IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2011-485-1308
[2013] NZHC 210

	BETWEEN	HEPBURN & ORS Plaintiffs
	AND	CUNNINGHAM CONTRACTS LIMITED & ANOR Defendants

Hearing: 30 July-3 August 2012

Counsel: P H Bremer for Plaintiffs
G W D Manktelow for Defendants

Judgment: 15 February 2013

In accordance with r 11.5, I direct the Registrar to endorse this judgment with the delivery time of 11:00am on the 15th February 2013.

JUDGMENT OF WILLIAMS J

Solicitors:
Grimshaw & Co, Wellington
Manktelow, Guy & Toby, Lower Hutt

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Introduction

[1] This is a case about the liability of a pre-purchase inspector for the costs of remediating a residential property. The plaintiffs purchased the property in reliance on his pre-purchase inspection report but the house was later found to have significant weathertightness issues.

The facts

The property

[2] On 17 February 2007, Mike and Sharon Hepburn together with Sharon's sister Tracey MacKinnon, entered into a conditional agreement for the purchase of the property at 28 Imran Terrace, Khandallah. The price agreed upon at that stage was $665,000.

[3] The house on site was completed in May 2000 and a code compliance certificate was issued on 30 May of that year. It is a three-level building of 260 square metres gross floor area. The building is constructed on a reinforced concrete slab. It is benched in on its eastern elevation so that a part of the exterior wall on that side is foundation and retaining wall. The rest of the lower level and upper levels are constructed on a typical timber-framed suspended floor. The roof utilises hip and gable configuration and is clad with lightweight metal tiles.

[4] Lower level roof planes terminate against upper level walls. All eaves project 600 mm from wall planes. There is a balcony on the west elevation accessible from the upper level living area. The balcony is waterproofed with a fibre mesh reinforced applied membrane. No secondary flow path is fitted. The balcony barrier wall or balustrade has no cross-fall on its top edge. Exterior cladding is direct fixed fibre-cement board protected with a texture coating. There are no capillary gaps along the bottom edge of the cladding. Aluminium window and door joinery are "face fixed". Head flashings are installed on all window joinery but there are no sill flashings.

Pre-purchase inspection

[5] The various special conditions of purchase included clause 17.0 as follows:

> Completion of this contract by the purchaser(s) is entirely conditional upon its completing and being satisfied with a due diligence programme in respect of all local authority records pertaining to permits and compliances, construction of the building and any other factors may deem necessary within ten (10) working days of the execution of this contract by both parties. This clause is inserted for the sole benefit of the purchaser(s).

[6] The plaintiffs argued that this clause made the agreement conditional on a satisfactory pre-purchase inspection within 10 days. The defendants argued that the clause was not that wide. I will return to this issue below. In any event the real estate agent, Ms Capovilla (the second defendant) supplied contact details for Trevor Cunningham, a pre-purchase inspector. She described him to the plaintiffs as "good". His was a one-man business trading as ABS Contractors (ABS). There is a question as to whether Mr Hepburn contracted with Mr Cunningham in his personal capacity or his company – Cunningham Consulting Limited (CCL), so it will be necessary to weave relevant scraps of evidence about this issue into the narrative.

[7] Mike Hepburn first made contact with Trevor Cunningham on 19 February 2007. According to Mr Cunningham, his office administrator took the call and filled out the standard acceptance form with Mike Hepburn's details. The form had appended to it various standard terms and conditions including the following:

> ABS Contractors claims a waiver of responsibility for faults not detected in the report. Quick check inspection [sic] are limited to visual inspections and professional assumptions are made for areas that cannot be sighted.

[8] Two days later on 21 February, Messrs Hepburn and Cunningham met on site to carry out the inspection. Ms Capovilla was also present. According to Trevor Cunningham, Mike Hepburn left after about 20 minutes leaving Ms Capovilla to lock up after the inspection was completed. Mr Cunningham said it was standard practice to present his acceptance form for counter-signing by the client. Perhaps because of Mike Hepburn's early departure from the site, it appears that the acceptance form was not produced at that stage and was not counter-signed.

[9] A conversation took place on site between Messrs Cunningham and Hepburn. They are not agreed on what was said. Trevor Cunningham's version was as follows:

> Mr Hepburn and I discussed the weathertight risks of monolithic cladding as used on this property. We discussed the fact that sealing of the monolithic exterior cladding was essential to maintain weathertightness and that this house would require recoating immediately. We also discussed the fact that having eaves on this particular building was a positive feature. Mr Hepburn's specific instructions were to report only on areas of concern and to include only actual identifiable faults on the building in the report. Mr Hepburn said to me that it was unnecessary for me to inspect any Council records as he would be doing that himself. That is why on the acceptance form it does not include a notation against "Council records".
>
> I explained to Mr Hepburn that what the report would contain would be a description of the present day condition of the property listing the material components and an assessment as to their condition. I explained to Mr Hepburn that the report was limited by the fact that it was non-invasive and was confined to what I could actually see. The only exception was that it was agreed that I would also carry out surface moisture readings to see whether that identified any point of concern.

[10] Mike Hepburn's version of the conversation was very different. He said:

> On first meeting Mr Cunningham we discussed the condition of the property in general terms. Mr Cunningham told me that he was familiar with the property, as he had previously done some work in the back yard area. Mr Cunningham advised me that his first impression of the property was that it was a "sound" house. Mr Cunningham undertook surface moisture readings around the house, as well as undertaking inspections of all areas of the premises. I specifically recall him commenting that the eaves were a good feature to have.
>
> The impression that I was left with after the inspection was that, while there were some minor issues which needed rectifying, the house was otherwise free from any significant defects.

The inspection report

[11] Trevor Cunningham completed the inspection and prepared a written report. He emailed it to Mike Hepburn the next day. The document was three pages long. In plain bold uppercase type on the top left-hand corner of the first page was recorded:

ABS CONTRACTORS
PO BOX 13-676
JOHNSONVILLE
WELLINGTON

[12] In the top right-hand corner the inspector was identified in smaller italic font as "Trev Cunningham". The report was headed up in bold uppercase as a "**QUICK CHECK REPORT**". The report was split into four main sections.

[13] The first described the house's internal and external elements, the curtilage features (gardens, paths etc) and miscellaneous features such as electrical componentary and major plumbing items. A one-word notation was then added to each item in relation to its condition – average, good, tidy and so forth.

[14] The second section listed faults, minor concerns and any relevant comments. The third section briefly described moisture testing results and the fourth section headed up "Summary" contained Trevor Cunningham's overall summary of the state of the property.

[15] Under Section 1 – Description and Condition – was an item relating to exterior walls. It described the cladding as "monolithic cladding, sheet lined with texture coating". Condition was described as "good".

[16] In the section relating to faults, minor concerns and comments, was an item headed "Exterior Cladding". It provided:

> Hairline cracks to some areas of exterior cladding require specialist repair
>
> Exterior cladding requires cleaning and recoating (refurbishment)
>
> Some rust bleed to exterior linings caused by fixings (most are to soffit linings)
>
> Gate post cut into wall polystyrene detail and not sealed (eastern side of house)
>
> Gate has swung open and damaged polystyrene detail (eastern side of house)
>
> Rock garden has been built up against exterior linings to northern wall in lower courtyard

[17] Under the heading "Decks" was the following:

> Trafficguard deck surface requires recoating with waterproof membrane
>
> Sheet lined balustrade identified as potential water leak area (no capping to linings and small open crack visible)

[18] Under the heading 'Walls', was reference to deterioration to interior wall linings beside the garage door as these were touching the ground and picking up moisture from the driveway.

[19] In the third section relating to moisture readings, the report recorded:

> Moisture readings were normal throughout the house excluding eastern wall to downstairs office/rumpus.

[20] Trevor Cunningham's summary of the state of the property was in these terms:

> House and property appears to be in good condition with a (sic) various faults detected.
>
> Most of these faults are of minor concern and could be remedied during the course of general maintenance and routine refurbishment.
>
> The most significant concerns would be high moisture readings to downstairs interior wall and various faults with exterior cladding.

[21] On the next day (22 February 2007), Trevor Cunningham signed a "certificate of inspection in accordance with NZS4306:2005" – the New Zealand standard in relation to residential property inspections (the Standard).

[22] The standard requires that all inspections purported to be done in accordance with its terms, must carry such a certificate. The certification in this case was in the following terms:

> I hereby certify that I have carried out the inspection of the property site at the above address in accordance with NZS4306:2005 residential property inspection – and I am competent to undertake this inspection.

[23] It is not clear whether the plaintiffs ever sighted the certificate.

The invoice

[24] Attached to the report was an invoice for $320 inclusive of GST with an offer of a $40 discount for prompt payment. Like the report, the invoice was headed up in the top left-hand corner with ABS Contractors in bold uppercase, but immediately below that was **CUNNINGHAM CONTRACTS LIMITED**, followed by the same Johnsonville postal address. The invoice had attached to it the same payment terms and conditions sheet as had been attached to the acceptance form that Trevor Cunningham had failed to present to Mike Hepburn on 21 February. The sheet included the same waiver of responsibility clause I mentioned earlier.

[25] Mike Hepburn confirmed the next day by email that he had paid $280 online to CCL's ANZ bank account.

