IN THE COURT OF APPEAL OF NEW ZEALAND

CA139/2013
CA350/2013
[2013] NZCA 662

BETWEEN	ROSS WAYNE JOHNSON, LINDA JEAN JOHNSON AND FIRST INVESTMENT TRUSTEES LIMITED Appellants
AND	AUCKLAND COUNCIL Respondent

Hearing:	31 July and 1 August 2013
Court:	O'Regan P, Ellen France and Asher JJ
Counsel:	G M Illingworth QC, G B Lewis and L V Chapman for Appellants S A Thodey and K M Parker for Respondent
Judgment:	18 December 2013 at 10.30 am

JUDGMENT OF THE COURT

A The appeal is allowed in part. The judgment in favour of the appellants that the respondent pay damages based on the difference between the purchase price and the market value of the property in its affected state at the date of purchase less 70 per cent for contributory negligence plus interest is set aside. The appellants are entitled to damages calculated on the basis of the cost of repairs less 40 per cent plus interest. The proceeding is remitted to the High Court for determination of quantum in light of the findings of liability as modified by this judgment.

B The decision to dismiss the appellants' claim for costs in the High Court is quashed. In its place, we make an order awarding the appellants 50 per cent of their costs in that Court on a 2B basis and usual

disbursements. Any issues about the calculation of these costs are to be dealt with in the High Court.

C The respondent must pay the appellants costs in this Court for a standard appeal on a band A basis and usual disbursements. We certify for second counsel.

REASONS OF THE COURT

(Given by Ellen France J)

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A leaky home purchase

[1] In April 2009 the appellants, Ross Johnson and Linda Johnson, bought a house to be occupied as a home for the couple and their children. Some years earlier substantial alterations had been made to the house. It is common ground that this work was defective and as a result the house was not weathertight.

[2] Mr and Mrs Johnson sued the respondent, Auckland Council, for the cost of repairs and other sums on the basis the Council was negligent in carrying out its functions under the Building Act 1991. The Council admitted it was negligent in not taking reasonable steps to identify the defects in the alteration work and, in issuing a code compliance certificate, to ensure that the alterations complied with the building code.[1] However, the Council said that Mr and Mrs Johnson's own negligent conduct contributed to their loss.

[3] The claim was heard in the High Court by Woodhouse J. The Judge agreed with the Council that Mr and Mrs Johnson's own negligence had contributed to their loss.[2] In particular, Woodhouse J found that the just and equitable reduction of the damages otherwise recoverable by Mr and Mrs Johnson was 70 per cent. In determining the quantum, the Judge said that the measure of the Johnsons' loss was the difference between the price Mr and Mrs Johnson paid for the house and the market value of the property in its defective state and not, as contended for by the Johnsons, the cost of repairs. Mr and Mrs Johnson were also awarded $10,000 by way of general damages. The Judge later declined to make a costs award.[3]

[4] Mr and Mrs Johnson appeal. The issues raised by their appeal can be dealt with under the following headings:

(a) Did the Judge correctly approach the issue of contributory negligence?

(b) If not, what allowance (if any) should be made for contributory negligence?

(c) What is the correct measure of loss?

(d) Did the Judge correctly approach the assessment of general damages?

(e) Did the Judge correctly approach the question of costs?

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1 The building code is contained in the Building Regulations 1992, sch 1.
2 *Johnson v Auckland Council* [2013] NZHC 165.
3 *Johnson v Auckland Council* [2013] NZHC 1148.

[5] We deal with each of these issues in turn after setting out the factual background and summarising the judgment in the High Court.

The factual narrative

[6] The house Mr and Mrs Johnson purchased is at 18 O'Neills Avenue in Takapuna. It is close to the beach just off what is called the "Golden Mile".

[7] The house was originally one storey and of brick and weatherboard construction. In June 1998, the then owner of the property obtained a building consent from the North Shore City Council, the predecessor of Auckland Council. The building consent was to carry out work described as "extra rooms upstairs & underground basement". The value of the work as stated in the consent was $210,000. Alterations were undertaken over a number of years from 1999.

[8] On 20 August 2004, a Council inspector undertook a final inspection of the property. A code compliance certificate was issued by North Shore City Council on 30 August 2004.[4]

[9] In March 2009 the mortgagee of the property (a bank) exercised its power of sale. Mr and Mrs Johnson knew of the house. They lived nearby and had been interested in buying the house some years earlier.

[10] Mrs Johnson went to three open homes of the property. On one of these occasions, Mr Johnson went with her. At the third of the open homes, on 29 March 2009, Mrs Johnson was accompanied by a project manager friend (and former builder), Stephen Johnston.

[11] Mr and Mrs Johnson liked the property although Mrs Johnson thought it would need interior renovation. They instructed solicitors to advise them and, on 1 April 2009, put in a tender for the property. Their tender in the sum of $3,910,000 was accepted. On 28 April 2009 Mr and Mrs Johnson took possession of the property although they did not move into the house.

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[4] The respondent, Auckland Council, is the successor of the North Shore City Council.

[12] Just prior to settlement, a company named Leak Scan Infrared Solutions Ltd contacted Mrs Johnson advising that she engage it to carry out checks before they painted the house. On the day after settlement Leak Scan visited the house and provided a proposal to the Johnsons to investigate leaks.

[13] In May 2009, Mr and Mrs Johnson engaged Citywide Building Consultants (NZ) Ltd to assess the property. They produced reports dated May and June 2009. These reports led to Mr and Mrs Johnson engaging CoveKinloch Consulting Ltd, building surveyors, to investigate the property in August and October 2009. As a result, significant building defects were identified and CoveKinloch recommended a full re-cladding of the property. Mr and Mrs Johnson employed a company called Santa Barbara Homes Ltd to project manage the remedial work to the exterior of the property, including a full re-clad, in February 2010.

[14] This proceeding was issued on 15 February 2010 claiming against the Council in negligence. The Council initially denied duty and breach. It later joined Stephen Johnston as a third party.

[15] An architect was engaged by the Johnsons in early 2010 to prepare designs for the remedial work. In May 2010, Mr and Mrs Johnson applied to the Council for a building consent for the remedial work. They engaged quantity surveyors in May 2010 and those surveyors provided an estimate of costs for the remedial works in the sum of $1,912,500. The Council issued a building consent for the remedial works on 23 December 2010. Those works commenced in January 2011 and at the same time Mr and Mrs Johnson undertook extensive internal renovations.

[16] On 16 May 2012 the quantum experts for the parties submitted a joint memorandum to the Council recording their agreement that the cost of the remedial works was $1,925,000 subject to further deductions proposed by the Council's expert for internal painting ($29,333), roofing ($24,573) and labour ($200,000).

[17] In its amended statement of defence of May 2012, the Council admitted the existence of building defects, that it owed a duty of care and that it breached that duty by failing to identify the defects and by issuing a code compliance certificate.

The judgment in the High Court

[18] The Judge was required at the outset to make factual findings on some issues that are no longer in dispute. We note two of these findings because they provide part of the context. First, Woodhouse J rejected the claim that Stephen Johnston, who went with Mrs Johnson to the last of the three open homes, had been engaged by the Johnsons to provide an opinion as to the quality of the work. Instead, the Judge accepted Stephen Johnston's evidence that he was there as a "'sounding board' for ideas".[5] Secondly, Mrs Johnson in her evidence said that there had been a representation as to weathertightness from the real estate agent, Nicola White. The Judge did not accept that.

[19] The Judge said that he preferred the evidence of Stephen Johnston and Nicola White on the central issues over that of Mrs Johnson, who was the principal witness for the appellants on these matters. The Judge set out his reasons for his conclusions in a careful and comprehensive way.

[20] Woodhouse J then dealt with whether this was a case of contributory negligence. We come back later to the detail of the reasoning for the conclusion that the loss suffered was as a result partly of Mr and Mrs Johnsons' own fault and partly as a result of the Council's fault. At this point we simply note that the Judge found that Mr and Mrs Johnson were "alert to the possibility that the house might be a leaky home" before they committed themselves to buy the property,[6] that there were other steps a prudent purchaser would have taken and that the failure to take those steps had contributed to the loss. As we shall also discuss in more detail shortly, for a number of reasons the Judge considered that, unlike other cases, the code compliance certificate by itself in this case could not provide complete assurance.

