignment of a claim.[2] However, this issue was not expanded on in oral argument or answered in the claimant's closing submissions. Subsequent to the hearing I invited counsel to provide further submissions on this issue which were duly filed on 2 February 2016.

[29] Manchester's position on the issue is that a vendor's cause of action is not extinguished on sale, even if full value is paid for damaged property, otherwise the wrongdoer would escape liability. Manchester places considerable reliance on English case law concerning the assignment of contractural rights. In particular Manchester relies on the English Court of Appeal case *Offer-Hoar v Larkstore Limited.*[3]

[30] In *Offer-Hoar,* a vendor of land assigned his contractural rights arising from an engineering report on the land to the purchaser, five years after selling for full value, and after a landslip occurred causing loss to the new landowner. The Court held that the assignment allowed the new owner to claim against the report writers for the cost of the landslip. It held that the principle that an assignee could not recover more than an assignor did not apply because the principle was not intended to allow the wrongdoer to escape liability for its wrongdoing.

[31] Manchester also relies on *Body Corporate 326421 v Auckland Council (Nautilus).*[4] In that decision, Gilbert J held that it was not contrary to public policy to allow assigned claims against the Council to stand.

[32] In its closing submissions, the Council relied on *Quin v North Shore City Council*[5] where it was held that a builder could not be sued under an assignment because, at the date of the assignment, there was no claim against the builder, the assignor having already been compensated for their loss. Manchester seeks to distinguish *Quin* in two respects. First, it submits

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[2] Closing submissions on behalf of the respondent at [37]-[41].
[3] *Offer-Hoar v Larkstore Limited* [2006] EWCA Civ 1079, [2006] 1 WLR 1079.
[4] *Body Corporate 326421 v Auckland Council* [2015] NZHC 862.
[5] *Quin v North Shore City Council* [2001] BCL 212.

that the sale and purchase agreement for level 12 was contingent on the assignment as there was no unconditional agreement until the cause of action was assigned. Secondly, it submits that, unlike the guarantor in *Quin* who agreed to bear the losses caused by the defects, Manchester did not make any such agreement and to the contrary took an assignment in order to pursue the Council for them.

[33] The Council's position is that Sage's potential right to sue the Council was extinguished when the sale and purchase agreement for level 12 at full value was entered into on 9 May 2006, or at the latest when the finance condition lapsed on 23 May 2006. After that date, Sage had nothing to assign as loss is a key element to any cause of action. The Council relies on *Quin*[6] which records that it is not possible to retrospectively assign something that does not exist at the time of the assignment. In other words, if no loss arises, the purported assignor has no right of recovery and therefore nothing to assign.

[34] The Council also relies on *P-Onefive Investments v Auckland Council.*[7] In that case Associate Judge Abbot considered an argument that as a vendor was paid current market value for a property, it has suffered no loss for which it could assign the right to sue. Associate Judge Abbott commented that this argument would have merit if it was found that the assignment was an afterthought rather than part of the sale and purchase transaction. Elsewhere in the decision it was confirmed that an assignment cannot succeed where there is no loss to assign.[8]

Assessment

[35] The *Offer-Hoar* decision relied on by the claimant is of limited applicability. It relates to an assignment of contractural, rather than tortious rights. The decision notes that the assignment did not enable the purchaser to make a claim in tort because damage had not occurred until after the sale. Therefore, there was no cause of action in tort to assign.

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[6] Above at [31]-[33].
[7] *P-Onefive Investments v Auckland Council* [2014] NZHC 825.
[8] At [102].

[36] The *Nautilus* decision is similarly of little assistance. Gilbert J rejected an argument that the assignment of claims was contrary to public policy. However, in making this finding he noted that the purchasers had bought units known to have defects and by doing so accepted an obligation to contribute a share of unquantified repair costs. The assignment gave them a measure of protection against these costs. His Honour noted that the alternative would have been for the units to be sold at a greater discount leaving the vendors to sue for losses on sale. The causes of action assigned in *Nautilus* clearly existed at the time of sale and were assigned as part of the sale agreement. The assignment in the present case more closely resembles the "afterthought" described by Associate Judge Abbot in *P-Onefive Investments.*

[37] The distinctions Manchester seeks to make from *Quin* do not assist it. It has not been suggested that Manchester agreed to bear the burden of losses caused by defects. This distinction has no clear relevance to the issue of the validity of an assignment. The simultaneous timing of the assignment and the confirmation that the agreement was unconditional do not assist Manchester. The sale and purchase agreement had been made several weeks earlier with no reference to an assignment.

[38] In my view Sage had no cause of action to assign to Manchester after entering into an agreement on 9 May 2006 for the sale of level 12 for full market value (the price being determined in a valuation report that recorded level 12 had code compliance, fully remediated decks and no re-cladding remediation required). The agreement was subject only to a finance condition and there is no evidence before me that Manchester had any difficulty satisfying this condition in accordance with its obligation to do all things necessary to fulfil it. Claims for negligent construction are claims for economic loss. This loss occurs when the market value of a dwelling is depreciated by reason of defects. Clearly such loss had not arisen when Sage entered into a sale and purchase agreement for full value. The assignment was an afterthought and not part of the sale and purchase agreement.

[39] It follows that the claim against the Council, based on the assignment fails.

WAS THE REQUIREMENT TO GIVE NOTICE OF THE ASSIGNMENT SATISFIED BEFORE PROCEEDINGS WERE COMMENCED?

[40] I have found that the assigned claim fails. However, in case I am wrong, I will determine the issues of notice and limitation that were raised by the Council and which received considerable emphasis at the hearing and in submissions.

[41] The Council's position is that, even if Sage had assigned a cause of action to Manchester, the assignment was not valid because notice of it was not given prior to the commencement of proceedings.

[42] The assignment was given in 2006 and therefore falls under the Property Law Act 1952. Section 130(1) of that Act provides that express notice of an assignment is required in order for it to be effectual in law. The Council argues that Manchester commenced proceedings on 26 April 2012 when it applied for an assessor's report. As notice was not given until 11 August 2014, the assignment was ineffectual and therefore invalid.

[43] The Council relies on *Mountain Road (No 9) Limited v Michael Edgley Corporation Pty Limited.* In *Mountain Rd* it was held that:[9]

- An assignee is not competent to enforce an assigned cause if notice has not been given.
- Time continues to run in favour of a prospective defendant in respect of an existing cause of action until someone entitled to enforce the cause of action validly commences proceedings for the purpose.

[44] In *Mountain Road* the assignee could not commence further proceedings as time had expired.[10]

[45] Under the Act, a claim is commenced when an application for an assessor's report is made.[11] The clock stops for limitation purposes at this

[9] *Mountain Road (No.9) Limited v Michael Edgley Corporation Limited* [1999] 1 NZLR 335 (CA) as authority for the proposition that an assignment is not possible against a third party unless notice is given within the limitation period prior to the commencement of proceedings at 345.

point. Section 37 of the Act provides that applying for an assessor's report has the effect of filing proceedings in a Court. The issue to be determined is whether notice of an assignment to potential respondents is required at this point.

