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Part A | Leaky buildings: A council class action in the making?

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Introduction

1. We are now on what may be called the "third wave leaky buildings". The first wave was the 1990s tide of leaking residential buildings, typically due to monolithic cladding installed without a cavity. In the 2000s came the second wave of leaking high rise residential and commercial buildings, particularly once the Supreme Court in *Spencer on Byron* concluded that the policies behind the Building Act 1991 did not justify distinguishing between duties of care owed by councils to owners of commercial versus residential property. Now we are well into the third wave, when repairs undertaken on defective buildings themselves fail and the buildings continue to leak or have other problems despite supposed compliance with the Building Act 2004 and the building code.

2. It seems endless. So how are building owners, councils and the construction sector responding? One response has been to recognise that it is not just faulty construction methodology that results in leaky buildings but potentially also the use of defective cladding products. Much attention has been paid to the fact that New Zealand imports a lot of the products that are used on buildings, including cladding components. The last 5 years have seen the beginning of actions (including class actions) against manufacturers and suppliers of cladding products.

3. This paper addresses, first, the potential liabilities of owners of buildings and others faced with a defective repair. Next, I will discuss some of the recent cases regarding allegedly substandard materials. Finally, I will address the practical questions of some ways to assist in ensuring that materials used in your construction (or remediation) project comply with the building code.

Liabilities of owners and councils faced with a defective repair

4. Generally, everyone involved with a defective repair has similar exposure to liability to that of the parties to the original construction. By and large, the obligations of architect, builder, council and developer are well known. For the purposes of this paper, I will focus on owners and councils.

5. Owners' exposure differs depending on whether they are building / purchasing properties for commercial purposes (e.g., to sell or to rent) or for residential purposes (to live in).

(a) Owners who build / renovate properties for a commercial purpose have been held to be developers with non-delegable duties of care at common law.

- This means they cannot rely on having delegated to consultants, contractors or subcontractors to avoid liability to third parties including people to whom they sell.[1]

- Similarly, while council negligence in inspections or certification may enable a developer to claim contribution or indemnity from the council, it will not provide a defence to the claims against the developer.[2]

(b) Residential owners who sell their properties after having performed work on them are typically not held to be developers:

- This means they do not have a non-delegable duty of care to subsequent purchasers.

- However, depending on their involvement in controlling the building process they may be held to have some duties of care arising out of the construction project.[3]

(c) Owners who are commercial on-sellers also have obligations under the Building Act. Sections 362H to K of the Building Act imply into a contract for on-sale of a residential unit various warranties on the part of the on-seller.

- An on-seller is a person who builds a household unit or arranges to have one built for the purposes of on-selling it, or purchases such a unit in trade. This is similar to the common law concept of developer.

- In this event, the contract of sale between the on-seller (developer) and the subsequent purchaser is taken to be a contract for the building work *already carried out or still to be carried out* on that residential unit.

- The contract of sale is taken to incorporate *as the obligations of the on-seller* the obligations of the building contractor under a residential building contract.

- Among other things, these include warranties that materials used will be fit for purpose (362I(1)(b)), that the building work will be carried out in accordance with applicable plans, specifications and consent documents (362I(1)(a)), and that the building work will comply with the Building Act and the building code (362I(1)(c)).

- The warranties are for 10 years and apply to contracts entered into on or after 1 January 2015 (for contracts prior to that, old sections 396-99 also set out warranties and continue to apply to all contracts entered into between 30 November 2004 and 1 January 2015).

- Section 362J expressly provides that any subsequent owner may take proceedings for breach of the warranties.

[1] *Morton v Douglas Homes Ltd* (No 2) [1984] 2 NZLR 620.
[2] *Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council* [2017] NZSC 190.
[3] See, e.g., *West v Perry* WHRS Claim No2368, 14/07/2006 at [12.8]; [12.27]; *Aldridge v Boe* HC Auckland CIV-2010-404-7805, 10/1/2012 at [81]-[82].

(1) You cannot contract out of the right of a purchaser to bring proceedings except to the extent that a breach of the warranties (i.e. the defective building work) is actually known (i.e. disclosed) to the purchaser or the purchaser reasonably should know of it at the time they entered into the Agreement for Sale and Purchase (**ASAP**) (362K).

(2) A commercial on-seller also commits an offence if it completes a sale of the household unit or allows a purchaser to enter into possession of the unit before a CCC is issued (362V). This is punishable by a fine of up to $200,000.

(d) The Building Act provisions are aimed at commercial owners / developers and are not designed to attract liability to people who build or acquire a residential unit *to live in themselves* but then happen to sell it some time later.

