IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA58/2020
[2021] NZCA 303

	BETWEEN	MICHAEL DOUGLAS ROBERTS Appellant
	AND	JULES CONSULTANCY LIMITED (IN LIQUIDATION) First Respondent
	AND	JULES LELOIR Second Respondent

Hearing:	18 February 2021
Further submissions:	23 June 2021
Court:	Gilbert, Mallon and Edwards JJ
Counsel:	B M Easton for Appellant No appearance for First Respondent J K Mahuta-Coyle for Second Respondent
Judgment:	9 July 2021 at 3 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The cross-appeal is allowed in part.

C The reduction for contributory negligence of 15 per cent is replaced with a reduction of 40 per cent. This is also to apply to the award of general damages. The judgment in the sum of $93,500 plus general damages of $25,000 is set aside and replaced with a judgment for $66,000 plus general damages of $15,000.

D Costs are to lie where they fall.

REASONS OF THE COURT

(Given by Gilbert J)

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Introduction

[1] Misleading statements made by a body corporate secretary about weathertightness issues were relied on by a purchaser in proceeding with the purchase of an apartment in a multi-unit apartment building. It turned out that the building suffered from serious weathertightness defects. This appeal raises four issues in respect of the assessment of the damages awarded to the purchaser under s 43 of the Fair Trading Act 1986 (the FTA). The damages were assessed as being the difference between the purchase price paid and the market value of the property at the time of sale if it had been properly described. The first issue is whether this was the correct approach or whether the losses should have been assessed with reference to the value of the apartment had the building been constructed without defects. The second issue is whether there was any loss at all, assuming the Judge's approach to the assessment was the correct one. The third issue is whether the loss should have been assessed at the date of the hearing, rather than five and a half years earlier when the misleading

statements were made and relied on. This matters because the estimated repair costs more than doubled during this period. The last issue is whether the damages should have been reduced for the contributory negligence of the purchaser in failing to obtain a specialist building report and the body corporate meeting minutes before unconditionally committing to the purchase and, if so, to what extent.

[2] On 20 February 2014, Mr Roberts entered into a conditional agreement to purchase for $397,000 a three-bedroom apartment in Sirocco Apartments (Sirocco), an 11-storey, 44-apartment building in Wellington. Ms Leloir provided secretarial and management services to the Sirocco body corporate through her company, Jules Consultancy Ltd (now in liquidation).[1] In a liability judgment delivered on 25 March 2019, Thomas J found that, in declaring the agreement unconditional in March 2014, Mr Roberts relied on false and misleading representations made by Ms Leloir to the effect that Sirocco had experienced weathertightness issues, but these related only to the walkways and had since been rectified.[2] The Judge found these representations were false and Ms Leloir had breached ss 9 and 14 of the FTA. These findings are not challenged in the present appeal.

[3] In a subsequent quantum judgment delivered on 17 December 2019, the Judge awarded damages to Mr Roberts pursuant to s 43(3)(f) of the FTA in the sum of $93,500 calculated as follows:[3]

	Purchase price of the apartment	$397,000
Less	Assessed market value in 2014 if the property had been described properly[4]	$287,000
		$110,000
Less	15 per cent for contributory negligence[5]	$16,500
		$93,500

1 The proceeding against Jules Consultancy Ltd was stayed as a result of its liquidation.
2 *Roberts v Jules Consultancy Ltd* [2019] NZHC 555, (2019) 21 NZCPR 163 [Liability judgment] at [75].
3 *Roberts v Jules Consultancy Ltd* [2019] NZHC 3342, (2019) 21 NZCPR 186 [Quantum judgment].
4 At [107].
5 At [61].

[4] The Judge also awarded Mr Roberts general damages of $25,000 for stress and inconvenience.[6] This brought the total damages awarded to $118,500.

[5] Mr Roberts contends on appeal that the damages should have been assessed at the date of the quantum hearing in late November 2019 as follows:

	Estimated value of the apartment in November 2019 if Sirocco had been built without defects	$721,000
Less	Estimated value as at that date with the defects unremedied	$49,170
		$671,830

[6] Mr Roberts says the Judge should have also awarded an amount to cover the special levies incurred to assess the defects of $11,460.62, the estimated costs of moving to replacement accommodation of $2,702.50 and estimated conveyancing fees on resale of $1,500. This would bring the total damages award to $712,493.12 including the general damages of $25,000. Mr Roberts also contends that there should not have been any reduction for contributory negligence.

[7] Ms Leloir cross-appeals. She says Mr Roberts suffered no loss given comparable apartments in Sirocco sold for similar prices in 2014, including sales that took place after Mr Roberts purchased his apartment. To the extent any damages are awarded, Ms Leloir argues the reduction for contributory negligence should have been 40 per cent, not 15 per cent.

[8] The power to award damages under the FTA must be exercised in a manner that does justice to the parties in the circumstances of the particular case and in accordance with the policy of the FTA.[7] Questions of contributory negligence require careful evaluation of relative fault and contribution to the loss. It is therefore necessary to set out the relevant facts in some detail.

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6 At [110].

7 *Goldsbro v Walker* [1993] 1 NZLR 394 (CA) at 403–404.

The facts

[9] Sirocco was constructed between 1996 and March 1999. Like many buildings constructed during that period, it has a number of features that are commonly associated with weathertightness problems including monolithic cladding and inadequate waterproofing details.

[10] The building has five levels of parking with six residential levels above. The complex roof comprises flat membrane sections together with pitched and vaulted structures with corrugated metal sheets. The building is clad with texture-coated fibre cement monolithic cladding with plywood rigid air barriers directly fixed to the timber framing of the external walls. External balconies adjoin all apartments. Most are projecting steel-framed curved balconies but several of the upper level apartments have rooftop balconies beneath vaulted roof coverings. There are numerous projecting fire spandrels and external inter-tenancy walls. Eight lightwells are located in the core of the building. Two open air walkways provide access to the main entrances of the apartments on levels six and eight.

[11] Andrew Gray, an experienced building surveyor called by Mr Roberts at the liability hearing, said that, based on his visual inspection in May 2018, Sirocco has "all of the hallmarks commonly associated with a leaky building". He stated that in conjunction with direct fixed monolithic cladding, these defects have a history of systemic failure. He said that at the time of Mr Roberts' purchase in 2014, this type of cladding system was no longer considered an acceptable solution under the Building Code (contained within the Building Regulations 1992) and he considered that a reasonably competent building expert carrying out an inspection at that time would have identified the high-risk junctions and reported the history of failure of these cladding systems.

[12] On 18 February 2014, the real estate agent acting for the vendor sent pre-contract disclosure information to Mr Roberts' lawyers. This included the minutes of the annual general meetings of the body corporate for the last three years (held on 31 May 2011, 12 June 2012 and 12 June 2013), the financial statements for the financial years ended 31 March 2011 to 2013 and the long-term maintenance plan

for the 10-year period commencing in 2009. A footnote to this plan, which appears to have been updated in 2011 or early 2012, referred to the rebuilding of the level six and level eight walkways and stated this work was not included in the original plan. It was noted that the work had commenced in late 2009 and was expected to be completed in March 2012. Costs of approximately $105,000 were recorded as having been incurred in carrying out this work. The financial statements showed amounts paid under the long-term maintenance plan of $31,887 in the 2013 financial year, $22,597 in 2012 and $86,470 in 2011. Other expenditure on repairs and maintenance was set out, but there was nothing significant. A pre-contract disclosure statement signed by the vendors (and Ms Leloir) was also provided as required by 146(1) of the Unit Titles Act 2010. This three-page statement dated 22 January 2014 included the following (correct) statement in accordance with reg 33(e) of the Unit Titles Regulations 2011:

> The unit or the common property is not currently, and has never been, the subject of a claim under the Weathertight Homes Resolution Services Act 2006 or any other civil proceedings in relation to water penetration of the buildings in the unit title development.

[13] Mr Roberts' agreement to purchase unit 812 was entered into two days later, on 20 February 2014. The agreement was in standard form — the ninth edition 2012 (2) approved by the Real Estate Institute of New Zealand and the Auckland District Law Society. This form sets out a number of important recommendations under the heading "BEFORE SIGNING THE AGREEMENT". Relevantly, it recommends that professional advice should be sought if the purchaser wishes to check the weathertightness and soundness of construction of any dwellings or other buildings on the land. Standard conditions are to be selected from options shown on the front page of the agreement. One of these is "Building report required: Yes/No". Mr Roberts chose not to make his agreement conditional on a building report, the "yes" option having been struck through. The agreement was however conditional on Mr Roberts' approval of a land information memorandum (LIM) and being entirely satisfied with the information contained in the body corporate minutes and financial records for the preceding three years.

[14] Following Mr Roberts' review of the pre-contract information provided by the real estate agent and an initial enquiry about whether maintenance had been conducted in accordance with the maintenance plan, a legal executive acting for

Mr Roberts on the purchase sent an email to Ms Leloir on 27 February 2014 requesting a copy of the chairperson's report referred to in the minutes of the 2013 body corporate annual general meeting and asking several questions including, relevantly:

> What caused the walkways to breakdown and be repaired? Was it a design defect or a maintenance issue and is the Body Corporate satisfied that the matter is now rectified and no further expenditure will be required?

[15] Ms Leloir called the legal executive to discuss the repairs that had been carried out to the walkways and invited Mr Roberts to call her directly if there was anything else he would like to know about the building:

> Further to our telephone call, I am more than happy for [Mr Roberts] to give me a call — a telephone discussion will assist him much more in his understanding of the building and I am more than happy to help here.

[16] Ms Leloir also sent a copy of the chairperson's report dated June 2013. This contained the following relevant passages:

> The building continues to be maintained well and some major works have been able to be undertaken this year, in particular the external staircase between levels 4, 6 and 8. …
>
> … I would like to remind us all of the importance of keeping a well maintained apartment, small bathroom and deck leaks in particular can impact seriously on your neighbours and as the owner you are responsible for putting right. In a multi [storey] building this can be very serious indeed. Insurance Act changes can also have a serious impact if small matters are ignored. Insurance companies take no responsibility for "gradual" damage and only respond to a single event. Landlords are encouraged to support their tenants to report any issues promptly and to regularly inspect their properties.

[17] The legal executive passed this information on to Mr Roberts by email later that day, on 27 February 2014:

> The Body Corporate Secretary just called me to discuss the requests we put to her. She said the easiest thing is for you to ring her and talk through everything and she can answer any questions you may have. …
>
> She also mentioned that she can not guarantee that there will never be any further issues with the walkways, but they were completely replaced and it was not just a cheap and basic patch up so hopefully there will be no further problems. Apparently the original design was ridiculous — the two walkways are apparently open air on the sides, but they were carpeted so every time it rained the carpet was soaked. As the carpet was wet for such long periods of time it rotted and the water broke down the membranes underneath which caused leaking issues. This issue has now hopefully been rectified and

> the walkways replaced so there should not be any further issues, but you never know what may happen in the future.
>
> If you would like to talk to [Ms Leloir], her phone numbers are …
>
> … I will forward you the email that I just received from her [attaching the chairperson's report].

