IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2011-404-007499
[2012] NZHC 2023

BETWEEN	AUCKLAND COUNCIL Appellant
AND	HERBERT JAMES BLINCOE & ORS First Respondent
AND	HUGHES & TUKE CONSTRUCTION LIMITED Second Respondent

Hearing: 16 May 2012

Appearances: P A Robertson for Appellant
G M Illingworth QC for Respondents

Judgment: 13 August 2012

JUDGMENT OF COURTNEY J

This judgment was delivered by Justice Courtney
on 13 August 2012 at 12 noon
pursuant to R 11.5 of the High Court Rules

Registrar / Deputy Registrar

Date.....

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Introduction

[1] The Auckland City Council appeals a decision of the Weathertight Homes Tribunal in relation to nine units that were "leaky buildings".[1] The adjudicator concluded that there were defects in the construction of the units that had allowed water ingress and resulted in damage to the properties. It is accepted that there were defects in the construction of the units, three of which were sufficiently serious to require remedial work. These were the improper installation of the window joinery (defect one) which would, on its own, have required the units to be reclad; the failure to install stucco plaster cladding high enough behind the timber fascia and barge boards (defect two); and a lack of clearance between the bottom of the stucco plaster cladding and ground (defect three).

[2] The adjudicator found that the Council had failed either to notice the defects or ensure that they were corrected and had, therefore, failed to meet the standard of care required of it when issuing Code Compliance Certificates. The adjudicator also determined that the Council had made out the defence of contributory negligence in respect of one claimant, Susan Brown, and reduced her damages award.

[3] The appeal is brought under s 93(1) of the Weathertight Homes Resolution Services Act 2006 (WHRSA 2006) which allows a party to a claim that has been determined by the Tribunal to appeal on a question of law or fact arising from the determination. The appeal is determined by way of rehearing.[2] The approach to such an appeal is as explained in *Austin, Nichols & Co Inc v Stichting Lodestar*, namely that the appellant must show that the first instance judge or tribunal was wrong and if it does so the appellate court must carry out its own assessment including, if appropriate, substituting its own findings of fact.[3]

[4] In respect of the finding that the Council had negligently failed to react to the three defects, the Council asserts error by the adjudicator in:

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[1] *BOAC v Auckland City Council* [2011] NZWHT Auckland 50, 51, 52, 53, 54, 55, 56 and 57.
[2] High Court Rules, r 20.18.
[3] *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141 (SC).

(a) Ignoring the evidence of the Council's witness, Mr Farrell, that the Council's inspections were sufficiently thorough;

(b) Shifting the onus of proof onto the Council to show that its inspections were sufficient, notwithstanding the lack of evidence adduced by the claimants on that issue;

(c) Failing to record whether the negligence of the Council caused the loss and damage claimed; and

(d) Relying upon the existence of a duty to have adequate systems of inspection in place.

[5] The Council also claims that the adjudicator erred in his apportionment of loss in respect of Ms Brown's claim.[4]

[6] Having considered the grounds of appeal directed at the finding of negligence in relation to defect one, I have concluded that, although the adjudicator did make some errors, the final outcome would nevertheless have been the same. As defect one was sufficiently serious to require recladding of the units, I have found it unnecessary to consider the issues arising in relation to defects two and three. Therefore, in this judgment I only consider the grounds of appeal concerning the finding of negligence in relation to defect one, and the reduction in Ms Brown's claim for contributory negligence.

The claim in the Weathertight Homes Tribunal

[7] The nine claimants were the owners of units in a multi-unit complex on Auckland's North Shore known as the Broadwood Villas complex. The complex was built in five stages and the claimants' units were part of stages 4 and 5 with construction spread over 1995 and 1996. The Council's staggered inspection process

[4] A further objection was made in respect of an award of costs for litigation support provided by Lighthouse NZ Limited, but this was abandoned at the hearing.

ran from mid to late 1996. Code Compliance Certificates for the units in stage 4 were issued in October 1996 and for stage 5 in December 1996.

[8] By the time the claims were brought in the Tribunal in 2010 remedial work had been completed. In its pleading against the Council the claimants asserted that the Council owed them a duty to satisfy itself, on reasonable grounds, that overall construction of the units complied with the provisions of the New Zealand Building Code and with the specific details, relevant technical literature and industry standards relevant to that construction that were, or should have been, included in the application for the building consents. There was no dispute by the Council that it did owe these duties.

