IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2011-404-7422
[2014] NZHC 2493

BETWEEN	KENNETH JAMES JERARD and LINDA IRENE LEADER Plaintiffs
	AUCKLAND COUNCIL First Defendant
AND	BRYCE WARRAN PAXTON and AMANDA SARAH PAXTON Second Defendants
	BROWN BROTHERS BUILDERS LIMITED First Third Party
	IAN HUTCHINSON CONSULTANTS LIMITED Second Third Party
	BRETT CONWAY BROWN Third Third Party
	MATTHEW TICKLE Fourth Third Party
	POLE SPECIALISTS LIMITED Fifth Third Party
	DEAN HENSHAW Sixth Third Party
	SHORE PLUMBING LIMITED Seventh Third Party

Hearing: 6-9 October 2014

Appearances: T J Rainey, D A Cowan and J Heard for plaintiffs
No appearance for second defendants

Judgment: 10 October 2014

JUDGMENT OF LANG J

This judgment was delivered by me on 10 October 2014 at 3 pm,
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……………

[1] This proceeding concerns a property situated at 12 Fairhaven Walk, Arkles Bay ("the property"). The plaintiffs, Mr Jerard and Ms Leader, are the present owners of the property. They purchased the property in December 2005 from the second defendants, Mr and Mrs Paxton.

[2] The plaintiffs commenced this proceeding in order to recover from the defendants the cost of rectifying defects they have discovered in relation to the property. They now seek judgment against the second defendants by way of formal proof.

[3] The plaintiffs originally sued Mr and Mrs Paxton in both negligence and for breach of contract, but ultimately restricted their claim to the latter. They allege that Mr and Mrs Paxton breached the warranties relating to building work contained in the agreement for sale and purchase that both parties signed when the plaintiffs agreed to purchase the property. Mr and Mrs Paxton defended the plaintiffs' claim up until July 2013, but thereafter took no steps to serve evidence in support of their defence or in support of their claims against the third parties. They did not appear when the trial commenced on 6 October 2014.

[4] On the second day of the hearing, counsel for the remaining parties advised the Court they had reached an unconditional settlement that will involve the plaintiffs receiving the sum of $260,000 from those parties. For that reason the trial proceeded by way of formal proof against the second defendants alone.

[5] When the trial began, the plaintiffs sought damages based on the cost of rendering the property code compliant. They contended that remedial works to the land would be likely to cost approximately $657,000, and that remedial works to the house will probably cost approximately $250,000. The plaintiffs also sought consequential losses totalling $42,514.69, and general damages for stress and inconvenience in the sum of $25,000.

[6] When the plaintiffs closed their case, they sought damages calculated on the basis of the extent to which their property has diminished in value by virtue of the

defects that have been identified. They sought damages in the sum of $550,000 on this basis, reduced by $260,000 to reflect the payment they are to receive from the other parties to this proceeding. They abandoned their claim for consequential losses, but maintained their claim for general damages in the sum of $25,000.

The plaintiffs' claim

[7] The plaintiffs sue Mr and Mrs Paxton for breach of the following warranties contained in cl 6.2(5) of the agreement for sale and purchase that they signed when they agreed to purchase the property from them:

> Where the vendor has done or caused or permitted to be done on the property any works for which a permit or building consent was required by law:
>
> (a) The required permit or consent was obtained; and
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> (b) The works were completed in compliance with that permit or consent; and
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> (c) Where appropriate, a code compliance certificate was issued for those works; and
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> (d) All obligations imposed under the Building Act 1991 were fully complied with.

[8] The evidence establishes conclusively that Mr and Mrs Paxton were the persons who caused the house to be built on the property, and that the construction of the house required a building consent. As a result, there can be no dispute that the plaintiffs are entitled to the protection of the warranty contained in cl 6.2(5) of the agreement for sale and purchase.

[9] The plaintiffs accept that Mr and Mrs Paxton obtained both a resource consent and building permit from the Rodney District Council (the Council) in respect of works to be carried out on the property. They maintain, however, that these could not and did not cover preparatory work that the plaintiffs had already carried out on the property before they had obtained either a resource consent or a building consent. They therefore contend that Mr and Mrs Paxton breached the warranty contained in cl 6.2(5)(a).

