IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2012-100-000028
[2013] NZWHT AUCKLAND 15

BETWEEN	**ANDRZEJ WOJCIECH KROCZAK, SEOK CHING NG AND AYSL TRUSTEE COMPANY LIMITED as Trustees of the TANK FAMILY TRUST** Claimants
AND	**AUCKLAND COUNCIL** First Respondent
AND	**WEI WANG** Second Respondent

Hearing:	18, 19 December 2012 and 11 March 2013
Appearances:	Tim Rainey and Georgina Grant for the Claimants Marie Harrison for the First Respondent Wei Wang, self represented
Closing Submissions:	14 March 2013
Decision:	17 May 2013

FINAL DETERMINATION
Adjudicator: S Pezaro

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BACKGROUND

[1] Andrzej Kroczak and Seok Ching Ng (Terri), the claimants, own a home at 11 Portsea Place, Chatswood, as trustees of the Tank Family Trust. The claimants purchased this property on 20 September 2002, less than six months after the North Shore City Council issued the code compliance certificate.

[2] After heavy rain in 2006 the claimants noticed that the carpet was damp in the guest bedroom. They contacted the real estate agent who gave them the contact details for Wei Wang, whom they understood to be the builder. Mr Wang arranged for some minor repairs to the roof. Two years later the claimants decided to renovate the house and after seeking advice from a plasterer they repaired cracks in the cladding. In 2011, after further leaks from the roof and other parts of the house and inspections by builders, the claimants applied for a WHRS Assessor's report. This report identified extensive weathertightness defects and recommended a complete re-clad of the house. The claimants then sought a second opinion from Neil Alvey of Kaizon Limited who agreed with the WHRS assessment of defects.

[3] The claimants now claim that Auckland Council was negligent in carrying out the inspections and issuing the CCC and therefore is liable for the full amount of their claim. The claimants make no claim against Mr Wang however the Council claims that Mr Wang is liable to it for contribution to the extent of an indemnity towards any judgment against the Council. Mr Wang was a director of Asian Building Services Limited (now struck off), the company that carried out the building work. Mr Wang described himself as the project manager and builder and said that he was engaged by his mother in-law to build the house.

[4] The Council's position in relation to defects is that unless Mr Wang disputes the existence of a particular defect, the defects pleaded by the claimants can be taken as proved. If found liable the Council submits that the most appropriate measure of quantifying the claimants' loss is diminution in value rather than remedial costs. If found liable for remedial

costs, the Council disputes the amount claimed for remedial costs and consequential losses.

[5] The claim is based on Mr Alvey's recommended scope of repairs and is calculated as follows:

Estimated remedial costs	$650,814.88
Consequential damages	$43,614.70
General damages	$25,000.00
Total	**$719,429.58**

ISSUES

[6] The issues that I need to determine are:

- What are the weathertightness defects?
- What is the reasonable cost of repairing those defects?
- Is the Council liable to the claimants for these defects and, if so, to what extent?
- If the Council is liable, is Mr Wang liable for contribution to the Council?
- What should be the apportionment of liability between the respondents?
- What are the consequential losses?
- What general damages should be awarded?
- Is the appropriate measure of loss diminution in value or the cost of repair?

THE DEFECTS

[7] Expert evidence on defects was given by the WHRS assessor, Frank Wiemann, and Mr Alvey. The Council did not call evidence on defects however Simon Paykel gave evidence for the Council on the role of a site supervisor in relation to each of the defects identified by Mr Alvey and the scope of remedial work required. Evidence on quantum was given by James White for the claimants and Paul Ranum for the Council.

[8] Mr Alvey identified eight key leak locations, similar to those identified by Mr Wiemann. Mr Alvey summarised these defects as follows:

1) Parapets - roofing butyl rubber lapped behind polystyrene plant on trim and omission of metal cap flashing.
2) Roof - incorrectly installed overflow to hopper.
3) Decks - inadequate cross fall to deck balustrade walls.
4a) Decks - inadequately sealed/flashed overflow penetration to deck.
4b) Decks - insufficient height of the deck membrane upstand to the deck balustrade walls.
5) Joinery - cladding installed hard down to the joinery unit head flashing.
6) Deck - inadequately sealed laps to deck membrane.
7) Cladding - inadequate clearance between the base of the cladding and the ground.
8) The inadequate construction of the plywood roof substrate (likely future damage).

[9] When Mr Wang made his opening statement at the hearing I asked him whether he had any disagreement with the defects.[1] Mr Wang then confirmed that he did not disagree with the defects or the amount claimed for remedial costs. He said that he had no experience in estimating repair costs. Mr Wang confirmed that he was disputing liability but not the defects or the calculation of the amount claimed.[2]

[10] In closing the Council accepted that Mr Wang did not dispute any of the defects except the inadequate construction of the plywood roof substrate which Mr Alvey identified as likely to cause future damage. Mr Paykel said that this defect will be rectified as a consequence of the work required to remedy other defects in the dwelling, primarily the parapet defect which Mr Paykel said has contributed to the decay damage of the plywood roofing. I therefore conclude that the single defect disputed by Mr Wang is not relevant to determining the cause and extent of the damage which has caused the claimants' loss.

