IN THE SUPREME COURT OF NEW ZEALAND

SC 33/2010
[2012] NZSC 11

BETWEEN	MARLBOROUGH DISTRICT COUNCIL Appellant
AND	ALTIMARLOCH JOINT VENTURE LIMITED First Respondent
AND	D S AND J W MOORHOUSE Second Respondents
AND	VINING REALTY GROUP LIMITED Third Respondent
AND	GASCOIGNE WICKS Fourth Respondent

SC 40/2010

BETWEEN	VINING REALTY GROUP LIMITED Appellant
AND	ALTIMARLOCH JOINT VENTURE LIMITED First Respondent
AND	GASCOIGNE WICKS Second Respondent
AND	D S AND J W MOORHOUSE Third Respondents
AND	MARLBOROUGH DISTRICT COUNCIL Fourth Respondent

SC 41/2010

BETWEEN	GASCOIGNE WICKS Appellant
AND	ALTIMARLOCH JOINT VENTURE LIMITED First Respondent
AND	D S AND J W MOORHOUSE Second Respondents
AND	MARLBOROUGH DISTRICT COUNCIL Third Respondent
AND	VINING REALTY GROUP LIMITED Fourth Respondent

Hearing:	15-16 February 2011
Court:	Elias CJ, Blanchard, Tipping, McGrath and Anderson JJ
Counsel:	D J Goddard QC, M A Cavanaugh, and J H Morrison for Marlborough District Council M E Casey QC and R N Dunningham for Altimarloch Joint Venture Limited M R Ring QC and A B Darroch for Vining Realty Group Limited F B Barton and M B Couling for Gascoigne Wicks
Judgment:	5 March 2012

JUDGMENT OF THE COURT

A **The appeal by the Marlborough District Council from the liability judgment given against it in favour of Altimarloch Joint Venture Limited is dismissed.**

B **The appeal by the Marlborough District Council from the contribution judgment given against it in favour of D S and J W Moorhouse is allowed. That judgment is set aside and judgment in favour of the Council is entered in respect of that claim.**

C **The appeals by Vining Realty Group Limited and Gascoigne Wicks against the amount of the judgment entered in favour of Altimarloch Joint Venture Limited against the Moorhouses are dismissed.**

D **Costs:**

In the Supreme Court

(a) **The Council is to pay Altimarloch costs of $10,000.**

(b) **Vining Realty and Gascoigne Wicks are to pay the Council costs of $5,000. They are to pay in the proportions fixed in the Court of Appeal, namely 60 per cent by Vining Realty and 40 per cent by Gascoigne Wicks.**

(c) **Vining Realty and Gascoigne Wicks are to pay in the same proportions costs of $10,000 to Altimarloch.**

(d) **In each case where costs are awarded, disbursements shall be added as agreed or fixed by the Registrar.**

In the Court of Appeal

(a) **The Council is to pay Altimarloch such costs as agreed or fixed by the Court of Appeal.**

(b) **Vining Realty and Gascoigne Wicks are to pay in the same proportions costs to the Council as agreed or fixed by the Court of Appeal.**

(c) **As between Vining Realty and Gascoigne Wicks on the one hand and Altimarloch on the other, Order F made by the Court of Appeal stands.**

(d) **All orders made in the Court of Appeal that are inconsistent with the foregoing orders are set aside.**

(e) **In each case where costs are awarded, disbursements shall be added as agreed or fixed by the Registrar.**

In the High Court

(a) **All costs orders are set aside and all matters of costs are to be as agreed or as fixed by the High Court in the light of the ultimate outcome of the case.**

REASONS

ELIAS CJ

[1] Although the appeal also concerns the important question whether a duty of care is owed by a territorial authority to someone who obtains from it a Land Information Memorandum, I write separately only on the questions concerning the measure of damages and contribution when a contract is induced by misrepresentation by both the vendors and a non-contracting party. The misrepresentation made was as to the quantity of water rights held by the vendors on the sale and purchase of 145.5 hectares of rural land, part of which was intended by the purchaser for planting in grape vines.[1] Under the agreement, all water rights held by the vendors were to be transferred to the purchaser, Altimarloch Joint Venture Limited. The same erroneous information as to the quantity of the water rights held by the vendors was given separately to the purchaser by agents for the vendors and by the Marlborough District Council in a Land Information Memorandum.

[2] The vendors (whose agents are required to indemnify them) are liable to pay damages to Altimarloch under s 6 of the Contractual Remedies Act 1979 "in the same manner and to the same extent as if the representation were a term of the contract that has been broken". In the lower Courts[2] damages have been assessed against the vendors on the basis of the cost of achieving "functional equivalence"[3] in the water represented to be available. This "cost of cure" has been assessed by adding the price paid by Altimarloch after settlement to an unrelated seller to obtain part of the shortfall in water rights and the estimated cost of construction of a dam for the storage of sufficient water to make up the balance of the shortfall. (It appears to have been accepted in the lower Courts that no further water rights are available for purchase.) The effect is that the vendors are liable to pay damages of

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1 The evidence is that the purchaser intended to plant vines on 95 ha of the land. Although other evidence suggested the potential for viticulture on the land was limited to between 45 and 55 ha, the High Court seems to have proceeded on the basis that irrigation was required for 95 ha, without reference to the difference in opinion.

2 The appeal is brought from the judgment of the Court of Appeal in *Vining Realty Group Ltd v Moorhouse* [2010] NZCA 104 (William Young P, Hammond and Robertson JJ). The Court of Appeal largely upheld the High Court in which two judgments were delivered by Wild J: *Altimarloch Joint Venture Ltd v Moorhouse* HC Blenheim CIV-2005-406-91, 3 July 2008; *Altimarloch Joint Venture Ltd v Moorhouse* HC Blenheim CIV-2005-406-91, 23 March 2009 [recall judgment].

3 As it was described by the Court of Appeal at [38].

$1,055,907.16 arising out of a contract in which the purchase price of the land was $2.675 million and its value without the water rights was put at $2.55 million.

[3] The Marlborough District Council has been held liable in the High Court for negligent misstatement about the extent of the water rights. Its appeal was dismissed by the Court of Appeal. The Council's misstatement was contained in a Land Information Memorandum obtained by Altimarloch from the Council under s 44A of the Local Government Official Information and Meetings Act 1987. Damages against the Council were assessed in the High Court at $400,000, representing the difference between the value of the property without the rights represented ($2.55 million) and the value of the property on the basis that the full rights represented had been available to be transferred ($2.95 million).[4] The Judge found this to be the appropriate award of damages against the Council:

> [235] Had it known the true position prior to settling the agreement on 30 July, Mr McNabb's evidence was that the plaintiff would have either renegotiated the agreement down at least to the value of Altimarloch, or have cancelled the agreement. I accept Mr McNabb's evidence. The consequence is that the plaintiff has paid $400,000 too much for Altimarloch, and that is the appropriate award of damages to the plaintiff against the [Council].

The Court of Appeal held that the High Court had adopted the contractual measure of damages which was not appropriate for the Council's liability in tort. It accordingly reduced the damages against the Council to $125,000, representing the difference between the purchase price paid ($2.675 million) and the value of the land without the water rights ($2.55 million).[5]

[4] In the first judgment in the High Court, the Judge apportioned liability between the vendors and Council at 66 per cent to the vendors and 34 per cent to the Council.[6] This was applied to the full cost of cure basis (assumed in that judgment to be $777,000 but subject to updating information then still to be provided). The proportions were set by the Judge to take account of the fact that the Council was

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4 At [229]–[235].
5 At [113].
6 At [239].

liable on his approach for damages of $400,000.[7] This part of the judgment was recalled by the Judge in his second judgment, in which he held that the damages of $400,000 were to be apportioned equally between the defendants on the basis that "equity is equality".[8] He accordingly made an order for contribution of $200,000 against the Council.[9] The Court of Appeal upheld the High Court's equal apportionment of damages between the vendors and the Council, but only in respect of the Council's liability on the tortious measure of $125,000.[10] In the result, therefore, following the Court of Appeal determination, the Marlborough District Council would pay $62,500 and the vendors $993,407.16.

[5] The agents, Vining Realty Group Limited and Gascoigne Wicks, appeal to this Court against the damages of $1.055 million for which, subject to recovery of the contribution ordered against the Council, they must indemnify the vendors.[11] They contend that the proper measure of damages is the loss of value which would have been gained by Altimarloch in the bargain if the representation had been true ($400,000). Vining Realty and Gascoigne Wicks say that it was not correct to award damages on a "cost of cure" assessed in part by reference to the cost of building a dam to supply the eventual deficiency. They argue that such a measure is unreasonable in the circumstances.

[6] The Marlborough District Council appeals the findings in the High Court and Court of Appeal that it owed Altimarloch a duty of care.[12] If wrong in that contention, it accepts that it breached the duty. In that event, it appeals the damages awarded on two bases which, however, substantially overlap. First, the Council claims that its negligence caused no loss to Altimarloch because it is accepted that Altimarloch will recover in full from the vendors, who are treated under s 6 of the Contractual Remedies Act as having warranted the truth of the representation made on their behalf. Secondly, the Council says that contribution should not have been ordered as between it and the vendors because their liability to Altimarloch was not

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7 The 34 per cent did not exceed the $400,000 the Judge held to be the liability of the Council.
8 At [61]–[63].
9 At [89] of the recall judgment.
10 At [125].
11 *Vining Realty Group Ltd v Altimarloch Joint Venture Ltd* [2010] NZSC 81.
12 *Marlborough District Council v Altimarloch Joint Venture Ltd* [2010] NZSC 82.

of the same nature as the liability of the vendors, as is necessary before equitable contribution may be ordered.[13]

[7] For the reasons that follow, I would allow the appeals by Vining Realty and Gascoigne Wicks. I consider that attempting what the Court of Appeal called "functional equivalence" in a cost of cure assessment was not justified in awarding damages under s 6 of the Contractual Remedies Act. The proper measure of damages was the extent to which Altimarloch suffered loss in the bargain because, contrary to the representation made, the vendors did not hold the water rights represented and therefore could not transfer them under its contractual obligation. Their expectation loss in my view is properly reflected in the difference in the value of the property with and without the represented water rights. On the valuation evidence accepted in the High Court such difference amounted to $400,000. In this conclusion I differ from other members of the Court, who would uphold the award made in the High Court and confirmed in the Court of Appeal.

[8] On the Council's appeal against liability, I agree with the reasons given by Tipping J in this Court for holding that the Council owed a duty of care to Altimarloch. On this issue, I add no further reasons of my own.

[9] I would allow the Council's appeal against the damages awarded against it. I accept that Altimarloch suffered loss and obtained a cause of action in negligence against the Council which accrued when it confirmed the contract as unconditional in reliance on the Council's negligent representation and paid the contract price, receiving in exchange land which was worth less than the price paid. The measure of damages it is able to recover from the Council is however limited to the loss which resulted from the contract. The potential claim available to Altimarloch against the Council arising out of its entry into a loss-making contract, in the absence of any claimed consequential loss, was for loss in value of $125,000, representing the difference between the price it paid and the value of the land without the water rights. The Court of Appeal was correct to reject the loss of bargain measure of $400,000 adopted in the High Court as inappropriate for the claim in negligence

[13] It was accepted that the conditions for contribution under the Law Reform Act 1936 are not made out since the vendors and the Council are not joint tortfeasors.

against the Council. The potential damages due to Altimarloch by the Council must, however, be adjusted for recovery obtained or reasonably in prospect under s 6 of the Contractual Remedies Act from the vendors because, to the extent of such recovery, loss through the Council's negligent inducement of a disadvantageous contract is eliminated.

[10] On the question of contribution as between the Council and the vendors, I consider that there is no basis for an order because the liabilities of the Council and the vendors to the purchaser were not of the same nature.[14]

History of the litigation

[11] In 2004 Altimarloch Joint Venture Limited purchased from David and Jillian Moorhouse a rural property in the Awatere Valley at a price of $2.675 million. It is now established by concurrent decisions in the High Court and Court of Appeal that Altimarloch was induced to enter into the contract by misrepresentations made both by agents for the vendors in the sale and by the Marlborough District Council in a Land Information Memorandum provided under s 44A of the Local Government Official Information and Meetings Act. The vendors themselves were unaware of the misrepresentations made on their behalf. The material misrepresentation was that the vendors held and were able to transfer under the contract resource consents for Class A rights giving priority to take up to 1,500 cubic metres of water a day from the Altimarloch Stream for the purposes of irrigation.[15] Altimarloch intended to plant part of the property in grapevines and the availability of the resource consents was important for its development. The representations about the resource consents were wrong. At the date of the contract Mr and Mrs Moorhouse held resource consents to take only 750 cubic metres a day from the stream. The correct

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[14] See *Burke v LFOT Pty Ltd* [2002] HCA 17, (2002) 209 CLR 282 at [15] per Gaudron ACJ and Hayne J, at [38] per McHugh J, at [92] per Kirby J, at [143] per Callinan J; see also *BP Petroleum Development Ltd v Esso Petroleum Co Ltd* [1987] SLT 345 (OH) at 348 per Lord Ross.

[15] The vendors' agents (but not the Council in preparation of its Land Information Memorandum) also misrepresented that Class B rights to take water were held by the Moorhouses and therefore able to be transferred. The absence of these rights is not material to the losses claimed by Altimarloch. Class C rights, also to take water for storage purposes, were correctly represented by the vendors' agents and the Council and were transferred on settlement of the sale and purchase agreement.

position was not discovered until shortly after settlement of the sale in late July 2004, when Altimarloch was embarking on its planting programme.[16] Altimarloch issued proceedings in the High Court seeking damages against both the vendors and the Council.

[12] Against the vendors, Altimarloch claimed damages under s 6 of the Contractual Remedies Act. Under s 6(1)(a) a party to a contract who has been induced to enter it by a misrepresentation by or on behalf of another party to the contract is entitled to damages "in the same manner and to the same extent as if the representation were a term of the contract that has been broken".

[13] The vendors joined their agents as third parties. They are Vining Realty Group Limited, who acted as real estate agents for the vendors in the sale, and Gascoigne Wicks, the solicitors who acted for them in the transaction. The vendors and the third parties claimed that the negligence of Altimarloch had contributed to the error and denied that their misrepresentations induced the entry into the contract.

[14] Against the Council, Altimarloch claimed damages for breach of a duty of care it said was owed to it by the Council in providing the Land Information Memorandum.[17] The Council denied that it owed a duty of care to Altimarloch. It accepted that, if a duty of care were found, it had been in breach of it in preparing the Land Information Memorandum but it alleged that Altimarloch had caused or contributed to its loss by its own negligence.

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[16] Some planting of vines took place in 2004, although Mr McNabb, the sole shareholder in Altimarloch, is not specific about timing. It seems from correspondence that Altimarloch had been given access to the property for the purpose of soil assessment and other preparatory work and in submissions its counsel spoke of planting occurring before and after settlement. It seems therefore that by early October, when the error as to the extent of water rights held by the Moorhouses was discovered, some planting was underway.

[17] Altimarloch also claimed damages against the Council for breach of statutory duty and for breach of the Fair Trading Act 1986. It was successful in contending breach of statutory duty in the High Court but Wild J chose not to deal with the Fair Trading Act cause of action beyond offering a tentative view: see [155]–[159] of the first High Court judgment. It is not necessary to refer further to these causes of action as they are not in issue on appeal to this Court.

(i) The claim against the vendors

[15] In the High Court, Wild J found that the misrepresentations on behalf of the vendors had been material in inducing Altimarloch to enter into the contract.[18] He rejected suggestions of contributory negligence on the part of Altimarloch, although he considered such contributory negligence, if established, would have required adjustment of damages under s 6 of the Contractual Remedies Act on the basis that claims under that provision are "essentially negligent misrepresentations".[19] In his second judgment, the Judge awarded damages of $1,055,907.16 to Altimarloch against the vendors.[20] In turn, the vendors were held entitled to be fully indemnified by judgments in their favour against their agents. The proportion in which the agents were to contribute to the indemnity for the vendors was set by the Judge at 80 per cent for Vining Realty and 20 per cent for Gascoigne Wicks.[21]

[16] The quantum of damages for which judgment was entered against the vendors was fixed by the Judge on the basis of the price paid by Altimarloch after the hearing to obtain additional water rights of 400 cubic metres together with the cost of constructing a dam capable of storing water to ensure supply throughout the year at the represented rate.[22] The estimates in the claim on which the trial proceeded had put the cost of constructing a dam to supply 750 cubic metres of water at $699,255. That assessment was later amended in opening submissions to $776,751. After the trial and before the first judgment of the High Court, Altimarloch had managed to acquire additional water rights for 400 cubic metres of water at a cost of $320,000.[23] Meanwhile, however, the costs of constructing a dam had escalated so that, despite the reduced capacity required following the purchase of the additional 400 cubic metres, the eventual cost of a dam to supply the 350 cubic

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18 At [97]–[100] of the first High Court judgment.

19 At [106].

20 Recall judgment at [13].

21 At [284] of the first High Court judgment.

22 Wild J in his first judgment indicated that the judgment sum would be quantified in this manner at [286], and confirmed the exact amount following receipt of memoranda in his recall judgment at [13].

23 There is no explicit consideration in either of the two judgments delivered in the High Court of whether the $320,000 paid for the additional water rights was reasonable market price in reasonable mitigation of Altimarloch's loss.

metres of ultimate deficiency was $735,907.16. The "cost of cure" measurement was claimed and adopted despite the fact that the sole shareholder in Altimarloch, Mr McNabb, gave evidence in the High Court that, had he been aware of the correct position in relation to the water rights, he would either not have confirmed the contract or would have negotiated a reduced price for the land to reflect its real value given the actual water supply.[24]

[17] Perhaps because of the way in which the matter was heard in the High Court, with additional information being received after trial but before the first judgment was issued and the second judgment given on the basis of memoranda filed rather than after further oral hearing, some of the evidence at the hearing bearing on quantum was dated and some of the implications of the changed position may not have been fully addressed.[25] In particular, there does not seem to have been any reassessment of the evidence of value of the land with and without the represented 750 cubic metres of water following the purchase of the additional 400 cubic metres of water.[26] Such reassessment may well have been relevant to consideration of the reasonableness of the cost of cure measure adopted and the reasonableness of the mitigation of loss undertaken by Altimarloch in the price paid for the additional water rights.

[18] The $320,000 paid for the additional 400 cubic metres may be contrasted with the finding made by Wild J that, without the rights to 750 cubic metres, the property was worth $400,000 less than it would have been with them. Although Gascoigne Wicks argued in the Court of Appeal[27] that the diminution of value of the property was the proper measure of Altimarloch's loss, its fall-back position was that the ultimate deficiency in the water rights of 350 cubic metres should be

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24 Referred to in the first High Court judgment at [235].

25 The revised costs of building the dam were not provided until some months after the first judgment of the Court was received. Although the parties had the opportunity to make submissions on the information (which was provided by affidavit evidence), it was not suggested in the High Court that the cost of building a dam contained in the revised proposal, accepted by Wild J in his second judgment, was the wrong measure of loss.

26 It cannot be assumed that the diminution in value of the land would have been proportionately reduced by the rights purchased.

27 The Court of Appeal permitted Gascoigne Wicks to challenge the measure of damages in its appeal to that Court, albeit acknowledging procedural issues arising from the manner in which appeals were lodged: at [9] and [37].

compensated for on the basis of the purchase price paid by Altimarloch for the rights to the additional 400 cubic metres.[28] The eventual shortfall on that basis would be valued at approximately $280,000[29] which, when added to the outlay of $320,000, would suggest a damages figure of $600,000 for the breach of s 6. Instead, as explained, the High Court compensated for the deficiency by awarding the estimated cost of a dam capable of storing sufficient water to supply 350 cubic metres a day. In the result, the eventual assessment of damages at $1,055,907.16, made in the second judgment in the High Court following receipt of memoranda relating to costings and as to the purchase of the additional water rights, was made up of the $320,000 spent on the additional 400 cubic metres of water, $661,660.00 for the cost of construction of the storage dam, $21,558.00 for power connection, and $52,689.16 for the cost of irrigation and pumping equipment.

[19] On appeal to the Court of Appeal, the award of damages against the vendors was upheld. So too was the judgment that the third parties indemnify the vendors. It was argued again in the Court of Appeal that Altimarloch was not induced by the misrepresentations to enter into the agreement and, in the alternative, that damages otherwise payable to Altimarloch ought to be reduced to allow for contributory negligence on its part. The Court of Appeal found that Altimarloch had been induced by the misrepresentations and had not acted unreasonably in relying upon them.[30] The Court also expressed disagreement with Wild J's view that any contributory negligence by Altimarloch was able to be raised as an issue on behalf of the vendors.[31] The Court of Appeal pointed out that s 6 of the Contractual Remedies Act treats the representation as if a term of the contract for the purpose of damages, and considered it followed that any negligence by Altimarloch would have been irrelevant in any event.[32] The Court of Appeal adjusted the apportionment between the third parties to require the burden to be shared as to 60 per cent by Vining Realty and as to 40 per cent by Gascoigne Wicks.[33] On the further appeals to this Court by

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28 At [59].
29 At the purchase price rate of $800 per cubic metre of water a day.
30 At [51]–[53].
31 The vendors themselves had not sought to rely on any contributory negligence by Altimarloch on the appeal to the Court of Appeal, but it was raised by Vining Realty and Gascoigne Wicks.
32 At [66]–[67].
33 At [129].

the third parties the only matter in issue is whether damages awarded against the vendors under s 6 of the Contractual Remedies Act were properly set on a "cost of cure" basis which was "functionally equivalent" to the water that would have been available if the representations had been true.