[18] Mr Roberts did not take up the invitation to speak to Ms Leloir. Nor were body corporate committee minutes sought. On 5 March 2014 he instructed his lawyers that he was happy with the body corporate information and confirmed that condition in the agreement was satisfied.

[19] The LIM was received from the Wellington City Council a few days later. The "Quick Reference Guide" near the beginning of the LIM included the following entry:

Weathertightness	There are Weathertightness issues Council is aware of. Refer to LIM "Supporting Information" for details about Weathertightness.

The "Supporting Information" section recorded:

> **Weathertightness**
>
> This section of the LIM will be completed only where Council has received **formal** notification of possible water ingress issues at the property from one of the following sources:
>
> - Ministry of Building Innovation and Employment (MBIE)
> - Weathertight Homes Tribunal
> - High or District Court
> - Written notification from the owner of the property or their agent
> - Where the owner has applied to MBIE for a Determination and the report carried out by MBIE has identified areas of water ingress
>
> …
>
> If you have any concerns we recommend that you seek independent advice from a suitably qualified person such as a building surveyor, and/or speak to the owners of the property.
>
> Wellington City Council has been advised by the Body Corporate that it sought professional advice and undertook the necessary work to remedy any potential weathertight issues. The Council had no involvement in this remediation and is unable to comment on the scope of remedial work

completed in respect of any potential weathertight issues. We would suggest you seek advice to your (and the Body Corporate's) satisfaction regarding this matter.

[20] The legal executive sent Mr Roberts a copy of the LIM on 7 March 2014 noting:

> The LIM report has arrived from the Council and a copy is attached.
>
> I do not see any significant issues, but I do comment as follows:
>
> 1 The Council noted they had been advised by the Body Corporate of a possible weather tightness issue. The LIM goes on to say the issue was rectified by the Body Corporate and the Council was not involved, so they have no further information. I suspect this will be the issues with the walkways which have now been fixed, but I recommend we send a note to the Body Corporate to confirm that this is what the Council is referring to.
>
> …

[21] Mr Roberts responded on 10 March 2014:

> Thanks for your review of the LIM. I've checked it out too.
>
> I agree with your suggestion in point 1 that we enquire about the weather tightness issue. I suspect there isn't much to it given that the [body corporate's] preliminary disclosure statement says there are no issues but worth checking.
>
> …
>
> Thanks, otherwise I'm happy with the details provided.

[22] The legal executive spoke to Ms Leloir and reported back to Mr Roberts later that day as follows:

> I have spoken to the Body Corporate Secretary. She said the only issue she could think of that the Council would be referring to is the walkways, which have now been [repaired]. She also stated that it was not the Body Corporate who originally notified the Council of the issue with the walkways, but that is the only possible weather tightness issue that she is aware of within the building.
>
> I sent a copy of the information through to [Ms Leloir] so that she could see the reference and confirm that she was not aware of anything else that the Council could be referring to.

[23] Mr Roberts gave instructions to confirm the agreement unconditional later that morning and this was done. Settlement took place on 3 April 2014.

[24] About one month later, Plastercoat Services Ltd observed some visible damage under the rain head of the deck to unit 806 while carrying out scheduled work to repair some minor cracks in the façade of the building. Le Celebre Ltd, a building contractor, was notified. It had previously carried out maintenance work in the building. After removing the cladding, rotten timber was found under the rain head. On further investigation, it was found that the water damage extended from level eight down as far as the car park level. Le Celebre provided a written report on 3 May 2014 attaching photographs of the affected areas and offering preliminary thoughts on the cause of the problem:

> Our thoughts for the reason for the rot are that the rain head has leaked into the double cavity system. This makes inspecting it very invasive and not obvious to the naked eye which makes identifying a problem very difficult.
>
> Due to the water back-flowing into the cavity, the situation has caused the timber to rot which has resulted in the joint detail for the cladding not working as it should, which has heightened the problem. The reason for this is the timber has rotted away supporting those joins in the cladding.

[25] Plastercoat Services also provided a written report on 3 May 2014. This identified two problems with the wall:

> **Firstly** is the rain head problem that has leaked and a backflow of water has penetrated the wall, resulting in the timber rotting. This is a problem with this type of system that was used extensively in building practices some years ago.
>
> **Secondly** is the negative detail joint used with the Hardies Cladding. It appears to be part of the problem, as time has progressed and movement of the building, water seeps in these areas and as a result rotten timber has occurred.

[26] Both contractors recommended that an architect and/or engineer should be engaged to advise on the necessary repairs.

[27] Ms Leloir immediately convened an urgent meeting of the body corporate committee to discuss the issue. This was held on Sunday 4 May 2014. Ms Leloir was asked to engage an engineer, Scott Miller of Silvester Clark Ltd, to assess the remedial

works and advise the body corporate committee on how it should proceed with those works.

[28] Silvester Clark Ltd provided an initial report on 6 May 2014 following inspection of one corner of the building where areas of façade had been opened up to expose corroded steelwork and rotten timber framing. Their conclusions and recommendations included:

> **Conclusions/Recommendations:**
>
> 1. The monolithic cladding system has failed and there is significant corrosion of support steelwork and also severely rotten timber.
>
> 2. The steelwork constructed in the area inspected is different to that shown on the consented drawings.
>
> 3. Action should be taken as soon as possible to rectify the issues encountered as they will continue to spread and become more of a structural support problem. The rectification would be replacement of the timber and replacement or cleaning up and painting of the steelwork.
>
> 4. We would suggest that either the decks/eyebrow structures are propped or not used by the owners until they have been checked and cleared. This may seem extreme but we cannot be sure the same issues are not present in these locations also and the consequence of failure would be very serious.
>
> 5. We would recommend that more areas are opened up in high risk areas (close to downpipes/scuppers and corners that have a high weather exposure). The extent of the issues found in this visit needs to be confirmed to get a handle on how widespread the issues are. The areas inspected to date are very limited.
>
> 6. We would recommend an architect is involved to comment on the reinstatement of the cladding flashing to an acceptable level and/or the improvement of the cladding flashing to the existing cladding. …

[29] Following further discussions with the engineer and an architect who was also engaged to assist, Ms Leloir notified all owners by email on 22 May 2014 of the concerns about degradation of the timber and steel framework in the areas where cladding had been removed and advised that the cantilevered balconies may not be structurally sound.[8] In accordance with the engineer's advice, all residents were advised not to use their balconies until further notice. Ms Leloir indicated that she

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[8] Although Mr Roberts had settled his purchase by this time, this email was sent to the previous owners of his apartment. However, Mr Roberts confirmed that he received the email on 25 November 2014 along with all body corporate minutes from 2007 onwards, the 2007 annual general meeting minutes and the 2008 extraordinary general meeting minutes.

would report further once more information was available from the engineer and architect:

> In late April one of the contractors we use for building maintenance expressed concern about markings that were visible on the cladding below a rain-head on the front side of the building. To safely investigate these markings required the erection of scaffolding and the removal of some of the cladding and timber structure around the rainhead.
>
> The contractors who carried out this work were concerned that there was some degradation of the timber and steel framework around this area where the cladding has been removed and we have engaged engineers and architects to investigate this area more fully and will report to you just as soon as we are able.
>
> As part of the initial investigation work being undertaken by the engineer and architect it was noted that there is a possibility that the cantilevered balconies may not be structurally sound.
>
> In accordance with their advice and to ensure all residents are safe, we ask that **all balconies be regarded as off limits until further notice.** It is their view that no-one should use the balconies at any time. Please be assured we are further consulting with experts in this field and will update you as soon as we are able.
>
> **Investor Owners** – it is imperative you advise your Property Managers immediately of this situation so that the recommendation to stay off the balconies is adhered to straight away by all residents.
>
> We will keep you informed of progress as and when it comes to hand.
>
> (Emphasis in original.)

[30] Ms Leloir provided a further update to owners on 3 July 2014 advising that the engineers and architects would be onsite again on 7 July 2014 to identify locations that should be opened up to check for deterioration to the framing.

[31] Silvester Clark Ltd provided a further report in September 2014 noting deterioration found in areas inspected, particularly relating to the decks. They reported that, based on the samples inspected, it was possible that 40 per cent of the cladding suffered from moisture penetration with consequent deterioration of the timber and steelwork. They recommended:

> Areas should be replaced where significant deterioration has been encountered. The decks on the Eastern elevation in nearly all areas inspected are in poor condition and until the extent of this is determined the occupants should be made aware of the risks. It is possible the decks are unsafe but this will not be known until the complete soffit is removed on a number of

> the decks to determine the extent of this problem. What has been established through this exercise is that there is a water ingress issue that appears to be serious with respect to the decks.
>
> Areas of the cladding should be opened up for inspection on an area by area basis now to determine scope. This will be an involved process. Work should commence on the areas where deterioration has been identified in this report as soon as possible to limit the future rate of deterioration.

[32] The agenda for the annual general meeting of the body corporate circulated in October 2014 referred to these building issues. Owners were reminded of the discovery in May 2014 of potential issues with the balconies and cladding leading to the engagement of a consulting engineer, an architect and cladding and building contractors to assess the extent of these issues. Owners were advised that at least two of these consultants would attend the meeting to explain the position and answer questions. Notice was given of a proposed motion to authorise the body corporate to raise a special levy of $500,000 to carry out the recommended investigative work.

[33] The annual general meeting was held on 12 November 2014. Mr Roberts attended. After considerable discussion, the proposed motion authorising a special levy was carried by an 81 per cent majority. Mr Roberts' share of this levy, payable in four monthly instalments from 1 January 2015, was $11,460.62.

[34] Following this meeting, Maynard Marks Ltd, property and building consultants, were engaged to carry out invasive and destructive testing as necessary to determine the extent of weathertightness issues and identify the scope of remedial works required. They provided a comprehensive report in July 2015 detailing the following key weathertightness defects:

(a) Inadequately weatherproofed roof to wall junctions, including to projecting fire spandrels.

(b) Steel-framed balcony penetrations to fire spandrels, and balcony to wall junctions.

(c) Inadequate cladding clearance above external surfaces, including a lack of drainage at cladding base details.

(d) Unprotected fibre-cement cladding sheets to the horizontal surfaces of the balustrade and inter-tenancy walls.

(e) Poorly formed cappings to the balustrade walls adjoining the enclosed rooftop balconies.

(f) Unprotected retaining wall junctions with inter-tenancy balustrade walls to lower level apartments on the west elevation.

(g) Inadequately weatherproofed joinery openings, including a lack of visible jamb and sill flashings.

[35] Maynard Marks detailed the remedial works required and estimated the cost to be approximately $10.1 million (including GST).

[36] A copy of this report was made available to all owners and an extraordinary general meeting to discuss it was convened on 18 August 2015. A schedule of the levies required to carry out remedial works was prepared. Mr Roberts' share was approximately $218,000. No decision was reached at this meeting and remedial works have still not been carried out.

