IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA717/2023
[2025] NZCA 684

BETWEEN	BODY CORPORATE 406198 First Appellant
	THE PARTIES LISTED IN SCHEDULE 1 Second Appellants
AND	ARGON CONSTRUCTION LIMITED First Respondent
	AUCKLAND COUNCIL Second Respondent

CA153/2024

BETWEEN	AUCKLAND COUNCIL Appellant
AND	BODY CORPORATE 406198 First Respondent
	THE PARTIES LISTED IN SCHEDULE 1 Second Respondents

CA342/2024

BETWEEN	AUCKLAND COUNCIL Appellants
AND	BODY CORPORATE 406198 First Respondent
	THE PARTIES LISTED IN SCHEDULE 1 Second Respondents
	ARGON CONSTRUCTION LIMITED Third Respondent

CA345/2024

BETWEEN	ARGON CONSTRUCTION LIMITED Appellant
AND	BODY CORPORATE 406198 First Respondent
	THE PARTIES LISTED IN SCHEDULE 1 Second Respondents
	AUCKLAND COUNCIL Third Respondent

CA132/2025

BETWEEN	HAILING WANG AND LINDA WU Applicants
AND	BODY CORPORATE 406198 First Respondent
	THE PARTIES LISTED IN SCHEDULE 1 Second Respondents
	ARGON CONSTRUCTION LIMTED Third Respondent
	AUCKLAND COUNCIL Fourth Respondent

Hearing: 8–9 April 2025

Court: Palmer, Woolford and Whata JJ

Counsel: D R Bigio KC, R D Butler and H Chung for First Appellant and represented Second Appellants in CA717/2023, and First Respondent and represented Second Respondents in CA153/2024, CA342/2024, CA345/2024 and CA132/2025
Unrepresented Second Appellants CA717/2023, and Second Respondents in CA153/2024, CA342/2024, CA345/2024 and CA132/2025 as listed in Schedule 2 in person
W A McCartney and D A Cowan for First Respondent in CA717/2023, Third Respondent in CA342/2024 and CA132/2025, and Appellant in CA345/2024
S C Price and C M Fairnie for Second Respondent in CA717/2023, Appellant in CA153/2024 and CA342/2024, Third Respondent in CA345/2024, and Fourth Respondent in CA132/2025
Applicants in CA132/2025 in person

Judgment: 18 December 2025 at 3.00 pm

JUDGMENT OF THE COURT

A The Body Corporate's appeal in CA717/2023 is dismissed.

B Argon's and Auckland Council's cross-appeals in CA717/2023 are allowed in respect of the award for consultancy costs and otherwise dismissed.

C We set aside the award of investigatory consultancy costs and refer the issue back to the High Court for reconsideration in light of our judgment.

D Auckland Council's appeal in CA153/2024 is allowed. The escalation award shall be modified to the sum of $322,359.78.

E Argon's and Auckland Council's appeals in CA342/2024 and CA345/2024 are allowed in respect of the costs award. We set aside the award of costs and refer the issue back to the High Court for reconsideration in light of our judgment.

F We make no order as to costs on the appeals.

G The application for substitution by Hailing Wang in CA132/2025 is granted.

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REASONS OF THE COURT

(Given by Whata J)

[1] The Bianco Off Queen is a two-tower apartment building with 157 units (the Apartments). It was built with defects. Body Corporate 406198, the Body Corporate for the Apartments, together with individual unit owners sued Argon Construction Ltd (Argon) as head contractor and the Auckland Council in negligence.[1] By the time of trial, only two type of defects were still claimed, namely:[2]

(a) The building was built with cantilevered balconies that had defective waterproofing (defect 1).

(b) Waterproofing at the ground level (including the podium common areas) was similarly defective (defect 2).

[2] The majority of the damages claimed relate to the costs of remedying defect 1.[3] The experts conferred and agreed that in relation to defect 1, there were the following defects to the balconies:[4]

(a) Failures in the waterproofing membrane have allowed water underneath.

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1 We refer to the Body Corporate when referring to the arguments advanced on behalf of both it and the individual unit owners set out in Schedule 1, excluding the unrepresented parties listed in Schedule 2. Argon Construct Ltd changed its name to Parkwood Builders Ltd, however we continue to refer to it as Argon in the judgment.

2 *Body Corporate 406198 v Argon Construction Ltd* [2023] NZHC 3034 [liability judgment] at [3].

3 At [3].

4 At [40].

(b) Water ingress is causing damage to the cork acoustic layer (cork acoustic matting).

(c) In respect of the damage to the cork acoustic matting, cls E2.3.2 and B2 of the Building Code have been breached.

(d) Water has entered the exterior walls causing damage in some locations, resulting in further breaches of cls E2.3.2 and B2 of the Building Code.

[3] It was agreed defect 2 was a much less significant issue than defect 1.[5] The experts agreed that moisture ingress had occurred at the ground floor balconies and the podium separating the two towers, allowing water to reach the basement carpark areas.[6]

[4] A key issue at trial (among many) was the extent of the remedial works and associated costs required to repair these defects. There were two main proposed scopes of works to remedy the defects before the Court:

(a) The Body Corporate's proposed remedial scope, prepared by Maynard Marks,[7] which involves replacing the waterproofing membrane system and consequential works to the balustrades and other building junctions to obtain code compliance (the Maynard Marks scope).

(b) Argon's proposed remedial scope, prepared by Mr Alexander, a building surveyor (the Alexander scope). This involves partial removal of the waterproofing membrane and applying to the exposed concrete AQURON 2000 (a spray-on hydrogel treatment for concrete designed to, among other things, waterproof concrete floors).

[5] In the High Court, Andrew J preferred the expert evidence for Argon on this issue, Mr Alexander. In the result, the Court awarded the sum of $5,344,816.55 in

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5 At [72].
6 At [74].
7 Maynard Marks are a professional property and building consultancy firm.

remedial costs (including a sum for escalation) as well as $779,500 in general damages.[8] This compares to the sum initially claimed by the Body Corporate of $40,739,870. Costs were awarded to the Body Corporate on a category 3B basis in the sum of $583,254 and disbursements of $579,514.73 notwithstanding a pre-trial *Calderbank* offer at nearly three times the damages award.[9]

Issues

[6] Each of the key parties filed appeals, most of which raised multiple issues. They may be grouped under the following headings:[10]

(a) Duty of care and liability: What is the nature and scope of the duty of care and corresponding remedial liability in negligent building cases?[11]

(b) Scope of remedial works: Did the Court adopt the correct scope for the remedial works?[12]

(c) Liability for the acoustic matting and consultancy costs:

(i) Was Argon liable for the cost of replacing the acoustic matting?[13]

(ii) Was there proper evidence to support the consultancy costs award?[14]

(d) Concurrent duties: Did the Council owe concurrent duties to both the Body Corporate and the individual unit owners?[15]

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8 *Body Corporate 406198 v Argon Construction Ltd* [2024] NZHC 237 [damages judgment]; and *Body Corporate 406198 v Argon Construction Ltd* [2024] NZHC 3791 [correction judgment]. The parties advised that the Sealed Order awarded $4,516,092.90.

9 *Body Corporate 406198 v Argon Construction Ltd* [2024] NZHC 1037 [costs judgment] at [4] and [61]–[62].

10 These issues are drawn from the agreed issues list provided by Argon and the Council, as slightly modified to accommodate a point of clarification made by the Body Corporate and based on the matters in focus during oral argument before us.

11 The cross-appeals in CA717/2023.

12 The Body Corporate's appeal and the Council's cross-appeal in CA717/2023.

13 Argon's cross-appeal in CA717/2023.

14 The cross-appeals in CA717/2023.

15 The Council's cross-appeal in CA717/2023.

(e) Costs:

(i) Should Argon and the Council be awarded costs and disbursements for post-*Calderbank* offer attendances?[16]

(ii) Was the Court wrong to award the Body Corporate $400,000 in disbursements for expert costs?[17]

(iii) Was the Court wrong to apportion costs liability as between the Council and Argon, 65 per cent to the Council and 35 per cent to Argon?[18]

(f) Substitution of parties: Should the application for substitution by Hailing Wang be granted?[19]

[7] There was also an issue as to the quantum of escalation for project costs to account for inflation during the construction period.[20] In the High Court, Andrew J awarded $563,869.87 in special damages.[21] The parties agreed this should be reduced to $322,359.78. We make the corresponding order below at [230].

Summary

Duty of care and liability

[8] The Judge did not err in his assessment of the nature and scope of the Council's or Argon's duty of care. Those duties march in step with their non-delegable statutory obligations to secure Building Code compliance and are accordingly non-delegable in the context of these circumstances. In this case both the Council and Argon must be taken to have assumed, and did assume, responsibility for the correct installation of the membranes. Both were liable for the cost of repair of the defective membrane

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16 The Council's appeal in CA342/2024 and Argon's appeal in CA345/2024.
17 The Council's appeal in CA342/2024 and Argon's appeal in CA345/2024.
18 The Council's appeal in CA342/2024.
19 Ms Wang's application in CA132/2025.
20 The Council's appeal in CA153/2024.
21 Liability judgment, above n 2 at [279]; and damages judgment, above n 8, at [23]–[24].

installation to the extent necessary to achieve code compliance, as well as for the cost to repair any related water damage.

Scope of remedial works

[9] The Alexander scope proposed by Argon was appropriate. Full "like-for-like" replacement of the defective membranes was not required. While in some cases a like-for-like repair may be necessary, it was not justified in this case. In short, there was no sufficient normative linkage between the duty of care, the breach and full membrane replacement because full code compliance can be achieved without it. However, the Judge was correct to find that the installation of the defective membranes was causally connected in fact and law to the Alexander scope. The defective installation was widespread and systemic and in conjunction with other defects, caused or created the potential for water damage to other elements of the building. A correspondingly widespread and systemic remedial response was therefore justified.

Acoustic matting

[10] Argon is liable for the damage to the cork acoustic matting. While replacement of those mats was not necessary to achieve code compliance, the Body Corporate are entitled to be compensated for the damage to them caused by Argon's negligence. Replacement cost is an appropriate measure of their loss.

Consultancy costs

[11] The evidence proffered by the Body Corporate in support of the claimed consultancy costs was unreliable hearsay, the deponent being unqualified to give that evidence. But there being no dispute that some consultancy costs were incurred, the proper remedy is to refer this matter back to the High Court for reconsideration with the benefit of relevant evidence.

Concurrent duties

[12] Whether a council owes a concurrent duty to a body corporate and individual owners is a matter of some controversy and this issue will need to be addressed in the right case. This is not the right case. The Judge's treatment of contributory negligence

in this case was just and fair to the Council. The likely impact of the negative answer sought by the Council on the damages award is likely to be immaterial. Intervention by this Court is not necessary.

Costs

[13] The Judge did not approach the significance of the *Calderbank* offer on the correct legal basis. Argon and the Council were entitled to their post-*Calderbank* costs unless there were compelling countervailing factors, and there needed to be exceptional reasons for making an award of costs against a qualifying *Calderbank* offeror. But as we cannot discount the possibility that the Judge might still have made an award of costs in favour of the Body Corporate and the unit owners, this matter must also be referred back to the High Court for reconsideration. The Judge did not otherwise err in his assessment of costs, including in respect of expert costs or apportionment.

Key facts

[14] Argon was engaged under contract by Bianco Ltd to build the Apartments. The original design and building consents envisaged cantilevered balconies covered with ceramic tiles, installed over liquid-applied waterproofing membranes and rubber acoustic matting, with metal-framed railings providing fall protection. As Andrew J explained:[22]

> [23] The structure and waterproofing of the balconies were designed by ADC Architects and Buller George Engineers Ltd. The initial drawings for the balconies specified that the concrete was to be poured off-site, with screed to be applied on-site to provide the balconies with a slope towards the building. This included forming a drain into the pre-cast concrete slab prior to installation. However, Argon proposed, and the architects approved, an alternative construction methodology. That alternative provided for the entirety of the structure to be completed off-site using pre-cast concrete and installed on-site by Argon. No screed was applied in the construction of the balconies.
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> [24] Concretec New Zealand Ltd supplied the pre-cast balconies which Argon subsequently installed. TAL Ltd (TAL), the tiling sub-contractor, waterproofed and tiled the balconies. Argon placed grates (or grills) over the balcony drains. The Auckland Council carried out some inspections of the waterproofing of the balconies throughout the construction.

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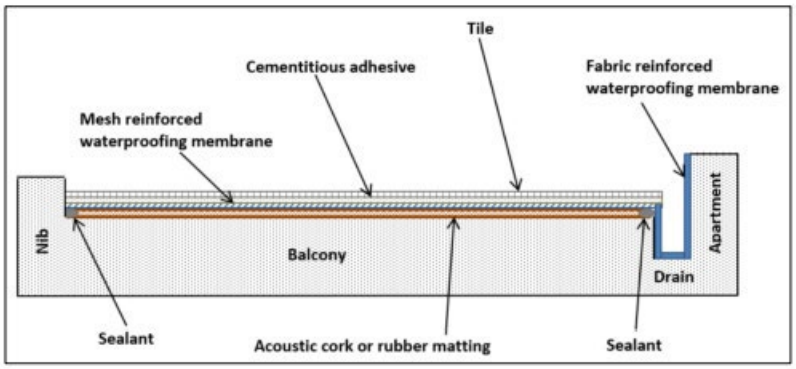
22 Liability judgment, above n 2 (footnote omitted).

[25] A diagram showing the design elements of the cantilevered balconies, as they were built, is set out below.



[26] The balconies are constructed with one or more pre-cast concrete slabs. As constructed, the pre-cast slabs extend into the building by approximately 250 mm. The steel holding the balcony to the building is contained in the bottom of the slab (the slab itself is a 200 mm slab). The steel, that does all the work of holding the balcony to the building, is about 50 mm from the bottom. On the slab, there is a raised perimeter nib, also made of concrete. The nib is located on the exterior face of the balconies.

[27] The apartments situated on the corners of the towers have larger balconies. For these balconies, there is more than one pre-cast concrete slab, meaning that multiple slabs butt together to form joins or joints. Those joints are more vulnerable to ingress from moisture. This is one of the areas where there has been water ingress through the balconies.

[28] The waterproofing membrane was to be reinforced with mesh. A cementitious adhesive was to be applied on top of the waterproof membrane, to which the tiles were to be affixed.

[29] Once constructed, the balconies had a fall of 20 mm, with the higher part of the fall being located adjacent to the perimeter nib. Water, once it lands on the tiles of the balconies, runs towards the apartments, where it was designed to be diverted away from the apartments by a channel drain with a downpipe.

[30] A diagram demonstrating the "bottom of wall detail" and where the wall intercepts with the balcony drain on the interior face of the balcony is attached as 'Appendix B'.

[31] The consented drawings showed "Mapelastic Waterproofing on [Mapefonic] Acoustic System", a BRANZ-approved proprietary system including a waterproof membrane and an acoustic mat. However, as built on most balconies, the acoustic matting was made of cork. In some instances, a rubber matting was used instead of Mapefonic. Cork is absorbent and biodegradable.

[32] The specified Mapelastic membrane is a cementitious (two-part) liquid-applied membrane system produced by Mapei New Zealand Ltd. The consented drawings show that the membrane was to terminate around the perimeter by "sawcut to seal waterproofing membrane".

[15] The Judge also noted:

> [35] As built, none of the balconies investigated by the plaintiffs' experts had membrane to the inside face of the nib. The membrane terminated on the horizontal surface of the balcony before the nib as shown in the drawing above at [25]. The plaintiffs say that the as-built detail was a high-risk detail.

[16] In terms of building consent and compliance with the Building Code, in November 2008, the Council inspected some of the balconies, including all of the balconies on levels four to eight in one of the towers of the Apartments. The waterproof membrane on the balconies was given a pass and the overflow and discharge drain were regarded as "not applicable". TAL also issued two producer statements for the tiling and waterproofing and Mapei, the supplier to TAL issued a performance warranty for their product. In relation to defect 2, the single inspection by the Council of the podium area was given a pass.

The claim

[17] A preliminary report from Maynard Marks received by the Body Corporate in May 2017 identified multiple weathertightness concerns. Litigation was commenced in July 2017. The initial statement of claim asserted 99 specific defects. Further reports from Maynard Marks in 2018 included a preliminary scope of remedial works that ran to more than 900 pages. However, by the nineth statement of claim dated 21 June 2022 only four defects remained. Two of these settled, leaving only the two alleged defects as noted above at [1].[23]

Outcome in High Court

[18] The Judge found that the two defects were proven, but the evidence of actual water damage was limited.[24] He also found that Argon had assumed responsibility for the building work and that it owed a non-delegable duty of care to individual unit owners, including subsequent purchasers.[25] The Council was considered liable for the defects, having failed to identify through the inspection process relevant non-compliance with the approved plans and the defective membrane installation.[26]

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23 At [41]–[43].
24 At [59], [66], [75], [85], [92] and [99]–[101].
25 At [120]–[122].
26 At [155]–[162].

The Judge also found that the Council's omissions were a substantial and material cause of specified losses.[27]

[19] On remedy, the Judge found that the Maynard Marks scope proposed by the Body Corporate was disproportionate and unreasonable.[28] The Judge instead adopted the Alexander scope proposed by Argon for both defects, including the following in respect of defect 1:[29]

> (a) removing the failed membrane;
>
> (b) removing the cork acoustic layer;
>
> (c) fixing any visible hairline cracks in the balcony concrete with an epoxy;
>
> (d) filling the construction joint, where it exists, with an epoxy mortar so that water cannot track to the building wall;
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> (e) moving the outlet hole further from the building wall, and sealing into the hole a new downpipe fitting so that water cannot track to the building wall;
>
> (f) leaving the balustrades in place;
>
> (g) leaving the aluminium joinery in place (the old membrane that extends under the joinery does not need to be removed because it is not being replaced);
>
> (h) waterproofing the balcony concrete with Aquaron 2000, as an extra layer of protection; and
>
> (i) installing a new under-flashing as designed by Mr Alexander.

[20] The claim regarding acoustic matting was also made out and Argon, but not the Council, was found liable for its replacement cost.[30]

[21] The Judge used the assessment of the cost of repairs (based on the Alexander scope) proffered by Mr Brock, Argon's quantity surveyor, as a starting point, reserving leave for further submissions on quantum.[31] With the benefit of those submissions, only issues relating to preliminary and general costs, construction duration,

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27 At [164] and [168].
28 At [203].
29 At [241]–[242].
30 At [257] and [259]–[260].
31 At [272].

weathertightness detail, escalation, consultants' costs and relocation costs remained to be resolved.[32] In the end, the Judge found, relevantly, that the Body Corporate should be awarded $5,344,816.55 in remedial damages and $779,500 in general damages, apportioning liability of 85 per cent for Argon and 15 per cent for the Council.[33]

Duty of care and liability

[22] All of the parties challenge the Judge's approach to the nature and scope of the duty of care and corresponding remedial liability:

(a) The Body Corporate claims that the Judge was wrong to limit the scope of the Council's and Argon's duty of care and corresponding remedial duty to a minimum code-compliant repair and should have instead adopted a like-for-like remedial approach. This is the scope question.

