

FOR SALE: BEAUTIFUL FAMILY HOME, 3 BEDROOMS,
FRIENDLY POLTERGEIST AND UNIQUE REPUTATION AS
LOCAL MURDER SITE — THE OBLIGATIONS OF DISCLOSURE
ON REAL ESTATE AGENTS UNDER THE FAIR TRADING ACT
(NZ)/TRADE PRACTICES ACT (CTH).

DEBRA WILSON*

I. INTRODUCTION

The doctrine of *caveat emptor*¹ requires a prospective purchaser to satisfy himself as to the quality of the property he is considering purchasing. There is therefore no obligation on the vendor to reveal any information about the property, and liability will only arise if the vendor makes a positive misrepresentation concerning the property. Although *caveat emptor* was initially the standard rule applied to the sale of residential properties, a series of exceptions developed in response to a change in social conditions following the First World War have severely limited its application.

This paper begins with a brief discussion of the development and decline of *caveat emptor*. It then considers a specific category of potential claims arising as a result of the sale and purchase of residential property, being damages for the failure to reveal that the property has a latent, stigmatising characteristic which is likely to have an effect on the value of the property.

Two differing approaches to these stigmatised property cases in other jurisdictions are then considered; first, the United States, which has relied on a combination of *caveat emptor* and specific disclosure legislation to determine liability and, second, the United Kingdom, which has considered the non-disclosure of stigmatising factors as a matter of interpretation of the contract between vendor and purchaser.

A recent New South Wales case, *Hinton v Commissioner for Fair Trading* ('*Hinton*'),² which involved the failure of real estate agents to disclose that three members of a family had recently been murdered in the house, raised the possibility that the *Fair Trading Act 1987* (NSW) could be applicable in stigmatised property cases in Australia. This paper considers the application of the *Trade Practices Act 1974* (Cth), the state Fair Trading Acts and also the New Zealand *Fair Trading Act 1986* to these type of cases, and suggests that while a claim under these Acts may be established due to the failure to disclose stigmatising characteristics, the additional requirements in the remedies provisions will likely reduce, if not prevent, the applicability of the Acts to stigmatised property cases.

II. THE RISE AND DECLINE OF CAVEAT EMPTOR

Caveat emptor was first applied to real estate transactions in England in the 16th century.³ It was considered an appropriate rule on the basis that English society at the time was agrarian in nature. It was the land itself that was therefore of the greatest value to the purchaser. Structures built on the land were generally sufficiently basic in design that any defects in their quality were patent, or identifiable by a potential purchaser on close inspection.⁴ Provided that there was no active misrepresentation or fraud by the vendor, the

* Lecturer, Business Law, Massey University.

1 The full Latin phrase is '*caveat emptor, qui ignorare non debuit quod jus alienum emir*' ['let a purchaser, who ought not be ignorant of the amount and nature of the interest which he is about to buy, exercise proper caution'].

2 *Hinton v Commissioner for Fair Trading* [2006] NSWADT 257 ('*Hinton*').

3 Alex Johnson, 'An Economic Analysis of the Duty to Disclose Information: Lessons Learned from the *Caveat Emptor* Doctrine' (2008) 45 *San Diego Law Review* 79, 102.

4 Caryn Chittenden, 'From *Caveat Emptor* to Consumer Equity — The Implied Warranty of Quality Under the Uniform Common Interest Ownership Act' (1992) 27 *Wake Forest Law Review* 571, 578.

purchaser was considered to be in as good a position as the vendor to identify any defects in the property.