(ii) The claim against the Marlborough District Council

[20] Wild J found the Marlborough District Council to have breached a duty of care owed to Altimarloch in the error in identifying the resource consents affecting the land in the Land Information Memorandum provided to Altimarloch. On appeal, the Court of Appeal confirmed the view taken in the High Court that the Council owed Altimarloch a duty of care in respect of the provision of the Land Information Memorandum.[34] It also rejected a submission on behalf of the Council, made for the first time on appeal, that it had immunity under s 41 of the Local Government Official Information and Meetings Act (on the basis that the Land Information Memorandum was official information to which s 41 applies).[35] On further appeal to this Court the Council continues to contend that it owed no duty of care in the provision of the Land Information Memorandum. It is accepted that, if a duty of care was owed, the Council was negligent in supplying the information contained in the Land Information Memorandum.

[21] The Court of Appeal affirmed Wild J's rejection of the Council's contention that Altimarloch had suffered no loss for which it was liable once the vendors' liability to pay damages under s 6 was taken into account.[36] Wild J indicated in his first judgment that the quantum of loss for which the Council was liable was $400,000, an amount representing the difference between the value of the property with the represented consents ($2.95 million) and without them ($2.55 million). As the Court of Appeal correctly identified, this was the wrong measure of the loss for which the Council was liable in negligence. The measure adopted by the High Court would have been appropriate for breach of contract, because it reflected the bargain lost (which should have been a good one for the purchaser who had paid only $2.675

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34 At [97].
35 At [79]–[91].
36 At [110].

million for a property that would, had the representation been correct, have been worth $2.95 million). It was not, however, the appropriate measure to restore the purchaser to the position it would have been in had it not been induced by the Council's negligence to enter into the contract. The Court of Appeal therefore indicated that the Council's liability was limited to $125,000, being the loss that resulted when Altimarloch was induced to pay $2.675 million for an asset worth only $2.55 million.[37] Judgment for this sum has not yet been entered.

(iii) Apportionment between vendors and Council

[22] In the second judgment, the High Court recalled those portions of the first judgment dealing with apportionment between the vendors and the Council.[38] The second judgment fixed the contributions equally on the basis that "equality is equity".[39] When the Court of Appeal reduced the liability of the Council to the tortious measure, it held that the 50/50 apportionment made in the High Court was to be applied to the overlap in liability, amounting to $125,000.[40] On this basis, the Council could ultimately expect to be responsible for $62,500 of the judgment.

The claim against the vendors: loss of value or cost of cure?

[23] Assessment of damages is a matter of fact.[41] The general principle is that where loss is caused by breach of a term of the contract the purpose of damages is "to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed".[42] This approach secures the benefit expected under the contract and is to be contrasted with the detriment measure applied to loss arising from non-contractual negligent misstatement (a measure that does not, however, preclude taking account of the value of loss of

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37 At [113].
38 At [8].
39 At [61]–[63].
40 At [123]–[125].
41 *Stirling v Poulgrain* [1980] 2 NZLR 402 (CA) at 419 per Cooke J.
42 *Victoria Laundry (Windsor) Ld v Newman Industries Ld* [1949] 2 KB 528 (CA) at 539 per Asquith LJ.

prospects).[43] In most cases recovery on the contractual measure will be more extensive but, in cases where the plaintiff has made a bad bargain, the loss flowing from reliance on the misrepresentation in tort may lead to greater recovery.

[24] Where property transferred under a contract is not as represented, the usual measure of the purchaser's loss is by deduction of the actual value of the property from its value as represented.[44] This usual measure is applicable to both land and goods,[45] but whether it is the appropriate measure depends on the circumstances. As has frequently been emphasised, because quantum of damage is a question of fact, the general principle is a guide only.[46] In addition to damages for the loss of bargain, someone who has been induced to enter a contract by misrepresentation of the other contracting party may be entitled, on proper proof, to damages for consequential loss, subject to questions of causation and remoteness. Altimarloch did not make claim for consequential loss in the present case.

[25] In some cases damages may more appropriately be measured by the cost of cure through securing performance through a third party, as where replacement goods can reasonably be acquired, or non-performance or defective performance can reasonably be remedied by another contractor. Indeed, such cure may well be necessary mitigation of loss and the cost of cure may be the best means of establishing the value of non-performance or non-delivery. Where there is a market for substitute goods or substitute performance, there may be no effective difference between damages based on difference between the value contracted for less the value delivered and damages based on cost of cure. There are some cases, however, where cost of cure is appropriate because the performance interest under the contract will not otherwise be recognised in damages. An example of such a case is *Radford v De Froberville*,[47] where the construction of a wall stipulated for in a contract added no value to the land of the plaintiff but was what he had bargained for.

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43 As recognised by Cooke J in *Gartside v Sheffield, Young & Ellis* [1983] NZLR 37 (CA) at 43; and see the discussion in DW McLauchlan "Assessment of Damages for Misrepresentations Inducing Contracts" (1987) 6 Otago L Rev 370 at 384–409.

44 Harvey McGregor *McGregor on Damages* (18th ed, Sweet & Maxwell, London, 2009) at [2-011].

45 *Walsh v Kerr* [1989] 1 NZLR 490 (CA) at 493.

46 See, for example, *Radford v De Froberville* [1977] 1 WLR 1262 (Ch) at 1270–1271 per Oliver J.

47 *Radford v De Froberville* [1977] 1 WLR 1262 (Ch).

[26] Where the expectation loss on breach of contract is not adequately measured by loss of value and cure is not practical or reasonable, damages may measure loss of expected amenity. Well-known examples are *Jarvis v Swans Tours Ltd*[48] (where a holiday did not conform to the contractual representation) and *Ruxley Electronics and Construction Ltd v Forsyth*[49] (where a swimming pool, though constructed to the wrong depth, was perfectly functional and caused no loss in value and cost of cure was out of proportion to any benefit to the owner).

[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.[50] 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.

[28] Resort to cost of cure to measure loss resulting from breach of warranty (as the damages under s 6 are treated) is unusual. There is, however, very little consideration in the reasons given in the High Court or in the Court of Appeal of the appropriateness or reasonableness of assessing damages under s 6 of the Contractual Remedies Act on a cost of cure basis.

[29] In his first judgment, Wild J, after citing *Stirling v Poulgrain*[51] and *McElroy Milne v Commercial Electronics Ltd*[52] for the proposition that the starting point is

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48 *Jarvis v Swans Tours Ltd* [1973] 1 QB 233 (CA).

49 *Ruxley Electronics and Construction Ltd v Forsyth* [1996] 1 AC 344 (HL).

50 As in the example of contractual breach in construction of a folly, relied upon in *Ruxley* at 358 per Lord Jauncey, at 360–361 per Lord Mustill and at 370–371 per Lord Lloyd. See also the article of Brian Coote "Contract Damages, *Ruxley,* and the Performance Interest" [1997] CLJ 537 at 541.

51 *Stirling v Poulgrain* [1980] 2 NZLR 402 (CA).

52 *McElroy Milne v Commercial Electronics Ltd* [1993] 1 NZLR 39 (CA).

that damages aim as far as possible to put the injured party in the position in which he would have been if the breach of contract had not occurred, said simply:

> [223] I accept the plaintiff's submission at trial that, applied here, that measure of damages is the cost of building a storage dam large enough to provide the plaintiff with the irrigation water it would have had had it received the transfer of the whole of the A water permit.

The second judgment contains no further discussion of the appropriate measure of damages.

[30] The Court of Appeal upheld the cost of cure measure in brief reasons, in which it rejected an argument, applying the approach in *Ruxley Electronics and Construction Ltd v Forsyth*, that damages based on cost of cure were unreasonable. In *Ruxley*, cost of cure was rejected in favour of a modest award based on loss of amenity when a swimming pool was not constructed to the depth specified in the contract but with no economic or functional disadvantage and the owner did not intend to rebuild. The Court of Appeal treated *Ruxley* as "an exception to the general rule":

> [60] We accept that a plaintiff cannot always insist on being placed in precisely the same situation as would have obtained if the contract had been correctly performed and indeed that this is likely to be particularly so in building cases where the cost of performance may far exceed any realistic assessment of the loss to the plaintiff. That said, *Ruxley* is fairly regarded as an exception to the general rule that the purpose of an award of damages is to place the injured party as nearly as possible in the position it would have been in if the contract had been performed. In other words, the primary measure of damages is expectations based.
>
> [61] In this case, the unchallenged evidence was that AJVL's expectations as to the availability of water could only be satisfied by the building of a dam. The only challenge to AJVL's contention that this was the appropriate measure of damages was based on the contention (no longer relied on) that a dam would be necessary for frost control purposes.
>
> [62] In the subsequent phase of the case – that is after the first judgment – AJVL submitted affidavit evidence as to the costs of the revised proposal. It was not then suggested by Gascoigne Wicks that the wrong measure of damages was being relied on. There was no suggestion of betterment and in particular the arguments now advanced by Gascoigne Wicks were not put forward.
>
> [63] There has thus been something of an attempt to run a new case on appeal and this provides a context which is inauspicious (from the viewpoint of Gascoigne Wicks) for an evaluation of their arguments, albeit that, as

> already explained, we are prepared to entertain them. The truth is that an award of damages on either of the bases contended for by Gascoigne Wicks would not satisfy AJVL's expectations. The requirement for irrigation water is real and tangible and there is no obvious reason why AJVL should be not compensated for the actual cost of obtaining the functional equivalent of what was warranted (via s 6 of the Contractual Remedies Act) as being available. And as to the time at which the cost of building a dam should be assessed, there comes a time (and we are well satisfied that this time has been arrived at in this case) when the music has to stop and a final decision is made.

[31] The way in which the case developed between the two judgments in the High Court and on appeal may have meant that the arguments earlier addressed to the High Court were somewhat overtaken. Although the Court of Appeal accepted the burden of addressing the merits of all contentions advanced on appeal, it acknowledged "considerable scope for disagreement as to whether all arguments which were put to us are legitimately on the table".[53] The quantum argument addressed to the Court of Appeal seems to have been distracted by points about betterment (for which the Court of Appeal considered no proper foundation had been laid in the High Court). The Court of Appeal seems, however, to have proceeded on the basis that only cost of cure through delivery of water equivalent to that able to be taken under the water rights would achieve the purpose of putting Altimarloch in the position it would have been in if the representation as to the quantity of the water rights had been true. It seems not to have considered that detriment in value on the contractual measure of difference between value obtained and expected was a measure of loss based on expectation. Nor did the Court explain why such "functionally equivalent" cost of cure was appropriate in circumstances where performance of the contract did not entail construction of a dam or even delivery of water, but transfer of rights to take water under a statutory regime under which the rights are limited in term (although with expectation of renewal if sought[54]) and subject to powers of restriction at times of scarcity.[55]

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53 At [9].

54 The material Class A water rights in issue on this appeal were of a 10 year term, as were the Class C rights to take water for storage purposes. These rights expired in 2007 and 2011 respectively. Mr McNabb gave evidence that he expected the important Class A water rights to be renewed by the Marlborough District Council, provided the rights were being exercised. This expectation of renewal was confirmed by the expert evidence of Mr Sutherland.

55 Section 329 of the Resource Management Act 1991 provides powers of control to regional Councils at times of water shortage. The Class C rights to take water for storage purposes were themselves subject to minimum water flows in the Altimarloch Stream.

[32] As I come to explain further, I consider that expectation losses, in application of the usual approach to measurement of damages, were properly met by damages reflecting the loss of value in the bargain. I do not think that the authorities on cost of cure support use of that measure to achieve "functional equivalence" of a representation the value of which was able to be measured in loss of value in the bargain. In any event, such measure could not be used to achieve cure if unreasonable and I consider that the measure of damages adopted in the High Court and approved by the Court of Appeal was unreasonable in circumstances where it would amount to $1.055 million in respect of a property valued at $2.55 million and for which the purchaser paid $2.675 million.

[33] It is necessary first to mention the reliance placed by the Court of Appeal on the evidence. It is not inaccurate to say, as the Court of Appeal does, that the "unchallenged evidence" was that, in the absence of the Class A rights, additional water for the dry months could only be secured by Altimarloch through construction of a water storage facility to store the 350 cubic metres of eventual deficiency. It may, however, be misleading if the impression is left that there was no evidence supportive of a different measure of expectation loss. Mr McNabb, the sole shareholder of Altimarloch, gave evidence that, had he known of the deficiency, he would either not have gone ahead with the purchase or would have obtained a reduced purchase price because "the land is simply not as valuable with the limited water available". While this evidence is not determinative of the appropriate measure of damages, it is evidence supportive of the usual expectation measure, based on the value of the bargain had the contract been properly performed. The valuation evidence that the land was worth $400,000 less than the bargain would have delivered to Altimarloch (on the expectation measure of difference between the value without the water rights and the value with them) was also evidence supportive of the usual measure. The comment that the evidence of loss was unchallenged should not be taken to suggest that the evidence did not support any other measure.

[34] More importantly, there is no discussion in the Court of Appeal's reasoning of why the expectation loss based on diminution of value was rejected in favour of the cost of cure through acquisition of additional water rights and construction of a dam to supply the ultimate deficiency. Nor does it emerge from paragraphs [60]–[63] of

its reasons that the Court of Appeal kept sight of the fact that restoring loss of value in the bargain is itself an expectation-based measure.[56] It seems, rather, to have taken the approach that only cost of cure through ensuring supply of sufficient water would meet the general principle that the injured party is to be placed as nearly as possible in the position he would have been in had the contract been performed.

[35] In *Tito v Waddell (No 2)*, in a passage subsequently adopted by Oliver J in *Radford v De Froberville*,[57] Megarry V-C described the basis on which damages on a cost of cure basis is appropriate in a case of non-performance of work stipulated for in a contract:[58]

> ... if the plaintiff can establish that his loss consists of or includes the cost of doing work which in breach of contract the defendant has failed to do, then he can recover as damages a sum equivalent to that cost. It is for the plaintiff to establish this: the essential question is what his loss is.
>
> ... In the end, the question seems to me to come down to a very short point. The cost is a loss if it is shown to be a loss.

To similar effect, the High Court of Australia held in *Bellgrove v Eldridge* that cost of cure is an appropriate measure of damages when it is the cost of work which is "necessary to produce conformity" with the contract.[59]

[36] The reasons identified in the authorities for preferring cost of cure measurement of damages are not engaged in the present case so as to justify its use here. They were illustrated by Dixon CJ in *Bellgrove v Eldridge* when he pointed out that the building case there was not comparable to one where a plaintiff sues for damages for breach of warranty with respect to "marketable commodities":[60]

> In the present case, the respondent was entitled to have a building erected *upon her land* in accordance with the contract and the plans and specifications which formed part of it, and her damage is the loss which she has sustained by the failure of the appellant to perform his obligation to her. This loss cannot be measured by comparing the value of the building which

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56 That was a point the Court had made in reducing the damages ordered against the Council in the High Court of $400,000 to $125,000: at [113]. As it said, $400,000 represented the expectation loss appropriate for breach of contract, but not for tort.

57 At 1282–1283.

58 *Tito v Waddell (No 2)* [1977] Ch 106 (Ch) at 332 and 334.

59 *Bellgrove v Eldridge* (1954) 90 CLR 613 at 618.

60 At 617 (emphasis in original).

> has been erected with the value it would have borne if erected in accordance with the contract; her loss can, prima facie, be measured only by ascertaining the amount required to rectify the defects complained of and so give to her the equivalent of a building on her land which is substantially in accordance with the contract.

The interest in performance could not there be met except by damages to enable the plaintiff to achieve substitute performance. The loss could be measured only by damages equivalent to enable rebuilding on the plaintiff's land.

[37] By contrast, the contract in the present case was one for the purchase of land, in respect of which a market existed and value could be objectively assessed to reflect the breach of warranty. It was not a contract for the performance of building work on the plaintiff's property, which the plaintiff was entitled to have performed as stipulated. The construction of a storage dam for water in the present case is not stipulated performance under the contract. It is not "work which in breach of contract the defendant has failed to do". Nor is it work which is "necessary to produce conformity" with the contract. The authorities concerning defective performance of contracts to supply services, construct buildings, or keep premises in repair do not seem to me to be in point. The contractual stipulation here was that the vendors held water rights for 1,500 cubic metres of water which, under the terms of the contract, they were obliged to transfer to the purchasers of the land on settlement. Altimarloch's loss under the contract was that the property it obtained was worth less than it would have been had the representation been true. Such loss can be met in full by damages for the difference in value, which is the usual and appropriate measure to achieve full expectation loss for breach of the deemed warranty.

[38] If sufficient water rights had been available for purchase, this could well have been a case where, depending on the reasonableness of price, cost of cure in such purchase could be an appropriate way to value the loss in the bargain, in the manner discussed at [25], and itself constituting reasonable mitigation. As Oliver J pointed out in *Radford v De Froberville*, the measurement of damages and the duty to mitigate can be seen as "mirror images":[61]

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[61] At 1272–1273.

> [T]he inquiry as to what sum would be required to put the plaintiff in the same situation as that in which he would have been if the contract had been performed almost necessarily involves an inquiry as to what sum would be reasonably required by him to mitigate by putting himself into that position.

[39] In addition, and even if cost of cure had been appropriate to achieve conformity with the contract, I do not consider that cost of cure was reasonable. That cost of cure must be reasonable to be the appropriate measure was made clear by the High Court of Australia in *Bellgrove v Eldridge.* The work must not only be "necessary to produce conformity", it must also "be a reasonable course to adopt":[62]

> 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.

Ruxley Electronics and Construction Ltd v Forsyth was a building contract case where cost of cure measurement was held not to be appropriate because the cost of cure was disproportionate to the benefit to be obtained.[63] The reasonableness of cost of cure is, then, a necessary test of whether it is appropriate measure of damages.

[40] Here, Altimarloch has undertaken a partial cost of cure in purchasing additional water rights for 750 cubic metres of water. It has not, however, undertaken the cost of cure entailed in building the dam to store the eventual deficiency of 750 cubic metres. While the fact that Altimarloch has not built the dam is not determinative, it is some check as to whether building a dam is a reasonable course.[64] It is not necessary to question the evidence accepted by the Judge that, if awarded damages on this basis, Altimarloch will undertake the construction, to take the view that the failure to do so to date is relevant to the question whether such a course can be seen as reasonable mitigation.

[41] The purchase price paid for the additional water rights of $320,000 (which is likely to have reflected the scarcity evident from the lack of other rights to be

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62 At 618–619.
63 At 358–359 per Lord Jauncey, at 361 per Lord Mustill and at 370–371 per Lord Lloyd.
64 *Ruxley*, above n 49, at 373 per Lord Lloyd.

purchased) was itself partial cost of cure, to which the additional cost of constructing the dam was added to obtain the measure of damages awarded. That total cost is to be contrasted with the purchase price of the property ($2.675 million) and its value without the water rights ($2.55 million). The disparity between the accepted valuation of the land with and without the water rights is direct evidence against which to assess the reasonableness of this cost of cure. I consider it is out of proportion to the increase in the value of the property and unreasonable.

[42] As some of the cost of cure cases indicate,[65] the reasonableness of the proposed measure of damages may not always be adequately assessed by a purely economic comparison. It is necessary however to identify some justification for departing from the usual approach. Professor Coote, invoking Francis Dawson, suggests that damages on the contractual measure should meet the reasonable expectations of the parties.[66] Where performance has been stipulated for, the parties may more readily be taken to expect that damages should enable the party to obtain performance. As already indicated, however, this is not a case where the parties stipulated for the construction of a dam. The cost of such storage is rather a proxy for achieving "functional equivalence". It is not a case where the parties can reasonably have expected such result, at any cost. Nor is it a case where the usual measure of damages based on difference between value received and the bargain as represented is inadequate to meet the expectations of the parties under the contract.

[43] Because the additional water rights were purchased by Altimarloch after the hearing, some of the implications for the measure of damages may not have been fully considered. The price paid for the additional rights suggests a higher value for them than is reflected in the valuation of the land with and without the represented rights. It is not clear whether that represents the scarcity of such rights in relation to the Altimarloch Stream or an increase in market price between the date of the breach of contract and the acquisition (in which case it might be expected to have some impact on the land valuations with and without the water rights). Nor is it clear that,

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65 See, for example, *Bellgrove v Eldridge*, above n 59, at 618–619, where the United States doctrine of "economic waste" was said to provide an inappropriate basis for an assessment of reasonableness. See also *Ruxley*, above n 49, at 360–361 per Lord Mustill.

66 Brian Coote "Contract Damages, *Ruxley*, and the Performance Interest" [1997] CLJ 537 at 563–564.

even if the price paid for the additional rights were reasonable, it should be extrapolated out as a measure of the loss in respect of the total shortfall, so requiring revaluation of the $400,000 deficiency in the land valuation accepted by the Judge. Issues such as these were not adequately ventilated at first instance.

[44] The Court of Appeal considered that no evidential foundation had been laid for any advantage obtained by Altimarloch in the cure obtained, for which credit should be given in calculation of damages.[67] It is not, however, difficult to envisage that the construction of permanent storage capacity may have had advantages over water rights which are limited in duration (although generally renewed), and which may be subject to controls in times of shortage, despite their priority over other water rights. Although it may have been accurate enough to characterise the lost expectation in terms of water, the contract was not for the supply of water but the delivery of rights to take water.

