IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA552/2023
[2024] NZCA 417

BETWEEN	ELIZABETH WATSON Appellant
AND	LEI ZHOU AND QIUYING ZHANG Respondents

Hearing:	17 June 2024
Court:	Cooke, Venning and van Bohemen JJ
Counsel:	D M Frandorfer for Appellant J T Wollerman and D A Fry and Respondents
Judgment:	4 September 2024 at 10.30 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B The cross-appeal is allowed in part.

C The proceedings are remitted to the High Court to address the further damages arising from the respondents' claim for breach of warranty on the basis outlined in paragraphs [100]–[101].

D The costs of the appeal and cross-appeal are to lie where they fall.

REASONS OF THE COURT

(Given by Cooke J)

Table of Contents

Introduction

[1] The appellant, Mrs Watson, appeals from a decision of the High Court awarding the respondents, Mr Zhou and Ms Zhang, $271,600 for mistake under the Contract and Commercial Law Act 2017 (the CCLA) and $15,000 for breach of a vendor warranty in relation to the sale of a residential property on standard terms and conditions.[1]

[2] Mr Zhou and Ms Zhang purchased the property from Mrs Watson. After settlement, they discovered that the property suffered from leaking issues. The High Court held that there was a common mistake between the parties that the property was sound and did not leak,[2] and that Mrs Watson was also liable for breach of warranty in connection with certain work undertaken on the property which required a consent which had not been obtained.[3] Mrs Watson appeals against the High Court's

---

1 *Zhou v Watson* [2023] NZHC 2328 [judgment under appeal].
2 At [149].
3 At [48] and [71].

finding of common mistake, and alternatively, submits that the High Court erred in assessing the quantum of relief for the cause of action.

[3] Mr Zhou and Ms Zhang cross-appeal against the Court's conclusion that there was no oral misrepresentation, and in relation to findings associated with the claim for breach of contractual warranty.

Background

[4] In 1969, Mrs Elizabeth Watson and her late husband, Mr Alan Watson, purchased a section on which a residential house was later constructed. Mr and Mrs Watson had undertaken various alterations and repairs to the property over the years.

[5] In early 2020, Mr and Mrs Watson listed the property for sale through their real estate agents, RedCoats Ltd. The selling agent from RedCoats Ltd was Ms Christine Kibblewhite. Ms Annie Liu also worked for RedCoats Ltd. She assisted Mr Zhou and Ms Zhang with a possible purchase of the property.

[6] Mr Lei Zhou (sometimes known as "Rocky") and Ms Qiuying Zhang (sometimes known as "Veronica") were recent immigrants to New Zealand. In February 2020, they went to see the property which was being marketed for sale. It was largely in its original condition.

[7] Mr Zhou and Ms Zhang viewed the property on three occasions before making a purchase offer. An important viewing took place on 10 February 2020. Ms Liu had arranged for a builder, Mr Huang, to come along with Mr Zhou and Ms Zhang for that visit. Mr and Mrs Watson were both also present. At the time, Mr Watson was suffering from dementia, and subsequent to the sale but prior to the High Court hearing, he died. Mrs Watson is in her 80s.

[8] It is agreed that there were some discussions about features of the property at the time of this inspection. There is a dispute whether there were particular statements made by Mrs Watson about whether the house suffered from leaks or not. We will address this below.

[9] Following the inspection, Mr Huang advised Mr Zhou and Ms Zhang that "the property looked to be in good condition" and there was only minor wear to some weatherboards and deck support that would require remediation. Mr Zhou and Ms Zhang subsequently decided to make an offer for the property, and they decided to do so unconditionally on the standard ADLS/REINZ terms.[4] After some brief negotiations, the parties entered into the sale and purchase agreement on 13 February 2020 for $848,000 (the Agreement). There was a pre-settlement inspection on 18 March 2020 during which Mr Zhou and Ms Zhang identified some minor issues with the property, but these were not resolved. Settlement proceeded in accordance with the Agreement on 19 March 2020.

[10] Just over a week after settlement, the property experienced substantial leaks during rainfall. Cellphone videos were introduced in evidence showing those leaks occurring at the time. Mr Zhou and Ms Zhang then obtained a report from a building specialist firm, Check Home Ltd, which identified significant defects and damage. Ms Zhang said that this suggested to her that the previous owners were likely aware of these issues. Subsequent expert advice was then obtained.

[11] The above events gave rise to the claim against Mrs Watson. Three main causes of action were advanced:

(a) misrepresentation (both orally and by concealment);

(b) common mistake;[5] and

(c) breach of warranty.

[12] By a judgment dated 24 August 2023, Gendall J dismissed the claim for misrepresentation and upheld the claims for common mistake and breach of warranty.[6] In relation to mistake he awarded $271,600 together with interest based on 70 per cent of the difference in value between the property in its damaged state and its value if it

---

4 Auckland District Law Society and Real Estate Institute of New Zealand "Agreement for Sale and Purchase of Real Estate" (10th ed, 2019).

5 Unilateral mistake was also pleaded but not considered by the High Court Judge given his conclusions on common mistake, see Judgment under appeal, above n 1, at [150].

6 Judgment under appeal, above n 1.

had been in an undamaged state.[7] He awarded $15,000 plus interest for breach of warranty representing the cost to make one of the walls where leaking had occurred compliant.[8]

Misrepresentation

[13] We deal first with the cross-appeal advanced by Mr Zhou and Ms Zhang in relation to the Judge's factual findings giving rise to his dismissal of the claim for misrepresentation.

[14] Both Mr Zhou and Ms Zhang gave evidence that Mrs Watson was asked during the property inspection on 10 February 2020 "[are there] any other leaks elsewhere in the house?", to which she responded "no". Mrs Watson denied that she had done so. The Judge concluded that it had not been proved that such a statement had been made. He held:

> [109] It is a somewhat vexed question, in light of all the circumstances I have outlined above, as to whether or not Mrs Watson did make the alleged representation to the effect that there were no leaks elsewhere in the house. On balance, and by a rather fine margin, I find that the plaintiffs have not been able to establish to the balance of probabilities that the representation was made, such that for present purposes, I must conclude that the alleged representation was not made.
>
> [110] If I may be wrong in that conclusion, however, then in any event I am satisfied it makes little difference here. This is because in my view if I was to find that the representation in question had been made then it was Mrs Watson's honest and reasonably held opinion that, as earlier leaks elsewhere in the house had been fixed, at the point of sale, there were no other leaks elsewhere in the house. The alleged statement, accordingly, could not reasonably be taken as a representation that the house was an entirely sound one with no future likelihood of weathertightness issues.
>
> [111] Again, if I may be wrong on that issue as well, then questions also arise as to whether any alleged representation would have itself induced Rocky and Veronica to enter into the SPA, bearing in mind first, the favourable advice about the house they had received from their builder, Mr Huang, and secondly, issues of reasonable reliance that arise here.
>
> [112] For all these reasons, but again by only a rather fine margin, I find that the plaintiffs have not been able to establish that an oral misrepresentation occurred here in terms of their second cause of action in their [amended statement of claim].