[9] The claimants alleged that the Council had breached its duty by:

(a) Failing to exercise reasonable skill and care in the conduct of its inspections;

(b) Failing to implement a regime of inspections of sufficient thoroughness and frequency to identify the defects and adequately assess weathertightness factors in relation to the construction;

(c) Failing to ensure that the units were constructed in accordance with the Building Code and were weathertight, waterproof, sound and durable;

(d) Failing to take all reasonable steps to have the defects rectified; and

(e) Issuing the Code Compliance Certificates notwithstanding that they did not have reasonable grounds to believe that the units complied with the Building Code.

[10] The claimants adduced evidence from a number of expert witnesses, including building surveyors Stuart Wilson and Simon Parry, and building assessor Noel Casey. The Tribunal also heard evidence from expert witnesses brought by the respondents, including building surveyor William Hursthouse, quantity surveyor

Geoffrey Bayley, building consultant David Medricky and conveyancing lawyer Tim Jones. However, the only witness who gave evidence to establish the standard required of a reasonably competent Council came from one of the Council's witnesses, Jeffrey Farrell of the Whakatane District Council.

[11] The Tribunal identified the nature of the duty owed, citing from the High Court decision in *Body Corporate 188529 v North Shore City Council (Sunset Terraces)*.[5] In that judgment Heath J described the duty as being to take reasonable care in performing the three regulatory functions in issue, namely deciding whether to grant or refuse a building consent, inspecting the premises to ensure compliance with the building consent and certification of compliance with the Code. The Judge went on:

> [221] The obligation of the Council can be no higher than expressed in the statute itself: namely, to be satisfied on all reasonable grounds that a building consent issued [sic]; to take reasonable steps in carrying out inspections and to be satisfied on reasonable grounds that code compliance should be certified.

[12] The adjudicator also cited Baragwanath J's decision in *Dicks v Hobson Swan Construction Ltd (in liquidation)*, in which the Judge referred to previous authorities establishing that the Council may be liable for defects that a reasonable Council inspector, judged according to the standards of the day, should have observed and that it could also be liable if defects were not detected due to a failure to establish a regime capable of identifying whether there was compliance with the Building Code.[6]

[13] The adjudicator then turned to consider the issue of the standard of care in the case before him and the issue of negligence. The adjudicator held that the Council had been negligent in respect of its failure to react to all three defects present in the units:

> [45] The overriding duty on a territorial authority is to enforce the Building Code's requirements. Inspection of window installations inserted into cladding for reasonably foreseeable failure of weathertightness is within the obvious ambit of the Council's duty; failure to react to defects apparent to a qualified inspectors [sic] eye is also a breach of duty; failure to ask

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[5] *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479 (HC) at [220]-[221].
[6] *Dicks v Hobson Swan Construction Ltd (in liq)* (2006) 7 NZCPR 881 (HC) at [100]-[107] and [116].

> questions and record answers about the method used, when for example the cladding is erected incorrectly and there is the ability to inspect visually must also be a breach of that duty of care and all the more so when there are obvious departures from the consented plans. Failure, at the same time, by the building trades engaged on the building project to meet the standard of care imposed at law on them, does not excuse the Council's obligations.
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> [46] I am satisfied that because of all of these failures by the Council, the Council should not have issued a [sic] Code Compliance Certificates for the nine units.
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> [47] For the reasons mentioned, the Council has failed to meet the standard of care expected of it by issuing Code Compliance Certificates for stages 4 and 5 because it failed to either notice the defects or to ensure that those defects were corrected.

[14] The adjudicator further held that Ms Brown, the owner of unit 28, was guilty of contributory negligence and reduced her damages award by 30%.

Defect one: joinery installation

The issues

[15] The main defect, which affected all of the units, was that the window jambs and sills had no mechanical flashings and no other satisfactory form of seal to prevent moisture entering through the join between the cladding and joinery. Although metal head flashings had been used, only silicone sealant was used along the sills. Deterioration of the sealant had allowed water to penetrate the joints.

