IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI 2016-100-00010
[2018] NZWHT AUCKLAND 01

BETWEEN	**PHORINA CHIEH-HSIN TSAI AND FERGUS TI-WEN MAO** First Claimants
AND	**UPPER HUTT CITY COUNCIL** First Respondent
AND	**MICHAEL ANTHONY BARROTT** Second Respondent
AND	**MICHAEL DANIEL KEANE (REMOVED)** Third Respondent
AND	**PANELCRETE CONSTRUCTION LIMITED (COMPANY NUMBER 40222) (REMOVED)** Fourth Respondent
AND	**PHILLIP ERIC GORRIE AND ROBYN JUNE BOND** Fifth Respondent
AND	**ROBYN JUNE BOND** Sixth Respondent
AND	**SAFARI REAL ESTATE LIMITED (COMPANY NUMBER 976128)** Seventh Respondent

Hearing:	9,10 & 11 October 2017 and 20 November 2017
Appearances:	A Davie for the claimants P Robertson and B Martelli for the first respondent R Laurenson for the fifth and sixth respondents R Hern for the seventh respondent
Decision:	27 February 2018

FINAL DETERMINATION
Adjudicator: K D Kilgour

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Introduction

[1] This claim concerns a large architecturally designed home situated on a prominent block of land at 8 McCarthy Grove, Clouston Park, with good views over the northern part of Upper Hutt city.

[2] Michael Barrott built the home beginning in late 2000. Mr Barrott and his family took occupation in 2001, before the Code Compliance Certificate was issued by the Upper Hutt City Council.

[3] Mr Barrott decided to sell the home in 2005, but was first required to complete construction and obtain a Code Compliance Certificate, which the Council issued on 1 November 2006.

[4] The Barrotts sold to Phillip Gorrie and Robyn Bond in 2007.

[5] By 2009 Mr Gorrie and Ms Bond's decided to sell. The first potential buyers withdrew from a conditional purchase contract in early February 2009 due to receipt of a critical pre-purchase report they obtained from Realsure Limited, dated 23 January 2009, which identified material weathertightness risks. Ms Bond was a real estate agent engaged by Safari Real Estate Limited (Safari). Ms Bond had an arrangement with Safari that she would be the sole selling agent and she, and Safari, advertised the home as a magnificent, amazing executive residence in excellent interior and exterior condition.

[6] In late July 2009, after undertaking what they considered to be more than adequate due diligence, Ms Tsai and Mr Mao purchased the home and took possession on 25 September 2009.

[7] The home has significant weathertightness defects and has suffered material moisture damage. Ms Tsai states that all this became apparent from 2014 to 2015.

[8] Ms Tsai and Mr Mao lodged a claim under the Weathertight Homes Resolution Services Act 2006. It was common ground at the hearing that the home suffers from construction defects and is clearly a "leaky home".

[9] They claim in negligence against the Council for issuing a Code Compliance Certificate, and Mr Barrott as the alleged developer and builder. They say they were induced by Mr Gorrie, Ms Bond and Safari to purchase the home due to their negligent misrepresentations and breaches of the Fair Trading Act 1986. The claim argues that Ms Bond failed to disclose or inform the claimants of the Realsure report which concluded that the home was designated as "high risk for weathertightness". Ms Tsai and Mr Mao's evidence is that they would not have purchased (which caused them to draw down a large mortgage) if they had known of the findings of the Realsure report. The claim estimates that the remedial costs will be nearly nine hundred thousand dollars.

[10] The respondents respond, among other defences, that the claims are time barred. The Council argues the repair costs are out of all proportion to the property's loss in value. And, that diminution in value is the appropriate measure of damage.

Factual Findings

[11] The Council issued building consent to Mr Barrott to build the home, the subject of this claim, on land which his family owned at 8 McCarthy Grove, Upper Hutt on 20 November 2000. The building consent issued under the Building Act 1991 and permitted Mr Barrott to undertake building work in accordance with the attached plans and specifications so as to comply with the provisions of the Building Code.[1]

[12] Mr Barrott contracted with a building company T.I. McRoberts Building Limited and other necessary sub-contractors to build the home.[2]

[13] It is clear from Mr Barrott's discovery documentation that he largely had control over the building process as the vast majority of invoices are addressed to him.[3] Building work began in late November 2000 and the Council's first inspection was 4 December 2000. Mr Barrott

[1] Page 19, Bundle of Documents (BOD).
[2] Second Respondent's response to claim (30 November 2016) at [24]; Affidavit of Michael Barrott at [6] in support of application for removal (12 August 2016).
[3] 2nd Respondents disclosure documents – Document MB18 (building consent dated 3 November 2000) through to Document MB206 (31 August 2001).

states that over the months from late 2000 into 2001 most of the building work was carried out.[4] By the end of August 2001 the house had been substantially built apart from "a small bit of painting outside and some interior decorating".[5] Mr Barrott states that the valuation he obtained on 2 April 2001 for funding purposes described the home as:[6]

> [p]resently being constructed on the site and which is approximately 70% complete.

[14] Electricity was connected in mid-2001. Mr Barrott states he and his family were living in the home by the end of 2001 and possibly earlier. T.I. McRoberts Building Limited completed its work and left the building site sometime before the Barrotts took occupation.[7]

[15] The Council's record of the inspections, dated 10 January 2005, stated amongst other matters that a leak was suspected in the large pillars in the front of the house, several penetrations in the exterior cladding needed to be sealed, further producer statements were required, roof-cladding was not suitably fixed and overall weathertightness was not approved.[8] This Council note was from a property inspection initiated by Mr Barrott. By the beginning of 2005 just he and his wife were living in the home. They considered selling and therefore requested a final inspection from the Council for the issue of a Code Compliance Certificate.

[16] The Council's inspection dated 25 October 2006 records that all work required to be done as at 10 January 2005 had been completed and "all appears to be okay".[9] That note also states that the required producer statements and reports had been obtained, and that letters had been received from the aluminium joiner, the roofer and the plasterer.

[17] The Council issued a Code Compliance Certificate for the home on 1 November 2006.

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[4] Barrott affidavit (12 August 2016) at [6] and [7] and Disclosure documents MB271, 272, 273, 274 and 275.
[5] Barrott Affidavit (12 August 2016) at [8].
[6] Mr Barrott's disclosure, Document MB142.
[7] Barrott Affidavit (12 August 2016) at [11].
[8] Document 23 BOD.
[9] Document 24 BOD.

[18] Ms Bond and Mr Gorrie purchased the home from Mr Barrott in or about June 2007 for $765,000.[10] Ms Bond stated that the residential market at that time was at a high.

[19] Ms Bond states that at the time of purchase she and Mr Gorrie relied on the property having received a Code Compliance Certificate, and were not aware of the matters between the Council and Mr Barrott, and the delay he experienced in receipt of the Code Compliance Certificate.[11]

[20] Ms Bond commenced work as a real estate sales person in March 2008 with Safari based in its Upper Hutt office. Safari then operated under the brand name of "Tommy's Real Estate".

[21] Mr Gorrie and Ms Bond's relationship ended after two years' ownership of the home, causing them to sell. Safari and Ms Bond were involved in the sale of the home, which was first promoted for sale on 22 October 2008.[12]

[22] In early 2009, Mr Gorrie and Ms Bond entered into a conditional contract for sale with clients of John Gwilliam and Co, solicitors of Upper Hutt. The sale did not proceed. The conditional purchaser obtained a pre-purchase building report from Realsure Limited, which indicated that the home was at a high risk of weathertightness issues and recommended a further specialist report to be undertaken by a specialist surveyor. Mr Gwilliam's facsimile to Ms Bond's solicitor copied to Safari and Mr Gorrie's solicitor, attached "the relevant pages of the builder's report " and stated that the report appears to indicate that the home is a "leaky home" and has high moisture readings throughout the cladding. The conditional purchaser bought the contract to an end.[13]

[23] Clause 16 of that conditional sale agreement allowed the vendors two working days to advise whether they were prepared to remedy the indicated building defects.

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[10] Robyn Bond's brief of evidence (15 September 2017) at [2] and [5].
[11] At [7] Ms Bond's brief of evidence (15 September 2017).
[12] Ms Bond's brief of evidence (15 September 2017) at [10] and [14].
[13] Document 15, BOD.

[24] Ms Bond's lawyer informed John Gwilliam and Co by facsimile on 9 February 2009 that she had been instructed by the vendors that they were not prepared to remedy the alleged defects therefore the contract was at an end.[14]

[25] Ms Bond's evidence is that she was aware that a property inspection had been done by Realsure but she did not see the report.

[26] The director of Safari James Coffey gave evidence for the agency. Mr Coffey's evidence is that as Ms Bond was the owner of the home she acted as her own listing and selling agent.

[27] Mr Coffey states that he does not believe that Safari received the full Realsure report but that a three-page extract from the report was received by Safari enclosed in John Gwilliam and Co's letter to Ms Bond's solicitor, dated 5 February 2008.[15]

[28] Bruce Symon gave evidence for Ms Tsai and Mr Mao. He is the sole manager and sole director of Realsure Limited. His evidence is that all Realsure pre-purchase reports contain a "client summary" and that this synopsis is possibly the most important part of the report.[16] His evidence is that Realsure have never had any objection to the client's summary being forwarded to third parties.[17]

[29] The Realsure client's summary, dated 22 January 2009, is very candid in its conclusion that because of the design of the home, it being more than a single level, monolithic clad with complex junctions, lack of roof overhangs, balconies and a number of complex roof to wall junctions puts it at a higher risk for weathertightness issues. The summary also stated that major dampness to the interior of the home was not detected by its moisture meter readings. The moisture meter did indicate high moisture readings to the exterior and "dampness could be ingressing through the cladding to the internal framing".

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[14] Document 16, BOD.
[15] Mark James Coffey's brief of evidence, 15 September 2017 at [18].
[16] Client's summary commences at page 6 of Document 5, BOD.
[17] Bruce Ian Symon, 3 October 2017 at [26] and [27].

[30] Ms Bond stated that it came as a shock to her that the conditional purchaser had received an adverse report, because her experience with the home was that it did not have defects. After taking advice from her Safari branch manager and other colleagues, Ms Bond determined to get her own report.

[31] She contacted Murray Proffitt of Apex Home Inspection Services Limited and made an arrangement with him to inspect the home on 12 February 2009. Ms Bond also went next door to 9 McCarthy Grove where Mr Barrott was then living. She explained to Mr Barrott the receipt of the unsatisfactory building report and Mr Barrott's response was that he would not live next door to the property if he knew the home was defective.[18] Following the comfort she received from Mr Barrott, Ms Bond decided to cancel her arrangement with Mr Proffitt (who had informed her that he had obtained a copy of the Realsure report and expected to agree with its conclusions) and to engage New Zealand House Inspection Company Wellington Limited to undertake inspection of the home and provide a building report. That report was produced on 27 June 2009. The inspection did not involve invasive testing. The terms and conditions of the New Zealand House Inspection Company[19] state that the client agrees to assume all the risk for any condition or problem with areas in the home that are concealed or inaccessible and will not be inspected or included in the report. Otherwise the report gave the home a favourable overview.

[32] Meanwhile, Safari and Ms Bond continued to market the home as "amazing executive residence in every piece" with "excellent interior condition" and "excellent exterior condition".[20]

[33] Ms Tsai's evidence is that in late June 2009, she viewed the advertisement mentioned above which stated the home as having "wow factors" and that it was also described as a "dream home".

[18] At [20.2] of Ms Bond's brief of evidence, 15 September 2017.
[19] Page 2 of the report, Document 2 BOD.
[20] Document 1, BOD.

[34] Ms Tsai visited the home at its first open home marketing. Then again at the second open home the following week, where Ms Tsai received a copy of the New Zealand House Inspection Company report from Ms Bond. She learnt that the reason Ms Bond was selling was that her relationship was breaking up and the property needed to be sold.

[35] Subsequent to the second open home viewing, Ms Tsai arranged a private viewing where she was accompanied by Warren Loader, a friend who she described as "a handy man builder".

[36] During the second open home Ms Tsai noticed water patches on the ceiling of the rumpus room and immediately outside the rumpus room door. Ms Tsai says that Ms Bond made it clear that those two patches were plumbing leaks, that the leaks were fixed but gib board painting was still required to be accomplished. A further leak was noticed by Ms Tsai in the downstairs master bedroom ceiling. Ms Bond explained that was caused by a toilet immediately above. Ms Tsai further states that she asked Ms Bond if there were any other leaks and Ms Bond's response was a firm "no".

[37] After accepting Ms Bond's explanation, Ms Tsai and Mr Mao expressed their interest in making an offer. Ms Bond also informed Ms Tsai that as the original builder lived next door, there would be no problem, otherwise he would not be living so close.

[38] Ms Tsai says that on a further visit to the property Ms Bond gave her a fact sheet for the material used to construct the home and the fact sheet claimed the cladding had a cavity system so that the moisture would not be trapped behind the walls.[21] However, at no stage did Ms Bond provide Ms Tsai or Mr Mao the Realsure report or its client summary dated 22 January 2009. Ms Tsai states that Mr Loader did a check around the home, went on to the roof, looked at the ceiling patches and advised Ms Tsai and Mr Mao that nothing major was present or should raise any concern.

[21] Documents 3 and 4, BOD.

[39] Since they liked the property and it suited their family needs, Ms Tsai and Mr Mao made a conditional offer to purchase the property for $635,000 which would require them to borrow on mortgage $450,000. The offer dated 30 June 2009 was conditional on a builder's report.[22]

[40] Ms Tsai and Mr Mao engaged Peter Stone a pre-purchase building inspector whom they had used before, to undertake a property inspection. He provided them with his report dated 3 August 2009.[23] Ms Tsai said that Mr Stone's report was generally very favourable, he referred to the home as being in sound condition and that there were no indications that the home had any general weathertightness concerns.

[41] Ms Tsai did say there were three minor items that required remediation. Mr Gorrie and Ms Bond agreed to carry out such work. Then, based upon undertakings from the vendors that remedial work had been fulfilled, they instructed their lawyers to declare their purchase unconditional. Although, as Ms Tsai stated they felt they were rushed into confirming the agreement as unconditional after advice from the manager of Safari advising that another buyer was interested and prepared to pay $20,000 more for the property.

[42] Ms Tsai and Mr Mao purchased the property on 25 September 2009 for $635,000.[24] Ms Bond indicated that in 2009 the residential real estate market had dropped in value after the 2008 global financial crash.[25]

[43] Mr Stone, whom they had not met with since receipt of his report, was called to the property in December 2009 to inspect a damp patch, which Ms Tsai observed in front of the bi-fold doors. Ms Tsai said Mr Stone could not identify a problem and did not equate a small amount of water sitting on a tiled floor area to any great weathertightness problem.[26] Ms Tsai said that the next leak was found in the winter of 2013, in the garage ceiling near the laundry. Mr Loader returned to the

[22] Documents 6, BOD.
[23] Document 8, BOD.
[24] Document 6, BOD.
[25] Ms Bond's brief of evidence, 15 September 2017 at [5].
[26] Ms Tsai's brief of evidence, 14 August 2017 at [26].

property, but could not find the problem and as it was only a small water stain Ms Tsai said that she gave it very little attention.[27]

[44] In the winter of 2014, Ms Tsai says that the water stain in the garage seemed to get bigger so she again asked Mr Loader to inspect, but he could not find anything. He did notice some paint flaking on the parapet walls during that visit.

[45] Ms Tsai said that they had done some significant maintenance by painting the whole property in 2011. She indicated that some metal flashings were installed on the parapets during the painting process. Ms Tsai further stated that each year they engaged their handy man friend, Mr Loader, to carry out maintenance around the home.

