

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

**CIV 2011-485-710
[2014] NZHC 295**

BETWEEN	BODY CORPORATE 90247 First Plaintiff
AND	MANFRINI LIMITED Second Plaintiff
AND	DAVID JAMES McCOLL AND BRENDA ELLEN McCOLL Third Plaintiffs
AND	TEMPLAR RESIDENTIAL HOLDINGS LIMITED Fourth Plaintiff
AND	REDWOOD COLLIER PROPERTIES LIMITED Fifth Plaintiff
AND	WELLINGTON CITY COUNCIL First Defendant
AND	DAYTONA DEVELOPMENTS LIMITED (IN LIQUIDATION) Second Defendant

Hearing: 29 October - 1 November 2014
4 November - 8 November 2014
11 November - 15 November 2014
18 November - 19 November 2014

Counsel: D J S Parker and A V Williamson for First to Fifth Plaintiffs
L J Taylor QC and T C Wood for First Defendant

Judgment: 27 February 2014

**JUDGMENT OF RONALD YOUNG J
(Recalled Judgment: 21 March 2014)**

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Introduction

[1] This case involves four leaky town house units built between 1996 and 2000 in Glenmore Street, Wellington. There is no doubt the units suffer from serious water entry and resulting damage. The Body Corporate and the owners of the four town houses now sue the Wellington City Council (the Council) and Daytona Developments Limited (Daytona) (the “final” builder and now in liquidation) in negligence. Daytona has not participated in the hearing.

[2] Broadly, the Glenmore Street unit owners (Glenmore) allege the Council owed a duty of care to them in issuing building consents, undertaking inspections and issuing code compliance certificates (CCC) with respect to their town houses. Glenmore’s case is that the Council was negligent in its inspection of the building work and in granting a CCC, because the building did not in fact meet the requirements of the Building Code and the Building Act 1991. The owners say the measure of damages is the remedial work (including the repair costs and consultants’ costs) to bring the building up to code compliance. This cost, together with a general damages claim, the owners say totals \$2,165,958.10.

[3] In addition to denying it was negligent the Council raises affirmative defences including limitation, causation and contributory negligence. The Council also challenges the amount of the owners’ claims and the basis on which they measure damages. The Council say the appropriate measure of damages is the difference in value between the town houses as they were with all defects known and the value without those defects.

Background

[4] On 26 January 1996 Remarkable Residential Housing Limited applied to the Council for a Project Information Memorandum (PIM) and a building consent to build four town houses at 14C Glenmore Street, Wellington. The application included plans and a number of engineering calculations for those plans. The town houses were some distance up a driveway from Glenmore Street. They were terraced houses on a sloping site. Unit 1 at the eastern end of the site was the lowest.

Each unit was higher than the next as the ground sloped uphill towards Unit 4 at the western end of the site. Each had their own garage at ground level and then three further levels of living space. Below and above these town houses at 14C Glenmore Street were other similar town house developments.

[5] The exterior cladding was mostly rusticated weatherboards with some monolithic cladding especially in the exterior junctions between the town houses. The roof was made of iron. There were aluminium windows.

[6] On the northern side of the property there was a steep bank which had been cut from the existing topography. It began below Unit 1 and at its highest point was 4.7 m above the building platform of Unit 1. The height of the cutting gradually decreased as it went uphill and then rose again on the north west corner. In addition, a cutting had been made at the rear of the property (its western side) beyond Unit 4 and a retaining wall constructed there. Part of the cut was unretained and its highest point was about five metres above the building platform.

[7] In May 1996 a building consent (15997) was issued by the Council for the construction of the units. Building then commenced. The original Council inspection records are no longer available but they have been (at least partially) converted to computer records. They were produced at the hearing.

[8] There appear to have been 24 inspections of the building by the Council between April 1996 and March 1997. The inspections from late 1996 until March 1997 were all related to plumbing and drainage. The last inspection of the structure itself was in December 1996. This was the pre-line inspection. Such an inspection is made when most of the exterior work is complete, including the roof and external cladding but before internal linings are fixed. The only issue noted by the Council inspectors at the time as preventing approval of the pre-line building work was that the framing timber was too wet to fix the interior lining.

[9] After the inspection of 12 March 1997 there was a gap of over three years until the next inspection of the building by the Council. In the intervening three years it appears that the original developer was unable to complete the project. The

land was sold to a company called Tavern One Limited and the building work contracted to Daytona, the second defendant. Tavern One, which had borrowed money from a law firm, also had financial difficulties. The law firm finally took over the completion of the work and the sale of the units.

[10] In September 2000 an application was made by Tavern One to the Council for a building consent for the construction of a retaining wall on the property. The application was granted.

[11] Shortly afterwards a complaint was made to the Council about a deck being built at the rear of Unit 4 without building consent. A Council inspector went to the property to discover that the four units had been almost completed in the interim although, as I have noted, no inspection had taken place since March 1997.

[12] The Council then issued notice to rectify (NTR) number C69193, dated 4 October 2000.¹ The notice told the owner that (amongst other things) the building consent² had lapsed, the deck built on Unit 4 had been built without building consent and. Units 1 to 4 “appeared to have been fully completed even though the building consent has lapsed”. The NTR went on to say in the “Particulars of Contravention”:

You are given notice that you must apply for a retrospective building consent to authorise the works set out in clause 1 above within 30 days of this notice.

[13] On the same day, the owner was told that the building work would have to stop.

[14] A few days later (on 9 October 2000) Mr Tait, who was a Council inspector in the Environmental Control Business Unit (ECBU), wrote to the owner of the property. He said that the purpose of the letter was to “clarify the situation in regards to building consents”. He said that the owner would “need to apply for a retrospective building consent and a building consent to satisfy the requirements of the NTR”. He then went on to describe in particular what was required. He said that once the relevant consent had been obtained the Council would be in a position to carry out an inspection of the dwellings “when required”.

¹ Building Act 1991, s 42.

² Consent 15997 issued in May 1996.

[15] One of the issues of concern to Mr Tait was the 100 mm x 100 mm posts in the deck attached to Unit 4. He noted that the normal sized posts would be 125 mm x 125 mm and that the Council would need certification from an engineer to accept the lesser posts. By 17 October Steven Young & Associates, Wellington engineers, provided a certificate to the Council which said the 100 mm x 100 mm posts were acceptable and the concrete stairs to the deck were adequately reinforced. They attached a plan to illustrate their advice.

[16] On 18 October 2000 the Council received an application for a PIM and building consent by Tavern One relating to 14C Glenmore Street. It related to a consent for the deck, mostly completed, to the rear of Unit 4. A copy of the building consent application subsequently discovered in these proceedings by the Council had a notation which said “deck consent PS 4 to be issued not retro. See Mark Scully”. Mr Scully was a Council employee. Building consent number 70437 was granted for the new deck.

[17] At about this time Mr Brodie, who was the principal of Tavern One and Daytona, was convicted (after prosecution by the Council) of constructing apartments in Taranaki Street other than in accordance with a building consent. Mr Brodie appealed unsuccessfully to the High Court against the conviction.

[18] On 15 November 2000 Tavern One made an application for another PIM and building consent. This was allocated number 71330. The work described was “plumbing and building to complete project to Units 1 to 4 for code compliance certificate”. The value of the work was said to be \$10,000 and there was a description of the plumbing and building work (primarily the installation of handrails) to be completed.

[19] Attached to the application was a set of plans for the construction of the town houses. Two of the plans had notations as to the installation of hand rails and plumbing work.

[20] In its NTR the Council had mentioned a retrospective building consent. It seems that the Wellington City Council was the only local authority in New Zealand that had a “retrospective” building consent process and as part of this process the Council had developed a retrospective building consent policy (dated March 1998).

[21] In his letter dated 9 October 2000 Mr Tait told the owners that they would need to apply for both retrospective and prospective building consents to comply with the NTR. Mr Tait’s evidence was that he told the owner shortly before sending that letter there was no possibility of obtaining a retrospective building consent for the work done from the beginning of construction of the building until the lapse of the building consent. The Council said that the original building consent had lapsed in 1999. And so Mr Tait claimed he had told the owners of Glenmore that there could never be a building consent for the work done from 1996 to 1999. This was when a significant majority of the construction work on the units took place.

[22] Building consent 71330 was granted on 29 November 2000. The Council then carried out inspections under 71330 between January and May 2001. Mr Tane was responsible for inspecting the plumbing, storm water and drainage and Mr Tait the building work. The first inspection by Mr Tait was on 11 January 2001 and the inspections appear to have finished by 1 June 2001 when a CCC was issued for building consent 71330 by the Council as well as for 70437, the deck building consent.

[23] Mr Tait gave evidence at trial. He understandably had limited recollection of the precise details of the inspections carried out by him in 2001.

[24] The items noted as inspected by Mr Tane and Mr Tait in both the Council inspection check lists and in correspondence from Mr Tait to the owners included: rustic plugs in the weather boards, the cladding and jointing system, gully traps, sealing around the doors and windows, deck nailing, glazing of the bay windows, drainage metal, the fibre cement cladding and the storm water system.

[25] The two inspectors carried out approximately 15 inspections. Eventually an interim CCC was issued on 9 May 2001 for 71330. It was said to be “interim for units 2, 3, 4 excluding the decks and unit 1 only”. On 1 June 2001 CCCs were issued for 70431 for the deck attached to Unit 4 and for 71330. The exact terms of the 71330 CCC are matters of some importance in this case and I will return to the content of that CCC later in this judgment.

[26] The four units are now owned by Manfrini Limited (Unit 1), Mr and Mrs McColl (Unit 2), Templar Residential Holdings Limited (Unit 3), and Redwood Colliers Properties Limited (Unit 4). Three of the four units are therefore currently held as investment properties while Mr and Mrs McColl reside in Unit 2.

[27] Dr Richard Mulgan is a shareholder of Templar Residential Holdings Limited which owns Unit 3 at Glenmore Street. He gave evidence at trial. Unit 3 was purchased by Dr Mulgan and his wife as trustees of the Mulgan Family Trust in June 2001 when it was first built. The trust then onsold the unit to the Mulgans’ company, Templar, in July 2002. The conveyancing file relating to the purchase has been destroyed but there is some evidence as to the surrounding circumstances of the purchase.

[28] The Mulgan Family Trust obtained a Land Information Memorandum (LIM) when it purchased the property. That LIM identified the lapse of the building consent during the course of the construction of the property. Dr Mulgan said that because of his concern about the building consent and the LIM one of his options was to cancel the contract. However, he decided to make his own enquiries with the Council before deciding whether to proceed with the contract. As a result of his discussion with a Council employee, he decided not to cancel the contract but to delay settling the transaction until a CCC was issued. Eventually Dr Mulgan settled the transaction after he believed a CCC had been issued for Unit 3.

[29] Dr Mulgan said the first time he became aware that there were significant defects affecting his unit and other units at 14C Glenmore Street, was in 2011 when he got a call from the owner of Unit 1, Mrs Ryan (of Manfrini Limited), who told him significant watertightness problems had been discovered in the building.

[30] Mr and Mrs McColl own Unit 2. They purchased it new in August 2000 as an investment property. Their sale and purchase agreement was conditional upon the provision of a CCC and title to the unit. There was considerable delay in the provision of both the title and a CCC. In October 2000 the McColls were told that a CCC was expected to be issued in the next few days. That did not happen.

[31] It wasn't until May 2001 that the McColls' solicitor received an interim CCC to Unit 2. It excluded the deck. It suggested that a CCC would be available the following week. Eventually the deck was completed and a CCC issued on 1 June 2001. Settlement then occurred. Mr and Mrs McColl now live in the unit. They first knew about the problems with the unit when they were told by Mrs Ryan about the leaks.

[32] The next purchasers in time were Mr and Mrs Collier through their company Redwood Collier Properties Limited. They own Unit 4 at 14C Glenmore Street. They purchased the unit as an investment property.

[33] Prior to entering into a sale and purchase agreement, Mrs Collier employed the New Zealand House Inspection Company to provide a building inspection report. The report said overall the unit was in average to good condition. She also had a builder check the unit. He expressed no concern.

[34] Mrs Collier took the view that the defects identified in the building report could be easily repaired and the condition of the unit improved by maintenance. Redwood agreed to buy the unit. The agreement for sale and purchase was conditional upon a Council CCC for the property. There was some delay in settlement relating to the CCC as well as finance. The solicitor approved the CCC for the property and the sale eventually proceeded. Mr and Mrs Collier did not obtain a LIM. The Colliers also first heard of the concerns about watertightness from Mrs Ryan in 2011.

[35] Mrs Ryan is a shareholder (together with her husband) in Manfrini Limited which owns Unit 1. She is the chairperson of the Body Corporate Committee. She purchased Unit 1 in 2010. Manfrini hired a property and investment company to find suitable investment properties to purchase. They identified 14C Glenmore Street as a potential suitable investment.

[36] Manfrini's agreement for sale and purchase was conditional upon a building surveyor's report as well as a LIM. Mrs Ryan searched the Council's file with respect to the building. In addition, a building surveyor's report was obtained. It did not identify any leaky building problems.

[37] Mrs Ryan made a number of enquiries arising from the LIM. She consulted her solicitor about the LIM and the CCC. Eventually the purchase proceeded.

[38] In January 2011 Manfrini's tenants complained about damp and cold rooms in winter. Mrs Ryan agreed to provide thermal curtains. When she was installing them she noticed there was some mildew on the back of the blinds and in other areas of the unit. She found some rot on the bay window sill of the downstairs bedroom. There was other damage in that area. Eventually she checked all of the windows and became concerned about the condition of the windows.

[39] At about that time the roof of the complex was being repainted because the previous paint surface had failed. It was being repainted under guarantee. While scaffolding was on the building Mrs Ryan arranged for a plumber to check the roof. Her concern about the bay windows led her to believe that there might be hidden rot. Eventually she contacted Helfen Limited (experts in identifying and remediating leaky buildings) and Mr Wutzler (a witness in this case). He confirmed there were major problems with the building.

[40] Glenmore identifies 13 categories of defects at the property:

- (a) lack of adequate detailing of roof and cladding junctions;
- (b) inadequate fixing of roof flashings and roof cladding in places;

- (c) poor installation of roofing underlay and/or an inappropriate underlay used;
- (d) poor detailing of internal gutters including lack of appropriate fall to internal gutters between units;
- (e) lack of adequate detailing of timber cladding;
- (f) lack of adequate detailing of fibre cement cladding;
- (g) inadequate protection of the junction between the cladding and the tops of the window and door units;
- (h) inadequate protection of the junction between the cladding and the jambs of the window and door units;
- (i) inadequate protection of the junction between the cladding and the sills of the windows and doors including installation of the window and door units hard down on timber sills, along with inadequate door thresholds;
- (j) defects to decks;
- (k) defects in the subfloor;
- (l) defects by way of inadequate retaining of ground in the subfloor area;
- (m) plumbing defects.

[41] As a result the direct remediation costs are said to be \$1,513,621. Further, consultants' fees, lost rental while the repairs are undertaken, special damages, legal fees, general damages, post-remediation stigma and disbursements total a further \$537,849.10. In total \$2,051,182.60. It is estimated there is a further \$114,775.50 in fees from consultants to prepare for and attend the experts' conference hearing. The total claim therefore is \$2,165,958.10 based on a repair measure of damages.

[42] The plaintiffs say the proper measure of damages is remediation. But if this Court concludes the proper measure is loss of value then the plaintiffs' claim is \$1,794,000 being the unaffected value of the property (\$2,094,000) less its current value (\$300,000). The Council disputes the plaintiffs' assessment of the property's current value.

[43] Much of the quantum has been agreed by the quantity surveyors for the opposing parties. I will return to that issue at the end of the judgment.

The pleadings

[44] Glenmore sues the Council in negligence. They say the Council owed them a duty of care expressed in the statement of claim in this way:

11. The Council owed the plaintiffs a duty to exercise reasonable care and skill and to properly discharge its functions, powers and duties as a territorial authority in administering and enforcing the Building Act 1991 and the NZBC. The duties owed by the Council to the plaintiffs included the following (inter alia):
 - (a) A duty when processing building consents to, after considering an application for building consent, grant the consent of the Council if satisfied on reasonable grounds that the provisions of the NZBC would mean that the building work would be properly completed in accordance with the plans and specifications submitted with the application.
 - (b) A duty to undertake all inspections necessary for the Council to be satisfied on reasonable grounds that the building work complied with the building consent and the NZBC.
 - (c) A duty when undertaking inspections to exercise reasonable care and skill and to ensure that the building work complied with the building consent and the NZBC.
 - (d) A duty when considering and issuing Code Compliance Certificates to issue a Code Compliance Certificate only if the Council is satisfied on reasonable grounds that:
 - (i) The building work to which the certificate relates complied with the building consent and the NZBC; or
 - (ii) The building work to which the certificate relates complied with the building consent and the NZBC to the extent authorised in terms of any previously approved waiver or modification of the building

consent and the NZBC contained in the building consent which relates to that work.

[45] Glenmore says that this duty of care arose from the granting of building consents, inspections and the issue of CCCs.

[46] Glenmore alleges the following breaches:

13. In breach of the duties pleaded in paragraph 11 above the Council:

- (a) Failed to adequately inspect and require rectification of defects that ought to have been noted on inspection and/or failed to ensure that defects that were noted on inspection were rectified including the defects set out in paragraph 5 above;
- (b) The Council issued a code compliance certificate when there were not reasonable grounds upon which the Council could be satisfied that the building work complied with the Building Consent and the NZBC.

Particulars

- (i) The code compliance certificate was issued when the property was subject to the defects pleaded in paragraph 5 above;
- (ii) The defects particularised in paragraph 5 above should have been identified by a reasonable building inspector and rectification required.

[47] The Council's response is that the duties set out above at [44] do not correctly identify the duty owed by the Council, particularly to future purchasers including the Glenmore owners. In any event most of the plaintiffs' claims are time barred.

[48] As to the building consents, the NTR, the inspections and the CCCs, the Council denies any negligence. They say in any event that the CCCs were only issued in respect of narrow building consents. The Council never certified that the whole building was code compliant.

[49] Further, the Council says if they were negligent then there was negligent contribution by the plaintiffs, particularly through the negligent acts of the plaintiffs' solicitors and with respect to some of the plaintiffs' negligent pre-purchase inspections. In the alternative, the Council says the actions of the solicitors, the

building inspectors and in some cases the plaintiffs, broke the chain of causation. Finally, there is disagreement about the measure of damages and the quantum of damages.