[16] It was unclear from the plans whether the design required mechanical sills and there was disagreement among the expert witnesses on the point. The adjudicator held that sills had been required by the design. He rejected Mr Farrell's evidence that the use of sealant was an alternative solution under the Building Act 1991 and found that the Council inspections were inadequate:

> [37] I accept the evidence of Mr Wilson and Mr Casey that the consented plans called for sill flashings to be installed to the windows and doors. The Hardibacker technical literature also included details for the installation of jamb flashings and sill flashings around aluminium windows and the February 1996 edition of the BRANZ Good Stucco Guide stated at paragraph 3.7.1 that windows should have had head and jamb flashings.

> [38] Mr Farrell's evidence was that the building practice of the time accepted sealants as an alternative solution to mechanical sill and jamb flashings. However Mr Farrell's answers to Mr Langlois' questioning, that the acceptance of sealant at the time was contrary to applicable building guides available to inspectors and that demonstrated fundamental flaws in the Council's inspection and approval regime, was [sic] equivocal. There is no evidence that the Council considered whether there were reasonable grounds for believing that the use of sealant would satisfy the Building Code, nor was there any evidence from the Council that a producer statement for the installation of the windows was requested and received. There is no record of the Council's decision making process of [sic] how the inspectors determined to approve the window installation contrary to the consented plans. Absence of records of the Council's decision making process causes me to conclude that the Council ignored in its inspections of the window installations the installation recommendation of the BRANZ and Hardibacker documentation calling for the installation of mechanical flashings.
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> ...
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> [44] An inspector can enquire about the use of sealants when it is obvious to the inspector's eye that no adequate flashings are in place. Whilst the Council can expect a tradesman-like standard to be applied by builders using manufacturer's specifications and requirements, when it comes to inspections, the Council inspectors need to question the operatives on these aspects before the issue of the Code Compliance Certificates. There is no evidence that proper enquiry was ever made of the builder or how the Council satisfied itself of how construction was to avoid the defects I have determined and how the Council properly discharged its duty to ensure the building complied with the Building Code.
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> (citations omitted)

[17] The Council asserts that the adjudicator:

(a) Should not have accepted Mr Wilson's evidence;

(b) Erred in finding that the building design requireed sill flashings;

(c) Misstated Mr Farrell's evidence that reliance on sealant for weatherproofing was permissible as an alternative solution and thus failed to address whther sealant was an acceptable solution;

(d) Had no or an insufficient evidential basis for finding that the windows were visually defective;

(e) Erred in his finding that the Council had ignored the recommendations of the BRANZ bulletins and guides and the James Hardie "Hardibacker" technical literature regarding the use of sealants by wrongly reversing the burden of proof;

(f) Failed to record a finding in respect of causation; and

(g) Erred in finding that the Council owed a duty to have in place an adequate system of inspection.

Challenge to expert evidence

[18] The objections directed at the adjudicator's factual findings rested, in part, upon a challenge to evidence given by Mr Wilson on the grounds of a lack of relevant experience. Mr Wilson is a qualified building surveyor: he holds a Bachelor of Science (Honours) degree in building surveying and is registered as a building surveyor. He is also a certified weathertightness specialist and is registered as a weathertightness assessor for the Weathertight Homes Resolution Service. However, he was not working in New Zealand when these units were built; he immigrated to New Zealand from the United Kingdom in 2004. Mr Wilson acknowledged this limitation on his experience in his brief of evidence, and said his opinions were based on extensive study and investigations of leaky buildings, and of the practices, codes, standards and technical literature available at the date of construction.

[19] I consider that Mr Wilson's experience and qualifications provided an adequate basis for him to draw a reliable expert opinion from the available material. The adjudicator was entitled to rely on that evidence.

Was there an evidential basis for the finding that the design required sill flashings?

[20] The adjudicator accepted the evidence of Mr Wilson and Mr Casey that "the consented plans called for sill flashings to be installed to the windows and doors". Mr Wilson's opinion was based on his view of the drawings, including the notes which specifically referred to "pre-finished aluminium sill flashings over building

paper and Hardibacker. Silicone sealant top of plaster". In addition Mr Wilson pointed to statements in the drawing's specification, particularly the following direction:

> 0581 FLASHINGS: install flashings to heads, jambs and sills of frames as supplied and recommended by the window manufacturer, as detailed on the drawings. Head flashings finished to match windows.