[46] In *Body Corporate 180379 v Auckland Council*[12] *(Donk)* the Tribunal found that a claim by an assignee against the Council was invalid because the assignee had failed to give notice of the assignment to the Council. Fogarty J set the Tribunal's decision aside. Fogarty J discussed the scheme of the 2002 and 2006 Weathertight Homes Resolution Services (WHRS) Acts and the provision that claims are commenced by an application for an assessor's report. His honour noted that at this stage, the claimants do not nominate who the respondents will be and that Parliament did not intend notice to be given to potential respondents or defendants at this time. Fogarty J contrasted the statutory mechanism under the 2002 and 2006 Acts for making a claim with the common law which presumes and requires a plaintiff to identify defendants in a statement of claim when it is lodged in court. Fogarty J took the view that if the common law of assignment, as amended by s 130 of the Property Law Act 1952, were to be applied to claims under the 2002 and 2006 Acts, there is a real risk that the application of natural law would defeat the remedial function of the WHRS legislation.

[47] Manchester takes the position that although the application for an assessor's report on 26 April 2012 "stopped the clock" pursuant to s 37 of the Act, the filing of the application for adjudication in the Tribunal on 15 August 2014 was the "commencement of proceedings" for the purpose of the law of assignment. As notice was given by this point, no issue arises regarding validity.

[48] Having regard to the comments of Fogarty J in *Donk*, to the remedial function of the legislation, and to the statutory scheme whereby applications for assessor's reports are made without notice to potential respondents, I take the view that, for the purpose of the law of assignment, proceedings were commenced when the application for adjudication was

[10] At 338.
[11] Weathertight Homes Resolution Services Act 2006, s 9.
[12] *Body Corporate 180379 v Auckland Council* [2012] NZHC 588.

filed with the Tribunal on 15 August 2014. Notice of the assignment was given before this date, effective for and consistent with the purpose of s 130(1) of the Property Law Act. The stopping of the clock for limitation purposes however occurred on 26 April 2012 when the application for the assessor's report was made. It follows that the failure to give notice prior to applying for an assessor's report (which is not anticipated or required by the Act) did not invalidate the claim.

[49] I record that the Council sought to distinguish *Donk* on the basis that in *Donk*, proceedings had been commenced in time by the assignor. I do not accept this distinction. The principle concerning the defeat of the remedial function of the legislation by the application of natural law remains the same.

WAS THE ASSIGNED CLAIM LIMITATION BARRED?

[50] Although as noted earlier, I have not accepted the validity of the assigned claim, I will determine whether the purported assigned claim was limitation-barred as of 26 April 2012. This will depend on when the cause of action arose. The Council's position was that this was August 2005, at the latest, when the Body Corporate issued its claim against the Council in respect of the building defects. On this reasoning, the assigned claim was limitation-barred by August 2011 and the claim brought in April 2012 (the application for an assessor's report) would be out of time.

[51] Manchester's position is that the cause of action arose in May or August 2006 (when pre-settlement inspections were carried out) and that the claim was therefore in time when the application for an assessor's report was made in April 2012.

[52] Section 4 of the Limitation Act 1950 provides that an action founded in tort shall not be brought after the expiration of six years from the date upon which the cause of action accrued. In *Invercargill City Council v Hamlin*[13] the Privy Council held that time begins to run when the defects or the damage are discovered or are so obvious that any reasonable home owner would have called in an expert to make investigations that properly

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

carried out, would have revealed the Council's breach of duty. The Court stressed that in building defects cases the loss is economic in nature and occurs when the market value of the house has depreciated by reason of the defective work.

[53] The Court of Appeal provided further clarification in *Pullar v R.*[14] The Court held that it was not necessary to be able to pin-point with precision the exact cause of every defect as this might mean time could not start running until the remedial work was underway. The question was when the market value of the building was affected.

[54] In *Burns v Argon Construction*[15] the High Court distinguished *Pullar.* In *Burns* an expert had been instructed and repairs carried out in response. The High Court overturned a finding by the Tribunal that the loss of value to the property had occurred at this point. While some damage was obvious, some significant problems were not and there was "mystery" about what was wrong and the remedial action required.

[55] Similarly, in *Cole v Pinnock*[16] the High Court found that even though the claimants had engaged a specialist concerning earlier leaks, the claimant's loss remained latent as the earlier leaks were caused by defective workmanship of a different nature to that which ultimately led to the underlying leaky home issues. The question was whether the problems identified during the earlier investigation should have led a reasonable person to discover the other systemic defects.

When were the level 12 defects reasonably discoverable?

[56] The question to be determined is when the level 12 defects were reasonably discoverable and accordingly, when they gave rise to economic loss.

[57] The Council's position is that defects requiring significant remedial work were reasonably discoverable in the *Hamlin* sense by 14 April 2004 when the Body Corporate AGM minutes record concerns about leaking from

[14] *Pullar v R* [2007] NZCA 389.
[15] *Burns v Argon Construction Ltd* HC Auckland CIV-2008-404-7316, 18 May 2009.
[16] *Cole v Pinnock* HC Auckland CIV-2011-404-3743, 16 December 2011.

the level 12 decks to level 11. This was some considerable time after the notice to rectify the leaking decks was issued on 19 November 1999 and the Sonoguard membrane had been installed on the decks by the vendor in response.

[58] The Council relies on the acceptance by Manchester's expert witness, Mr Alvey, that it would have been reasonable to call in a building surveyor at this point. Mr Alvey accepted that the testing of the planter junction at the balustrade walls would have identified a variety of defects including, potentially, the lack of capping over the top of the cladding to the outside face of the balustrade, the membrane defects to the planter box, and the lack of saddle flashing junction between the balustrade and wall.

[59] The Council also relied on the acceptance by the assessor, Mr Probett, that the history of leaks would have prompted a reasonable Body Corporate to instruct an expert and that: [17]

> ... after a certain stage they'd reach the point where they had to start doing something destructive and investigative to find it and that's when I believe they would have found at least some of the leak issues associated with the membrane, particularly in the region of the planters.

[60] The Council's expert, Mr Powell, also confirmed a building surveyor would have undertaken a series of investigations to understand why the decks were leaking and in the course of undertaking those investigations would have identified a number of defects now claimed in respect of the decks.

[61] The Council submits that the *Hamlin* analysis is met and the limitation period therefore began to run from 2004 and expired in 2010 in respect of the deck defects.

[62] The Council's position is the balance of the defects were also reasonably discoverable in the *Hamlin* sense prior to August 2005. The Council relies on the Joyce Group report of May 2005 and the Covekinloch report to the Body Corporate of June 2005. The Joyce Group report was prepared for the Body Corporate who were, at the time, exploring

[17] Transcript at 169.

remediation and litigation issues arising from the weathertightness defects at levels one to 11. The Council argues that a number of the observations made in the report with respect to levels one to 11 were also applicable to level 12. In particular, the inappropriate use of Harditex cladding which gave rise to wind loading issues and associated cracks, and the lack of saddle flashings at the balustrade wall junctions.

