IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2002 404 156

BETWEEN	GAIL JEANETTE LA GROUW Appellant
AND	MARITA ELLEN CAIRNS Respondent

Hearing: 28 October 2003

Appearances: P Dale appellant
G J Kohler for respondent

Judgment: 16 February 2004

JUDGMENT OF O'REGAN J

Solicitors

Grove Darlow & Partners, PO Box 2882, Auckland for appellant
Moody & Gulley, PO Box 33051, Takapuna for respondent

[1] In 1977, the appellant, Ms La Grouw, purchased a property situated at 31A Clarendon Road, St Heliers, Auckland (the property) from the respondent, Mrs Cairns. Ms La Grouw purchased the property in her capacity as trustee of the G J Peacocke Trust (the trust). After the purchase there were problems with leaks in the property, and those problems are on-going.

[2] Ms La Grouw (in her capacity as sole trustee of the trust) commenced proceedings in the District Court, against Mrs Cairns, alleging that Mrs Cairns misrepresented to her at the time of purchase that there were then no leaks in the house. She contended that the cost of remedying these leaks was about $84,000, based on a report by her expert, Mr O'Sullivan, and that she had already incurred costs of about $2,800 for plumbing work, and would incur further costs of about $6,200 for carpet. She sought judgment for a total sum of $93,700.82, and also sought general damages of $20,000 for distress and inconvenience, as well as interest and costs.

District Court decision

[3] In the District Court the case was heard and determined by Judge Cadenhead. In his judgment, he recounted the factual background. He said Ms La Grouw had entered into an agreement with Mrs Cairns to purchase the property on 17 February 1997 for $425,000. The contract was subject to a condition that Ms La Grouw had to be satisfied that the property was suitable for her, and had to notify Mrs Cairns to that effect by 21 February 1997. Ms La Grouw reinspected the property on 18 February 1997, accompanied by her friend Ms Haddon, and an architect, Mr Easton. She said during this inspection she had, at the suggestion of Ms Haddon, asked Mrs Cairns questions relating to leaks. She said she asked if there were any problems with leaks, or if there had been problems in the past, and that Mrs Cairns said there had been a few leaks around windows in the lounge, but that the problem had been fixed. Ms La Grouw declared the agreement unconditional and took possession on 31 May 1997.

[4] Ms La Grouw claimed that, on 1 June 1997, while she was entertaining guests there was a leakage in the house. She wrote to Mrs Cairns on 25 September 1997, stating that Mrs Cairns had told her there were no leaks and she had taken her at her word. She recounted in the letter that the night after she moved in (1 June), water came in above the stairs to the lounge, and there was softened plaster, disclosing previous problems and also water seepage on the stairs leading to the kitchen, and a considerable leakage problem in a cupboard behind where the piano had been situated. She said she had spent time and money trying to identify the problem, and the result of these efforts indicated it was a problem with the house, not with internal fittings. She said the problems were present at the time of sale and not disclosed when requested, and that she would contact Mrs Cairns to see how the issues could be resolved.

[5] Mrs Cairns replied on 6 October 1997. She acknowledged having a conversation prior to the purchase with a friend of Ms La Grouw's (apparently Mr Easton), in which he asked "Have you got any leaks?" and said she had answered truthfully "No, there aren't". She said she had not been asked about any history of problems with leaks, and therefore said no more. She acknowledged there had been leaks in the past, but believed they had been rectified. She said she was quite sure that earlier leakage in the area of the stairs to the lounge had been rectified, and she was not aware of leakage in the cupboard behind the piano because the piano blocked it. She denied making any misrepresentations.

[6] The Judge recounted the evidence given by Ms La Grouw, Ms Haddon, the real estate agent involved, Ms Mouche, and Mrs Cairns. Mr Easton did not give evidence; nor did another person, Mr Campbell, who inspected the house on behalf of Ms La Grouw. The Judge noted that there had been a number of previous incidents involving leaking at the property, prior to the house being sold by Mrs Cairns. In particular, he noted:

a) A leak in aluminium windows which caused staining to the carpet in November 1994;
b) A leak in July 1995 near a ranchslider in the lounge;

c) A leak in a skylight above the stairs between the lounge and the dining room in September/October 1995;

d) An incident in April 1996 where the bath overflowed and it was revealed there was a problem with a leaky shower;

e) The discovery of a small mouldy stain in the back wall in September 1996.

