

IN THE WEATHERTIGHT HOMES TRIBUNAL

**TRI-2008-100-000010
[2012] NZWHT AUCKLAND 25**

BETWEEN	MICHAEL and ADELE COLE Claimants
AND	EURO-ASIA INVESTMENTS CO LTD First Respondent (Settled)
AND	AUCKLAND COUNCIL (formerly NORTH SHORE CITY COUNCIL) Second Respondent (Settled)
AND	REALTY INSIGHT LIMITED Third Respondent
AND	DAVID LEE Fourth Respondent (Settled)
AND	THEOTESTO REYES Fifth Respondent
AND	CITYWIDE BUILDING CONSULTANTS (AUCKLAND) LTD (Removed) Sixth Respondent
AND	RAY RANGI Seventh Respondent
AND	JACK XIANG Eighth Respondent
AND	ALLEN PRESTON Ninth Respondent (Settled)
AND	CHRISTOPHER WERTHMANN Tenth Respondent (Settled)

Hearing: 19, 20 and 21 October 2011 and 18 November 2011

Appearances: Mr C Baird, counsel for the claimants
Mr S Piggin, counsel for the third and eighth respondents
Fifth respondent – no appearance
Seventh respondent – no appearance

Decision: 19 April 2012

FINAL DETERMINATION
Adjudicator: P J Andrew

CONTENTS

INTRODUCTION	4
THE ISSUES.....	5
MATERIAL FACTS	6
The Damages Claimed	10
ISSUE ONE – Whether the claimants’ settlement with the Council and Mr Lee in September 2009 also released and discharged Realty Insight and Mr Xiang from liability?	11
ISSUE TWO – Did the claimants meet with Mr Xiang on 23 August 2006 and did he advise them at that time that if a house is brand new and a CCC has just issued, then there is no need for a pre-purchase report?	13
CLAIMS UNDER THE FAIR TRADING ACT 1986	16
ISSUE THREE – Were the representations made by Mr Xiang and Realty Insight misleading conduct for the purposes of the Fair Trading Act 1986... ..	18
SECTION 14 OF THE FAIR TRADING ACT AND MR XIANG’S PROMISE OR GUARANTEE REPRESENTATION	21
ISSUE FOUR – was the misleading conduct of Mr Xiang an effective cause of the claimants’ loss, namely the purchase of a leaky home?	22
CAUSATION UNDER THE FAIR TRADING ACT	25
ANALYSIS OF THE CAUSATION ISSUE.....	28
CONCLUSION ON FAIR TRADING ACT CAUSES OF ACTION	35
CLAIMS IN NEGLIGENCE AGAINST MR XIANG AND REALTY INSIGHT	35
FORMAL PROOF - CLAIM IN NEGLIGENCE AGAINST MR THEOTESTO REYES, FIFTH RESPONDENT	37
FORMAL PROOF - CLAIM IN NEGLIGENCE AGAINST MR RAY RANGI, SEVENTH RESPONDENT	41
CONCLUSION	43

INTRODUCTION

[1] The claimants are the owners of a poorly constructed leaky home, which has substantial problems with its drainage system. It was purchased by them in 2006. At that time it was a brand new house and a code compliance certificate had just been issued by the North Shore City Council (NSCC), the second respondent.

[2] Mr Xiang, the eighth respondent, was the real estate agent acting for the vendor on the sale to the claimants. At issue in this claim are alleged representations made by Mr Xiang that the claimants did not need to get a pre-purchase inspection report on the house because it was brand new and a CCC had issued. It is contended by the claimants that these representations constituted misleading conduct under s 9 of the Fair Trading Act 1986. They are also the basis of a cause of action in negligent misstatement.

[3] Mr Xiang denies that he made such representations. He says that in any event, because of the intervention of the claimants' own solicitors and the subsequent cancellation of the original sale and purchase agreement, such representations (if made) did not cause the claimants loss.

[4] In 2009 the claimants settled their claim at mediation against the North Shore City Council and Mr Lee, the fourth respondent and the developer. The claimants now seek to recover the balance of their overall loss from Mr Xiang and Realty Insight Limited, the third respondent.

[5] The hearing also involved a formal proof claim against the alleged designer, Mr Theotesto Reyes, the sixth respondent, and the alleged drain layer, Mr Ray Rangji, the seventh respondent.

THE ISSUES

[6] There were are a large number of factual and legal matters in dispute. For the purposes of this determination, I must determine the following issues:

- a) Did the claimants' settlement with the North Shore City Council and Mr Lee in September 2009 also release and discharge Realty Insight and Mr Xiang from liability?
- b) Did the claimants meet with Mr Xiang on 23 August 2006 and did he advise them that if a house is brand new and a CCC has just issued, that there is then no need for a pre-purchase report?
- c) If so, did that constitute misleading conduct under s 9 of the Fair Trading Act 1986?
- d) Did the claimants' solicitors advise them prior to the signing of the second agreement for sale and purchase that if Mr Xiang had said that there was no need to get a pre-purchase report because the house was brand new and there was a CCC, that it was safe for them to proceed to purchase?
- e) If so, was the misleading conduct of Mr Xiang an effective cause of the claimants' loss, namely the purchase of the leaky home?
- f) Did Mr Xiang owe the claimants a duty of care in relation to the advice given on 23 August 2006 and was such advice causative of the claimants loss?
- g) Have the claimants established their formal proof claim against Mr Theotesto Reyes, the fifth respondent?
- h) Have the claimants established their formal proof claim against Mr Ray Rangi, the seventh respondent?

MATERIAL FACTS

[7] Euro-Asia Investments Co Limited, the first respondent, was a developer of the property at 117D Glendhu Road. Mr Lee, the fourth respondent, was its director. An application for resource consent was made on behalf of Euro-Asia by Mr Theotesto Reyes, the fifth respondent, in October 2004. The house was constructed in 2005-2006.

[8] An application for building consent relating to a change of cladding was filed in September 2005. This provided for a change from ground floor board cladding to brick veneer and the remainder of the cladding to cedar weatherboards.

[9] In 2006, the claimants, recent immigrants from South Africa, began looking to purchase a new home. They had some awareness of leaky home syndrome and were concerned not to purchase one themselves. Ms Melanie Amm, a real estate agent from Browns Bay, helped the claimants to identify potential properties for purchase.

[10] The claimants say that they met with Ms Melanie Amm and Mr Xiang at Mr Xiang's office in Albany on 23 August 2006 to discuss the sale of the house. They contend that it was at this meeting that Mr Xiang represented to them that because the house was brand new and a CCC had issued, they did not need to get a pre-purchase inspection report. Mr Xiang denies any such meeting took place and/or that he made any of the representations alleged.

[11] Mr Xiang was the principal of Realty Insight Limited, a licensed real estate agency.

[12] Mr Xiang had previously sold properties for Mr Lee. He and Mr Lee had a common understanding that Mr Lee would agree to having a maintenance clause and builder warranty for a new house in any agreement for sale and purchase.

[13] On 23 August 2006 the claimants made an offer to purchase the property which was accepted by Mr Lee and documented in a conditional sale and purchase agreement (the first agreement). There were three relevant conditions:

- a) The purchaser being satisfied with information disclosed in records held by the NSCC.
- b) A five year structural warranty from the vendor.
- c) A “make good clause” by the vendor for any defects in construction identified within 90 days of purchase.

[14] Subsequent to the signing of the first agreement, the claimants approached their solicitors. In a letter addressed to them dated 29 August 2006 the solicitors advised the claimants that they required a building expert to advise on the NSCC information. The letter further noted the CCC had not issued for the property, that unauthorised works had been conducted on site and that those works required further design works to protect the public drains. The letter stated that the Council would withhold the CCC until authorised by a Council development engineer. As a result of the “important issues” such as no CCC and unauthorised works, the solicitors suggested to the claimants that they might wish to apply for an extension of finance conditions. The letter also suggested that the claimants contact a building expert, Mr Pat O’Hagan, who could assist with inspecting the building and searching through the Council information disc.

