IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2015-404-1892
[2018] NZHC 2642

BETWEEN	JILL GRANT Plaintiff
AND	RIDGWAY EMPIRE LIMITED Defendant

Hearing:	30–31 July, 1 and 3 August 2018
Appearances:	G P Blanchard QC and E E Hill D R Bigio QC and D W Grove
Judgment:	11 October 2018

JUDGMENT OF PALMER J

This judgment was delivered by me on 11 October 2018 at 11:30 a.m.
pursuant to r 11.5 of the High Court Rules 1985.

Registrar/Deputy Registrar

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Counsel/Solicitors:
GP Blanchard QC, Auckland
D R Bigio QC, Auckland
Blackwells, Auckland
Quay Law, Auckland

Summary

[1] In 2009, Ms Jill Grant bought a townhouse at 37 Clifton Road, Hauraki, Auckland with a lovely view overlooking the Hauraki Gulf and Takapuna Beach. When purchasing it, she asked the vendor, Mr Aaron Ridgway, whether it was leaky. He said it was not; but it was leaky. Ms Grant claims damages for pre-contractual misrepresentation and breach of a warranty that work Mr Ridgway did on the property had Council consent where required. Mr Ridgway submits there was no misrepresentation or breach of warranty and there is insufficient evidence the damages claimed reflect remediation rather than renovation. He submits he did not need a consent for the work Ms Grant claims was in breach of the warranty.

[2] Mr Ridgway did not know the unit was leaking; only that it had suffered from three water issues he had repaired. But he made a representation of fact to Ms Grant that it did not leak, when it did. That was a pre-contractual misrepresentation which was one of the reasons Ms Grant bought the unit. She acted reasonably in relying on that misrepresentation. Mr Ridgway did not breach the warranty as I do not consider the work he did in 2004 required Council consent. Ms Grant is entitled to damages for the misrepresentation. I award her damages of $474,101 for the misrepresentation on the basis of her builder's estimate of the cost of repair, which was not challenged by contrary evidence.

What happened?

[3] In 2009, Ms Grant purchased unit four at 37 Clifton Road, Hauraki, Auckland from Mr Ridgway. At trial, Ms Grant called evidence from: her friend Ms Theresa Brooking; her architect Mr John Deed; an expert building surveyor Mr John-Paul Biggelaar; and her builder, Mr Alexander Coburn.[1] Mr Ridgway called evidence from: his plumber, Mr Michael Butler; his builder, Mr James Bakker; his tiler, Mr Andrew Williams; an expert building surveyor Mr Jacob Woolgar; and statements from his mother, Mrs Carol Fowke and other residents and former residents of units at 37 Clifton Road.

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[1] In a minute of 31 July 2018, I ruled some of the evidence in Mr Coburn's proposed brief inadmissible as it was not reply evidence.

Mr Ridgway's properties at 37 Clifton Road

[4] There are five connected townhouses on the property at 37 Clifton Road, Hauraki, Auckland, built in the early 1970s. Unit one is closest to the road. Unit five is closest to the beach. Unit four is on three levels with decks on the second floor and third floor. The third floor was added around 1983 and looks over unit five to the Hauraki Gulf and part of Takapuna Beach. The garage for unit five is underneath the second floor of unit four. The five units are subject to a cross-lease which, at cl 5, requires written consent of a majority of lessors to any structural alterations.

[5] Mr Ridgway is the sole director of Ridgway Empire Ltd (REL), the defendant. He and his mother, Mrs Carol Fowke, are trustees of the Aaron Ridgway Family Trust (the Trust). Entities associated with Mr Ridgway have owned four of the units at various times:

(a) REL purchased unit four in December 2003. Mr Ridgway lived there from February 2004 to October 2007. From then, until 2010, he rented it out.

(b) The Trust purchased unit five in September 2007. Mr Ridgway lived there from October 2007. In 2008 there was a large fire which took more than a year to repair. In December 2009 the garage ceiling was replaced. In 2012 there were renovations.

(c) REL purchased unit two in March 2014 and sold it in December 2016. Mr Ridgway lived there occasionally while renting out unit five. Otherwise he rented out unit two.

(d) In January 2016, REL purchased unit three.

[6] In early 2004, Mr Ridgway had building work done to unit four by Mr James Bakker, including alteration of the kitchen on the second floor. In removing gib-board from the second-floor lounge walls and ceiling Mr Bakker found there had been water

ingress from the third-floor deck.[2] The wood was wet but not rotten and he could see it was leaking from under the third-level deck at the ply sheet joins.[3] That led to the third-floor deck surface being removed. No building consent was obtained for this work, but it was inspected by Independent Property Inspections Ltd which stated, in a report of 2 March 2004:

> The deck was originally open slatted, however a waterproof membrane was subsequently added to the surface to prevent water causing damage to the roof below which serves the adjoining unit. The water shed by the membrane is taken to the stormwater system. The deck is displaying some wear but this is well within acceptable parameters.

