IN THE COURT OF APPEAL OF NEW ZEALAND

CA69/2017
[2017] NZCA 502

BETWEEN	ANDREW HAMILTON MAGEE AND SHARON LEE MAGEE Appellants
AND	STEVEN PHILIP MASON AND KATHARINE MARY MASON Respondents

Hearing:	29 August 2017
Court:	Miller, Courtney and Gendall JJ
Counsel:	M Freeman for Appellants DJS Parker and J T Wollerman for Respondents
Judgment:	8 November 2017 at 10.30 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B The judgment in the High Court is set aside.

C The respondents must pay the appellants costs for a standard appeal on a band A basis and usual disbursements.

D Costs in the High Court are to be fixed in that Court in light of this judgment.

REASONS

MILLER AND GENDALL JJ

(Given by Miller J)

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[1] Sharon Magee twice stated, when asked by an intending purchaser, Katharine Mason, that her house at 13 Karekare Rd, Raumati South, was not a leaky building.

[2] Mrs Magee's statement was honestly made and true at least in part. She and her husband, Andrew Magee, had purchased the house in 2009, some six years after it was built, in their two years of ownership it had not revealed weathertightness defects, and she had no reason to believe that its design and construction made it prone to leak.

[3] However, the house was in fact prone to leak, the result of a number of original design and construction defects, and it subsequently did leak. The parties agree that it is a "leaky building" as that term is commonly understood.

[4] In the High Court the Magees were found liable for a pre-contractual misrepresentation that induced Mrs Mason and her husband, Steven Mason, to buy the property.[1]

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1 *Mason v Magee* [2017] NZHC 51.

[5] The principal question on appeal is whether Mrs Magee's statement conveyed a misrepresentation about the building's design or construction. It is said that her statement conveyed only that it had not leaked while she owned it, and perhaps that she knew of no facts establishing that it was prone to do so; further, if the statement conveyed anything about its propensity to leak this was an opinion from which no representations of fact about design or construction were or could reasonably be taken.

[6] A secondary question is whether the statement induced the Masons to buy the house. The statement was not reduced to writing and incorporated into the agreement for sale and purchase, but the agreement was conditional on the Masons obtaining a building report to their satisfaction. They did obtain such report and they found it acceptable. Regrettably, the report failed to identify the weathertightness issues. Its author, Ian Hall of All Building Inspections Ltd (ABI), has settled, but we were given to understand that ABI's liability was limited, presumably by contract, to $68,000, a small part of the agreed loss of value ($537,000) and even smaller part of the remediation cost ($940,000).

The negotiations and contract

The house and the parties

[7] 13 Karekare Rd is a standalone two-storey dwelling situated on a high-wind coastal site. It is constructed of a monolithic insulated cladding known as EIFS over timber framing, some of which is untreated. The house features three balconies with timber balustrades and timber-framed parapets protected by metal cap flashings. The exterior joinery is aluminium.

[8] Mrs Magee is an interior designer and Mr Magee a plumber. They are not said to have claimed to possess knowledge about leaky buildings, although the Masons say they assumed the Magees would know whether the house leaked. The Magees have bought and sold homes regularly, decorating and reselling them. At 13 Karekare Rd they installed walk-in showers, repainted the interior and had the exterior re-coated with Nuplast in accordance with the manufacturer's guidelines, which recommend recoating every eight to 10 years. Some windowsills that had bowed were replaced

under warranty. A leak in a media room was attributed to a blocked drainage hole in the aluminium window and repaired.

[9] Mrs Mason is a Bowen massage therapist and Mr Mason an IT service delivery manager. They were sensitive to the risk that the property might be leaky. Its monolithic cladding and eaveless design suggest that possibility. They had also previously sold a property of their own and had the buyer, Paul Berryman, subsequently assert that they failed to disclose a leak, although no claim was brought. By coincidence, Mr Berryman was the real estate agent for the Magees on the sale of 13 Karekare Rd.

