IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA458/2021
[2022] NZCA 227

BETWEEN	DANIEL JOSEPH MILES AND ELIZABETH CHARLOTTE MILES Appellants
AND	BRUCE WILLIAM GADD Respondent

Hearing: 17 February 2022

Court: Gilbert, Katz and Edwards JJ

Counsel: B M Easton and D J Powell for Appellants
K P Sullivan and D A Bleier for Respondent

Judgment: 7 June 2022 at 2 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellants must pay costs to the respondent for a standard appeal on a band A basis and usual disbursements. We certify for second counsel.

REASONS OF THE COURT

(Given by Gilbert J)

Introduction

[1] This is an appeal against a judgment of the High Court[1] dismissing a claim alleging a breach of a standard vendor warranty in an agreement for sale and purchase

[1] *Miles v Gadd* [2021] NZHC 1527, (2021) 22 NZCPR 248 [High Court judgment].

of a unit title property (the agreement).[2] The warranty was that the vendor had no knowledge or notice of any fact which might give rise to or indicate the possibility of the owner or the purchaser incurring any other liability under any provision of the Unit Titles Act 2010 (the Act) or the Unit Titles Act 1972 (the 1972 Act). Eight months after settlement, weathertightness issues were discovered elsewhere in the multi-unit development. Upon further investigation, it emerged that there were numerous weathertightness defects throughout the development and that major remedial works would be required to achieve an enduring solution.

[2] Two questions arise on this appeal. First, what does "any other liability" in the warranty refer to? In particular, does it extend to a possible liability for a levy to address unidentified defects outside the particular unit? Secondly, if so, did the vendor have knowledge or notice of any fact which might give rise to, or indicate the possibility of, any such liability being incurred?

Background

[3] By an agreement dated 28 June 2013, the respondent, Mr Gadd, agreed to sell to the appellants, Mr and Mrs Miles, unit 803 (the apartment) in Sirocco Apartments for $540,000. Sirocco is an 11-storey, 44-apartment building situated in central Wellington and completed in March 1999.

[4] Mr Gadd had owned the apartment since October 2004 and had been a member of the body corporate committee at various times. He lived and worked in Europe for extended periods — June to November 2006 and June 2007 to July 2010 — and was not a member of the body corporate during the latter three-year period. In late 2012, he decided to put the apartment on the market and relocate to Auckland to take up a new position.

[5] The agreement contained the following vendor warranty (the warranty):

> **8.0 Unit title and cross lease provisions**

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[2] Real Estate Institute of New Zealand Incorporated and Auckland District Law Society Incorporated *Agreement for Sale and Purchase of Real Estate* (9th ed, 2012) [Standard Form Agreement] at cl 8.2(6)(a).

Unit Titles

…

8.2 If the property is a unit title, the vendor warrants and undertakes as follows:

…

(6) The vendor has no knowledge or notice of any fact which might give rise to or indicate the possibility of:

(a) the owner or the purchaser incurring any other liability under any provision of [the Act] or [the 1972 Act]; or

…

[6] The Miles did not make the agreement conditional on obtaining a satisfactory land information memorandum, but it was conditional on solicitor's approval of title, finance, a satisfactory valuation report and, if recommended by the valuer, a building report.

[7] The Miles obtained a valuation report from CBRE Valuations Pty Ltd (CBRE) dated 1 July 2013 assessing the current market value of the apartment at $535,000 (including chattels). CBRE noted that the valuation was based on a number of critical assumptions, including:

Critical Assumptions

- The subject dwelling is of a design and materials that the Market associates with potential weathertightness issues. Any such potential issues are largely built into sales of other properties of similar design and construction.

- That a builders report would not reveal any weathertightness issues that may impact negatively on the condition or value of the subject property.

…

[8] CBRE commented favourably on the condition of the building following their inspection:

Condition & Repair

This building was constructed in an era and of materials that are associated with leaking buildings. We have not been provided with a builders report however we understand from the Body Corporate Manager that there have

> been no instances of leaking in the building. The top level decks have been tiled to prevent leaking and the walk ways have been resurfaced. From our onsite inspection we noted that the exterior appeared in good condition with no obvious signs of cracks or water penetration. The foyer and common areas are clean and well presented. *Refer: Critical Assumptions*.
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> …

[9] The Miles were satisfied with this report and did not commission a building report. The agreement settled on 24 July 2013 and Mr Miles was appointed a member of the body corporate committee the following month.

[10] Eight months later, in early April 2014, Plastercoat Services Ltd discovered rotten timber under the rain head of the deck to another apartment while carrying out scheduled maintenance on minor cracks in the façade of the building. Le Celebre Ltd, a building contracting company that had previously carried out maintenance work on the building, was called to investigate. After removing the exterior cladding in this area, they found the underlying timber was rotten with water damage extending down as far as the car park level. Le Celebre reported these findings to the body corporate secretary on 1 May 2014.

[11] Silvester Clark Ltd, consulting engineers, were engaged to assess the condition of the external envelope of the building. They reported in September 2014 that it was possible 40 per cent of the cladding had moisture penetration, with corresponding deterioration of timber and steelwork. They recommended a larger scale inspection be carried out.

[12] At the annual general meeting of the body corporate on 12 November 2014, the body corporate committee's recommendation to raise a special levy of $500,000 to fund further investigations and some initial repair work was approved.