Limitation

[50] The Council's case is that the Limitation Act and Building Act time bar much of the plaintiffs' claim. These proceedings were filed on 21 April 2011. By virtue of s 393(3) of the Building Act 2004 and s 4 of the Limitation Act 1950 any negligent failure by the Council with respect to this building before 20 April 2001 will be time barred. Section 393(2) prohibits proceedings after 10 years from the date of the act or omission on which the proceedings are based. All the building consents relating to 14C Glenmore Street were issued prior to 20 April 2001.³ Any cause of action arising from the issue of these consents is, the Council says, time barred.

[51] Secondly, all Council inspections of the building made before 20 April 2001 giving rise to a cause of action in themselves are also time barred. Council inspections after 20 April 2001 and any CCCs issued after that date will not, the Council accept, be time barred.

[52] The Council's position as far as it goes is correct. However, Glenmore says that s 393 allows inspections and other actions undertaken by the Council which make up the CCC issued within the 10 year backstop to be considered as part of the analysis as to whether the CCC has been negligently issued. The Council says the Court cannot consider any inspections prior to April 2001 whether contributing to the CCC or not.

[53] Glenmore's case focused on the negligent issue of the CCC on 1 June 2001. In a CCC the local authority certifies that the work carried out on a building complies with the Building Code and Act. And so the issue of a CCC by a Council is typically based on Council inspections undertaken during the building work as well as a variety of other information available to the Council during the building work.

³ 1996 Building Consent 15997 for the construction of the property, Building Consent 70437 for the deck, Building Consent 71330 granted October 2000.

In this case, the Council inevitably had to rely upon inspections it carried out (or failed to adequately carry out) prior to 20 April 2001.

[54] I am satisfied that the negligent act in this case which triggers the 10 year Building Act 2004 backstop is the issue of the CCC and time therefore runs from that date. I am satisfied that where, as here, a cause of action arises from the negligent issue of a CCC then for limitation purposes it does not matter that the CCC in part depended upon inspections made more than 10 years before the issue of proceedings.

[55] In drafting s 393(3) of the Building Act 2004 Parliament has clearly recognised the potential for conflict given the decision to issue a CCC is typically based on a collection of information including building inspections that may or may not be within the 10 year limitation period. But Parliament has decided that where the collective enquiry including inspections is relied upon to issue a CCC, then “the date of issue of the [CCC]” is the logical start date for a limitation period.

[56] I am therefore satisfied that the claim relating to the negligent issue of the June 2001 CCC is not time barred by s 393 of the Building Act 2004.

Scope of the CCC: preliminary issues

[57] As I have noted Glenmore’s case is based on the proposition that the June 2001 CCC with respect to building consent 71330 is a “full” CCC relating to the whole building. The Council’s case is that this CCC relates only to the four items of plumbing work and the handrails specified in the building consent application and in turn in the CCC.

[58] If the Council is correct as to the limited extent of the CCC then Glenmore’s claim overall must fail, subject to the issue of the deck to Unit 4 and its separate CCC and subject to the claim of negligent inspections. There is no evidence that the granting of the CCC for consent 71330 for the limited plumbing work and hand rails was negligent nor that inspections of that work were negligent. Nor is there any evidence that any of the damage to the building was caused as a result of any inspection of the plumbing work and building work mentioned. I must therefore

answer this vital factual question: what did the CCC of 1 June 2001 relating to consent 71330 actually certify as code compliant?

[59] I pause to note that consent 70437 related to the construction of the deck attached to the back (western side) of Unit 4. A separate CCC was issued with respect to this deck. There are allegations that the CCC relating to this deck was negligently issued by the Council. And so irrespective of my conclusion about the extent of the CCC relating to 71330, the allegedly negligent CCC relating to the deck remains for resolution.

[60] Additionally, before I consider the detail of Glenmore's claims there are a number of factual and legal issues that need to be resolved regarding the first few years of the life of this building. Unfortunately this was a confusing construction. Developers came and went during the construction stage and sometimes they did not comply with their Building Act obligations. The Council's performance of its obligations relating to building consents, inspections and CCCs was often confused, contradictory and uncertain. Given the vital regulatory function the Council was performing, those failures were concerning.

[61] As a result it is not entirely clear what work was done and inspected on 14C Glenmore between 1997, when the inspections stopped, and 2000 when they resumed. It appears that there were no initial problems with the work on the property. However, some of the retaining walls shown in the plans which form the basis of the building consent were not built. The most obvious example is the retaining wall on the north face between Unit 1 and the cut slope. The plan showed a 1.5 m high retaining wall. This would typically be built before the foundations. It was not built. There is nothing in the Council notes that showed its inspectors were aware of the change, nor whether it was approved.

[62] The Council's record keeping was poor. There is a computer record of what appear to be the notes made by inspectors at each visit in 1996/1997, but no original inspection notes from this period. There are full inspection notes for 2001.

[63] The Council building inspection notes from 2001 are likely to illustrate Council inspector practice in 1996. The Council had prepared pre-printed inspection forms for its inspectors. The pre-printed forms required the inspector on each inspection to identify what work had been inspected by using tick boxes. If necessary there was room for comment. Assuming the inspection forms of the 24 inspections from 1996 and 1997 were accurately converted to the computer records, there is very little information about what was inspected, what was approved and what was not. The inspection forms from 2001 show a similar pattern. The inspection comments are almost exclusively comments about inadequacies in the building work. It is rare to read a report that a particular aspect of the building work has been properly completed. The tick boxes in the form are rarely used. Overall it is difficult to accurately identify what building work has been done, what has been inspected and what has been approved.

[64] The later inspection entries in 1996 and 1997 make it clear that the pre-line inspections failed because the moisture level of the framing timber was too high for the interior lining to be affixed. At this stage the building had the exterior cladding, roof, walls and windows in place. They seem to have been approved. It appears as though it was a question of waiting for the moisture level of the framing timber to drop before the interior lining could be fitted. March 1997 marked the last building inspection requested under the original building consent.

[65] At some stage, probably in 1999, the Council considered the original building consent 15997 had lapsed. In a LIM dated 15 November 1999 the Council said:

The following consents have no code compliance certificate and have lapsed:

- (i) number 15997 issued on 14 May 1996 for four units; and
- (ii) further, note inspections need carrying out on Units 1, 2, 3 and 4. No final inspections have been requested and no code compliance certificate has been sought or issued.
- (iii) no reasonable progress has been made within 12 months and therefore under s 41(1)(b) of the Building Act 1991, builder consent number 15997 has lapsed;
- (iv) no recent audit of the units has been undertaken to determine the compliance with the approved building consent.

[66] On 20 September 2000 Dr Mulgan obtained a LIM. That LIM was in similar but not identical terms to the 1999 LIM. It confirmed that:

The following consents have no code compliance certificate and have lapsed:

- (i) 15997 issued on 14 May 1996 for four units.

[67] The LIM also said:

Note: Inspections have been carried out through the construction period on units 1, 2, 3 and 4. No final inspections have been requested and no code compliance certificates have been sought or issued.

An inspection was undertaken on 18 December 2000 by officers of the Wellington City Council. It appears that work has been undertaken to finish the units, even though the building consent for the units has lapsed and a new consent was required to complete the work.

[68] The LIM noted that a new deck on Unit 4 had been built without a building consent. The LIM then said:

Further work is required to be completed before the units fully comply with the Building Code 1992. A notice to rectify under the Building Act 1991 is to be issued for building work done without a Building Consent.

Did the 1996 building consent (15997) lapse?

[69] Glenmore's position is that the Council had no authority under s 41 of the Building Act 1991 to lapse this building consent. The Council argued otherwise.

[70] Section 41(1) of the Building Act 1991 provides as follows:

41 Lapse and cancellation of building consent

- (1) A building consent shall lapse and be of no effect if—
 - (a) The building work concerned has not been commenced within 6 calendar months after the date of issue of the consent or within such further period as the territorial authority in its absolute discretion may allow; or
 - (b) Reasonable progress on the building work has not been made within 12 calendar months after work has commenced or within such further period as the territorial authority in its absolute discretion may allow.

[71] The applicable provision, both parties agree, is para (b).

[72] It seems that the Council interpreted para (b) as meaning that if in any 12 month calendar period after a building consent is granted, reasonable progress was not made on the building work, then the building consent would lapse.

[73] Strangely there is no process for a building consent to lapse under s 41. No one is authorised to decide whether or not reasonable progress has been made. There is no notification of a “lapse”. Somehow it just happens.

[74] Here, the Council did not notify the builder or developer that the building consent had lapsed. Most probably when the Council received the 1999 request for a LIM it looked at the consent file and realised no inspection had been made on the building for several years and concluded no reasonable progress had been made. And so it notified the LIM applicant the consent had lapsed. Neither the builder nor the developer seems to have been notified the consent had lapsed. It seems probable therefore they proceeded to complete the building in 1999/2000 believing the original consent remained alive.

[75] The Council argued that the intent behind para (b) of s 41(1) must be to lapse consent if reasonable progress is not made during any 12 month period. They submitted that otherwise after the first 12 months or any further extended period a building consent could remain alive for an indefinite period and the work being done subject to that consent could be delayed for an indefinite period without affecting the consent.

[76] Glenmore argues that the plain words meant that the only circumstance under para (b) where a building consent could lapse is where insufficient progress was made within 12 months of commencement, with the Council having the right to extend the 12 month period.

[77] There is no evidence before the Court as to Parliament’s intention in enacting this provision. The plain words of para (b) link the lapse of consent to a failure to make reasonable progress after commencing the building work. The Council can

provide more time than 12 months from commencement for reasonable progress to be made. This could be exercised, for example, where an unexpected event has caused delay in getting started.

[78] There seems no other way to interpret para (b) other than that a building consent will lapse and be of no effect only if reasonable progress has not been made on the building work within 12 months after the work has begun or within an extended period nominated by the territorial authority. I consider there is no basis on the plain words of para (b) to favour the Council's interpretation.

[79] Neither situation provided for in para (b) applies here. It is common ground that within the first 12 month period after the building consent was granted, reasonable progress was made on the construction of 14C Glenmore Street. While it can be appreciated that Parliament may have wished to lapse building consents when inadequate progress was made on the work approved, the plain words of s 41(1)(b) do not provide such a broad or generous power of control. The section's plain words relate the lapse principle to progress in the 12 months after commencement of building only.

[80] The Council's action in claiming that the building consent had lapsed and was of no effect in 1999 and 2000 was therefore wrong. On the basis of my analysis of s 41(1)(b) the building consent had not lapsed.

Was the 1996 building consent (15997) cancelled?

[81] In the alternative the Council says it cancelled the building permit under s 41(2) of the Building Act 1991. Section 41(2), (3) and (4) provide as follows:

41 Lapse and cancellation of building consent

...

(2) The territorial authority may cancel a building consent in whole or in part forthwith if—

(a) There has been a change of circumstances such that the territorial authority believes that the proposed building work may contravene any provision of the building code as in force at the time the work commenced; or

- (b) The rectification work required to be done by a notice to rectify under section 42 of this Act has not been commenced within a reasonable time, or there has been a breach of a condition of any such notice.
- (3) When a territorial authority cancels a building consent, all building work to which it relates shall cease immediately, except for work necessary to properly secure and protect the building and to keep the site in a safe condition.
- (4) If a building consent is cancelled under subsection (2) of this section, the owner may apply for a new consent as if making an application in respect of an alteration to an existing building.

[82] The claim of cancellation seems to be based on the notation in the CCC for consent 71330. As to consent 15997 it said:

... please note this consent has lapsed and is considered cancelled ...

[83] There was no evidence as to how this “cancellation” came about other than the words of the CCC for the 71330 consent. This comment seems to assume that where a consent lapses it is by virtue of the lapse cancelled. This is not at all the process contemplated by s 41(2).

[84] Subsection (2) anticipates a different situation than provided for in subs (1). Subsection (1) declares that a building consent lapses if certain events occur. Subsection (2) is concerned with the power of a territorial authority to cancel a building consent if certain events occur. Subsection (2) therefore involves some form of giving of notice and some form of exercise of discretion by the territorial authority. For example, the subsection requires that the Council “believe” the proposed work may contravene the Code.

[85] I consider subs (2) has no application to the facts of this case. There is no evidence that the Council turned its mind to s 41(2) and its application to consent 15997, nor that it in fact cancelled the building consent either under subs (2)(a) or (b).

[86] Further, neither para (a) nor (b) of subs (2) fit the facts of this case. Under para (a) if there has been a change of circumstances such that the territorial authority believes that the “proposed building work” may contravene the building code, then it

can cancel the building consent. There is no reason here to suppose that in 1999 the Council considered that proposed building work (the only work then left was some straightforward plumbing work and the fitting of hand rails to stairs) would contravene the building code.

[87] As to rectification work in para (b), a NTR had been given to the owners in September 2000 but there was no evidence that the rectification work had not been commenced within a reasonable time.

[88] Further, all of the LIM reports refer to the building consent as being lapsed and the NTR of 4 October 2000 also referred to the building consent having lapsed.

[89] I am therefore satisfied that the Council had no authority to lapse building consent 15997 under s 41(1) nor to cancel the building consent under s 41(2). I am also satisfied that the Council did not in fact intend to cancel building consent 15997.

[90] Unfortunately the Council proceeded on the basis that building consent 15997 had lapsed and as consequence had been cancelled from 1999 onwards. This erroneous view informed its decision making and its certification with respect to the building from then on. This view informed the LIMs, the NTR, the advice regarding building consents, its inspections and the issue of CCCs. Many of the subsequent problems in the Council approvals for this building and in this litigation have arisen because of these errors by the Council in its approach to this building.

What did building consent 71330 and therefore the June 2001 CCC relate to?

[91] This is perhaps the most important factual issue in this litigation. Glenmore's case is that the CCC from the Council on 1 June 2001 relating to consent 71330 was a full CCC for the four completed units covering all the building work. Their case is that prospective purchasers including all of the four owners of the units were entitled to rely upon the CCC as certifying that the four units complied with the Building Act and Code. And so Glenmore's case is that each owner proceeded with the purchase of their unit believing they had a CCC which covered the whole of the construction of their unit. Their case primarily relies upon this claim.

[92] The Council says that the CCC had limited coverage. They say it covered minor plumbing, handrails to each unit's stairwells and some safety rails and nothing further. And so the Council's case is that the vast majority of the construction work on the four units at 14C Glenmore Street was not certified by the Council as code compliant. The owners of the four units were wrong to believe the CCC covered the whole of their units. Their solicitors were negligent in either failing to ascertain this was a limited CCC or at least in failing to recognise the coverage of the CCC was not clear and advising further investigation.

[93] A Council CCC is intended to certify that particular building work covered by a building consent complies with the Building Code and has been completed. In this case there was considerable debate between the witnesses about what was being sought in the building consent and what was ultimately certified by the Council.

[94] Mr Wutzler and Mr Tidd took the view that whatever the building consent application covered, the CCC issued by the Council covered the whole of the building. Mr Flay took the view that whatever the building consent application covered, the CCC at least covered all that the Council inspectors had noted that they inspected and that required remedial work.

[95] As I have noted, the difficulty with Mr Flay's approach is that it assumes the inspectors have noted on the inspection forms all that they inspected. In fact it seems clear from the evidence that the inspectors only noted "problem" areas and did not generally note on their inspection forms building work which had been completed correctly and in compliance with the Code. And so it is not at all clear what in fact was inspected by the building inspectors in 2001.

[96] Finally, there is Mr Jones and Mr Tait who say that the building consent was only for some minor plumbing and building work and the CCC can only therefore cover that work.

[97] To understand these expert opinions and the issues that arise it is necessary to consider in further details the facts surrounding the issue of the CCC relating to consent 71330.

[98] As I have noted no inspections had been sought for the property by the builder or the owners from March 1997. The building was then at the interior pre-lining stage. In September 2000 the Council received a complaint about a deck being built attached to Unit 4 which was said to be without a building consent. The Council inspectors went to the property and found that the four units had been effectively completed.

[99] Mr Tait was then a Council building inspector. He gave evidence at trial. His evidence is of significance in relation to what happened over the following few months.

Retrospective Building Consent Policy

[100] The Council had developed a retrospective building consent process which was operative at the time. There was subsequently considerable doubt expressed about the lawfulness of any form of retrospective building consent. The Building Act 1991 did not appear to contemplate retrospective consents. In any event the ECBU within the Council issued the policy. The policy was publicly notified and commenced in March 1998. It is no longer operative.

[101] The policy provided that retrospective building consent was intended to apply to “building work being carried out (or completed) without a building consent”. This included situations where a building consent had been applied for but had not yet issued; and where no building consent had ever been applied for or issued. It applied where the work concerned was partly or fully completed.

[102] The policy worked in this way. When the ECBU found out about non-consented building work it would issue an NTR. The building work was required to stop. The fact there was an NTR with respect to the property would be noted on any LIM then issued.

[103] The ECBU would then decide whether the work done was of such a standard that it was necessary to issue a dangerous or insanitary notice. The owner then could do nothing or engage a “suitably qualified person to provide sufficient evidence that demonstrates the work has been done well enough not to pose a safety threat and not

to be dangerous or insanitary”. If the owner did so they could then apply for retrospective consent.

[104] If the owner chose to do nothing then the Council would consider prosecution or some form of enforcement action. If the owner obtained qualified evidence to show the work done was not dangerous or insanitary then, apart from noting the NTR (in any LIM issued) and that no further work would be allowed on the building, nothing further needed to be done by the Council.

[105] If the owner wanted a retrospective building consent, then a number of steps were required. They included providing the Council with:

- (a) a complete set of consent plans;
- (b) producer statements from suitably qualified persons covering all aspects of the work done to date;⁴
- (c) accompanying evidence of inspection of the building works;
- (d) reasons why the building work complied with the building code; and
- (e) evidence that the consent plans matched the physical structure actually erected.

[106] If the Council was satisfied with this evidence then a retrospective building consent could be issued for the work done without consent. In the meantime no work on the building was permitted.

Communications with Mr Tait

[107] On 4 October 2000 the Council issued a NTR with respect to Glenmore including particulars of contravention to the building owner. It said that the owners were required to rectify the building work not done in accordance with the Building

⁴ Producer statements were statements from suitably qualified persons that the building work they had done on the relevant building complied with the Building Code and Act.

Act as identified in an attached notice. It noted the original building consent had lapsed. The owners were told that work on the entire project was to cease and not to resume until written approval of the Council.

[108] The NTR notice said:

1. On 18 September 2000 an officer of the Wellington City Council (the Council) inspected your property and found the building work had been undertaken. In particular the officer observed:
 - (a) a deck has been built on Unit 4 (as shown in the Cutress McKenzie Martin Proposed Unit Title Development Plan 13921) without a building consent and it fails to comply with the requirements of the New Zealand Building Code;
 - (b) Units 1–4 appear to have been fully completed even though the building consent has lapsed.
2. You were given notice that you must apply for a retrospective building consent to authorise the work set out in cl 1 above within 30 days of this notice.

