IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2009-404-001880

BETWEEN	PAUL MICHAEL WHITE AND WILNA WHITE Appellants
AND	RODNEY DISTRICT COUNCIL First Respondent
AND	LORELLE JOY KERKIN Second Respondent

CIV 2009-404-002735

AND BETWEEN	PAUL MICHAEL WHITE AND WILNA WHITE Appellants
AND	LORELLE JOY KERKIN Respondent

Hearing: 16 July 2009

Appearances: GDR Shand and H M Dymond-Cate for Appellants
D Heaney SC and S Macky for Rodney District Council
M Black for L J Kerkin

Judgment: 19 November 2009 at 5:00 p.m.

JUDGMENT OF WOODHOUSE J

This judgment was delivered by me on 19 November 2009 at 5:00 p.m. pursuant to r 11.5 of the High Court Rules 1985.

Registrar/Deputy Registrar

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Solicitors:
Mr GDR Shand, Grimshaw & Co., Solicitors, Auckland
Mr D Heaney SC, Heaney & Co., Solicitors, Auckland
Mr M Black, Barrister, Auckland

[1] This is an appeal against determinations of the Weathertight Homes Tribunal on a claim by owners of a leaky home. The appellants, Mr and Mrs White, are the homeowners. The second respondent, Mrs Kerkin, with her late husband, built the house and sold it to the Whites in January 2002. The claim has been maintained against Mrs Kerkin personally and in her capacity as executor of her husband's estate. The first respondent, the Council, was responsible for inspecting the building during the course of construction and for issuing a code compliance certificate.

[2] In a decision dated 4 March 2009 the Tribunal adjudicator, Mr K D Kilgour, made the following determinations of relevance to the issues on appeal:

a) The Council was liable for negligence in inspections of the building work and in issuing a code compliance certificate.

b) Mrs Kerkin was liable for breach of warranties contained in the agreement for sale and purchase between the Whites and the Kerkins.

c) Mrs Kerkin was liable for negligence in respect of defective construction of the house. This arose from acts and omissions of Mrs Kerkin or her husband as project managers and head contractors for the construction of the house.

d) The costs of remedial work were assessed at $281,250, as against a claim by the Whites for $401,000.

e) There was an award of $14,752.68 for consequential losses (expenses arising from the necessary repair work).

f) General damages of $10,000 were awarded to each of Mr and Mrs White, as against claims of $30,000 each.

g) A claim that the Whites had failed to take reasonable steps to mitigate damage was upheld. This resulted in a reduction by 45% of the total of $315,002.68 awarded for remedial costs, consequential losses and

general damages. This reduced the award by $142,201.20 to $173,801.48.

[3] In a further determination, dated 23 April 2009, the adjudicator dismissed an application by the Whites against Mrs Kerkin for costs of $50,000 and disbursements of $23,509.50.

[4] Mr and Mrs White appealed against the assessments of the costs of remedial work and general damages, the mitigation finding, and the refusal of the application for costs. The appeal against the assessment of the costs of remedial work was withdrawn at the conclusion of the appeal hearing.

[5] There was a cross-appeal by the Council. This was withdrawn. There was no cross-appeal by Mrs Kerkin.

[6] I will consider the issues relating to mitigation, general damages and costs in that order.

Mitigation of damage

The principal issues

[7] The onus was on the defendants to establish that the Whites had failed to mitigate damage. It was not in issue that the Whites had not undertaken any relevant repairs to their house from the date of purchase in January 2002 until the date of the Tribunal hearing in January and February 2009. The principal issues that now arise are as follows:

a) In July 2003 Mr White became redundant and the Whites' savings were consumed. The evidence is that prior to that date the Whites could afford to carry out repairs to a deck at a cost of around $18,000. Did their failure to carry out those repairs constitute a failure to mitigate damage?

b) If that did constitute a failure to mitigate damage, to what extent did the Whites' omission increase the damage to their home and what sum should be deducted in that regard?

The facts

[8] Mr and Mrs Kerkin began building the house in June 1993. They did not obtain a code compliance certificate from the Council until November 2001, but they occupied the house as their home from early 1994.

[9] The Whites made an agreement to buy the property from the Kerkins in December 2001. They completed the purchase in January 2002.

[10] In February 2002 they received a report on the house from a building surveyor, Mr Jordan. Mr Jordan recorded his assessment that the house was built in about 1993. Under a heading "overall summary", Mr Jordan said:

> The house is in good overall condition. We have some concerns about the weatherproofness of the semi-circular decks and further investigation is recommended. The standard of materials and construction is appropriate for a house of this age and type. Recommended remedial works in the short to medium term are scheduled in section 13 of this report.

[11] In April 2002 the Whites got Mr Jordan back to carry out further investigation, as he had recommended. Mr Jordan then provided specifications for "remedial works to deck and water tanks". The house has a number of decks; Mr Jordan's recommendations related to one deck only.

[12] In May 2002 the Whites got a quote from a builder, Mr Claringbold, for close to $20,000 for the recommended work on the water tanks and the deck. In June and July 2002 the Whites obtained quotes from two other builders for broadly similar sums. The Whites got Mr Claringbold to do the work on the tanks as a priority because of health concerns. No other remedial work relevant to this appeal was undertaken down to the date of the Tribunal hearing.

[13] Mr Claringbold had been recommended to the Whites by Mr Jordan and the Whites were satisfied with the quality of Mr Claringbold's work. For these reasons they wanted him to do the work on the deck, but they had difficulties getting him back to do the job. Mr Jordan confirmed this. Mr Jordan was asked by Mr Black, for Mrs Kerkin, if the builder was "reasonably prompt and able to assist people as they may require". Mr Jordan replied:

> No. He's not. He's a very busy builder, because he's a pretty good builder and I subsequently gave up ever suggesting that he ever be involved because he's a very hard man to pin down.
>
> (page 333)

[14] In about September 2002 the Whites consulted solicitors. The solicitors wrote to Mr and Mrs Kerkin's solicitors in October 2002. They referred to the problems with the water tanks and the deck, sent a copy of Mr Jordan's report, and referred to the estimate for repairs at around $18,000 for the deck and $1,700 for the tanks. The Whites' solicitors advised that they considered that the Kerkins were liable to make good the damage outlined in the Jordan report. The response was a denial of any liability, criticism of the time taken by the Whites to contact the Kerkins, advice that the Kerkins were not aware of any defects, and reference to the fact that the Council had issued a code compliance certificate.