---

7 At [194].
8 At [195].

[15] On behalf of Mr Zhou and Ms Zhang, Mr Wollerman argued that the Court erred in making these findings. In terms of whether this statement was made, the evidence of Mr Zhou and Ms Zhang was clear and consistent, and it was corroborated by the only independent witness, the real estate agent, Ms Liu. By contrast, Mrs Watson's evidence was less definitive — she could not remember being asked by Ms Liu whether there were any leaks elsewhere, and her evidence was there were quite a few people around going around the property, a lot of voices, and she was being bombarded with questions. The claim for misrepresentation should accordingly have been accepted on the basis advanced.

[16] For Mrs Watson, Mr Fraundorfer supported the Judge's findings, stressing that these were based on findings of fact that should not be lightly overturned on appeal.

Analysis

[17] In accordance with the approach to general appeal identified by the Supreme Court in *Austin, Nichols & Co Inc v Stichting Lodestar*, an appellant is entitled to judgment in accordance with the opinion of the appellate court.[9] This includes an assessment of the facts whilst recognising the advantages that the lower court will have had in making factual findings.[10] The appellate court should nevertheless exercise caution in considering the challenges to findings based on credibility.[11] We approach the cross-appeal on that general basis, focusing on the Judge's factual findings which were the primary reason why this claim was dismissed, and which also have implications for the mistake claim.

[18] All witnesses agreed that there was a discussion with Mrs Watson concerning part of the ceiling in one room where a pipe had been plastered over/patched. Both Mr Zhou and Ms Zhang then gave evidence that the question about any other leaks was then asked by Ms Liu and answered by Mrs Watson. Ms Liu gave slightly different evidence, saying that the question was asked by Ms Zhang, but that she had translated it for Ms Zhang, and Mrs Watson then gave the answer.

---

9 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [16].
10 *Green v Green* [2016] NZCA 486, [2017] 2 NZLR 321 at [26]–[32].
11 *Austin, Nichols & Co Inc v Stichting Lodestar*, above n 9, at [13].

[19] We agree with the Judge that it is difficult to reconcile this evidence with the contemporaneous documents.[12] After the leaking at the property was discovered, there were a series of WeChat exchanges between Ms Liu, Mr Zhou, and Ms Zhang.[13] On 13 May 2020, Ms Liu sent Mr Zhou and Ms Zhang a messages asking:

> Do you remember you asked the vendor face to face some questions the first time we visited the house together? I remember we asked the vendor about the patched ceiling in the bedroom downstairs. She said it was fixed with no problem. Had you asked whether there was any leak elsewhere or something like that? What did she answer? Because I was with the kids mostly on that day, I am not sure about all the questions that you raised to the vendor.

A little later she further asked before Ms Zhang had replied:

> Back then the vendor did not disclose the water leak around the window to you, right?

And then a little later:

> Then I will confirm with our manager that the vendor did not tell us there was water leak issue.

[20] Mr Zhou then replied to these text messages in the following way:

> The vendor did not share any leak issue. Regarding that area she said it was a pipe popping out only.

A little later Ms Zhang said:

> We didn't talk to her on our own. I raised the question to her whether there was any asbestos. She said no, and you were beside us.

[21] These exchanges are not consistent with Ms Liu's evidence at trial that she asked Mrs Watson the question about leakiness herself, translating for Ms Zhang, or with the evidence of Ms Zhang and Mr Zhou that Ms Liu had asked Mrs Watson the question, and Mrs Watson had given the answer they described. Rather, Ms Liu was saying she did not know what, if anything Mrs Watson had said, and Mr Zhou stated that Mrs Watson "did not share any leak issue".

[22] Also on 13 May 2020, Ms Liu provided a formal report to Mr Morgan Philips at RedCoats Ltd explaining the events. She said:

---

12 Judgment under appeal, above n 1, at [97]–[104].

13 These messages were translated for evidence at trial.

> The first time they viewed the house was through the open home. As the Vendors are old people we didn't like to bother them. The second time I viewed the property (which after school time) the Buyers took 2 kids to the property. During that time the vendor, other groups of buyers, listing agent and I were there as well. As the vendors were old people they didn't like noise, so I looked after children downstairs outside. I let the buyer and builder look over the house by themselves and told them if they have any questions, they can ask vendors directly.
>
> When was I upstairs with the buyers we did ask some questions about the hot-water cylinder, insulation in the walls, also what happened about a trace of plaster that was fixed in the ceiling. The vendor explained there was a pipe in the ceiling that didn't look not nice, and they plastered it themselves.
>
> The Buyer also asked some other questions with the vendor face to face when I was outside looking after their young children.
>
> But the vendor had disclosure about the leaking problems.

[23] This confirms what was said in a more formal way. Given the evidence that it was Ms Liu herself who was said to have asked the question and received the answer from Mrs Watson, this email and the earlier exchanges are significant. If Mrs Watson had stated there were no leaks in the house Mr Zhou, Ms Zhang, and Ms Liu would have naturally emphasised this in their exchanges. This is particularly so as the exchanges were closer in time to the events, and at a stage where it was apparent that there was a significant issue about leaks in the house, and where the responsibility for the position that Mr Zhou and Ms Zhang were in was very much a live issue.

[24] We also see it as significant that it is apparent from the evidence of Mr Zhou and Ms Zhang that they understood that the vendors were obliged to point out any such leaking issues. Such an understanding could easily lead a person in their position to misremember a failure to disclose as inaccurate disclosure.

[25] Finally, whilst we agree that Mrs Watson's evidence appears less certain, she was ultimately clear in her evidence that she did not, and would not have said that the house did not leak. Her evidence was to the effect that, had she been asked she would have said there had been leaks which she believed had been fixed. We read her evidence as being consistent with her answering the questions at trial honestly and to the best of her ability.