[37] Two years later, Alexander & Co Ltd, building surveyors, were commissioned by the body corporate to review the work undertaken by Maynard Marks and advise whether further investigations should be undertaken. They reported in September 2017 that it was not feasible to access and test all areas, but it was reasonable to infer from Maynard Marks' findings that a full re-clad of the building was required.

[38] Bell Kelly Beaumont Team Architects Ltd reported in December 2017 on four possible options, ranging from remediation to a complete demolition and rebuild. The least expensive of these options, estimated to cost $20,152,000, involved a full remediation and the addition of two extra floors given the roof would have to be removed in any event.

[39] Patrick Hanlon, a quantity surveyor from BQH Ltd engaged by Mr Roberts, produced a report in December 2018 estimating that the cost of repairing the building was approximately $20.5 million of which Mr Roberts' share would be some $431,000. Mr Hanlon estimated that the remedial works would take 19 months to complete if Sirocco were to be unoccupied during this time (82 weeks).

Liability judgment

[40] Based on the telephone discussions and email correspondence we have referred to, particularly at [22] above, Mr Roberts claimed that Ms Leloir represented that Sirocco had weathertightness issues but these related only to the walkways and had since been rectified. The Judge agreed and found that these representations had been made.[9]

[41] The Judge also found that these representations were demonstrably untrue and misleading.[10] The Judge noted Mr Gray's evidence that there were widespread systemic weathertightness issues unrelated to the walkways at Sirocco.[11] The Judge referred to a table produced by Mr Gray showing that 23 of the 44 apartments had experienced leaks and 17 of these were recorded after the engagement of Ms Leloir's company by the body corporate in December 2007.[12]

[42] The Judge considered it significant that body corporate records in the months preceding the representations referred to leaking problems.[13] In particular, the minutes of a body corporate meeting held on 21 August 2013 referred to advice from Ms Leloir that she had notified the owners of apartments 806 and 811 that, following exhaustive investigations, the common area wall between their decks was responsible for leaks into an apartment below. These minutes recorded that the body corporate committee had instructed Ms Leloir to proceed with remedial work. Further, a management report prepared by Ms Leloir in December 2013 stated:

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9 Liability judgment, above n 2, at [74].
10 At [75].
11 At [76].
12 At [77].
13 At [78]–[80].

Leaks down into Apartment 807

For a number of months we have been trying to identify the cause of the leaks down into Apartment 807. A number of years ago it was established that a part of the deck of Apartment 806 was the cause and that area of the deck was replaced. About 7 months ago leaking returned into Apartment 807.

Some water testing was done earlier in the year with inconclusive results.

Both our contractors and the contractor for Apartment 811 identified possible problems with the common area wall between the two decks (in fact the #811 contractor suggested the wall was completely rotten) and your approval was given to investigate inside the wall and carry out the necessary repairs, assuming that this was the cause of the leaking.

This work was delayed by inclement weather for a number of months, however towards the end of November the contractors were able to get on and carry out the investigative work. The common area wall showed no signs of degradation. The gutters were resealed and the perimeter of the common area on both decks was sealed.

Heavy rains and wind arrived and after a couple of days of no water ingress, water then began trickling down and into Apartment 807 again. It also continued after the rain had stopped giving rise to the thinking that the problem lies somewhere on the higher part of the deck, possibly under the spa pool which is trapping water and slowly releasing it.

We are meeting with the owners of Apartment 806 to discuss the proposed remedial work tomorrow morning and I will be able to report further at the meeting tomorrow evening.

Under the new Unit Titles Act [2010], as the roof forms part of the structure of the unit below, it is now the body corporate's cost to effect all repairs, rather than just to the common area walls as was previously the case under the old [Unit Titles Act 1972].

[43] The Judge addressed a table Ms Leloir prepared detailing all leaks identified in the period of her involvement in the building from December 2007. Ms Leloir stated in her evidence that when she took over the management functions in December 2007, she "inherited a number of leaks" in apartments, including from the deck of apartment 815 into apartments 817 and 818. However, she said these were "not unexpected as all buildings have leaks from time to time". She gave as examples leaks from basins, overflowing toilets, showers and dishwashers, failing water pipes in walls and ceilings, sealants failing around windows, overflowing gutters and downpipes, and membranes on decks breaking down or being accidentally pierced. She considered these problems arose from normal wear and tear, storm damage or from the actions of owners or residents. Ms Leloir said that apart from these "routine

leaking situations", which were promptly investigated and repaired after they were reported to her, she was not aware of any major problems other than the walkways.

[44] The Judge accepted that Ms Leloir attempted to isolate the causes of these various leaks and have them repaired. The Judge also accepted that in some cases there were no signs of further leaking, but she noted that recurrent problems occurred in other cases:[14]

> For example, apartment 806 had its deck tiles lifted twice in 2009 to replace the membrane because of leaking down into apartment 807. There was a recurrence of that problem in 2012. In 2013, as discussed above, the common wall of the deck for apartment 806 and 811 had cracks in it, causing water ingress into apartments 810 and 807 and the wall required rebuilding. Similarly, apartment 810 suffered leaks from the deck wall of apartment 811 in 2009. There were further leaks from the deck of apartment 811 in 2010 and 2011. Apartment 818's deck leaked into apartment 817 in 2009. In 2007 and 2008, apartment 815 leaked into apartments 817 and 818. This leak was again apparent in 2011 and in 2012 it was recommended that the whole deck be replaced.

[45] The Judge asked Ms Leloir (who was unrepresented at the liability hearing) what she understood "weathertightness" to mean. Ms Leloir answered:[15]

> My understanding has always been that weathertightness was from the exterior envelope of the building and that if there were systemic, if there were leaks that occurred and reoccurred in the same places on the exterior envelope then that was a real concern for the building. Leaks between, from, on a corner of a deck down into an apartment was not what I would ever have thought was a weathertightness issue. The committee didn't feel it was a weather, they were weathertightness issues either, and I report to them at every turn.

[46] Although Ms Leloir did not consider there were any systemic weathertightness issues at Sirocco, the Judge was satisfied there were.[16] The Judge was also satisfied that Ms Leloir was aware of evidence suggesting there were weathertightness issues at Sirocco whether she recognised the significance of this or not. In particular, Ms Leloir became aware in 2011 of a letter written by her predecessor to the Council on 1 August 2007 which prompted Council to make its original weathertightness notation on the LIM:

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14 At [81].
15 At [83].
16 At [82].

> Over the last few years there have been a number of leaks within the Sirocco building complex. The majority of these leaks have been through structural areas within the complex. I.e. where exterior cladding joins together, where rain heads have not been installed correctly, decks not constructed or tiled correctly, sealing of the decks on open walkways where they enter into an apartment not sealed correctly etc.
>
> Some repairs that have been carried out have been very expensive for the owners concerned and insurance claims have been significant.
>
> These issues were raised at the last Annual General Meeting in June 2007 and the owners have requested that the Body Corporate obtain copies and results of all building inspections carried out by the Wellington City Council Building Inspectors during the construction of this building.

[47] In January 2011, after Ms Leloir became aware of this letter, she wrote to Council as instructed by the body corporate committee explaining that the weathertightness issues had been identified and resolved and asking for the notation on the LIM to be amended accordingly. Council did not agree to this but the correspondence records Ms Leloir's understanding of the position and explains the modified notation that appeared on the LIM at the time Mr Roberts obtained a copy.

> Thank you for the time spent discussing the LIM issues this morning.
>
> Further to the letter dated 1 August 2007 written by Kerry Duncan of Cedar Property Management Ltd (the former Body Corporate Secretary of Sirocco Apartments) I wish to advise that I have only become aware today of the notation on a LIM report for an apartment in the building that there may potentially be weathertight issues in the building.
>
> I was appointed the Body Corporate Secretary Manager on 1 December 2007 following dissatisfaction with the performance of Kerry Duncan. At no time was I made aware of his letter to the [Council] and there is no mention in the June 2007 Minutes of any concerns with weathertight issues nor any instructions from the owners to advise the [Council] that they were concerned about weathertightness in the building or the possibility of there ever being a claim against Weathertight Homes in this regard.
>
> Indeed on reading the letter dated 1 August 2007, it is clear that Kerry Duncan was not stating that there were potentially weathertight issues in the building, but merely requesting copies of previous Council reports and inspections.
>
> There have definitely been some issues with membranes breaking down on some balconies and there have also been issues with the Level 8 and Level 6 walkways being insufficiently covered in membranes to cope with the amount of water being deposited on it when there is rain. The carpeted walkways did not have sufficient run-off to remove excess water and over the 10 year period since the building was constructed there has been a large amount of water left

> sitting in the carpets which has eventually destroyed some of the membrane and the underneath ply.
>
> To remedy this the Body Corporate began a repair project on the walkways in 2009 and this work will be finished in February 2011. The walkways have been replaced with 18 ml ply (the original was 12 ml ply) and three coats of membrane followed by the top coat which has a very long life against the elements. We have had gutters and downpipes constructed which feed into the waste water system for the building, thus removing the bulk of water which had historically caused the continued wetness on the carpets. We have not replaced the carpets.
>
> The Body Corporate Committee of Body Corporate 85928 would appreciate the [Council] adding a notation to all LIM reports for all apartments in the building that to the best of their knowledge there are no weathertight issues at Sirocco Apartments.

[48] A representative of the Council responded, saying:

> Please be advised that any future LIM will also state the following:
>
> "Council has been advised by the Body Corporate that they undertook remedial work. The Council had no involvement in this remediation and is unable to comment on the scope of repair. We would suggest you seek advice from the Body Corporate re this matter."

[49] The Judge observed that conduct can be misleading and deceptive notwithstanding the honesty of the person whose conduct is at issue.[17] The representations were statements of fact, not expressed as statements of opinion.[18] Even if they had been, there was not a reasonable basis for the opinion.[19] The Judge therefore found that the representations — that the only weathertightness issues related to the walkways and had been rectified — were misleading and deceptive.[20] The Judge also found it was reasonable for Mr Roberts to rely on these representations in declaring the agreement unconditional.[21]

[50] Ms Leloir was therefore found to be liable to Mr Roberts for engaging in misleading and deceptive conduct and making false and misleading representations in trade in breach of ss 9 and 14 of the FTA.[22] These findings are not challenged on

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17 At [92].
18 At [99].
19 At [101].
20 At [102].
21 At [105].
22 At [123].

appeal, but the full context is relevant to the assessment of damages including the appropriate reduction, if any, for contributory negligence.