- However, this may not be a clear cut distinction in every case – what about person who acquires and renovates a flat for use of their children when at university and after that to on-sell? Each case will turn on its own facts.

(e) Owners who sell their residential properties may also have liabilities under their ASAP contractual warranties. These will apply to *all vendors* (developers or residential owners). The current (9th edition) of the REINZ / ADLS Agreement for Sale and Purchase of Real Estate includes warranties that:

- Where the vendor has done or caused or permitted to be done any works on the property:

  (1) Any permit, resource consent or building consent required by law was obtained;
  (2) To the vendor's knowledge, the works were completed in accordance with that permit or consent; and
  (3) Where appropriate, a code compliance certificate was issued for those works.

- The previous (8th) edition of this ASAP did not have the "knowledge" qualification as to compliance with consent. It also contained an additional warranty that all obligations under the Building Act 2004 were fully complied with.

- This was the subject of divergent decisions in the High Court as to whether the warranty simply applied to owners' obligations under the Building Act (e.g. to obtain consents) or more broadly meant owners warranted the building work complied in all respects with the Building Act (including weather-tightness obligations). The balance of authority favoured the more narrow interpretation;[4] however, presumably to remove uncertainty, the clause was removed from the present edition.

Weaver v HML Nominees Ltd[5]

- In *Weaver*, a residential owner undertook the recladding of a leaky home. The recladding had a cavity system and also involved attaching stone slips to the

[4] See discussion in *Saffioti v Ward* [2013] NZHC 2831.
[5] *Weaver v HML Nominees Ltd* [2015] NZHC 2080.

exterior cladding. The council issued CCC for the remediation. The owner subsequently sold the property.

- Although the leaking issue was remediated, the stone slips started cracking and delaminating. This was caused by a number of factors, including the substitution of an inferior product for the product specified in the consent. The Court found that the original owner / vendor was in breach of the ASAP warranty relating to compliance with consent conditions.

- The ASAP in question was the 8th edition which did not qualify the warranty of building consent compliance with the words "to the owner's knowledge". Since the Court was of the view that the owner did not actually know of the substitution, liability would not have been found under the current edition of the ASAP.

Comment

- The changes to the 9th edition of the ADLS ASAP ensure that vendor liability is limited to the obtaining of consent and CCC, and known failure to comply with consent conditions. At least in the residential owner context, this is consistent with the policies of the Building Act, which do not treat residential vendors as on-sellers.

- While the "to the owner's knowledge" qualification may encourage home owners who are concerned to avoid future liability to adopt a "hands off" approach towards such things as product substitutions when undertaking renovations, it is important to remember:

  (1) If you are a developer of the property, the Building Act warranties will be imported into your ASAP for a residential property; and

  (2) While residential home owners may not owe non-delegable duties of care in tort to subsequent purchasers, this does not mean they owe no duty of care at all. This is a fact specific inquiry and will depend on what they did or did not do in connection with the construction project.

(f) Owners of commercial leaky buildings also have obligations under health and safety legislation.

- Under the Health and Safety at Works Act a commercial property owner is a Person Conducting a Business or Undertaking (**PCBU**).[6]

- As a PCBU, the commercial owner has a duty of care to ensure, so far as reasonably practicable, the health and safety of everyone involved with or affected by work on or at the property.

- Leaky buildings can give rise to growth of mould that can have adverse health consequences to those exposed.

- Note obligations under the HSWA could also potentially arise for owners of a leaky building who have retained contractors to undertake remediation of areas in which there has been mould and mildew growth.

[6] Health and Safety at Works Act 2015, s 17.

6. Touching briefly on the obligations of councils as inspectors and certifiers:

(a) A council is a Building Consent Authority (BCA) under the Building Act and is responsible for:

- Issuing building consents;
- Inspecting building works for which the BCA has granted a consent;
- Issuing notices to fix;
- Issuing code compliance certificates; and
- Issuing compliance schedules for relevant buildings (generally non single-residence structures that are required to have certain safety systems).

(b) Section 14F of the 2004 Act provides:

> A building consent authority is responsible for—
> (a) checking, in accordance with the requirements of this Act for each type of building consent, to ensure that—
> (i) an application for a building consent complies with the building code:
> (ii) building work has been carried out in accordance with the building consent for that work:
> (b) issuing building consents and certificates in accordance with the requirements of this Act.

(c) These obligations complement the established common law duties of care on the part of councils to owners and subsequent purchasers in performing consent, inspection and certification roles.