[13] Maynard Marks Ltd, property and building consultants, were engaged to investigate the extent of the damage and assess the scope of the required remedial works. They reported on 1 July 2015 that there were numerous weathertightness defects in the building and the only viable repair option was to fully re-clad the entire building, including roofs and balconies. The estimated cost of this

work was $10.1 million (including GST). The main weathertightness defects were summarised as follows:

- Inadequately weatherproofed roof to wall junctions, including to projecting fire spandrels
- Steel framed balcony penetrations to fire spandrels and balcony to wall junctions
- Inadequate cladding clearance above external surfaces, including a lack of draining at cladding base details
- Unprotected fibre-cement cladding sheets to the horizontal surfaces of the balustrade and inter-tenancy walls
- Poorly formed cappings to the balustrade walls adjoining the enclosed rooftop balconies
- Unprotected retaining wall junctions with inter-tenancy balustrade walls to lower level apartments on the west elevation
- Inadequately weatherproofed joinery openings, including a lack of visible jamb and sill flashings

[14] Further reports were obtained from other consultants between September 2017 and May 2019 which confirmed the extensive repair work required and the escalating costs of carrying out this work. The most recent cost estimate to remediate the building at the time of the trial in November 2020 was approximately $22 million. The body corporate has, so far, decided not to remediate the building.

[15] Mr and Mrs Miles commenced proceedings against Mr Gadd in the High Court at Wellington on 27 June 2019 (immediately prior to the expiry of the limitation period) alleging a breach of the warranty.

[16] The Miles sold their apartment for $305,000 in May 2020 ($235,000 less than they paid for it seven years earlier).

The pleadings

[17] In their fourth amended statement of claim, the Miles claimed that as a result of Building Issues (as defined) having been referred to at body corporate meetings Mr Gadd attended and in minutes he received, he had "knowledge or notice of facts which might have given rise to or indicated the possibility of" the owner of the unit

being levied to cover the costs of further investigations into the "Building Issues" and to fund any remedial works.[3] He therefore breached the warranty. The Miles cast the net widely in their definition of "Building Issues" (particularised in 23 paragraphs with 70 subparagraphs) by referring to minutes, management reports and emails containing any reference to a building or maintenance issue over an eight and a half year period from 7 December 2004 to 20 June 2013.

[18] The Miles said they would not have purchased the apartment if they had notice of any of these matters. They claimed the apartment would have had a current market value of $992,000 if Sirocco had been constructed without the defects. Working from the premise that the warranty was equivalent to an assurance that Sirocco had been constructed without defects, they sought recovery of $687,000 ($992,000 less $305,000) plus $18,852.32, being their share of the special levy raised in November 2014 to investigate the extent of the defects initially identified in May 2014. The Miles also claimed general damages of $30,000 for stress, anxiety and inconvenience.

[19] Mr Gadd denied breaching the warranty. He acknowledged in his statement of defence that he was aware that parts of the building required repair, but said he was not aware of any reason why this would not be addressed through normal maintenance and paid for in the ordinary course with funds available to the body corporate. He said no additional levies were contemplated at the time of the agreement.

High Court judgment

[20] Clark J correctly noted that the date for assessment of any relevant knowledge for the purposes of the warranty was the date of the agreement, 28 June 2013.[4] The Judge considered that the question, objectively assessed, was what Mr Gadd knew or had notice of, taking into account he was a career civil servant with no specialist knowledge of building and construction.[5] Construing the warranty in context,

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3 The Miles also claimed Mr Gadd breached warranties relating to repair works he had carried out on the balcony of the apartment (cl 6.2(5)) and the warranty in cl 8.2(6)(b) as to his knowledge of the possibility of proceedings being instituted by or against the body corporate. The dismissal of these claims is not challenged on appeal.

4 High Court judgment, above n 1, at [117(b)].

5 At [117(c)].

the Judge found it was limited to actual knowledge or notice of facts giving rise to the possibility of a liability under either of the Acts "in relation to the owner's unit":

> [165] Clause 8.2(6) does not expressly state that the potential liability to be disclosed is a liability relating only to the owner's specific unit. That said, these documents are precedent forms to assist parties and their legal advisers in navigating the various requirements and intricacies of the transactions in which they are engaged. It is not to be expected that they will be drafted with the precision required of legislation. Parties to a property transaction may, after all, amend a standard form agreement in any way they choose.
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> [166] A sensible reading of cl 8.2(6) in the context of the other warranties in cl 8.2, and alongside the pre-contract and pre-settlement disclosure requirements, which I have not discussed but which involve the provision of extensive information to a purchaser, strongly suggests its scope is limited to actual knowledge or notice of a fact giving rise to the possibility of a liability under either the 1972 Act or [the Act] in relation to the owner's unit. The equivalent provisions in [the Act] of ss 14, 33 and 34 in the 1972 Act are, respectively, ss [142(6)], 126 and 127.

[21] However, the Judge went on to consider whether Mr Gadd had relevant knowledge or notice assuming, contrary to her finding, that the warranty had the broader scope contended for by the Miles.[6] The Judge noted that, despite the extensive pleading of sources of information allegedly giving rise to notice on his part, Mr Gadd was cross-examined on only a limited number of documents.[7] The Judge therefore focused on these, addressing each in turn.[8] She summarised Mr Gadd's evidence regarding these matters, which she accepted, in the following way:

> [125] In relation to the reports and meetings and minutes about which Mr Gadd was actually aware, his evidence was that he regarded the issues that were brought up over the years as confined to a handful of apartments and were to be expected with a large complex such as Sirocco. He understood that the problems that existed for this handful of apartments [were] not systemic across the building and that the issues were addressed within the available financial resources of the Body Corporate.

[22] In rejecting the claim for breach of the warranty, the Judge made the following overall findings:

> [171] Putting aside the fact that Mr Gadd had no knowledge of some of the documents while he was resident overseas, the substantive point is that while the documents are most likely to be probative of the fact there were

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6 At [118] and [178].
7 At [124].
8 At [126]–[149].

