IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2010-404-837
[2013] NZHC 165

BETWEEN	ROSS WAYNE JOHNSON, LINDA JEAN JOHNSON AND FIRST INVESTMENT TRUST LIMITED Plaintiffs
AND	AUCKLAND COUNCIL Defendant
AND	STEPHEN ROY JOHNSTON Third Party

Hearing: 21, 22, 23, 24, 25, 28 and 29 May 2012

Counsel: G B Lewis and L V Chapman for the Plaintiffs
S A Thodey and K M Parker for the Defendant
I J Thain and C Stacey for the Third Party

Judgment: 11 February 2013

JUDGMENT OF WOODHOUSE J

This judgment was delivered by me on 11 February 2013 at 4:30 p.m. pursuant to r 11.5 of the High Court Rules 1985.

Registrar/Deputy Registrar

Solicitors:
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Introduction

[1] In April 2009 the plaintiffs purchased a residential property to be occupied as the home of the first two plaintiffs, Mr and Mrs Johnson, and their children.[1]

[2] Substantial alterations to the house had been carried out before the property was purchased by the plaintiffs. It is not in issue that this work was defective and as a result the house was not weathertight. The plaintiffs now claim from the defendant Council $1.925 million for the cost of repairs and some other sums for consequential losses. The plaintiffs contend that the Council was negligent in carrying out functions under the Building Act 1991. The Council admits that it was negligent in failing to take reasonable steps to ensure that defects in the alteration work were rectified and that the alterations complied with the Building Code, and in issuing a code compliance certificate.

[3] The principal issues that arise for determination between the plaintiffs and the Council are:

(a) Was there contributory negligence by the plaintiffs?

The Council contends that the plaintiffs, before committing themselves to the purchase, failed to make enquiries and take other steps that reasonably prudent people would have taken, generally and in the particular circumstances of this case, and this contributed significantly to any losses they have suffered. The plaintiffs' response, in considerable measure, is that the argument for the Council amounts to a proposition that the public can no longer rely on code compliance certificates issued by councils and that this is contrary to authority binding on this Court in respect of the obligations of councils in leaky homes cases.

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[1] Mr and Mrs Johnson and the third plaintiff are the owners of the property as trustees of a family trust. Nothing turns on this.

(b) What is the proper measure of damages?

Are the plaintiffs entitled to the cost of the repairs or should damages be assessed as the difference between either the price paid or the market value unaffected by defective construction, and the market value taking account of the defective construction?

(c) What is the quantum of the loss on the correct measure?

[4] The third party, Mr Stephen Johnston, visited the house with Mrs Johnson on one occasion shortly before Mrs Johnston entered into an agreement to purchase the property. Mr Johnston had a business as a cost and project manager mainly for interior work. The plaintiffs say he was asked to advise on any problems with the house.

[5] In a third party claim by the Council against Mr Johnston, the Council contends that Mr Johnston was in breach of a duty of care to the plaintiffs in that he failed to carry out an adequate inspection of the house, failed to identify a number of defects, and in consequence failed to give appropriate advice to Mrs Johnston. The Council claims that it is entitled to recover from Mr Johnston the whole or part of the sum for which the Council is liable to the plaintiffs.[2] The essence of Mr Johnston's response is that he was not engaged in any capacity which could give rise to any liability to the plaintiffs.

[6] The central issues arising from the third party claim are ones of fact: the reasons why Mr Johnston visited the property with Mrs Johnson before purchase and what occurred on that visit, including what was said by Mrs Johnson and Mr Johnston to each other and what was said by others during the visit of Mrs Johnson and Mr Johnston. Although these and related questions arose out of the third party proceeding, they became matters of direct conflict between the plaintiffs, and Mrs Johnson in particular, and Mr Johnston. The Council did not withdraw its third party claim against Mr Johnston, but the Council supported Mr Johnston's contentions of fact in respect of a number of material conflicts of evidence between Mr Johnston

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[2] As a joint tortfeaser pursuant to s 17(1)(c) of the Law Reform Act 1936.

and Mrs Johnson. This is because the determinations of fact in this regard are relevant to the question of contributory negligence by the plaintiffs. Mrs Johnson said that she asked Mr Johnston to advise her if there were any weathertightness concerns with the house and that he positively told her there were not. Mr Johnston said that he was not asked to visit the property to advise on the structural integrity of the house at all, but that while he and Mrs Johnson were at the property there were indications of problems and he advised Mrs Johnson to consult an expert if she had concerns because Mr Johnston was not an expert.

[7] It is appropriate to consider the principles of law relating to contributory negligence before outlining the relevant evidence.

Contributory negligence: principles

The Contributory Negligence Act

[8] Section 3(1) of the Contributory Negligence Act 1947 provides, so far as material:

> **3 Apportionment of liability in case of contributory negligence**
>
> (1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof 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:
>
> ...

[9] This is appropriately restated in terms relevant to this case: if the loss suffered by the plaintiffs has occurred partly as a result of the plaintiffs' own fault and partly as a result of the Council's negligence, the compensation payable by the Council to the plaintiffs for the plaintiffs' total loss is to be reduced by an amount representing the plaintiffs' share of responsibility for the loss.

[10] The elements of contributory negligence and relevant principles are discussed in the following paragraphs.

Fault of the plaintiff

[11] The plaintiff's fault does not require proof of the same elements of negligence that are required to be proved against a defendant. This is made clear by the definition of "fault" in s 2 of the 1947 Act. "Fault" is defined as: "negligence, breach of statutory duty, 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". Acts or omissions – that is "conduct" – that would have given rise to the defence of contributory negligence before the 1947 Act was passed included conduct which would not have been sufficient to result in liability for negligence on the part of the defendant. As stated in *Fleming*:[3]

> [The plaintiff's "negligence"] does not necessarily connote conduct that is fraught with undue risk to *others*, but rather a failure on the part of the plaintiff to take reasonable care of him or herself for his or her *own* interests[4]
> ...
>
> [It] is well established that there is no necessity for the plaintiff to be under a duty to take care before a finding of contributory negligence can be made.[5]

Causation

[12] The plaintiffs' negligence must be causally connected to the plaintiffs' loss. It must also not be too remote for the loss in question to be attributed in part to the plaintiffs' conduct, but the critical issue is causation. Causation in relation to contributory negligence involves the following features of present relevance:

(a) As stated in *The Law of Torts in New Zealand*, it is sufficient that the plaintiff's conduct should contribute to the *damage* – the harm – the plaintiff suffers. It is not essential that it should contribute to the *event*.[6] The "event" in this case is the construction of a house which

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[3] Carolyn Sappideen and Prue Vines (eds) *Fleming's the Law of Torts* (10th ed, Brookers, Sydney, 2011) at [12.30].
[4] "[C]ontributory negligence involves conduct which exposes the actor to the risk of injury without necessarily exposing others to the risk." *Commissioner of Railways v Ruprecht* (1979) 142 CLR 563 at 570 (HCA) per Mason J.
[5] *Nance v British Columbia Electric Railway Co Ltd* [1951] AC 601 at 611 (PC); *Astley v Austrust Ltd* [1999] HCA 6 at [21], (1999) 197 CLR 1; *Sahib Foods Ltd v Paskin Kyriakides Sands* [2003] EWCA Civ 1832, (2003) 93 Con LR 1 at [62].
[6] Stephen Todd (ed) *The Law of Torts in New Zealand* (5th ed, Brookers, Wellington, 2009) at 987.

was not weathertight. The most direct contribution to that event was the negligent construction. There is the related and admitted negligence of the Council in carrying out inspections and in issuing the code compliance certificate. The conduct of the plaintiffs in this case that the Council says contributed to the loss is not conduct which contributed to the construction of a leaky home. That fact does not mean that there has not been contributory negligence.

(b) This primary point of principle is discussed in *Fleming* as follows:[7]

> [The] term "*contributory* negligence" might be interpreted as meaning that the plaintiff's negligence must have contributed to the *accident* in the sense of being instrumental in bringing it about. Actually, it means nothing more than the plaintiff's negligent failure to avoid getting hurt by the defendant or to take precautions that would have reduced the extent of his or her loss. Thus, while it is sufficient that the plaintiff's negligence contributed to the accident, this is not required. It is enough that it contribute to his or her damage.[8] The principle is nicely illustrated by a failure of a passenger injured in a motor vehicle accident to wear a seatbelt. If wearing a seatbelt would have made the passenger's injuries less severe or saved the passenger from injury altogether, the failure to use one may amount to contributory negligence.[9] It is irrelevant in this respect that the failure did not contribute to the accident.

(c) As an essential part of the enquiry into causation, it is therefore necessary to identify the loss – the damage – suffered by the plaintiffs and to identify the conduct of the plaintiffs which the defendant says contributed to the loss. This enquiry is not necessarily the same as the enquiry made when determining whether the defendant's conduct caused the loss in question.

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[7] Sappideen and Vines *Fleming's the Law of Torts*, above n 3 at [12.30].
[8] *Astley v Austrust Ltd* [1999] HCA 6 at [21], (1999) 197 CLR 1; *Eagle v Chambers* [2003] EWCA Civ 1107, [2004] RTR 115 at [15].
[9] *Froom v Butcher* [1976] QB 286 at 292 (CA).

The standard of care

[13] The standard of care required of the plaintiff is discussed in *The Law of Torts in New Zealand* as follows:[10]

> Whether conduct constitutes contributory negligence is a question of fact and is determined by whether the plaintiff acted reasonably in all the circumstances.[11] The defendant simply needs to show that the plaintiff did not, in his or her own interest, take reasonable care of himself or herself and contributed by this want of care to his or her own injury.[12] This is judged by the familiar test of reasonable foreseeability. "A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckonings he must take into act the possibility of others being careless".[13] The principle involved is that where a man is part author of his own injury, he cannot call on another to compensate him in full.[14]

[14] An aspect of the standard of care is discussed in *Fleming* as follows:[15]

> Ordinarily, one is entitled to proceed on the assumption that others will act with care and in accordance with accepted canons of propriety, but prudence demands as much from a potential plaintiff as from a defendant that he or she take guard as soon as he or she has reason to suspect that assumption to be ill-founded. Moreover, it is unreasonable – where there is no necessity for it – to cut things so fine as to allow no margin of safety for the mistakes or thoughtlessness of others.[16]

[15] The passage from *The Law of Torts in New Zealand* quoted above at [13] is followed by discussion of some factors relevant to the general question. Two are of particular relevance in this case. The first is expressed as "the likelihood and seriousness of any danger". It is conveniently expressed in terms related to this case with the elements separated out. Was there a risk for the plaintiffs in proceeding as they did notwithstanding the code compliance certificate? If the risk became reality, what were the possible consequences, both financial and non-financial? Non-financial consequences could include, in relation to this case, family disruption. What was the extent of the risks in respect of the possible consequences? The other

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[10] Todd *The Law of Torts in New Zealand*, above n 6 at 991.
[11] *Hooker v Stewart* [1989] NZLR 543 at 547 (CA).
[12] *Helson v McKenzies (Cuba Street) Ltd* [1950] NZLR 878 at 920 (CA); *Earl v Morris* [1950] NZLR 33 (SC).
[13] *Jones v Livox Quarries Ltd* [1952] 2 QB 608 at 615 per Denning LJ (CA).
[14] *Nance v British Columbia Electric Railway Co Ltd* [1951] AC 601 at 611 (PC).
[15] Sappideen and Vines *Fleming's the Law of Torts*, above n 3 at [12.200].
[16] *Municipal Tramways Trust v Ashby* [1951] SASR 61 at 64 (SC).

factor noted in *The Law of Torts in New Zealand* is described as "the ease of precautionary measures": what else could the plaintiffs have done beyond what they did do and what did this entail?

[16] Plaintiffs, like defendants sued in negligence, are held to an objective standard of care.[17] One consequence of this is that a failure by the plaintiffs to appreciate a risk which was reasonably foreseeable will not preclude a finding of contributory negligence.[18]

[17] If there has been contributory negligence by the plaintiff, s 3(1) of the 1947 Act requires an assessment of the plaintiff's "share in the responsibility for the damage". In practical terms, this involves comparison of the conduct of the plaintiff and the conduct of the defendant. This was discussed by Denning LJ in *Davies v Swan Motor Co (Swansea) Ltd* as follows:[19]

> Whilst causation is the decisive factor in determining whether there should be a reduced amount payable to the plaintiff, nevertheless, the amount of the reduction does not depend solely on the degree of causation. The amount of the reduction is such an amount as may be found by the court to be "just and equitable," having regard to the claimant's "share in the responsibility" for the damage. This involves a consideration, not only of the causative potency of a particular factor, but also of its blameworthiness.

This approach has been followed in New Zealand.[20]

The plaintiffs' submissions

[18] The principles summarised to this point are well established. Counsel did not argue to the contrary. The principles have been set out relatively fully because of the plaintiffs' argument as to why, as a matter of principle, the plaintiffs could not be contributorily negligent. Mr Lewis submitted that, because prospective property purchasers are entitled to rely on a code compliance certificate, they cannot be held contributorily negligent for failing to get a pre-purchase report, or make other

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[17] *O'Hagan v Body Corporate 189855 [Byron Avenue]* [2010] NZCA 65, [2010] 3 NZLR 445 at [76]-[80] (per Baragwanath J).
[18] *Joslyn v Berryman* [2003] HCA 34, (2003) 214 CLR 552 at [14], [38]-[39].
[19] *Davies v Swan Motor Co (Swansea) Ltd* [1949] 2 KB 291 at 326.
[20] See, for example, *Helson v McKenzie (Cuba St) Ltd* [1950] NZLR 878 (SC and CA) at 894 and 902; and *Mouat v Clark Boyce* [1992] 2 NZLR 559 (CA) at 572.

enquiries, or do other things, if a property is bought in reliance on the code compliance certificate and it is subsequently found that the certificate was negligently issued.

[19] This was at the forefront of Mr Lewis' submissions. He said:

> The Council's argument that purchasers should obtain pre-purchase reports is premised on the idea that the public can no longer rely on code compliance certificates issued by councils. This argument requires an examination of the statutory regime and the case law concerning code compliance certificates.

[20] The principal matters dealt with and points made by Mr Lewis in his survey of statutory provisions and case law may be summarised as follows, although setting matters out in a slightly different sequence from Mr Lewis' sequence:

(a) As Tipping J said in the Supreme Court in *Sunset/Byron*:[21]

> [It] is fundamental to the *Hamlin* principle that homeowners are entitled to place general reliance on councils to inspect residential premises with appropriate skill and care.

