



**PRESS SUMMARY – EMBARGOED UNTIL 3 PM TUESDAY 26 MARCH 2024.**

This summary is provided to assist in the understanding of the Court’s judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document.

The numbers in brackets refer to paragraph numbers in the judgment for ease of reference.

**Background**

The Body Corporate and unit owners of a 40-level apartment building on Gore Street in downtown Auckland launched a claim in the High Court in 2014. They claimed that the building, constructed between 2004 and 2006, has extensive defects. They alleged that parties involved in its construction breached duties of care owed to them. They also alleged that the predecessor to Auckland Council failed to exercise reasonable skill and care in the performance of its three regulatory functions — consenting, inspection, and code compliance — under the building regime. The claim against Auckland Council spanned all claimed defects but not all stages of the regulatory process were in issue in respect of each claimed defect.

There are 13 claimed defects. They fall into four broad categories, although there is overlap between categories: Fire; Structure; External Moisture; and Internal Moisture. Some defects, although pleaded as a single claimed defect, in fact comprised multiple sub-defects. The claim seeks the cost of remediation, estimated to be over \$120 million, plus consequential losses suffered by the unit owners and general damages. The overall damages claimed at trial was over \$150 million.

The principal contractor, Multiplex Constructions (NZ) Limited, went into liquidation before the claim was filed. As the case progressed, some named defendants also went into liquidation and claims against them were discontinued. Other defendants settled the claims made against them. Three defendants attended the trial when it started. One settled during the trial, leaving only Auckland Council and Equus Industries Limited (Equus), the supplier of membrane on the podium and level 3 canopy roof, actively defending the claims.

The unit owners and the Body Corporate (together, the claimants) still pressed claims against inactive parties which had filed a defence but did not attend the trial. These parties included Holmes Fire & Safety Limited (Holmes), Mapei New Zealand Limited (in liquidation) (Mapei), Clark Brown Architects Limited (in liquidation) (Clark Brown), and Chenery Contracting Limited (Chenery). The claimants were still required to prove the cause of action against the parties which had filed defences but did not actively defend, so far as the burden of proof lay on the claimants.

Auckland Council accepted that it owed a duty of care to the owners of units (not the Body Corporate) but denied any breach of its duty. It did not accept that all pleaded defects existed or that the physical state of affairs resulted in a building that did not comply with the Building Code. It pleaded various affirmative defences including the ten-year statutory time-bar under s 393 of the Building Act 2004 in respect of some of the claimed defects (see [19]).

Equus also accepted that it owed a duty of care but denied any breach of its duty in the supply of waterproofing membrane which was installed by a licensed applicator, and issue of producer statements.

## **The judgment**

The High Court issued a 469-page judgment on 30 January 2024 upholding some, but not all, of the claims against Auckland Council, Clark Brown, Mapei, Chenery, and Holmes. The claims against Equus were rejected.

The liability findings mean that the cost of repair and other monetary consequences claimed against the liable parties have not yet been determined. The findings will significantly impact the scope of proposed repair for which some defendants may be liable. The Court has invited further submissions from the parties as to how to resolve those matters.

## **A navigational guide**

This summary is designed as a guide to the judgment — the length of which reflects the duration and complexity of the proceedings. For context, the trial, heard by Justice Tracey Walker, took five months of hearing time, with more than 55 expert witnesses in fields such as quantity and building surveying, fire and structural engineering, software modelling,

conveyancing, accounting, and acoustic engineering. These expert witnesses filed thousands of pages of briefs of evidence before trial, some of which referred to exhibits which themselves comprised many thousands of pages. The trial generated over 5000 pages of transcribed notes of evidence and the electronic case comprised 50 gigabytes of data.

The judgment is prefaced by a summary of key outcomes which aims to assist the reader. That summary is also not part of the official judgment.

## **Part I — Introduction and legal issues**

Part I of the judgment:

- (a) Introduces the parties and their place in the proceeding (see [10]–[27]).
- (b) Provides a construction timeline (see [36]–[42]).
- (c) Outlines the various consents under the Building Act 1991 and Building Act 2004 (see [43]–[59]).
- (d) Summarises the 13 claimed defects (see [64]).
- (e) Makes observations on the factual evidence and the technical nature of the expert evidence (see [65]).
- (f) Adopts a practical working definition of what is a “defect” for the purposes of the judgment. It explains that the existence of a shortcoming or an error in an aspect of construction is only the first step in the requisite analysis. Just because a defect in this sense exists does not mean that the physical state of affairs is not compliant with the Building Code, against which it must ultimately be measured before the claimants can succeed in their claim (see [75]).
- (g) Describes the framework of the statutory obligations under the 1991 and 2004 Building Acts. It notes that the scheme of the legislation is that building work is to comply with the Building Code to achieve the purposes of the Act (see [76]).

