IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2022-485-49
[2023] NZHC 934

BETWEEN	ROSEMARY FENWICK MACFARLANE Plaintiff
AND	INFORMED HOUSE INSPECTIONS LIMITED First Defendant
	MARK WARRANT SEWELL Second Defendant

Hearing:	16 March 2023
Appearances:	E S K Dalzell and S Smith for Plaintiff No appearance for First Defendant Second Defendant in Person
Judgment:	26 April 2023

JUDGMENT OF McQUEEN J

Table of Contents

[1] The plaintiff, Ms MacFarlane, is suing the first and second defendants, Informed House Inspections Ltd (IHI) and that company's sole director and shareholder, Mark Sewell. Ms MacFarlane claims that she suffered loss as a result of acquiring in May 2019 a residential property at 7/21 McBain Grove, Lower Hutt (the Property). She says that she bought the Property in reliance on a report prepared by IHI (through Mr Sewell) and verbal advice from Mr Sewell about the condition of the Property, only to discover that significant defects with the Property were not identified. Essentially, she claims for the cost of rectifying these defects.

[2] The defendants are not and have never been represented. I describe below the manner in which the defendants have responded to the claim. The hearing before me proceeded as a formal proof hearing, for reasons discussed in more detail below.

The requirements of formal proof

[3] Rule 15.9 of the High Court Rules 2016 provides for the formal proof of claims. This occurs where the defendant does not file a statement of defence in accordance with the timeframe required by the notice of proceeding and the plaintiff seeks judgment by default for other than a liquidated demand. After a proceeding is listed for a formal proof hearing, no statement of defence may be filed except with the leave of a Judge granted on the ground that there will or may be a miscarriage of justice if judgment by default is entered.

[4] When assessing whether to exercise the discretion to grant leave to file a statement of defence, the following considerations are relevant:[1]

(a) whether the defendant has a substantial ground of defence;

(b) whether the delay is reasonably explained; and

(c) whether the plaintiff will suffer irreparable injury if leave to defend is belatedly granted, or judgment set aside.

[5] The plaintiff must, before or at the formal proof hearing, file affidavit evidence establishing, to a Judge's satisfaction, each cause of action relied on and, if damages are sought, providing sufficient information to enable the Judge to calculate and fix the damages.[2] It has been previously said that although the plaintiff is still required to prove their claim, the statement 'to a Judge's satisfaction' does not important notions of the burden of proof and of setting a particular standard of proof. [3] The balance of probabilities standard of proof has also been applied.[4] In the present case, Ms MacFarlane accepts that a formal proof is not a "rubber stamp exercise", and that

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1 *Neumayer v Kapiti Coast District Council* [2014] NZHC 417 at [8]; citing *Shoye Venture Ltd v Wilson* [2013] NZHC 2339 at [10]–[13].

2 High Court Rules 2016, r 15.9(4).

3 *R v Leitch* [1998] 1 NZLR 420 (CA) at 428; *Ferreira v Stockinger* [2015] NZHC 2916 at [33]–[36], adopted in *Wulff v De Marco & Anor* [2021] NZHC 3110; and *Roebuck v Liddle* [2022] NZHC 2016.

4 *Adventurer Hobson Ltd v Cockery* [2020] NZHC 675 at [39].

she must on the balance of probabilities prove her claim.[5] Accordingly, that is the standard that I apply, bearing in mind that:[6]

> …the plaintiff is only required to prove a cause of action so far as the burden of proof lies on the plaintiff. The plaintiff is not required to engage with any matters of affirmative defences, set-off or counter-claim.

Procedural background

[6] The proceeding was commenced in February 2022. The defendants did not enter appearances within the time limit prescribed by the High Court Rules. Accordingly, Ms MacFarlane sought a formal proof hearing and filed the necessary affidavit evidence. That hearing took place on 17 August 2022. However, prior to the hearing, Mr Sewell filed and served a document purporting to be a statement of defence on behalf of both defendants. He did so without paying the filing fee.

[7] In his judgment on the application for formal proof, Gendall J dismissed Ms MacFarlane's application.[7]

[8] Gendall J addressed the leave requirement in his judgment, considering that Mr Sewell's assertions clearly indicated that there were significant disputed factual and evidential issues in need of resolution.[8] His Honour was of the view that by a reasonably fine margin, leave to file a statement of defence should be granted as:

(a) at that time, being a preliminary stage of the proceeding, Mr Sewell had done enough in the documentation he had filed to show that the defendants had a substantial ground of defence (subject to the provision of appropriate affidavit evidence to confirm the pleaded allegations);[9]

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5 At [69].
6 *Ferreira v Stockinger* [2015] NZHC 2916 at [36], affirmed in *Wulff v De Marco & Anor* [2021] NZHC 3110.
7 *MacFarlane v Informed House Inspections Limited* [2022] NZHC 2069 at [24].
8 At [11].
9 At [19].

(b) Mr Sewell had provided reasons to establish that the delay in filing a statement of defence, which were reasonable—being sickness, and financial limitations;[10] and

(c) there was nothing before the Court to show that Ms MacFarlane would suffer irreparable damage if leave was granted to the defendants to file a statement of defence.[11]

[9] Gendall J concluded:[12]

> I reach this view also on the ground that there may be a miscarriage of justice if a formal proof judgment by default was to be entered here. It is relevant also, in my view, that, if the plaintiff's formal proof application was to be allowed to proceed, the provisions of r 15.10 would likely be activated to set aside such a default judgment, a judgment that could ultimately appear to be one seen as "a miscarriage of justice".

[10] Gendall J directed that IHI obtain legal representation, strongly recommended Mr Sewell obtain legal representation, and also directed that any statements of defence and affidavits in support for the defendants were to be filed within 30 days of 19 August 2022.[13] These directions were not complied with.[14]

[11] In October 2022, Ms MacFarlane drew the Court's attention to the defendants' failure to comply with Gendall J's directions. Further directions were made as to the filing of a defence. On 1 November 2022, Mr Sewell paid a filing fee, and his statement of defence was accepted for filing. No defence has been filed or served for IHI.

[12] Further orders were made on 15 November 2022 in relation to the provision of discovery and a case management conference. On 14 February 2023, Associate Judge Johnston ordered that unless the defendants complied with the discovery order by 17 February 2023, their defence would be struck out. As a result of their non-compliance with that order, the defendants must be treated as having not entered

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10 *MacFarlane*, above n 7, at [20].
11 At [23].
12 At [24].
13 At [25].
14 *MacFarlane v Informed House Inspections Limited* Minute of Associate Judge Johnston HC Wellington CIV-2022-485-49, 23 February 2023.

defences. In his minute of 23 February 2023, Johnston AJ therefore directed that the proceeding be set down for a formal proof hearing.

Decision to proceed with formal proof hearing

[13] That hearing took place before me on 16 March 2023. Mr Sewell was present at Court for the hearing. He indicated that he wished to participate in the hearing.

[14] I explained to Mr Sewell that the result of his and IHI's failure to take steps in relation to the proceeding was that no defence had been entered by him or IHI and that this meant on the face of it that he could not participate in the hearing. I noted that no evidence been filed for the defendants. I indicated that I would hear from Mr Dalzell, counsel for Ms MacFarlane, and then talk further to Mr Sewell.

[15] Mr Dalzell emphasised that the defendants have had the opportunity to properly participate in the proceeding, but despite many indulgences from the Court, had not complied with Court orders and directions. He submitted that the formal proof hearing was the next logical step, given the history of the proceeding, and noted that no defence or evidence may be provided by the defendants without leave of the Court.

[16] As explained above, r 15.9 of the High Court Rules grants the Court a discretion to grant leave to a defendant to file a statement of defence on the ground there will or may be a miscarriage of justice if judgment by default is entered. In exercising this discretion, I am required to consider whether the defendant has a substantial ground of defence, whether the delay is reasonably explained and whether Ms MacFarlane will suffer irreparable injury if leave to defend is granted belatedly.