[45] I consider that the loss flowing from the breach of contract is fully recognised by damages representing the difference in valuation of the property with and without the water rights. I would accordingly allow the appeals brought by the third parties and enter judgment against the vendors for $400,000 together with costs.

The measurement of damages for which the Council is responsible

[46] The effect of s 6 is to merge the misrepresentation, once shown to have induced the contract, into the contract.[68] The occasion for the claim for damages under s 6 is a misrepresentation inducing entry into a contract, but the measure of loss against the vendors is no longer the pre-Contractual Remedies Act tortious measure.

[47] The tortious measure is however the measure applicable to Altimarloch's claim against the Council. It depends on identification of the loss resulting from the

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67 At [62].

68 To similar effect the common law merged representations and warranties in cases such as *Pennsylvania Shipping Co v Compagnie Nationale de Navigation* [1936] 2 All ER 1167 (KB). See further JF Burrows "The Contractual Remedies Act 1979 – Six Years On" (1986) 6 Otago L Rev 220.

Council's negligence. The measure of the loss for which the Council is liable in negligence is therefore distinct from the measure under s 6 of the Contractual Remedies Act which applies to the vendors.[69] It depends on there being a net contractual loss. And its measurement is a question of fact. This is not to give primacy to contract over tort. It is to recognise that where misrepresentation induces entry into the contract, the loss occasioned is consequential on the net position under the contract.

[48] Here, actual damage was suffered by Altimarloch when, in reliance on the Council's negligent misinformation, it paid more for the land than it was worth. This is the "simple case", giving rise to no difficulty, given by Lord Nicholls in *Nykredit Mortgage Bank Plc v Edward Erdman Group Ltd (No 2)* as an illustration of the principle.[70] A similar illustration is provided by the entry into the flawed matrimonial property agreement in *Davys Burton v Thom*.[71] Actual damage was suffered immediately the transaction was entered into.

[49] Although there may be cases where it is difficult to determine when loss has been suffered,[72] this is not such a case. As Lord Nicholls made clear in *Nykredit*, for the purposes of identifying when a cause of action in tort or contract arises loss includes "any detriment, liability or loss capable of assessment in money terms and it includes liabilities which may arise on a contingency".[73] The only limit is that the loss must be "relevant loss": "loss falling within the measure of damage applicable to the wrong in question".[74] Here, the loss was suffered and the cause of action arose when the purchaser became committed to payment of the purchase price. The question in this case is not when loss was suffered and the cause of action arose. There was undoubted immediate detriment for the purpose of the cause of action.

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69 Section 6 treats the representation as a contractual warranty and compensates for the expectation loss that results from the representation being untrue.

70 *Nykredit Mortgage Bank Plc v Edward Erdman Group Ltd (No 2)* [1997] 1 WLR 1627 (HL) at 1630.

71 *Davys Burton v Thom* [2008] NZSC 65, [2009] 1 NZLR 437.

72 As was recognised in *Nykredit*, above n 70, by Lord Nicholls at 1631, discussing the timing of loss suffered by a lender who, on receipt of a negligent valuation, acquires property as loan security.

73 At 1630, adopting submissions approved by Stephenson LJ in *Forster v Outred & Co* [1982] 1 WLR 86 (CA) at 94, 98.

74 At 1630.

The question, rather, is the measurement of the loss ultimately suffered by Altimarloch as purchaser for which it is entitled to damages.

[50] Detriment through inducement of a contract of sale is diminished by value obtained by the purchaser in exchange for the price paid. It is the ultimate net position of the purchaser that establishes his loss. All gains or advantages obtained through the transaction must be brought into account to offset the loss.[75] In *Canavan v Wright*, FB Adams J emphasised that it is the plaintiff's net loss on the transaction as a whole that establishes the extent of the loss:[76]

> Where the tort consists in inducing him to enter into a single transaction, the net loss is the difference between what he gains and what he loses by entering into that transaction. It is the entirety of the transaction that matters, with all its gains and losses. If, by a fraudulent misrepresentation that one of two articles is worth £5, a man is induced, in one indivisible transaction, to buy two articles for £10, the misrepresented article being in fact valueless, but the other worth £10 or more, then, unless there be some recoverable consequential damage, the damages are *nil*, because the plaintiff has suffered no loss by reason of the fraud. He has got full value for his money, and cannot subdivide the transaction into two parts for the purposes of a claim for damages. Conversely, if both articles were valueless the damages amount to £10, even though the misrepresentation applied to one only. He is, of course, not entitled to claim in tort for the profit he would have made if the representation had been true: aliter, if he can found his claim in contract on the footing that the representation amounted to a warranty.

[51] I do not think that the general principle that the measurement of damages for inducing entry into a contract must reflect the net position of the plaintiff is affected by the cases principally relied upon by counsel: *Nykredit* (relied upon for the Council) and *Eastgate Group Ltd v Lindsey Morden Group Inc* (relied upon for the third parties).[77] Both were concerned, not with measurement of damages, but with whether a cause of action against the defendant had arisen.[78]

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75 See *New Zealand Refrigerating Co Ltd v Scott* [1969] NZLR 30 (SC).

76 *Canavan v Wright* [1957] NZLR 790 (CA) at 802 (emphasis in original).

77 *Eastgate Group Ltd v Lindsey Morden Group Inc* [2001] EWCA Civ 1446, [2002] 1 WLR 642.

78 *Nykredit* was concerned with whether loss had been suffered on the negligent valuation of a security before recourse to the debtor primarily liable. *Eastgate* was concerned with a claim for contribution between a vendor contract-breaker and the valuer who had advised the purchaser of a business under the Civil Liability (Contribution) Act 1978 (UK) and the result turns on the breadth of the statutory claim, which has no equivalent in New Zealand.

[52] There is nothing in *Nykredit* to suggest departure from the general approach to assess the net position under the contract for the purpose of damages for the tort of negligent misstatement. So, Lord Nicholls (taking the view that the first step in identifying when the lender first suffered "measurable, relevant loss" was to start by identifying the relevant measure of loss) said that the liability for damages for negligent misstatement were "for the adverse consequences, flowing from entering into the transaction, which are attributable to the deficiency in the valuation."[79] In this, the "basic comparison" was "between the plaintiff's position had he not entered into the transaction in question and his position under the transaction".[80]

[53] In *Eastgate*, Longmore LJ drew a distinction between debt and claims for damages in suggesting that, while the value of a covenant to repay a debt must be taken into account in identifying the loss for which a valuer of a security is liable in negligence, a claim in damages need not be brought into account unless recovery has actually been obtained. This conclusion was, however, concerned with the question whether the "damage" for which the vendor of a business was liable was "the same" as that for which the negligent valuer of a security was liable for the purposes of a claim for contribution under the Civil Liability (Contribution) Act 1978 (UK).[81] If Longmore LJ was suggesting that the same distinction should be drawn in assessing damages, I would not apply it. As was explicitly recognised in *Eastgate*, actual recovery on a claim for damages in tort for breach of duty would have to be taken into account in assessing the damages for breach of warranty.[82] While prospective assessment of the value likely to be recovered may be more difficult in the case of a claim for damages than in a claim for debt, I do not consider that there is a distinction in principle between a claim for debt and a claim for damages. Both should be taken into account in measuring the net loss under the contract induced. Indeed, where no recovery has yet been obtained, it is I think necessary to put a value on the claim for damages, as it is necessary to put a value on the claim in debt,

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79 At 1631.

80 Ibid.

81 The distinction was drawn in considering the application of a test of "mutual discharge", which Lord Steyn in *Royal Brompton Hospital NHS Trust v Hammond* [2002] UKHL 14, [2002] 1 WLR 1397 considered to add unnecessary complexity to questions of contribution; rather, one should simply apply the statutory test: at [28].

82 At [14].

because of the requirement that the plaintiff must act reasonably to mitigate loss. Like Tipping J, and for the purposes of measurement of the damages resulting from entry into the contract, I do not think there is any difference in principle between claim for repayment of a debt and a claim for damages.

[54] In some cases a purchaser in Altimarloch's position may be able to recover directly from a tortfeasor in the position of the Council because recovery against the vendor is shown not to be realistically in prospect (whether because of impecuniosity of the vendor or because of some legal impediment to the cause of action or for some other reason). In still other cases, the claim against the tortfeasor may be discounted by attributing a lesser value to the recovery reasonably in prospect from the vendor. While such assessments may be difficult, assessments of this kind are not uncommon in measurement of damages.[83] In a case where there is doubt about the ability of the contracting party to pay the damages ordered, sequencing of recourse could be provided for in the judgment of the Court. Similarly, judgment against the tortfeasor could be deferred pending determination of the net loss on the contract attributable to the misrepresentation. Such complications do not however arise in the present case because the vendors are acknowledged to be in a position to meet the full claim against them arising out of the breach of the deemed term of the contract.

[55] While in some cases measurement may be difficult, a plaintiff cannot recover damages for loss he could reasonably have taken steps to mitigate.[84] Although what is expected by way of mitigation is no more than is reasonable, reasonable steps may include those to recover all or part of the loss, as through the action for rectification considered in *Walker v Medlicott & Son (A Firm)*.[85] In others, litigation against a third party may be more than it is reasonable to require of the plaintiff.[86] Whether it is, is a matter of fact. A potential claim of doubtful success may well be more than is reasonable to expect. Difficulties in assessment of the reasonableness of mitigation through pursuit of a claim are, like all assessments of damages, "evidential and

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83 The necessity for estimates of contingencies to be made in quantification is discussed by Lord Diplock in *Mallett v McMonagle* [1970] AC 166 (HL) at 176E–G.

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

85 *Walker v Medlicott & Son (A Firm)* [1999] 1 WLR 727 (CA).

86 The "complex litigation" indicated in *Pilkington v Wood* [1953] Ch 770 is an illustration.

practical difficulties, not difficulties in principle", as Lord Nicholls pointed out in *Nykredit*.[87] Moreover, uncertainties at the outset of a claim, often resolve:[88]

> The amount of a plaintiff's loss frequently becomes clearer after court proceedings have been started and while awaiting trial. This is an everyday experience.

[56] In this case, where the plaintiff has brought proceedings against the vendors, the Court is not directly concerned with whether such a claim was reasonable mitigation, but with the connected question of causation of loss. This is not a case where it is necessary for the Court to estimate the recovery reasonably in prospect under the contractual warranty. Both parties who made misrepresentations are before the Court as defendants. It is acknowledged that the vendor is able to meet the full measure of damages flowing from breach of the contractual term. The Judge did not attempt proper measurement of the damages flowing from entry into the contract and for which the Council was responsible. He assumed concurrent responsibility rather than sequential responsibility according to the net position under the transaction for sale and purchase and he applied contribution principles on the assumption that equality met the equity of the case rather than measuring the detriment flowing from the Council's negligence. This was, I think, the wrong analysis. Since it is clear that the remedy obtained from the vendors will eliminate the loss flowing from the negligence of the Council, I would allow the appeal by the Council on damages.

Contribution

[57] I consider there is no basis for an order of contribution as between the Council and the vendors. This conclusion does not turn on the form of action; I accept that equitable contribution is available where liabilities are in substance coordinate although the legal basis of the claim differs.[89] On the view I take, however, the liability of the vendors was to remedy their breach of what is treated under s 6 of the Contractual Remedies Act as a term of the contract, while the

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87 At 1632.
88 At 1633.
89 *Street v Retravision (NSW) Pty Ltd* (1995) 135 ALR 168 (FCA) at 176.

liability of the Council was to remedy the loss suffered through the purchaser's entry into the contract. The liability for damages of the Council was accordingly dependent on the net position reached on the liability of the vendors for breach of contract. There is accordingly no occasion for contribution between vendors and the Council and the loss should not have been apportioned between them in the judgment given for Altimarloch. Indeed, in circumstances where the vendors' representation is treated by statute as though a term of the contract, I consider that it does not accord with the principles upon which contribution is ordered[90] that the vendors should be able to spread the liability while retaining the benefit of overpayment.[91] In this conclusion I agree with the result reached by Blanchard and Tipping JJ while not joining in the reasons they give.

[58] I would be reluctant to think that a just distribution of responsibility in a case where two or more parties are liable to the plaintiff in respect of damage which is in substance the same[92] cannot be achieved outside the application of the Law Reform Act 1936.[93] That Act, which overturned the rule in *Merryweather v Nixan*,[94] should not be taken to prevent further application of the general principles of the common law to fresh circumstances. I therefore see force in the approach to the question of contribution taken by McGrath J in this Court. Outside the application of s 6 of the Contractual Remedies Act, where two defendants separately induce the plaintiff to enter into a contract, as was comparable to the position in *Burke v LFOT Pty Ltd*,[95] I would want to consider further whether the liability of each is properly seen as coordinate or of the same nature, justifying contribution. On my view of the nature of the loss, that point, which divided the High Court in *Burke*, does not however arise here.

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90 As to which, see *Deering v Winchelsea* (1787) 1 Cox 318, 29 ER 1184 (Exch); *BP Petroleum Development Ltd v Esso Petroleum Co Ltd* [1987] SLT 345 (OH); and *Burke v LFOT Pty Ltd* [2002] HCA 17, (2002) 209 CLR 282.

91 See *Burke* at [66] per McHugh J.

92 As opposed to being "substantially or materially similar": see Lord Steyn in *Royal Brompton Hospital NHS Trust v Hammond* [2002] UKHL 14, [2002] 1 WLR 1397 at [27].

93 Perhaps statutory reform – as proposed by the Law Commission in its report, *Apportionment of Civil Liability* (NZLC R47, 1998) – would provide clarity, but I am not persuaded that the circumstances of this case suggest that such reform is necessary.

94 *Merryweather v Nixan* (1799) 8 TR 186, 101 ER 1337 (KB).

95 In *Burke*, it was claimed against LFOT that it had induced entry into the contract through misleading and deceptive conduct in contravention of s 52 of the Trade Practices Act (Cth). It was claimed against Burke that he had induced entry into the contract through breaching a duty of care owed to the purchaser.

Disposition

[59] In light of the views of all the members of the Court, the issues raised by the case should be determined as follows:

(1) As the Court is unanimous that the Council owed Altimarloch a duty of care and by majority considers the Council did cause Altimarloch loss (see point 3 below), the Council's appeal from the liability judgment given against it in favour of Altimarloch should be dismissed.

(2) By majority (Blanchard, Tipping and McGrath JJ) the appeal of Vining Realty Group Limited and Gascoigne Wicks against the quantum of damages awarded in favour of Altimarloch on a "cost of cure" basis is dismissed.

(3) As a majority of the Court (Blanchard, McGrath and Anderson JJ) considers that the Council's negligence did cause Altimarloch loss, the Council's no loss argument in opposition to the contribution order made against it in favour of DS and JW Moorhouse must fail.

(4) As a majority of the Court (Elias CJ, Blanchard and Tipping JJ) are of the view that a contribution order cannot in any event be made against the Council in favour of the Moorhouses, the Council's appeal from the contribution judgment should be allowed. That judgment should be set aside and judgment entered in favour of the Council in respect of that claim.

BLANCHARD J

[60] One cannot but have sympathy for both the vendors, Mr and Mrs Moorhouse, and the purchaser, Altimarloch Joint Venture Ltd, for finding themselves in the predicament of this complex and difficult litigation because of the compound errors of the real estate agents, the solicitors for the vendors and the Council. If any one of them had done their job competently the sale and purchase is unlikely to have proceeded as it did and the purchaser would not have found itself embarked on its

viticulture development without adequate water rights and having paid more than the property was worth.

[61] Through the negligence of the real estate agents and the vendors' solicitors (who have been ordered to indemnify the vendors), the vendors became committed to a conditional sale and purchase agreement in respect of which the quantity of water rights being sold to the purchaser had been misrepresented. The vendors were unaware of the misrepresentation made on their behalf. The Council then issued a Land Information Memorandum (LIM) to the purchaser which made the same misstatement about the water rights. That led to the purchaser declaring the contract unconditional. The error was not picked up when the conveyancing documents were signed by the vendors because they were not shown the transfer of the water rights, which the vendors' solicitor chose to sign in their names. Settlement occurred and it was only later, after planting of vines was underway, that the fatal discrepancy in the water rights emerged.

[62] The High Court found that the value of the property if all the represented water rights actually were available to the purchaser was $2.95 million. Without the "missing" water rights its value was $2.55 million – a difference of $400,000. But, as the Court of Appeal correctly pointed out, because the contract price was only $2.675 million, the purchaser had lost only $125,000 on an orthodox diminution in value measure of damages, which compares the price paid with the value of the property absent those water rights. That was the only measure available for the purchaser's claim in tort against the Council.

[63] The vendors were, however, being sued under s 6(1) of the Contractual Remedies Act 1979, which creates an entitlement to damages for a misrepresentation inducing the contract in the same manner and to the same extent as if the misrepresentation were a term of the contract. It also prevents the claim for damages being advanced as one in tort (deceit or negligence) in respect of the misrepresentation. Under s 6(1), the purchaser was able to claim against the vendors the cost of putting itself in the position which the vendors had represented it would be in when the contract was completed – a performance measure of damages available in a contract claim but not in a tort claim. The vendors, through the

misrepresentation and the operation of the section, were treated as though they had made a contractual promise which the purchaser sought to have made good. In contrast, the Council had simply performed in a careless manner its statutory obligation to supply information by means of the LIM. It had made no promise to the purchaser about the content of the LIM.

[64] Unfortunately for all concerned, the vendors and the third parties did not respond positively to the purchaser's efforts to settle its claim against the vendors and the matter went to trial some years after the problem became apparent. In the meantime the cost of building a dam to hold water for availability in dry seasons (which was possible under the existing water rights) escalated hugely. Much of that cost was in the operation of earthmoving machinery. A very significant increase in the cost of diesel fuel occurred during the period before trial.

[65] The High Court awarded damages against the vendors of $1,055,907.16 based on the cost of a dam plus an amount spent by the purchaser to acquire some additional water rights which happened to become available before the trial.

[66] In agreement with Tipping and McGrath JJ, I consider that in the particular and unusual circumstances of the case the purchaser's damages against the vendors should be measured by the costs of remedying the vendors' failure of performance – the failure to supply the represented quantity of water rights. The diminution of value measure would be quite inadequate. It would be unrealistic to treat the purchaser as if it were able to sell the property and use the proceeds to establish its vineyard on other land, even if it were the case that a comparable property with equivalent water rights to those promised by the vendors were actually available. In the circumstances, and given that the purchaser was entirely an innocent party and that the delay and cost escalation do not seem to have been attributable to any position adopted by it, the admittedly high amount of the performance damages is not disproportionate to the benefit the purchaser will gain from the dam and the additional water rights. The purchaser's disadvantage stemming from the misrepresentations made by the vendors' agents cannot be fairly corrected in any other way. It should not be penalised when its original decision to solve its water problem was entirely reasonable and the large cost escalation has come about

primarily because the vendors and the third parties chose to fight the case, rather than paying the then current cost of remedying the problem. The purchaser could not be expected, in view of the uncertainty caused by the attitude of the vendors and the third parties, to proceed to do so in anticipation of eventually receiving judgment.

[67] Turning then to the claims against the Council, I begin by expressing my agreement with Tipping J's conclusion that the Council did owe a duty of care to the purchaser in respect of the misstatement of the water rights in the LIM. The trial Judge correctly so concluded and entered judgment on liability against the Council in favour of the purchaser. The Judge had not at that stage fixed the quantum of any of the claims[96] but he did make an apportionment of liability for the judgment "once I have quantified it".[97] Curiously, in his quantum judgment he did not proceed to fix the quantum of liability as between the purchaser and the Council, though he recalled the paragraph of his liability judgment which made the apportionment. He ordered the Council to pay the vendors $200,000, being 50 per cent of the $400,000 difference between the value of the land with and without the water rights. As the Court of Appeal appreciated, however, to the extent that that amount represented an excess over the contract price, it was an expectation or performance measure not available in a claim by the purchaser against the Council. The Court of Appeal reduced the contribution order to $62,500 (50 per cent of the difference between the contract price and the value of the land without the water rights).

[68] That brings me to the argument made for the Council that it has caused the purchaser no loss because the purchaser retained the ability to claim damages for misrepresentation under the contract with the vendors and indeed has obtained a judgment against the vendors for a sum exceeding the amount of the loss caused by the Council's negligence. I observe, first of all, that one possible obstacle in the way of this argument, namely that the purchaser had failed to mitigate its loss by suing the vendors, has of course been removed because the purchaser did choose to sue them. If it had not chosen to do so there may well have been an issue over whether

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96 Although indicating at [235] that "the appropriate award of damages to the plaintiff against the MDC" was $400,000, the Judge made no order to that effect. He expressly reserved the amount of the judgment against both defendants: at [286].

97 At [287].

the so called duty to mitigate (which is in fact not a duty but a rule which disallows the claiming of avoidable loss) required the purchaser to become involved in complex litigation against the vendors. Generally, a plaintiff is not required to take such a step in mitigation.[98] As matters have transpired, such an argument is not open to the Council.

[69] Nonetheless, I do not agree with the view that the Council has caused the purchaser no loss. I consider that the Council cannot say as a matter of law that the purchaser has suffered no loss for which it must compensate the purchaser unless and until the purchaser has received payment from the vendors of an amount at least equal to the diminution in value of the land ($125,000). The purchaser's rights under the contract create an expectation that the purchaser will recover at least that amount from the vendors, but the existence of those rights and a judgment for their enforcement is not the equivalent of payment, even though there may be little doubt that the vendors (via the third parties and their insurers) will now pay. A right to receive damages (even pursuant to a judgment) should not be equated to an actual performance of the contract-breaker's contractual obligation to pay them.