[7] The Judge also noted that in September/October 1995 the exterior of the house was painted and decorative tiles were put on during this exercise. Joints were waterproofed, and two coats of waterproof paint were applied. The following month the house was put on the market. He noted that Mrs Cairns had accepted that the home was "a relatively high maintenance home".

[8] The Judge found the witnesses had given evidence honestly and to the best of their recall, but he preferred the evidence of Ms La Grouw and Ms Haddon. In view of the history of the leaks over the time Mrs Cairns lived in the house, he said Mrs Cairns' answers to the questions about the leaks were "coy". He found that on 18 February 1997, Ms La Grouw specifically asked Mrs Cairns whether there were any problems with leaks, or there had been any problems in the past, and that Mrs Cairns had replied there had been a few problems around the windows in the lounge, but that it had been fixed. He accepted that Mrs Cairns may have thought at the time the problem had been rectified, but she did not disclose past problems as to leaking, and her responses on that issue were less than frank. He said it was clear she had been frustrated by the leaking problem, and that the past problems concerning leaking should have been to the forefront of her mind in replying to Ms La Grouw's query.

[9] The Judge then outlined the legal test to be applied and found that Mrs Cairns had made "an express or implied inducing material representation" to the effect that, apart from the leaking around the window which she thought had been fixed, there had been no previous problems with leaks. He said if Mrs Cairns had said there had been considerable problems with leaking in the past, then Ms La Grouw would have asked more questions and taken independent expert advice. He said the representation was made to Ms La Grouw and she reasonably relied upon it in

arriving at her decision to confirm the contract. He found that, although the misrepresentation did not induce entry into the contract (but rather confirmation), s 6 of the Contractual Remedies Act 1979 applied.

[10] The Judge then turned to the question of damages. He considered whether it was appropriate that damages be awarded on a "cost of cure" basis, rather than by calculating the difference in value of a house with the defects, and a house without the defects, the subject of the misrepresentation. He noted that damages based on the cost of cure would not be awarded if the measure of damages yielded a disproportionate or unreasonable loss, citing *Ruxley Electronics and Construction Limited v Forsyth* [1996] 1 AC 344. He said neither side had presented valuation evidence and both should therefore be taken to have conceded that a cost of cure basis was appropriate and reasonable.

[11] The Judge had before him evidence from two experts. The expert giving evidence on behalf of Ms La Grouw, Mr O'Sullivan said substantial remedial work would be required. He calculated the loss as outlined in the statement of claim – about $80,000. The expert called on behalf of Mrs Cairns, Mr Wesseldine, said that the remedial steps proposed by Mr O'Sullivan were unnecessary, particularly the reroofing and recladding which Mr O'Sullivan proposed. He said it would be possible to remedy the leakage problems for a total cost of $12,500-$15,000, plus GST. The Judge found that both experts overstated their positions. He thought Mr O'Sullivan overinflated the extent and cost of renovations necessary to fix the problem, and Mr Wesseldine too readily minimised the cost of what was required for a satisfactory solution. He concluded that Mr Wesseldine's proposed fix was more appropriate, but he doubled Mr Wesseldine's estimate of the cost and awarded Ms La Grouw the sum of $30,000, (but not GST). He noted he had been tempted to call for further evidence as to the loss, but he did not wish unnecessarily to delay the proceedings.

[12] The Judge noted the claim for general damages. He found there was no conceptual difficulty in Ms La Grouw claiming such damages on behalf of the trust. However, he determined that the damages were not reasonably foreseeable, noting

that Ms La Grouw took no steps in respect of the leaking for over two years. He therefore declined to award general damages.

The appeal and cross appeal

[13] Ms La Grouw appealed against the District Court judgment on the grounds that paragraph [94] and following were erroneous in fact and law. That meant the appeal was limited to the Judge's findings as to the quantum of the award for the cost of remedial work to fix the leaking, and on the question of the availability of an award of general damages. This relatively confined appeal was to be dealt with in a fixture lasting no more than half a day. This was confirmed by counsel at the callover a few days before the case was heard.

