IN THE COURT OF APPEAL OF NEW ZEALAND

CA487/2015
[2016] NZCA 644

BETWEEN	ANDREWS PROPERTY SERVICES LIMITED Appellant
AND	BODY CORPORATE 160361 First Respondent
	BODY CORPORATE 160362 Second Respondent
	FONG HONG YUEN & OTHERS Third Respondent
	BC 2004 LIMITED AND BC 2009 LIMITED Fourth Respondent
	AUCKLAND COUNCIL Fifth Respondent
	JOHN LUKASZEWICZ Sixth Respondent

Hearing:	29–30 August 2016
Court:	French, Miller and Brown JJ
Counsel:	J D McBride and D A Cowan for Appellant G B Lewis and S L Tomlinson for First, Second and Third Respondents No appearance for Fourth Respondent S A Thodey and K M Parker for Fifth Respondent No appearance for Sixth Respondent
Judgment:	22 December 2016 at 2.00 pm

INTERIM JUDGMENT OF THE COURT

A **The appeal is allowed in part.**

B **The finding in the High Court that the appellant was liable for failing to ensure that the building was properly inspected by the fourth respondent is set aside.**

C **The judgment entered in the High Court that the appellant is liable to the first, second and third respondents directly for their losses occasioned by the omission to properly inspect the building is set aside.**

D **The judgment allocating responsibility for the losses of the first, second and third respondents among the appellant, the fourth respondent and the fifth respondent is set aside. The issue of contribution among the appellant, fourth and fifth respondents is reserved pending the determination of the cross-appeal.**

E **The applications for an extension of time within which to bring the cross-appeal are granted.**

F **The Registrar is directed to arrange a telephone conference with counsel and the Court early in 2017 for the fixing of a timetable for the exchange of written submissions on the issues specified at [154] and a further hearing date.**

G **All questions of costs are reserved pending consideration of the cross-appeal.**

REASONS OF THE COURT

(Given by Brown J)

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Introduction

[1] The owners of Fleetwood Apartments, a central Auckland 40-unit apartment building constructed in 1994, suffered the dual misfortune of weathertightness issues and a defective remediation undertaken in 2005. The owners brought proceedings in respect of the defective remediation against the architectural consultants, Babbage Consulting Limited (Babbage),[1] the contractor, Andrews Property Services Limited (APS), and the Auckland Council (the Council). The Council cross-claimed against Babbage and APS seeking a contribution (up to a full indemnity) in respect of any liability the Council was held to have to the owners.

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[1] Babbage Consultants has undergone a number of restructurings since 2003. When work was first commenced Babbage was trading as BC 2004 Limited. This became BC 2009 Limited in March 2009. This is why the fourth respondent, who we shall simply refer to as Babbage, is listed in the intituling of the High Court judgment as BC 2004 Limited and BC 2009 Limited.

[2] In the High Court, Whata J found all three defendants at fault.[2] With reference to APS, the Judge held:

(a) While APS's tender for the remediation contract had transferred to Babbage the obligation to undertake a survey of damage which the tender specification required, APS was nevertheless obliged to be satisfied that Babbage had undertaken a proper survey and it failed to do so.

(b) APS failed to correctly install the new exterior cladding by omitting to obtain design details for the fixing of the cladding panels and failing to use a clearance hole for the screws which resulted in the cladding panels cracking on movement.

(c) APS's producer statement misled the Council into thinking that a survey had been undertaken and that the new cladding had been properly affixed.

[3] Liability in respect of the owners' losses was apportioned as Babbage 60 per cent, APS 20 per cent and the Council 20 per cent. On the Council's cross-claim Whata J held APS liable for 20 per cent of the sum for which the Council was liable to the purchasers of units after the issue of the Code Compliance Certificate (CCC).

[4] On appeal APS challenged the Court's findings:

- concerning the requirement to carry out a survey and the conclusion that APS failed to ensure a survey was carried out;

- that APS failed to affix the new cladding in accordance with design specifications; and

- that producer statements provided by APS to the Council were a breach of the Fair Trading Act 1986 in that they were likely to mislead the

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2 *Body Corporate 160361 v BC 2004 Limited and BC 2009 Limited* [2015] NZHC 1803 [High Court judgment].

> Council into thinking that a survey had been undertaken and that the new cladding had been properly affixed.

Narrative of events relevant to appeal

Moisture damage discovered

[5] The apartments' original construction consisted of concrete slab walls and floors, an in-fill steel frame, fire-rated plaster board and Harditex cladding. There was no cavity through which air and moisture could pass. When water damage to the apartments was identified in 2003, Babbage was commissioned to undertake a review of the building for moisture damage.

[6] Babbage's September 2003 report advised that the Harditex clad exterior to the end sections of the building and the Fleet Street elevations had considerable moisture in the sub-frames, then assumed to be largely timber, which needed to be removed and replaced. It indicated that substantial remedial works were required including the formation of a cavity in accordance with the Council requirements and the installation of new exterior cladding.

The tender documents

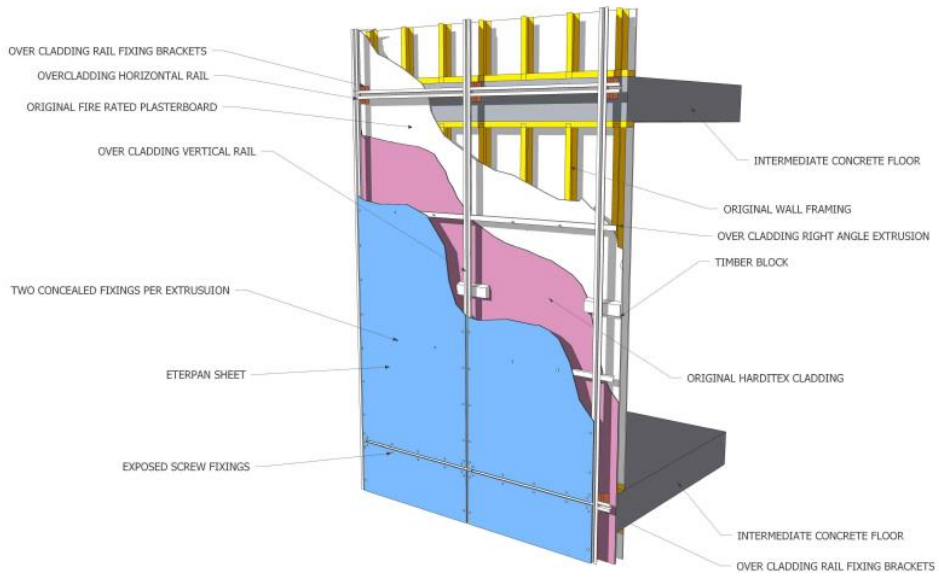
[7] Babbage was then engaged to prepare a tender for the substantial remediation works it advised were necessary to repair the damage. The tender specification document provided for three cladding options. Two involved removal of the exterior cladding and replacement with new cladding. The third option was an overcladding system that, as its name implies, would be installed over the existing cladding which would remain in place. A particular form of this system, the Overclad Support System (Overclad), was described in a test report provided by Window Engineering Consultants dated 29 October 2002 (the WEC test report), and annexed to the tender specification, in this way:

> The "Overclad" system is a proprietary external building cladding system designed to create a drained, vented (pressure equalised cavity) behind the cladding line. The drained & ventilated cavity is designed to allow water penetrating the outer building skin to be drained to the exterior & allow controlled air movement in the cavity. The "Overclad" aluminium

extrusions form a support grid for the cladding and manage air and water movement at the panel joints.

[8] The WEC test report listed a variety of cladding materials which could be mounted on the Overclad system, including a 9 mm medium density fibre cement board called Eterpan available from Progressive Building Systems (PBS). It noted that several fixing systems were used to mount the panels onto the Overclad system, such as adhesive or pop rivet fixing.

[9] An Overclad fixing diagram sourced from Prendos New Zealand Limited (Prendos), the company which undertook the 2015 remediation work, usefully displays the various layers of materials in a cut-away format:



[10] The tender specification did not incorporate discrete sections relating to the different remediation options. Consequently the "Particular Clauses" in the specification were confusing in that certain directions were specific to the Overclad option while other clauses appeared to apply either to the other two options or to all three. For example, the "Carpentry & Joinery: Particular Clauses" contained a number of specific references to the Overclad system, including the following which are of consequence to the installation issue on appeal:[3]

SW6-A-9 …

[3] See [122]–[123] below.

CLADDING SHEETS

Use only 9.0mm compressed sheet with square on all sides attached to the overclad systems as detailed.

SW6-A-10 SHEET FIXING

Timber frame moisture content must not exceed 18% prior to fixing the overclad system[.]

Pre-drill, allow screw fixings for counter sunk screws.

The compressed sheets shall be fixed in accordance with Cladding Systems Specification.

"Cladding Systems" refers to Cladding Systems Ltd (CSL), the designer and manufacturer of Overclad.

[11] By contrast, and of particular significance to the survey issues on this appeal, is the first of the "Preliminary & General Particular Clauses" which stated:

SW1-A-1 SCOPE OF WORK

The work in this contract includes:-

1.0 Exterior Walls

In conjunction with Babbage Consultants Limited inspect all external and associated walls to establish moisture content. A moisture content of 18% or less is required. Remove areas of the exterior cladding to front and block ends to access effected [sic] timbers/steel studs to determine level of deterioration. The deep balcony side facing Dominion Road, shows no signs of deterioration due to protection. If timbers have started to decay, then they will need to be replaced with H3.2 treated timbers for studs and H3.2 treated timbers for bottom plates. Steel studs need to be treated for rust and primed. Significant rusting may require replacement. This operation may pop nails out of the internal Gibraltar board lining. The other timbers should be treated with a 20% bleach solution to neutralize mould spores, reducing the risk of future mould. Treat the existing exposed timbers with Protim Timber Saver. Reline with matching Gibraltar board for fire rating and fibre cements sheets and install 'overclad' system with 9mm fibre cement sheets and paint to match existing colour schemes. Extent of new painting shall be whole walls that are effected [sic] by builders works, to the nearest corner.

The APS tender

[12] Prior to lodging its tender, APS obtained a quote from CSL for supply of its Overclad system. The scope of work in the CSL quotation letter was confined to the supply and delivery to site of the Overclad extrusions and brackets. Although it excluded site survey, installation and fixing of panels to the structure, it recommended the use of Eterpan panels and advised that the product was available from PBS. The quotation offered an additional service at a daily rate for sending an installer to the site to advise APS's staff on installation.