[15] The Whites' solicitors wrote again to the Kerkins' solicitors in November 2002. They explained steps taken by the Whites, stated that it appeared that the code compliance certificate should not have been issued, and said:

> We note that your clients are denying any liability in respect of the damage that has occurred. Our clients now wish to take mitigation measures and repair the deck during the summer months. We advise that the deck can be made available for inspection by your clients and/or their engineers before repair work commences for a further 14 days period. If we have not heard from you or your clients within that period of time we will presume that your clients do not want the opportunity to inspect the damage. Our clients will instruct their builders to repair the damage and once work has been completed will be issuing proceedings for recovery of the same.

[16] The Kerkins' response, through their solicitors, was to the same effect as the first response. The Kerkins steadfastly denied liability, in contract and tort, through to the conclusion of the Tribunal hearing in January 2008. The Council did likewise

from the date the Council was notified of a possible claim, which appears to have been around April 2004.

[17] By about October or November 2002, it became apparent to the Whites that their preferred builder, Mr Claringbold, was not going to be available to complete the work on the decks. They attempted to get other builders. They had difficulties. Mrs White said:

> … we were new immigrants to New Zealand, we have no support network, both of us were in full-time [work] and everyone of these visits [by builders for inspections] required one of us to take a day off work and we hadn't accrued that leave. It did take a long time, but builders work according to their own timetable as well. We would typically get hold of a builder and he would come around five weeks later.
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> …
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> MR BLACK: … are you saying that you just could not get any other person to deal with these remedial works that were specified by Mr Jordan?
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> MRS WHITE: I'm not saying we couldn't, I'm saying that we tried and a lot of the people that we arranged to come round and see the house, either didn't pitch, pitched up once and didn't return phone calls, pitched up and prepared a report and then declared they were unavailable to do the work. It's a long, sad story, but I'm not making it up and I'm sure there are many, many leaky home owners who have the same kind of history, would be able to confirm that. It was a boom time in Gulf Harbour and there was a lot of building work going on but not much interest in remediation. Builders were more interested in putting up new houses than they were in remedying current ones and that was certainly our experience over that time.
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> (pages 43-44)

[18] Mr Jordan also confirmed Mrs White's evidence on this. It was put to Mr Jordan that there was "a wide range of builders available to carry out the work" in addition to the three who had provided quotes. Mr Jordan replied:

> There are, but very difficult to get interested in this sort of work. Extremely difficult, particularly on the Hibiscus Coast where there is generally a fairly high level of new building work, which is more favoured by builders, than this sort of remedial work or alteration work as they would have called it.
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> …
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> MR BLACK: But apart from the Hibiscus Coast, in the Yellow Pages alone, there's all sorts of people that could carry out back then whatever work needed to be considered. It's not impossible to do it.

> MR JORDAN: It's not impossible to do it but it's difficult to get somebody that will do it correctly, on time … and for a reasonable cost. Or it was, I should say.
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> (pages 333-334)

[19] Mrs White agreed that at that time, around November 2002, they could afford to do the work on the deck recommended by Mr Jordan at the cost quoted by Mr Claringbold of $18,000. Mr Heaney SC advised in the course of his submissions for the Council that this was the only evidence as to the ability of the Whites to pay any particular sum.

[20] Mrs White said that in June 2003 her husband was made redundant. She said he was out of work for five months and that that swallowed up all the savings they had (transcript page 47). Mrs White was also made redundant at a later date. In her witness statement, for the hearing in January 2009, Mrs White said:

> 13. To date, we have not been able to arrange for any repair works to be carried out to the property because we do not have sufficient funds in place to pay for such repairs.
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> 14. Instead, we have planned for the required repair works as much as we can.

[21] In November 2003 the Whites filed an application with the Weathertight Homes Resolution Service. In relation to the period down to this date, and then following, Mr White said, in answer to a question from the adjudicator:

> … when we eventually got to the WHRS that was a couple of years down the track. I mean when we first came to New Zealand we were not aware of the leaky home problem and so we initially tried to sort it out ourselves. We initially went through our lawyer who did the conveyancing, who wrote letters to the Kerkins which are on public record – well, are in the records, so we wrote to them to try and sort it out, we also tried to get more builders, we tried everything we could to try and sort it out ourselves, but during that time I was made redundant so that hit us very hard, and then when my wife was made redundant it sort of came to our attention of the weathertightness and that's when we went to Weathertightness to see whether they could help us because we were in a situation where we had no other options, so we went to Weathertightness, and they sent out Mr O'Hagan who said that yes we did have a leaky home problem and ever since then we have tried everything that we can to try and sort this matter out and at every point, to be honest, we have been rebuffed. We have certainly been rebuffed by the Kerkins, and we have been rebuffed by the Council.
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> (page 76)

[22] An assessor for the Service carried out an inspection and provided a report dated 20 February 2004. The assessor identified a range of problems relating to water entering the house and noted damage, causes and recommended remedial work substantially more extensive than referred to in Mr Jordan's original report and subsequent specification.

[23] The Service advised the Council of the fact of the claim by the Whites in April 2004 and advised that the Whites were seeking mediation. In September 2005 the Whites wrote to the Council seeking help after a child had nearly fallen through a deck. It appears that no relevant steps were taken by the Council at that time. Mediation did not occur until June 2008. As will be apparent, it was unsuccessful.

[24] The Whites filed a formal statement of claim with the Tribunal in October 2007. They engaged another building expert, Mr Paykel. Mr Paykel's investigations revealed problems with the construction of the house substantially more extensive than had been identified by Mr Jordan. The only problem of present relevance identified by Mr Jordan related to one deck. Mr Claringbold's quote for $18,000 was for repairs to this deck as recommended by Mr Jordan. The construction defects identified by Mr Paykel related to all decks, or balconies, the cladding, internal roof gutters, the roof parapet and five other matters described as "additional defects". The recommended remedial work was, in consequence, also far more extensive than the work recommended by Mr Jordan on the single deck. The claim for this was $401,000. The sum of $281,250 was awarded for remedial costs, rather than the claim of $401,000, in considerable measure because of differences between the experts as to the extent of the remedial work required, rather than differences as to the extent of the construction defects.