> particular issues with particular apartments, the documents did not, either individually or in combination, prove the point the plaintiffs plead. The documents do not prove that Mr Gadd had knowledge of the possibility of special levies being struck to cover the costs of investigating or remediating a leaky building or of possible proceedings by the Body Corporate to recover monies expended on such works.
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> …
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> [177] I have concluded that cl 8.2(6)(a) constitutes a unit specific warranty that the vendor has no knowledge or notice of any fact which might give rise to, or indicate the possibility of, liability arising under [the Act] or the 1972 Act in relation to the apartment the vendor owns. Sections [14], 33 and 34 of the 1972 Act, and ss [142(6)], 126 and 127 of [the Act] are examples of provisions under which such a potential liability might arise. Mr Gadd had no such liability before or after sale.
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> [178] Even if the warranty has a broader effect, Mr Gadd did not have the knowledge or notice that the plaintiffs claim he possessed. Mr Gadd understood that some apartments had issues with leaking but that those issues had either been addressed or were being addressed. Importantly, he understood that the costs for repairs were borne either by individual owners or, in the normal way, by the Body Corporate and that maintenance costs would be addressed via the annual process of reviewing the budget for the long term maintenance plan. In other words, Mr Gadd did not have notice of any fact that indicated to a reasonable vendor in his position the possibility that he or a purchaser might incur any (relevant) liability under [the Act] or [the] 1972 Act.

[23] The Judge gave detailed reasons why she considered Mr Gadd's understanding of the state of affairs at Sirocco was objectively reasonable.[9] The Judge concluded that the Miles had not established on the balance of probabilities that Mr Gadd had notice or knowledge of any fact within the terms of the warranty irrespective of how it should be construed.[10]

Grounds of appeal

[24] Mr Easton, for the Miles, raises two grounds of appeal. First, he argues that the Judge was wrong to limit the warranty in cl 8.2(6)(a) to the possibility of a liability under the Acts "in relation to the owner's unit". He points out there are no such limiting words in the warranty. He contends the warranty covers the whole development and would include knowledge of the possibility of levies being raised to investigate and repair ongoing leaks and damage to Sirocco. Secondly, he challenges

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9 At [179].
10 At [178] and [180].

the Judge's factual findings that Mr Gadd did not have knowledge or notice of facts that may have given rise to this prospective liability.

First issue — What does "any other liability" in the warranty refer to?

[25] The warranty must be construed objectively in the context of the agreement as a whole and in light of its purpose. The Unit Titles legislation forms part of the relevant context. Although not decisive, the plain and ordinary meaning of the words in this carefully crafted standard form agreement used widely in real estate transactions throughout New Zealand is obviously an important guide to its meaning.

[26] The warranty is one of a suite of warranties contained in cls 8.1 and 8.2 of the standard form agreement that apply to the sale of unit title properties. They abrogate the normal rule of caveat emptor that would otherwise apply. We set them out in full because they provide the immediate context:[11]

> **8.0 Unit title and cross lease provisions**
>
> Unit Titles
>
> 8.1 If the property is a unit title, sections 144 to 153 of the Unit Titles Act 2010 ("the Act") require the vendor to provide to the purchaser a pre-contract disclosure statement, a pre-settlement disclosure statement and, if so requested by the purchaser, an additional disclosure statement.
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> 8.2 If the property is a unit title, the vendor warrants and undertakes as follows:
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> (1) Apart from regular periodic contributions, no contributions have been levied or proposed by the body corporate that have not been disclosed in writing to the purchaser.
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> (2) Not less than five working days before the settlement date the vendor will provide:
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> (a) a certificate of insurance for all insurances effected by the body corporate under the provisions of section 135 of the Act; and
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> (b) a pre-settlement disclosure statement from the vendor, certified correct by the body corporate, under section 147 of the Act. Any periodic contributions to the operating account shown in that pre-settlement disclosure statement shall be

[11] (Emphasis added).

apportioned. There shall be no apportionment of contributions to any long-term maintenance fund, contingency fund or capital improvement fund.

(3) There are no other amounts owing by the owner under any provision of the Act or the Unit Titles Act 1972.

(4) There are no unsatisfied judgments against the body corporate and no proceedings have been instituted against or by the body corporate.

(5) No order or declaration has been made by any Court against the body corporate or the owner under any provision of the Act or the Unit Titles Act 1972.

(6) *The vendor has no knowledge or notice of any fact which might give rise to or indicate the possibility of*:

(a) *the owner or the purchaser incurring any other liability under any provision of the Act or the Unit Titles Act 1972*; or

(b) any proceedings being instituted by or against the body corporate; or

(c) any order or declaration being sought against the body corporate or the owner under any provision of the Act or the Unit Titles Act 1972.

(7) The vendor is not aware of proposals to pass any body corporate resolution relating to its rules nor are there any unregistered changes to the body corporate rules which have not been disclosed in writing to the purchaser.

(8) No lease, licence, easement or special privilege has been granted by the body corporate in respect of any part of the common property which has not been disclosed in writing to the purchaser.

(9) No resolution has been passed and no application has been made and the vendor has no knowledge of any proposal for:

(a) the transfer of the whole or any part of the common property;

(b) the addition of any land to the common property;

(c) the cancellation of the unit plan; or

(d) the deposit of an amendment to the unit plan, a redevelopment plan or a new unit plan in substitution for the existing unit plan which has not been disclosed in writing to the purchaser.

(10) As at settlement, all contributions and other monies payable by the vendor to the body corporate have been paid in full.

[27] We make four preliminary observations. First, the reference in the warranty (cl 8.2(6)(a)) to "any *other* liability" under any provision of the relevant enactments can only refer to a liability not already covered by the more specific warranties contained in the preceding provisions of the clause. Secondly, the clause refers to "the possibility" of the owner or purchaser "incurring" a liability. Such a liability must be distinguished from existing liabilities already incurred. Thirdly, we note the breadth of the possible liability — *any* other liability under *any* provision of either Act. This is not confined to a liability under any *other* provision of either Act. The wording is broad enough to capture the possibility of the owner (or purchaser) incurring some additional liability under the same provision of either Act, beyond any actual or prospective liability under that provision that has already been covered by an earlier disclosure obligation or warranty. Fourthly, as the Judge observed, there is no express wording in the warranty to the effect that the liability is confined to a liability relating only to the vendor's particular unit.[12] The words "any other liability under any provision of [the Acts]" are apt to describe potential liabilities in relation to any part of the unit title development, including the common areas.

