IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2011-100-000019
[2013] NZWHT AUCKLAND 25

BETWEEN	SAILI LIU, HAILING LIU AND QIANGHUA LIU Claimants
AND	AUCKLAND COUNCIL First Respondent
AND	MODERN HOME DEVELOPMENTS LIMITED (In liquidation) (REMOVED) Second Respondent
AND	ANDREW THOMAS Third Respondent
AND	COUTTS & CO LIMITED (REMOVED) Fourth Respondent
AND	KIM ROBINSON (REMOVED) Fifth Respondent
AND	PBS DISTRIBUTORS LIMITED (In liquidation) (REMOVED) Sixth Respondent
AND	JAMES MCLEAN Seventh Respondent
AND	GEORGE MAREVICH Eighth Respondent

Hearing:	27, 28 March, 7 May 2013
Closing submissions:	13 May 2013
Appearances:	T.J. Rainey for the claimant F.Divich for the first respondent Second respondent in person Seventh respondent in person D. J. Jenkin for eighth respondent
Decision:	25 September 2013

FINAL DETERMINATION
Adjudicator: S Pezaro

CONTENTS

[1] Hailing Liu, also known as Helen Liu, her husband Saili Liu, and their adult son, Qianghua Liu, also known as Peter Liu, own a leaky home at 9 Wakaroa Avenue, Te Atatu Peninsula, Auckland. They claim $415,206.80 for remedial costs, consequential losses and general damages. The Lius' house was built at the same time as the adjacent house at 48 Waimanu Bay Drive. A single building consent was issued for both dwellings and they are mirror images of each other. The Waimanu Bay Drive property was the subject of another claim (the Tomov claim) determined by this Tribunal.[1] The developer of both properties was the second respondent, Modern Homes Development Limited (MHD), which went into liquidation after these proceedings commenced and is therefore removed.

[2] The Lius' house is a large three storey dwelling constructed using the Eterpan/Venticlad cladding system. The fibre cement sheets are installed over a ventilated cavity. The fact that a cavity was used gives rise to one of the main issues in this proceeding, namely the scope of repairs required to properly remediate the property.

[3] Prior to hearing Auckland Council, the first respondent, accepted that it owed the claimants a duty of care which it breached when carrying out inspections and issuing the code compliance certificate. The Council accepts responsibility for three primary defects which it agrees have necessitated a full reclad. However the Council disputes the scope of works and the consequential losses claimed. It also disagrees that the cost of the remedial work is the appropriate measure of loss and contends for a loss of value approach. The Council raises affirmative defences of failure to mitigate and contributory negligence and cross-claims against the other respondents.

[4] Andrew Thomas, the third respondent, was the plasterer responsible for applying the external texture coating and the polystyrene bands.

[5] The fourth and fifth respondents are the real estate agency engaged by the vendor and the agent who sold the property. Prior to

[1] *Tomov v Auckland Council* [2012] NZWHT Auckland 34.

hearing the claimants withdrew their claim against these respondents and they are therefore removed. The agent, Kim Robinson, gave evidence at the hearing after being summoned at the request of the Council.

[6] The sixth respondent, PBS Distributors Limited (PBS), supplied the Ventclad cladding system to MHD. PBS complied with orders for discovery but took no other steps and did not appear at the hearing. PBS went into liquidation after the hearing and is therefore removed and the claims by the claimants and the Council against PBS are struck out.

[7] James McLean, the seventh respondent, is alleged to have been engaged by MHD to design and supervise the construction of the dwelling.

[8] Mr Marevich was an employee of PBS. The claimants and the Council allege that he had a duty to supervise the installation of the cladding and that he is liable for failing to properly supervise and advise the builders who installed it.

ISSUES

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

a) What are the defects that have caused weathertightness defects and damage?
b) What is the liability, if any, of each respondent for the defects?
c) What is the scope of repairs required to properly remediate the dwelling?
d) What is the reasonable cost of repairing those defects?
e) What are the consequential losses?
f) What general damages should be awarded?
g) Is the appropriate measure of the Lius' loss the cost of repair or diminution in value?
h) Did the Lius fail to mitigate their loss and/or did they contribute to their own loss?
i) What is the appropriate apportionment of liability between the Council and other liable respondents?

DEFECTS

[10] The claimants and the Council engaged expert witnesses in relation to the defects, the scope of remedial repairs required and the reasonable cost of those repairs. The experts, including the WHRS assessor, Paul Probett, agreed at an experts' conference on the primary defects that caused weathertightness damage to the property. The experts agreed that the cladding needs to be removed and replaced but did not agree on the full scope of repairs required.

[11] Mr McLean did not accept that the installation of the inter-storey polystyrene band was a fault. However this assertion is inconsistent with the unanimous expert evidence and therefore rejected.

[12] The experts agreed that the following defects either caused or are likely to cause water ingress:

a) Defect 1 – the butyl rubber membranes are not adequately dressed into the outlet openings, leaving the timber frame exposed.
b) Defect 2a – the deck balustrade walls have an inadequate fall to their top surface.
c) Defect 2b – the waterproof membrane to the deck balustrade was not installed down the vertical faces of the balustrades.
d) Defect 2c – no waterproof membrane was installed below the texture coating.
e) Defect 2d – no saddle flashing was installed at the junction between the main wall and the balustrade wall.
f) Defect 3 – the fibre cement sheet behind the cap flashing was unsealed.
g) Defect 4 – at the south east, south west and north west location of the house the polystyrene inter-storey band was not texture coated and is inadequately sealed to the cladding.
h) Defect 5 – on the western and southern corners of the ground floor bedroom and the eastern corner of the ground floor lounge two sections of the 'h' mould to the inter-storey control joint have not been adequately formed or sealed.
i) Defect 6 – there is inadequate clearance between the deck level on the ground and first floor decks.

j) Defect 7 – there is a lack of vertical control joints to the south east elevation wall which exceeds 5.4 metres in length.
k) Defect 8 – the two sections of the PVC soffit flashing are not adequately joined or sealed on the southern corner of bedroom two.
l) Defect 9 – there is inadequate cladding clearance to the external ground level on the southern corner of the laundry.

[13] The experts agreed that Defects 2b, 2d, and 4 were primary defects causing the need for a full reclad. The Council accepts responsibility for these defects. The Council also accepts responsibility for Defects 2a and 2c but says that Defect 2a was not causative of damage and 2c caused localised damage only.