The decline of caveat emptor began in the 1930s in England⁵ as a result of an increase in the mass production of houses due to property damage following the First World War. Due to increased demand, houses were built more quickly and were of a poorer quality than previously.⁶ Houses were also more complex in design, resulting in more defects being classified as latent, or not readily identifiable even on the purchaser's close inspection. Further, the nature of purchasers had changed. Houses were now being purchased by the middle class, who had a tendency to buy and sell houses more frequently and were therefore not as careful in inspecting properties as the pre-World War purchasers, who were generally looking for a long-term home.⁷ As a result of these two factors, the vendor and purchaser were no longer in similar positions in terms of being able to identify defects in property. The purchaser could not rely on a close inspection to identify defects even if that inspection was carried out by a professional. The vendor, on the other hand, might have knowledge of the defect due to his personal experience with the property and, therefore, was at an advantage in the transaction.⁸

The courts addressed this disparity in knowledge by eroding the doctrine of caveat emptor on the basis that it no longer served the needs of society,⁹ imposing a duty on the vendor to disclose any information he held about potential defects to the purchaser. Failure to comply with this duty allowed the purchaser to seek damages for loss of value or rescission of the contract.¹⁰ The difficulty was in determining which non-physical defects were considered to sufficiently affect the value of the property to justify the granting of a remedy.

By the 1960s, the latent defect exception to caveat emptor had extended to require disclosure of any 'material facts affecting property value where the seller, but not the buyer, knew of the facts.'¹¹ This exception covered any latent defects affecting the value of the property, regardless of whether the defect was physical or non-physical.

III. NON-PHYSICAL DEFECTS IN PROPERTY

The common term used to describe property which has a non-physical defect is 'stigmatised property'. In the USA, the National Association of Realtors has defined this as any property which 'has been psychologically impacted by an event, which occurred or was suspected to have occurred on the property, such event being one that has no physical impact of any kind.'¹² Beginning in the 1980s in the USA, a series of cases considered the liability of vendors for failing to reveal that their property was stigmatised. The following are examples of non-physical defects which have been argued to meet this definition.

5 See, eg, *Miller v Cannon Hill Estates* [1931] 2 KB 113, where the court found that there was an implied warranty as to fitness in houses under construction. The decline of caveat emptor in other countries, notably the USA, began in the 1940s.

6 Alan Weinberger, 'Let the Buyer Be Well Informed? Doubting the Demise of Caveat Emptor' (1996) 55 *Maryland Law Review* 387, 387.

7 *Ibid* 387.

8 Alex Johnson, above n 3, 98.

9 Robert Shisler, 'Caveat Emptor is Alive and Well and Living in New Jersey: A New Disclosure Statute Inadequately Protects Residential Buyers' (1996) 8 *Fordham Environmental Law Journal* 181, 184. See also *Willite v Mays* 232 S E 2d 141, 143 (Ga Ct App, 1976) where the judge commented that caveat emptor 'apparently worked well in agricultural societies, as evidenced by its centuries of acceptance, but the sale of farm acreage ... is very different from the sale of a modern home, with complex plumbing, heating, air conditioning and electrical systems. [Caveat emptor is] no longer a reflection of American values.'

10 Although rescission was considered a 'most extraordinary power ... one which should be exercised with great caution': *Reed v King* 193 Cal Rptr 130, 132 (1983).

11 *Lingsch v Savage* 29 Cal Rptr 201, 204 (Dist Ct App, 1963).

12 Evelyn Williams, 'To Disclose Or Not To Disclose, That Is the Question for Michigan Residential Sellers' (2006) 85 *Michigan Bar Journal* 34, 34.

A. History Stigma

Some of the most common claims of stigma refer to the failure of the vendor to reveal the specific history of the house. In *Reed v King*,¹³ a purchaser was granted rescission of the purchase contract on the basis that the vendor had not revealed that the property had been the site of a multiple axe murder of a woman and her four children 10 years previously. In *Stambovsky v Ackley*,¹⁴ a purchaser argued that he ought to have been informed that the property was haunted by three ghosts: a civil war naval lieutenant; a man in his 60s; and a young child with a round, apple-cheeked face who wandered around the house and once ate a ham sandwich belonging to the owner.¹⁵ The judge in this case awarded damages, stating that as the vendor had actively publicised the existence of the ghosts on previous occasions,¹⁶ she was 'estopped to deny [the ghost's] existence, and [therefore that] as a matter of law the house is haunted.'¹⁷

