IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2012-100-000115
[2013] NZWHT AUCKLAND 29

BETWEEN	**LIZHEN YAN AND GIN WON NGAN** Claimants
AND	**AUCKLAND COUNCIL** First Respondent

Hearing: 23, 24 and 25 October 2013

Appearances: P Grimshaw, C Feng, B Easton – for the claimants
D Barr & K Lydiard – for the first respondent

Decision: 13 December 2013

FINAL DETERMINATION
Adjudicator: KD Kilgour

CONTENTS

INTRODUCTION AND FACTUAL BACKGROUND 3
ISSUES 4
DEFECTS AND REMEDIAL COSTINGS 4
EVIDENCE – DIMINUTION IN VALUE 6
GENERAL DAMAGES 8
CONTRIBUTORY NEGLIGENCE 9
Relevant Principles 10
The factual circumstances of the purchase 11
What was the standard of the reasonable prudent house purchaser in 2008? 12
To what extent did the claimants' negligence cause their loss? 15
MEASURE OF DAMAGES 17
Is diminution in value or the cost of repairs the appropriate measure of the claimants' loss? 17
Relevant facts 18
Relevant principles .....
Submissions of the parties 18
Conclusion on measure of loss 24
ORDERS 28

INTRODUCTION AND FACTUAL BACKGROUND

[1] Lizhen Yan and Gin Ngan, the claimants, owned and operated since 2006 a takeaway food business in Glendene near Te Atatu Peninsula. They were living in rental accommodation with their school age children and Mr Ngan's parents in Botany Downs and commuting across Auckland each day to their business.

[2] In June 2008, Ms Yan saw an advertisement in an Auckland Chinese newspaper advertising for sale a residential property at 11 Tollana Road, Te Atatu Peninsula. She visited the home with the real estate agent. Ms Yan made three or four further visits to the property with various members of her family. Ms Yan trusted the vendor's real estate agent. He was Chinese and told Ms Yan and Mr Ngan that the house was in very good condition, it was less than five years old (built in early 2003) and in a good locality. Ms Yan considered that the property was nicely presented and tidy. Schooling was close by for their children. The home was large enough for their extended family and was considerably closer to their business than where they had been renting.

[3] In late July 2008 Ms Yan signed an unconditional agreement to purchase, prepared by the vendor's agent, without inspecting the land information memorandum of the property, without seeking legal advice and without obtaining a pre-purchase building surveyor's inspection. Ms Yan and Mr Ngan took occupation in November 2008. In April 2009 they began to notice water ingress problems. They engaged a builder whom they learned of through an Auckland Chinese newspaper to fix the leaks. Whilst the leaks were reduced, the building work did not fix the problem. Further leaks were detected in late 2009 and 2010 and became more serious in 2012. On 2 August 2012 they applied for a WHRS report.

[4] Ms Yan and Mr Ngan had not owned a property before. They put their trust in and accepted solely the advice of the vendor's real estate agent. Ms Yan said they had no knowledge of or skill in building.

[5] Ms Yan and Mr Ngan applied for adjudication on 20 December 2012. They claim that Auckland Council, the first respondent, was negligent in the performance of its statutory building control functions by failing to identify defects in the house build, with the result that the home was built with variety of construction defects. This resulted in water damage requiring the home to be fully re-clad, the roof and decks to be repaired, and damaged structural timber framing to be replaced as required.

[6] The Council accepts that it owed duties of care to Ms Yan and Mr Ngan which it breached when carrying out its inspections and issuing a code compliance certificate. The Council accepts liability for the defects which necessitate a full re-clad and accepts that Ms Yan and Mr Ngan have suffered economic loss. The Council is therefore liable for any loss proved by Ms Yan and Mr Ngan.

ISSUES

[7] Counsel for Ms Yan and Mr Ngan and the Council agreed prior to the hearing that there are only two live issues to be determined:

a) Whether the measure of loss is the reasonable cost of repairs or the difference between what their home would have been worth had it been built weathertight (the unaffected value) and what it is worth now (the affected value); and
b) Whether Ms Yan and Mr Ngan were contributorily negligent and, if so, what is the causal potency of that negligence relative to the negligence of the Council?

DEFECTS AND REMEDIAL COSTINGS

[8] The home is monolithic texture coated fibre cement cladding without a cavity. It has multiple roof areas with no roof overhang and large decks on three levels with insufficient fall and incorrect balustrade cladding construction. The WHRS Assessor, Frank Wiemann, Ms Yan and Mr Ngan's expert Peter Jordan, the first respondent's expert, Simon Paykel, and the claimant's building surveyor witness, Andrew Gray, all describe the

home as a complex building with high risk features. As a consequence the home suffered a lack of weathertightness.

[9] On 9 November 2012 Mr Wiemann produced a full report describing the home as a complex building, listing its high risk features and explaining the variety of defects, deficiencies, and resulting damage in the three critical areas:

- Roof and roof parapet.
- Decks and deck balustrades.
- Cladding, cladding openings and junctions.

[10] His proposed scope of remediation requires a full re-clad of all monolithic texture coated fibre cement cladded elevations, repair to the multiple horizontal roof areas and decks, and timber framing replacement as required.

[11] Mr Jordan and Mr Paykel agreed with Mr Wiemann's findings and his detailed scope of remedial work.

[12] All three defects experts agreed with Mr Paykel who stated that:

> ... there will be extensive decay damage.., primarily because of the volume of moisture that has and is still ingressing at the butyl roof to wall junctions around the perimeter of the dwelling. At this junction there is an unobstructed path for moisture to ingress where the membrane laps behind the face of the cladding.