[46] In October 2014 Ms Tsai engaged a contractor to inspect the parapets and he suggested that the roof flashings needed repair. He was not able to undertake that work until about May or June 2015. After he completed some destructive testing, he informed Ms Tsai that their home was a "leaky home".[28]

[47] After some further delay in engaging a builder, Ms Tsai made contact with an Ian McGill, a builder specialising in leaky home repairs. He visited the property in October 2015 and confirmed to Ms Tsai that their home was "a leaky home". He recommended engaging Murray Proffitt of Apex Home Inspection Services Limited. Ms Tsai said that this was towards the end of 2015 and Mr McGill also advised them to immediately file a claim with the Weathertight Homes Resolution Service which they did on 3 November 2015.

[48] Ms Tsai said that when they received that news they approached Mr Barrott, their then neighbour. Mr Barrott indicated that he had built a number of homes in the local Riverstone development and had built 9 McCarthy Grove after he had moved out of their home. He further stated that he tried to build a home on the section of 8A McCarthy Grove but his health prevented him from doing so. That property is a vacant

[27] Ms Tsai's brief of evidence, 14 August 2017 at [28].
[28] Ms Tsai's brief of evidence, 14 August 2017 at [38].

section and was then on the market. Mr Barrott advised that he had used an incorrect flashing system on their home, he also informed Ms Tsai that when he was living in the property he had trouble keeping paint on the inside of the parapet walls above the garage.[29]

[49] Murray Donald Proffitt gave evidence for the claimants. In late 2015 he was asked to view the home and attended the property on 19 November 2015. At that visit he realised that he had some prior knowledge of this property, namely, his discussions with Ms Bond in early 2009.[30] After that visit, Mr Proffitt stated that Ms Tsai and Mr Mao had engaged his company to provide weathertightness and remedial advice and he engaged Haydon Rodger Miller, a building surveyor, in May 2016 to assist him. By this time John Lyttle had provided a full Weathertight Homes Resolution Service assessor's report dated 1 February 2016.

[50] Mr Lyttle's comprehensive report determined that the home met the "leaky home" criteria set out in the Weathertight Homes Resolution Services Act 2006. His report opined that the home exhibited the following weathertight deficiencies:

(a) top edges of parapets poorly designed;

(b) metal hand rails on decks penetrated plastered solid balustrades;

(c) windows and doors not sufficiently flashed; and

(d) roofs poorly detailed.

[51] Mr Lyttle said these deficiencies had caused repetitive damage to cladding and framing and unless remedied the home would deteriorate to a level that it became unsafe to live in.

[52] Mr Lyttle's observations and analysis of current damage are clearly articulated in paragraph [9] of his report. That analysis illustrates

[29] Ms Tsai's brief of evidence, 14 August 2017 at [41]–[47].
[30] Murray Donal Proffitt's brief of evidence, 10 August 2017 at [12].

a number of building details that lack longevity in terms of weathertightness. These have resulted in moisture ingress causing decay damage to the structural framing and to the internal linings. He said that these building defects exist on all elevations at varying degrees. He concluded that the building deficiencies are widespread and so is the decay damage. In Mr Lyttle's opinion and considering the deficiencies that exist, the incorrect installation of the cladding system and its components, the only viable repair option to achieve long term weathertightness and compliance with the New Zealand Building Code is to fully reclad all external walls with a new drained cavity system.

[53] Mr Proffitt's evidence is that his meeting with Ms Tsai at the property on 19 November 2015 concluded with the claimants engaging his company to provide weathertightness and remedial advice. This engagement enabled Mr Proffitt to contract with Haydon Miller, an experienced registered building surveyor and member of the New Zealand Institute of Building Surveyors. Mr Miller's evidence states that in early May 2016 he was instructed by Mr Proffitt of Apex Home Inspection Services Limited to undertake a full building survey and report on a remediation program for the home. He visited the property a number of times in May 2016 and compiled his preliminary report dated 14 July 2016.[31] Mr Miller found greater damage than that found by Mr Lyttle and he inspected the property on 31 July and 18 August 2016 and stated that the damage to the home had become a great deal worse by 31 July 2017 and concluded that the home deteriorated substantially from when he first saw it in May 2016. Mr Miller's defects and damages schedule compiled on 2 August 2017 sets out the breaches of the Building Code clauses and in particular E2 (external moisture) and B2 (durability).

[54] At the hearing, Mr Lyttle and Mr Miller were panelled and examined on their respective opinions. Mr Lyttle largely agreed with Mr Miller's further findings and with his extended scope of remedial works including remediation to the structural steel portable frame,

[31] Document 54, BOD.

increased scope of works to the entire roof area and additional remediation related to the windows and doors.[32]

[55] Both defects experts agreed on the primary cause of damage:[33]

1. parapets (Mr Lyttle says 70 per cent, Mr Miller says 60 per cent of damage);

2. balustrade penetrations (Mr Lyttle says 15 per cent, Mr Miller says 10 per cent);

3. windows and door junctions (Mr Lyttle says 10 per cent, Mr Miller says 20 per cent); and

4. roofs (Mr Lyttle says 5 per cent, Mr Miller says 10 per cent).

[56] Mr Lyttle and Mr Miller's evidence is that the parapets were a material cause of damage. Mr Proffitt agreed but went further, attributing the defective parapets as responsible for 100 per cent of the resulting damage to the home:[34]

> The whole detailing of the roof parapets is just contrary to Plaster Systems [installation literature] and good practice. They are different to any manufacturer's documents at the time and that should have been readily observable to anybody looking at this property.

[57] Evidence of the two defects experts and that of Mr Proffitt concerning defects and damage is credible and compelling. Their evidence establishes that the home is a leaky home with extensive damage from water ingress. The Council acknowledged through its counsel in the opening submissions that the claimants' home leaks. No respondent produced expert building evidence to contradict that of Mr Lyttle and Mr Miller.

[58] From their findings and their agreed scope of remedial work Mr Lyttle and Mr Miller agree that the most appropriate remediation

[32] Page 211 of the Notes of Evidence (NOE).
[33] See page 30 of assessor's report and page 15 of Document 54 BOD.
[34] Mr Proffitt's evidence line 26 -29 at page 145 NOE.

proposal is a full recladding of the home, uplifting the roof to attend to framing damage at the parapets and roof drains, and removal and re-pitching the roof to make it weathertight.

Defects findings

[59] After reading the experts briefs of evidence and reports and hearing their oral evidence, I determine that the principal construction defects causing extensive moisture ingress and damage are those set out by Mr Lyttle and Mr Miller as summarised above. And, the appropriate repair option is that recommended by the experts in paragraph 58 above.

Claims quantum

[60] The claimants, through their counsel's closing submissions, quantified their claim as follows:

1	Estimate of remedial costs inclusive of GST	$ 810,000.00
2	The cost of building consultants, property managers and quantity surveyors engaged to inspect and report, GST inclusive	$ 37,056.40
3	The cost associated with rehousing the claimants during the period required for remediation work, GST inclusive, 24 weeks at a weekly rental of $700	$ 16,800.00
4	General damages	$ 25,000.00
	TOTAL	**$ 888,856.40**

Issues

[61] The issues for determination are:

(a) the affirmative defence of limitation;

(b) the claim in negligence against the Upper Hutt City Council;

(c) Mr Barrott's liability as builder and/or developer;

(d) Ms Bond and Safari's liability under the Fair Trading Act 1986;

(e) whether Ms Bond, Mr Gorrie and Safari are liable for negligent misstatement;

(f) quantum and measure of damages – whether the measure of loss is the reasonable cost of repairs or diminution in value;

(g) whether Ms Tsai and Mr Mao were contributorily negligent, and if so, what is the causal potency of that negligence relative to the negligence of the other respondents;

(h) other defences – causation and failure to mitigate loss; and

(i) apportionment.

Limitation

[62] The key defence needing my initial determination is that of limitation. The respondents pleaded they have a limitation defence, in brief because:

(a) in August 2009, the claimants obtained a pre-purchase report (the Stone report) which reasonably put the claimants on notice that the home suffered material weathertightness features as a consequence of its design and construction;

(b) the claimants then had three years to file a claim under the Fair Trading Act 1986 and six years to file a claim in negligence; and

(c) the claimants did not file a claim until more than six years after August 2009.

[63] Under s 4(1)(a) of the Limitation Act 1950, a claim founded in tort cannot be brought more than six years from the date when the cause of action accrued.[35] In the case of claims for latent defects, a cause of action in negligence accrues from when the damage is reasonably discoverable.[36]

[64] Under the Fair Trading Act the applicable limitation period is found in s 43(a). This provides that an application for an order of the Court or Tribunal under s 43 of that Act may be made at any time within three years after the date on which the loss or damage, or the likelihood of loss or damage, was discovered or ought reasonably to have been discovered.

[65] Section 37(1) of the Weathertight Homes Resolution Services Act 2006, for the purposes of any enactment that imposes a limitation period, states that an application for an assessors' report has the effect as if it were the filing of proceedings in a court and thereby stops time running on the claim.

[66] Section 393(2) of the Building Act 2004 prohibits a claimant from seeking relief if proceedings are brought after 10 years or more from the date of the act or omission on which the proceedings are based. This longstop limitation has no application here for the respondents are arguing that the act giving rise to the claim, the Stone report of August 2009, was more than 6 years before the claim was lodged on 23 November 2015.

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[35] The Limitation Act 2010 has no application to the affirmative defences pleaded by the respondents. The Limitation Act 1950 was repealed on 1 January 2011 by the Limitation Act 2010, but continues to apply despite its repeal to acts or omissions before 1 January 2011 and hence its relevance and application in this case.

[36] *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC).

[67] The critical dates applicable to the affirmative defence raised by the respondents are:

(a) Mr Stone's report was issued on 3 August 2009;

(b) Ms Tsai and Mr Mao became committed to purchasing the home in August 2009;

(c) Ian McGill, a builder specialising in leaky home repairs reported to the claimants in October 2015 that their home was "a leaky home";

(d) Mr Proffitt inspected the home as the claimants' expert on 19 November 2015; and

(e) Ms Tsai and Mr Mao lodged their claim to stop time running on 23 November 2015.

[68] The limitation defence as pleaded by the respondents in this case is an absolute defence, if established. The onus of proof is to establish, on the balance of probabilities, that the claimants' claims have been brought out of time and that now rests on the respondents.

[69] It is not necessary in order for time to stop running in respect of a claim, to be able to pin point with precision the exact cause of every defect giving rise to the claim. It is an established principle that, where through negligent design, construction or property inspection, damage occurs in a home, its cause being obvious, any cause of action which may exist accrues when the damage becomes manifest. That is because from that point economic loss occurs, as the market value of the building would then be detrimentally affected.[37]

[70] A cause of action in negligence arises on the first occurrence of the damage giving rise to the claim, but it has always been accepted that limitation does not start to run in respect of the occurrence of damage which is merely negligible or minimal.[38] It has been accepted that a

[37] *Pullar v R* [2007] NZCA 389.
[38] *Duthie v Roose* [2017] NZSC 152 at [54].

cause of action accrues when all of its elements are subsisting. The concept of accrual of a cause of action is still clearly focussed on the occurrence of the events constituting the cause of action.

[71] Tipping J in *Murray v Morel* states:[39]

> [69] In my view the numerous references in the Limitation Act to accrual of a cause of action can only be construed as references to the point of time at which everything has happened entitling the plaintiff to the judgment of the court on the cause of action asserted. Save when the Limitation Act itself makes knowledge or reasonable discoverability relevant, the plaintiff's state of knowledge has no bearing on limitation issues. Accrual is an occurrence-based, not a knowledge-based, concept. The Limitation Act as a whole is structured around that fundamental starting point. The periods of time selected for various purposes must have been chosen on that understanding …

[72] Mr Hern submitted that this case does not involve a latent defect but rather a patent defect, relying upon the findings in the Stone report commissioned by the claimants.

[73] Mr Hern explained that this is quite an exceptional case as leaky building claims go, because in 2009 there was good expert knowledge of the property asserting that it had weathertight risk features. He said that no less than four building inspectors looked at the property in 2009. He asserts that Mr Symon's Realsure inspector and Mr Proffitt identified problems with the home in January and February 2009. He accepts that the New Zealand House Inspection report was patently negligent, but Mr Stone's report which clearly Ms Tsai and Mr Mao relied upon had made suggestion of some problems. Whilst four building inspectors had considered the home by August 2009, I am only concerned with what the claimants had seen and or learned.

[74] Mr Hern submits that given Mr Symon and Mr Proffitt's evidence, it is irrefutable that the claimants received an asset on settlement of their purchase that was less than they bargained for. He said that both Realsure and Mr Proffitt had identified that the home had substantive water ingress issues before the claimants entered into the agreement to

[39] *Murray v Morel* [2007] NZSC 27, [2007] 3 NZLR 721 at [69] per Tipping J.

purchase on 30 July 2009 and thus they suffered an immediate and quantifiable loss.

[75] I reject this argument because Ms Tsai and Mr Mao did not receive the reports of Realsure or Mr Proffitt at the time of their purchase. Mr Hern says that Ms Tsai and Mr Mao's ignorance that the property was compromised is immaterial. I accept that the claimants are imputed with the negligence of their building inspector, but the critical issue was whether any expert opinion at that time had identified actionable and quantifiable loss, that is, whether the damage was patent at that time.

[76] Mr Hern nevertheless argued that when the claimants settled their purchase they did not secure the benefits they expected, that is a home that was structurally sound and weathertight. At the latest, Mr Hern says, time for limitation purposes commenced accruing in September 2009 when they settled but probably in August 2009 when they became irrevocably committed.[40]

[77] Mr Hern said that the claimants' cause of action in negligence accrued when they first sustained loss attributable to the breach of the respondent's duty and that was when they received the damaged asset, namely the home, that is when they suffered their immediate loss. Mr Hern concluded that because significant problems were known about this home in 2009, damage was patent and apparent.

[78] Mr Davie's response submits that the damage to the home was not patent, other than minor possible water ingress at the dining room bifold door frame. He argues that the critical factor in this case is that it is a latent defect building case in line with *Hamlin*[41] rather than the validity of an insurance claim (*Newlands*)[42] negligence of solicitors (*James*)[43] or misstatements in a registered prospectus (*Murray*).[44] Mr Davie pointed me to Baragwanath J's finding in the Court of Appeal

[40] Analogous to *Thom v Davys Burton* [2008] NZSC 65, [2009] 1 NZLR 437 at [25]–[26].
[41] *Hamlin* above n 38.
[42] *Newlands v Sovereign Insurance Company Ltd* [2014] NZHC 803 at [36]–[38].
[43] *James v Butterworth Thompson* [2013] NZHC 3018, [2014] NZAR 295.
[44] *Murray* above n 41.

decision in *Carter Holt Harvey*,[45] where the Judge agreed that "discovery" required more than a ground for suspicion. Mr Davie submits that Tipping J in the Supreme Court in that case was of the view that suspicion was insufficient:[46]

> [29] Put simply, an applicant either is or is not aware of the loss or damage.

[79] Mr Davie says that the minor damage outlined in the Stone report was not sufficient to require the assistance of a fully registered building surveyor. He submitted that the Stone report, put at its highest, raised suspicion as to water ingress in one small part of the building but that was some distance from the huge future loss which the claimants have now discovered being "more probable than not" as explained in *Carter Holt Harvey*.[47]

[80] Mr Davie concludes that the first time the claimants became aware of the true extent of the loss was when Mr Proffitt was first instructed in 2015.

[81] The essential issue for me to determine is the date at which the cause of action accrued: was it August 2009, a patent defect then reasonably discoverable, or October/November 2015 a latent defect only then reasonably discoverable.

[82] The law is clear that loss must occur and is a central ingredient of a claim in negligence and negligent misstatement that the limitation period begins to run only when all the ingredients of the negligence claim are present. Furthermore, the concept of reasonable discoverability introduces an objective element and that concept requires the exercise of reasonable, not exceptional, diligence.[48]

[83] I do not agree with Mr Hern's submission that Mr Proffitt had identified that the home had substantive water ingress issues prior to

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[45] *Carter Holt Harvey Ltd v Commerce Commissioner* [2009] NZCA 40, [2009] NZLR 573 at [72].
[46] *The Commerce Commissioner v Carter Hold Harvey Ltd* [2009] NZSC 120, [2010] 1 NZLR 379 at [29] per Tipping J.
[47] *Carter Holt* Harvey at 45.
[48] *New Zealand Bloom Ltd v Cargolux Airlines* [2012] NZHC 3012 at [37].