The fact that sexual offences have occurred in a property is also considered stigmatising. In *Sanchez v Guerrero*,¹⁸ it was held that it ought to have been disclosed to a prospective purchaser that the current owner had allegedly molested several children in the house, and in *Van Camp v Bradford*,¹⁹ the fact that the daughter of the previous tenant had been raped at knife point in the property ought to have been revealed.²⁰ The judge in *Van Camp* concluded that 'the stigma associated with the residence is analogous to the latent property defects that have become an exception to the strict application of caveat emptor.'²¹

B. Health Stigma

It has been argued that any aspects of the property's history that might result in perceived health issues for new purchasers ought to be revealed. This is particularly relevant where a property was previously used, or rumoured to have been used, as a methamphetamine lab,²² as the chemical residue remains in household surfaces for several years.²³ It is also a matter for debate whether the prior medical history of an occupant ought to be revealed, for example, where the health issue was HIV or the AIDS virus,²⁴ or other disease which is 'highly unlikely to be transmitted through the occupying of a dwelling'²⁵ but might still be of concern to new purchasers.

C. Off-Site Stigma

It is not only non-physical characteristics of the property itself which arguably ought to be disclosed, but also any non-physical characteristics of the neighbourhood that might impact on the value of the property. In *Van Camp*, the judge held that, in addition to the rape of a tenant, it should also have been revealed that several rapes had occurred in the

13 145 Cal App 3d 261; 193 Cal Rptr 130 (1983).

14 169 AD 2d 254; 572 NY S2d 672 (1991).

15 Ibid 672.

16 The vendor had sent several articles on the hauntings to the Readers Digest, and the house featured on a local walking tour of the area as a 'riverfront Victorian with a ghost': 572 NY S2d 672 (1991), 675.

17 Ibid 674.

18 885 SW 2d 487, 492 (Tex App, 1994).

19 63 Ohio Misc 2d 245 (1993).

20 In both cases, the purchaser had specifically asked about the property's history. In *Sanchez*, the purchaser had asked about the previous owner. In *Van Camp*, the purchaser had asked about the reason for bars on the basement window and had been told only of several robberies in the street years ago.

21 63 Ohio Misc 2d 245 (1993), 252.

22 Note that if chemical residue was actually found in the property, this would be considered a physical defect while the fear of residue or the house's reputation as the site of a methamphetamine lab would be a non-physical defect.

23 Minnesota Department of Health, *Methamphetamine And Meth Labs*, <www.health.state.mn.us/divs/eh/meth/lab/index.html> at 11 December 2008.

24 See generally, Paula Murray, 'What Constitutes a Defect in Real Property' (1993) 22 *Real Estate Law Journal* 61.

25 Over 30 US states have legislation in place specifically exempting liability for failing to reveal diseases meeting this criteria to new purchasers: Massachusetts Association of Realtors, *Stigmatized Property* <<http://www.marealtor.com/content/stigmatizedproperty.htm>> at 11 December 2008.

neighbourhood.²⁶ In contrast, however, the mere presence of a sex offender in the neighbourhood did not need to be revealed.²⁷

In *Strawn v Canuso*,²⁸ a new subdivision was advertised as having a 'peaceful bucolic setting with an abundance of fresh air, clean lakes and rivers'.²⁹ It was held that the fact that a nearby landfill had contaminated the lake and groundwater with possibly hazardous waste ought to have been revealed.³⁰

One interesting case, *Alexander v McKnight*,³¹ suggested that the presence of undesirable neighbours ought also to be disclosed. This was a pre-emptive case, with the owners of the property claiming that their property value would decline due to the antisocial behaviour of their neighbours.³² The court held that while this information ought to be disclosed to potential purchasers, it was not appropriate in this case to award damages. The judge concluded by stating that 'if anything, the concept of let the buyer beware is an anachronism in California having little or no application in real estate law.'³³