[26] Trevor Cunningham said that with the hard copy of the report and invoice, he included a BRANZ poster entitled "Weathertightness – Identification of Risk". The poster identified areas in a dwelling's design and construction that represented weathertightness risks. Seven high risks factors included:

(a) elevated sites;

(b) exposed sites;

(c) sites in very high wind zones;

(d) three-storey buildings;

(e) low eaves, parapets, balconies etc;

(f) complex design;

(g) face sealed cladding system with no water management features.

[27] A typical monolithically clad complex house is pictured on the poster with risk areas in design and construction identified and explained in simple bullet-point terms.

[28] Mike Hepburn said he did not remember receiving the poster.

Post-report discussions

[29] Once Mike Hepburn received the report, he rang Mr Cunningham to discuss his findings. Once again the two men record significantly different versions of the conversation. In his brief of evidence, Mike Hepburn said:

> Mr Cunningham was of the opinion that the high moisture reading in this area was probably as a result of a small garden abutting directly onto the house in this area. He also noted that a new drain had been installed along the outside of that back wall, and that it was possible this work had been done incorrectly.
>
> We also discussed the faults with the exterior cladding. These were described as "hairline cracks" that would require "specialist repair" in the form of cleaning and recoating.
>
> I asked if there were any other areas of the house that were of concern. In response Mr Cunningham advised that, apart from those faults identified in his report, he had not uncovered any other matters of concern during his investigation.
>
> Mr Cunningham did not seek to qualify his advice or give any limitations on his report, and nor did he offer to undertake any further investigations or suggest that further investigations may be necessary or prudent. I was left with the clear understanding that his report and follow up advice was a comprehensive and complete report on the condition of the property.
>
> Mr Cunningham did not explain to me that the hairline cracks in the cladding may be an indicator of underlying weathertightness issues, or that they were weathertightness risk factors. I was left with the impression that these were reasonably normal, and could be dealt with by recoating – that I took to mean simple maintenance.
>
> I asked Mr Cunningham if he knew how much it was likely to cost to carry out the remedial works that he had suggested. Mr Cunningham advised that excavating the retaining wall by the bottom room would cost approximately $10,000. At his suggestion I also asked Builders Plastics Limited to quote for recoating the property. Builders Plastics Ltd gave an estimate of $10,000 for recoating, and about $5,000 for scaffolding, plus GST.

[30] In reply, Trevor Cunningham made the following points:

When Mr Hepburn duly contacted me I again explained to him that my inspection was limited by what I could see visually and that assumptions had to be made where physical inspection could not be made.

I told Mr Hepburn that the house exterior needed cleaning and the monolithic cladding needed to be recoated and stressed to him that it was critically important that he obtain specialist advice about the repairs of the exterior cladding. I told Mr Hepburn that if the repair and recoating work was to be done properly that it needed to be done by an approved membrane applicator, not just a painter. I suggested Builders Plastics Limited who are specialists in membrane upgrades and repairs and have particular knowledge of the fail points in monolithic houses. To explain, a membrane is a high tech coating designed to provide a thicker coverage than ordinary paint.

I also told Mr Hepburn that the eastern wall of the office/rumpus room had serious moisture ingress issues and the likely solution was to excavate the whole area and to reseal the block work foundation retaining wall and to check that the subsoil drainage system below the floor level had been installed correctly and was working properly.

At no stage did I ever tell Mr Hepburn that the high moisture reading in the downstairs area was the consequence of a "small garden abutting directly onto the house in this area". This garden was on the northern wall of the house. I recall that Mr Hepburn asked me if removal of that rock garden would make a difference and I said words to the effect that doing that would only have a minimal impact on the problem but should be done in any event. I didn't discuss a new drain and I did not discuss whether the work might have been done incorrectly. I did discuss drainage in general terms, particularly as I could not see an outlet to a subsoil drain for the concrete wall that we were discussing.

Turning to the inspection report, where I recommend under the heading Exterior Cladding "Specialist Repair", this is work extra and outside the need to clean and recoat that I have also recorded as being required as the next item.

I did not say to Mr Hepburn that my inspection report could be looked at alone. What I said to Mr Hepburn in Cunningham Contracts Limited's report and also verbally, was that he needed to carry out specialist repairs and I told him verbally that he needed to get an appropriate expert to provide advice on that.

Mr Hepburn is incorrect in what he says at paragraph 30 of his brief of evidence. As I have said earlier, I particularly pointed out to him that the hairline cracks to areas of the exterior cladding required specialist repair and advice. I did not in any way give him the impression that those were "reasonably normal" and could be dealt with by "recoating". Recoating is dealt with in the report as a separate item.

I do recall Mr Hepburn endeavouring to ascertain a price from me on the blockwork foundation wall and I certainly did mention the sum of $10,000.00 to him. However, I also said to him that without doing a full invasive inspection, it was impossible to be certain as to the actual cost and the full scope of works required.

[31] So Mike Hepburn's recollection was that Trevor Cunningham told him the house did have faults but was generally in good condition and the faults could be remediated during routine maintenance work – costing $10,000 for repair to the retaining wall and, following advice from Builders Plastics Limited, $15,000[1] for recoating.

[32] Trevor Cunningham's recollection on the other hand was that he emphasised three things:

(a) the limited role of a visual inspection;

(b) the significance of the watertightness issues identified both orally and in the report; and

(c) the need for specialist appraisal, repair and recoating of the monolithic cladding.

Purchase completed

[33] Armed with the estimate from Trevor Cunningham and Builders Plastics Limited, the Hepburns and Tracey McKinnon then went back to the vendors of 28 Imran Terrace and negotiated a further reduction from the initially agreed price of $665,000. The vendors eventually agreed to a $12,500 reduction. This satisfied Condition 17.0 of the agreement for sale and purchase, and the purchase was therefore settled on 4 April 2007. The plaintiffs moved in the same day.

Repairs and maintenance

[34] The new owners set about addressing some of the issues raised in the pre-inspection report reasonably promptly. The rock garden against the wall of the rumpus room was removed. Rather than use Builders Plastics Limited to recoat the cladding, the Hepburns decided to repaint. They did this on the advice of a neighbour, whose advice was apparently confirmed in a conversation with staff at

[1] This price includes the cost of scaffolding, which is required for recoating.

Resene's Paints. Mike Hepburn said that Resene's advised him that recoating was not required and that Resene's now had a product that performed the same function. Sharon Hepburn's father, a painter by trade, repainted the lower level of the house (that is the part with reach without scaffolding), completing that work in February 2008.

The 2010 re-inspection

[35] No other work was done to the house until early 2010 when, because Tracey McKinnon needed cash to fund a start-up business, the three decided to put the house back on the market. Before doing so, they invited Mr Cunningham back to re-inspect the property to ensure there were no issues to be addressed before marketing commenced.

[36] Trevor Cunningham inspected the property on 17 March 2010 and gave an oral report as requested. This was followed by an emailed bullet-point summary of the oral advice as follows:

- tested moisture readings to areas of concern (downstairs lower wall of rumpus room and hallway, normal readings)
- advised balustrade capping detail as an upgrade to waterproofing balustrade)
- discussed exterior cladding (recommended specific specialist coating be applied by approved applicator and request warranty documentation)
- inspected for minor cracks to interior lining (small area to kitchen wall-ceiling join was identified requiring replastering)

[37] An invoice for $228.57 (the standard price of oral reports) was issued the same day.

[38] The plaintiffs then had the entire house repainted in accordance with the recommendation made in the second inspection but otherwise did nothing further to address the issues raised by Trevor Cunningham in either of his reports. The property was then marketed by Tommy's Real Estate Agents.

Attempted sale and Realsure Limited inspection

[39] On 11 May 2010, an offer was received subject to a satisfactory pre-inspection report. A firm of inspectors called Realsure Limited undertook the inspection. The inspector was Martin Higgins. His report ran to 23 pages.

[40] The report advised that the dwelling suffered from serious weathertightness issues in relation to exterior cladding, the deck, garage door, some window joinery and at ground level (the last mentioned problem due to a lack of cladding ground clearance).

[41] On receiving the report, the proposed purchasers advised that the pre-inspection condition in the agreement for sale and purchase had not been satisfied and refused to complete the transaction. The plaintiffs took the property off the market to consider their next step.

The Ian Vaughan Realsure inspection – December 2006

[42] It transpired that the Higgins' inspection was not the first time Realsure Limited had assessed 28 Imran Terrace. In March 2005 and in December 2006 – the latter only two months before the plaintiffs' purchase – Realsure had provided pre-purchase reports to prospective purchasers and on each occasion the negative terms of the report had caused the respective conditional purchaser to walk away.

[43] The report of December 2006 has, in this proceeding, been used in different ways by both sides as a comparator. The report ran to 34 pages and was completed by Ian Vaughan who also gave evidence. The Vaughan Report (as I will call it), isolated 17 weathertightness risk areas as follows:

> Risk areas:
>
> 1. The design of the home, being more than one level, with a complex roof, spaces below ground and on a very exposed site put this house at high risk to weather tightness issues developing.
>
> 2. Incorrect cladding clearance to the ground and balcony surfaces.
>
> 3. Timber post fixed through cladding.