[15] On 30 August 2006 the first agreement was cancelled. The claimants’ solicitors advised the vendor’s solicitors that the bank had declined finance and that in any event, as a result of the misrepresentation that a CCC had issued, when it had not, the claimants would have sought to cancel.

[16] On 2 October 2006 the NSCC issued a CCC for the property. Mr Xiang then contacted Ms Amm to see if the claimants were still interested in purchasing.

[17] On 5 October 2006, Mr Cole telephoned his solicitors to seek advice on signing a second agreement for sale and purchase. The nature of that conversation and the advice received (if any) is in dispute. The claimants contend that they specifically sought and received advice about Mr Xiang's representation that there was no need to get a pre-purchase inspection report.

[18] On 8 October 2006 the claimants made a new offer to purchase the property which was accepted by the vendor and documented in a second agreement for sale and purchase (the second agreement). Mr Xiang personally took the second agreement around to where the claimants were staying for them to sign. The second agreement contained the same structural warranty condition and make good warranty that had appeared in the first agreement.

[19] At no time did the claimants seek or obtain a pre-purchase property inspection report.

[20] The claimants settled the purchase on 21 October 2006 and moved into their new home.

[21] In March 2007 the claimants' house flooded during a storm of torrential rain. They then engaged an engineer, Mr J H Little to inspect the property. In an interim report dated 10 May 2007 Mr Little outlined defects with the property storm water and sewage drainage systems and how these contrasted with the building consent drawings. Mr Little then made recommendations regarding the remedial works required to cure the defects.

[22] On 7 August 2007 the claimants filed their claim with DBH. The assessor's report was issued on 23 November 2007. In his report Mr Nevill noted that a complex system of both sewage and storm water retention tanks and piping existed in the rear yard which was bordered by a higher ground level or the rear wall of the dwelling on all sides. He further noted there were numerous examples of issues lacking in weathertight integrity and that these were "apparent". In evidence both Mr Nevill and Mr Grigg, an expert who gave evidence for the claimants, described the house as "very badly built".

[23] On 9 July 2008 the assessor issued an addendum report which addressed two issues:

- a) How repairs undertaken by the first respondent, Euro-Asia Investments Limited, since publication of the original report, affected the quantum of the remedial works that still needed to be carried out.
- b) Whether repairs already carried out adequately addressed the water ingress defects identified in the original report.

[24] Mr Nevill concluded that the minor application of sealant to some cladding/flushing areas could not be considered a long term solution to the "plethora" of shortcomings in the standard of workmanship on the house. He further concluded that the current storm water and surface drainage situation as existed in the rear yard was of an unsatisfactory standard. He expressed doubt on whether this situation, being surface water now at a level below floor slab and cladding, fell within the jurisdiction of the Weathertight Homes Resolution Services Act 2006. Mr Nevill recommended that the opinion of a specialist drainage engineer needed to be obtained in relation to these issues.

[25] On 10 September 2009 at a mediation, the claimants reached a settlement with the NSCC, the second respondents, and Mr David Lee, the fourth respondent. Clause 2 of the settlement agreement, whose interpretation is at issue, reads as follows:

“subject to any other provisions of this agreement, the claimants and other parties further agree that they have not made a claim against any other party (not a party to this agreement, except Jack Xiang, Theotesto Reyes, Ray Rangi, Don Wei Zhang, nor will they make such claim in the future relating to or in any way arising directly or indirectly out of the property, but excluding any claims arising out of any work undertaken pursuant to this agreement (i.e. remedial work at the property). If the claimants or the other parties have made such a claim, they agree they will not further prosecute that claim.”

[26] In January 2011 water again leaked through the claimants’ house during a heavy storm. In February 2011 Mr Grigg, the claimants’ expert, discovered a fake garden drainage sump.

[27] In Procedural Order No 20 dated 24 March 2011 the Tribunal refused an application by the claimants, to join their solicitors (i.e. the former solicitors who acted on the sale and purchase) as a further respondent party to the claim.

The Damages Claimed

[28] The claimants seek damages against all four remaining respondents on either a reinstatement or repair approach, or a diminution in the market value approach.

[29] The total amount of damages claimed pursuant to the reinstatement or repair approach is \$353,922.00. This includes a claim for stigma damages of \$58,500.00. The total amount of damages claimed pursuant to the diminution in market value approach is \$292,436.00.

[30] In relation to both the total amounts claimed the claimants have included a deduction to account for settlement monies already received. Both approaches also include a claim for general damages of \$60,000.00.

ISSUE ONE – Whether the claimants’ settlement with the Council and Mr Lee in September 2009 also released and discharged Realty Insight and Mr Xiang from liability?

[31] Mr Xiang and Realty Insight contend that the payment made under the settlement agreement of 2009 was made in full and final settlement of the proceedings and this included the present claims against them. They submit that the provisions of the settlement and in particular the reference in clause 2 to “claims arising directly or indirectly out of the proceeding and/or the property,” operate to release Mr Xiang and Realty Insight.

[32] It is further argued that apart from the release rule, the settlement agreement, read as a whole, confers an enforceable benefit on Mr Xiang and Realty Insight for the purposes of s 4 of the Contracts (Privity) Act 1982. They submit that they are designated by description being “any other party” not a party to the agreement in respect of “any claim made or that could be made arising directly or indirectly out of the proceedings and/or property” (clause 2). Therefore, whether under the release rule or as a matter of contract, it is contended that the settlement agreement has brought to an end any further claim by the claimants against Mr Xiang and Realty Insight.

[33] Mr Baird for the claimants submits that the position in respect of Mr Xiang is unambiguous. On the face of the settlement agreement, the claim against him is expressly excluded from release and discharge by clause 2. Clause 2 contains the words “except Jack Xiang”. In relation to Realty Insight, Mr Baird contends that the

clear common intention of the settlement agreement was to release only the parties to the existing claim who had actually settled at the mediation. Realty Insight was not by name expressly included in the handwritten additions to clause 2 because of an inadvertent oversight which occurred when the settlement agreement was drafted late at night after a long day of mediation.

[34] Mr Baird further argues that Realty Insight and Mr Xiang are concurrent tortfeasors with the other respondent parties to the settlement agreement and that applying ordinary common law principles,¹ the release of the Council and Mr Lee does not release Realty Insight and Mr Xiang from their liability to the claimants pursuant to the Fair Trading Act or in tort. There is thus no benefit in terms of s 2 of the Contracts (Privity) Act 1982 and that provision cannot therefore be relied upon. It is further argued that Realty Insight and Mr Xiang are not designated by name, description or class. Again, therefore the Contracts (Privity) Act does not apply.

[35] I accept the submissions of Mr Baird on this issue. Mr Xiang is expressly excluded from the settlement agreement and it is clear that the parties to the settlement intended that the claims against him could continue. That is the precise reason why the words “except Jack Xiang” appear in clause 2. While the position of Realty Insight is less clear, I accept that in reading the settlement agreement as a whole, the common intention was to allow extant claims against existing parties not party to the settlement agreement, to continue (albeit that the indemnity provisions might apply).

[36] In any event, Mr Xiang and Realty Insight cannot rely on the Contracts (Privity) Act 1982. They are concurrent tortfeasors and there is thus no benefit conferred for the purposes of the 1982 Act. I also doubt that they are sufficiently designated as contemplated by the statutory scheme of that legislation.

¹ *Allison v KPMG Peat Marwick* [2000] 1 NZLR 560 (CA).

[37] I therefore reject the defence advanced by Mr Xiang and Realty Insight that they are released and discharged from liability by the provisions of the settlement of 2009.