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[1] Transcript of evidence at [4].
[2] Transcript of evidence at [5].

[11] In Mr Paykel's opinion, the incorrect installation of the roofing butyl rubber and the omission of metal cap flashing (defect one) is the most significant defect in this dwelling. He said that this defect has necessitated a full re-clad and accounts for approximately 85 per cent of the total repair costs. Mr Paykel identified the inadequate cross-fall to the deck balustrade walls as causing a partial re-clad and approximately 20 per cent of the total repair costs.

[12] The Council accepted that any defects not disputed by Mr Wang could be taken as proved. I am satisfied that those defects which Mr Wang does not dispute (defects one to seven) caused all the current damage in this property and require the property to be fully re-clad.

WHAT IS THE REASONABLE COST OF REPAIR?

[13] In determining the scope of works and the reasonable repair cost I have considered the WHRS assessor's report and the expert evidence given for the claimants and the Council. Mr Wang did not give any evidence on these issues.

[14] The claimants and the Council agree that the property needs a full re-clad. Mr White and Mr Ranum met before the hearing to discuss the remedial costs. As a result, the claimants reduced their claim for remedial costs to $650,814.88 and the Council amended its estimate to $603,033.50.

[15] The difference between these sums is due to different estimates for:

a) The timber floor overlay.
b) The deck tiling.
c) Contingency.

[16] Mr Paykel gave evidence on the scope of the remedial work required for the timber floor and the contingency allowance.

Timber floor overlay

[17] The claimants claim the cost of replacing the entire timber floor. Mr Alvey recommended replacement of the entire timber floor because in his opinion the work necessary to fix the decayed particle board and floor joist underneath would be extensive and cannot be ascertained until repairs are underway. Mr Alvey also considered that it would be difficult to match the old sections of timber flooring with new timber if some parts of the timber flooring were reused.

[18] Although Mr Alvey anticipated in his brief of 22 November 2012 that the particle board would be damaged this was not the case. Prior to the hearing on 13 December 2013 the claimants produced photographs that Mr Alvey took of cut outs of the timber flooring overlay. These photographs show that the particle board is not damaged and that the tongue and groove flooring was glued to the board. Mr Paykel said that it was not difficult to remove the glued boards because they were short boards and that the photographs demonstrated that there was not an "over-generous" amount of adhesive. He also said that the colour looked like natural timber flooring which would not be difficult to match. Mr Alvey agreed that the existing timber flooring was a natural hardwood.

[19] In evidence Mr Alvey agreed that the damage to the floor was limited to the area described by Mr Wiemann in his report which equates to approximately 20 per cent of the floor. I conclude that it is not necessary to replace the entire timber floor to properly remediate this dwelling. I accept the evidence of the experts that 20 per cent of the floor needs to be replaced and 80 per cent will need to be relayed. At hearing the quantity surveyors agreed that if I adopt this scope of repairs, the appropriate deduction for this item from the sum claimed for remedial costs is $26,000.

The cost of tiling the decks/balcony

[20] The Council disputes the rate applied to calculating the cost of the tiling work required. Mr Ranum applied a rate of $149 per square metre whereas Mr White's rate was $250. However Mr Ranum's rate was based on another project and not calculated on the basis of the plans for this

property. I therefore prefer the evidence of Mr White on this issue and award the amount claimed for the cost of the tiling work.

Contingency Allowance

[21] Mr Alvey provided for a contingency allowance of 12 per cent whereas Mr Paykel was of the view that 10 per cent was sufficient. In Mr Paykel's view the only unknown was the extent of timber framing that will need to be replaced and in his view a 10 per cent contingency was reasonable. Mr Alvey accepted in evidence that in general 10 per cent was an acceptable contingency basis but said that each project had to be estimated separately. Mr Alvey said he allowed a higher contingency figure in this case because, although he allowed 20 per cent framing replacement of the roof, his photographs showed there was:

a) Significant decay to the parapets.
b) A need to lower the floor joists to allow for particle board replacement.
c) Corrosive fixings.

[22] Mr Alvey said that the first two issues alone justified an additional two per cent. However Mr Paykel considered that Mr Alvey's investigation and knowledge of the damage, and the fact that he had made a substantial allowance for timber framing replacement, needed to be taken into account in setting the contingency. Mr Paykel said that Mr Alvey had allowed for 65 per cent of wall replacement, over and above the parapets, and that the estimate of replacement should be based on investigation therefore 10 per cent should cover contingencies. Mr White agreed that 10 per cent was the normal contingency figure but considered that it did not address this property.

[23] Mr Wiemann said that the level of contingency depended on the quality of investigation and whether the scope of work adequately reflected the complexity of the building. In his view this property had been well investigated and was not overly complex. Mr Wiemann described the scope of works as well thought out and said in his view a 10 per cent contingency figure was adequate.