THE LIABILITY OF AUCKLAND COUNCIL

[14] The Council accepts that it owed duties of care to the claimants which it breached when carrying out its inspections and issuing the code compliance certificate. The Council accepts liability for three primary defects which together necessitate a full reclad and accepts that the claimants have suffered pure economic loss. The Council is therefore jointly and severally liable with the other liable respondents for any loss proved by the claimants.

THE LIABILITY OF ANDREW THOMAS

[15] Mr Thomas gave evidence at the hearing but did not make any closing submissions. Mr Thomas accepted that he personally carried out the plaster work on the house, including sealing the cladding joints and installing the polystyrene bands.

[16] In Mr Probett's opinion, the failure to mesh the inter-storey bands was a significant defect and a primary cause of the need to repair the house. When questioned by Mr Rainey about his experience in plastering, Mr Probett said that for ten years he was a licensed Insulclad applicator and that his company clad some 200 homes. I therefore accept Mr Probett's opinion on the extent of damage caused by this defect.

[17] When Mr Thomas gave a written guarantee for his workmanship, he excluded any damage done by other subcontractors, the polystyrene moulding bands, and any damage or leaks caused by the bad workmanship of other tradespeople involved with the exterior cladding.[2] Mr Thomas says that he specifically excluded liability for the substrate because he did not consider it had been installed properly and for the polystyrene moulding and inter-storey bands because they were not pre-meshed. In evidence Mr Thomas stated that he told Mr McLean that he was not happy to install the inter-storey bands but Mr McLean told him to do so.

[18] A contractor cannot contract out of their duty of care to subsequent owners of a house[3] and Mr Thomas' attempt to contract out of the duty he owed is of no effect. Mr McLean agreed that he told Mr Thomas he had to use the bands because they were on site and I accept that Mr Thomas was in the difficult position of either abandoning the work or proceeding as instructed by Mr McLean. However, Mr Thomas did have a choice and he elected to carry out the plastering work on a substrate which he knew to be unsatisfactory and attach the inter-storey bands even though he had doubts about their quality.

[19] The work that Mr Thomas carried out has caused weathertightness defects which necessitate a full reclad. I therefore find that Mr Thomas is jointly and severally liable to the claimants for the full amount of their loss.

THE LIABILITY OF JAMES MCLEAN

[20] The claimants and the Council claim that Mr McLean performed the role of site supervisor or project manager. However Mr McLean described himself as the consultant to the developer and said that he was responsible for the concept design. Mr McLean said that his company, Modern Home and Design Consultancy Limited, is a one-man company and that he had worked extensively for MHD for many years. Mr McLean said he was a trouble-shooter, keeping an eye on the site and coming up with a solution for any difficulties that arose. He said that Ms Zhang, a director of MHD, relied on him to 'make sense' of the project and to keep an eye on things during construction.

[2] Exhibit B.
[3] *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 (CA).

[21] Mr McLean said MHD paid him a lump sum of $15,000 when the project was completed. Mr McLean was unable to describe how this payment was calculated although he said the amount was agreed before the project started and related to his work designing and conceiving the project.

[22] Mr McLean said that he was on the site about twice a week although sometimes it could be more and sometimes less. In evidence Mr McLean said that he "got rid of" a contractor whose work he was not happy with because he was too slow and would not comply with directions. Such decisions are generally made by a supervisor or project manager with responsibility for the quality of the construction.

[23] Mr McLean demonstrated an extensive knowledge of construction. He appeared to have input into the decision that the property would be built with a cavity; he referred to a decision he made to install a skylight; he accepted that he instructed Mr Thomas to proceed with the plastering work despite the concerns that Mr Thomas raised about the substrate and the unmeshed bands; and he had the authority to dismiss contractors from the site if he was not satisfied with their work.

[24] I found both Mr Thomas and Mr Marevich credible witnesses. Their evidence was consistent. In contrast Mr McLean appeared to have a good memory for some details but not others. Mr McLean said he recalled Mr Marevich coming on site with a manual but he did not recall speaking to Mr Marevich on the phone.

[25] Mr McLean said that he only recalls seeing Mr Marevich on site a couple of times and that it was just coincidence if Mr Marevich saw him on site. Mr McLean said that it was also coincidence that he was on site when the polystyrene bands were installed. Whether or not it was a coincidence, Mr McLean accepts that he required Mr Thomas to follow his instructions.

[26] I do not consider it credible that Mr McLean was paid $15,000 for a concept design only, particularly as he said that the plans were drawn up by somebody else. The amount that Mr McLean was paid and the timing of the payment, at the end of the project, is consistent with someone either performing the role of project manager and/or responsible for ensuring the completion of the project. Mr McLean made decisions which are consistent

with such a role. I find that Mr McLean therefore owed the claimants a duty of care which he breached by instructing Mr Thomas to apply plaster over the inadequate substrate and install the unmeshed polystyrene bands. The experts agreed that this defect (Defect 4) caused 35 per cent of the remedial costs and contributed to the need for a reclad. Mr McLean is therefore jointly and severally liable to the claimants for their full loss.

THE LIABILITY OF GEORGE MAREVICH

[27] PBS issued a producer statement and warranty to MHD. The warranty recorded that MHD engaged PBS to certify each stage of the installation of the Ventclad Cladding System. The claimants and the Council claim that this was Mr Marevich's responsibility and that he is liable for failing to identify defects in the installation of the cladding.

[28] Mr Rainey argues that Mr Marevich was the only person who attended the site and carried out inspections on behalf of PBS and that he owed the claimants a duty of care to ensure that the cladding was properly installed. Mr Rainey submits that Mr Marevich had a duty to certify the cladding installation therefore he had a duty to detect the obvious defects and advise PBS not to issue the producer statement.

[29] The producer statement included the following paragraph with provision for a signature:

> I, George Marevich of PBS Distributors certify that the information contained in this certificate is, to the best of my knowledge and belief, true and accurate.

[30] However Mr Marevich did not sign the producer statement issued for this property; it was signed by the PBS office administrator 'on behalf of George Marevich'. Mr Marevich says that he was a sales representative only and was not aware that MHD had engaged PBS to supervise the cladding installation. He denies any involvement with the construction although he accepts that it was part of his job to sign the producer statement.

[31] Mr Marevich accepts that he provided the PBS cladding guidelines to the builders on site and took them through these guidelines but he does not accept any responsibility for the quality of their work. Mr Marevich said

that he viewed the installation of the first cavity battens and the first two or three sheets of cladding on the Tomov house but says that he told Mr McLean that he would not accept any liability for monitoring the quality of the cladding installation and that this was not part of his role.