[70] It is true that the House of Lords in *Nykredit*[99] did say that it was necessary to factor in the value of the lender's claim in debt against the borrower under the personal covenant.[100] But the context was, as the Chief Justice points out, the identification of the point at which a cause of action arose and interest on a judgment debt was first payable. The House was not concerned with the measurement of damages. The amount of the claimant's loss had previously been established by reference to a market valuation as at the date of the negligent valuation. I would not apply what was said in *Nykredit* to a claim for damages. Indeed, I can see no difference in principle between claims for debt and claims for damages when it comes to measurement of loss.

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98 *Pilkington v Wood* [1953] 1 Ch 770.

99 *Nykredit Mortgage Bank Plc v Edward Erdman Group Ltd (No 2)* [1997] 1 WLR 1627 (HL).

100 The personal covenant had in fact proved to be worthless.

[71] Significantly perhaps, towards the beginning of his judgment in *Nykredit* Lord Nicholls gave an instance of what he said was a simple case which gave rise to no difficulty:[101]

> A purchaser buys a house which has been negligently overvalued or which is subject to a local land charge not noticed by the purchaser's solicitor. Had he known the true position the purchaser would not have bought. In such a case the purchaser's cause of action in tort accrues when he completes the purchase. He suffers actual damage by parting with his money and receiving in exchange property worth less than the price he paid.

The position with regard to the existence of a land charge bears some similarity to the present case. The vendor would have had an obligation to remove such an encumbrance from the title and could be sued in contract for failing to do so, just as the present vendors could be sued for misrepresenting the position regarding the "missing" water rights. The damages would be the cost of rectifying the situation by removing the charge or the difference in value if it could not be removed. Yet Lord Nicholls, in saying that the purchaser has suffered actual damage, did not think it necessary to factor in the value of the purchaser's contractual rights against the vendor.

[72] My concern is that the plaintiff should not face exposure to any residual loss. I do not believe that it can with complete safety be said that there is no loss caused by the party in default under contract until and unless the plaintiff has actually received a sum in payment of its damages at least equalling the amount of the loss for which the other wrongdoer is separately legally responsible. I consider that the Court should not engage in prospective measurement of damages in cases of the present kind, just as it does not do so where both defendants are tortfeasors. To do so places the plaintiff, who may be blameless, at some risk of under-recovery – the risk that the contract defendant[102] who appears well able to pay a judgment against them may, perhaps because of an intervening event, actually prove unable to meet its obligations. The consequences of the Christchurch earthquake have surely

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101 At 1630.

102 The vendors are strictly speaking liable under s 6(1) of the Contractual Remedies Act rather than under the contract but the section requires assessment of damages as if a term of the contract had been broken.

demonstrated that even insured defendants may find themselves unexpectedly without a full indemnity because of the overall exposure of an insurer.[103]

[73] It may be that after quantifying damages in some cases of the present kind, involving both contractual and tortious claims against different defendants, a court would choose to defer entry of judgment against one defendant (the tortfeasor) for a monetary sum because it appears certain that the other defendant (the contract-breaker) will fully meet the judgment against it (as may in fact have been the High Court's thinking in this case). That would represent a view that fairness in the particular case requires that one defendant should pay the damages in the first place and that, if there were to be any apportionment, it should be worked out through a claim for contribution (though such a claim may, in my view, have difficulties – as will appear). But that does not mean that the court cannot enter such a judgment against the tortfeasor on the basis that, because of the existence of contractual rights, the tortfeasor has not been shown to have caused loss. In this respect I agree with the Court of Appeal and with McGrath J.

[74] As I have noted, there is as yet no quantum judgment for the purchaser against the Council. Consistently with the measure used by the Court of Appeal it could be expected that any such judgment would be for $125,000. But this Court has not been asked to undertake that task. My understanding is that it is unlikely to be necessary, but if that is wrong, the purchaser could still ask the High Court to formally fix the quantum between the purchaser and the Council.

[75] It does not follow, however, that the vendors have a right to equitable contribution from the Council.[104] On this aspect of the case I agree with Tipping J. While the Council's tortious act has caused the purchaser a loss for which the purchaser may obtain judgment against it, in my view there are two reasons for denying the vendors the right to recoup from the Council any of the amount which the vendors must pay to the purchaser. The first reason is that a tortfeasor is not

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[103] In saying this I am making a general observation about the appropriate principle. I am not questioning the soundness of whoever may be the insurers of the third parties in this case.

[104] Section 17 of the Law Reform Act 1936 can have no application because the vendors are not tortfeasors.

liable to contribute to a loss of a character for which it can have no liability to the plaintiff. The amount which the vendors have been ordered to pay to the purchaser is entirely measured on a performance basis. The only loss for which the Council is responsible to the purchaser (diminution in value) is not of the same nature and extent as the contractually-measured loss (non-performance of a (deemed) promise) for which the vendors have been held responsible. There is no common obligation or liability.[105]

[76] If then it is said that, putting aside the form of the quantification of the contract claim, it would have been possible for the purchaser to have claimed (in contract) against the vendors instead on a diminution in value basis, so that the two claims by the plaintiff could have been made in a way which was of the same nature and extent, there is a second difficulty in the way of the claim for contribution. If that had indeed been the purchaser's claim against the vendors, which would have been restricted to $125,000, then by asking the Council to contribute to it the vendors would be seeking to have the Council refund to them an overpayment by the purchaser which they had been obliged to refund. On that measure of damages, the vendors would have received more than the actual value of the land and would be restoring to the purchaser an amount they should not have received. There is, on that measure (the only one available against the Council), no loss to the vendors for which the Council should be made liable. The fact that the vendors have actually been found liable to make good their promise by paying very substantial performance damages cannot be a basis for requiring the Council to contribute to loss of a kind for which the Council has no responsibility to the purchaser.

[77] I favour the same outcome of the appeals as Tipping J, save that I would not set aside the purchaser's liability judgment against the Council. As it is unlikely that the purchaser will be required to take that judgment further, it is unnecessary to say anything about what rights the Council might have, if ordered to pay $125,000 to the

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105 *Burke v LFOT Pty Ltd* [2002] HCA 17, (2002) 209 CLR 282 at [14]–[15] and [38].

purchaser, by way of a claim for contribution against the vendors, should it think fit to make one. By parity of reasoning, however, such a claim would fail,[106] unless there were shown to be a basis for a claim of unjust enrichment. On the facts, that seems very doubtful. I do, however, join Tipping J's call for Parliament's attention to this very unsatisfactory area of the law.

TIPPING J

Introduction

[78] On 20 February 2004 David and Jillian Moorhouse (the vendors) sold some 145 hectares of farm land situated in the Awatere Valley in Marlborough to Altimarloch Joint Venture Ltd (the purchaser), a company controlled by Mr Warren McNabb. The purchase price was $2.675 million. The land was being acquired by the purchaser for the purpose of establishing a vineyard. The vendors' agents represented to the purchaser that the land would be transferred with the benefit of specified Class A, B and C water rights. The vendors could not transfer all the water rights which they thereby contracted to supply with the land. The circumstances in which this problem arose are not of any particular relevance to the issues arising on this appeal and will therefore be mentioned below only to the extent necessary. Prior to committing itself to the purchase, the purchaser sought a Land Information Memorandum (LIM) from the Marlborough District Council. That document negligently included information about the water rights which reinforced the erroneous representations made by the vendors to the purchaser.

[79] The shortfall in the water rights which the vendors had contracted to supply did not become apparent to the purchaser until after the transaction had been settled and work on the vineyard had begun. It was then discovered that only half the

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[106] "Contribution ... is a two way exercise. You cannot have contribution from one without contribution from the other": per Lord Sutherland in *Caledonia North Sea Ltd v London Bridge Engineering Ltd* [2000] SLT 1123 at 1182 (Inner House), cited with approval by the High Court of Australia in *HIH Claims Support Ltd v Insurance Australia Ltd* [2011] HCA 31, (2011) 280 ALR 1.

Class A and none of the Class B rights could be supplied. The vendors' agents had overlooked the fact that the missing rights had already been transferred as part of another transaction entered into prior to the transaction with the purchaser. The outcome was a claim for damages by the purchaser against the vendors based on s 6 of the Contractual Remedies Act 1979, the misrepresentation as to water rights being actionable under that section as if it were a term of the contract. The purchaser also sued the Council for negligence in supplying the erroneous LIM. The vendors joined the real estate agency (Vining Realty) and their solicitors (Gascoigne Wicks) on the basis that they were responsible for making the relevant misrepresentations of which the vendors themselves had been unaware. The real estate agents and the solicitors effectively represented the vendors in this Court as their indemnifiers.

[80] In the High Court Wild J delivered two judgments.[107] Their effect was to award the purchaser damages of $1,055,907.16 against the vendors under s 6; and damages of $400,000 against the Council for negligence.[108] The awards were joint and several but the purchaser could not, of course, recover more in total than the amount awarded against the vendors. The High Court also made contribution orders between various parties, the details of which need not be set out at this stage. The Court of Appeal altered aspects of the contribution orders but the primary judgments in favour of the purchaser against the vendors and the Council were upheld.[109] The reason why the amount of the judgment against the vendors differed from that against the Council was that a different measure of loss was adopted for each. In the case of the judgment against the vendors the measure of loss included the cost of building a dam on the property to ensure that the amount of water available when necessary would equate to that represented as available by the vendors.[110] The amount of the judgment against the Council was based on the difference between the contract price and the value of the property without the represented amount of water.

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[107] *Altimarloch Joint Venture Ltd v Moorhouse* HC Blenheim CIV-2005-406-91, 3 July 2008; *Altimarloch Joint Venture Ltd v Moorhouse* HC Blenheim CIV-2005-406-91, 23 March 2009.

[108] Correctly reduced by the Court of Appeal to $125,000 for the purposes of the tort claim, that being the difference between the contract price and the true value of the property.

[109] *Vining Realty Group Ltd v Moorhouse* [2010] NZCA 104.

[110] The purchaser was unable to acquire by purchase or otherwise all of the water rights promised but not delivered. Those acquired cost $320,000. The cost of constructing the dam was fixed at $661,660 and the balance of the total of $1,055,907.16 was made up of a power connection charge and the cost of irrigation and pumping equipment.

Issues

[81] On the appeal to this Court four issues arise. The first concerns whether the Council owed the purchaser a duty of care when it negligently misstated in the LIM the details of the water rights which the vendors enjoyed and were thus capable of transfer to the purchaser. The second concerns the relationship between the purchaser's claim against the vendors under s 6(1)(a) of the Contractual Remedies Act and its claim against the Council in tort. If, as is the case, the purchaser can recover its losses in full from the vendors, the question arises whether the Council's negligence has caused the purchaser any loss for which the Council is responsible. The third issue is whether the vendors can obtain a contribution from the Council to any damages they must pay the purchaser. The second and third issues arise only if the Council did in fact owe the purchaser a duty of care so as to make its negligence actionable.

[82] The fourth issue concerns the correct measure of the loss the purchaser can recover from the vendors. The question, as argued and simply put, is whether that measure should be based on the cost of construction of a dam to cover the remaining shortfall after some extra water rights had been acquired by the purchaser, or on the diminution in value of the land consequent upon the vendors' inability to convey all the water rights specified in the contract. That diminution, fixed for the purposes of the claim against the vendors at $400,000, is substantially less than the aggregate cost of replacing the missing water rights, fixed at $1,055,907.16.

[83] It will be convenient to examine the duty of care point first, followed by the causation question, as both of them arise in the claim between the purchaser and the Council. I will then examine the contribution point and finally the measure of loss point which arises in the claim between the purchaser and the vendors.

Duty of care

[84] The question whether the Council owed the purchaser a duty of care arises against the background of the Local Government Official Information and Meetings Act 1987 which provides in s 44A for LIMs in the following terms:

> **44A Land information memorandum**
>
> (1) A person may apply to a territorial authority for the issue, within 10 working days, of a land information memorandum in relation to matters affecting any land in the district of the authority.
>
> (2) The matters which shall be included in that memorandum are—
>
> (a) Information identifying each (if any) special feature or characteristic of the land concerned, including but not limited to potential erosion, avulsion, falling debris, subsidence, slippage, alluvion, or inundation, or likely presence of hazardous contaminants, being a feature or characteristic that—
>
> (i) Is known to the territorial authority; but
>
> (ii) Is not apparent from the district scheme under the Town and Country Planning Act 1977 or a district plan under the Resource Management Act 1991:
>
> (b) Information on private and public stormwater and sewerage drains as shown in the territorial authority's records:
>
> (ba) any information that has been notified to the territorial authority by a drinking-water supplier under section 69ZH of the Health Act 1956:
>
> (bb) information on—
>
> (i) whether the land is supplied with drinking water and if so, whether the supplier is the owner of the land or a networked supplier:
>
> (ii) if the land is supplied with drinking water by a networked supplier, any conditions that are applicable to that supply:
>
> (iii) if the land is supplied with water by the owner of the land, any information the territorial authority has about the supply:
>
> (c) Information relating to any rates owing in relation to the land:
>
> (d) Information concerning any consent, certificate, notice, order, or requisition affecting the land or any building on the land previously issued by the territorial authority (whether under the Building Act 1991, the Building Act 2004, or any other Act):

(e) Information concerning any certificate issued by a building certifier pursuant to the Building Act 1991 or the Building Act 2004:

(ea) information notified to the territorial authority under section 124 of the Weathertight Homes Resolution Services Act 2006:

(f) Information relating to the use to which that land may be put and conditions attached to that use:

(g) Information which, in terms of any other Act, has been notified to the territorial authority by any statutory organisation having the power to classify land or buildings for any purpose:

(h) Any information which has been notified to the territorial authority by any network utility operator pursuant to the Building Act 1991 or the Building Act 2004.

(3) In addition to the information provided for under subsection (2) of this section, a territorial authority may provide in the memorandum such other information concerning the land as the authority considers, at its discretion, to be relevant.

(4) An application for a land information memorandum shall be in writing and shall be accompanied by any charge fixed by the territorial authority in relation thereto.

(5) In the absence of proof to the contrary, a land information memorandum shall be sufficient evidence of the correctness, as at the date of its issue, of any information included in it pursuant to subsection (2) of this section.

(6) Notwithstanding anything to the contrary in this Act, there shall be no grounds for the territorial authority to withhold information specified in terms of subsection (2) of this section or to refuse to provide a land information memorandum where this has been requested.

[85] Section 44A is in Part 6 of the Act. I agree with the Court of Appeal, for the reasons it gave, that the water rights in issue, being consents affecting the land, come within para (d) of s 44A(2).[111] A person requesting a LIM from a territorial authority is clearly in a position of proximity to the authority. It was common ground that the duty of care issue should be considered against the conventional indicators of proximity and policy.

[86] The relationship between the parties is closely analogous to a contractual one. A fee is paid for the preparation and supply of the LIM. Mr Goddard QC suggested

[111] At [75]–[78].

there was no proximity because the Council could not know with any certainty, unless told in the request, for what purpose the information in the LIM was being requested. But that point affects the second issue of policy rather than that of proximity.

[87] Turning to the policy aspect, it is plain from subs (5) of s 44A that Parliament recognised, indeed was emphasising, that those obtaining LIMs from territorial authorities were entitled to rely on the accuracy of at least the subs (2) contents of the LIM.[112] The use of the word "evidence" in the subsection may suggest a forensic context but it is unlikely that it was intended to limit the scope and effect of the subsection to court proceedings. The subsection is apt to encourage general reliance on the accuracy of information required to be supplied in LIMs. That is a significant indicator, within the section itself, that as a matter of policy those relying on LIMs should not be denied the duty of care that proximity considerations suggest should exist.

[88] Reasonable and foreseeable reliance on a written statement made in a business context is a conventional indicator of both proximity between the maker and the recipient and, subject to any countervailing considerations, that as a matter of policy a duty of care should be imposed on the maker.[113] In the case of the supply of a service for a fee under the provisions of a statute, questions of policy are likely to be of greater import than the proximity that must thereby necessarily exist.

[89] I return here to Mr Goddard's argument that as the purpose for which the LIM is being sought will often be unknown, no duty of care should be imposed. If, as in this case, the purpose for which the LIM is requested comes within the scope of subs (2) of s 44A, there is no case for denying a duty simply because the precise purpose is not known. There is no obligation when requesting a LIM to identify the purpose for which it is sought. The Council's fee for supplying a LIM can be

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112 There is nothing in other parts of the Act, dealing with official information generally, equivalent to the correctness presumption set out in subs (5) as regards LIMs.

113 For a discussion of cases in the present field see Cherie Booth and Dan Squires *The Negligence Liability of Public Authorities* (Oxford University Press, Oxford, 2006) at [3.95].

expected to cover the costs of supplying subs (2) information, including insurance costs.

[90] There is nothing in the statutory regime which suggests that the Council's liability in the case of a negligently supplied LIM should be confined to safety or other limited issues.[114] The information supplied in a LIM is likely to be crucial to those who seek it. They will obviously rely on the accuracy of the LIM when deciding how to proceed. Indeed, as this Court said in the *Sunset Terraces* case,[115] it may well be negligent for a party to commit to a transaction without obtaining a LIM. And the central importance of a LIM in the case of a purchase of land is reflected in the terms of the standard ADLS/REINZ form of contract.[116]

[91] It is not necessary in this case to consider whether a similar duty is owed by Councils which supply information beyond the scope of subs (2) pursuant to subs (3). That question can be left to a case in which it necessarily arises.

[92] The most substantial and extensive of Mr Goddard's arguments against the imposition of a duty of care in respect of subs (2) information supplied in a LIM was based on an examination of the wider scope and structure of the Act and in particular s 41 which exempts local authorities from civil and criminal liability for making official information available:

> **41 Protection against certain actions**
>
> (1) Where any official information is made available in good faith pursuant to Part 2 or Part 3 or Part 4 of this Act by any local authority,—
>
> (a) No proceedings, civil or criminal, shall lie against the local authority or any other person in respect of the making available of that information, or for any consequences that flow from the making available of that information; and
>
> (b) No proceedings, civil or criminal, in respect of any publication involved in, or resulting from, the making

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114 Compare *Attorney-General v Carter* [2003] 2 NZLR 160 (CA).

115 *North Shore City Council v Body Corporate 188529* [2010] NZSC 158, [2011] 2 NZLR 289 at [79].

116 Real Estate Institute of New Zealand Inc and Auckland District Law Society *Agreement for Sale and Purchase of Real Estate* (8th ed, 2006) at cl 8.2.

> available of that information shall lie against the author of the information or any other person by reason of that author or other person having supplied the information to a local authority.
>
> (2) The making available of, or the giving of access to, any official information in consequence of a request made under Part 2 or Part 3 or Part 4 of this Act shall not be taken, for the purposes of the law relating to defamation or breach of confidence or infringement of copyright, to constitute an authorisation or approval of the publication of the document or of its contents by the person to whom the information is made available or the access is given.

[93] Section 41 applies to the making available of official information pursuant to Parts 2, 3 and 4 of the Act. The information supplied in a LIM is official information, but s 44A is in Part 6 of the Act which s 41 does not reach. Mr Goddard sought to avoid this difficulty by submitting that a request for a LIM should be viewed as being made not only under Part 6 but also under Part 2, thus bringing in the protective provisions of s 41. I cannot accept this argument. A LIM request is made under s 44A and hence under Part 6. The LIM provisions of s 44A could easily have been placed in any of Parts 2, 3 and 4 if Parliament had wished s 41 to apply to the LIM regime; alternatively s 41 could have been extended to s 44A. Instead, the LIM provisions have been placed in a self-contained way in Part 6 and represent a separate regime, materially different from the general regime to which the other parts apply.[117]

[94] The fact that LIMs were intended to be a self-contained regime, separate from the more general parts of the Act, is supported to a degree by the statutory history of s 44A. The section was parachuted, as Mr Goddard put it, into the Act from cl 74 of the Building Bill 1991 (54–2). That clause originally contained, as sub-cl (5), a provision as to voluntarily-supplied LIM information having some similarity with s 41.[118] In other words there was originally going to be protection from liability in respect of the supply of subs (3) information. But that was changed before the provision was enacted. The absence of a protective provision in s 44A

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[117] See for example the different time limits for the supply of official information generally, as opposed to LIMs; the inability to refuse to supply the subs (2) information in LIMs; and the different fee regimes for general information and LIMs.

[118] The sub-clause originally provided that "[a] territorial authority shall not incur any liability in respect of any information provided, in good faith, in addition to the information provided under subsection (2), of this section."

and the lack of any express linkage with s 41 makes it very difficult to argue it was intended that a territorial authority should owe no duty of care when issuing a LIM.

[95] Mr Goddard also argued that s 41 was included in the Act simply for the avoidance of doubt. The submission was based on the premise that even if s 41 had not been included in the Act, there would have been no basis for imposing a duty of care on Councils when supplying official information. Even if that were so, the fact that s 41 was not applied to s 44A, even for the avoidance of doubt, is a fragile basis for arguing that in the case of the specific LIM regime no duty of care should be imposed. The point does not persuade me that despite the other indicators favouring a duty of care, such a duty should not be imposed.