Pre-contractual negotiations

[10] The Masons met the Magees on 28 October 2011, at a dinner party at the home of mutual friends. At that time the Masons had a conditional contract to purchase another property, but they expressed interest in 13 Karekare Rd, which they had earlier viewed on the real estate agent's website, and arranged to inspect it the next day.

[11] The Magee's neighbour, Steven Hudson, was also at the dinner. He mentioned that he had seen the house shrouded in scaffolding earlier in the year and wondered whether it was undergoing repair. In Mrs Mason's presence he asked Mrs Magee whether it was leaky, and she said that it was not. The Judge's findings are:

> [17] Also present at the dinner party that night was the Magees' neighbour Steven Hudson from 21 Karekare Road. He said in evidence that he had seen 13 Karekare Road shrouded in scaffolding from the beginning of 2011 and wondered whether the house was being repaired because it was leaky. Katharine said that Steven Hudson in fact mentioned the scaffolding to Sharon Magee, but Mr Hudson did not recall doing so. In any event Steven Hudson said he asked Sharon directly whether 13 Karekare Road was a leaky home. He said her response was "No. It isn't a leaky house." Sharon accepted in cross-examination that they may not have been the exact words but the words were to that effect. Katharine confirmed Mr Hudson's evidence. She said that Mr Hudson asked his question in the context of a discussion at the dining table between her and Sharon over the relative qualities of 13 Karekare Road and Seaview Road, with Sharon suggesting that Karekare Road was the superior property. Sharon denied that this was the sort of thing she would say. According to Katharine, Sharon's response to the question was a firm "no" and her tone had the effect of shutting down that line of inquiry.
>
> [18] Neither of the Magees remembered the exchange at the dinner table, but Sharon was frank, and in my view, honest in her narrative.

> For the record if I had been asked directly if our house was a leaky home, I would almost certainly have said 'no'. That is because until these proceedings, I had no idea that this was a leaky home. I have never noticed anything (other than the leak at the media room window which we fixed and did not appear to be a big deal) that would make me think it was.

[12] On the following day the Masons arrived at 13 Karekare Rd about 4 pm and left in the evening. They toured the house and shared a bottle of wine. The Judge found:

> [20] … Katharine said it was a very sunny day and after the tour, the four of them sat around a table outside chatting about other things. She said:
>
> > During our chat I took the opportunity to ask Sharon about the leaky home question that was raised the previous night. I asked Sharon outright if the property was leaky or had any known weathertightness issues. I said 'all I want to know is that this property is not a leaky house because we couldn't cope with that' or words to that effect.
>
> [21] Katharine said:
>
> > Sharon replied that the house definitely was not leaky and I recall her responding 'absolutely not. We have never had any issues with this house' (or words to that effect).
>
> [22] Sharon, who provided the primary narrative from the Magees' point of view, said she did not recall being asked whether Karekare Road was a leaky building. But she made it clear that if she had been asked her response would have been emphatic:
>
> > "No it's not a leaky house is exactly what I would have said.
> >
> > …
> >
> > I wouldn't have said I don't think. I would have said no.

[13] Williams J noted that these discussions were held against the backdrop of the Mason's conditional agreement to purchase another property. Nonetheless, he found, the parties understood that the house was being promoted for sale.[2]

[14] The Masons attended an open home at 13 Karekare Rd on 30 October. Mrs Mason says she asked Mr Berryman whether the home was leaky and he replied that it was a quality build. It appears that the subject of monolithic cladding was

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2 At [56].

raised, because he gave them copies of warranties for the cladding and recommended they get a building report.

[15] Mrs Mason visited the property again on 15 December 2011. By that time their conditional agreement to buy another property had lapsed. It appears that Mrs Magee allowed her to look around the house by herself.

