IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2010-404-007093

BETWEEN	HAI CAO AND YANMING TAO Appellants
AND	AUCKLAND CITY COUNCIL First Respondents
AND	BRIAN WILLIAM NEWTH Second Respondent
AND	TONY MENG HIANG TAY Third Respondent

Hearing: 7 April 2011

Appearances: G Shand and E Rutherford for Appellants
P Robertson and J Morrison for First Respondent
No appearance for Second or Third Respondents

Judgment: 18 May 2011

(RESERVED) JUDGMENT OF ANDREWS J
[Appeal against determination of Weathertight Homes Tribunal]

This judgment is delivered by me on 18 May 2011 at 11:30am
pursuant to r 11.5 of the High Court Rules.

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Registrar / Deputy Registrar

Solicitors:
Grimshaw & Co, PO Box 6646, Wellesley Street, Auckland 1141 – G Shand (Appellants)
Heaney & Co, PO Box 105391, Auckland City, Auckland 1143 – P Robertson (First Respondent)

Introduction

[1] The appellants, Mr Cao and Ms Tao, are appealing against a determination of the Weathertight Homes Tribunal ("the Tribunal") on 24 September 2010,[1] in which they were awarded damages totalling $561,547. The grounds of their appeal are that the Tribunal erred in law in awarding damages based on the loss in value of the appellants' property, and in awarding them $25,000 for general damages.

[2] The first respondent, the Auckland City Council, supports the basis on which damages were awarded by the Tribunal, and has cross appealed against an award of $68,446 to the appellants, in respect of professional/consent fees paid for remedial design and management.

[3] The second respondent, Mr Newth, and the third respondent, Mr Tay, have taken no steps with respect to the appeal.

Background

[4] The appellants bought their home at 1/21 St Vincent Avenue, Remuera, Auckland, in November 2003. The house was approximately eight years old but had recently been repainted and appeared to be in very good condition.

[5] Within six months of buying the property, a leak was discovered in a ground floor bedroom. Further leaks appeared over the next few months. The appellants filed a claim with the Weathertight Homes Resolution Service ("WHRS") in March 2005. A WHRS assessor concluded that defects in construction had caused leaks, resulting in damage to the framing and cladding, and that significant remedial work was required.

[6] The appellants claimed for the estimated cost of remedial work, professional and consent fees, repair costs incurred, valuation fees, alternative accommodation costs, furniture removal, and interest, against the Auckland City Council, Mr Newth (builder) and Mr Tay (developer). The appellants also claimed general damages of $25,000 each, totalling $50,000.

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1 *Cao & Tao v Auckland City Council* [2010] NZWHT Auckland 26.

The Tribunal's determination

[7] The Tribunal noted that there was little disagreement between the expert witnesses as to the defects in the house, and as to each defect's contribution to the damage to the house.[2]

[8] The major cause of leaks was deficiencies in the installation and waterproofing of windows. This defect alone made a full re-clad of the house necessary. The Tribunal was satisfied that deficiencies in the installation of windows were widespread.[3] Further defects that contributed to leaks were the lack of ground clearances, inadequacies in the construction of an external staircase, and the failure to install a head flashing to the garage door.[4]

[9] The Tribunal held that the Council was negligent in failing to identify certain defects, and that it had contributed to all defects necessitating the full re-cladding of the house. Accordingly, the Council was held jointly and severally liable for the full amount of the claim.[5]

[10] Mr Newth was also found to be negligent in certain aspects of his work that necessitated the full re-cladding. He, too, was held jointly and severally liable for the full amount of the claim.[6] Mr Tay was held to have breached his duty of care as developer, which breaches resulted in defects requiring the house to be re-clad. He was also held jointly and severally liable for the full amount of the claim.[7]

[11] The Tribunal then turned to consider what was the appropriate level of damages to award.