[63] The Covekinloch report is in letter form. It discusses various matters including further destructive testing of balustrades and the inappropriateness of Harditex in high rise applications. It concludes that the balustrades could be rebuilt as targeted repairs but that to obtain code compliance, the building will have to be reclad on a drainable cavity system if monolithic cladding is used or with some other form of cladding that can be used without a cavity.

[64] The majority of level 12 is clad in stone tiles and metal sheeting although there are two small areas of Harditex. The Covekinloch recommendation regarding recladding therefore had limited applicability to level 12 as only the two small Harditex areas were affected. Ms Parker submits however that the limited remediation of the Harditex at level 12 would have led to the identification of further joinery defects and to the identification of the structural issues that have caused the need to replace 100 per cent of the timber framing.

[65] The Council submits in terms of *Pullar* that as a result of the Joyce and Covekinloch reports, there was no mystery about what was wrong and that it was not necessary to identify every defect. The Council submits that the market value of the building was reduced in 2005 causing economic loss. This submission ignores the sale of level 12, for full value, in May 2006.

[66] Manchester's position is that it has not been established that the vendor knew about the 0818 defects and the other defects that gave rise to the need to re-clad level 12 prior to 24 April 2006, nor has it been established that those defects were reasonably discoverable in the *Hamlin* sense prior to 24 April 2006. The Joyce Group report had minimal applicability to level 12 which was constructed at a different time and from different materials to levels one to 11.

[67] The Privy Council in *Hamlin* determined a defect is reasonably discoverable for limitation purposes when defects become so obvious that a reasonable homeowner would call in an expert. Manchester submits that this is judged against the standard of a reasonable homeowner at the time, not an expert building surveyor with the benefit of hindsight ten years later.

[68] Manchester points out that Joyce Group was engaged in June 2005 and reported that the level 12 deck problems had been addressed and that there were no other further problems. Joyce Group identified discrete defects with the level one to 11 balustrades and joinery. Although the report writer considered those defects could be remediated with targeted repairs, the report also noted that the Council may require the replacement of the monolithic cladding. In Manchester's submission the effect of the Joyce report is that the vendor would have known, at most, that the limited portions of Harditex at level 12 required replacement.

[69] Manchester submits that the Joyce Group did not identify or refer to any of the 0818 defects and that there is no evidence that these defects were reasonably discoverable in 2005. Having received CCCs in respect of the building work done under the 4926 and 0818 consents, the vendor had no reason, in 2005, to question these certificates or to second-guess the Joyce Group report. Mr Ho submitted that even if the missing saddle flashings defect identified in the Joyce report in respect of levels one to 11 applied to level 12, there was no link between this defect and 0818 defects which of themselves have caused the need for a complete re-clad. He also noted that the proposed solution in the Joyce Group report to rectify the missing saddle flashings was to install them.

[70] Manchester submits that the 0818 defects would have been identifiable by a pre-purchase inspector in either May or August 2006 (the dates when inspections were in fact done). Prior to this, nothing had triggered the reasonable discovery of the defects. Prior to the sale of the property, there was simply no reason for such an inspection.

Conclusion on limitation argument

[71] Mr Alvey gave evidence that he did not think anyone could say what would have fixed the leaks in 2004. He did not accept that the result of

an investigation would necessarily have been the identification of the defects and a reclad of the deck areas. He suggested that as the building was still relatively young, and the planter boxes appeared to be the major issue, the response would have been as simple as the demolition and repair of the planter boxes. He noted that in 2011, a WHRS assessor deemed a claim in respect of level 12 ineligible as he was unable to establish damage resulting from the window joinery installed under 0818. Further investigation and a second opinion from Kaizon Building Limited (expert building surveyors) was required before this damage was established.

[72] Mr Probett commented that in 2004, a holistic approach was still not being taken. However, a reasonable Body Corporate would have instructed investigations that would have progressed to the point where they were doing something destructive and investigative and would have found at least some of the leak issues associated with the membrane, particularly in the region of the planters. He could not say which ones they would find although he agreed that significant remedial work would have been triggered.

[73] The deck leaks were apparent at an early stage. The April 2004 Body Corporate minutes record concern regarding a leaking problem on level 10 and that a leak to level 11 from [level 12] above had been fixed but needed to be tested. There is a consensus between the experts that expert investigation would have been reasonable at this stage and would have identified at least the membrane issues associated with the planter boxes on the level 12 deck. The subsequent Joyce Group report recorded that the leak from level 12 to level 11 had been addressed and there had been no further problem. The Joyce Group report did not specifically consider level 12 although some of its findings in respect of levels one to 11 were analogous to level 12. The need to re-clad the building to obtain code compliance, identified in the Covekinloch letter was only applicable to a small section of level 12 which was mainly clad in different materials. The 0818 joinery defects which have necessitated a re-clad are independent of the deck defects although remediation of the 0818 defects necessitates remediation of the decks. An assessor in 2011 could find no evidence of the 0818 defects.

[74] On balance, I find that the present case is more analogous to *Burns* than *Pinnock*. I accept that although some leaks and defects had been identified, there was still "mystery" in April 2006 as to the nature of the level 12 defects and the scale of remediation they would require. Ms Parker has suggested that because more defects would have been revealed when the two discrete areas of Harditex were remediated, the "clock started" on those defects when the need to replace the Harditex was identified. I disagree. Those defects remained latent. It follows that the claim was not limitation barred when the application for an assessor's report was made in April 2012.

HAS THERE BEEN A BREAK IN CAUSATION OR CONTRIBUTORY NEGLIGENCE ON THE PART OF MANCHESTER?

[75] Manchester has made a claim in its own right as the owner of level 12. This claim is made in the alternative in case the assigned claim was found to be invalid. I have found in the Council's favour that the assigned claim fails. I will now determine Manchester's claim in its own right.

[76] At the time the sale and purchase agreement for level 12 was entered into, the notice to rectify the level 12 decks, issued in 1999, remained outstanding. There was no CCC for level 12 apart from the certificates issued in respect of consents 4926 and 0818. These matters would have been revealed in a LIM report which Manchester failed to obtain. Neither did Manchester obtain a pre-purchase inspection to ascertain the condition of the building and the presence of defects.

[77] The Council has argued that the knowledge and failings of Manchester when purchasing level 12 are such that there is a lack of causal connection between the Council's actions and Manchester's loss. Alternatively, the Council argues that Manchester has caused or contributed towards its losses and that damages must be reduced to reflect this.

[78] Manchester argues that it took the assignment in mitigation of its risk in purchasing level 12 and that the assigned claim should be considered when assessing relative blameworthiness and Manchester's share of responsibility for the loss. Given the failure of the assignment there is little weight in this argument.

[79] The issues of causation and contributory negligence are closely related. The issue of contributory negligence is more applicable to this case than the argument concerning lack of causal connection. Accordingly I turn to it first.

[80] Section 3 of the Contributory Negligence Act 1947 provides for the reduction of damages where there is fault on both sides.[18] In assessing whether a plaintiff is at fault, the standard is that of the reasonable person although the person's own general characteristics must be considered.[19]

[81] The test for assessing the existence and extent of contributory negligence was clarified in *Findlay v Auckland City Council*.[20] After considering case law on the standard of care expected of plaintiffs in terms of protecting themselves from harm, Ellis J determined three questions to be answered. In the context of this case these questions are:

(a) What if anything did Mr Cummins do on behalf of Manchester that contributed to its loss?
(b) To what degree were those actions or inactions a departure from the standard of behaviour expected from an ordinary prudent person in his position?
(c) To what extent did Manchester's actions or inactions contribute to its damage?