Contract and settlement

[16] On 20 December the parties entered an agreement for sale and purchase at $785,000. The agreement was in the standard REINZ/ADLS form (8th edn). It was conditional relevantly on the Masons getting a satisfactory Land Information Memorandum and also a satisfactory building report:

> 18.0 Builders Report
>
> This agreement is conditional upon the Purchaser(s) within ten (10) working days of acceptance hereof and at their own expense arranging and receiving a Builder's Report which is satisfactory to themselves in all respects on the said property from a Registered Builder. This condition is inserted for the sole benefit of the Purchaser(s).

[17] The report was duly obtained. It identified some relatively minor matters, including some corrosion on flashings and roof cladding. The roof was said to be well detailed and sealed, and moisture readings were within appropriate limits except for one window in the media room. On 9 January 2012 the Masons' solicitor confirmed that the condition was satisfied subject to certain items being remedied. On 14 January the Masons discussed the building report with the Magees, who explained that the issue in the media room had been attributed to a blocked drainage hole and repaired.

[18] The LIM condition was waived. The transaction settled on 8 February 2012.

Defects

[19] It was common ground at trial that the property suffers from defects which in combination justify the appellation 'leaky building':

(a) poor installation of the cladding system;

(b) inadequate protection of joinery and cladding junctions;

(c) inadequate detailing of deck membranes and balustrades;

(d) inadequate detailing of roof cladding and flashings; and

(e) inadequate sub-floor clearances and unsatisfactory ground contours around parts of the house.

[20] These defects must have been present since the house was built. The Masons encountered what they feared were widespread problems in mid-2013 and had the cause confirmed in February 2014. The defects have caused damage that includes decay in timber framing, floors and some exterior cladding, premature corrosion in steel members, and water damage to plasterboard linings and carpet.

The claim

[21] The claim contains one cause of action against the Magees, brought under s 6 of the Contractual Remedies Act 1979.[3] It is said that Mrs Magee twice represented that the property was not a leaky home, that the representations were untrue at the time, that the representations induced the Masons to enter the contract, and that the Masons have suffered loss in consequence. There is no claim under the agreement's general warranties, it being accepted that the Magees were not responsible for causing the defective building work. A claim against the local authority would be out of time.

The result below, and the appeal

[22] The defence put the Masons to proof, but it will be apparent that by trial much was agreed. Williams J was required to decide just what was said and with what effect in law. Having found for the Masons, he was required to select the measure of loss and decide a claim for general damages.

[23] The Judge's factual findings about what was said are quoted above. For purposes of appeal it is accepted that Mrs Magee did say that 13 Karekare Rd was not

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3 Now s 35 of the Contract and Commercial Law Act 2017.

a leaky home. His finding that, grounds for suspicion notwithstanding, these statements were innocently made is not in dispute. He found Mrs Magee a refreshingly frank and open witness.[4]

[24] The Judge concluded that loss of value was the proper measure of loss, rejecting the Mason's claim that they should recover remediation cost because they prefer to remain in the house, and fixed damages at $468,550.21, comprising $536,550.21 (which included $25,000 general damages), less $68,000 paid by the building inspector.[5] None of this is now in dispute either. He awarded the Masons costs on a 2B basis.[6]

[25] What is in dispute is the Judge's conclusion that the statements were a misrepresentation for purposes of the Contractual Remedies Act.[7] Also in dispute is his conclusion that the misrepresentations reasonably induced the Masons to enter the contract.[8]

Misrepresentation

[26] To paraphrase Professor McLauchlan, meaning comes first:[9]

> The first question in all misrepresentation cases is "What was the meaning of the misrepresentation". In other words, was the statement made fairly capable of the meaning alleged?

[27] We approach this question by identifying more precisely the meaning that the statement 'it isn't a leaky building' is said to impart in this context and examining more closely the evidence about what was said.