[109] The NTR said that it was an offence punishable by conviction and a substantial fine if the owner failed to comply with the NTR.

[110] On 9 October 2000 Mr Tait wrote a letter to the owners about 14C Glenmore Street. He referred to the NTR and provided what he described as “clarification” regarding the building consents that would be required.

[111] Mr Tait said that the owners would need to apply for both a retrospective building consent and a building consent to satisfy the NTR. The retrospective building consent was for the deck on the uppermost unit (presumably Unit 4) and “any structural work that has been completed on the rest of the apartments”. He noted this would need to include the concrete stairs that had been installed to Unit 4. He noted that the work would need to be certified by an engineer. He said that “the deck has been built on 100 mm x 100 mm posts and not the 125 mm x 125 mm posts as we would normally expect”. He mentioned that the concrete path to the top unit had been poured against the weatherboards of the unit.

[112] He then said:

You will also need to apply for a building consent for the work required to complete the apartments. When the apartments were originally inspected no fittings or fixtures had been installed. No taps etc, the showers had not been completed, all the plumbing systems had been capped off. There did not appear to be any hot water cylinders.

[113] Once the relevant consent had been obtained the Council said it would then be in a position to carry out an inspection of the dwellings when required.

[114] Mr Tait said in evidence that he had had a discussion with the owners prior to the letter dated 9 October 2000 and had made it clear to them that the retrospective policy would not allow them to get any form of building consent for the work done under the original building consent before that consent lapsed. He said that he told the owners that the only consent that they could expect to get retrospectively was consent for the work that had been done without a building consent from the time the building consent lapsed,⁵ through until the work had been halted with the NTR in October 2000.

[115] I did not find Mr Tait's evidence in this regard convincing or reliable. It is extraordinary to think that Mr Tait can now recall events 12, almost 13 years ago in the detail claimed, including detailed discussions with a particular owner with regard to a particular development. Mr Tait said that he had been involved in dozens of building consent applications for the Council and then as a private contractor both before these events and since.

[116] Mr Tait's evidence about his discussion with the owners was not mentioned in his letter dated 9 October 2000. Indeed this letter appears to be in conflict with this conversation. Part of the requirement for retrospective consent to be obtained in the letter related to "any structural work that has been completed on the rest of the apartments". The letter did not restrict the structural work to that done since the lapse of the building consent. The letter appeared to include some building work done before the building consent "lapsed".

⁵ The exact date and circumstances in which Mr Tait believed the original consent lapsed were not clear.

[117] By 1999 the Council claimed that the original building consent had lapsed and was of no effect. Mr Tait said that the retrospective policy did not apply to work that had a building consent. Thus he said the 1996/1997 building work completed under the original consent could not have a retrospective consent.

[118] The principle behind the retrospective building consent process was that where the Council could be reasonably assured that building work that had been done without a consent had been done in accordance with the plans and specifications and the Building Act and Code, it would be prepared to grant a building consent for work already done. The policy behind retrospective consents focused on obtaining evidence as to whether the Council could be reassured the building work had in fact complied with the Code.

[119] In this case, there was a high level of assurance that work done under the original building consent complied with the Act and Code. After all, it was the only work that had been done on this building that the Council had inspected, and was in a position to certify that the building work had been done in accordance with the Code and Act. The other building work, done after the Council inspections ended in 1997, would require certification by a third party that the work had been done in accordance with the plans, the Act and the Code.

[120] There is also an absurd circularity in Mr Tait's approach to the meaning of the Council's retrospective policy. The owner obtained the building consent and built part of the building in accordance with that consent. The building consent was then lapsed by the Council. But the Council knew that the work that had been done was in accordance with the building consent and Code. The lapse of the building consent meant the building consent was of no effect, thus the building work did not have a consent. The building owner wished to apply under the retrospective policy to obtain a building consent for the whole of the building. But Mr Tait said that was impossible because when the first part of the building was completed, it was done under a building consent (although now of no effect). And so the owner did not meet the criteria for a retrospective consent. As I have noted this was the only part of the building work by 2000 that the Council had inspected and could confidentially assess for compliance.

[121] And so Mr Tait's description of his discussion with the owners/developers as to the meaning of the retrospective policy made no sense. If the building work then completed had a building consent it would not need retrospective consent. If the building work completed did not have a valid building consent (including where it had lapsed and was of no effect),⁶ there was no reason why it should not come within the retrospective policy and every reason why it should.

Content of the consent and CCC documents

[122] In any event the service of the NTR in October 2000 was followed by two applications for PIMs and building consents by the owners. The first application related to the deck (70437). It was an application for a PIM and a building consent for the deck to Unit 4. This deck had been built prior to the NTR. As I have noted, on this building consent application these words appear "not retro see Mark Scully". Mr Scully was an employee of the Council. The note, however, made no sense. On the face of it the deck consent was retrospective. The deck had been all but completed by the time the application for the building consent was made.⁷

[123] Counsel for the Council speculated that it may not have been seen as a retrospective consent because the deck itself could be inspected even after it was built. Whatever the Council's capacity to inspect building work which was completed before a building consent was applied for, such construction would always require a retrospective consent. If the work had been completed before a building consent was applied for the consent could only be retrospective.

[124] The second consent application (71330) was filed on 15 November 2000. Under the description of building work it said "plumbing and building work to complete project to Units 1 to 4 for CCC". The value of the projected work was said to be \$10,000.

⁶ However, see [89].

⁷ Consent had to be obtained in advance of construction commencing: Building Act 1991, s 32.

[125] On the final page of the consent application there was a note identifying plumbing items. It described tap ware, shower mixers, toilet suites and hot water heaters to be installed. Under the heading “building items to be completed” it listed hand rails to each stairwell and safety barriers to Unit 2.

[126] Attached to the application were several sets of plans, some of which had notations on them relating to the plumbing and building items to be completed, and others were unmarked. On 15 November 2000, as a result of receiving a producer statement from an engineer, the deck was granted a building consent.

[127] As to the second application, a PIM and a building consent were issued (71330). Both the PIM and the building consent had identical project descriptions taken from the application itself. Under “building work”, safety barriers and hand rails were mentioned and under “plumbing”, the four items previously mentioned were identified.

[128] On 18 December 2000 Spencer Holmes, an engineering firm in Wellington, told the Council that it had been provided with the NTR of November 2000 and had undertaken various inspections of the building at the owner’s request. Copies of the site reports were also available. The inspections identified areas of non-compliance with the Code which had been addressed as the building work proceeded. Spencer Holmes said that:

On completion of the remedial works we confirm our intention to provide Certification as to compliance with the relevant sections of the Building Code completed.

[129] The Council inspections in relation to consent 71330 began on 11 January 2001. Mr Tait undertook the building inspections and Mr Tane the plumbing inspections. Inspectors’ checklists from January 2001 through until the issue of the interim and then final CCCs make it clear that both Mr Tane and Mr Tait inspected the property at Glenmore Street far more extensively than the four items of plumbing and two minor items of building work required. I have previously noted the extent of the inspections.⁸

⁸ At [8]–[25].

[130] It was suggested by the Council that what Mr Tait had done was to note a few self-evident inadequacies in the building and pass them on for the information of the owner. But that does not match either the inspection notes or a letter from Mr Tait of 22 March 2001 to the owner. In that letter Mr Tait said he required the following items be fixed:

Top Unit (called unit four) unable to gain access.

- Remove concrete poured up and over weatherboards where cutting has occurred
- Gully trap under deck to have a surcharge pipe fitted allowing surcharge to flow to a visible outfall
- Seal around all windows and doors
- Complete installation of rustic plugs

Unit three. Unable to gain access

- Seal around all windows and doors
- Complete installation of rustic plugs

Unit two

- Seal around all windows and doors
- Complete installation of rustic plugs
- Install air admittance valve to Kitchen sink
- Seal tub against wall
- Nail decking correctly

Unit one

- Seal around all windows and doors
- Complete installation of rustic plugs
- Verify glazing to bay windows meet the requirements of New Zealand standard applicable at the time of installation
- Remove drainage metal to north wall of garage to a level either below tanking or below floor level
- Clip bath waste
- Expose drainage pipe to rear of garage wall to determine where leak in garage is coming from
- Toilet pan water traps are pulling, venting to be upgraded and air admittance valves fitted to both toilet pans.

In regards to the fibre cement sheet cladding installed in some areas, all joints are to be protected by a covering board as per the detail used on the lower units.

Some areas of the rustic weatherboard have cracks or are not fixed in place correctly will need to be made good.

In regards to the separate building consent for the deck on unit 4 and the stairs up to Unit 1 a PS4 construction review is required from the design engineer.

[131] Mr Tane’s inspections of the plumbing also went well beyond the four items identified in the original application for a building consent.

[132] Two interim CCCs were issued for the two consents without limitation and both noted that the interim CCC “related to the particulars of work as described in the building consent”.

[133] The final CCC for 71330 had the following relevant notations. Under “project description” it said “plumbing and building to complete consent of Units 1 to 4 for CCC relating to NTR under SR69193”. The certificate was said to be subject to the conditions specified on the attached page.

[134] These conditions were:

This certificate relates only to building consent 71330. Nothing in the certificate states or implies that the following building work at the same address complies with the building code:

SR15997 – New Dwelling (please note this consent has been lapsed and is considered cancelled). Building consent 71330 is issued for the completion of the apartment.

Conclusions in relation to scope of the CCCs

[135] To reiterate, the Council’s case was that the CCC was limited to the few items of building and plumbing work expressly mentioned in consent 71330. Glenmore’s case was that the CCC related to the whole of the building work for the four units.

[136] I am satisfied that on the balance of probabilities the best view of the oral and documentary evidence is that the building consent application and the building consent was for all the building work for the four units, and that the CCC certified the whole building as code compliant. While there was only a small (thus the reference to \$10,000) amount of work for the building to be completed, the consent sought and granted related to the whole building.

[137] As I have previously said, undertaking this analysis to some degree requires an untrue assumption.⁹ It assumes that the original building consent (15997) had lawfully lapsed or been cancelled when it had not. Consent 15997 was alive in 2000 and a CCC could have been directly issued for the work completed up to the last inspection in 1997. The Council proceeded as if the consent was cancelled. In those circumstances the building work completed up until 1997 could have come within the Council's retrospective building consent process, despite Mr Tait's view.

[138] Thus, even if the 15997 building consent did lawfully lapse, then on the Council's own policy that work would have been eligible for a retrospective consent.

[139] I mention these matters to illustrate the confusion within the Council. The process of building consents and the issue of CCCs were (and are) of fundamental importance to the purchasers of residential properties in New Zealand. It is no exaggeration to say that in 2000/2001 the Council's attention to its statutory obligations was hopelessly inadequate. While the developers' actions left much to be desired in constructing Glenmore, the Council's inadequacies triggered much of the uncertainty behind this litigation.

[140] To return to the CCC. The reasons for my conclusion as to the extent of the CCC are as follows. I accept that there is ambiguity in consent 71330 and the CCC consequently issued. Where the CCC records the building consent was issued for the "completion of the apartment" the "completion" could mean the final work to be done on the apartment only, that is the limited plumbing work and the hand rails. The previous clause in the consent, noting that the original consent had lapsed, could be seen to reinforce this interpretation.

[141] On the other hand the issue of a building consent for the "completion of the apartments" could be interpreted as meaning that the whole of the apartments now have a building consent. The CCC condition relating to the original building consent¹⁰ could simply be advice to potential purchasers that this original building consent had lapsed and had been replaced by another building consent, and that it

⁹ At [90].

¹⁰ See above at [134].

was in respect of that consent that the CCC was granted. The two sentences read together could mean that consent 71330 was issued in place of the original new dwelling consent and was in relation to completing the whole of the building. This interpretation is supported by the actions of the Council inspectors.

[142] Mr Tait and Mr Tane approached the building consent and their inspection function as covering far more than a limited installation of the plumbing work and hand rails. These inspectors considered building work compliance with the Code and Act on a much wider basis than claimed by the Council.

[143] The purpose of the inspections was to ensure the building work carried out complied with the building consent granted and complied with the Code. Thus the CCC in turn would reflect these inspections. The broad range of inspections undertaken illustrated that this was not an inspection limited to a narrow range of plumbing and building work. The building consent application, the PIM, the building consent, and the CCC all referred in one form or another to CCCs for a “completed” building.

[144] This was a new building. The expectation would be for a CCC covering all the building work. If the Council was only certifying limited building work I consider its obligation was to expressly say so. This is especially so in this case where the Council claims the certification relates only to a very modest part of the building work. The Council therefore needed to explicitly say the CCC did not cover the whole building but only the very limited plumbing work and hand rails. It did not do so.

[145] The inspection records from 2001 show the inspectors inspected what they could see and required remedy where they believed there was no code compliance. Based on the Council’s records it is now effectively impossible to know what the inspectors did inspect. They listed problems in their inspection sheets. But they did not list building work which they inspected which passed code compliance.¹¹ Even

¹¹ The inspection forms provided a checkbox system for items that “passed” inspection but these were not used.

based on these limited inspection records the inspection of the property was wide ranging.

[146] These factors together convince me that the most likely position was that the Council inspectors were inspecting the property for a full CCC for the units. They had the inspection records up until 1997 which comprised the bulk of the building work. They could rely upon those records to satisfy themselves the earlier building work had been completed to their satisfaction. They then inspected what they could see of the building. Overall they had an inspection record of the vast majority of the building work.

[147] In summary:

- (a) the owner/developer was more likely than not applying for a CCC in respect of the whole building in its November 2000 application;
- (b) the inspectors undertook a broad inspection of the property which together with earlier Council inspections covered most if not all of the building;
- (c) the Council's failures caused the confusion as to the scope of consent 71330 and the CCC relating to 71330;
- (d) the CCC although possibly ambiguous can be reasonably interpreted as referring to the whole building.

[148] I am satisfied that the most probable interpretation of the CCC was that it certified compliance with the Code of the whole building at 14C Glenmore Street.

Deck CCC

[149] If I am wrong in my conclusion that the CCC for 71330 only covered the limited building work identified by the Council, then the plaintiffs' claim against the Council with respect to building consent and CCC 70437 remains.

[150] The evidence clearly establishes that the Council's inspection of the deck attached to Unit 4 (at the rear) was negligent and the CCC should not have been granted. I have previously identified those inadequacies, the primary flaw being construction of the deck so that the decking timber was hard against the exterior weatherboards. This construction did not allow water to drain from the deck and caused both the decking timber and weatherboards to rot. There was no separate identification of the cost of repair of this deck.

Negligent inspections

[151] If I am wrong and the CCC did not cover the whole of the building then the plaintiffs allege the Council negligently inspected the building in 2001. This claim arose from the Council's failure to adequately inspect the property and to identify the defects in the building. There is a significant difficulty with the plaintiffs' inspection failure causes of action. If the consent and CCC relate only to the handrails and plumbing work, the obligation on the Council was only to inspect that limited work.

[152] My conclusions about inspection failure leading to a negligently issued CCC were almost exclusively about what the Council inspectors failed to inspect (when they should have) rather than what they negligently did inspect. It seems to me therefore that if the plaintiffs' claim fails because the CCC is of limited coverage then the inspection cause of action by itself must also fail.

Was the Council negligent in issuing the CCC relating to building consent 71330?

[153] I am satisfied that the Council was negligent in the issue of the CCC of 1 June 2001 relating to building consent 71330. I am satisfied that if Council inspections had been properly carried out and the Council had taken into account the other information in its possession, the Council would not have certified the building work at 14C Glenmore Street as compliant with the Code.

[154] I am satisfied that Council inspectors negligently failed to identify defects in the building work. I am satisfied that the combination of the Council's knowledge of the builder's building practices together with the defects in the building work (that a

competent inspector would have identified) would have led to further enquiry that in turn would have revealed further building defects. The inevitable investigation which followed would have uncovered many of the leaky building problems. A CCC would not have been issued for the building.

[155] Mr Wutzler is a registered building surveyor and remediation specialist. He has been extensively involved in the identification of weathertightness issues in New Zealand buildings and in their remediation for more than 10 years. He was called by Glenmore. He identified a range of defects in the building, and his evidence was that a competent building inspector in 2001 should have identified the vast majority of defects in each of the defect categories he identified.¹²

[156] I accept, in part, the Council's criticism of his evidence. Mr Wutzler sets a "gold" standard in the identification of building trouble spots. Mr Wutzler's expectation of what a competent building inspector should see is, I consider, set at his own standard of knowledge of leaky buildings in 2013. Council building inspectors could not be expected to have reached this advanced level of knowledge in 2000/2001. Any assessment of what a building inspector could be expected to identify has to be tempered by taking into account reasonable standards of the day. I stress the word "reasonable".

[157] However, it is not enough for an inspector to simply say "that's how we did it in those days". If what the inspectors were doing was inadequate, judged by a reasonable standard of the day, then it is no excuse to simply say "that's how we did it then". There was a significant element of this approach in Mr Tait's evidence as to his inspections of the building work.

[158] The evidence given by Mr Saul and Mr Tidd as well as Mr Flay related directly to the standards of a building inspector in 2001. They gave specific evidence as to what a competent building inspector should have observed of the building work at Glenmore Street. Mr Tait who was the Council's building inspector for 14C Glenmore Street in 2001 gave evidence of what he could recall, and of

¹² For the categories of the building defects see [40].

Council inspection standards of the time. The evidence of Messrs Saul, Flay and Tidd focused on the list of defects identified by Mr Wutzler.

[159] Mr Saul is a building consultant with 30 years' experience in residential and commercial buildings. Between February 2000 and July 2008 he was employed by Wellington City Council, initially as a building officer and later as a consents officer which involved approvals of complex commercial construction. More recently he has run his own building consultancy and teaches Building Code Compliance and Construction.

[160] Mr Flay qualified as a carpenter in 1981. He was then self-employed as a builder for over 10 years. In 1996 he began working as a building inspector and was eventually promoted to Team Leader of building consents. Since that time he has primarily worked for various local authorities in inspection and building consents. He now runs his own consultancy business.

[161] Mr Tidd has been involved in building for 40 years primarily in residential and commercial construction. He has worked for a number of local authorities including Wellington and Auckland City Councils on building inspections and consents in a direct and supervisory role. More recently he has been employed by private companies in construction supervisory roles.