[28] We turn now to consider the liabilities covered by the preceding disclosure obligations and warranties in the clause.

[29] Clause 8.1 of the agreement simply relates the law. The evident purpose of the clause is to draw attention to the pre-contract and pre-settlement disclosure requirements provided for in ss 144 to 153 of the Act and any additional disclosure requested by the purchaser.

[30] Section 146 of the Act requires a pre-contract disclosure statement containing the information prescribed by reg 33 of the Unit Titles Regulations 2011 (the Regulations). This includes the amount of the contribution levied by the body corporate under s 121 of the Act in respect of the unit being sold, the period covered by such contribution, details of maintenance that the body corporate proposes

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12 At [165].

to carry out on the unit title development in the year following the date of the disclosure statement, and how the body corporate proposes to meet the cost of that maintenance. The balance of every fund or bank account held or operated by the body corporate at the date of the last financial statement must also be disclosed. This must include the operating account maintained under s 115 of the Act, the long-term maintenance fund required by s 117 and any optional contingency fund or capital improvement fund in terms of ss 118 and 119. Other information required to be disclosed at this stage includes whether the unit or the common property is, or has been, the subject of a claim under the Weathertight Homes Resolution Services Act 2006 or any other civil proceedings relating to water penetration of the buildings in the unit title development.

[31] Section 147 of the Act provides for pre-settlement disclosure of information prescribed by reg 34 of the Regulations. This statement must contain a certificate by the body corporate certifying that the information contained in it is correct.[13] The prescribed information includes the amount of the contribution levied by the body corporate in respect of the unit being sold, the period covered by that contribution, whether the levy has been paid and whether any legal proceedings have been instituted in relation to any unpaid levy. The statement must also include whether any costs relating to repairs to building elements or infrastructure contained in the unit are unpaid and whether there are any proceedings pending against the body corporate in any court or tribunal.

[32] The purchaser may request additional disclosure under s 148 of the Act.

[33] Section 150 requires the vendor to rectify any inaccuracies in any disclosure statement under any of ss 146, 147 and 148. This includes where information was correct when the disclosure statement was given but has since become inaccurate.[14]

[34] Section 153 provides that the purchaser is entitled to rely on the information given under any of these provisions as conclusive evidence of the accuracy of those matters.

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13 Unit Titles Act 2010, s 147(3)(b).
14 Section 150(1)(b).

[35] It can be seen that the Act provides for reasonably comprehensive pre-contractual and pre-settlement disclosure of, among other things, a purchaser's liability for levies that can be raised under s 121 of the Act. This includes the status of existing levies in respect of the unit, details of all maintenance proposed to be carried out on the development in the coming year and the balances of the operating account and long-term maintenance fund. Specific disclosure as to whether the unit or the common property is or has been the subject of any claim relating to water penetration is also required.

[36] We note that the pre-contractual disclosure provided by Mr Gadd also included copies of the minutes of the annual general meetings of the body corporate for the preceding three years. The Miles made no complaint about the pre-contractual and pre-settlement disclosure and they did not exercise their right to request any additional disclosure.

[37] The statutory disclosure requirements referred to in the agreement are supplemented by the warranties, including that:

(a) "[a]part from regular periodic contributions, no contributions have been levied or proposed by the body corporate that have not been disclosed in writing to the purchaser"[15] — this is obviously relevant to the purchaser's liability for levies under s 121 of the Act;

(b) "[t]here are no other amounts owing by the vendor under *any* provision of the Act or [the 1972 Act]"[16] — this could include liability under the following provisions of the Act:

(i) s 121 (outstanding levies);

(ii) s 126 (including liability for repair work carried out by the body corporate substantially for the benefit of the owner's unit or some of the units);

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15 Standard Form Agreement, above n 2, at cl 8.2(1).
16 At cl 8.2(3) (emphasis added).

(iii) s 127 (liability for repair work rendered necessary by any wilful or negligent act or omission or any breach of the Act, regulations or body corporate operational rules, by the unit owner, a tenant, lessee, licensee or invitee. This would not necessarily be confined to liability for repairs to the owner's unit);

(iv) s 138(4) (liability for costs incurred by the body corporate relating to repairs or maintenance of building elements and infrastructure contained in the owner's unit); and

(v) ss 142 and 143 (including liability in tort or for breach of statutory duty).

(c) "[t]here are no unsatisfied judgments against the body corporate and no proceedings have been instituted [by or against it]";[17] and

(d) "[n]o order or declaration has been made by any [c]ourt against the body corporate or the owner under any provision of the Act or [the 1972 Act]".[18]

[38] As discussed, all these liabilities necessarily fall outside the scope of the warranty in cl 8.2(6)(a). Most relate specifically to the owner's unit but not all fall into this category. The more important point is that, with a few exceptions, they concern crystallised liabilities whereas the warranty in cl 8.2(6)(a) is solely concerned with the possibility of any other liability being incurred. We do not consider these prospective liabilities are necessarily confined to the owner's unit. For example, damage to common areas caused by the tortious acts of a unit owner, tenant or invitee, could give rise to a liability, not only for the person who was the owner at the time of the damage, but also for the person who is the owner of the unit at the time proceedings are instituted.[19]

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17 At cl 8.2(4).
18 At cl 8.2(5).
19 Unit Titles Act 2010, s 127(2).

[39] The warranty in cl 8.2(6)(a) could also include a prospective liability relating to common areas. So, for example, if the vendor was aware that his or her tenant or invitee had negligently caused significant damage to structural elements of the car park (a common area) that might require a special levy (not yet raised or proposed), this would fit within the scope of the warranty in cl 8.2(6)(a). In this scenario, the vendor would have knowledge of a fact which might give rise to the possibility of the owner or the purchaser incurring "any other liability" under any provision of the Act, namely s 127. This would be the case notwithstanding the correctness of the vendor's warranty in cl 8.2(3) that there are no other amounts owing by the owner under any provision of the Act at the time of the agreement. Another example would be if the vendor was aware that major earthquake strengthening work to the development was required and the cost was not covered by any existing or proposed levies. This would also fit within the warranty as constituting knowledge of a fact which might give rise to the possibility of the purchaser incurring any other liability, namely liability to pay an undisclosed special levy to fund these works.