[21] Turning then to the measure of the loss, the Judge found that the "heart" of Mr and Mrs Johnson's complaint was that the code compliance certificate should not have been issued.[7] He said that "[i]n practical terms [Mr and Mrs Johnson] say that the code compliance certificate amounted to a representation to them that the house

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5 At [53].
6 At [131].
7 At [150].

had been built properly".[8] That led the Judge to conclude that the measure of damages was the difference between the price paid by Mr and Mrs Johnson and the actual value of the property in its true condition and not, as contended for by the Johnsons, the cost of repairs.

[22] After considering the evidence as to valuation, Woodhouse J concluded that the total loss was the difference between the purchase price of $3,910,000 plus any legal and other expenses and the sum of $2,675,000.[9] The sum recoverable by Mr and Mrs Johnson from the Council was 30 per cent of that figure. Absent any evidence of additional direct costs of purchase, that meant the recoverable sum was $370,500.

[23] As to the other claims made by Mr and Mrs Johnson, for these purposes we need only note that the Judge gave judgment for Mr and Mrs Johnson jointly in a total sum of $10,000 for general damages.

[24] We turn to the first of the issues raised on appeal, namely, the approach to contributory negligence.

Approach to contributory negligence

[25] There is no dispute that it is possible for Mr and Mrs Johnson to have contributed to their loss by their negligence. That is the case even though the Johnsons relied on the code compliance certificate which the Council accepts it was negligent in issuing.[10] The parties also agree that the inquiry is an objective one. Where the parties take issue is over whether Mr and Mrs Johnson were "alert" to watertightness problems and so were aware of the need to make further inquiries.

[26] In summary, the appellants dispute that Mr and Mrs Johnson's actions had either any causal potency or that they were blameworthy. They say that the Judge was factually incorrect on some key matters. They also argue that the Judge has

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8 At [150].
9 At [184].
10 See *North Shore City Council v Body Corporate 188529* [2010] NZSC 158, [2011] 2 NZLR 289 [*Sunset Terraces and Byron Avenue*] at [42], [61] and [79]–[84] per Blanchard, Tipping, McGrath and Anderson JJ.

taken into account various matters that are irrelevant to the inquiry including the subjective views of Mr and Mrs Johnson.

[27] In response, the Council says that the Johnsons had knowledge of the prospective risks and went ahead without taking the steps that a reasonably prudent purchaser would take in those circumstances. The Council says that while the test is an objective one, the Judge has not erred in taking into account what Mr and Mrs Johnson knew.

[28] We start with a consideration of the appellants' challenge to the Judge's findings that the code compliance certificate did not provide the usual assurance in this case. We interpolate here that there was some debate in the course of the hearing about the approach to be taken on appeal. As the appellants are exercising a general right of appeal, they are entitled to judgment in accordance with the opinion of this Court.[11] We do however need to keep in mind that some of the Judge's findings turn on assessments as to the credibility of a witness where those assessments were important.[12]

The scope of work covered by the code compliance certificate

[29] Woodhouse J found that the code compliance certificate was not the complete answer because it related to only a small part of the work that had been done. In particular, the Judge said that the entire house had been re-clad but the code compliance certificate did not cover the re-cladding. It followed from this, the Judge found, that the additional steps that could and should have been taken by Mr and Mrs Johnson included inspection of the Council records because that would have revealed the shortcomings of the code compliance certificate.

[30] We agree with the appellants that the Judge was wrong as to the scope of the work covered by the code compliance certificate. The certificate relates to the building consent issued in June 1998. The certificate records the project as

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11 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.
12 See *Austin, Nichols*, above n 11, at [5].

"Alterations and/or Additions" with a value of $210,000. However, the certificate states that it is issued:

> in respect of all of the building work under the ... building consent. The council is satisfied on reasonable grounds that work complies with the building consent on the basis of the council's inspection records.

[31] On an examination of the consented plans that form part of the building consent application, it is plain that the works consented to include the re-cladding. There is no dispute that, as Andrew Gray (a building surveyor who gave evidence on behalf of Mr and Mrs Johnson) said, the consent was issued on the basis of the plans and specifications submitted with the building consent application. The plans refer to the re-cladding.

[32] It seems that the confusion over the scope of the work covered by the certificate may have arisen because of an abbreviation in part of the description of the work given by Mr Gray in his brief of evidence. He said that the Council had issued a building consent "for the addition of extra rooms upstairs and an underground basement". Mr Gray went on to note that over the period from November 1999 until August 2004 "extensive" building works were undertaken at the property. He said that these works included:[13]

> the construction of additional rooms upstairs and at ground level and *a reclad of the entire property*. Although these works were more substantial than those originally provided for in the consent, I can find no record of any amendment to the building consent.

[33] Although Ms Thodey on behalf of the Council did not concede this point, she did accept that the re-cladding work was depicted on the plans and that inspection of the Council's records would not have added anything to Mr and Mrs Johnson's knowledge of the property. Mr Tim Jones, a lawyer who was called to give evidence by the Council, confirmed that a search of the Council's property file would not have identified any adverse information.

[34] In a similar vein, the appellants are also critical of the Judge's reference to evidence in cross-examination of Ross Forsyth, a valuer who gave evidence for the

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[13] Emphasis added.

Johnsons, about the recorded value of the building work in the certificate. Mr Forsyth accepted that a purchaser would not acquire the usual level of comfort from a certificate issued for alterations and renovations to a value of $210,000 as was the case here. However, it appears that the $210,000 figure was simply carried over from the application for the building consent made some years earlier. That said, we do not see this point as having assumed any particular significance in the Judge's reasoning.

[35] The scope of the work reflected in the code compliance certificate and the resultant utility (or otherwise) of checking the Council records were, however, important parts of the Judge's reasoning. Once those planks are removed, the question is whether Mr and Mrs Johnson met the standard of conduct expected. It is helpful to address this question by considering other findings challenged by the appellants.[14]

The evidence of Stephen Johnston

[36] Mr Johnston's background is summarised by the Judge.[15] Importantly, Mr Johnston was qualified and worked as a carpenter for a number of years. He then qualified as a quantity surveyor before working in that field. Mr Johnston established a business in 1996 and worked as a cost and project manager. He had never worked as a building inspector or certifier, nor as a pre-purchase house inspector. The Judge noted that Mr Johnston's business mostly undertakes interior work. Mr Johnston had looked at two other houses on behalf of the Johnsons while they were looking for another home.

[37] As we have indicated, Woodhouse J accepted Mr Johnston's evidence as to why he was asked to go with Mrs Johnson to the property on 29 March 2009. The Judge said that this conclusion and the reasons for it "in substantial measure provides the answer to the remaining principal issues" in terms of the conflict of evidence between Mrs Johnson and Mr Johnston.[16] The Judge said:[17]

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[14] There are some other points of detail raised but we do not consider that they could impact on the Judge's findings.
[15] At [51].
[16] At [116].
[17] At [116].

> I am not persuaded that there was, in effect, an assurance from Mr Johnston to Mrs Johnson that there were no visible signs of leaks or any structural concerns. I do accept Mr Johnston's evidence that Mrs Johnson did say to him, in as many words, that she knew that the house might have weathertightness issues. I further accept Mr Johnston's evidence that, arising out of what Mrs Johnson said, and the indications of possible leaking that they saw in the garage, Mr Johnston did tell Mrs Johnson that he could not advise on weathertightness and that if she had concerns she should get an engineer or a weathertightness expert. I further accept Mr Johnston's evidence that he heard other people discussing whether the house might be a leaky home and that Mrs Johnson raised her concerns about this with a man at the open home.

[38] The Judge went on to explain that there were internal inconsistencies in Mrs Johnson's evidence. For present purposes we need only refer to the second of the examples of internal inconsistency given by the Judge. Woodhouse J referred to Mrs Johnson's statement in her brief of evidence replying to Mr Johnston's brief that "there was nothing to suggest to me that the house may have problems with leaking". The Judge saw this as inconsistent with evidence in cross-examination of Mrs Johnson as follows:

> Q. But there would have been no reason to ask Stephen Johnston to comment on the existence of leaks or otherwise unless you understood what a leaky building was, would there?
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> A. No, Steve and I were standing – I remember this like it was yesterday. Steve and I were standing outside the house by the pool, and we were looking up and I saw a mark that was on the balcony above the, one of the spare rooms. And I made the comment to Steve, "This wouldn't be a leaky home would it?" and Steve made a comment to me that if there'd been any evidence of leaks it would have been evident by now.