(b) Argon claims that the Judge was wrong to find that Argon owed a non-delegable duty of care to the individual owners of the apartments. This is the non-delegable duty question.

(c) The Council claims that even if the scope of the Council's duty of care and remedial duty extended to the waterproofing membrane (where the membrane is not required for code compliance), the Judge was wrong to impose liability for repairs that were not sufficiently linked to the breach of that duty in fact or law. This is the causation question.

[23] We propose to address these questions first before moving to the issues under the separate appeals. We do not accept any of these claims.

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32 Damages judgment, above n 8, at [5].

33 Correction judgment, above n 8, at [1] and [18]; and liability judgment, above n 2, at [340]. The Judge initially awarded $4,974,830.11 (damages judgment, above n 8, at [33]), but this was corrected in the correction judgment, above n 8 to allow for "off-site overheads and profit": at [18].

The scope question

The Judge's findings

[24] The Judge identified two key scope issues for each defect:[34]

(a) What is reasonably required to remedy the alleged defect and any damage it caused?

(b) What are the costs of the reasonable remedial scope?

[25] The parties agreed that the Judge's findings in relation to defect 1 would be applicable to the conclusions reached in relation to defect 2.[35]

[26] In particular, the Judge referred to the agreed situational facts in relation to defect 1:[36]

(a) the membranes were not dressed into sawcuts and in many cases there was cork matting under the membrane rather than Mapefonic;

(b) the cork has become wet and/or decayed in the locations identified by the plaintiffs;

(c) the consented plans (as a matter of fact) required a chase/sawcut to the inside face of the balcony nib, but as built, there were no sawcuts;

(d) there was no membrane up-stand on the perimeter nib;

(e) on some balconies the membrane was poorly dressed into the outlet and in some cases not pressed into the outlet at all; and

(f) the thickness of the membrane was highly variable and on many balconies the mesh was not encapsulated within the membrane.

[27] The Judge concluded that defect 1 and defect 2 were proven. He made a number of key observations. First, the participating experts to a "Scott Schedule", including Mr Earley for the Council, agreed that there had been breaches of the Building Code, including cls B2 (durability) and E2 (external moisture).[37] Second, he found that the evidence of the building surveyor for Argon, Mr Alexander, was

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34 Liability judgment, above n 2, at [51].
35 At [72].
36 At [59].
37 At [61]. "Scott Schedules" are often used in relation to evidence on defective workmanship, and involve a table identifying the issues in dispute between the parties, along with the complaint and the other party's response. The Scott Schedule was produced under r 9.44 of the High Court Rules 2016.

"unassailable".[38] The Judge agreed with his analysis that there were two problems that arose with the balconies:[39]

> (a) Some of the downpipe connections leak where the downpipe connected to the channel drain in the balconies. Due to the downpipe being located very close to the exterior wall, this allowed some water to enter the wall.
>
> (b) Many of the balcony joints allowed water to pass through due to voids in the concrete that had not flowed well into the joints. As the joint extended over the top of the exterior wall, some water damage has occurred in that local area, but this only happens on balconies that have joints.

[28] Third, the Judge concluded that the application of the membrane was generally of poor quality.[40] This included failure to install Mapeband tape,[41] missing membranes over some outlet flanges, a lack of thickness with the membrane, lack of encapsulation of the reinforcing mesh within the membrane and failure to construct membrane upstands to the perimeter nib of the balconies (or to construct an equivalent sawcut/chase).[42] Fourth, he accepted that in order to be effective, the membrane had to be (and was not) terminated in an way that prevents moisture from entering behind and under the membrane system.[43] Fifth, dealing with defect 2, the Judge accepted that there was defective waterproofing on the ground level, including ground floor balconies, the exterior podium, the adjoining walkways and stairs, the vehicle access ramps and the truck dock.[44]

[29] On the issue of whether the defects amount to actionable damages, the Judge concluded that there had been a breach of the requirements of the Building Code and in particular, that due to the defects:[45]

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38 At [64].
39 At [66].
40 At [69].
41 Mapeband tape is an alkali-resistant rubber tape used for waterproofing systems.
42 At [69]–[71].
43 At [71].
44 At [73]–[74].
45 At [79]–[84].

(a) The cork acoustic matting was damaged in breach of cl B2 durability requirements.[46]

(b) Water entered exterior walls in breach of cl E2.3.2.[47]

(c) The balconies and membrane were constructed in a way that did not make due allowance for consequence of failure, in breach of cl E2.3.7 and potentially cl E2 (external moisture).[48]

(d) The damage was more than de minimis.

[30] Ultimately, the Judge accepted, applying the principle of anticipation and prohibition of potential damage, where actual damage is not required, there had been a breach of E2.[49] But the Judge was evidently unsatisfied with the Body Corporate's evidence of actual damage, noting "it is not good enough to simply rely upon the photographs [taken by Mr Angell]; some expert analysis, as carried out by Mr Alexander, needs to be done to squarely address the issue of extent of damage, including likely future damage if remedial action is not taken".[50] He adopted Mr Alexander's evidence instead, finding:[51]

(a) a failure of both the waterproofing membrane and the sealant between pipe and concrete must happen at the same location for leaking to occur;

(b) the gutters do not drain large quantities of water;

(c) evidence of water damage to date is minimal; and

(d) the most vulnerable area is the rainscreen portion of the wall.

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46 Clause B2.3.1 requires building elements, with only normal maintenance, to continue to satisfy the performance requirements of the Building Code for at least 15 years where such elements are moderately difficult to access or replace, or failure to comply with the Building Code would go undetected during normal use of the building.

47 Clause E2.3.2 requires roofs and exterior walls to prevent the penetration of water that could cause undue dampness, damage to building elements, or both.

48 Clause E2.3.7 requires building elements to be constructed in a way that makes due allowance for the consequences of failure.

49 Liability judgment, above n 2, at [85].

50 At [88].

51 At [90].

[31] The Judge therefore concluded that there was actionable damage in respect of defect 1, but the water penetration into the façade wall assembly had been limited.[52]

[32] As to defect 2, the Judge again preferred Mr Alexander's evidence and found that in breach of cls B2 and E2.3.2, water had leaked down the walls of the external stairs, 11 of the podium drainage outlets were leaking and for the apartments at ground level there was insufficient membrane to outlets in drainage pipes.[53] But he added that these issues must be put in context, noting in particular that the car park was designed as a wet space and that a number of waterproofing measures were not added to the building (which was an acceptable design choice).[54]

[33] With these findings in mind, the Judge laid out the principles guiding remedial scope. He observed that a court must ascertain the amount required to rectify the defects; the damages should reflect the extent of loss actually and reasonably suffered by the claimant; and the appropriate measure of loss is the reasonable cost of bringing the defective building up to Building Code compliance.[55] The Judge however rejected the Council's submission that "reasonable cost" automatically equates to the least expensive method.[56] The critical issue, he stated, is reasonableness, and affected plaintiffs should not accept makeshift repairs and be left with the risk that this would not be effective or durable.[57]

[34] The Judge noted that the Body Corporate's scope required the removal and replacement of the waterproof membrane together with consequential works, including the removal and replacement of all joinery units and the complete replacement of the cladding across the entire building.[58] Their claim relied on the contents of the Scott Schedule prepared by several of the expert witnesses (including Mr Alexander for Argon, Mr Earley for the Council and Mr August for the Body Corporate). That schedule records an agreement between the experts linking the

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52 At [92].
53 At [99].
54 At [100].
55 At [172]–[174] citing *Johnson v Auckland Council* [2013] NZCA 662 at [110] and *Leisure Investments NZ Ltd Partnership v Grace* [2023] NZCA 89, [2023] 2 NZLR 724 at [184(c)].
56 Liability judgment, above n 2, at [174].
57 At [176]–[179].
58 At [181]–[182].

need to replace the balustrades, joinery and cladding to the membrane replacement.[59] It was also premised on the need to bring the replaced part up to present Building Code requirements, an assumption rejected by the Judge, who found that the Building Act 2004 does not require existing buildings to be upgraded to comply with the Building Code (other than in relation to fire and accessibility, and in other certain circumstances) even if existing buildings are altered.[60]

[35] In rejecting the Body Corporate's Maynard Marks scope, involving 43 weeks of construction works and costing more than $40 million, the Judge made a number of findings, including that:

(a) The Apartments were a low-cost building with high maintenance requirements, with the cladding nearing the end of its 15-year minimum durability life cycle. There is no evidence the concrete is failing; there is very limited evidence of water ingress in and behind the cladding, and the rain-screen cavity appears to be in general workable order.[61]

(b) There is no need for full replacement of the cladding to achieve Building Act compliance.[62]

(c) The limited evidence from Mr Earley did not constitute a comprehensive and sufficiently detailed scope of remedial works to be adopted by the Judge, though it did provide some support for the scope proposed by Mr Alexander.[63]

(d) The Alexander scope was the appropriate, reasonable scope of repairs to address the proven defects in this case, and it requires none of the problematic elements contained in the Body Corporate's proposed scope.[64]

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59 At [183(b)].
60 At [184] and [200]–[202].
61 At [203].
62 At [215]–[236].
63 At [239].
64 At [240] and [248]–[249].

[36] As noted above however, the Judge was satisfied that Argon had negligently installed the acoustic matting and it was reasonable for Argon to put the Body Corporate in the position it would have been in but for the negligence of Argon.[65]

[37] In the result, the Judge adopted the Alexander scope for both defect 1 and defect 2. This scope is noted above at [19].

Submissions

[38] The Body Corporate says the basic remedial duty is to build like for like, and the Judge proceeded on an erroneous basis by not requiring that the membrane be replaced and by only requiring repairs to achieve code compliance. Mr Bigio KC elaborates that the Judge appears to have relied on the application of ss 17 and 112 of the Building Act as grounds to find that the full joinery costs (being the costs to be incurred in the event the defective membranes were properly replaced) were not recoverable. Those sections, he says, concern minimum standards for any repairs — they must be code compliant. But they do not set the framework for compensatory damages, which must be like for like. In short, the Body Corporate must be made good and returned to the position they would have been in had the membranes been properly installed. To the extent that requires the joinery to be replaced, that is a necessary corollary of the remedy to which they are entitled.

[39] Mr Bigio is particularly critical of the Judge's finding that membrane replacement (involving removal of all of the joinery) would be wholly disproportionate and unreasonable. He submits that the Body Corporate and the owners should not be left with the risk that the repairs will not be effective or durable and that the like-for-like remedial principle should be applied.[66] He notes that this finding is at odds with the Judge's adoption of the like-for-like principle in relation to Argon's liability for the acoustic matting.

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65 At [259].
66 Citing *Body Corporate 326421 v Auckland Council* [2015] NZHC 862 [*Nautilus*].

[40] Mr Price submits that the Council's duty is limited to securing a code-compliant build.[67] There was and is no need for a membrane for such compliance and it was not necessary for the Council to be satisfied that that there was compliance with the original building plans. On his view, unlike the Building Act 1991, under the 2004 Act the Council is obliged to issue the code compliance certificate if satisfied the build complies with the building consent.[68] That goes to quality of the build, not code compliance, however he highlights that despite this statutory change the duty continues to be tied to code compliance rather than building consent.[69] He was also unaware of any entitlement to a like-for-like remedial principle, emphasising that the remedy must always be reasonable.

[41] Mr McCartney for Argon joins with Mr Price in submitting that tortious liability for both the Council and Argon (as the builder) is limited to achieving repair to code compliance. He also submits that the membrane is not necessary to achieve weathertightness and it is therefore an unnecessary expense to replace it.

Analysis

[42] We commence with some relevant principles of general application in relation to claims in negligence. Helpfully they were recently laid out by Miller J in *Routhan v PGG Wrightson Real Estate Ltd* as follows:[70]

> [147] Speaking generally, New Zealand courts approach claims in negligence by inquiring into the nature of the actionable subject matter, the existence of a duty of care, breach of that duty, factual causation and remoteness. …

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67 Citing *Body Corporate No 207624 v North Shore City Council* [2012] NZSC 83, [2013] 2 NZLR 297 [*Spencer on Byron*] at [19] per Elias CJ, [47] per Tipping J and [193] per McGrath and Chambers JJ; and *Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council* [2017] NZSC 190, [2018] 1 NZLR 278 [*Southland*] at [60] per Elias CJ, O'Regan and Ellen France JJ.

68 Building Act 2004, s 94(1). Compare Building Act 1991, s 43(3)(a).

69 Citing *Spencer on Bryon*, above n 67.

70 *Routhan v PGG Wrightson Real Estate Ltd* [2025] NZSC 68, [2025] 1 NZLR 306 per Glazebrook and Miller JJ (footnotes omitted). See also the reasons of Winkelmann CJ and Ellen France J at [328]. Compare the reasoning of Kós J in the same case who rejected the scope of duty principle, noting that the primary utility of the assumption of risk analysis lies in providing a backward-looking cross check within or immediately following analysis of causation and remoteness to ensure liability does not extend to risks not assumed by the defendant (at [241] and [251]). We do not consider that this formulation is materially different from the statements of general principle stated by Glazebrook and Miller JJ for the purposes of our analysis.

[148] Still speaking generally, New Zealand courts have been wary of "formulae" or methodologies that require a staged analysis for liability in negligence or negligent misstatement. The authorities recognise that inquiries into the existence of a duty, its scope and remoteness are factual and normative in nature, requiring that the court decide what is fair and reasonable in the circumstances. In *McElroy Milne,* Cooke P explained that:

> … the ultimate question as to compensatory damages is whether the particular damage is sufficiently linked to the breach of the particular duty to merit recovery in all the circumstances.

That remains the guiding principle. Whether damage and fault are sufficiently connected for liability is a question of fact and degree.

[43] And further:[71]

[150] What can be said is that liability in negligence ought generally to be confined to harm that resulted from the risks that made the defendant's conduct negligent in the first place. It is necessary to consider the position at the time the duty arose or was assumed and inquire for what kinds of risk was the defendant taking responsibility and whether the allocation of risk was a fair one in the circumstances. That is a forward-looking inquiry.

[151] Breach requires an inquiry into what the defendant's duty required of them in the particular circumstances.

[152] It is necessary to examine causation in fact, looking for a sufficient connection between the losses actually suffered and the breach of duty. The connection between breach and loss must be more than *de minimis* or trivial. This principle recognises that the "but-for" test of factual causation can be over-inclusive, so that it is sometimes inappropriate to speak of a loss being caused in fact by the breach. As Henry J said in *Sew Hoy & Sons Ltd (in rec and in liq) v Coopers & Lybrand*:

> Failure to meet [the 'but-for' test] must of course negate causation, but what must still be established by a plaintiff is that in a commonsense practical way the loss claimed was attributable to the breach of duty, and thus justifies the Court in imposing responsibility on the defendant for the loss.

It is also necessary to distinguish loss caused by the breach from loss for which the breach merely provided the occasion.

[153] The losses also must not be too remote. The remoteness inquiry incorporates what was described by Lord Hodge DP and Lord Sales SCJ in *Meadows* [*v Khan*] as the duty nexus question and the "legal responsibility" question, known also as causation in law. These considerations can be grouped under remoteness because the underlying principle is that a line must be drawn beyond which it is not reasonable as a matter of policy to require the defendant to pay. The court looks back to inquire whether the losses actually suffered following the defendant's breach of duty were within the scope of

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71 Footnotes omitted.

> that duty. This is, as we have indicated, a factual and normative inquiry which focuses closely on the circumstances of the particular case. Also excluded for remoteness are consequences of a type which would not have been foreseeable to a reasonable person in the defendant's position and acts of the plaintiffs or others, or natural events, that were not within the scope of the defendants duty and so may be said to break the chain of causation. Defences usually will be considered separately, since they normally must be pleaded and proved by the defendant. They include contributory negligence, voluntary assumption of risk, illegality and limitation.

[44] In light of these general principles, we deal first with the Council's duty and then Argon's duty.

The scope of the Council's duty

[45] The Council's common law duty of care is framed by its Building Act obligations. As Chambers J said in *Spencer on Byron*: [72]

> The common law duty of care which we endorse in these reasons marches in step with the statutory functions Parliament saw fit to place on local authorities and building certifiers.

[46] And further: [73]

> The obligation falling on inspecting authorities … marches hand-in-hand with its statutory obligation and requires of the inspecting authority no more than Parliament has imposed.

[47] More recently, Ellen France J captured the statutory basis for the duty in these terms in *Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council*: [74]

> [60] … The relevance of the statutory basis is apparent from the references to the interlocking regulatory framework, the Council's control over the construction process and associated reliance, and in the reference to the fact that the common law duty of care "marches in step with the statutory functions" Parliament imposed on local authorities and building certifiers. As to the purpose, that included, but is not limited to, protection of the health and safety of those using the building. The purposes are promoted by ensuring compliance with the building code as a minimum standard.

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72 *Spencer on Byron*, above n 67, at [71] per McGrath and Chambers JJ.
73 At [194].
74 *Southland*, above n 67 (footnotes omitted).

[48] The comprehensive nature and scope of the Council's duty was also described by the Supreme Court in that case:[75]

> [62] …. The duty of care on councils under the [Building Act 1991] springs from councils' regulatory role under that Act. That is a different role from commissioning the building work or undertaking the construction. The distinction the Council seeks to draw on the basis that the Trust was a commissioning owner is not one made in the legislative scheme. In this context … there is no valid distinction between the issuing of a certificate of code compliance and councils' other functions such as the granting of a building consent or inspections. All of these functions, including the issuing of a code compliance certificate, are directed at ensuring buildings comply with the relevant building code. This means that the duty is not obviated by another party's negligence or knowledge, albeit the 1991 Act imposes obligations on owners, and there may be issues of contributory negligence. Further, as a matter of policy, the actions and knowledge of independent contractors have not been attributed to the owner.

[49] And further: "The Council cannot, except as permitted by the [Building Act 1991], contract out of those statutory obligations."[76]

[50] The Building Act 2004, applicable here, imposes similar (though not identical) obligations to its 1991 predecessor. Section 17 states:

> **17 All building work must comply with building code**
>
> All building work must comply with the building code to the extent required by this Act, whether or not a building consent is required in respect of that building work.

[51] All building work must be carried out "in accordance with a building consent".[77]

[52] Section 49(1) sets out the requirements for granting building consent:

> **49 Grant of building consent**
>
> (1) A building consent authority must grant a building consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work were properly completed in accordance with the plans and specifications that accompanied the application.
>
> …

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75 Footnote omitted.
76 At [72].
77 Building Act 2004, s 40(1).

[53] Section 90 states:

> **90 Inspections by building consent authorities**
>
> (1) Every building consent is subject to the condition that agents authorised by the building consent authority for the purposes of this section are entitled, at all times during normal working hours or while building work is being done, to inspect—
>
> (a) land on which building work is being or is proposed to be carried out; and
>
> (b) building work that has been or is being carried out on or off the building site; and
>
> (c) any building.
>
> (2) The provisions (if any) that are endorsed on a building consent in relation to inspection during the carrying out of building work must be taken to include the provisions of this section.
>
> (3) In this section, **inspection** means the taking of all reasonable steps to ensure that building work is being carried out in accordance with a building consent.