4. Cracks in the cladding.

5. Peeling texture, indicating it may not have been sealed correctly.

6. No corner mouldings to cladding.

7. Lack of vertical control joints.

8. Unsealed penetrations exiting the cladding.

9. Holes in the cladding.

10. Flat tops to parapets.

11. No visible saddle flashings.

12. Minimal threshold to doors.

13. No capillary gaps to the foundations and cladding, and also Balcony.

14. No vent to drainage gaps to column.

15. Poor flashing detail to fascia cladding junction.

16. Minimal drainage to Balcony and no over flows.

17. Balcony partly over a living space.

[44] By my count the ABS report identified three of these items: 3, 4 and 8. To be fair the ABS report does refer to moisture uptake at the garage from the driveway, but that did not amount to a warning about a general lack of capillary gaps throughout the house, so I discount that reference as it does not reflect the Vaughan report items 2 and 13.

[45] Actual weathertightness faults were identified in the Vaughan report in red type for those needing immediate attention and blue type for all others. The focus was on windows, external cladding, the deck and the wall of the rumpus. As to windows, higher than normal moisture readings were found at a sloping window at the front of the lounge but Mr Vaughan acknowledged that this could be condensation or leaky joinery.

[46] Cladding received extensive treatment. Cracking and peeling were red type issues. The report stressed the need for professional repair due to the risk of moisture ingress into internal framing. The cost of any remedial work, Mr Vaughan said, could vary considerably.

[47] Blue type issues in relation to cladding included various unsealed penetrations into the cladding (pipe work and so on), the lack of a 6 mm capillary gap between the concrete pad and the lower edge of the cladding, a similar problem with the large columns at the front entrance to the house, a timber post fixed through the cladding and the lack of external corner mouldings.

[48] There were two red type issues relating to the deck. The first was that the deck's surface needed recoating to prevent moisture ingress. The second was that higher than normal moisture levels were indicated at the textured surface of the balustrade. No repair recommendation was offered. Instead investigation was required.

[49] Blue type issues in relation to the deck included the need for saddle flashing at the parapet and ideally, a sloping edge to allow drainage, a higher threshold to the internal door, additional drainage from the deck and the installation of overflows.

[50] The rumpus room had only red type issues. Higher than normal moisture readings were found at the external wall and invasive investigation would be required to determine the source, and remediate.

The Weathertight Homes Resolution Service assessment

[51] The proposed purchasers in December 2006 provided a copy of the Vaughan report to the plaintiffs. On 24 May 2010, the plaintiffs lodged a weathertightness claim with the Department of Building and Housing (DBH). The DBH appointed John Lyttle of the Weathertight Homes Resolution Service (WHRS) to undertake an assessment of the dwelling.

[52] On 15 December 2010, Mr Lyttle produced a full WHRS assessment of both the problems with the dwelling and the remediation required. Some invasive and destructive investigation was carried out including resistance testing in areas of concern, cladding removal, use of moisture probes and taking of core samples for laboratory tests. The problems identified in the WHRS assessment were summarised as follows:

- face sealed windows and door frames having no proper seal against the textured coating and no lower sill flashing;

- direct fixed cement sheet cladding, having no gaps behind sheets to allow drainage;

- flat tops to solid handrails on the balustrade that are insufficiently sealed with no balustrade capping;

- retaining walls with a lack of sufficient waterproofing;

- lack of sufficient ground clearances to the base of the cladding.

[53] Damage was considered to be localised due to "singular faults". Mr Lyttle recommended that targeted repair was all that was required. The cost of remediation was estimated to be $103,500.

Proceedings and leave to amend

[54] High Court proceedings were commenced on July 2011 against Tommy's Real Estate Limited, Elizabeth Capovilla, Cunningham Contracts Limited, and Trevor Cunningham personally.

[55] Proceedings against Tommy's and Ms Capovilla settled in February 2012. This left causes of action against CCL in breach of contract, negligent mis-statement and breach of s 9 of the Fair Trading Act (FTA), together with one cause of action against Trevor Cunningham himself, also alleging breach of the FTA. Damages of $524,367.23 were sought.

[56] At the commencement of the trial, the plaintiffs sought leave to add mirror causes of action in contract and negligent mis-statement against Trevor Cunningham personally. Such leave is necessary because r 7.18 prohibits any amendment to pleadings without leave after the setting down date. It is efficient to address the leave issue now, before turning to the substance of the case.

[57] As Fisher J makes plain in *Fordham v Xcentrix Communications Limited*,[2] the underlying criterion in leave applications of this kind is the option that best achieves justice. I am satisfied that it is appropriate to grant leave as sought in this case. Trevor Cunningham already faces proceedings under the FTA. While the legal elements of that cause of action are different to those applicable in tort and contract, still the factual basis upon which all causes of action rest is identical so that the substance of the case levelled against Trevor Cunningham in those new causes of action can hardly be said to have taken him by surprise. The prejudice to Mr Cunningham is therefore minimal.

[58] On the other hand, the prejudice to the plaintiffs if it is found that the contract or tort duty is that of Mr Cunningham rather than his alter-ego company, would be significant. It would not on balance, serve the ends of justice, if technical arguments prevented me from properly considering the substantive dispute between these parties. Leave to amend the pleadings is granted accordingly.

The cases

[59] The plaintiffs say that Trevor Cunningham owed implied obligations in contract and a duty of care in tort to carry out the pre-purchase inspection for which he was paid with reasonable skill and care. This duty included complying with the Standard. The plaintiffs say these obligations (the contractual and tortious obligations are for our purposes co-extensive and identical) were breached when Trevor Cunningham failed to identify significant weathertightness defects in the property, advising instead in his report that:

> House and property appears to be in good condition with a [sic] various faults detected.
>
> Most of the faults are of minor concern and could be remedied during the course of general maintenance and routine refurbishment.

[60] The plaintiffs say, if the contract was with CCL rather than Trevor Cunningham, then CCL is vicariously liable for the actions of its employee on the same basis.

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2 *Fordham v Xcentrix Communications Limited* (1996) 9 PRNZ 682 (HC).

[61] The plaintiffs say that the report together with further discussions between themselves and Trevor Cunningham has caused them unknowingly to purchase a significantly damaged leaky home for which the defendants are liable in damages.

[62] The plaintiffs also argue under s 9 of the FTA that Trevor Cunningham's report was misleading as to the weathertightness of the dwelling, that they were misled in fact by the report and that a reasonable person in their circumstances would also have been misled. Again, they claim damages accordingly.

[63] For his part, Trevor Cunningham (and CCL) accepted that he owed the plaintiffs an obligation of reasonable skill and care, but argued that this was in the context of a "quick check" inspection limited to a one-off visual investigation for $284.45 plus GST. It was, the defendants said, not possible to identify the faults subsequently unearthed by later investigators without invasive investigation outside the scope of a quick check inspection. In addition, he argued, the report did in fact point out that the house had weathertightness issues. For example:

> The most significant concerns would be high moisture readings to downstairs interior wall and various faults with exterior cladding.

[64] The defendants also advanced affirmative defences. They argued that the plaintiffs assumed all risks by proceeding with the purchase after Trevor Cunningham advised them of the faults associated with the house in the written ABS report, orally (in more explicit terms) and through the BRANZ poster in hard copy. The defendants also argued that the plaintiffs failed to mitigate their losses and were contributorily negligent. Here the defendants argued that the plaintiffs failed to follow Trevor Cunningham's recommendations with respect to repair and maintenance of the cladding, cladding penetrations, decking, garage and retaining walls. In so failing, the defendants argued that the plaintiffs assumed at least a proportion of the responsibility for their own losses.

[65] The defendants also pointed to the waiver clause attached both to the acceptance form and the invoice. They say this meant that the plaintiffs agreed that the defendants were not responsible for undetected defects.

[66] As to the FTA, the defendant argued that the claim fell outside the three year limitation period in s 43 of the Act.

The witnesses

[67] All three plaintiffs gave evidence in support of their claim. Their evidence related to the inspection and purchase in 2007, discovery of the problem in 2010 and the issues they have confronted during the process of remediation. Other witnesses in support of the claim were:

(a) Ian Vaughan, Martin Higgins and Bruce Symon all of Realsure, who either provided pre-investigation reports in respect of 28 Imran Terrace for third party purchasers, or in the case of Bruce Symon, provided an audit of the quality of the ABS report.

(b) Ron Thurlow, the plaintiff's building consultant who both appraised the ABS report and provided evidence as the plaintiff's advisor on remediation works.

[68] For the defendants:

(a) Trevor Cunningham gave evidence in relation to the two inspections he completed at the property, the reports he wrote and associated discussions.

(b) Richard Maiden, building consultant, who gave evidence in relation to the quality of the ABS report.

(c) Mark Thomas, Managing Director of Specialist Coating Services who gave evidence of the kinds of investigation and remedial work that he undertakes when repairing and recoating monolithic cladding.

(d) David Cooke, a quantity surveyor, who considered the reasonableness of the scope of remedial work and damages claimed.

Issues

[69] The issues in this case may be summarised as follows:

(a) who did the plaintiffs contract with?

(b) what was the scope of the duty whether in contract or tort?

(c) what was the nature of the damage that required remediation?

(d) was the duty breached and did it cause the plaintiffs' loss?

[70] I will address each question in the order posed. I will address the defendants' affirmative defences in the context of the causation question. FTA issues will be addressed in a separate section.

Contract with whom?

[71] I consider that this case is on all fours with *McFall v Beattie*.[3] There is no reference in the evidence to CCL until an invoice is rendered *after* Trevor Cunningham completes the inspection and report. By that time the contract had already been formed. Up until that point, all indications in the business' stationery are that ABS was the trading name of Trevor Cunningham personally. CCL is mentioned only on the invoice and nowhere else. Even the formal certificate of inspection refers only to Trevor Cunningham and ABS.