Quantum judgment

[51] In a subsequent judgment dealing with quantum delivered in December 2019, the Judge awarded Mr Roberts damages for diminution in value of $93,500.[23] This was calculated as the difference between the purchase price paid ($397,000) and the value of the property at the time of purchase if it had been properly described ($287,000), less a deduction of 15 per cent for contributory negligence ($16,500).[24] The Judge also awarded general damages of $25,000 for stress and inconvenience.[25]

[52] The Judge summarised her findings on Mr Roberts' contributory negligence as follows:

> [56] I accept Mr Roberts did carry out due diligence. I am, however, satisfied that he contributed to the loss. A reasonably prudent purchaser in his position would have obtained a building report or a report from a suitably qualified specialist which, in the circumstances of the information identified in the LIM report, would have identified the design features of the Sirocco Apartments which put it at risk of weathertightness problems. Allied to this, a reasonably prudent purchaser in Mr Roberts' position would have required further information from the Body Corporate secretary, in particular the Body Corporate committee meeting minutes. These would have revealed a systemic problem with water ingress into the building.
>
> (Footnote omitted.)

[53] The Judge noted her finding in the liability judgment that the representations made by Ms Leloir were "demonstrably untrue and misleading".[26] The Judge considered that an analysis of the body corporate records would have inevitably led to the conclusion there was a systemic problem with water ingress in to the apartments at Sirocco. The Judge was therefore satisfied Ms Leloir was aware that the water ingress issues were not limited to the walkways.[27] On the other hand, the Judge found that Mr Roberts was on notice of problems and a reasonable person in his position

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23 Quantum judgment, above n 3.
24 At [107] and [112].
25 At [110].
26 At [58].
27 At [58].

would have made further inquiry. Mr Roberts therefore contributed to his loss by failing to make adequate inquiries.[28] The Judge referred to analogous cases where reductions ranging between 20 to 40 per cent had been allowed for contributory negligence.[29] Taking all matters into account, the Judge considered the appropriate reduction in this case was 15 per cent.[30]

Appeal

[54] Mr Roberts appeals against the damages award. He contends that the damages should have been assessed at the date of the quantum hearing in late November 2019, not at the time the misleading representations were made in March 2014. He says this is necessary to compensate him for his actual losses. The estimated repair costs escalated from $9.5 million in August 2015 to $22.7 million in April 2019 such that it is now uneconomic to repair the building.[31] Mr Roberts says the "diminution in value" assessed on this basis would have been $671,830 ($721,000, being what he claims the value of the apartment would have been in November 2019 if Sirocco had been constructed without defects, less $49,170, being what he claims the value was at that date with the defects). Mr Roberts seeks an order replacing the Judge's assessment as at 2014 of $110,000 with this figure of $671,830.

[55] Mr Roberts also argues that there should have been no reduction for contributory negligence. He claims that any building report obtained at the time would not have identified the risk of weathertightness problems. He also argues that a reasonable purchaser in his position in March 2014 would not have made further enquiries by seeking copies of the body corporate meeting minutes.

Cross-appeal

[56] Ms Leloir cross-appeals. She says the Judge was correct to assess the loss at the date of purchase in 2014. However, she says the Judge overstated the loss because

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28 At [60].
29 At [59].
30 At [61].
31 As noted, Maynard Marks reported in July 2015 that the remedial works were estimated to cost $10.1 million (including GST). The figure of $9.5 million comes from the special levy considered at the extraordinary general meeting held on 18 August 2015 and takes into account the $500,000 special levy already raised by the body corporate earlier that year.

there was little or no evidence of any diminution in value of apartments in Sirocco in 2014. Ms Leloir also says the reduction for Mr Roberts' contributory negligence should have been much higher — 40 per cent, not 15 per cent.

Did the Judge err in her assessment of damages prior to any reduction being made for contributory negligence?

[57] Three issues arise under this head. First, should the Judge have assessed the damages with reference to the value of the apartment had Sirocco been constructed without defects? Secondly, was the Judge in error in carrying out the damages assessment at the time of purchase in March 2014, rather than the date of the quantum hearing in November 2019? Thirdly, was the Judge in error in concluding on the evidence that *any* loss was suffered in 2014, applying the adopted methodology? For the reasons set out below, we are satisfied the answer to each of these questions is "no". It is convenient to address the issues together, starting with the principles to be applied.

General principles

[58] Section 43 of the FTA relevantly provides:

> **43 Other orders**
>
> (1) This section applies if, in proceedings under this Part or on the application of any person, a court … finds that a person (**person A**) has suffered, or is likely to suffer, loss or damage by conduct of another person (**person B**) that does or may constitute any of the following:
>
> (a) a contravention of a provision of Parts 1 to 4A (a **relevant provision**):
>
> …
>
> (2) The court … may make 1 or more of the orders described in subsection (3)—
>
> …
>
> (3) The orders are as follows:
>
> …
>
> (f) an order directing person B to pay to person A the amount of the loss or damage:

…

[59] In the leading case of *Goldsbro v Walker*, this Court emphasised that an award of damages under this section involves the exercise of a discretion and is not constrained by common law rules relating to the assessment of damages for traditional causes of action.[32] Cooke P observed:[33]

> As to a monetary award, no right of action is conferred. It is one of a range of discretionary remedies. In that context there is no compelling reason to hold that if the defendant's misleading conduct has contributed to cause the plaintiff's loss, the only course open to the Court, where no other form of relief is appropriate, is to order payment of a sum representing the full loss. Nor is there any compelling reason to hold that the only discretion of the Court is to award all or nothing.
>
> The common law rule that a tortfeasor whose wrongful conduct contributes to cause damage is liable for the whole damage to the plaintiff (with statutory rights to claim against a co-tortfeasor) need not be imported into the statutory remedy given by [s 43(3)(f)]. Power to award the full amount of the loss or damage should naturally carry implicitly power to award part of the full amount. It seems to me that this conclusion makes the Act work in accordance with its true intent, meaning and spirit. It enables the Court to grant a remedy that gives effect to the policy of the Act without at the same time being draconian or doing injustice.

[60] Richardson J said that, in broad terms, the underlying policy of the FTA is that consumers should receive accurate information on which they can make rational economic decisions. In cases of infringement resulting in loss it would ordinarily accord with the policy of the FTA to grant a remedy. But when exercising statutory powers under s 43, the Court was not required to apply conventional common law rules relating to traditional causes of action. Rather, it was "a matter of doing justice to the parties in the circumstances of the particular case and in terms of the policy of the Act".[34]

[61] Hardie Boys J said it would be wrong to attempt any categorisation of factors relevant to the exercise of the s 43 discretion, but these would include the degree of

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32 *Goldsbro v Walker*, above n 7, at 399; affirmed in *Red Eagle Corp v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492 at [28]–[31].

33 At 399.

34 At 403–404.

blameworthiness of the defendant and the extent to which the plaintiff failed to act reasonably in his or her own interests.[35]

[62] The next important case for present purposes is *Cox & Coxon Ltd v Leipst* which concerned a claim by a purchaser against a real estate agent acting for the vendor for misrepresenting the production and income from a lifestyle block.[36] The question at issue was whether expectation damages were available under s 43 of the FTA. In this Court, the majority held that the real estate agent had no obligation to perform the representation and damages could not be assessed on that expectation basis.[37] Henry J (writing also for Blanchard J) explained:[38]

> The only duty which can give rise to a claim for lost benefit or loss of expectation is one which imposes an obligation to perform the representation. Here the wrong complained of is making the representation, not in failing to honour it. To say that a particular representation is promissory in nature is unhelpful and does not assist the present argument. The promise must be one which is enforceable at law if it is to give rise to a remedy. Section 43(1) does not purport to make a representation enforceable against a representor. It says there is liability for loss or damage resulting from the representation. The difference is real and substantive.
>
> To hold that misrepresentation inducing a contract can give rise to a claim for expectation losses under [s 43(3)(f)] is to turn on its head the whole rationale of the measure of damages for a civil wrong. As we have said, the wrong here was making a misleading statement. Failing to make good a misleading statement does not constitute a breach of the Act. It is fundamental that the remedy must be directed to the consequences of the breach of the imposed duty, and not to consequences which are attributable to some other cause which is not the subject of an actionable duty.

[63] The majority's approach in *Cox & Coxon* was subsequently endorsed by this Court in *Harvey Corp Ltd v Barker*.[39] There, a real estate agent was sued for misrepresenting a property in that the ornamental gates and part of the driveway were erected across a paper road vested in the local council. The vendors were aware of the situation but remained silent. The real estate agent was unaware of the position. In the lower courts, damages were assessed against the vendors for misrepresentation under the Contractual Remedies Act 1979 and the FTA in the same sum and without

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35 At 406.
36 *Cox & Coxon Ltd v Leipst* [1999] 2 NZLR 15 (CA).
37 At 22 per Gault J and at 26 per Henry and Blanchard JJ.
38 At 26.
39 *Harvey Corp Ltd v Barker* [2002] 2 NZLR 213 (CA).

differentiating between the statutes.[40] Blanchard J, writing for the Court, explained why this was inappropriate:

> [13] Unfortunately the majority decision of this Court in *Cox & Coxon* appears not to have dispelled misapprehension concerning what damages are and are not claimable under s 43. The majority opinion, which now has the apparent endorsement of the High Court of Australia [in *Henville v Walker*[41]] was that a representation cannot give rise to a claim for a lost benefit or a loss of expectation where the defendant is under no obligation to perform the representation. …
>
> [14] The agent, Harveys, of course had no obligation to perform the contract and to fulfil the bargain made by the vendors. The proper question in a claim against Harveys under s 43 is whether the Barkers are worse off as a result of the making of the representation – by changing their position in reliance on it – not whether they have been unable to realise a benefit because of the failure of the vendors to convey a property without the defect complained of. The Barkers accordingly had to prove that the misrepresentation of the property had caused them to act in a way which resulted in a loss. Normal measures of such a loss are whether what has been acquired is worth less than what was paid and/or whether there has been wasted expenditure. …

[64] These general principles to the assessment of damages under the FTA are now well-settled.

Pleadings

[65] In his fourth amended statement of claim, Mr Roberts pleaded his losses as follows:

> **Losses**
>
> 13. As a result of the Defects [set out in the Maynard Marks report quoted above at [34]]:
>
> (a) The current value of the property is $671,830 less than it would have been if the Sirocco was constructed without the Defects ($721,000 - $49,170). [Described as Approach A: Diminution in Value].
>
> (b) [Mr Roberts'] share of the estimated cost to remediate the Sirocco is $456,916.06. [Described as Approach B: Remedial Losses].
>
> 14. [Mr Roberts] will suffer losses as set out below, quantified by reference to either:

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40 At [6].

41 *Henville v Walker* [2001] HCA 52, (2001) 206 CLR 459 at [132].

(a) The diminution in value of the Property; or

(b) [Mr Roberts'] share of the estimated cost to remediate the Sirocco.