ISSUE TWO – Did the claimants meet with Mr Xiang on 23 August 2006 and did he advise them at that time that if a house is brand new and a CCC has just issued, then there is no need for a pre-purchase report?

[38] The claimants and Ms Melanie Amm, real estate agent, gave evidence of a meeting with Mr Xiang at his office in Albany in mid-afternoon on 23 August 2006. All three say that Mr Xiang telephoned Mr Lee, the builder/developer, during that meeting although they could not understand what was discussed because Mr Xiang was speaking in an Asian language. Telephone records confirm a phone call between Mr Xiang and Mr Lee at 3.28pm on that day. The claimants and Ms Melanie Amm say that Mr Xiang telephoned Mr Lee after Mr Cole had asked Mr Xiang whether he and his wife should get a pre-purchase inspection report for the property. They further say that following that conversation Mr Xiang told Mr Cole that there was no need to obtain a pre-purchase report because:

- a) It was a new home;
- b) A CCC had already been issued by the North Shore City Council;
- c) The builder, Mr Lee was known personally to Mr Xiang and that if there were any issues arising in relation to the property that Mr Lee guaranteed that he would fix them all up properly without problems;
- d) If there were any issues arising in respect of the condition or quality of the property then Mr Xiang personally would ensure that Mr Lee would promptly remedy them.

[39] The claimants' daughter, Ms Geraldine Cole, and Mr and Mrs Cole Senior also gave evidence. These witnesses say that they drove with the claimants to the meeting in Albany on 23 August 2006. However, they did not personally attend the meeting but waited outside.

[40] Mr Xiang gave evidence denying any such meeting ever took place. He says that he never made the representations alleged.

[41] The claimants, Ms Melanie Amm, Ms Geraldine Cole and Mr and Mrs Cole Senior all presented as sincere and straight forward witnesses. I reject the contention of Mr Xiang that these witnesses somehow colluded to concoct a false story about a meeting that never took place. I prefer the evidence of the claimants and their witnesses to that of Mr Xiang whose testimony was unreliable and self-serving.

[42] The evidence of Mr Lee about the conversation he had with Mr Xiang on the afternoon of 23 August 2006 I found to be unreliable and of no assistance in reaching my findings on the issue of the meeting.

[43] The claimants originally filed a statement of evidence from Mr Lee as part of their case. It had been a condition of the settlement agreement of 2009 that Mr Lee would give evidence for them. In a subsequent statement dated 15 September 2011 filed by a firm of solicitors with no involvement in the hearing, Mr Lee has recanted what he had originally said about his conversation with Mr Xiang in his earlier statement. Mr Lee claims that because of language difficulties he had not appreciated what he had stated in his original statement.

[44] Mr Lee was a very unimpressive witness and I cannot place any reliance on his testimony.

[45] In closing submissions Mr Xiang made a wide ranging attack on the evidence of the claimants and their family, suggesting multiple reasons why the claimants have failed to establish that a meeting took place and that Mr Xiang made the alleged representations. I am not persuaded that either individually or viewed overall these submissions have any real merit. I will deal only with what I consider to be the main points made rather than each individual submission.

[46] Mr Xiang and Realty Insight submit that there is a “glaring gap” in the claimant’s case, namely that Mr Xiang had no need to make a representation of the type alleged for only a partial commission on a sale (partial, because it was to be shared with another real estate agency). It is contended that “on an elementary level” there was no reason, no motive for Mr Xiang to go so far “out on a limb” for the modest sum of \$7,000.

[47] I reject this submission. As the claimants point out, Mr Xiang and Mr Lee enjoyed a close relationship and Mr Xiang was naturally keen to assist his friend in selling houses that Mr Lee had built and developed. It was not just a question of a modest one off commission.

[48] As to the length of the phone call between Mr Lee and Mr Xiang on 23 August 2006, there was in my view sufficient time (especially given a close relationship between the two) for the issue of a CCC and a pre-purchase report to have been discussed.

[49] The fact that a real estate agent had represented to the claimants that a CCC for the property had issued, is corroborated by the subsequent letter from the claimants’ solicitors to the vendor’s solicitors dated 28 August 2006. Similarly, the letter from the claimants’ solicitors to the claimants dated 29 August 2006 notes that a CCC had not issued “contrary to the representation made to you by

the real estate agent.” I reject the submission of Mr Xiang that the references to “the real estate agent” could have been a reference to Ms Amm rather than Mr Xiang. In my view there is little doubt that it would have been a reference to Mr Xiang. It was Mr Xiang who was in control of the situation, had the close relationship with Mr Lee and was best placed to give advice about such issues.

[50] The recollection of the claimants’ witnesses about details of the meeting may not be 100% accurate but that is hardly surprising giving the frailty of human recollection. I also reject the submission made by Mr Xiang that it was implausible that Ms Geraldine Cole went to Albany on 23 August 2006 and it is far more likely that she would have been at school. Likewise the contention that Ms Amm colluded with the claimants to give false evidence because they were all from Africa, has no merit.

[51] I conclude therefore that the claimants have established that at a meeting with Mr Xiang on 23 August 2006 he did represent to them it was not necessary to get a pre-purchase inspection report because the house was new and that a CCC had issued. I also accept that Mr Xiang assured them that there would be no problems with the property. I now turn to address the legal consequences.

CLAIMS UNDER THE FAIR TRADING ACT 1986

[52] The claimants contend that the representations made by Mr Xiang and Realty Insight amounted to misleading or deceptive conduct in breach of s 9 of the Fair Trading Act 1986 and false or misleading representations in relation to land in breach of s 14(1)(b) of that Act.

[53] It is contended that in entering into the first agreement the Coles relied on these representations. Although the first agreement was cancelled they say that in entering into the second (and operative) agreement of 8 October 2006, and not making it

conditional on receiving a pre-purchase property inspection report satisfactory in all respects to them, and not obtaining a report on a dwelling, they did so in reasonable reliance on the representations of fact made to them by Mr Xiang on 23 August 2006.

[54] In *AMP Finance NZ Limited v Heaven*² the Court of Appeal held that the question of whether there has been a breach of s 9 should be addressed in three steps:³

- a) Ask whether the relevant conduct was capable of being misleading;
- b) Consider whether the plaintiffs were in fact misled by the relevant conduct; and
- c) Consider whether it was, in all the circumstances, reasonable for the plaintiffs to have been misled.

[55] In *Red Eagle Corporation Limited v Ellis*,⁴ the Supreme Court held that:

- a) S 9 enacts a prohibition and s 43, the remedy provision, operates only when a breach of s 9, or some other section of the Fair Trading Act has been proved.
- b) In a typical case in which a claim is alleged to be in contravention of the Act in claiming damages for loss caused by that contravention, it is preferable to deal consecutively with the requirements of each section.

[56] The Supreme Court further held that the three step test set down in *AMP v Heaven* was not intended to apply in all situations. The Court then proceeded to apply an alternative two stage approach which it considered applicable in relatively simple cases where there is no doubt about what was said, or about its meaning,

² *AMP Finance NZ Limited v Heaven* (1997) 8 TCLR 144 (CA).

³ At para [152].

⁴ *Red Eagle Corporation Limited v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492 (SC) at [26].

and where all of the loss arose from the same event or the loss did not have different components.

[57] Mr Xiang and Realty Insight say that this is far from a simple case and that the three step test laid down in *AMP v Heaven* should be applied. The claimants argue that the Supreme Court's approach in *Red Eagle* should be followed.

[58] I intend to apply the two step test laid down in *Red Eagle*. As Mr Baird submitted, recent High Court cases⁵ suggest that *Red Eagle* should be applied even in complex cases. There is also merit to Mr Baird's submission that the Supreme Court in *Red Eagle* repaired a conceptual problem with the *AMP v Heaven* test, namely that steps two and three of the *AMP v Heaven* test conflate the separate requirements of s 9 and s 43 of the Fair Trading Act.