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4 *Mason v Magee*, above n 1, at [62].
5 At [83]–[90]. The record does not explain how this final figure was calculated, but on the view we take it is immaterial.
6 At [91].
7 At [60]–[61].
8 At [69]–[70].
9 D W McLauchlan "Intention to Induce: Should it be a Requirement for Actionable Misrepresentation?" (2001) 7 NZBLQ 43 at 47, citing *Bisset v Wilkinson* [1927] AC 177 (PC) at 183.

What is the misrepresentation?

[28] The meaning alleged was simply that the house was not a leaky building. The Judge found that that statement was made, Mrs Magee "supporting that statement with the further statement that in the time the Magees had owned the home, they had experienced no weathertightness problems with it".[10] He held that the statement that it was not a leaky home was a misrepresentation,[11] which term he defined as an untrue statement of past or present fact.[12]

[29] The Judge's finding that Mrs Magee spoke truthfully necessitates closer analysis of the representation. As noted at [5] above, the statement is capable of bearing three meanings: first, that the house had not leaked while the Magees owned it (meaning 1); secondly, that Mrs Magee knew of no facts establishing that it was through design or construction prone to leak (meaning 2); and thirdly, that it was not through design or construction leaking or prone to leak (meaning 3). We say 'through design or construction' because it is common ground that a leaky building is susceptible to moisture ingress through some combination of design and construction characteristics such as those listed at [19] above.

[30] In this case it is common ground that meaning 1 and meaning 2 are both available; but perhaps uncommonly in proceedings of this kind, they are not false.[13] If they were, a court might not find it necessary to inquire further.

[31] So if there is a misrepresentation in this case, it must concern meaning 3. A statement that a building is not through design or construction prone to leak is a statement of opinion, but it may carry with it representations of past or present fact, such as (by way of example only) a statement that the manufacturer's recommended fittings and sealants were used when installing the EIFS cladding.[14] The Judge did not characterise Mrs Magee's statement as an opinion or identify any underlying misrepresentations of fact.

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10 *Mason v Magee*, above n 1, at [59].
11 At [60] and [61].
12 At [42].
13 Compare for example *Weaver v HML Nominees Ltd* [2015] NZHC 2080; and *Hamid v England* (2011) 13 TCLR 376 (HC).
14 *Smith v Land and House Property Corporation* (1884) 28 Ch D 7 (CA) at 15 per Bowen LJ; and *New Zealand Motor Bodies Ltd v Emslie* [1985] 2 NZLR 569 (HC) at 593 [*Emslie*].

What is the evidence?

[32] As noted, the Judge's findings that Mrs Magee said 13 Karekare Rd was not a leaky home are not in dispute. But the surrounding evidence helps to understand the meaning of what was said. For this purpose it is the evidence of the two women that matters; they were the speakers and also the principal witnesses at trial. The other witnesses confirmed what was said, described the setting and (in Mr Mason's case) spoke to reliance and loss.

[33] Mrs Mason's evidence was that when Mrs Magee was asked at the dinner party on 29 October whether 13 Karekare Rd was a leaky home, she replied "no, it isn't a leaky house" and explained, responding to Mr Hudson's query about scaffolding earlier in the year, that the property was being repainted at the time. As the Judge found, Mrs Magee did not recall making that statement but accepted that it was the sort of thing she would have said, if asked.[15]

[34] Mrs Mason deposed that she repeated the question when viewing the property the following day, saying: "It's not a leaky home, is it, we couldn't cope with that". Mrs Magee replied firmly: "Absolutely not, we have never had any issues with the property". Mrs Mason went on to explain in cross-examination what she had understood by the latter statement:

> Q. That is clearly a statement of her experience with the house, isn't it?
>
> A. I was hoping that we would be getting an honest answer in response to that question, yes.
>
> Q. And she says it was an honest answer, clearly that was a statement, that she hadn't noticed anything, isn't it?
>
> A. Well that clearly that she wasn't going to report of anything at that stage.
>
> Q. That she had noticed?
>
> A. That she had noticed.
>
> …
>
> Q. You knew Sharon wasn't a builder?