[72] Mr Cunningham said in cross-examination that he gave Mike Hepburn his business card when they met on 21 February 2007. He said the card had a reference to CCL on it as well as to ABS. Although the issue of with whom the plaintiffs had contracted was live when Trevor Cunningham served his brief of evidence on the plaintiffs – that is plain from the terms of the brief itself – no reference was made to this card in evidence-in-chief, and the card was not produced. He did not even offer

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[3] *Mackfall v Beattie* HC Wellington CIV-2011-485-82, 22 December 2011 at [18].

to produce a copy of it once he gave the new evidence in that respect in cross-examination.

[73] In the circumstances, I do not think that Mr Cunningham's evidence in this matter was reliable, and I reject it. I am satisfied that the contract for the inspection of 28 Imran Terrace was between the plaintiffs and Trevor Cunningham personally.

Scope of obligation in contract and tort

[74] There was no written term in the contract between the plaintiffs and Trevor Cunningham to the effect alleged by the plaintiffs – i.e. that reasonable skill and care was required of Mr Cunningham in carrying out his inspection and that this included compliance with the Standard.

[75] Nonetheless, the courts may imply a term into a certain type of contract because the term is a necessary incident of that class of contract.[4] In the context of a pre-purchase inspector where skill is the point of the contract, a requirement of reasonable skill and care in the circumstances will always be implied.[5] Even without that, a duty in tort would be in similar terms. The defendant accepted as much. The question is what does reasonable skill and care entail in the context of a visual inspection and written report about the state of a dwelling priced at $284.45 plus GST? And what relevance does the Standard have (if any) in setting that *legal* standard?

[76] The level of skill and care a reasonable pre-purchase inspector should display will be what is necessary for the reasonable operation of the type of contract concerned.[6] Relevant circumstances in this case are as follows:

(a) any negotiated limitations on scope;

(b) what was at stake for the plaintiffs?

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4 See generally, Burrows, Finn & Todd *The Law of Contracts in New Zealand (4th ed)* at 6.3.3.
5 See for example *Newton v Stewart* HC Wellington CIV-2010-485-2116, 18 April 2012.
6 E Peden (2001) 117 LQR 459 at 460 as cited by Burrows, Finn & Todd *The Law of Contract in New Zealand (4th ed)* at 6.3.3.

(c) price;

(d) visual inspection; and

(e) the Standard.

[77] I will address each of these factors in turn before coming to a general conclusion on scope.

Negotiated limitations

[78] Mr Cunningham's evidence was that at their initial onsite meeting, Mike Hepburn said he only wanted advice on identifiable faults and did not want any speculation. I take that to mean Mike Hepburn did not want advice about faults that were possible but could not actually be seen, rather he was interested only in observable actual faults.

[79] Trevor Cunningham said he understood the motivation for Mike Hepburn's instruction in this respect came from the need for a report that did not jeopardise the latter's finance. In response, Mike Hepburn denied issuing such an instruction. Instead he said that on 21 February when he met Trevor Cunningham onsite, the plaintiffs had already secured finance. The report was for his, Sharon and Tracey's peace of mind and not for the bank at all.

[80] I accept Mike Hepburn's evidence on this point and reject Trevor Cunningham's. I do not believe any such conversation took place between them. I therefore reject the notion that the scope of Trevor Cunningham's inspection was limited by any instruction from Mike Hepburn.

[81] A further potential negotiated limitation arises from the waiver clause attached to the ABS standard acceptance form and the invoice dated 22 February 2007. It will be recalled that the clause was in these terms:

> ABS Contractors claims a waiver of responsibility for faults not detected in the report. Quick check inspection [sic] are limited to visual inspections and professional assumptions are made for areas that cannot be sighted.

[82] I do not consider that this clause was a term of the contract between the plaintiffs and Trevor Cunningham. It was never put to them at any stage prior to commencement of the inspection and issue of the report. They never agreed to it. As I have said, the acceptance form was never provided to Mike Hepburn and, although he clearly did receive it together with the invoice on 22 February, by that stage the contract had already been formed.

[83] Even if that is wrong, the courts have traditionally taken a very restrictive approach to exclusion of liability clauses such as that used here. Express and clear words are required to negate liability for negligence.[7] The words used in the first sentence of the exclusion fall well short of excluding liability in negligence. The waiver of responsibility is simply claimed. The usual wording accepted by the courts as exclusionary – "no responsibility whatsoever" or simply "no responsibility"[8] and the like are not reflected in the terms of this clause. The second sentence refers to the practical limitations of the inspection process. They may be seen to limit responsibility, but they are not consistent with a complete exclusion of liability. They *are* consistent with reduced responsibility, but the limited nature of the investigation would always be relevant in setting the scope of the duty anyway. The words of the clause are not consistent with a clear intention to exclude negligence claims.

What was at stake?

[84] Obviously, a great deal was at stake for the Hepburns and Tracey McKinnon. The pre-purchase report was their only protection against spending $655,000 on a defective house. Taken alone, this factor would tend to sharpen the nature of the inspector's obligation.

Price

[85] On the other hand, price must be a significant limiting factor here. The inspection was relatively cheap. Ian Vaughan's more comprehensive inspection and

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7 See generally Burrows, Finn & Todd *The Law of Contract in New Zealand (4th ed)* at 7.3.5.

8 See *Shipbuilders Ltd v Benson* [1992] 3 NZLR 549 at 561 per Gault J.

report by contrast cost $575 inclusive of GST. The ABS price reflected the fact that the inspection only took about two hours and was, on the invoice at least, dubbed a "quick check". It was not a Rolls Royce service and did not hold itself out to be so. It was a basic visual check and written summary of findings. There was limited economic benefit to Trevor Cunningham here.

[86] The plaintiffs' own expert, Mr Symon, accepted that the ABS report was typical of pre-inspection reports at the time, at least, as I understand it, in terms of length and format. It is therefore important to keep the modest scale of the service purchased in mind to avoid the temptation to reverse engineer the scope of the standard in light of what was actually found, on closer inspection, to be wrong with the house. As it is often said in these contexts, competent inspectors can miss things and reasonable experts can disagree on the evidence.

Visual inspection

[87] A crucial aspect of the foregoing, is of course the fact that the inspection was visual only. No invasive or destructive investigation was, or indeed could be, undertaken: there was insufficient time and permission from the vendors would have been necessary. A reasonably skilled and careful inspector could still only report on what he or she could see on the surface of the property.

The Standard

[88] As I have said, on the day Mr Cunningham undertook the inspection, he signed the form of certificate contained in Appendix B to the Standard. This was to the effect that he had carried out his inspection in accordance with the requirements of the Standard. That fact alone makes the Standard highly relevant.

[89] It is therefore necessary to describe the Standard in a little detail before discussing its effect in this case.

[90] The Standard was promulgated in 2005 by a large committee comprising all key stakeholders in the residential building industry. This included the Building

Officials Institute of New Zealand – the body to which pre-purchase inspectors affiliate. Its purpose was, in light of New Zealand's recent experience with the leaky homes phenomenon (inter alia), to "… give credibility to the property inspection sector by … setting levels of competence."

[91] In clause 2.3, the Standard sets out at length and in detail what must be inspected for. These include (I mention here some of the items relevant to this proceeding) cladding weathertightness and clearances, balcony flashings and waterproofing membranes, exterior windows and door flashings.

[92] According to clause 3.2, the report must contain:

(a) a survey including an opinion as to the overall condition of the dwelling in the context of its age, type and general expectations of similar properties;

(b) a list of any significant faults or defects;

(c) advice of any further inspections deemed necessary; and

(d) a certificate confirming that the inspection complied with the Standard.

[93] According to clause 3.2:

> The summary is possibly the most important part of the report. The important points should be extracted from the body of the report to provide the reader with a brief survey of the major faults found with the building. The survey should also put the overall condition of the building in the context of the average condition of similar buildings of approximately the same age, type of construction and material types.

[94] It is clear that the inspection must be comprehensive, but the report need not be lengthy. In that vein, clause 3.2 also notes:

> Although it is necessary to inspect each of the areas in 2.3, it is not necessary to report on each one. Inspectors may choose to report only on an "exceptions or information basis" i.e. listing only significant defects, rather than also reporting on items which are in acceptable condition.