(b) The statutory regime underpinning the development of the case law is the Building Act 1991 and s 44A of the Local Government Official Information and Meetings Act 1987. Section 44A of the latter Act enables a prospective purchaser to obtain a land information memorandum (LIM). If a code compliance certificate has been issued for a building a copy of it can be obtained, together with other information relating to a property.

(c) In *Byron Avenue* in the Court of Appeal, William Young P described the LIM system as follows:[22]

> ... The LIM system was introduced as part of the same statutory package as the Building Act 1991 and was plainly intended to provide a simple mechanism by which potential

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[21] *North Shore City Council v Body Corporate 188529 [Sunset/Byron]* [2010] NZSC 158, [2011] 2 NZLR 289 at [61]. See in particular Tipping J at [20]-[23] and [48]-[49].

[22] *O'Hagan v Body Corporate 189855 [Byron Avenue]* [2010] NZCA 65, [2010] 3 NZLR 445 at [136]. And see Baragwanath J at [82].

> purchasers can inform themselves as to potential property risks. ...

(d) A purchaser plaintiff may be negligent for failing to obtain a LIM.[23]

(e) It has not been the practice in New Zealand for buyers of homes to get pre-purchase reports. In *Invercargill City Council v Hamlin*[24] Richardson J observed that there were six distinctive and long-standing features of the New Zealand housing market in the 1970s and 1980s. Mr Lewis cited Richardson J's comment on the sixth feature, as follows:[25]

> The sixth was that it has never been a common practice for new house buyers, including those contracting with builders for construction of houses, to commission engineering or architectural examinations or surveys of the building or proposed building. ...

The absence of a common practice relating to pre-purchase reports has been noted more recently in leaky homes cases.[26]

(f) The Supreme Court's decision in *Spencer on Byron* was delivered on 11 October 2012.[27] Mr Lewis filed a supplementary submission to the essential effect that numbers of observations of the Supreme Court support his primary argument as just outlined. Mrs Thodey for the defendant submitted to the contrary. It is unnecessary to refer to the passages particularly relied on by Mr Lewis because, in essence, they affirm points of principle from the earlier cases relied on by Mr Lewis and already outlined. The central question is whether these points of principle support the primary argument for the plaintiffs that there cannot be contributory negligence if a code compliance certificate has been relied on. I come to that issue shortly.

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[23] *O'Hagan v Body Corporate 189855 [Byron Avenue]* ibid at [136]-[138] and [145] per William Young P.
[24] *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA).
[25] *Invercargill City Council v Hamlin* ibid at 525.
[26] *Body Corporate 188529 v North Shore City Council [Sunset]* [2008] 3 NZLR 479 (HC); *Hartley v Balemi* HC Auckland CIV-2006-404-2589, 29 March 2007; *Body Corporate 189855 v North Shore City Council [Byron]* HC Auckland CIV-2005-404-5561, 25 July 2008.
[27] *Body Corporate 207624 v North Shore City Council* [2012] NZSC 83.

[21] Mr Lewis next submitted that, in his words, "pre-purchase reports should not become obligatory". He advanced nine reasons. These may be summarised as follows. (1) Making pre-purchase reports obligatory would run counter to the "common law principle" that purchasers are entitled to rely on councils. (2) It would run counter to the intent of the statutory regime to provide a central register for purchasers. (3) Councils are in a much better position than prospective purchasers to monitor building construction. (4) "It would be impossible to define [the circumstances in which] it is no longer reasonable for the public to rely on the code compliance certificate." (5) What is described as "the Council's proposal" – that is, pre-purchase inspections – would be "very inefficient". Each prospective purchaser would have to obtain a pre-purchase report. (6) "The quality of pre-purchase reports is very dubious."[28] (7) There is no evidence that there would be a sufficient number of qualified inspectors to carry out the work if pre-purchase inspections "become compulsory". (8) A council could, in effect, qualify a positive LIM with a warning about moisture problems. (9) "Ultimately the answer to this issue is for councils to institute more robust inspection and certification regimes."

[22] As would be expected, Mr Lewis' survey of principles relating to the liability in negligence of local bodies relating to the construction of buildings is an accurate and thorough survey. But these principles do not mean that a person who relies on a code compliance certificate negligently issued by a council, or a person who proceeds on the assumption that a council has carried out its statutory duties competently, cannot be contributorily negligent. If they could not be contributorily negligent a special exemption from contributory negligence would arise for purchasers suffering loss because of the negligence of councils in carrying out inspections and issuing code compliance certificates. The short answer to Mr Lewis' argument is that there is no principled basis for exempting one category of plaintiff from the consequences of contributory fault on the part of such plaintiffs. The whole point of contributory negligence is that, when it happens, the plaintiff cannot recover in full from a defendant, such as the Council in this case, who has breached a duty of care. The principles Mr Lewis refers to in his survey are the principles which

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[28] There is reference to evidence in the *Byron Avenue* case. Evidence from another case is not a solid base for a conclusion in the present case. There was also evidence from Mr Gray, the building surveyor. This evidence warrants some weight as to the limits of a pre-purchase inspection without any intrusive examination, but needs to be weighed with the rest of the evidence in this case.

establish the duty of care of councils. The existence of such a duty is simply not in issue.

[23] In my judgment that is sufficient to put the plaintiffs' argument of principle to one side. But in deference to the careful argument that was advanced, some further points may be noted.

[24] Firstly, the plaintiffs' argument starts on a wrong premise. The Council's argument in this case is not a bald proposition that "the public can no longer rely on code compliance certificates issued by councils". An argument for the Council to that effect would have been an argument flying in the face of the well established principles surveyed by Mr Lewis. But the Council admitted liability because of those principles.

[25] It is also incorrect to describe the Council's argument, as it was described by Mr Lewis, as an argument that purchasers should obtain pre-purchase reports. The argument for the Council, considered at the level of legal principle, is an argument founded on the law in New Zealand contained in the Contributory Negligence Act and explained in the cases. Whether or not the plaintiffs should have done anything in particular will depend on the facts of each case. In cases with a subject matter such as the present, a failure to get a pre-purchase report may in one case not amount to relevant fault on the part of a plaintiff; in another case it may. In any event, each case is bound to give rise to issues as to whether or not a range of things should have been done by the plaintiff. This is such a case as the survey of the evidence will make clear.

[26] Mr Lewis' nine reasons as to why pre-purchase reports should not become obligatory, as well as proceeding on the wrong premise, are directed to the wrong legal enquiry. These propositions, numbers of which have force, are propositions relevant to whether or not a duty of care should be imposed on councils. But of course there is a duty of care on councils. This brings the analysis back to the starting point. The relevant points of principle are not whether the Council in this case had a duty of care, but whether the plaintiffs, in spite of that duty of care, contributed by their own acts or omissions to the loss sustained.

[27] The reality is that many people and organisations with different duties of care fail to comply with the particular duty. This is a fact of life. This is why the law, as a matter of policy, makes provision for damages to be reduced if a plaintiff owed such a duty fails to take adequate care of his or her own interests.

The evidence

1998-2004: building consent to code compliance certificate

[28] The property is at 18 O'Neills Avenue, Takapuna, on Auckland's North Shore. I will refer to it as "O'Neills Avenue" or "the property". In June 1998 the then owner of the property obtained a building consent from North Shore City Council, the predecessor of Auckland Council. The consent was to carry out work described as: "Add extra rooms upstairs and underground basement". The value of the work stated in the consent is $210,000. Alterations were carried out between 1998 and 2002.

[29] On 20 August 2004 a council inspector carried out a final inspection. A code compliance certificate was issued by North Shore City Council on 30 August 2004. The certificate refers by certificate number, although not by date, to the building consent issued in June 1998. It records the project as "Alterations and or Addition" with a value of $210,000. It states:

> **INTENDED LIFE** INDEFINITE
>
> THIS IS
>
> > A final code compliance certificate issued in respect of all the building work under the above 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.

[30] The work carried out on the property was more extensive than the work described in the building consent. This was established by the evidence of Mr Andrew Gray, a building surveyor called as an expert witness for the plaintiffs. Mr Gray's conclusions were based on his inspection of the records of the North Shore City Council. Mr Gray inspected various records, including plans and specifications.

He referred to the plans and specifications submitted with the application for the building consent and which led to the 1998 consent. He then said:

> In the period from November 1999 until August 2004 extensive building works were undertaken at the property, including 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 original provided for in the consent, I can find no record of any amendment to the building consent.
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> (emphasis added)

[31] Mr Ross Forsyth gave expert valuation evidence for the plaintiffs. In his brief of evidence he expressed an opinion that, "given that a code compliance certificate had been issued for the development [referring to the house] one would realistically have anticipated that the property was therefore sound, *even allowing for the style [and] mode of construction*". The emphasis has been added because this is evidence, in effect, that the house in terms of its style and mode of construction is typical of houses with weathertightness problems. In cross-examination Mr Forsyth was referred to his opinion. He said that he had expressed the opinion based on an "assessment" that the code compliance certificate had been issued for the entire house. There was then the following:[29]

> Q. And so if the code compliance certificate had been issued in this instance for alterations and renovations to a value of $210,000 you'd agree that a purchaser wouldn't acquire the same degree of comfort, wouldn't you?
>
> A. Yes.

Mr and Mrs Johnson's house hunting

[32] In 2006 Mr and Mrs Johnson had a home in Milford on Auckland's North Shore. Mrs Johnson said that she and her husband had sold a business in 2006 and started looking for a new home. Mrs Johnson said they were looking to buy a home in Takapuna with views of the sea. It is apparent that they were well placed financially. Precise details were not given in evidence, but Mrs Johnson confirmed that they had sold the business "for a good chunk of cash, a lot of money". From the proceeds of sale of the business they were able to repay a mortgage on their existing

[29] Notes of evidence p 243, ll 26-30.

Milford Road home. They retained the Milford Road home when they purchased O'Neills Avenue in 2009 and did not require finance for the purchase of O'Neills Avenue, for which they paid $3.91 million.

[33] Although the plaintiffs purchased O'Neills Avenue in 2009, it had been on the market a few years earlier and Mr and Mrs Johnson had a look at it then. Mrs Johnson thought this may have been in 2007. She said that the asking price was around $6 million. She and Mr Johnson thought this was overpriced and they did not make an offer.

[34] They looked at other properties from time to time before O'Neills Avenue came back on the market in 2009. This included properties at Clifton Road and Hauraki Road, also on the North Shore. They got some advice from Mr Johnston about these properties. This is discussed further below.

2009: O'Neills Avenue mortgagee sale: terms of sale

[35] O'Neills Avenue came back on the market for sale at around the beginning of March 2009. At this time the property was being sold by the mortgagee, Westpac Bank, by tender. The closing date for tenders was Tuesday, 31 March 2009. Westpac, as vendor, reserved rights in relation to the acceptance or rejection of any tender. The terms of any agreement for sale and purchase entered into were stipulated by annexing a copy of the 8th edition of the REINZ/ADLS standard form agreement for sale and purchase of real estate, with a number of standard form clauses deleted. The deleted clauses included most of clauses 6.1-6.3 in respect of vendor's warranties and undertakings. The deleted clause 6.2(5) had provided:

> Where the vendor has done or caused or permitted to be done on the property any works:
>
> (a) any permit, resource consent or building consent required by law was obtained; and
>
> (b) the works were completed in compliance with these permits or consents; and
>
> (c) where appropriate, a code compliance certificate was issued for these works.

[36] There were two clauses added to the standard form, as follows:

> 28.0 The purchaser shall be deemed to have inspected, and be relying entirely upon his own inspection of the Property and to have knowledge of all improvements (if any) and the conditions of the same and the Purchaser shall make no requisition in respect thereof nor shall the Purchaser be entitled to make any requisition in respect of any contents or information disclosed by any land Information Memorandum or Project Information Memorandum obtained by a Territorial or Governmental Authority or any information disclosed as a result of any enquiries made of any Territorial or Governmental Authority pertaining to the property or any improvements thereon.
>
> 29.0 The purchaser acknowledges that the vendor, does not warrant in any respect whatsoever the condition or the structure of any buildings on the Property and that the vendor gives no warranty that no Local Body or Government requisitions and or Demolition or other orders exist or may be imposed in respect of the Property and the purchaser further acknowledges that he will make no requisition in respect of any requisitions, orders, contents or information disclosed by any Land Information Memorandum or Project Information Memorandum obtained from any Territorial or Governmental Authority pertaining to the property or any improvements thereon.

[37] The co-operation between the owners of the property and Westpac, for the purposes of sale, was limited. A real estate agent told Mrs Johnson that there was a "tense relationship" between the owners and the bank.

Mr and Mrs Johnson's renewed interest in O'Neills Avenue

[38] In early March 2009 Mr Johnson was contacted by a real estate agent, Ms Nicola White, who advised that O'Neills Avenue was on the market. Mr Johnson told Ms White that they were not interested because they had seen it earlier and they thought it was overpriced. Ms White, shortly after, contacted the Johnsons again and told them that the property was being sold by the mortgagee and, in Mrs Johnson's words, "the price was likely to be realistic". As a result the Johnsons decided to have another look at the property.

[39] The principal witness for the plaintiffs in relation to pre-purchase inspections and related activities was Mrs Johnson. Mrs Johnson attended three open homes for the property on 11, 18 and 29 March 2009. Mr Johnson accompanyied her on the second occasion. Mrs Johnson said that the open homes were for 45 minutes,

although the principal of one of the real estate agents for the bank, Mr Thomas Kane, said that the open homes were for one hour. Mrs Johnson was dealing with these matters while at the same time managing her home and the activities of their two children. Mrs Johnson emphasised in evidence that she was very busy with a range of family responsibilities. She said:

> With a five year old, a six year old, working part-time, studying part-time, doing a soccer run, the netball run, I was a very busy person and so no I did not read the papers every morning. I was pretty much on the go all the time. Um, I certainly knew of the topic of leaky homes, never in my wildest dreams did I imagine that I would buy a home that was leaky.

[40] Mrs Johnson said that, following her first open home inspection on 11 March, she was interested in the property. She "thought it would make an excellent family home" and the only changes she had in mind were different paint colours for the exterior and interior, re-carpeting and modernising the kitchen.

[41] On 17 March Ms White emailed Mr and Mrs Johnson copies of documents relating to the property. This included a copy of the code compliance certificate issued by the Council in August 2004. At the same time, and in any event before the second site visit on 18 March, Mr and Mrs Johnson received a copy of Westpac's invitation to tender with the particulars and conditions of tender and the draft agreement for sale and purchase. At around this time, and before Mrs Johnson submitted a formal tender, the documents were sent to the plaintiffs' solicitor.