[7] A waterproof membrane and new tiles were then laid on the third-floor deck by Mr Andrew Williams, a tiler, who also laid tiles of the same colour on top of existing tiles on the second-floor deck at Mr Ridgway's request.

[8] Mr Ridgway is only aware of two other water issues related to units four or five. In 2005, a water pipe burst and was repaired by an emergency plumber. In mid-2008, a blocked gutter caused a leak from the third floor to the second floor of unit four and damage to the lounge ceiling. It was fixed by Mr Michael Butler. Mr Butler's evidence was that he saw no sign of long-term water damage when he removed the lounge ceiling.[4] He considered the leak was most likely caused by water overflowing the back of the spouting and into the property.[5]

Sale of unit four to Ms Grant

[9] In 2009, to reduce REL's debt, Mr Ridgway put unit four up for sale. Mr Ridgway came across Ms Grant looking at the roadside sign, and encouraged her interest. She viewed the property several times. Mr Ridgway offered to help arrange finance for her to buy it. At the first viewing, he explained he proposed to add a bedroom on the roof of unit five but that would not adversely affect the view from unit four. In August 2009, she viewed the property again.

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2 Brief of Evidence of James William Bakker at [5]–[6]. Notes of Evidence (NOE) at 133/27 – 134/18.
3 NOE at 134/10–18 and 136/4–11.
4 NOE at 127/29–31.
5 NOE at 130/6–14.

[10] Ms Grant returned for another viewing, with her friend Ms Therese Brooking, in late August or early September. Mr Ridgway had constructed a timber frame of the proposed bedroom to show how it would look from unit four. Ms Grant and Ms Brooking said the purpose of the visit was to see the timber frame and ask about leaks. Ms Grant was aware of the leaky building crisis.[6] Ms Grant's evidence-in-chief was she specifically asked Mr Ridgway "whether the property was a leaky building or had suffered from leaks" and he told her it "was not a leaky home and had not suffered leaks before.[7] Under cross-examination, though, Ms Grant repeated she had asked whether it was a leaky home but said she had not asked if it had suffered from leaks.[8] She re-affirmed that in re-examination.[9]

[11] Ms Brooking's evidence-in-chief corroborated Ms Grant's evidence-in-chief.[10] Under cross-examination, Ms Brooking said Mr Ridgway said it was not a leaky home, it hadn't had leaks, it didn't have leaks.[11] She said the question they were asking was whether he had ever had issues with leaking at any time, and she was left with the impression there were never any issues, particularly during the time he had owned it.[12] Mr Ridgway's evidence was Ms Grant asked him whether the house leaked and he said it did not.[13] His evidence was he said that because the house did not leak, according to his cognitive intelligence.[14]

[12] On 8 September 2009, Ms Grant and Mr Ridgway, for REL, signed a sale and purchase agreement (the Agreement) in the eighth edition 2006(2) of the Real Estate Institute of New Zealand Inc and Auckland District Law Society Inc standard form. The purchase price was $1,460,000 with a lengthy possession date of 20 January 2011. There were negotiations between the lawyers over the terms of the Agreement. It provided for Ms Grant to rent the property from 1 March 2010 until 31 March 2011, and for the tenancy to "merge and be extinguished" at settlement. Payment was by instalments. Ms Grant provided a guarantee in the event she cancelled before

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6 NOE at 11/13–15.
7 Brief of Evidence of Ms Jill Grant [Grant Brief] at [9].
8 NOE at 10/32 to 11/15 and 15/7–10.
9 NOE at 30/2–14.
10 Brief of Evidence of Ms Theresa Brooking [Brooking Brief] at [9]-]10].
11 NOE at 33/17–31, 35/9–29, 36/16–38/4.
12 NOE at 36/18-38/4.
13 Brief of Evidence of Mr Aaron Ridgway [Ridgway Brief] at [45]-[46] and NOE at 121/11.
14 NOE at 168/28–169/2.

settlement and the Trust provided a guarantee of REL's obligations. There were requirements that the work Mr Ridgway intended to do on unit five not obstruct the views of unit four. Clause 6.2(5) was a warranty that where the vendor had done work on the property, any permit, resource consent or building consent required by law was obtained.