[12] Evidence was given that the estimated remedial costs were $566,137. This comprised the tender price for the costs of remedying the defects ($549,779), plus professional fees ($43,700), insurance ($1780) and carpet replacement ($1017), less

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2 At [16].
3 At [17]–[23].
4 At [24]–[35].
5 At [57].
6 At [71].
7 At [82].

an allowance for betterment ($30,139). Evidence was also given on the value of the house with and without leaky building problems. The Tribunal considered the difference between the two values ($965,000 and $513,000, respectively) to arrive at a loss in value of $452,000. The Tribunal noted that this was $114,137 less than the estimated repair costs.[8]

[13] The Tribunal then summarised the legal principles as to whether damages should be awarded on the basis of remedial costs or loss in value, and acknowledged that there is no fixed rule, as each case must be judged on its own facts as those facts affect the claimants and other parties.[9] The Tribunal concluded:[10]

> After taking all these matters into account I conclude that in the particular circumstances of this case the measure of damages best calculated to fairly compensate the claimants while at the same time being reasonable as between the claimants and the other parties is the loss of value. I have already concluded that this amount is $452,000.

[14] The Tribunal moved on to consider whether the appellants' claim was limitation barred and concluded that it was not. That finding is not challenged on appeal. The Tribunal also concluded that the appellants were not contributorily negligent, and that they had not failed to mitigate their loss. Again, those findings are not challenged on appeal.

[15] The Tribunal then considered what contribution each of the liable parties should pay. While each of the Council, Mr Newth, and Mr Tay were held jointly and severally liable for the total amount awarded ($561,547) the Tribunal set Mr Tay's contribution at 60 per cent, and the Council's and Mr Newth's contribution at 20 per cent each.[11] The Tribunal ordered that the Council was entitled to recover a contribution of up to $455,237 from Mr Newth and Mr Tay for any amount paid in excess of $112,310; Mr Newth was ordered to pay the claimants $112,310 and was held entitled to recover up to $455,237 from the Council and Mr Tay for any amount paid in excess of $112,310, and Mr Tay was ordered to pay the appellants the sum of

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8 At [91].
9 At [93]–[94].
10 At [100].
11 At [129].

$561,547, but entitled to recover a contribution of up to $224,620 from the Council and Mr Newth for any amount paid in excess of $336,927. [12]

[16] In summary, the Tribunal said that if the three liable parties met their obligations under the Tribunal's determination, the Council would pay $112,310, Mr Newth would pay $112,310 and Mr Tay would pay $336,927.[13]

Principles as to appeals from Tribunal determinations

[17] Pursuant to s 93 of the Weathertight Homes Resolution Services Act 2006, a party to a claim that has been determined by the Tribunal may appeal to the High Court (if the amount at issue exceeds $200,000) on a question of law or fact that arises from the determination. Part 20 of the High Court Rules applies to the appeal and the appeal is by way of re-hearing. An appeal by way of re-hearing is determined by the appeal court considering the issues that had to be determined at the original hearing, and the effect of the evidence heard at that hearing, applying the law as it is when the appeal is heard.[14]

[18] The correct approach to an appeal from a specialist tribunal such as the Weathertight Homes Tribunal is set out in the judgment of the Supreme Court in *Austin Nichols & Co Inc v Stichting Lodestar*:[15]

> [5] The appeal court may or may not find the reasoning of the tribunal persuasive in its own terms. The tribunal may have had a particular advantage (such as technical expertise or the opportunity to assess the credibility of witnesses, where such assessment is important). In such a case the appeal court may rightly hesitate to conclude that findings of fact or fact and degree are wrong. It may take the view that it has no basis for rejecting the reasoning of the tribunal appealed from and that its decision should stand. But the extent of the consideration an appeal court exercising a general power of appeal gives to the decision appealed from is a matter for its judgment. An appeal court makes no error in approach simply because it pays little explicit attention to the reasons of the court or tribunal appealed from, if it comes to a different reasoned result. On general appeal, the appeal court has the responsibility of arriving at its own assessment of the merits of the case.

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12 At [130].
13 At [131].
14 See *Pratt v Wanganui Education Board* [1977] 1 NZLR 476 (SC) at 490.
15 *Austin Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [5] and [16].

...

> [16] Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion is an assessment of fact and degree and entails a value judgment. If the appellate court's opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the only sense that matters, even if it was a conclusion on which minds might reasonably differ. In such circumstances it is an error for the High Court to defer to the lower Court's assessment of the acceptability and weight to be accorded to the evidence, rather than forming its own opinion.
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> (Footnotes omitted)

Issues for determination

[19] The appeal requires determination of the following issues:

(a) Should damages have been awarded to the appellants on the basis of the estimated remedial costs, rather than the loss in value?

(b) Should the appellants have been awarded $68,446 for professional/consent fees?

(c) Should the appellants have been awarded $25,000 each in general damages, rather than $25,000 between them?