[42] Mr and Mrs Johnson went to the second open home together on 18 March. Mrs Johnson said:[30]

> Ross and I went through together and had a long discussion, went through every room, went outside ..., and went through, we knew what our requirements were, what we'd been looking for for a house for a very long time and so yes we went through, um, you know, yes we were very happy.

Evidence conflict: Mrs Johnson and Ms White

[43] At about this time there was a discussion between Mrs Johnson and the real estate agent, Ms White. There is a conflict of evidence between Mrs Johnson and

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[30] Notes of evidence p 13, ll 1-5.

Ms White as to whether Ms White made a representation about the structural integrity of the house. In her brief of evidence Mrs Johnson said:

> 16. I asked Ms White whether she could comment on the structural soundness and general condition of the property. She said the property appeared to be sound and that other interested parties were satisfied with the property, including a party that had brought a builder through.

[44] Mrs Johnson remained firm in her evidence in cross-examination. She confirmed that Ms White had never walked around with her at the open homes, but said that she and Mr Johnson "had many discussions with [Ms White] about that house". Mr Johnson was less specific. He was asked if he could remember a discussion with Ms White. There was the following exchange in cross-examination:[31]

> A. Yes, yes we were – as probably any, um, potential buyers; just trying to ask as many questions as we could and she was answering us as best that she was allowed to and could.
>
> Q. And you took a lot of comfort from her answer as I understand is your evidence?
>
> A. We definitely took comfort, it wasn't anything negative that she said and it was a part of what, you know, um, a jigsaw puzzle of a lot of other people saying positive things about the property.

[45] Ms White did not provide a brief of evidence. She appeared on a summons issued for the Council. Mrs Johnson's statement, recorded above, was read to Ms White. Ms White said that she had not made such a statement. She said that she could be sure about that because the principal of the real estate agency she worked for, Mr Thomas Kane, had drummed it into her and other sales staff that interested people had to get their own advice. In cross-examination she remained firm in her evidence that she would not have made the representation.[32]

[46] Ms White's evidence as to her instructions as an employee was confirmed by Mr Kane. He said that there were a large number of questions about the property from interested people, that he endeavoured to answer the questions honestly, "but always with the clear proviso of referring to the tender documentation which made

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[31] Notes of evidence p 122, ll 12-19.
[32] See notes of evidence p 155, ll 18-28; p 157, l 10.

clear there were no vendor warranties whatsoever …". And there was the following:[33]

> Q. So as a matter of practice, in respect of this property and in respect of all properties you were selling in 2009, it can be reasonably assumed that if asked about the physical condition of the property in any way, you would've given your best answer but would have made it absolutely clear to the person seeking the advice that you were making it without any warranties, any disclaimers et cetera.
>
> A. That's absolutely correct and more to that point, um, at team meetings which we host on a weekly basis and discuss new properties coming into the market, there – you know, there are a couple of people on the team who'd never been involved in a mortgagee sale before so it was absolutely rammed down their throats there is a standard answer, no warranties as to condition, fixtures, fittings, chattels, the presence of a kitchen, vacant possession and those – it was like a broken record to every single question that was asked.
>
> Q. And you would've also advised anybody seeking information or advice from you to get their own check done wouldn't you?
>
> A. And it was – that would've been couched in the terms of do your own investigations and make your own decisions.

[47] Mr Kane also said that each salesperson employed by his business was required to sign a contract which includes "a very clear instruction that there is to be no representation as to … structural integrity, watertightness or other matters … and that's in every salesperson's contract signed by the salesperson and myself".

[48] I am satisfied that Mrs Johnson was mistaken in her recollection that she received the representation or assurance from Ms White that she said she received. It will be more convenient to explain the reasons for this conclusion after setting out the remaining evidence on the central points, including some further important conflicts of evidence.

Mrs Johnson's discussions with Mrs Stevens

[49] Mrs Stevens was one of the owners of the property. There was evidence from Mrs Johnson of discussions she said she had with Mrs Stevens. The evidence of statements said to have been made by Mrs Stevens was hearsay if offered in

[33] Notes of evidence p 136, l 26-p 137, l 10.

evidence to prove the truth of what Mrs Stevens said because Mrs Stevens was not a witness.[34] For the plaintiffs, Mr Lewis submitted that the evidence should come in because it was not being offered to prove the truth of its contents, but as evidence relevant to Mrs Johnson's state of mind. The distinction is so fine that the evidence does not assist me. For Mrs Johnson to say, in effect, that she got comfort from what she was told by Mrs Stevens requires a conclusion that Mrs Stevens did make the statement. There was some other evidence touching on Mrs Stevens which the Council sought to rely on. I leave all of this evidence to one side because it does not assist.

Mr Johnston's role and the third open home

[50] Mrs Johnson attended the final open home, on 31 March, with Mr Stephen Johnston, the third party. Mr Johnson did not attend. There are significant conflicts of evidence between Mrs Johnson and Mr Johnston about this; in broad terms as to why Mr Johnston attended the open home with Mrs Johnson and as to what was said and what happened at the open home. Before outlining the conflicting evidence some background is required in relation to Mr Johnston's areas of expertise and earlier dealings between Mr and Mrs Johnson and Mr Johnston.

[51] Mr Johnston obtained a certificate in carpentry in 1985. He worked as a carpenter and then as an on-site manager until about 1989, following which he obtained a certificate in quantity surveying. He worked as a quantity surveyor from 1990 to 1996, mainly in relation to interior works. In 1996 Mr Johnston established a business which, at some time before 2009, was transferred by him into a company he incorporated, JCS Cost Management Ltd (JCS). Through JCS Mr Johnston worked as a cost and project manager, including engaging outside contractors for cost management and project management for clients of JCS. Mr Johnston has not done any physical building work since about 1989, he has never worked as a building inspector or certifier, and he has never worked as a pre-purchase house inspector. Most of the work done by JCS relates to interior work.

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[34] See Evidence Act 2006, s 4(1).

[52] Mr Johnston said he met Mr and Mrs Johnson in about 2005. They were neighbours. Mr Johnston subsequently did a few small jobs for Mr Johnson's businesses, all of which were within the general scope of the work described above. Also, in late 2008, the Johnsons engaged JCS to project manage some interior work on the Johnsons' home.

[53] Mrs Johnson said that in about 2008 she asked Mr Johnston to look at the houses at Clifton Road and Hauraki Road that she and Mr Johnson were looking at when searching for a new home. Mrs Johnson said that Mr Johnston's opinion was sought as to whether the houses "were sound and suitable for renovation". I am satisfied that Mr Johnston correctly described the essence of his involvement as being simply as "a 'sounding board' for ideas about potential refurbishment/renovation works" at the two houses and that he was not asked for any opinion as to the quality of the construction. Although Mr Johnston may have anticipated the possibility that his company might get some work in project managing or cost managing some interior renovations if one of the properties was bought, the engagement of Mr Johnston, directly or through his company, was not on a professional, contractual basis.

[54] Mr Johnston said that "on a Sunday in March 2009" he was telephoned by Mrs Johnson who asked if he could meet her at an open home at 18 O'Neills Avenue "a short while later that day". From the context it is clear that the date Mr Johnston is referring to is 31 March 2009; the date of the final open home. Mr and Mrs Johnson said that Mr Johnston was contacted by Mr Johnson on 27 March. The plaintiffs produced Mr Johnson's mobile telephone records in a reply brief (from Mrs Johnston). These establish that there was a phone call to Mr Johnston on 27 March. However, there is no direct evidence as to the content of that discussion and Mr Johnston says it may very well have been about a small project he was managing for one of Mr Johnson's businesses. The plaintiffs did not produce their phone records for 31 March. I am satisfied that, whether or not there was a preliminary call a few days before, there was a call from Mrs Johnson to Mr Johnston on the day of the open home asking or confirming that she would like him to attend the open home with her.

[55] There is no clear evidence for the plaintiffs in respect of any instructions to Mr Johnston as to exactly what the plaintiffs were seeking from Mr Johnston when he was asked to go to the property with Mrs Johnson. In her original brief Mrs Johnson simply said that, in a discussion she had with her husband, they decided to get Mr Johnston to attend because they "wanted his opinion on whether there were any problems with the house and to discuss any work we might do". She added: "... as with the other properties Mr Johnston looked at for us". In respect of the other properties the evidence was similarly vague, including in a brief in reply to what Mr Johnston said. Mrs Johnson said that in asking Mr Johnston to provide an opinion as to whether these other properties "were sound and suitable for renovations" they "would have expected Mr Johnston to comment on any structural or weathertightness problems he saw".

[56] Mr Johnston said that the reason he was asked to attend O'Neills Avenue was to provide the same sort of preliminary advice that he had provided for the properties at Clifton Road and Hauraki Road.

[57] In her closing submissions for the Council, Mrs Thodey provided a summary of some of the main areas of conflict between the evidence of Mrs Johnson and that of Mr Johnston as to what was said and what occurred at the open home. It is convenient to use that summary, in large measure.

[58] Principal points from Mrs Johnson's evidence were:

(a) She asked Mr Johnston if he could see any problems with the house and he said there were no visible signs of leaks or any structural concerns and that any leaks would have been visible by then.

(b) There was nothing to suggest to her that the house may have had problems with leaking and she was not aware of any potential or actual weathertightness issues.

(c) Mr Johnston did not advise her to get an engineer or weathertightness expert to inspect the missing garage tiles/water stained timber or rust on a steel beam or to get the house checked by an expert.

(d) No one else at the open home was discussing whether the house was leaky.

(e) Mrs Johnson says she only told Mr Johnston that there was no access to the property outside of the scheduled open homes.

[59] Mr Johnston said:

(a) Mrs Johnson thought that they would get the property for a bargain because it was a mortgagee sale.

(b) Mrs Johnson conveyed to him that she knew the house had potential weathertightness issues. Mrs Johnson also noticed a musty smell, and they saw missing ceiling tiles in the garage with some poor condition timber and possible water staining and a rusty steel beam.

(c) He told Mrs Johnson that he could not advise on weathertightness issues and that if she had any concerns she would need to get an engineer or a weathertightness expert to inspect the areas she was concerned about.

(d) At the open home there were other people discussing whether the house might be leaky and Mrs Johnson raised her concerns with a man at the open home.

(e) Mrs Johnson told him that the real estate agents were not letting any building inspections be done, which was odd and they discussed that it made the property seem "risky" and "dodgy".

The reasonably prudent purchaser: expert legal opinion

[60] There was expert evidence from two solicitors as to steps typically taken in 2009 by purchasers before committing themselves unconditionally to a contract to buy and as to the advice that would be given to prospective purchasers by a reasonably competent conveyancing or property lawyer. Mr Robert Eades gave evidence for the plaintiffs and Mr Timothy Jones for the Council.

[61] There were differences of emphasis in this evidence, but Mr Eades and Mr Jones were essentially agreed on a number of points of importance. The summary which follows is again taken in large measure from the closing submissions for the Council and which I am satisfied is an accurate summary of the points of essential agreement and a summary which includes the points of significance on the question of contributory negligence:

(a) By early 2009 knowledge of the leaky building syndrome was within the public domain.

(b) Intending purchasers would typically seek legal advice as to the terms of the mortgagee sale documents. Mr Eades, for example, agreed that because an intending purchaser at an auction or on a tender would not have all of the rights and "abilities" under a "standard agreement", such purchaser "must make all necessary enquiries before bidding or tendering". As already noted, in this case the plaintiffs referred the purchase documents to their solicitor and I infer they obtained advice.

(c) Typical legal advice would have included recommendations:

  (i) To search the council file and to check the applicability of the code compliance certificate to the building work.

  (ii) To obtain a building report; also referred to as a pre-purchase report.

(iii) There would be a risk of going forward without obtaining a building report or generally following the solicitor's advice.

(iv) Even if an intending purchaser did not obtain legal advice it was common for them to carry out their own due diligence and in particular obtaining a pre-purchase report.

(d) Where a prospective purchaser was unable to complete all of their due diligence steps prior to the close of tenders, they could submit a conditional tender. Mr Eades expressed a qualification that this is generally thought to put a tenderer at a disadvantage as against an unconditional tender.

(e) In this instance, where there was a further period of negotiation after tenders were submitted, it was still possible to insert conditions if there were any concerns.

Mrs Johnson's tender: conclusion of agreement to purchase

[62] The closing date for tenders was 31 March 2009. A tender was submitted in the name of Mrs Johnson "or nominee". The price tendered was $3,610,000.

[63] Mr Kane said that there were only two tenders in which the bank was interested, one of which was the tender from Mrs Johnson. Mr Kane was instructed to negotiate further with both tenderers. This resulted in a new tender from Mrs Johnson dated 1 April 2009 at a price of $3,910,000. This was accepted.

[64] There were no modifications to the terms of the agreement for sale and purchase from those originally stipulated by the bank. There was no evidence of any attempt by Mrs Johnson, or the plaintiffs generally, to seek a variation of the terms of the agreement in any respect. There was no proposal to add a provision for some form of due diligence for the benefit of the plaintiffs, such as an agreement conditional upon Mrs Johnson's receiving a satisfactory report in respect of the

building, or conditional upon inspection of council records and acceptance of what was disclosed.

[65] Immediately above Mrs Johnson's signature on the agreement is the following:

> **WARNING** (This warning does not form part of this agreement)
>
> This is a binding contract. **Read the information set out on the back before signing.**

The information recorded on the back of the document, under the heading "Before signing the agreement" includes the following:

> - It is recommended both parties seek professional advice before signing. This is especially so if:
>
>   ...
>
>   - the purchaser wishes to check the weathertightness and soundness of construction of any dwellings or other buildings on the land.
>
>   ...
>
> - The vendor should ensure the warranties and undertakings in clauses 6 and 7:
>
>   ...
>
>   - are able to be complied with; and if not
>   - the applicable warranty is deleted from the agreement and any appropriate disclosure is made to the purchaser.
>
> **PROFESSIONAL ADVICE SHOULD BE SOUGHT REGARDING THE EFFECT AND CONSEQUENCES OF ANY AGREEMENT ENTERED INTO BETWEEN THE PARTIES.**

[66] The back of the agreement records the name of the solicitors acting for Mrs Johnson, a well known Auckland firm.