> *Spencer on Byron* per McGrath and Chambers JJ:
>
> > The law of negligence stands behind [the statutory duty imposed under the Building Act and the building code] by providing compensation should the Council contribute to breaches of the building code through careless acts or omissions in supervising construction.[7]
>
> *Southland Indoor Leisure Centre Charitable Trust*:
>
> > The common law duty of care "marches in step with the statutory functions" Parliament imposed on local authorities and building certifiers.[8]

(d) At common law, it is well-established that councils have a non-delegable duty of care in conducting inspections and certifying.[9]

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[7] *Spencer on Byron* [2012] NZSC 83 at [162] per McGrath and Chambers JJ.
[8] Above n 2, *Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council* at [60].
[9] *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234; *Young v Tomlinson* [1979] 2 NZLR 441 and *North Shore City Council v Body Corporate 188529 (Sunset Terraces)* [2011] 2 NZLR 289.

(e) For the most part, the same is true for obligations under the Building Act. In *Southland Indoor Leisure Centre Charitable Trust*, the Supreme Court stated that, as a general principle:

> All of these functions [of councils under the Building Act], including the issuing of a code compliance certificate, are directed at ensuring buildings comply with the relevant building code. This means that the duty is not obviated by another party's negligence or knowledge.[10]

(f) It is common practice of councils to require and rely on producer statements:

- Historically, this was a process that was set up under the Building Act 1991.
- The Building Act 2004 does not expressly envisage the producer statement process. Nonetheless, courts have commented that it makes practical sense for councils to rely on independent expert verification.[11]
- Indeed, failure by the council to require a producer statement that the substituted product complied with the building consent was a basis for the finding that the council breached a duty of care in *Weaver v HML Nominees* [12]
- However, councils cannot just rely on a producer statement without further inquiry. The decision to use a producer statement must be reasonable in the circumstances and the extent to which a particular producer statement should be relied on will depend on the circumstances.[13]
- In *Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council*, the relevant producer statement was issued after CCC was given. However, the Supreme Court noted that on receiving a defective PS4, the council had not reassessed its issuance of CCC. The Supreme Court agreed with the trial court that the council should have checked to ensure full compliance with the building consent conditions and that the PS4 stating that the works were completed "generally" in accordance with the consent documentation warranted further inquiry.[14]
- Even though a producer statement may not provide a defence to councils, they may claim for contribution under the principles of negligent misstatement; or for breach of the Fair Trading Act.

    (1) In *Andrews Property Services Ltd v Body Corporate 160361* involving defective remediation arising from the use of an over-clad solution, the High Court apportioned liability between the council, contractor and consultant to the project.[15]

[10] Above n 2, *Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council* at [62].
[11] *Body Corporate 160361 v BC 2004 Ltd* [2015] NZHC 3079; *Andrews Property Services Ltd v Body Corporate 160361* [2016] NZCA 644, [2017] 2 NZLR 772.
[12] Above n 5, at [93]-[94] and [190].
[13] *Lee v Auckland City Council* [2016] NZHC 2377] at [41]; *Body Corporate 326421 v Auckland Council* [2015] NZHC 862 at [115].
[14] Above n 2, *Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council* at [75]-[76].
[15] Above n 11, *Body Corporate 160361 v BC 2004 Ltd*.

(2) The Court found that the council and the contractor Andrews Property Solutions (APS) were each liable for 20% of the loss and considered that the consultant was liable for the remaining 60% of loss. APS was also found liable for 20% of the council's liability on the basis of a breach under the Fair Trading Act 1986 (FTA).

(3) The Court of Appeal reversed the apportionment of liability (given that it had allowed part of the appeal by APS and granted leave for a cross appeal to be filed). However, it upheld the finding that APS was liable to the council for issuing a producer statement that was erroneous and misleading insofar as it certified that the Eterpan overcladding had been installed in a good, workmanlike manner.[16]

(g) Reliance on private certifiers / product certifiers

Private Certifiers

- The situation with respect to council reliance is different with respect to private certifiers. Under the 1991 Building Act, councils, as territorial authorities, were obliged to accept the certifications of properly accredited certifiers acting within the scope of their accreditation. This provided a defence to council liability.

- Problems frequently arose, however, where during the course of a project a private certifier lost some or all of its accreditation.[17]

- The 2004 Act also contemplates that private certifiers may be accredited as BCAs [sections 250-251].[18] However, largely due to inability to obtain insurance, MBIE advises there are currently no registered private BCAs.

- Product Certifiers

- The product certification regime is set up under the Building Act 2004. Sections 268-269 permit the proprietor of a building product or method to apply to an accredited certification body for certification of that product or method.