[39] Woodhouse J saw two points as emerging from this unprompted statement. The first was that it showed Mrs Johnson's "own appreciation of at least the possibility that it was a leaky home".[18] Secondly, Woodhouse J said the last sentence of the answer was difficult to reconcile with Mrs Johnson's sworn answer to interrogatories from the Council. Mrs Johnson said in her affidavit in answer to interrogatories that, prior to the "settlement date" of the purchase, she had made inquiries of Mr Johnston about the physical condition of the property. The Judge cited the relevant question and answer, as follows:[19]

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[18] At [119].
[19] At [119].

> [Q.] What was the nature of the enquiry(s) and the response(s)?
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> [A.] I asked Steve [Johnston] to look at the property and see if there were any problems with it. Steve said that there were no visible signs of leaks or any structural concern[s].

[40] The Judge considered that if Mr Johnston had said what Mrs Johnson told the Court was his response, that response should have been reflected in her answer to the interrogatory. Mrs Johnson was cross-examined about this and explained that she was told to be "concise" in her answers to the interrogatories.[20] The Judge did not consider this provided sufficient explanation for this gap.

[41] The main focus of the appellants' criticism of this part of the Judge's reasoning is on the aspects we now discuss.

[42] First, the appellants say that Mr Johnston accepted that he had not identified any serious issues with the property himself and he would have told Mrs Johnson if he had done so. The appellants are critical of the Judge's failure to mention this evidence. They also suggest that there is no link between the "musty" smell in the gym that Mrs Johnson noted and the defects. Next, the appellants are critical of the Judge's reliance on what they term "open home gossip". They say that no reasonable purchaser would take any notice of that and that in any event there was evidence that Mrs Johnson did not hear these discussions. In this context, the appellants are critical of the fact that the Judge treated evidence from another prospective purchaser, Marcus Beveridge, who attended two of the open homes, as supporting the Judge's findings relating to Mr Johnston's evidence.

[43] As we shall discuss, we do not consider it was correct to attach any weight to the "open home gossip". That said, we do not see any of these matters raised by the appellants as affecting the key point that emerged from Mr Johnston's evidence, that is, that Mrs Johnson conveyed to him that the house might have weathertightness issues. There was plainly an evidential foundation for that finding both in Mr Johnston's evidence and in that of Mrs Johnson. Further, this is a finding influenced by the Judge's assessment of the witnesses' respective credibility and there is no basis for us to interfere with that assessment. Indeed, the appellants do

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[20] At [119].

not directly challenge the Judge's credibility findings except that they make the point that as the Council had claimed against Mr Johnston as a third party, he had an interest in the Johnsons' claim failing. That is not however a determinative point. The Judge stated that he found Mr Johnston convincing and he explained quite carefully why that was so.[21] It is important also to record that the Judge considered that some of Mrs Johnson's difficulties in recall were explicable by reason of the fact that she was distracted by various demands on her time.

[44] In terms of the "open home gossip" we need to say something about the evidence of Mr Beveridge. As we have indicated, he was interested in buying the property. He is a lawyer with expertise in construction law. Mr Beveridge's evidence was that at the second of the open homes he and his companions had "loud and open" conversations and that others nearby at the property would have been able to overhear their discussions. He said their remarks would have included comments such as the house "has all the hallmarks of a leaky property".

[45] The relevant passage in the judgment under appeal on this aspect reads as follows:[22]

> [120] Mr Johnston's evidence that he and Mrs Johnson heard other people discussing whether the house might be a leaky home is supported, to some extent, by Mr Beveridge's evidence about the deliberately loud discussion he and his group were having and why they had a loud discussion. Mr Beveridge's explanation for this tactic was confirmed by the plaintiffs' legal expert, Mr Eades, who agreed that it was "not at all unusual for would be buyers to be vocal and robust about a property in the hope that it may deter others". Mrs Johnson did not agree that she had a discussion with another person as to whether the building might be a leaky home, but she did acknowledge that she had a conversation with another person about the house. Mrs Johnson's evidence was that this person spoke very positively about the house.

[46] The difficulty with this passage is that Mrs Johnson's evidence was that she did not hear anyone at the open home saying that the house might be leaky. Absent any adverse finding on that, it is hard to see how Mr Beveridge's evidence could be called in aid. However, although we consider the Judge was therefore wrong to rely

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21 At [121].

22 Footnote omitted.

on this evidence, we do not regard this aspect as critical to the Judge's overall findings about Mr Johnston's evidence.

Style of the house

[47] The Judge placed some reliance on the fact that others without construction experience were at least alert to the possibility that the house had weathertightness problems. Woodhouse J noted that:[23]

> [130] Mrs Johnson knew about the widespread problem with leaky homes and she did make the comment to Mr Johnston, "This wouldn't be a leaky home would it?". Mrs Johnson said that she proceeded on the basis that it was not a leaky home. However, other people without construction expertise were at the least alert to the possibility of weathertightness problems. In my judgment the opinion of the plaintiffs' own valuer, Mr Forsyth, is telling. Although he expressed the original opinion that comfort could be got from the code compliance certificate, this was "even allowing for the style and mode of construction". In other words, it was obvious to him that the style of the house and the mode of construction were typical of leaky homes. This was also quite obvious to Mr Beveridge. There was also the significant qualification by Mr Forsyth of his original opinion that comfort could be got from the code compliance certificate.

[48] The appellants are critical of the Judge's reliance in this respect on Mr Beveridge's evidence for the reasons we have already discussed. They also say that when Mr Forsyth's evidence in this regard is read as a whole there is no validity in the point made by the Judge. The appellants further submit that the loss was not suffered because of the style of the house but because of the specific pleaded defects. They also stress that it is important not to judge these matters with hindsight.

[49] We first need to set out what Mr Forsyth said. In the relevant part of his evidence he stated that:

> Given that a code compliance certificate had been issued for the development one would realistically have anticipated that the property was therefore sound, even allowing for the style & mode of construction.

[50] The Judge set out the excerpt from Mr Forsyth's evidence in full earlier in the judgment. It is plain from that reference and from a reading of the paragraph from

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[23] Footnotes omitted.

his judgment we have cited in full above that he has not overlooked the context of Mr Forsyth's observation.

[51] There was evidence before the High Court to support the finding that there was some common knowledge of the problem of leaky homes. The Council placed in evidence numerous local newspaper articles on the topic at the time. However, we do not consider that the knowledge of those, like Mr Beveridge and Mr Forsyth, who are working in the field could be used to support the existence of that common knowledge. This is not a critical aspect because Mrs Johnson accepted that she was aware of the issue of leaky homes. Given that knowledge, the style of the house (monolithic cladding, balconies, a flat roof and no eaves) may be a part of the background relevant in assessing the extent to which Mr and Mrs Johnson may have been on the alert.

Alertness to potential problems

[52] This part of the appeal relates to an observation made by the Judge in the context of his finding that before Mr and Mrs Johnson committed to the purchase they were "alert" to the possibility that the house might be a leaky house. Woodhouse J stated:[24]

> Mr and Mrs Johnson were experienced owners of valuable property and people who had over the preceding several years been investigating the purchase of a new home. Both of them had been involved in the establishment and successful operation of a substantial business which had been sold to good advantage. The widespread problems with leaky homes, including significant failures by local authorities adequately to perform their statutory duties of inspection and certification, had been widely publicised by 2009. It may readily be inferred that Mr and Mrs Johnson were well informed people. [They] nevertheless decided to proceed with the purchase. I am satisfied they took a calculated risk. This is central to my overall conclusion.

[53] The appellants are critical of the consideration of the extent to which Mr and Mrs Johnson were well-informed. Mr Illingworth QC on their behalf submits that these observations reflect consideration of irrelevant, subjective matters.

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[24] At [131].

[54] The inquiry is an objective one and to the extent the passage in issue suggests otherwise it is not right.[25] However, we consider it was correct to say that a reasonable person would have made further inquiry. The Johnsons cannot point to anything that would have indicated that an obligation to make inquiries did not apply.