[162] I found Mr Saul an impressive witness who did his best to objectively assess what a reasonable inspector would see. I thought all three witnesses gave their best assessment of what they believe was an adequate inspection standard for 2001.

[163] I am satisfied that there were many defects in this building that were evident and should have been identified by a competent Council inspector.

Scope of inspection

[164] As I have mentioned above, it is not now possible, based on a reconstruction of Council records from 1996 to 2001, to know exactly what the Council inspected of this building.

[165] The fact that an aspect of the building work was not mentioned in the inspection reports did not indicate whether it had been inspected or not. Even if a competent inspector had noted only those defects seen by Mr Tait and Mr Tane the need for a more detailed inspection of the building, prior to any CCC issue, would have been established. This was especially so given the Council's knowledge of the building company's prosecution in 2000 for building without consent.

[166] In any case, a building inspector must ensure that building work is done in accordance with the building consent and complies with the Building Act and the Code. Obviously a Council inspector cannot and does not need to be on the site each day of construction, nor does he or she need to inspect every item of work done.

[167] But overall, a Council has to be able to certify that each part of the building was built to the standard required in the Code. A claim of inadequate inspection cannot therefore be met by an inspector saying that they did not look at that aspect of the building, because the inspector has an obligation to look at each aspect. If a CCC is issued, the Council is certifying that all the work covered by the certificate is built according to the Code.

[168] Given my conclusion that the CCC was a "full" certificate for the building, I proceed on the assumption that the Council inspected all the essential elements of the building sufficient to certify this "new build" was code compliant.

What defects should have been seen at Glenmore Street by a competent building inspector?

[169] The essence of the plaintiffs' case is that a competent building inspector undertaking an inspection of Glenmore Street in 2001 should have picked up a range of defects in the building even on a superficial inspection. This in turn should have led to a more detailed inspection, which ultimately should have led to a refusal to certify the building as code compliant, recognising the weathertightness problems of the building.

[170] I am satisfied that given the defects the Council inspectors noted and given the building defects the inspectors should have seen during their 2001 inspections, there should have been a more detailed inspection of the building. This in turn would have led to the realisation this was a building seriously vulnerable to water entry.

[171] As Mr Saul pointed out, Mr Tait specifically noted (in his letter of 22 March 2001 and in a number of building inspection forms) that there were a number of defects in the building. The letter of 22 March 2001 described at least these defects: concrete had been poured up to and over weatherboards; inadequate gully trap installation; failure to install rustic plugs around the weatherboards; inadequate nailing to the deck; drainage metal removal below floor level of Unit 1; inadequate fibre cement cladding joint installation; and cracks or inadequate fixing of weatherboards and inadequate sealing around all the windows and doors of all the units. Some of these defects related directly to watertightness issues.

[172] In Mr Tait's and Mr Tane's 2001 inspection records, there were questions noted about the cladding system, the jointing system, cover boards to unflushed horizontal joints, water in the garage of Unit 1 and many other issues.

[173] Mr Tait's evidence was that he had not inspected Glenmore beyond the building work required (essentially the installation of handrails) but had noticed some defects in the course of his inspection. He had noted these defects to assist the owner. He said that these observations were simply coincidental to this main purpose.

[174] I do not accept this evidence. The extent and type of the defects, including the number of visits to the building made by Mr Tait and Mr Tane, illustrate that the observations they made of defects and requirements to fix were not simply coincidental.

[175] Between them Mr Tait and Mr Tane made 14 inspector visits to the site (often together). If Mr Tait is correct, all he had to inspect were some handrails. One inspection, after he was notified the handrail construction was complete, would have

been sufficient. In fact none of the inspection reports mention any inspection of the handrails.

[176] The defects listed in the letter of 22 March 2001 and the defects in the inspection sheets needed to be fixed, and the inspectors returned to the site to ensure this had been done. In respect of many of the recorded defects, there is no record that the required remediation work was actually done. This process is consistent with a broad inspection of building work. And so the inspectors began with a significant list of defects they observed and required the builder to “put right”.

[177] The inspectors knew that this had been a troubled construction. The original builder and developer had not completed the work. No inspections had been carried out for a period of three years between 1997 and 2000. By then further work had been done and had not been inspected. It seems probable that the Council inspectors were aware of these problems and undertook a detailed inspection of the building.

[178] In addition to this list of defects identified by the building inspectors, there were other obvious defects in the building which should have alerted the inspectors to serious concerns about the construction of Glenmore. I now identify some of these defects.

Bay window flashing

[179] The three bay windows at the front of Unit 1 were not flashed. I am satisfied that the lack of flashing at the bay windows was an obvious and serious defect. Council inspectors were well aware that windows needed to be adequately flashed to avoid water entry to a house. By 2000/2001 they would have known that significant water entry often occurs through inadequately installed or flashed windows. The lack of flashing on the lower bay windows could probably have been seen from the driveway and could certainly have been seen from inside Unit 1.

[180] Given the inspectors would have known of the dangers of water entry through poor flashing, the absence of flashing should have been seen by them as a serious defect. The inspectors had already noted concern about the adequacy of the glass in the bay windows given the building was in a high wind zone. They had

expressed concern in their defects list about the sealing of all windows. Their attention had therefore been drawn to the bay windows. This should have led the inspectors to check the other window and door flashings in all four units. This, in turn, would have revealed a wider window flashing problem.

Window and door flashing

[181] It is possible (although unlikely) that without the bay window trigger the inspectors may not have seen the full extent of the inadequacy of some of the flashing on the other windows and doors. The flashing around most doors and windows on the lower levels could be easily seen. Many were just above eye level (particularly the doors) or could be seen from inside the building. Even a casual look at these doors and windows would have given reason for a competent inspector to be concerned.

[182] On some of the windows the flashing was shaped so that the water ran back into the building. This was obviously unacceptable and undermined the whole purpose of the flashing. It seems that flashings were installed after the weatherboards by making a cut in the weatherboard with a skill saw and slotting the flashing up from behind. This was not a traditional method of installation. While it may be possible to install a sufficient length of flashing behind the weatherboards using such a method, it is likely to be extremely difficult. This unorthodox method of installation should have triggered further enquiry by the inspectors.

[183] The incorrect shape of the flashing and the flashing installation should have raised serious concern with the inspectors. Together with the absence of flashings over the bay windows alarm bells should have been ringing. Here were reasons to be seriously concerned about the weathertightness of the doors and windows to the building. These combined inadequacies went to the heart of the building's weathertightness.

[184] Mr Tait, in his letter of 22 March 2001 to the developers, had himself noted that all the doors and windows in all of the units had to be "sealed". It is not now clear exactly what he meant. At least it seems clear he was concerned about the weathertightness of the doors and windows. Further, it is reasonable to assume on

the basis of this letter that Mr Tait had inspected at least some of the doors and windows, that there was inadequate sealing, and that he had reason to believe the inadequacy was repeated throughout the four units.

[185] The removal of one of the window flashings of concern would have been relatively straightforward. It would not have been a major intrusion into the integrity of the building, and would have revealed the inadequacy of the flashing uplift. It would have shown that this work had not been done to Code standard. And the obvious inference from this inadequate work was that the builder had cut corners. There should at that point have been an accumulation of evidence pointing to serious concerns about the building.

Deck construction

[186] Many of the decks had inadequate clearance between the deck timbers and the walls of the house. This was likely to cause water pooling and rotting of both the decking timbers and the weatherboards, allowing water to enter the house. This defect was easily seen. It related directly to building weathertightness.

Monolithic cladding

[187] Some of the lower monolithic cladding had been embedded in concrete. This had the capacity to rot the weatherboards and cover boards. It indicated a very poor quality of workmanship. It was easily viewable by the inspectors. And indeed the inspection reports noted the defect.

Underfloor defects

[188] Underneath the house some bearers were not connected to the joists. Drainage pipes were not properly installed. These defects would all have been obvious on inspection. In combination they should have concerned the inspectors. The extent and type of the defects should have told them that this building needed close inspection, including weathertightness checks, before the Council could say it was Code compliant.

Steel beam repair

[189] The steel beams in the subfloor area had primer paint but no other protective coat applied. There was conflicting evidence from the expert witnesses as to whether the Council would have insisted on a further sealing coat in 2001 and therefore whether the Council were negligent in issuing a CCC without requiring the beams to be painted with “top” coat. Today the steel beams are showing signs of surface corrosion and need to be scraped back, primed and sealed. The estimated cost is \$16,448 and is part of the plaintiffs claim.

[190] Mr Wutzler’s evidence was that the steel beams should not have been approved as Code compliant by the Council with only a primer coat. Mr Flay accepted that primer only might not meet the durability requirements under the Code but noted that an engineer’s certificate relating to the beams may have covered the situation. An engineer had provided a certificate relating to the beams prior to the CCC being issued. However, as Mr Saul pointed out the engineer’s certificate did not cover durability, the relevant issue with respect to painting of the steel beams.

[191] The weight of evidence favours the plaintiffs’ claim that the Council should not have approved the steel in the subfloor area being painted with primer only. This did not meet the durability requirements of the Code. Council inspectors had easy access to the subfloor area. Indeed, the inspectors’ records from 2001 show that the subfloor area was inspected. The fact that the steel beams only had a primer coat could therefore have been easily seen.

[192] I am therefore satisfied that the Council was negligent in issuing the CCC when the steel beams were not adequately painted and therefore would not meet the durability requirements of the Code.

[193] Further detailed inspections would, if competently done, have revealed many of the defects identified by Mr Wutzler and Mr Jones which have allowed water entry into the building. As the observable defects accumulated, a competent inspector would have understood there was reason to be concerned about the standard of construction and the weathertightness of the apartments.

[194] The inspectors' failure to observe the obvious defects and to require more detailed inspection of the building was negligent. It led directly to the certifying of the building as Code compliant when it was not.

Roof

[195] There was significant debate between the witnesses for the plaintiff and witnesses for the Council about inspections of the roof and whether a reasonable inspector could have seen the inadequacies of the roof, particularly the inadequacies of the roof flashings that are now known.

[196] I am satisfied that some of the defects on the lower roof could and should have been seen by the inspectors. Whether they would or would not have justified a wider inspection of the roof by themselves can be legitimately debated. But even if the initial inspection reasonably missed the defects in the roof flashings, the other serious inadequacies in the building identified above should have made Council inspectors aware of the serious inadequacies of construction. This in turn should have led to more detailed inspections of the rest of the building including the roof flashings.

[197] A reasonably competent inspector considering whether the building was Code compliant would have sought appropriate assurance that the roof and flashings were appropriately installed. This is especially so given the roof and flashings were important to weathertightness and adequate inspection was practically impossible in 2001.

[198] I accept that for the inspectors to require scaffolding to be installed so they could inspect the roof would be an absolute last resort. Their approach should have been to require the owners to satisfy the Council that the roof and flashings had been installed to an appropriate standard. The Council might accept a producer statement from the roofer who had undertaken the work if from the Council's knowledge of the work done by the roofer, he could be fairly relied upon.

[199] In the alternative, some form of independent inspection of what could be seen without scaffolding (for example, with ladders) was needed. If some form of

additional inspection had been undertaken even without scaffolding, I am satisfied such an inspection would more likely than not have revealed reasons to be concerned about the installation of the roof flashing, at least on the lower roofs. This, together with the other building issues, also should have led to a further comprehensive inspection of the whole roof. This, in turn, would have revealed a range of inadequacies with the roof flashing.

[200] The other inadequacies with the roof (for example inadequate nailing) would not have been visible on first inspection. But again, other defects warranted a comprehensive examination of the roof which would have revealed them.

[201] Mr Wutzler identified a number of defects within each of the 13 categories of defects (see at [40]). These were reproduced in a schedule of defects which a number of the witnesses used as a basis to comment. In this judgment I do not assess whether all these allegations are made out and if so whether each defect should have been seen by the Council inspectors. I have taken a different approach. I have concluded that there were a number of fundamental defects in the construction of this building which led to watertightness problems. These defects were there to be seen by a competent Council inspector.

[202] If they had been seen a competent inspector would have carried out a detailed and comprehensive inspection of the building. More inadequacies in the building work would have been revealed. A CCC would not have been issued for the building in that state. Perhaps as the Council says, some of Mr Wutzler's "defects" were either not defects or were not reasonably discoverable by a competent inspector. But the vast majority were not in this category. And many of the defects directly relevant to watertightness were easily able to be seen.

[203] I am therefore satisfied that in issuing the CCC the Council inspectors were negligent in their inspection and in turn negligent in certifying that the building had been built according to the Code when that was clearly not the case.

Negligence and the damage caused

[204] In the evidence of Mr Wutzler and Mr Jones, the two remediation experts, there was significant disagreement about the extent of the defects in the building. Mr Wutzler saw many more defects than Mr Jones. But what was in common was this basic proposition: the building had been constructed in a way which allowed water entry. This, in turn, had caused substantial damage to the building. The main causes of water entry appeared to be through roof flashings, window and door flashings and at deck and building junctions.

[205] I am satisfied the failure to identify the inadequacies of the bearer connections and the drainage inadequacies was negligent¹³ and the Council should not have certified code compliance while these inadequacies existed, and should not have issued a CCC on 1 June 2001.

[206] In each purchase of each unit by the plaintiffs, the contract was conditional upon a CCC for the building (or the particular unit). It is clear that unless there was a CCC for the particular unit, none of the plaintiffs would have purchased their unit. They would not have suffered loss if the Council had not been negligent in its issue of the CCC. Thus, the plaintiffs' loss arises directly from the actions of the Council.

Retaining walls

[207] A significant part of the dispute about the proposed repair to the units is whether the Council should pay for three retaining walls. The plaintiffs maintain these walls must be built to ensure code compliance. The cost of the proposed retaining walls is over \$300,000.

[208] The plaintiffs' case is that part of the Council's negligent failure in issuing a CCC was that it failed to identify the need for one retaining wall in the subfloor area and two exterior retaining walls on the boundaries of the building site. The inspection by the Council should have identified the need for these retaining walls. Thus, the CCC should not have been issued because without the retaining walls the building would not have complied with the Building Act and Code.

¹³ At [188].

[209] The Council says that in part these causes of action are time barred but if not then the plaintiffs have not established the need for retaining walls for the building work to comply with the Building Act and Code for the issue of a CCC.

Limitation

[210] I turn initially to the limitation point. The Council submits that the causes of action relating to two of the three retaining walls are time barred. This claim is based on the proposition that the original statement of claim filed on 19 April 2011 did not raise any claim in relation to one of the external retaining walls and the subfloor retaining wall. Thus, the Council says, that specific claims relating to those two walls were first raised in the April 2013 pleadings. As a result they are beyond the 10 year limitation period in s 393(3) of the Building Act 2004.

[211] The statement of claim filed on 19 April 2011 made a claim in relation to:

- 5.4 Defects in relation to the subfloor.
- 5.5 Defects in relation to the exterior (lack of adequate retaining of the ground).

[212] This claim was expanded upon in the Defects Schedule attached to the statement of claim. The relevant portion said:

- 5.5 Defects in relation to the subfloor:
 - 5.5.1 lack of adequate retaining of the ground on the northern side of Unit 1.

[213] In the 25 April 2013 amended statement of claim, the relevant pleadings were as follows:

- 5.5 Defects in relation to retaining of ground:
 - 5.5.1 lack of adequate retaining of ground including:
 - the soil face at the north east side of Unit 1;
 - the soil face at the north west deck of Unit 4;
 - the excavated soil face in the subfloor.

[214] I am satisfied the allegations at para 5.5 of the amended statement of claim of 25 April 2013 are not new causes of action but are a more precise pleading of the allegations in the 19 April 2011 pleading. I am satisfied that the Council would have known that the plaintiffs in their April 2011 pleadings were claiming defects in the retaining walls in the subfloor area of the building as well as defects by way of lack of retaining walls on the land exterior to the building. The 2013 pleadings were therefore essentially further and better particulars of the 2011 pleadings.

[215] The plaintiffs say three retaining walls were required to make the building code compliant. One in the subfloor area, one on the north side of Unit 1 and one on the north western face of a cut beyond Unit 4's western deck. The Council accept the 2011 pleading explicitly included the retaining wall to the north of Unit 1.

[216] The only possible complaint that the 2011 pleadings did not identify relates to the soil face beside the north west deck of Unit 4.

[217] As to the subfloor retaining wall, the 2011 statement of claim makes it clear that the plaintiffs were making claims in relation to the subfloor area and that one of those defects was a lack of a retaining wall. Confusingly, it described the inadequate subfloor retaining as being in the northern side of Unit 1 rather than the south western side of Unit 2. However, I am satisfied the essence of the claim relating to the retaining of the subfloor area was identified in 2011. The exact position of the retaining wall was a detail that did not go to the essence of the claim.

[218] As to the north western retaining wall, the 2011 pleadings identified lack of retaining of the ground in the exterior as a ground of claim. The Defects Schedule mentioned the northern wall but not the north western wall. However, the reference to the northern wall was somewhat confused as I have noted. It was raised in the context of subfloor defects, but was in fact an exterior defect. These details, however, illustrate that after the 2011 pleadings the Council would have known it faced claims in relation to exterior and subfloor retaining walls. The plaintiffs could be expected to provide the Council with further particulars of where the retaining walls should have been built at a later point. But the failure to mention particular sites in their 2011 pleadings did not mean the mention of a subfloor or exterior

retaining wall in a different location as a defect became a new cause of action. I am therefore satisfied the north west retaining wall was not a new cause of action in the 2013 pleadings.

[219] I am satisfied therefore that the pleadings in relation to all three retaining walls were contained in the April 2011 pleadings. In relation to the issue of the CCC in 1 June 2001, all came within the 10 year limitation period.

Were the retaining walls required for a CCC?

[220] The next issue is whether the Council was negligent in issuing the CCC without requiring three retaining walls to be built to an appropriate standard.

[221] As the Council identified, to comply with the Code relating to retaining walls the building had to be:

- (a) not likely to be affected by damage from slope collapse in a 20 year return period earthquake at each of the three slope sites (considered separately); and
- (b) not likely to collapse or be severely damaged in a 450 year return period earthquake at any of the three sites (considered separately).

[222] Thus, if the unretained ground did not meet the 20 year and 450 year earthquake tests, then the building would not meet the Code requirements. This required two assessments. First, would the slope likely collapse in such earthquakes? Second, if it did, what would be likely damage in the 20 year and 450 year return earthquakes?

[223] I accept the Council's submission that the only possible reason to require retaining walls for each of the three slopes is the potential danger from earthquakes. There is no evidence of any danger of slope collapse without earthquakes.