[17] I discussed these factors with Mr Dalzell. His position was that there was no evidence available to the Court to support the central allegations raised by the defendants in the material they provided to the Court, nor was there any adequate explanation for their failure to participate in the proceeding in a manner consistent with the High Court Rules. Mr Dalzell noted that there was a purposeful breach by the defendants of the discovery order and submitted that an inference could be drawn that there are no relevant documents that would assist them. He emphasised the significant costs incurred by Ms MacFarlane to date, including preparing for a second formal

proof hearing. He noted that she has little prospect of recovering all the costs she has incurred and that this is a real prejudice to her.

[18] The third factor under r 15.9(3), relating to the plaintiff suffering irreparable injury if leave to defence were to be granted, is of particular concern.[15] Mr Dalzell accepted that it appears to be a high standard but emphasised again that Ms MacFarlane has incurred significant costs in bringing the claim and there has been ongoing delay in its progression as a result of the defendants failing to engage. He emphasised the passage of time since Ms MacFarlane purchased the Property and said that the situation is extremely stressful, given she continues to live in the Property in its defective state. Mr Dalzell fairly acknowledged that an alternative approach would be for me to grant leave to the defendants with a view to setting the matter down for trial but said that, in the circumstances, Ms MacFarlane opposed this, and her strong preference was to proceed with the formal proof hearing.

[19] I invited Mr Sewell to explain to me his delays and what defence on his part he would seek to raise. In terms of delays in taking steps, he said he has not been able to obtain any legal advice. In terms of his defence, he said the report was provided to the vendor of the Property and the disclaimer in the report he prepared prevents Ms MacFarlane from relying on it. He said the vendor only wanted a standard report and that he, Mr Sewell, would always recommend to a potential purchaser that they obtain a more comprehensive report. He said the real estate agent should not have shared the report with Ms MacFarlane. He also said he doubted the basis on which the remediation costs claimed were calculated. Finally, Mr Sewell said he has no recollection of discussing the Property with Ms MacFarlane. I observe that these are the three matters identified in the material he has earlier provided to the Court.

[20] I decided not to grant the defendants leave to file any statement of defence. I consider that my approach to the discretion in r 15(3) requires me to be fair to both the plaintiff and the defendants, in all the circumstances. Mr Sewell has already had the advantage of the first application for formal proof being dismissed, and since that time, he has not taken the opportunities he has had to advance his or IHI's defence in

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[15] I adjourned briefly so Mr Dalzell could ascertain whether there was any case law relating to the application of this factor that might assist in the present circumstances. None was identified.

accordance with the High Court Rules and the directions and orders of this Court. I recognise the difficulties that can arise for someone in Mr Sewell's position in obtaining legal advice. I also note that it has been made very clear to him that IHI must have legal representation. These matters must nonetheless be balanced against Ms MacFarlane's interest in the resolution of her claim, which I accept is a matter of ongoing stress for her.

[21] A factor that was important to me in reaching this decision is that despite proceeding with the formal proof hearing, Mr Sewell retains the ability under r 15.10, should I enter default judgment against the defendants, to apply to set aside or vary such a judgment, if it appears to the Court that there has been, or may have been, a miscarriage of justice. My decision therefore has the effect of shifting the onus to take a step onto the defendants, and in my view, this is appropriate in all the circumstances. I emphasised to Mr Sewell that he would retain this opportunity.

[22] Accordingly, the hearing proceeded as a formal proof hearing. For the reasons set out below, I consider that Ms MacFarlane's claim is largely made out and that judgment should be entered against the defendants.

Ms MacFarlane's claim

[23] Ms MacFarlane's amended statement of claim dated 12 August 2022 pleads two causes of action, being a breach of s 9 of the Fair Trading Act 1986, and negligent misstatement, as against both the first and second defendant.

[24] Ms MacFarlane says that:

(a) she purchased the Property on 25 May 2019;

(b) the first defendant, IHI, through the second defendant, Mr Sewell, inspected the Property, and then wrote and confirmed verbally by phone to her a pre-purchase report on the Property (the report);

(c) the report:

(i) was commissioned by and addressed to Alex Sim, the previous registered proprietor of the Property, through Tiller's Holdings Limited;

(ii) describes Mr Sewell as a "Trade qualified experienced Inspector";

(iii) claims the inspection was carried out in accordance with minimum requirements under the relevant New Zealand Standard for the visual inspection of residential buildings, and for the preparation of the appropriate property inspection reports; and

(iv) describes the overall condition of the Property as reasonable and typical for a building of its age and type despite it being constructed at a time and of a design that it was clear it was potentially a "leaky" home;

(d) she expressed interest in the Property in early May 2019, visited the Property, and was provided the report by the vendor's agent on or around 16 May 2019;

(e) she entered into a conditional sale and purchase agreement for the property on 25 May 2019, and then a short time later, called Mr Sewell, and discussed the content of the report, and the condition of the Property;

(f) during that telephone conversation, Mr Sewell made several verbal representations that were materially misleading, particularly that the Property was:

(i) 'definitely not a leaky home';

(ii) 'structurally sound';

(iii) ‘a reasonably property with minor maintenance issues’; and

(iv) ‘well-maintained’; and

(g) in reliance on the report and verbal advice from Mr Sewell, Ms MacFarlane completed the purchase of the Property on 11 June 2019.

[25] Ms MacFarlane alleges that the Property in reality suffers from serious construction defects and building failures that are characteristic of what is commonly described as a “leaky” home. These defects and failures are alleged to have damaged the property, causing extensive damage and decay to timber framing, structural failure, rotting, and cracked cladding. This damage requires remedial work. Accordingly, Ms MacFarlane claims for:

(a) the cost of remediating the property, estimated to be $435,000 including GST;

(b) the cost of alternative accommodation during the period required for remedial work, estimated at the same time to be $18,717;

(c) general damages for stress, anxiety, disappointment, physical inconvenience and mental distress, assessed to be $35,000;

(d) interest pursuant to the Interest on Money Claims Act 2016 from 11 May 2022 (being the date of quantification of the claim) until the date that payment of the judgment debt is made; and

(e) costs.[16]

[26] As to the first cause of action under the Fair Trading Act, Ms MacFarlane says that IHI was in trade, produced the report, provided verbal advice to her, and thereby engaged in conduct that was misleading or deceptive or likely to mislead or deceive

[16] Scale and expert costs together with disbursements have been specified in a memorandum of counsel dated 13 March 2023.

her in breach of s 9 of the Fair Trading Act. Ms MacFarlane says that breach has caused her loss, in that she relied on and was misled by the report and verbal advice when considering whether to purchase the Property, or at what price, and has suffered the defects, damage and losses described above.

[27] As to the second cause of action against IHI, negligent misstatement, Ms MacFarlane says that:

(a) the report was required for the purposes of the vendor's sale of the Property to prospective buyers as a class, which was known or ought to have been known to the defendants;

(b) the verbal advice was required by Ms MacFarlane for the purposes of considering whether to purchase the Property, which was known or ought to have been known to the defendants;

(c) the defendants knew or ought to have known that the report and verbal advice were likely to be acted upon by Ms MacFarlane without independent inquiry;

(d) the report and verbal advice were relied upon by Ms MacFarlane to her detriment;

(e) IHI assumed responsibility and was under a duty of care to Ms MacFarlane to take reasonable care in preparing the report and providing verbal advice, specifically to ensure the report and advice was materially true and not misleading or deceptive; and

(f) the defendants failed to exercise the skill and care to be expected of competent pre-purchase inspectors, when carrying out the inspection, preparing the report and giving the verbal advice to Ms MacFarlane.

[28] As to the first cause of action against Mr Sewell, Ms MacFarlane says that he was acting in trade when he inspected the Property, produced the IHI report and provided the verbal advice to Ms MacFarlane, and engaged in conduct which was

misleading or deceptive or likely to mislead or deceive, as previously pleaded against IHI. Ms MacFarlane says that breach has caused her loss, in that she relied on and was misled by the report and verbal advice when considering whether to purchase the Property, or at what price, and has suffered the defects, damage and losses described above.