[54] The 2004 Act also stipulates that once the building work is completed, the owner must apply to the council for a code compliance certificate.[78] The council must issue the certificate if it is satisfied that the work complies with the building consent. Section 94 relevantly states:

> **94 Matters for consideration by building consent authority in deciding issue of code compliance certificate**
>
> (1) A building consent authority must issue a code compliance certificate if it is satisfied, on reasonable grounds,—
>
> (a) that the building work complies with the building consent; and
>
> (b) that,—
>
> (i) in a case where a compliance schedule is required as a result of the building work, the specified systems in the building are capable of performing to the performance standards set out in the building consent; or
>
> (ii) in a case where an amendment to an existing compliance schedule is required as a result of the building work, the specified systems that are being

[78] Section 92(1).

> altered in, or added to, the building in the course of the building work are capable of performing to the performance standards set out in the building consent.

…

[55] Taken together, the authorities, and the specific powers and obligations under the 2004 Act make clear that the Council was under a duty of care to ensure that all building work complied with the Building Code and on completion, with the building consent. It must issue the code compliance certificate, but only on that specific basis. Contrary to Mr Price's analysis, code compliant conformity with the building consent is required.

[56] Returning to the present facts, as noted above, the High Court found that the Apartments did not comply with the Building Code in relation to the installation of the membranes and that this gave rise to actionable damage, and that the Council was liable to pay for the costs of achieving a code-complaint build, though not on a like-for-like basis.[79]

[57] We agree with this outcome. We make four related points. First, looking forward from the time the duty arose, the Council plainly must be taken to have assumed, and did assume, responsibility for the construction of the Apartments in accordance with Building Code as specified in the building consent. This included the installation of the membranes as detailed in the plans attached to the building consent. It follows that the Council must be taken to have assumed the risk of losses arising from any membrane installation that did not conform with those plans, including the cost of replacing defective membranes insofar as that is necessary to achieve code compliance in conformity with those plans. To this extent, we agree with Mr Bigio's "like-for-like" principle. This is not about the Council providing a general warranty of quality or an assurance of golden taps, as was given as an example in oral submission. Rather, it is about the direct factual nexus between the duty to secure a code compliant building specifically in accordance with the building consent, and the losses arising from the breach of that duty. For this reason, full reinstatement or cost

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[79] Liability judgment, above n 2, at [174].

of like-for-like repair is an available remedy and has been the remedy in many building defect cases.[80]

[58] Second, a council's potential liability is not limited to repair only of defects or defective elements. The obligation in tort is to restore the plaintiff to the position had the wrong, namely the Council's negligence, not occurred.[81] Its liability therefore extends to all corresponding risks assumed by it, including the risk of water damage caused by code non-compliant defects to other parts of the building that may, for example, serve only a cosmetic function like golden taps. We do not however understand the Body Corporate to be claiming losses of this kind against the Council.

[59] Third, however, looking backward, we do not consider the full replacement costs to be within the scope of the Council's duty here. Put simply, on the unusual facts of this case, there is no sufficient normative linkage between the cost of *full* membrane replacement and the Council's breach of duty to secure code compliance, because the owners can be made good, and restored to a fully code-compliant position, without that costly remedy.

[60] Fourth, we consider that the High Court was correct to reject the cost of full membrane replacement repair on reasonableness grounds. That cost manifestly exceeds a viable code-compliant alternative. We do not consider that the various cases cited by Mr Bigio suggest that like-for-like repair is nevertheless required.[82] A like-for-like approach may be appropriate in building defect cases where repairing the defect may necessarily demand some form of exact replacement, whether in whole or part, of the affected area to achieve code compliance in respect of a particular type of building — for example a brick for a brick house. But, as Tipping J said in *Chase v de Groot*:[83]

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80 See for example *Nautilus*, above n 66; *Minister of Education v H Construction North Island Ltd* [2018] NZHC 871; *Dicks v Hobson Swan Construction Ltd (in liq)* HC Auckland CIV-2004-404-1065, 22 December 2006; and *Body Corporate 462460 "Nikau Apartments" v Auckland Council* [2023] NZHC 3203.

81 Stephen Todd (ed) *Todd on Torts* (9th ed, Thomson Reuters, Wellington, 2023) at [1.1.3].

82 These include *Nautilus*, above n 66; *Hamlin v Bruce Sterling Ltd* [1993] 1 NZLR 374 (HC), *Leisure Investments NZ Ltd Partnership v Grace*, above n 55; *Johnson v Auckland Council*, above n 55; and *Minister of Education v H Construction North Island Ltd*, above n 80.

83 *Chase v de Groot* [1994] 1 NZLR 613 (HC) at 627.

> Reinstatement will be adopted as the appropriate measure when to do so will be fair as between the parties. There is no immutable or even prima facie rule against or in favour of reinstatement as the correct measure. There are, however, two necessary prerequisites to an award based on reinstatement. First the plaintiff must be intending to reinstate and second it must be reasonable to do so.

[61] We return to the assessment of what is reasonable below when we come to our review of the Alexander scope, but, in summary:

(a) The Council was under a duty of care to ensure that all building work complied with the Building Code and, on completion, with the building consent.

(b) The Council assumed the risks of losses arising from non-compliant membrane installation, including the cost of replacing defective membranes insofar as that is necessary to achieve code compliance — to that extent, code-compliant reinstatement or cost of repair on a like-for-like basis is an available remedy in building defect cases.

(c) However, on the unusual facts of this case, there is no sufficient normative linkage between the cost of full membrane replacement and the Council's breach of duty because the owners can be restored to the position they would have been in but for that breach without it.

(d) As the cost of the full replacement of the membranes is also unreasonable in the circumstances, we can see no proper basis for making an award of that kind of repair against the Council.

The scope of Argon's duty

[62] We turn then to Argon's duty. It is helpful to start at the beginning. In *Bowen v Paramount Builders (Hamilton) Ltd* Richmond P observed:[84]

> Quite clearly English law has now developed to the point where contractors, architects and engineers are all subject to a duty to use reasonable care to

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[84] *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 (CA) at 406. See also at 425 per Cooke J.

> prevent damage to persons whom they should reasonably expect to be affected by their work.

[63] And further:[85]

> It is clear that a builder or architect cannot defend a claim in negligence made against him by a third person by saying that he was working under a contract for the owner of the land. He cannot say that the only duty which he owed was his contractual duty … Nevertheless the nature of the contractual duties may have considerable relevance in deciding whether or not the builder was negligent.

[64] In the same case, Woodhouse J said the key issue "is whether the builder is responsible for damage which is caused to the building itself by the defects he has left behind in it".[86] The Court found in the affirmative.[87]

[65] This is now settled law.[88]

[66] The significance of the link between the duty of care and the statutory obligation to secure code compliance was explained by Elias CJ in this way in *Spencer on Byron*:[89]

> [16] The code … is a minimum standard, as the legislation makes clear. … The [Building] Act sets up an interlocking system of assurance under which all undertaking building work or certifying compliance with the code are obliged to observe the standards set in it.

[67] Tipping J put it this way:

> [47] … The standard the duty requires is compliance with the building code. That is as clear and precise as the subject matter allows. There is no quality or commercial uncertainty as to what the duty requires. The parties cannot bargain for a standard below code compliance in return for a lesser price.

[68] And as Chambers J put it:

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85 At 407.

86 At 416.

87 At 410 per Richmond P, 417 per Woodhouse J, 423 per Cooke J.

88 See *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC) at 521; and *Body Corporate 202254 v Taylor* [2008] NZCA 317, [2009] 2 NZLR 17 [*Taylor*] at [125] per Chambers J. For a useful review of the relevant authorities see *Minister of Education v H Construction North Island Ltd*, above n 82, at [26]–[36].

89 *Spencer on Byron*, above n 67, at [16] per Elias CJ (footnotes omitted). See also *Southland*, above n 67, at [60] per Elias CJ, O'Regan and Ellen France JJ.

> [193] … No one can be a party to the construction of a building which does not comply with the building code. The duty in tort imposes no higher duty than that: for example, the inspecting authority is not responsible for ensuring the building is constructed in accordance with the plans and specifications, which will inevitably go beyond building code requirements. Obligations in tort, whether of the inspecting authority or of any supervising architect or engineer, will be limited to the exercise of reasonable care with a view to ensuring compliance with the building code.

[69] The Supreme Court more recently said in *Hotchin v New Zealand Guardian Trust Company Ltd*:[90]

> [198] … In a typical New Zealand case, the owner of a leaky building will have claims against the builder (which New Zealand courts accept can be brought in tort). As against the builder, the claim in tort will be based on breach of a duty of care associated with compliance with the Building Code.

[70] So, the clear thrust of the authorities, old and new, is that all parties to the construction of a building, including builders, are subject to a corresponding duty to secure code compliance. It follows that a builder responsible for the construction is, like the Council, ordinarily liable for the costs to repair code non-compliant defective works. Therefore our observations at [61] about the scope of the Council's duty and corresponding potential liability ordinarily apply with equal force to builders.

[71] However, the precise scope of a builder's duty in any particular set of circumstances may or may not be co-extensive with the Council's duty.[91] A builder will be subject to contractual obligations. Those obligations may more precisely define their responsibilities and that will influence whether there has been a breach of the corresponding tortious duty of care.[92] Conversely, there may be cases where the assumption of risk and control by a builder may be expressly qualified by the terms of the contract.[93] This may limit the scope of the builder's duty of care and corresponding remedial duty.[94] We return to this principle below when addressing whether Argon's

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90 *Hotchin v New Zealand Guardian Trust Company Ltd* [2016] NZSC 24, [2016] 1 NZLR 906 (footnotes omitted).

91 See for example *Andrews Property Services Ltd v Body Corporate 160361* [2016] NZCA 644, [2017] 2 NZLR 772 [*Andrews*] at [94]–[95].

92 *Bowen v Paramount Builders (Hamilton) Ltd*, above n 84, at 407 per Richmond P and 419 per Woodhouse J; *Routhan v PGG Wrightson Real Estate Ltd*, above n 70, at [160] per Glazebrook and Miller J; and *Spencer on Byron* above n 67, at [40] per Tipping J.

93 See *Andrews*, above n 91, at [54]–[55], [90] and [94]–[95]; *Morton v Douglas Homes* [1984] 2 NZLR 548 (HC) at 592; and *Cashfield House Ltd v David & Heather Sinclair Ltd* [1995] 1 NZLR 452 (HC) at 465–466.

94 *Andrews*, above n 91, at [94].

duty is non-delegable. Ultimately, then, the assumption of responsibility and control of the building work by builders under contract determines the precise scope of the tortious duty of care of a builder.[95]

[72] Returning to the facts, the nature of Argon's duty was fully explored by the High Court.[96] Argon challenges the High Court's designation of Argon's duty as "non-delegable" — an issue which we will return to below. But for present purposes the factual findings relating to the scope of Argon's duty are clear and we have no reason to depart from them. Most relevantly, Andrew J found that Argon took responsibility for the "adequacy" of all site operations and methods of construction and for "complying with all necessary permits, consents and approvals under the Building Act 2004 for the construction of the Contract Works".[97] Argon therefore assumed responsibility to build the Apartments to achieve code compliance in a particular way and for the risk of corresponding harm in the event of breach, including a risk of the type of weathertightness damage that in fact occurred.

[73] However, as to whether full membrane replacement is within the scope of Argon's duty, the position is more complex than that of the Council. Unlike the Council, Argon was under a positive contractual obligation to build the Apartments in a particular way. Looking back, as between Argon and the contracting owner, there is a sufficient normative linkage between the full replacement of the defective membranes and the actual breach of duty of care as defined by Argon's contractual obligations. Argon was obliged under contract to put the contracting owner in the position it would have been had the contract been performed.

[74] Ordinarily, as Miller J explained in *Routhan*, in cases of concurrent liability arising from a positive obligation, the tortious remedy would be similar to the contractual remedy.[98] But it is less clear that there is a similar linkage between full replacement of the membrane and Argon's tortious duty of care to subsequent owners.

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95 *Routhan v PGG Wrightson Real Estate Ltd*, above n 70, at [160] per Glazebrook and Miller J; and *Spencer on Byron*, above n 67, at [34]–[35] per Tipping J. See also *Southland*, above n 67, at [70] per Elias CJ, O'Regan and Ellen France JJ; and *Taylor*, above n 88, at [41] per William Young P and Arnold J.

96 Liability judgment, above n 2, at [115]–[122].

97 At [116], quoting cls 5 and 6 of the contract between Argon and the developer of the Apartments.

98 *Routhan v PGG Wrightson Real Estate Ltd*, above n 70, at [162].

The authorities assume, as we have said, that the contractual obligations define more precisely the responsibilities assumed by the builder for the purposes of establishing a breach. Undoubtedly also the contract is not a barrier to recognition of tortious liability.[99] But little or no attention has been given to the extent to which the tort remedial obligation to subsequent owners is coextensive with a builder's contractual obligations.[100] A duty of this kind could shade close to conferring a contractual warranty on non-contracting parties.[101] In any event, because we consider a full replacement remedy to be manifestly unreasonable, for reasons already expressed in relation to the Council's liability, it is unnecessary for us to resolve this issue with finality.

[75] It follows that we reject the claim by the Body Corporate that Argon was under a like-for-like full replacement remedial duty. Whether the remedy imposed by the Judge discharges Argon's remedial duty is addressed below at [81].

[76] We turn now to whether the duty owed by Argon was non-delegable.

The non-delegable duty question

[77] Mr McCartney contends that the Judge was wrong to find that Argon owed a non-delegable duty of care "as head contractor and builder.".[102] He says that the Judge erroneously relied on authorities that impose a non-delegable duty on developers only, not builders. He reviewed these authorities, noting that they referred to the non-delegable duty owed by a developer, not a builder, or did not involve a non-delegable duty but rather concerned conventional acts of negligence.[103]

[78] Mr McCartney emphasised, referring especially to *Cashfield House Ltd v David and Heather Sinclair Ltd*, a decision of Tipping J, that if a principal has selected

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99 Todd, above n 81, at [1.1.3].

100 The closest and most useful analysis is the judgment of Downs J in *Minister of Education v H Construction North Island*, above n 82, when addressing the effect of the contract in that case on the defendant builder's duty and standard of care: at [41]–[58].

101 In *Spencer on Byron*, above n 67, Tipping J was explicit that he was not suggesting that: at [46].

102 Liability judgment, above n 2, at [120].

103 Referring to *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA); *Morton v Douglas Homes*, above n 93; *Cashfield House Ltd v David & Heather Sinclair Ltd*, above n 93; *Lee v Ryang* HC Auckland CIV-2011-404-2779, 28 September 2011; *Carrington v Easton* [2013] NZHC 2023; and *Body Corporate 346799 v KNZ International Ltd* [2017] NZHC 511.

and instructed an independent contractor with care and skill appropriate to the occasion, the principal should be entitled to leave the task to that contractor without further supervision.[104] In such a case, there will be no liability unless the principal owes a non-delegable primary duty to those damaged by the contractor's negligence.[105]

[79] Finally, Mr McCartney contends that the Judge's analysis of Argon's liability on conventional negligent act or omission grounds was insufficient, with sparse identification of particular negligent acts or omissions by Argon. The Judge's discussion, he says, was largely limited to Argon's oversight of TAL (the waterproofer and tiler subcontractor) and the design changes which included dispensing with the sawcut in favour of terminating the membrane at the base of the nib wall.[106]

[80] On this he submits:

(a) It was not Argon's job to install the membrane — this was the job of the subcontractor TAL.

(b) Argon was therefore only liable if it had a non-delegable duty or was negligent in selecting TAL.[107]

(c) Mr Paykel, building surveyor for the Body Corporate, provided evidence that waterproofing is specialised, and Argon would have believed TAL was competent and was entitled to rely on the fact that other parties would be inspecting TAL's work.

(d) Argon was entitled to be able to rely on TAL's producer statements.

(e) Dispensing with the saw cut was approved by Mapei (the membrane producer) and the architect, and the evidence about this was not challenged.[108]

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104 *Cashfield House Ltd v David & Heather Sinclair Ltd*, above n 93, at 464–465.
105 At 465.
106 Liability judgment, above n 2, at [117]–[119].
107 Citing *Cashfield House Ltd v David & Heather Sinclair Ltd*, above n 93.
108 The original balcony design was amended to involve pre-casting the balconies off-site.

(f) Argon was entitled to be able to rely on those contractors and is not liable for their negligence.[109]

(g) No particular negligent acts or omissions by Argon were identified by the Judge in relation to defect 2.

[81] The arguments for the Body Corporate find expression in our reasons to follow so we do not repeat them here.

The Judge's findings

[82] The Judge found:[110]

> [103] The case law is settled; builders and local authorities in the performance of their statutory functions relating to building work owe duties of care to owners and subsequent purchasers of buildings. As the Privy Council held in the well-known case of *Invercargill City Council v Hamlin*:
>
> > In a succession of cases in New Zealand over the last 20 years it has been decided that community standards and expectations demand the imposition of a duty of care on local authorities and builders alike to ensure compliance with local bylaws.
>
> [104] Builders owe a duty to take reasonable care to prevent damage to persons reasonably expected to be affected by their work, including purchasers. The scope of this duty is to ensure compliance with the Building Code, good trade practice, and other relevant statutory requirements.

[83] And further:[111]

> [107] *Todd on Torts* describes non-delegable duties as follows:
>
> > The concept of a non-delegable duty is problematic … However, the category is well established, if indeterminate, and is generally associated with relationships which give rise to a duty of care "*of a special and 'more stringent' kind, namely a 'duty to ensure that reasonable care is taken*"'.
> >
> > …
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> [108] The classic case and the starting point for the analysis is *Mount Albert Borough Council v Johnson*. There, the Court of Appeal imposed, for the first

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109 Citing *Morton v Douglas Homes*, above n 93, at 592.
110 Liability judgment, above n 2 (footnotes omitted).
111 Emphasis in original, footnotes omitted.

time, a non-delegable duty of care on a development company. Since then, it has been held in some cases that a builder (i.e. a construction company), as head contractor, has a non-delegable duty of care. Where a principal owes a non-delegable duty of care they will also be liable for breaches by independent contractors they have hired. A head contractor who had a primary duty of care would, therefore, be liable for the acts of sub-contractors.

[109] The nature of the builder's role and responsibilities are key to determining whether it owes a non-delegable duty, as opposed to being liable solely for its own independent acts and/or omissions. Whether non-delegable duties are owed must be decided on the facts of each individual case. It is necessary to address whether the builder is in substance the "head contractor" and the extent to which it controlled and supervised the building work. The label is not always helpful. It is also apparent from *Mount Albert Borough Council v Johnson*, that public policy factors inform the ultimate conclusion.