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15 *Magee v Mason*, above n 1, at [18].

A. Mhm.

Q. You weren't asking her for a building report or a full structural report?

A. (no audible answer 15:04:03)

Q. You can't have understood her answer to be, the property has been fully investigated and we can guarantee there are no leaky building issues, you couldn't have taken it to mean that, could you?

A. No, um, the response, as I interpreted it, was very clear to me, that at face value I'm asking a question to which I could get a reply saying, no this is not a leaky building. Sharon, or not a leaky house. Sharon had lived in the property for two years. If anyone is going to know anything about that property, whether she's qualified to a building inspection or not, it would have been Sharon. She's an interior decorator. Her husband's a plumber. He owns his own plumbing company. I full believed that anything that they would say about the property would be genuine and accurate and I interpreted that as such.

…

Q. But nevertheless what you understood Sharon to be saying was, "I've not experienced any leaks with the property?"

A. Correct.

[35] Later in her evidence she repeated that she figured if there was anything wrong with the building the Magees would have noticed it.

Was the statement fairly capable of bearing the alleged meaning?

[36] Contrary to the view taken by the Judge, we think the statement that the Magees had never had any issue with the property is not a distinct representation, additional to the statement that it was not a leaky building. It formed part of a single answer to the question whether the house was a leaky building; and it explained and qualified Mrs Magee's negative response. It identified her experience as owner for two years as her reason for stating, almost in the same breath, that the house was not a leaky building. In our opinion it necessarily qualified both statements that she made to that effect before the contract was signed.

[37] Of course what Mrs Mason wanted to know was that the house did not and would not leak. We accept that she actually drew that inference from Mrs Magee' statements. However, her own evidence explains how she did so. She adopted an assumption that having lived in the property for two years Mrs Magee would know

whether it was a leaky building. Mrs Magee did nothing to engender that assumption. In particular, she made no representations about her knowledge or expertise.

[38] This case is accordingly distinguishable from *Humphries v Edinborough*, in which a real estate agent claimed to have known the building since it was developed and represented both that it was built of concrete, which did not leak, and that it was built after the leaky homes era.[16] Allan J held that the agent thereby held herself out as something of an expert.[17]

[39] We conclude that with the qualification given by Mrs Magee the statement did not reasonably bear meaning 3: that the house was not through design or construction leaking or prone to leak. It meant only that the Magees had not experienced weathertightness problems, and further that they had no reason to believe the house suffered defects that would cause such problems (meaning 1 and meaning 2 respectively). The evidence confirms that that is how Mrs Mason understood the statement.

[40] It follows that the appeal succeeds on the ground that there was no misrepresentation, for the statement did not convey any meaning that was false.

Inducement to contract

[41] We need not address inducement but do so briefly in deference to the arguments and in case the appeal should go further.

[42] In *Savill v NZI Finance Ltd* this Court held that to establish inducement the representee must show either that:[18]

> (a) the representor intended that he or she would be induced by the misrepresentation to enter the contract; or

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16 *Humphries v Edinborough* [2010] NZCA 416.

17 At [28]–[31]. See also *La Grouw v Cairns* (2003) 5 NZCPR 434 (HC), in which the representations pleaded were of past and present leaks, rather than propensity to leak.

18 *Savill v NZI Finance Ltd* [1990] 3 NZLR 135 (CA) at 145–146 per Hardie Boys J [*Savill*].

(b) the representor used language that would induce a reasonable person in the same circumstances to enter the contract.

[43] We need not examine the academic controversy about these requirements. In our view the evidence satisfies both limbs of the test for meaning 1 and meaning 2: the statement was intended to induce the Masons and would have induced a reasonable person. But neither test is satisfied for meaning 3. We explain why below. But first it is necessary to address Mr Freeman's careful argument for the Magees that the Masons' insistence on a building report precluded reliance and hence inducement.