[29] In the second cause of action against Mr Sewell, Ms MacFarlane repeats the matters set out above and says that Mr Sewell knew, actually or inferentially, that the report and the verbal advice would be communicated to and likely acted upon by her. She says the report and verbal advice were acted upon by her to her detriment. Ms MacFarlane says that Mr Sewell accepted personal responsibility such as to create a special relationship with and duty of care owed to her personally.

[30] Ms MacFarlane has made demand on both defendants and neither has accepted liability nor agreed to meet the costs of the necessary remedial work.

Evidence in support of Ms MacFarlane's claim

Ms MacFarlane's affidavits

[31] Ms MacFarlane has provided two affidavits in support of her claim, together with several affidavits from relevant experts. Her first affidavit, dated 2 June 2022, sets out the background to her purchase of the property. She explains that she and her husband decided in 2019 to look for a modest "lock up and leave" house for her to live in while working in Wellington, although their home base is in Hamilton, where her husband works. The intent was that the Wellington house would also be a place for their daughter to live when she moved to Wellington in mid-2020.

[32] The Property is a two-bedroom two-storey townhouse attached to one other townhouse in a complex of 20 similar townhouses, all managed by a Body Corporate. Ms MacFarlane and her husband initially had concerns about the potential for the Property to be a leaky home due to its monolithic cladding. They were aware of issues with leaky homes through media and people they knew. Ms MacFarlane says she told the real estate agent marketing the Property that they would not make an offer without a builder's report or the offer being subject to a builder's report. On 16 May 2019, the

agent sent Ms MacFarlane some documents, including the report prepared by Mr Sewell and presented as from IHI. It is undated but says it is based on an inspection carried out on 24 April 2019. None of the documents mentioned any weathertightness issues.

[33] Ms MacFarlane says she was initially concerned about whether she should rely on the IHI report given it had been arranged by the vendor. Her review of the IHI website alleviated her concerns given its focus on independent building inspections and the indication that IHI carried out inspections to the Residential Property Inspection Standards.

[34] Ms MacFarlane entered into a conditional sale and purchase agreement for the Property on 25 May 2019. One of the conditions stated that the contract was conditional upon the purchaser having the existing builder's report supplied by the vendor independently reviewed.

[35] Ms MacFarlane says that on or around 26 May 2019, she decided to call Mr Sewell directly to discuss the report and the condition of the Property, and that she made some brief notes of their call. Ms MacFarlane says that during their conversation, Mr Sewell told her the following things, which she considered to be critical as to whether or not she proceeded with the purchase:

(a) that the property was "definitely not a leaky home";

(b) that the house was "structurally sound";

(c) that the Property was a "reasonable property with some minor maintenance issues"; and

(d) that the Property had been "well maintained".

[36] These statements are recorded, albeit briefly, in Ms MacFarlane's notes of their conversation, which are exhibited to her affidavit. Ms MacFarlane says that the conversation was very reassuring, as her main concern was whether the property was

leaky. She says that Mr Sewell's comments in their phone conversation assured her that it was not.

[37] Ms MacFarlane proceeded to purchase the Property on 11 June 2019. She initially rented the Property as she had to be out of town for family reasons. On 4 July 2019, Ms MacFarlane emailed Mr Sewell to thank him for his guidance and support, and to ask for the IHI report to be re-issued in her name. That email is also exhibited to her affidavit. Although Ms MacFarlane has no specific record of his response, she says that her memory is that Mr Sewell declined to do so on the basis that she had not commissioned or paid for the report, so it would be unfair on the vendor who had.[17]

[38] Ms MacFarlane says that she first discovered leaks in the property on or around 5 July 2019. When her husband began painting internal walls, they noticed that new paint was sliding off the walls, and that a ranch slider door frame appeared to be swelling due to moisture ingress. They then noticed swelling and rot upstairs, above the ranch slider. Ms MacFarlane raised her concerns with the Body Corporate. Due to the impacts of COVID-19, it was not until April 2021 that a builder came to look at the Property. When the moist wall was removed so as to be replaced, it became clear that the timber framing behind the walls were rotting. At this time, it was recommended that the house should be assessed by a licenced building practitioner and building consultant. Ms MacFarlane says this is when she began to realise she may have bought a leaky home and she started to suffer from anxiety, fearing the extent of the problem.

[39] Ms MacFarlane says that during the winter of 2021, her daughter's health worsened considerably compared to when she was living in their Hamilton home. Throughout the spring of 2021, when it rained, she had to put down buckets and towels. Some parts of the house would ooze water when pressure was applied.

[40] Ms MacFarlane asked the Body Corporate many times to arrange for someone to come and repair the rotten framing that had been discovered. In May 2021,

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[17] I questioned Mr Dalzell about whether any email response from Mr Sewell had been provided in Ms MacFarlane's discovery. He confirmed that it had not. No discovery has been provided by IHI or Mr Sewell.

Mr John Lyttle, a building consultant with 20 years' experience in weathertightness issues, undertook an invasive weathertightness review of the property. He completed his report for the Body Corporate in June 2021, which provided that there was:

(a) insufficient or no ground clearances between the bottom edge of the cladding and the ground surfaces;

(b) poor construction detailing around the small area membrane roofs;

(c) poor construction detailing around the windows;

(d) a face-sealed cladding system directly attached to the timber framing, lacking drainage capacity when penetrated by water, and sealed up against the base of the concrete, stopping water drainage;

(e) lack of sealing or flashings at junctions between the wall cladding and other building materials;

(f) deterioration of aluminium window frames;

(g) cracking occurring at junctions that may be caused by movement in the structure; and

(h) several penetrations to the cladding system including the electrical meter box and plumbing penetrations.

[41] The report noted that each of these defects contributed to the possibility of water either penetrating into or remaining in the Property, thereby causing damage. Mr Lyttle undertook both invasive and non-invasive testing, and came to the conclusion that the Property has suffered from water ingress and damage, including:

(a) extensive damage and decay to the timber framing, 30 per cent of which may require replacement;

(b) the structural failure of some areas of framing, and areas of advanced soft rot and brown rot;

(c) decay underneath some roofing/wall junctions; and

(d) some cracking to cladding.

[42] Ms MacFarlane says that reading Mr Lyttle's report was devastating, and that had she been aware of the weathertightness risks she would not have purchased the Property without getting a specialist weathertightness report, or that she would have stayed clear of it altogether.

[43] The Body Corporate organised moisture testing of the Property (and the whole complex) by a company called "Seek a Leak" and engaged Maynard Marks to provide a remediation scope of works for the complex. In November 2021, Ms MacFarlane was advised by Maynard Marks that a high level cost estimate for repairing the Property was $225,000–$350,000 (excluding expert fees and GST).

[44] Ms MacFarlane explains that there have been ongoing delays with the Body Corporate in terms of initiating the complex-wide remediation process. Due to the urgent need to resolve the issues at the Property, Ms MacFarlane decided to look to progress remediation on her own (subject to approval from the Body Corporate).

[45] In April 2022, Ms MacFarlane engaged Helfen Limited to undertake a full and detailed scope of works for remediation of the Property, and Rider Levett Bucknell, Quantity Surveyors, to provide an estimate of the cost of the remediation, which was $435,000 including GST.

[46] Ms MacFarlane describes the anguish and concern she has suffered as a result of the weathertightness issues. She says it has affected her physically and mentally. She is concerned about the health risks of living in the house to her daughter, a chronic asthmatic. She is also concerned about her financial ability to undertake the remediation and where she will live while the work is being done. Ms MacFarlane feels embarrassed and mortified to find herself the owner of a leaky home.

[47] Ms MacFarlane's supplementary affidavit dated 11 August 2022 addresses her investigations into the cost of alternative accommodation while the Property is being remediated, including moving and storage costs. Based on her enquiries, Ms MacFarlane concludes that for the 19 week period that is estimated by Helfen Ltd to be required to complete the repairs, the cost will be $18,717.