[84] The Judge then reviewed the various authorities before turning to his assessment of Argon's responsibilities:

[115] Argon was the head contractor and the builder at the centre of the construction work. It had project management functions. It was a key party with significant control over and capacity to influence the quality of the construction and its adherence to Building Code standards. It entered into the construction contract, dated 1 March 2007, with the developer, Turn & Wave Ltd, to "construct, complete, deliver and remedy defects" in the contract works and do all things described in the contract documents (Construction Contract). Argon further agreed, as a matter of contract, to be responsible for the acts or omissions of sub-contractors or sub-contractor's agents under cl 4.4 of the special conditions.

[116] The terms of the Construction Contract are significant; the "contract price" is described as $28,726,987. Under cl 2.2.7 of the special conditions (attached as the first schedule), Argon agreed to review certain aspects of the design or specification of the contract works. The purpose of that review was "to reduce the construction cost and increase efficiency of the construction". Under cl 5.1.5, Argon took full responsibility for the "adequacy, stability and safety of all [s]ite operations and methods of construction". Under cl 5.4.1, Argon was responsible for programming the contract works and in accordance with cl 5.17.1 was required to provide a documented quality management system. Under cl 6.1 of Appendix 2: Scope of Contract Works, Argon was also responsible for "complying with all necessary permits, consents and approvals under the Building Act 2004 for the construction of the Contract Works."

[117] Argon was responsible for engaging TAL and was privy to all relevant communications between the architects (ADC), the engineers, Mapei and TAL. It identified issues with the consented plans and played a role in the design change to dispense with the sawcut. Argon was also responsible for the last step of the building-related work that took place on the balconies, giving it an opportunity to observe the work that had been carried out by TAL (Argon placed a grate, or grill, over the internal gutters on each of the balconies).

…

> [119] The terms of the sub-contractor's agreement between Argon and TAL are also informative; the sub-contractor, TAL, was required to comply with all instructions from the contractor [Argon] and was specifically prohibited from having any direct communications with or taking instructions from the architect. Furthermore, TAL indemnified Argon against any loss or liability arising out of TAL's failure to comply with cl 19.1. That clause required TAL to comply with the provisions of all legislation and bylaws, which must include the Building Code. The sub-contract expressly contemplated that Argon might be liable for the acts or omissions of TAL with respect to the Building Code.

[85] The Judge concluded, as foreshadowed above, that Argon owed non-delegable duties of care to subsequent owners and that it was liable for each of the pleaded defects.[112]

Analysis

[86] We agree with the Judge's summary of the law and we have no reason to depart from his factual assessment of the nature and scope of Argon's duties.

[87] We have addressed the general principles relating to building defects cases above. The genesis of the "non-delegable" duty of care of developers can be traced to the following statement in *Mount Albert Borough Council v Johnson* where Cooke and Somers JJ observed:[113]

> There appears to be no authority directly in point on the duty of such a development company. We would hold that it is a duty to see that proper care and skill are exercised in the building of the houses and that it cannot be avoided by delegation to an independent contractor.

[88] In *Morton v Douglas Homes Ltd* Hardie Boys J said: [114]

> … a builder's duty (and the company must be regarded as the builder) is to achieve an objective standard of safety and fitness.

[89] And further:[115]

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112 Liability judgment, above n 2, at [120]–[122].
113 *Mount Albert Borough Council v Johnson*, above n 103, at 241.
114 *Morton v Douglas Homes*, above n 103, at 591.
115 At 592.

> So far as the duty to observe the bylaws and the permit is concerned, this is a non-delegable duty and the fact that the company engaged [an engineer] to assist it discharge the duty cannot excuse it for non-compliance …

[90] This too is settled law.[116]

[91] While recent apex authorities have not expressed the duty of care as "non-delegable", as we have discussed, those authorities clearly link the duty of care to the non-delegable statutory obligation to secure code compliance.[117] Borrowing again the observation of Ellen France J in *Southland*: "The Council cannot, except as permitted by the [Building Act], contract out of those statutory obligations".[118]

[92] Notably, for this reason the Supreme Court in *Southland* rejected the proposition that, based on an agreement reached with the building owner in that case, the Council allocated responsibility for statutory compliance with the Building Act to the owner.[119] Logically the same reasoning should apply to builders. But it is not necessary for us to go that far in this case. Rather, we are satisfied that builders who contractually assume responsibility for construction are, like councils, subject to a non-delegable tortious duty to secure code-compliant construction.

[93] Under this formulation of principle, the assumption of responsibility and control of the work remain key to triggering and then defining the scope of the duty of care of builders.[120] As Tipping J said when dealing with whether to impose a duty of care in relation to commercial buildings: "It is the feature of control which, in my view, is central to the policy choice this Court has to make."[121]

[94] That is significant because there may be cases where the assumption of responsibility and control may be expressly qualified by the specific terms of

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116 See Todd, above n 81, at [21.9.2(5)] and cases cited therein. See also *Body Corporate 346799 v KNZ International Ltd*, above n 103, at [54]–[58] and [79]–[82] and cases cited therein.

117 See above at [62] and following.

118 *Southland*, above n 67, at [72] per Elias CJ, O'Regan and Ellen France JJ.

119 At [71]–[72] per Elias CJ, O'Regan and Ellen France JJ.

120 *Spencer on Byron,* above n 67, at [34] per Tipping J. See also *Southland*, above n 67, at [70] per Elias CJ, O'Regan and Ellen France JJ; and *Taylor*, above n 88, at [41] per William Young and Arnold JJ.

121 *Spencer on Byron,* above n 67, at [38].

engagement of the builder.[122] This addresses the concerns expressed by Mr McCartney that builders may find themselves at the mercy of developers. The facts in *Andrews Property Services Ltd v Body Corporate 160361* provide an illustration.[123] In that case, Andrews Property Services (APS) successfully tendered for remediation work to correct weathertightness defects. This included installation of a new cladding system but only after an inspection for damage had been undertaken by architectural consultants, Babbage Consulting Limited (BCL).[124] The APS contract expressly excluded responsibility for this inspection.[125] It transpired that BCL did not undertake the necessary damage inspection and the newly installed cladding system consequently failed.[126]

[95] This Court found that APS had assumed responsibility for the installation of the new system, and had an obligation to comply with the Building Code for that installation.[127] However, as APS did not have control of BCL and had expressly excluded responsibility for the inspection, it owed no duty of care to the owners to take steps to require BCL to undertake its contractual inspection obligation and thereby prevent BCL causing loss to the owners.[128]

[96] But that case is far removed from the present facts. Here, Argon agreed to contractual obligations to the developer to construct a defect-free building, to achieve code compliance, as well as responsibility for the acts and omissions of sub-contractors. Notably the special conditions of the contract expressly envisaged oversight by Argon.[129] No issue of limited or qualified assumption of responsibility or control therefore arises on the facts. On the contrary, Argon clearly assumed responsibility for, and direct control over, the relevant elements of the building and was thereby subject to a corresponding non-delegable duty to secure code compliance.

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122 See for example *Andrews,* above n 91; *Morton v Douglas Homes*, above n 103, at 592; and *Cashfield House Ltd v David & Heather Sinclair Ltd*, above n 93, at 465–466.
123 *Andrews,* above n 91.
124 At [12]–[18].
125 At [11] and [54].
126 At [29] and [64]–[67].
127 At [87].
128 At [95].
129 In particular, under cl 4.4 Argon is responsible for any act or omission of a subcontractor as if it were its own, and under cl 5.1.5 Argon had full responsibility for the adequacy, stability and safety of the building site and construction methods.

[97] Mr McCartney nevertheless places some significance on the summary of conclusions of Tipping J in *Cashfield House Ltd* about non-delegable primary duties and primary duties.[130] Relevantly, the Judge identified two types of duty that a principal may owe, namely:[131]

(a) a primary non-delegable duty of care and thus liability to those to whom the independent contractor is liable if the independent contractor is negligent; and

(b) a primary duty of care to those who could foreseeably be damaged by the acts or omissions of the independent contractor.

[98] Tipping J also observed:[132]

> If the principal has selected and instructed the independent contractor with the skill and care appropriate to the occasion, the principal should generally be entitled to leave the task to the independent contractor without further supervision. If the principal does so there will be no liability unless, of course, the principal owes a non-delegable primary duty to those damaged by the independent contractor's negligence.

[99] The Judge explained elsewhere in the judgment that in cases of non-delegable duties, "the principal has a personal and primary duty to exercise appropriate care and if the principal chooses to entrust the performance of that duty to someone else the principal will be liable if the other person fails to take the necessary care".[133] This he said might arise in relation to a particularly hazardous activity.[134] He nevertheless emphasised that the traditional starting point is that the principal has no general liability for the acts of a properly supervised independent contractor.[135]

[100] The first point to note is that *Cashfield House* was not a case about a duty to take care to secure code compliance. This is important, because the clear thrust of the apex authorities is that code compliance is a bottom line, non-delegable requirement

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130 *Cashfield House Ltd v David & Heather Sinclair Ltd*, above n 103.
131 At 465–466.
132 At 466.
133 At 463, referring to *Burnie Port Authority v General Jones Pty Ltd* (1994) 68 ALJR 331 (HCA) at 345–347 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ.
134 *Cashfield House Ltd v David & Heather Sinclair Ltd*, above n 103, at 465.
135 At 465.

deriving from statutory responsibilities.[136] As we have said, in light of *Southland*, councils (and arguably builders) cannot then delegate that responsibility to an independent contractor. Second, we think the distinction is meaningless on the facts of the present case. Argon assumed direct control and supervision of the construction, including the work done by TAL. Whether described as a non-delegable primary duty or simply a primary duty makes no difference to result. Argon was obliged to ensure all work under its control was completed in accordance with the Building Code. It did not do so.

[101] Finally, Mr McCartney asserts that Argon's contractual obligations are "a different set of obligations to tortious liability". We agree in principle.[137] But as Richmond P said in *Bowen*, and Miller J more recently stated in *Routhan*, contractual obligations inform the scope of any tortious duty.[138] Put simply, they provide an agreed frame for the responsibilities assumed by, in this case, Argon, for the construction of the building.

[102] We therefore reject Argon's contention that there was no non-delegable duty of care. Once it had clearly assumed contractual responsibility for the construction of the Apartments in the comprehensive way it did, Argon was liable for the losses arising from any code non-compliant defects. That being the case it is unnecessary for us to explore whether there might be some other basis for liability.

The causation question

[103] Mr Price submits that the Judge failed to properly assess whether there was sufficient linkage between the breach of the Council's duty of care in fact and law. More specifically he contends that:

(a) The Judge ought not to have held that the legal scope of the Council's duty extended to membranes, because the Judge accepted membranes

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136 See above at [62].

137 See our discussion above at [95]. See also *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA) at [66]; *Andrews,* above n 91; and *Minister of Education v H Construction North Island Ltd*, above n 82.

138 *Bowen v Paramount Builders (Hamilton) Ltd*, above n 84, at 407; and *Routhan v PGG Wrightson Real Estate Ltd*, above n 70, at [160] per Glazebrook and Miller JJ.

were not necessary to protect the concrete balconies and therefore not required for code compliance.[139]

(b) There was no causation between the Council's breach of duty to inspect the membrane installation and:

(i) the defects that actually caused or might cause water damage; and

(ii) the nature and scale of the proven damage and the remedy imposed.[140]

(c) There was no causation in law because the failed inspections only created an opportunity for loss. This does not meet the criterion for legal liability.

The Judge's findings

[104] We have summarised the Judge's key findings on breach of duty and actionable damage above at [82] onwards. Most relevantly for present purposes, the Judge found:[141]

> [67] The plaintiffs' expert witnesses focus on the failure of the membrane as the main mechanism of failure. However, I agree with Mr Alexander that that is not entirely correct. As Mr Alexander stated, pre-cast concrete balconies on the outside of a building should not need any water proofing membrane at all (except where that is required to protect an acoustic mat from water). The real problem is the fault under the membrane.
>
> [68] In addressing (below) the critical issues of the extent of damage and what might be a reasonable scope of repair, it is important to focus on these two specific pathways for water to get into the apartments (i.e. moisture ingress around the outlet pipes and the concrete joint between two sections of balconies). I note that Mr Angell in cross-examination accepted that these are the only two avenues for water to get in behind the cladding.

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139 Citing *Spencer on Byron*, above n 67, at [19].

140 Mr Price highlights that the proposed remedy repairs all balconies, while only 50 of 179 balconies have joints, and only 26 of those 50 balconies show evidence of moisture beneath the membrane. He notes further that only four instances have identified internal moisture ingress as a result of joints, and thus there are only four proven joint-related breaches. Of the 247 balcony outlets, only 20 (or eight per cent) leaked such that water ran down the outside of the downpipes.

141 Liability judgment, above n 2.

> [69] Mr Alexander's evidence, which I accept and adopt, does however provide substantial support for the plaintiffs' contention that the matters pleaded are actionable defects and sufficiently widespread to be described as systemic. This includes a failure to use a Mapeband tape. Mr Alexander notes that the application of the membrane was not uniform across all 179 balconies but that the application was "typically" of poor quality. As with Mr Angell, he did not observe any Mapeband tape on any of the balconies that he investigated. I find that it is reasonable to infer from the technical literature that the use of Mapeband tape is an integral part of the waterproofing product.

[105] The Judge then framed the critical issue in these terms:

> [70] … What of course is in dispute is whether these matters are ultimately of any consequence – are they systemic and what is the extent of any damage that has resulted? I discuss this below in the second stage of my analysis.

[106] In the second stage of the analysis, again relevantly, the Judge found there was a breach of cl E2.3.2 of the Building Code to the extent that water entered under the waterproofing membrane on the balconies (in breach of B2 with respect to the damage to the cork acoustic matting) and has entered exterior walls causing damage in some locations.[142] Significantly the Judge also found:

> [79] … a breach of cl E2.3.7 where the balconies and membrane were constructed in a way that did not make due allowance for the consequences of failure. On [this] point, I agree with the submission of Mr Bigio KC that the location of the downpipe, being located in some instances very close to the exterior wall, created a risk that if it was not sealed and constructed properly and consequently failed, it could cause a breach of E2.

[107] And further:

> [82] … the cork acoustic matting has a durability period of 15 years (at minimum). On the evidence, this requirement has clearly been breached.
>
> [83] … the construction of the balcony and in particular the waterproof membrane system has failed to prevent penetration of water that could cause damage or undue dampness. …

[108] The Judge acknowledged that penetration of the water beyond the rainwater cavity had been limited, and that water entry into that cavity is not necessarily a breach of E2. But, applying the principle of anticipation and prohibition of potential damage, where the actual damage is not required, he found that there had been a breach of E2.[143] The Judge also acknowledged that a "100 per cent scientifically accurate

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142 At [79].
143 At [85].

approach" to assessing the extent of the damage could not be achieved.[144] Ultimately he adopted the findings of Mr Alexander as follows:[145]

> (a) a failure of both the waterproofing membrane and the sealant between pipe and concrete must happen at the same location for leaking to occur;
>
> (b) the gutters do not drain large quantities of water;
>
> (c) evidence of water damage to date is minimal; and
>
> (d) the most vulnerable area is the rainscreen portion of the wall.

[109] The Judge also observed:

> [91] The Auckland Council was correct in pointing out that the failures associated with concrete joins are not pleaded defects. However, that is somewhat beside the point. The membrane was supposed to protect the joins in the concrete as well as the internal gutter. The sealant that was applied to the underside of the concrete joins was purely cosmetic. Water got into these joins because, amongst other things, the membrane directly above the joins failed. The pleadings understandably focus on the failure with the membranes.

[110] In terms of the Council's liability, the Judge recorded that the Council accepted that the lack of an upstand, missing membrane in some areas and lack of mesh encapsulation would have been physically observable to an inspector.[146] He found that the Council breached its duty of care in failing to check and observe that the balconies were constructed without the consented sawcut detail; that the Council's own internal publications at the time reinforced the expectation that the Council's officers should be viewing and ensuring compliance with the consented plans, and had non-compliance with those plans been observed and addressed, a Council officer should then have turned their attention to the issue of the membrane upstand and issues of membrane waterproofing generally.[147] He also found that they failed to sufficiently identify the poor workmanship associated with the lack of mesh encapsulation.[148] There had therefore been a clear breach of the standard of care and the Council had

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144 At [87].
145 At [90].
146 At [158]–[159].
147 At [160].
148 At [161].

also been negligent in failing to observe that no Mapeband tape had been used and that the membrane had been inadequately applied.[149]

[111] The Judge was also satisfied that causation in both fact and law had been established. Particular significance was placed on the following evidence of the expert for the Body Corporate, Mr Paykel:[150]

> [164] I am satisfied that in this case the plaintiffs have proven causation, both factual and legal. I find that the Council's omissions were a substantial and material cause of the loss suffered by the plaintiffs, as required for legal causation to be established. The plaintiffs are not seeking here to hold the Auckland Council liable for something more than protection against non-compliance with the Building Code. I agree with the conclusion reached by Mr Paykel as follows:
>
> > Had the Council undertaken inspections of the balcony waterproofing [at the time the membrane was applied], as required by their own list of notifiable inspections, the Council would have been able to identify the work that didn't conform with the approved building consent and the balcony membrane related defects. The [C]ouncil officer should have then failed the inspections. A subsequent re-inspection should have been required to ensure the work had been completed in a compliant manner. A code compliance certificate should not have been issued unless all relevant inspections had been passed.

Analysis

[112] The installation of a waterproofing membrane formed part of the approved building consent plans and its installation was governed by the Council's own literature. The Council was therefore obliged to secure compliance in accordance with those plans and its own literature.

[113] As Mr Bigio helpfully highlighted, the Council's own internal documentation and literature at the time of the inspection referred to the need to check balconies, the membrane and the upstand. Among other things, the Council had to, in accordance with its own practice note, approve compliance with falls, outlets, overflows, expansion joints and upstands. The Council's Code of Practice for Building Inspections relevantly stated:[151]

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149 At [161]–[162].
150 Footnote omitted.
151 Emphasis added.

Type	Requirements
Decks & balconies	**1st inspection** Before the water proof membrane is in place, moisture content 18% maximum. • substrate is suitable, dry and primed if required • substrate is screwed with appropriate fixings • fillets are fitted on all internal corners • provision for stormwater (waste and overflow) • minimum finished floor levels achieved **2nd inspection** Floor waste and secondary overflows must be installed after membrane fitted • *no claddings in place – upstand to be checked* • protection of membrane provided for balance of construction Applicator must provide workmanship certificates and written confirmation of the type of system used.

[114] Mr Bigio also referred to applicable Building Research Association of New Zealand Inc (BRANZ) literature. While compliance with BRANZ literature is not mandatory and the literature itself has a generic quality, it nevertheless provides guidance for effective waterproofing membrane installation and the risks associated with defective membrane installation. It would have been known to the Council. Given this literature and industry knowledge, the Council should have been aware of what was required for effective membrane installation and corresponding inspection; that defective membrane installation carried risk of water damage, and in failing to properly inspect that installation, the Council assumed that risk of water damage.[152]

[115] Accordingly, the Judge was correct to proceed on the basis that the Council was obliged to ensure that the membrane was correctly installed irrespective of the fact that it was now no longer needed to secure code compliance.