- Product certifications are different from producer statements, since BCAs (councils) are *required* to accept these statements as proof of compliance. Section 19(1)(d) of the Building Act 2004 requires BCAs to accept a current product certificate issued under section 269 as establishing code compliance, if every relevant condition in that product certificate is met.

- Accordingly, councils will be entitled to rely on a properly issued section 269 certificate as a defence. They will, however, need to satisfy themselves that all relevant conditions stated in the certificate are met.

[16] Above n 11, *Andrews Property Services Ltd v Body Corporate 160361*.
[17] *McNamara v Auckland City Council* [2012] NZSC 34, [2012] 3 NZLR 701.
[18] Private certifiers must first be accredited as a BCA by IANZ pursuant to the accreditation standards and criteria set out in the Building (Accreditation of Building Consent Authorities) Regulations 2006. Once accredited, the private body can apply to MBIE to become registered pursuant to the Building (Registration of Building Consent Authorities) Regulations 2007.

Latest developments in potential liability of manufacturers

7. Manufacturers and suppliers of ACP cladding will almost certainly face exposure in relation to claims arising from use of non-fire-rated ACP cladding in buildings.

8. Section 14G(2) of the Building Act 2004 (came into effect on 28 November 2013) provides that a product manufacturer or supplier is "responsible for ensuring that the product will, if installed in accordance with the technical data, plans, specifications and advice prescribed by the manufacturer, comply with the relevant provisions of the building code".

9. However, these obligations are only imposed on manufacturers or suppliers who state that their product will comply with the relevant provisions of the code (14G(1). Not every manufacturer / supplier (and very few foreign manufacturers / suppliers) makes such statements. It may be prudent to ask the supplier for a product technical statement which should include a statement as to what provisions of the code the product complies with. If they decline to provide one, BEWARE.

10. *Carter Holt Harvey Ltd v Minister of Education*[19]

    (a) The Minister of Education and various school boards had entered into contracts with construction companies to install Shadowclad, a cladding sheet product manufactured by Carter Holt Harvey (CHH), on numerous schools. It was alleged this product contributed to leaking. The Minister sued CHH alleging:

        - Negligent design, manufacture and / or supply of the defective cladding sheets and cladding systems;
        - Negligent misstatement in promotional materials;
        - Breach of the guarantees in sections 6, 9 and 13 of the Consumer Guarantees Act 1993 (CGA); and
        - Breach of section 9 of the Fair Trading Act by providing misleading or deceptive information relating to the nature, characteristics and suitability of these cladding products.

    (b) CHH sought to strike out the claims against it, failing in the High Court and Court of Appeal, except for the negligent misstatement claims. Both sides appealed to the Supreme Court.

    (c) The Minister's fundamental allegations were that the cladding products contained inherent defects that caused damage to the buildings on which they were installed and promoted growth of mould of a kind that was harmful to health:

    (d) It was alleged that Shadowclad was inherently defective due to:

        - Substandard preservative treatment;
        - Cladding sheets inherently prone to absorbing moisture;

[19] [2016] NZSC 95.

- Aspects of cladding system allowed moisture to penetrate behind cladding sheets.

(e) The Supreme Court refused to dismiss the claims against CHH on basis that there was an arguable case that a cladding manufacturer owed duty of care to purchasers of buildings with defective cladding. Accordingly, this was a matter that should be determined at trial.[20]

(f) The Supreme Court also reinstated the negligent misstatement claims against CHH which were also to be determined at trial.[21]

(g) Further, the Court determined that Building Act longstop provisions did not apply to claims against manufacturers of cladding because they were suppliers of building materials / products as opposed to undertaking building work in relation to a particular building.[22]

- Note that for claims that arose after 1 Jan 2011, the 15 year longstop limitation period of the Limitation Act 2010 will apply.

- Query how this decision will apply to:

  (1) Prefabricated building components (such as cladding);
  (2) Prefabricated pods – where whole self-contained modules that form part of a building are prefabricated; and
  (3) Prefabricated buildings?

- Where a whole building is prefabricated, it would seem strange to treat it as simply a "product" and not building work. But given the multiple options for prefabrication today it may be hard to distinguish between what is a product that is supplied for use in a building and what is actual "building work".

11. *Cridge v Studorp*[23]

(a) The High Court certified a product liability claim against James Hardie New Zealand Limited as a class action.

(b) The plaintiff owners of leaky homes clad with JH cladding alleged there were inherent defects in the products such that they were bound to cause water ingress and could not be installed in real world conditions in a manner so as to avoid that.