Ms Tsai and Mr Mao agreeing to purchase in 2009. Mr Proffitt's evidence is that in January 2009 he had received a copy of the Realsure report and opined that he tended to agree with it. But at that point in time he had not inspected the property.

[84] Mr Symon gave evidence that the Realsure report on the home was its standard pre-purchase inspection report. He also said that the report identified the home as leaking in several areas and was a high risk for weathertightness.[49] He was not the inspector and his evidence went on to state that the report recommended a further specialist report be undertaken by a weathertightness specialist survey. In any event this defence hinges not on the Realsure report but only upon the Stone report.

[85] The New Zealand House Inspection report was accepted at the hearing as negligent in failing to "red flag" any material weathertightness risk features.

[86] The Stone report, which I accept the claimants relied upon, only really red flagged moisture readings being too high on both side walls of the bottom of the dining room bifold doors. Otherwise that report showed a complete absence of any warnings or encouragement to have further weathertightness testing (invasive or otherwise) and inspections completed. There appeared no moisture damage issues in the Stone report. Mr Stone missed most of the findings of Mr Lyttle and Mr Miller. Mr Stone did not exercise reasonable skill and care in undertaking his inspection and reporting. He failed to identify significant and obvious observable weathertightness faults and risk features.

[87] I accept Ms Tsai and Mr Mao were entitled to rely on Mr Stone's report. Whilst they had purchased previous properties in the Wellington region, I accept that they were unaware of the technical detail of weathertightness issues (and therefore entirely reliant on the advice from an expert adviser) and were not able themselves to determine that the home had design features whose construction and materials meant that

[49] Mr Symon's BOD at [22].

it was a high-risk purchase. Mr Stone's report made no findings of weathertightness problems. His report concluded that the home was in "sound condition". The whole purpose of Mr Stone's advice was to prevent the claimants unknowingly buying a defective house whose value was significantly less than that paid.

[88] Instead, relying upon that report the claimants committed to purchase the home which Mr Stone described in sound condition, and according to Ms Bond's evidence, the purchase was at market value.

[89] The issue with the bifold door near the dining room and the rumpus room issue were all capable of categorising as merely negligible or minimal occurrence of damage. The only report relevant to this defence is the Stone report which the claimants were entitled to rely upon. Ms Bond's evidence supports Ms Tsai's that the home had not demonstrated any patent defects. The Limitation Act references to accrual of a cause of action means the point of time at which all components entitling the claimants' cause of action are capable of being asserted. It is at that moment that economic loss occurs and the market value of the home is detrimentally affected. I agree, for the reasons above stated, with Mr Davie that this is a latent defect case.

[90] The cause of action objectively did not accrue until the date that actual damage and loss was reasonably discoverable. The principle is that a person suffers a loss in tort when they suffer an "actual and quantifiable loss".[50] Damage and loss were only actual and quantifiable in November 2015, when Mr Proffitt identified damage by his expert inspection. Therefore all the provable components of the cause of action did not accrue until this time.

[91] Accordingly, the affirmative defence advanced by the respondents fails.

[50] *Smith v Singleton* [2015] NZHC 1643.

Negligence Claim against Council

[92] The Council issued a Code Compliance Certificate for the home on 1 November 2016.[51] In issuing such a certificate, the Council certified that it was satisfied on reasonable grounds that the home had been built in accordance with the building consent and otherwise complied with the provisions of the Building Code.

[93] Ms Tsai and Mr Mao allege that the Council failed to identify that the home did not comply with the approved plans and could not have been satisfied that there were reasonable grounds that the provisions of the Building Code had been met. Therefore, it was negligent in the issue of the Code Compliance Certificate.

[94] The claim relies on the Council's failure to have established an inspection regime capable of identifying whether there was compliance with significant aspects of the Building Act Code. Ms Tsai and Mr Mao relied upon the evidence of Mr Lyttle, Mr Miller and Mr Proffitt, all experienced registered building surveyors. No expert was called by the claimants regarding the practices of council officers.

[95] The Council concedes that it is potentially liable in negligence if its acts or omissions fall below the standard to be expected of a reasonably competent Council building inspector of the time. Mr Robertson argued that the onus is upon the claimants to prove their claim and as there was no evidence in relation to the negligence of the Council their claim must fail. The Council did not produce expert evidence on the practice of councils.

[96] Mr Robertson submits that even the inquisitorial nature of this Tribunal cannot override the basic principle that the claimants must prove negligence against the Council. Mr Robertson argues that the claimants rely upon inferences to be drawn from the evidence and that is not sufficient.

[51] Document 20 BOD.

[97] He stated that in *Auckland Council v Blincoe* it was argued unsuccessfully that the absence of evidence of negligence could be "patched over by inferring negligence".[52] He submits that the High Court rejected these submissions:

> [37] Firstly, the Council said that this finding had the effect of shifting the burden of proof onto the Council. The Council asserted that, since the claimants did not adduce any evidence as to the standard required of councils in the position of the Auckland City Council at the time, it could not discharge that onus. Secondly, the Council said that a building inspector could reasonably have certified the windows as built, as that design was superior to the approved design.
>
> [38] Turning to the Council's first submission, I accept that the burden of proof lay on the claimants. It was for the claimants to prove, on the balance of probabilities, that the Council fell below the standard of reasonable competence expected in relation to carrying out inspections and issuing Code Compliance certificates. It is generally the case that a finding of negligence will depend on establishing the requisite standard of care through evidence as to the standard generally exercised by reasonably competent and experienced members of that profession. Of course, it is possible for a judge to reject the standard commonly adopted in a particular profession as failing to satisfy the legal standard of reasonableness. However, absent some obvious flaw in the evidence or where the act or omission was so obvious as to not require evidence establishing the standard of care, the Court will have to be satisfied through expert evidence as to the standard expected of the defendant.

[98] Mr Robertson submits that the property inspections by Mr Lyttle, Mr Miller and Mr Proffitt were when the home was showing visible evidence of damage and their role was to track down the causes, undertaking destructive testing as necessary. He states that the experts' "evidence" cannot be relied upon to establish the correct approach of the Council officer looking at an almost brand new building, or to give context to the obvious defects. I reject that submission.

[99] The home when inspected in 2005 and 2006 by the Council was then some four to five years old and had been exposed to some years of weathering. Mr Robertson says the claimants' "inferences", must be based on what a reasonably competent Council inspector would have been inspecting in late 2006. This is because it is that final inspection that led to the issuing of the Code Compliance Certificate. Mr Robertson asserted that two pre-purchase inspectors "clambered over the property"

[52] *Auckland Council v Blincoe* [2012] NZHC 2023.

but did not identify the defects now proven. I accept the evidence of Mr Proffitt that those two pre-purchase inspections were poorly undertaken and failed to "red flag" obvious weathertightness risk factors. Mr Robertson overlooks the inspection by the Realsure inspector who did identify a number of areas of weathertightness risk.

[100] I further reject Mr Robertson's submission that final inspections by "a reasonably prudent Council building inspector of the time" are necessarily brief and that building inspectors are not building surveyors. Owners are entitled to and do rely on Council inspectors adequately performing their roles.

[101] Mr Davie submits that in order for the Council to be satisfied that the home was built in accordance with the consented plans and the relevant provisions of the Building Code, it was required to establish an inspection regime capable of identifying whether there was compliance. Mr Davie refers me to the decision of Justice Baragwanath in *Dicks v Hobson Swan Construction Limited (in liq)* at [116]:[53]

> … It was the task of the Council to establish and enforce a system that would give effect to the Building Code. Because of the crucial importance of seals as the substitute for cavities and flashings it should have done so in a manner that ensured that seals were present …

[102] Mr Davie states that the problem with the claimants' home was not so much seals but rather parapets, balustrade penetrations, windows and doors and their junctions, and roofs.[54] These items were observable in 2006.

[103] Mr Davie further refers me to Mr Lyttle's report where he states in relation to the Council's property file:[55]

> The property file contains enough information to obtain a building consent but contains virtually no detail as to how the exterior cladding was to be built.

[104] Mr Miller identified 31 breaches of the Building Code and Mr Lyttle agreed with him.[56]

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[53] *Dicks v Hobson Swan Construction Limited (in liq)*, (2006) 7 NZCPR 881 (HC).
[54] BOD document 54.
[55] At 19 of WHRS assessor's report at [9.2].

[105] Mr Davie concludes that the Council cannot have had an inspection regime capable of identifying whether the Building Code was complied with in light of the obvious and glaring deficiencies at this home. The lack of detail regarding the external cladding is a good example.

[106] In support of that submission Mr Davie refers me to Mr Proffitt's evidence after agreeing that the home was in a "fairly wretched state":[57]

> I think its quite clear in the reports but basically it's a monolithic clad house that was – had a lot of high risk details, i.e., parapets internal gutters, internal decks, balustrades, penetrations through the balustrades, lack of flashings, um, that wasn't built correctly and to anybody with a modicum of knowledge of the building industry it's patently obvious that it's been poorly constructed, or poorly detailed, or the exterior building envelope has, and that's particularly around the parapets, the window detailing, the cladding clearances to the ground, in other, um, how close the cladding is to the ground, and also the fact, that the cladding has been, in places, been used as rooves and its quite obvious on this house, those features and factors.

[107] The thrust of Mr Davie's submissions is that I have been presented with sufficient evidence to establish that the Council did not have in place a capable inspection regime for identifying whether there was compliance with the relevant aspects of the Building Code. He mentioned that the Council's submissions seemingly ignore this limb of potential negligence and refers me to paragraph [85] of the *Dicks* decisions:[58]

> The Council elected not to call the officers responsible for approving the plans and specifications and for carrying out the inspections, let alone the officers responsible for laying down and maintaining proper systems. The conclusion is irresistible that the Council staff responsible for approving the specification were either untrained or simply careless, treating the approval of the specifications as a mere formality.

[108] Mr Davie's submission finishes with the Council did not have a capable inspection regime and that the Court in *Dicks,* having found an inadequate inspection regime in that case, concluded at [118] that it was

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[56] At 211 NOE.
[57] At 168 and 169 in NOE.
[58] *Dicks,* above n 53 at [85].

not necessary to consider argument as to the exercise of reasonable care and skill on the issue of a Code Compliance Certificate.[59]

[109] Heath J in *Sunset Terraces* set out the responsibility of councils in carrying out inspections:[60]

> [450] … [A] reasonable Council ought to have prepared an inspection regime that would have enabled it to determine on reasonable grounds that all relevant aspects of the Code had been complied with. In the absence of a regime capable of identifying waterproofing issues involving the wing and parapet walls and the decks, the Council was negligent …

[110] And at paragraph [409]:[61]

> The Council's inspection processes are required in order for the Council (when acting as a certifier) to determine whether building work is being carried out in accordance with the consent. The Council's obligation is to take all reasonable steps to ensure that is done. It is not an absolute obligation to ensure the work has been done to that standard.

[111] In *Dicks*, the Court did not accept that what it considered to be systematically low standards of inspections absolved the Council from liability.[62] That decision held the Council liable at the organisational level for not having an adequate inspection regime, it is the task of the Council to establish and enforce an inspection system that gives effect to compliance with the Building Code.

[112] Baragwanath J in the Court of Appeal in *Sunset Terraces*:[63]

> [77] At bottom, the Council is seeking to escape liability for failing to carry out the duties imposed on it by Parliament, for which it was empowered to charge such fees as were required to enable it to do so, when successive owners had no rational choice but to make decisions on the basis that it had properly inspected (or had inspected) the work which was covered up by the construction process. This has had the predictable consequence that the work would be performed shoddily in defiance of the Building Code, with an overall injurious effect on the consumers: the owners and occupiers. There is in my opinion no policy reason that would justify relieving the Council of consequential liability.

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[59] At [118].
[60] *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479 (HC) – judgment no 3 of Heath J at [409].
[61] At [409].
[62] *Dicks,* above n 53.
[63] *Body Corporate 188529 v North Shore City Council* [2010] NZCA 64, [2010] 3 NZLR 486, per Baragwanath J.

[113] These authorities establish, that the Council is not only liable for defects that a reasonable Council officer, judged according to the standards of the day should have observed, but that it can also be liable if defects were not detected due to the Council's failure to establish a regime capable of identifying whether there was compliance with significant aspects of the Building Act Code.

[114] I will therefore be applying this test in determining whether the Council has any liability.

[115] Mr Robertson's submissions state that expert evidence before the Tribunal is that some defects were obvious to highly trained building surveyors in 2015/2016. He states that these experts were on site to find the causes of leaks and had longer time on site and that they were highly trained in identifying defects. I reject his submission that Council inspectors are not so highly trained and their inspections are necessarily brief.

[116] If they weren't so trained they should have been sufficiently trained and experienced to undertake their statutory functions and inspections must be of adequate length to accomplish that purpose. The Council could control these factors.

[117] He also said that Council inspectors do not climb onto roofs to inspect construction compliance. However, they must do so if the building construction requires a roof inspection to determine compliance. The High Court stated in *Blincoe* " it is possible for a Judge to reject the standard commonly adopted in a particular profession [council inspection regimes] as failing to satisfy the legal standard of reasonableness".[64] In other words, it has never been the case that an industry (such as a council inspection practice) standard or practice would automatically become the legal standard.

[64] *Auckland Council v Blincoe*, above n 51 at [38].

[118] Bad practice, or an inadequate inspection regime, is still bad practice and an inadequate inspection regime, even though it is arguably the generally followed industry practice at the time.[65]

[119] Mr Symon of Realsure stated at paragraph [37] of his brief that "by the mid-2000s the weathertightness issues in New Zealand were well known to the public due to the high media coverage and litigation being undertaken ". The High Court accepted in *Hepburn v Cunningham* that by the time of 2005, weathertightness risks and faults were well understood by reasonably experienced and expert pre-purchase inspectors.[66]

[120] Council inspectors at this time therefore should have been even more skilled at identifying weathertightness risk issues. The law certainly expected so, given the recent emphasis by the Supreme Court of the well settled principle of New Zealand law that Councils are liable to original and subsequent home owners for loss caused by the failure of building inspectors to carry out the inspection function with reasonable skill and care.[67] The Supreme Court emphasised the underlying rationale for the duty of care being control which Councils have over construction projects and the general reliance for which persons acquiring homes place on Councils to have exercised its independent powers of control and inspection.

[121] The client summary in the Realsure report highlighted the obvious weathertightness risk factors with this home: having more than a single level, monolithic cladding, lacking roof overhangs, complex cladding junctions, balconies and a number of complex roof to wall junctions. The summary opined that this put the home at a higher risk for weathertightness issues. Mr Lyttle's report also noted an obvious weathertightness risk factor that the home included enclosed decks over habitable areas.

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[65] *Edward Wong Finance Co Ltd v Johnson Stokes and* Master [1984] 1 AC 296 (PC).
[66] *Hepburn v Cunningham Contracts Ltd* [2013] NZHC 210.
[67] *Southland and Indoor Leisure Centre Charitable Trust v Invercargill City Council* [2017] NZSC 190 at [56].

[122] Mr Lyttle's report highlighted the four material weathertight deficiencies which have resulted in water ingress and damage to this home. Mr Proffitt agreed with Mr Lyttle. Mr Robertson, in his cross-examination of Mr Proffitt, indicates to me that he too accepts the weathertightness risk categorisation with this home as entirely proper.[68] Mr Symon said that in his role of training building surveyors he uses the claimants' home for training purposes because "that building is a classic example of what they should be looking for and where they should be looking at for defects".[69]

[123] The recent Supreme Court decision of *Southland Indoor Leisure Centre* emphasised that councils' regulatory functions are directed to ensuring home construction complies with the Building Code.[70] To illustrate that the Council in this case did not have a capable inspection regime for identifying whether there was compliance with significant aspects of the Building Code, one need only concentrate on the parapets and the balustrade penetrations. The experts determined that those are the two principal building defects causative of damage.