[26] We accordingly agree with the High Court Judge that Mr Zhou and Ms Zhang did not prove, on the balance of probabilities, that Mrs Watson made the alleged statement.[14]

[27] We also agree with the Judge's observation that, even if such an answer had been given, there would have been an issue over whether it could reasonably be relied on given the circumstances.[15] This would have been a brief question and answer between a couple for whom English was a second language and a person in her 80s, who was finding the number of people in her home, and the noise they were making, a little difficult to manage. Even if the question and answer had in fact been given in these circumstances, it may well have been necessary for the communication to have been more clear cut before it would have been reasonable to rely on such an answer — for example by more formal follow up questions and answers. There was too much scope for miscommunication and misunderstandings for a single question and answer in these circumstances to be the sole basis for a claim of misrepresentation under the CCLA.

[28] Given these findings, we agree with the High Court Judge that the claim in misrepresentation based on an oral misrepresentation was not made out.[16] The cross-appeal on this issue is dismissed.

Mistake

[29] The Judge upheld the claim of common mistake under the CCLA. He held that both parties thought the house was sound and did not leak in any significant way.[17] In awarding discretionary relief under the CCLA he used the value of the property without its defects compared with its value with those defects, and then deducted 30 per cent because Mr Zhou and Ms Zhang contributed to their own loss and they potentially had a remedy against the builder which they did not pursue.[18] He dismissed other claims. This resulted in an award of $271,600.[19]

---

14 Judgment under appeal, above n 1, at [109].
15 At [110]–[112].
16 At [112].
17 At [136] and [149].
18 At [155]–[169].
19 At [169].

Arguments

[30] For Mrs Watson, Mr Fraundorfer argued that there was no evidence that Mr Zhou and Ms Zhang turned their minds to the question of the leakiness of the building at all, and accordingly that there was no mistake under the CCLA. Neither did Mrs Watson turn her mind to the issue of leaking, so she was not mistaken either.

[31] Moreover, the contract was the standard ADLS/REINZ agreement which is carefully drafted to fairly apportion risk through disclosure obligations and due diligence. No conditions were inserted by Mr Zhou and Ms Zhang notwithstanding that they had brought a builder along with them to the inspections. Such agreements proceed on the basis of caveat emptor. To allow this claim to succeed was inconsistent with s 21(2)(b) of the CCLA as it is inconsistent with the general security of contractual relationships.

[32] This is an old house, with potential issues apparent on inspection, and, as noted, a builder was with the purchasers during the inspection. The position can be distinguished from other cases where mistake has been upheld with the sale and purchase of real estate of these terms, including the decision of the High Court in *Shen v Ossyanin (No 2)* where there had been an express discussion between vendor and purchaser about leakiness.[20]

[33] Mr Fraundorfer also criticised the findings of the Court relating to relief and quantum, including those concerning mitigation, betterment, and additional adjustments that should have been made under s 28 of the CCLA.

[34] For the respondents, Mr Wollerman supported the Judge's analysis. The Judge had considered the relevance of caveat emptor and the requirement for common mistake. A number of decisions have held that a claim for mistake under the CCLA could apply in the context of agreements for the sale of land.[21]

---

[20] *Shen v Ossyanin (No 2)* [2019] NZHC 2430, (2019) 20 NZCPR 590.

[21] See, for example, *Ware v Johnson* [1984] 2 NZLR 518 (HC); *Snodgrass v Hammington* (1995) 10 PRNZ 672 (CA); and *Shen v Ossyanin (No 2)*, above n 20.

[35] The Judge assessed the factual circumstances leading up to the sale, including the repair work that Mrs Watson had engaged in to deal with the leakiness. Mrs Watson believed that the repair work meant that when she sold the house it was sound and did not have leaks. This was a mistake. Mr Zhou and Ms Zhang had been told to avoid monolithic clad houses as they may be prone to leaking. They wanted a sound house, and asked relevant questions relating to the status of the house at the time. Had they known the house was leaking they would not have proceeded with the sale. The house itself appeared to be sound and in good condition, although rugs had been placed in a manner that meant that prior leaking was not identified. Mr Zhou and Ms Zhang would not have proceeded with the sale if they were aware of the issues with the property that were discovered post-settlement.

[36] In relation to the arguments regarding the level of damages, Mr Zhou and Ms Zhang supported the High Court Judge's conclusions.

Analysis

[37] Broadly speaking, the requirements for the application of the CCLA for common mistakes are that:[22]

(a) both parties made the same mistake, or a different mistake about the same matter of fact or law; and

(b) the mistake influenced both parties in their decisions to enter the contract; and

(c) the mistake(s) resulted in a substantially unequal exchange of values or disproportionate consideration.

[38] There are other statutory limitations on the claim, including that arising from s 24(1)(c) of the CCLA that there not be a term of the contract which obliges a party to assume the risk of the mistake. It was not argued that s 24(1)(c) applied in the present case.

---

22 Contract and Commercial Law Act 2017, s 24(1).

[39] Section 21(2)(b) also provides that the powers under subpt 2 "must not be exercised in a way that prejudices the general security of contractual relationships". There has been little assessment on the meaning and effect of s 21(2)(b).[23] It was included in the predecessor to the CCLA, the Contractual Mistakes Act 1977 after consideration of the Contractual Mistakes Bill 1977 by the Statutes Revision Committee.[24] The reasons for its addition were explained by the Minister of Justice in the following terms:[25]

> A number of submissions to the select committee expressed concern at what was thought to be the effect of the Bill on the certainty that normally attaches to a written contract. While some of these submissions failed to take account of the existing law relating to mistake, the select committee nevertheless felt it desirable to spell out that the general security of contractual relationships should not be prejudiced by the Bill.

[40] We consider that s 21(2)(b) potentially limits the exercise of the remedial powers under the CCLA. The expression "prejudices the general security of contractual relationships" contemplates a situation where the grant of a remedy under the CCLA would be inconsistent with the certainty that is intended to apply in relation to the particular type of contract in question. A contract may not have a provision that is within the concept contemplated by s 24(1)(c), but the general nature of the contract, including in relation to questions such as the understood allocation of risk, may restrict the application of powers under the CCLA.

[41] This case involves the sale of residential real estate under the standard ADLS/REINZ terms. This is a standard form contract that is used in almost all residential property sales in New Zealand. One feature of this standard contract is that it generally proceeds on the basis of the common law principle of caveat emptor. The buyer is taking the risk associated with the acquisition of the property subject only to the contractual warranties set out in the standard terms, any other express conditions included the contract (including any additional warranties), and the application of any other principles of law such as misrepresentation under the CCLA, or the potential

---

23 See Ian Gault (ed) *Gault on Commercial Law* (online ed, Thomson Reuters) at [CCL21.01].

24 It was not included in the Bill when first introduced: see Contract Mistakes Bill 1977 (11-1). The Bill followed on from a 1976 report of the Contracts and Commercial Law Reform Committee: Contracts and Commercial Law Reform Committee *Report on the Effect of Mistakes on Contracts* (Wellington, May 1976).