(c) The proposed class was owners and previous owners who had already consented to being represented or who in the future elected to opt in.

(d) Issues certified were:

- Whether JH owed the owners a duty of care in tort

- Whether JH had breached that duty

[20] *Carter Holt Harvey v Minister of Education* [2016] NZSC 95 at [56]; [72].
[21] At [85].
[22] At [129] – [131].
[23] [2017] NZCA 376.

- Whether statements made in JH technical literature were misleading and deceptive for the purposes of the Fair Trading Act

(e) JH appealed the certification, arguing that the inherent defects pleaded all involved issues of degree and that in any building the performance of cladding will be dependent on a large number of different factors specific to that building (para [14]).

(f) The Court of Appeal rejected this argument:

- The Court held that "[a]lthough manufacturers have been held to owe a duty of care to consumers ever since Donoghue v Stevenson, there has never been a concluded claim in New Zealand for pure economic loss against a cladding manufacturer. To that extent but to that extent only, the duty pleaded is a novel one" (at [27]).

- The Court also observed that the *Carter Holt Harvey* Supreme Court decision made clear that the key proximity and policy considerations that should inform the duty question are of a general nature and not peculiar to the individual parties (at [29]).

- The Court of Appeal considered the issues of breach could also be determined by reference to a common factual matrix – what JH knew, did, or omitted to do leading up to and following the release of the relevant products into the market place (at [32]).

- Finally, the Court was of the view that whether or not particular statements in JH's technical literature were deceptive or misleading was also amenable to being decided as a common issue (at [35]).

(g) Of course, issues of reliance and causation would need to be separately decided on a case by case basis.

(h) On limitation, the Court of Appeal found:

- The cause of action should be treated as having been interposed for limitation purposes at the time class action is filed, regardless of whether the proceeding is judicially allowed to continue on a representative basis.

- When time stops running for the representative owners, it also stops for everyone else on whose behalf they are purporting to act, regardless of whether a representative order is made or not (at [83] – [86]).

(i) Studorp and JH applied to appeal the Court of Appeal decision to the Supreme Court. The Supreme Court dismissed the application.[24]

12. Potential consequences of these cases

(a) So far, these issues have arisen in the early stages of proceedings (strike out; class certification). To date there has been no concluded trial. So judgment is still out.

[24] *Studorp Ltd v Cridge* [2017] NZSC 178.

(b) However, for cladding and other building product manufacturers, there is the potential for:

- Liability for up to 15 years
- Potential finding of breach of duty of care to large classes of plaintiffs.

(c) We are unlikely to see a tide of class actions against other categories of defendant – councils, builders or architects.

- Duties of care have already been broadly established for builders / councils / architects with respect to owners and subsequent purchasers and there is no need for a class action to clarify this further.
- In the case of the provider of a service, the question of breach is almost certainly going to be fact specific to the project in question.

(d) So, it is unlikely that councils will drown under class action claims. However, what is likely is that councils and plaintiffs will increasingly look to well-heeled manufacturers and suppliers for contribution to the costs of remediation. Such claims will be particularly attractive since (unlike builders or councils) manufacturers and suppliers will not get the benefit of the 10 year longstop provisions of the Building Act.

(e) However, if JH or any other cladding manufacturer is found to have provided a substandard product that cannot be installed in a manner that will satisfy the building code, there may be implications for councils who have issued Code Compliance Certificates and for builders and on-sellers under the implied warranties of the Building Act in relation to residential properties.

Risks of using substandard products and how to mitigate this

13. The risks of using substandard products are clear from the previous discussion. Specifically:

(a) Breach of implied warranties under the Building Act in relation to residential units;

(b) Breach of duties of care at common law;

(c) Depending on the knowledge of the owner, liability under ASAP warranties.

14. So how does a home owner, developer or a builder protect themselves against this?

(a) This is particularly problematic since much of what goes into a building is imported – from steel, to cladding to window glass and much more.

(b) Moreover, compliance with foreign standards does not necessarily mean compliance with NZ standards – they may be different.

15. One method is to use products certified as code-compliant under sections 268-269 of the Building Act 2004.

(a) As noted above, this is a voluntary certification scheme, under which a manufacturer / supplier of a product applies to an accredited certification body for certification of that product or method as complying with certain specified clauses of the building code.

(b) In New Zealand, accredited certification is provided through CodeMark. CodeMark is a trans-Tasman product certification scheme operating under MBIE. Manufacturers can apply to CodeMark to have a product certified as meeting the requirements of the New Zealand building code in accordance with sections 268-269 of the Building Act.