[124] The Council also clearly omitted to detect significant construction defects with the roofs. Mr Miller's evidence is that the roofs had inadequate pitch for the type of metal roofing used. The Council was informed by Mr Barrott that he had changed the roof material. I accept Mr Davie's submission that the Council was therefore on notice to re-examine the changed roofing detail and construction. Mr Robertson's submission was that it is difficult for a Council to detect a change in the degree of pitch over an entire roof but Mr Miller had no difficulty with determining that the roof had inadequate pitch. Also, the Council was told by Mr Barrott of the roof change. It was on notice of a change so should have taken extra care.

[125] I do accept Mr Robertson's submission that a Council is entitled to rely upon written assurances that specific building work has been completed appropriately when deciding to issue a Code Compliance

[68] At 148 NOE.
[69] At 439 NOE.
[70] *Southland* above n 66.

Certificate, but it must still depend upon the relevant circumstances and councils should not accept any written assurance without question.[71]

[126] The Council also needed to consider any other information relevant to whether the roof had been built to an appropriate standard and could be expected to be code compliant. The written assurance from the roofing contractor was patently wrong as evidenced by the experts.[72] Having been put on notice of the change to the roof, the Council produced no evidence, and its disclosed inspection records did not illustrate that it enquired about the roof change or undertook a roof inspection at its final inspection. The written assurance did not describe the roof or that its assembly was Code compliant. Access to the roof proved no difficulty to Mr Stone, Mr Loader, Mr Lyttle and Mr Miller. I would have expected the Council knowing that the roof was different from the consented plans to have made further enquiry of the roof manufacturer's assurance and to have inspected the finished construction.

[127] Mr Lyttle and Mr Miller's evidence was that the parapets were a significant cause of damage. Mr Proffitt stated that the whole detailing of the roof parapets was contrary to Plaster Systems Limited's compliance requirements and good practices. One would have expected the Council inspectors to have been aware that any damage caused by defective parapets to compound itself because Mr Miller's evidence, regarding windows stated:[73]

> … many of those windows are below other deficiencies and the windows are generally below the parapets, below the deck, balustrade so water travels down

[128] Mr Miller states in his report:[74]

> A number of the details used within the house are not as per manufacturers detail and accordingly Council had to be satisfied the detail was going to work or be code compliant before issuing a CCC.

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[71] *Body Corporate 326421 v Auckland Council* [2015] NZHC 862.
[72] Document 27 BOD.
[73] At [218] of NOE.
[74] Document 54 of BOD, at [27].

[129] The Council was aware at the building consent stage that the parapets were to be built in accordance with the manufacturer's details.[75]

[130] Mr Proffitt's said he would have expected the Plaster Systems (the manufacturer's details) data sheets to have been considered by the Council.[76] There is no evidence that the Council did consider Plaster Systems' data sheets. Access to the parapets for inspection was not difficult as Ms Tsai said that access to the parapets was reasonably easy.[77] The experts evidence is that the whole construction of the roof parapets was contrary to Plaster Systems' good practice. They are different to any manufacturer's documents at the time and this non-compliance should have been readily observable. Again, this indicates that the Council was negligent in not ensuring the accuracy of the Plaster Systems' workmanship guarantee. The experts' evidence illustrates to me that the Council's final inspection, which should have included the parapets, was inadequate.

[131] Having considered all the information before me concerning the parapets, I largely agree with Mr Davie's closing submissions[78] and reply submissions[79] where he illustrates the alleged inadequacies of the Council's inspection of the parapets.

[132] The top fixing of handrails are a significant building defect which again demonstrates the Council's inadequate inspection regime. This defect can best be shown at photo 12 on page 23 of document 54.[80]

[133] The manufacturer's drawings in Mr Robertson's closing submissions at paragraph [39] shows a rubber gasket being mandatory between the handrail and the plaster work and it shows screw heads and screw holes well sealed with silicone. This is not how the handrails were fixed as shown in photos 12, 16, or 44 of Mr Miller's report.[81]

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[75] See rest of sheet 3 of Mr Lyttle's plans in his WHRS report at [58].
[76] Page 173 of NOE.
[77] Page 121 of NOE.
[78] Dated 27 October 2017.
[79] Dated 16 November 2017.
[80] Document 54 BOD.
[81] Document 54 BOD.

[134] I disagree with Mr Robertson's submission that the 'as built' "does not look significantly visually different " from the manufacturers detail. There is no required 15 per cent gradient evident in photographs 12 and 44 of Mr Miller's report and photographs 53, 54 and 55 of that report illustrates damage immediately below a top fixed handrail. Mr Lyttle's report at photograph 20 illustrates the post of a handrail fitted hard down onto the framing enabling water to drain straight down into the support framing.

[135] In conclusion, applying the test[82] to the construction defects in this home the Council inspectors should have noted the construction inadequacy with the parapets, the balustrades and the roofs, and the variation from the consented drawings with the roof and the flashing of the cladding and a number of the other 31 breaches of the Building Act Code identified by the experts. The Council should have detected these faults during its inspections in 2006 and was negligent in not doing so. Its negligence has contributed to the claimants' loss.

[136] There are clearly areas of damage where it is reasonable to have expected the Council not to have noticed. Such as possibly some windows and door installations not sufficiently flashed. Nevertheless, given the extent of the damage that has been caused by the defects that should have been detected by the Council and the fact that they occur on all elevations, I conclude that the Council has contributed to defects that necessitated the full recladding and re-roofing of the home.

Negligence Claim against Mr Barrott

[137] Ms Tsai and Mr Mao allege that Mr Barrott exercised personal control over the building of their home and was the developer and builder. They say that he carried out these roles negligently.

[138] Mr Barrott elected not to attend the hearing. The only evidence therefore offered by Mr Barrott is his affidavit of 12 August 2016 filed in support of his unsuccessful removal application. Mr Barrott denied he was the builder and developer and asserted that he built the home for his

[82] See paragraph [111].

family. The Barrott family did reside in the home, but only until construction was completed. Mr Barrott then sold it.

[139] I approach the claim against Mr Barrott on the basis of his affidavit evidence and a number of documents which impugn his controlling involvement, the evidence of Ms Tsai and inferences made overall on a "common sense" basis. That approach leads to the conclusion that Mr Barrott was in the business of property development because he caused the subdivision and development of the claimants' property and the immediately surrounding properties, and he controlled the overall building of the home and the adjacent house at 9 McCarthy Grove. He did so with the view to taking a profit from these endeavours.

[140] The Upper Hutt City Council issued a building consent on 20 November 2000. The consent was in Mr Barrott's name.[83]

[141] The Council issued the Code Compliance Certificate on 1 November 2006.[84] The Code Compliance Certificate was issued to Mr Barrott.

[142] The home remained unfinished from August 2001 and Mr Barrott called for a local authority inspection on 10 January 2005.[85] The Council listed in that document a number of items of building work that needed to be completed and also noted that the roof cladding was not suitable.

[143] On 25 October 2006 the Council returned to undertake a final inspection,[86] which noted:

> All work to be done, as on the 10.1.05 final inspection, has now been completed and all appears to be okay.

[144] Four "producer statements" were listed as having been received by the Council.[87] Mr Barrott elected not to participate in this hearing with

[83] Document 19 in the BOD.
[84] Document 20 BOD.
[85] Document 23 BOD.
[86] Document 24 BOD.
[87] Document 24 BOD.

the result that his evidence was unable to be tested. I am able to determine the claim however on the basis of the information available.[88]

[145] Clearly Mr Barrott was involved in property development, particularly in the McCarthy Grove residential subdivision. Mr Barrott subdivided and developed both the buildings at 8 McCarthy Grove and 9 McCarthy Grove. He lived in both. He has now sold 8A, 8 and 9 McCarthy Grove. He was the owner and subdivider of 8A McCarthy Grove and he also owns a property at 1A Camp Street in Upper Hutt.[89]

[146] I accept Mr Davie's submissions after considering the evidence of Ms Tsai which includes her answers to Mr Laurenson's cross-examination.[90] Mr Barrott's discovery documentation clearly shows that he had overall control of the building process for the vast majority of invoices are in his name. Mr Barrott explained to Ms Tsai that he had used an incorrect flashing system which was not recommended by the manufacturer. Mr Barrott also informed the Council by letter on 20 December 2000 that he intended to change the slope of the roof and the roof material from a membrane roof to a steel roof.

[147] Mr Barrott had a building background. In his affidavit evidence he stated that he was an estimator for SR Adams & Contracting Limited.[91] He was a director between 31 May 2000 and 27 September 2006 of the building company Parapine Timber Limited.[92] He explained to Ms Tsai, that he had constructed a number of homes in the local Riverstone development and had built 9 McCarthy Grove after building Ms Tsai's home. Furthermore, he mentioned that he was wanting to build a house on section at 8A McCarthy Grove but that his health prevented him from doing so and that is why the section had been on the market for some years.

[148] Mr Barrott recited a limitation defence in his response. In order for any act or omission of Mr Barrott to be within the ten-year limitation

[88] Section 75 Weathertight Homes Resolution Services Act 2006.
[89] Evidence of 1A Camp Street can be seen clearly in Document 74 BOD.
[90] Notes of Evidence pages 60, 61, 62, 63, 64, 65 and 66 and Ms Tsai's Brief of Evidence 14 August 2017 paragraphs 41 to 47.
[91] Para 21 of Mr Barrott's affidavit of 12 August 2016.
[92] Document 42 Bundle of Documents.

period, there needed to have been building work completed by him at the home after 23 November 2005. The claim was lodged on 23 November 2015. I find that the later parts of Mr Barrott's work were within the ten-year limitation period of the Building Act 2004.

[149] The claimant's case is that completion of the producer statements are all building work within the definition of the Building Act 2004 and cites the authority for that proposition as *Kwak v Park*. In *Kwak,* Woolford J states: [93]

> So now we have both design and certification falling within the statutory definition of building work. It would be anomalous if the definition of building work was interpreted to exclude the completion of producer statements, which, in my view, are just as much building work as design and certification.

[150] The producer statements in *Kwak*, as in this claim, were only procured because Mr Park wanted a Code Compliance Certificate when he came to sell his home.

[151] Mr Barrott states in his affidavit [para 21]:

> As a result it was not until late in 2006 that I had collected all the trade certificates together and requested the re-inspection which the Council carried out on or about 25 October 2006.

[152] On Mr Barrott's own evidence therefore building work, which expression includes obtaining for Council producer statements, was completed after 23 November 2015. Hence actions involving building work were carried out by him within 10 years of 23 November 2015.

[153] The Somerville Contractors Limited roofing producer statement warranted the roof as compliant but the evidence of Mr Miller and Mr Lyttle establishes that the roof was a significant defect causative of water ingress, and Mr Barrott took it upon himself to change the roofing material.[94] The producer statement is undated, and I accept Mr Davie's submission that it would seem reasonable that it was produced in late 2006 as evidenced at paragraph 21 of Mr Barrott's affidavit.

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[93] *Kwak v Park* [2016] NZHC 530 at [53]
[94] Document 27 BOD.

[154] Another producer statement was the Nulook Windows and Doors statement dated 25 October 2006.[95] The Nulook producer statement evidences that the windows and doors were tested to comply with the New Zealand standards but again the evidence of Mr Miller and Mr Lyttle illustrates that the window junctions are causative of damage to the home.

[155] The Plaster Systems Limited correspondence refers to a workmanship guarantee regarding the plastering.[96] I agree with Mr Davie's submission that there are numerous problems with the plastering, as the evidence of Mr Miller and Mr Lyttle and Mr Proffitt opines that the roof parapets were a principal cause of damage to the home. Mr Barrott provided the Plaster Systems correspondence saying that the cladding had been installed in accordance with its recommendations, but Mr Barrott knew that this was false, as he had changed Plaster Systems flashing system. The Plaster Systems correspondence however is dated 20 May 2003. Mr Davie submits there must be a prospect that this document was "backdated" prior to being produced to the Council in October 2006 as Mr Barrott makes no mention of having obtained this document earlier and the clear implication from his affidavit evidence is that all statements were obtained "late in 2006". I make no finding as to the date of the Plaster Systems producer statement.

[156] The law is settled that a developer has a primary obligation to ensure that due skill and care is exercised in all aspects of building work. A non-delegable duty of care extends to building work undertaken by others. It is trite that the starting point with authorities is of course *Mt Albert Borough Council v Johnson*, which is authority for the proposition advanced by Mr Davie that a developer owes a non-delegable duty of care to homeowners in relation to defective buildings.[97]

[157] We know from Mr Barrott's evidence that he contracted necessary trades to undertake construction of the home. He also

[95] Document 26 BOD.
[96] Document 46 BOD.
[97] *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA).

became involved in the actual construction by changing the roof and the cladding system's flashings. Both changes resulted in defects and changes to the home.

[158] Mr Davie submits that Mr Barrott had a continuing duty to remedy construction defects up to the final inspection on 25 October 2006. Mr Davie states that Mr Barrott was at all times up until 25 October 2006 in a position to remedy the defects.

[159] Mr Davie submits that the Court of Appeal's decision of *Johnson v Watson states*: [98]

> Indeed, in a case like the present where the Johnsons could not be expected to point to an exact day on which the act or omission took place, there may be an argument for saying that where original building work is faulty the builder is under a continuing duty to remedy it right through until the date of completion, and there is a continuing "omission" until that date.

[160] Further support for this approach is found in the decision of *Kerr v South Wairarapa District Council*, which held that the continuing duty relates to both a builder and a developer.[99] Miller J held in *Kerr* at paragraph 20:

> It is further arguable that the duty continues until the final inspection is completed, and perhaps even until the development is completed by the issue of a code compliance certificate, on the principle that the duty continues so long as the defendant retains the practical ability to remedy its breach.

[161] The definition of a residential developer has changed little from that stated by Harrison J in *Body Corporate 188273 v Leuscke Group Architects Limited*[100] where it is stated:

> The word developer is not a term of art or a label of ready identification like a local authority, builder, architect or engineer, whose functions are well understood and settled within the hierarchy of involvement. It is a loose description, applied to the legal entity which by virtue of its ownership of the property in control of the consent, design, construction, approval and marketing process qualifies for the imposition of liability in appropriate circumstances.

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[98] *Johnson v Watson* [2003] 1 NZLR 626 (CA) is authority for his submission of the continuing duty to remedy defects at [27].
[99] *Kerr v South Wairarapa District Council* HC Wellington CIV-2010-035-156, 9 December 2011.
[100] *Body Corporate 188273 v Leuscke Group Architects Limited* (2007) 8 NZCPR 914 (HC)s at [31] – [32].

> The developer, and I accept there can be more than one, is the party sitting at the centre of and directing the project, invariably for its own financial benefit. It is the entity which decides on and engages the builder and any professional advisors. It is responsible for the implementation and completion of the development process. It has the power to make all the important decisions. Policy demands that the developer owes actionable duties to owners of the buildings it develops.

[162] That decision focused on the developer's role in directing the development but also referred to the developer's commercial purpose.

[163] Miller J in *Brichris Holdings Limited v Auckland Council* considered the meaning of the expression "residential property developer".[101] He observed that it is necessary to define the term "residential property developer" with some care.[102] That term is easily alleged but difficult to define. Miller J started with the following analysis:

> [24] A developer, in ordinary usage, develops land to realise its potential, usually by having something built on it. This definition captures anyone who has a home built, whether or not for sale. A narrower concept is needed if courts are to distinguish persons who may be excluded [as a residential property developer] as a class from any duty of care that territorial authorities owe to homeowners.