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[152] Andrew J also found that "the evidence suggests an awareness by the relevant Council inspector at the time of the Mapei membrane that was being applied. In my view, it is reasonable to expect the Council officer to have some familiarity with products of this kind, or at least familiarise himself/herself with the technical literature" (at [138]). We agree.

[116] We also agree with the Judge's findings on factual causation. They are based on an accurate understanding of Mr Alexander's evidence. As Mr Alexander explained:

(a) The membrane failure allowed water to penetrate under the membrane.

(b) Liquid water will not pass through 200 or 150 millimetres of sound, well-poured concrete.

(c) Where joint failure could be seen, there was a corresponding void allowing water through the joint.

(d) Some of the downpipes leaked where the downpipe connected to the channel drain in the balcony. Due to the downpipe being located very close to the exterior wall, this allowed water to enter the wall.

(e) If the downpipe outlet was sealed to the concrete balcony, with the correct sealant, then the connection to the balcony could have been successful without the presence of waterproofing membrane.

(f) The membrane was a design failure insofar as it was not achievable and so the subsequent waterproofing work was inadequate.

(g) Poor application of membrane in the balconies allows water to enter the cork acoustic layer in most locations examined. All balconies inspected have poor or inconsistent encapsulation of mesh into the membrane.

(h) Poor application of membrane at some drainage outlets allows water to bypass the pipe and drain outside onto the ground or the balcony below, or drain onto the top of the exterior wall.

(i) Inadequate gutter design and inadequate connection between the drainage channels and the downpipe is present on some balconies. This calls into question the same detail at all balconies, whether leaking or not.

[117] Taken together these observations (among others) confirm that the defective membrane installation was a systemic design and construction failure. This failure was widespread and allowed water to pass underneath the membrane, filling voids in defectively installed joints and flowing around poorly sealed downpipes. Some of this water penetrated other parts of the building complex. The inadequacy of the connection between drainage channels and downpipes also suggests widespread systemic failure. While the physical manifestation of related water damage was relatively limited, any remedial response to this failure needed to be commensurately systemic and widespread. The Alexander scope adopted by the Court achieves this — referred to above at [19].

[118] We are therefore satisfied that there is sufficient linkage between the proposed compensatory remedy and the Council's breach. That conclusion is premised on an inquiry that is both forward and backward looking. It is forward looking in the sense that the Council always assumed the risk of water penetrating beneath a defectively installed membrane together with the potential for consequential water damage. The widespread and systemic nature of the defective membrane installation, and corresponding failure to detect it, serves only to emphasise that the allocation of this risk fairly sits with the Council (and the builder). It is backward looking in the sense the Alexander scope is based on what is necessary now to repair existing defects and to avoid further potential water damage arising from this systemic failure *without* full membrane replacement. We address the Body Corporate's challenge to this scope below, but for present purposes it is necessary only to observe that the scope is both fair and reasonable in the particular circumstances.

[119] We also think that the type of fine-grained tracing of the actual and potential water damage to specific instances of membrane defects and repair suggested by the Council is unrealistic in a case like this involving such widespread systemic failure.[153]

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[153] While we do not rely on the Council's failure to identify the joint or outlet pipe defects in this analysis, we are circumspect about the Mr Price's claim that their flawed installation was not within the scope of the Council's duty of care. As we have said, the Council was obliged to secure code compliance in accordance with the building consent. Any major departure from or change to the consented design should have been identified during the construction process and an amended building consent obtained. Furthermore, the Council could not have been sure that the building was constructed in accordance with the building consent and therefore should not have issued the code compliance certificate.

It was not required. Having identified the corresponding potential for water damage, a precautionary approach that does not shift the risk of failure to the owners is reasonable in this case. As Henry J put it in *Sew Hoy & Sons Ltd v Coopers & Lybrand*:[154]

> … what must still be established by a plaintiff is that in a commonsense practical way the loss claimed was attributable to the breach of duty, and thus justifies the Court in imposing responsibility on the defendant for the loss.

[120] That has been achieved here. Also, it was not necessary to show that the Council's negligence was the sole cause of the damage. Rather it was necessary only to show that the Council's breach of duty was a contributory cause.[155] The Judge found that it was, and we have no reason to disagree with him.

[121] We also reject the claim that as there was never a need for a membrane over concrete, there was never a material breach of the Building Code. The Council is subject to positive statutory obligations to secure code compliance.[156] It achieves this by issuing a building consent for works that will achieve that compliance. Investment decisions had been made, both for the purpose of construction and then for the purpose of purchase, in reliance on the proper performance of the Council's duties. It is inconceivable that, many years after the construction of the Apartments, the Council could mount a defence on the basis that the installation of the waterproofing membrane was, in retrospect, not required for code compliance.

[122] Lastly, we reject the proposition that the Council is not liable for the proven losses because its negligence only created an opportunity for something else to cause the loss. We understand Mr Price to be saying that as the Council only inspects and does not build the defects, it can only be liable for the losses that would have been avoided had their inspection been correct. On that basis, so the theory goes, the Council cannot be liable for the repair of defects that have nothing to do with their failed inspections. But this analysis belies the causative potency of the failed inspections. As we have said, membrane defects enabled water to penetrate below the

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154 *Sew Hoy & Sons Ltd (in liq, in rec) v Coopers & Lybrand* [1996] 1 NZLR 392 (CA) at 403 per Henry J.

155 *Taylor*, above n 88, at [128] per Chambers J.

156 See for example Building Act 2004, ss 89–90 and 94.

membrane and into other defective elements of the building. It is this interaction between these defective elements and the cumulative potential for water damage that produces a code non-compliant building.

[123] The proposed remedy responds to this potential in a particular way, in this case without the need for a full membrane replacement because an alternative repair method has been identified. But, for reasons just expressed, this does not diminish the causative potency of the failed membrane inspections and their linkage to need for the proposed repair. Conversely, and somewhat perversely from the Council's perspective, if a direct link between the failed inspection and the remedy is demanded, then the Body Corporate's proposed full membrane replacement would be justified. In any event, this is not a case where the Council simply created an opportunity for loss. Its negligence formed an integral part of a code non-compliant construction that was causative of the losses incurred by the owners and for which it is now liable to remedy.

[124] For completeness we reject the pleadings claim for the reasons set out by the Judge at [91] of his decision (noted above at [109]).

Scope of remedial works

[125] The Body Corporate's appeal is essentially about whether the Judge adopted the correct remedial scope of repair. In addition to the scope issue addressed above at [24], Mr Bigio for the Body Corporate submits that the Judge (in summary):

(a) should have adopted the statements of opinion about scope of repairs of Mr Earley contained in his brief of evidence (which was exchanged by counsel) and stated in the Scott Schedule (the Earley scope); and

(b) was wrong to adopt Mr Alexander's novel scope.

[126] We do not accept Mr Bigio's criticisms. To fully explain our reasons it is necessary to:

(a) determine whether Mr Earley's opinion on the scope of repairs is admissible evidence, and if so what weight should be attributed to it; and

(b) assess whether the Judge was wrong to adopt the Alexander scope.

The Earley scope

[127] The Earley scope, unlike the Alexander scope, included the following:[157]

(a) Membrane treatment — the Earley scope replaced the defective membrane entirely, while the Alexander scope left portions in place.

(b) Building Code compliance approach — the Earley scope employed established methodologies, while the Alexander approach was novel and untested.

[128] Contrary to the submissions for Argon and the Council, Mr Bigio also submits that Mr Earley's opinion was properly before the Court by way of the Scott Schedule. That statement includes multiple cross-references to Mr Earley's exchanged brief. Mr Bigio submits the Earley scope was also before the Court because Mr White, the Council's quantity surveyor, provided an estimated a cost of repair based on it in his initial brief of evidence. That cost was estimated at approximately $18.9 million plus GST for defect 1. While Mr White adduced a replacement brief at trial without that analysis, Mr Bigio emphasised that he cross-examined Mr White on his initial brief and the revised costing.

[129] Mr McCartney submits that as Mr Earley was never called, his opinion evidence is inadmissible hearsay, and had he been called Argon would have cross-examined him, and have not had that opportunity. Mr Price agrees. He accepts

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[157] In their written submissions the Body Corporate incorrectly assumed that the Alexander scope did not include tile replacement.

that the Scott Schedule is admissible evidence as to the fact of Mr Earley's agreement (or disagreement) with other experts and his reasons, but is not admissible as to the truth of the content of Mr Earley's statements. He also says that, in any event, the Scott Schedule does not contain a scope. At most, Mr Earley simply stated that "a reasonable repair option is a direct-fixed tiling system by Ardex, which involves an exterior membrane and drainage mat and has acoustic properties". But this statement was premised on an assumption that a membrane was required and was not expression of an opinion that the repair should include membrane replacement.

[130] Moreover, the evidence was never produced at trial in accordance with the High Court Rules 2016 or s 83 of the Evidence Act 2006 referring to the ordinary way to give evidence, namely orally in a courtroom. The assertion that Mr Earley gave his evidence through joint conferral is also considered by Mr McCartney to be misguided given that matters discussed at the conference must not be referred to in the hearing unless the experts agree.[158] Furthermore, cross-examination of Mr White elicited no acceptance of the existence of a scope produced by Mr Earley, and on the contrary, he disclaimed its existence. In addition, the Body Corporate case did not close by reference to the so-called Earley scope and it is too late to rely on it now.

[131] What then was Mr Earley's opinion? As far as we can tell, the key statements made by him in the Scott Schedule (with cross-references to his brief) include:

(a) "The solution proposed by Mr Alexander will remedy Alleged Defect 1 (subject to comments in brief) [58]."

(b) "Without a waterproofing membrane, the existing balustrades, cladding and joinery will not need to be removed [56]."

(c) "Whether balconies required a membrane will depend on whether concrete requires protection from water [57]."

(d) "Instead of the jack tile system, a reasonable repair option is a direct-fixed tiling system by Ardex, which involves an exterior

[158] Referring to High Court Rules, r 9.44(6).

membrane and drainage mat and has acoustic properties [38–39]. This will reduce the consequential works compared to the jack tile system [39]."

(e) "Based on the evidence of Gerry Winter, I consider that the cladding replacement can be limited to one sheet either side, and above, the balcony door openings. The removed panels can then be replaced with new (using the same or similar product) [42]."

[132] The Scott Schedule also records the following "joint comments" on which the experts agreed:

(a) "Experts DA [Darryl August (for the plaintiffs)] … and ME [Mr Earley] agree the membrane requires replacement."

(b) "[A]coustic mat not required and tiles require replacement".

[133] The cross-references to Mr Earley's brief state:

> 38. In lieu of the jack tile system proposed by the plaintiffs, I propose using a direct-fixed tiling system by Ardex. This system involves an exterior membrane (known as Ardex WPM 1000 external deck membrane) …. and a drainage mat (known as Ardex UD 150 thin layer undertile drainage mat) …. The Ardex system has acoustic properties.
>
> 39. The advantages of the Ardex system over a jack tile system are the removal of chairs or jacks placed in each corner of the tile to stand it above the membrane. It will also reduce some consequential works, such as the need to raise concrete nib heights at the doorways and balcony edges and increasing the height of balcony balustrades. This is because the tiles on jacks system increases the finished surface height of the tiles above the deck surface significantly to create a void. I am aware of the Ardex system being consented and used on other remediation projects, including Settlers Retirement Village and 550 Albany Highway, Auckland.
>
> …
>
> 42. Based on the evidence of Gerry Winter, I consider that the cladding replacement can be limited to one sheet either side, and above, the balcony door openings. The removed panels can then be replaced with new (using the same or similar product).
>
> …

> 56. The solution proposed by Mr Alexander involves directly installing tiles to the concrete balconies, without a waterproofing membrane. This means that then existing balustrades, cladding and joinery will not need to be removed.
>
> 57. Whether balconies require a membrane will depend on whether concrete requires protection from water. I have not seen anything in the plaintiffs' evidence that suggests that the concrete balconies have been damaged by exposure to water. Ordinarily, concrete is considered waterproof (depending on the concrete's composition and porosity). Such an assessment is outside of my expertise, so I do not comment further.
>
> 58. In summary, I consider the solution proposed by Mr Alexander is pragmatic and cost-effective solution and will remedy Alleged Defect 1 (subject to my comments above).

[134] Mr Bigio also refers to Mr Earley's statement at [39] of his brief that his direct fix tile method had previously obtained building consent, while Mr Alexander's proposed fix remained untested.

Analysis

[135] We agree with the Judge's finding that the statements made by Mr Earley, by themselves, are not sufficiently comprehensive or detailed to provide a sound basis for a remedial scope.[159] In reality those statements comprise a handful of references to a potential solution based on a contestable assumption that the replacement of the membrane was necessary.

[136] We acknowledge that Mr White's initial brief of evidence provided a revised scope of works and associated repair cost based on it. But Mr White disavowed under cross-examination that Mr Earley provided a "scope of works". He said it was more of "a top-down approach [of] certain items that he would replace the specifications in the Maynard Marks scope of works, for example the waterproofed membrane scope". While it was highlighted to him that he used the phrase "scope of works" to describe Mr Earley's work in his initial brief, he did not resile from this basic position. Moreover, we are in no better position than the trial Judge to evaluate whether the so-called Earley scope provides a proper, robust basis upon which to base a remedy for the identified defects. It is also implicit (if not explicit) that Mr Earley doubted

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[159] See discussion above at [35](c).

that the replacement of the membrane was necessary everywhere. Given this, we are not satisfied that the trial Judge erred in his view of the Earley scope and the Body Corporate's reliance on the Earley scope is misplaced.

[137] Be that as it may, because of the emphasis placed on the so-called Earley scope, we address whether the statements made by Mr Earley, including those in his brief, were admissible as to the truth of what he asserts, and if so what significance can properly be placed on them.

[138] Plainly the Judge thought Mr Earley's comments were admissible, favourably it appears to Argon and the Council.[160] We think they were too. We make three points. First, the Scott Schedule was admitted into evidence without objection. It records areas of expert agreement and disagreement and corresponding reasons. Section 9(1) of the Evidence Act empowers a Judge to admit evidence offered in any form or way agreed by all the parties. Implied consent may be sufficient.[161] Section 9(1) refers generally to evidence, including expert evidence.[162] While no order appears to have been made to this effect, the Scott Schedule having been admitted without objection, there can be no serious complaint now about it coming into evidence pursuant to s 9. This includes references to the statements made by Mr Earley in his brief. They necessarily formed part of the Scott Schedule.[163]

[139] Second, while admitted by consent, the weight to be afforded to the statements of expert opinion remained contestable. The Scott Schedule, inclusive of points of agreement and disagreement with supporting reasons, could not have been admitted as conclusive proof of what the participating experts asserted. But once admitted by consent, whatever objection that may have been available based on hearsay fell away. There are strong policy reasons for this. Admission by agreement promotes more efficient resolution of proceedings.

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160 Liability judgment, above n 2, at [237]–[238].

161 *Hannigan v R* [2012] NZCA 133 at [13(c)], n 3.

162 See Scott Optician and Elisabeth McDonald (eds) *Mahoney on Evidence: Act & Analysis* (2nd ed, Thomson Reuters, Wellington, 2024) at [EV9.04].

163 We note for completeness that Mr Earley's brief of evidence was adduced as an exhibit through Mr White without apparent objection.

[140] Third, procedural and substantive fairness nevertheless demands a cautious approach. While Mr Earley's brief records that he complied with the code of conduct for expert witnesses, as he was not called to give this evidence, that compliance was not confirmed under oath and he was not available for cross-examination.[164] So, even though his statements were admitted by consent via the Scott Schedule, the weight to be afforded to his opinion must be correspondingly diminished. In the end, it was the task of the trial Judge to assess weight of such evidence and as we have already said, we agree with the Andrew J's assessment.

The Alexander scope

[141] We turn now to consider whether the High Court was wrong to adopt the Alexander scope. Before we examine this claim, we record Mr Bigio's indication that the Body Corporate no longer seeks a solution based on the Maynard Marks scope.

[142] Mr Bigio's primary complaint is that Mr Alexander's scope is novel, untested and building consent had never been obtained for it. Given this, he says the Judge should have placed greater weight on the advantages of a "tried and true" method to remedy the defects. He submits that the Judge wrongly concluded that removing the membrane was wholly disproportionate and that this finding stands in contrast to the principle adopted by Gilbert J in the *Nautilus,* in particular that the plaintiff should not be left with the risk that the repairs will not be effective or durable.[165] More so, he says, because Argon knowingly installed weather-vulnerable cork matting instead of the approved Mapefonic acoustic matting that was part of the original design that obtained building consent. Problematically also, he submits, the Alexander scope leaves defective membrane extending under the joinery in place, effectively doing repairs works to only part of the integrated membrane system designed to keep the Apartments watertight. He also submits that the Judge's finding on disproportionality stands in contrast to his application of the like-for-like principle to the issue of the

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[164] Section 26 of the Evidence Act 2006 requires that all experts in civil proceeding must prepare and give their evidence in accordance with the applicable rules of the court, here the code of conduct for expert witnesses in sch 4 of the High Court Rules.

[165] *Nautilus*, above n 66, at [39].

acoustic matting, and in particular that it was reasonable to restore the Body Corporate to the position they would have been in but for the negligence of Argon.[166]

[143] Mr Bigio further submits that the Judge wrongly drew support for his finding that the Alexander scope was appropriate and proportionate from the evidence of Mr Earley. In particular, the Judge recorded that Mr Earley expressed no view on whether the membrane needed replacement.[167] This is said to be wrong because:

(a) The Scott Schedule records that Mr August and Mr Earley agreed the membrane needed replacement.

(b) Mr Earley qualified his endorsement of Mr Alexander's scope when he said whether the membranes are needed will depend on "whether concrete requires protection from water".

[144] Mr Bigio further reiterated that Mr Earley's scope was properly before the Court and full costings based on it were provided by Mr White. Overall, therefore the Judge gave insufficient weight to the following factors:

(a) two of three remedial scopes relied on a solution predicated on the need for membrane replacement, the weight of the evidence therefore favoured membrane replacement;

(b) Mr Alexander's concession that the jack tile system was "commonplace" and recognised by the Council as a viable solution;[168]

(c) Mr Earley's scope was less extensive than the Maynard Marks scope with regard to the membrane replacement;

(d) the weight to be given to Mr Earley's evidence as the Council's expert;

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166 Citing liability judgment, above n 2, at [254]–[260].
167 At [238].
168 At [247].

(e) the Alexander scope was untested and novel, as acknowledged by the Court;[169] and

(f) the Court's acknowledgment that it would ordinarily be good practice to remove all of the membrane.[170]

[145] We do not summarise the various responses by Mr McCartney and Mr Price because they, for the most part, find expression in our analysis to follow.