[13] APS's tender of 14 July 2004 specified a discrete methodology for each of the three systems. The significantly different nature of the remediation which the Overclad system involved is usefully demonstrated by comparing the methodology for the Hardies and Hitex systems (which were virtually identical) with the methodology for the Overclad system:[4]

Hardies Systems	**Cladding System**
Methodology for this system is as follows:	*Methodology for this system is as follows (refer notes):*
1. Site setup. *2. Scaffold erection (to do in three stages).* *3. Demolition of cladding and downpipes.* *4. Install temporary nova coil for downpipe outlets.* *5. Temporary relocation of push button controls to doors.* *6. Repairs to exposed timber where necessary.* *7. Removal of wet insulation.* *8. Install bevelled timber to roof edge frame and balustrade tops.* *9. Treat timber with bleach and protim timber saver.* *10. Install new insulation where removed.* *11. Install Tyvec building wrap.* *12. Removal aluminium windows and doors.* *13. Install interior room protection and timber hoardings to open areas.* *14. Do window/door liner extensions onsite.* *15. Complete building wrap in*	*1. Site setup.* *2. Scaffold erection (to do in three stages).* *3. Full survey on structure repairs needed.* *4. Open up failed areas from survey, remove insulation, treat/repair timber.* *5. Open up under windows for installation of sill tray.* *6. Temporary relocation of push button panels.* *7. Removal of downpipes and install temporary noval coil.* *8. Install bevel timber work to roof edge cap.* *9. Set out and install brackets and grid to walls.* *10. Install new sill trays.* *11. Install extended aluminium window flashings (sill, head and jambs).* *12. Install cladding sheets to grid.* *13. Reinstate push button control panels and downpipes.* *14. Paint cladding (no texture).* *…*

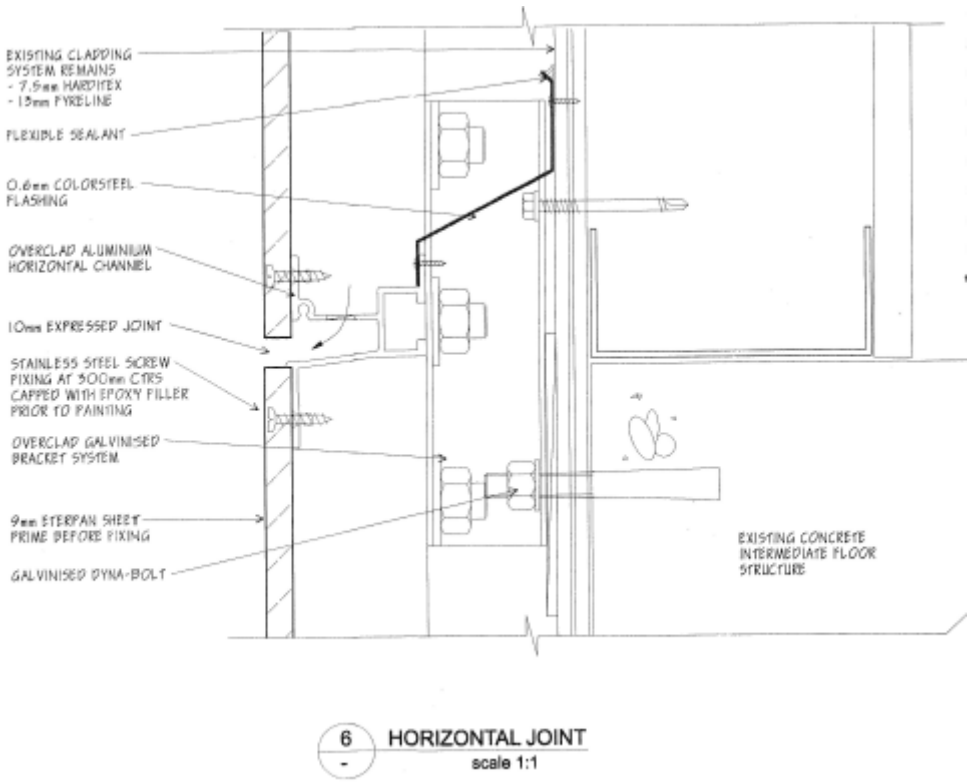
[4] The Hardies and Hitex systems being more traditional forms of weathertightness remediation.

window/door cavities. *16. Install fire rated gibboard and stop.* *17. Install second building paper.* *18. Install overflashing tape.* *19. Install airseals and inseals.* *20. Install window flashings and windows/doors.* *21. Install cavity batten system.* *22. Install exterior cladding, reinstate downpipes, push button panels and bevel flashings to roof edge cap and balustrade.* *23. Texture reclad walls.* *24. Paint cladding, balustrades and decks.* *...*	

[14] A list of "Notes & Conditions" applicable to the APS tender recognised that for all three systems the extent of internal remediation work required was uncertain and stated that such work would need to be part of the contingency sum. Specifically with reference to the Overclad option the Notes & Conditions stated:

> 10. For the cladding system option, the following is noted:
>
> - Existing cladding is not removed and all repairs are reliant on the initial Babbage Consultant survey when the scaffold is erected. However, additional repairs found or needed, can be achieved from the interior once the cladding is in place at extra cost.
>
> - Fire rating is retained due to the existing cladding remaining and any repairs will have original cladding reinstated.
>
> …
>
> - Details provided on this system do not show how the cladding is fixed to the grid. We have assumed screw fixing using stainless steel screws. Two options are possible:
>
> (a) Counter sink screws, flush stop and paint over.
>
> (b) Capped screws sitting proud of the surface and therefore an architectural detail.
>
> …

[15] In response to the observation that the tender specification did not show how the cladding should be fixed to the Overclad framing, Babbage provided a number of drawings including A602, a portion of which showed the manner of affixing both the Overclad bracket system to the existing concrete structure and the Eterpan sheets to the Overclad bracket as such:



[16] During August 2004 Mr Jon Dale of Babbage made a further inspection of the building and compiled a report which indicated that, because of moisture within the sub-frames, the cladding would need to be removed, the timber framing inspected and where, showing signs of decay, removed and replaced.

[17] In an email of 6 October 2004 to the apartment owners recommending the Overclad option in the APS tender, Mr Dale noted that the other two options required all the existing cladding to be removed together with the joinery whereas, in relation to the Overclad option, he advised:

> … this allows for only areas that are damaged to be removed as the new cladding is secured over the existing material with flashing to windows and doors without their removal unless the timber around them is decayed.
> Of which we would recommend is the final option the cladding system as it causes less disruption to the occupiers of the dwelling.

[18] The Babbage recommendation of the Overclad option was approved and on 15 November 2004 Babbage advised APS that its tender was accepted "based on the Babbage plans details and the methodology noted".

The building consent process

[19] Although in the tender acceptance letter Babbage advised that it had received a building consent from the Council, in fact the application for a building consent was not lodged until 22 March 2005. Notwithstanding the fact that the Overclad option had been accepted, the building consent application included the tender specification without any amendment.

[20] APS commenced work on the building prior to the building consent being obtained. In the process, early in 2005, it was discovered that the building structure was lightweight steel framing, not timber as originally assumed. On 19 April 2005 Mr Craig Boyle of APS sent an email to Mr Dale alerting him to the fact that the bottom plates of the window sills of the steel framing were rusted and seeking clarification on the manner of treatment.

[21] Two days later, after inspecting the extent of the rusting to the steel framing, Mr Dale sent a facsimile message to APS advising that once the moisture was eliminated no further rusting would occur. He instructed that the areas then exposed should be sanded back and a rust inhibitor applied to all visible metal surfaces.

[22] That course of action was recorded in an exchange relating to the processing of the building consent in the following month. A letter to Babbage from the Council dated 24 May 2005 included among matters which needed to be addressed:

> 1. The drawings show the existing cladding still in place. The cladding should be removed to inspect the existing framing and to treat the framing if the existing is found to be chem.-free. Any decay or rust found in specifically designed members should be inspected by an engineer. The ventilated cavity should be open to allow air movement around the framing.
>
> …

[23] Babbage's response of 25 May addressed the Council's concern in this way:

> 1. As stated the existing cladding is to remain in place and the new aluminium frame is to be attached directly over the top, therefore there is no need to remove the existing cladding. The existing framing is lightweight steel framing throughout with concrete intermediate floors.

> Where rusting is found at the underside of the sill areas, these will be sanded back and a rust inhibitor applied.
>
> …

The Babbage letter attached a copy of the producer statement from PBS concerning the Eterpan product, and advised that all fixings were to be stainless steel screws at 25mm centres, with the sheets predrilled and countersunk.

[24] Mr Thatcher, the Council consenting officer who was the signatory to the 24 May 2005 letter, then amended the copy of the tender specification. Clause 1.0 of SW1-A-1[5] was stamped "Revised: Endorsements on superseded plans transfer to this document" and "steel framing" was handwritten beside it, consistent with the information provided in Babbage's response.

[25] The building consent approval, issued on 1 June 2005, described the authorised work as "Overclad existing structure, replace roof with like and repaint entire facade". It recorded that the proposed work had been designed to a specific design and was to be constructed accordingly, specified that the Council was required to inspect all work before being covered up, and noted that it was the building owner's responsibility to call for inspection. With reference to the cladding elements it listed four categories of producer statement to be provided, including one from Mr Hanley of Facade Design Services Ltd who was engaged to carry out the design and specification of the cladding work.

Construction and completion

[26] A Practical Completion Certificate was issued by Babbage to APS on 9 June 2006. However securing a CCC was a protracted exercise, described in the judgment as a "post-contract scramble".[6] When the initial request was made in late April 2006 the Council sought further information about the cladding and compliance with consent conditions. In response APS supplied a producer statement dated 31 July 2006 which stated that the install of the Overclad had been completed in accordance with:

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5 Set out at [11] above.

6 High Court judgment, above n 2, at [82].

1. The standards specified in the contract documents.

2. All standards and specification from the suppliers (cladding systems).

3. A good workman like manager. [sic]

4. All building acts and regulations current.

[27] The High Court judgment records that:[7]

(a) the Council was not satisfied with that material;

(b) there was a discussion between Babbage and Council officers about what was required in order to achieve certification;

(c) Babbage lodged a second CCC application in August 2006 which included a report from Mr Hanley on the cladding work;

(d) Mr Hanley's refusal to provide a construction review producer statement triggered a further Council information request; and

(e) Babbage then produced various documents including an updated producer statement from APS dated 27 September 2006 containing an expanded description of work and various communications from CSL.

[28] An unconditional CCC was ultimately issued on 28 September 2006.

Defective remediation discovered

[29] When in late 2011 significant cracking of the Eterpan cladding panels was detected, the first and second respondents engaged Prendos to investigate the state of the apartments. Having identified several inadequacies in the building, Prendos was instructed to undertake remedial work which included removing the Overclad, the underlying cladding and the steel framing. Building consent for the works was issued on 18 June 2013 and by the time of the High Court hearing in February and March 2015 the remedial works had been largely completed.

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7 At [37]–[39].

[30] The first and second respondents commenced proceedings seeking to recover the wasted cost in the installation of the Overclad system and the cost of the remedial work identified and undertaken by Prendos. The amended statement of claim included causes of action against APS for breach of contract, breach of the Consumer Guarantees Act 1993, negligence and breach of the Fair Trading Act 1986. APS was alleged to have been in breach of its obligations to the first and second respondents in the following four ways:

(a) Installed the overclad system which was not an appropriate repair solution.

(b) Failed to identify and remove all damaged building elements.

(c) Constructed the remedial works with "the defects".