Terms of the contract

[55] The Judge said that there were other signs that should have alerted the Johnsons to the problems with reliance on the code compliance certificate. The Judge referred here to the terms of the contract which gave Mr and Mrs Johnson no contractual protection in relation to any of the matters at issue in the case. Woodhouse J continued:[26]

> At one level that should have, at the least, prompted caution as to whether there might be problems with the house. Mrs Johnson was expressly alerted to this with the warning immediately above her signature on the agreement for sale and purchase and the information to which she was directed on the back of the document. At another level, it was imprudent to proceed without seeking appropriate modification of the terms of the contract. If the mortgagee vendor was unwilling to agree to changes, the Johnsons were not bound to proceed. As noted above, this elementary point is simply ignored in the case presented for [Mr and Mrs Johnson].

[56] The appellants say that none of the clauses deleted from the agreement for sale and purchase offered any protection to the purchaser in relation to building matters. However, the point being made by the Judge was that the Johnsons could have taken steps to protect their position by changing the terms of the contract so that it allowed a building report to be obtained. Otherwise, as Ms Thodey submitted, the terms of the agreement made it clear that the purchasers proceeded at their own risk in relation to the seller. The Judge's approach is factually correct.

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[25] In *O'Hagan v Body Corporate 189855* [2010] NZCA 65, [2010] 3 NZLR 445 [*Byron Avenue*] (CA) at [79], Baragwanath J said the principle required an objective test but "expressed in terms of the person's own general characteristics".

[26] At [138] (footnote omitted).

Conveyancing practice

[57] In the context of considering whether there was contributory negligence, Woodhouse J also drew support from the evidence of the legal experts, Robert Eades and Timothy Jones. The Judge noted that Mrs Johnson instructed solicitors before the tender for purchase was submitted. His Honour said there was no evidence as to any advice received. The inference drawn was that she must have received advice and that the advice she received "was the prudent advice that Mr Jones and Mr Eades say should have been given",[27] particularly, that it was not sufficient to rely on the code compliance certificate.

[58] The appellants say, first, that the legal experts were not in agreement as to the prudent advice they would have given. Secondly, in any event, neither solicitor dealt with the advice they would have given in this case. Finally, it is submitted it was not open to the Judge to draw the inference he did absent any cross-examination of Mrs Johnson on the point. The appellants rely in this respect on s 54 of the Evidence Act 2006, which governs the privilege attaching to legal advice.

[59] The Council supports the Judge's approach.

[60] We consider that there was a measure of agreement between the two legal experts as to the prudent advice they would give in these types of cases. Mr Jones, the Council's expert, said that in his experience in 2009 "typical purchasers" would seek advice from their lawyer about the terms of a tender agreement and "typically" conveyancing solicitors would recommend that various conditions be inserted into the tender agreement to include:

(a) [obtaining a] LIM;

(b) Searching the property file; and

(c) Obtaining a building report.

[61] Mr Jones said that given the code compliance certificate had been issued some years ago, a typical conveyancing solicitor in 2009 would not have treated the

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[27] At [135].

"mere fact of the issue of a code compliance certificate" as an assurance of weathertightness. Mr Jones noted that the practice of obtaining building reports had been present in New Zealand for "many years". Mr Jones says that although this Court and the Privy Council in *Hamlin* observed that the obtaining of such reports was not common,[28] he says he can "only assume that the reference in those decisions was to a situation where an owner was having a house built for them, as was the situation in the *Hamlin* case". In his experience, the use of building reports was "fairly common in the early 1990s and since then has evolved to become common practice".

[62] Mr Eades, who gave evidence on behalf of Mr and Mrs Johnson, in cross-examination accepted that he would advise purchasers to make "appropriate" inquiries. He was asked whether he would specifically advise purchasers to get a pre-purchase report and he said he would discuss whether they should get such a report, saying "it's certainly an aspect that should be covered with the client". Mr Eades agreed that this was because he knew in 2009 about the leaky building syndrome. He was asked whether in terms of due diligence he would say further inquiries should be made of a Council. He accepted that they can and "depending on the circumstances" should be made. As to a pre-purchase report being obtained in this case, particularly given the monolithic cladding on the house, Mr Eades said:

> Well I would discuss with the clients whether a report should be obtained, whether the report can be obtained depends on the circumstances, particularly here with a sale by tender, and with a defaulting mortgagor in possession.

[63] Finally, Mr Eades accepted that he had earlier given evidence in the High Court in another case to the effect that the practice of obtaining pre-purchase reports "whilst not too prevalent in the mid to late 1990s certainly bec[a]me prevalent around 2000 in the greater Auckland area". Mr Eades qualified his response to that question by saying it was a matter of whether the opportunity reasonably allowed for the inquiries to be made but accepted that the reason for getting a pre-purchase report did not change. We consider the evidence provided a

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[28] *Hamlin v Invercargill City Council* [1994] 3 NZLR 513 (CA); *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC).

sufficient foundation for the Judge's conclusions as to what constitutes prudent advice.

[64] However, we agree with the appellants that Mrs Johnson should have been asked about the nature of the advice she received before an inference was drawn as to the import of that advice. She may well have sought to rely on legal privilege in answering that question but we consider it was unfair to draw an inference without this matter being put to her.[29] She was not asked in the interrogatories about this, although she was asked about her inquiries of the real estate agent regarding the physical condition of the house. There was also limited reference to this matter in the written submissions. The Council's written submissions proceeded on the basis that either the advice was not given or it was given and ignored. In the circumstances, it was unfair to draw the inference that Mrs Johnson received the prudent advice referred to by the experts. We accordingly put that inference to one side.

Events after purchase

[65] Woodhouse J noted that Mr and Mrs Johnson claimed that, unlike others, they were not on guard at least to the possibility of problems. But, the Judge said, "immediately on settlement of the purchase they engaged Citywide to check the house for weathertightness".[30]

[66] The appellants note that the Judge found that Leak Scan's involvement was not as the result of any initiative on the part of the Johnsons. The submission is that it is inconsistent with this finding to refer to the engagement of Citywide as demonstrative of the Johnsons' knowledge. That was a process put in train following Leak Scan's approach. The appellants also say it is not appropriate to reason backwards to suggest that the Johnsons were aware of the possibility of problems.

[67] We do not consider it necessarily follows from the finding in relation to Leak Scan that the Judge had to ignore the engagement of Citywide. The point is

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[29] Evidence Act 2006, s 92; see *Browne v Dunn* (1893) 6 R 67 (HL) and *Manukau Golf Club Inc v Shoye Venture Ltd* [2012] NZCA 154, (2012) 21 PRNZ 235 at [27].

[30] At [131].

that the Johnsons persisted in exploring the potential for weathertightness problems. In any event, this matter is not of great moment in the Judge's reasoning.

Our conclusions on contributory negligence

[68] Drawing these threads together, we accept that the Judge was incorrect in the findings as to the scope of the work covered by the code compliance certificate and in the inference drawn about the import of the legal advice to the Johnsons. Despite that, we are satisfied that Mr and Mrs Johnson were, as the Judge found, on the alert. In particular, we take the view that while Mr and Mrs Johnson were not certain that this was a leaky home, they were aware that that was a possibility and chose to gamble against that possibility. That is apparent from Mr Johnston's evidence which was accepted by the Judge.

[69] We turn to consider what, if any, steps should have been taken by the Johnsons and whether the failure to take those steps had a causal impact.

Other steps and their causal impact

[70] The Judge found that Mr and Mrs Johnson did not take prudent steps which should have been taken in this case. That included having the solicitor check the Council records and obtaining a building or pre-purchase report. Woodhouse J said that such a report would have disclosed "significant concerns" which, for this reason, meant it was negligent for Mr and Mrs Johnson to proceed or at least to proceed on the contractual terms that they did.[31]

[71] We have dealt already with the lack of utility in checking the Council records so need say nothing further about that. The focus is rather on the appellants' challenge to the requirement to obtain a building or pre-purchase report. The appellants say such a requirement is inefficient and has a number of disadvantages. They also submit that in this case the report would not have identified the problems and so any failure on the Johnsons' part has no causal impact.

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[31] At [136].