Measure of damages: loss in value or cost of remedial work?

Submissions

[20] On behalf of the appellants, Mr Shand submitted that the cost of remedial work (or "repair/reinstatement" costs) is "the normal measure of damages in defective building work cases".[16] He also submitted that if a plaintiff intends to continue to occupy and remedy defects, then the cost of that remedial work is the correct measure of damages.[17] He submitted that if remedial costs, as the

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16 Citing *East Ham Borough Council v Bernard Sunley & Sons Ltd* [1966] AC 406 (HL) at 434-435 and *Ruxley Electronics & Construction Limited v Forsyth* [1996] AC 344 (HL) at 366.

17 Citing *Dodd Properties (Kent) Ltd v Canterbury City Council [*1980] 1 WLR 433 (CA) at 456.

appropriate measure of damages, are more expensive to the defendants than loss of value, then they have no-one but themselves to blame.[18]

[21] Mr Shand then referred to a number of judgments concerning claims in respect of family homes, the reasonableness of undertaking remedial work, and the cost of remedial work as against loss in value. In support of the appellants' contention that remedial costs is the appropriate measure of damages in this case, he submitted that the house is the appellants' family home, chosen specifically as their permanent home as it is convenient to their places of work and in their son's school zone. Its size and design meets their requirements. Further, he submitted that the appellants intend, reasonably, to reinstate the house and have no available alternative, in that there is little hope of their purchasing a similar property in Remuera with the same features, at a price they can afford.

[22] Accordingly, Mr Shand submitted, reinstatement of the appellants' house is what is required to compensate them, is not unreasonable, is intended by the appellants, and is legally permissible.

[23] On behalf of the Council, Mr Robertson submitted that the Tribunal was correct to award damages on the basis of loss in value.

[24] Mr Robertson submitted that the cases cited by the appellants were not authority for the proposition that remedial costs is the "normal measure of damages for defective buildings". He submitted that the law was correctly stated by Tipping J in *Dynes v Warren & Mahoney*:[19] that there is no prima facie rule as between remedial costs and loss in value.

[25] Mr Robertson submitted that in the present case the Tribunal correctly considered the factors set out in *Dynes*, and correctly concluded that loss in value was the measure of damages that would fairly compensate the appellants, while at the same time be reasonable as between the appellants and the Council.

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[18] Citing *Evans v Balog* (1976) 1 NSWLR 36 (CA) at 40.

[19] *Dynes v Warren & Mahoney* HC Christchurch A242/84, 16 December 1987.

Discussion

[26] In *Dynes* Tipping J considered authorities as to the appropriate measure of damages in respect of a claim of defective construction of a house and swimming pool and concluded:[20]

> When there has been damage to realty, whether such damage results from breach of contract or tort, there is no rule for the assessment of damages which must be applied in all cases. I would venture to suggest that there is no prima facie rule either.
>
> The Court should not approach the task of assessing proper compensation by saying that the prima facie rule is diminution in value in certain circumstances or reinstatement/restoration in other circumstances. Each case must be judged on its own particular mixture of facts both as they affect the Plaintiff and as they affect the Defendant.
>
> The Court must select that measure of damages which is best calculated fairly to compensate the Plaintiff for the harm done while at the same time being reasonable as between Plaintiff and Defendant.
>
> A number of factors will be capable of bearing on the ultimate assessment. I am not attempting any exhaustive list but some of the matters which can be relevant are these.
>
> First there is the nature of the property and the Plaintiffs relationship to it. If the property itself has a special or particular value to the Plaintiff, such as being a family home as opposed to a property acquired for income or investment purposes, then this may be a pointer towards reinstatement as being the fairer approach.
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> Then there is the wrongdoer's connection with the property. Diminution in value may be a fairer approach if the wrongdoer is a complete outsider as opposed to someone whose purpose was to produce or contribute towards producing a particular result.
>
> The nature of the wrongful act may well have a bearing as indeed may the conduct of the parties subsequent to the wrong. If the wrongful act is the negligence of a person such as an architect or engineer whose purpose was to produce a particular result, the reasonable expectations of the Plaintiff in having that result achieved are obviously a relevant consideration.
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> Another matter is the question whether it is reasonably possible to recreate what has been damaged or unsoundly constructed on the site as originally intended.
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> Before the Court can consider reinstatement damages it must always be reasonable for the Plaintiff to seek to have his property reinstated. Another

[20] *Dynes* at 71–73.