(d) Issued a flawed producer statement dated 27 September 2006.

[31] The pleaded defects included the following:

(a) The use of the overclad fibre cement cladding system as a repair solution was inappropriate as:

(i) the overclad system was not suitable for use over an unsound lightweight substrate; and

(ii) the repair solution did not fully identify and remediate the existing damage;

(b) The fixing of the overclad fibre cement cladding system was inadequate in that:

(i) there were an insufficient number of fixings;

(ii) the rails distorted upon installation of sheet screw fixings; and

(iii) the rails deflected excessively between supports.

[32] At the close of the evidence in the trial the first and second respondents applied to amend their claim to include an additional defect:

(b) (iv) The method of the fixing caused the Eterpan sheets to crack.

Leave to make that amendment was granted in the judgment.[8]

The High Court judgment

[33] Although detailed lists of issues for the appeal were filed, which included items relating to pleadings, cross-examination obligations and quantum, the key findings which are the focus of APS's appeal are the three identified at [4] above.

The survey obligation

[34] While accepting that cl 1.0[9] imposed an obligation to conduct a detailed survey of the water damage to the property, Whata J found that such obligation fell on Babbage because, by its tender, APS had successfully transferred to Babbage the burden of securing such a survey of damage.[10] In rejecting the proposition that Babbage's acceptance of the APS tender was effective to place on APS the burden of conducting the survey, the Judge said:

> [109] Contrary to Mr Lewis' contention, Babbage's letter of confirmation did not change the basis of APS's involvement. The letter accepted the tender proposal and the tender price. The letter refers to Babbage's plan's details and methodology. But this can be read consistently with the APS' tender conditions, namely that the repair is reliant on Babbage's survey. An implied contractual duty to identify and remove the damage without further instruction from Babbage is not available on these facts.

[35] Whata J held that, in breach of its obligation, Babbage did not secure a proper survey of the underlying damage prior to the installation of the Overclad in accordance with cl 1.0, explaining:

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8 At [90]–[91].
9 Set out at [11] above.
10 High Court judgment, above n 2, at [108].

> [56] … It is reasonably clear from the available evidence that Mr Dale made a unilateral decision to depart from the strict requirements of [cl 1.0] and not require a detailed survey of the building. Instead, Mr Dale assumed that that the rust process would stop once the Overclad was installed and no further repair was required beyond those areas exposed for the purpose of the installation of the Overclad.

[36] The Judge rejected APS's argument that the Council's revision stamp on cl 1.0 when it granted building consent amounted to a deletion of that clause with the consequence that the survey obligation was also deleted.[11] While recognising that the placement of the stamp over the clause created legibility concerns, the Judge held that the revision stamp did not render cl 1.0 inoperative but served to alert the reader that the framing was steel framing and not timber framing.[12]

[37] However, notwithstanding the finding that it was not the obligation of APS under the contract to undertake a survey of the damage, the Judge concluded that APS was at fault in failing to be satisfied that Babbage had undertaken a proper survey of the building.[13]

Affixing of the Eterpan sheets to the Overclad brackets

[38] Provided that the substrate was in good condition, Whata J rejected the contention that the Overclad system was an inappropriate system for remediation.[14] However, the Judge concluded that the design details for the purpose of construction were inadequate in respect of the manner of affixing the Eterpan sheets to the Overclad grid. Noting that both the specification and Mr Hanley's producer statement referred to the need to install the Overclad system and the mounting of the sheets in accordance with manufacturer and CSL design specifications, the Judge observed:[15]

> While it appears that the plans supplied by Babbage were based on CSL drawings, it is not clear that they were obtained directly from CSL for the Fleetwood project. In any event, those drawings provide no or sparse detailing as to, among other things, method of screw fixing the Eterpan sheets to the Overclad grid. It also appears that no additional manufacturer's detailing was supplied with the Eterpan sheets for the specific purpose of

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11 At [158].
12 At [161].
13 At [114]–[118].
14 At [51]–[52] and [107].
15 At [53] (footnotes omitted).

> fixing the cladding to the Overclad grid. Furthermore, APS did not accept CSL's proposal to supply specifications for the Fleet St project. Instead, APS obtained CSL design drawings from another project and relied on ad hoc recommendations from Mr Lukaszewicz. As a consequence, the express requirements for compliance CSL design specification were not adequately met or secured by Babbage.

[39] The Judge accepted the experts' view that inappropriate screw fixing was likely to have been the cause of the cracking to the Eterpan sheets. It was the experts' agreed position that the cracking was caused by moisture effects leading to in-plane movement in the Eterpan sheets and that a clearance hole (a hole bigger than the screw) was needed to mitigate this effect. It appeared that no clearance holes were used in relation to the screw fixing at the periphery of the sheets.[16]

[40] Whata J concluded that APS had failed to comply with SW6-A-10[17] stating:

> [122] In my view APS did not obtain any design details from CSL. Rather APS relied on the Babbage plans and the plans for the Embassy Apartments and Lord Nelson projects supplied by CSL to APS during the tender process, together with ad hoc advice from Mr Lukaszewicz during the construction. But the Babbage plans provided only coarse information about the screw fixing, while the Embassy and Lord Nelson plans did not provide details as to the type of screw fixing at all. Mr Lukaszewicz's recorded advice only briefly touched upon the screw fixing requirements, with the observation made on 8 August 2005 (about the time APS was cutting the sheets for affixing to the grid) that:
>
> > We recommend 10g screws to fit the sheet because of the larger head size. I also mentioned that we used c/sk screws and s/s cup washers on the Embassy where the fixings were exposed — an option to just pan head screws
>
> [123] This is to be compared with the screw fixing required by the Eterpan literature attached as Annexure B. As Mr Lalas pointed out, the requirement for clearance holes is indicated in this literature. While this figure relates to a different system, it clearly signals the requirement and method to avoid the effects of movement. In addition, it appears that Mr Lukaszewicz's recommendation was not followed in any event.

[41] Consequently, APS was found to be in breach of an implied duty to install the cladding in a proper workmanlike manner.[18]

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16 At [120].
17 Set out at [10] above.
18 High Court judgment, above n 2, at [124].

The APS producer statement

[42] Rejecting APS's contention that the pleading was deficient, the Judge considered that the substance of this aspect of the claim was that the producer statement should not have been issued because APS could not assert the matters stated. He found that the statement was wrong in two key respects: there was no survey, and the cladding was not affixed in accordance with CSL specification.[19]

Issues on appeal

[43] Because the finding of liability on the part of APS with reference to a survey was necessarily contingent on Babbage having an obligation to conduct a survey, APS advanced a number of points directed to the issue of the existence of Babbages' obligation. The primary issues raised on the appeal can be condensed as follows:

(a) Liability for the lack of a survey:

(i) Did cl 1.0 require Babbage to undertake a survey?

(ii) Was that obligation modified by Babbage?

(iii) Was Babbage's obligation cancelled by the placement of the "Revised" stamp on cl 1.0 in the building consent documentation?

(iv) Did Babbage undertake the survey required by cl 1.0?

(v) Did APS have an obligation to be satisfied that a survey had been undertaken by Babbage?

(b) Liability for screw fixings:

(i) Did APS fail to comply with a contractual obligation concerning the method of affixing the Eterpan sheets?

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19 At [132].

(ii) Did APS breach an implied duty to install the Eterpan sheets in a proper workmanlike manner?

(c) Liability to the Council:

(i) Was the APS producer statement of 27 September 2006 erroneous and misleading?

Although not referred to in its notice of appeal, APS's submissions also raised questions concerning the quantum of damages.[20] Objection was taken by the owners and the Council to such questions being pursued on the appeal.[21]

Liability for the lack of a survey

Did cl 1.0 require Babbage to undertake a survey?

[44] We commence our analysis by identifying the nature of the particular contractual obligation assumed by Babbage and considering the description of that task as a "survey".

[45] Clause 1.0 required an inspection to be undertaken of all external and associated walls to establish moisture content.[22] The acceptable level of moisture content was specified as not more than 18 per cent, a moisture content level which cl SW6-A-10 reiterated was to be achieved for timber framing before the Overclad system was installed.[23]

[46] However, as the comparative methodologies in the APS tender demonstrated,[24] one of the benefits of the Overclad system was that, generally speaking, the existing cladding did not have to be demolished. Clause 10 in the Notes & Conditions in the APS tender stated that the existing cladding was not to be

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20 A separate quantum judgment was released by Whata J: *Body Corporate 160361 v BC 2004 Ltd & BC 2009 Ltd* [2015] NZHC 2979.

21 On the basis that this separate quantum judgment had not been appealed.

22 See [11] above.

23 See [10] above.

24 Set out at [13] above.

removed.[25] As Babbage explained to the owners, only areas that were damaged would be removed as the new cladding was to be secured over the existing material.[26]

[47] It was obvious that some removal of existing cladding might be required temporarily in order to remediate damaged areas. That was apparent not only from cl 1.0 but also from cl SW6-A-1 in the Carpentry & Joinery Particular Clauses. That any original cladding removed for that purpose would be reinstated was indicated in the second item in cl 10 of the Notes & Conditions of the APS tender.[27]

[48] However the word "survey" did not appear in cl 1.0 or in any of the other relevant clauses of the Babbage specification. Rather, the reference to a "survey" is derived from the APS tender itself. The word first appears in the description of the methodology of the Overclad system which states:

> 3 Full survey on structure repairs needed.
>
> 4 Open up failed areas from survey, remove insulation, treat/repair timber.

Further, the first item in cl 10 in the Notes & Conditions stated:

> Existing cladding is not removed and all repairs are reliant on the initial Babbage Consultant survey when the scaffolding is erected.

[49] The contractual obligation which, despite the retention of the introductory phrase "in conjunction with", Babbage exclusively assumed as a consequence of the terms of the APS tender, was an obligation to undertake the inspection of the external and associated walls. While in normal parlance it might be appropriate to describe that task as a "survey", the use of that term as a convenient shorthand description has the potential to cause confusion given the circumstances of the contractual negotiation.

[50] The judgment of Whata J makes reference to the inspection obligation variously as a "detailed", "proper" and "comprehensive" survey of the existing

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25 See [14] above.
26 At [17] above.
27 Set out at [14] above.

damage.[28] It specifically notes the reference in the APS tender to a "full survey on structure repairs needed" as a factor justifying the owners' expectation that a detailed survey of the existing damage would be undertaken.[29]

[51] However, the terms of the APS tender which the Judge held "specifically excluded … the survey work contemplated by [cl 1.0] and repair work, except on an additional instruction and invoice basis",[30] did not modify or supplement the content of Babbage's inspection obligation under cl 1.0.

[52] We further note that the reference to a "full survey" in the APS methodology needs to be read in the context of the entire APS tender. The description of the obligation in cl 10 of the tender as the "initial" survey[31] contemplated that the inspection task would be undertaken in the course of the single week allowed for hireage of the scaffolding in each of the three stages. Consequently, there is some ambiguity in the APS tender concerning the scope of the obligation which the tender terms were drafted to avoid.