[14] However, on 23 October 2003, only five days before the hearing and nearly 13 months after Ms La Grouw's appeal had been filed, Mrs Cairns filed a cross appeal which was considerably broader in scope than Ms La Grouw's appeal. Ms La Grouw's cross appeal alleged errors in three broad areas, namely:

a) *Liability*: that there was no basis for a finding of misrepresentation because the misrepresentation claimed in the fifth amended statement of claim related to the leaking at the time of purchase, not a misrepresentation of past leakage. It was said the Judge had made a finding of misrepresentation of past leakage, but not that there was misrepresentation as to present leakage, or that the property was in fact leaking at the time of the purchase;

b) *Past leakage*: that the Judge had in any event been wrong in treating past leaks as relevant, because they were not significant in the context of the case, and were not linked with the claimed defects in the construction of the house. It was said disclosure of the past leaks would not have made any difference because there was already an agreement to buy the property, and no different course would have followed if there had been disclosure;

c) *Quantum*: it was argued that the Judge was wrong to have held that Mrs Cairns conceded that a cost of cure basis was appropriate and that Ms La Grouw had not undertaken remedial upgrading work, may never do so, and had not therefore established any loss. In the alternative, it was argued there was no justification for doubling Mr Wesseldine's estimate of the cost of fixing the leaks. As a further alternative, it was argued that if Mr O'Sullivan's estimate was preferred, regard had to be given to contributory negligence and betterment.

[15] Given the very extensive delays in having this matter come before the Court, I did not defer the hearing, but the Court was considerably inconvenienced by the late filing of the cross appeal. No objection to it was taken by counsel for Ms La Grouw, because the filing of the cross appeal had apparently been foreshadowed to him at an earlier stage. However, it was unfortunate that counsel did not alert the Court to the cross appeal and the impact it would have on the time required to deal with the case when the matter was dealt with at callover in the week before the hearing. As it turned out the hearing took the whole day, with some extension of sitting hours, instead of the half day estimated by counsel. I was told by counsel that the reason for the late filing of the cross appeal was difficulties with the Legal Services Agency. I was given no details, but if indeed that was the only cause of the late filing of the cross appeal, it is a highly unsatisfactory situation. It is unacceptable for the efficient conduct of litigation in the Court to be disrupted in that way, and something that neither the applicant for legal aid, nor the opposing party, should be required to endure.

Liability issues

[16] I propose to deal with the cross appeal on the issue of liability first. On behalf of Mrs Cairns, Mr Kohler argued that the Judge's finding in relation to misrepresentation related to past leakage problems, rather than any leakage problems existing at the time of the representation. He pointed out that the statement of claim pleaded only a representation as to the present.

[17] The relevant parts of the statement of claim were paragraphs 20 and 21 which said:

> 20 The defendant advised the plaintiff that:
>
> (i) There had been leaks in the past;
>
> (ii) There were no leaks at the present time ("the representation").
>
> 21 That the representation contained in paragraph 20(ii) was untrue, because the property had a serious leakage problem in the lounge area, through the window and roof.

[18] In paragraph [4] of the judgment the Judge says:

> The representations as pleaded allege that the defendant advised the plaintiff:
>
> 1. there had been no leaks in the past:
> 2. there were no leaks at the present time.

[19] In fact the Judge was mistaken as to the pleading about past leaks in the statement of claim. Effectively, there is an acknowledgement in paragraph 20(i) of the statement of claim that Mrs Cairns advised Ms La Grouw that there had been leaks in the past. The Judge has inserted the word "no" in the pleading, and construed it as a pleading that there was a misrepresentation that there had not been leaks in the past. In fact, there was no pleading that there was a misrepresentation about past leaks. The only question the Judge had to determine was whether there was a representation that the house was not a leaky house at the time the representation was made, and whether that representation was untrue, ie whether the house was a leaky house at that time.

[20] In paragraph [57] of the judgment, the Judge found that Mrs Cairns made a representation that, apart from the leaking around the window which she thought had been fixed, there had been no previous problems with leaks. He said Mrs Cairns should have said to her knowledge there had been considerable problems with leaking, and pointed out the steps which had been taken to fix them. If this had been done, he said that Ms La Grouw would undoubtedly have asked more questions and taken independent expert advice. He said Ms La Grouw relied on that representation.