- MBIE promotes accreditation as providing a marketing advantage to manufacturers by providing assurance to consumers that a product complies with the building code.
- Certified products are listed on MBIE's product register.
- CodeMark certificates are issued by accredited product certification bodies (APCs) on behalf of CodeMark. APCs must follow the CodeMark Scheme Rules when certifying products.
- Note that MBIE limits its liability by an express statement on each certificate:

  "MBIE disclaims, to the extent permitted by law, all liability (including negligence) for claims of losses, expenses, damages, and costs arising as a result of the use of the building method(s) or product(s) referred to in this certificate."

- However, APCs could potentially be subject to claims in negligence if they do not adhere to the CodeMark Scheme Rules or are negligent in carrying out product certification and issuing CodeMark certificates.
- CodeMark certificates do NOT remove the need for building consent or building consent authority inspections during the building process.

(c) It is important to check the register to ensure that CodeMark certificates are current and read them carefully to see precisely what product is being certified and for which performance standards under the building code.

- CodeMark certificates only certify the specific product(s) mentioned in relation to the specific provisions of the building code noted on the certificate.
- Not all products of a manufacturer are necessarily certified.
- The products that are certified may only be certified in relation to some of the building code provisions.
- There may be limitations noted on the certificate.

16. By way of example, is the following comparison of two CodeMark certified cladding products (certificates available on MBIE register and attached to this paper):[25]

(a) Example 1: Certificate of Conformity for the Symonite Cladding System (Reynobond FR):

- The certification states: *If designed, installed and maintained in accordance with the purpose, use, scope and conditions of this certificate, Symonite Cladding System (Reynobond FR) will contribute to compliance with:*
- *E2.3.2, E2.3.5 and E2.3.7 (a, b, c)*.

- E2 of course is the part of the building code that address external moisture. You will see that very specific sub-clauses of E2 are referred to.

- The certificate also spells out *Product Purpose or Use* stating that the system is *intended for use as a drained and vented external wall cladding or an open rainscreen external cladding system for buildings*; describes what categories of building the certification is intended to apply to; sets out the maximum wind pressures for weathertightness design; and specifies that the cavity must be *drained and ventilated at least at every second-floor level or 10m height, whichever is the lesser.*

- The certificate also spells out the conditions to which the certification is subject, including installation by an installer approved by Symonite Panels Ltd (**SPL**).

(b) Example 2: Symonite (Alubond) Cladding Systems and covers Alubond, Alubond FRB1 and Alubond FRA2:

- The certification provides that the Alubond systems comply with NZBC External Moisture: E2.3.2, E2.3.3 and E2.3.5.

- The certification is subject to stated conditions relating to SPL oversight and approval of all components of the design, fabrication and installation of the cladding, preparation of shop drawings by SPL and installation by a tradesperson trained by SPL.

(c) Comparison: It is immediately apparent that there are differences between the certifications of these products:

- The sub-clauses of E2 for which they are certified are not identical.

- While Alubond is stated to "comply" with the pertinent code requirements, Reynobond is only stated to "contribute to compliance".

- There are different qualifications and conditions stated in the certificates.

[25] These were selected at random, but from the same manufacturer / supplier so as not to give rise to any implication that the products of one manufacturer might be preferred over another; a determination which the author is obviously not qualified to make. The purpose of these examples is merely to highlight the need to read CodeMark certificates carefully so as to understand their scope.

(d) Obviously, these certifications provide a useful starting point in seeing if the panels are comparable. However, given the differences, a lay person would be prudent to consult with SPL and /or a cladding engineer.

(e) MBIE provides some useful guidance documents including:

- Product Assurance Decision tool at: https://www.building.govt.nz/building-code-compliance/product-assurance-and-multiproof/product-assurance/products-and-building-code-compliance/product-assurance-decision-tool/

- Pathway to Compliance table at: https://www.building.govt.nz/building-code-compliance/product-assurance-and-multiproof/pathways-to-compliance/codemark-and-multiproof/

17. A major problem, however, is that contractors are frequently permitted to substitute materials with equivalents – as happened in *Weaver v HML Nominees Ltd* discussed above.[26]

(a) One way to control this is to have a contractual provision forbidding product substitutions.

- Alternatively, you could have a clause requiring:

(1) That any substituted product must have equivalent certification and comply with the building consent, the Building Act and the building code, and

(2) The contractor must obtain confirmation of this from the manufacturer / supplier, and

(3) The contractor must obtain approval of the substitution from the Engineer to the Contract / pertinent consultant and, where it affects building consent, the Building Consent Authority.