Legal principles

[25] An often cited statement of the duty to mitigate damage is that of Viscount Haldane L.C. in *British Westinghouse v Underground Electric Railways*[1]:

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

> The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a claimant the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps.

[26] The onus is on the defendant to establish what reasonable steps could and should have been taken by the plaintiff and that these steps were not taken[2]. The onus on the defendant includes an onus to demonstrate how the steps the defendant says should have been taken would have reduced the damage. In *Roper v Johnson*[3] the Court said:

> The plaintiffs having made out a prima facie case of damages, actual and prospective, to a given amount, the defendants should have given evidence to shew how and to what extent, that claim ought to be mitigated.

And in *Criss v Alexander (No 2)*[4] Street CJ said:

> A jury may be entitled to take into account anything which a plaintiff has done, or ought reasonably to have done, to diminish his loss, but the burden lies upon a defendant to show circumstances which would entitle him to a diminution of the amount which he may be called upon to pay, and the defendant should have given evidence to show how and to what extent the plaintiff's claim ought to be mitigated.

[27] The "duty of taking all reasonable steps", in the words of Viscount Haldane, requires consideration of all of the circumstances of the case, should not be assessed applying hindsight, and does not impose a high standard of reasonableness on the claimant. This was explained by Lord Macmillan in *Banco de Portugal v Waterlow & Sons Limited*[5] as follows:

> Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticise the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the cost of

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[2] *Geest plc v Lansiquot* [2002] 1 WLR 3111 at [13]-[14] per Lord Bingham (PC); *McGregor on Damages*, 18th ed, (2009) para 7-019.
[3] *Roper v Johnson* (1873) LR 8 CP 167 at 184.
[4] *Criss v Alexander (No 2)* (1928) 28 SR (NSW) 587 at 596 (CA).
[5] *Banco de Portugal v Waterlow & Sons Limited* [1932] AC 452 at 506 (HL).

> such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken.

Although the House of Lords was there dealing with breach of contract, the same principle applies in tort[6].

[28] There are particular aspects, or illustrations, of the general principle that the standard of reasonableness is not high. The adjudicator referred to one when he said, at [116], "a claimant cannot reasonably be required to spend money where he or she lacks the means to do so". The principle was stated by Lord Collins in *Clippens Oil Co. v Edinburgh and District Water Trustees*[7] as follows:

> … the wrong-doer must take his victim talem qualem, and if the position of the latter is aggravated because he is without the means of mitigating it, so much the worse for the wrong-doer, who has got to be answerable for the consequences flowing from his tortious act.

[29] The requirement that "the wrong-doer must take his victim talem qualem" – as he finds him – is not limited to cases of plaintiffs without means. It is a principle of general application illustrated by many different examples arising from the facts of many different cases. The particular circumstances of each plaintiff need to be assessed to determine whether they could reasonably have been expected to act in a particular way. The facts of this case illustrate a number of circumstances requiring that enquiry.

[30] The rule is concerned with mitigation of damage; were there steps which the claimant might reasonably have taken to reduce the extent of the damage resulting from the wrongful act of the defendant? The rule is not concerned, as such, with quantification of damages. This point has some importance in this case.

[31] The onus on the defendant is not met simply by demonstrating that it would have cost less in nominal terms to do repairs at an earlier date. This is an aspect of the requirement that the defendants in this case must show, amongst other things, that delay in carrying out repairs has increased the damage. For example, it would

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[6] On the standard of reasonableness see generally *McGregor on Damages*, 18th ed, paras 7-070 to 7-090. On the need to avoid using hindsight to assess reasonableness see also *Hooker v Stewart* [1989] 3 NZLR 543 at 547 (CA).

[7] *Clippens Oil Co. v Edinburgh and District Water Trustees* [1907] AC 291 at 303 (HL).

not be sufficient for a defendant to have proved only that damage which existed in 2002 would cost $40,000 to repair in 2009, whereas the same damage could have been repaired in 2002 for $20,000: see *Dodd Properties v Canterbury CC*[8].

[32] It may be reasonable for the plaintiff to postpone repair work because of a refusal by another party to accept liability, with that other party ultimately found to be liable. In *Alcoa Minerals of Jamaica Inc. v Herbert Broderick*[9] the Privy Council said:

> In a case where repairs have to be done at what is a heavy cost in relation to the plaintiff's financial position there may be stronger grounds for delaying the date of assessment than in a case where the plaintiff has undertaken a contractual obligation to buy and pay for goods where he could go out into the market and buy the goods at or near the same price. There is in their Lordships' view force in the statement of I N Duncan Wallace in "Costs of Repairs: Date for Assessment" (1980) 96 LQR 341, 342-343 that "failure by a wrongdoer to accept liability will in many cases be a crucial factor in justifying a plaintiff in postponing work of repair until final judgment".

Although the Privy Council was there concerned with the date for assessment of damages, the general principle may equally apply on the question of what is reasonable in relation to mitigation of loss.

The adjudicator's decision on mitigation

[33] The adjudicator's reasons for reducing the award by 45% were as follows:

> [115] The legal position regarding the obligation to mitigate is clear. The claimants must take all reasonable steps to mitigate their loss. They will not recover for any losses that should have been avoided.[10] The first and second respondents have submitted that the claimants have failed to mitigate their losses and carried out no effective maintenance even though they were aware of potential water ingress problems from the time of purchase.
>
> [116] The duty to mitigate is significant. A claimant cannot succeed if subsequent to the tort or breach of contract he or she could reasonably have avoided the loss. In addition the law does not allow a claimant to recover damages to compensate for loss which would not have been suffered if he or

[8] [1980] 1 All ER 928 (CA). And generally see *McGregor on Damages*, 18th ed, paras 7-088 and 34-017.
[9] *Alcoa Minerals of Jamaica Inc. v Herbert Broderick* [2002] 1 AC 371 at 378 (PC); [2000] UKPC 11 at [11].
[10] *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673 at 689 (HL); and *Sullivan v Darkin* [1986] 1 NZLR 214, at 217-218 (CA).

she had taken reasonable steps to mitigating their loss. The general principal is that the claimant cannot reasonably be required to spend money where he or she lacks the means to do so.[11]

[117] That is not the situation with this case. The claimants in evidence said that during 2002 and 2003 they had the financial means to undertake remedial work. In late 2002, the claimants' conveyancing lawyer informed the second respondent's lawyer that they "will instruct their builders to repair the damage – for they wished to take mitigation measures".