[21] I accept Mr Kohler's submission that the Judge has misinterpreted the pleading relating to misrepresentation. This has led to a situation where the Judge has found a misrepresentation where it has not been pleaded, and has not made a finding on the misrepresentation which was pleaded, namely, misrepresentation that there were no leaks at the present time. In order to make a finding on the representation as pleaded, it was necessary for the Judge to determine whether Mrs Cairns represented there were no leaks at the present time, and also to determine whether or not that representation was true – ie whether the house did have a leaking problem at the time the representation was made on 18 February 1997.

[22] There was certainly evidence of a representation that there were no leaks at the time the representation was made. Indeed, Mrs Cairns specifically acknowledged that she made a representation that there were no leaks (albeit to the architect Mr Easton, rather than to Ms La Grouw), in her letter to Ms La Grouw dated 6 October 1997.

[23] Of course, this representation would be a misrepresentation only if the house did leak at the relevant time. The pleading in paragraph 21 of the statement of claim was that the property had a serious leakage problem in the lounge area, through the window and roof, at the time the representation was made. Mr Kohler argued that there was no evidence this was the case. He accepted that Mr O'Sullivan had said in evidence that the house would have leaked from the outset (which would mean it would have had a leaking problem at the relevant time), but pointed out that Mr O'Sullivan did not give direct evidence that there was a leak at the relevant time in the lounge through the window and roof. He also said that Mr O'Sullivan's expert view was disputed by Mr Wesseltine, who said leaking would have developed as material such as sealants and paints deteriorated, and nails lifted, which would have occurred two or three years after the purchase of the property. Mr Kohler said this was consistent with Ms La Grouw's acknowledgement in cross-examination that she would have included a claim relating to leakage in the proceedings in 1999 (ie two years after the representation was made) if the leaking problem had manifested itself by then.

[24] Counsel for Ms La Grouw, Mr Dale, pointed to evidence that there was a leak at the time he highlighted Ms La Grouw's evidence that she found leaking in the cupboard between the kitchen and the lounge, immediately on taking possession of the house on 31 May 1997, and that the ceiling started leaking badly from the eastern corner of the skylight near the stairs, between the kitchen level and the lounge when she had a dinner party on 1 June 1997 (the day after she took possession). She also gave evidence of undertaking interior painting work in 1998, during which she discovered signs of decay and past repair, which led her to a suspicion there might have been more serious problems with leaks in the past than had been disclosed to her. Mr Dale also highlighted a passage in the notes of evidence where Mrs Cairns referred to the house as a relatively high maintenance home, and then accepted the proposition that she meant by that phrase that the house, like any others, had leaks. He said this was an acknowledgement the house was leaking at the time of the representation. However, as Mr Dale rightly acknowledged, Mrs Cairns later resiled from that acknowledgement.

[25] In my view, it is not appropriate for this Court to make a finding as to the existence or otherwise of a leaking problem in the property at the time of the representation, in view of the conflicting evidence before the Judge. I discussed with counsel at the hearing what the appropriate course would be if I came to the conclusion that the Judge had not made a finding on an issue of fact which needed to be determined. Mr Dale expressed some concern about the matter being sent back to the District Court because of the potential for further delay. Mr Kohler took the view that that was the only way of dealing with the matter adequately.

[26] I have come to the conclusion that remitting the matter to the District Court is the appropriate step to take. I share Mr Dale's concern about further delay, but it seems there is no other way the issue can be adequately dealt with. I therefore remit the matter to the District Court for decision on the specific factual matter required to determine liability, which can hopefully be done without significant further delay to the process.

[27] Although it was not specifically raised in his points of cross-appeal, Mr Kohler argued that any representation made by Mrs Cairns was a statement of

opinion, not a statement of fact, and therefore could not amount to a misrepresentation.

[28] I do not think there is much in this point. The substance of Mr Kohler's point appeared to be that it was unreasonable for Ms La Grouw to rely on any representation that the house was not leaking, rather than on her own judgment. In part he based this on the fact that Ms La Grouw had some experience in matters of real estate and buildings and had access to advice from an architect, an Auckland City Council officer and Mrs Haddon who was a property investor. He contrasted that with the situation of Mrs Cairns who was a nurse, a widow with two dependent children, and was an intermediate purchaser rather than a builder or expert adviser.