Affidavit from Mr Viatos

[48] Mr Viatos is a solicitor who works for the law firm representing Ms MacFarlane. The purpose of his affidavit is to place before the Court correspondence between the law firm and Mr Sewell. In December 2021, the law firm wrote to Mr Sewell to make demand on him and IHI to pay for the cost of remediation. Mr Sewell explained in an email in response that the IHI report had been prepared for the "exclusive use" of the vendor of the Property. He advised that, in preparing the report, he had engaged with Mr Sim's real estate agent to refer questions to Mr Sim as to any past weathertightness issues with the Property. Mr Sewell also said that had the report been commissioned by the purchaser rather than the vendor, it would have had extra detail about risk relating to direct fixed monolithic type cladding system and would have highly recommended more invasive testing was undertaken. Mr Sewell denied liability on the basis he had not been instructed or paid by Ms MacFarlane and said he had no recollection of interacting with her.

Affidavit from Mr Lyttle

[49] Mr Lyttle has provided an affidavit dated 31 May 2022. Mr Lyttle is a registered building surveyor who conducts weathertightness assessments, pre-purchase inspections and quality assurance. He has over 20 years' experience in general building services including 20 years in management and supervisory roles. He provides professional building advice and has acted as an expert witness for parties in weathertight and building disputes since 2003. Mr Lyttle confirms his evidence is within his knowledge and expertise.

[50] In his affidavit, Mr Lyttle explains that he was initially instructed by the Body Corporate at the 21 McBain Grove complex and provided a report on 4 June 2021. This report is attached to his affidavit. Mr Lyttle concludes in his report:

> In summary, my opinion is that the Property is suffering from significant and systemic weathertightness defects as listed above. It was clear from my inspection that water had entered the building envelope in various areas and caused decay and damage to the framing. I found that areas of timber framing had already failed structurally and to ensure ongoing durability of the dwelling, I recommended that the Property be fully remediated, including a full reclad.

Affidavit of Mr Symon

[51] Mr Bruce Symon has provided an affidavit dated 30 May 2022. Mr Symon is an Accredited Building Surveyor and has over 20 years' experience in the research and development of the pre-purchase property inspection industry. He was a member of the Standards New Zealand Expert Committee that developed the Residential Property Inspection Standard NZS4306:2005 and has provided expert evidence in relation to house inspection or pre-purchase inspection reports on multiple occasions. Mr Symon is the founder of Realsure Limited, a company specialising in providing building inspections. Mr Symon confirms that his evidence is within his area of knowledge and expertise.

[52] Mr Symon was engaged to provide an audit of the quality of the IHI report. It is Mr Symon's view that the report did not comply with inspection standards and fell well below the standard to be expected of a competent pre-purchase report at the time of the inspection in April 2019. He says that the Property clearly presents with a number of well-known weathertightness risk features, as well as a significant use of sealant, historic repairs, elevated moisture levels, and historic moisture indicators.

[53] Particularly, Mr Symon says that the report:

(a) failed to identify approximately 23 well-documented defects or weathertightness risks at the Property which would have been visible on inspection and noted in a competent pre-purchase report;

(b) failed to clearly link any weathertightness risks with potential failure;

(c) failed to report on several mandatory items for both the interior and exterior of the Property; and

(d) failed to recommend a full weathertightness specialist report be undertaken by a suitably skilled Registered Building Surveyor or Architect Weathertightness Specialist.

[54] Mr Symon's view is that the failure of the report to correctly reference or identify the weathertightness risks associated with the Property would lead the reader to conclude that there were no weathertightness concerns. He notes that although his inspection was undertaken approximately 27 months after the report was produced, many of the weathertightness risks and building defects would have been present when the IHI inspection took place, and when the report was produced, as they were a result of inherent design and construction. He concludes:

> In my view, the IHI Report misrepresents the risk and condition of the Property and fails to provide the reader with an accurate description of the Property (including significant defects and weather tightness risks) to enable a purchaser to make an informed buying decision.
>
> Had the IHI report complied with the Inspection Standard and/or been produced with reasonable care and skill, it would likely have provided the plaintiff with a better understanding of the actual condition of the Property, so that the plaintiff could have been more informed as a prospective purchaser.

[55] Mr Symon also notes that the report describes Mr Sewell's qualification as a 'trade qualified experienced inspector', when there is no trade qualification for property inspectors.

Affidavit of Mr Wutzler

[56] Mr Wutzler has provided an affidavit dated 30 May 2022. Mr Wutzler has over 20 years' experience as a registered building surveyor and 18 years as a remediation specialist. He holds memberships of various relevant professional industry bodies. He is a director and shareholder of Helfen Ltd, which provides expert advice on issues concerning building failures and expert evidence in Court and Weathertight Homes Tribunal proceedings. It also provides a remedial design service for buildings which have suffered from water ingress. Mr Wutzler confirms that his evidence is within his area of expertise.

[57] Mr Wutzler has inspected the Property in order to ascertain when various repairs were undertaken. He also completed a scope of works for the appropriate remediation of the Property for costing by a quantity surveyor, which is annexed to his affidavit. Mr Wutzler concluded that:

> [I]t is apparent the Property is suffering from significant water ingress on the front north west elevation, as outlined in the Helfen report. For example, we removed temporary plasterboard covers on the lounge ceiling and northwest wall (above the ranch slider) and on the northwest walls of both upper-level bedrooms and noted:
>
> a) Advanced decay of some of the visible timbers to the northwest walls of both bedrooms and the lounge (including the boundary joist);
>
> b) Decay of the upper-level floor joists of bedroom 1 (and blocking under the floor) which extended for some way into the floor structure;
>
> c) Some of the original particleboard flooring left in place in bedroom 1 was stained and degraded. Based on our findings and a review of the various reports it appears that the damage likely extends further across the northwest elevation. I agree with the conclusion of building inspector John Lyttle that a full re-clad is required.

[58] Mr Wutzler goes on to explain that he understands that a global remediation of all units within the 21 McBain Grove complex is not currently planned and Ms MacFarlane is proceeding with a re-clad of her unit only. Mr Wutzler says that as a result, there is a higher allowance for the remediation of the Property compared to the relevant proportion of the remediation cost if all the units were repaired at the same time, giving several examples.

Affidavit of Mr Jenkinson

[59] Mr Howard Jenkinson has provided an affidavit dated 27 May 2022. Mr Jenkinson is a registered quantity surveyor. He is a senior quantity surveyor at Rider Levett Bucknall and has over 30 years' professional construction industry experience. He has completed numerous weathertightness remediation estimates for all types of buildings, over the years. He was engaged by Helfen Ltd to produce a quantity surveying report on the cost of the proposed reclad work to the Property. Mr Jenkinson concluded that the quantum of the proposed reclad is $435,000 (including GST). This includes a 15% allowance for contingencies. He attaches his

report to his affidavit and notes that it is priced at rates current as at May 2022 and does not consider cost fluctuations after that date.

Affidavit of Mr Wakeling

[60] Mr Robin Wakeling has provided an affidavit dated 30 May 2022. Mr Wakeling is a biodeterioration consultant and wood protection scientist. To investigate the extent of moisture ingress into the timber framing of the Property, Ms MacFarlane engaged Mr Wakeling to carry out timber analysis of eight wood framing samples from the Property. Mr Wakeling is regularly consulted on the development of techniques and guidelines for leaky building diagnostics and remediation. He has given expert evidence on biodeterioration in both the District Court and the High Court. He specialises in factors affecting the rate and type of decay in wood. Mr Wakeling confirms that his evidence is within his area of expertise.