[13] The defects experts agreed that this was the primary defect which alone requires the home to be fully re-clad. They also agreed that the remedial works would require a redesign to reduce weathertightness risk features and that would be a necessary consequence of embarking upon remediation. They agreed that the home could be remediated although it would be an extensive exercise.

[14] I accept their findings.

[15] The parties engaged quantum experts to opine on the reasonable costs of repairing Ms Yan and Mr Ngan's home. Patrick Hanlon for Ms Yan and Mr Ngan and Peter Homes for the Council agreed that the reasonable cost of repairing the claimant's home is $689,550. Mr Barr submits that this agreed sum excludes betterment items involving the cost of painting the exterior cladding following remediation which would be an essential finishing cost. Betterment is not something which a respondent is liable for. Accordingly I accept the agreed sum for repair costs at $689,550.

[16] In addition to the agreed repair costs, Ms Yan and Mr Ngan seek compensation for:

a) The cost of alternative accommodation of $20,202.
b) Moving costs of $6,400.
c) Furniture storage costs of $1,980.
d) Cleaning costs of $573.
e) Application fee for assessors report of $500.

[17] I accept that remediation will require the claimants and their family to vacate their home for the duration of reconstruction. The Council did not challenge the evidence of Ms Yan concerning the above losses therefore I accept these consequential costs, which only become relevant should the conclusion of this determination award repair costs.

[18] The agreed repair costs and consequential losses total $719,205. Ms Yan and Mr Ngan also claim general damages which I will address later in this determination.

EVIDENCE – DIMINUTION IN VALUE

[19] Ms Yan and Mr Ngan's valuation expert Matthew Taylor and the Council's valuation expert Michael Gamby agreed on the value of Ms Yan and Mr Ngan's home in an "as is" state and in an unaffected state, as follows:

<u>As is value</u>

Land value	$460,000

Less cost of demolition		$45,000
As is value (on a no rental income basis)		**$415,000**

Unaffected Value

Unaffected Value	$825,000	
Less "as is" value	$415,000	
Loss in value		**$410,000**
Plus selling costs		
Commission = $415,000 x 3.5 per cent	$14,525	
Marketing costs	$2,000	
Legal costs	$1,500	
Selling costs		**$18,025**
Total loss		**$428,025**

[20] I accept the "as is" value at $415,000 on a "no rental income basis". After listening to the evidence of Ms Yan, Mr Gray and Mr Wiemann, I am satisfied that Ms Yan and Mr Ngan's home suffers from serious internal dampness, mould and damage to internal linings, such, that it is not in a sufficiently reasonable state of repair to be tenanted. Therefore diminution in value assessment should be without any credit for a notional rental income.

[21] Mr Taylor's opinion is that people in the situation of Ms Yan and Mr Ngan actually have no choice if they want to offset their loss, but, to go to the market with the uncertainty that exists in the market for affected properties. I accept Mr Taylor's evidence that the total loss should include an allowance for selling costs.

[22] Mr Gamby agreed that the selling cost estimates proposed by Mr Taylor were reasonable but he did not accept that they were recoverable by Ms Yan and Mr Ngan. I accept that if Ms Yan and Mr Ngan are forced to sell their property they should also be compensated for the selling costs.

[23] Accordingly, I accept the total loss in a diminution in value calculation should include selling costs. Therefore the total loss in this case is $428,025.

GENERAL DAMAGES

[24] Ms Yan and Mr Ngan seek general damages of $25,000 each. The Council accepts Ms Yan and Mr Ngan are entitled to general damages to a limit of $25,000 subject to any reduction for contributory negligence.

[25] General damages are usually awarded to claimants in leaky home claims to compensate them for stress and loss of amenity caused by ownership and occupancy of a home that suffers weathertightness issues.

[26] Mr Grimshaw submits that the appropriate award is per owner occupier. He submits that Ellis J's decision in *Findlay v Auckland City Council*[1] was incorrect. In that decision Ellis J expressed the view[2] that the Court of Appeal decision in *O'Hagan v Body Corporate 189855* (*Byron Avenue*)[3] stated that the appropriate award of damages was $25,000 per unit for owner-occupiers

[27] Mr Barr replied in his oral closing submissions that the authorities cited to me by Mr Grimshaw all preceded the decision of Andrews J in *Cao v Auckland City Council*[4] where in paragraph [75] the Judge stated "since the Court of Appeals judgment in *Byron Avenue* judgments have awarded general damages on a "per unit" basis".

[28] I am satisfied that what was intended by the Court of Appeal was a general guidance award for general damages.

[29] The evidence of Ms Yan and Mr Ngan's stress and anxiety before me although significant is not out of the ordinary or unique and I am not persuaded that an award in excess of $25,000 is justified. Accordingly I determine that the claimants are entitled to general damages of $25,000.

---

[1] *Findlay v Auckland City Council* HC Auckland, CIV-2009-404-6497, 16 September 2010.
[2] Above n 1 at [92].
[3] *O'Hagan v Body Corporate 189855* [2010] NZCA 65, [2010] 3 NZLR 486.
[4] *Cao v Auckland City Council* HC Auckland, CIV-2010-404-7093, 18 May 2011.

CONTRIBUTORY NEGLIGENCE

[30] The Council submit that Ms Yan and Mr Ngan failed to exercise reasonable care and contributed to their own loss by purchasing their home at a time when the risks associated with monolithically clad homes were well known and widely publicised without obtaining a building inspection report. Mr Barr submits that the claimants in particular failed to:

i. include in the purchase agreement a provision requiring them to obtain a satisfactory building inspection report prior to settling the purchase; and/or
ii. obtain a building inspection report prior to signing the purchase agreement;

and in doing so, Ms Yan and Mr Ngan failed to take steps that a reasonable, prudent buyer of residential real estate in 2008 would have taken.