Leaks to unit four

[13] In mid-2011, Ms Grant noticed leaking in the ceiling of the second-floor lounge in unit four. She and her partner, Mr Warwick Hearn, discovered the flashings at the exterior edge of the tiled third-floor deck had deteriorated, allowing water to enter the second-floor ceiling space. Further investigation revealed more leaks in the exterior walls of the third-floor ensuite bathroom and water damage in the third-floor sitting room floor. Ms Grant engaged Mr John Deed, of Deed Architectural. He told her the entire third-floor deck and joinery abutting the deck would have to be replaced in order to fix the leaking.

[14] In August 2012, Ms Grant applied for building and resource consent. In February 2013, Ms Grant received a quote for the work from QPC Builders, based on Mr Deed's plans, of $144,235.96 (GST excl), which she accepted. The decks on the second and third floors were shrink-wrapped in the course of the work. During the work, QPC removed the gib from the lounge ceiling and walls on the second floor and the tiles and joinery on the third floor. This revealed water damage to the timber below, and to the timber around the poles supporting the third-floor sitting room floor as well as under the deck and in the floor of the ensuite bathroom by the bay window and ranch sliders. Ms Grant provided photos of this damage. Mr Deed's evidence is, once exposed, the timber framing showed clear signs water ingress to the deck structure had occurred over a long period of time, as did rust on steel beams.[15] Mr Biggelaar's evidence was the damage is consistent with moisture ingress.[16]

[15] Mr Deed's evidence was his initial visual inspection raised concerns the third-floor deck was not constructed with sufficient falls and outlets to drain water away.[17]

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15 Brief of Evidence of Mr John Deed [Deed Brief] at [8]-[9].
16 Brief of Evidence of Mr John-Paul Biggelaar [Biggelaar Brief] at [39].
17 Deed Brief at [4].

After his initial site inspection he concluded there were numerous areas of non-compliance and the third-floor joinery needed replacement.[18] Mr Woolgar's evidence-in-chief was that he had not been able to establish the cause of the damage, though he considered water ingress likely to have occurred through the balustrade fixing points and, in the ensuite, from seals in the aluminium frame of the bay window.[19] Under cross-examination he agreed top-fixing a balustrade is a well-recognised cause of leaks and there were problems in the membrane not being lapped and the deck surface being too high.[20] He considered the damage could have been from the deck or the ensuite and the insufficient framing of the east wall was another potential source.[21] He agreed the timber showed clear signs of water ingress over a long period of time and, knowing what we know now, he agreed the building is "absolutely" a leaky building.[22] Mr Biggelaar and Mr Woolgar agreed there were problems with: the top-fixed balustrades penetrating the membrane; the membrane not lapping up under the cladding and joinery; the tiles compromising the deck to floor heights and cladding clearances; a lack of fall to the deck; high risk joinery in the ensuite bay window; the ranch slider; a gutter over the pergola; insufficient framing for the east wall cladding.

[16] Some damage, to the original upper deck framing, is shown in photograph one.

Photograph one

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18 Deed Brief at [5]–[6].
19 Brief of Evidence of Mr Jacob Woolgar [Woolgar Brief] at [28]-[28](a) and (c).
20 NOE at 186/17–187/24.
21 NOE at 192/31–33.
22 NOE at 196/5–8; 198/26–29; and 202/5–7.

[17] The Council was called in to inspect. The inspector's notes of a meeting on 26 March 2013 say "Reason for meeting Builder believes that this building could be potentially leaking to areas mentioned on the consent and other areas to the entire building". The next day there was another meeting on-site involving the Team Leader of the Council's Weathertightness Inspections team. Mr Deed's evidence was the whole floor required re-building. Because, he says, the previous structure was poorly designed, leading to sagging of the floor, a new portal frame was required for compliance.[23] The work now involved extending the area of the third-floor bedroom over a quarter of the third-floor deck. It was the subject of an amendment to the building consent in May 2013.

[18] Mr Ridgway said the work amounted to very substantial renovations to improve unit four immensely. The 2012 council consent summarised the work as "upper level additions and deck renovations". The May 2013 amended consent described the works as "re-build existing floors and ensuite roof, extend lower level bedroom". Ms Grant said the work was remedial, to fix the damage from the leak. Mr Deed's evidence was that he was approached "to prepare design work to fix leaks in the property, not for a renovation".[24] He said "all the work carried out was to rectify the leaking situation; the bedroom extension was considered to be the best option to simplify the design of the deck areas".[25] He said enclosing part of the deck "resulted in reducing that area from high risk to low risk in terms of water ingress" and repairing it as it was "would have been a difficult exercise to achieve compliance and there would have been additional costs associated with balustrading etc".[26] He said the cost to repair the deck would be the same as enclosing the deck, though acknowledged under cross-examination this was based on his assumption the costs would be similar.[27]

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23 Deed Brief at [10].
24 Brief of Mr John Deed in Reply [Deed Reply Brief] at [7] and NOE at 54/27–30.
25 Deed Reply Brief at [4].
26 Deed Reply Brief at [7].
27 NOE at 54/4–7.