[61] Mr Wakeling investigated the extent of moisture ingress into the timber framing of the Property. His analysis of eight timber samples revealed that:

> The fungal morphology, its distribution and the fungal and decay types identified suggested that all of the samples examined had been exposed to moisture conditions that are inconsistent with sound building practice and/or weather-tight design, and that appropriate remediation is needed to correct this.
>
> …
>
> The toxigenic mould *Stachybotrys* was detected. *Stachybotrys* is often an indicator of several potential biohazards that can in some situations have significant health issues in moisture compromised buildings.
>
> Presence of prolific fungal growths and/or decay typically has important implications for the building in general. It is important to establish the limits of fungal infection and/or decay and establish the causes and apply appropriate remediation.

The defendants' response

[62] The defendants are deemed to have not filed statements of defence and therefore have no entitlement to bring evidence. Nonetheless, I consider that it remains important in the context of a formal proof hearing to note what assertions they have raised in response to Ms MacFarlane's claim.

[63] Documents or emails from Mr Sewell have been provided to the Court in October and November 2022, and in February 2023. Attached to these have been the Inspection Agreement IHI entered into with the vendor of the Property, Mr Sim, and the invoice in the sum of around $1,200 tendered to Mr Sim for providing the report. Earlier email communications between the law firm acting for Ms MacFarlane and Mr Sewell have been disclosed through the affidavit of Mr Viatos. In addition, Mr Sewell's statement of defence dated 6 April 2022 was initially accepted by the Court before later being struck out.

[64] The material records that IHI is no longer trading and is in the process of being put into voluntary liquidation. It appears that at the present date, IHI has indeed been removed from the companies register. It also appears that IHI gave up its insurance cover at some point.

[65] Mr Sewell says that in accordance with the terms of Inspection Agreement, the report was prepared solely for the vendor of the Property, for the vendor's exclusive use, and its use by any third party was prohibited. He says that it was not a pre-market inspection report that could be used by any potential purchaser, which was clearly stated on the report. His view is that IHI cannot be liable to Ms MacFarlane for a report that was not prepared for her or for the purpose of prospective purchasers.

[66] Mr Sewell goes on to say first, that from the clear instructions he had received from Mr Sim, the report was only to be a limited visual inspection house report, and secondly, that the Inspection Agreement he entered into with Mr Sim included a recommendation that a full and invasive watertightness building survey should be obtained.

[67] Mr Sewell also denies that he had ever spoken to, met, or received instruction from Ms MacFarlane. He maintains that he never advised Ms MacFarlane prior to her purchase of the Property. As a result, Mr Sewell asserts that Ms MacFarlane's claim is false and misleading.

[68] After the hearing of this matter, Mr Sewell sent a further email to the Court. It raises the same matters identified above, as well as identifying further matters of

dispute. The email criticises one of the experts relied on by Ms MacFarlane and asserts that the Body Corporate should be held accountable for aspects of any "moisture ingress issues". Mr Sewell asserts that it would be a complete injustice to rule in favour of Ms MacFarlane.

[69] Of course, the difficulty with this information is that it is not properly put before the Court. As Mr Dalzell submitted to me, this is particularly important in relation to Mr Sewell's assertion that (as Mr Sewell put it at the hearing before me), he "does not recall" any conversation with Ms MacFarlane. Mr Sewell's position that no conversation with Ms MacFarlane took place has not been made on oath. There has been no cross-examination of Mr Sewell (nor, I note, of Ms MacFarlane) on this factual matter. This situation has arisen through the defendants' failure to take appropriate steps in the proceeding. I accept that such concerns are perhaps less acute in relation to the Inspection Agreement and the invoice as they are documents which reveal their contents on their face.

[70] I consider the proper way to deal with the material Mr Sewell has provided to the Court is to consider it as I analyse Ms MacFarlane's claim and the evidence she has filed, factoring in the difficulty I have noted as to the quality of Mr Sewell's evidence in terms of its reliability and strength, and bearing in mind that I consider that I must be satisfied that Ms MacFarlane's claim is made out, on the balance of probabilities.

Fair Trading Act claims

[71] Section 9 of the Fair Trading Act 1986 provides that no person in trade shall engage in conduct that is misleading or deceptive or is likely to mislead or deceive. Once a breach of s 9 is proved, s 43 enables a court to provide a remedy for any existing or future consequence of the breach, where someone has suffered or is likely to suffer loss or damage.[18]

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[18] *Red Eagle Corp Ltd v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492 at [26].

[72] In a relatively simple case, such as the present one, the Supreme Court has recommended the following approach, where a plaintiff must show on the balance of probabilities that:[19]

(a) There has been misleading or deceptive conduct by the defendant, by considering whether a reasonable person in the plaintiff's position, with the characteristics known to the defendant or of which the defendant ought to have been aware, would likely have been misled or deceived;

(b) the plaintiff was misled or deceived; and

(c) the defendant's conduct was the effective cause or an effective cause of the plaintiff's loss or damage, or in other words, there is a clear nexus between the defendant's conduct and the loss or damage.

[73] There is no requirement that a person intended to mislead or deceive.[20]

[74] The term 'in trade', is a broad term encompassing all kinds of commercial dealing by the party whose conduct is under examination.[21] Further, context is an important consideration, including the circumstances in which the conduct occurred, and the characteristics of the person said to be affected.[22] Finally, s 5C of the Fair Trading Act provides that persons are unable to displace the Fair Trading Act's application to conduct in trade by agreement or contract. Section 5C(2) states, "a provision of an agreement that has the effect of overriding a provision of this Act (whether directly or indirectly) is unenforceable".

[75] In the present circumstances it is clear that IHI was in trade. It was a registered company actively carrying out the business of pre-purchase house inspections. It was commissioned to provide a report and was paid to do so. It is also clear that inherent in the nature of this business was a knowledge that such reports would be used for the

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19 *Red Eagle Corp Ltd v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492 at [26]–[31].
20 *Taylor Bros Ltd v Taylors Textile Services Auckland Ltd (*1987) 2 TCLR 415 (HC) at 441; and *Red Eagle Corp Ltd*, above n 19 at [28].
21 *Clode v Sullivan* [2016] NZHC 1561 at [85(a)].
22 At [85(c)].

purpose of selling property, and notwithstanding the limitations contained in the report, it was just as likely to be provided to and used by prospective purchasers.

[76] On the basis of Ms MacFarlane's evidence described above, I consider that there has been misleading or deceptive conduct by IHI and Mr Sewell. I am satisfied that a reasonable person in Ms MacFarlane's situation would have been misled or deceived by the report produced by IHI. The report represented that there were no major issues with the Property, that it was in reasonable condition for a property of its type and age, and did not identify any significant defects. It is apparent that at the time the Property was inspected, there would have been some evidence of significant defects and risks associated with weathertightness.

[77] The report was based on a visual inspection and made positive representations as to the quality of the Property and its presentation at the time. The report presented a picture of a property that had been reasonably maintained, was in good order, and was without structural damage to the framing or abnormal moisture levels. The report did not represent that the Property was perfect, and did make recommendations as to upkeep, but overall sought to establish that there were no major issues.

[78] Objectively, the position represented in the report is fundamentally inconsistent with the evidence presented by Mr Lyttle, Mr Symon, and Mr Wutzler. Their evidence establishes a completely different picture of the Property, which is in need of remediation to a significant extent. While there is likely to have been some variation in the presentation of the property at the time Mr Sewell inspected it, as compared to when it was inspected by witnesses providing evidence to support Ms MacFarlane's claim, I accept their evidence to the effect that there would have been indicators of significant defects and weathertightness risk at the time the Property was first inspected. Indeed, the nature of the Property was such that Ms MacFarlane and her husband were on notice as to the potential for the Property to be a leaky home.

[79] The report warranted that the inspection was carried out in accordance with professional standards, and that the cladding system was in 'good overall condition'. Neither of these representations were correct. The report failed to alert the reader of weathertightness risks, or to recommend a specialist report, although I note that such

recommendations were made in the Inspection Agreement which was not within the knowledge of Ms MacFarlane. In sum, I am satisfied that the report presented a misleading and deceptive picture of the Property by positively representing that the property was in a reasonable condition with no significant defects or watertightness issues, and also in omitting to recommend that a more detailed inspection and analysis take place.