[32] Mr McLean and Mr Thomas were the only people who gave evidence at the hearing who were in a position to challenge Mr Marevich's evidence about his involvement on site. They did not do so. Mr Thomas said that he saw Mr Marevich on site but that Mr Marevich was not working or involved in the plastering work. Mr McLean did not recall meeting Mr Marevich on site or having any of the conversations described by Mr Marevich.

[33] Mr McLean said that the Lius' house went up simultaneously with the Tomov house and that each team was supervised by team leaders engaged by the head builder, Barry Walsh. In closing Mr McLean accepted that there was doubt as to whether Mr Marevich was responsible for ensuring that the cladding was installed in accordance with the PBS system.

[34] Mr Rainey submits that it is clear from the evidence of the PBS warranty and the affidavit sworn by Ms Zhang on 12 July 2011 in support of the application to join PBS and Mr Marevich that PBS agreed to certify the cladding installation. Ms Zhang deposed that Mr Marevich personally inspected the cladding work on behalf of PBS. However Ms Zhang was not called to give evidence at the hearing and Mr Marevich rejected her evidence. He said that he was not asked by PBS to supervise the cladding installation and did not agree to do so. Mr Marevich said that his role was restricted to selling the PBS system and making the builders aware of the need to use cavity battens and follow the requirements in the guidelines. I prefer the oral evidence of Mr Marevich to the untested evidence of Ms Zhang on this issue.

[35] The question of whether Mr Marevich owed these claimants a duty of care turns on his role in relation to the construction of their house, not the Tomov house. There is no evidence, other than that of Ms Zhang, that Mr Marevich did anything other than sell PBS product, provide the PBS cladding guidelines to the builders on site, and take them through those

guidelines. I do not accept that Mr Marevich's role extended beyond these duties. I therefore conclude that Mr Marevich was not responsible for the quality of the cladding installation and, as he did not assume such responsibility, he did not owe a duty of care to the claimants.

[36] Although Mr Marevich knew that the PBS producer statements were issued in his name, he did not sign the statement issued in respect of this dwelling. I therefore conclude that Mr Marevich has no personal responsibility for negligent misstatement. For these reasons the claim against Mr Marevich fails.

WHAT IS THE SCOPE OF REPAIRS REQUIRED TO PROPERLY REMEDIATE THE DWELLING?

[37] The claimants claim the cost of repairs based on the remedial proposal prepared by their expert, Neil Alvey. The estimate of costs based on this scope of works is $415,206.80. The Council argues that the correct cost for Mr Alvey's scope is $381,275.91 but contends that the scope proposed by Mr Alexander is more appropriate. The Council estimates the cost of repairs at $310,928.26 based on the scope of works prepared by its expert, Steve Alexander. The claimants have not provided an alternative estimate for Mr Alexander's scope.

[38] The difference between the two scopes, on the Council's estimate of costs, is $70,347.65. This difference increases to $104,278.54 if the Lius' estimate for the Alvey scope is applied.

[39] Mr Rainey suggested at the outset of the hearing that I am bound by the scope of work prepared by Mr Alvey and approved by the Tribunal in *Tomov*. I do not accept this contention as the evidence given in these proceedings is different from that in *Tomov*. The most significant difference is that different WHRS assessors were appointed in each case and in *Tomov* the assessor agreed with the scope of remedial work proposed by Mr Alvey.

[40] Each case must be decided on the basis of the factual matrix and evidence before the particular decision maker. In these proceedings there is a significant difference between the scope of repairs proposed by Mr

Alvey, Mr Alexander, and Mr Probett. The main difference in scope is due to different opinions on whether the windows need to be removed. There are also different opinions on the repairs required to the deck and the balustrade.

The Balustrade

[41] Mr Alvey proposes replacing the existing balustrade with one of a similar design and appearance however Mr Alexander recommends installing a glass and aluminium balustrade which is a cheaper option. Mr Probett disagrees with Mr Alexander's proposal because he considers that the design of this house requires the existing balustrade to be replaced with a similar one.

[42] An assessment of the reasonable cost of repair is premised on like for like repairs. I therefore accept Mr Probett's opinion that the balustrade proposed by Mr Alexander is not appropriate because it is not consistent with the design and appearance of the house.

Repairs to the Deck

[43] Mr Alvey proposes repairing the deck by removing and replacing the deck tiles with tiles sitting on tile jacks whereas Mr Alexander recommends replacing the existing balustrade with glass and aluminium and remediating the decks using an Ardex system with ceramic tiles adhered to the deck membrane. Mr Probett agrees that the Ardex system proposed by Mr Alexander is appropriate.

[44] Mr Rainey argued that the Alexander proposal for repairing the deck should not be accepted because the proposed Ardex system contravened a Council practice note. However Stephen Hubbuck gave evidence for the Council that there was ambiguity in the practice note and it was amended in the course of the hearing.

[45] In evidence Mr Hubbuck accepted that because the Ardex system proposed by Mr Alexander was an alternative solution, each application involving such a system would need to be determined on a case by case basis. Mr Rainey submits that the claimants should not be subject to such uncertainty about whether the Council will approve their remedial plans.

[46] Mr Probett considered the Ardex system a reasonable solution however it is clear from Mr Hubbuck's evidence that it is not certain that the Council will grant a building consent for a deck repair based on this system. The amount in issue is less than $7,000 and given the likely time and cost involved in amending the consent application, if the Ardex system is not approved by the Council, I am satisfied that it is fair and reasonable for the cost of the deck repairs to be based on the system proposed by Mr Alvey.

The Windows

[47] The experts agree that the existing cladding needs to be removed however Mr Alvey considers that the window joinery also needs to be removed together with the cavity battens and building wrap. He says that the claimants will need to vacate the house during repairs.

[48] Mr Alexander's scope of works is based on replacing all cladding with Literock, an alternative cladding system, and removing the building wrap around the joinery but leaving the window joinery in place. Mr Probett and Mr Alexander consider that as there is no evidence of damage around the windows it is not necessary to remove them during the remedial work. In their opinion the claimants can live in the house while it is repaired.