[95] As I indicated, the building's cladding must be inspected for weathertightness risk. These issues are further particularised in Appendix A under the heading "Definitions of Weathertightness Risk". Interestingly none of the risk areas relate directly to cladding. Rather, they identify design and environmental factors that can affect the weathertightness of cladding. Appendix A is in these terms:

Appendix A
Definitions of Weathertightness Risk
(Informative)

A: Wind zone	Low risk	Low wind zone as described by NZS 3604
	Medium risk	Medium wind zone as described by NZS 3604
	High risk	High wind zone as described by NZS 3604
	Very high risk	Very high wind zone as described by NZS 3604
B: Number of storeys	Low risk	One storey
	Medium risk	Two storeys in part
	High risk	Two storeys
	Very high risk	More than two storeys
C: Roof/wall intersection design	Low risk	Roof-to-wall intersection fully protected (e.g. hip and gable roof with eaves)
	Medium risk	Roof-to-wall intersection partly exposed (e.g. hip and gable roof with no eaves)
	High risk	Roof-to-wall intersection fully exposed (e.g. parapets or eaves at greater than 90º to vertical with soffit lining)
	Very high risk	Roof elements finishing within the boundaries formed by the exterior walls (e.g. lower ends of aprons, chimneys etc)
D: Eaves width(1)	Low risk	Greater than 600 mm at first floor level
	Medium risk	450-600 mm at first floor, or over 600 mm at second floor level
	High risk	100-450 mm at first floor, or 450-600 mm at second floor level
	Very high risk	0-100 mm at first floor, or 100-450 mm at second floor level, or 450-600 mm at third floor level(2)
E: Envelope complexity	Low risk	Simple rectangular, L, T or boomerang shape, with single cladding type
	Medium risk	More complex, angular or curved shapes (e.g. Y or arrowhead) with single cladding type

	High risk	Complex, angular or curved shapes (e.g. Y or arrowhead) with multiple cladding types
	Very high risk	As for high risk, but with junctions not covered in C or F of this table (e.g. box windows, pergolas, multi-storey re-entrant shapes etc)
F: Deck design	Low risk	None, timber slat deck or porch at ground level
	Medium risk	Fully covered in plan by roof, or timber slat deck attached at first or second floor level
	High risk	Enclosed deck exposed in plan or cantilevered at first floor level
	Very high risk	Enclosed deck exposed in plan or cantilevered at second floor level or above

NOTE–

(1) Eaves width measured from external face of wall cladding to outer edge of overhang, including gutters and fascias.

(2) Balustrades and parapets count as 0 mm eaves.

[96] Appendix A is informative only. It is not part of the Standard's normative directives. Indeed according to the appendix it is sourced from the Department of Building and Housing's "Acceptable Solutions to the New Zealand Building Code" Clause E2/AS1 External Moisture. This informative approach is understandable. It would, I imagine, be impossible to predict and record all possible weathertightness risk scenarios given the myriad of modern residential home designs, let alone impose enforceable rules in respect of each one. Rather, Appendix A records common design features in New Zealand homes and common factors that accentuate weathertightness risk in relation to those features.

[97] Thus, Appendix A gives Standards New Zealand and pre-purchase inspectors a little wriggle room. On the other hand, it is a warning that these are issues a careful inspector should consider.

[98] While it is never the case that an industry standard or practice would automatically become the legal standard for litigation purposes,[9] the Standard is nonetheless to be given considerable weight in establishing the content of an inspector's legal duties. It was the subject of wide discussion and consultation

[9] Whata J made this proposition clear insofar as pre-purchase inspections are concerned in *Mok v Bolderson* HC Auckland CIV-2010-404-007292, 20 April 2011.

within the industry and, given the committee's broad representation, it was reflective of both the state of industry knowledge in 2005 and a broad consensus on what kind of performance was acceptable within the industry. Just as importantly, Trevor Cunningham himself adopted the standard and certified that he operated in accordance with its terms in this inspection.

Conclusion on scope

[99] In light of the foregoing, I would delineate the scope of Trevor Cunningham's obligation to the plaintiffs in carrying out his pre-purchase inspection of 28 Imran Terrace as follows:

(a) to point out significant faults observable in a basic visual inspection of the dwelling using a reasonable degree of skill and care;

(b) to point out the presence of other significant weathertightness risk factors where these are observable in a basic visual inspection of the dwelling using reasonable skill and care;

(c) to summarise both the overall state of the dwelling in light of its age and construction and any major faults or other risk factors identified. I include in the term faults, those elements of weathertightness risk that arise because of reasonably observable faults in construction, even where at the time of the inspection, such faults had not produced observable problems of moisture incursion; and

(d) to summarise the foregoing in terms understandable to a lay person.

[100] Key drivers in setting the level of skill and care required for a pre-purchase inspector are as follows:

(a) the inspector is invariably experienced and expert while the plaintiffs are completely reliant on him or her identifying significant problems and communicating them;

(b) weathertightness risks and faults were, by the time of the 2005 Standard, well known and well understood by reasonably experienced and expert pre-purchase inspectors and this is reflected in the Standard; and

(c) the faults and risks to be reported can be recorded on an exceptions basis meaning reports may still be brief in style and inspection can still be carried out within the two hour timeframe described by Trevor Cunningham. In other words, the above obligation does not prevent the production of a basic "quick check" style of report focussing primarily on the big issues.

Damage and physical causes

[101] In his December 2010 report, Mr Lyttle from WHRS said that the internal damage to the building's framing from moisture ingress was localised. He located the damage as follows:

South elevation
- Lower window sills
- Ground level framing and cladding

West elevation
- Window framing
- Balustrade and saddle
- Ground level framing and cladding

North elevation
- Window sill and framing below sill
- Balustrade and saddle
- Corner cladding and ground level framing

East elevation
- Garage window
- Rumpus room retaining wall
- Wall junction

[102] Mr Lyttle's view was that the remedial work could also be localised accordingly. He said the cause of damage was moisture ingress due to:

(a) poorly sealed faced fixed windows;

(b) lack of capillary gap between cladding and ground;

(c) insufficient waterproofing of retaining wall; and

(d) failure to properly cap the balcony balustrade.

[103] The plaintiffs' consultant, Ron Thurlow, considered that the damage was more widespread than Mr Lyttle's assessment. He identified 11 faults in his evidence and the damage, he said, resulted from those flaws. The items were as follows:

(a) inadequate cladding clearances causing damage to framing timbers at the garage, front entrance, laundry, third bedroom and the rumpus room;

(b) space below ground level at the eastern elevation of the rumpus room had caused ingress of moisture through the retaining wall damaging timber strapping and paper faced gypsum plaster board on the eastern elevation of the rumpus room and the stairwell;

(c) damaged cladding and unsealed penetrations causing damage to framing timber to the northern elevation of bedroom 3 as a result of moisture ingress;

(d) faced fixed external joinery allowed moisture ingress causing damage to framing timbers, wall plates and cladding around all windows and rumpus room and balcony door;

(e) no saddle flashing fitted to the balustrade allowing moisture ingress and damaged balustrade framing and wall junctions;

(f) lack of wall control joints had not yet caused ingress but was likely to produce future damage;

(g) lack of capillary gaps along the lower edge of cladding causing moisture ingress along the garden area at the western elevation damaging framing timber;

(h) lack of sufficient door threshold likely to be the cause of future damage;

(i) lack of external corner flashings/moulding systems allowing moisture ingress at obtuse angle external corners below the balcony on the western elevation. This damaged framing timber at the external walls of the bathroom and bedroom 2 on the western elevation below the balcony;

(j) flat top balcony balustrade allowing ingress of moisture into balustrade and deck framing timber causing damage to that framing; and

(k) minimal balcony drainage allowing moisture ingress and causing damage to the deck's structure.

[104] It was on the basis of this assessment that Mr Thurlow found that remediation would require a complete reclad.

Breach

[105] Richard Maiden, a building consultant, gave evidence in support of Mr Cunningham, as I have said. The thrust of it was that the ABS report picked up most of the problems identified in the Vaughan report. Mr Maiden was also of the view that all reports (ABS, Realsure, and WHRS) and the investigative work of Mr Thurlow, in combination, really only pointed to three key problem areas:

(a) the eastern wall of the rumpus room;

(b) the balcony; and

(c) seals around the windows.

[106] Richard Maiden suggested that Trevor Cunningham missed only the seals around the windows but otherwise identified those key problems.

[107] I do not agree with that analysis. As Richard Maiden conceded in cross-examination, Trevor Cunningham missed several of the 17 points highlighted by Mr Vaughan, and Mr Thurlow's evidence clearly highlighted more than the three areas Mr Maiden isolated as the core of the dwelling's problems.

[108] I am satisfied that Trevor Cunningham did not exercise reasonable skill and care in undertaking his inspection at 28 Imran Terrace and in reporting on that inspection to the plaintiffs. Even accepting that the service provided was a "Quick Check" visual inspection involving no more than two hours' work or so, and costing less than $300, Mr Cunningham failed in two key areas.

[109] First, he failed to identify significant and obviously observable weathertightness faults and risk features. Second, even in respect of the faults he did identify, he failed to communicate to the plaintiffs the full implications of those faults and therefore the extent of the weathertightness risk associated with the dwelling.

[110] The causative faults Trevor Cunningham identified in his report were:

(a) cladding cracks and penetrations;

(b) the lack of a balustrade saddle flashing and the need to recoat the deck;

(c) poorly sealed retaining wall at the rumpus room in the lower level;

(d) moisture pick up at the garage; and

(e) some unsealed cladding penetrations.

[111] The causative faults he did *not* report on were:

(a) faced fixed joinery with inadequate seals between the cladding coat and the rear of the aluminium joinery;

(b) insufficient capillary gaps on the bottom edge of lower floor cladding columns and deck;

(c) lack of corner flashings or moulding systems at obtuse angle corners below the balcony; and

(d) insufficient drainage from the balcony.

[112] The first two of these unreported fault categories were, according to both Mr Lyttle and Mr Thurlow, very significant contributors to the problems with this dwelling.

[113] Mr Cunningham said that in addition to the written report he provided further oral warnings. His evidence under cross-examination was:

(a) he advised Mr Hepburn to have an expert examine the monolithic cladding to determine what remedial work might be required;

(b) he had identified all 17 risk items referred to in the Vaughan report (he later retracted this statement);

(c) if and when an expert cladding advisor viewed the dwelling, all of the other problems now identified would have become obvious to that person;[10] and

(d) that his legal counsel had deleted from his brief of evidence all reference to his detailed oral warnings to the Mr Hepburn.