What if anything did Mr Cummins do on behalf of Manchester that contributed to its loss?

[82] Mr Cummins admits he had Manchester buy the apartments although he had knowledge of:

a) The notice to rectify that had been issued by the Council in 1999 in relation to the decks and associated issues.

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[18] Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Thomson Reuters, Wellington, 2013) at [21.2.02]; *Hartley v Balemi* HC Auckland CIV-2006-404-2589, 29 March 2007 at [101].
[19] *O'Hagan v Body Corporate 189855* [2010] NZCA 65, [2010] 3 NZLR 445 at [79].
[20] *Findlay v Auckland City Council* HC Auckland CIV-2009-404-6497, 16 September 2010 at [59]-[64].

b) Defects identified in the May 2005 Joyce Group report.

c) Various Body Corporate correspondence concerning investigations into the development, culminating in the Body Corporate issuing proceedings in the High Court in August 2005 in relation to the building defects and claiming a full reclad.

d) The lack of CCCs for the construction of the exterior of the apartment building.

[83] The Council also relies on the fact that Manchester:

a) Failed to obtain a report by a building surveyor prior to entering into the sale and purchase agreement for level 12.

b) Elected not to obtain a LIM which would have revealed adverse information relating to the outstanding CCCs and the notice to rectify.

c) Could not reasonably have relied on the two 2003 CCCs to be reassured that the notice to rectify issues had been rectified.

[84] Mr Cummins is a former solicitor. He is the sole director of Manchester. From 1997 to March 2000 he acted as a property consultant to the then owner of level 12, Sage. In that capacity, he personally received a copy of the notice to rectify leaking decks on level 12 in November 1999 and liaised with the Council on Sage's behalf with respect to that notice.

[85] Mr Cummins recalls seeing a letter from the Council dated 8 March 2000 which stated:

> ... a requisition has been placed on your property. Until such time that the problem of water penetration to level 11 via your unit has been resolved ... all code compliance certificates relating to your apartment and that of the whole apartment complex will also be held up until the Council is satisfied that the provision of E2 of the New Zealand Building Code have been met.

[86] Mr Cummins' evidence was that he understood from this letter that the Council would not issue a final CCC in respect of any work to the property if the deck leak issues had not been resolved. Although he ceased involvement with the property in 2000, he remembers the director of Sage, Mr McGaveston, telling him in 2003 that Sage was trying to rectify the

leaking decks by applying a liquid membrane over the sandstone pavers and, in 2005, that there were some issues with leaking on the lower levels of the apartments arising from the junction between the balustrades and Harditex cladding at those levels. Mr McGaveston had also mentioned to him that the Body Corporate was taking legal advice about the installation of the Harditex and the leaks and told Mr Cummins about the Body Corporate's subsequent decision to issue proceedings against the Council in respect of the defects.

[87] Mr Cummins did not obtain a LIM report or check the Council file prior to entering into the sale and purchase agreement in respect of level 12.

[88] Mr Cummins accepted in his evidence that if the LIM at the time had indicated the outstanding notice to rectify, that that would have been a "red flag". In addition to not obtaining a LIM, Mr Cummins made no specific enquiry of Mr McGaveston as to whether the notice to rectify had been resolved. Rather, he assumed that because a membrane had been laid on the deck following the notice to rectify, and the 2003 CCCs had been issued, the problem had been resolved.

[89] At the hearing, the Council's conveyancing expert, Timothy Jones, gave evidence that the content of the Body Corporate minutes would have led a purchaser to conclude that the building of which level 12 formed part, was suffering from serious remedial problems. As a result, the purchaser should have taken further additional steps to identify exactly what the remedial work requirements were for level 12 and the financial consequences for the registered proprietor of that unit. This could only be properly achieved by instructing a suitably qualified building inspector to inspect the property. Mr Jones also gave evidence that it was typical of buyers to obtain such reports in 2006.

[90] The expert witnesses on defects were in agreement that significant defects would have been apparent to a building surveyor had a pre-purchase inspection been carried out in May 2006 including:

a) The failure of the deck membrane which had been intended to remediate the deck leak problems.

b) Inadequate height threshold between deck and internal floor.

c) Inadequate fall to deck surface.

d) Stone cladding installed hard down on decks.

e) No head flashing to kitchen window and lounge window.

f) Inadequately sealed junction between deck balustrade and glazed screen.

[91] Mr Cummins had previously been aware of the notice to rectify. Instead of making proper enquiries about it, he relied on a series of erroneous assumptions. A LIM report would have revealed the existence of the outstanding notice to rectify. A number of significant building defects would have been revealed had a building report been carried out in May 2006 prior to the sale and purchase agreement being executed. The loss Manchester has experienced flowing from the level 12 building defects could have been avoided by obtaining a LIM and obtaining a building report prior to committing to the purchase. I find that the failure of Mr Cummins in this regard contributed to Manchester's loss.

To what degree were Mr Cummins' actions or inactions on behalf of Manchester a departure from the standard of behaviour expected from an ordinary prudent person in their position?

[92] Mr Jones gave evidence that by 2003 conveyancing lawyers were typically recommending that LIM and building report conditions be inserted into sale and purchase agreements. Mr Jones also gave evidence that by 2006 typical purchasers of residential property would of their own volition make receipt of a satisfactory LIM a condition of sale and purchase agreements. He noted that there was a box on the standard agreement whereby this election could be made and a warning on the back page of the agreement that alerted purchasers of the need to apply for a LIM. Mr Cummins did not use the standard agreement but rather drafted his own using his skill and experience as a former solicitor and a person very familiar with property matters.[21]

[21] Transcript at 74-75.

[93] Mr Ho has argued that Manchester protected its interests and mitigated its risk by taking the assignment from Sage. This has been found to be invalid. In any case, I do not accept that this absolved Manchester from the responsibility to act as a prudent purchaser.

[94] I find that a person of ordinary prudence in Mr Cummins' situation would have obtained a building report and a LIM report prior to entering into the sale and purchase agreement for level 12. The failure of Mr Cummins to do so represented a failure to properly protect Manchester's interests.

To what extent did the actions of Mr Cummins contribute to the damage suffered by Manchester? What is the appropriate reduction to be made?

[95] The Council provided evidence from Denise Bianchi, the team leader, Building Support, for Auckland Council in respect of what a LIM in 2006 would likely have shown. Ms Bianchi's evidence was that a LIM requested for any unit within the complex in 2005 or 2006 would have contained the information that six building consents did not have CCCs issued. She also stated that it was reasonable to assume that the notice to rectify (which appears on a 2015 LIM) would have shown on a 2006 LIM. Mr Jones gave evidence that the notice to rectify would have appeared on the LIM from the time of its issue. Manchester elected not to cross-examine Ms Bianchi or to produce any alternative evidence as to what the content of a LIM would have been in 2006 in respect of level 12.