[21] The window manufacturer's instruction manual at the relevant time showed a sill and jamb flashing. Further, the BRANZ Bulletin 305 published in February 1993 relating to domestic flashing installation instructed that, for flashings around doors and windows, the builder should "ensure all sill flashings discharge the water clear of the opening and that they extend across the full width of the opening". It advised against total reliance on sealants to provide weatherproofing as not being good building practice. The BRANZ Good Stucco Guide published in 1996 advised that "the provision [sic] of proper flashings around openings in the cladding is essential with windows having both head and sill flashings".

[22] However, the transcript of the hot tub of experts records a disagreement about whether the design drawings did clearly show a metal sill flashing. Mr Wilson maintained his view, which was shared by Mr Casey. Mr Medricky and Mr Bayley disagreed. Although Mr Farrell did not participate in the hot tub, he was later cross-examined on the design drawing, including the note "pre-finished aluminium sill flashing over building paper and Hardibacker. Silicone sealant top of plaster". He was not prepared to agree that the drawing did show a mechanical flashing, noting that if what was shown was the lip of an aluminium extrusion, he would not regard it as a sill flashing.

[23] Self-evidently, there was evidence from which the adjudicator could have concluded that the design showed a sill flashing. The actual lines shown on the drawing was only one factor that had led Mr Wilson and Mr Casey to their conclusion that the design required sill flashings. The adjudicator was entitled to accept their view of the design. The evidence given by Mr Medricky and Mr Bayley during the hot tub and by Mr Farrell during cross-examination did not preclude the adjudicator from making the finding he did.

Was the use of sealant rather than a mechanical flashing permitted as an acceptable solution?

[24] Under the statutory scheme established by the Building Act, all building work must comply with the Building Code.[7] But the departure from the plans did not necessarily mean that the joinery installation failed to comply with the Building Code. Compliance could be achieved in one of two ways. The first was to show that an "acceptable solution" had been adopted – that is, a method that had been approved by the Building Industry Authority.[8] The second was to show that the requirements of the Building Code had been satisfied through some other means, termed an "alternative solution".[9]

[25] Mr Robertson, for the Council, submitted that the adjudicator misstated Mr Farrell's evidence when he referred to that evidence being "that the building practice of the time accepted sealants as an alternative solution to mechanical sill and jamb flashings". Mr Robertson said Mr Farrell's evidence was not that sealant was an alternative solution but, rather, that it was an acceptable solution. As a result, the Council was not required to be satisfied that the use of sealant would satisfy the building requirements of the Building Code because an acceptable solution was deemed to comply.[10]

[26] Mr Robertson is correct about what Mr Farrell said. In his brief of evidence Mr Farrell said that the document known as E2/AS1 (issued as an acceptable solution pursuant to s 49(1)) provided for joints between windows and doors and the cladding to be weatherproofed by one or a combination of head, jamb and sill flashings, scribers, proprietary seals or sealants not directly exposed to sunlight or the weather or that are easy to access or replace. He emphasised that E2/AS1 did not require head, sill or jamb flashings.

[27] The adjudicator's error in describing Mr Farrell's evidence will only make a difference, however, if the evidence was correct. Mr Illingworth argued that it was

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[7] Section 7.
[8] Section 49(1).
[9] Section 49(2).
[10] Section 50(1)(d).

wrong because it was premised on an incorrect reading of E2/AS1. Clause 3.0.1 and 3.0.2 of E2/AS1 provided that:

> Windows and doors, and the joints between them and the *cladding* materials, shall be as weatherproof as the *cladding* itself.
>
> Windows and doors shall have head flashings, and scribers or **proprietary seals** between facings and the *building cladding*.
>
> (emboldened for emphasis)

[28] It is correct that there is no requirement for sill flashings. On a plain reading the requirement for sills would appear to have been either scribers or a proprietary seal. Counsel explained that scribers were jagged pieces of timber slotted between the cladding and the window, usually used in weatherboard houses. There was no suggestion that they were relevant in this case. The question was whether a proprietary seal is the same as a sealant. Mr Illingworth submitted that a silicone sealant as used in this case was not a proprietary seal.