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[10] In this respect Mr Cunningham relied on the evidence of Mark Thomas, Managing Director of Specialist Coating Services Limited who discussed the sorts of faults he found with monolithic cladding and the steps deemed necessary to remediate them.

[114] I do not accept Mr Cunningham's evidence in these respects. As I have said, he retracted some of it and I do not regard his suggestion that counsel deleted further references to his verbal warnings as being in any way credible.

[115] In any event, the foregoing is inconsistent with other evidence Mr Cunningham gave. The following excerpt from cross-examination by Mr Bremer makes the point:

> Q … is it the case Mr Cunningham that you didn't put weathertightness risk of the monolithic cladding in your report because you didn't see any?
>
> A More than not see any, I didn't see any huge evidence of it.
>
> Q You saw evidence of it though?
>
> A Not significant.

[116] It is implausible to suggest that Mr Cunningham advised extensively of weathertightness risk and the need for further investigation of that issue before purchase when he confirmed he did not believe at the time that the risk existed. He thought the house was basically fine.

[117] The second big category of failure was that Mr Cunningham did not report on any standard weathertightness risk features even though a number of them as listed in Appendix A to the Standard were present. These included:

(a) location in a high wind zone;

(b) more than two storeys;

(c) roof (wall intersection design);

(d) building envelope complexity; and

(e) deck design.

[118] The contrast with the Vaughan report's treatment of this subject is sharp. That report provided:

> The design of the home, being more than one level, with a complex roof, spaces below ground and on a very exposed site, put this house at high risk to weathertightness issues developing.

[119] I acknowledge that, at $320 including GST, this was a cheap report. In contrast, the Vaughan report was more expensive at $575 including GST, but these issues, to coin a phrase, were not rocket science. All were set out in the Standard as being potential risk features. They were well known to the industry and would be well known to any competent pre-purchase inspector – not least one who certified that he had undertaken the inspection and written the report in compliance with the Standard.

[120] As I have said, Mr Cunningham did indeed point out some defects going to weathertightness risk. He said:

(a) hairline cracks in the cladding needed repair and recoating;

(b) the balustrade was a potential water leak area with no cappings and a visible small open crack and the deck needed resealing;

(c) some rust bleed to exterior linings was present due to fixings;

(d) there was an unsealed gatepost penetration into polystyrene detail;

(e) there was some additional damage to polystyrene detail due to the gate opening on to it;

(f) a rock garden had been built up against exterior linings.

[121] Having then said that moisture levels throughout the house were nonetheless fine except the rumpus room wall, Trevor Cunningham concluded that the dwelling appeared to be in good condition although it had faults – most of which were minor and could be dealt with in general maintenance. "The most significant concerns" he said "were high moisture readings to downstairs interior wall and various faults with exterior cladding."

[122] Trevor Cunningham said in evidence that this wording in context was sufficient to highlight to a buyer the potential weathertightness risks this dwelling exhibited. I do not agree. A reasonable prospective purchaser, unaware of the technical detail of weathertightness issues (and therefore entirely reliant on the advice of an expert advisor) would not take from these comments, that this was a dwelling whose design features and whose construction and materials meant that it was a high risk proposition. Nor would a buyer have concluded, on reading the report as a whole, that if the dwelling did not yet have observable water incursion problems (and remember in December 2006, the Vaughan report said that there were higher than normal moisture readings in a number of places in addition to the rumpus room), the dwelling was highly likely to succumb to such problems in the future. That was the advice of the Vaughan report.

[123] As Whata J concluded in *Mok v Bolderson*,[11] there is an obligation to explain the implications of what an inspector has observed[12] – as I have suggested, to explain the problems and risks in terms that a lay purchaser will understand. The inspector cannot hide behind unduly technical or opaque language so as to protect his or her relationship with the referring real estate agent anxious to secure a sale, while (technically at least) maintaining professional standards. The service purchased is *advice* after all. Advice has no value if it cannot be understood by a reasonably intelligent lay receiver.

[124] I finally make reference to the BRANZ poster that was, it must be said, Mr Cunningham's last refuge. The poster identified weathertightness risk areas. I do not accept that the failures in the ABS report could somehow be fixed by providing the plaintiffs with a standard form poster even if Mr Cunningham did send it to Mike Hepburn with the invoice – a possibility I rather doubt. The fact is the tenor of the report was generally positive and to the extent that it identified problems of significance, they were not held out to be "biggies". To suggest that the tenor of that advice could be transformed into a comprehensive set of alarm bells by a standard form poster is just not credible.

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11 *Mok v Bolderson* HC Auckland CIV-2010-404-007292, 20 April 2011.
12 At [113].

[125] Having considered carefully the evidence of experts from both sides, including that of Mr Cunningham, it is clear to me that the faults in this dwelling that went unobserved and unreported on by Mr Cunningham, would have been obvious to an experienced and competent pre-purchase inspector undertaking a basic visual inspection of the building. I find therefore that in the foregoing respects, Trevor Cunningham's inspection and report were not undertaken with reasonable skill and care as required by both the implied terms of his agreement with the plaintiffs and his duty of care in tort.

Causation

[126] For the defendants, Mr Manktelow, pointed to the terms of clause 17.0 of the special conditions. He argued that this clause did not relate to pre-purchase inspections, but rather to local authority records. He argued that the sale and purchase agreement was therefore never conditional on completion of a satisfactory pre-purchase report, rather it was to all intents and purposes unconditional, once all other special conditions had been satisfied. If Mr Manktelow is right in arguing that the clause did not relate to pre-purchase inspections, then his contention that there was no factual causation in this case has some substance. The plaintiffs would have been bound to complete the purchase with or without an inspection. I turn to consider that issue now.

[127] The terms of special condition 17.0 are, it will be remembered, as follows:

> Completion of this contract by the purchaser(s) is entirely conditional upon its completing and being satisfied with a due diligence programme in respect of all local authority records pertaining to permits and compliances, construction of the building and any other factors may deem necessary within ten (10) working days of the execution of this contract by both parties. This clause is inserted for the sole benefit of the purchaser(s).

[128] A plain reading of the clause does not support Mr Manktelow's submission. Rather, in my view, clause 17.0 should be read as if the "due diligence programme" to which it refers relates separately to each item on the list that follows it. Those items are:

(a) all local authority records pertaining to permits and compliances;

(b) construction of the building; and

(c) any other factors may (sic) deem necessary.

[129] The pre-purchase inspection is covered by the second item. I therefore do not accept Mr Manktelow's argument.

[130] Putting that to one side, there is no doubt that the Hepburns and Tracey McKinnon would not have suffered the losses they claim against Trevor Cunningham were it not for his breach of the pre-purchase inspector's duty of care. Had he advised the plaintiffs that the dwelling had design features and defects which make it a considerable weathertightness risk, I am satisfied that, just as occurred with the three Realsure clients in 2005, 2006 (the Vaughan report) and 2010, the plaintiffs would have abandoned the purchase. There is therefore causation in fact.

[131] The next question is whether the losses suffered were within the scope of the risk created by Trevor Cunningham's conduct – that is whether there is causation in law.[13]

[132] Clearly the losses were within scope. The whole point in this advice was to prevent the plaintiffs unknowingly buying a defective house whose value was significantly less than that paid. Subject to addressing the defendants' affirmative defences, I find there is causation here in fact and law.

Voluntary assumption of risk

[133] Mr Manktelow argued that by negotiating a $12,500 reduction in price to take account of the cost of proposed remedial work, the plaintiffs signalled that they accepted there were weathertightness issues in respect of the dwelling and therefore took complete responsibility for dealing with them. In other words, they voluntarily assumed the risk and broke the chain of causation.

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[13] See generally *Todd* at 20.3.02.

[134] The flaw in this reasoning is that the plaintiffs did not fully appreciate the extent of the problem they faced with this dwelling. Unlike the Vaughan report, the ABS report declared the condition of the house to be generally good with significant issues being high moisture levels at the rumpus room wall and cladding in need of repair and recoating. In fact the problems were far more extensive than that, and the evidence is that there were other water ingress problems into the framing at the time the ABS report was completed in addition to that relating to the rumpus room wall. As I have said, the Vaughan report referred to these wider problems two months before the ABS report.

[135] As White J pointed out in *Coughlan v Abernethy*[14] (there citing the Court of Appeal in *Heard v New Zealand Forest Products*[15]) a plaintiff will not have voluntarily assumed the risk of loss unless it is shown that he or she had full knowledge of the nature and extent of the risk and, with that full knowledge, in fact assumed it. Here, the plaintiffs knew there were two significant problems to be addressed, but they had no knowledge of the true nature of the risks they faced, because Trevor Cunningham had, in breach of his obligation, failed to appraise them of those larger risks.

[136] Mr Manktelow pointed to the decision of Venning J in *Jung v Templeton*[16] in which he found that a pre-purchase report that had pointed out some potential watertightness issues with a dwelling, put the plaintiff on notice prior to sale. The plaintiff was, he said, then obliged to follow these matters up by making further inquiries of the inspector or other experts.[17] Mr Manktelow argued that *Jung* was on all fours with the present facts. He argued that Mike Hepburn was put on inquiry by the ABS report and failed to further investigate the issues raised.