[29] In my view, those factors do not of themselves make it unreasonable for a purchaser to rely on a representation by a vendor that a house does not have leaking problems. If Mrs Cairns had stated in response to a question about the present situation, something like "I have experienced leaks in the past, but they are all fixed and as far as I know, there is no current issue with leaks", then Mr Kohler's submission may have had some weight. But what is alleged is that Mrs Cairns simply answered in the negative when asked if the house leaked and a purchaser is entitled to rely on such an answer in the circumstances of this case.

[30] In that respect, there are similarities between the situation in this case and the position which was considered by the Court of Appeal in *Snodgrass and Snodgrass v Hemmington* (CA254/93,22 December 1995) which related to a misrepresentation that a house was not subject to subsidence. If it is found that Mrs Cairns made the representation which she is said to have made in the statement of claim, then that would be a misrepresentation for the purposes of the Contractual Remedies Act, if the house did in fact have a leaking problem at the time the representation was made. The Judge was entitled to conclude that Ms La Grouw could rely on any representation made by Mrs Cairns about leaking and that such representation induced Ms La Grouw to enter into an unconditional commitment to purchase the property.

Measure of damages: cost of cure versus diminution in value

[31] The second point raised in the cross appeal was that the Judge was wrong to allow an assessment of damages based on the cost of cure. Mr Kohler argued that there should have been valuation evidence to determine whether the property acquired was worth less than a property which was not leaking at the time any representation was made. He said the appropriate measure of damages was the difference between the worth of the property obtained by Ms La Grouw against the price which she paid. Mr Kohler particularly objected to the statement in the District Court judgment to the effect that he could be taken to have conceded that cost of cure was the appropriate measure of damages. He said he strongly argued to the contrary.

[32] Mr Kohler's submission appeared to be based largely on the decision of the House of Lords in *Ruxley Electronics & Construction Limited v Forsyth.* In that case a contractor had been engaged to build a swimming pool which was to have a diving area 7 ft 6 ins deep, but the pool as completed had a diving area which was only 6 ft deep. There was no difference between the value of the property with the pool as built and the value the property would have had if the pool had been built to specification. On the other hand, the cost of rebuilding the pool to meet the specification was £21,560. In the High Court, the aggrieved pool owner was awarded £2,500 for loss of amenity, but not the cost of reinstatement which was said to be an unreasonable claim in the circumstances. In the Court of Appeal the pool owner was awarded damages based on the cost of reinstatement, but this was overturned in the House of Lords, which restored the High Court judgment. In the House of Lords it was found that the amount required to rebuild the pool to specification was out of all proportion to the benefit to be obtained by the pool owner.

[33] I do not accept Mr Kohler's submission that the present case has parallels with the *Ruxley* case. There is no basis to conclude that damages for cost of cure, even on the basis contended for by Ms La Grouw, are disproportionate to the benefit to be obtained by Ms La Grouw. The benefit in *Ruxley* was a slightly deeper pool, which had no greater value than the pool as built. In this case, if Ms La Grouw

successfully establishes that there was a representation that the house did not leak, when in fact it did, she is entitled to be placed in the position she would have been in if that representation had been correct, and the house did not have a leaking problem. The benefit of that to her is significant. The cost of placing her in that position is not disproportionate to the benefit she obtains, and there is no need for valuation evidence to be introduced to the Court when there is no claim based on diminution in value. I therefore reject the contention on the part of Mrs Cairns that the Judge erred in assessing damages on the basis of cost of cure in the circumstances of this case.

[34] I am satisfied that it would be reasonable to require Mrs Cairns to meet the cost of remedying the leaking problems in the house, if she is found to have made the misrepresentation alleged by Ms La Grouw. My conclusion on this issue is consistent with the analysis undertaken by Tompkins J on a similar issue on *Stevenson Precast Systems Ltd v Kelland* (High Court Auckland, CP 303/SD01, 9 August 2001).

[35] Mr Kohler also argued that it was inappropriate to award damages on the basis of the cost of curing the leaking problems, where Ms La Grouw had not undertaken the repairs and there was no guarantee she would do so if damages were awarded on this basis. That issue arose in *Ruxley Electronics* where it was found the contracting party's intention as to how he or she would spend any damages may be taken into account in determining whether the appropriate amount of damages should be the cost of reinstatement. But it was also held that, once it has been established that the appropriate measure of damages is the cost of cure, the Court is not concerned about the use to which any award of damages will be put.