[59] In any event, I doubt whether in relation to the principal issue of causation, the question of whether *AMP v Heaven* or *Red Eagle* applies makes any material difference in this case. Causation under s 43 must always be established.

[60] The parties agree that if the representations were in fact made (as I have found) that for the purposes of s 9 and s 14, Mr Xiang and Realty Insight were acting "in trade".⁶

ISSUE THREE – Were the representations made by Mr Xiang and Realty Insight misleading conduct for the purposes of the Fair Trading Act 1986.

[61] In *Red Eagle*⁷ the Supreme Court held that the question to be answered in relation to an alleged breach of s 9 is whether a

⁵ *WaikatoLink Limited v Comvita New Zealand Limited* (2010) 12 TCLR 808 (HC); and *McKeown Group Limited v Russell* (2010) 9 NZBLC 103, 068 (HC).

⁶ See *Newport v Coburn* (2006) 11 TCLR 831 (CA).

⁷ *Red Eagle Corporation Limited v Ellis* above n 4.

reasonable person in a claimants' situation – that is, with the characteristics known to the defendant or of which the defendant ought to be aware – would likely have been misled or deceived. If so, a breach of s 9 has been established. It is not necessary under s 9 to prove that the defendant's conduct actually misled or deceived the particular plaintiff or anyone else. If the conduct objectively had the capacity to mislead or deceive the hypothetical reasonable person, there has been a breach of s 9. If it is likely to do so, it has the capacity to do so. The fact that someone was actually misled or deceived may well be enough to show that the requisite capacity existed.

[62] The particular representations the claimants rely on and which they say are in substance statements of fact, are:

- a) That there was no need to obtain a pre-purchase property inspection for the particular circumstances because it was a brand new home, had a CCC and it was enough to proceed safely to purchase it, with the effect that there was no need to be concerned about buying a leaky building; and
- b) Mr Xiang guaranteed that there would be no problems with the house and if there were any problems he would ensure any problems would be promptly fixed.

[63] The claimants say that in an analogous factual situation, the Court of Appeal in *Body Corporate 202254 v Taylor*⁸ held that if there was not such a proper basis [in fact to make a statement] the assertion was misleading and deceptive.

[64] Mr Xiang and Realty Insight submit that advice about the pre-purchase report is not a statement of fact, nor is a promise or guarantee a representation. They conceded prior to the hearing that

⁸ *Body Corporate 202254 v Taylor* [2008] NZCA 317 at [50].

had a pre-purchase inspection report been obtained before purchase, then it would have disclosed the weathertight defects which would have been of concern to a purchaser. However, they submit that such concession is and was not an acknowledgment that the conduct of Mr Xiang was capable of being misleading or deceptive, viewed objectively in all the circumstances.

[65] In my view the representation made by Mr Xiang that there was no need to obtain a pre-purchase report because the house was brand new and a CCC had issued, was misleading conduct. There was no reasonable basis for Mr Xiang to make such statement.⁹ In this regard I accept the evidence of Mr Chalk and Mr Eades (experts for the claimants) that real estate agents in 2006 ought to have been aware that just because the territorial authority had issued a CCC did not necessarily mean that the property did not have any building defects or weathertight problems.

[66] While an application for CCC had been made at the time of the meeting and Mr Xiang genuinely believed it was then likely to issue, it was nevertheless also misleading for him to advise the claimants that it had in fact issued. Ultimately, however, this particular representation is irrelevant since it could not have caused any loss in this case. At the time the claimants signed the second agreement (i.e. the operative agreement) a CCC had in fact issued.

[67] I also find that a reasonable person in the claimants' situation – being immigrants to New Zealand and first time home buyers in the New Zealand market – being a characteristic that Mr Xiang was aware of – would likely have been misled by these representations. The conduct of Mr Xiang viewed objectively had the capacity to mislead or deceive the hypothetical reasonable person. Furthermore, in this case the claimants were in fact misled; they believed, that it was not necessary to get a pre-purchase report

⁹ *Stevens v Premium Real Estate Limited* [2009] NZSC 15, [2009] 2 NZLR 384; *Mok v Bolderson* HC Auckland, CIV-2010-404-7292, 20 April 2011.

because a CCC had issued. That was the basis upon which they signed the first agreement. The fact that the claimants were misled thus reinforces the finding that Mr Xiang's conduct had the capacity to do so.

[68] For all these reasons I find that the claimants have established that Mr Xiang's conduct in representing that a pre-purchase report was not necessary was misleading conduct in terms of s 9 of the Fair Trading Act. The critical issue then becomes whether the misleading conduct was an effective cause of the claimants' loss.

SECTION 14 OF THE FAIR TRADING ACT AND MR XIANG'S PROMISE OR GUARANTEE REPRESENTATION

[69] The claimants contend that Mr Xiang made a false or misleading representation concerning "the characteristics of the land" and/or "the use to which the land is capable of being put". The word "land" is not defined in the Fair Trading Act but the claimants argue that under s 30 of the Interpretation Act 1999 "land" includes houses and buildings.

[70] On this basis they contend that "the characteristics" of the dwelling at issue for the purposes of s 14(b) of the Fair Trading Act were that, because the house was new, once a CCC had been issued for the property, there was no need for the Coles to obtain a pre-purchase property inspection report, because the Council had given the house final approval so it would not be a leaky home.

[71] I have some reservations about whether this particular allegation is in fact a description or a representation about the characteristics of the land or dwelling, as contemplated by s 14. However, I make no final determination on this issue. The primary

and critical issue is whether any of these representations were causative of the claimants' loss.

[72] As to the promise or guarantee representation by Mr Xiang (i.e. that there would be no problems with the house), the claimants argue that at the time he made such promise, he had no intention of fulfilling it in the event that he was called on to do so, or that there was no adequate foundation for making this statement, or that he had no means to do so. On this basis it is said that these representations constitute actionable misleading conduct for the purposes of s 9.

[73] I find the evidence on this issue to be inconclusive and in particular Mr Xiang's intention at the time he made such guarantee. The claimants have thus not established that the promise or guarantee representation was misleading. As the High Court noted in *Mckeown v Russell*¹⁰ it will be a rare case where a plaintiff is able to prove a dishonest intention at the time the promise is made.

ISSUE FOUR – was the misleading conduct of Mr Xiang an effective cause of the claimants' loss, namely the purchase of a leaky home?

[74] In my view this is the principal issue in this claim and has to be addressed by a close analysis of the nature of the legal advice given to the claimants by their own conveyancing solicitors. Those solicitors were not involved in the hearing and gave no evidence apart from an affidavit filed in support of their opposition to being joined to the proceedings.¹¹

¹⁰ *Mckeown Group Limited v Russell* above n 5.

¹¹ I conclude that affidavit is admissible for all purposes. See *Kendall v The Queen* [2012] NZCA 5.

[75] Before analysing the issue of causation, I must make a factual finding on what advice the claimants received from their solicitors on 5 October 2006.

[76] In evidence Mr Cole said that after he had received a copy of the CCC on 5 October 2006 (from Ms Melanie Amm, who received it from Mr Xiang) he tried to fax it through to his solicitors. However, there were technical difficulties so he telephoned the legal executive they had been dealing with and discussed the issue of purchase directly with her. Mr Cole asked the legal executive whether having received a CCC it was a sufficient and safe basis upon which to sign a fresh offer for sale and purchase. The legal executive then asked Mr Cole if they had obtained a pre-purchase report. Mr Cole said to the legal executive that they had not done so because of the earlier advice they had received from Mr Xiang at the meeting on 23 August 2006 – i.e. a pre-purchase inspection report is unnecessary if a CCC has issued and that means there are no issues with the house as far as the Council are concerned. Mr Cole's evidence is that the legal executive then said to him "words to the effect" that if Mr Xiang was satisfied and confident that a pre-purchase property inspection report was not required because a new CCC for a brand new home meant that by the time of it issuing there were no issues with the Council in relation to the property, then they could proceed to go ahead and sign a new offer to purchase without obtaining a property inspection report and without making the agreement for sale and purchase conditional on such a report.