Analysis

[146] We do not accept Mr Bigio's criticisms of the Alexander scope. First, in reality, the Alexander scope is the last scope standing. For reasons already expressed, the so-called Earley scope did not constitute a comprehensive and sufficiently detailed scope of remedial works. It was not fully adduced in evidence or properly tested under cross-examination. The weight that could be afforded to it was always limited. In addition, as the Body Corporate now appears to accept, the Maynard Marks scope does not provide a reasonable scope. As the Judge found, there were several problems with the Maynard Marks scope that made it unsuitable.[171]

[147] Second, we have no reason to doubt the Judge's assessment of the weight and worth of Mr Alexander's evidence. Mr Alexander was well qualified to give evidence as to remedial scope, with more than 40 years' experience in the building industry, including 20 years investigating building defects. He undertook significant site investigations at the Apartments. He gave detailed cogent evidence as to why a full membrane replacement was no longer needed to achieve code compliance and a thorough account of water damage and related defects in the Apartments, including especially defects 1 and 2. This precedes an equally cogent explanation of the reasons

169 At [208] and [252].
170 At [253].
171 At [206] and [248].

the Body Corporate's experts proposed remedial solution was an "entirely disproportional approach". He observed:

> … the ultimate test for membrane application is "what is the membrane intended to protect". If the answer is only concrete then the membrane is unnecessary.

[148] This analysis underpinned Mr Alexander's relatively simple yet sensible remedial scope involving, most relevantly, the removal of the membranes without replacement and instead applying AQURON 2000 (as an extra layer protection for the concrete) to the entire top side of the concrete. For our part, nothing in the cross-examination of Mr Alexander undermined the cogency of his evidence or his simple solution. While Mr Alexander quite properly made the concession that the jack tile system preferred by the Body Corporate was an approved method, he did not resile from his position that the membrane was not necessary for waterproofing purposes. Indeed, on our reading of the transcript, Mr Alexander's evidence came through the cross-examination unscathed.

[149] Third, we do not consider that the "weight of the evidence" favoured full replacement of the membrane as Mr Bigio submits. No evidence was specifically cited to us in support of this sweeping proposition. Certainly, the experts did not reach agreement that it was necessary, and (as Mr Bigio noted) Mr Earley's opinion was that the need for the membrane depended on "whether concrete requires protection from water". There was clear evidence that it was not needed and we agree with Andrew J that it is most unlikely that the pre-cast concrete balconies on the outside of a building, without an acoustic mat, need a waterproofing membrane.[172] We are fortified in this view given the absence of evidence that the concrete was failing.[173]

[150] Fourth, turning to the issue of novelty, we understand that the novel element is the application of AQURON 2000. We see nothing in this point. Mr Alexander was pressed on whether the AQURON was appropriately tested for compliance purposes, and he confirmed that it was. The High Court was entitled, having considered all of

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[172] At [67]. Mr Alexander also noted under cross-examination that it was a matter of common knowledge in his field of work that precast concrete of a certain thickness does not need waterproofing.

[173] At [203].

the expert evidence, to prefer Mr Alexander's evidence and arrive at the conclusion that Mr Alexander's proposal was the most appropriate and likely to satisfy the Council's building consent requirements. It might well be novel, but it was in any event clearly available to Andrew J to reach the conclusion that he did. There was also evidence that the AQURON 2000 product provided an extra layer of protection but is not in fact needed. That being that case, the risk to the Body Corporate of being without an adequate remedy appears small.

[151] Fifth, as the membrane is no longer needed for waterproofing following the removal of the cork acoustic matting and completion of other remedial works, full replacement of the membrane, and the works associated with that are not necessary to achieve a code-complaint, weathertight outcome. Accordingly, we endorse the findings of the High Court that, in short, the Alexander scope was appropriate.

Relocation costs

[152] The Body Corporate makes a subsidiary point that in the event we find that the Alexander scope was appropriate, the Judge nevertheless erred in dismissing their claim to relocation costs. More specifically, it says the Judge failed to consider the evidence of Mr Andrews (Argon's programming expert) who said that the Apartments need to be vacated to complete the Alexander scope and estimated the relocation costs would be $302,047.87, not the $54,000 awarded by the Judge.[174]

[153] Mr Price responds that Mr Andrews' evidence in fact stated:[175]

> While the remedial works are being completed *in an apartment*, I consider the affected apartment needs to be vacated by the occupants.

[154] He notes that Mr Andrews' estimate of $302,047.87 is based on a combination of both the Alexander scope and the evidence of the fire expert, Mr Merryweather who dealt with internal works.

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174 Damages judgment, above n 8, at [33].
175 Emphasis added.

[155] The Judge found:[176]

> [278] Mr Alexander's scope does not require any of the unit owners or tenants to move out of their apartments during the construction period. I generally agree with that assessment. However, in terms of quantum I find that some modest allowance should be made to account for a small number of apartment owners having to move out. It seems likely that in respect of a small number of apartments, the disruption caused by the remedial works to particular unit owners and/or the tenants will be such that it is reasonable to make some allowance for this. I stress that this contingency would be of a modest kind.

[156] Nothing in Mr Andrews' evidence suggests to us that the Judge was wrong in his assessment. We therefore see nothing in this point.

Outcome of Body Corporate appeal

[157] We dismiss the Body Corporate appeal. The trial Judge was correct not to adopt a like-for-like full membrane replacement remedy. While Mr Earley's statements were admissible, as he was not called and not cross-examined on his opinion, only limited weight can be afforded to them and it is going too far to describe them as a fully developed "scope". Moreover, full membrane replacement is not necessary or reasonable to now secure code compliance. We also agree with the findings of the High Court that the Alexander scope was reasonable.

Liability for acoustic matting and consultancy costs

[158] Argon's cross-appeal raises four issues:

(a) Was the Judge wrong to find that Argon owed a non-delegable duty of care?

(b) If so, was Argon otherwise negligent?

(c) Was the Judge wrong to find Argon liable to pay for the cost of the acoustic matting?

(d) Was there a proper evidential basis for the consultancy costs award?

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[176] Liability judgment, above n 2.

[159] We have addressed the non-delegable duty issue above at [77]. We have found that the Judge was correct to find that Argon owed a non-delegable duty of care. There is therefore no need to assess whether Argon is otherwise negligent. We address the remaining two issues, each issue in turn.

The acoustic matting

[160] As to the liability for the damage to the cork acoustic matting, Mr McCartney submits that the Judge found that the Alexander scope was appropriate and that replacement of the acoustic matting was not required to comply with the Building Code.[177] On that basis, the Body Corporate is only entitled to the cost of a reasonable and appropriate remediation as per the Alexander scope. This scope did not include the cost of reinstallation of the acoustic matting. On this analysis, the Body Corporate is not entitled to damages for the matting.

Analysis

[161] We can deal with this briefly. The Judge found:

> [259] Argon was clearly negligent in installing cork matting instead of the proposed Mapefonic acoustic matting. It was reasonably foreseeable that if a membrane failed, the cork matting would be particularly vulnerable to rotting. I find that Argon is liable for the replacement cost of the acoustic matting ($111,628) on conventional negligence principles. It owed the plaintiffs a duty of care, it breached that duty, and the plaintiffs have suffered loss caused by the defendant's negligence. It is reasonable to require Argon to restore the plaintiffs to the position they would have been but for the negligence of Argon.

[162] We agree. As we have said, the critical issue is whether the remedy is sufficiently linked to the breach of duty and corresponding risks of harm. Any remedy must also be reasonable in the circumstances. While a repair need only achieve code compliance, damage to the acoustic matting was a foreseeable risk of a defective membrane (especially as Argon installed the cork acoustic mats rather than the original rubber acoustic mats). Those mats are property of the owners for which they are entitled to compensation for either cost of repair or diminution in value. A reasonable measure of their loss is the cost of replacement in present dollar terms. Given this, we can see no proper basis for interfering with the Judge's award.

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[177] At [240] and [255].

Consultancy costs

[163] Mr McCartney submits that the Court's award of consultancy costs for the investigation of defects of "$450,000, exclusive of GST" was not supported by admissible cogent evidence.[178] He says that the only evidence on point was given by Ms Yeo, for the Body Corporate. Mr McCartney notes that this was not her own evidence at all, as the relevant spreadsheet was produced by the Body Corporate's lawyers. Because of this there was no proper basis to make the award. Even if Ms Yeo's evidence was admissible, it did not provide cogent evidence as to the consultancy costs incurred specifically in relation to defects 1 and 2. Cross-examination revealed that the costs claimed either did not relate to those defects, or related to other defects or unrelated services. The Council supports Argon on this point.

[164] Mr Bigio makes five key points in response. First, no objection was raised to the admissibility of Ms Yeo's evidence at or prior to trial in accordance with r 9.11 of the High Court Rules and she was not cross-examined by Argon. It is too late now to claim that the evidence was inadmissible as unreliable hearsay. Second, the fact the costs were incurred is not in dispute, only quantum. A similar approach should be taken to this issue as is taken to the quantification of trial costs. Provided the costs claimed are reasonable, there is no need for elaborate evidence. Third, the Court must do its best with the available evidence as to quantum — the successful plaintiff should not be deprived of a remedy because of the difficulty in assessing damages.[179]

[165] Fourth, it was available to the Judge to rely on Ms Yeo's spreadsheet as an honest account of the consultancy costs that were in fact invoiced in respect of defects 1 and 2 and do the best he could in the circumstances to arrive at an estimate of consultancy costs that was fair to the parties. It would be unjust to deprive the Body Corporate of a remedy based on the form of the evidence, there being no dispute

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178 At [286]. A further $200,000 was awarded by the Judge for the consultancy costs for preparing the remedial scope: see damages judgment, above n 8, at [29].

179 Citing *McElroy Milne v Commercial Electronics Ltd* [1993] 1 NZLR 39 (CA) at 41; *Leisure Investments NZ Ltd Partnership v Grace*, above n 55; and *OHL Ltd v Johns* [2021] NZHC 77 at [62].

that consultancy costs were incurred. Fifth, the Judge was best placed to assess whether the consultancy costs claimed should be properly recoverable.

The evidence

[166] Ms Yeo was at the time of her evidence a member of the Body Corporate Committee. She holds a Bachelor of Commerce, majoring in accounting. She confirmed that the Body Corporate incurred various expert and consultancy costs. She attached a schedule to her evidence listing the costs incurred. They are listed by reference to expert and invoice, with the invoices attached. The costs totalled $932,213.79 plus GST. She then avers that the sum was reduced to $576,699.09 as a result of the settlement of claims and the removal of expert witness costs.

[167] Under cross-examination Ms Yeo said that she relied on a lawyer to identify what is claimable and what is not, and that the lawyer checked with the consultants as to whether the invoices were reasonable to claim or not. She could not identify the consultants who did some of the work that was invoiced; she based her understanding of what the consultants did from what was said in the invoices. As a result she was not able to pinpoint all of the invoiced work to defects 1 and 2. The only comment she could make on the invoices was that they were paid by the Body Corporate and that she was not qualified to make any assessment on whether these invoices were claimable in respect of the defects.

The Judge's findings

[168] The Judge recorded that the Body Corporate claimed the sum of $576,699 in consultancy costs.[180] He accepted that they were properly recoverable and genuine efforts were made to calculate the amount properly claimable.[181] His assessment however was that the amount claimed was excessive and proceeded on the evidence that was available. He concluded that the Body Corporate were entitled to $450,000 exclusive of GST.[182]

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180 Liability judgment, above n 2, at [261(c)] and [284].
181 At [284]–[285].
182 At [286].

Analysis

[169] As explained by a full court of this Court in *Attorney-General v Gilbert*:[183]

> [95] Once the plaintiff has proved, on the balance of probabilities, that he has lost something of value as a result of the breach, any difficulty in assessing damages does not deprive him of a remedy. The Court must do the best it can on the evidence to assess the amount of the loss.

[170] Plainly the Judge had this basic remedial approach in mind when awarding the consultancy costs. We are therefore disappointed that common sense has not prevailed here and agreement has not been reached as to the quantum of these costs, especially given that it is accepted that consultancy costs have been incurred and are payable.[184]

[171] Nevertheless, we have come to the view, reluctantly, that Ms Yeo's evidence was not sufficiently cogent or reliable as to the consultancy costs. She had no direct knowledge of the consultancy costs and she could not attest to either the accuracy or reasonableness of the costs claimed. Nor is the claim for damages like a claim for expert trial expenses. In the latter, but not the former, counsel have direct oversight of expenses incurred for the purposes of the trial and can be relied upon to ensure that the costs claimed are reasonable. Even then, it is preferable that evidence as to reasonableness be provided in complex cases involving large expert disbursements.[185] We have come to the view therefore that as there was no proper basis upon which to make a finding about the consultancy costs, and the order must be set aside.

[172] For completeness, we understand that no hearsay objection was taken to Ms Yeo's evidence, but we were advised by Ms Fairnie, for the Council, that this was because the evidence was only exchanged the night before it was given. In those circumstances, the absence of the objection is not a bar to the appeal point now being raised.

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[183] *Attorney-General v Gilbert* [2002] 2 NZLR 342 (CA) at [95]. While this was a contract breach case, the point of principle applies to all assessments of damage.

[184] In oral argument Mr Price emphasised that the evidence was only tabled on the night before it was presented so there was no time to agree. But it would have been a simple enough matter for the parties to invite the Court to adjourn this aspect of the matter on the basis that the parties would attempt to reach agreement on quantum, especially as it was simply a matter of isolating attendances by the consultants. Furthermore, it is a matter upon which agreement could have been reached pending the hearing of the appeal.

[185] See discussion below at [206].

[173] In the result, this appeal point is allowed. The question of the consultant's investigatory costs is referred back to the High Court for reconsideration. It will be for the High Court to determine as to whether leave is granted to the Body Corporate to adduce evidence from the experts as to the reasonableness of the claims.

Outcome of Argon's cross-appeal

[174] Save for the challenge to the consultancy costs, we dismiss Argon's cross-appeal for the following reasons:

(a) Argon assumed full responsibility for all aspects of the build. Given this, Argon owed a non-delegable duty of care to the Body Corporate to secure a code-complaint building.

(b) The membranes were negligently installed and the cork acoustic matting suffered consequential water damage. Argon was therefore liable for the cost to repair the matting or for any corresponding diminution in value. Replacement value of the matting was a reasonable measure of the Body Corporate's loss.

(c) Ms Yeo's evidence on consultancy costs was unreliable and lacked cogency. It could not provide a proper basis for making findings about the consultancy costs. This issue is referred back to the High Court for reconsideration.

Concurrent duties

[175] The Council's cross-appeal raises the following questions:

(a) What was the Council's duty of care, if any (and to whom)?

(b) Did the Council cause the losses in fact and law?

(c) Was the Council liable for works to remedy defects that have not caused water damage or are otherwise not required to secure code compliance?

(d) Was there a proper evidential basis for the consultancy costs award?

(e) Did the Council owe a concurrent duty of care to the Body Corporate?

[176] We have addressed the first four issues above at [45]–[61], [103]–[124] and [163]–[174]. Save for the issue as to the consultancy costs, we have rejected the Council's claims. We come now to whether the Council owed a concurrent duty of care to the Body Corporate and the individual owners.

The status of the Body Corporate

[177] Mr Price submits, referring to the reasoning of Walker J in *Body Corporate 366567 v Auckland Council* (*Gore Street*), that the Council does not owe concurrent duties of care to both the individual unit owners and the Body Corporate in respect of defect 1, and that the only persons to whom the Council owe a duty are the original and subsequent owners of the units.[186] This is important because if the Body Corporate can sue independently of the owners and recover damages, then the Council may be at risk of double liability to both the Body Corporate and the individual owners. For example, an owner that sells their unit at a diminished value due to the defects may look to recover their losses at the same time the Body Corporate sues in respect of the same damage, effectively on behalf of the purchaser. Relevantly to this case, because of the Judge's concurrent approach to the Council's duty, Mr Price argues the Judge failed to transparently adjust the damages award for repairs to the Body Corporate to reflect the contributory negligence of individual owners.[187]

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[186] *Body Corporate 366567 v Auckland City Council* [2024] NZHC 32 [*Gore Street*] at [118]–[141].

[187] In oral argument Mr Price elaborated that the primary defect, defect 1, related to the balconies which were owned by individual owners, not the Body Corporate and therefore the Council did not owe a duty to the Body Corporate in respect of those defects. He acknowledged however that the Body Corporate has responsibilities in relation to the common property, and to the extent the Council's negligence may affect the Body Corporate it is amenable to suit, but only on behalf of the owners. He also noted that if the Judge had taken this into account in terms of contributory negligence, it would affect the Body Corporate owners as a whole.

The Judge's findings

[178] Andrew J found that:[188]

> [311] When applying the principles of *Wheeldon* to this case, I find that the cantilevered balconies of Bianco Off Queen, the subject of defect 1, fall within the scope of s 138(1)(d) of the [Unit Titles Act (UTA)] 2010. Given the widespread nature and extent of the defects, the construction of this building and the location of the balconies, I find that every balcony affects more than just the unit of which it forms a direct part. That conclusion is entirely consistent with the rationale for bodies corporate undertaking building-wide repairs of the kind at issue here, as identified by the Court of Appeal in *Wheeldon*. This is the very sort of case where it is not realistic for unit owners to arrange the repair work individually. The necessary building-wide repairs require coordinated and professional management.
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> [312] I find that the Body Corporate here does have standing to sue for damage to unit property in these circumstances. In my view, its status goes beyond the role bodies corporate had as statutory agents under the UTA 1972 in respect of common property. The Body Corporate, under the UTA 2010, is entitled to sue in its own name and to recover in its own name damages that fall within the scope of its s 138 responsibilities. That is entirely consistent with the legislative policy of assigning responsibility to bodies corporate for building elements and infrastructure that relate to or serve more than one unit and limiting owners' responsibilities accordingly. It is not necessary for all individual owners to agree to that course of action, provided of course that the damage at issue is properly within the scope of s 138. This finding is consistent with the Court of Appeal's conclusion in *Otway*; s 138 was intended to limit owners' rights and obligations.

[179] The Judge also found that the unit owners may have claims that fall outside the Body Corporate's s 138 repair responsibility, including general damages, and that these could be reduced on account of contributory negligence.[189] On the issue of whether contributory negligence defences could be advanced in relation to damage to the units that fall within s 138(1)(d), the Judge concluded:[190]

> [318] Against that background, I am of the view that the defendants owed concurrent duties of care to both the Body Corporate and the individual owners. The Body Corporate has sufficient interest in the units and is required to repair and maintain damage that falls within the scope of s 138, even if the individual owner does not agree. Its interest is more than contractual. It is only the Body Corporate which can undertake the necessary remedial action to which s 138 applies. Its pocket is damaged as a result of the negligence of the defendants, even if it can recoup expenses from the individual owners. In principle, the affirmative defence of contributory negligence is available, and deductions can legitimately be made for contributory fault of either the

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188 Liability judgment, above n 2 (footnote omitted).
189 At [314].
190 Footnote omitted.

> Body Corporate or individual owners from any quantum sum awarded to the Body Corporate.