[40] For these reasons, we respectfully take a different view to that of the Judge as to the scope of the warranty. We agree with Mr Easton that it is not confined to prospective liabilities relating to the vendor's particular unit and could extend to the possible liability arising out of facts of which, he says, Mr Gadd had knowledge.

[41] However, nothing turns on this because the Judge did not limit her enquiry to whether Mr Gadd had knowledge of potential defects in his particular apartment.[20] Indeed, there was no allegation that there were specific defects in the apartment of which he had knowledge. The Judge fully considered the Miles' allegations concerning Mr Gadd's alleged knowledge of defects elsewhere in the complex.[21] The appeal therefore turns on whether Mr Easton can persuade us to depart from the Judge's findings that Mr Gadd had no knowledge or notice of facts indicating there were systemic weathertightness defects in the building, such that additional levies to investigate and remediate them were a reasonable prospect.

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20 High Court judgment, above n 1, at [178].
21 At [179].

Second issue — Was the Judge wrong to find that Mr Gadd did not have knowledge or notice of any relevant fact covered by the warranty?

[42] It is helpful to commence this part of the analysis by quoting the relevant part of the fourth amended statement of claim:

> By reason of one or more or a combination of the Building Issues referred to at Body Corporate meetings and/or recorded in Minutes of Body Corporate meetings and/or Reports provided to the Body Corporate Committee, [Mr Gadd] had knowledge or notice of facts which might have given rise to or indicated the possibility of:
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> (a) [the apartment] being levied to cover the costs of:
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> (i) further investigations into the Building Issues; and/or
>
> (ii) the remedial works;
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> (b) proceedings being instituted by the Body Corporate to recover monies expended on the remedial works and/or the Building Issues.

[43] As noted, "Building Issues" were defined to include all building maintenance issues raised at body corporate meetings going back to December 2004. By contrast, "remedial works" referred to work required to remediate the "Defects", being the defects identified by Maynard Marks in their July 2015 report. It is important to bear in mind there is a distinction, not obvious on a cursory reading of the pleading quoted above, between "Building Issues" and "Defects". The remedial works were to address the latter, not the former. The Building Issues were addressed as and when they arose without the need for any special levies. Nevertheless, it was critical to the Miles' claim to demonstrate that knowledge of the Building Issues gave rise to the possibility of a special levy being required to fund investigations and remedial works in respect of the Defects (being the systemic weathertightness defects discovered much later). In summary, the Miles claimed that as at the date of agreement, 28 June 2013, Mr Gadd had knowledge or notice of facts which might give rise to the possibility of levies to investigate and remediate the Defects, as reported by Maynard Marks in July 2015, two years later.

[44] We make the obvious point at the outset that because the assessment of knowledge must be made at the date of the agreement, information received by Mr Gadd concerning the status of the building many years earlier is likely to have little relevance. To illustrate, the definition of "Building Issues" includes the reference in

the minutes of the annual general meeting of the body corporate held in December 2004 to replacement of flooring on the main walkway on level 6. Remedial work to the walkways on levels 6 and 8 was completed and paid for well before the agreement was signed. There was no possibility of Mr Gadd or the Miles being levied to meet these costs. Moreover, the Defects requiring remedial work do not include these walkways. There is therefore a complete disconnect between knowledge or notice of this fact in 2004 and the possibility of a levy to investigate and remediate other defects reported by Maynard Marks in 2015.

[45] A similar point can be made about many of the other historical Building Issues going back many years before the agreement was entered into. For example, reference was also made in the claim to the minutes of the annual general meeting held on 11 December 2005 recording leaking taps and a toilet in one apartment and a leak in the shower of another apartment. We cannot see how this could be even remotely relevant to the warranty in June 2013. These issues have nothing to do with the systemic weathertightness defects in other areas of the complex.

[46] Mr Gadd was not cross-examined about many of these historical documents referenced in the claim and we consider the Judge was right not to attach any significance to them.[22]

[47] Mr Gadd was, however, cross-examined about the minutes of a body corporate meeting in February 2007 which referred to leaks from the deck of apartment 815 causing damage (covered by insurance) to apartments 817 and 818. The minutes also recorded a suggestion by one of the committee members, Mr Greenwood, that "the Body Corporate needs to register the building as a 'leaky building' before the cut off date".[23] Mr Gadd said he understood, based on the information he received, that the problem with the deck of apartment 815 was a localised issue caused by a lack of maintenance and the "registration" suggestion was made in order to meet the specific deadline in case there was a problem in the future.[24] Mr Gadd said the suggestion was not taken further, nor was it mentioned again during the time he was on

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22 At [127]–[149].
23 At [127]–[128].
24 At [127][128].

the committee.[25] Mr Greenwood himself, in his capacity as chair of the body corporate, stated at the 2008 annual general meeting that "Sirocco [was] not a leaky building".[26]

[48] We do not consider this suggestion, made in early 2007 by a layperson to protect against the expiry of a limitation period but not pursued, could qualify as knowledge or notice of a "fact" coming within the scope of the warranty given by Mr Gadd in June 2013. We agree with the Judge's assessment of this issue.

[49] Next, Mr Gadd was cross-examined about the minutes of the annual general meeting of the body corporate in June 2007.[27] Mr Gadd was not present at this meeting but the minutes record that one of the owners asked if there was any prospect of obtaining redress from Wellington City Council to recover costs incurred in addressing "continuing problems with the building" given it had "signed the building off". The minutes recorded that the chairperson was to approach the Council, but Mr Gadd did not know whether this was done and no other evidence on the topic was adduced.