[77] Mr Xiang and Realty Insight say that this evidence is implausible and that the claimants have not established a critical element in the factual chain namely that this conversation took place and that the legal executive gave advice with specific reference to Mr Xiang. It is further submitted that this evidence was fabricated in order to overcome the difficulty of the solicitor's advice of 29 August 2006 that a pre-purchase inspection report was "required" by the claimants. In his initial brief of evidence Mr Cole made no reference

to the conversation with the legal executive on 5 October 2006. The first reference in Mr Cole's evidence to this conversation was in his affidavit of 6 November 2010 filed in support of the application to join the solicitors (the firm of the legal executive) to the proceedings.

[78] At first glance the evidence of the conversation of 5 October 2006 and its absence from Mr Cole's first brief of evidence was a little surprising. So too, is the nature of the advice said to have been given by the legal executive. However, I reject Mr Xiang's submission that the evidence is implausible and was fabricated. I accept the claimants' reasons as to why the conversation was not mentioned in Mr Cole's earlier brief of evidence. In the circumstances the nature of the advice given is itself not implausible.

[79] The advice given by the legal executive on 5 October 2006 does not directly contradict the earlier written legal advice of 29 August 2006. The earlier advice was given at a time when it was understood that no CCC had issued for the property (contrary to representations made by Mr Xiang). The letter also relates to a number of other difficulties/problems with the property but the evidence, (including the legal executive's conveyancing file), establishes that most of these problems had been addressed in some way and, to the legal executive's satisfaction, by the time the conversation on 5 October 2006 took place. It was also logical for the legal executive to assume that in issuing the CCC the Council had in fact resolved some of these problems.

[80] Mr Cole's evidence was that he had not mentioned the conversation of 5 October 2006 with the legal executive in his original brief of evidence because at that stage neither he nor their current solicitors had seen the legal executive's conveyancing file. Mr Cole's evidence on this issue was vigorously tested under cross-examination. I accept his evidence as reliable and accurate on this and the other critical issues he spoke of. The evidence is not

implausible and was not fabricated. I find that the claimants have established that the conversation of 5 October 2006 took place and in the manner described by Mr Cole.

[81] I now turn to consider whether, in light of the events that took place between the representations made by Mr Xiang on 23 August 2006 and the date of the second agreement, Mr Xiang's misleading conduct was an effective cause of the claimants' loss.

CAUSATION UNDER THE FAIR TRADING ACT

[82] In accordance with the analysis of the Supreme Court in *Red Eagle*,¹² the issue of causation arises in relation to s 43 of the 1986 Act where it is necessary to establish that the claimant has suffered loss or damage "by" the conduct of the defendant. The Court held:

"The language of section 43 has been said to require a "common law practical or common-sense concept of causation". The Court must first ask itself whether a particular claimant was actually misled or deceived by the defendant's conduct. It does not follow from the fact that a reasonable person would have been misled or deceived (the capacity of the conduct) that the particular claimant was actually misled or deceived. If the Court takes the view, usually by drawing an inference from the evidence as a whole, that the claimant was indeed misled or deceived, it needs then to ask whether the defendant's conduct in breach of section 9 was an operating cause of the claimant's loss or damage. Put another way, **was the defendant's breach the effective cause or an effective cause?** Richardson J in *Goldsbro* spoke of the need for, or, as he put it, the sufficiency of, a "clear nexus" between the conduct and the loss or damage. The impugned conduct, in breach of section 9, does not have to be the sole cause, but it must be an effective cause, not merely something that was, in the end, immaterial to the suffering of the loss or damage. **The claimant may, for instance, have been materially influenced exclusively by some other matter, such as advice from a third party.**"¹³

¹² *Red Eagle Corporation Limited v Ellis* above n 4.

¹³ At [29].

[83] The High Court of Australia in *Travel Compensation Fund v Tambree*¹⁴ has held that the common law two step causation test (causation in fact and causation in law) was applicable to the Fair Trading Act 1987 (NSW) – albeit to be applied having regard to the policy and scheme of the legislation.

[84] The New Zealand Court of Appeal has very recently considered the issue of the common law test of causation in tort in a leaky home context. In *Scandle v Far North District Council*¹⁵ the Court affirmed the causation test for tortious negligence claims as one where the plaintiffs must show that the defendant's act or omission constituted a material and substantial cause of their loss. The concept of materiality denotes that the act or omission must have had a real influence of the occurrence of the loss. The concept of substantiality denotes that the act or omission must have made a more than de minimus or trivial contribution on the occurrence of the loss. Reference was made by the Court to a recent English decision¹⁶ which held that the chain of causation would be broken if there was an event which “obliterates” the defendant's wrongdoing.

[85] The *Scandle* test is not identical to the effective cause test laid down in *Red Eagle*. However, in my view, both tests require that there be a real connection, one of some substance, between the wrongdoing and the loss.

[86] I have already concluded that the claimants were actually misled by Mr Xiang's misleading conduct. They believed at the time of signing the first agreement that they did not need to get a pre-purchase inspection report because the house was brand new and a CCC had issued. However, the critical issue is whether this misleading conduct of Mr Xiang was an effective or operating clause

¹⁴ *Travel Compensation Fund v Tambree* (2005) 224 CLR 627.

¹⁵ *Scandle v Far North District Court* [2012] NZCA 52.

¹⁶ *Borealis AB v Geogas Trading SA* [2010] EWHC (Comm) 2789, [2011] 1 Lloyd's Rep 482 at [42]-[44].

of the claimants concluding the second agreement and purchasing the property. Ultimately it was the purchase of the property that caused them loss.¹⁷

[87] The claimants contend that the advice of Mr Xiang and the advice of the legal executive of 5 October 2006 were “two effective operating causes” of the loss suffered by the claimants by entering into the second agreement and buying a leaky home. But for those two events occurring and those two statements Mr Xiang and the legal executive, the claimants would not, they say, have suffered the loss claimed.

[88] In evidence the claimants emphasised that the issue of whether they needed to obtain a pre-purchase property inspection report was very important to them and remained so throughout the period August to October 2006. Although they cancelled the first agreement subsequent to the misleading representation of Mr Xiang, their case is that they were still relying on the representations about there being no need for a pre-purchase property inspection report when they entered into the second agreement on 8 October 2006. After the Council had issued the CCC, the claimants believed that the building issues that had delayed the CCC being issued earlier in 2006 had been resolved. Consequently, Mr Xiang’s representations of 23 August 2006 “came back into play” regarding the effect of a CCC having issued for the new home and therefore there was no need for the claimants to obtain a pre-purchase property inspection report. In closing submissions the claimants have also emphasised that Mr Xiang had been “clear, assertive, persuasive, unambiguous and unequivocal” in making the representations of 23 August 2006 about the effect and consequences of a CCC.

¹⁷ See *Mok v Bolderson* above n 9, Whata J, where the High Court accepted that the purchase of a leaky home as a result of a faulty pre-purchase inspection report can constitute recoverable loss under the Fair Trading Act 1986.

[89] Mr Xiang and Realty Insight submit that even if the August meeting occurred and the representations were made (which they deny) the subsequent events, including the advice from the claimants' solicitors and the cancellation of the first agreement, meant that the effect of the representations were spent – and whether this is expressed as a break in the chain of causation or ceasing to be an operative cause or there ceasing to be any reliance, the claim must fail.