[24] This property has been thoroughly investigated therefore I accept the opinion of Mr Wiemann and Mr Paykel that a 10 per cent contingency is reasonable. I have also taken account of Mr White's view that 10 per cent is the normal level of contingency and I am not satisfied that in this case the evidence supports a higher level. I therefore award contingency at the rate of 10 per cent on the proven estimate of remedial costs.

Conclusion on Remedial Work estimate

[25] The claimants have proved remedial costs of $624,814.88 calculated as follows:

Remedial costs claimed	$650,814.88
Less deduction for timber floor	$26,000.00
TOTAL	**$624,814.88**

[26] The amount of $624,814.87 does not include an allowance for contingency which is to be applied at the rate of 10 per cent. The contingency allowance is applied to only some aspects of the remedial costs therefore it will need to be calculated by the parties. If the parties are unable to agree on the total to be awarded for contingency, they may file memoranda and submissions on this issue within 10 days.

CONSEQUENTIAL LOSSES

[27] The Council disputes the amounts claimed for the cost of alternative accommodation and storage of household effects during the remedial work.

Alternative accommodation

[28] The claimants claim the cost of alternative accommodation at $925 per week for 26 weeks. The Council submits that this rent is inconsistent with the evidence of the claimants' valuation expert, Mathew Taylor, who based his valuation of the claimants' dwelling, at its unaffected value, on a rental of $750 per week.

[29] The Council also submits that rent of $925 per week is inconsistent with the evidence put to Ms Ng of three comparable rental properties ranging from $680 to $750 per week. Ms Ng's evidence was that these properties were not similar to her current house however the Council submits that these three properties have four to five bedrooms and two bathrooms and therefore provide reasonable alternatives. Mr Rainey argues that the rental figure used by Mr Taylor for the purposes of valuation is not the same as market rental.

[30] Although the purpose of Mr Taylor's report was to assess the value of the claimants' dwelling, his assessment of its unaffected market rental value was based on current market rent for a similar property. Mr Taylor and Mr Gamby used a similar weekly rental to estimate the unaffected market value of the claimants' property and the difference between their valuations is mainly due to the number of years each considered the property could be rented for before repair, not the weekly rental.

[31] Ms Ng's evidence is that the rental of $925 is claimed on the basis of the average of three properties which she believed were comparable to her current dwelling. The rental for these properties ranged from $875 per week to $1,000 a week however the $1,000 per week property is furnished and therefore not a reasonable comparison.

[32] Given the similarity of the weekly rental figure used by the two valuation experts, I conclude that the $750 per week rental applied by Mr Taylor in his valuation is reasonable. I therefore award the claimants rental of $750 per week for 26 weeks, the 26 week period being unchallenged by the respondents.

Storage costs

[33] The claimants claim $11,765 for removing, storing and reinstating their furniture. The Council disputes the sum of $4,290 claimed for storing their furniture and submits that there should be no cost for storage of furniture if the claimants move into an unfurnished rental property.

[34] I accept the evidence of Ms Ng that a four bedroom property is required as an alternative rental in order to provide equivalent alternative

accommodation to their current dwelling. Mr Rainey argued that the Council had not explained how the claimants' household effects could be protected and made safe if they remained in their current dwelling while it is repaired. However the Council is not arguing that all of the household goods should remain on site; it is suggesting that they can be accommodated in the rented property.

[35] The onus is on the claimants to prove that the amount claimed for storage is reasonable. I am not satisfied that the claimants have demonstrated that they need storage in addition to their alternative accommodation. I therefore decline to award the cost claimed for a storage facility. The sum awarded for consequential costs is therefore $34,774,70, calculated as follows:

Consequential costs:	
Alternative accommodation	$19,500.00
Moving/storage costs	$7,475.00
Out-of-pocket repair costs	$7,799.70
TOTAL	**$34,774,70**

IS THE COUNCIL LIABLE TO THE CLAIMANTS?

[36] The Council accepts that it owes the claimants a duty of care. The issues I need to determine are whether the Council breached its duty and, if so, whether the Council's breach has caused any loss to the claimants. The Council will have breached its duty if when carrying out inspections or in issuing the code compliance certificate it did not have reasonable grounds to be satisfied that the building work complied with the building consent and the requirements of the Building Code.

[37] In order to succeed against the Council, the claimants must prove that the practice of the Council either failed to meet the standard of a reasonable building inspector at the time or that common sense dictated that the inspector should have done something more.[3] The Council's performance must be judged against the standards of the day and the

[3] *Dicks v Hobson Swan Construction Ltd (in liquidation)* (2006) 7 NZCPR 881 (HC).

knowledge of the quality of the particular product used in the construction process.[4]

[38] The Council did not call any expert evidence on council practice or liability but at hearing challenged the ability of Mr Alvey to give expert evidence on council practice at the relevant time. The hearing was adjourned to allow the claimants an opportunity to call expert evidence on this issue and at the resumed hearing Stephen Flay gave evidence for the claimants.