[96] Mr Goddard pointed to various suggested anomalies that would flow from rejecting his argument. For example, if the same information were sought in one case under Part 2 and in another under s 44A, the Council would not be liable for negligence in the first case but would in the second. I consider it inherent in the statutory scheme that information which can be sought under s 44A should be sought under that section. The fact that it may be possible to seek the same information under Part 2 should not affect the duty of care issue. Another suggested anomaly results from the wider scope for liability faced by some territorial authorities than by others. Only regional councils may issue water permits.[119] Some, but not all, territorial authorities have the powers of regional councils (like the Council in this case).[120] So some territorial authorities do issue water permits. They must provide information about those permits in LIMs, and thus face more scope for liability than others. However, their greater potential for liability simply follows from their greater responsibilities. I do not consider this is an anomaly but in any event it should not affect the duty of care issue.

[97] Among the matters favouring a duty of care is the logical policy corollary of s 44A having been placed in Part 6 and thus outside the protection of s 41. That

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119 Under s 30(1)(e) of the Resource Management Act 1991.

120 Known as "unitary authorities": see the definition of "unitary authority" in the Local Government Act 2002, s 5; and the definition of "regional council" in the Resource Management Act, s 2.

must be a clear indicator that Parliament did not mean the protection of s 41 to apply to the LIM regime in s 44A. That point is reinforced by subs (5) of s 44A, already mentioned. For Parliament to have legislated as it did in s 44A and placed that section where it did in the Act while at the same time meaning s 41 to apply, would represent a most curious drafting technique.

[98] For these various reasons I am of the view that both proximity and policy considerations favour the imposition of a duty of care on territorial authorities so that if they negligently give erroneous information in a LIM and the recipient relies on that information to its detriment, they will be liable for the loss their negligence has caused, save possibly when the information is given under subs (3). I would therefore uphold the conclusion of the Court of Appeal on this aspect of the case.

The causation point

[99] The Council was required by the decisions below to pay damages to the purchaser. This was on the basis that its negligence had caused or contributed to the purchaser's loss by reinforcing the vendors' misrepresentation concerning the water rights. The Court of Appeal rejected the Council's submission that while its negligence may have induced the purchaser to enter into the contract, that contract ultimately involved the purchaser in no loss; hence the Council could not be liable to pay damages. This argument, which was renewed in this Court, proceeds on the uncontested premise that the purchaser is entitled to damages from the vendors on account of the misrepresentations made by their agents and that the vendors can pay those damages. The contract which the Council's negligence induced was not therefore ultimately a loss-making contract for the purchaser. I am referring here to loss caused by the Council's misstatement. It was only the missing water rights that made the contract potentially a loss-making one.

[100] The point can be put by asking whether the Council's negligence caused the purchaser any loss. The Council argues that it did not, because the purchaser is entitled to damages from the vendors which, in law, represent appropriate compensation for the missing water rights. The measure and amount of those damages must, the Council says, be regarded for all purposes as putting the

purchaser into the same position as it would have occupied had the water rights been supplied in full as contracted for. The loss as measured in contract will be at least equal to the tortious measure.

[101] The Court of Appeal described this aspect of the case as conceptually difficult and observed that there was considerable apparent force in the Council's argument. The Court recorded that Mr Goddard for the Council had relied on the decision of the House of Lords in *Nykredit Mortgage Bank Plc v Edward Erdman Group Ltd (No 2)*.[121] In that case valuers had overvalued a property over which the appellant financier took security. As the Court of Appeal put it, the approach of the House of Lords was that, in determining whether, and particularly when, the financier suffered a loss as a result of the valuer's negligence, the value of the borrower's covenant to repay had to be taken into account. The Council's argument equates the purchaser's right to contractual damages against the vendor with a borrower's personal covenant.

[102] The countervailing argument in the Court of Appeal was based primarily on *Eastgate Group Ltd v Lindsey Morden Group Inc*.[122] In that case the purchaser of a company obtained warranties from the vendor as to the company's financial performance and also took advice from its own accountants on the same subject. The purchaser sued the vendor for breach of warranty and the vendor sought to join the accountants so as to obtain contribution from them under the Civil Liability (Contribution) Act 1978 (UK).[123]

[103] Longmore LJ said:

> [14] The logic of this approach [based on *Nykredit*] is that, when damages fall to be assessed against a negligent valuer, the value of the buyer's [sic: sc borrower's] covenant to repay must be brought into account to reduce the claim against the valuer. That was done by Devlin J in *Eagle Star Insurance*

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121 *Nykredit Mortgage Bank Plc v Edward Erdman Group Ltd (No 2)* [1997] 1 WLR 1627 (HL).

122 *Eastgate Group Ltd v Lindsey Morden Group Inc* [2001] EWCA Civ 1446, [2002] 1 WLR 642 per Potter and Longmore LJJ.

123 That Act provided in s 1(1):

> ... any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).

As the Court of Appeal below pointed out at [102] this statutory provision covers, in part at least, the same ground as s 17 of the New Zealand Law Reform Act 1936, but with the crucial difference that the United Kingdom provision is not confined to tortfeasors.

> *Co Ltd v Gale & Power* (1955) 166 EG 37, approved in the dissenting judgment of Sir Denys Buckley in *London and South of England Building Society v Stone* [1983] 1 WLR 1242. But it does not follow that the same approach is correct for cases not of a borrower's covenant to repay his loan but of breach of contract, eg by a vendor of a business. The vendor's liability is to compensate the claimant for the loss suffered by his breach of warranty. This is a liability for damages not a covenant to repay a debt; as a matter of ordinary principle, whereby a claimant is entitled to compensation for loss actually suffered, any actual diminution of the buyer's loss would normally have to be taken into account in assessing the buyer's claim against the vendor. It cannot be the case, merely because a valuer can require a claimant, who brings an action for damages against him, to bring into account the value of a borrower's covenant to repay a debt, that therefore any party liable to a claimant for professional negligence can require the claimant to bring into account the value of his claim against any other contractor for breach of warranty. This is due to the essential difference between a claim for repayment of a debt (to which there can ordinarily be no substantive defence and in respect of which a claimant does not have to prove loss) and a claim for damages for breach of contract (to which there may be many defences and in respect of which the claimant must prove his loss). If a claimant's loss has in fact been diminished, that diminution must be brought into account in a claim for damages for breach of warranty.

[104] I should immediately say I do not consider it is appropriate in a case of the present kind to make a rigid distinction between a claim for a debt and a claim for damages. When a third party's negligence has induced the plaintiff's entry into a contract, the question being addressed should not depend on the nature and incidents of the plaintiff's cause of action under the contract. Rather it should relate to the likelihood of recovery. While a claim in debt may be thought in general terms more likely to bear fruit than a claim for damages, that is not necessarily so. Debtors become insolvent in the same way as persons liable to pay damages. I do not therefore consider the point on which Longmore LJ sought to distinguish *Nykredit* is for present purposes a sound point of distinction.[124]

[105] In the present case the Court of Appeal discussed arguments based on the different measures of damages conventionally awarded in contract and in tort and said there was no obvious reason, in the case of what it called detriment damages, why the Council could fairly demand that the purchaser resort first to the vendors for payment. I do not consider this observation answers the causation point. The Court also observed that the Council's argument took much of its strength from hindsight.

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[124] Compare the reservations about *Eastgate* expressed by Rix LJ in *Haugesund Kommune v Depfa ACS Bank (No 2)* [2011] EWCA Civ 33, [2011] 3 All ER 655 at [63].

The purchaser's claim against the vendors had succeeded only after "some hard litigating".[125] It had not been clear at the outset of the litigation that the purchaser could establish liability against the vendors, or, if so, that damages would necessarily be "expectations based".[126] The Court then stated that as a matter of commonsense and given the causal significance of the negligently issued LIM, it saw little intrinsic appeal in holding that the Council's "egg" could insist on the vendors' "chicken" coming first.[127] Again I do not consider this answers the causation point, at least in a case where judgment falls to be entered at the same time and concurrently against the chicken and the egg. The Court of Appeal proceeded to hold that the Council's negligence had caused the purchaser loss, the amount of which it then considered, together with how that loss should be apportioned as between the vendors and the Council.

[106] Similar arguments were raised in this Court, but I consider the point at issue can and should be dealt with by applying conventional causation principles to the circumstances of the present case. The Council's negligent misstatement in the LIM induced, or at least contributed to inducing, the purchaser to enter into the contract with the vendors. The essential question is what, if any, loss the purchaser suffered from entering into that contract. It would be artificial and contrary to authority to focus solely on the state of affairs existing when the contract was entered into or settled. The real issue is whether the contract was ultimately a loss-making one for the purchaser. That obviously has to be looked at more broadly. It is only to the extent that the purchaser is left with a shortfall in his claim for breach of contract that it can be said that the Council's negligence has caused the purchaser loss by reason of its inducing the purchaser to enter into that contract.[128]

[107] Whether a contract is ultimately a loss-making contract can be tested by considering a case in which the purchaser first sues the vendors and actually recovers the full measure of its loss on whatever basis the court considers appropriate. The purchaser could not then commence further proceedings against the Council. It

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125 At [107].
126 Ibid.
127 At [108].
128 The purchaser does not seek to recover from the Council as damages any of the costs it has incurred in its claim against the vendors.

would have no remaining loss to recover. Whether the contract damages are measured on the basis of diminution in value, or on a performance basis, there is no possibility of the purchaser getting anything more from the Council for the tort of negligence. The position cannot logically be different when, as here, the purchaser sues the vendors and the Council concurrently rather than sequentially and the purchaser's claim against the vendors results in full recovery.

[108] The reasoning which leads me to this conclusion is not based on any notion that contract has general primacy over tort. It is simply a reflection of ordinary principles of causation and the concurrency of the two causes of action. I am not casting doubt on the ordinary rule that a plaintiff may choose whom to sue when more than one person is potentially liable.[129] What is in issue here is whether one of those potentially liable parties has caused the plaintiff any loss.

[109] The view I take is supported both by the *Nykredit* case itself and by other authorities. In *Nykredit* Lord Nicholls, when speaking of the negligent valuation which had induced the lender to lend on a deficient security, said that the valuer was liable for the adverse consequences flowing from the lender's entry into the transaction, but only those consequences that were attributable to the deficiency in the valuation.[130] That was the point determined in the first round of the *Nykredit* litigation.[131]

[110] Importantly, for present purposes, his Lordship added that if the deficiency in the valuation had "in practice" caused no damage, there was no cause of action against the valuer. This means in the present case that if the deficiency in the LIM issued by the Council in practice caused no damage, the purchaser has no cause of action against the Council. By using the words "in practice" Lord Nicholls was, in context, signalling that the overall outcome of the transaction between the contracting parties (here the vendors and the purchaser) must be assessed before the

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129 See *Steamship Enterprises of Panama Inc v Ousel (Owners) (The Liverpool) (No 2)* [1963] P 64 (CA).

130 At 1631H.

131 *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 (HL) [*SAAMCO*].

negligence of a third party can be said to have caused loss to one of the contracting parties.

[111] Lord Hoffmann made essentially the same point when he said that the lender could not recover if "on balance" he was in no worse position than if he had not entered into the transaction at all.[132] In the present case the purchaser cannot say that by entering into the contract it is worse off than if it had not entered into the contract at all. This is because the value of the contract to it is no less than the amount it paid for the land. In this respect it is the tort measure that is relevant to any claim against the Council. The tort measure represents the extent to which the plaintiff is worse off because the information relied on is wrong. By contrast the contract measure represents the extent to which the plaintiff would have been better off had the information been right.[133]

[112] The conclusion I would adopt is consistent with the underlying approach of the House of Lords in *Nykredit*. In substance their Lordships held that the contractual position between borrower and lender must be fully worked through before it could be said that the valuer's negligence had caused any loss to the lender. The negligent valuer does not cause any ultimate loss to the lender unless and until the actual value of the security, together with the actual value of the borrower's personal covenant, are shown to be less than the amount owing to the lender.

[113] The decision of the Full Court of the Supreme Court of South Australia in *Shuman v Coober Pedy Tours Pty Ltd*[134] supports the view I have expressed. It is a rare example of a case like the present where a negligent statement parallels a contractual term. In *Shuman* vendors had sold a fossil to purchasers, representing that it was a dinosaur bone. The price paid was $30,000. The vendors' representation was based on a written statement by a museum curator employed by the State of South Australia upon which both parties had relied. In reality the fossil was simply part of an ancient tree and was worthless. The curator was found to have been negligent in his statement that it was a dinosaur bone.

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132 At 1638D.
133 See Lord Hoffmann in *SAAMCO* at 216.
134 *Shuman v Coober Pedy Tours Pty Ltd* [1994] SASC 4401.

[114] The purchasers rescinded the contract and sued the vendors and the State concurrently for damages of $30,000. In the Court of first instance, judgment was entered against each for that sum. On appeal the Full Court held that the judgment against the State should be set aside as premature. If the full amount was recoverable by the purchasers from the vendors the State's negligence would have caused the purchasers no loss. What was recoverable from the State for its negligence was the net loss suffered by the purchasers after they had taken all reasonable steps to recover from the vendors.

[115] Giving the first judgment King CJ said:

> [24] ... The loss flowing from the negligent advice, as it seems to me, was the amount of the purchase money paid out less the value of the right which remained in the purchaser ... to rescind the contract and recover the purchase price. If the respondent had not rescinded the contract, but had sued the State for damages, it would have been necessary to value the right for the purpose of the assessment of damages. There could be no obligation on the respondent to rescind the contract or to sue the vendors for damages for breach of contract or misrepresentation, but the value of its right to do so would have to be taken into account in the assessment of damages.

[116] The Chief Justice added that the loss sustained by the purchasers in consequence of the negligence for which the State was responsible extended only to so much of the amount paid under the contract as was not restored by the vendors.[135] Until some attempt was made to execute the judgment which had concurrently been entered against the vendors, the extent of the loss flowing from the State's negligence could not be ascertained. The purchasers had to take reasonable steps to enforce the judgment. In our present case it is, of course, common ground that the judgment obtained against the vendors by the purchaser is enforceable and will lead to recovery of the whole judgment debt.

[117] In his judgment in *Shuman* Olsson J said that the correct principle was that the damages for which the State was liable were those which valued the reasonably foreseeable losses suffered by the purchasers after reasonable attempts had been made by them to extract restitution from the vendors.[136] Olsson J also said that the

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135 At [29].
136 At [69] and [73].

damages recoverable from the State were those which represented the "net loss" sustained by the purchasers as a consequence of the negligent misstatement, that net loss being any amount that remained outstanding after reasonable attempts had been made to obtain restitution from the vendors.[137] The measure of the purchasers' loss, for the purposes of the negligent misstatement claim, was the difference between what the purchasers originally paid to the vendors and the sum which, by reasonable endeavour, they were able to recover from the vendors by way of restitution.[138]

[118] Both King CJ and Olsson J derived indirect assistance from the decision of the High Court of Australia in *Sibley v Grosvenor*.[139] In that case a vendor had sold land through an agent who fraudulently stated that the land was being sold by mortgagees. The vendor was not personally implicated in that fraud. The purchasers rescinded and sought return of the purchase money and other compensation. The High Court held that the agent was liable for the return of the purchase money to the extent that recovery could not be had in full by the purchasers from the vendor. In his judgment Griffith CJ said that the purchasers were entitled, as against the vendor, to be placed in the same position as if the contract had not been entered into.[140] That included an order for rescission and repayment of the purchase money with interest. His Honour said, as regards the fraudulent agent, that as there was no reason to doubt that the purchasers would obtain complete restitution from the vendor, it was not necessary to consider the form in which relief in respect of that branch of the case should be awarded against the agent.[141] I consider, as did King CJ and Olsson J, that Griffith CJ was thereby saying that the agent would be liable only to the extent that the purchasers could not obtain full restitution from the vendor.

[119] It does not particularly matter on what juridical basis the statements made in the various authorities I have cited were made. It seems to me, however, that the best analysis is to say, as I have foreshadowed earlier, that in cases like the present a negligent misstatement made by a third party does not cause a contracting party any

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137 At [77].
138 At [81].
139 *Sibley v Grosvenor* (1916) 21 CLR 469.
140 At 474.
141 At 476.

loss unless and until the contracting party's rights under the contract are shown to be worth less than the loss otherwise suffered.

[120] There is only one further issue that needs to be addressed on this aspect of the case. It is whether, in circumstances like the present, the plaintiff (here the purchaser) can bring claims against both the contract-breaker (the vendors) and the tortfeasor (the Council) at the same time and in the same proceeding. As is apparent the claim against the tortfeasor depends on there being a shortfall in the claim against the contract-breaker. But I can see no good reason why that should prevent the plaintiff from commencing proceedings against both at the same time.

[121] When the purchaser entered into the contract with the vendors it immediately acquired, at least prima facie, something worth less than the contract entitled it to receive. This is because the vendors were unable to supply all the water rights they had contracted to supply. At that point the contract which had been induced by the Council's negligence was worth less to the purchaser than its price. The damage thereby suffered by the purchaser was, however, capable of being reduced or eliminated[142] by the exercise of the purchaser's secondary rights under the contract, specifically its right to claim damages for breach. The fact that the exercise of that right might result in reduction or elimination of the purchaser's loss does not mean that no cause of action arose at the outset. This is not the sort of case where the occurrence of any loss is dependent on an external contingency, fulfilment of which is necessary before a cause of action arises.[143]

[122] This means that in the present case the purchaser acquired causes of action against both the vendors and the Council when it became committed to the contract. It could recover from the vendors damages for breach of contract and from the Council any ultimate shortfall in what the vendors were liable to pay, but only within the tortious measure. By that I mean that if the purchaser could recover from the vendors a sum representing the full tortious measure, but no more than that, the

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142 See the use by Lord Hoffmann in analogous circumstances in *SAAMCO* at 218B of the same concept of reduction or elimination of a loss.

143 See for example the discussion in *Gilbert v Shanahan* [1998] 3 NZLR 528 (CA) and *Davys Burton v Thom* [2008] NZSC 65, [2009] 1 NZLR 437.

Council could not have been required to pay anything towards the shortfall in the contractual measure because that would have exceeded the tortious measure which represented the extent of the Council's liability.

[123] In some cases it may be necessary to estimate the likely recovery from the contract-breaker in order to determine what, if any, loss has been caused by the tortfeasor. But courts are well used to doing that kind of exercise: for example when assessing the value of a claim which has become statute-barred by the negligence of the plaintiff's solicitors. In other cases it may be appropriate to adjourn the claim against the tortfeasor, after liability issues have been determined, to see whether the judgment entered against the contract-breaker bears fruit and in what amount.[144] In the present case there has not been any question about the ability of the vendors to satisfy the amount of such judgment as ultimately stands against them. They have the benefit of indemnities from their real estate agency and their solicitors. It follows that the Council's appeal from the judgment entered against it in favour of the purchaser should be allowed. That judgment should be set aside. The Council's negligence caused the purchaser no loss.

Contribution

[124] In view of my conclusion on the causation point, the Council is not liable to the purchaser. There is therefore no basis for it to make any contribution to the amount payable by the vendors to the purchaser. It is, however, desirable to address the contribution point as if the Council were liable to the purchaser, in order to indicate that the basis upon which the Courts below addressed the point is at least problematic and because this Court is divided on the causation point. In the High Court the amount of the Council's contribution was assessed at $200,000, being half of $400,000. The Court of Appeal reduced that amount to $62,500 (half of $125,000) for reasons which are not material to whether there should be any contribution at all. That point is not affected by quantum issues.

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144 As was done in *Shuman v Coober Pedy Tours Pty Ltd*.

[125] In the High Court the Judge considered s 17 of the Law Reform Act[145] and held, rightly, that the vendors' liability under s 6 of the Contractual Remedies Act did not make them tortfeasors. Hence s 17 did not apply.[146] He applied equitable contribution principles to apportion liability between the Council and vendors because he considered they were subject to a "'common' liability".[147] The underlying jurisdictional issues relevant to that exercise were apparently not much ventilated in argument. The Court of Appeal addressed the issue under the heading "Contribution and/or apportionment between the [vendors] and the [Council]". That the "common liability" fell to be apportioned seems to have been accepted by the parties.[148] The Court was therefore not required to consider whether and, if so, on what basis the vendors could obtain a contribution from the Council towards the damages they were obliged to pay to the purchaser. The issue seems to have been solely what that contribution should be.

[126] The Council argued in this Court that even if it had been liable to the purchaser there could be no order for contribution by it to the amount payable by the vendors to the purchaser. It is necessary to examine that matter from first principles. It is clear, as stated earlier, that s 17 of the Law Reform Act has no application to the present circumstances. It deals with contribution between tortfeasors. The vendors were not tortfeasors, they were contract-breakers. Their liability arose under s 6 of the Contractual Remedies Act which relevantly provides:

> **6 Damages for misrepresentation**
>
> (1) If a party to a contract has been induced to enter into it by a misrepresentation, whether innocent or fraudulent, made to him by or on behalf of another party to that contract—
>
> (a) He shall be entitled to damages from that other party in the same manner and to the same extent as if the representation were a term of the contract that has been broken; and

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145 This section is concerned with proceedings against, and contribution between, joint and several tortfeasors.

146 *Altimarloch Joint Venture Ltd v Moorhouse* HC Blenheim CIV-2005-406-91, 23 March 2009 at [39].

147 At [53]. His Honour relied primarily on the decision of the High Court of Australia in *Burke v LFOT Pty Ltd* [2002] HCA 17, (2002) 209 CLR 282, to be discussed below.

148 At [123].

(b) He shall not, in the case of a fraudulent misrepresentation, or of an innocent misrepresentation made negligently, be entitled to damages from that other party for deceit or negligence in respect of that misrepresentation.

...