Did the ABI report preclude inducement?

[44] As noted above at [16], the agreement was conditional on a building inspection. The evidence was that Mrs Mason found the ABI report equivocal and pressed Mr Hall on whether the property was a leaky home. He replied "no". She stated that he had been very confident about the house, saying it required only a brief inspection, and she had trusted him. In response to questions from the Court, Mr Mason accepted that the ABI report was the way in which the Masons meant to confirm for themselves that there were no weathertightness issues.

[45] Mr Freeman submitted that the evidence shows the Masons did not rely on Mrs Magee's statements. Inducement must be gauged when the Masons decided to declare the agreement unconditional, and what motivated them at that time was the ABI report. He argued that the authorities consistently treat a building inspection as independent verification rather than further assurance cumulative on a vendor's representation.[19] The vendor's known level of experience and knowledge, or lack of these qualities, has been found decisive in some cases.[20] Liability may follow where the purchaser relies on the vendor by choosing not to commission an inspection.[21] In this case the proper conclusion from the evidence is that the ABI report supplanted Mrs Magee's statements.

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19 See for example *Penney v Ng* [2014] NZHC 1486 at [36]; *Weaver v HML*, above n 13 at [78]–[79]; and *Sutherland v Gerahty* [2014] DCR 170 at [89].

20 *Weaver v HML*, above n 13, at [77]; and *Humphries v Edinborough*, above n 16, at [28]–[31].

21 *Hamid v England*, above n 13, at [111]–[114]; and *Humphries v Edinborough*, above n 16, at [35].

[46] The Judge rejected this argument, finding that the report did not remove "any possibility of reliance" on Mrs Mason's statements:[22]

> [64] The ABI report identified no weathertightness issues except for that relating to the media room window and that was put down by Mr Hall to blocked window vents creating pooled condensation. Katharine said that following receipt of the report, she phoned Mr Hall and asked him directly whether the house had weathertightness issues and Mr Hall said it did not. Such statement is hearsay, and that, at least goes to weight, but ABI has admitted the claim, and the Magees offered no objection to the evidence. Plainly, a great deal of reliance was placed on Mr Hall's knowledge and expertise. As already noted however, a proven misrepresentation need not be the sole inducement. Provided it can be established that it was a material cause for entry into the contract, this will be sufficient. I find that the ABI report and subsequent conversation with Mr Hall are not such powerful supervening events that they remove, of themselves, any possibility of reliance on prior misrepresentations by the Magees.

[47] The Judge went on to observe that inducement is a question of fact and degree. On the facts, the Magees clearly intended to "draw the Masons into the purchase" and they could not have failed to understand that Mrs Mason's question was important and the answer would be relied upon.[23]

[48] We make several points about inducement:

(a) There may be more than one factor inducing entry.[24] The test for any single inducement is whether it had a material effect on the decision.[25]

(b) In New Zealand conveyancing practice it is usual to reduce the material terms to writing, meaning to be bound by the document, but each case turns on its own facts.[26]

(c) A purchaser's independent inquiries may bring reliance to an end, so negating the effect of a misrepresentation, but that need not be so.[27]

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22 *Mason v Magee*, above n 1.

23 At [69]–[70].

24 *Emslie*, above n 14 at 595; and *Vining Realty Group Ltd v Moorhouse* [2010] NZCA 104, (2011) 11 NZCPR 879 at [51(b)].

25 *Mt Pleasant Estates Co Ltd v Withell* [1996] 3 NZLR 324 (HC) at 329.

26 *Concord Enterprises Ltd v Anthony Motors (Hutt) Ltd* [1981] 2 NZLR 385 (CA) at 388–389; and *Carruthers v Whittaker* [1975] 2 NZLR 667 (CA) at 672; and *Coughlan v Cox* [2014] NZCA 617, (2014) 16 NZCPR 66 at [47]–[48].