- (h) Describes the deemed to comply route under the Building Code and discusses the extent to which full compliance with an approved document is required before there is deemed compliance with the Building Code (see [80]–[83]).
- (i) Refers to the well-established principle that councils owe a duty of care when performing their statutory functions and provides an overview of what that duty of care entails at each of the consent, inspection, and compliance stages, and summarises the principles of the scope of a duty of care (see [85]). It notes that common industry practice is not necessarily determinative of the standard of care to be applied (see [86]).
- (j) Finds that the Building Act 2004 re-emphasises the consent phase of the building control process but does not change the nature of the primary obligation which is to ensure compliance with the building consent issued *so as* to achieve compliance with the Building Code (see [92]).
- (k) Discusses the factors informing the extent of the duty of care owed by councils at the consent stage of the regulatory process and its relationship with the inspection and compliance stages, including the role of producer statements from third parties (see [95]–[107]).
- (l) On the question of standing of a Body Corporate to sue for building defects, determines that the Body Corporate is entitled to claim in respect of all claimed defects, bar claimed defect 13, because claimed defects 1–12 (if established) fall within the ambit of its responsibilities under s 138 of the Unit Titles Act 2010 in respect of common property or building elements or infrastructure relating to or serving more than one unit (see [108]–[141]). In respect of claimed defect 13, holds that the owners of units have standing to make a claim.
- (m) Finds that owners who purchased units and to whom the right to claim was assigned by the vendors had standing to make those claims which the Body Corporate could not make, despite Auckland Council’s objection (see [142]–[163]).

## **Part II — claimed fire defects**

Part II of the judgment determines the claimed fire defects. In a broad sense, the claimants complained of inadequate fire protection at Gore Street, falling short of the then Building Code. At the heart of this part of the case was whether the failure to build in accordance with the consented documents so reduced performance in the event of a fire that there was no assurance of compliance with the Building Code at the time of construction.

The four primary claimed fire defects are referred to in the judgment as claimed defects 1, 2, 3, and 7. They are described at [164]. (There is overlap with the claimed structural defects numbered 4 and 6 also). Paragraphs [166]–[176] describe the fire safety clauses of the Building Code at the time of construction of Gore Street, before turning to the experts called by each party (see [177]–[178]). The judgment provides context to the fire safety considerations at [179]–[201], observing that fire safety design is based on a holistic or multi-layered approach with the primary line of fire protection being the provision of sprinklers which detect and then act to suppress or control a growing fire (see [180]). It was not claimed that the sprinkler system was defective. Rather, the claims centred on the secondary levels of protection aimed at containing and preventing the spread of fire if the sprinklers fail or operate in a less than optimal way.

Paragraphs [184]–[195] discuss the Acceptable Solution and alternative solutions in fire safety before turning to a description of the fire safety aspects of penetrations in fire separation walls or floors.

At [202]–[208], the differences between the consented documentation for Gore Street and the as-built construction are identified, along with the parties said to be responsible for the difference and why they are said to be responsible.

A summary of the respective cases in a nutshell for each of the claimed fire defects follows at [209]–[223], followed by a description of the as-built state of affairs and an explanation of how that state of affairs came about (see [240]–[276]).

Next, the judgment analyses whether the physical condition of the steel beams and fire separation walls breached the Building Code at construction. This required consideration of the claimants' experts' fire modelling, Auckland Council's criticisms of that modelling and

outputs, and the respective experts' agreements and disagreements following expert caucusing (see [277]–[423]). Numerous complex and technical sub-issues are covered in this section.

The conclusions in respect of Building Code compliance and claimed defects 1 and 2 are found at [423]–[424]. The conclusions in relation to the adequacy of welds in the staircases (claimed defect 3) are discussed at [425]–[427] and the allegedly defective firestopping (claimed defect 7) at [428]–[449].

### *Who is liable?*

Whether Auckland Council breached its duty of care at any stage of the regulatory process and caused or materially contributed to the existence of the state of affairs in respect of the limited fire defects which were established is discussed at [452]–[509].

The claims against other defendants in respect of the alleged fire defects are discussed at [510]–[536].