[10] The plaintiffs also accept that the Council subsequently issued a code compliance certificate in respect of the work carried out in relation to the construction of the house. The code compliance certificate was subsequently set aside, however, after the plaintiffs obtained a determination from the Chief Executive of the Department of Building and Housing that the Council did not have reasonable grounds to be satisfied that the work carried out under the building consent complied with the New Zealand Building Code.[1] Following that decision, the Council served a notice on the plaintiffs requiring them to rectify the defects identified in the Chief Executive's determination. The Council has agreed not to enforce that notice pending determination of the present proceeding.

[11] As counsel for the plaintiffs recognised in his closing submissions, the fact that the code compliance certificate was subsequently set aside does not mean that Mr and Mrs Paxton are in breach of the warranty contained in cl 6.2(5)(c). That warranty related to the state of affairs that existed when the parties signed the agreement for sale and purchase. As at that date there had been no challenge to the validity of the code compliance certificate. There is therefore no basis for the plaintiffs to allege that Mr and Mrs Paxton breached the warranty contained in cl 6.2(5)(c).

[12] For reasons I shall shortly explain,[2] it is not necessary in the circumstances of the present case for the plaintiffs to rely upon an alleged breach of cl 6.2(5)(d). The second defendants' liability can be determined by consideration of whether in terms of cl 6.2(5)(a) Mr and Mrs Paxton carried out work on the site before obtaining the necessary consents, and whether in terms of cl 6.2(5)(b) they built the house in compliance with the building consent.

The alleged defects

[13] The section on which Mr and Mrs Paxton built the house slopes steeply from top to bottom, and was originally covered densely with large trees and thick bush. Mr and Mrs Paxton began the construction works by felling a large number of trees. They then created a small building platform by digging into the hillside. They

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1 Determination 2010/116, 26 November 2010.
2 At [20].

disposed of spoil from the excavation works by tipping it over fallen trees to the eastern side of the building platform. This area was later gravelled, and currently forms an unsealed driveway that travels along the eastern side of the house to the rear of the building platform.

[14] Mr and Mrs Paxton then built a house on the platform supported by poles. At the rear of the house is a small back yard bounded by a steep rock face that was exposed by the excavation works. The land above the rock face remains covered in a mixture of very large trees and dense bush.

[15] The alleged defects that have given rise to the plaintiffs' claim can be summarised as follows:

(a) although the rock face at the rear of the house is stable, the absence of any retaining wall means that the house is exposed to the risk of being damaged by debris that may wash down the hillside above the house during extreme weather events;

(b) the construction of the house involved the diversion of natural water flows so that in times of heavy rainfall, water now runs under the house and through the uncompacted fill under the driveway on the eastern side of the house. This places the integrity of both the house and the driveway at risk;

(c) a retaining wall that runs along the edge of the driveway on the eastern side of the property is not structurally fit for purpose and does not have a safety rail or barrier; and

(d) the house suffers from weathertightness defects that have permitted water ingress and resulting damage to the structure of the house.

The remedial work

[16] The expert evidence called by the plaintiffs establishes that the identified defects will require extensive remedial work. This will include:

(a) construction of a substantial retaining wall at the rear of the house to protect the house from being damaged by debris that may be washed down the hillside;

(b) removal of the uncompacted fill under the driveway on the eastern side of the house and replacement with compacted fill of suitable quality;

(c) installation of appropriate drainage to ensure that the house and driveway are not placed at risk in times of extremely heavy rainfall;

(d) replacement of the retaining wall on the eastern side of the property with a retaining wall that is fit for purpose and has an adequate barrier;

(e) removal of existing cladding from the house and replacement of all damaged internal timber structures; and

(f) replacement of the entire cladding of the house and re-installation of all affected joinery using appropriate flashings.

[17] The plaintiffs have obtained quotations from contractors having the ability to carry out the necessary remedial work. These were based on calculations produced by the plaintiffs' quantity surveyor. The quotations establish that the work necessary to rectify the defects outside and around the house will cost $657,797, whilst the work necessary to rectify the weathertightness defects in the dwelling will cost $262,453.

Liability

[18] The plaintiffs point out that the preparatory work that Mr and Mrs Paxton carried out on the building platform was not the subject of a building permit at the time it was undertaken. I accept this submission, and consider it constituted a clear breach of the warranty in cl 6.2(5)(a). In order to rectify that issue now, the plaintiffs

will be required to build a substantial retaining wall and install appropriate drainage works.