[53] Against that background, we prefer to discuss the cl 1.0 obligation by reference to its terms and we refer to a "survey" only where that term is used in the High Court judgment, parties' submissions or other documents.

[54] To conclude on this issue, we note it is clear that cl 1.0 contemplated a thorough inspection of the exterior building walls in order to ascertain the extent to which there had been water damage that required timber replacement or rust treatment. While the reference to the inspection being undertaken "in conjunction with Babbage" anticipated that the contractor would also participate in that process, APS transferred to Babbage any responsibility it would otherwise have assumed to undertake a survey of the damage.[32] We agree with the Judge's finding[33] that Babbage's letter of confirmation to APS did not change the basis of APS's engagement.

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28 See High Court judgment, above n 2, at [55], [56], [60] and [63].
29 At [54].
30 At [93].
31 Noted at [48] above.
32 High Court judgment, above n 2, at [108].
33 Set out at [34] above.

[55] Consequently, unless cl 1.0 was deleted from the specification, the obligation to the owners to undertake the inspection resided with Babbage, an obligation which was confirmed by the submission of the unamended specification as part of the building consent application.

Was that obligation modified by Babbage?

[56] APS contended that Babbage, as the engineer and the owners' agent, was entitled to modify the cl 1.0 obligation and that it did so in its letter to APS dated 21 April 2005[34] and in its response to the Council's letter of 24 May 2005.[35]

[57] As the Judge observed, the decision to depart from the strict requirements of cl 1.0 was a unilateral decision by Mr Dale.[36] However, the obligation which Babbage had assumed under cl 1.0 was owed to the owners who had engaged Babbage. Any modification of the inspection obligation could only be made with the owners' agreement, which was neither sought nor obtained. The mere giving of notice to APS and the Council of a unilateral decision by Babbage to modify or depart from the cl 1.0 obligation therefore had no legal consequence so far as Babbage's contractual obligation to the owners is concerned.

Was Babbage's obligation cancelled by the placement of the "Revised" stamp on cl 1.0 in the building consent documentation?

[58] Whata J accepted APS's contention that the subjective view of the Council officer who placed the "Revised" stamp was not probative as to the legal effect of the conditions of the consent, applying the approach of the Privy Council in *Opua Ferries Ltd v Fullers Bay of Islands Ltd*.[37] Noting that the persons ordinarily expected to rely on specifications are qualified builders and building inspectors, the test applied by the Judge was: what would the ordinary builder or inspector make of the "Revised" stamp?[38]

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34 Referred to at [21] above.
35 Set out at [23] above.
36 High Court judgment, above n 2, at [56].
37 *Opua Ferries Ltd v Fullers Bay of Islands Ltd* [2003] UKPC 19, [2003] 3 NZLR 740 at [20].
38 High Court judgment, above n 2, at [157].

[59] Rejecting the submission that the revised stamp was ineffective to render cl 1.0 inoperative, the Judge said:

> [158] Turning then to the interpretation, the stamp states "Revised" and "Endorsements on superseded plans transferred to this document". The central issue is whether the revised stamp deleted or merely modified this clause. The placement of the stamp directly over the clause suggests that it is no longer operative. But, in my view, a builder or building inspector would not simplistically assume that the revision statement deleted a requirement to identify and repair existing water damage. Rather, I consider that he or she would immediately look to the superseded plans to understand how and in what way the specification was affected, bearing in mind that the superseded plans may be more or less onerous than the unmodified specification. The only directly relevant notation to [cl 1.0] is the reference to steel framing on one of the plans. This coincides with the annotation on the modified specification which states "STEEL FRAMING" ... . This suggests that the requirement to treat timber cladding in [cl 1.0] is likely to be redundant. But the remaining requirements of clause 1 specifically relating to the identification and repair of the steel framing are not obviously affected by the endorsement. I am, therefore, satisfied that the revised stamp did not delete or otherwise render inoperative [cl 1.0]. Rather, the revised stamp simply modifies [cl 1.0] by alerting the reader to the type of framing.
>
> (Footnote omitted).

[60] The Judge acknowledged APS's submission that the placement of the stamp over cl 1.0 created legibility concerns, but considered that the ordinary builder or building inspector could be expected to obtain a copy of the unmodified specification.[39]

[61] The judgment on this issue was criticised as factually and legally flawed for four reasons:

(a) Clause 1.0 already addressed both steel and timber framing and there was no need to modify it with a "Revised" stamp for that reason.

(b) The "Revised" stamp, if it deleted cl 1.0, was consistent with the exchanges between the Council and Babbage in May 2005.

(c) The clause was marked "Revised" and parts of it were illegible in such circumstances that a reasonable person would regard it as inoperative.

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39 At [160].

(d) The Court's view that the ordinary builder or building inspector should have responded to the "Revised" stamp by obtaining and following a copy of the original unmodified specification was contrary to common sense and wrong.

[62] On this question, we agree with the submission for the first, second and third respondents that the document as amended does not indicate an intention to delete cl 1.0. The stamp has in large print the word "Revised" followed by the statement "endorsements on superseded plans transfer to this document". The terms of the stamp read in their entirety convey that the clause to which it applies was the subject of some alteration, not deletion.

[63] Secondly, the respondents draw attention to the handwritten notation "steel framing", making the point that there would be no reason for such a notation adjacent to the clause if the intention was that the clause was being deleted in its entirety. That notation is consistent with the clause being read as amended to refer only to steel framing as opposed to both timber and steel framing in the original clause. Consequently, we are satisfied that Babbage remained under the obligation imposed by cl 1.0.

Did Babbage undertake the survey required by cl 1.0?

[64] Following his conclusion as to Mr Dale's unilateral decision to depart from the cl 1.0 requirement,[40] Whata J analysed the extent of the inspection undertaken by Babbage:

> [57] The extent of Babbage's "survey" is at best illustrated by a photographic essay of the building spanning the period July 2003 to August 2007 produced by Mr Grigg, a director of Babbage. These illustrate that specific areas of existing water damage under sills, cut-outs at floor level, around the entrance door and around the base of balustrades and in some unidentified areas were "surveyed". These specific areas largely coincide with the locations for fixing the grid and flashings. This may have involved up to 47 cut outs under the sills. But there is only meagre evidence of a substantive survey or assessment into the required repairs beyond the cut outs under the sills. Mr Grigg also conceded that Babbage did not perform a full survey of damage in terms of [cl 1.0]. Mr Boyle (project manager for APS) and Mr Peri (an onsite foreman) also noted under cross examination

[40] Set out at [35] above.

> that they could not recall any detailed survey of damage having been undertaken by APS or Babbage.
>
> (Footnote omitted).

[65] APS does not challenge those factual findings. Rather it says that, having opened up some areas and discovered rusted steel studs, APS asked Babbage to inspect those areas. Mr Dale's response, having inspected the extent of the rust, was simply to treat the visible rusted steel under the sills.[41] His determination not to remove further cladding therefore sufficiently discharged the survey obligation as there was no point in removing more cladding to reveal still more rusted steel. Mr McBride submitted that because of the way the system was designed, rusted steel was irrelevant. The structure was still capable of supporting the Overclad and, once the Overclad was installed, any further rusting would stop.

[66] However it was the Judge's conclusion that, had the survey been done properly, additional extensive areas of moderate to severe corrosion would have been identified together with damp and mouldy gib lining.[42] In explaining that conclusion he said:[43]

> An elevation illustrating the extent of severe corrosion is attached as **Annexure A**. The accuracy of this elevation was accepted by the engineering and cladding experts. Mr Marshall also produced extensive photographic evidence of the water damage, including severe rusting to the steel frame and water staining to fire rated plasterboard.

[67] That evidence is not challenged by APS. Rather the thrust of its appeal concerning Babbage's performance focuses on the extent of the obligation itself. However, we agree with the Judge's conclusion that the evidence established that Babbage did not adequately discharge the obligation it had assumed under cl 1.0. The clause clearly contemplated a more substantive assessment than a mere assumption as to the likely state of the damage to the building.

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41 Referred to at [21] above.
42 High Court judgment, above n 2, at [59].
43 At [59].

Did APS have an obligation to be satisfied that a survey had been undertaken by Babbage?

(a) A pleading issue

[68] Although at trial there was some contest about the sufficiency of the pleadings, that was not pursued in the notice of appeal.[44] Nevertheless, we have reservations whether the basis upon which liability was imposed on APS was fairly foreshadowed in the claim pleaded against it,[45] as compared with the pleading against Babbage which included an allegation of a breach of duty in failing to identify all damaged building elements. However, we determine this aspect of the appeal by reference to the substance of the claim, not the adequacy or otherwise of the pleadings.

(b) The significance of the Building Act 2004 in the judgment

[69] The judgment rejected the owners' "general claim" that APS should have identified the damage or advised Babbage of the risk of damage.[46] Specifically the Judge held that:

(a) APS installed an appropriate remedial system in that the Overclad system was conceptually sound for the purpose of providing a rain shield, assuming the substrate was in good condition;[47]

(b) APS did not undertake to the owners to identify and remove all damaged elements. An implied contractual duty to identify and remove the damage without further instruction from Babbage was not available on the facts;[48] and

(c) he was not satisfied that APS had failed to properly identify or to advise Babbage of any defects.[49]

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44 Although the issue of the sufficiency of the pleadings was noted again in APS's written submissions.
45 Set out at [30] above.
46 High Court judgment, above n 2, at [118].
47 At [107].
48 At [108]–[109].
49 At [113].

[70] The Judge nevertheless concluded that APS was obliged to be satisfied that a proper survey had been undertaken and that APS had an obligation to require Babbage to undertake such a survey.[50] That conclusion rested on alternative grounds:

(a) Clause 1.0 was a condition of the building consent and APS therefore needed to be satisfied that a survey had been undertaken in accordance with cl 1.0 in order to achieve compliance with the Building Act 2004 (the 2004 Act);[51]

(b) If cl 1.0 was not a condition of the building consent, APS's failure to be satisfied fell below the standard required of a competent builder for the purpose of securing building code compliance.[52]

[71] Both bases of reasoning were tied to the requirements of the 2004 Act as reflected in the question which comprised the heading preceding those findings:

> Was APS obliged under the Building Act 2004 to require a survey of the building in accordance with [cl 1.0]?

[72] The reference to an obligation on APS "under the Building Act 2004" has the potential to confuse because it was common ground that that statute was not in force when the contract between APS and the owners was made. The APS tender was accepted in the Babbage letter of 15 November 2004.[53]

[73] Consequently, in response to the fifth cause of action against APS alleging a breach of the statutory warranties in s 397 of the 2004 Act, APS pleaded an affirmative defence that those warranties did not apply because s 397 did not come into force until 30 November 2004. Consequently, the first and second respondents accepted this and, in their opening, abandoned their causes of action under the statutory warranties and also under the Fair Trading Act.[54] However, as is apparent

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50 At [114]–[119].
51 At [114]–[115]: see [78]–[79] below.
52 At [116]: see [116] below.
53 The majority of the Building Act 2004 came into force between 30 November 2004 and 31 March 2005.
54 High Court judgment, above n 2, at fn 15.

from the first basis for the finding of liability against APS, the 2004 Act was nevertheless influential in Whata J's conclusion.