A summary of the liability findings in relation to the claimed fire defects is found at [537]–[540]. The summary notes that the contractors deviated from the consented designs and plans in the construction of Gore Street but is no longer around to face the consequences. The claimants were left to seek recovery from the parties left standing.

### **Part III — earthquake defects**

Part III of the judgment determines the claimed earthquake defects. The claimants asserted that the structural elements were not designed and constructed to perform as they should in earthquake events and therefore fell short of the requirements of the then Building Code. It was said that if a significant earthquake occurred, there was a risk of structural failures, harm to occupants and significant damage to property. The specific claimed issues are described at [548].

The three claimed earthquake defects are referred to in the judgment as claimed defects 4, 5 and, 6 (see [545]). Relevant provisions of the Building Code are at [547].

At [549] the parties said by the claimants to be responsible in respect of each of the defects are identified along with the asserted reasons. A summary of the respective cases in a nutshell for each of the claimed earthquake defects follows at [553]–[566], followed by a description of the state of affairs at [567]–[581].

The judgment then analyses whether the claimed defects are actionable defects from [587]–[647] based on the expert evidence proffered by the respective parties. This section includes analysis of the modelling evidence relied on by the structural engineers. This section is followed by a description of how the relevant state of affairs came about and whether Auckland Council is responsible from [658]. The judgment canvasses the relevant consents from [660]–[680] in an assessment of whether the Council breached its duty of care by failing to ensure that the structural design for the staircases had been peer-reviewed (see [681]); whether the Council breached its duty of care in inspection and issue of the CCC in respect of the balustrade to column gaps (see [696]); and whether the Council breached its obligation to exercise reasonable care and skill by omitting to insert the condition of construction monitoring in relation to the grouting or bar sleeves and tendon ducts (see [701]).

#### *Who is liable?*

The question of whether the Council breached its duty of care in relation to claimed defect 4 is discussed at [691]–[695], subject to affirmative defences.

The question of whether the Council breached its duty of care in relation to defect 5 is discussed at [696]–[700].

The question of whether the Council breached its obligation in respect of defect 6 is discussed at [701]–[737].

A summary of key liability findings on claimed earthquake defects 4, 5, and 6, subject to affirmative defences, is at [738].

#### **Part IV — external moisture defects**

Part IV of the judgment determines the external moisture defects. These relate to the balconies, level 1 podium and level 3 canopy roof which are constructed with waterproofing membranes

that are intended to prevent moisture entry and direct water away from the building. The claimants said that there were inadequacies and deficiencies in the membrane application and the waterproofing and weathertightness of particular areas. There are four claimed defects in this part – defects 8 (balconies), 9 (column/beam junction), 10 (podium) and 11 (canopy roof).

They are described at [740] along with the key clauses of the Building Code and a description of the issues associated with claimed defects 8 and 9 at [745]–[748].

At [759], the parties said to be responsible and why are identified. The respective cases are set out at [764]–[771]. A summary of the state of affairs follows from [772]–[790] with an explanation of how the state of affairs came about from [863]–[870]. Whether claimed defects 8 and 9 are actionable is discussed from [791]–[849]. The claims against Mapei and Clark Brown are dealt with at [938] and [949] respectively.

Claimed defect 10 is explained at [953]. The issue and the claimed inadequacies of a liquid applied membrane are described from [960]–[963]. The “as built” state of affairs is discussed at [964]–[966]. Paragraphs [967]–[975] outline who was said to be responsible. The respective cases are distilled from [976]–[982] with a conclusion as to the actionability of the defect from [1001]–[1003]. How the relevant state of affairs came about and whether the Council is responsible is set out from [1004]–[1033].

The judgment then turns to the claim against Equus for defect 10 from [1034], noting the issues for determination at [1045], and concluding at [1079] that the claim against Equus in relation to claimed defect 10 had not been made out. The Council’s liability in relation to claimed defect 10 is set out at [1085]. Conclusions on the Council’s crossclaim against Equus, and the claims against Mapei and Clark Brown are set out at [1086], [1087], and [1091] respectively.

The final claimed external defect 11 is dealt with from [1101]. The asserted problem is described from [1105]–[1110] and the defendants said to be responsible are set out at [1111]–[1114]. The respective cases in a nutshell are laid out from [1115]–[1120] and the state of affairs including those matters the respective experts agreed are outlined at [1122]. Whether the defect was actionable is set out from [1123]–[1125].



The judgment then discusses liability in relation to claimed defect 11 by assessing Council responsibility from [1126], the role of Equus at [1136], and Clark Brown's liability from [1155].