[19] The plaintiffs' claim for breach of warranty under cl 6.2(5)(b) relies on the fact that the building consent contained an express provision requiring all building work carried out under the consent to comply with the provisions of the Building Code 1992.[3] It is therefore not necessary for me to consider whether failure to comply with the requirements of the Building Code also amounted to a breach of the warranty in cl 6.2(5)(d) of the agreement for sale and purchase. Under that clause the vendor warrants that all building work complies with the obligations imposed by the Building Act 1991. The issue potentially arises in the present case because at the time Mr and Mrs Paxton built the house s 7 of the Building Act 1991 required all building work to comply with the Building Code. Whether failure to comply with this statutory obligation also constitutes a breach of the warranty in cl 6.2(5)(d) has been the subject of conflicting decisions in this Court.[4]

[20] The issue as to whether Mr and Mrs Paxton built the house in a manner that complied with the requirements imposed by the Building Code has already largely been determined in their favour by the determination issued by the Chief Executive of the Department of Building and Housing. The Chief Executive determined that the site stability and structure did not comply with Clause B1 of the Building Code, and that the drainage on the property was not adequate to direct water from overland flow paths away from the dwelling. This meant that the building work did not comply with Clauses B2, E1 and E2 of the Building Code. Furthermore, the fact that the retaining wall on the eastern boundary of the property did not have a safety barrier meant that it did not comply with Clause F4 of the Building Code. In the absence of any fresh evidence demonstrating that these conclusions were wrong, this Court has no basis to revisit them. Each of the identified defects would constitute a breach of the warranty contained in cl 6.2(5)(b).

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3 The Building Code is set out in the First Schedule to the Building Regulations 1992.

4 Compare the approach taken by Ronald Young J in *Van Huijsduijnen v Woodley* [2012] NZHC 2685 at [32]-[34] with that taken by Asher J in *Saffioti v Ward* [2013] NZHC 2831, (2013) 14 NZCPR 792 at [36]-[43].

[21] Mr and Mrs Paxton also rely in this context upon the expert evidence given by Mr Patrick Shorten, Dr Sean Finnegan and Mr Barry Gill.

Mr Shorten's evidence

[22] Mr Shorten is a Chartered Professional Engineer with 36 years experience as a geotechnical engineer and engineering geologist. Through his firm Fraser Thomas Ltd, Mr Shorten has provided the plaintiffs with expert advice regarding the geotechnical issues arising out of the manner in which Mr and Mrs Paxton constructed the house. His evidence is to the effect that:

(a) the retaining wall on the eastern side of the property does not meet the structural requirements of the Building Code for several reasons. These stem largely from the fact that insufficient analysis was carried out in relation to ground strength and conditions beneath the proposed path of the retaining wall. He considers that poles having a much larger diameter ought to have been used to prop up the wall, and that a safety barrier will need to be installed on top of the wall;

(b) the cut to the steep bank at the rear of the house fails to meet the requirements of Clause B2 of the Building Code, which requires building elements to be sufficiently durable to ensure that buildings satisfy their functional requirements throughout their usable lives. It requires structural elements to perform for 50 years if they provide structural stability to a building; and

(c) the failure to make adequate provision for water flows meant that the work failed to comply with Clause E1 of the Building Code, which requires that surface water from storm events having a two per cent probability of occurring annually shall not enter buildings.

Dr Finnegan's evidence

[23] Dr Finnegan is a senior Environmental Engineer and a director of Fraser Thomas Ltd. He has specialist skills and expertise in several fields, including

hydrology and issues relating to stormwater. He has provided the plaintiffs with expert advice regarding the issues arising out of the diversion of the natural water flows at the time Mr and Mrs Paxton built the house and the proposal that new retaining walls be built at the rear and along the eastern side of the property.

[24] Dr Finnegan says that the present forms of drainage at the property breach the requirements of Clause E1 of the Building Code in several respects. The objective of this clause is to safeguard property from damage from surface water and to protect the outfalls of drainage systems. Furthermore, the fact that water is able to flow beneath the house means that the land may become saturated and will cause further instability to the uncompacted fill on the site. This is in breach of Clauses E2 and B1 of the Building Code. Other aspects of the present drainage system breach the requirements of Clauses B1, B2 and E1 of the Building Code.