IV. THE USA RESPONSE TO STIGMATISED PROPERTY CASES

The increase in stigmatised property cases in the USA resulted in the enactment of state legislation to clarify the extent of the duty owed to prospective purchasers. According to Johnson, 34 states have enacted some form of legislation.³⁴ These Acts take one of three forms: those specifically requiring disclosure of particular conditions,³⁵ those specifically exempting certain information from disclosure,³⁶ and those requiring that 'material or adverse conditions' be disclosed. This third form has resulted in uncertainty concerning whether 'material or adverse' is limited solely to physical defects or whether it could also include non-physical defects. Real estate agents have responded to this uncertainty by inserting disclaimers, or 'as is' clauses into the sales contract, in effect, re-introducing caveat emptor.³⁷ The enforceability of these clauses is uncertain.

V. STIGMATISED PROPERTY CASES IN ENGLAND

Although cases concerning stigmatised property in England are not as common, there have been two relevant cases in recent years. In *Sykes v Taylor-Rose*,³⁸ the Taylor-Roses purchased property without being told of its history. In the 1980s, a young girl kept as a slave had been murdered and buried in the back garden, then later exhumed and

26 63 Ohio Misc 2d 245 (1993). It has been suggested that this would include any area crime issues: Daivia Kasper, 'Ohio's Homeowner Disclosure Law' (1995) 45 *Case Western Reserve Law Review* 1149, 1175.

27 *Spinelli v Bair*, No 1999CA00399, WL 34335853 (2000), p5. Megan's Law, the sex offender notification statute, requires only that information be provided when a sex offender moves into a neighbourhood, not when anyone else moves into the neighbourhood he lives in.

28 657 A 2d 420, 423 (NJ, 1995).

29 *Ibid* 423.

30 However, this obligation to disclose was limited to builder-vendors, as they would have had access to this information. See also *Village Development Company v Filice*, 90 Nev 305, 312, 526 P2d 83, 87 (1974), where there was an obligation to warn a purchaser that the property was on the floodplain of a mountain stream.

31 9 Cal Rptr 3d 453 (Ct App, 1992).

32 This behaviour included continuously running a loud tree chipper late at night, pouring motor oil on the roof of their own house, and generally being loud.

33 9 Cal Rptr 3d 453 (Ct App, 1992), 456. See also *Shapiro v Sutherland*, 76 Cal Rptr 2d 101 (1998), 103-4, where it was stated that there were 'common law and statutory obligations to make full disclosure as to neighbourhood noise problems ... if they in fact occurred and were of sufficient import as to materially affect the value or desirability of the property'.

34 Alex Johnson, above n 3, 114.

35 Including, for example, that it was previously the site of a meth lab, or the presence of asbestos, lead paint, termites, septic systems, or toxic contamination. See Denis Binder, 'The Duty to Disclose Geologic Hazards in Real Estate Transactions' (1998) 1 *Chapman Law Review* 13.

36 Including, for example, that a previous occupant suffered from AIDS, whether the presence of sex offenders ought to be disclosed, or whether it need only be stated where to find information on the sex offenders register. See Shelly Ross Saxer, 'Am I My Brother's Keeper? Requiring Landowner Disclosure of the Presence of Sex Offenders and Other Criminal Activity' (2001) 80 *Nebraska Law Review* 522, 558.

37 Florrie Young Roberts, 'Let the Seller Beware: Disclosures, Disclaimers and "As Is" Clauses' (2003) 31 *Real Estate Law Journal* 303, 315, states that at least five states permit disclaimers and 'as is' clauses.

38 [2004] EWCA Civ 299.

dismembered. Various body parts were hidden in the walls of the house.³⁹ When the Taylor-Roses discovered this, they sold the house. The purchasers, the Sykeses, were told only that a murder had taken place in the house, but discovered the specific details through watching a documentary on television. They claimed that the Taylor-Roses ought to have revealed all of the details of the murder, specifically that there were still unaccounted-for body parts thought to be in the house.