[50] It appears that the "continuing problems" with the building related to an earlier discussion recorded in the minutes concerning the leak from the deck of apartment 815 (also mentioned in the February 2007 minutes referred to above). This leak was said to be due to a lack of maintenance by the owners of that apartment and had caused water damage to apartments 817 and 818. The minutes record that major work had been carried out over the past 12 months to remediate these issues, the cost of which was partly covered by insurance (the damage to apartments 817 and 818) and recompense was to be sought from the owners of apartment 815 for the balance.

[51] Costs incurred in 2007 to remediate issues identified then, most of which were covered by insurance with the balance said to be the responsibility of the particular apartment owner, would not objectively be viewed as giving rise to the possibility of a levy being raised more than six years later to investigate other issues not identified until a year after that. The issue in apartment 302 appears not to have been referred to

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25 At [128].
26 At [129].
27 At [130].

in any subsequent minutes or reports, certainly none we were taken to. It seems to us to be irrelevant for present purposes.

[52] The Miles placed considerable emphasis on a report prepared by Regional Property Services Ltd dated 31 January 2009 (RPS report), which was circulated to the body corporate members, including Mr Gadd, by email on 21 March 2012. By way of background, RPS was commissioned by the body corporate secretary in November 2008 to prepare a 10-year fully-costed maintenance schedule for the purposes of establishing a more accurate budget for the building's long-term maintenance plan for the building. RPS provided its report on 31 January 2009. The maintenance plan forecast total expenditure of approximately $358,000 over the 10-year period allocated across 33 line items, starting with a "General Catchup" in year 1, 2009. Mr Gadd's uncontradicted evidence was that he did not receive this report at the time it was originally prepared (he was living in Milan at that time). The reason for sending this document to the body corporate members in March 2012 was so that they could review the plan and consider future costs and funding requirements in advance of the upcoming annual general meeting. This was part of the process that led to the levies being increased by 18 per cent, as we come to below.

[53] The RPS report divided the maintenance items into two groups — "priority" (specific issues identified such as replacing two tiles, replacing a broken mirror in the pool area and extending a downpipe outside one of the apartments) and "scheduled" (such as periodic cleaning of exterior walls, decks and spoutings). The last-mentioned, but most significant, priority item concerned the Harditex exterior wall cladding, particularly the jointing problems being experienced. This was described as "URGENT WORK". RPS explained that much of the cladding was exposed to the weather and, despite being a generally inflexible system, was "called upon to 'flex' when there are earthquakes or other external forces". They pointed out that the manufacturer stipulated that if this product was to be used above two storeys in height, it should be installed in accordance with a "Specific Design" approved by architects and engineers. RPS did not know whether this had been done, but observed:

> Should this be the case with Sirocco, it means that the (mainly) jointing problems are at best an 'inherent defect', at worst, a demonstration and symptom of the effects of faulty workmanship.
>
> I notice that some 'bandaging' with fibreglass and/or other taping has been carried out. Most (but not all) of this is still sound. Much more fibreglass bandaging needs to be done – if this is the approach you wish to take. In the specialist industry of weathertight remediation to Monolithic claddings, this is called 'Targeted Repairs'. As a first step, this is a wise move because of the need to 'mitigate' possible moisture damage to the framing and the substrate. Unfortunately the backing to this system is a porous Harditex Board and it has now been withdrawn from the market[.]

[54] The version of this report sent to the body corporate committee members in March 2012 contained updating commentary in red text from the body corporate secretary. Her comment immediately beneath this passage read as follows:

> Checked in 2009, 2010 and 2011 and in good condition – watching brief being kept through Plastercoat Services Ltd.

[55] The RPS report continued:

> In the Schedule, I have included a **Budget Allowance of $45,000.00** and suggest that you act as soon as practicable. This amount (or more) can be spent on targeted repairs – which may include some structural work (e.g. Photo 30). However, the prudent action initially, would be to commission an urgent PRELIMINARY REPORT from a weathertightness expert, in order to 'sample check' the current status of the framing and obtain comment on the options as you move forward. This person would most probably be a member of the Building Surveyors Institute of New Zealand and would carry an appropriate amount of Professional Indemnity Insurance.
>
> An example of such a person would be Thomas Wutzler of Helfen Ltd – although he is usually booked out for several months ahead.
>
> My role in this is simply to discharge my duty by informing you of the situation. Unfortunately, without a Weathertightness Specialist's report, and a definitive course of action, no reliable costs can be calculated at this stage.

[56] The body corporate secretary recorded in red text between these last two paragraphs that she had consulted Mr Wutzler following receipt of the RPS report in 2009 and he supported the approach being taken:

> In 2009 I spoke to Thomas [Wutzler] who I have a relationship with on another building and he thinks we are wise to remain keeping a watching brief with Jim Henderson [Plastercoat Services Ltd] and Bill Millar [Weathertight Waterproofing Ltd].

[57] Mr Gadd said at the trial (in November 2020) that he could not recall reading this report when it was emailed to him in March 2012. However, he readily accepted that he would have read it at the time. The Judge discussed this report in some detail in assessing whether Mr Gadd ought reasonably to have known of the possibility that special levies may be required in the future to remediate systemic defects in the building.[28]

[58] The Judge noted that the RPS report was sent to the body corporate committee members with the secretary's annotations the day after their meeting on 20 March 2012. The minutes of that meeting record the body corporate secretary reported the "huge amount of work that had been undertaken over the past few years on 'invisible' infrastructure and that Sirocco was now in much better shape than previously".[29] This is consistent with the long-term maintenance plan recommended by RPS, including the significant sum budgeted in year 1 for "General Catchup".

[59] The body corporate secretary's comment about the improved state of the building was also supported by her other annotations alongside RPS's various recommendations. Of the 12 priority maintenance items, she had marked six of them as "Done – 2009" and two were being done twice yearly. Three items were noted "To be carried out in 2012" — moisture entrapment on level 4 (RPS budget allowance of $2,700), rust issues on the external stairs and steel support poles (RPS budget allowance of $9,000), and replacement of a floor tile at the entrance to apartment 404. We have already addressed the remaining item, being the cladding (RPS budget allowance of $45,000 for targeted repairs). As noted, the body corporate secretary's 2012 annotations confirm that the recommended weathertightness specialist had been consulted in 2009 and he considered the watching brief being maintained with Plastercoat Services Ltd and Weathertight Waterproofing Ltd was wise. It appeared that targeted repairs were continuing as planned, in accordance with RPS's recommended maintenance schedule.