*Who is liable?*

A summary of liability findings for defect 8 is at [929]–[930], [948], and [952]. A summary of liability findings and for defect 9 is at [937] and [952].

A summary in relation to claimed defect 10 is at [1097]–[1100].

Conclusions on liability in relation to defect 11 are at [1151], [1153], and [1157].

## **Part V — internal moisture defects**

Part V of the judgment determines the internal moisture defects. The claimed internal moisture defects are referred to as defects 12 and 13. These relate to the alleged lack of adequate waterproofing of the apartment bathrooms, more particularly junctions between baths and tiles and inadequate containment of water. The problem is outlined at [1182]. Those parties said to be responsible and the reasons why are set out at [1185]–[1190]. The judgment then describes the state of affairs at [1191] and the respective cases in a nutshell from [1195]. The judgment describes how the state of affairs came about from [1203].

At [1231]–[1244] the judgment discusses whether claimed defects 12 and 13 are actionable defects. The Council's alleged negligence at the inspection and/or CCC stage is discussed in relation to the bath edge detail, shower screen issues, and the floor and missing membrane from [1245]–[1259].

*Who is liable?*

A summary as to the Council's partial liability in relation to claimed defects 12 and 13 is from [1260]–[1264].

A summary of Clark Brown's and Mapei's liability is at [1266] and [1267] respectively.

## **Part VI — affirmative defences**

Part VI of the judgment determines the affirmative defences relied on by the defendants: the six year time bar under the Limitation Act 1950 for some claimed defects; the 10 year longstop limitation contained in both the 1991 and 2004 Building Acts; the contributory negligence/voluntary assumption of risk defences; and the alleged failure to mitigate on the part of the claimants.

Whether claimed defects 10 and 12 are barred under s 4 of the Limitation Act 1950 is discussed at [1268] and [1284] respectively. The Court's conclusions on the affirmative defence for defect 10 are found at [1238] and for defect 12 at [1294].

The judgment analyses the application of the ten year longstop limitation at [1295], in relation to claimed defects 1, 2, 3, 4, 6, 9, and 12. A summary of the contentions between the parties is at [1302]–[1305]. A survey of existing cases and the history of the provision is at [1312]–[1332]. The judgment then determines whether the ten year limitation blocks the claims at [1369]–[1383]. Equus' reliance on the defence is discussed at [1384] and Holmes' reliance on the defence is discussed at [1389].

The affirmative defence of contributory negligence/voluntary assumption of risk is discussed at [1391]–[1452]. The judgment identifies the legal principles relating to contributory negligence at [1401] and outlines the key issues in determining whether the claimants were contributorily negligent at [1414]. Each of these key issues is then addressed from [1416]–[1452].

The judgment describes the affirmative defence of alleged failure to mitigate at [1453]–[1459].

## **Part VII — remediation and quantum**

Part VII of the judgment explains why remediation and quantum cannot be determined in the light of the liability findings and the global approach to remedial scope taken by the claimants at [1462].

Despite the inability to determine quantum, guidance is provided as to the approach and provisional views on disputed issues are set out in the judgment to aid the parties to narrow the issues between them.

General principles are discussed at [1465] along with the remediation design and tender process (see [1468]), the anticipated work programme (see [1476]), and costings (see [1478]). The Brosnan tender, being the foundational document for the remedial costs claim and the admissibility challenges to it are discussed at [1492]–[1497].

Next, the judgment discusses a contingency factor (see [1498]), prolongation (see [1499]), and the impact of construction programme and cost escalation (see [1502]). The judgment then discusses the “as near as reasonably practicable” or ANARP approach and whether it is appropriate at [1502]. Whether the 272 fire doors should be remediated by replacement or by retrofitting seals is discussed at [1517].

The remedial scope for claimed defect 10 is discussed at [1519], and for claimed defect 11 at [1538] because those defects can be remediated in isolation, unlike the remainder of the project.

The judgment briefly discusses professional fees at [1552] before turning to consequential losses at [1553].

The claimants claimed consequential losses in the form of: loss of rental and alternative accommodation costs, moving and storage (see [1556]); construction noise (see [1559]); hotel lost profits (see [1580]); and diminution in value of units (see [1606]).

The claim to general damages for distress, anxiety and mental suffering is discussed at [1609].

Whether betterment has been established is discussed at [1618] and whether any defendants are entitled to contribution from any other defendant is outlined at [1630].

Finally, the treatment of Goods and Services Tax once a final determination of damages is resolved is discussed at [1631].

A summary of the key determined claims is provided at [1640]–[1648].