[90] In developing this argument, Mr Piggin submitted that on any objective basis a party who cancels a contract relying on an alleged misrepresentation and at the same time he receives legal advice directly contradicting the alleged misrepresentation, it cannot be reasonable for that party to place any further reliance on it and ought not to be misled by it. Where the respondent has not said or done anything further subsequently in the way of a representation or conduct, then the effect of the misrepresentation is spent.

[91] Mr Piggin sought to emphasise that the reality of the claimants' own evidence was that they were not in fact relying on anything Mr Xiang had said, by the time they entered into the second agreement. Not only had they subsequently (i.e. subsequent to 23 August 2006) received legal advice contradicting what Mr Xiang had said but given the importance to them of a CCC (i.e. the claimants' evidence) Mr Xiang's false representation to them that one had in fact issued, they would and could not have trusted him in any way.

ANALYSIS OF THE CAUSATION ISSUE

[92] As already noted the answer to the question of whether Mr Xiang's misleading conduct was an effective cause of the loss, depends on a careful analysis of the role played by the claimants' own solicitors. It is also important to focus on the sequence of events between 23 August 2006 (i.e. the date of the misleading

conduct) and 8 October 2006 when the second agreement was signed.

[93] The misleading conduct preceded the cancellation of the first agreement. The representations made by Mr Xiang that there was no need for a pre-purchase report were made in the context of that first agreement and not repeated by him subsequently. They were also made prior to the claimants receiving their own independent legal advice. Having said all that, I accept that the representation about the issue of a pre-purchase report and a CCC was expressed as a general proposition.

[94] The first agreement was cancelled as a result of advice received and obtained from the claimants' own solicitors. The letter of cancellation expressly stated that the real estate agent had made a misrepresentation about the CCC. Importantly, the claimants approached their solicitors for the express purpose of obtaining independent, sound legal advice about all aspects of the conveyancing transaction. The advice given and in particular, the ascertaining by the solicitors and communication to the claimants that no CCC had in fact issued must have suggested to the claimants that Mr Xiang was not as reliable as they may have originally believed.

[95] I accept that in dealing with Mr Xiang in relation to the second agreement that the claimants did not regard Mr Xiang as wholly unreliable or untrustworthy. They welcomed him into their home to sign the second agreement on 8 October 2006. Matters between them at that time were obviously amicable. Having heard the evidence I conclude that the claimants most likely believed that despite the fact that Mr Xiang's earlier representation about a CCC having issued being wrong, it was not wholly inaccurate because an application for a CCC was then in the pipeline and, as events

subsequently transpired, one did in fact issue not all that long afterwards.

[96] However, despite amicable relations with Mr Xiang, the claimants had sufficient doubts about whether Mr Xiang's earlier representation (i.e. the misleading conduct) was correct or not so again approached their own solicitors and expressly sought from them an independent view on whether that advice was correct.

[97] In relation to the obligations of the claimants' solicitors when approached by their clients (i.e. the claimants) on 5 October 2006 the claimants called evidence from Mr Eades, an expert witness on the role and responsibilities of legal practitioners. Mr Eades gave unchallenged evidence as follows:¹⁸

- a) In engaging with Mr Cole on 5 October 2006 about the issue of a CCC and whether there was still a need to obtain a pre-purchase property inspection report, the scope of the claimants' solicitors' retainer was expressly extended to encompass those matters. The claimants' solicitors assumed a duty to the claimants to give correct legal advice on the issues that flowed from Mr Cole's specific enquiries.
- b) In failing properly to advise the claimants about the difference between a CCC and a property inspection report, and the implications of this, and in giving the advice that was given to Mr Cole on 5 October 2006, the claimants' solicitors breached their retainer.
- c) The claimants' solicitors should have advised the claimants as follows:
 - i. They should still have obtained all relevant documentation about the property and, that if they themselves were not qualified to make

¹⁸ In referring to this evidence I note that the factual assumptions underpinning Mr Eades' expert opinion, have been established as a matter of evidence and proof.

their own enquiries and inspections, should consider obtaining a building inspection report from a qualified inspector; and

- ii. Should also have been advised not to commit to the purchase without such a report being obtained and being satisfactory in all respects to them, so that, if they could not defer signing an agreement until they had such a report, the new agreement (i.e. the second agreement) needed to be made conditional on the obtaining one and being satisfied with it; and
- iii. Should have had it made clear to them (the claimants) that Mr Xiang (as the listing agent) should not be relied on by them because he was acting for the vendors and at all times acting in the vendor's interest, not theirs.

d) The advice given to the claimants by the claimants' solicitors was not the advice that should have been given by a competent practitioner. The claimants' solicitors breached their duties to the claimants in that they failed to exercise the standard of care and skill to be expected of a competent conveyancing practitioner.

[98] I accept the evidence of Mr Eades on these issues. The claimants' solicitors acted negligently and in breach of retainer.

[99] Mr Baird accepts that the solicitors' negligence was an effective cause of his client's loss but submits that so was too Mr Xiang's misleading conduct. However, I reject that submission and conclude that Mr Xiang's misleading conduct was not an effective cause of the claimants' loss. At the critical time of signing the second agreement, the representations made by Mr Xiang on 23 August 2006 were mere background factors of no real legal consequence. In reality the claimants were relying on the advice of their own

solicitors when they entered into the second agreement and not on anything that Mr Xiang had said.

[100] The claimants approached their solicitors on 5 October 2006 with obvious doubts about whether Mr Xiang's earlier representations were correct. They sought an independent view from their own advisors on an issue falling squarely within the expertise of a conveyancing solicitor. The solicitors' obligations were to form an independent view on the issue of a pre-purchase inspection report and in affirming Mr Xiang's advice breached their direct legal and contractual obligations to the claimants. Mr Xiang, by contrast had no contractual relationship with the claimants and was the real estate agent who in law is the agent for the vendor.

[101] In my view, the solicitors' breach of duty to their clients, the claimants, was a serious one. The advice given was plainly wrong. The obligations of a solicitor to his/her client are generally more onerous than any obligation (e.g. under s 9) that a real estate agent might owe to a purchaser. This is because the relationships are fundamentally different. While in the minds of the claimants the origins of the advice about there being no need for a pre-purchase inspection report were Mr Xiang, it was the solicitor's advice on this issue that was the decisive and critical step in their concluding the unconditional agreement for sale and purchase. The solicitor's advice was given immediately prior to the signing of the second agreement and it was that advice (not Mr Xiang's misleading conduct) that was the causally potent factor.

[102] That Mr Xiang had said that a pre-purchase inspection report was not necessary where a CCC has issued, was irrelevant in a legal sense, to the advice the solicitors should have given. The solicitors' advice was erroneous not only because it should have advised the claimants that a CCC is not an adequate substitute for a pre-purchase inspection report but also because it deferred to the advice

and expertise of Mr Xiang. As Mr Eades noted, Mr Xiang was the vendor's agent.

[103] In my view, the plainly wrong advice of the claimants' own solicitors did not and could not bring Mr Xiang's misleading conduct back into play. Mr Xiang's misleading conduct was spent and no longer legally operative. The fact that reference was made by the claimants' solicitors to Mr Xiang's advice/representation is simply incidental.

[104] It is also significant that the misleading conduct of Mr Xiang was committed prior to the first agreement being cancelled and prior to the claimants obtaining legal advice. Once engaged the claimants' solicitors then gave advice in relation to the first agreement. This resulted in the first agreement being cancelled. The solicitors were thus fully informed of all relevant factors in advising Mr Cole on 5 October 2006 – but despite this, the advice was seriously flawed. The jurisprudence makes clear that negligent conduct is more likely to break the chain of causation than conduct which is not.¹⁹

[105] The effect of both the claimants' solicitors' negligence and Mr Xiang's misleading conduct fall to be determined in the context of a leaky home case, where neither of these parties had any direct involvement in the construction defect. That fact is not decisive of whether the effective cause test is made out but nevertheless part of the context for considering the application of the test. I also accept that the consumer protection policy of the Fair Trading Act 1986 is relevant to the application of the effective cause test.²⁰

[106] I accept that the conduct of Mr Xiang and Realty Insight in this case was not an acceptable standard of conduct by real estate agents acting in trade. However, s 9 does not provide a mechanism to deal with every situation in which parties consider they have

¹⁹ *Knightley v Johns* [1982] 1 WLR 349.