[67] As earlier recorded, the plaintiffs' solicitor was instructed shortly after Mr and Mrs Johnson received the tender documents, and other information, on or about 17 March. Mr Lewis noted in his closing submissions that there were no questions put to Mr or Mrs Johnson in cross-examination as to whether they took advice from

their lawyer and therefore no evidence as to the nature of any advice. On the other hand, the plaintiffs did not themselves adduce any evidence as to any advice they received and what was done pursuant to any advice. The plaintiffs' instructions to their lawyer and the advice given are, of course, subject to privilege unless the plaintiffs choose to waive privilege.

[68] The sale was completed on 28 April 2009 and the plaintiffs took possession on that date.

Plaintiffs' investigations of weathertightness: chronology

[69] After the plaintiffs settled the purchase of O'Neills Avenue and took possession, they engaged two companies to investigate weathertightness. Under the present heading I will provide an outline of the sequence of events in this regard. The results of the investigations are recorded below under the next heading: *What did visual inspection disclose?*

[70] Sometime in April 2009, but before the plaintiffs took possession, Mrs Johnson received a call from Mr Robert Maine, a representative of a company called Leakscan. Leakscan is a company which investigates buildings for weathertightness. The Council and Mr Johnston argued that this call, or at least what led to Mr Maine's making the call, indicated that the plaintiffs had concerns about weathertightness before they committed themselves to purchase. I am satisfied that Mr Maine made the call as a result of a chance meeting between Mr Maine and a close friend of Mr and Mrs Johnson, Mr Winston Kidd. There was a casual discussion between Mr Maine and Mr Kidd. I do not draw the adverse inferences against the plaintiffs that the Council and Mr Johnston argued should be drawn. I am not persuaded that Mr Maine made the telephone call as a result of some initiative, direct or indirect, on the part of the Johnsons. There is no evidence that they told their friend, Mr Kidd, that they were concerned about weathertightness. Mr Kidd gave evidence. He said that the only reason he suggested Mr Maine phone the Johnsons was because Mr Maine asked if he knew anybody who had recently purchased a property or was looking to sell a property. Mr Kidd told Mr Maine that his friends Ross and Linda Johnson had

just purchased the property at O'Neills Avenue and were planning some redecoration.

[71] However, although the call appears to have been out of the blue from Mrs Johnson's perspective, Mrs Johnson arranged to meet Mr Maine at O'Neills Avenue on 29 April, immediately on taking possession. Mr Maine said that his company could do the work for $8,000. Mrs Johnson decided to speak to her husband about it before making any commitment. This led to the Johnsons engaging Mr Johnston to act on their behalf in discussions with Leakscan representatives. I am satisfied that Mr Johnston's role was solely as an agent to arrange quotes. He was not engaged for the purpose of any technical assessment in relation to weathertightness or the appropriate way to investigate.

[72] Mr Johnston obtained a proposal from Leakscan but also recommended that quotes be obtained from other companies. As a result, Mr Johnson accepted a proposal from another company, Citywide Building Consultants (NZ) Ltd (Citywide). This was on 11 May 2009. Citywide carried out an inspection on 19 May 2009 and provided a report dated 20 May 2009. The plaintiffs decided to get a further report from Citywide. Citywide carried out a further inspection on 24 June and provided a further report on 25 June 2009.

[73] On or about 25 June 2009 the plaintiffs engaged another company, CoveKinloch Consulting Ltd (CoveKinloch), to undertake further investigations. There were two investigations with reports to the plaintiffs in or around August and October 2009. CoveKinloch in their second report confirmed their original recommendation that the entire house be reclad.

[74] At this point Mr Johnston advised Mr and Mrs Johnson that he could no longer act as project manager as the necessary remedial work was outside his area of expertise and he could not obtain insurance for the type of work that was required.

What did visual inspection disclose?

[75] There is evidence in addition to that of Mr and Mrs Johnson and Mr Johnston as to what could be seen from a visual inspection of the house. This evidence is important. It is summarised in this section.

[76] There is evidence from the first Citywide report, dated 20 May 2009. The report records that the instruction was "to undertake an assessment of the dwelling to establish the condition of the exterior cladding". There was the following in a short conclusion: "In general the cladding appears to have been performing with no real areas of concern apart from the poor detailing". This was given emphasis by the plaintiffs. However, that statement needs to be read in conjunction with a disclaimer. It also needs to be put into perspective by reference to the detail of the report.

[77] The disclaimer is as follows:

> This opinion is based on a visual inspection of those parts of the dwelling reasonably accessible, no invasive or destructive inspection methods were used in this assessment; therefore no opinion can be given in respect of such concealed work.

[78] The detail in the body of the report makes clear that the inspection involved examination of a substantial part of the building; it was not confined to an inspection of the exterior cladding. As the disclaimer notes, this was a visual inspection only. Three pieces of equipment were used to take moisture readings, but there was no destructive testing. Mr Lewis in his closing submissions referred to evidence from Mr Gray, the building surveyor called by the plaintiffs, in which Mr Gray said that the Citywide inspection "was superior to a pre-purchase inspection as Citywide undertook invasive testing". This begs the question as to what sort of pre-purchase inspection a prospective purchaser might ask for. In any event, the Citywide report makes clear as to what could be seen from a visual inspection only.

[79] The body of the report records the following from visual inspection:

(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 …"

(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."

[80] The moisture readings, which have not been noted in the preceding summary, required the use of the equipment, although none of it involved destructive testing. A table in the report states that concern is indicated by moisture content of 20% or more for boric treated timber framing and 17% or more for untreated timber framing. The report does not record whether the timber framing was boric treated or untreated, although the date of construction indicates that it may have been untreated. The report also noted in relation to indicated moisture content that there could be timber decay that had not been detected if an area earlier affected by water had dried out. Readings in some areas were at levels of 17% or more. Readings for bedroom 2 ranged between 11-67.8%, although, and also as noted above, the conclusion was that this had come from a blocked gutter.

[81] The second report from Citywide, in June 2009, was again based on visual inspection, coupled with some further use of moisture measuring equipment, but with no destructive testing. Mr Johnson referred to one conclusion in the report: "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." However, there are two further statements in the conclusion following this, as follows:

> 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.
>
> I suggest that you contact a remediation expert from the New Zealand Institute of Building Surveyors … to provide you with guidance in how best to provide long term assurance that the house cladding will perform.

[82] This advice from Citywide led to the prompt engagement of CoveKinloch on about 25 June 2009. The CoveKinloch advice in August 2009 was that the house had a number of building defects which allowed moisture ingress and that the cladding system did not allow the moisture to escape. The recommendation was that the entire house be reclad with a cavity system. This advice was given following investigation without destructive testing; CoveKinloch had been asked to carry out the further investigation in a manner that would ensure, in Mr Johnson's words, "that the testing did not leave the house with a patched appearance". Because of this advice from CoveKinloch the plaintiffs asked the company to undertake destructive testing to determine the full extent of the problem and confirm whether a full clad was necessary. In October 2009 CoveKinloch confirmed their original recommendation that the entire house be reclad.

[83] Evidence of what could be seen from a visual inspection was also provided by Mr Gray. He gave evidence as to what would have been apparent to a builder, as well as a council inspector, once the work was completed in 2004, before the final inspection and the issuing of the code compliance certificate. He said these things would have also been visible in 2009.

[84] Mr Gray's evidence came from cross-examination of him by Mrs Thodey directed to a brief of evidence prepared by Mr Gray, as an expert on instructions for the plaintiffs, at a time when the Council was denying liability. This contained a lengthy section (some 26 pages out of a total of 41), detailing 13 building defects in the house. Mr Gray said those defects "resulted in widespread moisture ingress through the external envelope of the property causing damage to various building elements". In cross-examination he confirmed that 11 of these would have been apparent in 2004 and were apparent in 2009. These defects, in summary, are: (1) incorrect fixing of the cavity batons and j-moulds; (2) flat topped parapets and balustrades; (3) "W" shaped moulding in the vertical control joints; (4) defects in the solid plaster and issues relating to insufficient control joints; (5) incorrectly installed cavity doors; (6) insufficient ground and cladding clearances; (7) inappropriate use of sealant around the canopy roof junctions; (8) issues with the deck outlet downpipe on deck floor; (9) top fixed decorative louvers; (10) external basement stairs constructed without provision to remove surface water; and (11) lack of weatherproofing at the brick wall/external southern wall junction.

[85] Another witness as to what could be seen was Mr Marcus Beveridge, an Auckland lawyer. In March 2009 Mr Beveridge attended two of the open homes at O'Neills Avenue. He was interested in the property as a possible family home.

[86] Mr Beveridge was admitted as a solicitor in 1992. He established his own practice in 2004. His principal areas of practice include construction and property law as well as commercial law, foreign investment and immigration. Mr Beveridge has recognised expertise and experience with construction law and his firm has been engaged in legal work relating to leaky homes since 2009.

[87] Mr Beveridge said the first open home he attended was either alone or with his wife. He said in respect of this visit:

> 12. … My first impression on seeing the property was that it had all of the appearances of a "leaky building". I say that because I was generally aware of the leaky building syndrome problem which existed throughout Auckland and other parts of the country. I had gained that knowledge through publicity in the newspapers and on the television concerning the types of defects and the widespread scale of the problem. Although as I have noted above, that I have

> practised in the area of construction law and have provided commercial advice for some body corporates in respect of the construction framework to be adopted for the remedial work, none of my own professional work as at 2009 (or subsequently) involved acting on leaky building claims.

[88] Mr Beveridge's evidence about the appearance of the building was similar to evidence from Mr Johnston, when referring to his site visit. He said:

> I, like everyone else in attendance, was aware that the house was generally of a style associated with leaky building syndrome …

Photographs of the house were put in evidence. It is a very large house with monolithic cladding, numbers of balconies, a flat roof and no eaves.

[89] Mr Beveridge said that, in spite of his impression that the house "had all of the appearances of a leaky building", he and his wife were interested in purchasing the property because it was being sold at a mortgagee sale and they might be able to obtain it at a significantly reduced price. He and his wife therefore attended a second open home in March. Mr and Mrs Beveridge went with Mr Beveridge's step-father, who Mr Beveridge described as being experienced in the construction industry, and with Mr Brian Duffy. Mr Beveridge understood that Mr Duffy had previously had a senior position at Fletcher Construction Limited and was employed as a project manager for high value construction projects. Mr Beveridge said:

> 14. … I took my step-father and Brian with us, so that they could provide us with their views on whether the house was a "leaky building" as I was particularly conscious that as it was a mortgagee sale, any tender offer made on it would be on an unconditional "as is where is basis." I was therefore concerned to obtain as much information about the property as I could, prior to considering whether or not to submit a tender.
>
> 15. … When we looked around the property, it was apparent to me that there were or potentially could be some serious leaky issues with the property. From memory, the main defects I noticed were some apparently leaking balconies around the swimming pool area which had peeling paint and you could see that the paint colour had changed in various areas, together with potential evidence of a leak above the garage and in the nanny's quarters.

[90] Mr Beveridge also described investigations his step-father carried out. Mr and Mrs Beveridge discussed their conclusions while they were at the property. Mr

Beveridge said their conversations were "loud and open" and others nearby at the property would have been able to overhear the discussion. Mr Beveridge recalled that there were approximately 12 other groups of people looking through the property. He said that their loud discussions and "the prodding around in general" may have been a bit tactical to try and influence what others might consider fair value for the property; to seek to reduce competitors' offers. Mr Beveridge said that the things they would have said included remarks such as the house "has all the hallmarks of a leaky property".

[91] Mr Beveridge said that, as a result of the discussions he and his wife had with his step-father and Mr Duffy, they decided that if they submitted a tender it would be on the basis that the property was potentially a leaky home and that the cost of repairs would need to be taken into account. He said they would only be interested in submitting a tender "at the approximate bare land value". In his brief of evidence Mr Beveridge said he could not recall whether in the end they did submit a tender. In cross-examination he remained uncertain, but thought that he and his wife may have submitted a tender conditional upon further inspection of the property.

The plaintiffs' original renovation intentions

[92] There is an issue between the plaintiffs on the one hand and the Council and Mr Johnston on the other, as to Mr and Mrs Johnson's intentions concerning renovations of the property before they entered into the contract to buy and also before they discovered the full extent of the remedial work required for the weathertightness problems. It is again convenient to use the summary in the submissions for the Council, as recorded in the following two paragraphs.

[93] Mr and Mrs Johnson said:

(a) They only intended minor renovation works which included painting the interior and exterior of the house, recarpeting and modernising the kitchen.

(b) After engaging and talking to an interior designer they decided to undertake significantly more work, including replacing flooring, renovating the bathrooms and wardrobes, replacing the kitchen and dismantling/renovating the guest flat including the removal of an internal wall with the nanny's quarters.

(c) By September 2009 the work extended to include new windows for the dining and family areas, shifting the angle of a toilet upstairs and fencing around the pool.

(d) They denied that before settlement they were planning to spend $300,000 on renovations.

[94] The evidence from Mr Johnston, and from Mr and Mrs Johnson in cross-examination, indicates the following:

(a) Before settlement the Johnsons planned to do approximately $300,000 worth of renovations.

(b) By 6 May 2009 they were working towards an estimate of $450,000-$500,000 based on a Martin Hughes Design Services fee submission and the Johnsons sought insurance for a $500,000 project that would take four months.

(c) The scope of the renovations extended from $300,000 to $500,000 and then to $800,000.

The plaintiffs' interior renovations and remedial work: chronology: expenditure

[95] The plaintiffs applied for a building consent for the interior renovations in October 2009. A consent for this work was issued in February 2010.

[96] An application for a building consent to undertake the recladding and associated remedial work was lodged in May 2010. The consent was issued in December 2010. The remedial work began in January 2011 and was due to be completed in August 2012.

[97] The total expenditure by the plaintiffs on the interior renovations and remedial work was $3,738,686. With the purchase price of $3,910,000, the total expenditure on the property as a whole was therefore $7,648,686.

[98] The amount claimed by the plaintiffs for remedial costs – the cost of remedying the defective work resulting in the weathertightness problems – is $1,925,000. This is a sum agreed by the quantity surveyors engaged by the plaintiffs and the Council subject to three items, totalling $253,906, which the Council contends should be deducted.