[80] Ms MacFarlane's evidence is that this misleading and deceptive conduct has caused her loss. She says that she held a genuine belief that the Property was in good condition and relied upon Mr Sewell's representation that the property was "definitely not a leaky home". She says that the report produced by IHI was an effective cause of her purchase of the Property. The issue in this respect is whether it was reasonable for Ms MacFarlane to rely upon the report given the limitations and disclaimers expressed within it, as to the purpose of the report, particularly references to the availability of its use by third parties. The report noted that the use of the report by any third parties was prohibited, and that it was only to be used by the vendor, Mr Sim.

[81] Ms MacFarlane's position is that Mr Sim's real estate agent provided her with a copy of the report, and then she had a telephone conversation with Mr Sewell as to the report and the condition of the Property, in which no disclaimer was made. She submits that the disclaimer in the report does not provide an answer to a claim for breach of the Fair Trading Act, and that therefore her reliance on the report and verbal advice was reasonable.

[82] Mr Sewell has both denied outright and said he "cannot recall" that he ever had a conversation with Ms MacFarlane where he discussed the report or made representations as to the state of the Property. Against this, are the notes made by Ms MacFarlane's at the time of the conversation, and the email she sent Mr Sewell following her purchase of the property. On the balance of probabilities, Ms MacFarlane's evidence appears to me to establish that the conversation with Mr Sewell did occur, and that he made the representations as described by Ms MacFarlane. I find it difficult to believe that Ms MacFarlane would have emailed Mr Sewell following the purchase of the Property otherwise, or that she would have said in that email that his advice was relied upon by her in deciding to purchase the

Property. The basis for such comments would have been the report prepared by Mr Sewell, and her subsequent conversation with him. I conclude that Ms MacFarlane's evidence is both strong and to be preferred against what Mr Sewell has said informally.

[83] IHI held itself out as a specialist in pre-purchase reports, providing expert advice on the condition of a property. Ms MacFarlane had no expertise in property inspection, building or weathertightness. In such circumstances, I consider it reasonable for her to rely upon the report and verbal advice in her purchase of the Property. Logically, it follows that both IHI and Mr Sewell had positive knowledge of the fact that not only was it likely that the report would be viewed and relied upon by prospective purchasers, but that it was in fact viewed and relied upon by Ms MacFarlane.

[84] While in this case there were express limitations on the audience of the report (included in both the report and the Inspection Agreement), given the general prohibition on contracting out of the Fair Trading Act, and the specific circumstances of this case, I am satisfied that it was reasonable for Ms MacFarlane to rely on both the report and the verbal advice. There are strong policy reasons for this to be the case. A property inspector who verifies the condition of a property pre-purchase and gives further verbal advice to a prospective purchaser which is misleading and/or deceptive should not be able to escape liability under the Fair Trading Act where they know or ought to have known that a prospective purchaser was likely to be a recipient of an inspection report.

[85] This is particularly so where the defendants held themselves out to be experts providing advice to lay-persons, and that was what occurred in this case. I am satisfied that IHI and Mr Sewell had both inferred and actual knowledge that the report was likely to be read by potential purchasers of the property. I also consider that they can also be taken to have been aware that the report was read by Ms MacFarlane, and that she sought to rely on it in the purchase of the property. Accordingly, I am satisfied that the limitations and disclaimers in the report are unable to absolve the defendants from liability under the Fair Trading Act.

[86] To be clear, I consider that Mr Sewell is personally liable under the Fair Trading Act for any misleading or deceptive conduct in relation to the report and the verbal advice. He was the sole director and shareholder of IHI. He produced the report for IHI, relying on his personal skills and expertise. He personally inspected the Property and made representations to Ms MacFarlane on the basis of that inspection. It appears in fact that no one was involved with the inspection of the Property or the preparation of the report, other than Mr Sewell. Accordingly, I am satisfied that Mr Sewell was the alter ego of IHI and himself "in trade" for the purposes of the Fair Trading Act. As such, where it is considered that IHI and Mr Sewell have engaged in misleading and deceptive conduct relating to the report, Mr Sewell himself can be personally liable for the report.[23] This is also the case for the verbal advice given to Ms MacFarlane.

[87] It follows that I conclude that Ms MacFarlane has established that IHI and Mr Sewell engaged in misleading and deceptive conduct, that she was misled by that conduct, and that their conduct was the effective cause of her loss. I address the question of relief for this breach of s 9 of the Fair Trading Act below.

Negligent misstatement

[88] The tort of negligent misstatement is intended to provide for loss caused when a person relies on a statement made or advice given to them by a person with special skills, from which loss results. In such circumstances, a duty of care may exist and the person providing the statement or advice can be liable for the loss that flows. A defendant is deemed to have assumed responsibility if they foresaw or ought to have foreseen that the plaintiff would place reasonable reliance on the statement or advice.[24]

[89] In *Steel v Spence Consultants Ltd*, Gendall J set out the particular requirements of the tort as follows:[25]

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23 See *Steel v Spence Consultants Ltd* [2016] NZHC 398, (2017) 18 NZCPR 540 at [54]–[64]; citing *Body Corporate 202254 v Taylor* [2009] 2 NZLR 17; and *Gloken Holdings Limited v The CDE Company Limited* HC Hamilton, CP28195, 24 June 1997.

24 *Attorney-General v Carter* [2003] 2 NZLR 160 (CA) at [26].

25 *Steel v Spence Consultants Ltd*, above n 24,at [91].

(a) the advice is required for a purpose, particularly or generally described, which purpose is made known, either actually or inferentially, to the adviser at the time the advice is given;

(b) the adviser knows that their advice will be communicated to the advisee, either specifically or as a member of an ascertainable class, in order that it should be used by that advisee for that purpose;

(c) it is known, actually or inferentially, that the advice so communicated is likely to be acted upon by the advisee for that purchase without independent inquiry; and

(d) the advice is so acted upon by the advisee to their detriment.

[90] I address this cause of action briefly.

[91] The purpose of the inspection and report was to examine the Property and evaluate the condition of the it and its components, and to educate the client about the general condition of the building. The report was undoubtedly obtained for the purpose of marketing the Property for sale. It was in fact provided to Ms MacFarlane by the vendor's real estate agent. I consider, as set out above, that the defendants knew at least inferentially that the report would be communicated to prospective purchasers in order for it to be used by them for the purpose of considering a purchase of the Property. Also as set out above, this can be taken to be actual knowledge, following my finding in relation to Ms MacFarlane's conversation with Mr Sewell regarding the report.

[92] IHI was in the business of providing property inspection and reports. Mr Sewell was the director of IHI and the person who actually carried out the inspection of the Property. Ms MacFarlane was a lay person. When preparing an inspection report for a vendor considering the sale of a property, it is common sense that the defendants can be taken to know that their work will be communicated to prospective purchasers. Again, that is what occurred in this case, and that knowledge is confirmed by the subsequent verbal advice. I am satisfied that Mr Sewell's role in

completing the inspection and his conversation with Ms MacFarlane establish a special relationship with and duty of care owed to her.

[93] I also consider that the defendants knew that the report and advice was likely to be acted on by potential purchasers without further independent inquiry. The report itself failed to make recommendations as to further inquiries. Mr Sewell has provided no evidence establishing that he instructed Ms MacFarlane to pursue further independent inquiries. Rather, he denies any conversation with her happened at all, or at best cannot recollect it. The evidence from Ms MacFarlane as to what was said in the conversation is that Mr Sewell represented that the property was "definitely not a leaky home". In that representation is an implicit indication that further independent verification was not required. It was reasonable for Ms MacFarlane, as a lay-person, to rely on that representation, being that it came from a person holding themselves out as an expert on property and building inspection matters. There was nothing in the information available to Ms MacFarlane to suggest to her that she should make further enquiries.