[29] Mr Robertson argued that, notwithstanding the use of the word "seals" in clause 3.0.2, the use of sealant was an acceptable solution. Mr Robertson did not provide any support for this assertion apart from the fact that in *Dicks* Baragwanath J concluded, on the facts of the case, that a suitable silicone sealant would satisfy the criterion of "proprietary seals". It is clear from the decision that the Judge's conclusion was based on the evidence adduced in that case. It was not a decision based on the construction of the clause. For these reasons that case is of limited assistance in the present case. Baragwanath J's reasons were:[11]

> There was a difference between the experts as to the meaning of "proprietary seals". The plaintiff's expert, Mr Jordan, described "proprietary seal" as effectively a custom built prefabricated item which would fill a gap between the aluminium window and the stucco surround. But none was in fact available. Mr Williams for the plaintiff however accepted, as the Council's experts asserted, that the use of sealants rather than metal flashings on the sides and on the sill at the bottom of the window would conform with the standards specified. I accept the predominant opinion that proper use of silicone sealant would satisfy the criterion of "proprietary seals".

[30] Mr Farrell's evidence did not distinguish between a proprietary seal and sealant. He simply asserted that sealants were an acceptable solution for the purposes of the Building Code. But the fact that neither he nor counsel seemed to be

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[11] *Dicks*, above n 4, at [24].

alert to the potential differences between a sealant and a proprietary seal undermines his assertion.

[31] The plain and ordinary meaning of a seal is, among other things, a "means of preventing the passage of gas or liquid into or out of something".[12] This could, self-evidently, encompass a sealant which itself is defined as "a substance designed to seal a surface or container against the passage of a gas or liquid".[13] But the acceptable solution is satisfied not by any seal or sealant but by a "proprietary seal". In ordinary language, this would be one manufactured and marketed under a patent or registered trademark. A probable reason for this distinction is that a proprietary product is likely to be the subject of specific instructions regarding its application. I note that the expert evidence in *Dicks* suggested that a proprietary seal was a custom built prefabricated item. But that reported view cannot, of course, have any weight in this case.

[32] Whether a properly applied sealant could have provided a satisfactory alternative solution is not the issue. I consider that a generic silicone sealant does not fall within cl 3.0.2. It therefore could not have been an acceptable solution as Mr Farrell asserted.

Were the windows visually defective?

[33] The Council further challenged the adjudicator's comment that "an inspector can inquire about the use of sealants when it is obvious to the inspector's eye that no adequate flashings are in place". Mr Robertson submitted that this was a finding that the windows were visually defective and that such a finding was not available on the evidence.

[34] Mr Wilson said that the lack of flashings would have been visible during the completion of the stucco plaster inspections and at later inspections. Mr Farrell was asked to comment on this in re-examination and said:

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[12] "seal n.2" (June 2012) OED Online www.oed.com.
[13] *Shorter Oxford English Dictionary on historical principles* (5th ed, Oxford University Press, Oxford, 2002) at 2725.

Q: And it was put to you that when it was noticed that it wasn't built that way and there needed to be more [enquiries]. How visually would that appear on the wall? ...

A: I think the main difference is that the plaster comes out in front of the ... well there is plaster, I'm not sure, it looks like it's up behind the sill, am I correct? Yes, it is, on photograph 1.13 ... under the lower flange, rather, and then comes out in front of the aluminium window extrusion which [sic] on the design detail it doesn't come out in front. That would be the main difference I would see there.

Q: And would that be visually viewed as something significant by an inspector?

A: Not particularly no.

[35] Mr Farrell's response was not a robust one. Given that Mr Wilson had made his view plain, the adjudicator was entitled to make a finding based on Mr Wilson's evidence rather than Mr Farrell's response.

Was there a proper basis to find that the Council had ignored the recommendations made by BRANZ and James Hardie?

[36] The Council asserted that the adjudicator had erred in two ways in reaching the following conclusion:[14]

> Absence of records of the Council's decision making process causes me to conclude that the Council ignored in its inspections of the window installations the installation recommendation of the BRANZ and Hardibacker documentation calling for the installation of mechanical flashings.

[37] Firstly, the Council said that this finding had the effect of shifting the burden of proof onto the Council. The Council asserted that, since the claimants did not adduce any evidence as to the standard required of councils in the position of the Auckland City Council at the time, it could not discharge that onus. Secondly, the Council said that a building inspector could reasonably have certified the windows as built, as that design was superior to the approved design.