[74] Having found it necessary to examine APS's duties by reference to first principles, the Judge commenced his analysis in this way:

> [97] A builder must do the building work in a good workman like manner, must take care to use good materials, and that the nature of contractual duties between owner and builder cannot limit the duty of care owed to third parties. But this does not address the a priori issue raised in these proceedings, namely the effect of the express allocation of risk by APS to Babbage in terms of the survey of the building.
>
> (Footnotes omitted).

A central issue was identified as being whether APS was subject to a duty to take care in relation to matters that extended beyond APS's tender proposal.

[75] After discussing the relevant authorities,[55] the Judge proceeded on the basis of a number of propositions including:[56]

(a) A builder must advise the architect or principal of any obvious problems or defects with the design of the building.

(b) The standard of care in relation to building works is, as a minimum, compliance with the Building Code.

(c) Whether APS assumed responsibility to take care in respect of specific works depended on the precise nature of the relationship with Babbage and the owners and the role played by it in the installation of the Overclad.

[76] Although the Judge's conclusion on APS's liability was expressed as an obligation to be satisfied that a survey had taken place, it is apparent that the Judge considered that, absent such a state of satisfaction, APS was required to take some

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55 Namely *Rolls Royce NZ Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA); *North Shore City Council v Attorney-General* [2012] NZSC 49, [2013] 3 NZLR 341; and *Body Corporate No 207624 v North Shore City Council [Spencer on Byron]* [2012] NZSC 83, [2013] 2 NZLR 297.

56 High Court judgment, above n 2, at [105].

positive steps. However, the steps in contemplation did not involve APS undertaking the survey itself because the requirement to be satisfied was said not to alter the allocation of risk to Babbage to perform a proper survey. Rather it was said that APS "simply needed to ensure"[57] and was obliged to "require"[58] compliance by Babbage with cl 1.0.

[77] The manner in which Whata J envisaged this might occur was revealed in his later discussion of loss attribution:

> [134] I acknowledge that it would have been difficult for APS to refuse to undertake the installation until satisfied that a proper survey was undertaken. I also find that Babbage would have been unlikely to complete a comprehensive survey given the approach recommended by Mr Dale. But, APS's failure to be satisfied that a proper survey was undertaken meant that the issue was not escalated to the owners so that they could make an informed decision as to how to proceed. APS's insistence on a survey would have, as a minimum, contradicted Mr Dale's misleading representation to them that damaged components had been removed and the cladding repaired. The extensive cross examination of the owners, including former members of the BC1 committee, reveals that they assumed that the remediation would include a survey and repair of the existing damage, albeit on a piecemeal basis as set out in the APS tender proposal. Even accepting the self serving nature of such evidence, I find that had APS required a proper survey, the owners would have insisted on it.

(c) First alternative: the specification incorporates cl 1.0

[78] On the footing that cl 1.0 remained in the specification and was therefore a condition of the building consent, the essence of the Judge's reasoning was:[59]

> APS was the builder responsible for the Overclad installation works. … APS should have known that Overclad could not be installed in a manner that did not comply with the Building Code and with the building consent, including the relevant plans and specifications.[60] Relevantly, it was also obliged under the contract for tender to ensure that all work was executed in accordance with requirements. It also knew that a full survey needed to be undertaken … . It therefore needed to be satisfied that a proper survey had, in fact, been undertaken in accordance with [cl 1.0], in order to achieve compliance with the Building Act 2004.

[79] The significance of compliance with the 2004 Act was emphasised again in his conclusion:

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57 At [114].
58 At [118].
59 At [114].
60 As required by s 40 of the Building Act 2004.

> [115] Based on the evidence given by APS representatives, they were aware that Babbage had undertaken some moisture testing prior to the tender process, but could not recall whether a survey was undertaken at all during the installation of the Overclad. It is clear from this that APS did not take any active steps to be satisfied that a survey had been undertaken. Accordingly, APS did not ensure conformity with the Building Act requirements and so did not meet the requisite standard of care in relation to the installation of the Overclad.

[80] We have reached a different conclusion from the Judge on the issue whether APS owed a duty of care to the owners to require that Babbage discharge a contractual obligation which Babbage, not APS, had assumed to the owners. We consider that the Judge reached an erroneous conclusion primarily as a consequence of his view of:

(a) the extent of the obligations imposed by the 2004 Act;

(b) the application to the present case of certain statements in *Body Corporate No 207624 v North Shore City Council [Spencer on Byron]*.[61]

[81] The section of the 2004 Act specifically referenced by the Judge was the offence provision in s 40 which states:[62]

> **40 Buildings not to be constructed, altered, demolished, or removed without consent**
>
> (1) A person must not carry out any building work except in accordance with a building consent.
>
> …

"Building consent" is defined in s 7 as "a consent to carry out building work granted by a building consent authority under section 49". Section 49 of the 2004 Act relevantly states:

> **49 Grant of building consent**
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> (1) A building consent authority must grant a building consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work were properly completed in

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61 *Spencer on Byron*, above n 55.

62 The equivalent provision in the Building Act 1991 was s 32(1).

> accordance with the plans and specifications that accompanied the application.
>
> …

Consequently, a contractor must carry out any building work it contracts to perform in accordance with the terms and conditions of the building consent granted for that work.[63]

[82] The distinction between the obligation to comply with the building code and the responsibility for ensuring a building is constructed in accordance with a building consent was explored by Chambers J, writing for himself and McGrath J, in *Spencer on Byron*:[64]

> No one can be party to the construction of a building which does not comply with the building code. The duty in tort imposes no higher duty than that: for example, the inspecting authority is not responsible for ensuring the building is constructed in accordance with the plans and specifications, which will inevitably go beyond building code requirements. Obligations in tort, whether of the inspecting authority or of any supervising architect or engineer, will be limited to the exercise of reasonable care with a view to ensuring compliance with the building code.

[83] Whata J recorded only the first sentence of that quote at [101] of the High Court judgment, it being the authority cited for the proposition set out at [74(b)] above. Whata J also noted[65] the following statement of Tipping J in *Spencer on Byron*:

> [40] I accept that in circumstances where the parties have allocated, or have had the opportunity to allocate, risks by contract, tort law should be slow to impose a different allocation from that expressly or implicitly adopted by the parties. But because of the way the Act is framed I do not see that proposition as being a significant feature of the present case.

[84] However in the preceding paragraph Tipping J stated:[66]

> It is suggested that to recognise a duty of care for all buildings would tend to undermine relevant contractual relationships and loss allocation mechanisms or opportunities thereby provided. I regard this as an overstated problem. In the first place, private certifiers were unable under the 1991 Act to limit or

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63 The Building Act 2004 also contains separate provision in ss 16–18 in relation to compliance with the building code. Similarly, see s 7 of the Building Act 1991.

64 *Spencer on Byron*, above n 55, at [193].

65 High Court judgment, above n 2, at [102].

66 *Spencer on Byron*, above n 55, at [39] (footnote omitted).

> contract out of liability. The position must implicitly have been the same for councils when they were performing the same functions. In the second place, those performing functions under the Act or within the scope of the Act owed statutory duties not to breach the building code. So to that extent there was no capacity for anyone involved to limit their liability by contract.

[85] Later, on the subject of the quality of work undertaken, Tipping J said:

> [46] In expressing myself in this way I am not to be taken as suggesting that the law of tort, through the mechanism of a duty of care, should provide the owner of a building with what amounts to a warranty of quality. Generally, quality is for contract. But if a negligently caused deficiency in a building is apt to impinge on the interests the Act is designed to protect, tort law can properly become involved.
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> [47] In *Rolls-Royce*, the Court of Appeal was concerned about how quality standards would be set if a duty were to be recognised. That may be a valid concern if the tort duty would be unclear as to the precise standard required. But in the present context there is no difficulty in this respect. The standard the duty requires is compliance with the building code. That is as clear and precise as the subject matter allows. There is no quality or commercial uncertainty as to what the duty requires. The parties cannot bargain for a standard below code compliance in return for a lesser price. The imposition of the duty leads to total clarity as to where the risk falls.
>
> (Footnote omitted).

[86] In addressing what he described as "compliance with" and "conformity with" the 2004 Act, Whata J amalgamated the building code and building consent obligations, in the case of the latter specifically referring to the relevant plans and specifications and footnoting the offence provision in s 40.[67] The references to the building consent and the specifications provided the link to cl 1.0 and the obligation to undertake a survey which the Judge had already held was a contractual obligation owed to the owners by Babbage, not APS.

[87] Plainly, in performing the particular work it had contracted to undertake, APS had an obligation to comply with the building code and, to the extent to which the specification incorporated in the building consent applied to APS, with the specification. Thus cl 2.6 of the specification ("separate contractors") emphasised the contractor's responsibility for the watertightness and general integrity of the work in its contract. APS also had an obligation to ensure compliance to a like degree in respect of the work undertaken by its sub-contractors as was apparent

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[67] High Court judgment, above n 2, at [114]–[115].

from, for example, cls 2.5 ("sub-contractors"), 2.7 ("responsibility"), 2.18 ("materials and workmanship") and 2.21 ("producer statements").

[88] However, as contractor, APS was to be the recipient of instructions by and approvals from Babbage in its capacity as architect and specialist engineer, not the reverse. APS's responsibility was to comply with instructions it received from Babbage. The legally subservient nature of that relationship was evident in cl 2.18 ("materials and workmanship") which, among other things, provided that all materials and workmanship were to be subject to the approval of the architect. The formality associated with contract instructions was reflected in cl 2.11:

> **2.11 CONTRACT INSTRUCTIONS**
>
> Every instruction issued by the Architect is to be contained on a **Contract Direction form**. The Contractor shall notify the Architect of any verbal directions received which have not been confirmed by a 'Contract Direction'.

[89] Furthermore, the fact that only Babbage had responsibility for undertaking the cl 1.0 inspection meant that it was for Babbage to identify the fact and extent of any repairs necessary to rectify damage revealed on its inspection. It was for Babbage to notify APS of such work; as the Judge noted, APS was reliant on Babbage for direction in respect of the integrity of the substructure.[68]

[90] It is against that backdrop that the duty of care, which the Judge found was owed by APS to the owners, must be evaluated. As Lord Bridge observed in *Caparo Industries plc v Dickman*, it is always necessary to determine the scope of an asserted duty of care by reference to the kind of damage from which A must take care to save B harmless.[69] In the present case, the contention for the owners, which the Judge endorsed, is that the contractor owed a duty of care to the owners to save them harmless from the damage they sustained as a consequence of Babbage failing to perform its contractual obligation in the specification to undertake a survey.

[91] The asserted duty of care here relates not to the performance by APS of its, or its sub-contractors', contractual obligations but to the performance of a contractual

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[68] At [117].