The claim was based on Question 13 of the Seller's Property Information Form: 'Is there any other information which you think the buyer might have a right to know?'⁴⁰ The court held that there was no obligation to disclose based on the wording of this question. The test was not objective but whether, in the honest opinion of the seller, the information should be given.⁴¹

In another example, rescission of a purchase contract was sought following a claim that a property in Derbyshire was haunted by 'a little boy with piggy eyes'.⁴² It was also reported that walls weeped, objects were moved, and the female purchaser felt on one occasion as if she had been raped by a ghost.⁴³ A remedy was denied in this case, with the judge finding no proof of the haunting and dismissing the claims as 'hysterical reactions'.

VI. STIGMATISED PROPERTY CASES IN AUSTRALIA AND NEW ZEALAND

The early stigmatised property cases in the USA and England suffered from the disadvantage that there was no applicable legislation concerning the level of disclosure required. The early USA cases based their arguments on caveat emptor jurisprudence, and the English cases were argued as a breach of a standard form contract provision. While there is no specific legislation relevant to stigmatised property in Australia or New Zealand (with the exception of the New South Wales state legislation discussed below), there is some general legislation imposing a standard of conduct in trade which is potentially of application.

The *Trade Practices Act 1974* (Cth) contains two relevant provisions. Section 52 states that 'a corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive'. Section 53A states 'a corporation shall not, in trade or commerce, in connexion with the sale or grant ... of an interest in land ... (b) make a false or misleading representation concerning ... characteristics of the land.' New Zealand and the Australian states and territories have enacted Fair Trading Acts with almost identical wording.⁴⁴

The legislation restricts liability for misleading or deceptive conduct by requiring that the conduct occur 'in trade'. The private vendor of a residential property is not in trade and will, therefore, not be liable for failing to reveal stigmatising characteristics.⁴⁵ The legislation will, however, apply to the sale of residential property by a commercial entity and, more particularly, to real estate agents.⁴⁶

Non-disclosure of information can be considered misleading or deceptive depending on the circumstances of the case. In *Demagogue Pty Ltd v Ramensky*⁴⁷ Black CJ stated '[s]ilence is to be assessed as a circumstance like any other. To say this is certainly not to impose a general duty of disclosure; the question is simply whether, having regard to all

39 John Murdoch, 'A House of Horrors' *Estates Gazette*, 5 August 2004 p240.

40 Question 13 is no longer part of the Sellers Property Information Form.

41 David Collins, 'The Disclosure of Stigma Events in Property Transactions' (2008) 1 *Conveyancer & Property Lawyer* 50, 64. See also Mark Pawlowski, 'Horror Homes' (2004) 148(17) *Solicitors Journal* 497.

42 Mark Pawlowski, 'Things That Go Bump in the Night' (2000) 144(48) *Solicitors Journal* 1166, 1166.

43 *Ibid* 1167.

44 *Fair Trading Act 1986* (NZ) ss 9, 13; *Fair Trading Act 1987* (NSW) ss 42, 45; *Fair Trading Act 1989* (Qld) ss 38, 40; *Fair Trading Act 1987* (SA) ss 56, 59; *Fair Trading Act 1990* (Tas) ss 14, 17; *Fair Trading Act 1999* (Vic) ss 9, 12; *Fair Trading Act 1987* (WA) ss 10, 12; *Fair Trading Act 1992* (ACT) ss 12, 15; *Consumer Affairs and Fair Trading Act 1992* (NT) ss 42, 45.

45 *Prestia v Aknar* (1996) 40 NSWLR 165, 181.

46 *Cervolo v Peter Economou Real Estate Pty Ltd* (1985) ATPR 40-635.