[38] Turning to the Council's first submission, I accept that the burden of proof lay on the claimants. It was for the claimants to prove, on the balance of

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[14] At [38].

probabilities, that the Council fell below the standard of reasonable competence expected in relation to carrying out inspections and issuing Code Compliance certificates. It is generally the case that a finding of negligence will depend on establishing the requisite standard of care through evidence as to the standard generally exercised by reasonably competent and experienced members of that profession.[15] Of course, it is possible for a judge to reject the standard commonly adopted in a particular profession as failing to satisfy the legal standard of reasonableness. However, absent some obvious flaw in the evidence or where the act or omission was so obvious as to not require evidence establishing the standard of care, the Court will have to be satisfied through expert evidence as to the standard expected of the defendant.

[39] The adjudicator's findings are problematic. The totality of the evidence, including the lack of Council records, may have justified an inference that the Council failed to have regard to the BRANZ and Hardibacker technical literature. However, this is not the way the adjudicator expressed himself. The tenor of the adjudicator's finding is to emphasise the lack of evidence about what the Council did. That is the wrong approach; it was for the claimants to prove that the Council failed to take the necessary action. This error justifies a fresh look at this aspect.

[40] Turning to the evidence before the Court, Mr Robertson submitted that, as the plans had minimal details of the window flashings and the design drawing referred to consultation with the window manufacturer being necessary to finalise the detail adopted, there was no justification for finding that the Council should have ensured that the flashings were installed in accordance with the specified detail. It does appear that the plans were not very clear, though they contained sufficient detail for Mr Wilson and Mr Casey to identify the need for sill flashings. In any event, the Council could have fulfilled its duty by approving an alternative solution under the Building Code so whether the flashing complied with the specification is not determinative.

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[15] *McLaren Maycroft & Co v Fletcher* [1973] 2 NZLR 100 (CA) at 107, citing *Sulco Ltd v E S Redit & Co Ltd* [1959] NZLR 45 (SC).

[41] Mr Robertson submitted that the "as built" installation was appropriate and would have been approved by any reasonably competent Council. This was the evidence of Mr Farrell who said:

> I have been supplied with a clearer flashing detail from the architectural plans ... This detail specifies prefinished aluminium metal flashings to the head, jamb and sill of windows plus a sealant bead between the jamb and sill flashing and adjacent cladding. In my opinion, well designed and well installed mechanical flashing systems require less maintenance and generally out perform sealant flashing systems over time. However, I note that the jamb and sill metal flashings in detail 21 are not designed to direct water out of the wall and hence they are not, in a mechanical sense, significantly different than [sic] the option adopted.
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> In the course of the inspection of these units, I would expect the [C]ouncil officer to make sure that there was some form of flashing to the jamb and sills, but there was no requirement or expectation at the time that the detail drawn would be slavishly followed. The building inspector was entitled to accept the "as buildt" [sic] detail which relied upon sealant to weatherproof the jambs and sills.

[42] The difficulty is that Mr Farrell's evidence seems to be premised on the assumption that sealant was an acceptable solution whereas, for the reasons already discussed, I have concluded that it was not. As a result, the Council was required to be satisfied on reasonable grounds that the building work to which the certificate relates complied with the Building Code. In the absence of records evidencing the reasons behind the Council's decision to issue Code Compliance certificates, it is necessary to consider the totality of evidence surrounding the requirements of window joinery.

[43] The Council asserted some ambiguity in the requirements of acceptable solution E2/AS1 which provided the following in relation to joinery:

> Clause 2.0.1:
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> Walls shall have
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> ...
>
> (d) joints between the cladding and exterior joinery waterproofed by the use of flashings and sealing systems

[44] Mr Farrell, in his brief of evidence, stated that E2/AS1 did not require head, sill or jamb flashings and that the Hardibacker technical literature simply provided

suggested examples for flashing options rather than stipulating requirements. Mr Farrell's evidence was that, against that regulatory background in the 1990s, "it was common practice amongst some tradespeople to rely on sealants as flashing solutions for weatherproofing openings, junctions between materials etc". With proper maintenance, Mr Farrell was of the view that sealant could provide sufficient weather proofing.

[45] However, the technical literature clearly stated that mechanical flashings were necessary for weatherproofing. As I have already noted, the Hardibacker technical literature stated that sill flashings must be installed and the Good Stucco Guide directed that proper flashings, being both head and sill flashings, were essential. Despite Mr Farrell's evidence that it was common for tradespeople to rely on sealants as flashings solutions, the BRANZ Bulletin 304 explicitly warned against that practice.