[66] Mr Roberts gave particulars of these losses in the following table:

	APPROACH A: DIMINUTION IN VALUE	APPROACH B: REMEDIAL LOSSES
Loss of value of the Property	$671,830	----
Plaintiff's share of the remedial costs	----	$456,916.06
Special levies to investigate the Defects	$11,460.62	$11,460.62
Alternative accommodation costs ($830/week x 82 weeks)	----	$68,060
Furniture uplift and moving costs	$2,702.50	$5,405
Conveyancing fees on the sale of the Property	$1,500	----
TOTAL	**$687,493.12**	**$541,841.68**

Submissions

[67] In his closing submissions in the High Court, Mr Easton for Mr Roberts, argued that the correct measure in this case was the "diminution in value" (Approach A), taking as the starting point the value of the property in November 2019 if it had been constructed without defects. The same argument is advanced on appeal. Mr Easton contends that an assessment at this later date is required to reflect the extent of the loss Mr Roberts has actually and reasonably suffered.[42] He seeks judgment from this Court

[42] Citing *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726 at [156] per Tipping J.

quashing the Judge's award of damages of $93,500 ($110,000 before reduction of $16,500 for contributory negligence) and replacing it with judgment for $687,493.12 plus $25,000 for general damages.

[68] Mr Easton makes the following points in support of this overall submission:

(a) The breach date rule for the assessment of damages (namely that the relevant date for assessing damages is the date of breach of the duty giving rise to the liability) anticipates that a plaintiff will discover the defendant's breach of conduct or tortious duty at the date of breach or shortly thereafter, but that is not the case here.

(b) The apartment is not a readily or immediately resellable asset like a commodity.

(c) In building defect cases where the cost of repairs is the correct measure of loss, it is usual to assess the loss by reference to when the repairs could reasonably have been carried out even though that may be many years after the relevant breach of contract or tortious duty. It would be incongruous to adhere rigidly to the breach date rule when the loss being claimed reflects the diminution in value.

(d) The estimated cost of remedial work increased considerably over a comparatively short period — from $9.5 million in August 2015 to $22.7 million in April 2019.

(e) Mr Roberts did not face any defence that he failed to mitigate his loss by selling the apartment earlier. There was uncertainty about whether Sirocco would be repaired, and it was reasonable for Mr Roberts to wait and see what the body corporate chose to do before making any decision whether to retain the apartment or not. The apartment was Mr Roberts' home. He says he was unable to buy another property because he did not have the means to do so, whether by borrowing

against the equity in the apartment or by selling it (assuming he could find a buyer).

[69] Ms Leloir supports the methodology adopted by the Judge and the date chosen for the assessment of loss. However, she contends the evidence did not support the Judge's assessment of $110,000 of loss carried out on this basis.

Assessment

[70] It will be apparent from our discussion of the relevant principles that the loss claimed by Mr Roberts under his preferred Approach A is misconceived and contrary to the governing authorities (as is Approach B). Ms Leloir did not assume an obligation to Mr Roberts to ensure he realised the benefit of an apartment in Sirocco as if it had been constructed without defects. The value of the apartment assessed on that basis was not the right enquiry and the starting point of $721,000 for Approach A was therefore wrong. Similarly, Ms Leloir did not underwrite the remedial costs claimed by Mr Roberts (but not incurred) under Approach B.

[71] Not only was the proposed starting figure of $721,000 inappropriate, the comparative figure of $49,170 was also rightly rejected by the Judge. This figure was arrived at by assessing the land value after deducting costs of demolition.[43] This theoretical, derived figure was significantly out of step with the evidence of market sales. For example, as the Judge pointed out, apartment 7 sold in May 2019 for $150,000. Apartment 606 sold in late 2019 for just over $159,000.[44] In the light of this and the other evidence referred to by the Judge, Mr Roberts' claim for "diminution in value" as at November 2019 in the sum of $671,830 ($721,000 – $49,170) is simply unsustainable.

[72] Ms Leloir's liability was for making misleading statements which were found to have been relied on by Mr Roberts in making his purchase unconditional. The Judge accepted Mr Roberts' claim that he would not have gone ahead with the purchase had

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43 Quantum judgment, above n 3, at [76].
44 At [81] and [84].

he not been misled.[45] The normal measure of loss in such a case (often termed a "no transaction" case) is the difference between the price paid and the value of the property received in return.[46] That is the approach the Judge adopted, correctly.

[73] There are no hard and fast rules as to the date for the assessment of damages. However, it is usual to assess damages at the date of the breach. The normal rule is generally only departed from if required to do justice between the parties in a particular case.[47] For the reasons that follow, we are not persuaded the Judge was wrong to assess damages proximate in time to the breach in this case.

[74] Contrary to Mr Easton's submission, Mr Roberts cannot rely on non-discoverability of the defects as justifying a departure from the normal breach date rule in a misleading statement case such as this, especially not for a period of five and a half years. The likelihood of there being extensive weathertightness issues at Sirocco was brought to Mr Roberts' attention in late 2014. The agenda for the 12 November 2014 annual general meeting alerted owners to the need for extensive investigations of the balconies and cladding to assess the extent of the issues that had been identified and they were advised that this investigative work would need to be funded by raising a special levy of $500,000. Mr Roberts received this agenda and the supporting documents on 6 November 2014. He attended the annual general meeting when the matter was discussed by the owners and the motion was passed to raise the levy. On 25 November 2014, Mr Roberts requested and received from Ms Leloir copies of the annual general meeting minutes from 2007 onwards and the minutes of the 2008 extraordinary general meeting. He also received a copy of the email Ms Leloir sent to owners on 22 May 2014 alerting them to the recently discovered weathertightness issues and relaying the engineer's advice not to use the balconies until further notice (referred to at [29] above).

[75] As we will demonstrate when we come to discuss the issue of contributory negligence, Mr Roberts was by then equipped with greater knowledge about weathertightness issues at Sirocco than Ms Leloir could have provided in March 2014

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45 Liability judgment, above n 2, at [103].

46 See James Edelman, Simon Colton and James Varuhas (eds) *McGregor on Damages* (20th ed, Sweet and Maxwell, London, 2017) at [34–051].

47 *New Zealand Land Development Co Ltd v Porter* [1992] 2 NZLR 462 (HC) at 466.

based on the available body corporate information. Any justification for postponing the assessment date on account of non-discoverability was therefore spent by the end of 2014.

[76] Nor can postponement be justified on the further basis contended by Mr Easton that the apartment was not readily resellable. Apartment sales have been transacted with full knowledge of the weathertightness issues from April 2015 onwards. These sales included the transaction in April 2015 relied on by the Judge in assessing Mr Roberts' loss. As the Judge also pointed out, apartment 606 sold for $159,250 as recently as late 2019.[48] That apartment was marketed on the basis it was expected to achieve a yield of 15 to 16 per cent given the likely rental return from the apartment in its unremediated state. The suggestion that the apartment was unsaleable is contradicted by the evidence.

[77] Mr Easton is correct in saying that, where the cost of repairs is the correct measure of loss, it may be appropriate, depending on the circumstances, to assess the loss at the time the repairs could reasonably have been carried out rather than at the date of the breach of obligation. An example might be where the claim is for a breach of warranty in a contract and the damages are to be assessed on the basis of repair costs (the cost of cure). A delay occasioned by the need to determine the extent of the defects and the required remedial works could readily justify a departure from the normal breach date rule. Mr Easton suggests it would be incongruous to apply a different rule when assessing diminution in value in a claim based on a misleading statement under the FTA in a case similarly involving building defects.

[78] The flaw in this submission is that it is founded on the incorrect premise that the assessment of damages should be the same in both cases. Ms Leloir did not assume an obligation to ensure Mr Roberts obtained the benefit of an apartment in a building constructed without defects. She is not liable for the cost of achieving that benefit, whether by meeting Mr Roberts' share of the remediation costs or otherwise. There is no incongruity because the obligations breached in these two cases are conceptually different as this Court made clear in *Cox & Coxon Ltd v Leipst* and *Harvey Corp Ltd*

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[48] Quantum judgment, above n 3, at [84].

v Barker. The fact that both types of claims arise in the context of a "building defect" case is a distraction.

[79] Ms Leloir was not liable to underwrite the repair costs and the fact these escalated over time does not require the date for the assessment of loss to be deferred. Mr Roberts could have sold his apartment if he had wished to. As to his claim that he could not afford to buy another apartment (one without any defects), Ms Leloir was not liable to fund that aspiration. Rather, as we have explained, her liability was to meet the loss caused by her misleading statements.

[80] For these reasons, we are not persuaded the Judge made any error in assessing the loss in accordance with the normal measure at the date of the breach.

[81] In any event, the Judge did not apply the breach date rule strictly. Had she done so, the damages could have been lower, as submitted by Mr Mahuta-Coyle for Ms Leloir. It will be recalled that Mr Roberts purchased apartment 812 on 20 February 2014 for $397,000 and the agreement went unconditional on 10 March 2014. Three other apartments sold for similar prices shortly after Mr Roberts' purchase. Two of these agreements went unconditional after owners had been advised by Ms Leloir not to use their balconies until further notice. We set out the comparable sales data in the table below:

Unit No.	**Floor area**	**Agreement date**	**Unconditional date**	**Settlement date**	**Sale price**
812	140 m^2	26/02/14	10/03/14	03/04/14	$397,000
612	160 m^2	06/03/14	11/03/14	27/03/14	$390,000
608	160 m^2	09/05/14	30/05/14	13/06/14	$391,000
804	140 m^2	17/06/14	01/07/14	18/07/14	$397,000

[82] Mr Roberts did not call any expert evidence about the market value of his apartment had it been properly described at the time the representations were made in March 2014. For the purposes of her assessment of the loss, the Judge relied on a sale

of a comparable apartment entered into on 21 April 2015, more than a year after Mr Roberts entered into his agreement. This was the sale of apartment 817 (having the same floor area as Mr Roberts' apartment 812) for $287,000 which settled on 22 May 2015. The Judge used that figure as a proxy for the market value of Mr Roberts' apartment in 2014 if it had been properly described.[49]

[83] Relying on this sale to assess the market value in March 2014 was arguably generous to Mr Roberts for three reasons. First, the sale was made more than a year after the normal date for assessment. Secondly and relatedly, by the time of that sale in April 2015, the likelihood of systemic weathertightness issues with the cladding and the decks had been identified, the November 2014 annual general meeting had taken place and the special levy of $500,000 had been approved and raised. Thirdly, the assessment required setting to one side the sale of apartment 813 (also 140 m^2) on 30 May 2015 for $420,000.

[84] It follows that we reject Mr Robert's claim that the Judge's assessment of the loss as being $110,000 (before any adjustment for contributory negligence) should be replaced with $671,830.

[85] It remains only for us to consider under this head Ms Leloir's complaint that the damages should have been assessed as nil. The suggestion that *no* loss was suffered as a result of the misleading statements found to have been made is unattractive and does not accord with common sense. The Judge accepted Mr Roberts' evidence that he would not have proceeded with the purchase had he not been misled by Ms Leloir's statements. The statements were obviously material to the quality of the apartment and therefore to its value.

[86] We have no information about the circumstances surrounding the sales tabulated at [81] above on which Ms Leloir relies for her contention there was no loss. It may well be that those sales were not indicative of market value, which is an objective test — the price that a hypothetical willing but not over-anxious, prudent and informed purchaser would have paid to a similarly described vendor.[50] The purchasers

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49 At [105].