[60] The Judge observed that the 18 per cent increase in levies agreed at the June 2012 annual general meeting supported Mr Gadd's understanding that

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28 At [132]–[145].
29 At [143].

the body corporate was adequately funded to meet projected expenditure in accordance with the long-term maintenance plan.[30] The Judge considered that the report prepared by the chairperson for this annual general meeting was also reassuring:[31]

> This last year has been a really challenging year for apartment owners in Wellington and elsewhere in the country. The Christchurch earthquakes have impacted on insurance in particular and also on earthquake strengthening.
>
> In that regard we at Sirocco have come off lightly. [The body corporate secretary] has negotiated a very competitive price on our behalf and we have signalled the necessary increase well in advance. An eighteen percent increase in levies is very modest when you ask around about what many other buildings are facing. At Sirocco we are not facing earthquake-strengthening work either.
>
> Weather tightness is the other big challenge for apartment buildings and again *we have managed the relatively minor water tightness issues within the maintenance budget*. The walkways are now sealed and any water ingress which appears from time to time has been repaired. *Sirocco is not a leaky building – rather it is a building with some occasional water ingress!!*

[61] Mr Easton submits it was not objectively reasonable for Mr Gadd to place any reliance on the body corporate secretary's comments in red text on the RPS report. This was because, like the chairperson, she did not have any relevant weathertightness qualifications, nor was she a building surveyor. Further, he argues that her comments do not adequately address the concerns raised in the RPS report for three reasons. First, the red text contains no commentary about the expertise of Mr Henderson from Plastercoat Services Ltd or Mr Millar of Weathertight Waterproofing Ltd. Secondly, Mr Easton says a watching brief is not the same as a weathertightness expert's report and the body corporate secretary's suggestion that in 2009, 2010 and 2011 the cladding was in "good condition" overlooks RPS's warning about jointing problems in the cladding and potential inherent defects and/or faulty workmanship. Thirdly, Mr Easton points out that the conversation with Mr Wutzler apparently took place in 2009, some two to three years before the report was sent to the committee members and there was nothing to suggest that he had inspected the building or prepared an expert report as recommended by RPS.

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30 At [145].
31 At [145] (emphasis added).

[62] We are not persuaded by these points. The body corporate secretary was not being relied on as having specialist expertise as a building surveyor or weathertightness expert. This is no doubt why RPS was engaged, and Mr Wutzler consulted on their recommendation. The body corporate secretary was clearly efficient and attended diligently to any issues with the building as they arose. We do not consider there was any reason for Mr Gadd to discount the information relayed by her that appropriate specialists had been engaged, were monitoring the cladding on an ongoing basis and carrying out targeted repairs as necessary funded by existing levies. These specialist contractors had apparently been satisfactorily involved in the maintenance of the building for some time and Mr Wutzler had specifically endorsed the wisdom of their engagement to provide ongoing oversight. Mr Gadd was entitled to expect that Mr Wutzler was appropriately qualified and sufficiently appraised of the situation at Sirocco to be able to make this recommendation.

[63] Mr Easton also pointed to three emails Mr Gadd received after the June 2012 annual general meeting, in the period leading up to the agreement being signed. Mr Easton says these emails put Mr Gadd on notice of "further problems".

[64] The first of these was dated 28 November 2012 and was sent by the body corporate secretary to the committee members reporting very high moisture readings at the base of a wall:

> Good morning All
>
> Just letting you know that late yesterday afternoon we discovered damage to the wall leading down the inside stairs which led to very high moisture readings outside at the base of the wall around and under the exterior stairs as well as around the inside stairs.
>
> This morning the plumber will be on site with us to discuss improving draining in the outside area as it would appear that over the years when there has been heavy rain, the water does not adequately drain away and it has pooled against the exterior wall causing the long term ingress of water and the subsequent damage to the wooden structure.
>
> We have removed the gib and you can see how damaged the wood is inside the wall.
>
> Once a solution is found we will proceed to repairing the wall.
>
> Cheers

Kind regards

[65] We note that despite the comprehensive definition of Building Issues in the fourth amended statement of claim, this document was not referred to. In any case, it appears that the issue was promptly resolved.

[66] In a follow-up email later that day, the body corporate secretary relayed to committee members the plumber's assessment and recommendation. She advised that she had instructed the plumber to carry out the necessary work:[32]

> Further to my earlier email with regard to the flooding problem on level 4, Derek Thompson the plumber reports as follows:-
>
> > *I think a new storm water outlet definitely needs to be installed to allow for the rain water to drain more effectively.*
> >
> > *Also it would be wise to install an overflow for this area, as if or when the storm water outlet blocks, the water floods back towards the stairs resulting in the damage you found with your moisture meter.*
> >
> > *The overflow would have to discharge close by, to alert people there is a problem.*
>
> I have given Derek the go ahead to proceed to getting the work done just as soon as possible – all the debris has been completely removed from the area and the drain cover has in fact been removed until such time as a larger outlet can be created – bearing in mind we have a couple of days of rain forecast for the end of this week and over the weekend.
>
> Kind regards

[67] In her December 2012 management report, the body corporate secretary provided a further update on this issue:

> A combination of the maintenance contractor and plumber have installed a new flashing outside, expanded the stormwater outlet and improved the drainage. The area on the inside stairs is still exposed, showing very blackened wooden structures but it is slowly drying out and will be repaired once this has happened – hopefully before Christmas.