²⁰ Debra Wilson "Fair trading: causation" [2009] NZLJ 349.

suffered loss as a result of being influenced by the views of advisors.²¹

[107] It may be that the claimants can establish causation in fact – i.e. but “for” the misleading conduct of Mr Xiang, they would not have bought the house because they would have obtained a pre-purchase inspection report. However, and essentially for the reasons already given, there is in my view, no causation in law. The subsequent involvement of the claimants’ solicitors (i.e. subsequent to Mr Xiang’s misleading conduct) including the cancellation of the first agreement and the plainly erroneous advice given on 5 October 2006 “obliterates” the misleading conduct of Mr Xiang.

[108] In terms of the *Red Eagle* test, the misleading conduct of Mr Xiang was, in the end, immaterial to the loss suffered. The claimants were materially influenced exclusively, by the erroneous advice of their own solicitors. In saying that, I accept that they also relied on the CCC but their reliance on their solicitor’s advice and the CCC was exclusive of Mr Xiang’s misleading conduct. There is ultimately no clear nexus between the misleading conduct and the loss.

[109] There were some disturbing aspects to the evidence in this case. There were suggestions (e.g. a fake garden sump) that the house had been deliberately built in a cheap manner and with the intention of concealing some significant defects. However, the evidence falls short of establishing that any of the parties to this claim were involved in such conduct.

[110] Mr Xiang and Mr Lee, one of the developers, were of course colleagues and friends. Had there been probative evidence that Mr Lee and Mr Xiang had colluded to conceal defects in this house and that Mr Xiang’s misleading conduct was intended to further this aim, I may have reached a different conclusion on the issue of causation.

²¹ *Premium Real Estate Limited v Stevens* [2009] NZCA 82, [2009] 1 NZLR 148.

As noted in *Todd: The Law of Torts in New Zealand*²² cases involving the deliberate infliction of harm, deserve special attention.

CONCLUSION ON FAIR TRADING ACT CAUSES OF ACTION

[111] The claimants have failed to establish that the misleading conduct of Mr Xiang and/or Realty Insight was an effective or operating cause of their loss. Accordingly, the claims against both these parties under the Fair Trading Act 1986 are dismissed.

CLAIMS IN NEGLIGENCE AGAINST MR XIANG AND REALTY INSIGHT

[112] The claimants have also sued Mr Xiang and Realty Insight for negligent misstatement in relation to the misrepresentations made on 23 August 2006. It is contended that there was a special relationship between Mr Xiang and the claimants and that Mr Xiang's representations about there being no need to obtain a pre-purchase inspection report both breached the relevant standard of care and caused the claimants loss.

[113] I have considerable reservations about whether Mr Xiang owed the claimants a duty of care in circumstances of this case. Mr Xiang was the agent for the vendor, not the claimants (i.e. the purchasers) and I query whether this relationship qualifies as a special relationship as contemplated by the tort of negligent misstatement. In my view, the statutory scheme of the Fair Trading Act 1986 arguably provides a better way to regulate the conduct of real estate agents than the tort of negligent misstatement. That may well be a policy reason for not imposing a duty of care. The claimants refer to the decision *Brown v Thornes*²³ for the proposition that "recognised categories of duty" [of care] include real estate

²² Stephen Todd (ed) *The Law of Torts in New Zealand* (5th ed, Brookers, Wellington, 2009) at 20.03.02 (2).

²³ *Brown v Thornes* [1920] NZLR 300 (SC).

agents. However, in that case, it was a vendor who was suing his own agent in a situation where the agent was acting for both parties.

[114] Despite my reservations on the issue of a duty of care I am prepared for the purposes of this proceeding, to accept there was a special relationship between Mr Xiang and the claimants and that Mr Xiang owed them a duty of care – i.e. Mr Xiang and Realty Insight assumed a responsibility to the claimants to exercise reasonable care in the giving of advice on 23 August 2006.

[115] As to the issue of a breach of the standard of care, I accept the evidence of Messrs Grigg, Chalk and Eades that Mr Xiang and Realty Insight did not exercise reasonable care and failed to meet the relevant standard expected of real estate agents – i.e. they were negligent.

[116] On the critical issue of causation, namely whether Mr Xiang and Realty Insights negligence caused the claimants' loss, I must apply the test recently affirmed by the Court of Appeal in *Scandle v Far North District Council*.²⁴ Essentially for the same reasons given above in relation to the Fair Trading Act claims, I conclude that the claimants have failed to establish the negligence of Mr Xiang and Realty Insight was a material and substantial cause of their loss. The negligent advice given by Mr Xiang, in the circumstances, did not have a real influence on the occurrence of the loss; it made only a trivial or de minimus contribution.

[117] Accordingly, the claims in negligence against both Mr Xiang and Realty Insight are also dismissed.

²⁴ *Scandle v Far North District Council* above n 15.

FORMAL PROOF - CLAIM IN NEGLIGENCE AGAINST MR THEOTESTO REYES, FIFTH RESPONDENT

[118] Mr Theotesto Reyes, the fifth respondent, was not a party to the settlement agreement of September 2009. He did not attend either the mediation or the hearing.

[119] The claimants sue Mr Reyes in negligence, contending that he was the designer of the house, who was actively involved in the construction process.

[120] Mr Grigg gave expert evidence for the claimants, on the liability of Mr Reyes, as follows: -

- a) The plans prepared by Mr Reyes had a number of details as to weathertightness which were directly copied from the New Zealand Building Code. They were generic and non-site specific, where as they ought to have been converted and applied to the actual site conditions and circumstances.
- b) The standard details provided in Mr Reyes consent drawings did not cover a number of specific situations that were constructed on site.
- c) Mr Reyes' specifications were also deficient because the product specified, such as the roof being custom-run Coloursteel long run metal roofing, did not match with the roofing noted on drawing BC 13.
- d) The standard details provided in Mr Reyes' consent drawings were not constructed on site, such as the inclusion of a deck trough drain, as opposed to the edge gutter and drawing WD-02, the boxed corner detail with scribes and drawing WD-03 but not installed on site. These and similar design changes, should have been

identified by Mr Reyes during site visits so that compliance was achieved.

- e) Mr Reyes should have noted and addressed with Mr Lee the poorly installed flashings at the top of the brick veneer and weatherboard junctions.
- f) When Mr Reyes assumed responsibility for the design of the dwelling, he undertook to provide a set of plans that would comply with the requirements of the building code, particularly clauses B2 “durability”, E2 “external moisture” and E1 “surface water”. Mr Reyes’ plans lacked critical information that could and should have been provided when Mr Lee spoke to him or during site visits.
- g) If Mr Reyes had not been engaged to provide further technical information, then he should have made sure that there was sufficient information included within his plans and specifications to cover the critical construction and weathertight issues.
- h) All the above issues led directly to the dwelling leaking.

[121] The claimants submit that on the basis of the evidence of Mr Grigg, Mr Nevill, the assessor, and Mr Lee, that Mr Reyes: -

- a) In purporting to carry out design work personally assumed a duty of care to the claimants to exercise all reasonable care; and
- b) Failed to exercise reasonable skill and care expected of a reasonably competent designer, and in breaching his duties to the Cole’s caused them to suffer loss.