(b) Following the above process is important because even with CodeMark certified products, it is not always clear whether one is an appropriate substitute for the other. In the examples discussed above, any proposed substitution of one for the other would, at a minimum, need to be confirmed as appropriate by SPL and approved by the Building Consent Authority. You need to have the contractual mechanisms in place in order to ensure this is done.

(c) Again, MBIE provides a useful guidance document on product substitutions at: https://www.building.govt.nz/building-code-compliance/product-assurance-and-multiproof/product-assurance/guide-to-product-substitution/

Concluding Comments

18. For the most part councils and residential owners do not face greater exposure to liability to future purchasers for defective building / remediation than they did a decade ago. Indeed, the 2012 edition of the ADLS ASAP reigns in owner-vendors' potential exposure for breach of warranty. Although not wholly free from risk of liability to subsequent purchasers, residential

[26] Above n 5.

owners neither owe non-delegable duties of care at common law nor are on-sellers with implied warranties under the Building Act.

19. For commercial owners / developers who have undertaken building works on residential properties, however, the principle of caveat emptor has been turned on its head. It is truly now a case of vendor beware!

20. For councils, long-established duties have not changed – we can expect to see increased insistence on producer statements and reliance (where possible) on product certification.

21. For all the traditional parties in a leaky building proceeding, the prospect of adding cladding manufacturers into the defendant space is one that will undoubtedly be watched closely as the first test cases work their way through the courts.

22. And if any product liability case is successful in achieving a holding that a particular cladding product is inherently defective such that it cannot comply with the building code, there may well be a tsunami of claims against councils who have certified buildings clad with such products as code compliant.

Hesketh Henry

CERTIFICATE OF CONFORMITY

CODEMARK™

CertMark New Zealand

This is to certify that

Symonite (Alubond) Cladding Systems

Product Description

Aluminium Composite Panel consisting of 2 skins of aluminium sandwiching a proprietary core.

Products:

- Alubond
- Alubond FRB1
- Alubond FRA2

Product Purpose or Use

External decorative wall cladding for timber frame or timber frame infill construction used as partial or complete cladding system.

Certificate Holder

Symonite Panels Limited
24G Allright Place, Mt Wellington
PO Box 124000, Penrose, Auckland
Ph: 09 570 7077 | Fax: 09 574 6910
www.symonite.co.nz

CodeMark Certification Body

CertMark Australasia Ltd
(ACN 154 306 804)
JAS-ANZ Accreditation No. Z4450210AK
PO Box 231 Tuakau NZ 2121
www.certmark.co.nz

Complies with the Building Code of New Zealand:

1. NZBC Structure: B1.3.1, B1.3.2 and B1.3.4
2. NZBC Durability: B2.3.1(b)
3. NZBC External Moisture: E2.3.2, E2.3.3 & E2.3.5
4. NZBC Hazardous Building materials: F2.3.1

Alubond FRB1 and Alubond FRA2 also comply with:

1. NZBC Protection from Fire: C3.5, C3.7(a), (b) and (c)
2. NZBC Protection from Fire: 5.8 C/AS1 – C/AS7 (Acceptable Solution)

Subject to the following conditions and limitations:

1. This certificate provides third parties with compliance to NZBC Clauses and standards specified within this certificate, provided that all components of design, fabrication and installation are overseen and approved by Symonite Panels Limited.
2. Design is where Symonite Panels Limited develop project specific shop drawings. These shop drawings are produced from architectural concepts from which a building consent has been issued.
3. Only to be installed by a suitably qualified tradesperson trained by Symonite specifically to install Symonite Alubond Cladding Systems.

John Thorpe
Director
CertMark Australasia Pty Ltd

21/08/2013
Date of issue

CMA-CM40094
Certificate Number

JAS-ANZ

MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT

- This certificate is issued by an independent certification body accredited by the product certification accreditation body appointed by the Chief Executive of the Ministry of Business, Innovation & Employment (MBIE) under the Building Act 2004. MBIE does not in any way warrant, guarantee, or represent that the building method or product the subject of this certificate conforms to the New Zealand Building Code, nor accept any liability arising out of the use of the building method or product. MBIE disclaims, to the extent permitted by law, all liability (including negligence) for claims of losses, expenses, damages, and costs arising as a result of the use of the building method(s) or product(s) referred to in this certificate.
- It is advised to check that this Certificate of Conformity is currently valid and not withdrawn, suspended or superseded by a later issue by referring to the MBIE website. http://www.mbie.govt.nz/
- This certificate may only be reproduced in its entirety

Hesketh Henry

CERTIFICATE OF CONFORMITY

This is to certify that

Symonite Panels Limited
Symonite Cladding System (Reynobond FR)

CertMark International

CODEMARK™

Product Description

The Symonite Cladding System (Reynobond FR) is an external cladding system incorporating: Reynobond FR panel: 4mm aluminium composite panel (ACP), comprising a 3mm fire resistant core, sandwiched between 0.5mm Aluminium layers.