[94] It is undisputable that Ms MacFarlane acted on the defendants' advice to her detriment. She purchased the Property, which she would not have done if she had known its true nature. She is now faced with a significant cost because the Property requires remediation. I therefore conclude that the defendants owed a duty of care to Ms MacFarlane and other prospective purchasers in the preparation of the report, and the giving of verbal advice.

[95] It then follows that I consider that the duty of care has been breached in relation to Ms MacFarlane. The defendants held themselves out as experts, making assessments in accordance with industry standards. The evidence demonstrates that was not what occurred. The defendants did not exhibit the care reasonably expected of the building inspection industry, at the time the report was prepared and when the verbal advice was given.

[96] For completeness, I note that Ms MacFarlane was unaware of the disclaimer contained in the Inspection Agreement. She did not have the Inspection Agreement, as

she did not commission the report, and it was not otherwise provided to her. The Inspection Agreement contained a particularly substantive disclaimer. It recorded:

(a) that the cavity inspection does not constitute a full weathertightness/ invasive building inspection;

(b) that IHI recommended a full weathertightness building inspection be completed, and that it was the only way to give a more accurate overall condition of the structure being inspected;

(c) the likely cost of remediating a leaky home; and

(d) in "no way a two hour visual inspection can 100% guarantee there are no moisture ingress issues with the property".

[97] In *Steel v Spence*, Gendall J noted that a disclaimer might have the effect of making a defendant not liable for a negligent misstatement claim as reliance on the misstatement may be unreasonable.[26] However, in the present case, I do not consider that Ms MacFarlane's reliance on the report and verbal advice is unreasonable in the circumstances.

[98] I have accepted Ms MacFarlane's evidence about her conversation with Mr Sewell. In my view, Mr Sewell had the opportunity to tell Ms MacFarlane in that conversation about the disclaimer in the Inspection Agreement or indeed provide the document to her, as well as the opportunity to comment more generally in a manner that would have discouraged her reliance on the report. But he did not take that opportunity. Rather, he made positive representations to her about the condition of the Property. No such representations were made in *Steel v Spence*, where the report in question (excluding the disclaimer) was included in an auction pack provided to the plaintiff prior to auction. According to Ms MacFarlane's evidence, the representations that Mr Sewell made in the phone call were not limited in any fashion, and certainly not in the manner provided for in the Inspection Agreement's disclaimer. Unlike *Steel*

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[26] Above n 24, at [108]–[110], citing *Bonney v Cottle* HC Auckland CIV-2010-404-427, 24 November 2011.

v Spence, this is not a situation where IHI and Mr Sewell had no control over whether the Inspection Agreement was provided to Ms MacFarlane.

[99] Given my acceptance of Ms MacFarlane's evidence, I consider that the claim in negligent misstatement has been made out in relation to both IHI and Mr Sewell.

Conclusion and relief

[100] I have concluded that both IHI and Mr Sewell are liable for a breach of s 9 of the Fair Trading Act and for the tort of negligent misstatement. I turn now to the question of relief. For convenience, I set out again the relief sought by Ms MacFarlane:

(a) the cost of remediating the property, estimated to be $435,000 including GST;

(b) the cost of alternative accommodation during the period required for remedial work, estimated at the same time to be $18,717;

(c) general damages for stress, anxiety, disappointment, physical inconvenience and mental distress assessed to be $35,000;

(d) interest pursuant to the Interest on Money Claims Act 2016 from 11 May 2022 until the date that payment of the judgment debt is made; and

(e) costs and disbursements of $61,778.52 as set out in Schedule 1 to the memorandum of counsel for the plaintiff dated 13 March 2023.

[101] Section 43 of the Fair Trading Act applies where the Court finds a person has suffered loss or damage by conduct of another person which contravenes s 9. Section 43(3)(f) empowers the Court to order a person to pay damages of the amount of the loss or damage.[27] The remedy is to put the wronged party in the same position

[27] *Cox & Coxon Ltd v Leipst* [1999] 2 NZLR 15, (1998) 8 TCLR 516 (CA) at 26.

they would have been but for the wrong, although the Court retains a discretion as to the award of any damages.[28]

[102] Considerations to be assessed in the exercise of that discretion have previously included the benefit obtained by misleading statements, the role played by a defendant, the nexus between misleading conduct and the loss, and the defendant's relationship to the plaintiff.[29] Also relevant is any blameworthy conduct or carelessness on the plaintiff's behalf.[30]

[103] Overall, the exercise of the power to make an order for payment under s 43 is a matter of doing justice to the parties in the circumstances of the particular case and in terms of the policy of the Act.[31]

Damages for cost of remediation and alternative accommodation

[104] Looking then to the circumstances:

(a) the benefit obtained by the misleading conduct was minor, with the fee paid for the report being approximately $1,200;

(b) the defendants were closely involved, with a clear and direct nexus between the misleading conduct and the loss, particularly given Mr Sewell's conversation with Ms MacFarlane;

(c) it follows that the defendants did have a direct relationship with Ms MacFarlane; and

(d) it is difficult to see what else Ms MacFarlane should have done to satisfy herself that the Property was in a reasonable condition, having read the report and discussed the matter with Mr Sewell.

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28 *Goldsbro v Walker* [1993] 1 NZLR 394, (1992) 5 TCLR 46 (CA), reaffirmed in *Red Eagle Corp Ltd v Ellis*, above n 19.

29 *Mok v Bolderson* HC Auckland CIV-2010-404-7292, 20 April 2011.

30 *Steel v Spence*, above n 24, at [75].

31 *Red Eagle Corp Ltd v Ellis*, above n 19, at [31].

[105] In all the circumstances, this appears to be a case in which it would be appropriate for Ms MacFarlane to be awarded close to full quantum of her loss. I turn, however, to specifically consider three aspects of the claim.

[106] The first is whether there should be a reduction to respond to the fact that the benefit obtained by the defendants from their conduct was relatively small. I raised this with Mr Dalzell. He accepted that such an acknowledgement could be made but emphasised that while the reward was small, the defendants took on the risk that reliance on the advice given by them could lead to an award of damages. In the circumstances I consider a reduction to the remediation costs of approximately 5 per cent to be appropriate, being $21,000.

[107] The second aspect reflects the fact that, as acknowledged in the evidence from the registered building surveyor and remediation specialist, Mr Wutzler, there is a higher allowance for the remediation of the Property because a global remediation of all units within the 21 McBain Grove complex is not currently planned, and Ms MacFarlane is proceeding with a re-clad of her unit only. Ms MacFarlane accepts this makes her remediation more expensive but submits that she is entitled to get on with repairing the Property.

[108] I agree that Ms MacFarlane must be able to proceed with remediating the Property. It is severely damaged, and she continues to live in it. She cannot unilaterally require the Body Corporate to undertake repairs. I have no specific evidence before me as to the amount by which the remediation costs are increased by repairing the Property outside of a global remediation exercise. However, the scope of works provided by Mr Wutzler is clear that it is unlikely to have identified all matters that may eventuate in the remediation process. The evidence from Mr Jenkinson, the Quantity Surveyor who has priced the scope of works, is that his report also excludes various possible other costs, including cost fluctuations. I note that his report was completed in May 2022, and so is now essentially a year old. Mr Dalzell also submits that although the report contained a contingency allowance of 15 per cent, the current inflationary environment will necessarily increase the costs of remediation.

[109] It seems to me that for all these reasons, remediating the Property will in fact cost more than has been calculated in the scope of works. In all the circumstances, I am therefore satisfied that it is not appropriate to make any reduction to the calculation of the costs of remediation because of the recognised additional remediation costs as a result of repairs being undertaken in relation to Ms MacFarlane's unit only.

[110] Finally, I cannot see how, in any way, Ms MacFarlane could be considered to have contributed to her loss. She took reasonable care, and reasonably relied on the representations both in the report and the verbal advice. I do not consider it tenable to argue that, in all the circumstances, Ms MacFarlane should have obtained her own watertightness inspection, rather than relying on a report prepared for the vendor. As noted, prospective purchasers were within a reasonably foreseeable class of persons that would read the report, and Mr Sewell compounded that by representing to Ms MacFarlane that the property was without fault of any significance.