[72] We agree that the imposition of any general requirement on purchasers to obtain a building report raises a range of practical and policy issues. However, any requirement in the present case stems from the facts as found. The starting point is that the Johnsons were aware of the potential problems. Moreover, Mr Johnston told Mrs Johnson that if she had any concerns she would need to get an expert to inspect the areas of concern. The focus is therefore on whether or not getting a report would have revealed the problems. We can test that in this case because the Johnsons obtained two reports from Citywide.

[73] The first of these reports was dated 20 May 2009. The report writers noted that they undertook no destructive testing and relied on visual inspection, although they also used a moisture scanner and imaging camera. The disclaimer in the report makes it clear no opinion could be given in relation to concealed work.

[74] The report notes that moisture readings of 20–25 per cent for treated timber are of concern (the equivalent readings for untreated timber are at 17–20 per cent) and readings of 25–30 per cent for treated timber (21–24 per cent for untreated timber) are seen as representing a hazard. The report records the moisture readings and other issues for each room in the house. The report does not record whether the timber framing was treated or untreated, although Woodhouse J notes that the date of construction indicates that it may have been untreated. As the Judge said, the report also noted with respect to indicated moisture content that there could be timber decay that had not been detected where an area earlier affected by water had dried out. Readings in some areas were at levels of 17 per cent or more. Readings for "Bedroom Two" ranged between 11 and 67.8 per cent, although, as the Judge noted, the conclusion was that this had come from a blocked gutter.

[75] The relevant parts of the body of the report are recorded in the judgment as follows:[32]

> (a) Deck over the garage: "Evidence of leakage directly beneath this deck. Direct access to the framing via the cavity slider opening is allowing wind driven moisture into this area. Further testing of the detail and weatherproofing is recommended …"

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[32] At [79].

(b) Entertaining area: "Damage to the base of the gib-lined walls. … The cladding to the exterior is continued into the tiled step which can allow for wicking of moisture."

(c) Kitchen/dining area: There is a photograph with a caption "moisture can be transmitted to framing via the channel of the door".

(d) Master bedroom: "Staining to wall line from heater and lack of clearance between balcony and exterior cladding."

(e) Bedroom 1: "Slight moisture damage to sill linings noted."

(f) Bedroom 2: "… visible water damage was noted. This has been caused by blocked gutter above backing up into building line."

(g) Roof: "The parapet capping is clad with stucco and does not have sufficient fall to shed water or prevent water from ponding. Cracks to the cladding were noted to this upper surface and the paint finish was deteriorating in areas. This is a high risk area as stucco is designed as a roof covering." There is a photograph with a caption "ensuring [sic ensure] junctions of the parapets and tiled columns be well sealed". In a caption over a photograph of a louvre – "seal louvre penetration".

(h) Cladding: "The exterior cladding is solid plaster cladding which has been applied over a cavity system of sorts; however the drainage and ventilation at the base of the cladding have been compromised in a number of areas by running it down into the adjacent ground. The construction of the wall makes it very difficult to locate areas of elevated moisture or damaged framing but it does appear that the exterior cladding has benefited from having the cavity in place. Discolouration of the paint finish is noted around the dwelling which is normally as a result of moisture getting behind the paint finish …".

(i) Garage: "… appears to be performing in regard to the exterior moisture; however noticeable areas of concern are as follows: (1) water staining and damage to the underside of the joist which appears related to the balcony membrane above …; (2) the steel beam to the northeast corner of the garage has corroded due to seepage …; (3) corrosion noted along the beam; (4) moisture pulling down the block work from the tiled deck above; (5) moisture around the tiled base is trapped and pulls through the concrete."

(j) "Moisture noted to the floor of the laundry. It appears moisture can freely drain from the stair above."

(k) Ceramic balconies/deck: "The duckboards are fitted hard up beneath the lower edge of the stucco. The decks have both floor waste and overflows installed. I would recommend that the duckboards are lifted and the membranes assessed with special attention to the wastes and overflows."

[76] The conclusion in the report was as follows:

> 7.1 In general the cladding appears to have been performing with no real areas of concern apart from the poor detailing.
>
> 7.2 The roof does require attention to ensure its ongoing performance.

[77] In the second report prepared by Citywide, dated 25 June 2009, it was noted that the report was undertaken with the assistance of a resistance metre, a device that measures the moisture content of a sample of wood by passing an electric current through the sample. The conclusion to this report was as follows:

> 4.1 From testing of details to the decks with the extended probes of the resistance metre it appears that the only area of concern is around the chimney. Whilst the decks are not well detailed they do appear to be performing.
>
> 4.2 Due to the design and detailing of the cladding I am not in a position to state that there are no problems; however I have been unable to find any areas of decayed framing apart from that picked up at an earlier inspection beneath a rainhead.
>
> 4.3 I suggest that you contact a remediation expert from the New Zealand Institute of Building Surveyors … to provide you with guidance on how best to provide long term assurance that the house cladding will perform.

[78] Following receipt of this report, as we have noted, the Johnsons asked CoveKinloch to undertake further investigations. They undertook two investigations and provided reports to the Johnsons in or around August and October 2009. CoveKinloch in their second report confirmed their original recommendation that the entire house be re-clad. The CoveKinloch advice was given following investigation without destructive testing.

[79] In addition, evidence of what a visual inspection revealed was also provided by Mr Gray. Mr Gray said that the 13 identified defects to the house resulted in "widespread moisture ingress through the external envelope of the property causing damage to various building elements". He confirmed that 11 of these 13 defects would have been apparent from a visual inspection in 2004 and were apparent in 2009.

[80] It is the case, as Mr Illingworth submitted, that the first Citywide report discloses some discrete issues rather than a problem of fundamental design.[33] However, Mr Jones' evidence was that a typical purchaser receiving a report of this nature would seek a specialist consultant's opinion on the cost of remedial works that the report identified. We consider that the initial Citywide inspection should at least have triggered some further action on the part of the Johnsons, for example, seeking to amend the contractual terms and/or obtaining, as they ultimately did, further reports. Certainly, the recommendation in the second Citywide report to contact a remediation expert should have rung alarm bells. The implication is that there was a question as to how the cladding would perform.

[81] It follows we agree with Woodhouse J that there was negligence on the part of Mr and Mrs Johnson and that it was causative. The next issue is as to what reduction should apply.

Apportionment of liability

[82] The Judge's approach was that the Johnsons were, in large part, the "authors of their own misfortune".[34] Woodhouse J relied on the various factors relevant to his conclusions about contributory negligence. In addition, he took the view that Mrs Johnson was determined to proceed with the purchase. It was also important to the Judge that the Johnsons saw the fact that this was a mortgagee sale as giving them a "buffer in respect of risk".[35]

[83] The appellants say any reduction for contributory negligence should be very low in percentage terms. That is because the fault of the Council was considerable. The code compliance certificate was issued in August 2004 when the Council ought to have been taking particular care as to weathertightness issues.

[84] For the Council, Ms Thodey acknowledges that some of the factual findings by the Judge did not accurately reflect the evidence. Nonetheless, it is submitted that the circumstances justified a reduction of 70 per cent against the award.

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[33] Mr Gray was critical of the failure to identify that there was "extensive underlying" damage.
[34] At [142].
[35] At [144].

Ms Thodey emphasises that on the evidence, this was a deliberate courting of the risk by the appellants and a failure to make inquiries that would have protected their position. This must be measured against the level of negligence of the Council, the secondary tortfeasor. Finally, the point is made that the Judge's assessment of the contribution depended on his findings of credibility and assessment of the witnesses.

[85] We consider it is necessary for us to look at this matter afresh. That is because some of the aspects on which the Judge relied have no causal potency.[36] The Judge's assumption that the code compliance certificate only applied to part of the work may have led to an inadequate weighting of the extent to which the negligently given code compliance certificate contributed to the loss. The Judge may also have placed undue weight on his perception that Mrs Johnson must have received legal advice to obtain a report whereas we have found that inference should not have been drawn.

[86] The apportionment of liability in cases of contributory negligence is dealt with in the Contributory Negligence Act 1947. Section 3 of that Act states that where a person suffers damage as the result "partly of his own fault and partly of the fault of any other person[s]" the claim in respect of that damage is not defeated by that fault but the damages recoverable shall be reduced "to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage".[37]

[87] There is no dispute that in making the apportionment, it is necessary to consider both relative blameworthiness and causative potency.[38] The question of the appropriate apportionment is a question of fact involving matters of impression and not some sort of "mathematical computation".[39] In personal injury cases, the

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36 As was the case in *Gilbert v Shanahan* [1998] 3 NZLR 528 (CA); see our comments above at [35] and [68].