[127] Mr Casey QC argued that liability under s 6 represented a statutory liability akin to a breach of statutory duty and thus akin to a tort; hence the vendors could be regarded as joint tortfeasors with the Council. But that is not a view that can be taken of s 6 whose history, purpose and text are all contractual in nature. The effect of s 6 is to equate a misrepresentation with a term of the contract which has been broken. Nothing could be more contractual than that. Clearly the vendors were not tortfeasors.

[128] With s 17 out of play there is no other applicable statutory provision. The relevant High Court Rules are procedural only and do not provide jurisdiction where none can be found elsewhere.[149] The complicated issues which arise in this area were comprehensively examined by the Law Commission in its Preliminary Paper 19 entitled *Apportionment of Civil Liability*,[150] and its Report 47 of the same title.[151] It is neither necessary nor appropriate to examine all the intricacies discussed by the Commission. It recommended legislation, but none has eventuated. The subject would repay early legislative attention. The current legal position, put simply, is that one wrongdoer can recover contribution from another wrongdoer, in respect of the same loss, only by virtue of some statutory provision or in accordance with the principles of equitable contribution which now subsume the old common law position. As the vendors cannot invoke s 17, which is the only potentially applicable statutory provision, they must look to equitable principles.

[129] Equity will order contribution when two or more parties are under what is conventionally called a coordinate liability (that is a liability of the same nature and extent) to make good one loss and one of them pays more than his or her

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149 High Court Rules, r 4.4 (r 75 in the Rules current at the time of this proceeding).
150 Law Commission *Apportionment of Civil Liability: A Discussion Paper* (NZLC PP19, 1992).
151 Law Commission *Apportionment of Civil Liability* (NZLC R47, 1998).

proportionate share of that loss.[152] In such circumstances the overpaying party can recover equalising contribution from the other party or parties. It is essential to the application of the equitable doctrine that all parties involved in the contribution issue are under a coordinate liability for the same loss. Because their liability is coordinate it is appropriate in equity for the liability to be shared as, for example, in the case of co-sureties. In the present case, assuming the Council for present purposes to be liable to the purchaser, the liabilities of the parties are far from coordinate. They are distinctly dissimilar. The liability of the vendors is in contract and that of the Council is in tort. The vendors are liable for selling property without an attribute they claimed it had. The Council is liable for negligently informing the purchaser that it did have that attribute. The amounts for which each party is liable are by no means the same. There is no one loss. No case of which I am aware, and none was cited, has ever applied the equitable doctrine to the extent necessary to cover this degree of dissimilarity.

[130] In *Burke v LFOT Pty Ltd* the High Court of Australia refused a contribution order against a negligent solicitor in favour of a vendor company and its director who were liable for misleading and deceptive conduct under the Trade Practices Act 1974 (Cth).[153] The Court was prepared to accept that the fact that the liability of the parties to the plaintiff arose under different causes of action was not an absolute bar to a contribution order, but considered that the matter could not be left as open-ended as that proposition might imply. In their joint judgment Gaudron ACJ and Hayne J said that the notion of coordinate liability depended on "common interest and common burden",[154] citing the early influential case of *Deering v Earl of*

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152 RP Meagher, JD Heydon and MJ Leeming *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (4th ed, Butterworths LexisNexis, Chatswood, 2002) at [10-030]–[10-085]; Peter Young, Clyde Croft and Megan Smith *On Equity* (Lawbook Company, Sydney, 2009) at [12.380]ff; GE Dal Pont *Equity and Trusts in Australia* (5th ed, Lawbook Company, Sydney, 2011) at [14.120]–[14.125].

153 *Burke v LFOT Pty Ltd* [2002] HCA 17, (2002) 209 CLR 282. The High Court in *HIH Claims Support Ltd v Insurance Australia Ltd* [2011] HCA 31, (2011) 280 ALR 1 at [36]–[48] recently reaffirmed the stance it took on equitable contribution in *Burke*.

154 At [16].

Winchelsea.[155] Their Honours also made reference to the concept of paying more than a proper share to discharge a common obligation.[156]

[131] In his judgment McHugh J confirmed that in determining whether there was a common obligation the traditional test was whether the liability of each party was "of the same nature and to the same extent".[157] In *BP Petroleum Development Ltd v Esso Petroleum Co Ltd* the same concept was rendered as each party having to perform substantially the same obligation.[158] In *Scholefield Goodman and Sons Ltd v Zyngier* the Privy Council held that it was necessary for the party from whom contribution was claimed to be on the "same level of liability" as the claimant.[159] Contribution would not lie simply because the respective liabilities arose out of "similar" relationships or "related" transactions.[160]

[132] By way of further example McHugh J cited *Ruabon Steamship Co, Ltd v London Assurance* where Lord Halsbury LC spoke of the liability of the parties needing to arise by virtue of some contract or obligation "binding them all to equality of payment or sacrifice" in respect of the common obligation.[161] Another conventional indicator of a common or coordinate obligation is when satisfaction of the obligation by one obligee discharges, as a matter of law, all other obligees.[162]

[133] In relation to the *Burke* case itself McHugh J described the obligations in issue (under the Trade Practices Act and in negligence) as independent not common; being neither of the same nature nor of the same extent.[163] The same must apply to

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155 *Deering v Earl of Winchelsea* (1787) 1 Cox 318 at 323, 29 ER 1184 (Exch) at 1186.

156 At [22] citing *Albion Insurance Co Ltd v Government Insurance Office (NSW)* (1969) 121 CLR 342 at 351 per Kitto J.

157 At [38].

158 *BP Petroleum Development Ltd v Esso Petroleum Co Ltd* (1987) SLT 345 (OH) at 348.

159 *Scholefield Goodman and Sons Ltd v Zyngier* [1986] 1 AC 562 (PC) at 575.

160 At [43] per McHugh J citing *Smith v Cock* [1911] AC 317 (PC). In that case the sole "similarity" between the obligations was that the two different trusts had the same beneficiary as their object. This did not suffice for a common liability. In parallel, the sole similarity between the Council's and vendors' liabilities here is that they are to pay damages to the same party.

161 *The Ruabon Steamship Co, Ltd v The London Assurance* [1900] AC 6 (HL) at 12.

162 See *Albion Insurance Co Ltd v Government Insurance Office (NSW)* (1969) 121 CLR 342 at 346 per Barwick CJ, McTiernan and Menzies JJ.

163 At [52]. That independence arose from the liabilities' different legal sources and different contents: one was a positive obligation not to induce the purchaser into the contract by misleading conduct (and was thus also owed to Mr Burke), while the other was a duty to advise the purchaser to check the accuracy of those misleading representations.

the obligations in the instant case of the vendors and the Council. By contrast, in the *BP Petroleum* case, BP was liable in contract for damage it had caused to a jetty owned by the Shetland Islands Council. Esso was also liable to pay for that same damage by virtue of a statute. The Outer House held that the obligations of the parties were substantially the same. They could be regarded as being under a common obligation, or liable for the same debt, despite the different sources of that obligation. The same cannot be said of the present case. The obligations of the Council and the vendors are not common, nor are they of the same nature and extent.

[134] The leading case in England, albeit under the Civil Liability (Contribution) Act 1978, is the decision of the House of Lords in *Royal Brompton Hospital NHS Trust v Hammond*.[164] The speeches of Lord Bingham, Lord Steyn and Lord Hope in that case each contain valuable discussions of the history of the law of contribution and its statutory development in the United Kingdom, the crucial provision of which (contained in s 1(1)) can be found in footnote 123 above.

[135] Lord Bingham made several important points. He said that the common link between all the situations giving rise to a liability to contribute was the obvious justice of requiring that "a common liability should be shared between those liable".[165] He added that the English legislation, by using the words "in respect of the same damage", emphasised the need for the one loss to be apportioned among those liable.[166] His Lordship emphasised the difference between a common liability and an independent liability.[167] In the case before us the liabilities are clearly independent because the causes of action are different and the loss is not the same. There is no single claim for which both parties are liable.

[136] Lord Steyn said that "the notion of a common liability, and of sharing that common liability, lies at the root of the principle of contribution".[168] He added that the legislative context did not justify "an expansive interpretation of the words 'the

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164 *Royal Brompton Hospital NHS Trust v Hammond* [2002] UKHL 14, [2002] 1 WLR 1397.
165 At [2].
166 At [5].
167 At [7].
168 At [27].

same damage' so as to mean substantially or materially similar damage. ... No glosses, extensive or restrictive, are warranted."

[137] Lord Hope said:

> [46] I do not detect either in the Law Commission's Report or in the wording of the Act itself [the 1978 Act] an intention to depart from the assumption which has always been made in contribution cases that this relief is available only where two or more persons have contributed, albeit in different ways, to the same harm or damage – that is, where a single harm has resulted from what they have done.

[138] A little later his Lordship added:

> [47] The effect of those words ["same damage"] is that the entitlement to contribution applies only where the person from whom the contribution is sought is liable for the same harm or damage, whatever the legal basis of his liability. But the mere fact that two or more wrongs lead to a common result does not of itself mean that the wrongdoers are liable in respect of the same damage. The facts must be examined more closely to determine whether or not the damage is the same.

[139] It follows from the foregoing discussion that unless this Court were substantially to extend the principles of equitable contribution, the vendors could not obtain contribution from the Council even if the Council were liable to the purchaser. I do not, however, need to consider whether it would be appropriate for the courts to undertake the necessary extension, rather than Parliament, because there is a point not yet addressed which would make it inappropriate to order contribution even if, as a matter of law, it were possible to do so. The point, put shortly, is that if the Council were ordered to contribute to the amount payable by the vendors to the purchaser, the vendors would end up in receipt of more than the property was truly worth with only the more limited water rights available to it.

[140] A similar situation arose in *Burke* and the same point was mentioned by Longmore LJ in *Eastgate*. In *Burke*, Gaudron ACJ and Hayne J said that Kitto J's reference in *Albion Insurance* to natural justice required that if one of several persons had paid more than his proper share towards discharging a common obligation, that person was entitled to be recompensed by those who had not.[169]

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[169] At [22].

Significantly for the purposes of the present case, their Honours added that if contribution were made on that basis in *Burke*, the vendor to which the contribution was to be paid would be unjustly enriched. This was because that party would then receive an amount in excess of the true value of the property which its misleading conduct had caused the purchaser to acquire. McHugh J made a similar point.[170] Their Honours' reference to "unjustly enriched" may be more suitably rendered as "overpaid", so as to avoid the perils that might be thought inherent in any reference to the concept of unjust enrichment.

[141] The relevance of this point to the present case is that if the vendors were to receive contribution (ultimately fixed below at $62,500) from the Council, they would be left in possession of $62,500 more than the property was truly worth. There is, of course, no basis upon which the Council could be required to contribute to the amount paid by the vendors to the purchasers above the tortious measure because the Council's wrong was tortious rather than contractual.

[142] At the end of his judgment in *Eastgate*, Longmore LJ addressed a similar issue, without having finally to decide it. The argument was that contribution in that case would result in the vendor of the business receiving (from the third party wrongdoer) more than the true value of the business. The vendor would thus be "unjustly enriched".[171] Longmore LJ used exactly the same terminology in this respect as Gaudron ACJ and Hayne J, albeit his formulation seems to have originated with counsel. Longmore LJ said that this was an argument of considerable force but not one that could be determined on a strike-out application. Hence he did not further engage with it.

[143] It follows that I would allow the Council's appeal against the order requiring it to pay the vendors a contribution to the damages payable by them to the purchaser.

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170 At [59].
171 At [21].

Postscript on causation and contribution issues

[144] Since preparing these reasons, I have had the opportunity to consider the views of those other members of the Court who take a different approach to the causation or contribution issues. In relation to the latter, McGrath J relies principally on the judgment of Gaudron ACJ and Hayne J in *Burke*, from which I too have cited. My views, and those expressed by McGrath J, differ not so much on the legal approach to be adopted to contribution issues but rather on the application of that approach to the facts of the present case.

[145] In *Burke* Gaudron ACJ and Hayne J held that the liabilities of the parties between whom contribution may be ordered must be "of the same nature and to the same extent".[172] McHugh J used the same formulation in the course of his reasons.[173] In this respect I accept that it is not fatal that the causes of action are not the same. But, if they are not, the matter requires careful analysis in answering the two questions inherent in the test: (1) is the nature of each liability the same; and (2) are the liabilities of the same extent?

[146] The first question requires a comparison of the nature of the liability of each party, not of the consequences of that liability. The nature of the liability of the vendors in the present case is a liability to compensate the purchaser for the vendors' failure to perform the promise inherent in a contractual term. By contrast, the nature of the liability of the Council is to compensate the purchaser for the consequences of the Council's negligent misstatement which induced the purchaser to enter into the contract of purchase. I do not consider that it can properly be said that these liabilities are of the same nature. One is based on a broken promise; the other is based on a negligent statement. Different duties underlie the two liabilities.

[147] The second question requires a comparison of the extent of the liability of each party. The extent of the vendors' liability is to compensate the purchaser in money for the absence of the promised water rights. As will appear later, the extent

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172 At [15]–[16].

173 See above n 157.

of the vendors' liability in this respect is based on the sum of money necessary to put the purchaser into the same position as if the contract had been properly performed, that is as if the promise had been fulfilled. By contrast the extent of the Council's liability is to put the purchaser into the same position as if it had not entered into the contract at all; that is, to compensate the purchaser for the amount by which it is worse off from having entered into the contract. In the present case the former is $1.05m and the latter $125,000. The liabilities of the vendors and the Council to the purchaser are neither conceptually nor actually of the same extent. The only recognised situation when contribution is ordered in respect of unequal amounts is when there is a pro rata difference in sharing a common liability.

[148] It is, with respect, not sufficient to say that the vendors and the purchaser made the same error in their representations and that each error was an operative cause of the purchaser's entry into the contract. While those propositions are undoubtedly true, they represent a case of independent rather than common liabilities. The necessary commonality of liability is absent.

[149] I should also expand on the "overpayment" point as a basis for refusing contribution on the merits. The vendors are liable to the purchaser for performance damages. The Council is liable for diminution in value damages. The Council could not therefore be required to contribute to the vendors more than the total amount of the diminution damages. Any payment from the Council to the vendors leaves the vendors ultimately better off by the amount of the payment.

[150] As between the Council and the vendors, it is irrelevant that the vendors are liable to the purchaser for more than the diminution measure. This is because the Council cannot be required to contribute to that measure. As between themselves and the Council, the vendors should not be in a better position because they are liable to the purchaser on a different and more onerous basis. Hence any payment from the Council to the vendors must be regarded as paid by way of contribution towards the diminution measure, thereby putting the vendors into the position of receiving more than their property was actually worth. I do not consider that result to be equitable because the vendors would be making an unjustified profit at the Council's expense.

[151] There is another way of looking at this matter which yields the same result. We have already seen that the liabilities of the vendors and the Council to the purchaser are not of the same extent. If they were, both parties could be liable only for the lower tort measure. Any contribution by the Council to the vendors on the basis of that measure would necessarily result in the vendors receiving more for their property than it was actually worth. That would represent an unjust overpayment, and contribution by the Council on that basis would not be equitable.

[152] In my view only legislation can make the liabilities we have here subject to contribution by one party to the other. The obligors are not, as the cases put it, co-obligors. The obligations are different in both nature and extent. The liabilities are not shared in the sense that the parties are each subject to a common obligation. The corollary is that if the Council had been sued alone and, despite the causation point, found liable, it would not have been able to obtain contribution from the vendors towards its liability to the purchaser. I accept that this would be an unsatisfactory outcome. This is why legislation is badly needed. Only legislation can satisfactorily reconcile and accommodate all the controversial and difficult issues that beset this area of the law.

[153] Coming to the causation point, I draw attention to the fact that in *Eastgate* it was held that "actual diminution of loss" should be taken into account but not the ability to claim damages against others. It is already evident that I do not agree that a right of action for damages cannot be taken into account. In the circumstances of the present case the value of the right to claim damages must be relevant as bearing on the value of the contract to the purchaser. By the time judgment came to be entered against the Council, the purchaser's right to claim damages against the vendors had crystallised into a right to a judgment against them, that judgment being good for its full amount. I do not consider it is either realistic or principled to ignore that fact, and its obvious relevance to the value of the purchaser's right to claim damages against the vendors. Nor do I consider it persuasive for present purposes to make a distinction between actual receipt of monetary compensation and potential receipt in the future when, as here, it is certain that will happen.

[154] The purchaser's loss should not be assessed at the time the contract was entered into. *Eastgate* clearly does not require that. Rather the loss should be assessed at the time when judgment comes to be entered against the Council. It is only at that time that it can properly be determined whether the contract which the Council's conduct induced actually caused the purchaser any loss and, if so, in what amount. In the present case it was then known that the purchaser was no worse off through its entry into the contract.

Measure of damages

[155] The issue which arises on this aspect of the case is whether the Courts below were correct in assessing the damages payable by the vendors on the basis of the cost to the purchaser of building a dam to provide the shortfall of water not available from the water rights in all seasons. The real estate agents and the solicitors, as indemnifiers of the vendors, contend that the appropriate measure is the diminution in value of the property brought about by the absence of the water rights which the vendors contracted to transfer. As will be recalled, the competing amounts are $1,055.907.16 on the former measure and $400,000 on the latter.

[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.

[157] In the leading case of *Robinson v Harman*,[174] 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*

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[174] *Robinson v Harman* (1848) 1 Exch 850 at 855, 154 ER 363 (Exch) at 365.

de Froberville[175] Oliver J emphasised that this formulation did not necessarily mean only as good a *financial*[176] 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[177]) 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.

[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.[178] Damages in this second kind of case can therefore usefully be called performance damages, as opposed to damages which compensate for loss of value.

[159] Two modern cases of high persuasive authority serve to demonstrate the distinction just drawn. In *Ruxley Electronics and Construction Ltd v Forsyth*[179]

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175 *Radford v De Froberville* [1977] 1 WLR 1262 (Ch) at 1273.

176 (Emphasis added.)

177 Sometimes referred to as a fungible.

178 As it was put in *New Zealand Land Development Co Ltd v Porter* [1992] 2 NZLR 462 (HC) at 466: " ... an appropriately calculated sum of money must take the place of the promised benefit which the contract breaker has failed to provide". See also *Bloxham v Robinson* (1996) 7 TCLR 122 (CA) at 133 where McKay J said that the plaintiff is not to be put in the position he would have occupied had the contract not been made, but rather in the position he would have occupied if the contract had been performed.

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

contractors had built a swimming pool, the contractual specifications for which required the diving area to be 7 feet 6 inches deep. The diving area of the completed pool was only 6 feet deep. The question was whether the damages to which the landowner was entitled should be measured by the cost of rebuilding the pool, some £21,560, or rather on the basis of diminution in value of the property. As it happened there was no such diminution. The depth of the diving area did not render the pool unsuitable for diving so there was no need to reconstruct the pool for that purpose.

[160] The trial Judge held that claiming the cost of reconstruction was unreasonable in the circumstances. The Court of Appeal (by a majority) allowed the appeal, holding that the proper measure of the landowner's loss was the amount necessary to put him in the same position as if the contract had been performed, which in the circumstances was the cost of rebuilding the pool. The House of Lords allowed the builder's appeal from that conclusion, holding that the appropriate measure was diminution in value rather than reconstruction. This was because reconstruction would have been unreasonable in all the circumstances. The necessary expenditure was out of all proportion to the benefit to be obtained from it. In effect their Lordships were saying that to award the cost of reconstruction would have the effect of unreasonably inflating the loss suffered.

[161] The speeches in *Ruxley* make clear that a party to a contract has not only a financial interest in the contract but also what may be described as a performance interest. The damages necessary to reflect the disappointment of those interests may be the same or they may not. In cases of non-substitutability of subject-matter the performance interest is likely to be the one which the damages should reflect. It is also likely that in non-substitutability cases a requirement to pay damages on a performance basis will be a reasonable response to the breach. Of course the plaintiff must have a genuine intention to expend the damages to protect the performance interest. If that is not so, it would hardly be reasonable to award damages according to the performance measure.[180]

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[180] See for example *Tito v Waddell (No 2)* [1977] Ch 106 (Ch) at 332 per Megarry V-C.

[162] In *Ruxley* Lord Mustill emphasised that the test of reasonableness played a "central" part in determining the basis of recovery.[181] So too did Lord Lloyd in a whole section of his speech headed with the word "Reasonableness". And, as his Lordship said,[182] the cost of reinstatement (effectively the performance measure) is recoverable only if it is reasonable for the plaintiff to insist on that course. In *Ruxley* the House held unanimously that it would not be reasonable for the plaintiff to insist on the performance measure. This was because the cost of rebuilding the pool was wholly disproportionate to the benefit the plaintiff would obtain. Hence *Ruxley* was a case where the correct measure was the difference in value between the subject-matter as delivered and as promised. As there was in fact no diminution in value, nothing could be awarded on that head.

[163] The contrasting case is the decision of the High Court of Australia in *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd*.[183] The tenant of office premises in Melbourne had covenanted with the landlord not to make any substantial alteration to the very decorative entrance lobby of the premises without the written approval of the landlord. The tenant sought the landlord's approval for proposed alterations but was told that no approval would be given, if at all, until after a site meeting. The tenant proceeded with the alterations before the site meeting and afterwards, despite approval not being forthcoming. The landlord sued the tenant for the cost of restoring the premises to their former state. The tenant contended 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 a sum substantially less than the cost of restoration.