[111] As discussed earlier, Ms MacFarlane has provided evidence as to the quoted cost of remediation, as well as the cost of alternative accommodation while the remediation is carried out. I am satisfied that her loss in this regard is proven.

[112] As for the negligent misstatement causes of action, I consider the same measure of loss should apply as for the causes of action based on the breach of s 9 of the Fair Trading Act.[32]

General damages

[113] I also find that Ms MacFarlane has suffered stress, anxiety, disappointment, physical inconvenience and mental distress. Damages under the Fair Trading Act are not limited to physical or monetary loss or damage, but can include damages for distress and inconvenience.[33] However, the Court is unlikely to award damages under this head in respect of a strictly commercial context.[34]

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32 *Steel v Spence*, above n 24, at [111].

33 See *Sinclair v Webb and McCormack Ltd* (1989) 2 NZBLC 103,605 (HC); *Smythe v Bayleys Real Estate Ltd* (1993) 5 TCLR 454 (HC) at 476; *AMP Finance New Zealand Ltd v Heaven* (1997) 8 TCLR 144 (CA) at 154; *Roberts v Jules Consultancy Ltd* [2019] NZHC 3342; *Roberts v Jules Consultancy Ltd (in liq)* [2021] NZCA 303, (2021) 16 TCLR 85; and *Mitchell v Murphy* [2019] NZHC 3262.

34 *Crump v Wala* [1994] 2 NZLR 331 (HC).

[114] In *O'Hagan v Body Corporate 189855*, the Court of Appeal discussed the appropriate method of determining quantum in a claim for non-economic loss.[35] Baragwanath J summarised previous High Court decisions in the following manner:[36]

> High Court decisions include *Court v Dunedin City Council* ($6000); *Chase v de Groot* (two years disturbance, $15,000); *Birch v Palmerston North City Council* ($10,000*); Battersby v Foundation Engineering Ltd* (total loss of cliff property to family with four children, $20,000 joint award to husband and wife); *Dicks v Hobson Swan Construction Ltd* ($22,500); *Sunset Terraces* ($25,000 per person); B*ody Corporate 185960 v North Shore City Council* ($25,000); *Body Corporate 183523 v Tony Tay & Associates Ltd* ($25,000 per person).
>
> The facts of these cases vary considerably but generally entailed occupancy of a leaky building for a significant period and the associated anxiety.
>
> (footnotes omitted)

[115] William Young P then stated:[37]

> I consider that this Court has a role in giving general guidance as to appropriate levels of compensation for non-economic loss in leaky homes cases. Rules of thumb would serve to reduce the cost of resolving litigation of this sort, and, as well would facilitate consistency. On the other hand, I agree with Baragwanath J that this is not an ideal case for such general guidance to be given, [primarily] because, as he notes, the material before us was rather too limited for us to be confident that we have a reasonably complete grasp of all the relevant issues.
>
> For the reasons given by Baragwanath J, I support awards for non-economic loss in this case which proceed on the bases that:
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> (a) Such awards should not made in favour of corporate owners;
>
> (b) $15,000 is appropriate per unit for non-occupiers ; and
>
> (c) $25,000 is appropriate per unit for occupiers.
>
> As Baragwanath J points out, however, not all the claims can be neatly categorised in this way and some evaluative assessment may be required.
>
> This approach involves elements of rough justice. By way of illustration of this proposition, a purchaser with a phlegmatic disposition does as well as one who is more prone to stress and allowances for the length of time the purchasers have lived with the problem are broad-brush at best. On the other hand, there is a limit to the extent to which it is practical to go into fine detail on assessments of this kind.

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35 *O'Hagan v Body Corporate 189855* [2010] NZCA 65, [2010] 3 NZLR 445.
36 At [115]–[116].
37 At [152]–[154].

[116] This approach was recently adopted by Gordon J in *Mitchell v Murphy*, in which the plaintiffs had purchased a leaky home in reliance on representations made by a real estate agent, and brought a claim under the Contract and Commercial Law Act 2017 and the Fair Trading Act.[38] Without significant analysis, Gordon J stated:[39]

> I consider that this is a case where an award of general damages to reflect stress, disruption and inconvenience to the Mitchells is appropriate. Adopting the level of compensation in O'Hagan, I award the sum of $25,000

[117] Further (and more recent) reference was made to *O'Hagen* in the case of *Bhargav v First Trust Ltd*.[40] In that case, Hinton J accepted the plaintiffs' submission that given the effect of inflation between the time *O'Hagen* was decided and the date of hearing of the case, an award greater than the $25,000 proposed by *O'Hagen* was warranted. In doing so, Hinton J stated:[41]

> The plaintiffs claim general damages for stress, anxiety and inconvenience as a result of being deceived by the first to fourth defendants into buying a leaky home which needs such extensive repairs. The statement of claim seeks $30,000. Ms Wroe submits that the tariff was set by [*O'Hagan*] at $25,000, but it has not since moved with inflation. Ms Wroe says that an award of $30,000 reflects both the changes to the consumer price index and the extent of anxiety and stress caused to the plaintiffs as they have had to cope with this situation in the context of the birth of their first child and a pandemic. The inability to have rooms available for boarders as intended has also contributed to financial-based stress.
>
> I agree that the plaintiffs are entitled to general damages. It is appropriate that an award of $30,000 be granted to reflect both inflation over the 12 years since [*O'Hagan*] was decided and the high level of stress and anxiety the plaintiffs have endured as a result of occupying the defective property for over two years.
>
> (footnotes omitted)

[118] I agree with the reasoning of Hinton J on the need for the *O'Hagan* tariff to be increased. Accordingly, I consider that Ms MacFarlane is entitled to an award of general damages in the sum of $30,000.

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38 *Mitchell v Murphy* [2019] NZHC 3262 at [337]–[338].

39 At [338].

40 *Bhargav v First Trust Ltd* [2022] NZHC 1710. I note that this judgment was set aside in part in *Bhargav v First Trust Ltd* [2023] NZHC 174, following an application to set the judgment aside pursuant to r 15.10 of the High Court Rules 2016.

41 At [84]–[85].

Interest

[119] Ms MacFarlane seeks interest from 11 May 2022 until the date that payment of the judgment debt is made as 11 May 2022 is the date on which Ms MacFarlane's claim was quantified. An award of interest on a money claim is mandatory, pursuant to s 9 of the Interest on Money Claims Act 2016. Section 9(1) also provides that interest is to run from either the day on which the cause of action arose or on the day at which the claim was quantified. I accept that it is appropriate and reasonable for interest to run from 11 May 2022, being the date that Mr Jenkinson's report was provided to Ms MacFarlane, for the purpose of quantifying her claim.

Costs and disbursements

[120] I have reviewed the schedule of legal and expert costs and disbursements provided by Ms MacFarlane and consider them reasonable. I understand the schedule to already include costs attributable to the formal proof hearing leading to this judgment and therefore no further question of costs arises.

Conclusion

[121] Accordingly, then, I award to Ms MacFarlane:

(a) costs of remediation of the Property, being $414,000;

(b) the cost of alternative accommodation during the period required for completion of the remedial work, being $18,717;

(c) general damages for stress, anxiety, disappointment, physical inconvenience and mental distress of $30,000;

(d) legal and experts costs and disbursements of $61,778.52; and

(e) interest pursuant to the Interest on Money Claims Act 2016 from 11 May 2022, until the date that payment of the judgment debt is made.

[122] The defendants are to be jointly and severally liable for the payment of those sums.

Result

[123] I enter judgment against the defendants jointly and severally in favour of Ms MacFarlane in the sum of $524,495.52 plus interest on this sum from 11 May 2022 until the date that payment of the judgment debt is made.

McQueen J

Solicitors:
Dalzell Wollerman, Wellington for Plaintiff