> factor of necessity must be whether the Plaintiff genuinely intends to have the property reinstated.
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> If reinstatement cannot be achieved on the site, either by reason of planning considerations or for safety or suitability reasons, then the question arises whether the Plaintiff should reasonably be entitled to have what he was hoping to achieve on the defective site achieved elsewhere.

[27] Warren and Mahoney appealed from the judgment of Tipping J.[21] One of the grounds of appeal was that Tipping J had erred in assessing damages on the basis of diminution in value rather than "looking for proven rectification or restoration costs".

[28] In its judgment on this aspect of the appeal, the Court of Appeal referred to the judgment of the High Court of Australia in *Bellgrove v Eldridge*.[22] In that case, the High Court of Australia rejected the diminution in value approach and held that the plaintiff's loss could, prima facie, be measured only by ascertaining the amount required to rectify defects. The "prima facie rule" was, however, made subject to the qualification that it can be departed from if the circumstances of the particular case mean that it is not a reasonable course to adopt.

[29] The Court of Appeal in *Warren & Mahoney v Dynes* adopted the prima facie rule and its qualification. The Court of Appeal said that:[23]

> The real question is whether there should be a departure from the prima facie, but not inflexible, rule that the primary concern of the Court should be to ascertain the amount required to rectify the defects complained of in order to give the Dynes, so far as it is now possible, the equivalent of a building which is substantially in accordance with the contract they made with the architects.

[30] Despite the slight difference noted above, I conclude that there is little, if any, real practical difference between the approach of Tipping J and the Court of Appeal. They both accept that there may be a different measure of damages in each particular case. Which measure is ultimately chosen in each case is the one that is reasonable and makes most sense in that case.

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21 *Warren & Mahoney v Dynes* CA49/88, 26 October 1988.
22 *Bellgrove v Eldridge* (1954) 90 CLR 613 (HCA) at 617.
23 *Warren & Mahoney* at 22.

[31] I adopt the reference by the Court of Appeal to a "prima facie rule". The primary concern of the Court in each case should be to ascertain remedial costs but, as with any "prima facie rule", that is not inflexible; the Court must always be satisfied that remedying defects is a reasonable course to adopt. I also accept that the factors set out by Tipping J in *Dynes* are appropriate for considering what is the reasonable course to adopt in ascertaining the appropriate measure of damages in any particular case. Accordingly, this case must be considered on its own particular facts, as they affect the appellants and as they affect the Council. Because the focus must be on the particular facts of this case, there is little value in referring to decisions made on the facts of other cases.

Evidence relevant to determination of the appropriate measure of damages

[32] It is helpful to set out a snapshot of the evidence that was before the Tribunal that is relevant to the determination whether damages should be assessed on the basis of repair/reinstatement costs, or loss in value; that is, the evidence that addresses the factors listed by Tipping J in *Dynes*.

[33] In their witness statement dated 8 July 2010, the appellants said that when they first saw the house they were excited because it was in Remuera, an area they both knew well and liked, and met their "ideal house" which was modern, large, and able to accommodate their family and overseas family. In their reply statement dated 20 August 2010, the appellants said:

(a) They intend to have the property repaired, they wish to fix the defects and prevent further leaks to the house.

(b) They like living in the Remuera area and have no desire to relocate. They love the location and frequently use the local amenities. The location is convenient to their work and in their son's school zone.

(c) They doubt they could find a buyer for the house "as is".

(d) They have little hope they could afford to buy a house in a similar location, defect-free, with five bedrooms, three bathrooms, two living areas, double internal access garage, kitchen and dining room. This space is required to accommodate their extended family.

[34] In cross-examination at the Tribunal hearing, Ms Tao agreed that if the cost of remedial work is more that the estimated contract price, the appellants would not be able to find the additional funds. She also said that the appellants have looked at the availability of similar houses in the area. She referred to a five bedroom house in the same street, in respect of which the asking price was $1.1 million. She said that the appellants could not afford that.

[35] The valuer instructed on behalf of the Council, Mr Gamby, said that he could locate only two houses on the market in the general area that would be satisfactory as an alternative for the appellants. They both had an asking price of $1.1 million. One was the property referred to by Ms Tao. Mr Gamby said "other than that you have very little choice, in fact".