[39] Mr Flay set out his qualifications and experience in his brief dated 31 January 2013. He worked in various roles for territorial authorities between 1996 and 2010. During 2001/2002 when the claimants' house was built Mr Flay established a building consultancy that contracted to North Shore, Manukau and Franklin Councils. Mr Flay's duties included processing building consents, undertaking inspections, and setting up and administering the process for the issuing of consents from/by certifiers, filing monthly certifier reports and filing of code compliance certificates. For most of 2002 Mr Flay was employed by Franklin District Council as a building inspector.

[40] The Council submits that *Bindon & Bishop*[5] requires that in order to give admissible expert evidence, a witness giving evidence as a member of a profession in claims of negligence must give evidence of current acceptable practice. Ms Harrison argues that Mr Flay's knowledge of the manner in which inspections were carried out at North Shore City Council is limited because at the relevant time he was working for Franklin District Council and not North Shore. She submits that therefore Mr Flay's evidence does not establish the processes followed by North Shore City Council or what its inspectors actually knew.

[41] I do not accept Ms Harrison's argument that Mr Flay does not qualify as an expert on North Shore City Council procedures and practices because he did not work for North Shore City at the relevant time. It is Mr Flay's evidence that between 1996 and 2010 he was involved in the day to day regulatory processes of three councils. Each territorial authority was

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[4] *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479 (HC) at [183].
[5] *Bindon v Bishop* [2003] 2 NZLR 136 (HC).

required to comply with the same legislation. Mr Flay gave evidence of seminars conducted throughout the Auckland region by BRANZ and public seminars and discussions for the building industry that were attended by inspectors from North Shore City Council and other territorial authorities. His evidence is that professional development was similar for inspectors throughout the Auckland region.

[42] I do not accept that a witness giving evidence on professional standards needs to have been employed by the organisation in question in order to qualify as an expert on acceptable practice. This criterion is not applied to other trades or professions that are governed by common legislation and, in any event, could give rise to questions about the expert's independence. At the time this house was constructed, Mr Flay was a consultant to territorial authorities in relation to private building certifiers and a building inspector with Franklin District Council. I consider that this experience combined with Mr Flay's knowledge of the building industry qualifies him to give expert evidence on acceptable practice for council inspectors at the relevant time.

[43] Mr Flay's evidence was that the Council inspector should have identified defects one, two, four (a), five and seven. Mr Flay said that the incorrectly installed overflow outlet on the roof, defect two, would have been observable at both of the final inspections by the Council and possibly the post line inspection however in Mr Flay's opinion this was not something which would typically have been checked in April 2002. Mr Flay said that the other defects would not have been identified by Council officers at the time.

[44] Defect one relates to the absence of metal cap flashing on the parapets. Mr Flay confirmed in evidence that this was a variation from the plans and should have been detected by the Council inspector at the time. He said that BRANZ training was that a metal flashing was required and that the absence of this flashing should have been identified.

[45] The Council argues that because Mr Flay said that the Council could reasonably expect the butynol on the roof parapets to be installed by a licensed applicator, the Council was entitled to rely on the licensed

applicator to install appropriate waterproofing. I do not accept that this is a proper interpretation of Mr Flay's evidence. His opinion was that the Council inspector should have observed the variation from the plans in relation to the parapets and the failure to properly waterproof them. In his brief, Mr Flay said that the variance from the plans ought to have triggered a further enquiry and a closer look at the parapet construction methods. It was also Mr Flay's evidence that parapet defects and the risk of leaking problems was well known at the time that this house was built and inspected. Mr Flay supported his evidence with reference to BRANZ documents and practices at the time and I am satisfied that this is a defect which the Council officer should have detected.

[46] The Council also argued that Mr Flay qualified his comments by saying that in addition to needing to be properly waterproofed, the parapet needed appropriate maintenance. The Council submits that photographs taken by Mr Alvey and the WHRS assessor show plants and lichen on the parapets raise doubt as to whether the parapets would have remained watertight even if they had been weatherproofed.

[47] I do not accept that the photographs relied on by the Council demonstrate that a lack of maintenance has caused or contributed to water ingress in this property. These photographs were not put to the experts on defects and there is no evidence as to the extent or duration of the plant growth in the photographs or that any lack of maintenance has contributed to the agreed defects or extent of water ingress in this property.

[48] In the opinion of Mr Paykel, the Council's own witness, the parapet defect is the most significant and necessitates a full reclad of the dwelling. I therefore conclude that the Council is liable to the claimants for the full sum of their loss. As a result of this conclusion there is no need to consider Mr Flay's evidence in relation to the other defects.

IS WEI WANG LIABLE FOR CONTRIBUTION TO THE COUNCIL?