[46] Further, Mr Hursthouse, a registered building surveyor with 38 years' building experience, expressed the view that:

> In this particular case, I was surprised the inspectors had let the joinery installations pass without sill or jamb flashings and I do struggle to see how that was reasonable. I remember conversations with inspectors over joinery flashings in the late nineteen eighties. They had a very bright awareness of how important flashings were, which was also instilled (at least partly by those inspectors) into me. In my opinion the omission of a proper sill flashing on all these windows is probably the single most significant defect on these two blocks.

[47] Mr Wilson was similarly critical of the fact that without sill and jamb flashings the junction of the plaster and joinery was reliant on the seal formed between the two different materials with an exposed bead of silicone sealant for waterproofing. He stated in his brief of evidence that:

> ...silicone sealant applied around window and door openings should never be used in place of properly designed and installed flashings. An exposed bead of sealant could only ever be considered as a temporary solution whether or not perfectly installed.

[48] Although Mr Wilson acknowledged that properly installed and maintained sealant would help prevent the entry of moisture around windows and doors, nevertheless he considered that relying on sealant alone would be unreasonable.

[49] In my view, the totality of the evidence was to the effect that there were no grounds on which the Council could reasonably have satisfied itself that the units complied with the Building Code. For the reasons already discussed, defect one departed from the consented plans, was visually defective and contrary to the clear instructions of technical literature and guides available at the time. If there were no grounds on which the Council could have satisfied itself, it follows that the Council did not satisfy itself, *on reasonable grounds*, that the units complied with the Building Code. I find that this failure allowed defect one to persist unremedied, causing damage to the units.

[50] Defect one, as mentioned previously, itself required the units to be fully reclad and so it is not necessary to revisit the adjudicator's findings in respect of the other two defects. Nor is it necessary to consider the Council's submissions regarding the duty to have in place an inspection regime capable of uncovering defects; being guilty of the duty to take reasonable care in issuing Code Compliance Certificates (which I have held was causative of damage requiring recladding), it is not necessary to look further.

Contributory negligence

[51] Ms Brown entered into a sale and purchase agreement in relation to unit 28 on 10 September 2005. Upon the advice of her solicitor, Ms Brown signed the agreement subject to her solicitor's approval and a satisfactory pre-purchase inspection report being obtained. There was no condition requiring a satisfactory Land Information Memorandum (LIM) as Ms Brown's solicitor advised her that it was unnecessary.

[52] The adjudicator relied upon the evidence of Tim Jones, an experienced conveyancing lawyer, who stated that a reasonable conveyancing solicitor in September 2005 would have advised Ms Brown of the importance of obtaining a LIM. The adjudicator further noted that the pre-purchase inspection report included the following recommendation:

> 4. It is always recommended to check with local council regards to all permits having been applied for and signed off i.e. LIM/file search.

[53] Despite this, Ms Brown did not obtain a LIM. If she had, the LIM would have included a notation to the effect that the adjoining unit, unit 29, was subject to a weathertightness claim, that remedial work may be necessary to ensure unit 29 complies with the Building Code, and that all units in the Broadwood Villas complex were constructed by the same builder.

[54] In respect of Ms Brown's failure to obtain an LIM, the adjudicator found:

> [150] The LIM procedure is an effective way Councils can warn intending buyers. It has potential causal potency because the LIM procedure allows local authorities to absolve themselves of earlier negligence by warning potential buyers. Ms Brown confirmed under questioning that she would have been cautious if she had obtained a LIM with such a notation. I am satisfied that the LIM would have given her notice of serious weathertightness concerns.
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> [151] I am therefore satisfied that the Council has affirmatively established that a contributing cause of Ms Brown's losses was her failure to take reasonable care to protect her own interests by not obtaining an LIM. Her failure to take such reasonable care contributed partly to her loss. The notation on the LIM would have given notice of probable weathertightess issues with all the units in Broadwood villa [sic] development. Her failure to take advice from the building surveyor and the carelessness, of her and her conveyancing lawyer, not to obtain a LIM has materially contributed to Ms Brown's loss for which she should carry some responsibility.
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> [152] I determine that a reduction of 30% to the amount of damages awarded to Ms Brown is a fair and appropriate contributory negligence apportionment.
>
> (citations omitted)