[164] The Building Act 2004 identifies residential property developers as a class to whom certain obligations are attached. For the Act's purposes, a residential property developer is a person who, in trade, builds a home or has it built, for the purposes of sale for profit.[103]

[165] Woodhouse J in *Keven Investments Limited v Montgomery* discounted the notion that liability depended on whether the developer was directly involved in the planning and construction, and identified one essential requirement for liability as a developer, the person concerned must be in the business of having buildings erected for the primary purpose of sale to other people. *[104]*

[166] The term "developer" is not a clear legal term, it is a word which the industry and the courts have used in this area of the law as a label for a person or company whose involvement in connection with the

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[101] *Brichris Holdings Ltd v Auckland Council* [2012] NZHC 2089.
[102] At [43].
[103] *"Trimac" Body Corporate 187820 v Auckland City Council* (2005) 6 NZCPR 536 (HC).
[104] *Keven Investments Ltd v Montgomery* [2012] NZHC 1596, [2013] NZAR 1113 at [19].

subdivision of land and the building of houses was such that the person is held by the courts to have a duty of care to buyers who purchase, whether from the person described as the developer or subsequently, even though the actual construction work was carried out by an independent contractor. In the circumstances, the duty of care is explained as being non-delegable; the person labelled as "developer" is unable at law to delegate the duty of care to the builder.

[167] As I stated earlier, Mr Barrott's failure to participate in the hearing does not inhibit my powers to determine the claim against him.[105] After considering all available information and evidence before me, I conclude that Mr Barrott implemented and controlled the subdivision and building on the land and surrounding properties and their eventual sale. Such that this development, inferentially at least, was primarily a business one and for profit. I determine that the claim against Mr Barrott as a developer succeeds. He was the developer of the claimants' home. He built it with a view to profiting from its sale on completion. On the claim that Mr Barrott was the builder, the work he did in changing the construction methodology may make him liable as a builder. But I do not need to determine that because of my finding that he was the developer.

Fair Trading Act claims

[168] Ms Tsai and Mr Mao allege that Ms Bond made a number of false representations to them during the sale of the home to them. This cause of action is against Ms Bond in her capacity as the real estate agent. Safari is sued as the principal real estate company engaged by the then vendors Ms Bond and Mr Gorrie. The claimants submit that these misrepresentations and omissions were actionable under s 9 of the Fair Trading Act 1986.

[169] Section 9 of the Fair Trading Act 1986 provides:

> **9 Misleading and deceptive conduct generally**
>
> No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive".

[105] Weathertight Homes Resolution Services Act 2006, ss 74, 75.

[170] The purpose of the FairTrading Act 1986 is consumer protection through fair dealing. Whata J in *Hamid v England* stated that s 9 is not so much concerned with the outcome of any misleading conduct but rather with the misleading conduct itself. He said that if that conduct induces a person to purchase under some misapprehension of fact, then the policy of the Act is that such conduct is to be discouraged by the ordering of relief under s 43 of the Act.[106]

[171] It is not necessary to show that Ms Bond and Safari had any intention to mislead or deceive anyone.[107]

[172] The leading authority which provides guidance on the approach in determining whether an actionable claim exists under s 9 is the Supreme Court decision of *Red Eagle*.[108]

[173] It is a requirement of s 9 that the misleading or deceptive conduct occur "in trade". The alleged conduct of Ms Bond and Safari in this case was "in trade". They were the real estate agents engaged to market and sell the home at 8 McCarthy Grove.

[174] The Supreme Court emphasised the need for a s 9 analysis to be undertaken in context. A breach of s 9 will only occur when it is objectively reasonable for the claimants to be misled in all the circumstances.

[175] If a s 9 claim is made out, the next enquiry is into the loss (if any) that the claimants have suffered by "the conduct" of in this case, Ms Bond and Safari. Section 43 of the Fair Trading Act 1986 provides a number of remedies but for present purposes it is sufficient to refer to the ability to award damages to compensate for the loss.[109] Furthermore, reference in s 43 to the need for loss to arise "by the conduct" of in this case Ms Bond and Safari, emphasises the need to establish a causal connection between any false representation and loss or damage claimed to have been suffered.

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[106] *Hamid v England* HC Auckland CIV-2009-404-3697, 26 September 2011.
[107] *Neumegen v Neumegen & Co* [1998] 3 NZLR 310 (CA) at [317].
[108] *Red Eagle Corporation Ltd v Alice* [2010] NZSC 20, [2010] 2 NZLR 492.
[109] Fair Trading Act 1986, s 43(3)(f).

[176] *Red Eagle* further stated that in order to qualify for a remedy under the Fair Trading Act the misleading conduct must be "the effective cause or an effective cause"[110] of the loss suffered by Ms Tsai and Mr Mao.

[177] Safari is properly a party to this claim because a principal will be liable for an agent's misleading conduct where the agent is engaged on behalf of the principal and if at the time of that conduct the agent had actual or apparent authority to act for the principal.[111] I have already determined that both Ms Bond and Safari were acting "in trade" at the time of the alleged misleading conduct. Ms Bond had actual and apparent authority to act on behalf of Safari.

[178] Mr Davie submits that in addition to the agency implication, Safari is liable in its own right for misleading and deceptive conduct in that it was fixed with the knowledge of the Realsure report summary, because it received a copy of Mr Gwilliam's document, and that it had a duty to disclose it to future purchasers.[112]

[179] I have considered the detailed arguments advanced by Mr Davie, Mr Laurenson and Mr Hern. I am grateful for their helpful submissions but I will not be referencing all aspects of the evidence or counsel's submissions. My approach from here is to analyse the different aspects of the Fair Trading Act claim and reference what I consider to be the salient facts and evidence.

[180] I turn now to the factual findings. The sales brochure designed to promote the home for sale was prepared for the then vendors Ms Bond and Mr Gorrie by Ms Bond and Safari when the home was first marketed for sale in October 2008.[113] It contains a clear representation about the condition of the cladding of the home. It mentions amongst other attributes that the home has "excellent exterior condition". I have stated above that it is not necessary in establishing the claim, to prove

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[110] *Red Eagle Corporation*, above n 109, at [29].
[111] Fair Trading Act, s 45(4).
[112] Document 15 BOD.
[113] Document 1 BOD.

that the brochure is the sole cause of the claimants' loss. It is sufficient if it is an effective cause.

[181] Mr Davies submits that the brochure's representation about the condition of the cladding is a misrepresentation.

[182] The evidence establishes that the claimants placed reliance on the brochure. Ms Tsai's evidence is that in late June 2009 she read an advertisement in the local newspaper advertising the property at 8 McCarthy Grove.[114] That advertisement was the sales brochure. It was this document which indicated firstly to Ms Tsai that the property was in "pretty good condition".[115]

[183] Mr Davie's closing submissions argue that it was only when Ms Bond's brief of evidence dated 18 September 2017 was served on the claimants that Ms Tsai and Mr Mao learnt that it was alleged by Ms Bond that she had told them at one of the two open homes that the home had failed a previous building inspection report. This was vehemently disputed in reply briefs filed by both Ms Tsai and Mr Mao.

[184] Ms Tsai stated in her reply brief:[116]

> If that had occurred we would have walked away. As I have previously stated we would not have taken out such a large mortgage to risk purchasing a leaky home.

[185] Mr Mao in his reply brief states:[117]

> [7] I wish to be very clear. This is not true. I attended with Phorina on each occasion we visited the property prior to purchase. Never on any occasion did Ms Bond inform us of a failed previous building inspection report.

[186] Mr Davie submits that Ms Bond's credibility is not assisted by the sales brochure, which describes the cladding as being in "excellent exterior condition". He says that on her own evidence Ms Bond knew the cladding had weathertight problems.[118]

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[114] At [3] of Ms Tsai's BOD dated 14 August 2017.
[115] Mr Robertson's cross examination of Ms Tsai at 51 NOE.
[116] At [4] reply brief 3 October 2017.
[117] At [7] reply brief of Mr Mao 3 October 2017.
[118] At 301 of NOE.

[187] Ms Bond steadfastly maintained up to and part way through the hearing that she did not obtain the Realsure report until this proceeding.[119] The claimants' position is that this is simply untenable.

[188] I accept that the evidence establishes that the leaky home problem was well known throughout the New Zealand community in 2008 – 2009. And, whilst I accept that Ms Bond's training in 2008 as a real estate agent sounded somewhat casual and placed no emphasis on how to deal with the sale of a leaky home, her evidence is that she was aware of the leaky home problem.[120]

[189] Ms Bond responded to a question from Mr Davie that she was not familiar with the Realsure report and that the first time that she actually saw the report was when it was produced as part of evidence in this proceeding.

[190] Without wishing in any way to criticise Ms Bond, I have doubts about the reliability of her recollection of events and am certain she was mistaken. I accept that she may not have seen the full Realsure report, but it is just not plausible that she had not seen, considered and understood the implications detailed in the Realsure client summary. It was this document which Mr Symon said was the most important part of the report.

[191] Mr Gwilliam's letter to Ms Bond's solicitor of 5 February 2009 stated that the home appeared to be "a leaky home", it had high moisture readings throughout the cladding and he enclosed relevant pages of the builder's report which was the Realsure client summary. That letter and its enclosures were copied to Ms Bond's office and to Mr Gorrie's solicitor. I am satisfied from Mr Coffey's evidence that the Realsure summary was received by Safari.[121] And, as Ms Bond's evidence is that she was the only agent marketing the home, the Realsure summary was, inferentially at least, available to her at the Safari office when she next attended there.

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[119] At 295 of NOE.
[120] Mr Davies' cross-examination of Ms Bond at 295 NOE.
[121] Mr Coffey's evidence at 421 of NOE.

[192] Mr Gwilliams' letter prompted Ms Bond to then have discussions with her solicitor about remedying matters that were raised in the Realsure summary. The response was Ms Bond's instruction to her solicitor to reply to Mr Gwilliam.[122] Ms Bond, then wearing her "hat" as a vendor, clearly instructed her solicitor to inform Mr Gwilliam that the vendors were not prepared to remedy the alleged defects mentioned in the Realsure summary. That letter was also sent to Ms Bond's workplace.

[193] I do not consider it credible that, at a meeting with Ms Bond's solicitor, she was not made aware of the contents of the Realsure summary, its findings, and realisation that a pre-purchase building inspector had opined after an extensive examination of the home that it had noticeable weathertightness features. Her later actions are only consistent with her having seen it.

[194] Ms Bond's answer to a question from Mr Davie agreed that the Realsure report cast the home in a very bad light.[123] In that same cross-examination Ms Bond agreed with Mr Davie that as vendor, if a conditional purchaser was going to cancel the purchase contract, she would want to know why.

[195] I find therefore that in February 2009, wearing her "hat" as the selling agent, and also as the vendor, Ms Bond was fully aware that Realsure had determined that the cladding to her home was not in excellent condition and that it had disclosed high moisture readings.

[196] The evidence establishes that Ms Bond and Safari then made no attempt to correct the brochure which in June 2009 continued to state that the exterior condition of the home was excellent. That was clearly not correct. My view is that a reasonable prospective purchaser would take from the brochure that the home's cladding was in sound condition and that the house was not a leaky home.

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[122] Document 16 in BOD.
[123] At 296 NOE.

[197] After considering the Realsure inspection findings, I do not find it possible to class the use of the term "excellent" as advertising puffery. In its context, the brochure is actually stating the certain condition of the exterior of the home. I determine therefore that it amounts to an actionable representation.

[198] Ms Tsai and Mr Mao had resided in New Zealand for some 22 years and in that time had purchased five residential properties. Ms Tsai's evidence is that on each occasion they obtained a builder's report before buying and in most cases engaged Mr Stone. During this period it had not been the practice in New Zealand for buyers of homes to get pre-purchase reports.[124]

[199] Ms Tsai and Mr Mao should be regarded therefore, as reasonably experienced residential property buyers. I do not accept Ms Tsai's evidence that she was not familiar with the leaky home problem, it was well known by 2009. But, I do accept they would want to be assured that the home's cladding was in sound condition and that indeed was her response to Mr Robertson's cross-examination. I find, for the reasons stated above, after considering the brochure objectively, the description of the cladding was obviously incorrect and conveyed a misrepresentation about the exterior construction of the home. It was capable of and did induce the claimants into buying the home.

[200] Before turning to whether there is sufficient causal connection between the loss or damage claimed and the false representation in the brochure, I now consider the allegation of misleading and deceptive conduct concerning the failure to disclose the Realsure summary or to make definite mention of the Realsure report which had described the property as a leaky home and caused an earlier conditional purchase not to proceed because of the findings of the pre-purchase inspection.

[201] Mr Proffitt's evidence is that in late January 2009 he obtained a copy of the Realsure report from Mr Symon. It is of no consequence whether Mr Proffitt received just the client summary or the full report, but

[124] *Johnson v Auckland Council* [2013] NZHC 165 at [20](c).

he clearly had access to the findings of Realsure's inspection of the home on 22 January 2009.[125]

[202] There was some confusion at the hearing as to how Mr Symon's wife obtained information concerning Ms Bond.[126] Inferentially it is probable that Ms Bond in arranging for Realsure access to the property for its pre-purchase inspection on 22 January 2009, made contact with Mrs Symon.

[203] Ms Bond's evidence is that she did talk to her solicitor Ms Strachan about Realsure's findings surrounding the cladding and the moisture readings.[127] In answer to a question from me, Ms Bond did not deny that her solicitor had a copy of the Realsure summary. Inferentially, that allowed them to discuss the findings of the Realsure pre-purchase inspection and to determine that it was necessary to get a specialist to do a further inspection of the property.

[204] Ms Bond had made contact with Mr Proffitt whom was well known in the Wellington region as an expert in inspecting and reporting on "leaky buildings". Once she learnt from Mr Proffitt that his findings would probably concur with those of Realsure, she cancelled her arrangement with him to inspect the property on 12 February 2009. Ms Bond had by this stage approached Mr Barrott and received some reassuring comments from him.

[205] In any event, after further enquiries of her colleagues at Safari she eventually, in June 2009, engaged New Zealand House Inspection Company to undertake a property inspection and to report to her. This report was available for distribution at the open home on 28 June 2009 when Ms Bond handed a copy of that report to Ms Tsai.

[206] Ms Bond indicated that after the conditional purchase contract in February 2009 collapsed she was concerned, presumably about the findings of the Realsure inspection, but at no stage made efforts to obtain a copy of the Realsure report. I accept the policy of Realsure was that it

[125] Document 76 BOD.
[126] Document 77 BOD.
[127] At 300 NOE.

was reluctant, without the consent of its clients, to release copies of the full report. But, Mr Symon's evidence was unequivocal, Realsure never had a problem with copying the client summary.

[207] Ms Tsai in her brief of evidence states that at the second open home, after learning of the causes of the two leaks in the downstairs master bedroom ceiling and the rumpus room, she enquired whether "there were any other leaks she knew of. On both occasions Ms Bond firmly answered no. Ms Tsai believed her."[128] Ms Bond was then acting in her capacity as the selling agent for she was conducting the open home.

[208] The evidence of Ms Tsai and Mr Mao is that Ms Bond made no mention of the Realsure report or provided a copy at the open home. Ms Bond's evidence is that she did not recall saying to Ms Tsai that she did not have access to the previous report but logically "I would have said so".[129]

[209] It was a three plus month gap in time from the failed sale in February 2009 and Ms Bond engaging New Zealand House Inspection Company to undertake a house inspection and to report in late June 2009. I accept Ms Bond's explanation that during that period she was considering buying out Mr Gorrie's interest in the property.

[210] Ms Bond accepted in cross-examination from Mr Davie that the Realsure report or even the Realsure client summary was not a great marketing tool for it disclosed the property in very bad light. Her evidence is that she did mention to Mr Proffitt in first wishing to engage him that Realsure had undertaken an inspection of the home and failed it. She said she told New Zealand House Inspection Company that Realsure had inspected and failed the home.

[211] Mr Davie took Ms Bond, in cross-examination, to the Rules of the Real Estate Institute of New Zealand which stated amongst other matters that "a member must be fair and just to all parties in

[128] At [13] Ms Tsai's brief of evidence dated 14 August 2017.
[129] At [26.2] of Ms Bond's brief of evidence dated 15 September 2017.

negotiations."[130] Ms Bond agreed that it would have been fair for a real estate agent to have made enquiries about the Realsure report and to have it available for disclosure at the open homes.