Mr Gill's evidence

[25] Mr Gill is a registered building surveyor and has significant experience in dealing with weathertightness issues. He has given detailed evidence regarding the defects that have contributed to water ingress at the plaintiffs' property. The four principal defects are the fact that several joinery units lack a weathertight seal and there has been a failure to install the cavity cladding system in accordance with good trade practice. In addition, the roof has not been installed in accordance with good trade practice, and inadequate repairs have been carried out to a butynol membrane covering a deck at the front of the property. All of these defects have permitted water to enter the house and cause damage to the internal structure.

[26] Mr Gill says that the ingress of water through these defects means that the house was not built in accordance with two particular requirements imposed by the Building Code. These are Clauses B2 (relating to durability of construction work) and E2 (relating to moisture).

[27] In his closing submissions counsel for the plaintiffs helpfully tendered a table setting out in greater detail the individual defects that have been identified as being in breach of relevant requirements imposed by the Building Code. The table is annexed as an Appendix to this judgment.

Conclusion

[28] The evidence summarised above satisfies me that the plaintiffs have established that Mr and Mrs Paxton began construction work before they had obtained the required resource and building consents, and that the construction work did not comply with material requirements imposed by the Building Code. It follows that the plaintiffs have established that Mr and Mrs Paxton breached the warranties contained in cl 6.2(5)(a) and (b) of the agreement for sale and purchase.

Damages

Should damages be awarded based on diminution of value of the property or the likely cost of remedial work?

[29] As a general proposition, damages awarded for breach of contract are designed to return the injured party to the same position he or she would have been in but for the breach in question. The circumstances of the present case are such, however, that there could have been a real issue as to whether the plaintiffs should receive damages based on the cost of repairing the property or damages based on the extent to which the defects have diminished the value of the property. Although the plaintiffs ultimately elected for practical purposes to proceed on the latter basis, I propose to briefly consider whether they may have been able to recover damages based on the likely cost of remedial work.

[30] There being no evidence to the contrary, I accept that the likely costs of remedial works to the land will be $657,797 and the likely costs of repairing the house would be $253,745.

[31] It is then necessary is to fix a present value for the property. The plaintiffs' valuer says it is difficult to assess the current market value of the property, because it is difficult to see why a reasonable purchaser would be prepared to pay anything to acquire a property requiring so much remedial work to be carried out before it will be code compliant. He says that the property may in fact have a negative value. By that I take him to say that the plaintiffs may need to pay a purchaser to take the property off their hands. At the most, the plaintiffs' valuer considers the property may be worth $150,000.

[32] The problems that beset this property are such that I do not consider that it currently has any value. I reach that conclusion because I cannot conceive of any rational person being prepared to pay for the privilege of fixing them. In the absence of further evidence quantifying the negative value of the property, however, I would not be prepared to ascribe a negative value to it.

[33] The potential issue, therefore, was whether the plaintiffs should receive damages in the sum of $911,542 or damages in the sum of $550,000.

[34] The most recent New Zealand authority in relation to the measure of damages for breach of contract is the decision of the Supreme Court in *Marlborough District Council v Altimarloch Joint Venture Ltd.*[5] In that case Tipping J observed:

> [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.

[35] I also draw assistance from the following passages of the judgment of Tipping J in *Altimarloch.*

> [157] In the leading case of *Robinson v Harman*, Parke B said that a party who suffers loss on account of a breach of contract is, by means of damages, to be placed in the same situation as if the contract had been performed. In *Radford v de Froberville* Oliver J emphasised that this formulation did not necessarily mean only as good a *financial* position; more may be required. In some cases the appropriate and sufficient measure of damages for breach will put the plaintiff in as good a financial position as if the contract had not been broken. That is likely to be the case where the contract involves a marketable (that is, readily substitutable) commodity or other subject-matter. But if the subject-matter of the contract is not of that kind, an actual or notional sale of the defective item and its replacement with an item of the contractual standard will not usually be a feasible measure. A performance measure rather than one which is strictly compensatory may then be necessary. The difference in subject-matter which underpins this approach is similar to the difference between cases where damages are an adequate remedy and those where the subject-matter is such that specific performance is the appropriate remedy for non-performance.