27 *Attwood v Small* (1838) 7 ER 684 (HL) at 730–731.

[49] We agree with the Judge that in this case Mrs Mason's question was plainly important. She made it clear that she was anxiously seeking reassurance as a prospective purchaser, and the Magees cannot have failed to appreciate that the answer might be relied upon. It was also open to the Judge to find that the Masons continued to rely on the answer when declaring the agreement unconditional, treating the vendors' experience with the house as independent support for Mr Hall's opinion. Consistent with that, although too late to count as inducement, there is evidence that the Masons continued to seek reassurance as late as 14 January 2012, when they visited to discuss the ABI report.

[50] For these reasons we accept that this case is properly distinguished on its facts from those in which a purchaser's reliance on a building report was found to preclude inducement by a vendor's representation.

Did the Masons reasonably rely upon the representation for meaning 3?

[51] The representee must show both that he or she actually relied on the representation when entering the contract and that such reliance was reasonable.[28] The test is easily satisfied once it is shown that the representor intended that it induce entry.[29]

[52] We have already accepted that the Masons did rely on Mrs Magee's statement so far as it bore the first and second meanings, and we accept that it was reasonable to do so.

[53] We have accepted too that the Masons drew the inference from the statement that the building was not through design or construction prone to leak. But as discussed at [37] above, Mrs Mason understood that she was being told the house had not leaked while the Magees owned it. Her inference that it was not prone to leak resulted from an assumption, for which Mrs Magee is not responsible, that the Magees would have experienced weathertightness problems if the house was a leaky building.

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28 *Vining Realty Group Ltd v Moorhouse*, above n 24, at [46], citing *Savill*, above n 18.
29 *Vining Realty Group Ltd v Moorhouse*, above n 24, at [53(a)].

Accordingly, we consider that the Masons did not rely upon the statement for the third meaning.

[54] Nor would it have been reasonable for them to do so, in circumstances where the Magees had owned the house for two years and did not hold themselves out as relevantly expert. In our opinion this case is analogous to *Richards v Murgatroyd*, where one of the vendors was said to have made misrepresentations about the state of chimneys in the house she was selling.[30] In the High Court Allan J found that there was no actionable misrepresentation.[31] He also found however that it was not reasonable for the plaintiffs to have relied on the statements. The representor disclosed that there had been a fire and that a particular fireplace had not been used since. The plaintiffs attempted to rely on these disclosures as constituting a misrepresentation about the safety of the chimneys generally, but Allan J rejected that attempt as placing too much weight on a limited conversation.[32] The representor was not an expert and made no claim to be.

Result

[55] The appeal is allowed. The judgment in the High Court is set aside.

[56] The respondents must pay costs for a standard appeal on a band A basis and usual disbursements. Costs in the High Court are to be fixed in light of this judgment.

COURTNEY J

[57] I have reached a different view to the majority on the meaning of the representation that Mrs Magee made. In my opinion, the statement that Mrs Magee made to Mrs Mason meant (using the meaning described at [29] of the majority decision) that the house was not, through design or construction, leaking or prone to leak. The reason for my view can be stated briefly.

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30 *Richards v Murgatroyd* HC Christchurch CP75/98, 21 December 1999 [*Richards v Murgatroyd* (HC)]; aff'd *Richards v Murgatroyd* CA30/00, 21 August 2000.

31 *Richards v Murgatroyd* (HC), at [31].

32 At [32].

[58] It is uncontentious that the meaning of a statement must be determined against the context in which it was made. Where the statement is made in response to a question the most immediate, and critical, context is that question. In the text *Misrepresentation, Mistake and Non-Disclosure*, John Cartwright states:[33]

> The interpretation of communications is always dependent on their context, and this is no less true for (mis)representations. If, for example, the statement which is alleged to have been a misrepresentation was made by the defendant in answer to a question put by the claimant, it may be necessary to construe the question in order to ascertain the true meaning of the answer.