[137] I do not think that *Jung* applies to these facts. In *Jung*, the list of faults ran to two and a half pages. It included reference to the fact that previous water damage had been repaired or covered over and that timber rot was present. The inspector specifically noted that it was not possible to determine the state of framing timber.

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14 *Coughlan v Abernethy* HC Auckland CIV-2009-004-2374, 20 October 2010 at [42].
15 *Heard v New Zealand Forest Product* [1960] NZLR 321.
16 *Jung v Templeton* [2010] 2 NZLR 255.
17 At [49] and [50].

These points obviously threw the onus back on a reasonable purchaser to make further inquiries. In that case, the plaintiff did not even discuss matters further with the inspector. In this case, Mike Hepburn called Trevor Cunningham back promptly. He sought clarification and further advice, and it was duly given. Neither the written report nor the subsequent oral exchange rang any alarm bells for the plaintiff. By contrast, the report in *Jung* clearly did.

[138] A somewhat related point is that Mr Cunningham also said in evidence that he advised Mike Hepburn to obtain a report from a specialist in monolithic cladding in relation to the issues associated with the cladding. As I have said, I do not believe that advice was given. It suggests that Mr Cunningham thought there was a significant issue with the cladding requiring the intervention of an expert before any final decision on purchase was made. This is quite contrary to Mr Cunningham's evidence that he saw no real moisture problems with this dwelling. Both the terms of his report, and Mr Cunningham's own evidence, confirm that alarm bells were not going off in his expert mind in respect of this property. It therefore is not credible to suggest, as he did, that he was so concerned about the state of the cladding, that an expert should have been called in to give a further opinion prior to purchase.

[139] In any event, Mr Cunningham *was* the expert. The Standard, adherence to which he certified, made it clear that the assessment of weathertightness issues in relation to cladding is a matter for the pre-purchase inspector to advise his or her clients on. Indeed even if that is wrong, if Mr Cunningham did have serious concerns with respect to the state of the cladding, he clearly needed, in accordance with the Standard, to record those in his report. He did not. On the contrary, he recorded that the condition of the cladding was "good".

[140] It follows that the plaintiffs' knowledge at the time they completed the purchase was not such as to break the chain of causation. They, like Mr Cunningham (it appears) thought that this was basically a sound house.

Contributory negligence and duty to mitigate

[141] As recited earlier, the plaintiffs undertook some remedial work following purchase. They cleared the rock garden against the rumpus room and painted the first floor of the dwelling. But they did not repair or recoat the cladding. The whole dwelling was then repainted in 2010 (but again, not recoated by a qualified coating applicator). No other work was done. It was common ground that none of the recommended remedial work was done on the balustrade and balcony as recommended by Trevor Cunningham in the body of his report.

[142] Although Mr Thurlow said that repainting had provided some additional protection – the evidence for which was framing timber that had been wet but had subsequently dried out in situ – it must have been the case that further ingress occurred into the problem areas identified by the ABS report in the three years between the plaintiffs purchasing the property and commencement of remediation. That must be particularly so of the failure to cap the balustrade about which Mr Cunningham gave further warning in his 2010 pre-sale recheck.[18]

[143] Mr Thurlow's evidence was that significant areas of the framing were saturated, suggesting water ingress was still occurring when he undertook his investigation between September 2011 and March 2012.

[144] That said, it is important not to overstate the contribution of the plaintiffs' own failure to remediate after they were warned. The WHRS and Vaughan assessments both point to window joinery fixing and lack of cladding capillary gaps as very significant sites of moisture ingress and these were not identified by the ABS report. These problems were observable – in fact obvious – to a competent pre-purchase inspector. All of the Realsure reports picked them up.

[145] At this point, it is necessary to resolve the conflict between Mike Hepburn and Trevor Cunningham over what was said in relation to moisture ingress at the rumpus room wall. It will be recalled that Mike Hepburn's version of Trevor

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[18] Of course he also said that moisture levels in the problem areas, including the rumpus room wall, were now normal. In light of the Realsure reports both in 2006 and in 2010, his advice in that respect must be seen as unreliable.

Cunningham's advice was that the leaking was probably due to the small garden that had been built up against the external wall there, and that this should be removed.

[146] According to Mike Hepburn, Trevor Cunningham also advised that new drainage running parallel to, and outside that wall, needed to be checked for faults as this could be the source of the problem. The cost, it was said, would be approximately $10,000.

[147] Trevor Cunningham accepted that he mentioned a cost of $10,000. But he said he was careful to say that it was an estimate only. In any event, Trevor Cunningham said that he advised Mike Hepburn that the work was more extensive than just excavating the garden. The wall required resealing and subsoil drainage needed to be checked for faults.

[148] Thus, the difference between the two versions really comes down to the resealing point. On this matter, I accept Mr Cunningham's evidence that he advised that the block wall should have been resealed. It is difficult otherwise to see where the cost of $10,000 would come from. In addition, Sharon Hepburn's evidence was that in 2010 when Trevor Cunningham carried out his recheck, she asked Mr Cunningham whether the wall should now be resealed. The logical inference is that it was Mr Cunningham who planted that idea in her mind in 2007, Sharon Hepburn having, I also infer, no idea about these matters. Curiously, although it is not relevant to what was said and done in 2007, Sharon Hepburn's evidence was that in 2010, Trevor Cunningham advised against resealing as this would prevent the moisture from draining out.

[149] It is common ground, in any event, that the resealing work was not done.

[150] I would conclude that the plaintiffs did contribute to the deterioration of this building in the three year period between purchase and remediation due to their failure to properly address the problems with the rumpus room wall, balustrade and cladding that Trevor Cunningham pointed out. While these areas must have been material contributors to deterioration in the framing and lining of the dwelling, I am not at all satisfied that they are dominant. While the balustrade problems did

contribute to real problems with the decking, cladding cracks were, on all assessments, a minor factor. While I accept that the rumpus room wall remained a significant source of moisture ingress, other significant causes of water incursion were, on the evidence, elsewhere. They related to face fixed joinery, lack of cladding clearances and other problems with the balcony drainage. Fault is clearly to be shared.

[151] I would set the contribution of the plaintiffs' negligence to the damage to the property at 50 per cent.

Fair Trading Act

Limitations

[152] The defendant argues that the plaintiffs are out of time to bring FTA proceedings because more than three years had elapsed between February 2007 (when the agreement for sale and purchase was entered into and the inspection completed) and the commencement of proceedings in July 2011. This, the defendant argued, would take it outside the three year limitation period in s 43 of the Act. The essential point was that Mr Cunningham had pointed out, in part at least, that the building had some weathertightness problems. They had therefore either been discovered or were reasonably discoverable when Mike Hepburn received the report.

[153] For the plaintiffs, Mr Bremer argued that the problem was not reasonably discoverable until receipt of the Vaughan report in 2010.

[154] Consistent with my conclusions under the 'Voluntary Assumption Risk' heading, I do not consider that the plaintiffs could reasonably have discovered the nature of the problem with the dwelling until the Vaughan report. While the ABS report pointed out some weathertightness issues, its tenor and the associated discussions between Mr Cunningham and Mike Hepburn, was that the house had a few fixable problems but was basically sound. This was not a case of the plaintiffs

wilfully closing their eyes to a problem about which they had been warned.[19] On the contrary, when returning to the market three years later, the plaintiffs innocently recalled Trevor Cunningham to do a recheck. The evidence is clear that they had no inkling that the dwelling had a problem of any seriousness.

[155] In my view, a reasonable person would not have been put on notice by the ABS report in February 2007.

Misleading or deceptive?

[156] Section 9 of the FTA provides:

> No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

[157] It is well settled that the test arising from this provision is in three parts:[20]

(a) Was Trevor Cunningham's advice capable of misleading the plaintiffs?

(b) Were the plaintiffs misled by that advice in fact?

(c) Was it reasonable that they should be so misled?

[158] Though the test is straightforward, and its ambit potentially broad, s 9 has important limits. In the oft-quoted phrase of Elias J (as she then was) in *DeForges v Wright*:[21]

> Section 9 is not to be turned into a general warranty by a vendor of the expectations of a purchaser.

[159] A similar sentiment is expressed by the Court of the Appeal in *Premium Real Estate Limited v Stephens*:[22]

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19 *Pullar v R* [2007] NZCA 389 at [15] where the court found that the defects were apparent and there was no mystery about what was wrong.

20 *Krtolica v Westpac* [2008] NZCCLR 24 (HC) at [158].

21 *DeForges v Wright* [1996] 2 NZLR 758 at 764 (HC).

22 *Premium Real Estate Limited v Stevens* [2008] NZCA 82 at [48].

> Decisions that have proved unwise in hindsight, and against which, other advisors might have counselled, may well cause regret, but they will not necessarily be capable of remedy through s 9.

[160] In my view, this is not a case merely of dashed expectations or regret in hindsight. The ABS report was capable of misleading and did in fact mislead the plaintiffs. What is more, it was reasonable for them to be so misled in these circumstances. The report taken as a whole, suggested the dwelling was generally in good condition with the only matters of significance being cladding cracks and retaining wall moisture levels. Mr Cunningham accepted that he advised the plaintiffs the cost of remediating the rumpus wall would be around $10,000 and that BPL could provide a quote or estimate for recoating. The estimate for recoating turned out to be $15,000.

[161] Even without knowing the cost of recoating the whole thrust of the report was that the building had some issues, but they were not "huge". Its condition was generally good, and, apart from the rumpus room, moisture readings were normal throughout the house. This overall impression was confirmed by Trevor Cunningham's own evidence under cross-examination and by Mike Hepburn's rendition of the discussion between them following receipt of the report.