[36] I am satisfied the cost of cure is the appropriate measure of damages. While all available measures of curing the leaking problems have not been taken by Ms La Grouw, that is at least in part because of the delays in the conduct of this litigation. As the House of Lords found in *Ruxley Electronics*, intention (or lack of intention) to reinstate has relevance only to reasonableness and hence to the extent of loss which has been sustained, but once that loss has been established, intention as to the subsequent use of the damages ceases to be relevant – see *Ruxley Electronics* at p 359 per Lord Jauncey.

Quantifying the cost of cure

[37] As already indicated, the Judge had before him expert evidence from Mr O'Sullivan (on behalf of Ms La Grouw), and Mr Wesseldine (on behalf of Mrs Cairns). The Judge noted that there appeared to be some rivalry between the experts which he thought might explain the divergence in their views about the appropriate steps to fix the leaking problem. Whether that is true or not, the fact is that the two experts, having an obligation to provide impartial assistance to the Court on the matters within their areas of expertise (rather than advocating a cause for the persons who engaged them), placed before the Court uncompromising and apparently irreconcilable positions.

[38] In the end the Judge determined that the limited approach suggested by Mr Wesseldine was to be preferred, but since he thought that both experts were exaggerating their respective positions, he decided that the best approach was to double Mr Wesseldine's estimate of the cost (from $15,000 to $30,000). In fact, Mr Wesseldine's estimate was between $12,500 and $15,000, but he (unhelpfully) provided no breakdown of these costs, in contrast to Mr O'Sullivan who provided very detailed costings which had been scrutinised and approved by a quantity surveyor.

[39] Both parties were dissatisfied with the outcome – Mr Dale argued that the Judge should have adopted the more comprehensive approach suggested by Mr O'Sullivan, while Mr Kohler said the Judge had no reason to double Mr Wesseldine's estimate, given that he had accepted the correctness of the Wesseldine approach.

[40] Mr O'Sullivan said that in order to remedy the problems which caused the property to leak, it was necessary to remove the cladding to all areas in the walls affected by moisture, replace wet insulation and framing, apply new building paper, then apply vertical strapping over which Harditex cladding would be installed, using stainless steel screws. This would create a ventilated cavity behind the cladding which would allow any moisture that entered to exit again. Affected windows would also need to be removed and restored. There would also be consequential work to

window frames and internal repairs, including repainting. He also suggested that the roof be replaced, including increasing the pitch of the roof to three degrees.

[41] On the other hand, Mr Wesseldine said that recladding and reroofing would be an unnecessary embellishment. He said the house was maintenance-hungry because it was built of a brittle fibrolite material, and that the New Zealand Building Code, 1991 required external cladding to have a durability limit of 15 years, and this cladding had already used up a considerable proportion of that time. However, he did not in his brief of evidence set out exactly what it was he proposed should be done to remedy the problems. Rather he criticised the approach suggested by Mr O'Sullivan as being excessive. He made particular mention of the proposed new pitched roof, and suggested the appropriate alternative was to trace the corroded positions of the roofing, re-establish the original minimal falls, and repaint the roof using a zinc galvanised paint system.

[42] However, Mr Wesseldine's brief was silent on what should be done to the walls, other than a general statement that "highly satisfactory repair and maintenance work could be undertaken for between $12,500 and $15,000 plus GST". There was no indication of what work would be done, and as already stated, no breakdown of the cost. In view of that, it is hard to see how the Judge could have made a finding that the approach suggested by Ms Wesseldine was preferable, because he did not really suggest an approach at all. In cross-examination, he referred to similar leaky houses, and said the way in which his firm had rehabilitated houses in that situation was to recoat them in situ, routing out the control joints of the sealing and putting in new sealing, then recoating the house with a good "high built paint system". It seems likely that he had a similar solution in mind for the property.

[43] Mr Wesseldine was asked to identify any aspects of the work proposed by Mr O'Sullivan which were unnecessary but could not do so. Rather, he commented that he disagreed with the fix in its entirety. It was not put to Mr O'Sullivan in cross-examination that the steps he was proposing were unnecessary in order to remedy the leaking problem in the property. He was asked about the improvement or betterment that would result, but it was not suggested to him that it was possible

to fix the leaks so that the house was placed in a position where it was not a leaking building, by taking the limited steps proposed by Mr Wesseldine.