[49] The claimants argue that the lesser scope of repairs proposed by Mr Alexander would not necessarily be granted a building consent. The Council disagrees. It relied on the evidence given by Mr Hubbuck who is a Team Leader, Specialist Claims at Auckland Council. In his brief Mr Hubbuck said that the Council would issue a building consent for the Alexander proposal which allowed the windows to remain in place although the building consent would have to be amended if it became apparent that there was timber damage. However, in evidence Mr Hubbuck could not confirm that a building consent would be issued on the basis of the Alexander proposal. Mr Rainey submits that therefore the Alexander scope is not credible or reasonable.

[50] However at hearing Mr Alvey accepted that there was no evidence of damage around the windows. This concession meant that the only reason for removing the windows is to avoid any risk of undiscovered damage and to ensure that the new cladding is properly fitted around the windows.

[51] Mr Probett had no concerns about the effectiveness of the cladding system proposed by Mr Alexander and was clear that he saw no need for the windows to be removed. Differences of opinion between experts should not be resolved simply on the weight of numbers however I place significant weight on the evidence of Mr Probett as an independent expert. It is clear from the opinion he expressed in relation to the balustrade (above) that he considered the two proposed scopes objectively and formed his own view.

[52] Ms Liu said in evidence that Mr Alvey was likely to be engaged as the project manager for the remedial work. As a result Mr Alvey does not have the same degree of independence as Mr Probett. I therefore prefer the opinions of Mr Alexander and Mr Probett on this issue and conclude that the house can be properly reclad without removing the windows and that there is no appreciable risk in leaving the windows in place.

Disruption to Services

[53] In Mr Alvey's opinion the bathrooms and kitchen will be disrupted due to the need to repair the corners of the house. However in closing Mr Rainey accepted that there was no evidence of decay at the corners of the house and conceded that this element of Mr Alvey's scope of works was not appropriate.

[54] The window removal and disruption costs are two elements of the remedial work proposed by Mr Alvey that are not supported by the evidence. Therefore I prefer the evidence of Mr Alexander and Mr Probett on the extent of the damage and the repairs required. I am satisfied that the remedial scope proposed by Mr Alexander, amended to provide for a balustrade of a similar style to the existing one, will effectively remediate the property.

WHAT IS THE REASONABLE COST OF THE REMEDIAL WORK?

[55] I am satisfied that the estimate of $310,928.26 provided by the Council is reasonable for this scope with the addition of the sum of $6,829.00 for the decks. This brings the total repair cost to $324,495.26.

This sum does not allow for the additional cost of the balustrade repair in accordance with the Alvey scope and I do not have the information necessary to make this minor adjustment. However, given my conclusion on the measure of loss, it is not necessary to do so.

Consequential Losses

Remedial plans and building consent applications

[56] The Lius claim the cost of applying for two building consents because the first application lapsed. Ms Liu said that the first consent lapsed as they could not afford to carry out the remedial work until their claim was awarded.

[57] In my view it was not prudent for the claimants to apply for the consent until they were certain they could afford the repairs. It is not reasonably foreseeable that the Council's negligence would cause the cost of two building consents. The claim for the cost of the first building consent therefore fails.

Alternative accommodation and storage

[58] The claimants claim $24,611.75 being the estimated cost of alternative accommodation and moving and storing the contents of their house while repairs are carried out. The Alexander scope of works which I have accepted does not require the claimants to vacate the property however in evidence Mr Alexander and Trevor Henry, a quantity surveyor giving expert on costs for the Council, accepted that there may be some costs incurred if the claimants remained in the property during remediation. Mr Alexander accepted that these costs would include some provision for an office and portable toilet facilities.

[59] Mr White was not instructed prior to hearing to give evidence on such costs and at the hearing he gave what he described as a rough verbal estimate of $60,000 plus GST. In response to questions from Ms Divich, Mr White estimated the cost of an onsite office as approximately $150 per week and toilet facilities at approximately $40-$80 per week. Mr White also referred to allowances for transporting accommodation to the site, power, water, and other related costs.

[60] The Council has not provided any evidence on the costs that will be incurred if the claimants remain in the house during repairs. However I am not satisfied that Mr White justified his verbal estimate of $60,000. He said that, in addition to the cost of an onsite office and toilet facilities, there would be the cost of cleaning, power, and water. I am not satisfied that these costs, based on a 26 week repair period, are likely to amount to $60,000.

[61] Even if Mr White's estimate of the onsite costs was considered reasonable, it is clearly more than the cost to the Lius of vacating the property during remediation which is their preferred option. I therefore base the award of consequential costs on the cost of relocating to alternative accommodation, as estimated by Mr White.

GENERAL DAMAGES

[62] The claimants seek general damages of $25,000. This is not disputed other than the defence of contributory negligence. I accept that the claimants have suffered stress and are entitled to these damages.

CONTRIBUTORY NEGLIGENCE

[63] The Council and Mr Marevich, and to some extent Mr McLean, submit that the claimants contributed to their own loss by purchasing the property in 2009 when knowledge of leaky buildings was in the public domain without obtaining legal advice or a building report. The Council submits that the Lius' contribution to their own loss in this case is similar to that of the claimants in *Johnson v Auckland Council*[4] and a 70 per cent deduction is appropriate.

[64] Mr Rainey argued that the claimants were not negligent because there is no evidence before me that a reasonably prudent purchaser would have obtained a report. However Mr Rainey submits that, if the claimants are found to have contributed to their own loss, their contribution cannot be higher than that of the Council which caused the defects. On that basis he argues that the Lius' contribution should be no more than 20 per cent.

[65] The questions that need to be answered are:

[4] *Johnson v Auckland Council* [2013] NZHC 165.

a) Is there anything that the Lius have done which departed from the standard of a reasonably prudent purchaser and was negligent in relation to protecting their own interests?
b) If so, what is the causative effect of the Lius' negligence in relation to the damage for which they claim?