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5 *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726.

> [158] In the first kind of case, where the subject-matter is readily substitutable, the damages are truly compensatory, that is, they compensate for the difference between the value of the defective subject-matter (which is either actually or notionally sold) and the value or cost of goods or other subject-matter answering to the contractual requirements. In the second kind of case, where the subject-matter is not readily substitutable, the damages are designed to require the defendant to pay the plaintiff enough money to enable the plaintiff to have the contract performed as fully as is reasonable and possible. Damages in this second kind of case can therefore usefully be called performance damages, as opposed to damages which compensate for loss of value.
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> (footnotes omitted)

[36] Although the members of the Court were ultimately divided as to the appropriate outcome in *Altimarloch*, I do not read the judgments of the other members of the Court as taking issue with the statements of principle set out above. By way of example, the Chief Justice, who disagreed as to the outcome on this point, observed:

> [27] The usual measure of damages for breach of a term of a contract is the difference between the value contracted for and the value obtained. That measure may not be appropriate where achieving substitute performance is necessary mitigation of loss or itself establishes the value lost, or in cases where the performance interest in a contract is not captured through damages representing the economic loss on the bargain. The last are usually encountered where the contractual breach consists of failure to perform or defective performance of contracts to supply services, construct buildings or keep premises in repair, and where the usual measure is inadequate to meet the failure in stipulated performance. In such cases, the appropriate measure of damages may be the cost to the innocent party of having substitute performance undertaken by a third party.

[37] Tipping J went on to refer to two modern cases of "high persuasive authority" to demonstrate the distinction between compensatory and performance-based damages.[6] In *Ruxley Electronics and Construction Ltd v Forsyth*,[7] contractors had built a swimming pool to a lesser depth than that required by the contractual specifications. The cost of rebuilding the pool in accordance with the specifications was approximately £21,550. The evidence established, however, that the lesser depth of the pool did not diminish the value of the plaintiff's property in any way at all. The trial Judge held that the costs involved in rebuilding the pool were therefore unreasonable and not recoverable. The Court of Appeal allowed the resulting appeal, holding that the proper measure of the plaintiff's loss was the amount necessary to put him in the same position

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[6] At [159]-[166].

[7] *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 (HL).

as if the contract had been performed. This meant that the plaintiff was entitled to recover the costs of rebuilding the pool.

[38] The House of Lords disagreed. It considered that the appropriate measure of damages was diminution in value rather than reconstruction. Reconstruction of the pool would have been unreasonable in all the circumstances, and the expenditure necessary to achieve that outcome was out of all proportion to the benefit to be obtained from it. Tipping J took their Lordships in *Ruxley* to be saying that to award the cost of rebuilding the pool "would have the effect of unreasonably inflating the loss suffered".[8]

[39] This approach is to be contrasted with that taken by the High Court of Australia in *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd*.[9] In that case the tenant of office premises had covenanted not to alter the premises without the landlord's prior written approval. The tenant proceeded to alter the ornate entrance lobby of the premises without first obtaining the landlord's approval. The landlord then sued the tenant to recover the cost of restoring the lobby to its former state. The tenant argued that the proper measure of damages was the amount by which the premises had diminished in value as a result of the breach of covenant. This was substantially less than the cost of restoring it to its former condition. The High Court rejected this argument, holding that it was reasonable for the landlord to insist on restoration of the lobby to its original state. The proper measure of damages was therefore the cost of undertaking that work.

[40] Another case that provides useful assistance is the decision of the High Court of Australia in *Bellgrove v Eldridge.*[10] In that case the plaintiff had entered into a contract under which a builder agreed to build a house for her. The plaintiff issued proceedings after she discovered defects in the composition of the concrete used in the foundations of the building, and in the mortar used in the erection of brick walls. The Court held that the defects in the foundations were such that it was reasonable to award damages reflecting the cost of demolishing the whole of the building and erecting another in its place. In reaching this conclusion the Court said:[11]

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8 *Marlborough District Council v Altimarloch Joint Venture Ltd*, above n 5 at [160].
9 *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* [2009] HCA 8, (2009) 236 CLR 272.
10 *Bellgrove v Eldridge* (1954) 90 CLR 613 (HCA).
11 At 618.