[212] Mr Coffey's evidence is that there was no constraint from copying and passing on to third parties the Realsure summary.[131]

[213] Brian Andre Childs, an experienced Upper Hutt real estate agent and an owner of a real estate business gave evidence for Ms Bond. He stated that:[132]

> If I knew there was defective cladding, yes I'd make a purchaser aware of it.

[214] Ms Bond, as a relatively new real estate agent stated that she prided herself in keeping good records and that she was a careful and thorough agent.[133] Mr Coffey's evidence is that he was pleasantly surprised at the level of detail Ms Bond made in her notes regarding open homes.[134] Despite these comments, Ms Bond's notes regarding the open homes attended by Ms Tsai do not contain any mention of the Realsure report.[135] I accept Mr Davie's submission that in light of the above, it is just not credible to suggest that an agent of Ms Bond's meticulous attention to record keeping would have failed to make reference to such an important point as mentioning and/or disclosing the Realsure summary, if she had done so.

[215] To conclude this analysis. The claimants' allegations in support of this claim are:

(a) In answer to Mr Davie's question "now Ms Tsai asked you on two occasions under the rumpus room roof do you know of any other leaks? And you said 'No', do you accept

[130] Document 52 at 14 BOD and 323 of NOE.
[131] At 428 NOE.
[132] At 365 NOE.
[133] At 336 and 338 NOE.
[134] At 427 of NOE.
[135] Document 62 BOD.

that?"[136] And Ms Bond answered yes. She mentioned they were the only two that she knew of. She was then acting as the selling agent because that was at an open home.

(b) Ms Bond and Safari were aware of problems with the home because of their knowledge of the findings of the Realsure inspection. Ms Bond and Safari should have mentioned the Realsure report. They were obliged by law and the Real Estate Institutes rules to do so. Instead, Ms Bond produced the account most favourable to Ms Bond and Mr Gorrie as vendors, and Ms Bond as agent, namely the New Zealand House Inspection report which we know to be an inadequate report in that it failed to highlight any of the weathertight risk features identified by Realsure, Mr Lyttle, Mr Miller and Mr Proffitt.

[216] I am satisfied that the claimants' allegations in support of their claim have been made out.

[217] Ms Bond did say that had she known about the findings of the Realsure report she would not have bought the home.[137] When asked by Ms Tsai about further leaks Ms Bond knew that the cladding was impugned but she kept silent. The Realsure summary indicated high moisture readings to the exterior and dampness "could be ingressing through the cladding to the internal framing".

[218] The common law imposes a duty to disclose material facts in cases where a person tells only part of the truth. Engaging in conduct does include silence and silence can amount to misleading conduct.[138] When the speaker, such as Ms Bond in this case, is in fact aware of a

[136] At 329 NOE.
[137] At 295 NOE.
[138] *Hieber v Barfoot & Thompson Ltd* (1996) 7 TCLR 301 (HC).

problem and does not convey the relevant facts then that is misleading conduct.[139]

[219] Ms Bond's silence and failure to disclose created a false impression in the minds of the claimants and if they had full information, I am satisfied that Ms Tsai and Mr Mao would have reconsidered their position.

[220] This case is not dissimilar to the findings of Whata J in *Hamid v England.*[140] In both cases the vendor/agents neglected to hand over a report regarding significant findings of weathertightness risk features. Clearly Ms Bond was acting with actual authority from Safari. As stated earlier a principal such as Safari is liable for an agent's misleading conduct.

[221] I conclude that Ms Bond as agent and Safari as principal were in breach of s 9 of the Fair Trading Act. I am satisfied from the facts and evidence disclosed that there was a reasonable expectation of disclosure, both objectively and from the claimants' point of view, as prospective purchasers, such that there was an obligation at law to disclose the Realsure report summary and the serious concerns existing as to the weathertightness of this home.

[222] I now need to determine the question of whether there is a sufficient causal connection between the breach of s 9 and the claimants' loss or damage.

[223] Both Mr Laurenson and Mr Hern submitted on behalf of their respective clients that there was no causation. They both argued that Ms Tsai and Mr Mao had the benefit of expert advice in relation to the condition of the home in that they obtained a verbal building report from their builder friend Mr Loader, they were provided with the New Zealand House Inspection Company report commissioned by Ms Bond and they obtained their own property inspection report from Mr Stone. They argue that the claimants therefore proceeded with the purchase of the home in

[139] *Premium Real Estate Ltd v Stevens* [2008] NZCA 82, [2009] 1 NZLR 148.
[140] *Hamid v England* above n 108.

reliance on one or more of those reports which broke the chain of causation between the claimants and the fifth and sixth respondents. I reject that argument.

[224] The evidence of Ms Tsai and Mr Mao satisfies me that if they had received the Realsure report, or learnt of its findings, then they would not have proceeded beyond the open homes. I find that Ms Tsai and Mr Mao would not have proceeded to make a purchase offer if they had known that an earlier pre-purchase report had failed the home. Safari was fixed with knowledge of the Realsure report and yet its then office manager encouraged Ms Bond to obtain her own report from New Zealand House Insurance Company and did not counsel Ms Bond to produce to potential buyers in addition to that report, a copy of the Realsure client summary.

[225] Similarly, I must determine as to whether there was any basis to reduce the amount that would otherwise be awarded to Ms Tsai and Mr Mao on the basis of their own failure to take reasonable care to look after their own interests. This is because, again, Mr Laurenson and Mr Hern submitted that the claimants contributed to their loss in that the Stone report identified previous and current weathertightness issues, the claimants were aware that the home suffered from weathertightness issues prior to making the decision to purchase. Accordingly they say any damages recoverable by the claimants ought to be reduced having regard to the claimants' share in responsibility for such damage. Again, I reject the submissions on the claimants contributing to their own loss.

[226] I do accept that the Stone report was careless and failed to red flag any of the obvious and material weathertightness features with the home and otherwise suggested that the home was in sound condition. The Stone report was capable of misleading and did in fact mislead Ms Tsai and Mr Mao. Mr Stone's negligence and his culpability for the failings in that report clearly rest with the claimants, for they instructed Mr Stone.

[227] But as mentioned above, the purchase transaction would not have got to the stage of engaging Mr Stone had there not been a breach

of s 9 and/or negligent misrepresentations by Ms Bond and Safari. As I have found, Ms Tsai and Mr Mao would not have proceeded with the purchase but for the Fair Trading Act breaches of Ms Bond, inferentially Mr Gorrie and Safari.

[228] Having found that Ms Bond and Safari conducted themselves in a misleading and deceptive way, I must now consider whether the claimants are entitled to relief. In their particulars of claim, Ms Tsai and Mr Mao claim the same quantity of remedial costs, consequential costs and general damages as they do against the Council and against Mr Barrott.

[229] The Supreme Court in *Red Eagle* made clear that the proper approach to be adopted in terms of s 43 of the Fair Trading Act is to consider whether it is proved the claimants have suffered loss or damage "by" the conduct of, in this case Ms Bond and Safari.

[230] The Court of Appeal considered the question of damages under s 43(2)(f). The Court in *Cox & Coxon v Leipst* considered that the critical words of the provision are that the person who engaged in the wrongful conduct may be ordered "to pay the person who suffered the loss or damage the amount of [that] loss or damage". [141]

[231] As mentioned, s 9 creates a duty not to mislead. If that duty has been breached money may be awarded to make good the loss or damage which had been caused by the breach.

[232] Hammond J in *Joblin Insurance Brokers Ltd v Me Joblin Insurance Ltd (No 2)* refined the principle of awarding damages for breaches of the Fair Trading Act:[142]

> … the injured party is entitled to the reparation for all the actual damage flowing directly from the false and misleading statement … 'actual' damages are a powerful measure, and will sometimes exceed expectancy or reliance interests.

[141] *Cox & Coxon Ltd v Leipst* [1999] 2 NZLR 15 (CA).
[142] *Joblin Insurance Brokers Ltd v Me Joblin Insurance Ltd (No 2)* [2001] 1 NZLR 753 (HC) at 753–754.

[233] Gendall J in *Steel v Spence* stated that it follows that reliance cost is the norm when awarding damages in breach of the Fair Trading Act.[143]

[234] I accept Tipping J's finding in *Marlborough District Council v Altimarloch*:[144]

> … are no absolute rules in this area … the key purpose when assessing damages is to reflect the extent of loss actually and reasonably suffered by the plaintiff.

[235] Both Ms Tsai and Mr Mao gave compelling evidence that had they known of the Realsure report and its findings they would not have proceeded with the purchase. I am satisfied that it was proven that the claimants have suffered loss or damage "by" the conduct of Ms Bond and Safari. I therefore consider that the measure of loss to be the same measure of loss found against the Council and Mr Barrott.

Negligent misrepresentation claim against the vendors and their agents

[236] The further claim by Ms Tsai and Mr Mao is against Ms Bond and Safari as agents and their principals, Ms Bond and Mr Gorrie as vendors, and is in negligence, specifically negligent misstatement.

[237] To summarise the claim from the claimants' particulars of claim:

(a) Ms Bond during July 2009, on behalf of the vendors and as authorised agent of Safari, made the following misrepresentations:

(i) Ms Bond twice (once during a conversation standing under the ceiling patches by the rumpus room doors) indicated to Ms Tsai and Mr Mao that there were no leaks other than the two mentioned minor plumbing leaks that could be repaired;

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[143] *Steel v Spence Consultants Ltd* [2017] NZHC 398 at [69].
[144] *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726 at [156] per Tipping J.

(ii) At no stage did any respondent provide the Realsure report to Ms Tsai and Mr Mao, they chose to withhold that report despite direct questions asked by Ms Tsai as to leaks in the home, instead they remained silent.

(b) At all material times Mr Gorrie and Ms Bond retained Safari and Ms Bond as their real estate agents instructed to sell the home.

(c) Accordingly, Mr Gorrie and Ms Bond are bound by the statements and actions of their agents on their behalf.

(d) Through their agents, the vendors misrepresented the home which they knew did have water ingress problems and showed weathertightness risk features. These misrepresentations were effected through their agents and/or through the statements of Ms Bond and/or their silence and/or half truths,in particular, the failure to disclose the Realsure report.

[238] The claimants conclude that the vendors' and their agents' misrepresentation and/or their silence satisfied them as to the weathertightness of the property and induced them to buy the home.

[239] The false statements and/or omissions and/or silence [the sales brochure and the failure to disclose or mention the Realsure report] are the same under this claim as under the Fair Trading Act claim and the allegations being that they would lead the claimants to believe the cladding and exterior condition of the home was in sound condition and would be weathertight.

[240] Lord Oliver's speech in *Caparo Industries*, held that the following requirements "must generally be met" by the claimants in a negligent misstatement case in order to show that they were entitled to rely on the statement or advice in question.[145] These were that:

[145] *Caparo Industries Plc v Dickman* [1990] 2 AC 605 (HL).

(a) the advice is required for a purpose that is made known (at least inferentially) by in this case Ms Tsai, to Ms Bond as vendor and agent and by implication her principal;

(b) Ms Bond and by implication her principal, Safari, knows (at least inferentially) that the advice is likely to be acted on without independent inquiry; and

(c) the claimants do act on the advice to their detriment.

[241] Because of my determination in respect of the Fair Trading Act claim, the factual findings being the same, I need only deal briefly with this negligent misstatement claim. I have already found that Ms Bond and Safari had actual knowledge of the Realsure summary and its findings. Mr Symon's evidence and the document itself, states that the client summary is the most important part of the report.

[242] Knowledge of the agent acting with actual and apparent authority is attributed to the principal. Mr Gorrie was one of the vendor principals and so Mr Gorrie is caught by this rule.[146] This is so notwithstanding Mr Gorrie's evidence that he had no involvement or interest in the home sale: he left that all to Ms Bond his agent and co-vendor. Mr Gorrie stated that he wouldn't have been happy, as a vendor, if Ms Bond had handed over the Realsure report at the open homes.[147]

[243] The House of Lords in *Hedley Byrne v Heller* addressed the tort of negligent misstatement, where it was held someone with special skills who made a statement or gave advice to another person which was false could owe them a duty of care and be liable for loss flowing from that false statement.[148] I am satisfied that the vendors and agents in light of all the circumstances of this case owed the claimants a duty of care to prevent loss arising from the making of a false statement.

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[146] *Jessett Properties Ltd v UDC Finance Ltd* [1992] 1 NZLR 138 (CA) at [143] per Hardie-Boys J.
[147] Mr Gorrie's evidence at 403 of NOE.
[148] *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HC).

[244] Whether a duty of care is owed depends on a judgment not a formula. The judgment requires consideration of the significant facts in conjunction with recognition of the likelihood and seriousness of foreseeable harm.[149]

[245] Both the vendors (and Mr Gorrie is implicated here because he assigned all decision making to his agent and joint property owner Ms Bond) and the agents were fixed with knowledge that the home had material weathertightness risk features and could foresee the serious consequences if they elected not to disclose. Ms Bond and Safari were advising and promoting the home to the claimants and within the necessary close relationship to them. In the circumstances it is only just and reasonable that a duty of care is imposed.

[246] The standard of care which every respondent facing a claim for negligent misrepresentation must conform to is one of reasonableness. Todd on Torts states that it is an objective standard that removes the personal equation and is thereby independent of the idiosyncrasies of the respondent whose conduct is in question.[150]

[247] In situations of the specially skilled, the standard of conduct needs to conform to that which ought to be attained by persons holding themselves out as possessing those special skills. In the present case, the agents (and the vendors by attribution), must exhibit the care reasonably expected of those engaged in the real estate industry, judged as at the time of the impugned conduct.

[248] The respondents contend here that Ms Bond, Mr Gorrie and Safari were not alert to the problems of leaky homes and the type of construction of the home in question. Ms Bond says she did not receive sufficient instruction on the construction of leaky homes during her training and clearly Safari paid little attention to the then well known and current problem of lack of weathertightness.

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[149] *Manufacturing Co Ltd v New Zealand Security Consultants and Investigations* [1992] 2 NZLR 282 (CA) and *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341 [the Grange].

[150] Stephen Todd (ed) The Law of Torts in New Zealand (7th ed, Thomas Reuters, Wellington, 2016) at [7.2.01] citing *Glasgow Corp v Muir* [1943] AC 448 (HL) at 457 per Lord MacMillan.

[249] Furthermore, the respondents contend that Ms Bond and Mr Gorrie genuinely believed that the home had only two leaks, the one in the rumpus room and the other caused by an upstairs leaking toilet.[151] I reject this evidence for the reasons set out earlier in this determination. Ms Bond and Safari were fixed with the knowledge of the Realsure summary and as principals of the agents, so too were Ms Bond and Mr Gorrie as vendors.

[250] I have earlier made a finding that there was a reasonable expectation of disclosure and Ms Bond and Safari as the vendors' real estate agents failed to disclose to the prospective buyers when the standard of conduct of the real estate industry reasonably expected disclosure. Ms Bond was in fact aware of weathertightness risk features and cladding problems and when put on enquiry by the prospective purchasers she did not convey the relevant facts. I find that the respondents facing this claim of negligent misrepresentation breached their duty of care to Ms Tsai and Mr Mao.

[251] I have already determined that Ms Bond, and by implication Safari, as agents for the vendors, were aware of the purpose for which Ms Tsai and Mr Mao were making enquiries concerning leaks and weathertightness of the home.

[252] I have also determined that Ms Bond's silence and decision not to mention or disclose the Realsure report, but instead, produce the report most favourable to the vendors, knowing that it would be used by the claimants for the purpose of considering whether to purchase the home, was a breach of the Fair Trading Act. It is also a negligent misrepresentation.

[253] I am satisfied that the vendors, through their agent, knew that their and their agent's advice was likely to be acted upon without independent enquiry by the claimants. Clearly, at the open home stage of the claimants' enquiries, Ms Bond did not know that Ms Tsai and Mr Mao would be engaging their own pre-purchase inspection, even

[151] Brief of evidence of Ms Bond at [26.5]–[28]; and Brief of evidence Mr Gorrie at [6].

though she did encourage all buyers to obtain their own pre-purchase inspection.