[31] The Council submitted that the defects would have been apparent to a reasonably prudent pre-purchase inspector and if the agreement was subject to a pre-purchase report Ms Yan and Mr Ngan would have had the opportunity to avoid the losses they now claim.

[32] Mr Grimshaw submits that Heath J in *Sunset Terraces*[5] rejected an argument that buyers of residential properties in New Zealand were contributorily negligent for not obtaining building reports. Mr Grimshaw submits that it is clear from Heath J's comments that the yard stick against which a plaintiff's conduct is measured is what other citizens in his/her position were doing at the time. He also stated that Venning J in *Byron Avenue*[6] rejects an argument that buyers of real estate in New Zealand were negligent for not obtaining legal advice before entering into a sale and purchase agreement. Mr Grimshaw submitted that there is no case which states that a prospective buyer of residential property must obtain a pre-purchase building report in 2008, and that they would be contributorily

[5] *North Shore City Council v Body Corporate 188529* [2010] NZSC 158, [2011] 2 NZLR 289.
[6] *Body Corporate 189855 v North Shore City Council* HC Auckland, CIV-2005-404-5561, 25 July 2008.

negligent if they did not. Mr Grimshaw referred me to paragraph [25] of Woodhouse J's judgment in *Johnson v Auckland Council:*[7]

> ... whether or not the plaintiffs should have done anything in particular will depend on the facts of each case. In cases with a subject matter such as the present, a failure to get a pre-purchase report may in one case not amount to relevant fault on the part of a plaintiff; in another case it may. In any event, each case is bound to give rise to issues as to whether or not a range of things should have been done by the plaintiff.

[33] The questions that need to be addressed are:

i. Is there anything that Ms Yan and Mr Ngan did which departed from the standard of a reasonable, prudent buyer of residential property and was negligent in relation to properly protecting their own interests?
ii. If so, what is the causative effect of their negligence in relation to the damage for which they claim?

Relevant Principles

[34] Section 3 of the Contributory Negligence Act 1947 provides:

> **3 Apportionment of liability in case of contributory negligence**
> (1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage:

[35] The Law of Torts in New Zealand[8] comments on the standard of care expected of a plaintiff as follows:

---

[7] *Johnson v Auckland Council* [2013] NZHC165 at [25].
[8] Steven Todd, (ed) *The Law of Torts in New Zealand* (6th ed, Thomson Reuters, Wellington, 2013) at [21.2.05].

> A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckonings he must take into account the possibility of others being careless.[9] The principle involved is that where a man is part author of his own injury, he cannot call on another to compensate him in full.[10]

[36] The test is an objective test, therefore it removes the personal equation and "requires everyone to exercise all such precautions as a man of ordinary prudence would observe".[11]

[37] It is only causal or operative negligence or fault on the part of the claimants that is to be taken into account.[12] As part of an enquiry into causation it is necessary to identify the loss – the damage suffered by the plaintiffs and identify the conduct of the plaintiffs which the defendant says contributed to the loss.[13]

[38] Where a claimant is found to have been contributorily negligent, the Tribunal needs to apportion damage as between the claimant and the respondent:[14]

> The amount of the reduction is such an amount as may be found by the Court to be "just and equitable" having regard to the claimant's share in the responsibility for the damage. This involves a consideration, not only of the causative potency of a particular factor, but also its blameworthiness.

The factual circumstances of the purchase

[39] Ms Yan purchased the home because of its size, locality and closeness to their business and children's schooling. It was their first home. They had no experience of building. Ms Yan said she had not heard about the leaky home problem. She said that the vendors' real estate agent explained that the home was only five years old, that it was in

---

[9] *Jones v Livox Quarries Ltd* [1952] 2 QB 608 (CA) at [615].
[10] *Nance v British Columbia Electric Ry* [1951] AC 601 (PC) at [611].
[11] *Froom v Butcher* [1976] QB 286 (CA) at [294].
[12] *Griffin v F.T.Wimble & Company (N.Z) Limited* [1950] NZLR 774 (SC). Approving *Davies v Swan Motor Co (Swansea) Limited* [1949] 2 KB 291 (CA).
[13] Above n 7 at [12(c)].
[14] *Davies v Swan Motor Co (Swansea) Ltd* [1949] 2 KB 291 (CA) at [326].

very good condition and in a good locality. She said that it looked in a tidy condition and it contained all the facilities that she and her husband and family were looking for in a home.

[40] She signed the agreement for purchase prepared in handwritten form by the vendor's real estate agent without reading the warnings on the backing sheet, without taking legal advice and without involving a building inspector to report to her on the condition of the home.

What was the standard of the reasonable, prudent house purchaser in 2008?

[41] Simon Damerell, an experienced real estate agent, familiar with Te Atatu residential selling, gave evidence for Ms Yan and Mr Ngan. He said that based on his experience it was not general practice with the majority of home buyers in 2008 to obtain pre-purchase reports or to engage a lawyer before committing to buying a home. Mr Damerell's evidence is that in the Te Atatu area only 36 per cent of buyers in the 2008 period inserted a pre-purchase report condition in their contract to buy. Mr Damerell conceded that knowledge of the weathertight home problem was growing amongst buyers and that by 2008 it was much higher than just a few years before. He also accepted that the insertion of weathertightness inspection conditions in purchase agreements was trending upwards. His empirical analysis was unable to confirm whether all contracts in this 36 per cent category were for the purchase of monolithic clad homes.