> The qualification, however, to which this rule is subject is that, not only must the work undertaken be necessary to produce conformity, but that also, it must be a reasonable course to adopt. No one would doubt that where pursuant to a building contract calling for the erection of a house with cement rendered external walls of second-hand bricks, the builder has constructed the walls of new bricks of first quality the owner would not be entitled to the cost of demolishing the walls and re-erecting them in second-hand bricks. In such circumstances the work of demolition and re-erection would be quite unreasonable or it would, to use a term current in the United States, constitute "economic waste".[12] We prefer, however, to think that the building owner's right to undertake remedial works at the expense of a builder is not subject to any limit other than is to be found in the expressions "necessary" and "reasonable", for the expression "economic waste" appears to us to go too far and would deny to a building owner the right to demolish a structure which, though satisfactory as a structure of a particular type, is quite different in character from that called for by the contract. Many examples may, of course, be given of remedial work, which though necessary to produce conformity would not constitute a reasonable method of dealing with the situation and in such cases the true measure of the building owner's loss will be the diminution in value, if any, produced by the departure from the plans and specifications or by the defective workmanship or materials.

[41] I consider that the present case lies at the margin in terms of whether it would have been reasonable for the plaintiffs to obtain performance-based damages. Many would consider it unreasonable to spend more than $950,000 to produce an end product having a market value of just $650,000. Having regard to the authorities, however, it is at least arguable that the plaintiffs would be entitled to recover the full cost of rectifying the defects so as to make their property code compliant. The authorities, and in particular the approach taken in *Altimarloch*, appear to indicate that performance-based damages will usually be justified in cases where the subject-matter of the contract is not readily substitutable for another equivalent alternative. That would clearly be the situation in the present case.

[42] Acceptance of that argument would necessarily involve a major qualification. Before the Court would award performance-based damages, it would need to be satisfied that the plaintiffs were genuinely committed to undertaking the remedial works in respect of which the damages were to be awarded.[13] By the end of the evidence, however, several factors left me unconvinced that the plaintiffs would take that step. First, it does not make economic sense for the plaintiffs to repair the property given the costs involved and the likely market value of the property once repairs have been

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12 See *Restatement of the Law of Contracts* (1932) par 346.

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completed. Secondly, I did not sense that the plaintiffs have any emotional or spiritual commitment to either the property or its location. Rather, their evidence was to the effect that their involvement with the property has been a financial and emotional disaster for them from the outset. Thirdly, their evidence did not go so far as to expressly confirm their commitment to undertaking the remedial work. In addition, their relationship has been placed under severe strain by the problems they have encountered with the property. This was likely to undermine their commitment to the remedial works. The fact that Mr and Mrs Paxton now reside overseas is also likely to mean that the plaintiffs would not commence the remedial work unless they could be sure that any judgment they obtain against Mr and Mrs Paxton is likely to bear fruit.

[43] These factors led me to conclude that there was a realistic prospect that the plaintiffs would use whatever funds they recover from this litigation to dispose of the property and acquire alternative accommodation. In that event the plaintiffs' true loss would be approximately $550,000, being the difference between the current market value of the home that they have had to abandon and the value their property would have had if it had been code compliant from the outset. An award of performance-based damages in those circumstances would be inappropriate, because it would provide the plaintiffs with a windfall profit of approximately $400,000.

[44] The issue ultimately became moot when counsel for the plaintiffs clarified his clients' position during closing submissions. He advised me that the plaintiffs do not intend to carry out the remedial works. Instead, they propose to try to sell the property and use the sale proceeds and the funds realised by this litigation to pay off their mortgage. They will then divide any remaining balance between them and go their separate ways.

[45] For that reason counsel for the plaintiffs appropriately confirmed that his clients now sought damages on a diminution of value basis. They seek damages in respect of the difference between the current value of the property and the value that it would have had but for the defects that have been identified. The judgment sum must then be reduced to reflect the cash payment that the plaintiffs are shortly to receive from the other parties to this litigation. Given my earlier conclusion that the property has no realistic value in its current state, I agree with this approach. As a consequence, I award damages to the plaintiffs in the sum of $290,000.