[122] On the critical issue of the actual role played by Mr Reyes, the claimants are reliant on the evidence of Mr Lee. Neither Mr Grigg, nor any other claimant witnesses (apart from Mr Lee) had any first-hand knowledge of what actually occurred on site during the

construction process. On the issue of Mr Lee's evidence the claimants' submission was as follows:

"Unlike when he was giving contrived and altered evidence to try and protect his very good friend, Mr Xiang, from liability under pressure from Xiang, Mr Lee gave reliable compelling evidence about Mr Reyes active involvement with the construction process, that he was consulted on and gave evidence about and was involved in decisions as to design changes as built compared to plans. He was in effect actively supervised in the construction from a design perspective **Lee XXN** day two about 2.50pm - 2.58pm"²⁵

[123] Regrettably, I cannot accept that submission. In my view Mr Lee was a very unreliable witness and it would be unprincipled and unsound to attempt to accept some but not all of his evidence.

[124] The result of my rejecting Mr Lee's evidence as unreliable is that the claimants have not established what role, if any, Mr Reyes played in the actual construction of the house. The documentary evidence in the common bundle supports the contention that Mr Reyes was the designer involved with the building consent application but not in relation to the actual construction process. There is no reliable evidence to support the contention that Mr Reyes was actively involved in construction, as the claimants allege.

[125] The critical issue then becomes, whether the claimants have established that the plans prepared by Mr Reyes were deficient and caused them loss.

[126] In *Body Corporate 188529 v North Shore City Council (Sunset Terraces)*²⁶ Heath J concluded that an architect or designer is entitled to assume that a competent builder would refer to manufacturer's specifications or established literature for construction when there was insufficient detail in the plans. In that case, even

²⁵ Claimants closing submissions dated 17 November 2011 at para 218 page 68.

²⁶ *Body Corporate 188529 v North Shore City Council (Sunset Terraces)* [2008] 3 NZLR 479.

though the plans were skeletal in nature, did not contain references or detail relating to manufacture specifications and the specifications were poorly prepared and contained outdated references, the Court was satisfied that the dwelling could have been constructed in accordance with the Building Code.

[127] If construction details are omitted from plans, the person who undertakes that work in the absence of a prescribed detail is primarily liable. In *Saffioti v Ward*²⁷ the Tribunal held that a person in that situation has two choices, either to ask for further detail, or to design the detail themselves. If they choose to design it themselves then the complaint should be against that person if it fails and not against the architect.

[128] I accept the unchallenged evidence of Mr Grigg that the plans prepared by Mr Reyes were deficient in the manner he has described - in particular they were generic and non-site specific. However, there is a lack of reliable evidence to support a finding that these deficiencies with the plans caused the claimants loss. There is no reliable evidence on the critical issue of what those builders on site did or did not do, faced with generic and non site specific plans - and what role, if any, Mr Reyes played in relation to any of those decisions. Many of the standard details provided in the plans were not constructed on site. I simply do not know whether the builders on site asked Mr Reyes for further detail or designed the detail themselves. Likewise I do not know what the particular terms of Mr Reyes commission were; there were not documents produced in evidence relevant to that issue.

[129] I also note that in his main report of 23 November 2007, the assessor, Mr Nevill, did not name the designer as a recommended party to the claim. Mr Nevill's report emphasised the poor standard

²⁷ *Saffioti v Ward*, TRI 2011-100-000065 Procedural Order 9 dated 14 March 2012 P M McConnell Tribunal Member Chair; see also *Carter v Tulip Holdings* DBH claim 692, 30 June 2006.

of workmanship and that many of the issues “lacking in weathertight integrity and standard of workmanship” exist over the envelope of the dwelling and many of these contravene building consent documentation and instructions given by inspection field memoranda. While far from decisive, that report tends to suggest that the problems with this building relate principally to the actual construction process rather than particular design defects.

[130] Pursuant to s 75 of the Weathertight Homes Resolution Services Act 2006 the Tribunal may draw reasonable inferences from a failure by a party to serve a response to the claim or comply with any timetable or other orders under s 74. The Tribunal is also empowered to determine the claim on the basis of the information available to it (s 75(b)). In this case there has been a repeated failure by Mr Reyes to comply with Tribunal orders. However, in the circumstances of this case the Tribunal cannot rely on s 75 to draw any inference from Mr Reyes’ failure to comply with orders, that he might somehow be reliable to the claimants. There is a lack of relevant and probative evidence.

[131] I conclude therefore, that the claimants have failed to establish that any negligence of Mr Reyes caused them loss. Accordingly, the claim against Mr Theotesto Reyes, the fifth respondent, is dismissed.

FORMAL PROOF - CLAIM IN NEGLIGENCE AGAINST MR RAY RANGI, SEVENTH RESPONDENT

[132] Mr Ray Rangi, the seventh respondent was not a party to the settlement agreement of September 2009. He did not attend either the mediation or the hearing.

[133] The claimants sue Mr Ray Rangi in negligence. They contend that he was the drainage sub contractor who personally

assumed a duty of care to them, as subsequent purchasers, to exercise the reasonable care and the skill expected of a reasonably competent drain layer.

[134] Mr Grigg, expert witness for the claimants, gave the following evidence on the liability of Mr Ray Rangi:

- a) The poorly installed drainage works undertaken by Mr Rangi are evidenced by the retaining wall leaks and the fake gardens sump, which Mr Grigg discovered on 19 February 2011.
- b) Mr Rangi was provided with the “Site Plan and Drainage” Drawing BC-02 prepared by Mr Reyes. As an experienced drain layer, Mr Rangi should have reviewed drawing BC-02 and if he considered changes to the site plan and drainage drawing were required, he should have sent it back to Mr Reyes for changing. This did not occur and is a serious lapse.

[135] Mr Grigg further contended that the changes that were made to the site plan and drainage drawings included:

- a) Installing a down pipe against the brick column noted on plan BC-02 at the north west corner of the patio, which is not connected to the site storm water system, even though it extends into the ground.
- b) Installing the fake garden sump, which is not shown on the drainage plan.
- c) The inclusion of sub-soil drains behind the internal lower level retaining wall is not shown on the drainage plans. This would be required to be installed and discharged into a sump, but none is shown in the low rear garden area on the only one provided was the fake one.

[136] The claimants also refer to the assessors report in support of their claim against Mr Rangi. That report also noted that there were significant problems with the drainage system.

[137] Mr Grigg has no first-hand knowledge of what Mr Rangi did on site. The claimants are again reliant on the evidence of Mr Lee to establish the nature and extent of the role played by Mr Rangi in relation to the drainage work. They again submit that I should be selective in accepting some but not all of Mr Lee's evidence.

[138] For reasons already given, I find Mr Lee's evidence to be unreliable. The inevitable conclusion is that the claimants have failed to establish that Mr Ray Rangi personally owed them a duty of care and/or breached that duty of care causing them loss. There is simply no reliable evidence for me to reach a finding on what Mr Rangi did in relation to the drainage work.

[139] The claimants produced evidence that Mr Ray Rangi was not a registered drain layer at the time of construction and was not supervised by a registered drain layer in breach of statutory requirements. This evidence was based on enquiries made with the Plumbers Gasfitters and Drainlayers Board. However, that evidence does not allow me to draw any inference as to what Mr Rangi did or did not do in relation to the drainage works.

[140] The claim against Mr Ray Rangi, the seventh respondent, is thus dismissed.

CONCLUSION

[141] The claimants have failed to establish that the misleading conduct and/or negligence of Mr Xiang and/or Realty Insight caused them loss. Accordingly, all claims against both Mr Xiang, the eighth respondent, and Realty Insight Limited, the third respondent, are dismissed.

[142] The claim against Mr Theotesto Reyes, the fifth respondent, is dismissed.

[143] The claim against Mr Ray Rangi, the seventh respondent, is dismissed.

DATED this 19th day of April 2012

P J Andrew
Tribunal Member