[42] Mr Damerell said after inspecting the photos in the WHRS assessor's report, that he could recognise that Ms Yan and Mr Ngan's home had visually all the characteristics of a home with a lack of weathertightness. He also agreed with Mr Barr that the standard of his industry was not high and whilst agents were unlikely to encourage or assist buyers to read the contract before signing or to point out the warnings on the back of the agreement, he personally would not have signed a contract for the purchase of a $770,000 home unconditionally without first reading the agreement.[15]

[15] Transcript of hearing, page 38 at [15].

[43] Mr Grimshaw argued that even if the claimants had obtained a pre-purchase report in 2008 it would not have revealed any weathertight defects. Andrew Gray, an experienced building surveyor, gave evidence for Ms Yan and Mr Ngan. He had carried out a review of pre-purchase reports and found that a large number of pre-purchase inspections and reports around 2008 did not meet the New Zealand Standard of NZS 4306:2005. He stated that many such reports concentrated on cosmetic issues, that typically they viewed properties when they were given a visual makeover for sale and that such building surveys were visual and not invasive.

[44] Mr Gray's review of the pre-purchase inspection reports in 2009 (he could not access 2008 reports) was undertaken by finding and analysing a sample of reports on the internet. I agree with Mr Barr's submission that such evidence is unhelpful in determining whether pre-purchase inspections would have identified the defects in 2008.

[45] Mr Gray also conceded that in 2008:

- The knowledge in the building industry of weathertightness was significant.
- That a reasonably competent pre-purchase inspector in accordance with NZS 4306:2005 would have been well aware of leaky building issues and would have had them at the forefront of their minds when home inspecting.
- That home buyers could locate qualified pre-purchase inspectors from websites, the Department of Building and Housing and the Consumer Institute of New Zealand Inc.

[46] Mr Gray also agreed that an experienced building surveyor or a competent builder doing a pre-purchase non-invasive inspection in 2008 would identify the high risk factors and a number of the suspect material defects identified by the WHRS assessor in relation to Ms Yan and Mr Ngan's home.

[47] Mr Paykel, Mr Wiemann, and, somewhat tentatively, Mr Jordan also agreed that in 2008, a building surveyor applying the standard NZS

4306:2005 would have identified the high risk factors and a significant number of the material defects with Ms Yan and Mr Ngan's home as identified by the WHRS assessor. Mr Paykel and Mr Wiemann were clearly of the view that such an inspection would have identified the primary defect mentioned in para [12] above.

[48] I conclude that in 2008 a pre-purchase inspector is likely to have detected the significant workmanship issues that caused the primary defects.

[49] The 2006 edition of the sale and purchase agreement signed by Ms Yan recommended that buyers seek professional advice before signing especially if the buyers wished to check the weathertightness and soundness of construction. The reference to "weathertightness" in that edition indicates that leaky buildings were an issue for buyers in 2006.

[50] In *Johnson*[16] Woodhouse J considered that the widespread problem with New Zealand's weathertight home issues were well publicised by 2009.

[51] The Council relies on the evidence of Mr Jones, an expert conveyancing lawyer. Mr Jones said that if Ms Yan and Mr Ngan had sought legal advice prior to signing the purchase agreement, they would have been advised to obtain a pre-purchase builder's report, particularly if they disclosed to their conveyancing lawyer that the house they were buying was monolithically clad. Mr Jones said that most lawyers would want to look at the LIM and would not want their clients to rely on their own inspection because clients do not usually know what they were looking for.

[52] Mr Jones said in his opinion a reasonable, prudent purchaser in 2008 would insert a clause into the agreement for sale and purchase providing for a building inspection and would not rely on the opinion of the vendor's real estate agent on the condition of the building.

[16] Above n 7.

[53] Mr Jones and Mr Damerell's evidence was that the majority of buyers neither sought legal advice before committing to purchase a home nor inserted pre-purchase report conditions in agreements. Nevertheless, bad practice is still bad practice.[17] The so-called general practice prevalent in New Zealand in 2008 had inherent risk in the ordinary sense. The fact that the majority of buyers adopted this practice is not conclusive evidence that it is prudent. Ms Yan took a foreseeable risk where there was no necessity to do so. The fact that other buyers did the same did not make the risk less apparent or unreal.

[54] Ms Yan was purchasing a home of significant value. Ms Yan and Mr Ngan were not experienced in home buying and were borrowing to buy. I am satisfied that at the time when Ms Yan purchased, a prudent buyer would have sought advice around the weathertightness and soundness of construction of a monolithic clad dwelling before committing to buy. A reasonable, prudent purchaser would have placed little reliance or trust on advice provided by the vendor's real estate agent.

[55] I conclude that by failing to obtain legal advice and, particularly, a building report, Ms Yan and Mr Ngan did not act in accordance with the standard of a reasonable, prudent first home purchaser and were negligent in protecting their own interests.

To what extent did the claimants' negligence cause their loss?

[56] Ms Yan and Mr Ngan committed to the purchase without making any enquiries or taking any steps to protect their own position. Unfamiliarity with New Zealand conditions does not excuse their actions.[18]

[57] I am permitted to consider the presented circumstances of their purchase and how prospective buyers would ordinarily manage the risk with the purchase of such a home. In *Byron Avenue*,[19] Baragwanath J stated that a finding of contributory negligence requires an objective test expressed in terms of the person's own general characteristics. The

[17] *Edward Wong Finance Co. Ltd v Johnson* [1984] AC 296.
[18] Above n 3.
[19] Above n 3 at [67].

evidence establishes that the risks associated with monolithic clad homes in July 2008 were well known and widely publicised.