[49] Mr Wang was self-represented throughout these proceedings. He did not file a response to the claim or call any witnesses. Mr Wang gave evidence prior to the adjudication after being summoned to a hearing before the Tribunal and he was cross-examined at adjudication. At

adjudication Mr Wang was given an opportunity to question all witnesses, including the panel of experts.

[50] Mr Wang stated that he built quite a few homes at the time the claimants' house was built, probably about three or four per year. He accepted that he had named himself as the builder on the application for building consent and that the structural calculations and geotechnical reports required by the Council were addressed to him. Mr Wang confirmed that he engaged the sub-contractors, told them when to be on site and what work to do, and answered their queries. Mr Wang also said that he understood how to read the plans and the requirements of the Building Code and that he checked the sub-contractors' work for compliance with the plans and decided whether they should be paid. When Mr Wang gave evidence prior to adjudication, he described himself as the site supervisor although in his opening statement he said he was the project manager. He accepted that he did not hire anyone else as site supervisor or project manager.

[51] I am satisfied that in carrying out these tasks Mr Wang performed the role generally attributed to a project manager/site supervisor to the extent that he owed a duty of care to subsequent purchasers.[6]

[52] Under cross examination Mr Wang accepted that a site supervisor should have known that the parapets had insufficient slope and needed a metal flashing. Although Mr Wang also said that the plans did not require a metal cap flashing, this is not correct and as the project manager/site supervisor Mr Wang should have ensured that the parapets were waterproofed in accordance with the plans. He failed to do so and is therefore liable for this defect which I have concluded necessitated a full reclad.

[53] Mr Wang also accepted that a site supervisor should have detected the roof defect in the incorrectly installed overflow to the hopper, the inadequate cross fall to the deck balustrade walls, the inadequately sealed overflow penetration to the deck, and the lack of ground clearance on the northern elevation.

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[6] *Body Corporate 185960 v North Shore City Council* HC Auckland, CIV-2006-404-3535, 22 December 2008 at [102].

[54] I conclude that Mr Wang breached his duty of care as project manager/site supervisor and is liable to make a contribution to the Council towards the amount awarded against the Council in favour of the claimants.

WHAT SHOULD BE THE APPORTIONMENT OF LIABILITY BETWEEN THE RESPONDENTS?

[55] Section 72(2) of the Weathertight Homes Resolution Services Act 2006 provides that the Tribunal can determine the liability of any respondent to any other respondent and remedies in relation to any liability determined. In addition, section 90(1) enables the Tribunal to make any order that a court of competent jurisdiction could make in relation to a claim in accordance with the law.

[56] Under section 17 of the Law Reform Act 1936 any tortfeasor is entitled to claim a contribution from any other tortfeasor in respect of the amount to which it would otherwise be liable.

[57] The basis of recovery of contribution provided for in section 17(1)(c) is as follows:

> Where damage is suffered by any person as a result of a tort... any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is... liable in respect of the same damage, whether as a joint tortfeasor or otherwise...

[58] Section 17(2) of the Law Reform Act 1936 sets out the approach to be taken. It provides that the contribution recoverable shall be what is fair taking into account the relevant responsibilities of the parties for the damage.

[59] The extent of the damage caused by each party is relevant when determining apportionment. However, as there is not usually clear evidence of the amount of damage caused by a particular defect, apportionment cannot be an exact science. Such decisions must be made on the evidence available and any difficulty in calculating the apportionment of damages is not a justification for avoiding a finding of liability.

[60] Mr Wang, as project manager/site supervisor, had primary responsibility for the weathertightness defects that caused the need for the house to be fully reclad. For this reason I conclude that Mr Wang has greater liability than the Council. The Council submits that its liability should be no more than 20 per cent which is consistent with the decision of *Mt Albert Borough Council v Johnson*.[7] I accept that this is reasonable under the circumstances and have apportioned liability at 20 per cent to the Council and 80 per cent to Wei Wang.

WHAT GENERAL DAMAGES SHOULD BE AWARDED?

[61] The claim of $25,000 general damages is not disputed. I am satisfied that the evidence of Ms Ng of the stress suffered by her family as a result of their leaky home justifies the claim for damages of $25,000. I therefore award this sum.

CONCLUSION ON QUANTUM based on remedial costs

[62] If the claimants are awarded damages based on the cost of repair, I conclude that they have proved the sum of $684,589.57 (plus contingency in accordance with [26] above) calculated as follows:

Remedial costs	$624,814.88
Consequential costs	$34,774.70
Sub total	**$659,589.58**
General damages	$25,000.00
TOTAL	**$684,589.58**

IS DIMINUTION IN VALUE OR THE COST OF REPAIR THE APPROPRIATE MEASURE OF THE CLAIMANTS' LOSS?

[63] The claimants and the Council disagree on the appropriate measure of the claimants' loss. The claimants submit that it is appropriate in this case to award damages based on the cost of the remedial work whereas the Council contends that damages should be based on diminution in value because the claim against the Council is in tort.

[7] *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 235 (CA).