[254] Finally, the claimants clearly did act upon the advice to their detriment. That is, they continued to purchase the home, and their evidence is that they would not have done so if the findings of the Realsure inspection had been disclosed to them. I conclude that the tortious claim has successfully been made out: each respondent has breached their duty of care to the claimants and as joint tortfeasors are jointly and severally liable to Ms Tsai and Mr Mao for their misrepresentations.

[255] For similar reasons, which I have addressed under the Fair Trading Act claim, I am of the view that Ms Bond and Mr Gorrie breached their duty of care to the claimants (albeit through their agents) for their actions were simply misleading. I am satisfied that Ms Tsai and Mr Mao have established their claim of negligent misstatement against Ms Bond, in her capacity as vendor and Mr Gorrie as vendor.

[256] There is no reason here for me to separately consider the measure of loss for negligent misstatement. I find that it would be the same measure of loss as for the Fair Trading Act cause of action.

[257] The respondents argue that the claimants were contributorily negligent. They submitted that Ms Tsai and Mr Mao were not naïve first home buyers, they relied upon the Stone report and had no real discussion with Mr Stone on his report before confirming their purchase and that is the cause of their loss. I have rejected these arguments earlier and my findings in paragraph [227] equally apply here. I find that the claimants did not contribute to their own loss.

Measure of damages

[258] The claimants seek as damages the reasonable cost of remedial work to repair their home. Mr Robertson submits that damages should be awarded on loss in value because he states that where the cost of

reinstatement substantially exceeds the amount by which the value has been diminished, the reduction in value is the appropriate measure.

[259] I need to determine whether damages should be awarded to the claimants on the basis of the estimated remedial costs or on the loss in value.

[260] Mr Davie's approach is that there is a prima facie rule in favour of the reasonable costs of remedial work. He says the genesis for this rule is found in the decision of *Warren & Mahoney v Dynes*, where the Court stated:[152]

> [22] The real question is whether there should be a departure from the prima facie, but not inflexible, rule that the primary concern of the court should be to ascertain the amount required to rectify the defects complained of in order to give the Dynes, so far as it is now possible, the equivalent of a building which is substantially in accordance with the contract they made with the architect.

[261] Mr Davie referred me to *Cao v Auckland City Council* where the High Court accepted the approach as set out by Tipping J in *Dynes* stating they were the appropriate measure of what is a reasonable course to adopt in ascertaining appropriate damages.[153] Mr Davie submitted that some of those factors were the nature of the property and the plaintiff's relationship to it.

[262] He said that Ms Tsai's evidence is that the home suited the family, they had lived in it for many years, the design was perfect, the family was settled, the property had great views and it was convenient for Mr Mao's business.

[263] Mr Davie said a further factor to be considered from *Dynes* was what was the wrongdoer's connection with the property. He argues that one could not consider the Council who mounts this quantum challenge, to have been a complete outsider. He concludes that another feature is whether it is reasonably possible to recreate what has been damaged or unsoundly constructed. He submits that remediation is possible. He refers me to the evidence of the Council's expert on valuation,

[152] *Warren & Mahoney v Dynes* CA 49/88, 26 October 1998.
[153] *Cao & Ors v Auckland City Council & Ors* HC Auckland CIV-2010-404-7093, 18 May 2011.

Christopher James Barnsley who states "Given the level of remediation costs at the date of valuation, the remediation program is considered feasible".[154]

[264] Mr Davie submits that the reinstatement cost estimates are reasonable and the claimants are genuine in their wish to remain in the property and to repair it.

[265] Mr Robertson responds that there is no presumption that the cost of repairs should be awarded in preference to the loss of value. He submits that in *Johnson v Auckland Council*, the Court of Appeal said, (when discussing that proposition):[155]

> [110] … we emphasise, as the authorities here and overseas relied on by Ms Thodey posit, that the assessment is a factual one and it is necessary to do fairness between the parties.

[266] He states that all of the cases listed by the claimants in favour of their proposition of remediation costs predate the Court of Appeal decision in *Johnson v Auckland Council*.[156] He concludes that where the cost of reinstatement far exceeds the amount by which the value has been diminished, the reduction in value will be the appropriate measure.[157]

[267] Mr Davie responds that Mr Robertson's opening submissions in quoting from *Johnson v Auckland Council* only quoted the last sentence of this paragraph. He refers me to the full paragraph [110] of *Johnson v Auckland Council* where the Court of Appeal states:

> [110] There is support in *Hamlin*, and in the pre-*Hamlin* cases on which the appellants relied, for the proposition that in these types of cases the measure of loss will be 'the cost of repairs, if it is reasonable to repair, or the depreciation in the market value if it is not'.
> 61. As Professor Atkin notes in the Law of Torts of New Zealand, a 'more flexible pragmatic' approach is adopted in courts 'will award the cost of reinstatement where the plaintiff intends to restore and occupy the property and it is reasonable to do so'.

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[154] Mr Barnsley's second brief of evidence at [20].
[155] *Johnson v Auckland Council* [2013] NZCA 662.
[156] At [157].
[157] See also, the Law of Torts in New Zealand, Todd (ed) online edition, chapter 25, Remedies. (3) Property damage, (a) Land.

> 62. This Court in *Warren & Mahoney v Dynes* referred to a 'prima facie, but not inflexible, rule' that the main concern should be to 'ascertain the amount required to rectify the defects'.
> 63. That was a contract case although the Court indicated that in the circumstances of that case there was no difference in the measure of damages. We emphasise as the authorities here and overseas relied on by Ms Thodey Posit, that the measure is a factual one and it is necessary to do fairness between the parties.

[268] Mr Davie says that the Court of Appeal does not disagree with the *Warren & Mahoney v Dynes*[158] decision which does, after all, refer to the prima facie rule as not being inflexible. He submits that it is difficult to see why the "prima facie, but not inflexible, rule" is referred to if it is not at least, in part, taken into account by the Court in *Johnson*. The decision, after all, did reverse the diminution of value finding in the High Court. Mr Davie nevertheless does agree that it is in essence a factual argument as to what is reasonable to do fairness between the parties. He says that if it is unfair to apply the prima facie rule then it should not be applied but he argues that the claimants start with the rule.

[269] My initial decision must be to ascertain the remedial costs. I heard from valuation experts, Grant Donald Watkins for the claimants, Mr Barnsley for the Council and quantum expert Alan Wilmore Webb for the claimants and James Vincent Colin White for the Council. I panelled each group of experts at the hearing. The experts were not in agreement so the conclusion I come to on remedial costs, is, using Mr Barnsley's terminology, more art than science.

[270] Before I consider the evidence of Mr Barnsley and Mr Webb regarding diminution in value, it is necessary to fix on a figure for the costs of remediation of the damage. It was Mr Barnsley's evidence that his "best science" method of diminution calculation is reliant on costs of remediation.[159]

[271] Mr Watkins and Mr White gave evidence as experienced quantity surveyors and whilst they were in disagreement, they did make progress in a meeting I directed them to prior to giving evidence at the hearing.

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[158] Above n 154.
[159] At 242 of NOE.

[272] Mr Watkins agreed that his quantum for remedial costs could be adjusted to $810,000 (GST inclusive) and Mr White agreed his figure could be adjusted to $653,000 (GST inclusive).[160] The gap of $157,000 nevertheless is still significant.

[273] Both quantity surveyors were in general agreement with the scope of remediation and the quantities that had been specified. Before the experts were panelled, I required that they exclude from their repair cost estimates the expense for a rigid air barrier sheathing board (RAB). This was because a risk matrix determines if a RAB is necessary. An important part of such a matrix is the wind zone for the property. I accept the evidence of Mr Lyttle that the home is in a medium wind zone and as such the Council would not require that the property be remediated with a RAB.

[274] The significant disputed items were:

(a) cost of the external insulation and finish system (EIFS) cladding panels – Mr White (adjusted at the hearing) at $175 per square meter and Mr Watkins at $190 per square meter; and

(b) Wellington prices increasing. Mr Watkins' estimate of remedial costs increased some 12 per cent from August 2016 through to September 2017.

[275] Both Mr White and Mr Watkins are acknowledged and experienced experts in the remediation market. Mr Davie submitted that I should prefer Mr Watkins' figures as he had visited the property and had specific local knowledge for he resides in Wellington and is aware of the "boom times" in the Wellington area. I am not persuaded by that submission. Mr White did not visit the property but I am not certain that is an essential requirement for him to give an expert opinion. Whilst he resides in Auckland he has nation-wide knowledge and experience. I do accept however that Mr Watkins' explanation that the reason for the buoyancy in the Wellington market is not so much inflation but lack of

[160] At 265 of NOE.

building resources in Wellington. Mr Watkins stated "It is the lack of resource which is the killer".[161]

[276] I accept Mr Watkins' evidence that remediation contractors all compete in the same market for various projects and that such contractors would prefer greenfield projects over remediation. And, as there is a building buoyancy in the Wellington market, that would lead to further scarcity in the remediation market.

[277] Mr White did acknowledge that a spike in building demand will increase contract prices but stated that continued price increases would not be ongoing because the profits will draw competitors to the area and he instanced the Christchurch market as an example. Mr Webb asserted that the spike in demand in the buoyant Wellington market related to commercial and retail projects, earthquake remediation and that all made resources scarce for the Wellington wide market.

[278] Contractors engaged to repair leaky houses would, according to Mr Watkins, necessarily compete in the same commercial, retail and earthquake strengthening projects. I do accept Mr Watkins' opinion that there is a great deal of construction work now coming to the Wellington market and from his experience and that of his firm he sees little or no increase in competition given that all other regions are experiencing similar buoyancy. Mr Watkins does not see a tapering off in the "short term".[162]

[279] I accept Mr Robertson's submission that ideally repair costs should be calculated to an objective metric and not based on speculation of future sector wide indications. Both experts did seem to agree however that the remediation project with this home would take some time to arrange: drawing up the necessary plans and specifications, obtaining building consent for the extensive remediation and locating and engaging a remediation contractor. The lead time is likely to be upwards of 18 months possibly two years, before building begins.

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[161] At 271 of NOE.
[162] At 275 of NOE.

[280] I am left with persuasive opinion regarding construction inflation and lack of building resources in the Wellington market. And that it will not taper off over the short term. Given the scarcity of objective evidential criteria, I reluctantly conclude that the estimated costs of remediation of this home will be $810,000 (GST inclusive). I also accept Mr White's opinion that demolishing the home and building a brand new home on the property would cost slightly more than $810,000.[163]

[281] My determination of the remediation costs now raises Mr Robertson's argument that where the cost of reinstatement substantially exceeds the amount by which the value has been diminished, the reduction in value should be the appropriate measure. His argument is that the estimated repair costs (which I have now determined at $810,000) are out of all proportion to the property's loss in value and consequently diminution in value is the appropriate measure of loss.

[282] To illustrate, Mr Webb and Mr Barnsley are in agreement that the land value without a house is $200,000.[164] Adding to the land value the cost of remediation illustrates that the cost of remediation is disproportionate to the loss in value.

[283] The claimants and the Council's experts in October 2017 both agreed that the home unaffected by weathertightness defects would be worth $835,000.

[284] I now need to consider the loss in value measure of damages before concluding my determination on the appropriate measure of loss.

[285] I heard from Mr Barnsley and Mr Webb in relation to a diminution of value assessment. As both experts agreed on an unaffected value for the home of $835,000, the question becomes what is the value of the affected state of the home currently.

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[163] At 283, line 13 NOE.
[164] Alan Webb's reply brief, 3 Octboer 2017, annexure A at 4; and Mr Barnsley's supplementary brief, 5 October 2017 at [19].

[286] Mr Webb initially opined that the home's present affected value was $135,000 and how he arrived at that is set out in his brief of evidence. Mr Webb stated that the home had no salvageable value and no rental value. At the hearing, Mr Webb conceded in a question from me that the home could be rented.[165] I accept that in its affected state the home does have rental potential and Ms Tsai's evidence is that the home is still capable of being lived in. I am not convinced about a 6 year rental term, but Mr Barnsley's opinion regarding rental potential is the best evidence I have. In closing submissions the claimants concede that there is salvageable value and accept that $40,000 would be a minimum figure for the salvageable items.

[287] Mr Barnsley's evidence assesses the home's present value affected by weathertightness at $400,000. There are clearly salvageable items like driveway, plumbing, foundations, landscaping and salvageable materials from the destruction of the home. Although I agree with Mr Webb that most of the construction items are nearing 20 years of age and would have little real value. Mr Barnsley's figure for salvageable at $80,000 is probably on the high side but it is the only evidence I have. Both Mr Webb and Mr Barnsley are experienced experts in this area. On balance I prefer the opinions of Mr Barnsley. I thought Mr Webb was not realistic regarding salvageable value, rental potential and demolition costs.

[288] In assessing the value of the home in its existing state, Mr Barnsley's evidence gave consideration to sales of leaky buildings throughout the Wellington region, the rental market, the selling market being restricted to developers and builders who would probably rent the home until ready to re-develop and their ability to assess salvageable value. Whilst I agree with Mr Webb when he says the market for selling and renting leaky buildings is limited nevertheless, on balance I consider Mr Barnsley's evidence more compelling.

[289] My conclusion is to adopt Mr Barnsley's market value "as is" at $400,000. This therefore means that I agree with the Council's

[165] At 250, line 9 NOE.

submission that the claimants' loss in value is $435,000.00 (present unaffected value $835,000, and present market value as affected $400,000). I determine the claimant's loss or diminution in value at $435,000.00.

[290] Given my determination on damages, the claimants have no choice if they want to offset their loss, but, to go to the market and sell their affected home. So, the total loss should include an allowance for selling costs.

[291] I therefore add to diminution in value an estimate of selling costs, inclusive of real estate agent's selling commission, advertising and legal costs which I estimate at $19,550 inclusive of GST.[166]

[292] Returning now to the respective arguments between Mr Davie and Mr Robertson as to what will fairly compensate the claimants for the harm done while at the same time being reasonable between the claimants and the respondents. The actual cost of repairs is only one consideration. Mr Robertson argues that where as in this case the cost of reinstatement far exceeds the amount by which the value has been diminished, the reduction in value will be the appropriate measure of damages. Mr Robertson states that repairing the home is illogical and unjust to the respondents because it is out of all proportion with the loss in value.

[293] Mr Davie submitted that remediation is possible. I have mentioned that the defects experts never suggested that the home could not be remediated. They agree that Mr Miller's scope of works is appropriate and that the necessary redesign will eliminate the high risk weathertight factors. Mr Davies concluded his submissions that because the family's attachment to the home and its all round suitability and that the remediation costs are reasonable, reinstatement is the solution.

[294] Mr Robertson argues that it is not reasonable to remediate. Mr Robertson submits that the correct measure of loss in a tort claim is

[166] Estimate selling commissioner $14,000 at generally 3.5% commission for Wellington region, realestatefees.co.nz index website, legal costs estimate $1,000, sales promotion estimate $2,000 plus GST on estimate of $17,000.

detriment loss, that is, the amount which reflects the detriment actually and reasonably suffered by Ms Tsai and Mr Mao. He argues that the Court of Appeal decision in *Johnson*[167] means there is no *prima facie* rule. It is all now fact dependent: where the cost of reinstatement far exceeds the amount by which the value has been diminished, the reduction in value will be the appropriate measure.

[295] The sum I determined for the cost of repairs (without consequential costs) is $810,000 compared with loss in value which I have determined at $435,000. It is immediately apparent that the repair costs exceed loss in value.

[296] Mr Davie submits that where repair costs exceed loss of value it does not of itself make the awarding of repair costs unreasonable. He is supported in that submission where the High Court stated in *Cao* that the most appropriate measure is not done by an arithmetic comparison.[168] Ms Tao's evidence indicates that if the cost to repair is more costly to the respondents than diminution in value then the respondents have no one else to blame.