[69] *Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL) at 627, cited by this Court in *Boyd Knight v Purdue* [1999] 2 NZLR 278 (CA) at [53].

obligation to the owners assumed by Babbage and expressly avoided by APS. The alleged breach of the duty lies in an omission on the part of APS either to be satisfied that a survey had been undertaken by Babbage or to require that it be undertaken.

[92] We consider that the observations of Tipping J in *Couch v Attorney-General* are pertinent for this scenario.[70] Tipping J noted that the law has always been cautious about imposing a duty of care in cases of omission as opposed to commission, in particular where:[71]

> It is the voluntary and independent conduct of the third person that has been the immediate cause of the loss or damage suffered by the plaintiff. The necessary causative link between the defendant's conduct and the harm suffered by the plaintiff is said to lie in the failure of the defendant to exercise an available power of control over the immediate wrongdoer or in a failure to warn of the risk the immediate wrongdoer posed. Discussion of the appropriate way to determine such cases can usefully begin with the general observation of Dixon J in *Smith v Leurs* that it is:
>
> > "… exceptional to find in the law a duty to control another's actions to prevent harm to strangers. The general rule is that one man is under no duty of controlling another man to prevent his doing damage to a third. There are, however, special relations which are the source of a duty of this nature."
>
> … Whether that relationship is sufficiently special is conventionally assessed by reference to the concept of control. Did the defendant have sufficient power and ability to exercise the necessary control over the immediate wrongdoer? Unless that is so, it would be inappropriate to impose a duty of care on the defendant in favour of the plaintiff, fulfilment of which necessarily requires that power and ability.

[93] Did APS have sufficient power and ability to exercise the necessary control over Babbage? In our view the answer is clearly no. Babbage was not a sub-contractor to APS. Babbage was the owners' representative and, as the architect, had the powers of direction and approval as discussed above. If APS had declined to follow an instruction issued by Babbage as architect, APS would have been in breach of its contractual obligations. Specifically in respect of any repairs which were necessary arising from Babbage's inspection, the repair work was to be undertaken by APS on an additional instruction and invoice basis.[72]

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70 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725.
71 At [81]–[82] (footnotes omitted).
72 High Court judgment, above n 2, at [93].

[94] As a general observation, it would introduce a significant degree of uncertainty into the performance of construction contracts if a contractor considered that it may be under an obligation to second-guess instructions issued by an architect or engineer because of a concern that the contractor could be liable in negligence for failing to scrutinise the work of the architect or engineer. Nevertheless, whether a duty of the nature found exists will turn on the circumstances of the individual cases. As Whata J correctly noted, whether APS, as a contractor, assumed a responsibility to take care in respect of specific works depended on the precise nature of the relationship with Babbage, as the architect/engineer, and the owners and the role it assumed in the remediation works.[73]

[95] It was Babbage who assumed a contractual obligation to the owners to undertake an inspection. The owners had the contractual right to require Babbage to do so. In its contract with the owners APS avoided any obligation to participate in a "survey". In the circumstances of those contractual arrangements in our view there is no proper basis for a conclusion that APS owed a duty of care to the owners to take steps to require Babbage to undertake its contractual inspection obligation and thereby prevent Babbage causing loss to the owners.

[96] Although the obligation of APS found by the Judge was formulated as a duty to require Babbage to complete a survey, he recognised that APS was powerless to do so directly. However the Judge appears to have envisaged that the insistence by APS on a survey being completed would have had the consequence of the issue being "escalated" to the owners.[74]

[97] Developing that theme, the owners and the Council argued before us that if APS had ceased work and communicated to the owners a concern about the absence of a survey, then the owners would have required Babbage to undertake a survey. Whether that would have been the consequence would perhaps depend upon the explanation which Babbage provided to the owners. However, we consider that this expression of the duty owed by APS as one involving such indirect action, rather than action directly towards Babbage, better reflects the reality of the situation. It is

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73 At [105(e)].
74 At [134].

tantamount to an allegation of a duty on APS to warn the owners of an omission on the part of Babbage.

[98] Consideration of a duty to warn in the setting of construction contracts by the higher courts in New Zealand appears to be confined to the recent judgments in *Carter Holt Harvey Ltd v Minister of Education* in this Court[75] and in the Supreme Court.[76] The relevant cause of action was a tortious duty of care on the part of Carter Holt to warn of the risk characteristics of cladding system products. In this Court the underlying rationale for the duty was said to flow from an imbalance in the information held by a manufacturer (and hence knowledge) as compared with the consumer or user about the risks or dangers inherent in the use of the product.[77] The Supreme Court upheld the decisions below, declining to strike-out the claim, and observed that the existence of a duty of care for failure to warn will depend on all the circumstances and the facts to be proved at trial.[78]

[99] The issue of manufacturers' liability aside, a duty owed by A to warn B will generally only arise in the context of some extant legal relationship between them. As Tipping J observed in *Brownie Wills v Shrimpton*:[79]

> … the distinction between law and morals is nowhere more clearly apparent than in cases of failure to act. A solicitor who fails to do something can only be liable for that failure if under a duty to act. If I see a blind man about to walk over a cliff or a man of limited intellect about to make an unwise business decision likely to lead to financial loss, I have a strong moral duty to give them a warning, but in the absence of an existing relationship between us, such as a contract or fiduciary relationship relevant to their impending peril, I have no general duty to speak for breach of which I am liable in tort.

[100] Accordingly, if there was an obligation on APS to warn the owners about an aspect of the performance of the remediation works, such obligation must have

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75 *Carter Holt Harvey Ltd v Minister of Education* [2015] NZCA 321, (2015) 14 TCLR 106 [*Carter Holt* (CA)].
76 *Carter Holt Harvey Ltd v Minister of Education* [2016] NZSC 95 [*Carter Holt* (SC)].
77 *Carter Holt* (CA), above n 75, at [130].
78 *Carter Holt* (SC), above n 76, at [77].
79 *Brownie Wills v Shrimpton* [1998] 2 NZLR 320 (CA) at 327.

arisen as an incident of APS's contractual relationship with the owners. As Dyson J remarked in *Aurum Investments Ltd v Avonforce Ltd (In Liquidation)*:[80]

> The duty to warn is no more than an aspect of the duty of a contractor to act with the skill and care of a reasonably competent contractor. Reasonableness lies at the heart of the common law. As Lord Reid said in *Young & Marten Ltd v McManus Childs Ltd* … "no warranty ought to be implied in a contract unless it is in all the circumstances reasonable".

[101] Dyson J concluded that a Court should not hold a contractor to be under a duty towards his client unless it is reasonable to do so, noting that it was clear from the England and Wales Court of Appeal's decision in *Plant Construction Plc v Clive Adams Associates (No 2)*[81] that the law is moving with caution in this area.[82]

[102] In *Plant* May LJ commenced by noting that there was no authority in the English Court of Appeal which had considered whether and in what circumstances a contractor or a sub-contractor had a duty to give a warning if it appreciated or ought to appreciate that work which it was contractually obliged to perform was inadequate.[83] The Court of Appeal concluded that the obligation on the contractor in that case to perform the contract with the skill and care of an ordinary competent contractor carried an obligation to warn of an obvious danger in the design of temporary works, but expressly reserved for future consideration circumstances where:[84]

(a) the contractor did not know, but arguably ought to have known, that the design was dangerous; and

(b) where there was a design defect, of which the contractor knew or ought to have known, which was not dangerous.

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80 *Aurum Investments Ltd v Avonforce Ltd (In Liquidation)* (2001) 3 TCLR 21 (EWHC (TCC)) at [17] (citation omitted).

81 *Plant Construction Plc v Clive Adams Associates (No 2)* [2000] BLR 137 (CA).

82 *Aurum Investments Ltd*, above n 80, at [18].

83 *Plant Construction Plc*, above n 81, at [34].

84 At [46]–[47].

[103] The several English authorities on the duty to warn were most recently considered in *Goldswain v Beltec Ltd* where Akenhead J summarised the principles in this way: 85

> Drawing from the authorities, I can reach the following conclusions in relation to a duty to warn:
>
> (a) Where the professionals (engineers in this case) are contractually retained, the Court must initially determine what the scope of the contractual duties and services were. It is in the context of what the professional person is contractually engaged to do that the scope of the duty to warn and the circumstances in which it may in practice arise should be determined.
>
> (b) It will, almost invariably, be incumbent upon the professional to exercise reasonable care and skill. That duty must be looked at in the context of what the professional person is engaged to do. The duty to warn is no more than an aspect of the duty of a professional to act with the skill and care of a reasonably competent person in that profession.
>
> (c) Whether, when and to what extent the duty will arise will depend on all the circumstances.
>
> (d) The duty to warn will often arise when there is an obvious and significant danger either to life and limb or to property. It can arise however when a careful professional ought to have known of such danger, having regard to all the facts and circumstances.
>
> (e) In considering a case where it is alleged that the careful professional ought to have known of danger, the Court will be unlikely to find liability merely because at the time that the professional sees what is happening there was only a possibility in future of some danger (see *Aurum*); any duty to warn may well not be engaged if all there is is a possibility that the contractor in question may in future not do the works properly.

[104] Two qualifications should be noted. First, the *Goldswain* summary refers to "professionals" but it is clear from the English authorities that a contractor may also have an obligation to warn. Secondly, as the judgment of McGrath and Chambers JJ in the Supreme Court in *Spencer on Byron* illustrates, the New Zealand courts do not draw a distinction between dangerous defects and other defects in buildings.[86]

[105] Although we have not had the benefit of submissions on these authorities, subject to those two qualifications, we incline to the view that New Zealand law should recognise an equivalent duty to warn.

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85 *Goldswain v Beltec Ltd* [2015] EWHC 556 (TCC) at [47].

86 *Spencer on Byron*, above n 55, at [146].

[106] However, in the present case we do not consider that it would be reasonable to hold that APS had a duty to warn the owners about Babbage's performance of the inspection obligation under cl 1.0 for the following reasons:

(a) In its tender APS had specifically declined to assume a joint obligation to undertake the inspection, with the consequence that Babbage assumed the sole obligation of inspection.

(b) APS was only required to undertake repair work which was the subject of a specific direction by Babbage.

(c) Babbage was the architect appointed under the terms of the NZIA Small Works Standard Conditions of Contract 2002 and APS was required to act upon its contractual directions.

(d) When it was discovered that the structure was mainly steel, and not timber as originally believed, Babbage made the decision concerning the steps to be taken for the remedial treatment of the steel structure.

(e) In accordance with its decision, Babbage gave a direction to APS, advised the Council and secured an amendment to the tender specification which had been submitted with the application for building consent.

(f) Although the specification had stated that the general contractor was to be responsible for the watertightness of the work in its contract, and was to provide a weathertightness guarantee of the complete new building envelope for a minimum period of three years, the APS tender contained the following guarantee exclusion:

> f) Weather tightness
>
> A three year workmanship warranty is provided for all work only. No weather tightness guarantee is provided as two systems are unproven and all three are not BRANZ approved. (**note** — all work will be inspected by Babbage Consultants as well as product suppliers for material warranties along with digital

> photographic data collection so chances of failure are small).