[36] The valuer instructed on behalf of the appellants, Mr Clark, was asked if he had reached the view that the "remedial option" was not an economic use of the land. He responded that, initially, the remedial option "probably was" an economic use of the land, as remedial costs were lower, but it had "come to a point now where it appears the cost to remediate far outweighs what the added value of the improvements would be".

[37] As to the certainty of the remedial costs, the building surveyor instructed on behalf of the appellants, Mr Powell, said that the tender for remedial work is a combination of a fixed price for elements that could reasonably be determined, and a contract that allows for variations, to accommodate elements that could not reasonably be determined.

The Tribunal's determination: discussion

[38] The Tribunal recorded that the issues for determination included:[24]

> What is the appropriate level of damages to award? In particular should damages be assessed on the remedial cost or the loss of value?

The Tribunal went on to say:[25]

> ... What is in dispute is the appropriate level of damages and whether it is economic to fix the property given the fact that the estimated cost of remedial works exceeds the value of the improvements.

[39] The test for determining whether damages should be assessed on the basis of remedial costs or loss in value is not whether it is "economic to fix the property". Damages must be assessed on whichever basis is the best to adopt in the sense that it will fairly compensate the appellants for harm done while at the same time being reasonable as between the claimants and other parties.[26]

[40] The test was correctly stated in the Tribunal's determination at [93]. However, the Tribunal said later:[27]

> The key issue therefore is whether it would be unreasonable to award damages to the extent of the remedial work because the cost to the liable party exceeds what is fair. In deciding this issue I need, among other things, to consider whether it is economic to repair.

In expressing the "key issue" in that manner, the Tribunal erroneously focused on whether it is economic to repair the house rather than on what would fairly compensate the appellants while at the same time be reasonable as between the appellants and the liable parties.

[41] The Tribunal calculated that the future remedial costs sought by the appellants were 25.25 per cent more than the loss of value, then went on to consider other factors.

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24 Tribunal determination at [4].
25 At [14].
26 *Dynes* at 72, and *Warren & Mahoney* at 22 and 28.
27 At [97].

[42] First, the Tribunal recorded the appellants' desire to remain living in the house, and the fact that it is their family home. The Tribunal said, however, that the appellants had done very little research as to whether they could buy a replacement property, and concluded that their limited research did not negate the valuers' view that "there would be other properties of a similar size in the general area for the amount at which they have valued their property once remediated".[28]

[43] I am satisfied that that finding was not open to the Tribunal. I have referred to Mr Gamby's evidence: he could find only two properties that met the appellants' needs; both were on the market for $1.1 million, and the appellants could not afford either. Mr Gamby said that other than these two properties, there was very little choice. Mr Clark did not refer to any comparable properties on the market. Accordingly, I conclude that the Tribunal was wrong to find that the appellants' research was negated by the valuers' evidence.

[44] The Tribunal also said:[29]

> Information was provided during the course of the hearing which tended to establish that there were a large number of properties for sale in the Remuera area although it was acknowledged that many of these were being marketed without any indication of price.

That appears to be a reference to a question, or proposition, put to Ms Tao by Mr Robertson, counsel for the Council, in cross-examination. Mr Robertson put to Ms Tao that he had visited a Remuera real estate agent that morning and had been given "a report with quite a few houses in your area that have four or five bedrooms and all kinds of features". Mr Robertson did not take Ms Tao through any of the information regarding these properties, and he noted that "most of them don't have a price on them". Ms Tao did not respond except to note some difficulty as to affording a property.

[45] I am satisfied that what Mr Robertson put to Ms Tao was not a sufficient evidential basis on which the Tribunal could conclude that the appellants would be able to buy a similar house in Remuera to replace their present house. Counsel's

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[28] At [98].
[29] At [98].

reference to properties for which no details were given, no prices specified, and were not put in detail to the appellants, is not evidence of similar available properties.

[46] The Tribunal accepted that the appellants' desire to carry out remedial work is sincere, and from their perspective reasonable.[30] However, the Tribunal went on to say that the decision to undertake remedial work had been taken when remedial costs were significantly lower than the amount now sought, leading to a "genuine question" as to whether it remained economic to undertake that work.