[180] And further:

> [320] In reaching the conclusion that the defendants owed concurrent duties of care, I reject the Auckland Council's submission that there is not the necessary element of reliance by the Body Corporate to support the imposition of a duty of care. Although the Body Corporate is a statutory construct, at its inception and the commencement of its s 138 responsibilities, it does rely, as do the individual owners, on the diligence and skill of those involved in the construction of the building and the certification of its status as code compliant. There are also sound policy reasons for the imposition of a concurrent duty of care. There is a clear level of efficiency in such an approach, but it also allows, in the exercise of the Court's broad discretion, to have regard to fault by individual owners.

[181] However, the Judge accepted that the status of the plaintiff remained important, referring for example to the Council's submission on double jeopardy.[191] Turning then to the substantive issue of whether there was contributory negligence, the Judge found:[192]

> [333] In reviewing all this evidence, I conclude that there was a degree of carelessness by the [individual unit owners] which has contributed in some way to their loss. In the circumstances here, I find that the moral blameworthiness can properly be considered to be low, particularly in relation to those who purchased their unit after the date of the 2016 AGM minutes, but before the 2017 AGM minutes. In the circumstances, I find that there should be a deduction of the sum of $7,500 from any award of general damages to those of the [individual unit owners] who purchased their unit after the 2016 AGM minutes but before the 2017 AGM minutes. In respect of those [unit owners] who purchased after the 2017 AGM minutes I find that there should be no award of general damages to them. In the circumstances and having regard to the broad discretion in s 3(1) of the Contributory Negligence Act [1947], in particular the just and equitable threshold, I conclude that there should be no further deductions. That would be disproportionate to the level of fault I have identified. It would also not be just and equitable in this case to make any further deduction, given the nature and extent of the loss and the fact that it falls on the general body of owners.

Analysis

[182] In *Gore Street*, Walker J agreed with and endorsed Andrew J's conclusions and reasoning (noted above) as to the basis upon which a body corporate is entitled to sue in their own name and to recover damages falling within the scope of s 138

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191 At [321].
192 Footnote omitted.

responsibilities.[193] However she did not agree with him that the relevant council owes concurrent duties to both the body corporate and the individual owners. The Judge observed:

> [137] I respectfully depart from Andrew J's conclusion that the duty is concurrent. I consider that if the [UTA 2010] intended to so affect general principles of tort law, then it would have done so more explicitly and clearly. I agree with Ms Meechan KC's submission that the focus on legal ownership to establish to whom the duty is owed is misplaced because the legal ownership of bodies corporate is a statutory construct for a specific purpose. It is clearly the unit owners who ultimately bear the loss of owning or purchasing a defective building and separating the entity or person to whom the duty is owed based on whether the defect is on common or unit property lacks coherence.

[183] And further:

> [140] In summary, I am not persuaded that the duty of care is owed to the Body Corporate. Rather, the duty of care remains owed to the general body of owners whose interests coalesce in the Body Corporate under the legislation.

[184] We accept therefore that whether the relevant council owes a concurrent duty to a body corporate is a matter of controversy and in the right case, that controversy will need to be resolved. But this is not the right case. We understand that Walker J's judgment is presently under appeal, and we think that is the better forum to address it because we are satisfied that the Judge's treatment of contributory negligence in this case was just and fair to the Council. In this regard, Mr Price did not explain why the Judge was wrong in his substantive treatment of contributory negligence other than to contend, in short, that had he found the duty was not concurrent, he may have reached a different quantum on remedial damages payable to the Body Corporate. But there is nothing in the reasoning of the Judge that suggests he made a rudimentary error of this kind or if he did, that it would result in a material difference to the damages payable by the Council. In this regard, we think Mr Price appropriately captured the lack of materiality when he said in oral argument:

> What difference does it make? Well, it makes a difference in relation to contributory negligence in the present case, because [Andrew J] did identify that if he had taken into account contributory negligence it would [affect] the Body Corporate owners as a whole. Which is consistent with a duty owed to the Body Corporate, which would be different to, if you're looking at it as the

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193 *Gore Street*, above n 186, at [125]–[126].

> individual owner's claim. So, that's where it does make a difference. It's not a significant financial difference but it's an important point of law.

[185] We therefore dismiss this ground of appeal.

Outcome on the Council's cross-appeal

[186] Save in respect of the appeal on the quantum of the consultancy costs, the Council's cross-appeal is dismissed.

Costs

[187] There are three main issues raised by the costs appeals:[194]

(a) Was the Court wrong to not award Argon and the Council costs and disbursements from the date of the *Calderbank* offer pursuant to r 14.11(3) of the High Court Rules?[195]

(b) Was the Court wrong to award the Body Corporate $400,000 in disbursements for expert fees?[196]

(c) Was the Court wrong to apportion costs liability as between the Council and Argon, 65 per cent to the Council and 35 per cent to Argon?[197]

The Calderbank *issue*

[188] Helpfully, Mr Price has provided a short summary of the relevant context which we adopt for the purposes of resolving this issue:[198]

(a) When filed on 28 July 2017, the Body Corporate's statement of claim against the Council and Argon asserted 99 defects plus a 100th 'catch-all' for "additional hidden defects and deficiencies".

(b) By the time of their 9th amended statement of claim, dated 21 June 2022, only four defects remained – Defects 1, 2, 7 and 8 (yet the alleged scope of works had barely changed, and they were seeking

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194 CA342/2024 and CA345/2024.
195 Costs judgment, above n 9, at [29].
196 At [50].
197 At [53].
198 Footnote omitted.

from the Council and Argon a very large award of damages – nearly $70,000,000).

(c) On 29 March 2023, the defendants (at that stage the Council, Argon and Beca) made a joint offer on a Calderbank basis to settle the claims in the proceeding for $19,230,000. The contributions offered were $10,000,000 from the Council, $9,000,000 from Argon and $230,000 from Beca.

(d) The Body Corporate did not respond to that offer and subsequently made their own offer. Defects 7 and 8 were then settled in the first weeks of trial. The settlement agreements are not before the Court, but the damages the Body Corporate was seeking, in full, for the two defects was only in the order of $1,500,000 in their written opening submissions.

(e) The Body Corporate's closing submissions sought damages of nearly $41,000,000 but they were awarded damages of approximately $6,000,000, around a third of what had been offered by way of settlement (or slightly less than a third if the full value of Defects 7 and 8 is added to the judgment sum, although they were settled for less).

[189] Both the Council and Argon sought orders in the High Court to the effect that costs and disbursements should be awarded to them from the date of the *Calderbank* offer, on the basis that they had offered a sum of money that exceeded the amount of the judgment obtained.[199] The Judge declined to follow this approach. The Judge found that the starting point is that the Body Corporate was the successful party.[200] He then turned to the effect of the *Calderbank* offer. He said:[201]

> [22] I find that in this case, to award costs to the defendants of any kind, whether scale costs or on an increased basis or otherwise, would be unconscionable and unjust. The *Calderbank* offer made was not for the entirety of the pleaded claim and, as I concluded in my liability judgment, the defendants (but most particularly, the Auckland Council) put the plaintiff to proof on virtually every aspect of the claim. This included the nature and scale of the defects and the fundamental issue of liability.
>
> [23] The critical issue to address is whether the *Calderbank* offer should operate to reduce costs. The defendants bear the onus of satisfying the Court that it is appropriate to do so. It is clear from r 14.11 [of the High Court Rules] that whether a *Calderbank* offer has any effect is ultimately a highly discretionary matter. The case law is clear that the ultimate judgment sum exceeding the amount offered in a *Calderbank* offer does not mean that the Court is duty bound to award the offer[or] costs.

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199 Costs judgment, above n 9, at [5(b)].
200 At [17].
201 Footnotes omitted.

[24] Furthermore, the "reasonableness of a party's rejection of such an offer must be assessed at the time of rejection, not against the subsequent result."

[25] I find that it would be unjust and unreasonable to reduce any costs in this case on account of the *Calderbank* offer. I find that the plaintiffs, at the time they rejected the offer, cannot be said to have acted unreasonably. The following factors are relevant:

(a) The defendants' offer of 29 March 2023 was premised on the fact that Mr Earl[e]y (a then proposed expert witness for the Auckland Council on the issue of remedial scope), was still being called as a witness by the Council. It was therefore fair for the plaintiffs to assume that his alternative scope was a reasonably possible outcome. Mr White, the quantity surveyor expert for the Council, estimated Mr Earl[e]y's scope of repairs was approximately $20,590,126 before GST. That materially exceeded the cost of Mr Alexander's scope as costed by Mr Brock;

(b) The offer failed to address the question of costs, despite it being clear that significant costs had been incurred by the time the offer was made; and

(c) There was a failure to make any relevant or material admissions or concessions — liability was, in fact, denied at all times.

[26] I reject the defendants' submission that the plaintiffs' case lacked merit, seemingly from the outset. The amount of the *Calderbank* offer, namely $19.2 million, does not bear this out. Rather, that amount tends to indicate relatively significant litigation risk for the defendants, at least at the time that the offer was made.

[27] In contrast to a number of cases where a plaintiff's rejection of a settlement offer can be regarded as unreasonable, the present case was necessarily one where the plaintiffs and their lawyers were obviously reliant on independent expert advice on the critical issue of scope of repairs.

…

[29] In conclusion, on the issue of the *Calderbank* offer, I find that the *Calderbank* offer does not affect my analysis that the plaintiffs were successful. In this case, the *Calderbank* offer should not operate to reverse liability for costs or give rise to a basis for reducing costs to be awarded to the plaintiffs.

[190] The Council and Argon contend that the Judge:

(a) did not correctly apply r 14.11 and misapplied leading authority;[202]

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202 Citing *Weaver v Auckland Council* [2017] NZCA 330, (2017) 24 PRNZ 379.

(b) was wrong to place significance on the fact the *Calderbank* offer was not made for the entirety of the pleaded claim as that claim was grossly disproportionate, and in any event failure to make an offer for the entirety of the claim cannot be a disqualifying factor;

(c) failed to acknowledge the full extent of the *Calderbank* offer, despite the fact that it was made also to settle defects 7 and 8, which was more than 3.5 times the eventual judgment;

(d) was wrong to find that the Council put the Body Corporate to proof on "virtually every aspect of the claim"[203] — for example the Council did not dispute that it owed a duty of care or the physical realities of the Apartments, and in relation to those matters that the Council put the Body Corporate to proof, the Body Corporate's evidence was rejected;

(e) was wrong to have regard to the reasonableness of the Body Corporate's non-acceptance, because unreasonableness under r 14.7(f)(v) is unrelated to the *Calderbank* provisions;

(f) placed undue significance on the Body Corporate's reliance on the Earley scope, as it cannot be said that the *Calderbank* offer was premised on that and in any event, the Alexander scope was in evidence and available to be weighed; and

(g) was wrong to treat as relevant that the Council and Argon made no relevant or material admissions or concessions given the clear effect of r 14.11.

[191] Mr Bigio responds:

(a) To succeed on appeal against a costs award, the Judge must be shown to have erred in principle, failed to take account of some relevant matter, factored in the irrelevant or been plainly wrong.

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[203] Costs judgment, above n 9, at [22].

(b) The Judge did not err in principle:

(i) He found that the plaintiffs were successful and on that basis costs should follow the event (as mandated by apex authority).[204]

(ii) He exercised the overarching discretion expressly affirmed by r 14.11(1) and (2)(a) to award costs to the successful party notwithstanding the *Calderbank* offer — the Judge was not duty bound to award costs to Argon and the Council.

(c) The Judge was not plainly wrong — in rejecting the validity of the *Calderbank* offer in this case, the Judge relied on long-standing authority and orthodox principles.[205]

Threshold

[192] As Gilbert J put it in *Kinney v Pardington*:[206]

> [1] Questions of costs are ultimately a matter of discretion. The exercise often requires assessment of a wide range of factors. The overall objective is to achieve an outcome that best meets the interests of justice in the given case in accordance with any applicable costs rules and consistent with established principles. The trial judge is uniquely placed to make this assessment. It is well-settled that an appellate court should not interfere with a costs award unless satisfied that the judge acted on a wrong principle, failed to take account of some relevant matter, factored in the irrelevant or was plainly wrong. This is why appeals against costs awards seldom succeed.

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204 Citing *Shirley v Wairarapa District Health Board* [2006] NZSC 63, [2006] 3 NZLR 523 at [19]; and *Manukau Golf Club Inc v Shoye Venture Ltd* [2012] NZSC 109, [2013] 1 NZLR 305 at [8]–[9].

205 Costs judgment, above n 9, at [24] citing *Pangani Properties Ltd v Lloyd* [2019] NZHC 863 at [25], citing *New Zealand Sports Merchandising Ltd v DSL Logistics Ltd* HC Auckland CIV-2009-404-5548, 19 August 2010.

206 *Kinney v Pardington (as executors and trustees of the estate of Pardington)* [2021] NZCA 174 (footnotes omitted).

Analysis

[193] Rule 14.1 of the High Court Rules relevantly provides:

> **14.1 Costs at discretion of court**
>
> (1) All matters are at the discretion of the court if they relate to costs—
>
> (a) of a proceeding; or
>
> (b) incidental to a proceeding; or
>
> (c) of a step in a proceeding.
>
> (2) Rules 14.2 to 14.10 are subject to subclause (1).
>
> …

[194] Rule 14.2(1) then states:

> **14.2 Principles applying to determination of costs**
>
> (1) The following general principles apply to the determination of costs:
>
> (a) the party who fails with respect to a proceeding or an interlocutory application should pay costs to the party who succeeds:
>
> (b) an award of costs should reflect the complexity and significance of the proceeding:
>
> (c) costs should be assessed by applying the appropriate daily recovery rate to the time considered reasonable for each step reasonably required in relation to the proceeding or interlocutory application:
>
> (d) an appropriate daily recovery rate should normally be two-thirds of the daily rate considered reasonable in relation to the proceeding or interlocutory application:
>
> (e) what is an appropriate daily recovery rate and what is a reasonable time should not depend on the skill or experience of the solicitor or counsel involved or on the time actually spent by the solicitor or counsel involved or on the costs actually incurred by the party claiming costs:
>
> (f) an award of costs should not exceed the costs incurred by the party claiming costs (not being a party acting in person):
>
> (g) so far as possible the determination of costs should be predictable and expeditious.

[195] The effect of these rules was helpfully summarised by this Court in *Weaver v Auckland Council*:[207]

> [19] The starting point is that costs are discretionary. As this Court recently noted in *Water Guard NZ Ltd v Midgen Enterprises Ltd*:
>
> > an appellate court should not interfere unless, in accordance with settled principles, it is satisfied that in exercising his statutory discretion the Judge acted on a wrong principle, failed to take into account some relevant factor, took into account an irrelevant factor, or was plainly wrong.
>
> [20] But it is well settled that the party that lost should pay the costs of the party that won. The Supreme Court in *Shirley v Wairarapa District Health Board*, in referring to what is now r 14.2(a), made clear that the "loser, and *only the loser*, pays", unless there are exceptional reasons.
>
> [21] Recourse may then be had in search of such reasons to r 14.7(d) of the High Court Rules, which gives the Court discretion "despite rr 14.2 to 14.5," to refuse to award costs to the successful party if, notwithstanding overall success, "that party has failed in relation to a cause of action or issue which significantly increased the costs of the party opposing costs". The same rule also empowers the Court to reduce costs in such circumstances.

[196] Here, the Body Corporate succeeded in the result, though for a sum much smaller than was claimed by them. Nevertheless, limited success is still success.[208] That is the starting point. However, at issue here was whether the Judge was wrong to exercise his discretion to award costs to the Body Corporate in the face of a *Calderbank* offer that was 3.5 times the amount of the damages won by the Body Corporate. This brings into frame r 14.11 which relevantly states:

> **14.11 Effect on costs**
>
> (1) The effect (if any) that the making of an offer under rule 14.10 has on the question of costs is at the discretion of the court.
>
> (2) Subclauses (3) and (4)—
>
> (a) are subject to subclause (1); and
>
> (b) do not limit rule 14.6 or 14.7; and
>
> (c) apply to an offer made under rule 14.10 by a party to a proceeding (**party A**) to another party to it (**party B**).
>
> (3) Party A is entitled to costs on the steps taken in the proceeding after the offer is made, if party A—

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207 *Weaver v Auckland Council*, above n 202 (footnotes omitted).
208 At [26].

(a) offers a sum of money to party B that exceeds the amount of a judgment obtained by party B against party A; or

(b) makes an offer that would have been more beneficial to party B than the judgment obtained by party B against party A.

…

[197] As r 14.11(3) states, a *Calderbank* offeror is "entitled" to costs on steps made after an offer in exceedance of the judgment sum. In addition, as this Court put it in *Bluestar Print Group (NZ) Ltd v Mitchell*:[209]

> [20] … As this Court has previously said a "steely" approach is required. It has been repeatedly emphasised that the scarce resources of the Courts should not be burdened by litigants who choose to reject reasonable settlement offers, proceed with litigation and then fail to achieve any more than was previously offered. Where defendants have acted reasonably in such circumstances, they should not be further penalised by an award of costs in favour of the plaintiff in the absence of compelling countervailing factors. …

[198] And further: "The normal effect of a Calderbank offer is that the costs position is reversed."[210]

[199] That means that the effect of r 14.11(3) is that when a qualifying *Calderbank* offer has been made, the usual starting point is reversed if the offeree gains less from litigating than what was offered: the *Calderbank* offeror is effectively the successful party in relation to post-*Calderbank* steps and entitled to their costs on those steps in the absence of compelling countervailing factors. There must also be exceptional reasons for making an award against a successful *Calderbank* offeror.[211] This recognises the important function played by Calderbank offers in the fair and expeditious resolution of disputes.[212]

[200] We do not consider the directive at r 14.11(1) that "the effect (if any) that the making of an offer … has on the question of costs remains at the discretion of the court" derogates from this reversed starting point.[213] The usual principles apply but on the basis that the qualifying *Calderbank* offeror is normally entitled to their costs

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209 *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385, [2010] ERNZ 446 (footnote omitted).
210 At [24].
211 Applying by extension the reasoning in *Weaver v Auckland Council*, above n 202, at [20].
212 As noted in *Bluestar Print Group (NZ) Ltd v Mitchell*, above n 209, at [18].
213 *Shirley v Wairarapa District Health Board*, above n 204, at [16]–[17].

on the post-*Calderbank* steps. In this vein, r 14.11(2)(b) makes clear that a qualifying *Calderbank* offer does not limit the application of rr 14.6 and 14.7. Those rules empower the Court to reduce or increase costs payable to the *Calderbank* offeror having regard to the conduct of the parties.

[201] Returning to the facts of this case, we consider the Judge erred in principle by assuming whether a *Calderbank* offer has any effect is ultimately a highly discretionary matter.[214] In so doing, he did not clearly or sufficiently acknowledge the fact that the *Calderbank* offeror is effectively the successful party in relation to post-*Calderbank* steps and entitled to its costs on those steps in the absence of compelling countervailing factors. Rather it appears that the Judge treated the Body Corporate as the successful party for all steps. Nor is there any reference to the need for exceptional reasons to justify an award against Argon or the Council on the post-*Calderbank* steps.