[297] Prior to *Johnson*[169] (the High Court decision) it is arguable that the relevant authority on when loss in value will be awarded in defective building cases was *Cao*. However, *Cao* was decided without the benefit of the reasoning in *Altimarloch*[170] for *Altimarloch* had not been decided at the time *Cao* was heard. Therefore, the High Court found in *Johnson* that *Cao* was *per incurium* and therefore not good law.[171]

[298] To summarise my understanding of Mr Robertson's argument, *Johnson*[172] *(Court of Appeal decision)* does not stand for loss in value or for remedial costs: I deduce that he says it stands for neither because *Johnson* supports the fact that when one is looking at a tort claim, as was expressed in *Altimarloch*,[173] one was looking at detriment loss and when

[167] *Johnson v Auckland Council*, above n 157.
[168] Andrews J in *Cao* at [39].
[169] *Johnson v Auckland Council* [2013] NZHC 165.
[170] *Marlborough District Council v Altimarloch Joint Venture Ltd*, above n 146.
[171] In that case it was decided without reference to relevant authority.
[172] Above n 157.
[173] Above n 146.

you are looking at a contract claim you are looking at expectation loss. Because this is not a contract case, it is a tort case his closing is that the measure of loss is therefore detriment loss.

[299] Ms Tsai's evidence that the home is unique to the family is not borne out by Mr Barnsley's evidence. His expert opinion is that there is nothing unique about the home other than perhaps its views. He illustrated a number of reasonably comparable homes in nearby areas.[174] His examples of properties on the market within the proximate area of the home were not all comparable, some were of five bedroom homes and their selling costs in some instances were higher. But I accepted his evidence that there are probable alternative and suitable homes available at similar prices in the Upper Hutt area.

[300] Mr Davie does place reliance on the Privy Council decision in *Hamlin* and submits that there is no proper argument for a diminution approach in this case. He relies too on *Dynes v Warren & Mahoney,*[175] but that decision has been properly distinguished in the High Court in *Johnson*. The Court of Appeal's decision in *Warren & Mahoney* may be described as a building defects case but Woodhouse J in the High Court in *Johnson* stated it does not assist analysis of the measure of damages in tort.

[301] In the majority of defective building claims against Councils, the courts have determined cost of repairs can be the way loss of value is calculated. In other words, the loss of value is what it will cost to remediate the home. Woodhouse J in the High Court in *Johnson* made the observation that in the numerous leaky building claims against Councils, it has not been necessary to give any consideration to the correct measure of damages because it has never been an issue.[176]

[302] It is commonplace to state that the basic measure of damages for physical injury to land and improvements is the amount by which the

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[174] BOD 78.
[175] Above n 157.
[176] *Johnson v Auckland Council* [2013] NZHC 165 per Woodhouse J at [175]; and Stephen Todd (ed) "The Law of Torts in New Zealand" (7th ed, e-book ed, Thomson Reuters, 2016 at 3) Property Damage (a) Land.

value was diminished rather than the (usually) higher cost of reinstating the land and improvements to their former state. However, the Court of Appeal in *Johnson*[177] now encourages taking a more flexible, pragmatic approach and the courts will award the cost of reinstatement where the plaintiff intends to restore and occupy the property and it is reasonable to do so. But, where the cost of reinstatement far exceeds the amount by which the value has been diminished the reduction in value will be the appropriate measure.[178]

[303] I am satisfied that the superior courts when now approaching whether the appropriate measure is reinstatement or diminution in value when considered in light of where there is a disproportionate cost to reinstate, will make their assessment more flexibly and pragmatically. The test now adopted and appropriate to this case is how reasonable is the claimants' desire to rebuild, judged in part by the advantages to them of rebuilding in relation to the additional cost to the respondents over the diminution in value. In applying this test, I have not taken just the simple diminution in value figure but have added the accompanying estimated figure for associated selling and conveyancing costs.

[304] It is understandable that Ms Tsai and Mr Mao do not wish to embark upon the search for another property even though their property buying and selling history suggests they are content to move homes, but I do not think that the inconvenience of the search counts for much, because there would also be inconvenience associated with the rebuilding. This involves time, cost and effort in acquiring the necessary plans for the rebuild, Council approval and locating a reinstatement builder. I have already suggested this time involvement will be more than 18 months. And the costs at this stage are calculated on late 2017 estimates in a buoyant Wellington regional market. The claimants have not commenced with reinstatement.

[305] I accept Mr Robertson's submission that for this case the cost of restoration is disproportionate to any diminution in value. In my view,

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[177] Above n 157.
[178] Stephen Todd (ed) "The Law of Torts in New Zealand" (7th ed, e-book ed, Thomson Reuters, 2016).

restoration costs are unreasonable as against the measure of diminution in value. A valiant attempt has been made by Mr Davie for the claimants to argue that there were reasons personal to Ms Tsai and Mr Mao which justified an expenditure otherwise disproportionate to the diminution in value. My conclusion is that the cost of restoring the home as close as possible to its original condition is out of all proportion to the diminution in value created by the respondents so it is unreasonable to award reinstatement.

[306] For the reasons set down above I conclude that diminution in value should be the measure of damages adopted.

Claim for consequential costs

[307] Paragraph [60](2) above illustrates that the claimants are seeking recovery of the trial preparation costs of their building consultant's of some $37,056.40.

[308] Mr Robertson objects on the grounds that this item is an unrecoverable expense. He submits that parties to the adjudication must meet their own costs and expenses.[179]

[309] The Tribunal does have discretion to award costs in limited circumstances. However, the presumption which the claimants must overcome to successfully secure an award of costs is set down in s 91(2) of the Act, namely, that the parties must meet their own costs and expenses. The presumption is only overcome if the Tribunal finds that there has been either bad faith or allegations that are without substantial merit on the part of the party concerned which has caused costs and expenses to have been incurred unnecessarily by, in this case, the claimants. There is no suggestion or evidence before me that any of the parties in this proceeding has acted in bad faith or that they have made arguments without substantial merit. The presumption has not been overcome by the claimants and they are not entitled to their claim for $37,056.40.

[179] Weathertight Homes Resolution Services Act 2006, s 91.

[310] The rehousing expenses set down in paragraph [60](3) above are no longer claimable for remediation costs have not been awarded.

[311] The final claim is for general damages: paragraph [60](4) above. The claimants seek general damages for the occupancy of the leaky home for a significant period and the associated anxiety and considerable stress. Ms Tsai gave compelling evidence of her family's stress and anxiety occasioned by their "leaky home" predicament. I determine they are entitled to general damages and the High Courts accepted "tariff" in these types of claims for a single dwelling is an award of $25,000.

[312] To conclude the total measure of loss, the quantum I award the claimants amounts to:

1.	Measure of loss for diminution in value	$435,000
2.	General damages & selling costs	$ 44,550
	Total award	$ 479,550

Failure to mitigate loss

[313] Ms Bond, Mr Gorrie and Safari advance the defence that Ms Tsai and Mr Mao have failed to mitigate their alleged losses.

[314] The law is clear regarding succeeding with such a defence. The onus is on the respondents to establish that Ms Tsai and Mr Mao have failed to mitigate damage and must advance evidence as to what reasonable steps could have and should have been taken by Ms Tsai and Mr Mao and that these steps were not taken.[180] The respondents advanced no evidence in support of their submissions arguing this defence.

[180] *Geest plc v Lansiquot* [2002] 1 WLR 3111 at [13] – [14] per Lord Bingham (PC); McGregor on Damages, 18th ed, (2009) para 7-019 and *White v Rodney District Council*, HC Auckland, CIV-2009-404-001880, 19 November 2009, Woodhouse J.

[315] The evidence of Ms Tsai and Mr Mao contradicts the submissions that they failed to mitigate their alleged losses.[181]

[316] Ms Tsai's evidence is that Mr Stone was called in by the claimants in December 2009 to inspect and advise on a damp patch in front of the bifold doors inside the home on a tiled floor. Mr Loader was engaged in the winter of 2013 to inspect a water stain on the garage ceiling and again when this matter appeared to increase in the winter of 2014.

[317] Ms Tsai said that every year Mr Loader was engaged to carry out maintenance work around the home and to see if anything needed to be repaired.

[318] In 2011 Ms Tsai and Mr Mao had the entire home repainted and to reduce the cost of the repainting Ms Tsai undertook some of the house painting herself. Ms Tsai and Mr Mao installed metal flashings on the parapets at the time of the house painting. This was done following advice from the painter although when Mr Kane visited the property some time earlier concerning a proposal regarding boundary fencing, he then advised that the parapets needed cap flashings installed as he could not see any from his observation on the driveway.

[319] Ms Tsai's evidence and the closing submission from Mr Davie was that by the time the actual costs of remediating the defects were ascertained (Mr Watkins report of August 2016) they were huge and not then affordable by Ms Tsai and Mr Mao.

[320] The obligation on the claimants to mitigate damage is cited clearly in the statement of Viscount Haldane LC in *British Westinghouse v Underground Electric Railways*.[182] Viscount Haldane set out that the law imposes on claimants a duty to take all reasonable steps to mitigate the loss consequent on the alleged breach of duty and debars the

[181] See para 59 of the 5th and 6th respondents' response to the claim dated 27 July 2017 and para 4 of the 7th respondent's response to the claim dated 12 September 2017. [Note, Mr Hern, counsel for Safari did not advance this defence further at the hearing or in closing submissions.]

[182] *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673 at 689 (HL).

claimant from claiming any part of the damage which is due to his or her neglect to take such steps.

[321] Woodhouse J in *White v Rodney District Council*[183] stated at para [27] that the "duty of taking all reasonable steps" in the words of Viscount Haldane requires consideration of all of the circumstances of the claim and should not be assessed applying hindsight and does not impose a high standard of reasonableness on the claimants. Woodhouse J states that this was better explained by Lord McMillan in *Banco de Portugal v Waterlow & Sons Ltd*.[184] Although the House of Lords in that decision was dealing with breach of contract, Woodhouse J stated that the same principles apply in tort.[185] The rule on mitigating the alleged losses is that the wrongdoer must take his/her victim as he/she finds him. This starkly illustrates the ability, financial and otherwise of the claimants.

[322] The respondents in advancing this defence did not produce evidence as to what steps the claimants might reasonably have taken to reduce the extent of the damage resulting from the wrongful acts of the respondents. The onus is on the respondents. I determine that Ms Tsai and Mr Mao acted reasonably in maintaining their home and mitigating their losses given their financial resources.

[323] I determine that the defence of failure to mitigate has not been made out.

Apportionments

[324] Section 72(2) of the Weathertight Homes Resolution Services Act 2006 provides that the Tribunal can determine any liability of any respondent to any other respondent and remedies in relation to any liability determined. In addition, s 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.

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[183] Supra.
[184] *Banco de Portugal v Waterlow & Sons Ltd* [1932] AC 452 at 506 (HL).
[185] Para 27 of *White v Rodney District Council* and para 7-070 to 7-090 McGregor on Damages, 18th edition.

[325] Further, under s 17 of the Law Reform Act 1936 any tortfeasor is entitled to claim a contribution from any other tortfeasor in respect of the amount it would otherwise be liable for.

[326] The basis of recovery of contribution provided for in s 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 …

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

[328] Contribution does not turn on the type of tortious cause of action: this case had allegations of both negligence and negligent misrepresentation.

[329] It is available between tortfeasors under s 17 (1) (c) whenever the liability is in respect of "the same damage". In all causes of action the damage was the same: lack of weathertightness causative of diminution in value. The apportionment of responsibility requires an analysis of the roles of the parties. I do not believe in this case that it is simply a matter of adopting apportionments made in other cases.

[330] I have found the respondent agents liable for breaching s 9 of the Fair Trading Act, and all respondents liable in negligence. Each respondent is therefore a tortfeasor. Joint or concurrent tortfeasors are each liable for the full amount of the loss, known as liability *in solidum.*[186]

[331] Counsel for each of the respondents submitted a claim for contribution, if found liable, with any other tortfeasor.

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[186] Todd above n 149 at [24.4.01] and *Allison v KPMG Peat Marwick* [2000] 1 NZLR 560.

[332] The added complication here is that the agents I have found liable for breaching the Fair Trading Act (such a breach is not a tort) but, as they are also liable as joint tortfeasors I determine that applying s 72(2) of the Act, I am entitled to determine their liability to any other respondent.

[333] Now, to analyse the roles of the parties for apportionment of responsibility. It is well established that the parties undertaking the construction work or overseeing the work as a developer should bear a greater responsibility than those certifying the construction work. This is because the local authority is not a clerk of works or a project manager. Mr Barrott's involvement in the construction of the home which resulted in weathertightness defects has caused a full re-clad and roof reconstruction. I am of the view that both Mr Barrott and the Council during their respective oversight of the construction work had opportunity to prevent the workmanship deficiencies causative of the defects.

[334] But, the significant cause of the claimants' loss was poor building workmanship and Mr Barrott is the person who owed a non-delegable duty to ensure the construction work was carried out properly and therefore between he and the Council he is primarily to blame. I assess Mr Barrott's liability at 35 per cent of the full amount of the loss.

[335] I conclude that the Council in failing to detect the defects and in issuing a Code Compliance Certificate was negligent and the appropriate apportionment is 15 per cent of the full amount of the loss.

[336] Ms Bond was fixed with knowledge of the weathertightness risk features of the home and the serious defects with the cladding and yet, as agent, elected not to disclose such information to prospective buyers. Her principal, Safari, encouraged her, in breach of the standards of the real estate industry not to disclose and, according to Ms Bond's evidence when the claimants entered into their conditional contract Safari took over total responsibility for concluding the transaction and still elected not to disclose. I determine that Ms Bond and Safari's culpability is equal and deserving of an uplift because of their liability in negligence and under the Fair trading Act. Jointly I assess it at 35 per cent of the full

amount of the loss. The evidence satisfies me that the claimants would not have proceeded beyond the open homes if they knew of the Realsure findings.

[337] Ms Bond and Mr Gorrie as vendors were fixed with the knowledge of the Realsure report summary. Ms Bond determined not to disclose that information, but went searching for a more favourable report which she did instruct (at least inferentially) her agents to disclose and Mr Gorrie's evidence is that he would not have been happy if Ms Bond had disclosed the Realsure report. Their joint culpability I assess as 15 per cent of the full amount of the loss.

Orders

[338] The claim by Ms Tsai and Mr Mao is proven to the extent of $479,550.00. For the reasons set out above I make the following orders:

1. Upper Hutt City Council is ordered to pay Ms Tsai and Mr Mao the sum of $71,932.50 forthwith. And the Council is entitled to recover a contribution from the second, fifth, sixth and seventh respondents up to $407,617.50 for any amount paid in excess of $71,932.50.

2. Michael Anthony Barrott is ordered to pay to Ms Tsai and Mr Mao the sum of $167,842.50 forthwith. Mr Barrott is entitled to recover a contribution from the first, fifth, sixth and seventh respondents of up to $311,707.50 for any amount paid in excess of $167,842.50.

3. Phillip Eric Gorrie and Robin June Bond are ordered to pay to Ms Tsai and Mr Mao the sum of $71,932.50 forthwith. Mr Gorrie and Ms Bond are entitled to recover a contribution from the first, second, sixth and seventh respondents of up to $407,617.50 for any amount paid in excess of $71,932.50.

4. Robin June Bond and Safari Real Estate Ltd are ordered to pay to Ms Tsai and Mr Mao the sum of $167,842.50

forthwith. Ms Bond and Safari are entitled to recover a contribution from the first, second and fifth respondents of up to $311,707.50 for any amount paid in excess of $167,842.50.

[339] To summarise the decision, if the five liable respondents meet their obligations under this determination this would result in the following payments being made by the respondents to the claimants forthwith:

First respondent – Upper Hutt City Council	$ 71,932.50
Second respondent – Michael Anthony Barrott	$ 167,842.50
Fifth respondents – Phillip Eric Gorrie and Robin June Bond	$ 71,932.50
Sixth respondent and seventh respondent jointly – Robin June Bond and Safari Real Estate Ltd	$ 167,842.50
Total	**$ 479,550.00**

DATED this 27th day of February 2018

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K D Kilgour
Tribunal Member