Relevant Principles

[66] 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:

[67] A pre-requisite to a finding of contributory negligence is a reasonable foreseeability of the risk of harm by a claimant.[5] The standard of care expected of a claimant in relation to protecting their own interests is lower than the standard expected of the defendant.[6] Any negligence by the claimant is not relevant unless it was a proximate cause of the damage on which the claim is based. Only negligence which is causal and operative can form the basis of a finding of contributory negligence and ordinary principles of causation and remoteness must be applied before any apportionment arises.[7]

[68] In *Sunset Terraces*[8] Heath J noted the reference in s 3(1) of the Contributory Negligence Act 1947 to the dual concepts of "fault" and "relative responsibility" and concluded that any assessment of contributory negligence turns on the relative blameworthiness and the causal potency of the alleged negligence by the claimant. In *O'Hagan v Body Corporate* 189855 (*Byron Avenue*)[9] the Court of Appeal concluded that a failure to obtain a LIM may amount to contributory negligence and warrant a

[5] *Hartley v Balemi* HC Auckland, CIV-2006-404-2589, 29 March 2007 at [100] - [111] and [117].
[6] Stephen Todd (ed) *Law of Torts* (6th ed, Brookers, Wellington, 2013) at 21.2.05.
[7] At 21.2.03.
[8] *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479 (HC).
[9] *O'Hagan v Body Corporate* 189855 [2010] NZCA 65, [2010] 3 NZLR 445.

reduction in the award of damages.[10] Whether a finding of contributory negligence and a reduction in damages is appropriate depends on the circumstances, particularly on what enquiries would have revealed and what a prudent purchaser would have concluded on the basis of the resulting information.[11]

[69] The question of contributory negligence was considered by the High Court in *Jung v Templeton.*[12] The claimant had purchased a unit subject to a building inspection which indicated that remedial work needed to be done. However the claimant failed to carry out this work. The Court concluded that the purchaser of a building can be guilty of contributory negligence either by failing to avail themselves of the opportunity of an inspection or, having carried out an inspection, by failing to act reasonably in response to that inspection report.[13] The Court found that the appropriate test of reasonableness is whether a prudent person would have acted to safeguard their own interest in the same circumstances.[14]

[70] In *Johnson v Auckland Council*[15] the claimants purchased a house by tender as a mortgagee sale. They argued that they relied on the CCC when they purchased and therefore were not negligent in not carrying out a pre-purchase inspection report or checking the Council file. Woodhouse J concluded that the Johnsons contributed to their own loss because they committed themselves even though there was a possibility that the house may be a leaky home. His Honour concluded that they took a calculated risk and set contributory negligence at 70 per cent.

[71] In *Coughlan v Abernethy*[16] the Court considered an appeal from this Tribunal on the issue of whether owners who purchased in 2003 were negligent by failing to heed warnings in a pre-purchase report. The Court held that the claimants took a risk by proceeding with the purchase without obtaining full invasive tests as recommended by the pre-purchase inspector. Contributory negligence was set at 10 per cent.

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[10] At [136].
[11] At [138].
[12] *Jung v Templeton* [2010] 2 NZLR 255 (HC).
[13] At [44].
[14] At [45].
[15] Above n4.
[16] *Coughlan v Abernethy & Ors* HC Auckland, CIV-2009-004-2374, 20 October 2010.

What were the circumstances of the purchase?

[72] Mrs Liu said she saw some fine hairline cracks in the cladding prior to purchase although she said that there was no damage on the inside. Ms Liu said she was reassured about the condition of the house after talking to Mr Robinson, the real estate agent, because he said that the building had a cavity and the house had only been lived in for four years. Mr Robinson denies telling Ms Liu that the building had a cavity and does not recall telling her how long the vendors lived there.

[73] Mr Robinson gave the claimants a property pack which included a copy of the title and the LIM. They then went to the Council office and looked at the Council file. They saw that the Council had issued a Code Compliance Certificate.

[74] The claimants then returned to inspect the property a second time. Mr Robinson told them that the property was subject to a conditional offer by another party. The Lius understood that they had to make either an unconditional offer or one which would shortly become unconditional to trigger the condition whereby the vendor could accept their offer.

[75] The Lius did not obtain legal advice before signing the agreement to purchase nor did they make the agreement conditional on obtaining a pre-purchase building inspection report. They signed the agreement on 5 April 2009 and it went unconditional on 8 April 2009. They took possession on 22 May 2009.

What was the standard of the reasonably prudent purchaser in 2009?

[76] Ms Divich submits that from 2003 the Courts have indicated that a failure to obtain a pre-purchase inspection report or to heed the warnings in any pre-purchase report may lead to a finding of contributory negligence between the level of 25 and 75 per cent. Ms Divich argues that claimants such as the Lius who do not take any steps to obtain a pre-purchase report or seek advice before purchasing should not be in a better position than claimants who obtain a report but fail to act on that advice.

[77] The Council relies on the evidence of Tim Jones, an expert conveyancing solicitor. Mr Jones said that if the Lius had sought legal

advice prior to signing the agreement, they would have been advised to obtain a pre-purchase builder's report, particularly if they disclosed to their conveyancing solicitor that they had seen cracks in the cladding. Mr Jones said that most solicitors would want to look at the LIM and would not want their clients to rely on their own inspection of a Council file because clients do not know what they are looking for.

[78] In evidence Mr Jones said that in his opinion a reasonably prudent purchaser 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 vendors or a real estate agent on the condition of the building.

[79] Under cross-examination by Mr Rainey, Mr Jones accepted that not every purchaser obtains a building report, even when purchasing monolithically clad buildings. He also accepted that the value of a pre-purchase report depends on the person carrying out the report and that he "wouldn't recommend too many people in the yellow pages" and that a report does not guarantee that defects will be identified.

[80] Mr Rainey argues that there is no history of purchasers in New Zealand obtaining pre-purchase reports and submits that the Lius' failure to obtain legal advice was not negligent. Mr Rainey relies on the decision of the High Court in *Byron Avenue*[17] where Venning J concluded that a purchaser was not negligent for failing to take legal advice before signing the agreement. Mr Rainey accepts that *Byron Avenue* concerned a purchaser in March 2002 however he submits that the evidence before the Tribunal does not establish that the situation was different in 2009.

[81] However the Lius were in a very different situation from the purchasers in *Byron Avenue*. The *Byron Avenue* unit owners purchased before the establishment of the Weathertight Homes Resolution Service in 2003, the Building Act 2004, and the Weathertight Homes Tribunal in 2007. The ADLS agreement for sale and purchase[18] that the Lius signed was introduced in 2006. This edition included the recommendation that both parties seek professional advice before signing the agreement, especially if

[17] *Body Corporate No 189855 v North Shore City Council* HC Auckland, CIV-2005-404-5561, 25 July 2008.
[18] Auckland District Law Society & Real Estate Institute of New Zealand Inc, *Agreement for Sale and Purchase of Real Estate* (8th ed, 2006(2)).

the purchaser wishes to check the weathertightness and soundness of construction of any dwellings or other buildings on the land. The reference to weathertightness in this edition indicates that leaky buildings were an issue for purchasers to consider by 2006.