25 (8 November 1977) 416 NZPD 4287. See also Andrew Beck and Richard Sutton "Contractual Mistakes Act 1977" in Law Commission *Contract Statutes Review* (NZLC R25, 1993) at [2.89].

application of the Fair Trading Act 1986, which limit caveat emptor.[26] If there is some important issue that affects the value but this issue does not go to one of the exceptions, the risk of this matter is taken by the purchaser.

[42] Risks associated with the acquisition of residential property under these terms are commonly addressed by offers to enter a contract under those terms being conditional on a satisfactory builder's report, or other techniques of this kind. It is also reflected in the statement on the final page of the standard form ADLS/REINZ contract which relevantly says:

> **BEFORE SIGNING THE AGREEMENT**
>
> …
>
> - It is recommended both parties seek professional advice before signing. This is especially so if:
>
>   …
>
>   - the purchaser wishes to check the weathertightness and soundness of the construction of any dwellings or other buildings on the land.

[43] This is not a term of the contract, but is advice contained within the standard terms that reflects the risk allocation that underlies the contract, and accordingly notifies the parties that caveat emptor is operating. In the present case, this feature was also reflected in the presence of a builder accompanying the prospective purchasers on their visit. They were also aware of weathertightness issues as a result of a previous unsuccessful potential purchase. Mr Zhou and Ms Zhang decided not to make their offer conditional on a satisfactory builder's report, however.

[44] We consider that this general contractual framework means that s 21(2)(b) restricts the exercise of the remedial powers under the CCLA through limiting what may be accepted as a qualifying mistake. There is no definition of "mistake" contained in the CCLA apart from it being specified to include a mistake of fact or law, although

---

[26] See D W McMorland *Sale of Land* (4th ed, Cathcart Trust, Auckland, 2022) at [2.01].

more extensive definitions were considered during the legislative process for the Contractual Mistakes Act.[27]

[45] It has been held that when a party fails to turn their mind to a particular matter there is no qualifying mistake — in other words, ignorance is not a mistake.[28] In other contexts, however, when both parties have forgotten about a particular matter, a mistake has been found.[29] As has been pointed out by commentators, the difference in these cases may depend on how the mistake contended for is formulated, and it may be possible to reformulate the ignorance cases so that a mistake is identified.[30] It is accordingly for the court to assess and determine whether a qualifying mistake arises from the states of belief held by parties to the contract. Section 21(2)(b) limits what can be held to be sufficient in the context of the contract in question.

[46] The mistake identified here by the Judge was expressed in slightly different ways, but the key finding was a belief of the parties that "the house was sound and did not leak in any significant way".[31] We consider that the operative concept associated with this finding is that there was a belief by the purchaser that the house was sound — the reference to leakiness is really an illustration of the soundness.

[47] The difficulty with this being a qualifying mistake in this contractual context is that it could arise in any situation where there is any underlying problem that the parties are unaware of. For example, an issue with subsidence, or even other unknown matters such as a plan by a public authority that the property be compulsorily acquired, could become a qualifying mistake. Both parties could erroneously believe there were

---

27 The original form of the Contractual Mistakes Bill contained a more detailed definition of "mistake": Contractual Mistakes Bill 1977 (11-1). This was removed from the final version of the Bill following discussion in the House, see (8 September 1977) 413 NZPD 2804. The definition of "mistake" in the Contractual Mistakes Act 1977, s 2 was simply "means a mistake, whether of law or of fact". This definition was carried through to the Contract and Commercial Law Act 2017 in s 23(1).

28 *New Zealand Refining Co Ltd v Attorney-General* (1993) 15 NZTC 10,038 (CA) at 10,045 per Cooke P, 10,047 per Gault J and 10,051 per McKay J; *Ladstone Holdings Ltd v Leonora Holdings Ltd* [2006] 1 NZLR 211 (HC) at [70]–[87]; and *Camelot Court Motel Ltd v Anderson* [2012] NZHC 153, (2012) 13 NZCPR 355 at [46].

29 *Slater Wilmshurst Ltd v Crown Group Custodian Ltd* [1991] 1 NZLR 344 (HC) at 356–357.

30 See D W McLaughlin and C E F Rickett "Mistake and Ignorance under the New Zealand Contractual Mistakes Act 1977" (1995) 8 JCL 193 at 196; and Stephen Todd and Matthew Barber *Burrows, Finn and Todd on The Law of Contract in New Zealand* (7th ed, LexisNexis, Wellington, 2022) at [10.3.3].

31 Judgment under appeal, above n 1, at [136].

no such issues. Such scenarios could be treated as a qualifying mistake with a formulation that the house was sound, or that it did not suffer from issues that substantively affected value, or alternative formulations of that kind.

[48] We do not consider that general beliefs of this kind can found a claim for mistake under the CCLA in this contractual setting. Allowing such formulations to qualify as mistakes would undermine the concept of caveat emptor that still generally exists with residential property sales on the standard ADLS/REINZ terms, and the certainty of contract that the standard terms promote in connection with the sale and purchase of real estate in New Zealand. It is especially important for the everyday subject of property sales that the law be as straightforward as possible.[32] If this kind of mistake operated in this context, the CCLA could be applied in any sale of property on the standard terms whenever it transpired that there was an unknown issue of significance affecting the value of the property. This would generally undermine the certainty of property sales.

[49] It is relevant to consider the history of the application of the CCLA in relation to mistake in recent decisions involving the standard ADLS/REINZ terms. In *Magee v Mason*, this Court considered an appeal against a decision upholding a claim for misrepresentation associated with a sale on these terms.[33] The purchasers had asked one of the vendors whether the house was a leaky building, and the vendor had replied: "Absolutely not, we have never had any issues with the property."[34] The house turned out to have weathertightness issues. The majority held that the vendor's statement did not involve a misrepresentation and the appeal was allowed.[35] Professor McLauchlan subsequently suggested the result in this case may have been different if it had been addressed as a claim for mistake under the CCLA.[36]

---

32 *Hunt v Wilson* [1978] 2 NZLR 261 (CA) at 273 per Cooke J.

33 *Magee v Mason* [2017] NZCA 502, (2017) 18 NZCPR 902. The agreement in question was under the 8th edition of ADLS/REINZ terms, but the difference in the versions is not material.