[99] The figure of $1,925,000 was arrived at by deducting a sum for expenditure on internal renovations and betterment arising in other ways, with a small adjustment for savings. This is conveniently set out in a table:

	$
Total expenditure	3,738,686
Less betterment as originally calculated by the plaintiffs' quantity surveyor	(1,436,582)
Plus savings	81,411
Plaintiffs' original claim	2,383,515
Less further adjustments agreed by both quantity surveyors	(458,515)
Plaintiffs' final claim for cost of remedial work	1,925,000
Sum of items disputed by the Council	(253,906)
Sum accepted by Council for cost of remedial work	1,671,094

Valuation evidence

[100] Evidence of the value of O'Neills Avenue was given by two registered valuers; Mr Ross Forsyth for the plaintiffs and Mr Evan Gamby for the Council. Mr

Forsyth provided an opinion of value as at February 2010 for the property on the basis that it was unaffected by the weathertightness problems ("unaffected value") and taking account of the weathertightness problems ("affected value"). Mr Gamby assessed unaffected and affected values as at the date of purchase by the plaintiffs in April 2009, in January/February 2010 and as at the date of trial in May 2012.

[101] It will be necessary to consider some of the detail of the opinions when assessing quantum on the basis that the measure of damages should be diminution in value. At this point it will be sufficient to record the valuation figures from both valuers for the January/February 2010 date. Mr Gamby's figures for April 2009 were the same as his figures for January/February 2010 and his May 2012 figures had a difference of only $25,000.

[102] The figures are: January/February 2010

	Forsyth unaffected $	Forsyth affected $	Gamby unaffected $	Gamby affected $
Land	2,600,000	2,600,000	2,750,000	2,750,000
House[35]	1,500,000	(2,000)	1,400,000	200,000
	4,100,000	2,598,000	4,150,000	2,950,000
Diminution in value		1,500,000[36]		1,200,000

[103] Mr Gamby noted the price paid by the plaintiffs of $3,910,000. He said that in his opinion this was below market value and may have been influenced by the mortgagee sale conditions. However, he recorded the arithmetic on the basis that the market value in January/February 2010 was taken as the purchase price, with the diminution in value then being $960,000 rather than his assessed figure of $1,200,000.[37]

[35] Including site improvements and chattels.
[36] Mr Forsyth rounded this down by $2,000.
[37] That is to say, purchase price/market value $3,910,000 less affected value $2,950,000 = $960,000.

The conflicts of evidence between the witnesses of fact

[104] I prefer the evidence of Mr Johnston and Ms White on the central issues. In broad measure this is because the evidence of Mr Johnston and Ms White is more consistent with other evidence than is the evidence of Mrs Johnson and because there were some errors of recollection by Mrs Johnson. I will note the latter aspects first.

Mrs Johnson's recollection of events

[105] Mrs Johnson's evidence about the plans for renovations disclosed errors sufficient to indicate lapses of memory of events at this time. The timing of significant increases in cost of Mr and Mrs Johnson's plans for renovations was in issue. Material errors by Mrs Johnson were demonstrated by reference to contemporaneous documents and after Mrs Johnson had, in a reply brief, directly challenged Mr Johnston's evidence on the points. Standing alone, a few errors as occurred here would not carry much, if any, weight in determining the reliability of Mrs Johnson's evidence generally. But this was a closely contested issue, irrespective of its overall significance on the main issues.

[106] This also illustrates a point of broader relevance in relation to the conflict of evidence between Mrs Johnson, and Mr Johnston and Ms White. I am satisfied that Mrs Johnson was distracted over this period. It comes from her own evidence. Mrs Johnson had been doing most of the work over March to investigate the purchase, leading to the formal tender signed by Mrs Johnson alone. I am not suggesting she was making decisions without discussing matters with Mr Johnson, but that it was Mrs Johnson who was most directly engaged in the process. She was pursuing the purchase with much enthusiasm and real determination. But my conclusion is that she was looking only at the big picture – getting her dream home – without pausing to concentrate on much detail. To the extent that there was concentration on detail, it was in relation to internal alterations that could be made. And Mrs Johnson's ideas for internal alterations were in turn cementing the fairly single minded objective of becoming the owner. Mrs Johnson's ability to pause and concentrate on matters of

detail was also made difficult by her family responsibilities.[38] Mrs Johnson had a lot on her plate. It would not be surprising if she forgot matters or glossed over them to the extent that she simply did not take them on board at the time. It is my conclusion that this is what occurred and this is part of my reason for preferring the evidence of Mr Johnston and Ms White.

The conflict of evidence between Mrs Johnson and Mr Johnston

[107] Mr Johnston said that he was asked to go to the final open home, on 29 March, as a "sounding board" in relation to internal alterations which Mrs Johnson already had in mind. Mrs Johnson said that she asked Mr Johnston to come to the open home to advise if there were any problems with the house. I prefer Mr Johnston's evidence for the following reasons, in addition to the matters just discussed.

[108] What Mr Johnston said he was asked to do is consistent with what he had done when asked to look at the other properties at Clifton Road and Hauraki Road. There was no material challenge to what he said about Clifton Road and Hauraki Road. There was evidence from Mrs Johnson to the effect that what she was wanting Mr Johnston to do at O'Neills Avenue was what she had asked him to do on the earlier occasions. This evidence from Mrs Johnston therefore supports what Mr Johnston said in respect of O'Neills Avenue; it was the same as Clifton Road and Hauraki Road.

[109] The plaintiffs' evidence is that they wanted particular advice from Mr Johnston, but they did not provide any clear evidence that in fact either of them gave him any such instructions to that effect. There was no clear evidence from Mr Johnson as to what he said in the telephone conversation on 27 March.

[110] The plaintiffs' evidence as to why Mr Johnston was asked to go to the open home is inconsistent with Mrs Johnson's evidence that, in effect, the code compliance certificate gave them all the assurance they needed. The copy of the certificate was received before Mr Johnston was contacted.

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[38] See above at [39].

[111] The plaintiffs' evidence is not consistent with the arrangements actually made. Whether or not there was a relevant discussion between Mr Johnson and Mr Johnston about O'Neills Avenue on 27 March, I accept Mr Johnston's evidence that there was a call from Mrs Johnson on Sunday morning. He was therefore asked to attend, or his request to attend was confirmed, only a few hours before the commencement time of the open home. According to Mrs Johnson the open home was for only 45 minutes. This was the last open home, with tenders required to go in two days later – on Tuesday, 31 March. The very short notice to Mr Johnston is consistent with someone being asked to look at the interior in a broad-brush way and to act as a sounding board for Mrs Johnson's plans. It is not consistent with a request to inspect the building to advise on the quality of construction.

[112] Before he went to O'Neills Avenue Mr Johnston did not undertake any preparation for the purpose of checking the quality of construction. He did not inspect any plans or other records, nor did he do so after the site visit, nor was he asked to do so after the site visit. He had no equipment when he went to the property.

[113] Mr Johnston was not engaged in a professional capacity. Mrs Johnson confirmed that there had been no arrangement for payment of a fee and that, consistently with the assistance he had provided before, Mr and Mrs Johnson did not expect there to be a fee. It is not plausible that a person would agree for no fee to take professional responsibility for advising a prospective purchaser of a property worth several million dollars whether the property was structurally sound. It is not plausible that a person would agree for no fee to undertake this work on a few days' notice at the most, and probably in this case on a few hours' notice, and then go to the property without any equipment which might assist in at least a superficial examination, and then provide advice without even a cursory glance at plans and other records available from the Council. It is also not plausible, applying the analysis directly to the facts of this case, that the Johnsons would have expected Mr Johnston to undertake the work they say they were expecting him to undertake, but at the same time make no payment for the work.

[114] There was no challenge to Mr Johnston's evidence that he did not regard himself as qualified to give advice of the sort the plaintiffs contend he agreed to provide. There was no challenge to his evidence that he was sensitive to risk in relation to these matters. When the plaintiffs decided to have investigations carried out as to weathertightness they did not engage Mr Johnston or his company. The fact that the plaintiffs engaged Citywide and then CoveKinloch, two companies specialising in this sort of work, but at the same time engaged Mr Johnston simply to arrange for quotes to be provided, is not only consistent with Mr Johnston's evidence as to his lack of expertise, but also makes sufficiently clear that the plaintiffs recognised that he did not have any expertise. And, once the final CoveKinloch report came in, with the plaintiffs accepting the need for a complete reclad, Mr Johnston, consistently with all of his evidence, withdrew because of his lack of expertise.

[115] Mr Johnston did not do anything at O'Neills Avenue indicative of a person assessing whether the exterior of the building had been properly constructed or, more specifically, whether there were potential weathertight problems. There was conflicting evidence as to whether some evidence of leaks had been seen and fairly extensive submissions on this. This, in its context, is not relevant to the nature of Mr Johnston's role at the open home. The thrust of the evidence from Mrs Johnson as well as Mr Johnston is that they undertook a general inspection consistent with what Mr Johnston said he was asked to do.

[116] For these reasons I accept Mr Johnston's evidence as to why he was asked to go with Mrs Johnson to the property on 29 March 2009. This conclusion, and the reasons for it, in substantial measure provides the answer to the remaining principal issues in the conflict of evidence between Mrs Johnson and Mr Johnston. 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.

[117] There are internal inconsistencies in what Mrs Johnson said. For example, she said that Mr Johnston had told her there were no visible signs of leaks, but that she herself had seen leaks in the garage when she was in the garage with Mr Johnston. I agree with Mr Thain's submission for Mr Johnston that this inconsistency is not resolved by further evidence from Mrs Johnson that the real estate agent, Mr Kane, said that this had come from a leak in a kitchen pipe which had subsequently been repaired and that there was no problem. And this evidence as to what Mr Kane said is in turn not entirely consistent with Mr Kane's evidence.

[118] Mrs Johnson, in a brief of evidence replying to Mr Johnston's brief of evidence, said that "there was nothing to suggest to me that the house may have problems with leaking". This is not consistent with evidence in cross-examination of Mrs Johnson. There was the following:[39]

> 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?
>
> 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. …

[119] This effectively emerged unprompted. There are two main points. The first is that this records Mrs Johnson's own appreciation of at least the possibility that it was a leaky home. The second is that the last sentence of the answer is not easily reconciled with a sworn answer by Mrs Johnson to interrogatories from the Council. Mrs Johnson said in her affidavit that, before the "settlement date" of the purchase,

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[39] Notes of evidence p 16.

she made enquiries of Mr Johnston about the physical condition of the building.[40] A particular interrogatory flowing from this and the answer were as follows:

> What was the nature of the enquiry(s) and the response(s)?
>
> Answer: 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.

If Mr Johnston had said what Mrs Johnson stated in evidence in Court that he had said, this should have been in the answer to the interrogatory. Mrs Johnson, when cross-examined on this, said that she was told to be concise in her answers. That does not provide sufficient explanation for the omission. And I agree with Mr Thain's submission to the essential effect that the statement in the answer to the interrogatory is different from the statement attributed to Mr Johnston in cross-examination.

[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".[41] 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.

[121] Mr Johnston was convincing as a witness. He was quite straightforward. He had clear recollection of matters of detail with nothing to indicate that it was contrived. And he conceded matters of detail, including on points which were against him and which he clearly recognised were against him.

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[40] The time period prior to "settlement date" was obviously taken to include the time before the tender was submitted. Nothing turns on this.

[41] Mr Eades brief of evidence para 54.

The conflict of evidence between Mrs Johnson and Ms White

[122] I earlier recorded, following a survey of the evidence, that I was satisfied that Mrs Johnson was mistaken in her recollection that Ms White had made a representation to her as to the soundness of the house.[42] My reasons are as follows.

[123] It is, in the first place, unlikely that Ms White would have made such a statement in the face of express instructions from Mr Kane and documented conditions of employment. What she said in terms of her instructions and conditions of employment was confirmed by Mr Kane who made the point that the instructions were drummed into the staff. The statement attributed by Mrs Johnson to Ms White would also have been in direct conflict with the terms upon which the principal of Ms White's employer, Westpac, was insisting that the property be sold.

[124] Ms White's evidence is also consistent in an important respect with Mr Johnson's evidence.[43] Mr Johnson recognised the constraints on Ms White in terms of what she could say. He expressly acknowledged that Ms White provided answers "as best that she was allowed to and could". What is more, Mr Johnson did not confirm that Ms White had made a statement as suggested by Mrs Johnson. That does not exclude the possibility of a statement being made in Mr Johnson's absence. But Mr Johnson added in the passage of evidence quoted earlier that the statements from Ms White did not contain "anything negative". That is considerably removed from a positive statement about the quality of the construction of the house. Mr Johnson's evidence is also inconsistent with another interrogatory answer by Mrs Johnson when she said that "the real estate agents" told both of them that the property appeared to be sound.

[125] As earlier recorded, Ms White appeared on a witness summons. She had not provided a brief of evidence to the Council's solicitors. Her response, after Mrs Johnson's statement was read to her, was immediate and firm to the effect that she had made no such statement. The manner in which a witness gives evidence is by no means conclusive, but I do attach some weight to the manner of the response, and the

[42] See above at [43]-[48].
[43] See above at [44].

subsequent evidence, in coming to the conclusion that Ms White's evidence on this matter is to be preferred.

The conflicts of evidence in general

[126] There is one further consideration bearing on my assessment of these conflicts of evidence. This is the fact that there are conflicts of evidence on some significant points between Mrs Johnson and two other people, Mr Johnston and Ms White, and with Mr Johnston and Ms White being completely independent of each other. That, by itself, would not take the assessment of reliability very far. But when the point is weighed in respect of the other considerations bearing on the individual assessments for the conflict with Mr Johnston and the conflict with Ms White, the fact of material conflict with the two independent witnesses is an additional factor in coming to the overall conclusion to prefer the evidence of Mr Johnston and of Ms White on the important points of difference.

Contributory negligence: discussion and conclusion

Was there contributory negligence?

[127] I am satisfied that the plaintiffs were contributorily negligent; that the loss arising from the fact that they bought a house that was not weathertight is a loss suffered as a result partly of their own fault and partly as a result of the Council's fault. The reasons for this conclusion are contained in the matters discussed to this point: the well established principles applying where there is a claim of contributory negligence; the reasons for disagreeing with Mr Lewis' submissions as to why there should be no contributory negligence as a matter of principle; and the facts I have found established in this case.

[128] I preface the reasons for my conclusion with some broader observations. These observations apply in every case, but are appropriately expressed in this case having regard to some of the submissions for the plaintiffs. Every case must be determined on its own facts. A case determined on its particular facts by applying settled principles of law is unlikely to create a precedent, except to the extent that

there are new cases where the facts are sufficiently similar. The facts of this case are in relevant respects materially different from the facts of the leading cases recently decided in New Zealand in respect of leaky homes. And the facts of this case are in relevant respects materially different from those in the earlier leading cases in respect of the liability of councils through to the Privy Council's decision in *Hamlin*. That broad introduction leads to the factual heart of this case which bears significantly on the reasons for my conclusion.