37 "Fault" is defined to mean "negligence, ... or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence": s 2.

38 *Gilbert v Shanahan*, above n 36, at 534; see also Harvey McGregor *McGregor on Damages* (18th ed, Sweet & Maxwell, London, 2009) at [5–007], citing Denning LJ in *Davies v Swan Motor Co (Swansea) Ltd* [1949] 2 KB 291 (CA) at 326; Andrew Burrows *Remedies for Torts and Breach of Contract* (3rd ed, Oxford University Press, New York, 2004) at 131; and Michael A Jones (ed) *Clerk & Lindsell on Torts* (20th ed, Sweet & Maxwell, London, 2010) at [3–84].

39 RFV Heuston and RA Buckley *Salmond & Heuston on the Law of Torts* (21st ed, Sweet & Maxwell, London, 1996) at [22–12]; and see Glanville Williams *Joint Torts and Contributory Negligence* (Stevens & Sons, London, 1951) at 390.

English courts have adopted standard figures for "seatbelt" cases, that is, in cases where a plaintiff has been contributorily negligent in the event of a car accident by not wearing a seatbelt.[40] Courts have been careful to confine these tariffs to seatbelt cases, reaching a different assessment in respect of, for example, complainant cyclists who fail to correctly wear helmets and who are involved in traffic accidents.[41]

[88] Given the nature of the apportionment exercise, comparisons with the figures in other cases are not particularly helpful. However, we need to address the Johnsons' submission that their situation is much less serious than that of RCA Investment Ltd (RCA) in *Body Corporate 189855 v North Shore City Council* (*Byron Avenue*).[42] The Johnsons point out that, in that case, Venning J reduced the company's damages by 25 per cent.[43] That reduction was upheld on the appeal to this Court.[44]

[89] One of the units in issue in that case was purchased by a Mr and Mrs Coulthard who nominated their company, RCA, as purchaser. Prior to signing the agreement for sale and purchase Mr Coulthard was aware of the following matters: the unit did not have a code compliance certificate; his builder friend who inspected the unit for him said it was fine; and almost $8,800 was owing in respect of building levies for approved capital repairs. Venning J identified the damage suffered by the company as a result of its own negligence as the purchase of a defective unit in a defective building. The damage was the cost of repairs. The Judge said the Council's negligence was in approving the defective units on inspection. Mr Coulthard and RCA also contributed causally by not making inquiries.

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40 In *Froom v Butcher* [1976] QB 286 (CA), Lord Denning MR set out an enduring reduction of 25 per cent where the damage would have been prevented altogether by wearing a seatbelt and 15 per cent where it would have been considerably less severe.

41 For example *Capps v Miller* [1989] 1 WLR 839 (CA) as cited in Burrows, above n 38, at 131–132; see also WVH Rogers *Winfield and Jolowicz on Tort* (17th ed, Sweet & Maxwell, London, 2006) at [6–53].

42 *Body Corporate 189855 v North Shore City Council* HC Auckland CIV-2005-404-5561, 25 July 2008 [*Byron Avenue* (HC)].

43 At [337].

44 *Byron Avenue* (CA), above n 25.

[90] As to relative blameworthiness, Venning J saw RCA's failure as similar to that of a driver who did not wear a seatbelt and that this failure must lead to a reduction in its claim. But, the Judge said, the major contributor to RCA's loss was the Council's negligence in approving the defective development during the construction process. These factors led Venning J to find that the appropriate reduction was 25 per cent.

[91] On appeal in this Court, Baragwanath J said RCA's failure to inquire was both morally blameworthy and causatively potent, "since inquiry would have revealed that the Council had reason to withhold its code compliance certificate because the repair work had not cured the problem".[45] But, Baragwanath J said, the failure did not exceed the 25 per cent fixed by the Judge. William Young P stated:

> [169] I regard the contributory negligence finding against RCA as on the margin. They did not get a LIM but did find out that there was no code compliance certificate. More significantly they did not follow up the implications of the nearly $9,000 that was owing for repairs, this at a time when the leaky home problem was receiving a good deal of publicity. On the other hand, they did have the property inspected by a builder.

[92] In terms of the causative negligence of the Council in the present case, that related to the failure to identify the defects on inspection of the property and in issuing the code compliance certificate. The Johnsons contributed by failing to make inquires when they were on the alert to the potential problems.

[93] By contrast to the *Byron Avenue* case, Mr and Mrs Johnson had the code compliance certificate. But they also had knowledge that the house might be leaky and they went ahead anyway without looking after their own interests. As Ms Thodey put it, they deliberately courted the risk. If they had taken prudent steps, of the sort they set in train after the purchase, they would have obtained a report which would most likely have led to a chain of events that revealed the leaks and dissuaded the Johnsons from the purchase, or the negotiation of a significant discount. On the other hand, it is still the case, to use Venning J's language from *Byron Avenue*, that a "major contributor" to the loss "remains the negligence of the Council in approving the defective [house] during the inspection process. That has

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[45] At [73].

been a major cause of the [house] being built with the defects".[46] It is also appropriate, as Cooke J observed in *Kendall Wilson Securities Ltd v Barraclough*, to give some weight to the general impressions formed by the Judge.[47] Woodhouse J obviously formed the view the Johnsons' level of blameworthiness was high.

[94] When we consider all the relevant factors, we conclude that the appropriate reduction in the circumstances was one of 40 per cent.

The correct measure of loss

[95] Woodhouse J approached the question of the measure of loss on the basis that the "normal measure of damages … applying in cases of tortious negligence such as that of the Council in this case" should apply.[48] The Judge saw this approach as consistent with the observation of Tipping J in *Marlborough District Council v Altimarloch Joint Venture Ltd*,[49] particularly Tipping J's conclusion that "[a] plaintiff cannot claim damages which could have been avoided or reduced by the taking of reasonable steps".[50] Rather, the Judge said that the damages should put the Johnsons back in the position they would have been in as if the tort had not been committed.

[96] The Judge said that the Council's wrong was "negligence in carrying out the inspections and in issuing the code compliance certificate".[51] The Judge continued:[52]

> The heart of the [Johnsons'] complaint is that the code compliance certificate should not have been issued. In practical terms the [Johnsons] say that the code compliance certificate amounted to a representation to them that the house had been built properly. There is the evidence from Mrs Johnson to the effect that the code compliance certificate gave them an assurance to that effect. The [Johnsons'] complaint is that this was a misrepresentation.

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46 At [337].
47 *Kendall Wilson Securities Ltd v Barraclough* [1986] 1 NZLR 592 (CA) at 595.
48 At [172].
49 *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726.
50 At [174] citing *Altimarloch*, above n 49, at [156].
51 At [150].
52 At [150].

[97] Accordingly, damages were measured on the basis of the difference between the cost of purchase and the market value of the property in its affected state at the date of purchase.

The submissions as to measure of loss

[98] The appellants say the appropriate measure of loss is the cost of repairs. They say the Judge has erred in approaching the measure of damages on the basis of a negligent misstatement when the claim was pleaded on the basis the Council's inspection was defective.

[99] The respondent says the Judge was right. The Council first submits that the Judge was correct to take as the starting point the idea that the claim is one akin to negligent misstatement. That is because that is its nature at heart. Ms Thodey points to the emphasis in Mrs Johnson's evidence on the fact that she had the code compliance certificate. Ms Thodey says it is not suggested that Mrs Johnson understood the significance of that in a community reliance sense. Accordingly, as in *Altimarloch*, the starting point is to ascertain the difference in value between the amount paid for the property and its value in a defective state. The damages awarded should compensate for the damage but in a manner that is fair as between the parties. In the written submissions, Ms Thodey said this will "typically be the lesser of the loss in value claim or the cost of repairs".

[100] Secondly, the respondent says that this is one of those cases in which the cost of repairs is not an appropriate measure of the loss. Given the need to do fairness between the parties, the high value of the land in this case means that the cost of repairs is not an appropriate measure.

Our analysis

[101] Some of the discussion in the judgment under appeal on this topic of which the appellants are critical is directed to differences in the normal measure of damages between claims in contract and claims in tort. To the extent that this discussion suggests the present claim should have been treated as a claim for negligent misstatement, with damages assessed on that basis, we respectfully disagree.