[58] Mr Barr referred me to a number of authorities in the Council's submissions on contributory negligence such as *Byron Avenue,*[20] *Johnson v Auckland Council,*[21] *Liu v Auckland Council,*[22] and *Hepburn v Cunningham Contracts Ltd.*[23] In each of these cases the claimants had an understanding of the leaky home problem and also detected signs of concerns over watertightness issues with their respective purchases. That is not the case here and as such their respective reductions for contributory negligence are a guide only.

[59] Mr Grimshaw relied on *Angela Poynter Trust v Wang.*[24] In that case the Council argued that the claimants had caused or contributed to their own loss by failing to make the sale and purchase conditional on obtaining a satisfactory building report. In that case I found that a pre-purchase inspection by a suitably qualified building surveyor would have identified a number of weathertightness defects and held that a reduction of 10 per cent for contributory negligence from the amount of damages awarded was fair and appropriate.

[60] However the Poynters entered into their purchase in December 2006 and in my view a reduction for contributory negligence in 2008 deserves a higher amount because of the greater awareness of weathertightness, more prudent pre-purchase enquiries, and increasing reduction of damages by the Courts as illustrated by Mr Barr. The Poynters also entered into a conditional contract, conditional upon solicitor's approval.

[61] I am satisfied that the Council has affirmatively established that a contributing cause of Ms Yan and Mr Ngan loss was their failure to obtain a pre-purchase building report, which I have found is likely to have detected the primary defects and alerted them to weathertightness issues with the

[20] Above n 3.
[21] Above n 7.
[22] *Liu v Auckland Council* [2013] NZWHT Auckland 25.
[23] *Hepburn v Cunningham Contracts Ltd* [2013] NZHC 210.

home (at [48]), thereby allowing them the opportunity to avoid the purchase.

[62] I conclude that the Council has affirmatively established that a contributing cause of Ms Yan and Mr Ngan's losses was their failure to take reasonable care to protect their own interests and in failing to take such reasonable care they contributed partly to their own loss.

[63] Considering that the purchase was in 2008 when knowledge of the leaky home problem was well known, the home exhibited obvious weathertight risk factors, Ms Yan was a first home buyer, and the courts are more readily awarding greater deductions in respect of contributory negligence, the amount of the reduction which I find to be just and equitable having regard to Ms Yan and Mr Ngan's share in the responsibility for the damage is 12 per cent.

MEASURE OF DAMAGES

Is diminution in value or the cost of repairs the appropriate measure of the claimants' loss?

[64] Ms Yan and Mr Ngan and the Council disagree on the appropriate measure of Ms Yan and Mr Ngan's loss. Ms Yan and Mr Ngan seek the reasonable cost of repairing their home. Mr Grimshaw submits that where an injury is to be compensated by money, the amount of money is determined as the amount that will put the injured party in the same position as if the party had not sustained the wrong for which the party now seeks compensation.[25]

[65] The Council argues that it is not reasonable to remediate. Mr Barr submits that the correct measure of loss in a tort claim is detriment loss, that is, the amount which reflects the detriment actually and reasonably suffered by Ms Yan and Mr Ngan. He submits that how this is determined in tort claims and, in particular, in tort claims against the Council has recently been considered in some detail by Justice Woodhouse in

[24] *Angela Poynter Trust v Wang* [2011] NZWHT Auckland 40.
[25] *Livingstone v Raywards Coal Co* (1880) 5 App CAS 25 at [39].

Johnson.[26] Mr Barr says that there is $261,525 gap between the remedial costs and diminution in value. Of that remedial cost, that extra $261,525 cannot be a loss caused as a result of the tort. It can only be a loss caused as the result of undertaking remedial work when it is not reasonable to do so.

Relevant Facts

[66] The defects experts and Mr Gray are all in agreement that Ms Yan and Mr Ngan's home can be remediated. They agree that Mr Wiemann's scope of works is appropriate and that the necessary re-design will eliminate the high risk weathertight factors. Mr Jordan cautioned that there could be resource consent issues.

[67] The sum agreed for the cost of repairs (without consequential costs) is $689,550 compared with loss of value which was agreed at $428,025. The difference between the two is $261,525.

[68] Ms Yan and Mr Ngan enjoy the property, its location and have formed a personal attachment to the home. Aside from the building defects the house contains all the facilities that Ms Yan and Mr Ngan were looking for in a family home. Ms Yan was clear about their intention to repair the home once their legal claim has been resolved, although Mr Ngan's evidence indicates a real concern over how they are going to pay for repairs because they already have a large bank mortgage.

Submissions of the Parties

[69] Mr Grimshaw submitted that the Privy Council decision in *Hamlin* describes the measure of loss in building defects claims as follows:

> ...The measure of loss will then be the cost of repairs, if it is reasonable to repair, or the depreciation in value if it is not: see *Ruxley Electronics and Constructions Limited v Forsyth* [1995] 3 WLR 118.[27]

[70] He stated that the *Hamlin* test for the measure of damages has generally been followed in negligence claims arising from building defects.

[26] Above n 7.

[71] Mr Grimshaw referred to an early High Court decision of *Bell v Hughes*.[28] He said that case is a relevant decision for it involved a tortious claim against an engineer and the Hamilton City Council arising out of defective foundations. He mentioned that the plaintiffs sought an award of damages for the cost of demolition and reconstruction and yet the first defendant contended that diminution in value was the correct measure of damages.