[107] In our view, Whata J erred in concluding that APS had an obligation to be satisfied that an adequate inspection had been undertaken by Babbage, whether the obligation is expressed as a duty to require Babbage to undertake the cl 1.0 inspection or as a duty to warn the owners that an adequate inspection had not been undertaken. It therefore remains to address two further points that were advanced in support of the judgment on this issue.

[108] For the Council, Ms Thodey sought to support the Judge's finding as to APS's duty of care to the owners by reference to *Bowen v Paramount Builders (Hamilton) Ltd*, drawing attention specifically to the following findings:[87]

> (a) Contractors, architects and engineers are all subject to a duty to use reasonable care to prevent damage to persons whom they should reasonably expect to be affected by their work.
>
> (b) A builder is liable for the negligent creation of a hidden defect which is a source of danger to third persons whom he ought reasonably to foresee as likely to suffer damage either in the form of personal injury or injury to property.
>
> (c) A builder or architect cannot defend an action for negligence made against him by a third person on the ground that he had complied with the requirements of his contract with the owner, but the nature of his contractual duties may have considerable relevance in deciding whether he has been negligent or not.

[109] However, we do not consider that those propositions have application to the particular circumstances of the present case where APS had no contractual obligation to undertake a survey and, as the Judge held:

> (a) the Overclad was conceptually sound for the purpose of providing a rain shield assuming the substrate was in good condition;[88]
>
> (b) he was not satisfied that APS had failed to properly identify or advise Babbage of any defects;[89]

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87 *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 (CA) at 406–407.
88 High Court judgment, above n 2, at [107].
89 At [110]–[113].

(c) the party obligated to undertake the survey was Babbage, not APS;[90] and

(d) an implied contractual duty to identify and remove the damage without further instruction from Babbage was not available on the facts.[91]

[110] Finally, we refer to s 112(1) of the 2004 Act, which was discussed by Whata J in the context of the question whether the Council had the power to impose a condition requiring a survey.[92] It was also referred to in argument before us on the issue of APS's postulated duty of care, in response to a suggestion that APS was required to ensure that the underlying substrate was surveyed and repaired so as to make its work compliant with the building code.

[111] Section 112 provides:

> **112 Alterations to existing buildings**
>
> (1) A building consent authority must not grant a building consent for the alteration of an existing building, or part of an existing building, unless the building consent authority is satisfied that, after the alteration,—
>
> (a) the building will comply, as nearly as is reasonably practicable, with the provisions of the building code that relate to—
>
> (i) means of escape from fire; and
>
> (ii) access and facilities for persons with disabilities (if this is a requirement in terms of section 118); and
>
> (b) the building will,—
>
> (i) if it complied with the other provisions of the building code immediately before the building work began, continue to comply with those provisions; or

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90 At [108].
91 At [109].
92 At [162]–[163].

(ii) if it did not comply with the other provisions of the building code immediately before the building work began, continue to comply at least to the same extent as it did then comply.

…

[112] The section has received passing attention in two reported cases. It was included among sections referred to as relevant to the interpretive task in *University of Canterbury v Insurance Council of New Zealand Inc.*[93] The Supreme Court there noted, without comment, the submission that s 112 does not allow a territorial authority to require that the whole of a building that is being altered be upgraded to meet the current requirements of the building code.[94] In *Wheeldon v Body Corporate 342525*, in the course of considering a contention that certain repairs amounted to betterment, Muir J rejected as misconceived the proposition that s 112 authorised remediation to an historical and superceded code requirement, stating that s 112 does not detract from the s 17 requirement that all building work must comply with the building code.[95]

[113] In the circumstances of this case, where Babbage was the architect and had assumed the contractual inspection obligation, and where APS was only required to remove any existing damage on receipt of an instruction from Babbage, we do not consider that the obligation on a Council under s 112 is a useful analogy for the duties which APS ought reasonably be required to discharge, particularly having regard to the relative state of building code compliance reflected in s 112(1)(b)(ii).

[114] We therefore do not consider that a contractor such as APS, when undertaking a discrete remediation task, has a duty to undertake remedial work outside of its contractual responsibility to ensure that the entirety of a building will be code compliant.

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93 *University of Canterbury v Insurance Council of New Zealand Inc* [2014] NZSC 193, [2015] 1 NZLR 261 at [36(e)].

94 At [36(e)].

95 *Wheeldon v Body Corporate 342525* [2015] NZHC 884, (2015) 16 NZCPR 829 at [160].

(d) Second alternative: cl 1.0 deleted from specification by Council's stamp

[115] Whata J's second reason for finding that APS owed a duty of care to the owners to require Babbage to undertake a survey proceeded on the hypothesis that his conclusion at [161] was wrong and that cl 1.0 had been deleted from the specification and thus the building consent.[96] He again reached the conclusion that APS fell below the standard required of a competent builder for the purpose of achieving building code compliance by its failure to be satisfied that a survey had been undertaken.

[116] That conclusion is puzzling because it is apparent that cl 1.0 remained integral to the conclusion:

> [116] … The conditions of the Building Consent did not vary the specification as between APS and BC1 and APS knew that a full survey was required. By not taking any steps to be satisfied that a survey was undertaken in accordance with [cl 1.0], APS could not be reasonably satisfied that Code compliance was achieved.

[117] Both those statements contradict the hypothesis on which the Judge proceeded in his alternative analysis, namely that cl 1.0 was deleted from the specification. However even if, despite the deletion from the building consent documentation, cl 1.0 maintained some contractual relevance between the parties, any inspection obligation had been assumed solely by Babbage as a consequence of the terms of the APS tender. Contrary to the implication in [116] above, the specification imposed no contractual obligation on APS to the owners concerning the inspection.

[118] We consider that the Judge's statement in the second sentence is inconsistent with, and undermined by, his observation immediately following:

> [117] In fairness to APS it is necessary to recall, for the purpose of apportionment, that APS was acting on instruction and reliant on Babbage for direction as to what was necessary for the purpose of the structural integrity of the substructure.

[119] We refer back to our analysis of the relationship between architect/engineer and contractor. APS's reliance on Babbage for instructions and its obligation to

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[96] High Court judgment, above n 2, at [116].

follow such instructions have relevance beyond mere apportionment. In the context of the contractual relationships in this case, the requirement for APS to meet the standard of a competent builder did not impose on APS an obligation to require Babbage to perform an obligation Babbage had contracted with the owners to perform.

Conclusion

[120] While we agree with the Judge's conclusions that APS had no implied contractual duty to identify and remove any damage without further instruction from Babbage and that there was no failure by APS to identify or advise Babbage of any defects, for the reasons above we conclude that APS did not owe to the owners a duty of care of the nature found by the Judge. Consequently the finding of fault and liability set out at [2(a)] above is set aside.

Liability for screw fixings

Did APS fail to comply with a contractual obligation concerning the method of affixing the Eterpan sheets?

[121] Having found that the cause of the cracking of the Eterpan panels was the absence of clearance holes to mitigate the in plane movement caused by moisture effects, the Judge held that APS failed to comply with SW6-A-10 because it did not obtain any design details from CSL.[97] Rather, APS had relied on three sources of information:[98]

(a) the Babbage plans;

(b) plans for other projects supplied by CSL to APS; and

(c) ad hoc advice from Mr Lukaszewicz.

[122] The starting point for the obligations of APS in respect of the screw fixings is the tender specification. SW6-17 in the "Carpentry & Joinery: General Clauses"

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97 At [121].
98 See [40] above.

required the contractor to "[p]rovide and fix the exterior cladding types scheduled, as specified in the Particular Section". The "Particular Clauses" included SW6-A-9 and SW6-A-10 set out above.[99] The former referred to the cladding sheets being attached to the Overclad system "as detailed". The latter stated that the sheets were to be "fixed in accordance with Cladding Systems Specification".

[123] In our view, it is the plain meaning of the specification that the directions in both SW6-A-9 and SW6-A-10 were references to the WEC test report annexed to the specification, albeit its description as the Cladding Systems Specification was not entirely apt. However, SW6-A-10 also included the direction: "Pre-drill, allow screw fixings for counter sunk screws." That reference to screws was inconsistent with the WEC test report which, both in the text and the annexed diagram of the exterior elevation of the Overclad test unit, indicated that the 9 mm Eterpan panels were affixed by either adhesive or pop rivets.

[124] Hence it was unsurprising that the APS tender responded in relation to the Overclad option:

> Details provided on this system do not show how the cladding is fixed to the grid. We have assumed screw fixing using stainless steel screws.

Two options were proposed by APS:

> (a) Counter sink screws, flush stop and paint over.
>
> (b) Capped screws sitting proud of the surface and therefore an architectural detail.

[125] APS's query and proposed options were addressed in Babbage's drawing A602,[100] both in diagrammatic form and in the adjacent explanation which adopted APS's first option, "stainless steel screw fixing at 300 mm ctrs capped with epoxy filler prior to painting."

[126] While noting that the Babbage plans were based on CSL drawings, Whata J stated that it was not clear that they were obtained directly from CSL for the

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99 At [10] above.
100 Set out at [15] above.

Fleetwood project.[101] He described the plans as providing only "coarse" information about the screw fixing,[102] a comment consistent with his earlier observation that the drawings provided no or sparse detailing as to the method of screwing the Eterpan sheets to the Overclad grid.[103]

[127] Mr McBride challenged that characterisation, contending that the Babbage drawings were detailed and specific. He drew attention to the evidence of Mr Winter, a facade engineer, who stated that such drawings would override the specification in terms of the hierarchy of documents which a contractor should follow.

[128] However, Ms Thodey's cross-examination of Mr Winter with reference to the Babbage drawing concluded in this way:

> Q So we have that plan that provides no direction as to what type of hole that should be used? Just provides an outcome —
>
> A Are we talking about a hole through the aluminium?
>
> Q We're talking about the hole through the Eterpan panel.
>
> A That has not been addressed on this document at all. It indicates there's a close-fit hole, it indicates, I would suggest, that the screw is cutting its threads through the Eterpan.
>
> Q So there's no specific direction on that plan that illustrates a clearance hole should be used?
>
> A That is correct.

[129] Hence irrespective of the adequacy of the Babbage drawings in other respects, the Judge's particular criticism was warranted because, while SW6-A-10 had specified that the sheets were to be pre-drilled, no specific direction was provided in the drawings as to the size of the specified pre-drilled holes. A decision as to the size of the pre-drilled screw holes needed to be made.

[130] Mr Grigg, a registered architect and a consultant to Babbage, whose evidence was led by the Council, explained that the difference between a pilot hole (being

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101 High Court judgment, above n 2, at [53].
102 At [122].
103 At [53].

smaller than the final size of the fixing) and an oversize (or clearance) hole (being larger than the final size of the fixing) was common knowledge in the construction industry. Mr Grigg's evidence, which it appears Whata J accepted, was that an Eterpan data sheet, thought to be provided with the panels for the Overclad system, provided a detail for a screw fixing which incorporated a clearance hole and that APS should have followed that data sheet.[104]

[131] Mr McBride argued that APS did receive detailed instructions from CSL on the installation of the Overclad at the Fleetwood apartments, referring in particular to the set-out of the screw fixings and the size of the screw to be used to fit the Eterpan panels, namely a 10 g screw. However, the fact is that APS did not seek further guidance on the size of the pre-drilled screw holes. As Mr Powell, a building surveyor called by the Council, explained, and a photograph produced as an exhibit illustrated, APS simply proceeded to drill holes in the Eterpan sheets of the same dimension as the screws used to fix the sheets.