[47] I do not accept that it is appropriate that the passage of time can be used in this particular manner to determine which measure of damages is appropriate. It is apparent from the Tribunal's narrative of the material facts that the appellants made their claim to the WHRS in March 2005, after a claim under their insurance policy was declined. The WHRS assessor's report was provided in August 2005, and an amended report in July 2007. In mid-2007 the appellants engaged Mr Powell's firm to prepare a remedial design and specification for the property. At that time, the estimated repair costs were less than the estimated loss in value. It was not until August 2010 that the appellants' claim came before the Tribunal. An updated estimate of remedial costs and new valuations were prepared. These indicated that estimated remedial costs exceeded the estimated loss in value.

[48] I can see no basis in the evidence given at the Tribunal hearing for, in essence, laying the effect of the passage of time on the appellants simply because such passage meant that it became "uneconomic" to repair the property. This is not the basis upon which the choice of measure of damages should be assessed.

[49] The Tribunal went on to say that even if Ms Tao and Mr Cao are successful in their claim it is not certain that they will be able to afford to carry out the remedial work.[31]

[50] It is clear from the transcript of the hearing that the appellants agreed that if the remedial costs exceeded the tender price, then they would have difficulty funding

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30 At [99].
31 At [99].

those costs. It is equally clear that if they are not able to find a suitable similar house to buy for the amount they were awarded on a loss of value basis, they will not be able to afford a replacement house. Either way, it is a matter of speculation. I am satisfied that speculation as to the appellants' inability to carry out the remedial work is not a sufficient evidential basis for determining the appropriate measure of damages.

[51] Having considered all of the above matters, I am satisfied that the findings made by the Tribunal when considering whether it would be reasonable to award damages to the extent of remedial work were not supported by the evidence, and were wrong. Further, they do not provide a basis on which the Tribunal could conclude that the measure of damages could be determined by answering the question whether it would be economic to repair the property, only.

[52] In determining the appropriate measure of damages, the Tribunal should have considered the evidence that this is the appellants' family home, bought because it satisfied their particular requirements and that they have always intended, and wished, to remedy the defects so they can continue to live there. The Tribunal should also have considered the evidence, both from the appellants and from Mr Gamby, that there is no other similar property on the market at a price the appellants can afford.

[53] In the circumstances, I am satisfied that the Tribunal was wrong to conclude that the appropriate measure of damages is loss in value. I have concluded that in this case the appropriate measure of damages is the cost of remedial work.

Consequences of conclusion as to appropriate measure of damages

[54] As noted in the Tribunal's determination, there was no real dispute as to the estimated remedial costs. An issue as to betterment was raised but not pursued at the hearing. The Tribunal concluded that the installation of new windows was not betterment, nor was the installation of a cavity: both were necessary parts of the remedial work.[32]

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[32] At [85].

[55] Mr Shand submitted that if this Court found that the cost of remedial work is the appropriate measure of damages, then the appellants were also entitled to succeed on their claim for alternative accommodation ($34,500) and furniture removal ($4,556.50), both of which were declined by the Tribunal. Mr Robertson submitted that if this Court found that the Tribunal correctly held that loss in value was the appropriate measure, the claims for accommodation and furniture removal should not succeed.

[56] In the light of my conclusion that the appropriate measure of damages is remedial costs, it follows that the appellants succeed on their claim for the costs of alternative accommodation and furniture removal.

Should the appellants have been awarded $68,446 for professional/consent fees?

[57] The Council cross-appealed against the award of $68,446 to the appellants in respect of professional and consent fees for remedial design and management paid by them. Mr Robertson submitted that if the Tribunal was correct to hold that loss in value is the appropriate measure of damages, then the appellants could not claim these costs, as they were the start of the process of repair and reinstatement.

[58] Mr Shand submitted that these costs were properly awarded as they were incurred as part of appropriate steps taken by the appellants to mitigate their loss.

[59] The Tribunal did not give any specific reasons for awarding these sums. A separate award was made in respect of temporary repairs and remedial work.

[60] In the light of my conclusion that the appropriate measure of damages is remedial costs, I am not required to consider the cross-appeal. I would only have been required to do so if I had concluded that loss in value was the appropriate measure. However, I record that had I concluded that loss in value was the appropriate measure, I would have upheld the Tribunal's award for these costs.

[61] I accept Mr Shand's submission that it was reasonable for the appellants to take the steps they did to engage Mr Powell's firm to investigate and report on the

defects, and to prepare and manage a remedial design. I also accept his submission that the appellants would have been open to criticism for failing to mitigate their loss had they not taken steps to identify and remedy the defects.