50 *Boat Park Ltd v Hutchinson* [1999] 2 NZLR 74 (CA) at 83.

of these apartments in 2014 may also not have taken the prudent step of seeking a pre-purchase building inspection report from a suitably qualified specialist. Only the last of these sales was entered into after the email from Ms Leloir on 22 May 2014 drawing attention to the recently discovered weathertightness issues and warning occupiers not to use the balconies. There was therefore an entirely logical basis for the Judge's choice of the sale of apartment 817 as providing the best evidence of the value of Mr Roberts' apartment if it had been properly described. We accept this was arguably generous to Mr Roberts for the reasons given, but we are not persuaded the assessment was wrong. The Judge did the best she could with the available evidence.

[87] We are also not prepared to interfere with the Judge's decision not to award recovery of the special levies, estimated moving costs and conveyancing costs on a hypothetical resale.[51] The special levy was raised before the sale of apartment 817 for $287,000 in April 2015, so that price appears not to reflect any obligation to meet this cost. The Judge was therefore entitled to rely on the price of $287,000 as evidence of the market price Mr Roberts could have obtained for his apartment if he had chosen to sell it in 2014 having learned about the defects and before any special levy was raised. Mr Roberts did not sell his apartment and he has therefore not incurred moving costs or conveyancing costs on resale. Of course, there can be no criticism of Mr Roberts for not selling his apartment to mitigate his loss. But his claim to these sums as wasted expenditure caused by Ms Leloir's misleading statement cannot be justified given they have still not been incurred, seven years on.

Was the Judge wrong to deduct 15 per cent for contributory negligence?

Failure to obtain a specialist building report

[88] Mr Easton responsibly no longer challenges the Judge's finding that a reasonably prudent purchaser would have obtained a specialist building report before unconditionally committing to the purchase. Instead, he argues that any such report obtained in March 2014 would not have put Mr Roberts on notice of any weathertightness issues at Sirocco. To support this submission, Mr Roberts produced

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[51] Quantum judgment, above n 3, at [111].

at the quantum hearing a pre-purchase inspection report prepared in July 2013 by Habit New Zealand Ltd in respect of apartment 615 at Sirocco. This report described the apartment as presenting in "reasonable to good condition". No high moisture readings were found and the weathertightness defects at Sirocco were not identified.

[89] However, we consider the Judge was entitled to place little weight on this report given its limited scope. The report itself made clear that it was not directed to weathertightness issues or Building Code compliance in respect of such issues. The report states that specialist inspections for this purpose can be arranged. One of the disclaimers appearing on the first page of the report reads:

> The inspection did not assess compliance with the NZ Building Code including the Code's weathertightness requirements or structural aspects. On request, specialist inspections can be arranged of weathertightness or structure or any systems including electrical, plumbing, gas or heating.

The limited scope of the report is described on page two. This included the following statement:

> It is outside the scope of this report to investigate, or comment on if the dwelling complies with any Building Code legislations or Local Body bylaws.
>
> … This is also not a leaky home report [it] is a visual report only.

[90] The Judge was entitled to find, based on the evidence summarised below, that had a pre-purchase inspection report on weathertightness issues been obtained by Mr Roberts from a suitably qualified specialist as he ought to have done, it is likely the weathertightness issues at Sirocco would have been identified.

[91] We have already referred to the evidence of Mr Gray, an experienced building surveyor called by Mr Roberts at the liability hearing. Mr Gray said that in 2014 it was known that the monolithic cladding system used at Sirocco was high risk and no longer an acceptable solution under the Building Code. He considered a reasonably competent pre-purchase building report obtained at the time would have noted this. Mr Gray also identified numerous design and installation defects commonly indicative of weathertightness problems. He said that most of these are present throughout the building and are evident on a visual inspection, as is apparent from the photographs

he produced. Many of these defects are present in Mr Roberts' apartment and can be easily seen on a non-invasive inspection. To illustrate this point, we refer to just three significant examples drawn from Mr Gray's evidence (all identified in Maynard Marks' report) and shown in his photographs of apartment 812:

(a) Defective roof/deck to wall junctions — Mr Gray said these defective junctions were common to *all* apartments with decks and are found wherever any roof or deck meets an adjacent wall. Apartment 812 has two decks. Mr Gray said when he viewed the decks to apartment 812 he did not observe any means to flash or waterproof the deck to wall junctions. The exterior wall cladding had been taken hard down, with little or no clearance, to the deck tiles on both decks. The gap between the tiles and/or membrane and the bottom of the cladding was filled with what appeared to be a flexible sealant.

(b) Lack of flashings around window and door joinery openings. Mr Gray said he identified multiple locations where joinery was installed with no visible sill, jamb or head flashings. He produced seven photographs to illustrate this defect. At least three of these were taken of apartment 812.

(c) Steel-framed balcony penetrations — these defects occur where the balustrade connects to the side and top of the deck and at the junction between the steel deck beam and the wall. Mr Gray said these defects are common to all decks. He produced photographs showing the presence of these defects on both decks of apartment 812.

[92] Mr Gray said that in his experience, all of these defects (and the others he identified) have a history of causing systemic failure, especially in buildings with direct-fixed monolithic cladding. As noted, he went further and said that based on his visual inspection, Sirocco has "all of the hallmarks associated with a leaky building". Mr Gray considered that a reasonably competent building inspector would have identified these issues in 2014:

A. There are many types of building reports but if I was to, I suppose – I would answer that by saying, "What would a reasonably competent pre-purchase inspector identify?" I would expect that a reasonably competent pre-purchase inspector, depending on the condition of the building when they saw it, would identify that it had high-risk junctions and a cladding system that was the type of cladding system that was there.

…

QUESTIONS FROM THE COURT:

Q. … you did say, of course, in your brief of evidence … that the Sirocco Apartments have all of the hallmarks commonly associated with a leaky building?

A. Yes.

Q. So wouldn't it be fair to say that a competent building inspector would have raised the issue about particularly the style of the building, the monolithic cladding, and said that that was a high risk for leaky building problems?

A. Absolutely, Ma'am, yes, and I think that fits in with what I said about they would identify the cladding and they would say that that is a high-risk cladding.

…

Q. But it would have been evident [in 2014], for example, that there was the lack of flashings that you discussed?

A. Yes, you would see those, but again … a pre-purchase report is slightly different to a building investigation. It's … performance based. So although it will identify that there may not have been flashings and the grounds clearances may have been minimal or non-existent, the best it could do without identifying damage is to say that these are a risk junction.

Q. But that would be in addition to the flags given the cladding system?

A. Yes.

[93] Bruce Symon is the founder of a company which has specialised in providing building inspections throughout the North Island since 2000. He produced two pre-purchase inspection reports in respect of Sirocco apartments prepared by his company prior to Mr Roberts' purchase, one in 2006 (which happened to be Mr Roberts' apartment 812) and the other in 2010 (apartment 618). Both reports identified potential weathertightness issues, including the lack of clearance between the cladding and the deck tiles. The 2010 report, written more than three years before

Mr Roberts' purchase, raised serious concerns about the weathertightness and durability of the exterior cladding system and recommended that a further specialist report be undertaken by a weathertightness specialist surveyor before proceeding further. Under a heading "Weathertightness" it stated in bold:

> The design of this unit being part of a multi-unit complex with a monolithic cladding system in a high wind zone and exposed site, with a complex design in plan and form and cantilevered attached decks, a lack of cladding clearance to deck and roof areas and evidence of damage and repairs to the cladding would in our opinion put it at *a very high risk for weathertightness*.
>
> (Emphasis added.)

[94] Unsurprisingly, Mr Symon said these systemic weathertightness risks would have been identified had a competent pre-purchase inspection report been obtained at the time Mr Roberts purchased his apartment over three years later in March 2014.

[95] We agree with the Judge's conclusion (which is no longer challenged) that a reasonably prudent purchaser in March 2014 would have obtained a pre-purchase building report from a suitably qualified expert before committing to the purchase of apartment 812. From the time building weathertightness issues were brought to public attention following the Hunn report in August 2002, there has been widespread publicity concerning the leaky building crisis in New Zealand.[52] Mr Roberts confirmed in his evidence that at the time he purchased his apartment, he was aware of the need to protect himself against the risk of buying an apartment in a leaky building. The standard form agreement for sale and purchase he signed and the LIM he obtained from Wellington City Council both contained prominent recommendations that prospective purchasers should obtain professional advice to check for potential weathertightness issues before proceeding. Mr Roberts must take some responsibility for his own loss given he failed to take this recommended, basic and obvious precaution.

[96] The Judge was entitled to accept the expert evidence we have summarised that such a report would likely have identified serious weathertightness defects and risks

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[52] Donn Hunn, Ian Bond and David Kernohan *Report of the Overview Group on the Weathertightness of Buildings* (Building Industry Authority, 31 August 2002).

at Sirocco, including in apartment 812. She considered it "almost inconceivable" that had such a report been obtained, the weathertightness risks at Sirocco would not have been identified.[53] We agree. We therefore reject Mr Roberts' contention that there should have been no reduction for contributory negligence. In our view, that contention is plainly unsustainable.

Failure to obtain body corporate minutes

[97] Apart from his failure to obtain a pre-purchase inspection report from a suitably qualified expert, the Judge found that Mr Roberts also contributed to his loss by failing to request copies of the body corporate minutes.[54] This is because, as the Judge explained, the detailed maintenance and repair work carried out in a building like Sirocco is likely to be revealed by body corporate minutes and supporting reports. This detail will usually not appear in the annual general meeting minutes.[55] While the Judge accepted the evidence of Timothy Jones, an experienced conveyancing practitioner, that it was not standard practice at the time to look beyond the annual general meeting minutes, she considered Mr Roberts ought to have made further enquiry and sought these minutes in view of the matters disclosed in the minutes he did receive and in light of the potential weathertightness issues flagged in the LIM.[56] Mr Easton challenges this finding.

[98] The 2011 to 2013 annual general meeting minutes and the 2013 chairperson's report provided to Mr Roberts before he declared the agreement unconditional contained the following references to leaks or potentially relevant building defects:

> [2011 AGM:]
>
> The *6th Floor Walkway was nearly complete* which was a major undertaking *due to the need to rebuild the whole walkway and the entranceways*;
>
> *The repairs to apartments caused by the breakdown of the walkways* were almost complete;
>
> …

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53 Quantum judgment, above n 3, at [48].
54 At [55]–[56].
55 At [53].
56 At [54]–[55].

[Ms Leloir] was asked if the painting in the building was up to date and [she] replied that whilst there had been no further painting of the exterior of the building done recently, *once the walkways were completed and other repairs to the building done*, then the painting on Level 6 would follow and then other parts (some pillars in particular) which required painting would also be done as and when finances permitted.

…

Why was the *rust predominantly on one side of the building* only? [Ms Leloir] suggested that maybe the southerly side appeared to be more exposed to the salt and wind which may explain it;

A query about the *drips into the carpark* garage from the concrete and pipes. [Ms Leloir] advised that there had been a number of covers made to direct any water away from cars but that the long term fix was not a priority when there were other more pressing matters such as the rust on the exterior stairs and some exterior painting which needed to be carried out. None of the drips were affecting cars and no damage was being caused by them.