[129] The facts as I have found them mean that the only thing of consequence that the plaintiffs had to rely on in relation to quality of construction when deciding to proceed with purchase was the code compliance certificate. The fact that the code compliance certificate was issued contains the essence of the plaintiffs' response to the Council's argument that there was contributory negligence. But in this case the certificate, by itself, could not provide the assurance that certificates have been found to provide in other cases. This is because the certificate related to only a small part of work that had been done.[44] In particular, the entire house had been reclad, but the certificate did not relate to this.

[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?".[45] 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".[46] 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.[47] There was also the significant qualification by Mr Forsyth of his original opinion that comfort could be got from the code compliance certificate.

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[44] See above at [30]-[31].
[45] See above at [118].
[46] See above at [31].
[47] See above at [88].

[131] The plaintiffs' claimed that, unlike others, they were not alert at least to the possibility of problems. However, immediately on settlement of the purchase they engaged Citywide to check the house for weathertightness. I am satisfied that Mr and Mrs Johnson, before they committed themselves to the purchase, were alert to the possibility that the house might be a leaky home. 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. The plaintiffs nevertheless decided to proceed with the purchase. I am satisfied they took a calculated risk. This is central to my overall conclusion. I come back to the point later in this discussion.

[132] There is the evidence of the legal experts, Mr Eades and Mr Jones. None of the prudent steps they say should have been taken was taken. An important part of the plaintiffs' case is that some steps that Mr Jones in particular considered should have been taken would be contrary to statements of principle in the leading cases dealing with the purpose of LIMs and community reliance. In my judgment this is not a point of conflict. The advice given by experienced legal practitioners, and which a prudent purchaser should take, is given with the knowledge that, in spite of the statutory objectives, local authorities were not meeting their obligations.

[133] Mr Eades suggested that, looking at matters in 2009 when the purchase was made, more reliance could be placed on a code compliance certificate issued in 2004 than one issued earlier. The point made for the plaintiffs was that by 2004 councils were well aware of the weathertight homes problem and would be taking more care. I am unpersuaded by the submission. It is correct that significant and widespread problems with the weathertightness of buildings constructed in the 1990s had started to become apparent some years before the code compliance certificate was issued in this case. The "Hunn Report" was completed in August 2002 following appointment

of the enquiry group in February 2002.[48] However, in my judgment it would have been negligent for a solicitor in 2009 to tell a client that a code compliance certificate issued in 2004 could be relied on, and nothing more needed to be done, simply because councils, along with many others involved in the building industry, were aware of the problems before 2004. It would, in essence, be taking a big risk with a client's interests based on an assumption that local bodies had suddenly started getting it right having, in many cases, got it so badly wrong before. It would not have been prudent to pin everything on the certificate.

[134] It would in my judgment certainly have been negligent on the part of the solicitor to have given such advice without firstly checking the records available from the Council. The prudence of that course, and one which was and is simple to take, is amply demonstrated by the facts of this case from what was readily apparent from council records.[49] It may also be noted that at least three of the earlier High Court decisions in respect of leaky homes were in proceedings against North Shore City Council: the decisions known as *Sunset Terraces*,[50] *Byron Avenue*,[51] and *Kilham Mews*.[52] These judgments were delivered on, respectively, 30 April 2008, 25 July 2008 and 22 December 2008.

[135] Mrs Johnson did instruct solicitors before the tender for purchase was submitted. The absence of evidence as to any advice received was earlier noted.[53] The inference I draw is what seems to me to be the obvious inference; Mrs Johnson referred the documents to her solicitors in order to get advice from them. The further inference I draw on that basis is that the advice she got was the prudent advice that Mr Jones and Mr Eades say should have been given. On this basis Mrs Johnson, and through her the plaintiffs, proceeded with the purchase notwithstanding advice of risk and advice of other steps that could be taken which would have made the risk

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[48] Report of the overview group of the weathertightness of buildings to the Building Industry Authority.
[49] See above at [30].
[50] *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479 (HC).
[51] *Body Corporate 189855 v North Shore City Council* HC Auckland CIV-2005-404-5561, 25 July 2008, per Venning J.
[52] *Body Corporate 185960 v North Shore City Council* HC Auckland CIV-2006-004-3535, 22 December 2008, per Duffy J.
[53] See above at [67].

even more apparent. If the plaintiffs did not seek advice, then the degree of fault on their part is at least the same.

[136] The evidence establishes that one prudent step for a purchaser is to obtain what was variously described as a building report or a pre-purchase report. The plaintiffs said that this was not a course available to them because it was a mortgagee sale, with restrictions on access to the property and an inability to undertake any testing of an invasive nature. I am not persuaded that this in some way excuses the plaintiffs' actions. In the first place, if the prudent course would have been not to buy a house of this nature, and having regard to other relevant circumstances, without obtaining a building report, and it was not possible to get a report, then the purchase should not have proceeded at all. This elementary point is ignored in the plaintiffs' arguments in response to the contributory negligence contention of the Council. In addition, the evidence indicates that non-invasive inspection could have been carried out within the restrictions imposed by the owners and the mortgagee vendor. The evidence also establishes that a competent inspector could have been engaged at short notice and could have quickly carried out a visual inspection and provided a report. The evidence in relation to the Citywide inspections amply demonstrates this.[54] The evidence in this case establishes that such inspection would have disclosed significant concerns which, for this separate reason, means that it was negligent for the plaintiffs to proceed; or at least to proceed on the contractual terms that they did proceed.

[137] There were other steps the plaintiffs could have taken and should have taken. Inspection of council records has already been referred to in this discussion, albeit in a different context. Council records could easily have been inspected within the time available to the plaintiffs. And obviously it was a step that could be taken without need for any co-operation on the part of the homeowner or the mortgagee vendor. The evidence, already noted in relation to the code compliance certificate, establishes that inspection of the Council's records would have indicated that proceeding with the purchase on the assumption that there were no material problems with the construction of the house would have been foolhardy.[55] This is

[54] See above at [72].
[55] See above at [30]-[31].

not to suggest that Mrs Johnson, or Mr Johnson, should have been the person inspecting the council records, unless one or both of them considered they had sufficient expertise. If they did not have sufficient expertise it was a simple matter to engage someone who did have the expertise, as has been demonstrated by the availability of the plaintiffs' expert witness in this case who did inspect the records.

[138] There were warning signs in addition to the matters already noted. The terms of the contract stipulated by the vendor gave the purchaser no contractual protection in respect of any of the matters with which this case is concerned. 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.[56] 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 the plaintiffs.

[139] The plaintiffs' case is presented, in this context, on the basis that because it was a mortgagee sale by tender, with onerous terms stipulated by the vendor, and a tight timeframe, and various other constraints referred to in the evidence, they had no option but to present an unconditional offer, and the only flexibility they had was in relation to the price they offered. There are three points in response to this. The first is that they made no attempt to seek a variation of terms which would have provided them with better protection, including an ability to withdraw. In particular, no attempt was made to do this when Mr and Mrs Johnson were asked by the vendor to increase their offer. Mr Eades made the point that a conditional offer might put an offeror at a disadvantage against others making unconditional offers. That, however, is not the point at issue when considering whether an offeror is taking adequate care of his or her own interests. An offeror is free to take a risk by not inserting protective conditions, but in that event the risk should be carried by the offeror, not

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[56] See above at [66]. And see above at [36]-[37] as to the onerous terms of the agreement from a purchaser's point of view, including express exclusion of all relevant warranties and an express assumption of responsibility by the purchaser and effective waiver of any liability for the vendor.

by a third party. The second point is that the plaintiffs did not use price as a protective mechanism. The risk that I have found was present in this case before an offer was made is the risk that the house was not weathertight. The worst case scenario, looking at risk, was what actually happened; the need for all of the remedial work that was in fact undertaken. The value of the property on this basis, from the evidence, was in round figures between $650,000 and $1,000,000 less than the price *initially* offered by the plaintiffs. The third point goes back to the elementary, and in my judgment critical, fact that the plaintiffs were not bound to proceed at all if they could not secure an agreement on terms as to price, and other prudent terms, which sufficiently protected against risk. Whatever constraints there were on Mr and Mrs Johnson in negotiating the terms of a contract, there were none on them as to whether or not to proceed.

Apportionment of liability

[140] For the Council, Mrs Thodey submitted that the circumstances of this case justify a reduction by 75% of the damages otherwise recoverable by the plaintiffs. Mr Lewis submitted that, if there was contributory negligence, the reduction should be "significantly lower" than 25%. The 25% came from reductions in the case of three owners in the *Byron Avenue* case.[57] Mr Lewis also referred to the 10% reduction for contributory negligence in *Coughlan v Abernethy*, which he submitted involved significantly greater fault on the part of the plaintiff than any of the matters alleged against the plaintiffs in this case.[58]

[141] The damages otherwise recoverable by the plaintiffs are to be reduced "to such extent as the Court thinks just and equitable having regard to" the plaintiffs' share in the responsibility for their loss.[59] The question is one of fact. Assessments in other cases are unlikely to provide any real assistance. It requires a determination as to what is thought to be just and equitable in all of the particular circumstances of this case. The statutory direction is to the plaintiffs' share in the responsibility for

[57] *Body Corporate 189855 v North Shore City Council [Byron]* HC Auckland CIV-2005-404-5561, 25 July 2008.
[58] *Coughlan v Abernethy* HC Auckland CIV-2009-004-2374, 20 October 2010, White J. This was an appeal against a decision of the Weathertight Homes Tribunal. The reduction by the Tribunal was 10% and White J declined to interfere with that assessment.
[59] Contributory Negligence Act 1947, s 3(1), recorded above at [8].

their own loss. It involves the consideration of the two factors earlier discussed; causative potency and blame worthiness.[60]

[142] In my judgment the plaintiffs were in substantial measure the authors of their own misfortune. The foundation for that assessment is largely contained in the preceding discussion as to why there was contributory negligence. There are further considerations of consequence. The clear impression I formed as Mrs Johnson's evidence unfolded is that she was determined to purchase O'Neills Avenue. It was her dream home. Mr and Mrs Johnson were in the fortunate position of having a substantial sum of cash available for the purchase. I do not suggest, from this, that price was of little consequence. However, my assessment is, as I have already indicated, that price was subordinate to the primary desire to acquire this particular property. In addition, I am satisfied that financial security led to a willingness to take a significant risk, together with a degree of relative indifference to, or at least casualness in respect of, risk.

[143] My assessment that there was such an approach to risk, coupled with material failure to take account of risk, is reinforced by other matters. It is apparent from the earlier survey of the evidence. I will touch on some matters only. Mrs Johnson had the primary responsibility for investigating the purchase, she was enthusiastically determined to proceed, but her attention to important matters was diverted, both by this enthusiastic determination and by other responsibilities in her life.[61] This approach is illustrated in fairly graphic terms by the way in which Mr and Mrs Johnson proceeded once they had settled the purchase. They had express advice at least by August 2009 that the house would have to be reclad and it was obvious from this that the cost would be significant. However, well before they had got accurate costings for the repair work, they started on the interior renovations for a sum which ended up being, it appears, well in excess of $1 million. The point of this is not to suggest that the plaintiffs were not entitled to proceed in this way. The point is to illustrate the way in which the plaintiffs did choose to proceed in spite of very obvious risk.

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[60] See above at [17].
[61] See above at [106].

[144] Another matter of relevance is that this was a mortgagee sale. And this is a distinctive fact in this case. I am satisfied that the plaintiffs' approach to risk was materially influenced by the fact that it was a mortgagee sale. I am satisfied that there was a belief that the price being paid contained a buffer in respect of risk. For reasons discussed above, this was wrong as a matter of fact. But that is not the point of present relevance. The point of present relevance is the degree of blameworthiness in risk taking. The point is illustrated by numbers of other facts. Two only may be added in conclusion. One is the difference between the plaintiffs' approach and that of Mr Beveridge in terms of the price that he would have been prepared to pay. The second is the outcome of the further negotiations following the first tender round. Against all of the objective indicators of risk the plaintiffs, having offered to purchase at a price in excess of all but one other offer, then increased their offer by over 8% – from $3.6 million to $3.9 million – a price only $200,000 to $250,000 less than the market value on the basis that the house had no defects.

[145] In my judgment, weighing all of the matters discussed to this point, I consider that the just and equitable reduction of the damages otherwise recoverable by the plaintiffs is 70%.

Measure of damages

Principles

[146] The plaintiffs contend that the proper measure of damages is the cost of the repairs to the house. The Council contends that the proper measure of damages is the difference between the price the plaintiffs paid and the market value of the property with the house in its defective state (the affected value). The measure the plaintiffs apply may be referred to as the cost of repair and the measure the Council applies as diminution in value.[62]

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[62] "Diminution in value" is the expression commonly used for this measure of damages. However, if the measure is the difference between the price paid and the value with the known defects, the measure is not, strictly speaking, diminution in value. See *Watts v Morrow* [1991] 1 WLR 1421 (CA) at 1430, per Ralph Gibson LJ.

[147] In *Marlborough District Council v Altimarloch Joint Venture Ltd*[63] Tipping J said:

> [156] It is as well to remember at the outset that what damages are appropriate is a question of fact. There are no absolute rules in this area, albeit the courts have established prima facie approaches in certain types of case to give general guidance and a measure of predictability. The key purpose when assessing damages is to reflect the extent of the loss actually and reasonably suffered by the plaintiff. The reference to reasonableness has echoes of mitigation. A plaintiff cannot claim damages which could have been avoided or reduced by the taking of reasonable steps.

[148] The different types of case in which the Courts have established prima facie approaches that are of most relevance to the issue in this case, are cases in negligence. General principles are clear. The general principles, or what may be called the normal measure of damages, applying to different types of tort have been worked out, at least in part, by taking account of the difference between the nature of the wrong that occurs when there is negligence or some other tort, and the nature of the wrong that occurs when there is breach of a contract. Bearing this distinction in mind is important because it is the principled underpinning to the factual enquiry to which Tipping J refers. In order to assess the loss "actually and reasonably suffered by the plaintiff" it is necessary to consider, in a principled way, the nature of the legal wrong suffered by the plaintiff. This is necessary, not for the purpose of putting things into rigid legal pigeonholes, but because the process requires consideration of what is reasonable from the point of view of the defendant as well as the point of view of the plaintiff. The need to consider the position from both sides is given emphasis by Tipping J in the final sentence.

[149] There is a basic distinction between contract and tort which bears on the measure of damages. This is discussed in *McGregor on Damages* as follows:[64]

> ... This distinction is in the general rule which is the starting point for resolving all problems as to measure of damages. The distinction is latent because the leading formulation of the general rule is sufficiently wide to cover contract and tort equally: this formulation is that the claimant is

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[63] *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726, (2012) 10 NZBLC 99-700.