[224] The Council identified the following matters (which I have amended) as relevant to an assessment of whether the Council was negligent. I accept they are helpful. The following questions need to be assessed:

- (a) What risk of failure is inherent in the cut slopes?
- (b) What is the likely effect of a failure of the cut slope on the building?
- (c) Should the risk identified in (a) and (b) have been identified on inspection and if identified result in the refusal of a CCC?

[225] Mr Davidge was the plaintiffs' geotechnical expert. The Council did not have any direct evidence from a geotechnical expert. The Council did not instruct such an expert until very late in the trial preparation period. They applied for that expert to give evidence late at trial. I refused the application.¹⁴ I consider each slope separately.

Is the north east slope likely to collapse in an earthquake?

[226] Mr Davidge's evidence was that the slope at the north east corner of the property beside Unit 1 was overly steep (at about 80 to 85 degrees to the horizontal). It was unstable and should be retained. If it was not retained there was a likelihood the slope would collapse in an earthquake and cause significant damage to the unit and endanger life.

[227] Mr Davidge said he assessed the "Factor of Safety" (FOS) for slope stability for this slope was about 1.0. He said that the Code required a FOS of 1.5. The FOS of 1 was below the safety factor required by the Code.

[228] Mr Davidge first carried out a risk assessment on the slope using a "Hazard Failure Report" procedure developed by the Wellington Regional Council. He said the risk assessment considered the severity of six key factors and this, in turn, enabled the calculation of slope stability from very low to very high risk. Each of the three slopes in this case were assessed as being at high risk of failure. That

¹⁴ *Body Corporate 90247 v Wellington City Council* [2013] NZHC 2962.

assessment was essentially because they were overly steep, relatively high and composed of exposed soil of uncertain strength.

[229] Given the closeness of this slope to the building the primary mitigation of this risk, Mr Davidge said, was to construct a retaining wall. Mr Davidge conceded in cross-examination that the soils in the banks were of relatively high strength.

[230] The evidence of the two recent earthquakes in Wellington has, the Council says, established that the building would not be damaged in a 20 year return earthquake from lack of retaining walls. The two earthquakes recently felt in Wellington caused forces approximately equal to a one in 20 year earthquake level to be applied to the site but caused no obvious damage to any of the slopes at 14C Glenmore Street.

[231] The plaintiffs' case is therefore that the building would be severely damaged in an "ultimate" earthquake, that is, a one in 450 year return earthquake.

[232] The Council disputed Mr Davidge's evidence that the slope is at high risk of collapse and that an earthquake-generated failure would cause severe damage to Unit 1 in a 450 year return earthquake.

[233] Mr Davidge said his assessment of the slope having a high risk of collapse and causing severe damage is based on his experience as a geotechnical engineer and on the use of the Regional Council Hazard Failure Report analysis. The Council challenged both the usefulness of assessing the vulnerability of particular slopes using this methodology and Mr Davidge's assessment that the slope had an FOS of 1.0. The Council said without these two measures Mr Davidge's experience alone would not be sufficient to establish the slopes required retaining.

[234] I agree broadly with the Council's criticisms of Mr Davidge's evidence. Mr Davidge said that he understood what essentially was his intuition (as to the need to retain the slope) would not be sufficient in Court to justify his view that the slope was at high risk of collapse, thus his use of the Regional Council analysis. However, I doubt the suitability of the Wellington Regional Council's measure, applied to a

particular slope, as a proper basis for concluding that the particular slope requires support.

[235] As Mr Davidge accepted, the key risk analysis factors in the Regional Council assessment are constructed in such a way that if the slope is a cut slope rather than a natural slope, the hazard risk will be assessed as high irrespective of any other factors. Each of the slopes in this case is a cut slope and so, based on this alone, using the Regional Council assessment, the risk of slope collapse in a one in 450 year earthquake is high. As counsel pointed out in cross-examination, the Wellington Regional Council is concerned with land use applications and this risk analysis tool was likely developed to assist planners in assessing such applications. This is quite different than using the analysis as a basis for saying a retaining wall is required for safety. Mr Davidge in response came back time and again to the proposition that any engineer would say a slope needed retaining which was up to 4.7 m in height (as he said the north east slope was) with an 80 to 85 per cent angle based on his intuition.

[236] There is nothing in the Regional Council report to suggest that this general risk assessment tool was intended to be applied to a specific slope to dictate specific safety and remediation requirements.

[237] Using the Wellington Regional Council hazard assessment tool meant that almost every slope of more than 45 degrees in the Wellington region was at high risk of collapse. Mr Davidge has accepted that there would be large numbers of properties in Wellington with unretained slopes which came within this high risk category using this assessment tool. I am therefore not convinced that where Mr Davidge's evidence relies upon the Regional Council assessment tool, it can be used to conclude the slope is at such a risk that significant collapse is probable in a 450 year return earthquake.

[238] The other factor taken into account by Mr Davidge is the FOS test. It was common ground that if that test resulted in a figure of 1.0 or less, then that indicated the slope was in imminent danger of collapse. Mr Davidge's figure was 1.0. A

figure of 1.4 and above was accepted as indicating no retaining wall was required and the slope was stable.

[239] The FOS figure is based on a range of factors including the height of the slope and the density of the slope. Mr Symonds is a geotechnical engineer. He is the witness the Crown sought leave to call to give evidence. As mentioned, I refused that application. However, the thrust of his proposed evidence was used by counsel for the Council to challenge Mr Davidge's evidence.

[240] As to the FOS, it was suggested that to use 4.7 m as the height of the slope was wrong because that was the highest point. Most of the slope was about 4 m high or lower. Further, it was suggested the density of the slope was more likely 20 kilonewtons rather than the 18 kilonewtons assessed by Mr Davidge.

[241] The difficulty is that whether 18 or 20 kilonewtons is correct or whether the correct height is 4 m or 4.7 m, cannot be adequately determined on the evidence that I have heard. The 18 kilonewton assessment was, as I understand it, a professional guess by Mr Davidge and 20 a professional guess by Mr Symonds (although his "evidence" cannot be taken into account). Mr Davidge did not undertake any scientific process which measured soil density – it was his best "professional" guess. The alternative figure suggested, 20 kilonewtons was little more than 10 per cent greater. Given Mr Davidge's figure was an estimate based on his experience it could not be said Mr Davidge's figure was clearly correct.

[242] The height of the slope was in a similar category. While the highest point was 4.7 m, most of the slope was less than this. There was no clear evidence as to what figure was the appropriate input to the FOS formula.

[243] If Mr Davidge's figures were changed so that an average height of 4 m rather than 4.7 m was used and 20 rather than 18 kilonewtons was used, the FOS figure was 1.4 to 1.5. This is a "safe" figure which indicated retaining of the wall would not be required.

[244] Given the imprecision about both pivotal input figures I am not satisfied I can conclude that the FOS figure is more likely 1.0 rather than 1.4 or 1.5. Essentially Mr Davidge's evidence came back to the proposition that he believed any slope at an 80 to 85 degree angle and up to 4.7 m high should be retained.

[245] My conclusion is therefore that neither of the methodologies used by Mr Davidge have been shown to be a reliable basis on which to assess slope stability in this case. I do not accept therefore there is evidence to establish likelihood of slope collapse in a 450 year earthquake. And in turn, I am not satisfied the plaintiffs have established that the Council were negligent in granting a CCC for the building without requiring a retaining wall on the north east slope.

Likelihood of severe damage or injury

[246] If I am wrong in this conclusion and collapse would be likely in a 450 year return earthquake, the Council say the risk was not such that there was likely to be severe damage to the building and/or injury to persons. This likelihood of damage needed to be established before retaining could be required as a prerequisite to the issue of a CCC.

[247] As I have observed, the recent Wellington earthquakes have effectively answered whether there will likely be damage to the building in a 20 year return earthquake. No such damage in fact occurred to the building. Mr Davidge said that a 450 year return earthquake "would result in major deep-seated instability in the existing steep cut profile" of the northern slope and he considered in those circumstances there was a risk of damage likely to result in injury or death to someone in the building. Mr Davidge considered there was potential for a "wedge" of slope to collapse into the building and to "push or punch" through the bulk of the building.

[248] If the collapse was a more shallow scallop of the bank than Mr Davidge accepted, that would likely involve about five cubic metres of material. In those circumstances, Mr Davidge accepted that such a collapse would be unlikely to endanger the building or threaten the safety of those inside even if some of the material pushed through the cladding.

[249] As to the structural effect on the building of such a five cubic metre slip, Mr Thompson, the plaintiffs' engineer, gave evidence. In his evidence in chief, Mr Thompson said he considered that in a major earthquake there was likely to be a large bank collapse and the foundations of the building were likely to be undermined, the reinforced concrete walls would suffer damage and injury or death to those in the building was a reasonable possibility. Mr Thompson thought there was a 10 to 20 per cent chance of the bank collapsing in such an earthquake and causing such severe damage to the building. At least at the local area of the slip, there would be significant damage to the building. But if the FOS figure was 1.1, then Mr Thompson accepted there would be no need for the Council to require a retaining wall.

[250] On balance I was not convinced that the plaintiffs had established there was a likelihood of severe damage to the building from the slope consequent upon a 450 year return earthquake. Clearly there is a chance of bank collapse but there is little evidence to say this will involve more than five cubic metres of material. A collapse of this size suggests damage to the wooden framing area of the north face of Unit 1 will occur. But I do not consider the evidence on balance establishes the likelihood of severe damage to the building or danger to occupants.

[251] There is some force in the plaintiffs' case that the building inspectors on seeing the slope cut should have asked the developer for some form of engineering assurance that there was no requirement for a full retaining wall. It seems probable they did not do so. Certainly there is no evidence to say such reports were ever obtained.

[252] However, the evidence does not convince me on the balance of probabilities that once the reports were obtained, they would have shown the need for retaining walls if the building was to meet Code standard. And so I am not satisfied the plaintiffs have established that a failure to retain the slopes should have resulted in refusal to grant a CCC for the property and that the Council was negligent in granting the CCC without requiring the north east slope to be retained.

North west slope

[253] The second slope that the plaintiffs say should have been retained is on the north western corner of the building above Unit 4. The slope is some 3 m from the unit. Mr Davidge's assessment of this slope was based on the same assessment as the other external slope on the north east side of the building. For the same reasons given with respect to that slope, I reject his evidence.

[254] Mr Thompson, the plaintiffs' engineer, said in his first brief of evidence that he considered that any failure would be unlikely to affect the building given the distance between the building and the slope. He thought that after any failure the resulting slope was likely to be even more stable. However, in his supplementary brief Mr Thompson said that he believed that a cantilevered wall was required to protect the building at this site.

[255] Mr Garrett is a professional engineer with over 50 years experience in structural engineering. His evidence was that the bank was stable and no form of retaining was required.

[256] I accept the possibility that a reasonable inspector would have obtained an engineer's report. However, I am not satisfied the plaintiffs have established the probability that any such report would have required a retaining wall at the north western slope. And so any failure to obtain the engineer's reports is more probably than not of no consequence. The plaintiffs' claim relating to the north western retaining wall therefore fails.

Under floor retaining wall

[257] When the foundations and excavation for the building were completed, a significant bank of clay and soil was left under the building. A retaining wall was in fact built. But the plaintiffs' case is that this area was inadequately retained. The Council's failure to adequately inspect this area and require the construction of a Code compliant retaining wall was negligent.

[258] Most of the evidence relating to retaining walls focused on the north east wall by Unit 1. Mr Thompson, the plaintiffs' engineer, considered that the existing ground backfill between the existing retaining wall and the excavated slope was inadequate. He considered that a further quantity of backfill, sufficient to fill the void to a height of 1.5 m above the existing fill was required. He considered that at present there was a high risk of soil failure which was likely to compromise the decks and house foundations.

[259] Mr Garrett, the engineer called by the Council, suggested there was an inexpensive solution to the underfloor inadequacies. He said the existing retaining wall could be backfilled at a very modest cost and so no new retaining wall was required. However, in cross-examination Mr Thompson pointed out that it was not possible to backfill the existing retaining wall because this wall had no support at the top. It was not therefore sufficiently strong to support further backfill. A new wall would have to be built before the necessary backfill could be emplaced.

[260] The evidence relating to the underfloor retaining wall was sparse. It is not mentioned in Counsel's final submissions in any detail. However, the evidence established the need to protect the foundations and decks in the event of a collapse of the underfloor slope. Mr Thompson's evidence was that in the event of a significant earthquake, collapse of the wall was probable. It seemed to be common ground that further subfloor retaining was required. I accept Mr Thompson's evidence that the "cheap" option suggested by Mr Garrett would not comply with the Code.

[261] The existence of the underfloor slope was easily able to be seen by an inspector going under the units. The inspection records show the inspectors did inspect under the units. In doing so, they should have noticed the slope and at least required an engineer's report on the stability and safety of the bank. The fact they did not do so was negligent. I am satisfied on the evidence I have heard that an engineer would have required a stronger retaining wall be built with more backfill. The plaintiffs have therefore established this part of their retaining wall claim. There was no challenge to the quantum of this aspect of the retaining wall claim. The cost of this retaining wall is \$22,133.

[262] Counsel for the plaintiffs expressed concern that the Council's position on the need for retaining walls would change once the plaintiffs applied for building consent for the necessary remediation work. Counsel for the Council gave an assurance that the Council would not require any of the three retaining walls in dispute in this case as part of any building consent requirement.

Solicitors' negligence and contributory negligence

[263] The Council alleged that each of the solicitors acting for each of the plaintiffs when they purchased their units were negligent because they failed to appreciate the CCC for consent 71330 related only to limited building work. Or they were negligent in failing to investigate the extent of the coverage of the CCC given its ambiguity. If the solicitors who acted for the plaintiffs were aware or should have been aware of the ambiguity of the CCC, but failed to act on that awareness, then such a failure could be negligent. The Council said that the plaintiffs were vicariously liable for the negligence of their solicitors. In the alternative, the chain of causation was broken by the solicitors' actions.

[264] I have concluded that the solicitors were not negligent and that even if they recognised the ambiguity no reasonable enquiry of the Council could have identified the allegedly limited CCC. If, however, I am wrong in this conclusion and the solicitors were negligent, then I will consider whether that negligence means the plaintiffs are vicariously liable for the acts of their solicitors and therefore should contribute to the negligence that gave rise to their loss and/or whether the chain of causation was broken.

[265] I have also concluded that the CCC issued with respect to Glenmore was for the whole building. And so the solicitors for the owners would not be negligent as the Council alleges in either failing to interpret the CCC as covering limited building work or in failing to make further enquiries. The solicitors correctly assessed the CCC as covering the whole of the building. However, if I am wrong in this then I go on to consider whether the solicitors were negligent as identified, if in fact the CCC was limited as the Council say.

Solicitors' negligence

[266] Prior to declaring their purchases unconditional, the solicitors for each of the purchasing plaintiffs sought and obtained copies of the CCCs for consents 71330 and 70437. The circumstances under which the Mulgan Family Trust's solicitor did so is somewhat different than the other three purchasers. However, each of the solicitors were faced with essentially the same enquiry with respect to the units their clients were purchasing – did the CCC cover the whole of the building work with respect to the unit? The evidence establishes that on each occasion the solicitor concluded it did. The Council say this conclusion was negligent or at least further enquiry should have been made to identify precisely what the CCC did cover.

[267] I have no reason to doubt that the owners of the units at Glenmore in 2001 and subsequent vendors and purchasers of the units and their solicitors all believed that the CCC provided by the Council in 2001 covered all the building work undertaken at 14C Glenmore Street. There is no evidence any vendor or any purchaser or their solicitors suggested that the CCC was anything other than comprehensive.

[268] The fact that four unrelated solicitors all interpreted the CCC one way is relevant evidence in this assessment. But it is not determinative. All the solicitors could have been negligent.

[269] Some context is necessary. Each of the solicitors knew the CCC had been prepared for a new construction, not a renovation. In building renovation, it is particularly important to identify exactly what work has been done and what part of that work is covered by the CCC. Here, a new property had been built and the expectation would be for a whole of building CCC. But a solicitor would need to be alive to the possibility it did not cover all the building work.

[270] The Council says that the plain words of the CCC show its limited reach. At the very least there is ambiguity. The conditions of the CCC for 71330 state:

This certificate relates only to building consent 71330. Nothing in the certificate states or implies that the following building work at the same address complies with the Building Code:

SR number: 15997 – New Dwelling (please note this consent has been lapsed and is considered cancelled. Building consent 71330 was issued for the completion of the apartment).

[271] The Council emphasised that the words that nothing in the certificate states or implies that the building work completed under the original consent complies with the Building Code should have brought the problems with the certificate to the solicitor's attention.

[272] The difficulty with that submission is that again it depends upon the interpretation of the CCC. I have already concluded the CCC meant: although the original consent has lapsed and the CCC does not relate to that consent, there is a new consent for the whole building which did relate to the building work. On that interpretation of the CCC there was nothing for the solicitors to further investigate.

[273] And further, under "Project Description" the certificate says:

Plumbing and building to complete consent of units 1–4 for CCC related to notice to rectify under SR 69193.

[274] Now that there is a detailed understanding of Glenmore's construction history, the Council's and the developer's involvement and the inspection process, it is possible to see an ambiguity in the conditions of the certificate and thereby its reach. The wording of the certificate could mean that it covers all the building work to the completion of the building or only the very limited building work undertaken relating to plumbing and handrails, being the final work to "complete" the construction of the units in 2001.

[275] The "Project Description" includes a reference to the NTR. Crucially, it also states the project is to "complete consents" for Units 1 to 4 at Glenmore Street so a CCC can be issued. This implies that once the work is done there will be full (complete) building consents for the building. What follows is therefore a CCC for the completed building.

[276] And so a solicitor considering the CCC has:

- (a) a CCC which is for all the building work in 71330. The CCC states that although the original consent has lapsed, a building consent had been issued for the completion of the unit;
- (b) the Project Description in the CCC is to complete consent on the units for a CCC. It refers to the NTR;
- (c) the NTR tells the enquirer the building is complete but the building consent has lapsed so a retrospective consent is required;
- (d) the building consent in 71330 is to “complete consent” for the units for a CCC. It also refers to the NTR.

[277] I am satisfied that a reasonable lawyer, by reading all the relevant documents, would be entitled to interpret the CCC as saying that the original CCC for the building had lapsed and was cancelled, but that a new consent had been issued to complete the units and that a CCC was being issued to all the four units.

[278] Neither the CCC nor any LIM suggest that the CCC is for a very small part of the building work (modest plumbing and some handrails) and that the vast majority of the building has no CCC as the Council claims. That fact would obviously be vital information for any prospective purchaser and for the owner of each unit. This would be especially important in a new build.