[118] The claimants are property owners with some experience in homeownership and in evidence stated that they are aware of annual maintenance requirements for houses. Furthermore, in this case, they obtained at around the time of purchase a report (the Jordan Report) identifying critical structural concerns with their house and recommending short and medium term repairs. The claimants then obtained a scope of works from Mr Jordan and sought quotations from three builders to attend to the immediate remedial work. They also sought legal advice and approached their vendors, the Kerkins, for contribution. Having carried out all such enquiries, the claimants took no further action. In evidence they stated that they did have difficulty in engaging a builder. Their perseverance in trying to find a builder was missing. They did not take all reasonable steps, which the law requires of them, to mitigate their loss.

[119] The evidence determines that apart from lodging a claim on 7 November 2003 with the WHRS, the claimants took no effective steps to mitigate the damage that was occurring to their house.

[120] Had the claimants undertaken remedial work in 2002-2003, when they were financially able to do so, the evidence is that the costs would have been somewhere from $19,000 upwards to $60,000 (all excluding GST) or a little more. Their failure then to remedy the defects means that the remedial costs have over time increased significantly to around $316,000.

[121] I conclude from all the evidence that by not undertaking the necessary remedial work in 2002/2003 and annually the usual maintenance and repairs, the claimants allowed their house to deteriorate and thus greatly increase the extent and cost of remedial work.

[122] I find that the claimants failed to mitigate their loss. I assess the damages reduction at 45% of the total amount of the claim – i.e. $142,201.20 (45% of $316,002.38).

Discussion

[34] For the Whites, Mr Shand submitted that there were material errors by the adjudicator in findings of fact and, in essence, that there was a failure to apply relevant legal principles. I will discuss these submissions as necessary in the following paragraphs.

[11] See *Clippens Oil Company v Edinburgh and District Water Trustees* [1907] AC 291 (HL).

[35] Except in one respect, the respondents sought to uphold the adjudicator's decision, submitting that he had correctly directed himself in law and that his findings of fact were supported by the evidence. The exception related to the adjudicator's ultimate conclusion that the award should be reduced by 45%. In oral submissions, Mr Heaney accepted that the basis for the 45% reduction was not apparent. I did not understand Mr Black to demur. Mr Heaney submitted that, if there was a failure to mitigate, the reduction should be a quantified sum. I agree.

[36] This is a general appeal by way of rehearing. In consequence, as all counsel accepted, I am bound to come to my own conclusion. The respondents submitted that caution is required because I did not have the advantage the adjudicator had of seeing and hearing all of the witnesses. There is no indication from the adjudicator's decision, or from the evidence referred to me, that this is likely to be material. In particular, determination of questions of fact relevant to mitigation do not appear to have turned on questions of credibility, or even reliability, of witnesses. This applies also to the next issue, general damages.

[37] In my opinion the adjudicator led himself into error on questions of law, or did not have sufficient regard to all relevant principles, and in consequence reached conclusions of fact which were not reasonably open to him. As a result, in my opinion the adjudicator was in error in his conclusion that the Whites failed to take steps which they should reasonably have taken to mitigate the damage caused to their home, and to them personally, by the respondents.

[38] The adjudicator said, at [116], that "the duty to mitigate is significant". This is a misstatement of the law: see the citation from *Banco de Portugal* at [27]. The standard of reasonableness applied to the appellants in this case was too high. And in approaching the evidence in this way, it appears that an onus was effectively put on the Whites to demonstrate that what they did do was reasonable, when the onus in all respects remained on the respondents and on the basis earlier outlined.

[39] It was necessary to assess all of the evidence relating to the Whites' circumstances, why they acted in particular ways, and the relevant sequence of events, but this was not done.

[40] Having regard to the evidence as a whole, the most relevant period for inquiry is up to June 2003. This is because the uncontradicted evidence is that in June 2003 Mr White became redundant, this swallowed up all of the Whites' savings and from this time onwards they had no money to do any repairs. Mrs White also became redundant, apparently later in 2003, and this would not only have increased the financial constraints but imposed other pressures.

[41] The steps taken by the Whites before this, in relation to builders, were not unreasonable. For example, it was not unreasonable for the Whites to persevere, as they did, in the efforts to get Mr Claringbold. Following this they tried to engage other builders. There is the apparently uncontradicted evidence of Mrs White as to the reasons why they were unable to engage a builder to do the deck when they could afford it. This related not only to the market for competent builders, a point fully corroborated by Mr Jordan, but also the particular personal circumstances of Mr and Mrs White. The adjudicator made passing reference to this at [118]. But he did so in a way which, on this important point, failed to give effect to the uncontradicted evidence on a point where the onus was firmly on the defendants. The evidence was that what happened was reasonable having regard not only to the difficulties encountered with builders, but also to Mr and Mrs White's personal circumstances as detailed by them in their evidence. The standard of reasonableness applied by the adjudicator was contrary to law.

[42] There is a range of further evidence bearing on the reasonableness of the Whites' actions which in my judgment fortifies the conclusion that their approach was reasonable. None of this evidence, which I will outline, was assessed by the adjudicator.

[43] The Whites were told by Mr Jordan, a building expert, that the house they bought was basically sound. It was not until the Whites got the report from the WHRS assessor, Mr O'Hagan, in February 2004, that they were alerted to the fact that there were more significant problems than defective workmanship on one deck. By this date both Mr and Mrs White had lost their jobs and used up all their savings.

[44] Mr White said that at the beginning they were not aware of the leaky home problem. There was no apparent challenge to that evidence. Faced with the difficulties in actually engaging a builder, coupled with the personal difficulties in being available to instruct a builder, if one could be found and then turned up, it was not unreasonable for the Whites simply to close the deck off because they thought they were dealing with an isolated problem.

[45] There was evidence from the building experts as to what might have been discovered if the deck work had been done. But the question at issue was not the reasonable discoverability of the extent of the defective workmanship, but whether the Whites acted reasonably in relation to the isolated deck problem which was all they were aware of. The reasonableness of what the Whites actually did needs to be assessed on the basis of the knowledge they actually had. It should not be assessed with hindsight, or on the basis of what a building expert might have discovered, or even on the basis of what a building expert would be likely to have discovered.