[64] Harvey McGregor QC *McGregor on Damages* (18th ed, Sweet and Maxwell, London, 2009) at [19-003].

> entitled to be put into the same position, as far as money can do it, as he would have been in had the wrong not been committed. In contract, however, the wrong consists not in the making but in the breaking of the contract and therefore the claimant is entitled to be put into the position he would have been in if the contract had never been broken, or in other words, if the contract had been performed. The claimant is entitled to recover damages for the loss of his bargain. In tort, on the other hand, no question of loss of bargain can arise: the claimant is not complaining of failure to implement a promise but of failure to leave him alone. The measure of damages in tort is therefore to be assessed on the basis of restoring as far as possible the *status quo ante*. This distinction does not stand out in the great majority of cases since contract and tort have such widely different areas of application, but in cases involving misrepresentations there is an overlap of contract and tort which is instructive in this connection. Where the claimant has been induced to enter into a contract by a misrepresentation of fact on the defendant's part, then if the representation constitutes a term of the contract, whether condition or warranty, he can sue for breach of contract and, in claiming for loss of his bargain, is entitled to such damages as will put him into the position he would have been in had the misrepresentation been true. If, however, the representation does not constitute a term of the contract, then, although the claimant may be entitled to rescind on the ground of misrepresentation, there is no breach of contract for which he can get damages, and his only common law action for damages can be in tort, in deceit if the misrepresentation has been fraudulently made, in negligence where it has been carelessly made. (Footnotes omitted.)

[150] The basic distinction between contract and tort is explained in the first part of this passage. The citation has been extended to the discussion of misrepresentation because it is relevant in the circumstances of this case. It is also a point of distinction clearly brought out in the *Altimarloch* case, a point to which I will return. The Council's wrong in this case was a tort – negligence in carrying out the inspections and in issuing the code compliance certificate. The heart of the plaintiffs' complaint is that the code compliance certificate should not have been issued. In practical terms the plaintiffs 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 plaintiffs' complaint is that this was a misrepresentation.

[151] The normal measure of damages for negligent misrepresentation where there is no contract between the plaintiff and the defendant, but which leads to the plaintiff's purchasing a property, is the difference between the price paid by the

plaintiff and the actual value of the property in its true condition.[65] The normal measure to be applied in this case may also be considered by reference to cases involving negligent surveys of buildings and negligent valuations of property. The leading cases discussed in *McGregor on Damages* are cases of breach of contract, rather than tort, but the breach is negligence in performance of the survey or valuation with the plaintiff's loss arising from purchase of a property in reliance on the negligent survey or valuation. The normal measure is authoritatively established in England and Wales as the difference between the price paid for the property by the person who relied on the survey or valuation, and the market value of the property in its actual condition at the time of purchase.[66]

[152] The normal rule measures the difference between the price paid by the plaintiff and the market value of the property in its true condition, rather than the market value of the property as represented (or without the defect) and the actual market value with the defects. This particular point is addressed in the authorities discussed in *McGregor*. Because of its importance in this case it warrants some further discussion. In *Watts v Morrow*[67] the plaintiffs bought a country house for £177,500 in reliance on the defendant's building survey which failed to reveal substantial defects in the property. The plaintiffs carried out repairs to remedy the defects at a cost of some £34,000. They claimed the cost of repairs from the surveyor. It was agreed that at the date of purchase the value of the house in its true condition was £162,500 and therefore £15,000 below the price paid by the plaintiffs. The trial judge found that the plaintiffs acted entirely reasonably in retaining and repairing the house, rather than reselling it, and awarded the cost of repairs as claimed. In the Court of Appeal Ralph Gibson LJ said:[68]

> … The fact that it is reasonable for the plaintiff to retain the property and to do the repairs seems to me to be irrelevant to determination of the question whether recovery of the cost of repairs is justified in order to put the plaintiff in the position in which he would have been if the contract, i.e. the promise to make a careful report, had been performed. The position is no different

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[65] Ibid at [41-002] to [41-006] and [41-057]. And see [41-049] to [41-052] for cases of negligent misrepresentation followed by a contract between the representor and the representee where the normal measure of damages is essentially the same.
[66] Ibid at [29-044] to [29-049] and the cases there cited.
[67] *Watts v Morrow* [1991] 1 WLR 1421 (CA). The summary of facts is taken from the summary in *McGregor on Damages*, above n 64 at [29-047].
[68] *Watts v Morrow* ibid at 1435H-1436B.

> from that in *Philips v Ward*:[69] the plaintiff would have refused to buy or he would have negotiated a reduced price. Recovery of the cost of repairs after having gone into possession ... is not a position into which the plaintiff could have been put as a result of proper performance of the contract.

[153] Bingham LJ said:[70]

> If Mr and Mrs Watts were to end up with the house and an award of £34,000 damages they would have obtained the house for £143,500. But even if the defendant had properly performed his contract this bargain was never on offer. The effect of the judge's award is not to put Mr and Mrs Watts in the same position as if the defendant had properly performed but in a much better one.

[154] The measure of damages the plaintiffs contend for is the normal measure that would be applied, for example, in a claim by a purchaser of a residential property against the vendor for breach of a warranty or contractual representation that the house had been constructed in accordance with the Building Code, or a claim by a property owner against a contracted builder for failing to construct a building in accordance with the contract. These examples have been referred to because some of the factual content of claims of this sort are similar to some of the factual content of the present claim. The examples – breach of the vendor warranty or contractual representation and the claim against the builder – are concerned with a house that has not been properly constructed. But a principled approach to determining the correct measure of damages is not achieved by isolating one common factual feature, but by putting the particular factual feature into its proper legal context (as well as its broader factual context). The legal context for the claims against the vendor and the builder in these examples is contract, with the claims being for breach of contract. The normal measure is the measure the plaintiffs contend for in this case; that is, the cost of repair.[71]

[155] The difference in the normal measure of damages between claims in contract and claims in tort is brought out fairly starkly by the *Altimarloch* case.[72] In that case the vendors' agents represented to the purchaser that the land came with resource consents enabling extraction of up to 1,500 cubic metres of water a day from a

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[69] *Philips v Ward* [1956] 1 WLR 471 (CA).
[70] *Watts v Morrow* above n 67 at 1445A-B.
[71] Harvey McGregor QC *McGregor on Damages*, above n 64 at [26-011] to [26-015].
[72] *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726.

stream. The purchaser entered into the contract to buy the land in reliance on this representation. It was wrong. The consents were for 750 cubic metres a day. The Marlborough District Council issued a LIM which also contained a statement that there were resource consents for the extraction of 1,500 cubic metres a day. The purchaser sued the vendors and the Council. The vendors were responsible for the misrepresentations of their agents. The purchaser sued the vendors for breach of contract because the misrepresentation of the agents became a term of the agreement for sale and purchase for the land pursuant to s 6(1) of the Contractual Remedies Act 1979. The purchaser sued the Council for negligence for misstating the details of the water rights in the LIM.[73]

[156] For the purchaser to have available 1,500 cubic metres of water a day it was necessary to build a dam at a cost of over $1 million. This is the cost of cure, the equivalent of the cost of repair for a badly constructed house. In other words, that was the cost of producing what the vendor contractually assured the purchaser would be available. The difference between the market value of the property with the water rights as represented and its market value without those rights was $400,000. The difference between the price paid by the purchaser and the value of the property as purchased was $125,000.

[157] The High Court and the Court of Appeal held that the cost of cure was the appropriate measure of damages for the purchaser's claim against the vendor. This was upheld in the Supreme Court by a majority; Blanchard, Tipping and McGrath JJ. Elias CJ and Anderson J held that the appropriate measure of damages was the difference in the value of the property with and without the water rights as represented by the vendor. In the High Court a diminution in value measure was applied for the purchaser's successful claim against the Council for negligence; that is to say, the sum of $400,000 referred to above. The Court of Appeal held that the correct measure of damages for the loss caused by the Council's negligent misstatement was the difference between the contract price and what the property

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[73] There were two other causes of action by the purchaser against the Council. These do not require consideration. See the brief discussion in the Court of Appeal: *Vining Realty Group Ltd v Moorhouse* [2010] NZCA 104, (2011) 11 NZCPR 879 at [70].

was actually worth; the sum of $125,000. The Court of Appeal saw this as a straightforward issue. It said:[74]

> This [approach in the High Court] ... necessarily builds in an element of expectations into the assessment. On an orthodox detriment basis, the loss suffered is the difference between the contract price and what the property was worth ... We can see no basis for departing from this approach.

[158] There was no leave to appeal to the Supreme Court on the measure of damages for the claim against the Council. However, there were some observations on broader principles which are relevant to a claim in tort for negligent misstatement.

[159] On the broader principles, Elias CJ said:[75]

> [23] Assessment of damages is a matter of fact.[76] The general principle is that where loss is caused by breach of a term of the contract the purpose of damages is "to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed".[77] This approach secures the benefit expected under the contract and is to be contrasted with the detriment measure applied to loss arising from non-contractual negligent misstatement (a measure that does not, however, preclude taking account of the value of loss of prospects).[78] In most cases recovery on the contractual measure will be more extensive but, in cases where the plaintiff has made a bad bargain, the loss flowing from reliance on the misrepresentation in tort may lead to greater recovery.

[160] Blanchard J referred expressly to the measure applied by the Court of Appeal. He said:

> [62] The High Court found that the value of the property if all the represented water rights actually were available to the purchaser was $2.95 million. Without the "missing" water rights its value was $2.55 million – a difference of $400,000. But, as the Court of Appeal correctly pointed out, because the contract price was only $2.675 million, the purchaser had lost only $125,000 on an orthodox diminution in value measure of damages, which compares the price paid with the value of the property absent those water rights. That was the only measure available for the purchaser's claim in tort against the Council.

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[74] *Vining Realty Group Ltd v Moorhouse* ibid at [113].
[75] *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726, (2012) 10 NZBLC 99-700.
[76] *Stirling v Poulgrain* [1980] 2 NZLR 402 (CA) at 419 per Cooke J.
[77] *Victoria Laundry (Windsor) Ld v Newman Industries Ld* [1949] 2 KB 528 (CA) at 539 per Asquith LJ.
[78] As recognised by Cooke J in *Gartside v Sheffield, Young & Ellis* [1983] NZLR 37 (CA) at 43; and see the discussion in DW McLauchlan "Assessment of Damages for Misrepresentations Inducing Contracts" (1987) 6 Otago L Rev 370 at 384–409.

> [63] ... [The] purchaser was able to claim against the vendors the cost of putting itself in the position which the vendors had represented it would be in when the contract was completed – a performance measure of damages available in a contract claim but not in a tort claim. The vendors, through the misrepresentation and the operation of the section, were treated as though they had made a contractual promise which the purchaser sought to have made good. In contrast, the Council had simply performed in a careless manner its statutory obligation to supply information by means of the LIM. It had made no promise to the purchaser about the content of the LIM.

The plaintiffs' submissions

[161] Mr Lewis was so bold as to submit that "there is no credible argument for a diminution approach in this case". He referred first to an observation of the Privy Council in *Invercargill City Council v Hamlin*.[79] Lord Lloyd of Berwick said:[80]

> Once it is appreciated that the loss in respect of which the plaintiff in the present case is suing is loss to his pocket, and not for physical damage to the house or foundations, then most, if not all the difficulties surrounding the limitation question fall away. The plaintiff's loss occurs when the market value of the house is depreciated by reason of the defective foundations, and not before. If he resells the house at full value before the defect is discovered, he has suffered no loss. Thus in the common case the occurrence of the loss and the discovery of the loss will coincide.
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> But the plaintiff cannot postpone the start of the limitation period by shutting his eyes to the obvious. In *Dennis v Charnwood Borough Council* [1983] 1 QB 409, a case decided in the Court of Appeal before *Pirelli* reached the House of Lords, Templeman LJ said at p 420 that time would begin to run in favour of a local authority:-
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>> "... if the building suffers damage or an event occurs which reveals the breach of duty by the Local Authority or which would cause a prudent owner-occupier to make investigations which, if properly carried out, would reveal the breach of duty by that local authority."
>
> In other words, the cause of action accrues when the cracks become so bad, or the defects so obvious, that any reasonable homeowner would call in an expert. Since the defects would then be obvious to a potential buyer, or his expert, that marks the moment when the market value of the building is depreciated, and therefore the moment when the economic loss occurs. Their Lordships do not think it is possible to define the moment more accurately. The measure of the loss will then be the cost of repairs, if it is reasonable to repair, or the depreciation in the market value if it is not: see *Ruxley Electronics and Constructions Ltd v Forsyth* [1995] 3 WLR 118.

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[79] *Invercargill City Council v Hamlin* [1996] 1 NZLR 513, [1996] 2 WLR 367, [1996] AC 624 (PC).
[80] *Invercargill City Council v Hamlin* ibid, at 526.

[162] Mr Lewis referred to the concluding part of this passage. I have set out more of the discussion because it makes clear that *Hamlin* was not concerned with the measure of damages. The central issue, leading to his Lordship's observation, was as to when the cause of action of the plaintiff homeowner arose in order then to determine whether the claim had been brought within the limitation period. The passage cited above is part of the discussion as to how best to assess when the plaintiff's loss arose for this purpose.

[163] The *Ruxley* decision of the House of Lords referred to by Lord Lloyd, and relied on by Mr Lewis, involved a claim for breach of contract by a builder. The House of Lords in *Ruxley* affirmed the normal measure as being the cost of repair.[81] *Ruxley* is usually cited as authority for another general principle applying to the measure of damages. This is that the measure that may normally apply will not apply if the sum involved is not reasonable. In *Ruxley* the normal measure for breach of contract in construction of a swimming pool was the cost of repair, but that was held to be unreasonable and a different measure was applied. In my opinion *Hamlin* and *Ruxley* do not assist the plaintiffs in this case.

[164] Mr Lewis also submitted:

> The New Zealand Court of Appeal has affirmed that in building defect cases the cost of repair is the *prima facie* measure of loss.[82] Not surprisingly almost all leaky building cases have been assessed on this basis, including a number of cases in which the diminution value approach was specifically considered and rejected.[83]

[165] The submission contains within it a globalised approach related not to *damages* but to a particular type of *damage* – building defects. As the preceding discussion makes clear, although there are no absolute rules as to the measure of damages in particular cases, there are normal measures, or prima facie measures, applying to different types of legal wrong, both as between contract and tort in general, and within the two broad categories of contract and tort. *Warren and*

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[81] As noted earlier in this judgment at [154] with reference to *McGregor on Damages* at [26-011] to [26-015].
[82] *Warren & Mahoney v Dynes* CA49/88, 26 October 1988.
[83] *Dicks v Hobson Swan Construction Ltd (in liq)* (2006) 7 NZCPR 881 (HC); *La Grouw v Cairns* (2004) 5 NZCPR 434 (HC); *Cao v Auckland City Council* HC Auckland CIV-2010-404-7093, 18 May 2011, Andrews J.