[102] Ms Thodey in supporting the analogy to a claim for negligent misstatement refers to observations of Elias CJ in *Body Corporate No 207624 v North Shore City Council* (*Spencer on Byron*).[53] In particular, Ms Thodey refers to her Honour's observation that the claimed duty of care was "closely linked with the negligent misstatement cause of action against the Council" arising out of a Land Information Memorandum (LIM) in *Altimarloch*.[54] However, Elias CJ goes on to distinguish the case from those cases, illustrated by *Stovin v Wise*, where courts have to decide whether a duty to use available powers arises.[55] Elias CJ noted that the Council was said to have been negligent in relation to inspection carried out by its officer and in relation to its own code compliance certificates. Elias CJ also said that the Building Act imposes a duty on councils to ensure code compliance.

[103] That the focus is on the Building Act duty to ensure houses are built correctly is apparent from the other judgments in *Spencer on Byron*. Tipping J, for example, stated that the purpose of the Act and the building code was:[56]

> to maintain minimum standards of construction …, [and] to protect the interest society has in having buildings constructed properly. … The Act and code are also based on the premise that non-compliance with the code necessarily has a health or safety connotation; so that does not have to be established in addition to non-compliance."

[104] As to the interrelationship with negligent misstatement, Tipping J stated:

> [49] When it comes to the claim in negligent misstatement on account of the issue of the code compliance certificate, we must bear in mind that in *Altimarloch* this Court accepted that councils owe a duty of care in respect of ... [LIMs]. That duty is owed irrespective of the nature of the premises involved. In that light, and bearing in mind that the LIM duty includes protection for interests that are solely economic, it is not a long step to hold that councils should owe a duty of care when issuing code compliance certificates. That duty must of course be tailored to the exact form in which code compliance certificates are designed to be issued. If a duty is held to exist as regards all buildings to compensate for negligent misstatement in a code compliance certificate, it would be strange if a duty was denied in respect of all, save residential, buildings in the case of a negligent inspection which was the basis of the erroneous certificate.

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53 *Body Corporate No 207624 v North Shore City Council* [2012] NZSC 83, [2013] 2 NZLR 297 [*Spencer on Byron*].

54 At [9].

55 *Stovin v Wise* [1996] AC 923 (HL). The Chief Justice also distinguished this case from *Fleming v Securities Commission* [1995] 2 NZLR 514 (CA) and from *McNamara v Auckland City Council* [2012] NZSC 34, [2012] 3 NZLR 701.

56 At [44].

[105] In the reasons for the judgment of McGrath and Chambers JJ given by Chambers J, their Honours noted that the Building Act could be seen as having strengthened the argument that local authorities should be liable if they performed their supervision tasks negligently. Chambers J also noted that the "underpinning rationale" of the duty of care in this area is "the need to provide encouragement to those responsible for the construction of buildings to use reasonable care in their respective tasks within that overall undertaking".[57]

[106] Further, Chambers J stated that reliance has "only a limited role" in relation to the tort of negligence and contrasted that position with the tort of negligent misstatement where:[58]

> (specific) reliance is an essential feature in the chain of causation. … Some have since interpreted *Hamlin* as if, in some vague way, it introduced an element of reliance into the tort. It did not.

[107] Finally, Chambers J noted that some of the owners had also brought a claim under the tort of negligent misstatement. Essentially these owners claimed that they had relied on the Council's code compliance certificates when deciding to purchase their units. Chambers J said that this claim added nothing. His Honour continued:[59]

> If a council owes a duty of care when inspecting the construction of a building, as this Court has held in *Sunset Terraces* and now here, then a negligent misstatement cause of action will bring no additional relief to those affected by the negligence. Indeed, all it may do is put an additional hurdle in the plaintiff's way. Negligent misstatement has traditionally required, among other things, the plaintiff to demonstrate he or she relied on the defendant's statement. The pure negligence action in this area has never required the plaintiff (property owner) to establish actual reliance on the council. The property owner, for instance, does not have to prove that he or she went to look at council records and assured himself or herself that a code compliance certificate had been given. An owner has been able to recover loss sustained by the council's negligence whether or not the owner checked council records before purchasing.

[108] As the Court noted, one of the principal purposes of code compliance certificates is to provide assurance to building users that the building was built

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57 At [162].
58 At [199].
59 At [220] (footnote omitted).

properly and so did not have hidden defects.[60] The emphasis of Mrs Johnson on reliance on the code compliance certificate needs to be seen in that light.

[109] It follows from this analysis that it was not correct to treat *Altimarloch* as the precedent applicable to this case because that was a negligent misstatement case.

[110] There is support in *Hamlin*, and in the pre-*Hamlin* cases on which the appellants relied, for the proposition that in these types of cases the measure of loss will be "the cost of repairs, if it is reasonable to repair, or the depreciation in the market value if it is not".[61] As Professor Atkin notes in *The Law of Torts in New Zealand*, a "more flexible, pragmatic" approach is adopted and courts "will award the cost of reinstatement where the plaintiff intends to restore and occupy the property and it is reasonable to do so".[62] This Court in *Warren & Mahoney v Dynes* referred to a "prima facie, but not inflexible, rule" that the main concern should be to "ascertain the amount required to rectify the defects".[63] That was a contract case although the Court indicated that in the circumstances of that case there was no difference in the measure of damages. We emphasise, as the authorities here and overseas relied on by Ms Thodey posit, that the assessment is a factual one and it is necessary to do fairness between the parties.

[111] In this case it was reasonable to repair and, indeed, the Judge says that his conclusion was not based on an assessment that the cost of repairs was unreasonable or "disproportionate when compared with diminution in value".[64] We consider that the cost of repairs was the appropriate measure.

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60 At [222]. As to the rationale for the duty and the link to the Council's statutory responsibilities see *Sunset Terraces and Byron Avenue*, above n 10, at [40], [48], [50] and [60]–[61] per Blanchard, Tipping, McGrath and Anderson JJ.

61 *Hamlin* (PC), above n 28, at 526; *Sunset Terraces and Byron Avenue*, above n 10, at [17] per Blanchard, Tipping, McGrath and Anderson JJ; and see *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 (CA); *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA); *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548 (HC); *Williams v Mount Eden Borough Council* (1986) 1 NZBLC ¶99-065 (HC); *Stieller v Porirua City Council* [1986] 1 NZLR 84 (CA); and *Brown v Heathcote County Council* [1986] 1 NZLR 76 (CA); aff'd [1987] 1 NZLR 720 (PC); compare *Chase v de Groot* [1994] 1 NZLR 613 (HC) where the property in question had already been sold.

62 W Atkin "Remedies" in Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Brookers, Wellington, 2013) 1237 at [25.2.08(3)(a)] (footnote omitted).

63 *Warren & Mahoney v Dynes* CA49/88, 26 October 1988 at 22.

64 At [173].

[112] In our view, it would not be fair as between the parties to measure the loss on the basis of diminution in value. At a practical level, it is relevant that the Council granted consent for the remedial work after the proceeding had been issued and that work had started prior to the trial. Associated with that, the Council in its first two statements of defence did not include any diminution in value pleadings. The statement of defence of 29 May 2012, provided as a draft on 18 May 2012 before the trial commenced on 21 May 2012, disputes the quantum but does not plead diminution in value as a measure of loss. The Council pleaded a failure to mitigate loss in that the Johnsons elected to proceed with remediating the house rather than selling. The Council also admitted the pleading that as a result of the defects the property required repairs, including a full re-clad.

[113] There are a number of other factors that support a cost of repair approach. First, it is not suggested that this was a case where the Johnsons could have lived in the house for any length of time in its unrepaired state. Nor is it suggested that the house was a candidate for demolition.[65] Secondly, although the Johnsons had not moved into the house, it was bought as a family home in circumstances where the evidence showed it was a unique property obtained after a long search to provide what the Johnsons considered was a suitable home. Finally, depending on the figures that are adopted, there is not a great deal of difference in any event between the two measures of loss. Ms Thodey relies on the evidence of Evan Gamby, the valuer instructed by the Council, who assessed the loss in value as at May 2012 at $1,175,000 and contrasts that with the Johnsons' estimate of repairs of just over $2 million including interest. However, applying the figures adopted by the Judge, taking the purchase price of $3,910,000 and subtracting as the affected value at purchase the figure of $2,675,000 plus interest of $327,447, the diminution in value is just over $1.5 million in contrast to the Council's figures for repairs of just under $1.7 million. If Mr Forsyth's valuation evidence is adopted, the difference between the cost of repairs and diminution in value is even less.