[72] Tompkins J in that case surveyed the relevant authorities and then stated: [29]

> So in the present case the matter is to be determined by deciding whether the Plaintiffs' desire to rebuild the flats is reasonable taking into account that the cost of doing so is substantially greater than the diminution in value.
>
> I have concluded that it is, for these reasons. The Plaintiffs originally decided to erect the units on part of the land that they already owned and upon which they lived because they considered it would be an advantage in administering the units to have them in close proximity to where they lived. Further, the units were an income producing investment. They enabled land otherwise unoccupied to be put to profitable use. If, as is involved in the diminution approach, the units were demolished and left unoccupied, the Plaintiffs would receive the current value of the units but they would be deprived of the investment income that they would have received from the units and from the land upon which they were erected. So in that sense, the diminution in value assessment would not put the Plaintiffs in the same position as they would have been had the damage not occurred. So it is my conclusion that in the present case the appropriate measure of damage is the cost of reinstatement.

[73] Mr Grimshaw's submission is:

> ... as to whether it is reasonable to repair, the New Zealand[30] and overseas authorities[31] indicate that an intention to repair, the fact

---

[27] Invercargill City Council v Hamlin [1996] 1 NZLR 513(PC) at [526].
[28] *Bell v Hughes* HC Hamilton, A110/80, 10 October 1984.

> that the property is a family home and the fact that the property is unique all weigh heavily in favour of a cost of repair approach.

[74] Mr Grimshaw stated 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. An excess of repair cost over loss in value does not of itself make the awarding of repair costs unreasonable.[32] He further stated that *Cao* is authority that the most appropriate measure is not done by an arithmetic comparison. Andrews J in that decision stated:[33]

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

[75] Andrews J in that appeal decision stated that the Tribunal erroneously focussed on whether it was economic to repair the house rather than on what would fairly compensate the claimants.

[76] Mr Grimshaw's response to the Council's argument that *Johnson* is binding on the Tribunal is that Woodhouse J, incorrectly stated that the Court of Appeal's comments in *Warren & Mahoney* about a prima facie measure of damages were directed only at contract cases. He says that *Johnson* discloses that:

> (a) Woodhouse J was not purporting to say that the measure of damages in all building defects claims in tort was to be assessed on the diminution in value.
>
> (b) The facts of *Johnson* were a long way from the facts in this case.

---

[29] Above n 35.
[30] Above n 4.
[31] *Tabcorp Holdings Ltd v Bowen Investments Ltd* [2009] HCA8, *Evans v Balog* [1976] 1 NSWLR 36(CA); *Hollebone v Midhurst & Fernhurst Builders* [1968] 1 Lloyd's Rep 38; Harvey McGregor *McGregor on Damages* (18th ed, Sweet & Maxwell, London, 2009) at [34-003] – [34-013].
[32] *Evans v Balog* [1976] NSWLR 36(CA).

[77] Mr Grimshaw states that in *Johnson*, Woodhouse J cites Tipping J's dicta in *Altimarloch*[34] that what measure of damages is appropriate is a question of fact and that there are no absolute rules in this area. Mr Grimshaw says that that is a correct analysis of the law. The plaintiff in *Johnson* undertook some due diligence. They searched the Council file and checked that a code compliance certificate had been issued. Mr Grimshaw submits that Woodhouse J considered that such facts were material to choosing the correct measure of damages.[35]

[78] Mr Grimshaw says that on a careful reading of *Johnson*, it becomes apparent that Woodhouse J's decision that the diminution in value which he said was the correct measure of loss was influenced by the similarities between the facts of that case and misrepresentation cases. Mr Grimshaw says that the facts of the present case are distinguishable. He says that Ms Yan and Mr Ngan in this case did not check the Council file or obtain a LIM report, and that they were not aware of a CCC being issued. Indeed there was not even any evidence that they knew what a CCC was.

[79] Mr Grimshaw also submitted that what influenced Woodhouse J's decision to award damages based on diminution in value was the significant contributory negligence of the plaintiffs in that case.

[80] Mr Grimshaw submits that Ms Yan and Mr Ngan's position is that they were not contributory negligent, but, if they were (which he denies), any negligence on their part was at a far lower level than that of the plaintiffs in *Johnson*. I agree with that submission.

[81] Mr Grimshaw summarises his submissions on measure of damages by stating that *Johnson* is not authority for the proposition that diminution in value is the correct measure of loss where the cause of action is negligence rather than contract. He says that in *Johnson* the decision to award losses according to diminution in value was very much driven by the

---

[33] *Marlborough District Council v Altimarloch Joint Venture Limited* [2012] NZSC 11, [2012] 2 NZLR 726 at [156].
[34] Above n 33 at [156].
[35] Above n 7 at [150]-[151].

specific facts of that case, including the plaintiffs stated reliance on the CCC and the nature and extent of their contributory negligence.

[82] He states that from the unchallenged evidence of Ms Yan and Mr Ngan, they have formed an attachment to their home and that the home and property meet their and their extended families specific requirements. I do accept Mr Barr's submission that home attachment is fickle and their homes location is not as proximate to their business as they indicated in their evidence.

[83] Mr Barr argues that because Ms Yan and Mr Ngan's claim against the Council is in negligence, it is a tortious action and the correct measure of loss in tort is an amount which reflects the detriment actually suffered by Ms Yan and Mr Ngan.