[164] The Court viewed the case as one where in substance the tenant had covenanted to preserve the premises without alteration unless the alteration was approved.[184] It was reasonable for the landlord to insist on restoration in the circumstances. Hence the proper measure was the cost of doing so. The damages should reflect what it would cost for the tenant to perform its covenant. That

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181 At 361.
182 At 369.
183 *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* [2009] HCA 8, (2009) 236 CLR 272.
184 At [15].

measure represented performance damages rather than financial loss damages in terms of the distinction drawn earlier in these reasons.

[165] In their joint judgment in *Tabcorp* the members of the High Court traversed the familiar ground of *Robinson v Harman*, *Radford v De Froberville*, and *Ruxley*. They also referred to the earlier decision of that Court in *Bellgrove v Eldridge*[185] where a builder had constructed a house with defective concrete and mortar. He contended that the proper measure was diminution in value not the cost of rectifying the defects. The Court there held that the proper measure of the owner's loss was the amount required to give her the equivalent of a house which was substantially in accordance with the contract.[186] That was, of course, the performance measure, not the diminution in value measure.

[166] In *Tabcorp* their Honours emphasised that reasonableness was a key consideration. They also drew the analogy with cases of specific performance which I have suggested above, and indicated that if the case was of that kind, performance damages would almost always be reasonable.[187]

[167] Against that legal background, I turn to consider the circumstances of the present case. The evidence establishes that it is only by building a dam to store water against dry seasons that the purchaser can be reasonably assured of having available at all times the full quantity of water which the vendors had contracted to supply. There is no basis in the evidence for concluding that it would have been reasonable for the purchaser to sell the land and endeavour to establish its vineyard elsewhere nor, indeed, that a suitable substitute property was available. All aspects of the purchaser's choice of where to establish its vineyard must be taken into account. When that is done the property being acquired under the contract was not, on the evidence, reasonably substitutable by purchase elsewhere.

[168] Indeed it was not even suggested to Mr McNabb that he ought reasonably to have sold, thereby crystallising his loss in terms of diminution in value. Although it

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185 *Bellgrove v Eldridge* (1954) 90 CLR 613.
186 At 617.
187 At [13]–[14].

was for the purchaser to establish that the performance measure was the appropriate one, it is difficult for the vendors to contend that this measure was not appropriate when they did not put the point in issue when cross-examining Mr McNabb. Indeed it would have been difficult persuasively to suggest to Mr McNabb that he should reasonably have sold on becoming aware of the shortfall in the water rights. He did not find out about this until after the sale and purchase had been settled. Altimarloch was then in the process of establishing vines on the land. It is not as if the purchaser elected to settle with knowledge of the shortfall. If that had been so the position as regards the proper measure of loss may have been different. This, in my view, is a clear case for the award of performance damages.

[169] The vendors complained that the cost of building the dam had escalated during the progress of the litigation in the High Court. There was no discrete suggestion that damages should have been fixed at the date of the breach. That would, in any event, have been a difficult proposition to sustain. By disputing the purchaser's claim for damages the vendors were running the risk that the amount of money required of them to satisfy the purchaser's claim, if it succeeded, would increase, particularly if the performance measure was found to be appropriate. It was neither unconventional nor unfair for the amount necessary in this case to satisfy the performance measure to be fixed at the date of trial.[188] The purchasers could hardly be expected to go ahead and build the dam without the assurance of having had damages fixed on that basis. I say that irrespective of whether they had the means to do so.

[170] The vendors sought to make something out of the dollar difference between the financial loss and performance measures. That difference cannot affect the principles to be applied. It was, of course, capable of bearing on the question of reasonableness, that is the proportionality of benefit to cost. But, that said, those who are in breach of contract cannot complain if they are required to pay by way of damages the financial equivalent of performance, subject only to that course being reasonable between the parties.

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[188] Compare *Stirling v Poulgrain* [1980] 2 NZLR 402 (CA) at 424; *Radford v De Froberville* at 1286–1287.

[171] The question of reasonableness must be assessed against the premise that parties enter into contracts with the expectation of performance, not with the expectation of compensation for breach. In the present case there is nothing to suggest that simply because the performance measure was substantially more than the compensation measure, the former was an unreasonable response to the vendors' breach. This factor does not make the performance measure disproportionate to the benefit to be achieved. There was no evidence that the purchaser could have achieved the benefit of obtaining the promised quantity of water by less expensive means. The substantial nominal dollar difference between the two measures was due in large part to the time taken to resolve the proceedings.[189] That factor cannot be laid at the purchaser's door. If those responsible had accepted their liability earlier they would not have been facing the level of claim which was ultimately established.

[172] It follows that for these reasons the appeal against the performance measure of damages adopted by the trial Judge and confirmed by the Court of Appeal must be dismissed.

Summary of conclusions and disposition

[173] I would resolve the four issues identified above[190] as follows. The Council owed the purchaser a duty of care when it supplied the LIM. I consider the Council's negligence did not cause the purchaser any loss. The vendors cannot obtain a contribution from the Council to the damages they must pay the purchaser. The correct measure of the purchaser's loss was that adopted below, namely the cost of performance rather than diminution in value.

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189 In a letter written in December 2004 Altimarloch's solicitors advised the vendors' solicitors that Mr McNabb had ascertained from a construction company that the expected cost of the dam was $280,000. They also expressly gave notice that delay would "inevitably increase the losses" as Altimarloch's development plans were formulated on the basis that there was adequate water available for irrigation. In its Third Amended Statement of Claim filed on 4 October 2007 Altimarloch claimed that the cost of a dam had risen to $699,255. The figure submitted by Altimarloch for the damages assessment and accepted by the Judge in his judgment of 23 March 2009 was $735,907.16.

190 At [81] and [82].

Costs

[174] The position with regard to costs is distinctly more complicated than usual. It is necessary to bear in mind that some of the parties have succeeded on some issues and failed on others. Bringing all relevant aspects to account I would make orders:

In the Supreme Court

(a) The Council should pay Altimarloch costs of $10,000.

(b) Vining Realty and Gascoigne Wicks should pay the Council costs of $5,000. They are to pay in the proportions fixed in the Court of Appeal, namely 60 per cent by Vining Realty and 40 per cent by Gascoigne Wicks.

(c) Vining Realty and Gascoigne Wicks are to pay in the same proportions costs of $10,000 to the purchaser.

(d) In each case where costs are awarded disbursements should be added as agreed or fixed by the Registrar.

In the Court of Appeal

(a) The Council should pay Altimarloch such costs as agreed or fixed by the Court of Appeal.

(b) Vining Realty and Gascoigne Wicks are to pay in the same proportions costs to the Council as agreed or fixed by the Court of Appeal.

(c) As between Vining Realty and Gascoigne Wicks on the one hand and the purchaser on the other, Order F made by the Court of Appeal should stand.

(d) In each case where costs are awarded disbursements should be added as agreed or fixed by the Registrar.

In the High Court

(a) All matters of costs should be as agreed or as fixed by the High Court in the light of the ultimate outcome of the case.

McGRATH J

Introduction

[175] These appeals are brought against a judgment of the Court of Appeal in a case in which a real estate agent and solicitors, who were acting on behalf of the vendors of farm land, misrepresented to a purchaser the quantity of water rights that could be sold with the land.[191] Materially, the same erroneous representation was made by the Marlborough District Council in a Land Information Memorandum it provided to the purchaser prior to the agreement for sale and purchase of the land becoming unconditional.

[176] The error was discovered following confirmation and settlement of the contract. The purchaser, Altimarloch Joint Venture Ltd, then sued both the vendors, Mr and Mrs Moorhouse, and the Council claiming damages.

[177] In the High Court,[192] Wild J held that the vendors were liable to the purchaser for the acts of their agents "as if the misrepresentations were terms of the contract of sale".[193] Wild J also held that the Council was liable to the purchaser in negligence, having breached a duty of care it owed to the purchaser when providing the erroneous information.

[178] The High Court awarded damages of $1,055,907.16 against the vendors for breach of contract. It found that $400,000 was the appropriate award in damages in

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191 *Vining Realty Group Ltd v Moorhouse* [2010] NZCA 104.

192 *Altimarloch Joint Venture Ltd v Moorhouse* HC Blenheim CIV-2005-406-91, 3 July 2008; *Altimarloch Joint Venture Ltd v Moorhouse* HC Blenheim CIV-2005-406-91, 23 March 2009.

193 Under s 6 of the Contractual Remedies Act 1979.

tort against the Council. The latter sum was based on the difference in value between the property if it had the represented water rights and the actual value of the property without them. The real estate agent, Vining Realty Group Ltd, and Gascoigne Wicks, the solicitors who had made the misrepresentations, were ordered to indemnify the vendors. Contribution was also ordered between the Council and the vendors' agents for the common tortious liability of $400,000 on a 50/50 basis. The Court of Appeal upheld the High Court's findings of liability of the vendors and the Council, as well as the award of damages against the vendors. However, the Court reassessed the quantum of the shared liability in tort so it reflected the detriment suffered by the purchasers, rather than their expectations. The loss therefore was the difference between the contract price and what the property was worth, which was $125,000. The 50/50 contribution order was upheld so the award of tort damages against the Council was reduced to $62,500.

Issues

[179] In this Court there are four issues. First, the Council appeals against the Court of Appeal's judgment as to its liability in negligence on the ground that the Council did not owe the purchaser a duty of care when providing the information. Secondly, if the first ground fails, the Council contends that the purchaser suffered no loss from its negligence as it is able to recover its losses in full from the vendors in its action for breach of contract. The third issue, also arising in the Council's appeal, is whether the vendors (effectively their indemnifying real estate agent and solicitors) are entitled to contribution from the Council towards their liability to the purchaser. The Council contends it is not required to so contribute.

[180] Finally, the real estate agent and solicitors have each appealed against the amount of damages awarded against the vendors in the contract proceeding, which was upheld by the Court of Appeal. The fourth issue we must decide is accordingly whether that award of damages against the vendors was excessive.

The Council's liability

[181] On the first issue, I agree with Tipping J, for the reasons he gives, that the Marlborough District Council did act in breach of a duty of care which it owed to the purchaser when it gave incorrect information about rights to water in its Land Information Memorandum. I would accordingly not uphold that ground of appeal by the Council.

Quantum of damages issues

[182] It is convenient next to address the fourth issue which the real estate agent and solicitors, standing in the vendors' shoes, appeal against: the amount of damages that the vendors have been ordered to pay to the purchaser. Both lower courts have held that the vendors must pay damages calculated by reference to the cost of providing access to water equivalent to what would have been available had the representations been true and the contract fully performed. This was the sum of the cost of certain additional water rights that the purchaser was able to purchase and the cost of constructing a dam to provide access to enough water in dry seasons to meet the shortfall. The real estate agent and solicitors challenge this basis for assessment of damages and contend that the award should rather have been based on the difference in value of the land with the contract water rights and with the lesser rights that were actually transferred.

[183] The claim against the vendors is for damages for misrepresentation under s 6(1)(a) of the Contractual Remedies Act 1979. It provides that a party induced by a misrepresentation to enter into a contract is:

> ... entitled to damages from that other party in the same manner and to the same extent as if the misrepresentation were a term of the contract that has been broken.

[184] Section 6(1)(b) excludes any entitlement for tort damages in the case of a misrepresentation made negligently.

[185] In the High Court, Wild J held that s 6(1)(a) did not make the misrepresentation a term of the contract. Because, however, the provision gave a remedy in damages as if the misrepresentation were such a term, liability under it was contractual in nature.[194] The Court of Appeal agreed, saying that this was the effect of s 6(1)(a) and (b).[195] Mr Casey QC has submitted that the cause of action is statutory, but I prefer the analysis of the High Court and Court of Appeal.

[186] The principles for determining the measure of damages for breach of contract were stated by Cooke J and Richardson J in their separate judgments in *Stirling v Poulgrain*.[196] As Cooke J expressed them:[197]

> Whereas in tort they might be restricted to proved damages to their existing position, in contract they are entitled prima facie to damages for the benefits that would have accrued from performance of the contract or contracts. The starting point and basic principle indicated by high authority is that the injured party is to be put as nearly as possible in the situation that he would have occupied if the contract had been performed ... Various circumstances are recognised as justifying a departure in favour of the defendant from the full rigour of that principle. In particular a plaintiff must normally show that the damages are of a kind within the reasonable contemplation of the parties; and there is no reason why that requirement should not apply to this case. Also, of course, a plaintiff must act reasonably to mitigate his damages.

[187] Richardson J said:[198]

> The general objective underlying the assessment of damages for breach of contract is compensation: the innocent party should be put, in money terms, in as good a position as he would have been in had the contract-breaker performed his contract. So, in measuring the damages the basic inquiry must be as to the value to the party injured of the loss of the promised performance.

[188] Cooke J also emphasised that in the end assessment of damages is a question of fact rather than the subject of a legal rule applicable to all cases. In *McElroy Milne v Commercial Electronics Ltd*, he said that:[199]

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194 *Altimarloch Joint Venture Ltd v Moorhouse* HC Blenheim CIV-2005-406-91, 23 March 2009 at [32] and [36].

195 At [121].

196 *Stirling v Poulgrain* [1980] 2 NZLR 402 (CA).

197 At 419.

198 At 422.

199 *McElroy Milne v Commercial Electronics Ltd* [1993] 1 NZLR 39 (CA) at 41.

> ... the ultimate question as to compensatory damages is whether the particular damage claimed is sufficiently linked to the breach of the particular duty to merit recovery in all the circumstances.

[189] Richardson J also observed that the yardstick for assessing loss had to be reasonable in all the circumstances. He cited[200] an observation of Lord Morris as helpful in deciding the figure that truly reflects the loss to be compensated:[201]

> The reasonable cost, depending on the facts of particular cases, will be the actual reasonable cost which a complainant has incurred or can be expected to incur; it will be such cost at the time when equivalent reinstatement reasonably does or should take place.

[190] While the two Judges eventually differed as to the effect of the application of the principles in the case, they did not differ on the principles.

[191] In applying these principles, guidance can of course be derived from the many decisions applying them to fix compensation in particular cases.[202] The starting point, however, is that the purchaser is to be put as nearly as possible in the situation it would have been in if the contract had been performed. In cases of awards for damages for misrepresentation in contracts for the sale of land, the difference in value between the land as transferred, and had the representation been true, is normally the measure of the loss.[203] By contrast, a remedial approach is common in cases involving contracts for the performance of work on a property.[204]

[192] The particular contract in this case, however, was one for both the purchase of farm land and the transfer of water rights associated with that land. The importance to the purchaser of the representations as to the extent of the water rights arose from its intention to develop a vineyard on the land. That was known to those making representations to the purchaser on behalf of the vendors. Work on the planting of vines had commenced when the deficiency in water rights was

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200 *Stirling* at 425.

201 *Birmingham Corporation v West Midland Baptist (Trust) Association (Inc)* [1970] AC 874 (CA) at 903.

202 Including *Bellgrove v Eldridge* (1954) 90 CLR 613; *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 (HL); and *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* [2009] HCA 8, (2009) 236 CLR 272.

203 John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (3rd ed, LexisNexis NZ, Wellington, 2007) at [11.2.6].

204 As the Chief Justice points out at [25] and [27].

discovered. In this context the purchaser contended that the contract was analogous to one providing for transfer of machinery or equipment to be used on the land and a remedial approach to fixing damages was a reasonable and appropriate measure. There is some force in that contention. In the end it was not possible for the purchaser to acquire the full extent of water rights it had expected would be transferred under the contract. If it had been, that cost would be highly relevant to the true loss and whether the High Court's approach, incorporating the cost of a dam of sufficient size to meet the shortfall access to water, was reasonable in the circumstances.

[193] The purchaser purchased water rights for $320,000. The ultimate cost of the dam that would meet the shortfall in water rights was $735,907.16,[205] making the total award of damages accordingly $1,055,907.16. In December 2004, the expected cost of a storage dam had been only $280,000. Cases of breach of contract for purchase of land, where damages are sought for breach on the basis of a remedial cost which is very high in relation to difference in value, call for consideration of whether a reasonable purchaser would cut losses by selling the property, and seek to be compensated on a difference in value basis. But in this case the reasonableness of pursuing the reasonable cost option was not put to the principal of the purchaser in cross-examination and the issue of reasonableness was not significantly explored in other evidence.

[194] In those circumstances it is not surprising that the High Court and Court of Appeal judgments do not include a detailed discussion of alternative ways of measuring the damages award. As a result I conclude that the way the issue was addressed in evidence at the trial would not justify this Court taking a different view from that of Wild J which was upheld by the Court of Appeal. Accordingly I would dismiss the cross-appeal.

[195] I differ, however, from Tipping J on the second and third issues which concern causation and contribution, to which I now turn.

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[205] Inclusive of power connection, and irrigation and pumping equipment.

Was any loss caused by the Council?

[196] The next issue, also arising in the Council's appeal, is whether the purchaser suffered any loss as a result of the Council's misrepresentation. It arises because the vendors are liable to the purchaser for damages and the liability of the vendors will be met under the judgment they have obtained against their solicitors and land agent. In that context the Council argues that the purchaser suffered no loss from the Council's negligence which the Council should be required to compensate.

[197] There are two cases bearing on the differing contentions on this issue of the agents of the vendors and the Council. In *Nykredit Mortgage Bank Plc v Edward Erdman Group Ltd (No 2)*, a financier sued valuers who had overvalued a property over which the financiers had taken security for a loan.[206] The House of Lords held that, in deciding what loss the financier had sustained, the value of the borrower's covenant to repay the loan had to be taken into account. The Council submits that, applying this approach in the present case, the value of the purchaser's right to recover under its contract with the vendors must be taken into account in deciding what loss the purchaser suffered as a result of the Council's negligence. As the value of the loss recovered from the vendors exceeds that for which the Council is liable, it contends that its negligence has not been causative of any loss.

[198] On the other hand, in *Eastgate Group Ltd v Lindsey Morden Group Inc*,[207] the purchaser of a company sued the vendor for breach of warranties as to the company's financial performance. Prior to the contract the purchaser had taken advice from accountants on that matter. The vendor sought to join the accountants to obtain contribution under the Civil Liability (Contribution) Act 1978 (UK) by which any person liable in respect of damage suffered by another may recover contribution from any other person liable for the same damage. In the Court of Appeal, Longmore LJ accepted that any actual diminution in loss would have to be taken into account in assessing the claim against the vendor. That did not, however, mean that the purchaser was required to bring into account the value of the potential claim

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206 *Nykredit Mortgage Bank Plc v Edward Erdman Group Ltd (No 2)* [1997] 1 WLR 1627 (HL).

207 *Eastgate Group Ltd v Lindsey Morden Group Inc* [2001] EWCA Civ 1446, [2002] 1 WLR 642.

against a third party which, if pursued successfully, would extinguish the loss. Longmore LJ distinguished *Nykredit* where the plaintiff's rights against the purchaser were for repayment of a debt for which it had an obligation to repay, whereas damages are not ordered as of right. He explained the point of distinction in this way:[208]

> But it does not follow that the same approach is correct for cases not of a borrower's covenant to repay his loan but of breach of contract, eg by a vendor of a business. The vendor's liability is to compensate the claimant for the loss suffered by his breach of warranty. This is a liability for damages not a covenant to repay a debt; as a matter of ordinary principle, whereby a claimant is entitled to compensation for loss actually suffered, any actual diminution of the buyer's loss would normally have to be taken into account in assessing the buyer's claim against the vendor. It cannot be the case, merely because a valuer can require a claimant, who brings an action for damages against him, to bring into account the value of a borrower's covenant to repay a debt, that therefore any party liable to a claimant for professional negligence can require the claimant to bring into account the value of his claim against any other contractor for breach of warranty. This is due to the essential difference between a claim for repayment of a debt (to which there can ordinarily be no substantive defence and in respect of which a claimant does not have to prove loss) and a claim for damages for breach of contract (to which there may be many defences and in respect of which the claimant must prove his loss). If a claimant's loss has in fact been diminished, that diminution must be brought into account in a claim for damages for breach of warranty.

[199] *Eastgate* is referred to without criticism by Lord Steyn in his judgment in *Royal Brompton NHS Trust v Hammond*.[209]

[200] In the present case, Tipping J[210] concludes that Longmore LJ's distinction between an obligation to repay a debt on the one hand and liability in damages on the other is an inappropriate one to apply to the present case where the negligence has induced the purchaser to enter the contract.[211] In his view what is brought into account in assessing the loss should not turn on "the nature and incidents of the plaintiff's cause of action under the contract" but should rather relate to the likelihood of its recovery. But the relevance of the distinction in cases such as the present is supported by Lord Nicholls' treatment in *Nykredit* of the hypothetical

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208 At [14].
209 *Royal Brompton NHS Trust v Hammond* [2002] UKHL 14, [2002] 1 WLR 1397 at 1411.
210 With whom the Chief Justice agrees.
211 At [104].

purchaser who buys a house that has been negligently overvalued, or which is subject to a local land charge not noticed by the purchaser's solicitor. According to Lord Nicholls, in such a "simple case" the cause of action in tort accrues when the purchase is completed because the purchaser "suffers actual damage by parting with his money and receiving in exchange property worth less than the price he paid".[212] The negligent party could then be sued for damages without having to factor the value of contractual rights against the vendor into the amount claimed.[213] The other members of the House of Lords all agreed with Lord Nicholls' judgment. It supports the view that in this case the Council is not entitled to have the extent of its liability for damages determined by taking into account the value of the purchaser's claim against the vendors for damages for breach of contract.