Relevant Principles

[64] The claimants rely on the decision of the High Court in *Cao v Auckland City Council*[8] which set damages based on the cost of repairing the weathertightness defects, overturning a decision of this Tribunal to award damages against the Council based on diminution in value. The Council argues that the Tribunal is bound by the more recent decision of the High Court in *Johnson v Auckland Council*[9] which awarded damages based on loss of value. Prior to *Johnson*, the cost of repair was the measure of loss generally applied by the High Court to an award of damages against the Council in leaky building claims.

[65] In *Marlborough District Council v Altimarloch Joint Venture Ltd*[10] 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.

[66] Whereas a breach of contract entitles the claimant to be put into the position he or she would have been in if either the contract had been performed or had never been broken, the measure of damages in tort is what would restore the claimant to the position held before the tort was committed.

[67] Diminution in value was the measure of loss applied by the High Court in *Altimarloch* in relation to the claim against the Council, the Court of Appeal saw no reason to depart from this approach[11] and the Supreme

[8] *Cao v Auckland City Council* HC Auckland, CIV-2010-404-7093, 18 May 2011.
[9] *Johnson v Auckland Council* [2013] NZHC 165.
[10] *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726.
[11] *Vining Realty Group Limited v Moorhouse* [2010] NZCA 104, (2011) 11 NZCPR 879 at [113].

Court was not required to consider this issue. However Elias CJ emphasised that assessment of damages is a matter of fact.[12]

[68] In *Johnson v Auckland Council*[13] Woodhouse J reviewed cases in negligence and concluded that, although there are no absolute rules as to the measure of damages in particular cases, there are normal or prima facie measures. His Honour concluded that:

> [148]...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....

[69] In *Johnson* the plaintiffs argued that the cost of repairs was the normal measure of damages which should apply to their claim against the Council. However Woodhouse J observed that in a number of leaky home cases before the Court the correct measure of damages had not been considered because it was not in issue. His Honour expressed the view that "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."[14]

[70] His Honour also noted that the Johnsons did not address the underlying principles or advance any argument which justified a different

[12] *Stirling v Poulgrain* [1980] 2 NZLR 402 (CA) AT 419 per Cooke J.
[13] *Johnson v Auckland Council* above n 9.
[14] Above n 9 at [175].

outcome from the Court of Appeal decision in *Altimarloch*[15] and concluded that the normal measure of damages applying in cases of tortious negligence should apply. Woodhouse J also considered that the High Court in *Altimarloch* applied the principle that the "plaintiff cannot claim damages which could have been avoided or reduced by the taking of reasonable steps". His Honour concluded that the finding of contributory negligence against the Johnsons warranted the decision that it would not be reasonable to assess loss on the basis of repair costs.

[71] His Honour concluded that the normal measure of damages for negligent misrepresentation in tort applied and calculated damages on the difference between the price paid by the Johnsons and the actual value of the property in its true condition.[16] His Honour recorded that this decision was based on long established principles, not on an assessment that the cost of repairs was unreasonable or disproportionate to diminution in value.[17]

[72] Woodhouse J distinguished *Cao*[18] in which the High Court awarded damages against the Council based on repair costs because in his view it wrongly interpreted the prima facie rule applied in *Warren & Mahoney v Dynes*[19] to claims for breach of contract as applying to tortious negligence.[20]

[73] *Warren & Mahoney* involved claims against an architect and an engineer relating to the construction of a house and swimming pool on unstable land. The claim against the architect was in contract whereas the claim against the engineer was in tort. The High Court concluded that in the circumstances of that particular case there should be no difference in the measure of damages awarded between the claims in contract and in tort.[21] However, in *Warren & Mahoney* the plaintiff argued that damages should be assessed either as the cost of rebuilding on other land or diminution of value and the architect and engineer argued that the appropriate measure was a combination of both.

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[15] Above n 9 at [172].
[16] Above n 9 at [151].
[17] Above n 9 at [173].
[18] *Cao v Auckland City Council* above n 8.
[19] *Warren & Mahoney v Dynes* CA 49-88, 26 October 1988.
[20] Above n 9 at [171].
[21] *Dynes v Warren & Mahoney* HC Christchurch, A252/84, 18 December 1987.

The submissions for the claimants

[74] The claimants argue that only the cost of repairs will restore them to the position they would have been in had the Council not been negligent. Mr Rainey submits that *Cao* and *Warren & Mahoney*, and a proper reading of *Johnson*, confirm that the appropriate measure of damages is a question of fact to be determined in each case. He submits that the diminution in value measure of loss applied in *Johnson* is not appropriate in this case because the nature of the wrong committed by the Council is materially different from the Council's wrong in *Johnson*. Mr Rainey argues that in this case the Council's negligence caused the house to be built with defects whereas in *Johnson* the Council's wrong was not a cause of the defects but negligence in issuing the CCC which amounted to misrepresentation about the quality of the home. Mr Rainey submits that *Altimarloch* supports this distinction because in *Altimarloch* the Council's negligence did not cause the defect (fewer water rights than specified on the LIM) and the measure of damage applied to the loss caused by the Council was the difference between the price paid for the land and the actual value.