[96] I accept the evidence of Ms Bianchi and Mr Jones. Accordingly I find that had a LIM report been requested in 2006, the notice to rectify which Mr Cummins described in his evidence as a "red flag" would have been revealed.

[97] There are a number of cases which consider the appropriate reduction to be made from damages for contributory negligence in weathertightness cases. These cases are reviewed at length in the submissions of counsel. None of the cases relied on by counsel deal with the situation where a purchaser failed to obtain a LIM report prior to entering into a sale and purchase agreement and such a LIM report would have revealed adverse information.

[98] In *Byron Avenue*[22] Tipping J commented that if a prospective purchaser obtained a LIM which disclosed a moisture problem before becoming committed to the purchase, it is unlikely that any proceedings could ever be taken against the Council. Tipping J also commented that where a prospective purchaser fails to request the LIM in circumstances where it would probably have given notice of actual potential problems, it is likely the purchaser's failure amounts to negligence and the question arises as to whether that negligence amounts only to contributory negligence, albeit probably at a high level, or whether the prospective purchaser's negligent omission amounts to a new and independent cause of the loss which removes all causal potency from the Council's original negligence.

[99] In *Auckland Council v Blincoe*[23] Courtney J considered a case where a LIM would have notified a purchaser of a weathertightness claim in respect of an adjoining unit. Courtney J considered the comments of Tipping J in the Supreme Court set out above but expressed the view that the comments concerning a LIM removing all causal potency from earlier negligence were qualified by the words "depending on the circumstances". Her Honour considered that the failure of the purchaser to obtain a LIM was not sufficiently significant as to constitute a new cause of loss as the purchaser did take steps to assess her unit's weathertightness. She upheld a finding of the Tribunal that the contributory negligence that this failure gave rise to should be assessed at 30 per cent.

[100] In *Nautilus*[24] the High Court accepted that a LIM would not have contained information that would have alerted purchasers to defects. However the Judge accepted that one set of purchasers ignored clear warnings regarding global defects in a building report. A 75 per cent deduction for contributory negligence was made. The Council submits that Manchester is in an analogous position to these purchasers.

[101] There is no clear precedent regarding the appropriate level of apportionment for Manchester's contributory negligence. The High Court

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[22] *North Shore City Council v Body Corporate* 188529 [2010] NZSC 158, [2011] 2 NZLR 289 at [99].
[23] *Auckland Council v Blincoe* [2012] NZHC 2023.
[24] *Body Corporate 326421 v Auckland Council* [2015] NZHC 862.

noted in *Johnson v Auckland Council*[25] that assessments in other cases are unlikely to provide assistance as what is required is a determination of what is just and equitable in the particular circumstances of a case. On appeal, the Court of Appeal noted that in assessing apportionment, it is necessary to consider both relative blameworthiness and causal potency.[26] The Court also noted that the appropriate apportionment is a question of fact involving matters of impression and not some sort of mathematical computation. The Court of Appeal noted that the purchasers in *Johnson* were aware of potential problems prior to committing to the purchase and by failing to obtain a building report, contributed to their own loss. The apportionment for their negligence was set at 40 per cent. In that case, unlike the present case, it was accepted that the negligent issue of a CCC was at the "heart" of the purchaser's loss and that a search of the Council file would not have revealed anything that would have alerted them to problems.

[102] In the present case, I have accepted that significant building defects would have been revealed had a building report been obtained before purchase. I have also accepted that the notice to rectify and the lack of a CCC for level 12 overall would have been revealed on the LIM report. This reduces the Council's share in the responsibility for Manchester's loss.[27] The question is by how much. Having considered the most analogous cases, in particular *Nautilus, Johnson* and *Blincoe*, I find that the level of contributory negligence on the part of Manchester is appropriately set at 50 per cent. In making this assessment I give weight to the three-fold failure on the part of Manchester which was first, the failure to obtain a LIM report, secondly the failure to have appropriate regard to the content of the Body Corporate minutes and thirdly, the failure to obtain a building report prior to committing to the purchase.

Causation argument

[103] The Council's position is that Manchester's knowledge and failings displaced any reliance by Manchester on the Council and breaks the chain of causation between the Council's actions and Manchester's loss.

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[25] *Johnson v Auckland Council* [2013] NZHC 165 at [141].
[26] *Johnson v Auckland Council* [2013] NZCA 662 at [87].
[27] *Above* n 22 at [99].

[104] In arguing that its actions have not caused loss, the Council relied on the decision of Duffy J in *Scandle v Far North District Council.*[28] Her Honour found that a two-step analysis was required when examining causation: firstly, a factual inquiry into whether the defendant's conduct caused the loss (the application of the "but for" test) and, secondly, to assess whether causation in a legal sense existed in order to allow legal liability to follow. This involves an assessment of proximity between the cause and the loss.

[105] Applying the two step test I find that the Council's conduct caused the loss. The negligent issue of the 0818 CCC has resulted in the need for extensive repair work to level 12. In terms of the second step I find there is sufficient proximity between the Council's conduct and the loss. I do not accept that the causal connection between the Council's actions and Manchester's loss is broken. In other words, I do not accept that Manchester's conduct can be regarded as the real cause of the damage. The present case is entirely different from *Scandle* where the defendant council alerted the owner to issues following inspections and in response was "sacked" and replaced with a private certifier who thereafter regulated the building work.

IS THE COUNCIL LIABLE FOR MANCHESTER'S WASTED EXPENDITURE ON THE CLOSED IN OPTION?

[106] In order to mitigate the remediation costs Manchester initially sought to close in the level 12 decks by means of a glazed wall on the west face of the property with a new roof over the decks (referred to as "the closed in option"). This was intended to avoid the cost of making the decks watertight.

[107] To progress the closed in option Manchester engaged various consultants including architects, engineers and planners. The Council issued a building consent for the closed in option on 21 March 2013. However approximately one month later the Council advised Manchester that it required the level 12 decks to be watertight as a prerequisite to issuing a CCC to the Body Corporate for levels one to 11. This meant

[28] *Scandle v Far North District Council* HC Whangarei CIV-2008-488-203, 30 July 2010.

Manchester had to waterproof the decks because the closed in option would not be completed ahead of the Body Corporate's application for a CCC. As a consequence, the anticipated saving from pursuing the closed in option (avoiding the need to remediate the decks in related works) was no longer available. Manchester accordingly abandoned the closed in option.

[108] Manchester has claimed the wasted expenditure on the closed in option. Mr Ho submitted that this expenditure should be regarded as failed mitigation, which is recoverable.[29]

[109] The Council opposes this. It submits that the wasted expenditure arising from Manchester's pursuit of the closed in option does not reasonably flow from the Council's negligence in issuing the 2003 CCCs for level 12. The Council submits that it did not stop Manchester from pursuing the closed in option but merely applied the Building Code requirements to the Body Corporate's building consent and completion of works.

[110] I accept the Council's submission that the wasted expenditure arising from the pursuit of the closed in option is not a claim that reasonably flows from the negligent issue of CCCs for level 12 in 2003. It appears from the evidence that there was a failure in communication between Manchester and the Council concerning the closed in option. It is unclear why, at a preliminary stage, assurance was not sought that the timing of the closed in option would satisfy the requirements of the Building Code for levels one to 11.