[44] In the circumstances, I do not believe it was appropriate for the Judge to adopt an approach involving an acceptance of the general parameters of the solution proposed by Mr Wesseldine, but doubling the cost estimate. It is difficult to see how the Judge could have been in a position to reach a conclusion about Mr Wesseldine's cost estimate, because there was no indication as to what steps were proposed. It may well be the Judge was trying to reach a form of compromise between the two positions, which he regarded as extreme, but neither party is prepared to accept a compromise position, and they are entitled to have the matter dealt with in terms of principles.

[45] I have reached the conclusion that the appropriate way of calculating damages is to start with the more comprehensive solution proposed by Mr O'Sullivan, which has the virtue of providing a solution which will clearly make the house one which is appropriately constructed to avoid water damage from leaking. Mr O'Sullivan accepted that the proposal to replace the roof with one with a higher pitch was more than remedial. Although it is clearly a desirable step, I do not believe on the basis of the evidence before the Court it would be appropriate to classify that as a remedial step for which Mrs Cairns should be financially responsible. Various actions have now been taken to fix problems with the roof, and I believe it would be appropriate to remove the proposed work on the roof from the estimate made by Mr O'Sullivan.

[46] That leads to a necessity to consider whether an allowance for betterment ought to be made, because the result of the work suggested by Mr O'Sullivan would be a house built to higher standards than those applied in the building of this house. The replacement of aged cladding by new cladding, properly installed with a cavity behind it, would mean it had better qualities than that originally applied to the house. It is a matter for the defendant in a case such as this to prove the extent of betterment. The only evidence the Judge had before him of betterment was Mr Wesseldine's assertion that it should be assessed against the performance standards and provisions of the New Zealand Building Code 1991. He said since the

Building Code required cladding to have a durability limit of 15 years, and this cladding was 12 years old, any replacement of the cladding would amount to betterment to the extent of 80%. He did not explain why the assessment of betterment would be by reference to the 1991 Building Code's minimum durability requirement.

[47] Fisher J helpfully summarised the law relating to betterment in *J & B Caldwell Limited v Logan House Retirement Home Limited* [1999] 2 NZLR 99 at 106-110. He said that the appropriate approach to betterment was to make a deduction from the cost of replacement or cure to reflect betterment, but only after allowance to the plaintiff of any disadvantages associated with the involuntary nature of the additional investment in the improved asset. This is consistent with the fundamental object of damages, which is to restore the plaintiff to no more and no less than the position which he or she would have occupied if the contract had been performed.

[48] In the present case, it was necessary to determine whether the property, after the completion of the work suggested by Mr O'Sullivan, would be more valuable than a property complying with the contract (ie one which did not have a leaking problem, but which otherwise had the characteristics of the property purchased by Ms La Grouw), and then to make allowance for the involuntary nature of what would effectively be an additional investment in the property by Ms La Grouw.

[49] Fisher J said in the *Caldwell* decision that a defendant had the onus of showing that betterment had occurred. In my view, the defendant failed to discharge that onus. What was needed was an analysis of the respective values of the house, which did not leak, but was built of the original materials in accordance with the building codes applying at the time of the house's construction, against the house as it would be after the completion of the work suggested by Mr O'Sullivan. That would allow for a quantification of betterment and then an appropriate allowance would be made for the involuntary investment required on the part of Ms La Grouw in achieving that betterment in accordance with the approach outlined by Fisher J in *Caldwell*.

[50] The evidence of betterment put forward on behalf of Mrs Cairns does not establish betterment in the way that term is used in the *Caldwell* decision. This meant there was no proper evidence before the Judge on which he could base an allowance for betterment.