[75] Mr Rainey further submits that the wording and purpose of the Act supports the cost of repair as the primary measure of loss in Tribunal claims. Although he acknowledges that s 50 empowers the Tribunal to award either loss of value or the cost of repairs, Mr Rainey argues that because s 42(2) requires the assessor to estimate the cost of repair and not the loss in value, Parliament intended that the cost of repairs would be the main measure of loss and damages.

[76] Mr Rainey also argues that loss in value cannot be the appropriate measure because it is a loss that the claimant can never suffer under the Act. His theory is that such loss does not crystallise until the property is sold and, because s 55 requires a claim to be terminated if ownership transfers, loss of value can never be determined.

The submissions for the Council

[77] The Council submits that the correct measure of loss in a tort claim is an amount which reflects the detriment actually and reasonably suffered by the claimants and in claims against the Council this loss should normally

be measured by the difference between the price paid by the claimant and the value of the property in its true condition. Ms Harrison submits that *Cao* should not be followed as it was decided without the benefit of the decision of the Supreme Court in *Altimarloch* and that *Johnson* is binding on the Tribunal because it was decided after *Altimarloch* and addressed the nature of the legal wrong suffered in tort claims.

[78] The Council argues that it is not reasonable for the claimants to claim the cost of repairs because when this amount is added to the land value, the sum exceeds the market value of the property. It is submitted that it would be unreasonable for the Council to pay the claimants the cost of repair when the loss of value is between $370,000 (Mr Gamby's evidence) and $468,000 (Mr Taylor's evidence). The Council accepts that the loss should be calculated on the basis of the value of the property at the date of hearing because the defects were not apparent at the date of purchase.

Discussion

The nature of the legal wrong

[79] Whether a cause of action against the Council is the conduct of the inspections or the issuing of the code compliance certificate the legal wrong is a tort. In *Johnson* the Council admitted negligence in carrying out the inspections and issuing the CCC, the same acts which give rise to this claim against the Council.[22] I am not persuaded that negligence in conducting building inspections is a more direct cause of building defects than issuing the CCC or that each cause of action necessarily gives rise to a different measure of damages. I also note that, although the claimants do not plead misrepresentation, Ms Ng's evidence is that they obtained a LIM and looked at the property file because they wanted to ensure that the Council had issued the CCC before they proceeded with the purchase.[23] For these reasons I do not accept Mr Rainey's submission that this case can be distinguished from *Johnson* in respect of the nature of the claim against the Council.

[22] Amended Statement of Claim, 15 November 2012, at [22].
[23] Brief of Evidence of Seok Ching (Terri) Ng, 22 November 2012 at [14].

[80] I do not accept Mr Rainey's submission that the Act reflects an intention that the cost of repair is the primary measure of damages. While Parliament may have anticipated that damages would generally be applied to repairing homes that does not mean that it intended the cost of cure to be based on repair costs in every case. The amendments to the Act to provide for the Financial Assistance Package are intended specifically to provide for contribution by government and territorial authorities toward repair costs and should not in my view be interpreted as limiting the Tribunal's power to award damages based on loss of value, in accordance with common law principles.

[81] In my view, the argument that loss of value cannot be determined until the house is sold has no merit. This is no more logical than suggesting that the cost of repairs cannot be determined until the repairs are carried out. I am satisfied that it is fair and appropriate to assess either the estimated cost of repair or estimated loss of value on the basis of the evidence before the Tribunal which in this case is expert evidence. Further, it is not possible to calculate diminution in value without first assessing the cost of repairs and there is nothing in s 50 to indicate that the Tribunal should prefer one measure of loss over the other.

[82] While I accept that the Tribunal is bound by *Johnson*, the Court in that case concluded that, although there are prima facie measures, there are no absolute rules on the measure of damages and in *Altimarloch* the Supreme Court confirmed that an assessment of damages is a question of fact.

The relevant facts

[83] In this case there is a significant difference between damages based on repair costs and the loss of value. The sum proved for the cost of repair (without contingency) and consequential costs is $659,589.58 compared with the loss of value estimated at $468,000 by the claimants' valuer, Mr Taylor, and $370,000 by Mr Gamby, for the Council.

[84] Mr Taylor and Mr Gamby calculated the loss of value by deducting their 'as is' valuation from the unaffected value of the house. There was a small difference in the value each valuer applied to the land and the

improvements and they accepted these were matters of judgment and that the differences were minor. However there was a significant difference of $42,000 between the assessments of Mr Taylor and Mr Gamby of the dwelling as a rental, in its current condition.

[85] Mr Alvey considered that the house would only be habitable for two to three years and Mr Taylor therefore based his valuation on three years. Mr Gamby based his valuation on the house being habitable for five years however in evidence Mr Paykel, also a witness for the Council, agreed with the assessor, Mr Wiemann, that the house could be unsafe after three years.