[201] Support is also found in the principle that a claimant need not take steps to recover compensation for his loss from parties who, in addition to the defendant, are liable to him.[214] There is no duty on the purchaser to mitigate its loss arising from the Council's negligence by first suing the vendor for breach of contract by its misrepresentations. This is consistent with the approach taken in *Pilkington v Wood*,[215] where Harman J rejected a submission that the plaintiff had not acted reasonably by suing first on a vendor's covenant as to title. As the English Court of Appeal recently said:[216]

> It is trite law that, if a claimant has distinct rights of action against more than one wrongdoer in respect of the same loss, he can recover against them all, provided that he does not recover in total more than the amount of the loss. So far as we are aware, this principle has never been expressed as having anything to do with the rule that a claimant must take all reasonable steps to mitigate the loss caused to him by the defendant's wrong and that he cannot recover damages for any such loss which he could have avoided but has failed, through unreasonable inaction, to avoid: for the rule, see *McGregor on Damages*, 17th ed (2003), paragraph 7-004.

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212 *Nykredit* at 1630.

213 As Blanchard J points out at [71] of his judgment.

214 *Steamship Enterprises of Panama Inc v Ousel (Owners) (The Liverpool) (No 2)* [1963] P 64 (CA) per Harman LJ; Harvey McGregor *McGregor on Damages* (18th ed, Sweet & Maxwell, London, 2009) at [7-085].

215 *Pilkington v Wood* [1953] 1 Ch 770 at 772–773.

216 *Peters v East Midlands Strategic Health Authority* [2009] 3 WLR 737 (CA) at 750 per Dyson LJ.

[202] *McGregor on Damages*[217] suggests that later authorities demonstrate a greater readiness on the part of the courts in professional negligence cases to require litigation against third parties where failure to proceed in the first instance against a particular defendant may create injustice.[218] However, in the present case the purchaser has sued both wrongdoers in the same action. In such a case the courts can avoid situations of injustice arising. Questions of recovery and contribution from those found liable can be addressed on principles applicable to those aspects of the law of remedies. The rule requiring a plaintiff to take reasonable steps to mitigate loss is accordingly not applicable to this situation.

[203] In deciding what loss was caused to the purchaser through entering into the defective contract in the present case, Tipping J has concluded that the real issue is whether the contract was ultimately a loss-making one for the purchaser. The matter must be looked at broadly. The contract induced by the Council's negligence was worth less to the purchaser than the contract price. That loss could, however, be eliminated by the vendors' exercise of "secondary rights" to claim damages for breach. On that view it was necessary to estimate the likely recovery from the vendors' agents to determine whether any loss was caused by the tortfeasor.[219] This is said to be required on ordinary causation principles.

[204] This approach can be contrasted with the approach taken in *Eastgate*, which holds that actual diminution of loss should be taken into account but not the ability to claim damages against others.[220] On this basis, the loss for which the Council is liable should be assessed at the time the contract was entered into, which was when the purchaser became bound to buy the property and water rights, together worth less than the purchase price.

[205] *Eastgate* applied legislation directed at contribution. As well, the judgment was concerned with the existence of a cause of action against accountants. In my view the *Eastgate* approach nevertheless is applicable to the present case.

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217 At [7-083].
218 As in *Walker v Medlicott & Son (A Firm)* [1999] 1 WLR 727 (CA) at 739.
219 At [123] of Tipping J's reasons.
220 At [14].

Measurement of losses flowing from different bases of liability involves ascertaining whether or not loss has occurred. While the authorities address contribution rather than causation, the two concepts are interdependent. The principles can equally be used to determine causation.

[206] Although Tipping J accepts that the loss "initially" occurred at the time of contract, his reasoning in reaching his contrary view of the later position appears to be based on giving primacy to contractual over tort loss;[221] that certainly is its effect as the approach requires taking into account contractual loss first.

[207] This approach also takes a narrow view of causation. Under the contract the purchasers were to undertake due diligence which included obtaining a Land Information Memorandum from the Council. The agreement was conditional on the purchaser completing to its satisfaction due diligence in relation to the property. The contract also provided for all water permits related to the property to be transferred on settlement.[222] In relation to that matter, the Council's Land Information Memorandum resulted in the contract becoming unconditional, thereby causing the loss, along with the vendors' misrepresentation. The purchaser would not have confirmed the contract if the Council's Memorandum were correctly supplied. In those circumstances, it is artificial to treat the vendors' misrepresentations as the sole cause of loss. On ordinary principles of causation, the Council's negligence was also an operative cause of the loss.

[208] In this case the vendors are entitled under the High Court judgment to be indemnified by their solicitors and land agents who made the misrepresentations for which they are liable to the purchaser. But, for the same reasons, that judgment of indemnity does not remove their loss for the purposes of contribution. Rather it will put those agents in the shoes of the vendor so that they will benefit from any contribution to be made by the Council.

[209] I have already indicated that I am satisfied that the Council is liable in tort to Altimarloch for the loss it caused and I agree with the Court of Appeal that the

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221 See [108].

222 See [51] of the first High Court judgment.

measure of damages is the difference in value of the land coupled with associated water rights represented by the Council and the value of the land with the lesser rights actually transferred to the purchaser.

Contribution and common obligations

[210] The fourth issue concerns rights to contribution between the vendors and the Council. At common law, when the actions of two or more defendants caused a single loss to a plaintiff, both were liable to that plaintiff. The shared liability was indivisible and gave rise to full responsibility on each defendant for the entire loss. Where the liability was in tort, a defendant who met the entire loss was unable to seek any contribution from other tortfeasors, even where the plaintiff had obtained judgment against one or more of them.[223]

[211] The injustice of the rule precluding contribution between tortfeasors led to reforming legislation in the United Kingdom in 1935,[224] which was replicated in New Zealand in 1936.[225] The New Zealand statute remains in force. Under it, if a tortfeasor who sued in time would have been liable to the plaintiff, any other tortfeasor liable for the same damage may claim contribution. The amount of contribution recoverable is what the court finds to be just and equitable.

[212] The common law was not, however, as rigid in relation to contribution between wrongdoers other than tortfeasors. Where liability was joint and did not arise in tort, a right to equitable contribution could arise in cases involving a common obligation and burden. This was typically the case where the same liability arose in debt between sureties.[226] The law of joint obligations has developed in equity to permit contribution in cases of common obligation. Without it, there could be no contribution.[227]

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223 *Merryweather v Nixan* (1799) 8 TR 186, 101 ER 1337 (KB).
224 Law Reform (Married Women and Tortfeasors) Act 1935 (having effect in England), s 6.
225 Law Reform Act 1936, s 17.
226 *Deering v The Earl of Winchelsea* (1787) 2 Bos & Pul 270, 126 ER 1276.
227 Law Commission *Apportionment of Civil Liability: A Discussion Paper* (NZLC PP19, 1992) at [34].

[213] In England and Wales, the scope of the legislation was extended in 1978. It now applies to any person liable to compensate a plaintiff who has suffered damage, whatever the basis of that person's liability.[228] Parties must be liable for "the same damage" for contribution to apply. Although the New Zealand Law Commission, as long ago as 1992, made similar proposals for the extension of civil liability where acts of two or more persons give rise to loss or damage, its proposals have not yet progressed to legislation.[229] The present case accordingly requires this Court to consider whether the law of common obligations in New Zealand permits the Court to order contribution between the vendors, who are liable to the purchaser for damages for breach of contract on account of misrepresentations by their agents, and the Council, which is also liable to the purchaser, but in negligence, for the errors in its Land Information Memorandum.

Equitable contribution in Australia

[214] The decisions of the courts of Australia provide the greatest assistance in ascertaining the principles underlying the current state of the law of contribution. Although state legislation has largely intervened, case law continues to apply in the area not covered by statute. In an influential judgment, *Albion Insurance Co Ltd v Government Insurance Office (NSW)*,[230] Kitto J observed that the basic concept of the general doctrine of contribution was one of natural justice.[231] He referred to Justice Story of the United States Supreme Court who, in his *Commentaries on Equity Jurisprudence*, said:[232]

> The claim certainly has its foundation in the clearest principles of natural justice; for, as all are equally bound and are equally relieved, it seems but just that in such a case all should contribute in proportion towards a benefit obtained by all ... And the doctrine has an equal foundation in morals; since no one ought to profit by another man's loss where he himself has incurred a like responsibility. Any other rule would put it in the power of the creditor to select his own victim; and, upon motives of mere caprice or favouritism, to make a common burden a most gross personal oppression. It would be

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228 Civil Liability (Contribution) Act 1978 (UK), s 6(1).
229 Law Commission *Apportionment of Civil Liability: A Discussion Paper* (NZLC PP19, 1992).
230 *Albion Insurance Co Ltd v Government Insurance Office (NSW)* (1969) 121 CLR 342.
231 At 350–352.
232 Joseph Story *Commentaries on Equity Jurisprudence* (3rd ed, Sweet & Maxwell, London, 1920) at §493.

> against equity for the creditor to exact or receive payment from one, and to permit, or by his conduct to cause, the other debtors to be exempt from payment ... It can be no matter of surprise, therefore, to find, that courts of equity, at a very early period, adopted and acted upon this salutary doctrine, as equally well founded in equity and morality.

[215] Kitto J himself in *Albion Insurance Co* said that the right of contribution exists in law:[233]

> ... when one of several persons has paid more than his proper share towards discharging a common obligation ... and it arises in equity when a liability of one of several to pay more than his share is ascertained ...

[216] According to Kitto J, what attracted the right to contribution between insurers was that each, under contracts of indemnity, covered the identical loss that the identical insured had sustained in a situation in which the insured received one satisfaction.

[217] On the approach taken to contribution in *Mahoney v McManus*,[234] a case of a claim for contribution between co-sureties, Gibbs CJ said:[235]

> It should be remembered that the doctrine of contribution is based on the principle of natural justice that if several persons have a common obligation they should as between themselves contribute proportionately in satisfaction of that obligation. The operation of such a principle should not be defeated by too technical an approach to the question whether a surety has paid the creditor, when he has supplied moneys to the principal debtor for the purpose of making such payment.

[218] It has been suggested by the English text, Goff and Jones in *The Law of Restitution* that contribution is only available at law and equity when obligors are liable to a common demand. By this reasoning, it is only by virtue of the 1978 Act that contribution between parties both liable in damages is available in the United Kingdom.[236] This was certainly the case for tortfeasors before remedial legislation was enacted. In the Federal Court of Australia's decision in *Burke v LFOT Pty Ltd*,[237] however, Lehane J demonstrated that the old authorities did not lay

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233 At 351 (footnotes omitted).

234 *Mahoney v McManus* (1981) 180 CLR 370.

235 At 378.

236 Lord Goff and Gareth Jones *The Law of Restitution* (7th ed, Sweet & Maxwell, London, 2007) at 385.

237 *Burke v LFOT Pty Ltd* [2000] FCA 1155, (2000) 178 ALR 161.

down any general rule that a shared obligation to pay damages or compensation for a civil wrong ruled out an award of contribution. He also pointed out that cases allowing contribution among defaulting trustees are inconsistent with this proposition,[238] citing *Lingard v Bromley*.[239]

[219] A recent description of the requirements of equitable contribution is that of Gauldron ACJ and Hayne J in *Burke v LFOT Pty Ltd*:[240]

> The doctrine of equitable contribution applies both at common law and in equity. It is usually expressed in terms requiring contribution between parties who share "co-ordinate liabilities" or a "common obligation" to "make good the one loss". More recently, in *BP Petroleum Development Ltd v Esso Petroleum Co Ltd*, the right to contribution was said to depend on whether the liability was "of the same nature and to the same extent".
>
> The notion of "co-ordinate liability" is one that depends on common interest and common burden. Perhaps because, at common law, there was no general right of contribution between tortfeasors, the notion of "co-ordinate liability" has not traditionally been expressed in terms requiring equal or comparable culpability or a requirement that the acts or omissions of the persons in question be of equal or comparable causal significance to the loss in respect of which contribution is sought. However, the requirement that liability be "of the same nature and to the same extent", as stated in *BP Petroleum*, is apt to include notions of equal or comparable culpability and equal or comparable causal significance.

[220] Consistent with this formulation is the earlier judgment of Gummow J at first instance in a case concerning contribution between persons respectively liable for debts and under guarantee:[241]

> It would be taking too narrow a view of the matter and give insufficient weight to the preference equity has for substance over form to hold that there could be no common obligation if there were different "causes of action" against the co-obligers. In *BP Petroleum Development Ltd v Esso Petroleum Co Ltd*, Lord Ross preferred the statement of the criterion as whether the liability "is of the same nature and the same extent". This was the phrase used by Lord Chelmsford in *Caledonian Railway Co v Colt*.

[221] The judges of the High Court of Australia in *Burke* differed on the scope of what constitutes coordinate responsibilities for the purposes of contribution.

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238 At [130].

239 *Lingard v Bromley* (1812) 1 V & B 114; 35 ER 45 at 45 per Grant MR.

240 *Burke v LFOT Pty Ltd* [2002] HCA 17, (2002) 209 CLR 282 at [15] and [16] (footnotes omitted).

241 *Street v Retravision (NSW) Pty Ltd* (1995) 135 ALR 168 (FCA) at 176 (citations omitted).

McHugh J was of the view that there must at least be an involvement of the parties in a common design to achieve a common end.[242] His approach narrows the class of claims for which contribution is available.[243] Gauldron ACJ and Hayne J in their formulation did not include the limitation. They emphasised the requirement that liability be of the same nature and extent, including the notions of culpability and causal significance.[244]

[222] Kirby J adopted the following test for coordinate liabilities:[245]

> The test for "coordinate liabilities" which I would accept as giving rise to contribution is whether "the liabilities of the co-obligors to the principal claimant are such that enforcement by [the claimant] against either co-obliger would diminish that obligor in his material substance to the value of the liability. Any alternative or additional requirement in the doctrine of contribution ... between the liabilities to which the co-obligors are exposed would produce intolerable uncertainty and obscure the true object of the doctrine.

[223] Kirby J accordingly took a wider view of the class of coordinate liabilities. He was critical of attempts to narrow the scope of contribution which he saw as contrary to the history and source of the principle.[246] He endorsed the view, already cited, of Gibbs CJ, saying that:[247]

> The operation of the principle of contribution must not be "defeated by too technical an approach". Courts must keep their eye fixed on the purpose of the remedy, that is, on the essential concept, not just particular past applications.

[224] Although Callinan J's view of the scope of coordinate liabilities was closer to that of McHugh J, the other three Judges expressed views which indicate a broader

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242 At [48], endorsing a view expressed in the first edition of Keith Mason and JW Carter *Restitution Law in Australia* (Butterworths, Sydney, 1995) at [622]. The passage is repeated in the second 2008 edition at [623].

243 In the Federal Court Lehane J doubted this view, saying at [133] that the law had "advanced beyond the stage where it is possible to limit rights of contribution to cases where a common liability arises from an (antecedent) common design to achieve a common end". The majority of the High Court of Australia agreed that a "common design" is not required before an equity for contribution can arise in *Friend v Brooker* [2009] HCA 21, (2009) 255 ALR 601 at [42] per French CJ, Gummow, Hayne and Bell JJ.

244 At [16]. This formulation was accepted by the High Court of Australia in *Friend* at [40] per French CJ, Gummow, Hayne and Bell JJ.

245 At [103]. The passage cited appeared in the third edition of RP Meagher, WM Gummow and JRF Lehane *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992) at [1006].

246 At [90].

247 At [96]. See [217] above.

ambit for equitable contribution. While in policy terms there is much to be said for the straightforward approach of Kirby J, which would come close to giving effect to the position proposed in the Law Commission paper, that can only be reached by legislation. I prefer in the New Zealand context to adopt the formulation for coordinate liabilities of Gaudron ACJ and Hayne J which looks to whether the liability was of the same nature and extent. But applying that approach, I would heed what Gibbs CJ and Kirby J have said, keeping the essential concept of contribution in mind and not allowing the principle to be defeated by too technical an approach.[248]

[225] On this basis I now consider whether the liabilities of the Council and the vendors are of the same nature and extent so as to be coordinate and amenable to a contribution award. On this issue, Mr Goddard QC's contribution and no loss arguments for the Council converge. He submits that it would not be appropriate or just to allow contribution in respect of s 6 damages which reflect a strict obligation to make good a loss as if that were a term of the contract. The Council's obligation in negligence is not of the same nature or extent. As well, the contract claim is logically prior to that in tort.

[226] In each case, however, the liability arose because the party liable represented to the purchaser the extent of water rights associated with the land which became the subject of the contract. The liabilities arose from different facts, occurring at different times and giving rise to different causes of action. As indicated, equity eschews too technical an approach to the question of contribution. Liability need not be predicated on the nature of the cause of action. It is now recognised that application of the "nature and extent" test is on the parties' liability for the same *damage*.[249] Here that inquiry establishes that the parties made the same error in their representations which, in each case, induced the purchaser to enter the contract under

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[248] This accords with the majority view of the High Court of Australia in *HIH Claims Support Ltd v Insurance Australia Ltd* [2011] HCA 31, (2011) 280 ALR 1 as I agree that, even though the substance of the transaction is important, this cannot trump the need to demonstrate coordinate liabilities before equitable contribution can operate. See *HIH Claims Support* at [47] per Gummow ACJ, Hayne, Crennan and Kiefel JJ.

[249] *BP Petroleum Development v Esso Petroleum Co Ltd* (1987) SLT 345 (OH) at 346–347.

a mistaken belief that the water rights were of the extent the parties had stated to the purchaser.

[227] In each case the wrongful act was an operative cause of the inducement to enter the contract. Importantly, and unlike the facts in *Burke*, neither party was misled by the other. Had either correctly stated the position in respect of water rights, the error by the other would not have had the inducing effect. No question of different degrees of culpability between the parties arises. The combination of wrongful acts of each party was the primary cause of the same damage.

[228] It is not a disqualifying factor that the Council's liability is tortious and that of the vendor is contractual in nature. The authorities cited make plain that whether liabilities are of the same nature and same extent does not turn on such a narrow and technical view. The reality in this case is that both the Council and the vendors made the same error of communication, with the same result that caused the purchaser loss which in my view was of the same nature.

[229] A more difficult question is whether the loss was of the same extent. The measure of the purchaser's loss in tort is the difference between the contract price and the value of the property with the water rights actually transferred. That has been fixed at $125,000. In relation to the loss for which the vendors are liable for breach of contract, however, the purchaser was able to elect between that loss and the reliance based loss, fixed by reference to what it would reasonably cost the purchaser to be put in the same position as if the contract were performed. The purchaser elected in favour of that loss which was fixed at $1,055,907.

[230] The Court of Appeal pointed out that the purchaser did not, under s 6(1)(a) of the Contractual Remedies Act, have an absolute entitlement to damages fixed on the reliance basis. Nor was it clear at the outset that damages would be so based. If detriment damages had been awarded against the vendors, there would have been no fair and obvious reason for the Council to demand that the purchasers first resort to the vendors for damages.[250] In my view, the Court's decision on the measure of

[250] As William Young P points out at [106]–[107].

damages would be a very narrow basis upon which to determine whether the loss was of the same extent, under the test for coordinate liability. I am reinforced in this view by decisions that indicate that liability in different sums does not preclude contribution.

[231] Having regard to the correct approach to equitable contribution, and to ensuring that the loss is of the same extent, the Council's contribution should be confined to one based on its liability so that it is liable to contribute a share of the loss borne by the vendors (effectively their agents) in proportion to its contribution. I do not accept that this results in the vendors being "overpaid" for the property as a result of their misrepresentation. They will not receive any "profit" from the sale, even with contribution. The sum the Council must pay should not be treated as being a supplement to the purchase price, a reimbursement of difference in value damages, or any other form of inequitable benefit. Rather, it is ensuring that all wrongdoers are held to account for their actions without relief from the exercise of their own causative power. Equity must seek to do justice in the particular circumstances, without being defeated by too technical an approach. Indeed, the Courts below were not concerned about the concept of unjust enrichment when assessing the situation as a whole. This is not a case like *Burke* where the negligent party had been misled by the vendors. Both parties had a causative effect on the facts of this case; therefore, both parties should contribute.

Conclusion

[232] For these reasons I would dismiss the appeal of the Council and that of the real estate agent and solicitors. I would uphold the Court of Appeal's judgment as to quantum and direct that the Council contribute half of the shared liability, that is, $62,500, to the overall amount payable as damages to the purchaser.

ANDERSON J

[233] Having had the advantage of reading in draft the reasons of the other members of the Court I think it unnecessary to reiterate or paraphrase the considerations which have led me to the conclusions expressed below.

[234] For the reasons given by the other members of the Court I agree that both proximity and policy considerations favour the imposition of a duty of care on territorial authorities so that if they negligently give erroneous information in a LIM and the recipient relies on that information to its detriment, they will be liable for the loss their negligence has caused, save possibly when the information is given under subs (3) of s 44A of the Local Government Official Information and Meetings Act 1987. Accordingly I also would dismiss the Marlborough District Council's appeal against the liability judgment.

[235] For the reasons given by McGrath J, including his finding that the Council's negligence was an operative cause of the loss, I would dismiss the Council's appeal against the judgment requiring it to contribute $62,500 to the overall amount payable as damages to the purchaser.

[236] On the question of damages, I entirely agree with the Chief Justice's reasons and conclusion that the appropriate measure of damages in this case was the difference in valuation of the property with and without the water rights. Therefore I also would allow the appeals brought by the third parties and would enter judgment against the vendors for $400,000 together with costs.

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