[111] In the circumstances I find that it is not established that the negligent issue by the Council of the 2003 CCCs were a substantial and material cause of the costs incurred in respect of the closed in option. I disallow this part of the claim.

DID THE LACK OF COOPERATION AND COORDINATION BETWEEN MANCHESTER AND THE BODY CORPORATE IN RESPECT OF REPAIRS AMOUNT TO A FAILURE TO MITIGATE?

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[29] *Body Corporate 189855 v North Shore City Council HC Auckland*, CIV-2005-404-5561, 25 July 2008 at [263].

[112] A plaintiff is under a duty to take reasonable steps to mitigate its loss and thereby minimise the damages the defendant will be required to pay.[30]

[113] The Council has alleged that Manchester had the option of completing the remedial work to level 12 in conjunction with work carried out to levels one to 11. Manchester elected to complete the remedial work under a separate building consent and separate contract thereby significantly increasing the cost and the length of the project. For example, instead of using the already erected Body Corporate scaffolding, Manchester had to incur the cost of its own scaffolding including a design cost as the scaffolding was cantilevered from level 12.

[114] The issues to be determined are:

a) Whether a reduction in damages is appropriate to reflect the costs that would have been incurred if the level 12 work had been carried out in cooperation with the Body Corporate.

b) Whether any reduction should be made in respect of the delay in commencing work.

c) Whether the consequential loss of rent should include the period of time in respect of which level 12 was untenanted by reason of the work being carried out to levels one to 11.

[115] Mr Leishman, the Body Corporate secretary, gave evidence regarding the difficult relationship between the Body Corporate and Mr Cummins. In particular he stated:

a) The Body Corporate brought proceedings against the Council in respect of the building defects at levels one to 11 which settled. The settlement did not include the cost of the remediation of level 12.

b) The building consent initially obtained by the Body Corporate in 2009 for the repair of the apartment block included the reclad of level 12.

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[30] Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Thomson Reuters, Wellington, 2013) at [25.2.03].

c) In 2009 the Body Corporate applied for a s 48 scheme (as it was then) pursuant to the Unit Titles Act. Manchester opposed the scheme on the basis that:

1. The scope of work required to level 12 was less than that in the building consent obtained by the Body Corporate.

2. The exterior of unit 12 is private property, not common property. The Body Corporate should therefore not have power to force work on it.

3. Manchester did not want to wait for the outcome of the Body Corporate litigation against the Council before commencing repairs to level 12.

d) In August 2010 the High Court issued a judgment allowing Manchester to separate its work from the Body Corporate.[31]

e) Despite representing to the Court that Manchester wished to remediate level 12 without waiting for the outcome of the Body Corporate litigation, the work on level 12 had only just started in 2013 when the Body Corporate remediation was near completion.

[116] The Council submits that Manchester's election to proceed independently of the Body Corporate was unreasonable and amounts to a failure to mitigate. Similarly the failure by Manchester to finalise the scope of work and get the building consent process underway within a reasonable time after the Court's judgment in August 2010 amounts to a failure to mitigate. Accordingly there should be a reduction in the interest awarded and the quantum of the consequential losses. The Council also seeks a related deduction in respect of the preliminary and general component of the remedial costs and the scaffolding and scaffolding design costs based on the unreasonable length of the project.

[117] Mr Leishman agreed that Mr Cummins had proposed that Manchester be given access to the Body Corporate scaffolding for the

[31] *Body Corporate 172108 v Meader (No 2)* HC Auckland, CIV-2009-404-6868, 19 August 2010.

purpose of carrying out the level 12 work. This request was declined. A letter to Manchester from the Body Corporate management company recorded that Manchester must undertake the work itself using its own contractor, own gentry access, own design and under its own consent.

[118] Mr Leishman agreed that there was a level of mistrust between the Body Corporate and Manchester arising from the fact that after the decision concerning the s 48 scheme was made by the High Court, Manchester resiled from the positions presented to the Court regarding the timing and scope of remedial work to level 12. Mr Leishman gave evidence that this mistrust was a significant factor in the Body Corporate's reluctance to allow Manchester access to their scaffolding.

[119] The Council's position is that the dispute between the Body Corporate and Manchester cannot be causally linked to any breach of duty by the Council and that the delays and lost opportunities to save costs resulting from that dispute cannot lie with the Council.

[120] It is common ground that there would have been a considerable cost saving had Manchester's remedial work been completed in conjunction with the Body Corporate's work. The lack of cooperation between the Body Corporate and Manchester contributed significantly to the extension of the project and therefore its cost. The Council's quantum expert, Mr John Ewen, gave evidence that the repair period should not have exceeded 18 months.

[121] Manchester submits that it was the Body Corporate that declined to co-operate in respect of level 12 thereby significantly increasing the scope and cost of the work. It is Manchester's position that the unreasonable position taken by the Body Corporate caused delay to Manchester. In particular the Body Corporate:

a) Refused Manchester access to its scaffolding.

b) Barred Manchester from approaching the Body Corporate's head contractor to quote for the work to level 12.

[122] Manchester also submits that if the Body Corporate had not been remediating levels one to 11, there would have been no dispute concerning

the scaffolding costs claimed. Manchester argues that the position is not different just because Manchester had the opportunity to use the Body Corporate's scaffolding, but was denied access.

[123] Undoubtedly if the remediation of level 12 had been undertaken as a part of the same project as the remediation of levels one to 11, it would have been more efficient. However I accept Manchester's submission that the level 12 repair costs would still have been incurred had levels one to 11 not required repair. Some attempts at cooperation were made by Manchester that were rebuffed by the Body Corporate. It seems these attempts were made after the relationship between Manchester and the Body Corporate had deteriorated to a level where the distrust between the parties made cooperation impossible.

[124] The Council correctly submits that it is not responsible for the relationship between Manchester and the Body Corporate. However, I do not accept that the deterioration of the relationship and the resulting inability to carry out level 12 repairs in coordination with the Body Corporate repairs amounts to a failure to mitigate. Manchester is not required to do anything more than is reasonable in the circumstances. The onus is on the Council to show reasonable steps were not taken in this regard and the standard of reasonableness is not high.[32]

[125] In the circumstances, I do not accept that deductions should be made to the cost of scaffolding and other costs to reflect the time that would have been taken if Manchester and the Body Corporate had co-operated.

[126] I do however accept the Council is not liable for the lost rental in respect of level 12 due to the work carried out on levels one to 11. As this loss is not attributable to the cost of remediating level 12, I disallow the claim for consequential damages for the rental during the period. Lost rental was claimed in respect of unit 12A at $1,063 per week from 23 September 2012 and for unit 12B at $475 per week from 5 May 2013. The vacation of unit 12A occurred because shrink wrap and scaffolding appeared around the level 12 windows as a result of the Body Corporate work. This was some 38 weeks prior to the vacation of unit 12B and I therefore disallow the rent

claimed for unit 12A for this 38 week period. This amounts to a deduction of $40,394.00 from the sum claimed.