34 At [34] per Miller and Gendall JJ.

35 At [55] per Miller and Gendall JJ.

36 David McLauchlan "Misrepresentation? Or was it a case for relief on the ground of common mistake?" [2018] NZLJ 13.

[50] In *Shen v Ossyanin (No 2)*, the High Court then upheld a claim for common mistake under the CCLA applying the approach proposed by Professor McLauchlan.[37] The Court had earlier held that there had been no misrepresentation about whether the house leaked, but that the purchaser had asked the vendor whether the house leaked, and that vendor had (honestly) replied that it did not.[38] A claim for common mistake was upheld on the basis that both parties were mistaken about the house's leakiness.[39]

[51] In both these cases the question of weathertightness/leakiness was expressly raised between vendor and purchaser. A basis for a mistaken belief in relation to the weathertightness/leakiness of the house potentially arose as a consequence. But in the present case, the Judge did not find that there was any relevant discussion between vendor and purchaser about the weathertightness/leakiness of the house.[40] For the reasons outlined above, we agree with this finding. There was no other evidence that the vendors or purchasers directly considered leakiness. The absence of evidence that weathertightness/leakiness was a matter that was raised or considered has resulted in the Court identifying the relevant mistake based on a belief in the "soundness" of the property, with weathertightness essentially seen as part of that concept. The mistake was described by the Judge as mistake about:

(a) "the physical characteristics and water-tightness of the house";[41]

(b) that "the house was sound and did not leak in any significant way";[42]

(c) "as to what were very important physical characteristics of the house including its general watertightness";[43]

---

37 *Shen v Ossyanin (No 2)*, above n 20. The Judge had reached a preliminary view that contractual mistake was established in an earlier decision: see *Shen v Ossyanin* [2019] NZHC 135. These observations were confirmed in the later decision: see *Shen v Ossyanin (No 2)* at [16]–[55].

38 *Shen v Ossyanin*, above n 38, at [110].

39 *Shen v Ossyanin (No 2)*, above n 20, at [16]–[55]. See also *Shen v Ossyanin*, above n 37, at [105]–[109].

40 Judgment under appeal, above n 1, at [109].

41 At [136].

42 At [136].

43 At [137].

(d) "that the house was indeed sound and had no significant leaking issues";[44] and

(e) "the house was sound and did not have significant leaks".[45]

[52] In all of these formulations it is the "soundness" of the building that is first identified, with leakiness then said to be included within that concept. The pleaded mistake in the amended statement of claim was that "the property did not leak and/or was a sound one with no likelihood of weathertightness problems". It was necessary for the mistake to be formulated in those more general terms given that, on the Judge's findings, weathertightness/leakiness was itself not raised by the purchasers with the vendors, or otherwise specifically considered by either party at the time of purchase. There was nevertheless a basis for the Judge to find that the purchasers wanted, and thought they were getting, a "sound" home. It is relevant that the Judge considered that it was arguable that Mrs Watson had "caused" the mistake, which we consider was a finding that she had greatest responsibility for what was an unsatisfactory situation.[46]

[53] We consider that these findings reflect the difficulty with this state of belief founding a claim for mistake under the CCLA under the standard ADLS/REINZ contract. There are a number of factors that could affect the soundness, or the inherent value of a property. To allow this kind of belief, or assumption about the characteristics of the property to give rise to a claim for mistake under the CCLA would be inconsistent with the essential nature of this contract, and accordingly how this standard form contract is intended to operate in the market for house sales.

[54] It is also necessary for the mistake to have influenced the entry of the contract.[47] The High Court Judge proceeded on the basis that neither the vendors nor the purchasers would have proceeded with this contract had the true position been known about the leakiness of the property.[48] But that is not what must be proved under

---

44 At [146].
45 At [149].
46 At [142]–[143].
47 Contract and Commercial Law Act, s 24(1)(a).
48 Judgment under appeal, above n 1, at [137]–[138].

s 24(1)(a)(ii). It must be shown that all parties were "influenced in their respective decisions to enter the contract by the same mistake".[49]

[55] This would normally require parties to have turned their mind to the mistaken matter for it to have had an influence on the decision to enter the contract. In this particular context, we consider that the satisfaction of those elements required greater particularity about the erroneous matter of fact, and how it influenced the decision of the parties to enter the contract, before the elements could be said to be satisfied. If that level of particularity is not satisfied then the requirements of the CCLA are being applied in a way that undermines the desirability for general certainty in relation to contracts for the sale of real estate in New Zealand.

Conclusion

[56] For these reasons, we accept Mrs Watson's argument that the appeal should be allowed.

[57] In this contractual context, the requirement that there be a common mistake and that it influence the parties in their decision to enter the contract must involve a more specific mistake before the CCLA can be applied in the way that does not undermine the general security of contractual relationships in the way contemplated by s 21(2)(b).

[58] There is still room for the CCLA to operate in this contractual context, but it requires a level of particularity. The parties' general belief that the building is sound, and that there are unlikely to be unknown defects or other matters that may affect its value, will not be sufficient to be a qualifying mistake, and neither can such a belief be said to have influenced the entry of a contract without something more explicit.

[59] Given these findings, it is not necessary to address Mrs Watson's further grounds of appeal relating to the quantum of damages awarded on the mistake claim.

---

[49] Contract and Commercial Law Act, s 24(1)(a)(ii).

Breach of warranty

[60] We now address the remaining aspect of Mr Zhou and Ms Zhang's cross-appeal. Mr Zhou and Ms Zhang advanced, as their first cause of action in the High Court, a claim for breach of contractual warranty under the Agreement. The Agreement provided:

> 7.3 The vendor warrants and undertakes that at settlement:
>
> …
>
> (6) where the vendor has done or caused or permitted to be done on the property any works:
>
> (a) any permit, resource consent, or building consent required by law was obtained; and
>
> (b) to the vendor's knowledge, the works were completed in compliance with those permits or consents; and
>
> (c) where appropriate, a code compliance certificate was issued for those works.

[61] Mr Zhou and Ms Zhang contended that there were three categories of unconsented building works that had been undertaken which required a consent. The first related to work undertaken on an upper deck. The second related to a retaining wall. The third related to drainage work undertaken on a lower storey of the building.[50]

[62] Mr Zhou and Ms Zhang argued that, had the required building consents been applied for, the Hutt City Council (the Council) would have undertaken wider weathertightness assessments of the property and discovered further defects with the weathertightness of the property, not just in relation to the work to which the application related, but to the whole property. In the High Court, Mr Zhou and Ms Zhang sought the full cost of remediating the whole property (or the equivalent diminution in value) on this basis.