Mahoney v Dynes, the Court of Appeal's decision relied on by Mr Lewis, may be described as a "building defect case", but this does not assist analysis. There were claims in that case against an architect and an engineer relating to construction of a house and a swimming pool on unstable land. The claim against the architect was in contract. The claim against the engineer was in tort. In the High Court Tipping J concluded that in the circumstances of that case there was no difference in the measure of damages which might be awarded as between the claims in tort and in contract.[84] On appeal the parties did not contend otherwise and the Court of Appeal affirmed Tipping J's approach.[85] In that case the plaintiff homeowner argued that damages should be assessed as the cost of rebuilding the house and pool on other land, or the difference between the value of the house and pool as they would have been if built according to design and the actual value; that is to say, diminution of value. The architect and the engineer argued that the appropriate measure was a mixture: wasted expenditure on the useless swimming pool, the cost of removing the pool, and a modest allowance for the reduced value of the house.

[166] The Court did not affirm a prima facie measure in the terms stated by Mr Lewis. What the Court said in this regard was as follows:[86]

> 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 plaintiffs], 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.
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> (emphasis added)

In the particular circumstances of that case it was the plaintiffs who were arguing for a departure from the normal measure. On the facts of that case, the Court of Appeal affirmed the High Court's assessment of damages based on diminution of value.

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[84] *Dynes v Warren & Mahoney* HC Christchurch A242/84, 16 December 1987.
[85] *Warren & Mahoney v Dynes* CA49/88, 26 October 1988 at 9.
[86] *Warren & Mahoney v Dynes* ibid at p 22.

[167] The three cases referred to by Mr Lewis as being leaky building cases which "specifically considered and rejected" measure based on diminution in value, do not in my judgment assist the plaintiffs. *Dicks v Hobson Swan Construction Ltd*[87] was a claim against a builder in tort and in contract and a claim against the Council for negligence in failing to stipulate adequate flashings and to detect the inadequacy of what was in fact done. The measure of damages was simply touched on without any discussion.[88]

[168] *La Grouw v Cairns*[89] was a claim by a purchaser against a vendor for misrepresentation to the essential effect that the house had no leaks. There was an appeal by the vendor and the correct measure of damages was directly in issue on the appeal. However, this decision does not assist the plaintiffs. The claim was for breach of contract arising out of a contractual misrepresentation. The plaintiff claimed on the basis of the normal measure in such cases, being the cost of repair or the cost of cure. The main point at issue was the vendor's argument that the normal measure should not be applied because the cost of repair was unreasonable as disproportionate to the benefit obtained. In other words, the vendor argued that the principle discussed in the *Ruxley Electronics* case should be applied.

[169] The third case referred to by Mr Lewis is *Cao v Auckland City Council*,[90] an appeal to the High Court from a decision of the Weathertight Homes Tribunal. This was a claim by a couple who had bought an eight year old house which was later found to be a leaky home. The claim was against the builder, the developer and the Council. The claims against all three defendants were for negligence. The Council was said to be negligent in failing to identify various defects. The plaintiffs claimed the cost of repairs. The defendant contended that the correct measure was diminution of value, quantified in a sum of around $114,000 less than the repair costs. The Tribunal applied diminution of value as the measure.

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[87] *Dicks v Hobson Swan Construction Ltd (in liq)* (2006) 7 NZCPR 881 (HC).
[88] *Dicks v Hobson Swan Construction Ltd (in liq)* ibid at [121]-[122].
[89] *La Grouw v Cairns* (2004) 5 NZCPR 434 (HC).
[90] *Cao v Auckland City Council* HC Auckland CIV-2010-404-7093, 18 May 2011, Andrews J.

[170] In the High Court Andrews J cited the discussion of the approach to the measure of damages by Tipping J in the High Court in the *Dynes* case.[91] Her Honour then referred to the decision of the High Court of Australia in *Bellgrove v Eldridge*,[92] which had been cited by the Court of Appeal in *Warren & Mahoney v Dynes*.[93] Andrews J concluded her discussion of general principles by citing the statement of the Court of Appeal in *Warren & Mahoney v Dynes* which I have cited above at [166].

[171] The Judge concluded that the appropriate measure of damages was the cost of repairs to remedy the defects. She had proceeded on the basis of the Court of Appeal's reference in *Warren & Mahoney v Dynes* to the prima facie rule. The prima facie rule the Court of Appeal was there referring to was the prima facie rule in claims for breach of contract. It is not, with respect, a prima facie rule, or normal measure, that would apply for tortious negligence. However, the focus of the Judge's analysis of the issue was on the facts for the purpose of determining, as a question of fact, the appropriate measure in that case. For this reason, I am again unpersuaded that the particular conclusion in that case assists the plaintiffs in this case. As Andrews J said:[94]

> [31] ... [T]his 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.

Conclusion on the measure

[172] The argument for the plaintiffs proceeded on the basis that the normal measure of damages that should apply to its claim against the Council should be the cost of repairs. There was no consideration to any extent of the underlying principles. No argument was advanced that persuades me that the normal measure applying in cases of tortious negligence such as that of the Council in this case should not be applied in this case. No argument was advanced which would justify a

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[91] *Cao v Auckland City Council* ibid at [26], citing *Dynes v Warren & Mahoney* HC Christchurch A242/84, 16 December 1987, at 71-73.
[92] *Bellgrove v Eldridge* (1954) 90 CLR 613 (HCA) at 617.
[93] *Warren & Mahoney v Dynes* CA49/88, 26 October 1988 at 19-20.
[94] *Cao v Auckland City Council* HC Auckland CIV-2010-404-7093, 18 May 2011.

result in this case different from the result which the Court of Appeal in *Altimarloch* applied without any hesitation.

[173] This is not a conclusion based on an assessment that the cost of repairs are unreasonable or, more specifically, that the cost of repairs are disproportionate when compared with diminution in value. It is a conclusion based on long established principles recently applied by the Court of Appeal, with that decision approved by the discussion of some of the Judges in the Supreme Court in *Altimarloch*.

[174] It is also a conclusion which in my judgment is consistent with the observations of Tipping J in the *Altimarloch* case cited above at [147]. In particular, the concluding statement that "[a] plaintiff cannot claim damages which could have been avoided or reduced by the taking of reasonable steps". The earlier conclusions in this case in relation to contributory negligence also warrant a conclusion that it would not be reasonable to assess the plaintiffs' loss in this case as the cost of repairs.

[175] Leaky homes cases are often brought against several defendants, some of whom are sued for breach of contract, some of whom are sued for tortious negligence and, sometimes, some of whom are sued for both. Councils almost always are sued for tortious negligence, not for any contractual breach. However, in numbers of the cases it has not been necessary to give any consideration to the correct measure of damages simply because it has not been an issue. There will be numbers of reasons, varying from case to case, as to why it is not in issue. But the weight of numbers of cases where a particular measure has been applied does not assist on questions of principle if principle has not been considered in any of the cases.

Quantum

[176] The measure of damages is the difference between the cost of purchase and the market value of the property in its affected state at the date of purchase.

[177] The cost of purchase is the purchase price of $3,910,000 plus any costs directly associated with purchase. This will include any sum paid by the plaintiffs to their solicitors in respect of the purchase. There does not appear to be any evidence of cost other than the purchase price. If there is evidence of other direct costs of purchase, hopefully there will be no issues between the plaintiffs and the Council in this regard. If there are issues leave is reserved to apply for further directions. This is leave provided there is evidence already before the Court. It is not leave to adduce fresh evidence.

[178] Mr Forsyth's opinion of the market value of the property in its defective condition was $2,598,000. Mr Gamby's assessment was $2,950,000.[95] The difference arises from different opinions as to the value of the land and the value of the house. Mr Forsyth assessed the land value at $2,600,000. Mr Gamby assessed it at $2,750,000. This is a reasonably small difference having regard to the value as a whole and having regard to the fact that the subject matter does not permit mathematical precision. If it was necessary to select one figure or the other, I would prefer Mr Gamby's assessment on the basis that he has considerably more experience than Mr Forsyth. However, because of the factors just mentioned in respect of the small difference and the subject matter, I consider that the appropriate course is to fix the land value at the mid-point between the two opinions; that is, a figure of $2,675,000.

[179] Mr Gamby assessed the house in its affected state, together with site improvements and chattels at $200,000. Mr Forsyth assessed these items at a negative sum of $2,000. Their broad conclusion as to the value of the house compared with the value of the land was almost identical. Mr Forsyth said:

> In looking to the value 'as is' the dwelling component can only have a relatively small residual value, in addition to the land value. In the light of the sales and our valuation of the unaffected value as a whole the greater component of the overall value is provided by the land. ... It is apparent from the investigations that at some point the dwelling would have required remediation, demolition or substantial upgrading.

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[95] See above at [102].

Mr Gamby said:

> In my opinion the dwelling component can have a relatively small residual value in an 'as is' condition in addition to the land value. Predominantly, the bulk of the value is provided by the land with the dwelling providing living accommodation until a decision is made either to remediate or demolish.

[180] Both valuers assessed the affected value of the house by fixing a rental income for a period after purchase before remediation or demolition. Mr Forsyth concluded that it was appropriate to allow a gross rental income from the property for a period of one year in a sum of $78,000 less estimated costs of demolition in a sum of $80,000, resulting in the negative figure of $2,000. Mr Gamby was of the opinion that the house could have been lived in for five to ten years before requiring "remediation, demolition or substantial upgrading". He allowed a sum of $240,000 for rental income over a seven year period, based on a net rental income compared with Mr Forsyth's gross income figure, and estimated costs of demolition of $40,000, resulting in the assessment of $200,000 essentially for the value of the house.

[181] The basic methodology is the same. The difference arises largely from an opinion as to what the notional purchaser would be planning to do with the property immediately before a contract to purchase was entered into, and with that purchaser knowing that there were major defects in the construction. Assessing the matter in that way, determination of the value of the house requires consideration of factors which go beyond areas of valuation expertise. The opinions of both valuers are undoubtedly of assistance, and I have already referred to the fact that Mr Gamby's experience is more extensive than that of Mr Forsyth. But once the factors beyond valuation expertise are factored in I prefer the essence of Mr Forsyth's assessment. I am assisted by the evidence of the plaintiffs in this case, being actual, not notional, purchasers. I am satisfied that the market value of the house should be assessed on the basis that the notional purchaser would buy both with the intention and with the financial ability to proceed promptly with demolition or a complete restoration. I find that the house had no value in net terms – setting off rent against demolition costs.

[182] As earlier noted, Mr Forsyth provided opinions of value as at February 2010 only. This was not the date of purchase. In my opinion the correct date for assessing value is the date of purchase. Mr Gamby provided figures at the date of purchase and as at February 2010 (as well as the date of trial). Because Mr Gamby's figures at the date of purchase and in February 2010 were the same, I consider it is reasonable to assume that had Mr Forsyth assessed value as at the date of purchase there would also be no material difference.

[183] The result is that I assess the market value of the property in its affected state at the date of purchase in April 2009 as $2,675,000.

[184] The total loss is therefore the difference between the purchase price of $3,910,000, plus any legal and other expenses as earlier noted, and the sum of $2,675,000. The sum recoverable by the plaintiffs from the Council is 30% of this figure. If there is no evidence of additional direct costs of purchase the recoverable sum is $370,500.

Other claims of the plaintiffs

[185] The plaintiffs have four claims for consequential losses. The first is a claim for $122,250 for loss of rental income on their property in Milford Road. The basis of the claim is that Mr and Mrs Johnson would have moved into the O'Neills Avenue property with their children and rented the Milford Road property, but rental income from Milford Road was not available over the period of the recladding work at O'Neills Avenue. Having regard to my conclusion on the measure of damages this is not a recoverable sum. However, the plaintiffs are entitled to interest on the primary loss, as assessed at [184] above, from the date of purchase. The rate of interest is the rate prescribed from time to time under s 87 of the Judicature Act 1908 from the date of payment of the purchase price. This will include interest on any deposit paid, at the Judicature Act rate, from the date of payment of the deposit to the date of the balance of the purchase price. The plaintiffs are entitled to 30% of the total.

[186] The second consequential loss claim is for $3,338 for goods stolen from O'Neills Avenue during the course of remedial work. This sum is not recoverable

because of the conclusion as to the measure of damages and in any event would not be recoverable because it is too remote.

[187] The third claim is for interest on the money spent for the costs of repair and consequential losses. That is not recoverable because of the conclusion reached on the primary measure and because interest is allowed on a different basis as indicated above.

[188] The fourth claim is for general damages of $25,000 for Mr Johnson and $25,000 for Mrs Johnson. The foundation for the claim is 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. The Council conceded that Mr and Mrs Johnson are entitled to an award of general damages. However, Mrs Thodey submitted that, because the property was not used as a full time residence (implicitly referring to the availability of the Milford Road property), it would not be appropriate to award damages in a sum of $25,000 each, being the general level of awards in other cases. I am satisfied that, leaving aside any question of contributory negligence, the appropriate sum would be $10,000 each. 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.

The Council's claim against Mr Johnston

[189] The Council's claim against Mr Johnston is dismissed. This follows from my conclusion that Mr Johnston did not agree to provide any relevant advice or service to the plaintiffs, or any one of them. There was no negligence by Mr Johnston as alleged by the Council. There is a separate reason for dismissing the claim against Mr Johnston. The plaintiffs' dealings, in a legal sense, were not with Mr Johnston, but with his company, JCS. It is unnecessary to go into this issue having regard to the first conclusion on the facts.

Result

[190] There will be judgment for the plaintiffs against the defendant in accordance with the preceding conclusions.

[191] The defendant's claim against the third party is dismissed.

[192] If the parties are unable to agree on costs, any party seeking costs should file and serve a memorandum within six weeks of the date of this judgment and any party opposing should file and serve a memorandum within three weeks after service of the claimant's memorandum.

[193] Leave is reserved to apply for further orders in respect of costs incurred by the plaintiffs on purchase in addition to the purchase price, in accordance with [177] and [184] above.

Woodhouse J