WHAT ARE THE QUANTUM ISSUES?

[127] The quantum evidence was given in a panel by expert quantity surveying witnesses, John Ewen, on behalf of the Council and Jeffrey Maddren on behalf of Manchester. The agreed starting point for the estimated building repair costs was $1,886,397. Mr Ewen gave evidence that a further adjustment sum should be deducted from this estimate to account for betterment, excessive preliminary and general costs, excessive scaffolding costs, the cost of external wall replacement and a reduction in contingency. The experts gave evidence about each of these issues. I will review this evidence and make findings regarding each of the issues below.

Betterment

[128] At the hearing Manchester conceded that the sum of $7,124 should be deducted for betterment to the windows. Accordingly this sum is deducted from the estimated building costs.

[129] The second betterment item identified by Mr Ewen relates to the removal of the Harditex portion of the external cladding and its replacement with aluminium panelling. Mr Ewen considers as maintenance painting is overdue on the Harditex, the cost of painting should be deducted ($2,285.63). He also considers that the cost of scaffolding that would be required for such painting should be deducted ($6,846.89). The total deduction for betterment in this regard is therefore ($9,142.52).

[130] Mr Maddren disagreed on the basis that an agreed betterment cost reflecting the change of cladding had already been factored into the estimate. The difference between Mr Ewen and Mr Maddren was whether Manchester should receive the benefit of failing to paint the Harditex. I accept that had the re-clad not been required, this cost would have been incurred as part of the normal maintenance cycle and it is appropriate to

[32] *White v Rodney District Council* [2009] 11 NZCPR 1 (HC) at [27].

deduct it. The betterment adjustment to reflect improved cladding referred to by Mr Maddren does not cover this. It follows that $9,142.52 should be deducted from the estimated building costs.

Preliminary and general

[131] The preliminary and general costs itemised in Mr Maddren's estimate consist of 14 items totalling $321,128.72. This sum represents 29 per cent of the repair costs. Mr Ewen's evidence was that the 29 per cent figure was excessive and that preliminary and general costs are more typically between 12 and 15 per cent with 15 per cent being at the upper end. The extended length of time of the building work is a significant factor in the high rate of preliminary and general costs. Mr Maddren accepted that for an ordinary dwelling the estimated time period would be between 12 and 18 months and preliminary and general costs would be between 12 and 15 per cent.

[132] The dispute concerning preliminary and general costs relates to whether the complexities that flowed from Manchester doing its work separately from the Body Corporate work, and the consequent extended time period it has taken, are matters that are reasonably recoverable against the Council. The Council submitted that rather than taking a line by line approach (there were 14 different preliminary and general items in Mr Maddren's schedule) the preliminary and general costs should be reduced so that they are between 10 and 15 per cent.

[133] I have already found that the level 12 remediation should be considered independently from the Body Corporate work. It follows that I do not accept the Council's proposal for a global reduction for preliminary and general costs to reflect the construction period a cooperative approach would have resulted in. It is however appropriate to consider the expert evidence regarding individual line items of the preliminary and general costs and I do so below.

[134] The most significant item in dispute is the cost of a full time site manager ($157,232.92). The experts disagreed as to whether a full time site manager was required and as to whether the period for which their services

was estimated was excessive. Mr Ewen in his brief stated that a project of this size would not usually require a full time site manager but one charged at closer to 10 per cent of their time. This estimate was based on his position that the level 12 work should have been carried out in conjunction with the work to levels one to 11. Under cross-examination he accepted that if the level 12 work had proceeded in isolation (if the Tribunal found this to be reasonable) that this figure would be between 10 per cent and 50 per cent. Mr Maddren's position was that the site manager should be present 100 per cent of the time due to the complexity of the project and the attendant health and safety risks.

[135] The assessor gave evidence that, having visited the site three times and having observed that the general foreman was, "a working man who puts his apron on and does things", that 50 per cent of his time would be a reasonable estimate for him to be acting as a site manager. He commented that there would be times when he would not be able to do anything other than site manage but that there would be times that he would be free to do other work.

[136] Having heard and considered the evidence of the experts and the assessor I accept Mr Probett's view that a site manager at 50 per cent would be reasonable and therefore the sum allowed in the estimate for the site manager should be halved to $78,616.46.

[137] There were two further line items that Mr Ewen discussed in his brief. First was item eight which was an allowance of $6,000 for the external cleaning of levels one to 11. Mr Ewen said that while he accepted that there was a risk of dust and debris to the levels below caused by the level 12 works, this should not be an additional cost as the building would be regularly cleaned as an operational cost. He also said that, as a risk, this sum should be covered by the estimate contingency sum. Mr Ewen was not cross-examined on this point and I accept his evidence. It follows that the deduction of $6,000 should be made.

[138] The second further line item discussed was item 14 for traffic management at $15,000. Mr Ewen stated that this cost was unnecessary as in his opinion this would have been incurred on the repair of levels one to 12 at a cost of approximately $4,000 to $5,000 per building level. Mr Ewen's

position flows from the view that level 12 should have been remediated in co-operation with the Body Corporate and that greater costs arising from the lack of co-operation should be disallowed. As I have rejected this position it follows that the sum allowed for traffic management is accepted.

Scaffolding issues

[139] In his brief and under cross examination Mr Ewen explained that the difference he took with the scaffolding costs estimated by Mr Maddren were based on what he considered to be the unreasonably extended period for which it is required due to Manchester's programming delays. He also objected to the allowance of $10,000 for the cost of an engineer's specific design for the high level cantilever scaffold. While he accepted that this design would be required, he considered that had the scaffold been erected as part of level one to 12 works, the cost would have been one twelfth.

[140] I have already determined not to make deductions based on Manchester not co-ordinating its remediation with the Body Corporate. It follows that I do not allow the scaffolding deductions suggested by Mr Ewen.

External timber wall replacement and bracing to internal walls

[141] The costs claimed by Manchester include 100 per cent removal of the timber framing to the north elevation metal clad wall. Only 10 per cent of this framing requires replacement due to water ingress. The remainder relates to the current timber framing being inadequate for the wind loading at level 12. The Council argues that this timber replacement is unrelated to weathertight issues and is not a "deficiency" for the purposes of the Act. The Council argues that therefore the cost to replace the undamaged external wall timber should be excluded.

[142] Paul Hutton, Manchester's engineering expert, disagreed with the proposition of the Council that the structural design of the exterior walls had no bearing on weathertightness issues as the cladding is supported by structural timber framing to the exterior walls.

[143] I accept that replacement of 100 per cent of the exterior timber framing was a necessary part of the remediation of the exterior walls. It would not have been possible to re-clad the exterior of level 12 without

replacing the timber framing and I accept that this replacement is a cost that flowed from the need to reclad which the Council has acknowledged was caused by their negligence in respect of the 0818 CCC.

[144] The Council also argues that the same principle applies to the cost of internal wall bracing. In his evidence Mr Hutton stated that his engineering consultancy (EDC) had discovered errors in the original lateral load calculations which resulted in insufficient wall bracing being installed to carry earthquake loads. This necessitated additional internal wall bracing which was reduced because Manchester had, independently of the remediation work, constructed new inter-tenancy walls to create a third apartment which provided additional bracing.