[46] In his discussion of the mitigation issue, the adjudicator did not refer to the evidence as to what might have been discovered about the extent of the defective workmanship if the work on the single deck had been done. But it is possible that he had this in mind in coming to his decision on mitigation. There were questions from him to some of the experts on this point. The adjudicator did make one apparent finding of fact, in his mitigation decision, which is broadly related to this topic and which is not supported by the evidence. He said, at [118], that Mr Jordan's report identified "critical structural concerns with their house". Mr Jordan did not identify problems which could reasonably be described as "critical structural concerns". As I have already recorded, what he did identify, and what Mr and Mrs White read about in his report, was relatively minor compared with the range of construction defects not identified until 2004, at the earliest, by Mr O'Hagan.

[47] In a letter in November 2002 the Whites' solicitors advised the Kerkins' solicitors that the Whites would proceed with the repair to the deck unless the Kerkins accepted responsibility: see [15] above. The adjudicator quoted the relevant part of this letter in his outline of the facts and noted it in his discussion of the mitigation issues. The fact that the Whites, through their solicitor, said that they

would do the deck work does not make the failure to do the deck work unreasonable. They still had to get a builder. Down to the date of the letter they had been trying to get Mr Claringbold. Their efforts to get Mr Claringbold were not unreasonable. Further, from November 2002, the Whites not only had the continuing difficulty in engaging other builders, arising from their personal commitments as well as the market, but they were then faced with the steadfast denial of liability by the Kerkins and with the uncertainty that that created for them.

[48] The adjudicator referred to the general principle from the cases that a claimant cannot be required to take particular steps if the claimant does not have the financial means to do so. But he held that the Whites did have "the financial means to undertake remedial work": para [117]. From the context, it appears that the adjudicator was there expressing a finding of fact that the Whites had the money in 2002 and 2003 to do the remedial work in respect of which they were making their claim to the Tribunal in 2009. If that is the purport of the finding then it is plainly wrong. The only evidence of financial means was an ability to pay around $18,000 for the repair to the single deck. There is no evidence that, if all of the damage had been identified in 2002 and 2003, the Whites would have had the financial resources to pay for it. An inference might reasonably be drawn that they could not have paid for it, but it is unnecessary to draw that inference because the onus is on the defendants.

[49] If, at [117], the adjudicator was intending to refer only to the Whites' ability to pay for repairs costing around $18,000, a finding of fact to that effect was plainly borne out by the evidence, but it did not justify the overall conclusion in relation to all of the remedial work.

[50] In my judgment, for these reasons, the respondents did not meet the onus on them to establish that the Whites failed to act reasonably, up to the date Mr White became redundant, in relation to the single deck. That conclusion is sufficient to allow the appeal on the mitigation finding because the evidence is that the Whites did not have the financial means to undertake any remedial work from around the middle of 2003.

[51] However, if the inquiry as to reasonable steps is extended beyond June 2003, through to the date of the Tribunal hearing, there are further considerations supporting a conclusion that the Whites acted reasonably irrespective of their financial resources. From November 2002 they were faced with the denial of liability by the Kerkins, being the party with primary responsibility for the damage. From around April 2004 there was a similar denial of liability by the Council.

[52] I referred earlier to evidence suggesting that work on the deck might have disclosed more extensive construction defects and more extensive damage. If that is assumed to be correct, then the assessment of reasonableness must be made on the basis that the Whites were faced with far greater problems than what was identified by Mr Jordan. In these circumstances, with the denials of liability from the vendor and the Council, it was not shown to be unreasonable for the Whites to wait until there was a determination as to whether others would be meeting the substantial cost.

[53] This is given emphasis by an argument advanced for the Kerkins that it would have been better to demolish the house than to repair it. It would be reasonable to await the Tribunal's determination before making a decision as to which course to follow. Or the Whites might reasonably have waited for a decision to decide whether their best course would simply be to sell the house as is. Emphasis is given to this aspect by the adjudicator's own comment at [101] that "remedial work is difficult to price for a great deal is really unknown until repairs commence". In addition, from November 2003, the Whites were in the hands of the WHRS. This is the organisation established by the government specifically to assist people in the situation the Whites found themselves in through no fault of theirs.

The consequence of not doing the deck work recommended by Mr Jordan

[54] If I am wrong in my conclusion to this point, there are further questions as to what the Whites should reasonably have done and what consequence that would have had on the extent of the damage. These questions were not analysed by the adjudicator. He simply stated that the Whites' failure in 2002-2003 "to remedy the defects means that the remedial costs have over time increased significantly to around $316,000" from around "$19,000 upwards to $60,000": para [120]. There

are, with respect, two difficulties with this statement. The first is that it ignores the fact that the estimates of between $19,000 and $60,000 were solely for the repair of the single deck. The second is that it confuses damages with damage.

[55] In light of all the evidence, the only assumption that can properly be made as to work that might have been done by the Whites is the repair to the single deck. If it is assumed that that work should have been done, the most that would have been avoided, in relation to increased damage, is any increased damage to the deck between 2002-2003 and 2009. I was not referred to any evidence which established, on the balance of probabilities, that failure to do the deck repairs in 2002-2003 means that the extent of the damage to the deck in 2009 was materially more than it had been in 2002. In fact, there was evidence from Mr Jordan suggesting that there may have been no material change. This was as follows:

> MR BLACK: If this work was left and nothing done at all, then it's obviously going to be a problem isn't it?
>
> …
>
> MR JORDAN: May I just review my outline specification for a moment? Well, it may well be that the damage was done by the time I made this recommendation or specification, because it's fairly extensive, so it's hard to say now whether, had it been done then it would have cost any less in real terms than if it had been done later. I just don't really know. It was certainly in pretty poor condition.
>
> MR BLACK: The decks in particular, as you say?
>
> (page 334)

[56] There was, as I have already indicated, evidence from other experts that work on the deck would likely have disclosed, or might have disclosed, that the construction defects in the house were more extensive than those Mr Jordan identified in relation to the single deck. But that does not demonstrate a failure by the Whites to take reasonable steps to mitigate the damage they knew about. In addition, even if the more extensive problems had been disclosed, there is no evidence that the Whites could have afforded what would have been far greater cost than Mr Claringbold's estimate of $18,000 for the work specified by Mr Jordan for the single deck. It was not for the Whites to prove that they had the resources to undertake the far more extensive range of remedial work. And this, in any event, did

not begin to be disclosed to them until February 2004 at the earliest, by which date the evidence is that they had no money to do any repairs.