[51] Mr O'Sullivan's breakdown of costs assesses the net repair cost at $51,435 before the builder's margin, contingencies and GST. In my view, there should be a deduction of $9,114, the amount he attributed to the cost of replacing the roof, reducing that sum to $42,321. It is necessary to add the builder's margin of 8%, being $3,386, which gives a total of $45,707. Following Mr O'Sullivan's approach, I then add $6,700 for contract administration and miscellaneous costs, which makes the net repair cost $52,407. To that is then added a 10% contingency amount, which yields a total repair cost excluding GST of $57,647.70. When GST at 12.5% is added to that, the total repair cost, including GST is $64,854. That is the amount of the award to which Ms La Grouw should be entitled in the event that she establishes the representation that the house did not leak, as at 18 February 1997 was untrue and therefore amounted to a misrepresentation.

[52] Mr O'Sullivan accepted there was betterment to the extent of about $1000, and Mrs Cairns is entitled to the benefit of an allowance for a small degree of betterment, given this was acknowledged by the expert engaged by Ms La Grouw. I would therefore reduce the total amount to $63,000. In addition she would be entitled to reimbursement of plumbing expenses already incurred ($2,779.86) and for the cost of replacing carpet ($6,218) which would give a total entitlement of $71,997.86.

Contributory fault

[53] Mr Kohler said the Judge should have reduced the award to recognise Ms La Grouw's contributory fault, which he characterised as "failure to get a pre-inspection report, particularly given the advice she was receiving". I have already said that I believe Ms La Grouw was entitled to rely on the representation made to her that the house did not have a leaking problem, and in those circumstances I do not believe a

failure to get a pre-inspection report can be properly characterised as contributory fault.

Mitigation

[54] In his evidence, Mr Wesseldine made much of the fact that no repairs had been undertaken, and this would make his repair solution more expensive to implement, because damage to the structure may have been exacerbated by the on-going ingress of water through the roof and cladding. But there appeared to be a general consensus between the experts that the cause of any leaking was the basic structure of the property, which was defective, and the adoption of Mr O'Sullivan's fix means any exacerbation of the problem by failure to repair would be minimal. I do not believe it would be appropriate to make any allowance for this, given that Ms La Grouw is faced with a situation where Mrs Cairns denies all liability, and if this appeal on behalf of Mrs Cairns were successful, Ms La Grouw may receive nothing. In these circumstances, she is entitled to await the outcome of the case before expending large sums of money on substantial repairs, given that the impact of not doing so on the scale of the steps needed to remedy the problem is minimal.

General damages

[55] Ms La Grouw claimed $20,000 general damages, but it was conceded in the District Court that such damages would not exceed $10,000. The Judge accepted it was possible to award general damages to Ms La Grouw, even though she was acting in her capacity as trustee of a trust. In that regard he relied on *Jackson v Horizon Holidays Limited* [1975] 1 WLR 1468. Although that case is not on all fours with the present situation, I believe an award of general damages could have been made in the circumstances of this case, essentially for the reasons that the Judge outlined.

[56] However, the Judge declined to award general damages because he said they were not reasonably foreseeable. Mr Dale took issue with that conclusion. He referred me to the *Stevenson Precast Concrete* case where the supplier of the precast concrete panels which had to be replaced in a holiday home in Waiheke was found

liable for general damages, on the basis that it was foreseeable that if these panels were deficient and had to be replaced, this would cause considerable distress and inconvenience to the owner of the property.

[57] In the present case, Mrs Cairns had experienced problems with leaks and would have known the distress caused by leaks in a property. If she misrepresented that the house did not have a leaking problem, then it should have been foreseeable to her that the person purchasing the house in reliance on that representation would suffer distress and inconvenience if the house was leaking, and needed remedial action taken. The Judge ought to have found that such damage was reasonably foreseeable. However, as noted in the *Stevenson* case, awards of general damages should be modest, and in these circumstances, a sum of $5,000 would have been appropriate.

Decision

[58] I determine that the case be remitted to the District Court for decision on the issue as to whether a misrepresentation was made by Mrs Cairns on 18 February 1997, to the effect that the house did not have a leaking problem and, if so, whether the house did, in fact, have a leaking problem at that time which rendered the representation untrue. If it is concluded that the representation was made and that it was a misrepresentation, then Ms La Grouw is entitled to an award of $71,997.86 (including GST), for the cost of remedying the leaking problems, and also to $5,000 general damages.

Costs

[59] Each party has had a measure of success in this Court. In the circumstances, I believe it is appropriate that no costs award be made in respect of this appeal.

Signed at am/pm on 16 February 2004

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M A O'Regan J