47 (1992) 39 FCR 31, 32.

the relevant circumstances, there has been conduct that is misleading or deceptive.’ The test is whether, on the facts of the case, there was a reasonable expectation that particular information would be disclosed.⁴⁸

The application of this legislation to stigmatised property was tested in *Hinton*.⁴⁹ This case concerned the purchase of the house in which Sef Gonzalez had murdered his parents and sister three years previously. The property was purchased by Mr Kwok and Ms Lin. After paying the deposit, they discovered the history of the house and sought rescission of the contract on the basis that due to their Buddhist faith, they could not live in a property where a murder had occurred. Although the vendor finally agreed to refund the deposit and release the purchasers from the contract, the New South Wales Fair Trading Commission brought an action against the real estate agents for engaging in misleading or deceptive conduct under s 42 of the *Fair Trading Act 1987* (NSW) (the equivalent to s 52 of the *Trade Practices Act 1974*), and s 52 of the *Property Stock and Business Agents Act 2002* (NSW), for failing to reveal the history of the property.⁵⁰ The New South Wales Administrative Decisions Tribunal held that the real estate agents had breached the *Property Stock and Business Agents Act* and had engaged in misleading or deceptive conduct under the *Fair Trading Act*. It considered that the purchasers had a reasonable expectation of being told about the history of the property, as this might affect its value.⁵¹

The issue of stigmatised property has only been considered in New Zealand in a striking out application, *Deverick v Hedley*.⁵² In this case, the purchaser of property brought an action under s 9 of the *Fair Trading Act* (NZ)⁵³ claiming, inter alia, loss of value to the property on discovering that a previous owner had contracted AIDS and died in the house, where his body remained for a period of time during a wake. Williams J refused to strike out the claim, on the basis that ‘it could not be said that Mr Hedley’s claim under the *Fair Trading Act* is incapable of success’.⁵⁴

VII. CAN THE TRADE PRACTICES ACT/FAIR TRADING ACTS PROVIDE A REMEDY IN STIGMATISED PROPERTY CASES?

In *Hinton*, although finding that the real estate agents had breached both Acts, the penalty imposed was under s 192 of the *Property Stock and Business Agents Act 2002* (NSW).⁵⁵ It was not necessary to consider damages under the *Fair Trading Act 1987* (NSW) as the contract had already been rescinded and an amount equivalent to the deposit given to the purchaser by the vendor. It is not clear whether, had the vendor not agreed to release the purchasers from the contract, a remedy would have been available under this Act.

While it was determined that the Hinton had engaged in misleading or deceptive conduct under s 42, this is not sufficient to result in a remedy. Section 68 states that:

- (1) A person who suffers loss or damage by conduct of another person that is in contravention of a provision of [Parts of the Act including s 42] may recover the

48 Ibid.

49 [2006] NSWADT 257. For a detailed discussion of this case, and stigma cases in general, see Eileen Webb, ‘Houses With a History — Disclosure Obligations and “Psychologically Stigmatised” Property’ (2006) 13(1) *Australian Property Law Journal* 67.

50 Section 52(1) of the *Property Stock and Business Agents Act 2002* (NSW) states that ‘A person who, while exercising or performing any function as a licensee or registered person, by any statement, representation or promise that is false, misleading or deceptive (whether to the knowledge of the person or not) or by any concealment of a material fact (whether intended or not), induces any other person to enter into any contract or arrangement is guilty of an offence against this Act.’ Following the media reporting of the Lin’s claim, the New South Wales Government introduced amendments to the Act to allow action to be taken against a licensee who repeatedly engages in conduct ‘that is dishonest or unfair’ as from 1 July 2007: *Estates Gazette Property Stock and Business Agents Act 2002* (NSW) s 53A, amended by *Property Stock and Business Agents Amendment Act 2006* (NSW) s 15.

51 [2006] NSWADT 257 [150].

52 (2000) 9 TCLR 326.

53 Equivalent to *Trade Practices Act 1974* (Cth) s 52.

54 (2000) 9 TCLR 326 [38].

55 *Hinton & Ors v Commissioner for Fair Trading (No2)* [2006] NSWADT 299 (19 October 2006) [8].

amount of the loss or damage by action against the other person or against any person involved in the contravention.

This same wording occurs in s 82 of the *Trade Practices Act 1974* (Cth) and the various Fair Trading Acts.⁵⁶ The requirements of the remedies section create two issues for the recovery of damages in stigmatised property cases. First, it must be shown that the person suffered 'loss or damage by conduct of another person'. This wording introduces a causation requirement into the section. In order to gain a remedy, it must therefore be proven that the loss or damage was suffered as a result of the failure to disclose the stigmatising characteristic of the property.