[279] Each of the important documents (the CCC, the building consent and the NTR) mention a new consent for the completion of the building so that a CCC could be issued. A search of the Council file would have revealed an interim CCC which had no conditions attached. The Council files reveal that the building had a consent for a substantial part of the building work and a retrospective consent would be available for the work done to complete the building.

[280] And so in summary: the documentation relating to the CCC pointed to a new consent for the completion of the building on which the CCC would be issued and

implying the whole construction would be covered; the interim CCC had no restriction in its terms; there was no statement in any Council document, CCC, LIM or otherwise that explicitly said the CCC issued for a new building only covered a tiny fraction of its building work.

[281] Given these facts, I am satisfied that the plaintiffs' solicitors were not negligent in their interpretation of the CCC nor in failing to identify what the Council say was an ambiguity in the CCC and investigating further.

Plaintiffs' liability for contributory negligence of solicitors

[282] If I am wrong in my assessment of the solicitors' negligence, and assuming that each of the solicitors acting for the purchasers was negligent, the Council claims that the plaintiffs are vicariously liable for the actions of their solicitors. Thus the Council says, in terms of s 3(1) of the Contributory Negligence Act 1947, the damage the plaintiffs have suffered is partly the result of their own fault. The Council submits that in the circumstances the plaintiffs' contribution to the fault of its own loss (through their solicitors' actions) is substantial and a 70 to 90 per cent contribution would be appropriate.

[283] Conventionally a litigant is not vicariously liable for an independent contractor's negligence.¹⁵

[284] Solicitors are typically independent contractors. Whether a plaintiff is contributorily negligent arising from their own solicitor's negligence is ordinarily determined by the "both ways" or "identification" rule.¹⁶

[285] The both ways rule can, in this case, be expressed as follows. The solicitors' negligence can only be attributed to a purchasing plaintiff if that plaintiff (sued in tort as a defendant) would be liable to another for its solicitor's negligence.

¹⁵ Exceptions are typically where there are foreseeable damages or non delegable duties: *Cashfield House Ltd v David & Heather Sinclair Ltd* [1995] 1 NZLR 452 (HC) at 461; Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Brookers, Wellington, 2013) at [22.5.01].

¹⁶ *O'Hagan v Body Corporate 189855* [2010] NZCA 65, [2010] 3 NZLR 486 [*Byron Avenue*] at [186].

[286] It is difficult to think of any credible circumstance where any of the Glenmore purchasers could be liable to another for the negligence of the purchaser's solicitor. And so prima facie the Glenmore purchasers would not be vicariously liable for the acts of their solicitors. Therefore, no contribution could be required from them to any damages award against the defendants arising from their solicitors' negligence.

[287] There are, however, exceptions to the "both ways" rule. And the Council says this case comes within those exceptions. The exceptions to the rule were discussed by the Court of Appeal in the *Byron Avenue* decision.¹⁷

[288] In *Byron Avenue* one of the plaintiffs, Mrs Kim, did not request a LIM before she bought a unit in a defective building. She instructed a solicitor but the solicitor negligently failed to advise her to obtain a LIM. The Court held unanimously that while the "both ways" rule applied, Mrs Kim was contributorily negligent by identification with the negligence of her solicitor.

[289] Arnold J and William Young P took much the same view on the matter. William Young P's reasoning turned on a policy exception to the "both ways" rule. He considered that to follow the both ways rule in the circumstances would produce an arbitrary result. The local authority would be worse off simply because it was the solicitor and not the purchaser who failed to obtain a LIM. He considered that it was no answer to say that the Council could seek a contribution from the solicitor because privilege would make that impractical.

[290] Arnold J stressed that in this transaction the solicitor was essentially the client's agent. And in those circumstances it was reasonable as a matter of policy that the client should be responsible for the solicitor's default. The client, in turn, could therefore seek recovery of the loss from the solicitor.

[291] Baragwanath J took a rather different approach. He considered that the LIM procedure had been introduced by Parliament to protect purchasers. Purchasers

¹⁷ *Byron Avenue*, above n 15.

therefore had an obligation to obtain a LIM to protect themselves. Accordingly, Mrs Kim could not protect herself by delegating the responsibility to her solicitor.

[292] Baragwanath J's approach is therefore based on the proposition that the purchaser owes the Council a non delegable duty to obtain a LIM report. The fact that she delegated that responsibility to her solicitor did not absolve her from responsibility.

[293] I now apply those principles to this case. I consider that interpreting the content of a CCC is in a different category than the obligation to obtain a LIM. Here the solicitors obtained a copy of the CCC. The negligence was alleged to be a failure of interpretation of the CCC and/or a failure to enquire further after seeing an ambiguous CCC. While obtaining a CCC could be seen as the equivalent of obtaining a LIM (and both are designed to provide consumer protection), the interpretative task could not be seen as typically that of a purchaser. Interpretation of such a "technical" document as a CCC or carrying out research as to the scope of a CCC is lawyerly work.

[294] Here, I am satisfied the solicitors were performing an independent and expert function in interpreting a CCC. The solicitors were not, in contrast with obtaining a LIM or indeed merely obtaining a CCC, performing an agent's function.

[295] On this assessment the plaintiffs would not be vicariously liable were they sued for the tort of their solicitors. They should not therefore be vicariously liable on a contributory negligence basis as claimed here.

[296] I am therefore satisfied that in the circumstances of this case, the plaintiffs are not identified with their solicitors' negligence, and that their solicitors' conduct cannot amount to contributory negligence on the part of the plaintiffs.

Private building inspectors' negligence

[297] The Council also maintains that the two private building inspectors' reports in 2009 and 2010 for the second and fifth plaintiffs, in anticipation of their purchase of Units 1 and 4, were negligently completed. The Council says the inspectors'

negligence meant the second and fifth plaintiffs were vicariously liable for their own loss.

[298] I have identified the relevant tests for vicarious liability in the section in this judgment relating to solicitors' negligence and contributory negligence and I adopt that approach here.¹⁸

[299] The first question therefore is whether the Council have proved that the inspectors were negligent in their inspections of the units and consequently in the reporting to their clients, the second and fifth plaintiffs.

[300] I am satisfied that both inspections were negligently carried out. The reports identified the general condition of the units as good to average. They said some maintenance needed to be completed on the properties. In particular some rotting boards would need to be replaced. There was no concern expressed in either report that the building might have weathertightness issues or have any inadequacies other than some outstanding maintenance.

[301] The property inspection report for Unit 1 was completed in February 2010. The report noted the building was generally sound but with some maintenance issues to attend to. The report notes that with respect to the windows "all obvious weather proofing measures have been taken". The priority repairs listed are all relatively minor maintenance issues.

[302] The property inspection report for Unit 4 was undertaken on 23 October 2009. The property received grades of "average" to "generally good" and "good". There were no areas that were described as poor.

[303] Non-invasive moisture tests were said to have returned acceptable levels. In particular the roof and windows were said to be in generally good condition. The report noted some rot in the weatherboards by one of the decks. Replacement of the weatherboards was suggested. The report did not suggest any investigation of the

¹⁸ At [278]–[292].

cause of the rot or remark on the obviously defective construction of the deck in relation to the weatherboards.

[304] I have concluded that Council inspectors should have picked up many obvious weathertightness problems with the building in 2001. It is reasonable to assume eight to nine years later, with the significant advancements made in industry awareness of leaky building problems, a private building inspection firm should have picked up many of the weathertightness problems in their inspection.

[305] I acknowledge Council inspectors and privately commissioned building inspectors have quite different functions. Council building inspectors inspect a building on multiple occasions for many hours throughout its construction. They are able to see each part of the building as it is built. Council inspectors will therefore be very familiar with the building by the time they consider whether to issue a CCC. The Council inspector's purpose is to ensure compliance with the Code and Act and ensure the building is constructed in accordance with the building consent.

[306] Pre-purchase privately commissioned inspectors have a different role. They generally inspect the property after it has been built. The inspection will only be for a few hours, typically on one day. Their brief is relatively narrow, essentially to identify: any significant defects; any gradual deterioration of the property; any significant maintenance required; and any potential problems with the building that would be relevant to a purchaser and which might require further investigation. They charge a limited fee, typically around \$400 in 2009/2010.

[307] New Zealand Standard NZS 4306/2005, Residential Property Inspections, sets out the scope of the standard for residential property inspections.

[308] It identifies the following areas relevant to this case where inspections of a building should be undertaken: pile to bearer connections; dampness and moisture damage to timber framed houses; flashings and clearances particularly relating to decks; roof underlay and support; and ground clearance of timber framing.

[309] In addition, Appendix A to NZS 4306 identified a number of weathertightness risk factors of relevance to this property that should have been considered, inspected and reported on by the inspectors. If proper attention had been paid to NZS 4306 then defects in the building would inevitably have been discovered and reported on in 2009 and 2010 by the inspectors.

[310] This building had observable defects in 2009/10. Some defects were noted by the private inspectors, for example, rotting weatherboards and the connection between the weatherboards and the decking. The private inspectors' reports suggested replacement of a weatherboard that was rotten. But there was no recognition by either inspector of the possibility of a more deep seated weathertightness problem arising from the cause of the rotting weatherboard. This was an important failure. A competent inspection would have recognised there were serious defects in the building which raised serious watertightness problems.

[311] Acknowledging the differences between Council inspectors and private building inspectors, there were a number of defects which I have concluded should have been seen by the Council inspectors and which private building inspectors should have identified and at least given cause for further investigation.

[312] I have previously identified these defects.¹⁹ They include inadequate window flashings, the deck/cladding problems, the monolithic cladding joints, and subfloor defects.

[313] I am satisfied therefore that the two inspections undertaken on Unit 1 and Unit 4 were done so negligently. The inspectors should have identified a number of defects in the building which should have given rise to serious concern about the building's weathertightness requiring further investigation. Failure to do so was negligent and resulted in negligent reporting to their clients, the second and fifth plaintiffs.

¹⁹ At [169]-[199].

[314] The second question is therefore whether the plaintiff owners of Unit 1 and Unit 4 are vicariously liable for their inspectors' negligence and therefore are required to contribute to the loss they say they have suffered by the negligence of the Council.

[315] I apply the same test from the *Byron Avenue* case as I have with respect to the allegation of solicitors' negligence, vicarious liability and contributory negligence.

[316] I am satisfied that the plaintiffs are not vicariously liable for the negligence of their two building inspectors. First, it cannot be said that undertaking a building inspection is a non delegable duty of the plaintiffs and that the inspectors are simply acting as the plaintiffs' agents in this case. Building inspection is a specialised skill which the typical purchaser could not be expected to personally carry out.

[317] Thus, in terms of Baragwanath J's analysis in *Byron Avenue*, no exception has been identified to the conventional position as to the application of the vicarious liability rule. Thus, the plaintiffs would not, under the approach of Baragwanath J, be vicariously liable for the building inspectors fault.

[318] As to William Young P and Arnold J's analysis, there is nothing to suggest that for policy reasons the burden of negligent pre-purchase inspection should fall on the house purchaser. As William Young P said in *Byron Avenue*:²⁰

I would, at least usually, take a different view where the person from whom the purchaser sought advice was a builder or architect (or like person) whose advice was directed to the soundness of the building. Such an adviser will hardly ever be an agent of the purchaser and there would thus usually be no scope for attribution based on the application of the both ways rule.

[319] I am therefore satisfied that the "both ways" rule applies. There are no applicable policy exceptions and the building inspectors' negligence cannot be attributed to the plaintiffs. The plaintiffs therefore are not contributorily negligent because they are not vicariously liable for the negligent actions of their building inspectors.

²⁰ *Byron Avenue*, above n 17, at [147].

Causation

[320] The Council submits that the negligent actions of the solicitors and/or the building inspectors caused a break in the chain of causation such that the Council is no longer the cause of any loss by the Glenmore plaintiffs. I consider, first, the causation issue with respect to the actions of the plaintiffs' solicitors. This assumes solicitor negligence (although I have concluded the solicitors were not negligent).

[321] In *Sunset Terraces* the Supreme Court affirmed that an intervening cause may remove all causal potency from the original negligence and become the real cause of the damage.²¹ Where it does so then the chain of causation may be broken. The intervening cause can arise from the conduct of a third party or can arise from the conduct of the plaintiff itself. In *Sunset Terraces* the Supreme Court accepted that a prospective purchaser who failed to request a LIM (assuming the LIM would probably have disclosed the defects) was likely to be negligent and that such a negligent failure could amount to a new and independent cause of the loss and therefore break the chain of causation.

[322] In assessing whether there has been a break in the chain of causation, the first step is to assess whether the solicitors' negligence is one of the causes of the plaintiffs' loss. This requires a "but for" test: would the plaintiff have suffered the loss without the solicitors' wrongdoing? If not, then the solicitors' conduct was a cause of the loss.

[323] The correct counterfactual in such a circumstance requires an assumption that the solicitors are engaged by the plaintiff and that they perform with reasonable care. The question then is if the solicitors had taken reasonable care, would the plaintiff have purchased the property or negotiated a discount and therefore would they have suffered any diminution in value?

[324] Here, if the solicitors had acted with reasonable care (assuming negligence by the solicitors), then they would have ascertained that the CCC did not cover all of the building work at Glenmore. The plaintiffs then may well not have purchased the

²¹ *North Shore City Council v Body Corporate 188529* [2010] NZSC 158, [2011] 2 NZLR 289 [*Sunset Terraces*] at [83].

property or may have negotiated a discount to reflect the lowered value. They would hardly have proceeded to purchase their unit on the same basis as their original contract.

[325] Accordingly, applying the “but for” test the plaintiffs would not have suffered loss without the solicitors’ wrongdoing. The solicitors’ negligence therefore in those circumstances, is one of the causes of Glenmore’s loss.

[326] Thus, the negligence of the Council and the solicitors are both causes in fact of the plaintiffs’ loss. But is the subsequent negligence by the solicitors such that it breaks the chain of causation between the Council’s negligence and the loss suffered by the plaintiffs? If it does then it would become the sole cause of the plaintiffs’ loss in law.

[327] This is determined by an assessment as to whether or not the plaintiffs’ actual loss was within the scope of the risk created by the Council’s conduct. If it was then the solicitors’ negligence would not have broken the chain of causation. If it was not then the solicitors’ negligence would have done so.

[328] The plaintiffs say that the Court of Appeal’s approach to determining whether the intervening act of a third party amounts to a break in the chain of causation set out in *Sherwin Chan & Walshe Ltd (in Liq) v Jones* is the correct approach here.²²

[329] There the Court said:

[36] In *Bank of New Zealand v New Zealand Guardian Trust Co Ltd*, this Court approved a composite test for determining liability in performing professional services. Two corresponding elements are relevant: one is identification of the scope of the duty; the other is identification of the risk against which the professional had a duty to protect the client. In adopting this approach, the Court was influenced by *South Australia Asset Management Corp v York Montague Ltd*. The House of Lords there drew a distinction within the causation inquiry between an assumption of a positive duty to advise on a course of action and a lesser duty to inform. In the former case the professional is responsible for all the foreseeable consequences of his or her negligence; in the latter the professional is responsible only for the consequences attributable to the wrongful information.

²² *Sherwin Chan & Walshe Ltd (in Liq) v Jones* [2012] NZCA 474, [2013] 1 NZLR 166.

[37] In policy terms this approach is designed to ensure that the wrongdoer is not liable for losses arising from an independent cause in circumstances where the breach of duty simply creates or allows an opportunity for loss. This is sometimes referred to as the “but for” or distant nexus test, postulating liability for an event which would not have happened without the originating negligence. It is not normally a sufficient basis for fixing liability in contract. However, labels can mislead. The principle is not absolute in an area where the ultimate inquiry is shaped by the particular facts. So, where the professional assumes an affirmative duty to advise on the appropriate course of action, rather than simply to inform, a modified “but for” test may be appropriate, buttressed by a requirement that the negligence has a real influence on the cause of loss.
(footnotes omitted)

[330] The issue of a CCC is a function of the Council’s inspection role. The Council inspects the building which has a (building) consent during the currency of the building work. At completion it issues a CCC if it is satisfied that its inspections confirm a code compliant building. The Council owes a duty of care in both the inspection role and in its role in issuing a CCC to subsequent purchasers of buildings. The scope of that duty as far as inspection is concerned was described by the Supreme Court in *Sunset Terraces* in this way:²³

... homeowners are entitled to place general reliance on councils to inspect residential premises with appropriate skill and care.

[331] However, the Supreme Court pointed out:²⁴

What loss the homeowner may be able to claim on account of the breach may be influenced by the absence of a CCC and whether the owner should have been aware of that fact. The point may go to causation or it may go to contributory negligence.

[332] Thus, in some circumstances if a home owner has failed to ascertain whether a building has a CCC then the Council may not be required to cover that risk. That principle may apply equally to a situation where there is a failure to ascertain what, if any, part of the building has a CCC.

[333] The fundamental question is whether a negligent inquiry into a CCC by a purchaser’s solicitors is within the scope of risk that falls on the Council as part of its duty of care.

²³ *Sunset Terraces*, above n 20, at [61].

²⁴ At [61].

[334] Local authorities have been responsible for the oversight of building work in New Zealand for decades.²⁵ The Building Act and other legislation gives a council significant control over building work in their territorial area. With this control comes a corresponding duty. That duty has been expressed as an obligation to properly control building work, to use reasonable care to inspect the building, to ensure compliance and to take reasonable care that a building is indeed code compliant when a CCC is issued.

[335] And so it is the local authority which is ultimately responsible for ensuring that houses are properly built. Houses will typically pass through various hands over the years and each purchaser is entitled to assume that where a CCC is issued, their interests as purchasers and occupiers have been protected by the Council with respect to the building work covered by the CCC.

[336] I now apply that analysis to the facts of this case. Here, the Wellington City Council would have been well aware that where it failed to provide accurate information to a purchaser through its inspections and the CCC, then it was likely to be liable for the loss resulting from the purchase of a defective building. Issuing LIMs and CCCs, in slightly different ways, provides opportunities for the Council to tell potential purchasers of the standard of the building work measured by its compliance with the Code. For example, if a purchaser does not get a LIM they do not give the Council a chance to right its wrongdoing and to “absolve themselves from any earlier negligence on their part”.²⁶

[337] Here, the allegation of negligence is that the solicitors failed to either pick up on an ambiguity in the Council’s CCC or failed to investigate the ambiguity in the CCC.

[338] The presence or absence of a CCC for building work (here, the construction of a building) is a way of telling potential purchasers that the building either is or is not up to appropriate standard.

²⁵ See *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA).
²⁶ *Sunset Terraces*, above n 20, at [81].