General damages

[46] The plaintiffs have given extensive evidence as to the severe impact that the issues giving rise to this proceeding have had on them since before they settled the purchase of the property in December 2005. I accept their evidence on this issue without reservation. The only factor that reduces the quantum of damages that would otherwise be appropriate is the fact that the plaintiffs' evidence confirms that a significant proportion of their stress and anxiety has been caused by their dealings with the first defendant. Mr and Mrs Paxton should not be required to pay damages in respect of anxiety and stress caused by the actions of another party. I consider an appropriate award of general damages to be $15,000.00.

Costs

[47] The plaintiffs are entitled to costs on a Category 2B basis, together with disbursements as fixed by the Registrar. The disbursements are to include the reasonable costs incurred in engaging experts to provide them with advice and evidence in relation to this proceeding.

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Lang J

Solicitors:
Rainey Law, Auckland

APPENDIX 2 – BUILDING DEFECTS

CONSTRUCTION DETAIL AND LOCATION	DEPARTURES FROM THE BUILDING CONSENT APPROVED CONSTRUCTION METHOD AND NON-COMPLIANCE WITH THE BUILDING CODE	DEFECT
Roofing	A Zincalume Styleline longrun roof was installed not the Council approved Coloursteel longrun roof. 20 November 2010 - DBH Determination at page 20, paragraph 10.2.1.[14] Breach of Building Code Compliance Document E2/AS1 of July 2004.[15]	1. The roof installed is not a marine grade product. It is rusting at the base of sheets. 2. No wire mesh was installed to provide support to the roofing paper that underlies the roof. 3. Failure to provide suitable stopends to the profile metal roof sheets. 4. Failure to provide turn downs to the profile metal roof sheets at the junction with the gutter.
Cladding	Breach of the Acceptable Solution E2/AS1.	1. The cavity plywood cladding system has been incorrectly installed with a continuous horizontal fixed batten at the mid-point and at the base of the cladding which prevents ventilation and moisture control. 2. The cladding has been installed with insufficient

[14] CBD Volume 1, Tab 49, pg 278
[15] Evidence of Mr Gill at paragraph 120(a) and at CBD Volume 3

	Insufficient clearance is a breach of the Acceptance Solution E2/AS1 of the Building Code. Breach of the Building Code E2/AS1 of July 2004. Contrary to the requirements of the Compliance Document E2/AS1.[16]	clearance at the junction with the deck membrane, resulting in potential for moisture ingress from wicking up of water. 3. The cladding has been installed with insufficient clearance at the junction with the deck membrane, resulting in potential for moisture ingress from wicking up of water. 4. The horizontal flashing at the junction between the plywood cladding sheets has: 5. The flashing has been incorrectly penetrated with nail fixings creating potential moisture ingress points. 6. The copper horizontal flashing installed between sheets of plywood cladding is in contact with the galvanised back-flashings and corner flashings. The two materials are incompatible and corrode each other. 7. The profile of the copper horizontal sheet joint flashing was not installed with the minimum 15 degree fall resulting in the junction collecting moisture and being prone to allowing water entry. 8. Building paper was installed in contact with the rear face of the plywood cladding. Because the cladding cavity system has been blocked by the installation of horizontal battens, moisture cannot exit

16 Evidence of Mr Gill at paragraph 118 and at CBD Volume 3, Tab 117 page 651

	Contrary to the recommendations of the Acceptable Solution E2/AS1 of July 2004.[17]	the cavity. 9. Failure to provide a suitable support for the roof underlay.
Window joinery	Breach of Building Code Compliance Document E2/AS1 of July 2004.[18] Breach of Building Code Compliance Document E2/AS1 of July 2004.	1. The window head flashings have not been installed with suitable stop-ends.[19] 2. The head flashings have been installed with excessive lap to them causing a gap between it and the window allowing a moisture ingress pathway. 3. No jamb flashings have been provided to the window units resulting in moisture ingress at the junction with the horizontal copper sheet joint flashings. 4. No air seals have been provided to the windows, creating a potential pathway for moisture ingress

[17] Evidence of Mr Gill at paragraph 126.
[18] Evidence of Mr Gill at paragraph 103(b) and at CBD Volume 3, Tab 117 page 660
[19] Evidence of Mr Gill at paragraphs 18 and 19 and at CBD Volume 2, Tab 61, pg 446 and 447