[68] Mr Gadd was entitled to expect from this correspondence that this issue had been satisfactorily addressed and paid for out of the body corporate's existing financial resources prior to the agreement being signed. Further, no such defect was identified in Maynard Marks' July 2015 report. We do not consider that a reasonable vendor in

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[32] (Emphasis in the original).

Mr Gadd's position would have been alerted by the knowledge of this issue to the prospect of a levy being raised to remedy other defects reported much later.

[69] The second email relied on by Mr Easton was sent by the body corporate secretary to the committee members on 12 March 2013 and attached the March 2013 management report. This report referred to an issue with apartment 613 that had been traced to the failure of the seals under the aluminium doors leading to a courtyard:

> After some extensive investigation and removal of the floor and parts of the walls, it was discovered that water was getting in up and under the aluminium doors from the courtyard and tracking under the walkway part of the floor and settling on the floor against the wall. The seals under the doors were no longer doing their job and they had been letting water in for many many months and most probably for years.

[70] The body corporate secretary advised that she had lodged an insurance claim for the repair costs amounting to $7,630, but the claim had been declined. She recommended that the seals in the eight other courtyard apartments be checked immediately and any necessary costs be paid for out of the long-term maintenance fund:

> I think it is really important that we now look to seal around the area of the other eight courtyard apartments where the cladding meets the tiles to prevent this happening again. As it is part of the cladding it is body corporate responsibility to ensure there are effective seals rather than individual owners' responsibility. This would need to be funded from the long term maintenance fund.

[71] Mr Gadd and the other committee members were specifically told that the work would be funded from the long-term maintenance fund. We do not consider this would have caused a reasonable vendor in Mr Gadd's position to appreciate the possibility of a special levy being raised to address this issue, let alone the as-yet unidentified issues reported by Maynard Marks two years later.

[72] The third email was another sent by the body corporate secretary to the committee members and is in the same category. This email was sent on 20 June 2013, a week before the agreement was signed, and advised that water was getting into an apartment from two of the penthouse apartment decks. The body corporate secretary attached a quote totalling $9,220 (plus GST) from Plastercoat Services Ltd and Le Celebre Ltd to carry out the recommended remedial work and she

asked for approval to get this work done. Again, the committee members were told that the work would be funded from the long-term maintenance fund. The body corporate secretary explained "this is work that in the long term must be done for the structure of the building to remain sound".

[73] Given the advice that these works were to be funded from the long-term maintenance fund, the Judge considered this report did not "undermine Mr Gadd's reasonable belief that such work was consistently carried out and paid for from that budget".[33] We agree.

[74] Mr Easton makes the point that, under s 117(2) of the Act, a body corporate cannot use money held in the long-term maintenance fund for work that is not in the long-term maintenance plan. He says this quote exceeded the amount budgeted for miscellaneous expenses and repairs ($3,300 per year) or any other relevant budgeted expense item. He notes that at the time the agreement was entered into there was $31,964 in the long-term maintenance fund. Taking account of expenses incurred for other repairs, Mr Easton submits that it ought to have been apparent to Mr Gadd that:

> … there may have to be future levying to fund either investigations into and/or repairs to the weathertightness defects which were an ongoing issue the Body Corporate was having to deal with right up until the time Mr Gadd entered into the Agreement.

[75] The Judge did not address Mr Easton's point about the restrictions on the use of funds in the long-term maintenance fund. Mr Sullivan, for Mr Gadd, says this is because the point was not raised in the High Court. Mr Gadd therefore had no opportunity to address the point in evidence. Leaving that objection aside, we consider Mr Easton's submission quoted above exposes the flaw in the claim alluded to earlier, namely the important distinction between special levies to meet the cost of "remedial works" to remediate "the Defects" reported by Maynard Marks in July 2015, and the various "Building Issues" that had been addressed over the nine-year period leading up to the agreement and paid for from existing levies. We agree with Mr Easton that Mr Gadd knew that maintenance issues would be "ongoing".

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[33] At [148].

But, having owned the apartment for nearly nine years, Mr Gadd had good reason to believe that these ongoing repairs were appropriately addressed as they arose and paid for using funds accumulated from normal periodic levies. A reasonable vendor in his position in late June 2013 would expect more of the same — ongoing maintenance and repairs funded by normal periodic levies. The documents Mr Easton relies on support that reasonable understanding. Of course, there would have to be "future levying" to fund such continuing maintenance. But we agree with the Judge that a reasonable vendor in Mr Gadd's position would not have been alerted to the possibility of a special levy being required to investigate and remediate the major systemic weathertightness issues found much later.

[76] We have not been persuaded that the Judge's key factual findings were wrong. We have already set these out, but, for ease of reference, we set them out again here:

> [171] Putting aside the fact that Mr Gadd had no knowledge of some of the documents while he was resident overseas, the substantive point is that while the documents are most likely to be probative of the fact there were particular issues with particular apartments, the documents did not, either individually or in combination, prove the point the plaintiffs plead. The documents do not prove that Mr Gadd had knowledge of the possibility of special levies being struck to cover the costs of investigating or remediating a leaky building or of possible proceedings by the Body Corporate to recover monies expended on such works.
>
> …
>
> [178] Even if the warranty has a broader effect, Mr Gadd did not have the knowledge or notice that the plaintiffs claim he possessed. Mr Gadd understood that some apartments had issues with leaking but that those issues had either been addressed or were being addressed. Importantly, he understood that the costs for repairs were borne either by individual owners or, in the normal way, by the Body Corporate and that maintenance costs would be addressed via the annual process of reviewing the budget for the long term maintenance plan. In other words, Mr Gadd did not have notice of any fact that indicated to a reasonable vendor in his position the possibility that he or a purchaser might incur any (relevant) liability under [the Act] or [the] 1972 Act.

[77] For the reasons given, the appeal must be dismissed.

Result

[78] The appeal is dismissed.

[79] The appellants must pay costs to the respondent for a standard appeal on a band A basis and usual disbursements. We certify for second counsel.

Solicitors:
Grimshaw& Co, Auckland for Appellants
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