[339] The Council knew there were uncertainties about the building consent process, the inspection process and accordingly the CCC process. It knew and understood the importance of CCCs for both the vendor and purchaser in any property transaction. But the Council's ambiguous CCC (assuming for this purpose it was ambiguous) did not make it clear to a prospective purchaser the exact extent of the building work covered by the certification. This, as the Council would have understood, went to the heart of its certification obligation – identifying the scope of the building work that the Council was certifying had been built in accordance with the Code.

[340] The Council is responsible for that ambiguity. In those circumstances I am satisfied the provision of the CCC and the information relating to the original building consent in the CCC²⁷ was not sufficient for the Council to absolve itself of its earlier negligent inspections. A solicitor negligently inspecting an ambiguous CCC is within the scope of the risk created by the Council's negligence.

[341] I am satisfied therefore that the plaintiffs' solicitors' negligence did not break the chain of causation.

Building maintenance

[342] The Council's case was that inadequate maintenance over the life of the building had contributed to the damage to the building and therefore the loss suffered. Thus, the plaintiffs had contributed to their loss and this contributory negligence should be taken into account in assessing damages.

[343] I note that this issue was not included in the Council's final written submissions. Prior to April 2010 the individual property owners looked after the maintenance of their own units. In April 2010 the owners had their first body corporate meeting. A maintenance programme was set in place and some maintenance commenced. I note the private inspection reports with respect to Units 1 and 4 said the units were in average to good condition but with some maintenance required.

²⁷ See above at [134] and [140].

[344] I accept Mr Wutzler's evidence that even if there was a basis to claim some maintenance of the building had been delayed or neglected, there was nothing to suggest that any such delay or any lack of maintenance was causative of any damage to the building. Mr Jones, the relevant witness for the Council did not give any evidence which specifically contradicted this evidence, nor did he identify any particular inadequate maintenance which might have actually contributed to the loss or damage here.

[345] I therefore reject the Council's claim relating to this aspect of contributory negligence.

[346] The other complaint by the Council was that the plaintiffs should have exhausted their remedies against the solicitors and/or the private building inspectors before suing the Council. I accept the plaintiffs' case that there is no rule of law which requires them to sue either the solicitors or the inspectors prior to suing the Council.²⁸

[347] The Council could have joined either or both the solicitors and the inspectors as joint tortfeasers. It did not do so.

[348] Finally, the Council claimed that with respect to the later purchases of the units the solicitors and/or the purchasers were negligent in failing to obtain a LIM report at the time of purchase. However, there is no evidence that there was anything in any LIM report which would have alerted the purchasers to the problems. I reject this claim.

Summary so far

[349] I will now summarise my conclusions so far in this judgment. I am satisfied that:

²⁸ *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726 at [68] and [73].

- (a) the Council owed the purchasers a duty of care with respect to the inspection of the building and the issue of the CCC;
- (b) the CCC issued for 14C Glenmore Street related to the whole of the completed building;
- (c) the proceedings relating to the CCC include the inspections on which the CCC is based and are not time barred;
- (d) each of the plaintiffs relied upon the CCC in purchasing his or her unit;
- (e) the inspections on which the CCCs were based and the CCC itself were negligently undertaken and issued respectively;
- (f) the solicitors acting for the plaintiffs were not negligent relating to their advice with respect to the CCC but if they were, the plaintiffs were not vicariously liable for their solicitors' negligence;
- (g) the private building inspectors were negligent in their inspections of the building but the plaintiffs were not vicariously liable for the actions of their building inspectors;
- (h) the chain of causation was not broken by either the actions of the solicitors or the private building inspectors;
- (i) the Council therefore as a result of their negligent actions are liable for the plaintiffs' loss;
- (j) the plaintiffs are not contributorily negligent. And so the next section of this judgment considers what damages are appropriate.

Measure of damages

[350] The plaintiffs claim that the appropriate measure of damages in this case is the cost of repair of the units on a like-for-like basis. The repair would ensure that the units are weathertight and appropriate retaining walls are built to protect the property such that it would obtain a CCC from the Council.

[351] There is some agreement between the parties as to the remediation cost of these units with discrete areas of dispute. In addition, there are issues of post-remediation stigma and betterment which might affect the question of the quantum of the plaintiffs' claim.

[352] However, the Council submits that repair is not the proper measure of damages in this case. They say that diminution in value is the appropriate measure: the current value of the property less its value as known in its defective state.

[353] In *Warren & Mahoney v Dynes* the proceedings involved an action in contract against an architect and in tort against an engineer.²⁹ The Court of Appeal concluded that where the cause of action involved damage to real property, the default measure of damages, whether the cause of action was in contract or tort, was the cost of rectification of the defects.³⁰

[354] In the recent case of *Johnson v Auckland Council* the Council had negligently inspected and issued a CCC for a leaky home.³¹ The Court affirmed that the approach in *Warren & Mahoney v Dynes* applied:³²

... in these types of cases the measure of loss will be “the cost of repairs, if it is reasonable to repair, or the depreciation in the market value if it is not”. As Professor Atkin notes in *The Law of Torts in New Zealand*, a “more flexible, pragmatic” approach is adopted and courts “will award the cost of reinstatement where the plaintiff intends to restore and occupy the property and it is reasonable to do so”. This Court in *Warren & Mahoney v Dynes* referred to a “prima facie”, but not inflexible, rule” that the main concern should be to “ascertain the amount required to rectify the defects”. That was a contract case although the Court indicated that in the circumstances of that case there was no difference in the measure of damages. We emphasise, as

²⁹ *Warren & Mahoney v Dynes* CA49/88, 26 October 1988.

³⁰ At 22.

³¹ *Johnson v Auckland Council* [2013] NZCA 662.

³² At [110].

the authorities here and overseas relied on by Ms Thodey posit, that the assessment is a factual one and it is necessary to do fairness between the parties. (footnotes omitted)

[355] The prima facie position for the assessment of damages for negligent inspection and issuing of a CCC is therefore repair costs. However, that rule is not inflexible and it is necessary to do fairness between the parties.

[356] In conducting a factual assessment of the appropriate measure of damages, I have considered factors militating for and against repair costs as the measure of damage. In favour of repair costs is the fact that the owners intend to restore and occupy the property.³³ In favour of diminution of value are the following:

- (a) it is possible for people to continue to live in the property in its unrepaired state for some time;³⁴
- (b) there are no particularly unique features of the property;³⁵
- (c) repairs have not already begun.³⁶

[357] More importantly, there is considerable uncertainty about the exact extent of the damage to the property from weathertightness issues. In *Warren & Mahoney v Dynes* the fact that remedial costs were unknown or highly speculative led the Court to favour diminution of value as the measure of damages.³⁷

[358] In this case there are substantial differences between the expert witnesses for the plaintiffs and defendant on the exact extent of the damage to the building. This extends to disputes about the extent to which water affected the framing timber, the extent of the damaged floors, and the extent to which the internal framing and linings must be replaced. No doubt both experts have conscientiously done their best to estimate total damage. But the only way to discover the exact extent of the damage to the building is to remove the weatherboards. This will reveal the full extent of the

³³ At [110].

³⁴ At [113].

³⁵ At [113].

³⁶ At [112].

³⁷ *Warren & Mahoney v Dynes*, above n 28, at 23-24.

damage to the framing and probably enable an assessment of any internal damage. That will not occur until the repairs are actually under way. It underlines the substantial uncertainty in assessing damages when the exact extent of the damage is not known. And in this case it illustrates that a cost of repairs assessment is on the facts the less reasonable option.

[359] For the reasons given therefore I am satisfied that the proper measure of damages here is diminution of value.

Loss based on diminution of value

[360] I turn now to the dispute about what the diminution of value is in this case. The fundamental assessment is agreed. The loss is the value of the property as if unaffected by the issues that meant it did not comply with the Code, less its value with its known problems.

[361] I approach this section of the judgment in the following manner. First, I assess what the diminution in value of the property is. Second, if I am wrong that diminution of value is the proper basis for assessment of damages and repair costs are appropriate, then I assess the competing claims arising from a damages award based on cost of repair. There are disputes about which items should be repaired as well as disputes about the existence of post-remediation stigma (affecting value of the building) and betterment (also relevant to building value after remediation).

[362] Mr Myers, a registered valuer, gave evidence for the defendants. He said that the current unaffected value of the four units was \$2,057,000 and that the affected value was \$1,156,000. The plaintiffs' collective loss therefore was \$901,000.

[363] Mr Myers' evidence was that there was sufficient evidence of sales of properties with known weathertightness issues on which to make an assessment of the affected value of 14C Glenmore Street. He said that "my research indicates a discount on the unaffected market value of between 30 and 60 per cent and usually significantly above land value" for a building affected by weathertightness issues.

[364] Thus, the thrust of Mr Myers' evidence was that properties affected by weathertightness were selling at prices well above their land value. This assessment was based on what was described as sales of leaky homes that are unremediated. Fourteen properties were listed by Mr Myers.

[365] The average sale price for these 14 leaky properties was \$336,000. This was an average of a 45 per cent reduction from the properties' average rateable value. The average price is 56 per cent higher than the average land value (based on its rating value). The Council says therefore that there is a significant premium for these properties over and above land value only. Mr Myers said that younger people who were perhaps prepared to live in a building while repairing it were amongst those prepared to buy such buildings.

[366] Mr Myers valued the land only at 14C Glenmore Street as worth \$456,000 assuming four units could be rebuilt upon it. If five units could be built it was worth \$509,300.

[367] Mr Truebridge, a valuer, gave evidence for the plaintiffs. He took a different view. He considered that the current unaffected value is \$2,094,000. This valuation is close to Mr Myers' valuation, well within an acceptable variation. He considered that the value of the units in their current known state was \$300,000, being the land value only.

[368] I turn therefore to the valuation evidence of Mr Myers that the current affected value of the units is \$1.156 million. I did not find the evidence to justify this conclusion convincing.

[369] First, each of the leaky homes in Mr Myers' sample of 14 properties was a standalone home, save one. It seems reasonable to conclude that the repair of a standalone property is likely to be more straightforward than a multi-unit property. The owner of the standalone property need only please him or herself.

[370] The sale price comparisons in Mr Myers' evidence are made with rateable value, not actual unaffected value. What is not known is the value of the property if unaffected by weathertightness issues. The percentage variations from rateable value to sale price are therefore based not on the value of the property but on the value allocated for the purpose of rate collection. It is difficult to know what the difference in value might be and how this might affect the percentages. But this unknown creates serious concerns about the reliability of this data.

[371] Thirdly, Mr Myers did not know the extent of the weathertightness issues in each property. It may be that the properties involved had minor weathertightness problems. It may be they had significant weathertightness problems or it may be they had a mix. It is not known what the mix is nor how this may be related to particular percentage variations.

[372] Finally, it was not entirely clear what market there might be for the purchase of this block of units as opposed to the single dwellings in all but one of the 14 properties. Much of the repair of this building will be interrelated. And so the purchase of individual units of Glenmore seems unlikely. The risk upon the purchaser of a single unit would be substantial. The purchaser would be reliant upon cooperation with the other owners of the units. For example, one owner may wish to repair, the other three owners may wish to demolish. Some of the damage may be to common areas such as party walls where unit owners will have to agree. Multiple owners will have to agree on the quality of the repairs and any "improvement" to the building. These factors would all likely severely limit the market for units in such a building. Such a purchaser is hardly likely to be a first home buyer looking for a bargain as Mr Myers claimed.

[373] In the circumstances I do not think that the valuation evidence provided by Mr Myers to support his claim of a value of \$1.156 million was reliable.

[374] What then are the units worth in their current state? Given the extensive damage and the obvious problems with a multi unit dwelling, I consider it is highly unlikely that in its present state the building itself has real value.

[375] Although expert witnesses gave evidence about their view as to the extent of the damage, the full extent cannot be known until the weatherboard cladding is removed and the building inspected. What is clear is that there is extensive damage to this building and that any repair costs will be very large. Assuming the repair costs will be less than the demolish and rebuilt costs, given these uncertainties, would be something of a gamble.

[376] In those circumstances it seems to me the most accurate current value is the land value alone. Mr Truebridge says the value of the land is \$300,000. Mr Myers somewhere between \$450,000 and \$510,000.

[377] The difference primarily is about realisation and use of the property. Mr Myers takes the view that either four or five units could be built on the property. Four units as of right, five units requiring local authority consent. Mr Myers says the value of the land should be based on a five unit development but with a reduction in value to reflect the “risk” that a five unit development might not be approved.

[378] Mr Truebridge’s evidence is that Mr Myers has wrongly assessed the value based on the realisation of the land. That should not be done unless and until that value is realised by building the units on that land. Once new units have been built on the land the land value will then reflect the existence of those units. Thus, once the units are built the value of the land will be reflected in the existence of the units. Each piece of land with a unit built on it will reflect that fact in its value. But until the units are built the land should be valued as a whole.

[379] No doubt anyone wishing to purchase this land will take into account its potential. While the value of the land should not assume a value as if the units had been built, the land value should reflect the potential to build at least four and possibly five units.

[380] There remains uncertainty about the capacity to build five units. It seems probable local authority consent is required. Whether it will be given remains uncertain. The current approval is for four units. In those circumstances, it seems to

me the most accurate value of the land today should be based on the existing arrangements of four units with some allowance for the possibility of five units.

[381] Mr Truebridge's \$300,000 did not seem to me to sufficiently reflect the significant potential of this land, the construction of at least four and possibly five substantial units. On the other hand it seemed to me Mr Myers' valuation assumed the realisation of the land, as if four or five units had been built. Balancing these factors I consider a figure closer to Mr Myers assessment is more accurate. I assess the land value at \$420,000.

[382] As I indicated there is little difference between Mr Myers and Mr Truebridge as to the current unaffected value of the property. In fairness to all parties I propose to set a middle point in that value at \$2,075,500. The loss based on diminution of value is \$1,655,500. At the conclusion of this judgment I will identify the full damages payable arising from diminution of value.

Repair measure of damages

[383] If I am wrong in my conclusion that loss of value is the correct measure of damages and repair is more appropriate, then there are the following disputes between the parties:

- (a) betterment;
- (b) post-remediation stigma; and
- (c) the cost of discrete repair issues.

[384] The total claimed by the plaintiffs based on repairs and consequential damages is \$2,165,958.60.

Betterment

[385] I accept that the property after repair will be in a better condition than it is today (excluding the weathertightness issues). The evidence is that there has been

only a modest amount of maintenance done on the property since it was built more than 17 years ago. For example, the building's exterior is due to be repainted.

[386] The Council's case is that after remediation the building will be in significantly better condition than it is now (excluding weathertightness issues). This improved condition will mean the value of the building has increased. This "betterment" component of any damages award would be a windfall gain to the owners and so the award of damages should be reduced to reflect this increase in value.

[387] Mr Myers considered that, based on a market analysis, each of the units would have a lift in value from their current (excluding watertightness issues) value as follows:

	\$ Remediated value	\$ Unaffected value	\$ Difference
Unit 1	\$586,000	\$559,000	\$27,000
Unit 2	\$535,000	\$515,000	\$20,000
Unit 3	\$548,000	\$525,000	\$23,000
Unit 4	\$600,000	\$570,000	\$30,000

TOTAL CLAIMED BETTERMENT

\$100,000

[388] Mr Truebridge did not agree there would be any betterment. He approached the issue, as I understood it, on the basis that there would be a "like-for-like" remediation and so there would be no betterment.

[389] In a literal sense this is not a "like-for-like" remediation. The same weatherboards will be installed. But they will be freshly painted weatherboards as opposed to weatherboards exposed to the elements 17 years. Similarly with all items requiring replacement. On a like-for-like repair, a property can be significantly improved. In this case, after remediation the building will inevitably be significantly improved from its current condition (excluding weathertightness issues).

[390] The only cogent market valuation evidence was from Mr Myers. He said the evidence showed that properties in better condition will obtain higher prices than

those in poor condition. There was no evidence to support any proposition that such an approach does not apply to weathertight homes.

[391] I accept therefore that the proper approach to valuation and betterment is to value the property post-remediation on the basis of its remediated state but without any leaky home/s overlay and compare this with the value of the units in their current condition but also without any leaky home overlay. The difference in values will reflect what is in this case the improved condition of the building. This improvement in value will need to be accounted for in the assessment of damages based on repair. I have no reason to doubt the accuracy of Mr Myers figures in this regard. The total figure for betterment is therefore \$100,000.

Post-remediation stigma

[392] The evidence for the plaintiffs through Mr Truebridge is that even after a leaky home has been fully remediated, there is a post-remediation stigma associated with that property that is likely to reduce its value by (in this case) 7.5 per cent on resale. The plaintiffs say they should be compensated for this loss which resulted ultimately from the Council's negligence in issuing the CCC. This submission is dependent upon a conclusion that damages should be assessed on the basis of the cost of remediation. Mr Myers says that there is no post-remediation stigma and that the market is now sufficiently sophisticated to understand a comprehensive building remediation will give reassurance to a buyer without any residual "stigma" associated with the property.

[393] Mr Truebridge's claim of post-remediation stigma is based on his experience and contact with home buyers, research undertaken and published in 2003 and on what he says is an analysis of market evidence and "supporting case law". He says that his valuation firm has completed "a relatively extensive survey of sale prices achieved with post-remediated apartment buildings and those with pre-remediated apartment buildings where the estimated cost to rectify is known". The result of this survey, he says, supports the proposition that there is post-remediation stigma and gives guidance as to the reduction in value.

[394] Mr Truebridge claims further support can be obtained from a Massey University study. The 2003 Massey study was completed by a master's student at the University. The definition of stigma used in the study was "a residual loss in value even after remediation as a result of increased risks of uncertainty regarding future events". The paper was based on a survey of valuers, real estate agents and building consultants in response to the question "is there a residual loss in value from leaky home stigma?" Only 35 percent of those surveyed answered the survey. Of the respondents 95 per cent considered there would be a loss of value.

[395] Those surveyed said the properties most likely to be affected were homes with monolithic cladding. The expected residual loss of value varied between five and 15 per cent.

[396] I did not find the Massey University study of particular value in assessing whether this building is likely to be affected by post-remediation stigma. Those who responded to the survey were not purchasers of remediated houses. The information obtained was therefore second or third hand (or more) or was simply an expression of opinion by those surveyed.

[397] As a particular example of post-remediation stigma, Mr Truebridge identified a property at 93A Kelburn Parade. The property was previously clad in monolithic cladding. It was then reclad in weatherboards after remediation of weathertightness problems.