[63] The Judge accepted the work undertaken on the deck may have been undertaken in 2006 and that if that was so it was accepted by Mrs Watson's expert that

---

[50] The claim relating to the drainage work was not pleaded in the amended statement of claim. An application to amend the pleadings was advanced at trial but not expressly addressed by the Judge. The Judge acknowledged the dispute about this aspect of the pleadings in the judgment and ultimately addressed the issue regardless: see Judgment under appeal, above n 1, at [35]–[36].

a consent was required.[51] In relation to the retaining wall, the Judge held that the wall was over 1.5 m, and accordingly that it required a building consent as the experts had agreed.[52] In relation to the drainage work, the Judge indicated there was some doubt as to whether this work required building consent.[53]

[64] The Judge held that the proper award of damages for breaches of warranty should be limited to the cost of bringing the relevant building work up to the standard required by the Building Code.[54] He recorded that the warranty should only bear its ordinary and natural meaning and that it was not a warranty that the home in question was watertight.[55] He rejected Mr Zhou and Ms Zhang's argument that the costs for remedying the water damage to the property could be recovered on this basis. He held that it was too uncertain as to what the Council may have done when inspecting the work for which consents were required, and the lack of consent was not causative of the damage done to the house.[56] He found that this damage was too remote, albeit "by a reasonably fine margin".[57]

[65] Given those findings, the award of damages was limited to $15,000 excluding GST, being the cost of making the retaining wall compliant.[58]

Arguments

[66] Mr Wollerman, for Mr Zhou and Ms Zhang, argued that the High Court had erred in finding that there was doubt that the drainage work required a building consent. The Judge was correct in finding the deck work required a building consent. If the building consents had been sought for the drainage work and the deck work, the Council would have undertaken a wider assessment of the weathertightness of the property. Whilst the argument was similar to that advanced in *Newton v Stewart*, there were distinguishing features in the present case.[59]

---

51 Judgment under appeal, above n 1, at [47].
52 At [48].
53 At [61]–[62].
54 At [64]–[66], citing *Bhargav v First Trust Ltd* [2023] NZHC 174 at [44]; and *Ford v Ryan* (2007) 8 NZCPR 945 (HC) at [46].
55 At [69], citing *Newton v Stewart* [2013] NZHC 970 at [98].
56 At [70], citing *Newton v Stewart*, above n 55, at [52].
57 At [70].
58 At [68] and [72].
59 *Newton v Stewart*, above n 55.

[67] Where a consent is required but has not been sought, it is a question of assessing what would have happened if it had been sought. It was wrong for the Judge to say there would have been doubt about what the Council would have done as the Council would have considered weathertightness to be of critical significance. The expert evidence was that the work had interrelated aspects, and inspections would have been required. The authorities relied upon by the Judge were not instructive. The case was more similar to *Anderson v De Marco*, where the Court had held that, had a consent been applied for, the interrelated weathertightness problems with the property would have been discovered.[60]

[68] Even if the Judge did not award damages for the cost of remediating the entire property, evidence was also produced for costs required to remediate the retaining wall, deck, and drainage, and corresponding valuation evidence was also provided. Damages should at least have been awarded on that basis.

[69] For Mrs Watson, Mr Fraundorfer argued that neither the work on the deck nor the drainage work required a building consent. In relation to the drainage work, this was a minor alteration to a drain falling within sch 1 of the Building Act 2004. It was also prejudicial to allow the drainage claim to be advanced which had not been within Mr Zhou and Ms Zhang's pleading, with a later application for amendment not addressed by the Court.[61]

[70] Mr Fraundorfer also supported the Judge's findings in relation to causation. It was not established that the Council would have addressed any wider issues concerning weathertightness. The way that Mr Zhou and Ms Zhang had presented their case in this respect meant that this claim was rightly dismissed.

Analysis

[71] The starting point for assessing the remedy for a breach of a contractual warranty is the normal approach for breach of contract. When a party has warranted that a particular matter is true, a breach of contract is established by the plaintiff

---

60 *Anderson v De Marco* [2020] NZHC 2979, (2020) 21 NZCPR 758 at [123].

61 Mrs Watson acknowledged that the Judge addressed the pleadings issue in the judgment, see Judgment under appeal, above n 1, at [36].

showing that the matter is not true. The plaintiff need not show that the defendant was fraudulent or negligent in making the relevant statement, only that it is false. The obligation of the defendant is strict — liability flows from non-performance.[62]

[72] The basis for the award of damages for breach of warranty is the same as for other contractual breaches. A plaintiff is entitled to be put in the position they would have been in had the contract been performed.[63] So Mr Zhou and Ms Zhang were entitled to an award that put them in the position they would have been had the relevant work been conducted with any required building consents. Usually, an award of damages would be based on the diminution in value, but the approach is not inflexible.[64]

[73] If a consent was not obtained when it should have been, then Mr Zhou and Ms Zhang may be entitled to an award representing the cost of now obtaining a consent, and having work undertaken so that the building is compliant. In addition, Mr Zhou and Ms Zhang may be entitled to an award of damages to compensate for any damage to the property arising from the non-compliant nature of the work undertaken, particularly if the non-compliance and damage were not apparent to them when purchasing the property.[65]

(i) What damages were recoverable?

[74] We agree with the Judge that damages could not be awarded to Mr Zhou and Ms Zhang on the basis advanced at trial.[66]

[75] Mr Zhou and Ms Zhang contended that, had the required consents been applied for, the more profound problems with the leakiness of the house would have been

---

62 See John Cartwright *Misrepresentation, Mistake and Non-Disclosure* (6th ed, Sweet & Maxwell, London, 2022) at [8–02] and [8–23]. See also *Gedye v South* [2010] NZCA 207, [2010] 3 NZLR 271, aff'd *Gedye v South* [2010] NZSC 97, [2010] 3 NZLR 271 at [3]–[4].

63 See Todd and Barber *Burrows, Finn and Todd on The Law of Contract in New Zealand,* above n 30, at [21.2.1].

64 *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726 at [24] and [27] per Elias CJ, [156] per Tipping J, and [191] per McGrath J; and *Leisure Investments NZ Ltd v Grace* [2023] NZCA 89, [2023] 2 NZLR 724 at [184].

65 If a purchaser is aware of the damage, it can be presumed to have been reflected in the purchase price such that no loss would have arisen.

66 Judgment under appeal, above n 1, at [71].

identified by the Council, and more widespread remediation would then have been required. We agree that this consequential effect was not established on the evidence. Mr Zhou and Ms Zhang did not show the Council would have required an extensive remediation exercise over the whole property. Indeed, we consider it unlikely that any other weathertightness issues, not directly associated with the work in question, would have been identified by any inspections by the Council or otherwise. It was not shown that the cost of this remediation was caused by the breach of the warranty.