[2012 AGM:]

… *water dripping from toilets leaking* higher in the building and then coming out through smoke detectors.

…

The *water drips into the garage* – why are they still happening …

There are areas which are letting *small amounts of water drip down into the carpark* but these have had special drip tray removers made above the cars so no water lands on cars …

…

Q: *What are the big issues* facing the body corporate this year?

A: The Body Corporate Committee is particularly looking at the long term maintenance plan to ensure it is accurately reflecting the building's needs and is looking at following up with *exterior cladding work and painting*.

[2013 AGM:]

An owner queried what was covered under General Repairs. [Ms Leloir] explained that this budget line covered work done either in the common areas of the building such as:- *repairs where damage has occurred*; gardening carried out; graffiti removal; *interior apartment repairs as a result of leaks from other apartments – …*

[June 2013 chairperson's report:]

… I would like to remind us all of the importance of keeping a well maintained apartment, *small bathroom and deck leaks* in particular can impact seriously

> on your neighbours and as the owner you are responsible for putting right. In a multi story building this can be very serious indeed.
>
> (Emphasis added.)

[99] When read in conjunction with the financial statements that were also provided to Mr Roberts, these issues might not have appeared to be particularly serious or indicative of systemic weathertightness defects. The financial statements showed only modest annual expenditure on general repairs and maintenance for the entire building:

Year ended	
31 March 2010	$10,118
31 March 2011	$9,505
31 March 2012	$10,800
31 March 2013	$12,654

[100] While the LIM referred to work having been carried out to remediate weathertightness issues, enquiries made on Mr Roberts' behalf established that this was a reference to the walkways. Similarly, the long-term maintenance plan supported Mr Roberts' understanding that the only identified weathertightness defects related to the walkways. That also appears to have been Ms Leloir's understanding, albeit one found by the Judge to have been mistaken. In view of the expert evidence of Mr Jones, which the Judge accepted, that it was not common practice in 2014 for purchasers to seek body corporate minutes (in addition to annual general meeting minutes) and given the legal executive acting for him did not recommend these be sought despite reviewing the same material he received, Mr Roberts' failure to make further enquiries and seek additional records is, perhaps, understandable.

[101] We are nevertheless not persuaded the Judge was wrong to conclude that a prudent purchaser in Mr Roberts' position in May 2014 would have sought further information before declaring the agreement unconditional. By that time, there was general public awareness of the "leaky building" crisis, its causes in broad terms and the consequent need for prospective purchasers to take particular care to protect themselves against this risk when purchasing an apartment or other dwelling. This was particularly the case for buildings constructed during the high-risk years from about 1988 until 2004 when building work, performance standards and regulatory oversight were tightened up under the Building Act 2004. Sirocco was

completed in 1999, during this high-risk period. There was nothing about the appearance of Sirocco or the time of its construction that would offer reassurance to a reasonably prudent purchaser in 2014 that Sirocco would *not* be at risk of weathertightness issues. On the contrary, as Mr Gray's evidence confirmed, it had all the hallmarks of a leaky building. Further, as the Judge observed, there were some potential red flags in the pre-contract disclosure and other body corporate materials Mr Roberts received. All these matters, taken together, provide support for the Judge's conclusion that a prudent purchaser would have made further enquiry.

[102] The further enquiries that should have been made were obvious. Mr Roberts' agreement was conditional on him being entirely satisfied with "[t]he Body Corporate Minutes" (not limited solely to the annual general meeting minutes) for the past three years. We agree with the Judge that a prudent purchaser in Mr Roberts' position would have sought these. Mr Roberts ought to have appreciated that much of the work of the Sirocco body corporate was conducted, not at annual general meetings, but by the body corporate committee. The minutes of the annual general meetings provided to him made this quite clear, containing frequent references to the "Body Corporate Committee" and the "Body Corporate Committee Minutes". Ms Leloir also invited Mr Roberts to call her directly to find out more about the building, but he chose not to take advantage of that opportunity.

[103] In all the circumstances, we consider the Judge was justified in finding that a prudent purchaser would have made further enquiry by seeking the body corporate committee minutes. Mr Roberts therefore contributed to his own loss not only by failing to obtain a pre-purchase building report, but also by failing to take this further simple step to protect himself from this known risk.

Relative blameworthiness and causal potency

[104] The sole remaining issue is whether the reduction of 15 per cent was adequate to reflect Mr Roberts' contributory negligence. It requires consideration of the relative blameworthiness and causal potency of the contributions Ms Leloir and Mr Roberts each made to the loss.[57] The appropriate reduction in each case will always be an

[57] *Gilbert v Shanahan* [1998] 3 NZLR 528 (CA) at 534.

intensely fact-specific assessment. For this reason, other authorities are likely to provide only limited assistance.

[105] Mr Roberts did not plead that Ms Leloir intentionally misled him, nor was it necessary for him to do so. As the Judge observed, conduct can be misleading and deceptive notwithstanding the honesty of the person whose conduct is at issue.[58] Ms Leloir had nothing to gain by misleading Mr Roberts. His claim was not that she was dishonest, only that the express or implied statements she made were misleading. Neither party was "morally" blameworthy.

[106] It is necessary to examine the body corporate minutes to determine the causal potency of Mr Roberts' negligent failure to seek them. The exercise also helps inform the extent to which Ms Leloir ought to have appreciated that the building suffered from systemic weathertightness issues. We set out the relevant references from the body corporate minutes below. For ease of reference when we come to analyse them, we have underlined the apartment numbers where the leaks occurred as well as the apartments affected by the leaks. It is important to bear in mind when reviewing these extracts that they collect in one place all relevant entries involving leaks in the body corporate minutes over a period of more than six years for this multi-level building comprising 44 apartments. They should be read from the perspective of a prudent purchaser assessing them at the relevant time, not with the benefit of hindsight and in the light of the expert reports since obtained that show that Sirocco suffered from systemic weathertightness defects all along:

Date	Comment
12/12/07	Discussion of liability for cost of unauthorised repairs to deck at apartment 815 instructed by previous body corporate secretary.
19/02/08	Nothing relevant recorded.
20/05/08	Further discussion about the dispute regarding the costs incurred to repair the historical leak from deck of apartment 815 after the "tiled area around the spa collapsed and water poured into apartments 817 and 818 below".

[58] Liability judgment, above n 2, at [92].

02/09/08	"We have been notified of a number of leaks into apartments which appear to be coming from the balcony above. We are carrying out investigations on one balcony at this stage before continuing with the others. The owners of the apartments are co-operating fully whilst the work is being done. It is the Body Corporate's responsibility to ensure apartments are watertight but any repair work to an owner's property, remains the owner's responsibility once the cause and basic repair work has been done by the Body Corporate. We are also managing a leak into Apartment 609 which appears to be coming in down an inside wall. The problem here is just how far away from the resultant wet patch is the place where the water is getting in — it may well be at least a floor and an apartment above. We are also sealing up holes in the balcony wall of Apartment 815 which had never been attended to following the major work done in 2007. We have had the wall sealed, plastered and painted to avoid continued water ingress into apartment 818 below."
17/06/09	General discussion about responsibility for the costs of repairing balcony leaks — Ms Leloir "explained that where the balcony had failed and caused leaking problems into another apartment, it was the responsibility of the body corporate to stop that leak and make the area weathertight to avoid any further leaking into the other apartment".
09/12/09	General discussion about "the various leaks as highlighted in the Management Report but these were under control and being managed effectively".
15/02/11	Ms Leloir "detailed the works being done on various apartment leaks, the bulk of which are as a result of the breakdown in the Level 6 walkways".
30/11/11	Ms Leloir "detailed the works being done on various apartment leaks – again from toilet cisterns leaking down into apartments and in some instances causing the smoke alarms to sound".
20/03/12	Mr Leloir "detailed the works being done on various apartment leaks – major leaks down into #818 is still being managed and there is a leak into the wall of #817 which is also being managed". There was also mention by an owner that "the leak from #806's deck down into the living room at #807 had begun again and [Ms Leloir] will follow this up".
18/09/12	Comment made that "The leak into 807 does not appear to have got any worse and as [the owners] will be moving into the apartment early next year [they are] happy to wait until the tenants have left before investigating further".

12/12/12	Ms Leloir "confirmed that all the current leaks are in hand – small areas into apartments aligned generally to building movement and slight cracking in the cladding, all of which will be remedied in the New Year. **Post Meeting Note**: During Sunday night (16th December) and into the early hours of Monday morning residents in two apartments, one on the 6th floor and one on the 4th floor were both woken by dripping water from their light fittings. This took some time to track on Monday morning with the maintenance contractor and plumber, but we found in apartment 802 that the main bathroom was in an appalling condition as outlined in my email to the Property Manager and Owner. ***There had obviously been water on their floor recently – whether they have actually experienced a flood we couldn't tell but there was a substantial crack on the tiles on the bathroom floor; the tiles on the wall behind the loo are coming away as is the skirting board; the wall on the left side of the basin is also coming away as is the skirting board; the extra waste outlet on the bathroom floor had soap bubbles above it; the tiles in the shower are not water tight either!!!***" Indications are that water has been leaking from both the loo and basin for quite some time without any maintenance having been carried out and so we closed the bathroom down until it could be made watertight and the owners have authorised the bathroom to be repaired immediately and I think the tenants were being moved to alternative accommodation. I would like your approval to send a notice to all owners asking them to keep a close watch on the condition of their bathrooms – should the skirtings behind their toilets or the tiles surrounding it, start to lift or crack or show any signs of wetness or the walls appear to be "soft", these are definite indications that there may well be a leak in behind the toilet or basin and to get it attended to immediately to avoid disruption to other apartment resident[s] and subsequent damage to other apartments. Keeping a watch on the state of the tiles (for cracking or obvious signs of deterioration or grout breaking down) is also very important and property managers should be asked to check these when they are doing their three monthly inspections. (Emphasis in original.)
13/03/13	The comments from the 12 December 2012 minutes quoted above are repeated in full.
21/08/13	Ms Leloir advised that she had notified the owners of apartments 806 and 811 that, following exhaustive investigations, the common area wall between their decks was responsible for leaks into an apartment below. Both owners were advised of the required remedial work and asked for their approval.

04/12/13	In discussion of financial statements, the following note appears: "R & M General [ahead of budget] by $2,729 ($1,610 has been paid in anticipation of reimbursement from #811 owner for work done on investigating the toilet stack leaking issues, together with a number of ceiling repaints due to small water leaks which were too small to claim on our insurance". Under "Building Management and Maintenance" the following comment appears: "Investigations as to the cause of the leak into the living room [of apartment 807] have continued without long term success. The work, on the common area wall between Apartments 806 and 811 has been completed. There was minimum degradation to the structure which was easily repaired and the gutters and joins between the walls and deck tiles have been sealed, however water continued to track into Apartment 807". A post meeting note recorded "The work done by the contractors immediately following the meeting in resealing parts of the deck would appear to have solved the problem. We are just waiting on some rain and wind to confirm".
26/02/14	Further discussion concerning the leak into apartment 807 from apartment 806. "The whole balcony of Apartment 806 has been lifted, the tiles removed and it has been rebuilt and resealed which should resolve any more issues with water ingress into the apartment below".