[82] In *Johnson* Woodhouse J considered that the widespread problem with leaky homes was well publicised by 2009. In 2009 when the Lius purchased because they knew about leaky buildings. Mrs Liu's evidence is that she heard about leaky buildings on the radio through Chinese language programs. In addition, the Lius could see cracks in the cladding and were concerned enough by these cracks to ask questions of the real estate agent. Ms Liu confirmed in evidence that the cracks that she noticed prior to purchase were the same sort of cracks photographed less than four months later by the WHRS assessor.

[83] The question of contributory negligence is determined objectively.[19] The test is not whether the Lius' conduct fell below the standard reasonably expected of them but whether it fell below the standard reasonably to be expected of people in their position.

[84] The Lius were purchasing a house of significant value. Although it was their third home in New Zealand, there is no evidence that experienced home owners have less need of legal advice than first home buyers. On the basis of Mr Jones' evidence I am satisfied that at the time when the Lius purchased and in those circumstances, a prudent purchaser would have sought legal advice.

[85] I accept Mr Jones' evidence that, had they sought legal advice, the Lius would have been properly advised on the age of the property and advised to obtain a pre-purchase report. I accept that the standard of reports may differ and that a report does not guarantee that particular defects will be found. However, given the cracks that existed at the time of purchase were apparent to the untrained eye of Ms Liu, I conclude that it is likely that a pre-purchase report obtained at this time would have identified the risk that this house was a leaky building.

[19] *Badger v Ministry of Defence* [2006] 3 All ER 173 as cited in *Hartley v Balemi,* above n5, at [104].

[86] I conclude that by failing to obtain legal advice and a building report, the Lius did not act in accordance with the standard of a reasonable purchaser and were negligent in protecting their own interests.

To what extent, if any, did the Lius' negligence cause their loss?

[87] Within four months of settling the purchase, the claimants applied for a WHRS report. In evidence Mr Probett confirmed that some of the cracks which he photographed in his report would have been apparent at the time of purchase.

[88] In *Johnson v Auckland Council* Woodhouse J cited *Marlborough District Council v Altimarloch Joint Venture Ltd*[20] and concluded that a plaintiff cannot claim damages which could have been avoided or reduced by taking reasonable steps.[21] The Lius were aware of the leaky home problem and could see cracks in the cladding of this house before they purchased. I have concluded that they could have reduced their loss by taking steps to protect their interests. By failing to obtain proper pre-purchase advice the Lius took what the Court in *Johnson* termed 'a calculated risk'.

[89] The Lius' liability is assessed by taking into account the causative potency of their negligence and their relative blame worthiness.[22] I do not accept Mr Rainey's submission that the Lius' liability should be no higher than the Council's. This submission confuses the negligence of joint tortfeasors who have caused construction defects with the Lius' negligence in acquiring the house without proper regard to the foreseeable risk.

[90] The condition of the house at the time of purchase is relevant to the extent of the risk. In December 2012 I instructed Mr Probett to update his original report in relation to the extent of remedial work required and the estimated cost. Mr Probett considered the evidence of Mr Alvey and also carried out his own investigation. He made only minor amendments to the scope of repairs that he had identified in 2009. The Alexander scope of works that I have approved is consistent with Mr Probett's latest report.

[20] *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726, (2012) 10 NZBLC 99-700.
[21] *Johnson v Auckland* Council, above n4, at [174].
[22] See *Body Corporate 188529 v North Shore City Council & Ors (No 3)* HC Auckland, CIV-2004-404-3230, 30 April 2008, at [555] – [567].

Therefore I conclude that the extent of the Lius' potential loss was largely established at the date of purchase.

[91] A further relevant factor is the extent to which the claimants departed from the standard of a reasonably prudent purchaser. Woodhouse J observed in *Johnson v Council* that a precedent will only be established where facts are sufficiently similar.[23] In my view *Johnson* provides a guideline because the circumstances of this case are similar. The Lius purchased in April 2009, as did the Johnsons. Like the Johnsons, the Lius were aware of leaky buildings and made some enquiry about the soundness of the construction but did not get a building report.

[92] The Lius did inspect the Council records to satisfy themselves that the Code Compliance Certificate had issued. Unlike the Johnsons they could see cracks in the cladding prior to purchase. Unlike the Johnsons, the Lius did not seek legal advice.

[93] I have weighed all these factors in determining the level of contributory negligence and assess the liability of the Lius at less than that of the Johnsons. I conclude that a 40 per cent reduction of the damages that would otherwise be recoverable by these claimants is just and equitable.

DID THE CLAIMANTS FAIL TO MITIGATE THEIR LOSS?

[94] The Council submitted that the claimants failed to mitigate their loss because they had a contractual claim against PBS which they chose not to pursue. In closing, Ms Divich conceded that this was a difficult argument to maintain. The fact that PBS is now in liquidation demonstrates that, even if the claimants had elected initially to pursue PBS in contract, there may have been no benefit to them or the other respondents. I am not satisfied that the claimants could have mitigated their loss by pursuing a contractual claim and this defence therefore fails.

[23] Above n4, at [128].

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

[95] The claimants and the Council disagree on the appropriate measure of the Lius' loss. The claimants submit that it is appropriate in this case to award damages based on the cost of the remedial work whereas the Council contends that damages should be based on diminution in value because the claim against the Council is in tort. The difference between the proven cost of repairs of $324,495.26 and the Council's estimate of $200,000 for diminution in value is $124,495.26.[24]

Relevant Principles

[96] The claimants rely on the decision of the High Court in *Cao v Auckland City Council*[25] which set damages based on the cost of repairing the weathertightness defects, overturning a decision of this Tribunal to award damages against the Council based on diminution in value. The Council argues that the Tribunal is bound by the more recent decision of the High Court in *Johnson v Council* which awarded damages based on loss of 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.

[97] In *Marlborough District Council v Altimarloch Joint Venture Ltd,*[26] Tipping J said:

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

[24] The repair cost does not allow for the additional cost awarded for the balustrade, see [55] above.
[25] *Cao v Auckland City Council* HC Auckland, CIV-2010-404-7093, 18 May 2011.
[26] *Marlborough District Council v Altimarloch Joint Venture Ltd* , above n 20.

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

[99] 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[27] and the Supreme Court was not required to consider this issue. However Elias CJ emphasised that assessment of damages is a matter of fact.[28]

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

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

[101] In *Johnson* the plaintiffs argued that the cost of repairs was the normal measure of damages which should apply to their claim against the Council. However Woodhouse J observed that in a number of leaky home

[27] *Vining Realty Group Limited v Moorhouse* [2010] NZCA 104, (2010) 11 NZCPR 879 at [113].
[28] *Marlborough District Council v Altimarloch Joint Venture Ltd*, above n20, at [23].

cases before the Court the correct measure of damages had not been considered because it was not in issue. His Honour expressed the view that: [29]

> ...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.