In stigma cases, the loss or damage is generally the loss of property value. This loss stems not from the failure of the real estate agent to disclose the stigmatising characteristic, but from the general public reaction to it, something which the real estate agent has no control over. The public reaction ought, therefore, to be considered a *novus actus interveniens*, preventing causation being established.⁵⁷ This point was made in the case of *Adkins v Thomas Solvent Co*⁵⁸ in which the majority decision commented that if the stigma had a physical consequence, in this case the fear of living near to contaminated land, which did, in fact, result in the property being contaminated, then causation could be established. If there was no physical consequence, it would be a *novus actus interveniens*.

The second issue is that the damage suffered must be quantified. The person may recover 'the amount of the loss or damage'. This amount can generally be determined by the difference between a reasonable market value and the amount the property sold for once people were aware of the stigmatising characteristic.⁵⁹

The problem with a calculation of damages in this manner is that a stigmatising characteristic does not permanently affect property values. While property values might initially decrease, over time the property will generally regain its value.⁶⁰ A Wright State University study showed that a well-publicised murder can lower the value of the property by 15-35 per cent, but that in five to seven years, this fades.⁶¹ The Stambovsky house was subsequently sold for market value.⁶² For this reason, judges in South Carolina have only awarded damages when the stigma results in permanent physical injury.⁶³

This might suggest that the decision of the purchaser to immediately attempt to sell the property on discovering the stigmatising characteristic is a factor that ought to be taken into account. A real estate agent could potentially argue that the purchaser's decision to immediately resell the property and not wait until the stigma fades can have two

56 *Fair Trading Act 1986* (NZ) s 43; *Fair Trading Act 1987* (NSW) s 68; *Fair Trading Act 1989* (Qld) s 99; *Fair Trading Act 1987* (SA) s 84; *Fair Trading Act 1990* (Tas) s 37; *Fair Trading Act 1999* (Vic) s 159; *Fair Trading Act 1987* (WA) s 79; *Fair Trading Act 1992* (ACT) s 46; *Consumer Affairs and Fair Trading Act 1992* (NT) s 91.

57 Evelyn Williams, above n 12, 39, states that the fear resulting in a decrease in property value 'caused by the irrational fears of thirdparties destroys the necessary proximate causation'.

58 440 Mich. 293, 487 NW2d 715 (1992).

59 There is clear evidence that a stigmatising characteristic will reduce the property value. The property in which Nicole Brown Simpson was murdered was listed at \$795,000, reflecting market value, and finally sold two years later for \$595,000. The house where Lyle and Erik Menendez killed their parents was valued at \$4.2 million but sold for \$3 million: Wylie Wong, *The Cost of Death* (2003) Silicon Valley/San Jose Business Journal <<http://www.bizjournals.com/sanjose/stories/2003/10/06/focus1.html>> at 11 December 2008. A Columbia University study showed that a sex offender living next door will lower property values by 12 per cent, or 4 per cent for property within 1/10 mile of the sex offender's property: Leigh Linden and Jonah Rockoff, *There Goes the Neighborhood? Estimates of the Impact of Crime Risk on Property Values From Megan's Laws* (2006) EconPapers <<http://econpapers.repec.org/paper/nbrnberwo/12253.htm>> at 11 December 2008.

60 Eric Schlichter, 'Stigma Damages in Environmental Contamination Cases: A Possible Windfall for Plaintiffs?' (1997) 34 *Houston Law Review* 1125, 1153.