[76] But we do not consider that these findings are sufficient to fully address Mr Zhou and Ms Zhang's claim for damages for breach of warranty. Whilst Mr Zhou and Ms Zhang were seeking to recover the entire cost of remediating the whole building, this did not disqualify them from being awarded the direct loss attributable to the breach of warranty in a more particular way.[67]

[77] The Judge did address this category of damages with respect to the retaining wall, finding that a building consent was required for this wall, that it had not been obtained, and that $15,000 was the cost of now bringing that wall up to Building Code standards.[68] That was the basis of the award in relation to breach of warranty. There is no challenge to these findings. But the Judge did not make such findings with respect to the deck or the drainage work.

(ii) The deck work

[78] With respect to the deck, the Judge did not make a definitive finding that a building consent was required for this work, although he noted that Mrs Watson's expert appeared to agree with Mr Zhou and Ms Zhang's expert that a consent would have been required if the work had been undertaken in 2006.[69] If so, Mr Zhou and Ms Zhang could have been awarded damages representing the cost of now bringing the deck up to Building Code standards, and possibly for any consequential damage arising from the work not being done to that standard.

---

67 High Court Rules 2016, r 5.31(2).
68 Judgment under appeal, above n 1, at [59]–[60], and [67]–[68].
69 At [45]–[47].

[79] However, Mr Zhou and Ms Zhang did not provide any clear identification of the particular costs that would have been necessary to bring the deck up to standard, or identification of any damage caused to the property because the deck work was not at that standard. We therefore do not see a basis upon which Mr Zhou and Ms Zhang could have been awarded additional damages on the more limited basis. We accordingly agree with the Judge that no additional award associated with the deck could properly be made.

(iii) The drainage work

[80] We consider the drainage work to be in a different category, however. The drainage work was important because it is clear from the evidence that there has been significant water ingress at this location which has caused damage to the building. The very purpose of the building work for which consent was alleged to be required, but not obtained, was to prevent this water ingress. Mrs Watson explained that she had had work done on the property prior to sale to remedy this problem. It is also apparent that Mr Zhou and Ms Zhang were not aware of this water ingress, or the water damage, at the time of the property sale.

[81] We consider that an award of damages to Mr Zhou and Ms Zhang for breach of warranty in relation to this work could involve the cost of now bringing the drainage work associated with the building up to Building Code standards, and the remediation of the damage caused to the building by that work not being undertaken pursuant to a building consent that would have required that standard to be met.

[82] The position concerning the drainage work had an additional complication. A claim in relation to that work had not been specified in Mr Zhou and Ms Zhang's amended statement of claim dated 31 October 2022, but they had made an application at trial to amend their pleadings to include it. Mrs Watson opposed the grant of leave. The Judge did not expressly rule on the application, but he nevertheless addressed the drainage work in the judgment.[70] Given those circumstances, we consider that the only appropriate course is to proceed on the basis that the Judge implicitly granted

[70] At [35]–[36].

leave to amend the pleading. We consider that there is no real prejudice to Mrs Watson in the grant of leave. Two matters then needed to be addressed:

(a) whether the work undertaken in relation to the drainage required a consent; and

(b) whether any loss arose from the work being done with a consent.

(iv) Was a consent required for the drainage work?

[83] The Judge held there was some doubt about whether the December 2019 work required a consent on the basis it was more in the nature of general maintenance to an existing drain, and accordingly a minor alteration which would be exempt work.[71]

[84] We do not agree with the Judge's analysis.

[85] Mr Zhou and Ms Zhang's expert, Mr Tidd, gave evidence that a consent would have been required for this work given cl E2 of the Building Code. The Judge recorded that it appeared that Mrs Watson's expert, Dr Stahlhut, agreed that if water proofing was carried out to the foundation wall of the building, a consent, or at least an application for an exemption, would have been required.[72] It is also apparent from the evidence that the area of the building in question suffers from significant water ingress in certain conditions, and that damage was caused by that water ingress when it occurred.

[86] We consider that the evidence shows that this work fell into a category where the weathertightness system for this part of the building had failed. We do not consider that the work to address this can be classified as general repair, maintenance, or replacement under sch 1 of the Building Act as the Judge suggested and as Mr Fraundorfer argued.[73] Schedule 1 relevantly provides that a building consent is not required for the following work:

---

71 At [61].
72 At [49].
73 At [61].

> **1 General repair, maintenance, and replacement**
>
> (1) The repair and maintenance of a building product or an assembly incorporated in or associated with a building, provided that a comparable building product or assembly is used.
>
> …
>
> (3) However, subclauses (1) and (2) do not include the following building work:
>
> …
>
> (c) repair or replacement (other than maintenance) of a building product or an assembly incorporated in or associated with a building that has failed to satisfy the provisions of the building code for durability, for example, through a failure to comply with the external moisture requirements of the building code; or
>
> …

[87] It is clear that a building consent is not required simply because building elements such as roofing or cladding need to be repaired and there is leaking. This kind of repair work happens all the time and no consent is required. But when a weathertightness system has completely failed and there is significant leaking causing damage to the building interior, the work cannot accurately be categorised as only maintenance. We consider that the warranty was breached here for this reason. The work to repair the failed weathertightness system in this part of the house required a consent.

(v) Damage caused by the breach

[88] The next question is to identify the damages that arise from the work being undertaken without a building consent. Mr Zhou and Ms Zhang are potentially entitled to the cost of bringing that building up to Building Code standards. We agree with the Judge that the relevant warranty was not that the house did not leak.[74] Rather, it is a warranty that all work done on the house was undertaken with a consent when required. But Mr Zhou and Ms Zhang are still potentially entitled to the cost of repairing the damage to the property caused by the work not being up to the standard that would have been required if a consent had been sought.

---

[74] At [69].

[89] There appears to be little doubt that Mrs Watson and her husband had work undertaken to fix this weathertightness problem in 2019, at a time when the Building Act was in force, and when a building consent would have been required. But the work in 2019 was, on Mrs Watson's evidence, a second attempted repair. An earlier attempt to fix the problem had been unsuccessful. It was unclear from the evidence when the earlier repair work took place and there can be issues arising from the fact that the standards of the Building Code have changed since the relevant work was undertaken.[75] But, as the Judge found, the relevant dates would not have been known to the respondents.[76] Neither could Mr Zhou and Ms Zhang know when and how the relevant damage occurred.