[102] His Honour also noted that the Johnsons did not address the underlying principles or advance any argument which justified a different outcome from the Court of Appeal decision in *Altimarloch*[30] and concluded that the normal measure of damages applying in cases of tortious negligence should apply. Woodhouse J also considered that the High Court in *Altimarloch* applied the principle that the "plaintiff cannot claim damages which could have been avoided or reduced by the taking of reasonable steps". His Honour concluded that the finding of contributory negligence against the Johnsons warranted the decision that it would not be reasonable to assess loss on the basis of repair costs.

[103] His Honour concluded that the normal measure of damages for negligent misrepresentation in tort applied and calculated damages on the difference between the price paid by the Johnsons and the actual value of the property in its true condition.[31] His Honour recorded that this decision was based on long established principles, not on an assessment that the cost of repairs was unreasonable or disproportionate to diminution in value.[32]

[104] Woodhouse J distinguished *Cao v Auckland City Council*[33] in which the High Court awarded damages against the Council based on repair costs because in his view it wrongly interpreted the prima facie rule applied in *Warren & Mahoney v Dynes*[34] to claims for breach of contract as applying to tortious negligence.[35]

[105] *Warren & Mahoney* involved claims against an architect and an engineer relating to the construction of a house and swimming pool on

[29] *Johnson v Auckland Council*, above n 4, at [175].
[30] At [172].
[31] At [151].
[32] At [173].
[33] *Cao v Auckland City Council,* above n25.
[34] *Warren & Mahoney v Dynes* CA4988, 26 October 1988.
[35] *Johnson v Auckland Council*, above n4, at [171].

unstable land. The claim against the architect was in contract whereas the claim against the engineer was in tort. The High Court concluded that in the circumstances of that particular case there should be no difference in the measure of damages awarded between the claims in contract and in tort.[36] However, in *Warren & Mahoney* the plaintiff argued that damages should be assessed either as the cost of rebuilding on other land or diminution of value and the architect and engineer argued that the appropriate measure was a combination of both.

The submissions of the Claimants

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

[107] Mr Rainey further submits that the wording and purpose of the Weathertight Homes Resolution Services Act 2006 supports the cost of repair as the primary measure of loss in Tribunal claims. Although he acknowledges that s 50 of the Act empowers the Tribunal to award either loss of value or the cost of repairs, Mr Rainey argues that because s 42(2) of the Act requires the assessor to estimate the cost of repair and not the loss in value, Parliament intended that the cost of repairs would be the main measure of loss and damages.

[36] *Dynes v Warren & Mahoney* HC Christchurch, A252/84, 18 December 1987.

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

[109] Mr Rainey accepts that the cost of repair is greater than the loss the claimants would suffer if they sold and bought another similar property but argues that it is not unreasonable for the claimants to undertake repairs. He submits that the cost of repairs is not disproportionate to the diminution in value although the repairs represent investment of 51 per cent of the value of the house.

Submissions of the Council

[110] Ms Divich submits that there is a basic distinction between damages claimable in tort and damages claimable in contract which has been analysed by the Supreme Court in *Altimarloch* and applied by the High Court in *Johnson*. Ms Divich submits that the Tribunal is bound by those decisions and the proper measure of damages is therefore the difference between the price the claimants paid for the property ($710,000) and the market value of the property in its defective state ($510,000). The Council therefore argues that the Lius' loss is $200,000.

[111] Ms Divich argues that the evidence given by Evan Gamby for the Council on the 2009 value of the property should be preferred to Matthew Taylor's evidence for the claimants because Mr Taylor's evidence is contradictory. Ms Divich points out that in 2009 Mr Taylor assessed the 'as is' value of the property on the basis that it could only be lived in for two years before needing to be demolished or repaired. However, Mr Taylor then estimated the value of the property in 2013 based on it being livable for a further three years from that date.

[112] Ms Divich argues that Mr Taylor's second valuation implies that the property was able to be lived in, or rented, for seven years from 2009. She submits that Mr Gamby's opinion that in 2009 the property was livable for six years is consistent and should be preferred. Ms Divich also argues that the property has increased in value over the four years since the claimants purchased, making it more economic to rebuild.

Discussion

[113] Mr Rainey argues that the Lius are in a very different situation from the claimants in the *Johnson* case. He submits that their position is similar to the claimants in *Cao* and in *Hepburn v Cunningham.*[37] I do not accept this submission as, although in *Hepburn* Wiliams J referred to *Cao* and adopted the approach used in that case, His Honour did so without the benefit of submissions that took into account the decisions in *Altimarloch* or *Johnson*.

[114] Whether the cause of action against the Council is the conduct of the inspections or the issuing of the code compliance certificate the legal wrong is a tort. In *Johnson* the Council admitted negligence in carrying out the inspections and issuing the CCC, the same acts which give rise to this claim against the Council.[38] I am not persuaded that negligence in conducting building inspections is a more direct cause of building defects than issuing the CCC or that each cause of action necessarily gives rise to a different measure of damages. I therefore do not accept Mr Rainey's submission that there is a basis for distinguishing *Johnson* from this claim against the Council.

[115] I also do not accept Mr Rainey's submission that the Act reflects an intention that the cost of repair is the primary measure of damages. While Parliament may have anticipated that damages would generally be applied to repairing homes that does not mean that it intended the cost of cure to be based on repair costs in every case. Section 50(1) of the Act provides that a claimant may claim any remedy that can be claimed in a court of law. The amendments to the Act to provide for the Financial Assistance Package are intended specifically to provide for contribution by government and territorial authorities toward repair costs and should not in my view be interpreted as limiting the Tribunal's power to award damages based on loss of value, in accordance with common law principles.

[116] The argument that loss of value cannot be determined until the house is sold has no merit. This is no more logical than suggesting that the cost of repairs cannot be determined until the repairs are carried out. I am satisfied that it is fair and appropriate to assess either the estimated cost of

[37] *Hepburn v Cunningham Contracts Limited* [2013] NZHC 2119.
[38] Amended Statement of Claim, 15 November 2012, at [22].

repair or estimated loss of value on the basis of the evidence before the Tribunal which in this case is expert evidence. Further, it is not possible to calculate diminution in value without first assessing the cost of repairs and there is nothing in s 50 to indicate that the Tribunal should prefer one measure of loss over the other.