Certificate Holder

Symonite Panels Limited
NZBN: 9429030078437
72 Ellice Road, Wairau Valley, Glenfield
PO Box 101 760, North Shore 0745
Auckland, NZ
Ph: 09 443 3896
W: www.symonite.co.nz

Certification Body

CertMark International Pty Ltd
ABN: 80 111 217 568
JAS-ANZ Accreditation No. Z4450210AK
PO Box 321 Tuakau 2121
+64 (09) 951 8246
www.CertMark.org

Complies with the New Zealand Building Code:
If designed, installed and maintained in accordance with the purpose, use, scope and conditions of this Certificate, the Symonite Cladding System (Reynobond FR) will comply with:

1. B1.3.1, B1.3.2, B1.3.3 (a), (f) (h) and (q) and B1.3.4.
2. B2.3.1 (b).
3. C3.4 (a)
4. C3.5 and C3.7 (b) and (c)
5. F2.3.1, F2.3.3(a) and (b)

If designed, installed and maintained in accordance with the purpose, use, scope and conditions of this certificate, Symonite Cladding System (Reynobond FR) will contribute to compliance with:

1. E2.3.2, E2.3.5 and E2.3.7 (a, b, c)

Product Purpose or Use
The Symonite Cladding System is intended for use as a non-load bearing, internal lining or external cladding system on new and existing buildings.

a. The Symonite Cladding System is intended for use as a drained and vented external wall cladding or an open rainscreen external cladding system for buildings with the following scope:
   - Buildings of importance level 1 to 5 as described by AS/NZS 1170 suite of standards, except that housing and communal residential buildings that fall within the scope limitations of NZBC Acceptable Solution E2/AS1, Paragraph 1.1 are excluded; and
   - Constructed with timber framing, or timber framing infill complying with the NZBC, this does not limit the panel being fixed to steel framing, concrete or concrete masonry.
   - Subject to maximum wind pressures for weathertightness design of 2.5 kPa Ultimate Limit State (ULS); and
   - Where the cavity is drained and ventilated at least at every second-floor level or 10m height, whichever is the lesser.
b. Compliance with clause B1.3.1, B1.3.2 and B1.3.3 for the cladding system as a building element is subject to the fixing system and sub-frame where:
   - Specification of the Symonite Cladding System (Reynobond FR) including the selection system must be in accordance with the Symonite "Specify Now" documents (version September 2015). Available on www.symonite.co.nz
   - All aluminium components must be kept out of contact with treated timber where Copper is one of the reagents of the treatment protocol.
c. The compliance with B2.3.1 (b) for a 15-year period is only valid where the duragloss coating is applied.
d. The compliance with C3.4(a) is applicable where a Group 1-S rating is permitted.

The Art of Law

e. The compliance with C3.5 and C3.7 (b) and (c) includes buildings greater than 10m in height and less than 1m in distance to the boundary provided the building is designed by a suitably qualified engineer in accordance with AS/NZS 1170 suite of standards.
f. The compliance requirements of the wall the cladding is attached to is outside the scope of this certificate including fire resistance, acoustics and energy efficiency.

Subject to the following Conditions & Limitations:

a. The certificate holder must maintain compliance with the conditions set out in Section 15 of the Building (Product Certification) Regulations 2008.
b. The Symonite Cladding System (Reynobond FR) must be installed by an installer approved by Symonite Panels Ltd.
c. The wall structure to which the cladding system is to be installed must be able to support the intended building work as designed by suitably qualified engineers and be subjected to wind loads not exceeding ULS 2.5kPa. Supporting substrates may be timber or steel framing, concrete or concrete masonry.
d. The product is to be mechanically fixed to the wall sub-structure with approved Symonite fixing systems being "Rout and Return (1-2 Levels), WAB Extrusion System (2+ Levels) or Open Joint (Hook and Pin)".
e. Details available on www.symonite.co.nz

John Thorpe
CertMark International Pty Ltd

13/07/2014
Date of Issue

CMA-CM40111-I02-R03
Certificate Number
Renewed 13/07/2017
Revision September 2017