[55] The Council appeals this apportionment of loss on the basis that Ms Brown's failure to obtain a LIM removed all causal potency from the Council's negligence and therefore her claim should fail entirely or, alternatively, contributory negligence should be assessed at 100%. The Council argued that a LIM is the only way the Council can warn prospective purchasers of potential issues with buildings and that the warning the LIM would have included in this case would have been "emphatic". Mr Robertson relied heavily upon the Supreme Court's obiter comments in *Sunset Terraces*:[16]

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[16] *North Shore City Council v Body Corporate 188529* [2010] NZSC 158, [2011] 2 NZLR 289 at [79]-[84].

> A prospective purchaser may, however, fail to request a LIM in circumstances where the LIM, if requested, would probably have given notice of actual or potential problems. *If, as is likely to be the case, the purchaser's failure amounts to negligence, a question may arise 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 at the inspection stage.*
>
> The legal background pertaining to LIMs is that under s 44A of the Local Government Official Information and Meetings Act 1987, councils must issue, on request, a Land Information Memorandum about the property concerned. The memorandum is designed to advise of "matters affecting any land [in the Council's area]". The section specifies (in subs (2)) matters which must be included in the memorandum and then says (in subs (3)) that a Council may provide in the memorandum "such other information concerning the land as the [Council] considers, at its discretion, to be relevant".
>
> Relevance must include what is relevant to an intending purchaser and, in context, land must include buildings on the land. Hence s 44A authorises councils to include in a LIM such information as the council has concerning the presence or possible presence of leaky buildings on the land. This is effectively the only way councils can warn intending purchasers and thereby seek to absolve themselves from any earlier negligence on their part. By means of a LIM the council is metaphorically saying to potential purchasers who choose to look that they should be careful, because there is (or may be) a snail in this bottle. That is how, in causal potency terms, failure to request a LIM may differ from failing to inspect the building itself.
>
> ...
>
> It is clear that the plaintiff's own conduct may go beyond contributory negligence and become the real cause of the damage. This is simply a plaintiff-based example of what was traditionally called a novus actus interveniens. That was a convenient label to describe a new cause which intervenes and removes all causal potency from the original negligence. The intervening cause can arise from the conduct of a third party or from the conduct of the plaintiff himself.
>
> In a case in which the issue arises, the Court will have to examine how to treat a failure by a prospective purchaser to request a LIM before becoming committed to the purchase. That failure may amount to contributory negligence or, depending on the circumstances, it may be the only real and effective cause of the purchaser's ultimate loss.
>
> (emphasis added)

[56] Whilst the Supreme Court has recognised the possibility of a failure to obtain a LIM removing all causal potency from earlier negligence, that view was qualified by the words "depending on the circumstances". In Ms Brown's circumstances, I am not convinced that her failure to obtain a LIM was so significant as to constitute a

new cause of loss. Although Ms Brown did not obtain a LIM, she did take steps to assess her unit's weathertightness. Her purchase agreement was conditional upon a satisfactory pre-purchase inspection report being obtained. When the first report obtained showed some concerning moisture level test results, a re-inspection was carried out which confirmed that the wall lining was dry. It was not unreasonable for Ms Brown to rely upon that report. Although Ms Brown gave evidence that if she had obtained a LIM she would have been more cautious, I do not see that the steps she took to assess her unit were different from what would be expected of someone who had received a LIM with a weathertightness warning. Therefore, I do not consider that her failure to obtain a LIM could be considered the "only real and effective cause" of her loss, and the adjudicator did not err in his assessment of apportionment of loss in the manner contended by the Council.

Conclusion

[57] I conclude that the Council breached its duty to take reasonable care in satisfying itself that the units complied with the Building Code before issuing Code Compliance certificates. That breach caused defect one to remain without remedy, allowing it to cause the damage requiring recladding of the units.

[58] I further conclude that the adjudicator did not err in apportioning loss for Ms Brown's contributory negligence.

[59] The appeal is dismissed.

[60] I was not addressed on the issue of costs. Counsel may file memoranda as to costs by 24 August 2012 and memoranda in reply by 31 August 2012.

P Courtney J