[59] By way of example, Cartwright refers to the decision in *Sykes v Taylor-Rose*, which concerned the sale of a house in which a gruesome murder had occurred.[34] As a matter of law the vendors would not have had to disclose the history of the house. The vendor answered "no" to the question "Is there any other information which you think the buyer might have a right to know?" On the issue of whether that answer constituted a misrepresentation, Sir William Aldous observed that "[t]he first step should be to construe the question" and Peter Gibson LJ said:[35]

> It is for the buyer to decide what enquiry to raise and in what form. It cannot be doubted that a more specific and less subjective question going to the value of the property or to the ability of the purchaser to enjoy the property could have been asked. Unhappily [the question] did allow the answer to be given in a way which only required, in my view, the vendor to answer the question honestly.

[60] In comparison, in my view, the question that Mrs Mason asked was not one directed towards Mrs Magee's personal experience or knowledge. It was a specific question that sought an objective answer. It was not a question that sought merely honesty, nor one that could be answered simply from personal experience unless that fact were made clear. That is the context in which Mrs Magee's statement falls to be considered.

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33 John Cartwright *Misrepresentation, Mistake and Non-Disclosure* (4th ed Sweet & Maxwell, London 2017) at [3-07].

34 *Sykes v Taylor-Rose* [2004] EWCA Civ 299 at [29].

35 At [50].

[61] As to determining the meaning of a representation, I refer to this Court's decision in *West v Quayside Trustee Ltd (in rec and in liq)* approving the following statements of the first instance Judge, Allan J:[36]

> If there has been a representation of a type that is actionable, the Court must determine whether the representation was a misrepresentation by examining its meaning. The meaning relied upon by the representee must be reasonable in all the circumstances.[37]
>
> As was said by Chambers J in *Gunton v Aviation Classics Ltd*:[38]
>
> > People in trades should choose their words carefully so that wrongful impressions are not conveyed. If they fail to act carefully they can scarcely complain when others, quite reasonably, are misled to their detriment.
>
> The necessary inquiry is as to the meaning actually conveyed by the representation.[39] The meaning intended by the representor is irrelevant.

[62] Mrs Magee gave her answer in two parts. Taken alone, the first part of the answer, "absolutely not", would, indisputably, have been a misrepresentation. The true character of the answer depends on the meaning one ascribes to the subsequent words "we have never had any issues with this house" (or words to that effect). The majority has concluded that, taken together, both parts of the answer form a single answer and the subsequent words explained and qualified the initial answer. I agree that the two sentences must be read together to form a single answer. But I consider that the additional words had the effect of conveying reassurance that the first part of the answer could be supported from Mrs Magee's personal experience, rather than qualifying the previous words.

[63] If Mrs Magee had wanted only to make a representation based on her personal experience she could easily have done so by prefacing the answer with phrases such as "all I can say is…" or "I can only speak from my experience…" which would have had the effect of limiting the information she was imparting. Phrases added after the first answer such as "as far as I know" would also have indicated that she could speak only from her personal experience. Alternatively, she could simply have said "we have never had any issues with the house" without prefacing the statement with the words

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36 *West v Quayside Trustee Ltd* [2012] NZCA 232, [2012] NZCCLR 16 at [30].
37 Citing *Lawton v Norcross* (2009) TCLR 338 (HC).
38 *Gunton v Aviation Classics Ltd* [2004] 3 NZLR 836 (HC) at [244].
39 Citing *Bisset v Willkinson*, above n 9, at 183.

"absolutely not". But in my view, she gave an unequivocal response followed by words that conveyed reassurance rather than limitation. The answer was plainly open to be understood as meaning that the house was not a leaky house and that Mrs Mason could be reassured as to the correctness of that answer by the fact that Mrs Magee herself had never experienced any problems.

[64] I would therefore dismiss the appeal.

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