[145] I do not accept that the requirement for additional internal wall bracing has the same causal link as the exterior timber framing to the negligent issue of the 0818 CCC. Accordingly, I disallow this cost and accept the Council's submission that it should be deducted. The relevant sum is $13,595.04.

Contingency

[146] There had been a dispute between the parties regarding an allowance for contingency which the Council considered should be deducted. In his closing submissions, Mr Ho stated that Manchester did not now dispute the Council's $39,386 deduction for contingency. As there is no dispute I confirm that this amount is deducted from the claimed estimated building cost.

Conclusion on Quantum

[147] Taking into account the deductions accepted above I find that the estimated building costs are $1,728,953.98. I calculate this sum as follows:

Estimated costs (agreed starting point) **Less**	$1,886,397.00
Window coating	$7,124.00
Painting	$9,142.52
Site management	$78,616.46

Exterior cleaning	$6,000.00
Internal wall bracing	$13,595.04
Contingency	$39,386.00
Balance	$1,732,532.98

SHOULD INTEREST BE AWARDED AND IF SO HOW SHOULD IT BE CALCULATED?

[148] There is a dispute between Manchester and the Council concerning interest claimed by Manchester in the third amended particulars of claim and in the memorandum on behalf of Manchester regarding quantum.

[149] Interest on funds borrowed is claimed as follows:

January 2014	$48,000
May 2014	$23,475
October 2014	$44,450
March 2015	$43,606

These sums total $159,531. Thereafter interest on $1,650,000 is sought from 20 March 2015 to 7 September 2015 at 8 per cent per annum – 24 weeks ($60,923 thereafter $363 per day).

[150] In his brief Mr Ewen states that, upon request, Manchester provided a copy of the "Term Loan Agreements" which shows the funds in respect of which interest is claimed are from the lender, Sage, and Phillip McGaveston, and that the interest rate is at 8 per cent per annum. It will be recalled that Sage was the vendor of the property. With respect to the interest claim for $60,923 interest on $1,650,000, Mr Ewen notes that there is no detail provided as to how the borrowed amount is determined and that Manchester's "Manchester Work Cost Summary" lists invoices paid between 30 June 2011 and 1 May 2015 in a total sum of $1,131,231.86 including GST or $983,000 excluding GST. This amount includes the claimed wasted expenditure cost claimed of $174,284.

[151] Mr Ewen gave evidence that he queried how the $1,650,000 sum was determined. In response, he received an email advising him that it included legal costs, holding costs and future costs which had not yet been

incurred. Accordingly he reworked the portion from March to September 2015 on actual expenditure and calculated a different interest figure accordingly.

[152] Mr Ewen was questioned about his calculation of interest included in Schedule A to his brief. He agreed that his calculation did not take into account when the various loans were drawn down but rather were based on actual expenditure according to the list of invoices provided, working off the midpoint of the year as opposed to Manchester's methodology claiming the borrowings as a tranche when the borrowings may themselves be earning interest and where there is a lack of evidence regarding the expenditure. In contrast, Mr Maddren's approach was to calculate the interest from when funds were drawn down.

[153] Mr Ewen also made a reduction in his calculation of interest based on what he considered the likely duration of the repairs should have been.

[154] The Council has submitted that the interest claim should be declined in its entirety.

[155] In his closing submissions, Mr Ho argued that the interest claim is reasonable and that Manchester's borrowing cost is a loss that flowed from the Council's negligence. Mr Ho submitted that Manchester should be compensated for the interest costs actually incurred, rather than if it had been able to borrow from a traditional financer. He referred to Mr Cummins' evidence that it had not been possible to secure funds from a traditional financier and that there was some mitigation in this regard as there had been no charge for a facility fee. Mr Ho drew a distinction between interest on an award of damages and interest in the sense of a "hard cost" which had been incurred by Manchester.

[156] Having listened to the evidence of Mr Ewen and Mr Maddren and having considered the submissions made by both counsel regarding the issues raised by the interest component of the claim, I prefer the methodology used by Mr Ewen to that of Mr Maddren. I do not accept that the Council is liable for interest on funds drawn down by Manchester from the date of that draw down without those funds correspondingly being accounted for in the repair expenditure. I am concerned by the reference to

legal costs being paid for by funds in respect of which interest is claimed as such costs are outside the jurisdiction of this Tribunal.[33]

[157] I have already determined that the wasted expenditure claim is disallowed. Interest on that expenditure is similarly disallowed. I do not accept the Council's invitation to decline the claim for interest in its entirety but find that the claim should be reduced in accordance with the methodology presented in the evidence of Mr Ewen with some exceptions. I find that the repair cost sum for which interest can be claimed is $983,679.88 as calculated by Mr Ewen minus the wasted expenditure costs of $174,284. The total is $809,395.88.

[158] The interest claim considered by Mr Ewen includes interest claimed on the lost rental. There was no evidence at the hearing regarding this claim which I consider to be too remote. This aspect of the interest claim is disallowed.

[159] Mr Ewen's calculations at schedule A to his brief are replicated below but re-calculated in respect of the 2013 expenditure which has been adjusted to reflect the deduction of wasted expenditure costs.

DESCRIPTION	EXPENDITURE EXCL GST	INTEREST AT 8% p.a.
Expenditure to end 2011	$9,9972.31	
– Interest 2011 over 3 months average		$263.27
– accumulated interest 2012 - 20 March 2015 over 41.67 months		$2,885.24
Expenditure during 2012	$104,935.78	
– accumulated interest 2012 - 20 March 2015 over 32.67 months		$24,597.55
Expenditure during 2013	$506,102.26 ($174,284.00) = $331,818.26	
– accumulated interest 2013 - 20 March 2015 over 20.67 months		$47,439.50
Expenditure during 2014	$282,396.03	
– accumulated interest 2014 - 20 March 2015 over 8.67 months		$16,464.82
Expenditure during 2015	$80,273.49	

[33] Weathertight Homes Resolution Services Act 2006, s 91.

– accumulated interest 2015 - 20 March 2015 over 2.67 months		$706.41
Subtotal	**$809,395.88**	**$92,356.78**
Interest on $809,395.88 20 March 2015 - 1 March 2016 (49.5 weeks)		$61,638.61
Total interest		**$153,995.39**

Conclusion as to Quantum

[160] The claim has been established to the amount of $2,064,936.37 which is calculated as follows:

Remedial costs	$1,732,532.98
Interest	$153,995.39
Lost Rent unit 12A Lost Rent unit 12B	$123,308.00 $55,100.00
TOTAL	**$2,064,936.37**

Deduction for Contributory negligence

[161] I have found that the appropriate deduction for contributory negligence is 50 per cent. The total established claim is therefore reduced to $1,032,468.19.

[162] The claim by Manchester Securities Limited against the Auckland Council is proven to the extent of $1,032,468.19. Auckland Council is ordered to pay Manchester Securities Limited the sum of $1,032,468.19 forthwith.

DATED this 1st day of March 2016

M A Roche
Tribunal Member