[398] The units at 93A Kelburn Parade, Mr Truebridge said, were sold at a price below equivalent properties that had no watertightness issues. The only explanation was that the Kelburn Parade units had been leaky homes before remediation. The lower equivalent price they fetched could only be explained, he said, as a stigma associated with being a leaky home even after remediation. Mr Truebridge considered a fair and appropriate figure to apply to the Glenmore units was a 7.5 per cent reduction in value after remediation.

[399] Mr Myers rejected this approach. He said that sale price analysis of the Kelburn property could not be relied upon and that there might be a number of

factors why a remediated building had achieved a lower sale price than other similar properties. He said the analysis undertaken by Mr Truebridge could not eliminate a variety of reasons for price differentials.

[400] As to the remediated value of the building, Mr Myers said that there would not be any post-remediation stigma associated with the property because it had been a leaky building.

[401] Post-remediation stigma is an inherently difficult issue to analyse. There are a large range of factors which influence the price of real property. However, the leaky home problem in New Zealand is now extensive. There is wide knowledge of the problem. This knowledge is something of a double edged sword. Buyers are likely to be aware and understandably concerned about any building that has had watertightness problems. Have all the problems been identified and fixed? Has the remediation been extensive or has the minimum necessary been done? On the other hand with knowledge comes the capacity to check the work done and seek reassurances as to extent and quality.

[402] I am satisfied that there is a basis for saying that some post-remediation stigma exists. It is perhaps best illustrated in this way. If there were two similar properties for sale, one that had been remediated, the other not a leaky building, then if they were a similar price the purchaser would almost certainly purchase the property that had never been the subject of weathertightness problems. In such a situation to achieve a sale, the owner of the post-remediated property would need to lower their price.

[403] Here, there will be extensive remediation of Glenmore. And so there is a reasonable level of assurance that there are unlikely to be further difficulties with weathertightness. However, the concern will likely remain. Are there further undisclosed or unknown defects which will be costly to repair? There is no reason to suppose, however, that post-remediation stigma is uniform. Here, the extensive remediation required (identified and categorised by an experienced remediator) is likely to give some assurance to prospective purchasers that a thorough check of the

building has been undertaken. In those circumstances, I consider a post-remediation stigma figure of five per cent will adequately compensate the plaintiffs for their loss.

Discrete valuation issues

[404] The plaintiffs' and the Council's quantity surveyors agree on substantial parts of the remediation cost. The disputed topics are:

- (a) the extent of the replacement of the floor and ceilings, floor joists and internal framing;
- (b) remediation and design costs;
- (c) the carpet/vinyl;
- (d) the drapes;
- (e) the roof;
- (f) investigation costs; and
- (g) steel beams.

(a) Replacement of the internal framing and consequential replacement

[405] Mr Wutzler's evidence is that 100 per cent of the timber framing on the perimeter of the building needs to be replaced. This in turn will, he says, necessitate the replacement of 600 to 700 mm of floors and ceilings (measured from the intersection of the framing timber and floors/ceilings) around each level of each unit as well as all internal linings (wall and ceiling).

[406] Mr Jones' view is that approximately 50 per cent of the external framing timber will need to be replaced. Other than around the three bay windows, he estimates that little of the flooring and few of the internal wall linings will need to be replaced. He accepts that it is not possible to be 100 per cent certain about the

internal damage but says that any remediation to internal framing and linings can easily be covered by the contingency amount allowed for in the repair estimate.

[407] Mr Wutzler accepted that it is unlikely that 100 per cent of the timber framing is rotten or seriously affected. However, he says once 50 per cent or more of the timber in the external framing walls is seriously affected, it is more cost effective to replace 100 per cent of the external framing. He accepts that it is most likely that somewhere between 65 and 75 per cent of the external framing including the boundary joists are water affected.

[408] Mr Wutzler accepts that he does not know for certain that there is other extensive internal damage. He believes, based on his experience, that there is likely to be significant other internal damage not able to be currently seen.

[409] The cost difference between Mr Wutzler's estimate of 100 per cent and Mr Jones' estimate of 50 per cent replacement of the external framing and boundary joists is \$11,000 but it is the consequential cost of Mr Wutzler's planned remediation that involves significant extra cost. It is impossible to know the exact extent of damage to the external framing although the testing undertaken by Mr Jones and Mr Wutzler does show extensive damage. But it does not show 100 per cent damage to external framing or boundary joists.

[410] It is clear that some of the boundary joists have suffered decay and will need to be replaced and where a boundary joist is affected by water the whole of the joist will need to be replaced.

[411] However, given the relatively small monetary difference, I am satisfied that the prudent thing to do here is to allow for 100 per cent replacement of boundary joists and external timber framing. That does not mean, however, that 100 per cent of the internal linings and other costs need be incurred.

[412] I accept that where the floor joists intercept with water damaged boundary joists, care will need to be taken to examine the floor joists for damage. It seems a reasonable possibility that some of the floor joists will need to be replaced and where

replacement of floor joists is required consequential replacement of some flooring and some internal lining is likely.

[413] But I reject the claim by Mr Wutzler that a 100 per cent replacement of internal linings will inevitably be required. The additional costs based on Mr Wutzler's assessment of total replacement are: (apart from the frame replacement at \$11,500) 100 per cent plasterboard replacement – \$23,863; perimeter floor replacement – \$40,556; remedial work to internal walls – \$71,017; total \$135,436. The costings of Mr Wutzler's 100 per cent replacement and Mr Jones' reliance upon the contingency fee for any internal damage are each at the opposite end of the cost spectrum.

[414] Some costs seem likely to be incurred. It seems probable that there will be some floor joist and other internal damage which will require remediation. Any costs incurred will be well less than the 100 per cent sought. However, whatever figure is settled upon for the replacement of the internal lining and walls it is a "best guess". No one knows the exact extent of the damage beyond a reasonable estimate of the external timber frame.

[415] The best estimate of external framing and boundary joist damage is between 50 percent and 75 percent. This is based on a wide range of factors from invasive moisture testing to the removal of weatherboards to view the framing and boundary joists. There is (for understandable reasons) no equivalent evidence in relation to damage to flooring or floor joists or other internal structures. It seems most likely that as a result of external framing and boundary joist damage some modest percentage of floor and ceiling joists (with other building items) may be damaged. Given the uncertainty about such damage I consider an allowance of 25 per cent of the additional cost estimated by Mr Wutzler adequately compensates the plaintiffs for the consequential remediation of the floor joists and other internal structures. This sum is therefore 25 per cent of \$135,436 or \$33,859. If there proves to be greater damage this could be met from the contingency sum.

(b) *Remediation and design costs*

[416] The plaintiffs have sought remediation design and contract supervision fees of \$148,000 for the remediation of the building. This is divided equally between the design aspect and supervision – \$74,000 for each. This is approximately 14 per cent of the total remediation cost. The Council accepts the supervision cost of \$74,000 is reasonable but disputes the \$74,000 design cost. The Council says it has a fixed price quote from an experienced remediation architect for \$11,500 for the remediation design cost. The architect has been given a scope of works for the building and the relevant building consent plans to inform his quote.

[417] The plaintiffs' case is that seven per cent of the total repair costs for remediation design is a reasonable figure and one which is commonly used. They say remediation design is a specialist subject. The architect who has given the quote is not a remediation expert and so his quote cannot be relied upon. The best approach is to take the lowest reasonable cost of design from someone adequately informed to do the job.

[418] The plaintiffs have not satisfied me the Council's architect's qualifications (academic and practical) are such that he is not qualified to undertake this work. Obviously an architect has formal professional qualifications in building design. The particular architect here had, to Mr Myers' knowledge, designed other remediation projects.

[419] Given these facts I am satisfied the lowest cost for the design work competently done is \$11,500, subject to one caveat. There is some uncertainty that the architect has been fully informed of the extent of the remediation and therefore the design work required. I add a modest sum of \$3,500 to the \$11,500 quote to allow for this possibility. I therefore allow \$15,000 as a fair and appropriate design fee. The plaintiffs' estimate of remediation cost should therefore be reduced by \$59,000 (\$74,000 less \$15,000).

(c) *The carpet/vinyl*

[420] The plaintiffs' case is that 100 per cent of the carpet in all four units should be replaced at a cost of \$35,000. That is so because they say the carpets throughout the units are water damaged from water entry into the apartments.

[421] The main evidence of actual damage given directly in evidence is to an area around the bay windows in Unit 1. There is no other direct evidence of carpet damage although there is a vague reference by Mr Wutzler to other carpet damage in the units. There is no precise identification of where this other damage is situated, why Mr Wutzler thinks it relates to the weathertightness of the building, and what the "damage" consists of. None of the unit owners said they observed any carpet damage.

[422] The carpet in the units is about 12 or 13 years old and therefore near the end of its useful life. There is some evidence that at least one of the owners thought the carpet was near the end of its life. Mr and Mrs McColl were going to replace the carpet for resale purposes before the discovery of watertightness issues.

[423] I found it difficult to be clear about the exact extent of the claimed damage to the carpet in these four units. I accept the Council's case that only three rooms in Unit 1 seemed to have affected carpet. There was very little other evidence as to damage to the carpet other than Mr Wutzler's evidence that he had lifted the carpet in some areas in each unit to find damage.

[424] Certainly there is likely to be damage in the bay window area. The only photograph of carpet damage came from this area.

[425] I accept therefore that there was damage to carpet in Unit 1 and that there were patches of damage to carpet in other units but full carpet replacement throughout all units is not necessary, nor justified.

[426] A global figure is appropriate. I make an allowance of \$4,000 for the need to replace the carpet in the three rooms which abut the bay windows and for other carpet damage in Unit 1. I make an allowance of \$1,000 to each of the other unit

owners for carpet replacement in their units. The total allowed is therefore \$7,000. The Council accepted that all carpets would need to be lifted and stored during the remedial work. This was a cost of \$6,769 which is, in addition to the carpet replacement cost (of \$7,000) payable by the Council.

[427] Mr Wutzler also said that all vinyl should be replaced in the bathrooms. But there is no evidence to justify this. In particular, there is no evidence to establish that vinyl was damaged necessitating full replacement nor evidence that any damage was caused from weathertightness problems.

[428] No allowance is made for vinyl replacement.

(d) The drapes

[429] The plaintiffs seek the cost of 100 per cent replacement of all drapes in all units. Each of the fact witnesses gave evidence of mould in drapes in each of their units. This evidence did not identify exactly what drapes in what rooms were affected. These units are in a damp area. There are a number of springs in the area. They have modest sunshine. It is difficult to identify whether the damage to the curtains is because these are damp and shaded units or whether the mould is primarily from watertightness problems. Most likely a combination of factors has caused the damage. I allow a figure of 40 per cent of the total cost of full drape replacement. That is 40 per cent of \$24,000 or \$9,600 spread equally amongst the four units.

(e) The roof

[430] The plaintiffs' case is that to remedy the roof defects, in particular the flashing problems, requires the installation of a new roof. The Council disagrees. It says that the roof and roof flashing can be repaired. The difference between repair and a new roof is \$8,500. The new roof is more expensive. There is nothing to suggest that the repair and replacement of the existing roof as opposed to a new roof will not "cure" the watertightness problems of the roof. In those circumstances, the Council are entitled to insist on the least costly option. The appropriate claim figure

is for the repair of the roof and flashing. The plaintiffs' claim for roofing is therefore reduced by \$8,425.00.

(f) *Investigation cost*

[431] The plaintiffs claim \$244,035.89 for the investigation of weathertightness and other issues at 14C Glenmore Street. These costs are in addition to the expert fees the plaintiffs seek if they are entitled to costs in these proceedings. The significant majority of the costs are fees charged by Helfen Ltd, the remediation experts who employ Mr Wutzler. These are effectively the fees to investigate the building at 14C Glenmore Street and assess the problems with the building, its remediation and the cost of the remediation.

[432] Mr Jones' evidence is that from his experience in inspecting and reporting on 275 dwellings and 15 multi unit developments he would not have expected costs of more than \$70–\$80,000 for this work. Mr Jones stressed that this was not a particularly large multi unit development given there were only four units.

[433] The plaintiffs have provided a detailed breakdown of how the \$244,000 figure was made up. It includes, apart from the Helfen work, a builder, an expert on the requirements for fire protection, a structural engineer, quantity surveyor, a valuation expert, an expert on building consent processes, a building surveyor, the cost of scaffolding, a wood decay scientist and a consulting engineer. Many of the above have been consulted more than once and have several accounts. Multiple consultations were, the plaintiffs say, necessary because the settlement conference was adjourned, part considered, because the Council sought additional information from the plaintiffs about their claims.

[434] Each of the experts consulted performed an appropriate investigative task or were paid for carrying out particular work relevant to an investigation (for example, the builder and the scaffolders).

[435] I have no reason to doubt Mr Jones' evidence that he considers the investigative work could have been done for less. However, there is no evidence to

say that the particular investigations were not necessary or took longer than required or were charged at an hourly rate that was excessive.

[436] Further, Mr Jones was not intimately involved in the initial investigative work. It can be difficult therefore to accurately assess what was required from the outside. Mr Jones' evidence did not convince me that any of the investigative work charged was unnecessary or charged at an unfairly high rate.

[437] In those circumstances I have no reason to doubt that the costs incurred were properly incurred in the investigation of this building. I therefore allow the full amount claimed of \$244,035.89.

(g) Steel beam repair

[438] The remedial cost of \$16,448 was not the subject of specific challenge. I therefore approve that as a legitimate cost arising from the negligence of the Council.

Peer review

[439] There is a possibility, that before the Council will approve the building consent application for the remediation of the units, it may require the plaintiffs to subject the remediation design to peer review. Should that be the case then the cost of the peer review would have to be met by the plaintiffs. In the event that the Council does require a peer review, then the parties agree the Council will pay the plaintiffs \$10,000 to reflect the best estimate of the costs of that review.

Damages

[440] At para [345] I summarised my findings as to liability. I then concluded that the appropriate measure of damages was based on diminution of value. At para [378] I concluded the loss based on diminution of value of the property done was \$1,655,500. In addition to that sum the plaintiffs are entitled to the following sums as damages:

- (a) Consultants' fees and costs – \$244,035.89 (at [433]);
- (b) real estate agents' fee on sale – \$12,000.00;
- (c) legal fees on sale – \$4,000.00;
- (d) special damages – \$8,682.27.

A total of \$1,924,218.16.

[441] I do not enter judgment for that figure. I invite counsel to file further submissions on the accuracy of this calculation should that be necessary. In reaching this figure I have not attempted to allocate the damages for individual units. I deal with the general damages claim by the third plaintiff separately.

[442] With reference to the plaintiffs' quantum schedule, I make no allowance for item 12 (legal fees for neighbourhood consent agreements) nor for the disbursements claim. The latter can be part of any costs claim made by the plaintiffs.

[443] As to the damages based on remediation, I set out below a summary of my relevant conclusions relating to remediation. This assessment assumes the correct measure of damages is remediation. The parties will, with the benefit of this judgment, need to calculate the damages payable arising from the remediation-based damages claim. Counsel for the plaintiffs and the first defendant advise that they calculate the damages payable arising from the remediation-based damages claim, based on the findings in this judgment, to be \$1,496,699.39 (including the \$25,000 general damages award). As I have noted some of the damages claim has been agreed upon between the parties. This summary therefore deals solely with areas of dispute.

[444] The disputed remediation costs are summarised as follows:

- (a) retaining walls allowance, only under floor wall – \$22,133.00;
- (b) Wellington City Council fees for the remediation – \$10,435.00;

- (c) construction insurance payable for remediation – \$12,000.00;
- (d) lost rental during the construction period – \$88,100.00;
- (e) consultants' costs payable of \$244,035.89 (at [433]);
- (f) post-remediation stigma. The plaintiffs claimed \$157,000.00. I have allowed five per cent of \$2,075,500.00 being \$103,775.00 (at [399]);
- (g) betterment allowance – \$100,000.00 (at [387]);
- (h) allowance for remediation of joists and other internal structures (in addition to the contingency allowances) – \$33,859.00 (at [411]);
- (i) carpet allowance (replacement, lifting and storage) – \$13,769.00 (at [422]);
- (j) no allowance for replacement of vinyl;
- (k) drapes – \$9,600.00 (at [425]);
- (l) roof. The allowance sought by the plaintiffs for the repair of the roof by way of full replacement is reduced by the sum of \$8,425.00 to reflect my conclusion at [426];
- (m) remediation design and supervision. The plaintiffs claim \$148,000.00 for the supervision and design costs. I allow \$89,000 (at [415]);
- (n) steel beam repair – \$16,448.00 (at [437]).

General damages

[445] Apart from the McColls, the third plaintiffs, the other three units were owned by companies. The plaintiffs accept that none of the plaintiff companies can make a claim for general damages.

[446] Mr and Mrs McColl personally own and live in Unit 2. When they shifted into that unit, they had intended to occupy it only until they had the opportunity to recarpet and refurbish it and sell it. Their intention was then to use those funds for a retirement home and capital. The current condition of their unit has not allowed them to progress their lives toward retirement because the unit is a “leaky home”.

[447] This situation has had very serious consequences for the McColls. Both have serious health problems. Mrs McColl has had difficulty in walking up and down the many stairs in the unit. Mr McColl has suffered from bronchial difficulties probably, in part, contributed to by the dampness of the unit. Both have been under significant stress since they discovered this was a leaky building.

[448] I am satisfied that a general damages award is appropriate for Mr and Mrs McColl and I award the sum of \$25,000.00 in total jointly.

Daytona Developments

[449] Finally, one of the defendants is Daytona Developments Limited, the construction company of the development at Glenmore Street. This judgment makes it clear that the construction of the building by Daytona was negligent. Most of the numerous defects of the building are identified in this judgment. These defects were caused by the negligence of Daytona. The plaintiffs should have a damages award against Daytona (for what it is worth given the company is in liquidation) for the same quantum as their claim against the Council. Once that amount is settled I will formally enter judgment also against the second defendants.

Summary

[450] At [345] I summarised my conclusions as to liability. I concluded the Council was liable for the plaintiffs’ loss and that the plaintiffs did not by their negligence contribute to the loss. In the second part of the judgment I have concluded that the appropriate measure of damages is based on the diminution of value of the property. I have calculated this (together with other allowable losses) at \$1,924,218.16. If I am wrong about this measure of damages then I have made

findings on which the parties can calculate the remediation damages amount. I have allowed Mr and Mrs McColl a total of \$25,000 general damages.

Costs

[451] Should the plaintiffs seek costs and if the parties are unable to agree on quantum, the plaintiffs should file a memorandum within 21 days and the defendants to respond within a further 21 days.

Ronald Young J

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