61 Susan Deuschle, *Ghostly Occupants, Well-Publicized Murder Case Can Drop a Property's Value by up to 35%* (2001) Columbus Business First <<http://columbus.bizjournals.com/columbus/stories/2001/11/05/focus1.html>> at 11 December 2008. See also Carole Fleck, 'Stigma or Superstition? Appraisers Weigh Diminished Value of Tainted Properties' (1997) Realtor <<http://www.realtor.org/archives/stigmaorsucararchive1997may>> at 11 December 2008, citing Randall Bell, an instructor at an appraiser's institute, that the property value can drop by '15 percent to 25 percent ... for two to three years after the fact. Over time the discount evaporates, but it takes 10-25 years [for the stigma] to go away entirely.'

62 Evelyn Williams, above n 12, 34.

63 Jennifer Young, 'Stigma Damages: Defining the Appropriate Balance Between Full Compensation and Reasonable Certainty' (2001) 52 *South Carolina Law Review* 409.

consequences for the recovery of damages. First, the immediate resale could itself be seen as a *novus actus interveniens*. If the purchasers had used the property in the manner reasonably to be expected of homeowners (which could be argued as purchasing a property to live in for at least several years) then the stigma might have vanished and they would have been able to sell the property for market value, therefore suffering no loss.

Alternatively, the purchasers could be argued to have failed to mitigate their loss, by selling the property immediately.⁶⁴ It might be considered reasonable to retain the property until the stigma faded, although this argument will depend on several factors including the nature of the stigma and the particular characteristics of the purchaser. The purchasers of the Gonzales house, due to their religious beliefs preventing them from living in property where a murder had taken place, could likely not be reasonably required to remain in the house.

The particular facts of the Gonzales house raise yet another issue. If the religious beliefs of the purchasers were significant enough that they could not live in a house where a murder had taken place, ought they not to have specifically raised this question with the real estate agents? The real estate agents had informed the purchasers that the property was a 'deceased estate'. Did the purchasers then contribute to their own loss by not asking a question that clearly had important implications to them, but that the real estate agents felt did not need to be revealed to satisfy the reasonable expectations test?⁶⁵

VIII. CONCLUSION

The *Hinton* case suggests that the failure to reveal stigmatising characteristics has the potential to result in a remedy under the *Trade Practices Act 1974* (Cth) or *Fair Trading Acts*. It is not clear that this is the case. While the non-disclosure can, depending on the facts, satisfy the misleading or deceptive requirement of the legislation, this does not in itself result in a remedy. It has been suggested that an application of the remedies section, not required in the *Hinton* decision, raises several issues. First, a remedy may be denied altogether due to a lack of causation between the failure to disclose and the loss of value. Second, if a remedy is awarded, there are arguments of failure to mitigate the loss and contributory negligence, which might result in the amount of the damages being reduced.

It is not unreasonable to expect that stigmatised property cases will increase in New Zealand and Australia over the next few years. Experience in the USA and England has demonstrated that deciding these cases by reference to exceptions to caveat emptor, or the terms of the purchase contract, does not always give a satisfactory result. In the USA, it was seen that legislation was needed to clarify the extent of disclosure obligations. With the exception of New South Wales, there is no specific legislation in Australia or New Zealand that can apply to the disclosure of non-physical defects, leaving the matter to be addressed by reference to the *Trade Practices Act 1974* (Cth) or *Fair Trading Act 1986* (NZ). If there are issues as to whether the Acts can be applied in these cases, then this ought to be considered ahead of time to avoid the negative public reaction to that seen following the sale of the Gonzales house.

64 Damages under the *Trade Practices Act 1974* (Cth) and *Fair Trading Act 1986* (NZ) can be reduced due to failure to mitigate: *Finucane v NSW Egg Corporation* (1988) 80 ALR 486, and *Smythe v Bayleys Real Estate Ltd* (1993) 5 TCLR 454.

65 Contributory negligence is not available in Australia under the *Trade Practices Act 1974* (Cth): *I&L Securities v HTW Valuers (Brisbane) Pty Ltd* (2000) 210 CLR 109. However, it is available under the New Zealand *Fair Trading Act 1986*, which contains identical wording: *Specialised Livestock Imports Ltd v Borrie* (Unreported, Court of Appeal CA 72/01 McGrath, Robertson, Randerson JJ, 20 September 2002).