[84] Mr Barr submits that in *Johnson*, Woodhouse J began his analysis of how damages should be assessed by quoting from Tipping J in *Altimarloch* who summarised how the appropriate measure of damages should be determined:[36]

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

[85] Mr Barr submits that Woodhouse J considered, relying upon the *Altimarloch* decision as set out above, that it is important to consider the nature of the legal wrong suffered in tort claims in order to determine what is the actual and reasonable loss suffered by the plaintiff:[37]

> The general principles, or what may be called the normal measure of damages, applying to different types of tort have been worked

[36] Above n 33 at [156].
[37] Above n 7 at [148].

> out, at least in part, by taking account of the difference between the nature of the wrong that occurs when there is negligence or some other tort, and the nature of the wrong that occurs when there is a breach of contract. Bearing this distinction in mind is important because it is the principled underpinning to the factual enquiry to which Tipping J [in Altimarloch] refers. In order to assess the loss "actually and reasonably suffered by the plaintiff" it is necessary to consider, in a principled way, the nature of the legal wrong suffered by the plaintiff. This is necessary, not for the purpose of putting things into legal rigid pigeon holes, but because the process requires consideration of what is reasonable from the point of view of the defendant as well as the point of view of the plaintiff.

[86] Mr Barr therefore submits that Woodhouse J found that the measure of loss is to be approached differently depending on whether the claim is in contract or in tort because of the different nature of the legal wrong suffered.

[87] Mr Barr submits that Woodhouse J in *Johnson* went on to say that the measure the Johnsons were contending for in that case (as he says Ms Yan and Mr Ngan are in this case), that is, the cost of the remedial work, is the normal measure of loss in contract not in tort. He says this was illustrated in *Altimarloch* where the Supreme Court held that the plaintiff was entitled to the cost of cure from the vendor as its claim against the vendor was in contract. However as against the Council, it was only entitled to the difference between its purchase price and what the property was actually worth at the time of purchase because its claim against the Council was in tort. He said that this reflected the detriment actually suffered by the plaintiff as opposed to a loss of expectation.

[88] Mr Barr conceded that prior to *Johnson*, the relevant authority on when loss in value will be awarded in defective building cases was *Cao*. However, Mr Barr stated that Woodhouse J found in *Johnson* that the statement in *Cao* that the prima facie default measure of loss in defective building cases was for cost of the remedial work was incorrect. Mr Barr also states that *Cao* was decided without the benefit of the reasoning in *Altimarloch* for *Altimarloch* had not been decided at the time *Cao* was heard

and therefore the Court has found in *Johnson* that *Cao* is per incuriam[38] and therefore not good law.

[89] In his closing submissions Mr Barr argued that *Johnson* does not stand for loss in value or for remedial costs: he says it stands for neither because *Johnson* stands for the fact that when one is looking at a tort claim, as was expressed in *Altimarloch*, one is looking at detriment loss and when you are looking at a contract claim you are looking at expectation loss. He says this case is not a contract case. It is a tort case and the measure of loss is detriment loss. Mr Barr argues that Ms Yan and Mr Ngan cannot claim damages which could have been avoided or reduced by taking of reasonable steps.

Discussion and conclusion on measure of loss

[90] Both parties referred me frequently to the recent High Court decision of *Johnson,*[39] which is binding on this Tribunal. *Johnson* awarded damages based on diminution in value. Prior to *Johnson*, the High Court generally applied the cost of repair as the measure of loss for an award of damages against the Council in leaky building claims. However, in the majority of cases the 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 dwelling. Claims against the Council in leaky building cases invariably sue for tortious negligence, not for contractual breach. Woodhouse J 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. He stated:[40]

> ... the weight of numbers of cases where a particular measure has been applied does not assist on questions of principle if principle has not been considered in any of the cases.

[91] The Court also decided in *Johnson* that a principled approach to determining the proper measure of damages is necessary to put the particular factual features into its proper legal context.

---

[38] In that case it was decided without reference to relevant authority.
[39] Above n 7 at [156].

[92] In the factual analysis of this case, I reject Mr Grimshaw's submission that the facts in *Johnson* are a long way from the facts of this case. In 2009 the Johnsons purchased a residential property for their family home. Substantial defective alterations which the vendor carried out caused the home to leak and the Johnsons sued the Council in negligence for its performance in issuing a code compliance certificate. The Johnsons undertook some pre-purchase due diligence but negligently, and the Court determined that the losses suffered could have been avoided or reduced had they taken further reasonable steps. The losses suffered by Ms Yan and Mr Ngan are damages which could have been avoided or reduced had they taken reasonable steps when they embarked in 2008 upon the purchase of a residential home for their family.

[93] *Johnson* illustrates that there is a fundamental difference between contract and tort which bears on the measure of damages. Woodhouse J in *Johnson* began his analysis of assessment of damages by referring to Tipping J in *Altimarloch* where he summarised how the proper measure of damages should be determined, above para [84]. Woodhouse J determined that it is necessary to consider the nature of the legal wrong suffered in tort claims to be able to determine what is the actual and reasonable loss that the plaintiff has suffered.[41]

[94] The Council's wrong in this case is the same as the Council's wrong in *Johnson*, that is a tort – negligence in carrying out the inspections and in issuing the code compliance certificate.

[95] Woodhouse J stated that the difference in the normal measure of damages between claims in contract and claims in tort is fairly set down in *Altimarloch.*[42] Diminution in value was the measure of loss applied by the High Court in *Altimarloch* in relation to the claim against the Council. The Court of Appeal saw no reason to depart from this approach[43] and the Supreme Court was not required to consider this issue in relation to the

---

[40] Above n 7 at [175].
[41] Above n 7 at [148].
[42] Above n 33.
[43] *Vining Realty Group Limited v Moorhouse* [2010] NZCA 104, (2011) 11 NZCPR 879 at [113].