[57] There would be a further question beyond these considerations. If it was established that it would have been reasonable for the Whites to repair the deck and that the failure to repair increased the damage, it would not be enough simply to demonstrate that work on the deck would have cost less in 2002 than the assessment of cost in 2009. The relevant question would be whether there was a material increase in the damage to the deck followed by quantification of the cost associated with any increase. The only evidence referred to me which appears to touch on the point was evidence from Mr Bayley, the building expert called for the Council. He said in his witness statement:

> 10 In my calculations, the total cost of all deck and parapet related items incorporated within my remedial estimate total was $105,913.35. This included the cladding replacement, P & G, overheads and margin, contingency and remediation expert costs. Within my figure for deck and parapet related items $68,271.59 is, in my view, as a result of failure to mitigate.
>
> 11 Deducting $68,271.59 credit for failure to mitigate from my remedial estimate of $179,000 results in a remedial cost after deduction of betterment and excessive costs of $110,728.41 including GST.

[58] It is not clear what Mr Bayley's figure of $68,271.59 covers. If it is Mr Bayley's assessment of the cost to do work that would not have been required had the Whites repaired the deck in 2002, that would be a quantification consistent with principle. However, the figure, in the absence of explanation, could equally be read as being the present cost of doing the work which, on these assumptions, the Whites should have undertaken for around $18,000 in 2002. If the increase was simply the result of changes in the market, the Whites would not for that reason be disqualified from recovering the greater sum.

[59] There were no submissions to me in respect of this evidence, or pointing me to evidence better explaining what Mr Bayley meant. In these circumstances, and bearing in mind that I am now dealing with points that are not central to my decision, I am unable to conclude that there is sufficient evidence from the respondents establishing that the damages otherwise recoverable by the Whites for remedial work

should be reduced by $68,000, which would be the maximum on any basis, or by some lesser sum, or not at all.

General damages

The adjudicator's decision

[60] The adjudicator outlined the elements of the claim, submissions for the Whites, and awards of general damages in other leaky building cases. He then said:

> [111] I accept that Mr and Mrs White and their children have suffered stress, anxiety, inconvenience and disruption as a result of their home being a leaky building. Indeed, Mr and Mrs White have incurred medical expenses for the stress it has caused them. However, the claimants understood that their house was not maintenance-free and was a potential leaking building, and indeed, was a leaking building on or shortly after settlement of their purchase. Furthermore, the claimants' failure to take prompt remedial action has contributed to the deterioration of their house as well as the stress, anxiety, inconvenience and disruption they have suffered.
>
> [112] Accordingly, I find that for these reasons this claim is distinguishable from the above mentioned High Court decisions whereby awards in the vicinity of $30,000.00 each for general damages have been made.
>
> [113] I am satisfied that an award of general damages in the amount of $30,000.00 for each of the claimants in this matter is overly generous. Whilst I uphold the claim for general damages, a more modest award in the amount of $10,000.00 each for Mr and Mrs White in this matter is more realistic and better recognises the degree of stress, anxiety, inconvenience and the loss of enjoyment of their home that I apprehend they have suffered to date, given their own contribution to the problem. I find that the claimants have exacerbated their considerable stress, anxiety and inconvenience as a consequence of their inaction to address the remedial needs of their house. In determining the quantum of general damages, I am cognisant of the impact a further reduction based on my assessment of the claimants' failure to mitigate, will have.

Discussion

[61] Mr Heaney, supported by Mr Black, argued that this Court should not interfere with the adjudicator's assessment for several reasons. One was that, in effect, an important part of the adjudicator's assessment was the benefit he got from seeing and hearing the witnesses. Having regard to the nature of the evidence and

the reasons for the adjudicator's decision I do not consider that this is a material constraint on review on appeal.

[62] It was submitted that a calculation of general damages at first instance is not readily open to review because it involves an assessment of compensation for intangible losses such as stress and anxiety and such calculations necessarily do not have the precision, or relative precision, of a calculation of special damages. I agree with the general proposition.

[63] A related submission for the respondents was that the assessment of general damages involves exercise of a discretion. In that regard Mr Heaney placed some emphasis on observations of Tipping J in a decision of the Court of Appeal in *Bronlund v Thames Coromandel District Council*[12]. Tipping J said:

> [59] It is not the function of this Court to substitute its own assessment of general damages for that of the trial Judge. A different award will be made on appeal only if this Court is satisfied that the trial Judge's award was so low (or so high) as to amount to a wholly erroneous figure, see *Stieller v Porirua CC* [1986] 1 NZLR 84 (CA).
>
> [60] A colloquial yet helpful approach is that adopted by Lord Denning MR in *McCarthy v Coldair* [1951] 2 TLR 1226; 95 SJ 711: "Counsel expressed the test graphically and rightly when he said that this Court would interfere if, when seeing the figure, it said to itself — Good gracious me — as high [or low] as that."

[64] Henry J in *Bronlund* encapsulated the two related submissions for the respondents in the present case as follows:

> [4] General damages for resulting harm of this kind is invariably a difficult exercise, and one which is not capable of precision. It is also very much in the province of the Tribunal entrusted with the exercise, be it Judge or jury. The function of an appellate Court, now well established, is not in issue, and has been restated by Tipping J.

[65] The statement by the Court of Appeal in *Stieller v Porirua City Council*[13], cited by Tipping J, is at p 97 as follows:

> The discretion of the Judge in such cases is not to be lightly interfered with and it is trite that an appellate Court will not be inclined to reverse the

[12] *Bronlund v Thames Coromandel District Council* (CA190/98, 26 August 1999, Henry, Thomas and Tipping JJ).
[13] *Stieller v Porirua City Council* [1986] 1 NZLR 84 (CA).

> finding of a trial Judge as to the amount of damages merely because the appellate Court would have given a different sum itself: *Flint v Lovell* [1935] 1 KB 354. We would be prepared to interfere with the award of $1000 only if we thought that the amount was so low that we were satisfied, which is not the case, that it was an entirely erroneous estimate of the general damages to which the Stiellers were entitled.