[86] I conclude that the expert evidence does not support a valuation based on a five year habitable period and therefore prefer Mr Taylor's rental valuation to that of Mr Gamby. As I have noted, the other factors contributing to the difference between the valuers' assessments of loss in value were minor and I accept the loss of value assessment by Mr Taylor in all respects. I therefore adopt Mr Taylor's estimate of the 'as is' value of the property of $462,000 and his loss of value estimate of $468,000.

[87] The difference between the two measures of damages is $191,589.58. The following table illustrates the effect of this difference on the position of the claimants:

"As is" value	$462,000.00	
Repair cost	$659,589.58	
		$1,121,589.58
"As is" value	$462,000.00	
Loss of value	$468,000.00	
		$930,000.00
Difference		**$191,589.58**

[88] Mr Rainey accepted that the claimed repair cost represents an investment of 70 per cent of the value of the house but he suggested that it would not be disproportionate over-capitalisation to repair this property. The question of over-capitalisation was not put to the valuation experts however the opinion of both valuers is that when repaired the house will not sell for over $1million and in evidence Mr Taylor said that if remediated the house would not be worth more than the unaffected value which he estimated at $930,000.

[89] The claimants' house is large with six bedrooms and four bathrooms. There was some disagreement as to whether the sixth bedroom downstairs was in accordance with the building consent. Mr Taylor valued this area as a self-contained flat although he accepted it was not on the building consent; Mr Gamby did not consider the area a proper bedroom and valued it accordingly. However, the house was configured in this manner when the claimants bought it and I accept Ms Ng's evidence that their family orientated lifestyle means they make full use of this house.

[90] It was Mr Gamby's evidence that there are very few houses in the Chatswood area advertised for over $1million and that if the claimants were awarded damages based on loss of value, it would be possible for them to purchase an alternative property. In this respect the claimants are in a different position from the claimants in *Cao* who could not purchase a similar home in the same area on the basis of an award based on diminution in value.

[91] However I accept that, unlike the Johnsons, the claimants have established an attachment to this property as their family home and that this attachment was established well before any weathertightness defects were apparent. The claimants had furniture made to fit this house and Ms Ng said that the location, in a cul-de-sac and with good views, was particularly important to them. Ms Ng was adamant that this house suits their needs.

[92] Ms Ng expressed concern that moving would cause stress and upheaval for the family and selling the house in its current condition would be very difficult and unfair. The claimants are likely to have to move regardless of the measure of loss applied however I accept that a move for the purpose of carrying out repairs is very different from selling and leaving a family home permanently. I also accept that the identified weathertightness defects may make selling this house difficult although the claimants concern about perceived 'unfairness' in selling could be addressed by disclosing the defects.

Conclusion on measure of loss

[93] In assessing the actual and reasonable loss of the claimants I have considered that the claimants purchased this house within six months of the Council issuing the CCC. They inspected the Council file and were entitled to believe that the house was properly built and in good, as new, condition. There is no allegation that they have contributed to their own loss. In this respect these claimants are in a different position from the claimants in *Johnson.*

[94] The claimants promptly attended to the first signs of water ingress which emerged after four years and sought professional advice on maintenance. They had lived in the house for nine years before they discovered that it was a leaky home. I am satisfied that these claimants have a genuine desire to repair their house and retain it as their family home.

[95] I have carefully considered the Council's argument that an award based on the cost of repair would be unreasonable in light of the evidence that if awarded loss of value the claimants could buy a similar house. However any concern that an award based on the cost of repair will result in a windfall for the claimants will only materialise if the claimants successfully negotiate several hurdles. They would need to sell their house 'as is' for a price that, when added to an award of repair costs, is significantly less than the cost of a similar property that meets their needs and is free of weathertightness defects. This scenario presupposes that when the claimants sell, the type of home they require is available for purchase at the right price.

[96] The claimants' loss is that their family home has become a leaky building. In my view an award based on diminution in value would make the claimants vulnerable to the market and therefore would not necessarily restore them to the position they would have been in but for the Council's and Mr Wang's negligence. For these reasons I consider that the cost of repairs is the appropriate measure of loss in this case.

ORDERS

[97] I therefore make the following orders:

i. Auckland Council and Wei Wang are jointly and severally liable to pay Andrzej Kroczak and Seok Ching Ng the sum of $684,589.58 immediately plus an allowance for contingency to be calculated in accordance with [26] above.

ii. The Auckland Council is entitled to recover from Wei Wang any amount that it pays to the claimants over and above the sum of $136,917.92 being 20 per cent of $684,589.58 plus up to 80 per cent of the allowance for contingency, calculated in accordance with [26] above.

iii. Wei Wang is entitled to recover from Auckland Council any amount that he pays to the claimants over and above the sum of $547,671.66 being 80 per cent of $684,589.58 plus 20 per cent of the allowance for contingency calculated in accordance with [26] above.

DATED this 17th day of May 2013

S Pezaro
Tribunal Member