[202] We make four acknowledgements. First, we accept that insofar as the Judge found that Argon and the Council's costs on the post-*Calderbank* steps should be reduced, the conduct of Argon and the Council in the *entire* proceedings was plainly relevant to this assessment in accordance with r 14.7(d). The weight to be afforded to that factor was for the Judge who had (and still has) the best view of its significance to that assessment, having laboured through the trial. Second, finding an award to Argon and the Council to be unconscionable and unjust was an evaluative matter for the Judge, and as this Court said in *Kinney* and *Weaver*, that evaluation is not amenable to reversal absent clear reviewable error.[215]

[203] Third, the fact that the offer did not meet the Body Corporate's claim, the reasonableness of the Body Corporate's decision to reject the offer and the conduct of the defendants are all relevant matters going to the question of costs.[216] Again, the weight to be afforded to those matters was for the Judge to determine. Collectively, they might qualify as compelling countervailing factors affecting the entitlement to costs and exceptional reasons for an award of costs against Argon and the Council.

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214 Costs judgment, above n 9, at [23].

215 *Kinney v Pardington*, above n 206, at [1]; and *Weaver v Auckland Council*, above n 202, at [19].

216 As noted at [197] above, all of these factors were considered relevant in *Bluestar Print Group (NZ) Ltd v Mitchell*, above n 209, at [20].

[204] Fourth, it was not necessary for the Judge to divide his analysis of costs issues between the pre and post-*Calderbank* phases of the litigation. He was entitled to examine the issue in the round, taking into account the effect of the pre-trial offer.[217] An overall judgment that costs should still be payable to the Body Corporate, having regard to their success in the result and the conduct of litigation as a whole was therefore available to him.

[205] But we cannot be sure that the Judge approached his assessment on the correct legal basis, namely that Argon and the Council were entitled to an award of costs on the post-*Calderbank* steps in the absence of compelling countervailing factors and that there needed to be exceptional reasons to justify an award in favour the Body Corporate on those post-*Calderbank* steps. Accordingly, his costs order must be set aside and returned to him for reconsideration in light of our judgment.

Expert costs

[206] The Council and Argon submit, in summary, that the Judge was wrong to take a "broad brush" approach to the assessment of expert costs, particularly in the absence of evidence from the experts about the relevance of the costs incurred to the matters in dispute in the proceeding.[218] It is also submitted that any expert costs should have been limited to fees that demonstrably related to defects 1 and 2, and an allowance should have been made for the fact that the Body Corporate's expert evidence in relation to those defects was largely rejected.

[207] We disagree. Rule 14.12(2) and (3) of the High Court Rules states:

> **14.12 Disbursements**
>
> …
>
> (2) A disbursement must, if claimed and verified, be included in the costs awarded for a proceeding to the extent that it is—
>
> (a) of a class that is either—
>
> (i) approved by the court for the purposes of the proceeding; or

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[217] See *Weaver v Auckland Council*, above n 202, at [18].
[218] See costs judgment, above n 9, at [50].

(ii) specified in paragraph (b) of subclause (1); and

(b) specific to the conduct of the proceeding; and

(c) reasonably necessary for the conduct of the proceeding; and

(d) reasonable in amount.

(3) Despite subclause (2), a disbursement may be disallowed or reduced if it is disproportionate in the circumstances of the proceeding.

…

[208] The Body Corporate claimed expert witness fees of $617,323.19.[219] In support of this claim, the Body Corporate attached an appendix detailing the experts' costs. Counsel advised the Court that they had ensured that the invoices and charges within those invoices were excluded if they related to settled defects, and discounted charges relating to settled defects. They said it was not possible to delineate at a granular level precisely which portion of an experts' fees relates solely to defects 1 and 2.

[209] The Judge found:

> [46] The Auckland Council is critical of the "broad brush" approach. It submits that more is required than "bare assertion" when the plaintiffs are seeking to recover more than $600,000. It argues that an assessment of particular expert witness work concerning defects 1 and 2 requires detailed supporting information, which has not been supplied.
>
> [47] The Auckland Council further submits that the plaintiffs cannot recover the expert witness fees for the Maynard Marks witnesses, including Mr Angell (with the exception of Mr Simon Paykel's evidence in relation to Council practice), Mr Hakin, Mr August, Ms Gould or Ms van Eden (even when those fees relate to defects 1 and 2). The Auckland Council submits that their evidence was for the most part, completely rejected.
>
> [48] I find that the criticisms the Auckland Council makes of the plaintiff's proposed "broad brush" approach are overstated. While in principle a distinction should be drawn between defects 1 and 2 and the other defects that were settled and/or abandoned, in practice and given the late settlement of those other claims, it seems to be that this may well have been a difficult, complex, and expensive exercise. This litigation must already have been hugely expensive for all parties and there must be very real questions that at this late costs stage, whether any work to resolve these issues is at all cost-effective. The realities of litigation of this scale need to be firmly kept in mind.

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219 Costs judgment, above n 9, at [42(c)].

> [49] I accept that there is merit to the Auckland Council's contention that there should be some further discount for the expert fees for some of those expert witnesses whose evidence I rejected.
>
> [50] In this case, I do not see how anything other than a "broad brush" approach can ultimately be applied in determining the amount of expert fees that are recoverable. Taking all matters into account, I find that the plaintiffs should be allowed $400,000 under r 14.12 for expert witness fees.

[210] The Judge awarded $400,000 in expert fees.[220]

[211] As already stated, it is not the function of this Court to interfere with the costs decision of a trial judge unless there has been a clear reviewable error. It is not enough to simply assert that the trial judge should have taken a finer grained approach. The trial judge is much better placed than this Court to form an evaluative judgment as to what of the expert costs are reasonably claimable.[221] Provided there is some proper basis their recovery, no more than a broad brush is necessary.

[212] We accept it would have been preferable for the Body Corporate to obtain affidavit evidence from its experts to attest to the fact that the sums claimed related to the proceedings and that those fees were reasonable.[222] But a clear assurance from counsel with oversight of these matters was sufficient, there being no reason to suppose that counsel would mislead the Court about this. This can be contrasted from expert consultancy costs that are not incurred in the conduct of the proceeding and for which counsel had no direct oversight (as canvassed above in relation to Ms Yeo's evidence). The Judge was also particularly well placed in this case to assess whether the invoiced fees related to the proceedings and whether the deductions were appropriate.

[213] Finally we reject the suggestion that a judge must make an allowance in respect of rejected evidence. There is nothing in the r 14.12(2) that demands an allowance of this kind. It would place an inordinate burden on parties and judges to disaggregate the winning and losing parts of the evidence for the purpose of a disbursement award.

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220 At [62].

221 We note that fees that are disproportionate to the circumstances of the proceeding would not be reasonably claimable.

222 See for example *Progressive Enterprises Ltd v North Shore City Council* (2005) 17 PRNZ 919 (HC) at [31]–[33].

While a judge may exercise a discretion to do so, all reasonable expenses specific to the conduct of the proceedings are claimable. In this regard, we agree with Mr Bigio that the Judge, by disallowing expert fees for witnesses whose evidence he rejected, favoured the Argon and the Council. Indeed, we think this was very generous to them.

[214] Accordingly, we are satisfied the expert disbursements award was available to the Judge and fair and just in the circumstances.

Apportionment

[215] The Council appeals the apportionment of costs liability between itself and Argon. The Judge apportioned 65 per cent of this liability to the Council and 35 per cent to Argon.[223] It says the Judge erred by:

(a) failing to take into account the need for proportionality between each party's responsibility for the loss and its liability for costs; and

(b) basing the decision on the difference in the approaches taken by the parties to defending the claim, which were either irrelevant to the apportionment or did not justify the apportionment that was adopted.

[216] It also says that the Judge should have apportioned costs liability on the same basis as he apportioned damages — 85 per cent to Argon, 15 per cent to the Council.

[217] In reaching his conclusion the Judge found:[224]

> [54] This apportionment is made to recognise the different roles taken by the defendants and, in particular, the approach of the Auckland Council to contest virtually every element of the plaintiffs' claim. It also recognises the fact that the evidence called by Argon Construction Ltd from Mr Alexander and Mr Brock (as to scope and quantum) met the plaintiffs' case head-on. I ultimately concluded as follows:
>
> > Ironically, if I were to accept the plaintiffs' criticisms of Mr Alexander and reject his evidence, then there would be no scope before the Court that could be accepted.

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223 Costs judgment, above n 9, at [63].
224 Footnote omitted.

[218] For the reasons largely set out in the submissions of Mr McCartney for Argon, we do not propose to disturb the Judge's apportionment of costs liability. Like other aspects of the costs judgment, apportionment is a discretionary matter. We accept that a court may allocate costs liability in conformity with the apportionment of damages. But it is trite that a costs order must relate to the proceeding itself.[225] In this case the Judge was clearly troubled by what he perceived to be an unduly litigious approach taken by the Council. The matters specifically raised by the Judge in the costs decision, including the tactical approach taken by the counsel, relate to the proceeding and thus were fairly relevant to the discretionary assessment. But just as importantly, the Judge was entitled to acknowledge the proactive approach taken by Argon to the just and expeditious resolution to the proceedings.[226]

[219] There being no error of principle or other error, this ground of appeal is also dismissed.

Outcome on the costs appeals

[220] The appeal against the costs order as it relates to the effect of the *Calderbank* offer is allowed. The issue of costs on that specific issue is referred back to the High Court for reconsideration in light of our judgment. The appeal in relation to expert costs and apportionment is dismissed.

Substitution of parties

[221] In the context of an application to this Court by Hailing Wang and Linda Wu to extend time to appeal Andrew J's costs decision, Ms Wang also applied for leave to be substituted as an applicant with the effect that she would become a party to the intended appeal. As the application for extension of time was dismissed, it was not necessary to resolve the application for substitution. The Court however resolved that the application should be resolved in the context of these proceedings.[227] A copy of this judgment was served on all parties.

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225 See High Court Rules, r 14.1(1).
226 See costs judgment, above n 9, at [54].
227 *Wang v Body Corporate 406198* [2025] NZCA 536 at [13].

Background

[222] The Body Corporate's notice of opposition to the extension of time application noted that Ms Wang was not a party to the High Court proceeding. In its submissions, it states:[228]

> 4. The notice of application (Notice) was signed by Hailing Wang and Linda Wu (Applicants).[229]
>
> 5. Linda Wu was a second plaintiff in the High Court proceeding in her capacity as the registered proprietor of unit 4E8.[230]
>
> 6. Hailing Wang was not a second plaintiff in the High Court proceeding. However, it appears that approximately 5 months after the High Court hearing ending in June 2023, she and Linda Wu entered into an agreement to purchase unit 1E2 from the second plaintiff owners for that unit, being Chan Keith Kei Shun and Cheng Sow Peng.[231]
>
> 7 The Applicants became the registered proprietors of unit 1E2 by December 2023 but did not seek leave to be substituted as the second plaintiffs for that unit prior to the Costs Decision being issued on 1 May 2024.[232]

[223] Ms Wang states that she is the lawful holder of the rights to Unit 1E2 but was not formally substituted in the High Court. For this reason she now seeks to be substituted as one of the owners. The Body Corporate abides the decision of the Court as to whether there was an effective assignment of rights.

Analysis

[224] The Court of Appeal (Civil) Rules 2005 do not provide for the substitution of parties. However, where there is a gap in the Court of Appeal (Civil) Rules, this Court

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228 Footnotes in original.

229 Application Under Rule 29A for Leave to Appeal Out of Time dated 4 April 2025, filed on 7 April 2025.

230 Ms Wu was registered on the title for unit 4E8 and named in the High Court proceeding as "Yinling Linda Wu".

231 The Deed of Assignment dated 8 December 2023 refers to a sale and purchase agreement for unit 1E2 dated 16 November 2023. At that time the substantive judgment had been issued on 30 October 2023 with the decision on costs reserved.

232 Typically leave would be sought for new unit owners to be substituted for those second plaintiff unit owners that have sold and assigned their causes of action. *See Body Corporate 354994 v Auckland Council* [2018] NZHC 1121 at [4]–[7].

generally applies the High Court Rules by analogy.[233] The relevant rule under the High Court Rules, provides:

> **4.52 New parties order**
>
> (1) Subclause (2) applies if, after a proceeding has commenced, there is an event causing a change or transmission of interest or liability (including death or bankruptcy) or an interested person comes into existence, making it necessary or desirable—
>
> (a) that a person be made a party; or
>
> (b) an existing party be made a party in another capacity.
>
> (2) An application without notice may be made for an order that the proceeding be carried on between the continuing parties and the new party (a **new parties order**).
>
> (3) The new parties order must, unless the court otherwise directs, be served on—
>
> (a) the continuing parties to the proceeding; and
>
> (b) each new party, unless the person making the application is the only new party.
>
> (4) The new parties order is binding on a person served from the time of service.
>
> (5) A person who is not already a party who is served with a new parties order must file a statement of defence in the same time frame and manner as a person served with a statement of claim.

[225] Given that the judgment of this Court signalling the application was served on counsel for the parties to these appeals, we see no reason for the application to be served on the continuing parties. In terms of the merits, if all rights have been legally assigned to Ms Wang, as she says, we would be minded to make a new parties order to reflect her ownership interests. In short, we consider that such an order is necessary and desirable in the circumstances.[234]

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233 See, for instance: *Harrison v Harrison* [2020] NZCA 189 at [4]; and *Moodie v Employment Court* [2012] NZCA 508, [2012] ERNZ 201 at [18]–[25]. See also Court of Appeal (Civil) Rules 2005, r 5(4).

234 See, for instance: *Wayby Investments Ltd v Krukziener* (2003) 16 PRNZ 907 (CA) at [16], where the Court declined to substitute in a party who had been assigned the right of action (in the context of the Judicature Act 1908) because it would offend the rules against maintenance and champerty.

[226] At this stage we have not been provided with a copy of the documentation assignment, but as Ms Wang is a registered proprietor of Unit 1E2 we are satisfied that there is a proper basis for the order to be made.

[227] There shall be an order accordingly.

Result

[228] The Body Corporate's appeal in CA717/2023 is dismissed.

[229] Argon's and Auckland Council's cross-appeals in CA717/2023 are allowed in respect of the award for consultancy costs and otherwise dismissed. We set aside the award of investigatory consultancy costs and refer the issue back to the High Court for reconsideration in light of our judgment.

[230] Auckland Council's appeal in CA153/2024 is allowed. The escalation award shall be modified to the sum of $322,359.78.

[231] Argon's and Auckland Council's appeals in CA342/2024 and CA345/2024 are allowed in respect of the costs award. We set aside the award of costs and refer the issue back to the High Court for reconsideration in light of our judgment.

[232] Having regard to the outcomes of the appeals overall, we make no order as to costs.

[233] The application for substitution by Hailing Wang in CA132/2025 is granted.

Solicitors:
Lane Neave, Auckland for Appellant in CA717/2023 and First Respondent in CA153/2024, CA342/2024, CA345/2024 and CA132/2025
Cowan Law, Auckland for First Respondent in CA717/2023, Third Respondent in CA342/2024, and CA132/2025, and Appellant in CA345/2024
MinterEllisonRuddWatts, Auckland for Second Respondent in CA717/2023, Appellant in CA153/2024 and CA342/2024, Third Respondent in CA345/2024, and Fourth Respondent in CA132/2025

SCHEDULE 1 — List of Parties

HHTS Limited
Housing New Zealand Limited
Ziying Zhu
Haixin Wang
Thiam Chye Chong
Thi Thu Hang Le
Brenda Yap
Hailing Wang and Linda Wu
Retirement 2050 Limited
Property Opportunities Limited
Sarin Enterprises Limited
Robert George Bryning and Samantha Elizabeth Harwood
High Property Limited
Shan He
Ting Wei Leo
Hui-Po Lin and Kuan-Ying Chen
TG Link Investment Limited
Siow Guan Tang and Soh Than Ong
Anthony John Stanton and Dean Maxwell Stanton
John McCreath, Anne Deborah McCreath and Macann Investment Trustee Limited
Naveen Kumar
Yao Tong
Kim Eng Tan and Kah Fong Tai
Kim Pong Tan and Helen Kwa
Yunnan Investment & Development Limited
Caledonian Investments Limited
Qiusi Ji
Atig Limited
Chong Meng Teo and Siew Huang Tan
Wenjie Ran
J Bodle 101 Limited

Stephen Raymond Perkins, Jane Evelyn Perkins and S & J Perkins Trustees Limited
Yan Hei Tommy Yu
Anna Wei Lern Yeo
Yellow Banana Dog Limited
Kuei Chue Chang
NSJ Holdings Limited
Lui Lam and Chit Wah Wong
Ching-Jung Tsai
Kiwi Holiday Insurance Limited (previously Kiwitravelcover Limited)
Wei Wu
Mark Joseph Wilson, Dingxiang Liu and SH Trustee Services (CNZ) Limited
Clive Khoon Lip Tan and Jolene Weiling Tan
Yosua Timothy
Yi Chia Lee
Chunlai Shen
Sai Ma and Nan Zhang
GS Property Investments (NZ) Limited
Kok Hong Tai and Man Lin Chew
Jeyasothy T Palakrishnar and Rajini Pararajasingam
Annie Attia and Bruno Coignard
Ge Shen
Donald Giorgio
David Xi Xie and Wenli Qiu
Qinchao Lin and Qing Wang
Chin-Chien Lin and Kun Lin
J'N A Investments Limited
Weijing Lu
Lee Mee Then and Lian Soon Koh
Hairong Shi
Claire Dawn Siew Koon Yio and Joanne Yan Hua Seow
Kok Seng Hui
828 Investment Property Limited

Mian Qu and Suqin He
Jiang Xun
Joshua James Gooley and Vey Desita Hadinoto
Chee Leong Wong and Siew Eng Yeo
Yance Utama
MCK Enterprises Limited
Fadak Investment Limited
Dimei Lu
Kwok Shen Alvin Kiew
Michael Lye Hee Koh and Ai Choo Basilisa Wah
Ho Man Nah
Sin Min Benjamin Yeo and Mearn Hwa Lim
Jessica Ngoh Mei Jang and Tse Ming Toh
Chee Wah Low and Tzu Lin Chia
Yu Liu
Wei Li
Sao Leng Wong
Chian Zhang
Shahrzad Shahbazi
Kwan Ying Judy Chan and Malcolm Lindsay Grant
Jingjing He
Milos Pejovic and Blair Norwood Knight
Chenyan Xiao
GPS Property Holdings Limited
Stefano Vio
Paul Kaye Wells and Gregory Ewen Morgan
Mui Ling Lee

SCHEDULE 2 — List of Unrepresented Parties

Haixin Wang
Yingling Linda Wu
Lui Lam and Chit Wah Wong
Chunlai Shen
Sai Ma and Nan Zhang
Ge Shen
Weijing Lu