[66] I do not consider that the statements of the Court of Appeal that I have cited were intended to describe the only circumstances in which an appellate court could properly interfere with an assessment of general damages. For example, in *Bronlund*, the argument for the appellants was, in essence, simply that the trial Judge's assessment was "breathtakingly" low. The award was $20,000 plus interest against a claim for $100,000 for general damages. As Tipping J noted, at [57]: "There was no suggestion that in making his assessment the Judge had overlooked any relevant aspect of the general damages claim". Had that been a point on appeal and established it may have provided grounds to alter the award.

[67] The general approach to an appeal from exercise of a discretion was stated in *May v May*[14] at p 169-170 as follows:

> But in the end the proper role of this Court is not to reach an original conclusion on the application. Its function is that of an appellate Court. No authority requires to be stated for the proposition that in considering an appeal of this kind an appellant must show that the Judge acted on a wrong principle; or that he failed to take into account some relevant matter or that he took account of some irrelevant matter or that he was plainly wrong.

[68] I am of the opinion that the adjudicator did err in ways which make his decision reviewable on appeal. It is implicit in the adjudicator's decision that, but for the matters noted at [111] and [113] he would have awarded Mr and Mrs White general damages of an amount "in the vicinity of $30,000 each". The two reasons for awarding substantially less were that Mr and Mrs White knew their home was "a potential leaking building" when they bought it, or soon after, and they had failed to take prompt remedial action. Both conclusions, in my judgment, were not supported by the evidence. And the second conclusion, when related to the decision on mitigation, involved an error of principle because it amounted to a double deduction.

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[14] *May v May* (1982) 1 NZFLR 165 (CA).

[69] At [111] the adjudicator placed some weight on an apparent factual finding that the Whites knew, at the time of settlement of the purchase, or shortly after, that the house "was a potential leaking building". A submission to this effect was also made for the Council on this appeal. There is no evidence to support any knowledge prior to settlement. The evidence is expressly to the opposite effect.

[70] The passage of evidence referred to in the submissions for the Council came from cross-examination of Mrs White by Mr Black on this point. Mrs White made clear that they would not have purchased the property had they not received the LIM from the Council confirming that a code compliance certificate had been issued by the Council. Based on the advice they had, the Whites concluded that the building was in fact fully complying because of the issue of the code compliance certificate. This was an entirely reasonable position to adopt. Immediately following this evidence there were questions as to when the Whites received Mr Jordan's first report and whether they might have had discussions with him before the report was produced. This evidence (transcript pages 40-42) makes clear that there were no discussions with Mr Jordan prior to settlement about anything he may have discovered. And the adjudicator expressly found that, although there was some uncertainty as to when the Whites received Mr Jordan's report, "the probability is that they received the report on or about 13 February 2002", a month or so after settlement of the purchase. In the determination dated 4 March 2009 the date of receipt of the report is recorded as 13 January 2002. In the costs decision the adjudicator stated that this was an error and made the correction to 13 February 2002.

[71] The second ground for the adjudicator's distinguishing the other cases was that the Whites' own failure to take prompt remedial action contributed to their stress and the other matters for which general damages were sought. For a consideration of that nature to justify a reduction in general damages there would have to be a basis for concluding either that there was some form of contributory negligence on the part of the Whites or that there were steps reasonably open to the Whites to alleviate the personal problems and they did not take them. On the first point, the adjudicator's own decision rules out contributory negligence. The Council and Mrs Kerkin contended that there was contributory negligence. Those claims failed and there has

been no appeal against the adjudicator's conclusion. My findings in respect of the duty to mitigate rule out the second point.

[72] The adjudicator did recognise that the award of $10,000 each would be further reduced by the 45% reduction for failure to mitigate. Arithmetically that reduced general damages to $5,500 each. The consequence is that the general damages that would otherwise have been awarded were, in large measure, reduced twice for the same reason. That is an error of principle. And if the starting point was $30,000, the figure was reduced by over 80%. I have not overlooked the fact that there was a separate reason for the first reduction; the erroneous factual conclusion that Mr and Mrs White knew they had a leaking house when they bought it. But the principal reason for the reduced award of general damages does seem to have been the conclusion that Mr and Mrs White had failed to take steps that they could have taken and in that respect there has been a double deduction.

[73] Mr Heaney, when addressing the question of a double deduction, submitted that the ultimate inquiry should be whether the end result was within a permissible range, rather than whether the reasons for the conclusion can all stand up to scrutiny. I accept that submission as a general proposition, but it does not provide an answer in this case. That is for the reasons earlier indicated; but for these errors the adjudicator would have awarded substantially more, and the amount would have been similar to awards in other cases.

[74] The evidence bearing on quantification of general damages did not give rise to any issues of credibility, or any other considerations requiring particular caution on an appeal. The evidence of Mr and Mrs White as to the extent to which they and their children were adversely affected by the state of the house does not appear to have been seriously challenged. That evidence makes clear that the consequences for them were at least as bad as the consequences for other owners of leaky homes who have been awarded general damages of $20,000 to $25,000. The result is that, in my judgment, the Whites are entitled to an award of general damages for a sum substantially in excess of the amount awarded.

[75] They claimed $30,000. This was on the basis that the adverse effects on them and their children were markedly worse than in other leaky home cases. However, because this issue has come before me on an appeal, without detailed submissions on the relevant evidence, I do not consider it appropriate to make an award in excess of awards made in other broadly comparable cases.

[76] There have been recent, or fairly recent, awards ranging from $20,000 to $25,000[15]. Mr Heaney noted that in some of these cases the awards were made without opposition from the party against whom the awards were made, or without substantial argument. Heath J referred to this fact in *Body Corporate 188529* ("Sunset") and said that for that reason the award should not be regarded as a precedent in cases involving leaky homes. Nevertheless, there is a broad consistency in the awards. What is more, in *Mouat v Clark Boyce (No 2)*[16] the Court of Appeal upheld an award of $25,000 for general damages made in the High Court in a judgment delivered in September 1991. Although Cooke P described the award as "on the high side", when regard is had to the effects of inflation since *Mouat* was decided, that decision provides some assistance in indicating that an award of the same amount today would be a reasonable award to meet the extensive personal harm suffered by the Whites.

[77] My conclusion therefore is that the appeal against the award of general damages should be allowed and an award of $25,000 each should be made.