Council, although Elias CJ did emphasise that assessment of damages is a matter of fact.[44]

[96] Mr Grimshaw relies on the decision of the Privy Council in *Hamlin.*[45] He submitted that there is no proper argument for a diminution approach in this case, above para [69]. However Woodhouse J in *Johnson* discussed *Hamlin* and quoted a larger segment of the passage cited by Mr Grimshaw above.[46] Woodhouse J said in concluding his discussion on *Hamlin* that the passage quoted makes it clear that *Hamlin* was not concerned with the measure of damages, and the central issue was as to when the cause of action of the homeowner arose in order to determine whether the claim had been bought within the limitation period. *Hamlin* is not authority on what is the proper measure of damages in leaky building cases. The *Ruxley Electronic and Constructions Limited v Forsyth*[47] decision of the House of Lords referred to in *Hamlin* involved a claim for breach of contract so *Hamlin* and *Ruxley* do not assist Ms Yan and Mr Ngan in this case.

[97] Woodhouse J also distinguished *Dicks v Hobson Swan Construction Limited*[48] where he stated that the measure of damages was simply touched on without any discussion.[49] Although *Dicks* was a claim against a builder in tort and in contract and a claim against the Council for negligence, Woodhouse J's distinguishment of that case equally applies in this case and it does not assist Ms Yan and Mr Ngan.

[98] Mr Grimshaw also relies on *Dynes v Warren & Mahoney*[50]. But it too has been properly distinguished in *Johnson.* The Court of Appeals decision in *Warren & Mahoney*[51] may be described as a building defects case, but again Woodhouse J stated it does not assist analysis of the measure of damages in tort. In *Dynes* there were claims against an architect and an engineer relating to the building of a house and a swimming pool on unsuitable land. The claim against the architect was in contract. The claim against the engineer was in tort. Tipping J in the High

[44] Above n 33 at [23].
[45] Above n 27.
[46] Above n 7 at [161].
[47] *Ruxley Electronic and Cnostructions Limited v Forsyth* [1995] 3 WLR 118.
[48] *Dicks v Hobson Swan Construction Limited* (in liquidation)(2006) 7 NZCPR 881 (HC)
[49] Above n 7 at [121] – [122].
[50] *Dynes v Warren & Mahoney* HC Christchurch A242/84, 16 December 1987.
[51] *Warren & Mahoney v Dynes* CA49/88, 26 October 1988.

Court concluded that in the circumstances of that case there was no difference in the measure of damages which might be awarded as between the claims in tort and in contract.[52] On appeal the parties did not contend otherwise and the Court of Appeal affirmed Tipping J's approach. Woodhouse J concluded that the Court did not affirm a prima facie measure for assessing damages in tortious actions against Councils[53]. He stated that what the Court said in that regard was: [54]

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

[99] Finally, the claimants relied upon *Cao.*[55] Woodhouse J distinguished *Cao* in which the High Court awarded damages against the Council based on repair costs, because in his view it wrongly interpreted the prima facie rule applied in *Warren & Mahoney* to claims for breach of contract as applying to tortious negligence.[56] In this case the Council's wrong was its negligence in carrying out the inspections and issuing the code compliance certificate. That is no different from the Council's tortious wrong in *Johnson.* There are no absolute rules as to the measure of damages in particular cases, but the general principles applied by the Supreme Court in *Altimarloch* and the High Court in *Johnson* in determining the appropriate measure of loss for a claim in tort should, I conclude, be appropriately applied in this case. There are no particular factual features in this case to persuade me that the normal measure of loss applying in cases of tortious negligence against the Council should not be applied in this case.

[100] Ms Yan and Mr Ngan have not undertaken repairs. The loss suffered to date is loss in value. Mr Gamby's uncontested evidence is that there are similar properties available on the market from time to time. He mentioned a number listed in recent months and included three comparable

[52] Above n 49.
[53] Above n 7 at [166].
[54] Above n 51 at 22.
[55] Above n 4.
[56] Above n 7 at [171].

monolithic clad homes for sale in his April 2013 valuation report.[57] Mr Gamby's evidence illustrates that the claimants should be able to purchase a similar home in the wider locality that they have grown an attachment to. I am of the view that detriment loss properly reflects the extent of the detriment actually suffered by Ms Yan and Mr Ngan, and fairly compensates them and is reasonable as between the parties.

[101] *Johnson* explains it is not necessary to make an assessment that the cost of repairs are unreasonable or that the cost of repairs are disproportionate. The conclusion needs to be based on established principles such as those applied in *Altimarloch* and *Johnson.* I am satisfied that the loss suffered by Ms Yan and Mr Ngan is the loss in value which could have been avoided or reduced had they taken reasonable steps. By assessing Ms Yan and Mr Ngan's detriment loss and awarding them diminution in value damages, it is consistent with my earlier conclusion in relation to contributory negligence.

[102] For the reasons discussed above, I conclude that detriment loss or diminution in value is the appropriate measure of loss in this tort case.

ORDERS

[103] I have found that Lizhen Yan and Gin Won Ngan have established their claim for damages of $453,025, less a reduction for their contributory negligence of 12 per cent being $54,363.00.

[104] I therefore make the following order:

a) Auckland Council is liable to pay Lizhen Yan and Gin Won Ngan the sum of $398,662.00 immediately.

DATED this 13th day of December 2013

K D Kilgour
Tribunal Member

[57] Michael Evan Leigh Gamby's Brief of Evidence dated 13 September 2013 at [26].