[132] While, as earlier noted, we consider that the reference in SW6-A-10 to the CSL specification was to the WEC test report annexed to the tender specification, we do not accept that, in the circumstances where APS had no specific direction from Babbage as to the size of the specified pre-drilled holes and the WEC test report was entirely silent on the issue of screw-fixing, APS could simply proceed to pre-drill holes without seeking further direction from CSL. The fact that the document, inaptly described as the Cladding Systems Specification, did not address the point did not mean that, in the discharge of its contractual obligation to make pre-drilled holes, APS needed to make no further enquiry as to the requisite dimension of those holes.

[133] It may have been a disincentive for APS that CSL had included in its quotation a daily charge-out rate for the service of sending an installer to the site to advise APS's staff on installation. As it happens CSL reiterated that offer in its fax of 21 December 2004 advising of impending price increases, stating that it was still able to supply its leading hand for a day to advise the APS staff on installation. APS

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[104] The relevant extract from the data sheet was annexed to the High Court judgment as Annexure B.

elected not to avail itself of that opportunity. We agree with the Judge that, in failing to seek clarification on this issue, APS did not discharge the contractual obligation imposed by SW6-A-10.

Did APS breach an implied duty to install the Eterpan sheets in a proper workmanlike manner?

[134] Even if our conclusion concerning APS's failure to comply with SW6-A-10 is not correct, we consider that the Judge's conclusion is sound that APS breached an implied duty to install the cladding in a proper workmanlike manner.[105]

[135] APS rightly identified uncertainty in the specification relating to the manner of affixing the Eterpan sheets to the Overclad brackets.[106] It embarked on the process of obtaining clear directions as to what was required but it did not carry the process through.

[136] However, as Whata J noted, instead of seeking from CSL, and PBS if necessary, the requisite information about the size of the specified pre-drilled holes relative to the screw size, APS relied on the Babbage drawing, the plans for the Embassy Apartments and Lord Nelson projects supplied by CSL prior to APS lodging its tender and the ad hoc advice from Mr Lukaszewicz on one of his occasional visits to site.[107]

[137] We consider that if APS had pursued the issue with CSL, then the probability is that either CSL would have informed APS that, as at the Lord Nelson project, a clearance hole was appropriate, or either CSL or APS would have had reference to the Eterpan data sheets which were likely to have been the technical literature which Mr Boyle accepted accompanied each delivery of the Eterpan boards.

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105 High Court judgment, above n 2, at [124].
106 Noted at [14] above.
107 High Court judgment, above n 2, at [122].

Liability to the Council

Was the APS producer statement of 27 September 2006 erroneous and misleading?

[138] The Judge ruled that the APS producer statement of 27 September 2006 was erroneous for the dual reasons that no survey had been undertaken and the cladding was not affixed in accordance with the CSL specification.[108] In view of our conclusion that APS did not owe an obligation as found concerning the "survey" by Babbage, it follows that we do not agree that the APS producer statement was erroneous in the former respect.

[139] It is at least arguable that the producer statement of APS of 31 July 2006 would not have been factually incorrect because the description of work was confined to the supply and installation of the "overclad system" which, while failing to use the trade-marked name "Overclad", could have been construed to be limited to the installation of only the materials sourced from CSL and not the Eterpan sheets.

[140] However, one consequence of the "post-contract scramble" was that various documents required by the Council in the CCC process were either created or were the subject of further elaboration. For example, the Facade Design Services Ltd report of 6 September 2006 was revised to include in the final 21 September 2006 version a specific reference to the cladding material having been screw-fixed and paint-finished.

[141] Similarly, while the body of APS's producer statement remained unchanged from July 2006, the description of work in the final APS producer statement of 27 September 2006 was expanded to specifically refer to the cladding itself:

> Supply and install over clad system [sic] using 9 mm Eterpan sheet to approved over clad system [sic] at Fleet Street Apartments.

[142] Consequently, we agree with the Judge that the APS producer statement was erroneous and misleading to the extent that it certified that the Eterpan sheets had been installed in a good workmanlike manner.

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[108] At [132].

The applications for an extension of time to bring a cross-appeal

[143] Although the appeal was directed to both the inspection and installation issues, in the course of argument Mr McBride drew attention to the following finding of the High Court on causation in relation to the latter issue:

> [136] APS's failure to adhere to SW6-A-10 and the use of incorrect screw fixings was causative of the cracking of the Eterpan sheets. Similarly, APS's flawed producer statement as it relates to the affixing of the Eterpan sheets may have materially contributed to these losses insofar as the Council would have refused Code Compliance pending rectification of the defective screw fixing. But it transpired that the Overclad panels needed to be removed (and not replaced) in any event to repair the pre-existing damage irrespective of APS's affixing failures. It cannot be said therefore that but for these failures that the Plaintiff owners at the time of the remediation works suffered the loss or damage in suit.[109]

[144] It appears that it was only then that the respondents' counsel apprehended the risk that, if APS was successful on its appeal on the inspection issue, the respondents would be deprived of their damages award against APS even if the appeal on the installation issue was unsuccessful.

[145] In these circumstances, the first, second, third and fifth respondents filed applications after the hearing seeking an extension of time within which to bring a cross-appeal against the finding at [136] of the High Court judgment. The order sought in the proposed cross-appeal annexed to the application is in the following terms:

> In the event that this court should find that APS is not liable to the plaintiff owners at the time of the remediation works for failing to ensure that the survey and/or an adequate survey was carried out that APS should still stand liable to the first to third respondents for the loss arising from APS' affixing failure and to a level equal to that of the fifth respondent.

[146] The grounds for the application are:

(a) All parties to the appeal overlooked the consequences of the finding at [136].

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[109] *Johnson v Watson* [2003] 1 NZLR 626 (CA) at [18].

(b) APS appealed the installation issue when, in view of the finding at [136], there was no need for it to do so.

(c) There is no prejudice to any of the parties in the proposed cross-appeal being entertained.

(d) In view of the authorities on causation and apportionment, the issue which it is sought to argue as a cross-appeal is of importance and has merit.

[147] In considering an application for an extension of time to bring a cross-appeal under r 29A of the Court of Appeal (Civil) Rules 2005 (the Rules), the overarching consideration is where the interests of justice lie.[110] Relevant factors include the length of the delay and the reasons for it; the conduct of the parties; the extent of any prejudice caused by the delay; the prospective merits of the appeal; and whether the appeal raises any issue of public importance.[111]

[148] This litigation has been on foot since 2011 and APS's appeal has been heard. Mr McBride submits that an application for an extension of time to cross-appeal following the hearing of an appeal is completely unprecedented. However, he properly recognises that this Court has a broad discretion to allow late appeals.

[149] It is regrettable that the implications of the finding at [136] did not dawn on the respondents until the hearing was underway. However, we recognise the possibility that APS's pursuit of an appeal on the installation issue may have served to obscure the respondents' potential exposure if the appeal was successful only on the inspection issue. While the delay is considerable, we accept that it is a consequence of oversight on the part of legal advisers and not the result of a conscious election by the respondents not to challenge the point.

[150] Although Mr McBride contends that APS is prejudiced by the lateness of the application, the extent of the prejudice identified is confined to the deprivation of

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110 *My Noodle Ltd v Queenstown-Lakes District Council* [2009] NZCA 224, (2009) 19 PRNZ 518 at [19].

111 *Wardell v ASB Bank Ltd* [2015] NZCA 344 at [12].

"the usual entitlements" under the Rules and the short time to respond to the application, limited to written submissions. He submits that, as a matter of policy, the Court should not allow parties to cross-appeal in this manner. However, aside from the burden of preparing further submissions and a likely further hearing to determine the cross-appeal, which can be addressed by a costs order if appropriate, we do not accept that APS is prejudiced by the delay occasioned by the bringing of a cross-appeal.

[151] With reference to the finding to which the cross-appeal is directed, Mr McBride acknowledges that the authority cited by Whata J, *Johnson v Watson*, is inapposite. However, he maintains that the Council must reimburse the owners for the cost of the Overclad system because the damaged substrate was not surveyed first. Citing other authorities,[112] APS submits that the "wasted cost" loss is distinct from and independent of the losses arising from the cracked Eterpan sheets. The respondents counter that, properly analysed, the dual causes are concurrent, and not successive and independent acts causing the same harm.

[152] It does appear that *Johnson v Watson* does not sustain the conclusion at [136] and, on first impression, the respondents' cross-appeal, on what is a complex question, is not without merit. In addition, we consider that the law on causation and apportionment and its application in the New Zealand construction and remediation context has significance beyond the instant case.

[153] These factors persuade us that the interests of justice favour the exercise of the discretion to allow the cross-appeal to be pursued. Consequently, the applications by the first, second, third and fifth respondents for an extension of time within which to bring the cross-appeal are granted. This will necessitate a further hearing.

[154] The cross-appeal is confined to APS's liability for loss arising from APS's fixings failure. The issues which we consider are comprised in the cross-appeal are:

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[112] *Kuwait Airways Corp v Iraqi Airways Co* [2002] UKHL 19, [2002] 2 AC 883 at [72]; and *Barnett v Chelsea and Kensington Hospital Management Committee* [1969] 1 QB 428.

(a) What loss (if any) was suffered by the owners as a consequence of APS's incorrect screw fixing which caused the cracking of the Eterpan sheets?

(b) Whether there should be an order for contribution among Babbage, APS and the Council?

(c) If so, what should be the levels of contribution?

[155] At the hearing of the cross-appeal, the Court will also ask counsel to address what effect our findings regarding the survey obligation should have on contribution.

Result

[156] The formal orders of the Court are:

(a) The appeal is allowed in part.

(b) The finding in the High Court that the appellant was liable for failing to ensure that the building was properly inspected by the fourth respondent is set aside.

(c) The judgment entered in the High Court that the appellant is liable to the first, second and third respondents directly for their losses occasioned by the omission to properly inspect the building is set aside.

(d) The judgment allocating responsibility for the losses of the first, second and third respondents among the appellant, the fourth respondent and the fifth respondent is set aside. The issue of contribution among the appellant, fourth and fifth respondents is reserved pending the determination of the cross-appeal.

(e) The applications for an extension of time within which to bring the cross-appeal are granted.

(f) The Registrar is directed to arrange a telephone conference with counsel and the Court early in 2017 for the fixing of a timetable for the exchange of

written submissions on the issues specified at [154] and a further hearing date.

(g) All questions of costs are reserved pending consideration of the cross-appeal.

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Grimshaw & Co, Auckland for First, Second and Third Respondents
Heaney & Partners, Auckland for Fifth Respondent