Should the appellants have been awarded $50,000 for general damages, rather than $25,000?

Tribunal's determination

[62] The Tribunal noted that the appellants had claimed for general damages of $50,000, or $25,000 each, and found that they had both suffered considerable stress and difficulty as a result of living in a leaky home. The Tribunal referred to the judgment of Ellis J in *Findlay Family Trust*,[33] in which her Honour referred to the judgment of the Court of Appeal in *O'Hagan v Body Corporate 189855* ["*Byron Avenue*"].[34] The Tribunal paraphrased Ellis J as having said that "the *Byron Avenue* appeal confirmed the availability of general damages in leaky building cases in general was $25,000 per dwelling for owner-occupiers".

[63] Mr Shand submitted that the Tribunal erred in law in awarding only $25,000 in general damages, when both appellants occupied the house and both had suffered as a result. He submitted that Ellis J had incorrectly interpreted the judgment of the Court of Appeal. He submitted that in *Byron Avenue*:

(a) single owner-occupiers received an award of $25,000 each;

(b) single non-occupier owners received $15,000; and

(c) where there was more than one non-occupier owner they received $25,000, in total.[35]

[64] Mr Shand submitted that in *Byron Avenue* there were no units where there was more than one owner-occupier and referred to earlier High Court judgments

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33 *Findlay and Sandelin as trustees of the Lee Findlay Family Trust v Auckland City Council* HC Auckland CIV-2009-404-6497, 16 September 2010 at [92].

34 *O'Hagan v Body Corporate 189855* [2010] NZCA 65; [2010] 3 NZLR 445 at [153].

35 *Byron Avenue* at [127]–[129].

where general damages of $25,000 had been awarded to each resident owner-occupier of a leaky property.

[65] Mr Robertson submitted that *Byron Avenue* is not a guideline judgment, and the Court of Appeal declined to give one in that case. He referred in particular to the judgment of William Young P as to giving a guideline judgment:[36]

> I consider that this Court has a role in giving general guidance as to appropriate levels of compensation for non-economic loss in leaky homes cases. Rules of thumb would serve to reduce the cost of resolving litigation of this sort, and, as well would facilitate consistency. On the other hand, I agree with Baragwanath J that this is not an ideal case for such general guidance to be given, primarily because, as he notes, the material before us was rather too limited for us to be confident that we have a reasonably complete grasp of all the relevant issues.

He submitted that the awards referred to in *Byron Avenue* were examples only, and should not be interpreted as guidance as to "standard" awards.

[66] Mr Robertson also referred to the recent judgment of the Court of Appeal in *Brouwers v Street*,[37] where the Court awarded $20,000 in general damages to a plaintiff who succeeded in a claim in nuisance and negligence where the defendant's actions had led to the removal of support for the plaintiff's land and rendered his house uninhabitable. He submitted that the circumstances in *Brouwers* presented a far more compelling argument for general damages than did those of the present case.

[67] Further, Mr Robertson submitted that an appellate Court should not interfere with an award of general damages unless it is satisfied that the award is "wholly erroneous". He submitted that the Tribunal's decision to award $25,000 in general damages is consistent with authorities and is not wholly erroneous.

Discussion

[68] As noted earlier, Mr Shand referred me to judgments of the High Court, prior to the judgments of the Court of Appeal in *Byron Avenue*, where awards of damages

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36 At [152].

37 *Brouwers v Street* [2010] NZCA 463; [2011] 1 NZLR 645.

of $25,000 were made to each of multiple owner-occupiers of leaky buildings. In *White v Rodney District Council*,[38] $25,000 was awarded on appeal to each of two owner-occupiers. In *Body Corporate 183523 v Tony Tay*,[39]each owner-occupier plaintiff was awarded $25,000 in general damages. It is not clear from the judgment how many, if any, of the units concerned had more than one owner-occupier. In *Body Corporate 188529 v North Shore City Council* [**"***Sunset Terraces*"],[40] each owner-occupier was awarded $25,000. In *Body Corporate 185960 v North Shore City Council*,[41] $25,000 was awarded to each owner-occupier, where there was more than one.

[69] I was referred to three relevant judgments after *Byron Avenue*.