[114] We consider for these reasons that the cost of repairs is the appropriate measure of the loss. The parties agree that in this case, the question of quantum

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[65] Mr Forsyth's evidence was that a total rebuild would put the overall value of the property beyond the bounds of market value.

should be referred back to the High Court for consideration. That is because there is an unresolved difference between them as to the cost of repairs. The parties anticipate that, in this event, they will be able to reach agreement as to quantum.

General damages

[115] Woodhouse J recorded that general damages were sought, $25,000 for Mr Johnson and $25,000 for Mrs Johnson. The Judge noted that the claim was based on "the personal impact on Mr and Mrs Johnson of the discovery of the building defects and the long and difficult process in getting the house repaired".[66]

[116] It was conceded in the High Court that an award was appropriate but the Council said the award should be for a lesser sum than that sought. Woodhouse J concluded that, putting to one side any question of contributory negligence, the appropriate sum would be $10,000 each. The Judge then said:[67]

> Their circumstances in a personal sense were not as adverse as those in cases where the award of general damages has been around $25,000. Taking account of contributory negligence, but without applying a precise percentage of responsibility in this context, because I consider it is inappropriate, there will be judgment for Mr and Mrs Johnson jointly in a total sum of $10,000 for general damages.

[117] Mr Lewis, who argued this part of the case for the Johnsons, said that the reduction to $10,000 each, prior to the reduction for contributory negligence, was inappropriate. Mr Lewis emphasised the distress Mr and Mrs Johnson in their evidence said they had experienced. The submission is that the amount awarded was inadequate compensation bearing in mind the awards made in other cases and the impact of inflation since this Court's decision in *Byron Avenue,* where various awards of general damages were made, up to $25,000.

[118] The respondent supports the Judge's decision and rejects the idea of a tariff analysis. Ms Thodey submits that the facts of this case meant that Mr and Mrs Johnson were not subjected to the stresses that are sometimes seen in other claims. In particular, the Johnsons were not living in the house and nor were they intending to live in the house immediately. Their financial position alleviated the

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66 At [188].
67 At [188].

stress faced by most claimants who are forced to remain living in their defective home.

[119] The awards of general damages vary. Baragwanath J in his judgment in *Byron Avenue* referred to the award of $20,000 in this Court in *Bronlund v Thames Coromandel District Council*.[68] Baragwanath J also referred to a number of High Court decisions where awards ranged from $6,000 to $25,000.[69] His Honour noted that the facts of these cases "vary considerably" but "generally entailed occupancy of a leaky building for a significant period and the associated anxiety".[70] William Young P recorded his agreement with Baragwanath J that *Byron Avenue* was not an ideal case for general guidance to be given about appropriate levels of compensation for non-economic loss in leaky homes cases. However, William Young P said he supported awards for non-economic loss in that case which proceeded on the basis that there would be no awards for corporate owners, $15,000 as an appropriate figure per unit for non-occupiers and $25,000 as an appropriate figure per unit for occupiers. William Young P also observed that, as Baragwanath J had pointed out, "not all the claims can be neatly categorised in this way and some evaluative assessment may be required".[71]

[120] In our view, the Judge's approach in this case was correct for the reason he gave. There was a basis for an award at the lower end of the scale. The point is well made by a comparison with the case discussed by Baragwanath J from this Court, *Bronlund*. As Baragwanath J noted, the plaintiffs in that case:[72]

> were forced, in the interim for economic reasons, to live in the uncompleted house with temporary cladding which leaked and was draughty and unpleasant, and there were initially no bathing facilities. Their children suffered more colds than usual. They were unable to entertain. The emotional impact placed strain on their marriage.

[121] Further, this is an area where, as Baragwanath J states, a trial judge is well placed to make an assessment of the degree of stress experienced by the plaintiffs.[73]

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68 *Bronlund v Thames Coromandel District Council* CA190/98, 26 August 1999.
69 At [115].
70 At [116].
71 At [153].
72 At [114].
73 At [112].

[122] The only issue remaining is whether some adjustment should be made to reflect our view on the appropriate level of reduction for contributory negligence. On balance, we consider no adjustment is required. Some downwards adjustment was necessary and we are satisfied the end result was appropriate. The Johnsons were not living in the house and did not experience the adverse effects identified in other cases where the plaintiffs are living in defective and sometimes unhealthy buildings.

Costs in the High Court

[123] In the High Court, Mr and Mrs Johnson sought costs against the Council, generally on a 2B basis. Woodhouse J declined to make an order for costs.[74] The Judge took the view that, although the Johnsons were successful in establishing liability, they had lost on the two live issues at trial, namely, contributory negligence and the measure of damages. In addition, Woodhouse J considered that if the settlement offer made by the Council was brought into account, that was sufficient to justify leaving costs to lie where they fell.

[124] On appeal, Mr and Mrs Johnson say the Judge erred in two respects. First, it is said the focus should have been on the end result, namely, a judgment in their favour. The argument is that, in terms of r 14.7(d) of the High Court Rules, there was nothing out of the ordinary in the conduct of either party that would justify a departure from the usual rule that costs follow the event.

[125] Secondly, the submission is that the settlement offer was not relevant. That is because, primarily, it was made too late (two days prior to trial) and its conditions were unduly onerous. If the settlement offer is seen as relevant, the Johnsons say they should have costs and disbursements up to the date of the offer (17 May 2012).

[126] The Council submits this Court should interfere with the Court's order only if it can be shown to be plainly wrong. The Council says that the Judge was correct because the Council was successful on the two critical issues. Further, it is submitted that the Council's offer was more than reasonable, exceeding both the

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[74] *Johnson*, above n 3.

judgment sum and costs. Although acknowledging the offer was only made shortly before the hearing, counsel notes it was made shortly after mediation when all of the evidence was available and that Mr and Mrs Johnson were represented by experienced counsel in this area.

Our analysis

[127] Rule 14.2(a) encapsulates the principle that costs should follow the event. However, costs are at the discretion of the Court.[75] In this case, the Judge has explained his reasons for departing from the position in r 14.2(a). Were it not for the different view we have taken on the two critical trial issues, we would not have interfered with the costs decision.

[128] As this Court said in *Packing In Ltd (in liq) formerly known as Bond Cargo Ltd v Chilcott*, this is a case in which it is not helpful "to focus too closely on which party has failed and which has succeeded".[76] It was open to the Judge to see the parties as each having enjoyed success. Further, while the settlement offer was made late in the piece and was conditional, for the reasons given by the Council in its submissions, we consider it was relevant. On the other hand, the Council's concession that it owed a duty of care and that the duty had been breached was not made until just prior to the start of the trial.

[129] The respective outcomes have altered on appeal. We consider an appropriate outcome is struck by an award of half of the costs in the High Court. That reflects the greater success enjoyed by the Johnsons while taking account of the settlement offer.

Result

[130] For these reasons the appeal is allowed in part. The judgment in favour of the appellants that the respondent pay damages based on the difference between the purchase price and the market value of the property in its affected state at the date of purchase less 70 per cent for contributory negligence plus interest is set aside.

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[75] Rule 14.1

[76] *Packing In Ltd (in liq) formerly known as Bond Cargo Ltd v Chilcott* (2003) 16 PRNZ 869 (CA) at [5].

The appellants are entitled to damages calculated on the basis of the cost of repairs less 40 per cent plus interest. The proceeding is remitted to the High Court for determination of quantum in light of the findings of liability as modified by this judgment.

[131] The decision to dismiss the appellants' claim for costs in the High Court is also quashed. In its place, we make an order awarding the appellants 50 per cent of their costs in that Court on a 2B basis and usual disbursements. Any issues about the calculation of these costs are to be dealt with in the High Court if the parties cannot agree.

[132] The respondent must pay the appellants costs in this Court for a standard appeal on a band A basis and usual disbursements. We certify for second counsel (but not for third counsel).

Solicitors:
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