[90] In those circumstances, an evidential burden fell to Mrs Watson to show that that earlier building repair work occurred at a time before a building consent was required, that the relevant standards under the Building Code were then lower so that the work done was compliant with the Building Code, or that the damage to the building was not the consequence of the repair work not being undertaken in accordance with a building consent.[77]

[91] It is plain that Mrs Watson and her husband were very aware of the leaking occurring in this area. It had previously caused reasonably significant damage. Part of the carpet had been cut away because water had entered into the adjacent living room. Rugs had been placed over the areas where the carpet had been cut away. The placement of those rugs over this area meant that this damage was not apparent to Mr Zhou and Ms Zhang when they undertook their inspections of the property. Mr Zhou and Ms Zhang's claim for misrepresentation by concealment was rejected by the High Court,[78] but these actions nevertheless played a part in Mr Zhou and Ms Zhang being unaware of the previous water damage.

[92] Mr Zhou and Ms Zhang have proved that there was a failure of the weathertightness system in this location, that work to address this had been undertaken

---

75 See, for example, *Ford v Ryan*, above n 54, at [46]–[47].
76 Judgment under appeal, above n 1, at [36].
77 See *Halsbury's Laws of England* (5th ed, 2020, online ed) vol 12 Civil Procedure at [700]. See also *Ansley v Prospectus Nominees Unlimited* [2004] 2 NZLR 590 (CA) at [42]–[48].
78 Judgment under appeal, above n 1, at [113]–[120].

by the vendors without a building consent when it was required, that the work had failed to address the issue, and that damage had been caused by water ingress. In the absence of evidence from Mrs Watson showing that damage had occurred before the building works requiring consent were undertaken, or that the Building Code requirements were lower at the time the work was done, we consider that Mrs Watson did not discharge the evidential burden on her, and that Mr Zhou and Ms Zhang have proved their claim on the balance of probabilities.

[93] They are entitled to an award of damages representing the cost of repairing the damage caused by the water ingress resulting from a failure of the building work to meet the requirements of the Building Code at this location in addition to the cost of bringing the building to Code standards. That is because that damage would not have occurred if it were true, as Mrs Watson warranted, that the building work had been undertaken in accordance with a consent, and Mr Zhou and Ms Zhang were unaware of the problem, or the damage when they made their successful offer.

[94] We also consider that this is the correct basis for the award of damages rather than damages based on diminution of value in this context. The area of leakiness, and the damage caused by the leaks, needs to be repaired. This is a residential property where people such as Mr Zhou and Ms Zhang and their children will live and it is necessary to bring it up to appropriate standards for habitation.

(vi) Quantum of damages for breach of warranty claims

[95] Given the above conclusions, there remains the difficulty that the High Court Judge did not make any findings in relation to damages flowing from any breach of warranty in respect of the drainage works. He rejected the broader claim by Mr Zhou and Ms Zhang, although "only by a reasonably fine margin" but did not address this more particular claim.[79]

[96] At the hearing of the appeal, we gave leave to Mr Zhou and Ms Zhang to file a memorandum to identify whether the evidence before the High Court identified the cost of now bringing this area up to the requirements of the Building Code, and

[79] At [70].

whether the evidence also addressed the cost of remediating the damage associated with this weathertightness failure. We also gave leave to Mrs Watson to respond.

[97] Mr Zhou and Ms Zhang filed a memorandum contending that the supplementary evidence of Mr Robertson at trial had addressed these issues, and using his evidence they identified the cost of remedying the weathertightness issue at $46,830.30, and the cost of remedying the water damage at $48,208.50, a total of $95,110.81 including GST.

[98] In response, Mrs Watson noted a number of issues concerning Mr Zhou and Ms Zhang's calculations, including a number of margins that had been added. She filed a revised calculation of cost based on the evidence of Dr Stahlhut and Ms van Eden. This totalled $33,916.87 including GST. Mrs Watson also then deducted the amount awarded in relation to the retaining wall already awarded ($15,000 excluding GST), leading to an amount of $14,492.93 plus GST. In relation to any wider award for the water damage, Mrs Watson argued that there was no coherent evidence before the High Court that could form the basis of a further award.

[99] The relevant range for the award accordingly appears to be between approximately $15,000 and approximately $95,000.

[100] Somewhat reluctantly, we have reached the view that we are not in a position to finally resolve what the award should be. We are conscious that there is a significant need for finality in this litigation. It is being conducted between ordinary members of the community in relation to a residential property sale that has gone wrong. Mrs Watson has been in receipt of legal aid. Unfortunately, however, any attempt by us to determine the amount of the award runs the risk of being arbitrary. In these circumstances we feel we have no option but to remit this question to the High Court for determination. It is our expectation that the parties, with the assistance of their lawyers, will be able to resolve the remaining difference without further litigation, and litigation cost.

[101] For the avoidance of doubt, we give the following directions about the matter remitted to the High Court:

(a) Mr Zhou and Ms Zhang have established that Mrs Watson is liable for breach of warranty in respect of the drainage works. Mr Zhou and Ms Zhang are entitled to damages representing the cost of bringing this area of failed weathertightness up to the weathertightness standards of the Building Code, and the costs of remediating the water damage that has occurred to the property as a consequence of water entry at this point. Questions of liability and causation are no longer alive to be addressed. The question is simply the calculation of damages on the above basis but taking into account what has already been awarded (if relevant).

(b) The parties should be allowed to update their expert evidence directed to these issues along the lines of what has been provided in their supplementary memoranda filed in this Court. The objective is to fairly and accurately identify the costs in question. We do not anticipate this being an elaborate exercise, however. It may be possible for the experts to agree on the amount. Expert conferral under r 9.44 of the High Court Rules may well be appropriate if the matter has not been able to be resolved by prior discussions.

(c) Mr Zhou and Ms Zhang are not to reargue their other claims, such as any other claims for water damage elsewhere. The inquiry is to be limited in the way identified above.

(d) As we see it, given that the remaining issue is limited to the award of damages, the matter falls within the jurisdiction of an Associate Judge under s 20(1)(f) of the Senior Courts Act 2016. We do not say this to suggest that this is how the matter must proceed, but simply identify it as an option.

Costs

[102] As to costs, given that both parties have been successful with their respective appeals, we consider that costs in this Court should lie where they fall. We note that Mrs Watson has been legally aided.

[103] The High Court awarded costs in the respondents' favour. Whilst the award of damages will now be lower we consider that this award remains appropriate.

Conclusion

[104] The appeal is allowed.

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

[106] The proceedings are remitted to the High Court to address the further damages arising from the respondents' claim for breach of warranty on the basis outlined in paragraphs [100]–[101].

[107] The costs of the appeal and cross-appeal are to lie where they fall.

Solicitors:
Bush Forbes, Tauranga for Appellant
Dalzell Wollerman, Wellington for Respondents