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[15] *Body Corporate 183523 v Tony Tay & Associates Limited* (HC AK, CIV 2004-404-4824, 30 March 2009, Priestley J) at [203] - $25,000; *Body Corporate 185960 v North Shore City Council* (HC AK, CIV 2006-004-003535, 22 December 2008, Duffy J) at [122]-[123] and [130] - $25,000; *Body Corporate 188529 v North Shore City Council* (HC AK, CIV 2004-404-3230, 30 September 2008, Heath J) at [27]-[39] - $25,000, noting that the award was based on submissions from the plaintiffs alone without argument from the developers against whom the awards were made so that they "should not be regarded as a precedent for quantum in cases of this type"; *Body Corporate 189855 v North Shore City Council* (HC AK, CIV 2005-404-5561, 25 July 2008, Venning J) at [396]-[425] - $20,000; *Dicks v Hobson Swan Construction Limited* (2006) 7 NZCPR 881 at [124] - $22,500.

[16] *Mouat v Clark Boyce (No 2)* [1992] 2 NZLR 559 (CA).

Costs

[78] Following the substantive determination in the Tribunal, the Whites applied for costs on the grounds that ss 91(1)(a) and (b) of the Weathertight Homes Resolution Service Act 2006 (the Act) applied. Section 91 provides:

> 91 Costs of adjudication proceedings
>
> (1) The tribunal may determine that costs and expenses must be met by any of the parties to the adjudication (whether those parties are or are not, on the whole, successful in the adjudication) if it considers that the party has caused those costs and expenses to be incurred unnecessarily by—
>
> (a) bad faith on the part of that party; or
>
> (b) allegations or objections by that party that are without substantial merit.
>
> (2) If the tribunal does not make a determination under subsection (1), the parties to the adjudication must meet their own costs and expenses.

[79] There are no rules under the Act relating to quantification of costs. In consequence, pursuant to s 125(3) of the Act, the District Court Rules apply. The Whites sought costs in excess of the scale prescribed by the District Court Rules. The grounds for seeking costs in excess of scale were essentially the same as the grounds in support of the submission that s 91(1) of the Act applied; that is to say, Mrs Kerkin acted in bad faith and persisted with arguments without substantial merit.

[80] The adjudicator received detailed written submissions and provided his reasons for dismissing the application in a careful reserved decision. He discussed two legal aspects of the application. The first related to the provisions of s 91. He correctly observed that the onus is on an applicant for costs to demonstrate that the case comes within one or both of the provisions in s 91(1) and, if that onus is met, there is then a discretion for the Tribunal to award costs.

[81] The second point of law was the meaning of bad faith. He referred to a number of cases and outlined relevant principles. On the facts he concluded:

> I am satisfied that there is no basis for a finding of bad faith on the part of [Mrs Kerkin] in pursuing her grounds for defence. Having heard from and

> seen Mrs Kerkin at the hearing, I accept her submission that she entered into the process of mediation and adjudication in good faith.

[82] It is convenient to dispose of the bad faith ground at this point. I asked Mr Shand to point me to the evidence of bad faith. There was one document only. This was an e-mail sent to Mr Kerkin by a person acting on behalf of the Kerkins at the time (not a lawyer). The representative sent Mr Kerkin a copy of a short opinion on some legal points, the opinion being contrary to the position being taken by the Whites. In the covering letter the representative said to Mr Kerkin: "This'll cost them another few hundred". This single piece of evidence falls far short of establishing bad faith on the part of the Kerkins. I am not persuaded that the adjudicator was wrong in his conclusion that bad faith was not established.

[83] The adjudicator clearly gave careful attention to the arguments for the Whites under s 91(1)(b) that Mrs Kerkin had unnecessarily pursued arguments or positions without substantial merit. In reaching his conclusion that she had not, the adjudicator gave weight to his first-hand knowledge of Mrs Kerkin as a witness, his knowledge of the course of the proceeding, including a genuine attempt by Mrs Kerkin to settle, and his awareness of the substantial range of issues, of fact and law, that were before him. He correctly directed himself to the need to avoid applying hindsight in determining the merit of an argument.

[84] In the end he was bound to exercise a discretion, albeit within the statutory framework of s 91. I am not persuaded that there was any appealable error by the adjudicator.

[85] I should note, in conclusion, that even if there was a basis for allowing some costs to the Whites against Mrs Kerkin, the amount would be substantially less than the sum sought by the Whites. The argument about costs in the Tribunal, both in respect of unreasonable arguments as well as bad faith, related solely to the Whites' claim that the Kerkins had liability pursuant to the warranty in the agreement for sale and purchase. It was not contended, certainly on the appeal, that the position taken in respect of other claims was unreasonable, let alone sounded in bad faith. The consequence of this is that it was not contended that Mrs Kerkin did not act unreasonably or improperly in maintaining other defences, counterclaims or cross-

claims to deal with a wide range of matters beyond or quite unrelated to contractual liability.

[86] Mr Shand submitted that probably 75% of the hearing was directed to the question of liability under the warranty, so that the costs award, if there was to be one, should be reduced by 25%. Although this issue is not determinative, it is appropriate to record that I do not agree with Mr Shand's assessment. The most obvious initial point is that there were two defendants, both of whom were denying liability. Beyond that, a reproduction of the contents of the adjudicator's substantive award shows the range of matters he had to consider. The contents topics are as follows: the dwelling; factual background; the claim; technical basis of claim and causes of damage to the house; liability of the first respondent, Rodney District Council; liability of the second respondent, Mrs Kerkin [being claims in tort as well as contract]; second respondent's cross-claim against the first respondent, Rodney District Council; remedial costs; other losses; general damages; summary of damages; mitigation and intervening acts; contributory negligence; result [on the Whites' claims]; contribution issues [between Mrs Kerkin and the Council]; summary of the respondents' liability; conclusion and orders.

[87] On a broad brush assessment I would not have allowed more than 10% to 15% on the contractual warranty issue as a proportion of the total had there been grounds to allow the appeal on costs.

Result

[88] The appeal against the determinations on mitigation of damage and general damages are allowed.

[89] The awards of $10,000 general damages each to Mr and Mrs White are set aside and awards of $25,000 each are substituted.

[90] The reduction of damages by 45% is set aside, with the result that the appellants are entitled to the following damages:

Cost of repairs including GST	281,250.00
Consequential losses	14,752.68
General damages	50,000
	$346,002.68

[91] The appeal against the refusal to award costs is dismissed.

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Peter Woodhouse J