[107] It can be seen that these minutes, spanning a six-year period, refer to recurrent issues with deck leaks originating from only three apartments (806, 811 and 815) affecting three other apartments (807, 817 and 818). There is also mention of a leak into apartment 609, but that was in September 2008 and it is not mentioned thereafter. Apart from the February 2011 entry concerning leaks caused by the failure of the level six walkways before they were remediated, the other leaks mentioned all concern interior leaks in toilets and bathrooms and are not related to weathertightness issues.

[108] The leak from the deck of apartment 815 was said to have been originally caused by the collapse of the tiled area around the spa pool and affected apartments 817 and 818 below. This occurred prior to Ms Leloir's appointment and is mentioned in the minutes dated 20 May 2008. While there is further mention of leaks into apartments 817 and 818 in the minutes of 20 March 2012, these issues were reported

as being managed and there is no further mention of them in the minutes in the intervening two-year period prior to Mr Roberts' purchase.

[109] The leaks from apartments 806 and 811, affecting apartment 807 below, appeared to have been difficult to overcome. However, it appears that the problems were addressed by the work carried out on the common wall between apartments 806 and 811 (referred to in the minutes dated 4 December 2013) and by removing the tiles on the balcony of apartment 806 and resealing that balcony (referred to in the minutes dated 26 February 2014). There did not appear to be any unresolved issues as at the date of Mr Roberts' purchase.

[110] The Judge considered that reports of water leaking into the apartments were a "constant theme" in the body corporate committee meeting minutes from the time Ms Leloir was appointed in December 2007.[59] That is undoubtedly correct for at least part of the time. From June 2009 to March 2013, the minutes of these meetings (eight in all) included as a standard item — "Leaks in the Building". However, from August 2013 onwards, this heading no longer appeared. As can be seen from the extracts in the table, the only relevant references were to the few specific apartments where the issues had not been finally resolved.

[111] Ms Leloir was apparently unaware of the major systemic weathertightness issues that existed at Sirocco at the time Mr Roberts settled his purchase on 3 April 2014. The February 2014 management report she authored recorded that the body corporate had completed the works required to rectify any balcony leaks (in apartments 806 and 811). No new leaks were referred to.

[112] In any case, the minutes do not disclose the multiplicity of serious systemic weathertightness issues at Sirocco that came to light following the reports from Silvester Clark and Maynard Marks, including, for example, the steel-framed balcony penetrations to fire spandrels, inadequately weatherproofed joinery openings including the lack of jamb and sill flashings and widespread problems associated with the monolithic cladding system. These would have been identified by a competent pre-purchase inspection report but not from reviewing the body corporate minutes.

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59 At [24].

Overall assessment

[113] One cannot help but have sympathy for both parties. Ms Leloir appears to have been a conscientious body corporate secretary who responded appropriately and efficiently in attempting to address all maintenance issues at Sirocco that were brought to her attention. She promptly provided all information sought by Mr Roberts' lawyers, and later by Mr Roberts himself. She offered to speak to Mr Roberts prior to the agreement becoming unconditional so that he could obtain a better understanding of the building. Like Mr Roberts, and indeed the other members of the body corporate committee, she evidently lacked the necessary expertise to identify the systemic weathertightness risks at Sirocco that would have been apparent to an expert. Ms Leloir was not morally blameworthy. However, she made misleading statements and must share responsibility for Mr Roberts' losses.

[114] On the other hand, Mr Roberts was aware of the leaky building crisis in general terms and wished to protect himself from that risk. He thought he had done so by making the limited enquiries he did. However, he now accepts he ought to have obtained a specialist pre-purchase building inspection report as was recommended in the agreement for sale and purchase he signed and by the Council in the LIM. Mr Roberts' failure to take this obvious precautionary step was a significant and direct cause of his loss. A competent report would have revealed serious and systemic weathertightness issues well beyond any information that could have been gleaned by Mr Roberts from a review of the body corporate meeting minutes even if he had sought these, as he should have done. Mr Roberts' acknowledged failure in this respect was both negligent and causally potent. His additional failure to request copies of the body corporate minutes was less causally potent for the reasons discussed but should nevertheless weigh in the balance.

[115] The Judge referred to other cases where reductions for contributory negligence ranging between 20 and 40 per cent had been applied.[60] Of these, the Judge considered the most analogous were *Body Corporate No 189855 v North Shore City Council*

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[60] Quantum judgment, above n 3, at [59].

(*Byron Avenue*)[61] where a 25 per cent reduction was applied and *Johnson v Auckland Council*[62] where the deduction was reduced by this Court on appeal from 70 per cent to 40 per cent. It may be observed that the reductions applied in those cases were significantly higher than here.

[116] Those cases both involved findings of negligence against councils for failing to meet their obligations under the Building Act 1991. A council's negligent performance of its statutory functions cannot be equated with the making of an innocently misleading statement by a layperson contrary to the FTA. Further, public knowledge about leaky building issues has increased in the years that have passed since the events giving rise to the claims in those cases. The need for purchasers to take basic precautions to protect themselves against that risk was more widely publicised and understood by the time Mr Roberts purchased his apartment in 2014. For these reasons, the comparative blameworthiness and causal potency calculus between those cases and the present is different. This is why, as this Court remarked in *Johnson*, comparisons with figures adopted in other cases is generally not particularly helpful.[63]

[117] In *Byron Avenue*, the Council was found liable for the negligent failure by its building inspectors to identify numerous weathertightness defects while carrying out inspections (94 in total) during the construction of a block of 14 residential units in Takapuna between January 1998 and March 2002. Venning J was satisfied the defects were in breach of the Building Code and ought to have been identified by the Council. These defects and Council's negligence were found to be "major contributors to the problem of moisture ingress".[64] Remedial works were carried out and completed in early 2004 but it transpired that these were not adequate. The Council declined to issue a code compliance certificate. The body corporate and owners sued the Council and others associated with the construction, including the person who carried out the failed remedial works. Reductions of 25 per cent were applied to reflect

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61 *Body Corporate No 189855 v North Shore City Council* HC Auckland CIV-2005-404-5561, 25 July 2008 [*Byron Avenue*].
62 *Johnson v Auckland Council* [2013] NZCA 662.
63 At [88].
64 *Byron Avenue*, above n 61, at [155].

the contributory negligence of those purchasers who acquired their units after the remedial works were carried out but without making appropriate enquiries. These reductions were upheld on appeal to this Court.[65]

[118] In *Johnson*, the Council admitted it was negligent in carrying out its functions under the Building Act. It negligently failed to identify defects in substantial alterations to the house and negligently issued a code compliance certificate. Despite the causal potency of Council's negligence, Woodhouse J reduced the damages by 70 per cent because the Johnsons were alert to the possibility that the house might have weathertightness defects at the time of their purchase in April 2009 given the widespread publicity about the leaky home crisis:[66]

> Mr and Mrs Johnson were experienced owners of valuable property and people who had over the preceding several years been investigating the purchase of a new home. Both of them had been involved in the establishment and successful operation of a substantial business which had been sold to good advantage. The widespread problems with leaky homes, including significant failures by local authorities adequately to perform their statutory duties of inspection and certification, had been widely publicised by 2009. It may readily be inferred that Mr and Mrs Johnson were well informed people. [They] nevertheless decided to proceed with the purchase. I am satisfied they took a calculated risk. This is central to my overall conclusion.

[119] On appeal, this Court pointed out that the enquiry is an objective one and to the extent this passage suggested otherwise, it was incorrect.[67] However, this Court agreed with the Judge that Mr and Mrs Johnson were on the alert.[68] They were aware of the possibility the property was a leaky home and chose to gamble against that possibility by failing to obtain a pre-purchase building report.[69] The Johnsons' contribution was reduced to 40 per cent for this negligent failure which was found to have been causative of the loss.[70]

[120] The Johnsons' decision to proceed with their purchase without obtaining a pre-purchase inspection report was negligent given what was known about leaky building risks in April 2009. Those risks were all the more apparent at the time of

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65 *O'Hagan v Body Corporate 189855* [2010] NZCA 65, [2010] 3 NZLR 445.
66 *Johnson v Auckland Council* [2013] NZHC 165 at [131].
67 *Johnson v Auckland* Council, above n 62, at [54].
68 At [68].
69 At [68] and [70]–[81].
70 At [94].

Mr Roberts' decision to declare his agreement unconditional in March 2014, five years later. Apart from further widespread publicity about the leaky building crisis, the Unit Titles Act 2010 had come into force providing for an enhanced disclosure regime and the standard form agreement for sale and purchase (signed by Mr Roberts) had been amended to include a standardised building report condition. In terms of relative blameworthiness, the Council's negligence in *Johnson* might be seen as being greater than that of Ms Leloir here. The Council negligently breached its statutory obligations and was directly responsible for the latent defects in the building. By contrast, Ms Leloir was a layperson who made an innocently misleading statement.

[121] We are conscious of the fact the experienced Judge had the advantage of presiding over both the liability and the quantum hearings. Nevertheless, contributory negligence is assessed according to an objective standard and, in this case, turns almost entirely on the written record. We respectfully consider Mr Roberts' contribution to his own loss was understated at only 15 per cent. This is lower than any of the authorities cited to us. In our assessment, a significantly greater reduction is required to reflect the parties' relative blameworthiness and the causal potency of their respective failures in contributing to the loss. In all the circumstances, we consider a 40 per cent reduction for contributory negligence, as contended for by Mr Mahuta-Coyle, would deliver a just outcome between the parties.

Post-hearing issue

[122] The Judge applied the 15 per cent reduction for contributory negligence to the special damages, but not to the general damages. Ms Leloir did not challenge this in her cross-appeal and the issue was not addressed at the hearing. However, it appeared to us in preparing the judgment that the omission to apply the reduction to all damages may have been the result of a slip, especially given that no explanation for this was given in the judgment. We therefore raised the issue with counsel after the hearing. The parties have now advised they agree that any reduction should apply to all of the damages. We consider this is appropriate.

Costs

[123] Mr Roberts has failed on his appeal. Ms Leloir has succeeded on her cross-appeal, but only in small part. In almost every respect, the High Court judgment has been upheld. In these circumstances, we consider that costs should lie where they fall.

Result

[124] The appeal is dismissed.

[125] The cross-appeal is allowed in part.

[126] The reduction for contributory negligence of 15 per cent is replaced with a reduction of 40 per cent. This is also to apply to the award of general damages. The judgment in the sum of $93,500 plus general damages of $25,000 is set aside and replaced with a judgment for $66,000 plus general damages of $15,000.

[127] Costs are to lie where they fall.

Solicitors:
Grimshaw & Co, Auckland for Appellant