[70] In her judgment in *Scandle v Far North District Council*,[42] Duffy J referred to *Sunset Terraces* and *Byron Avenue* in her brief discussion on a non-occupier's claim for general damages. In that case, Mr Scandle was the sole plaintiff, but it had been intended that he and his wife would use the house as a holiday home and live in it in their retirement. Mr Scandle was awarded $15,000, as a non-occupier, for general damages.[43]

[71] In *Findlay*, Ellis J allowed an appeal from a Tribunal's decision that trustee owners of a leaky home were not entitled to an award of general damages. Mr Findlay was one of the trustees of the Trust which owned the house, and he lived in it. Ellis J held that Mr Findlay was entitled to an award of general damages as an owner-occupier of a leaky home.

[72] In *Coughlan v Abernethy*,[44] White J referred to *Byron Avenue* and noted that the Court of Appeal was giving "a general guidance" and "rules of thumb" for the purpose of reducing litigation costs and facilitating consistency. He also referred to

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38 *White v Rodney District Council* (2009) 11 NZCPR 1 (HC).
39 *Body Corporate 183523 v Tony Tay* HC Auckland CIV-2004-404-4824, 30 March 2009.
40 *Body Corporate 188529 & Ors v North Shore City Council* HC Auckland CIV-2004-404-3230, 30 September 2008.
41 *Body Corporate 185960 v North Shore City Council* HC Auckland CIV-2006-004-3535, 22 December 2008.
42 *Scandle v Far North District Council* HC Whangarei CIV-2008-488-203, 30 July 2010.
43 *Scandle* at [160].
44 *Coughlan v Abernethy* HC Auckland CIV-2009-004-2374, 20 October 2010.

the observation of Baragwanath J that an appellate court will only interfere with an award of general damages if it is satisfied that the award is "wholly erroneous".[45] His Honour refused to interfere with an award of $12,500 for two non-occupier owners of a leaky home ($7,500 to one and $5,000 to the other) on the grounds that the award was not wholly erroneous or so outside the range of what was reasonable in the circumstances of the case that it ought to be set aside.[46]

[73] I do not accept Mr Shand's submission that Ellis J misinterpreted the judgment of the Court of Appeal in *Byron Avenue*. She correctly set out [153] of the Court's judgment. Further, with respect, I have concluded that she correctly understood William Young P as having said that "$25,000 is appropriate per unit for occupiers". Further, I do not accept Mr Shand's submission that the Tribunal erred at [102] of the determination when paraphrasing Ellis J's judgment.

[74] As did White J, I understand that in *Byron Avenue* the Court of Appeal was giving "general guidance" and "rules of thumb", and that the Court emphasised that an appellate court should interfere with an award of damages only if it is wholly erroneous or so outside the range of what was reasonable in the circumstances of the case that it should be set aside. I am not satisfied that the award of $25,000 to the appellants in this case was wholly erroneous, and ought to be set aside.

[75] Judgments since the Court of Appeal's judgment in *Byron Avenue* have awarded general damages on a "per unit" basis. I am satisfied that that was what was intended by the Court of Appeal was "general guidance" and a "rule of thumb".

[76] Accordingly, I conclude that the Tribunal did not err in awarding the appellants $25,000 in general damages.

Result

[77] The appellants' appeal as to the measure of damages is allowed and the Council's cross-appeal in respect of professional and consent fees is dismissed.

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45 *Coughlan* at [119].
46 At [120].

Damages are to be assessed according to the costs of repair/reinstatement. The appellants are entitled to the following:

Repair/reinstatement costs	$566,137.00
Professional and consent fees incurred	68,446.00
Repair costs incurred	4,669.00
Valuation fees	1,450.00
Alternative accommodation costs	34,500.00
Furniture removal	4,556.50
Interest	9,982.00

[78] The appellants' appeal against the award of general damages is dismissed. The award for general damages remains $25,000.

[79] An adjustment will be required to the amounts payable, as set out at [130] of the Tribunal's determination, in order to maintain the percentage contributions set out at [129].

[80] Counsel did not make submissions as to costs. Both the appellants and the Council have succeeded in part and failed in part. It may be appropriate for costs to lie where they fall.

[81] In the event that the parties are not able to agree as to costs then memoranda may be filed: those on behalf of the appellants within 20 working days of the date of this judgment and those on behalf of the Council within a further 20 working days. Counsel should indicate in their memoranda whether a hearing is required, or if a decision may be made on the papers.

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Andrews J