Conclusion of the measure of loss

[117] In assessing the actual and reasonable loss of these claimants I have considered the following facts:

a) The claimants purchased at a time when damage caused by weathertightness issues was apparent to them;
b) Within four months of purchase they had arranged an assessment which confirmed that this was a leaky home;

[118] The Lius are in a different position from the claimants in *Kroczak*[39] who purchased their house within six months of the Council issuing a CCC and lived in the house for nine years before they discovered it was a leaky home.

[119] I therefore conclude that, although there are no absolute rules as to the measure of damages in particular cases, the general principles applied by the Supreme Court in *Altimarloch* and the High Court in *Johnson* to determining the appropriate measure of loss for a claim in tort are appropriately applied in this case. I am satisfied that the losses suffered by these claimants are damages which could have been avoided or reduced had they taken reasonable steps. I therefore conclude that the Lius' loss occurred at the date of purchase and that the appropriate measure of their loss is the loss of value as at the date of purchase.

[120] Mr Rainey argued that if the loss of value argument was accepted there remains a question as to whether that assessment would fully compensate the claimants for their loss. He submitted that an intermediate sum between loss of value and full reinstatement can be awarded. Mr Rainey said that the evidence of both valuers suggested that there would be a significant risk in the claimants achieving the sale price "as is". He

[39] *Kroczak v Auckland Council* [2013] NZWHT Auckland 15.

suggested that there was a real risk that the claimants might get no more than the land value when they come to sell.

[121] An assessment of such risk may be relevant to an award of damages based on breach of contract where the purpose of damages is to put the party whose rights have been breached in the same position as if those rights have been served. However in this case I have concluded that proper measure of damages is the tortious measure and this involves an assessment of the loss at the date that it occurred. Both valuers took the same approach to assessing that loss and it is clear from Mr Taylor's valuation that the land value has increased since the claimants purchased.

QUANTUM OF LOSS

[122] I note that there is a significant difference between the cost of repairs and damages based on the loss of value. However this has not been a determining factor in assessing the appropriate measure.

[123] Mr Taylor and Mr Gamby used the same methodology in giving evidence on value. However there was a difference between their assessed loss in value as at May 2009 of $135,000.

[124] I have taken the starting point for assessing loss of value in May 2009 as the purchase price of $710,000. Mr Taylor based his assessment of the 'as is' value of the property at the time of purchase on an unaffected valuation of $740,000. However, the Lius only paid $710,000 and in my view there is no justification for basing the loss on anything other than the price the claimants paid for the property. This is what Mr Gamby did and I therefore prefer his evidence on the "as is" market value of the property in May 2009.

[125] The difference of $85,000 in the two valuers' assessments of the affected market value is largely due to a difference of opinion on the residual value of the improvements. Mr Taylor assessed this value on the basis that in 2009 the property could only be rented for two years before it would need to be repaired or demolished. Mr Taylor then assessed the affected value in 2013 on the basis that the property could be rented for a further two years. In total therefore he has assessed the property as being able to be lived in or rented for six years.

[126] Mr Gamby's assessment of the property at 2009 was that it could be lived in for five to seven years with a conclusion that six years was the appropriate date for demolition or repairs.

[127] Mr Probett noted in his second report in 2012/2013 that there was still no evidence of internal damage and at the date of hearing the claimants had lived in the property for four years without undertaking repairs.

[128] I conclude that Mr Taylor's assessment of the residual value at 2009 is not consistent with either his assessment of the 'as is' value in 2013 or the evidence that the property has been fit for the Lius to live in for a longer period than he allowed. I therefore prefer Mr Gamby's evidence in relation to the 2009 "as is" value and accept his valuation of $510,000 for the property at that date.

[129] However Mr Gamby did not allow for the costs that the claimants will incur when they sell. Mr Taylor assessed these costs as $20,075 and I have awarded this sum to the claimants.

[130] The sum awarded to the claimants is $147,045.00 calculated as follows:

Unaffected value of property at May 2009	$710,000.00
Less "as is" value	$510,000.00
Balance	$200,000.00
Plus – selling costs	$20,075.00
Total	$220,075.00
General damages	$25,000.00
Total	$245,075.00
Less 40 per cent	$98,030.00
Total	$147,045.00

WHAT IS THE APPROPRIATE APPORTIONMENT OF LIABILITY BETWEEN RESPONDENTS?

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

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

[133] 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…

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

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

[136] The Council submits that its liability should be no more than 20 per cent which is consistent with the decision of *Mt Albert Borough Council v Johnson.*[40] However in the circumstances of this claim where the liable

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

parties do not include the developer or the supplier of the cladding I have apportioned liability of 30 per cent to the Council.

[137] Mr Thomas made it clear to Mr McLean that he was not satisfied with the quality of the substrate or the polystyrene bands and attempted to exclude these aspects of the work from his guarantee. However, Mr McLean required Mr Thomas to proceed with the work. The only alternative for Mr Thomas was to leave the job. He did not do so and in the circumstances of this claim I apportion liability to him of 10 per cent.

[138] Mr McLean had the authority to ensure that the substrate defects were rectified and to provide the meshed bands, as requested by Mr Thomas. However Mr McLean made a conscious decision to reject the advice of the expert, Mr Thomas. I therefore find Mr McLean responsible for the defects in the cladding substrate and the inter storey bands which alone caused the need for the house to be fully reclad. Mr McLean has greater liability than the Council and Mr Thomas and I apportion liability to him of 60 per cent.

ORDERS

[139] I therefore make the following orders:

i. Auckland Council, Andrew Thomas, and James McLean are jointly and severally liable to pay Hailing Liu, Saili Liu, and Qianghua Liu the sum of $147,045.00 immediately.
ii. The Auckland Council is entitled to recover from Andrew Thomas and James McLean any amount that it pays to the claimants over and above the sum of $44,113.50 being 30 per cent of $147,045.00.
iii. Andrew Thomas is entitled to recover from Auckland Council and James McLean any amount that he pays to the claimants over and above the sum of $14,704.50 being 10 per cent of $147,045.00.

iv. James McLean is entitled to recover from Auckland Council and Andrew Thomas any amount that he pays to the claimants over and above the sum of $88,227.00 being 60 per cent of $147,045.00.

DATED this 25th day of September 2013

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S Pezaro
Tribunal Member