[162] That sense conveyed in the report was misleading. As I have said, the dwelling had far more significant problems of water ingress at the time of the inspection than Mr Cunningham had led the plaintiffs to believe. And its design and faults rendered it prone to even greater problems in the future.

[163] The house was not in "good condition" as advised. Although Mr Cunningham advised that the rumpus wall had moisture ingress problems and the cladding was cracked, these issues were simultaneously downplayed as manageable. What is more, other even more significant problems were either not identified at all, or not highlighted as significant issues.

[164] I find that a breach of s 9 is made out.

Quantum

Loss in value or cost of repair?

[165] Home owners are generally entitled to the cost of repair if it is reasonable.[23] In her recent decision in *Cao v Auckland City Council*[24] – an appeal from the Weathertight Homes Tribunal – Andrews J traversed the authorities on the question of appropriate measure for damages in leaky homes cases.

[166] It is sufficient for me simply to adopt the approach used in that case. There may well be a prima facie rule that repair is the starting point, but if it does have the status of a rule, it is a highly flexible one. All will depend on the circumstances of the case. The option to be preferred is that which is reasonable and makes most sense in its context.

[167] Mr Mantkelow referred in argument to the English Court of Appeal decision in *Phillips v Ward*[25] – a case of a negligent pre-purchase inspection – in which the court was unanimous that the proper measure of damages was the difference in value between the house as it was at the time of the purchase and the same house at the same time without the defects complained of. I do not however take the court in that case to have been setting a hard and fast rule. As Denning LJ (as he then was) said, in the end:[26]

> It all depends on the circumstances of the case … The general rule is the injured person is to be fairly compensated for the damage he has sustained, no more, no less.

[168] What then is fair in this case? According to a 2011 valuation by Trubridge Partners, registered valuers, the difference in value pre and post remediation in 2011[27] was $305,000 – $710,000 post remediation value less $405,000 pre remediation value. The Trubridge report was completed prior to remediation and

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23 *Invercargill City Council v Hamlin* [1967] 1 NZLR 513 at 526.
24 *Cao v Auckland City Council* HC Auckland CIV-2010-404-007093, 18 May 2011.
25 *Phillips v Ward* [1956] 1 All ER.
26 At 876.
27 Note the valuation is four years after the date of the purchase.

so under assessed its cost at approximately $253,300 rather than the actual cost of approximately $346,000.

[169] In any event, these indicative numbers (for that is all they can be) suggest that actual remediation was around $31,000 more expensive than a difference in value calculation – at least in 2011. In other words, a difference in 2007 terms was likely to have been material but probably around 10 per cent less than the remediation figure.

[170] I consider that the appropriate measure here is the cost of repair. This is a family home in which the plaintiffs live. While there was an intention to sell in 2010, I do not think that intention necessarily remains. In light of the significant outlay incurred to date in remediation, not all of which will be recovered in these proceedings, the plaintiffs probably cannot afford to sell yet.

Amounts claimed

[171] The actual amounts claimed in special and general damages are as follows:

(a) remedial work by Wellington Builders Limited – **$346,312**;

(b) weathertightness stigma 5 per cent of post-remediation value of $710,000 – **$35,000**;

(c) project insurance – **$1,681.67**;

(d) weathertightness assessments setting out scope of remediation and valuation for financing purposes – **$3,437.86**;

(e) day care, when children could not be in the house during the day – **$3,808**.

(f) interest on those sums at 7½ per cent per annum;

(g) general damages $25,000 per adult occupant – **$75,000**;

Was remediation reasonable?

[172] Mr Manktelow argued that the $346,000 cost of remediation was completely over the top, when compared with the estimate of cost completed by Mr Lyttle of WHS in 2010. It will be recalled that the Lyttle estimate was $103,000. It recommended targeted repair in identified problem areas rather than the replacement of significant areas of framing and a complete recladding.

[173] It was argued that when the plaintiffs failed to base a scope of works on the Lyttle assessment, the remediation that followed was necessarily a disproportionate response to the problems identified.

[174] In addition, Mr Manktelow called David Cooke, a registered quantity surveyor who gave evidence that:

(a) the choice to reclad in weatherboard instead of monolithic cladding represented betterment of approximately of $20,000;

(b) the failure to reuse the existing window to the deck created an extra cost of approximately $3,000; and

(c) the failure to put the project out to competitive tender meant that savings up to 10 per cent were not achieved. This, David Cooke said, represented approximately $34,000 of extra cost.

[175] In my view, it is wrong as a general proposition to describe the remedial work actually undertaken as wholly disproportionate. The assessment done by Mr Lyttle for WHRS was limited in scope and proved – once Mr Thurlow started pulling cladding off – to be a significant underestimate, both of the actual extent of moisture ingress, and the sites of such ingress. The problem in Mr Thurlow's words was: "considerably more than expected."

[176] In that vein, even the defendant's own expert witness, David Maiden, confirmed that WHRS assessments were wrong 99 per cent of the time. In any

event, Mr Thurlow said that after lengthy discussions with council officials, it was decided that all water-stained timber had to be replaced. As it transpired a great deal of it was saturated anyway according to Mr Thurlow.

[177] Moving now to cladding, as I understand it Mrs Hepburn's and Mr Thurlow's evidence was that a full clad became necessary for three reasons because:

(a) a partial reclad would have created both aesthetic and practical problems at the joins between old and new material;

(b) face fixed cladding was unsuitable on this exposed site, lacking as it did a cavity behind the cladding to allow drainage of water where, if for any reason, it had passed through the cladding; and

(c) perhaps crucially, almost all the building firms that showed an interest in the work (and there were few of those) treated complete recladding as a bottom line.

[178] By contrast, none of the experts called by Trevor Cunningham, nor Mr Cunningham himself, visited the site during remediation work. They had no first-hand knowledge of the actual state of the dwelling when it was stripped down during remediation – despite having been invited by counsel to inspect. Neither Mr Cunningham nor his experts could gain-say the first-hand knowledge of the plaintiffs and their experts in relation to the state of framing, cladding or in relation to discussions with council officials and tradesmen.[28] The evidence for the plaintiffs is to be preferred accordingly.

[179] Nor do I accept, as argued by the defendant's quantity surveyor, Mr Cooke, that the plaintiffs should have put the remediation project out to tender. That idea is fine in theory but it did not make any sense in reality. There were too few building firms who wanted the work – perhaps because of ongoing liability questions. I accept the evidence of Sharon Hepburn and Ian Thurlow that there were very few

[28] According to Mr Cunningham "Raj" from BPL did in fact visit the site during remediation work, but he was not called as a witness. There is no way of knowing his views on any of these matters.

builders in Wellington willing to take on the work – i.e. that weathertightness remediation was a tradesman's market and that WBL were not an expensive operation with a reputation for exploiting that situation.

[180] I would note however, that there are two adjustments that should be made for other items claimed. First, I agree that weatherboard cladding creates betterment. There is, according to Mr Maiden, a monolithic product that is suitable for exposed sites. Sharon Hepburn said that the difference between the price of weatherboard and new monolithic cladding was only $3,000, so that there was little to choose between them.

[181] Mr Cooke's response was to suggest the pricing for monolithic cladding provided to her must have been too high. I consider it likely that Mr Cooke's scepticism is well placed. In my view, the role of weatherboard cladding here was as much to address market aversion to monolithic cladding as it was to remediate the problem. I consider that a deduction of $12,500 should be made for betterment in that respect.

[182] Second, I do not consider that it is appropriate to add to the damages calculation an amount for alleged weathertightness stigma in the market place. I am not at all satisfied that stigma will be an issue in this case. First of all, if the state of the internal workings of this dwelling is disclosed to prospective buyers, it will reveal new framing, new cladding and new joinery. Almost a new house. And, as I have said, this house has the added advantage of weatherboard cladding. It does not look like a leaky home any more, it certainly does not leak any more, and I am not convinced it will attract the stigma of a leaky home. I would deduct $35,500 accordingly.

[183] Finally, I am satisfied that an award of general damages is in order. All three plaintiffs gave convincing evidence of the adverse physical and emotional impact on them individually and collectively as they have tried to cope with remediation, both as a practical project and as a financial nightmare. I do not however consider that individual awards should be made.

[184] Having now read a number of weathertightness decisions of this court, I do not consider that the facts in this case warrant individual assessments. Rather, I consider that a single award of $25,000 is appropriate.

[185] All other items claimed and referred to in paragraph [171] are, in my view, properly claimable as foreseeable and approximate damages to which the plaintiffs will be entitled.

[186] The gross award in this matter is therefore $364,649.53 plus interest at 7.5 per cent per annum less 50 per cent in contributory negligence.

Next steps

[187] I am aware that a settlement was achieved with the 1st and 2nd defendants, the terms of which are confidential. It is necessary for me, in light of that, to determine an apportionment of liability between the 1st and 2nd defendants on the one hand and Mr Cunningham on the other. To do so, the terms of that settlement will now need to be disclosed. Counsel should make submissions on appropriate terms for such disclosure. In addition, any financial assistance provided to the plaintiffs under the Weathertight Homes Resolution Service Act 2006 will need to be taken into account in terms of s 125(h)(ii) of that Act.

[188] Counsel are to file further memoranda accordingly within 14 days hereof.

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Williams J