[19] Mr Biggelaar's evidence was the repairs carried out by QPC, apart from that not claimed by Ms Grant, "are appropriate and represent like for like repairs" and "the amounts appear fair and reasonable".[28] Mr Woolgar considered the costs detailed by Ms Grant do not sufficiently separate remediation costs from betterment, which would require a quantity surveyor's input and apportionment of the professional fees.[29]

Leaks through unit four to unit five

[20] In September 2013, after the unit four shrink-wrapping was removed, there was significant leaking to the garage and back bedroom of unit five, below unit four. Mr Ridgway's evidence is that, every time it rained, there were leaks into unit five.[30] Relations between Mr Ridgway and Ms Grant deteriorated and lawyers were involved.

[21] The Council issued Ms Grant with a notice to fix in November 2013. A new application to amend the building consent was lodged to require leg flashings for the portal, which had previously been discussed but not required by the Council.[31] However, investigating this revealed extensive damage to timber-framing and steel beams under the second-floor of unit four and in the ceiling of the unit five garage. Mr Deed's evidence was this was from water ingress to the second-level deck over a long period of time, related to a planter box on the second-level deck containing an unsealed light pole.[32] Mr Biggelaar inspected the property in January and April 2014 and June 2016. He identified extensive leaking around the planter box with the unsealed light stand.[33] His opinion was the extensive rust in the steel beams and the decay in the timber framing in the unit five garage ceiling is "indicative of long term water ingress" which, in his opinion, "would appear to be over an extended period of time, which would have predated Jill's purchase of the Property".[34]

[22] In his evidence-in-chief Mr Biggelaar thought the additional tiles installed in 2004 at Mr Ridgway's direction, including the additional tiles installed on the second-floor deck on top of the existing tiles, were to prevent leaking and, if so, a building

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28 Biggelaar Brief at [52] and [62].
29 Woolgar Brief at [42] and [44]–[45].
30 Ridgway Brief at [65]–[66].
31 Deed Brief at [13]-[22]
32 Deed Brief at [23]-[24].
33 Biggelaar Brief at [17].
34 Biggelaar Brief at [18]-[19].

consent would have been required. But, under cross-examination, he acknowledged he did not know Mr Ridgway's purpose.[35] In his evidence-in-chief Mr Woolgar considered there is no explanation as to how the damage to the framing of the second-floor deck occurred but believed the highest risk locations were around the seat and planter.[36] He did not consider the tiling by Mr Ridgway would have made the situation any worse that it was previously.[37] Under cross-examination Mr Woolgar accepted the planter box and seat were high risk, leading to extensive leaking over an extended period of time, and the cladding on the balustrades was an issue, but he considered the damage was not increased or diminished by the additional layer of tiles.[38] The damage is illustrated in photograph two.

Photograph two

[23] The Council required the second-floor deck to be rebuilt. The planter box was removed and covered. In March 2014, Ms Grant shrink-wrapped the second-floor deck and the leaks to the unit five garage stopped.[39] During an insurance inspection of the garage, possibly in late 2014, there appeared to be serious water damage to gib-board and rust to the beam in the ceiling of the unit five garage. The work exposed

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35 Biggelaar Brief at [23] and NOE at 70/1–10 and 20–24.
36 Woolgar Brief at [28](b).
37 Woolgar Brief at [31].
38 NOE 196/18–197/6.
39 Grant Brief at [60].

the ceiling of unit five's garage to view from the top, which revealed timber date-stamped November 2009. Mr Biggelaar considered the repairs installing those beams could only have been done from below, from unit five, and said they appear to have been done to repair damage from leaking from unit four's deck.[40] He did not consider it would have been possible for an experienced contractor to have installed new timber in 2009 without realising the existing timber was decayed.[41] He considered a building consent would have been required for work to address the issues of moisture ingress, but was not obtained.[42]

[24] Mr Ridgway says he saw no signs of water damage to the garage ceiling until Ms Grant's renovation works. Mr Woolgar considered that, had there been damage to the timber framing in 2009, the Council would have identified it during inspection in at that time.[43] In 2017, when he attended the site and removed a quarter of the garage ceiling linings, he did not see evidence of moisture damage on timber and linings stamped November 2009 and he has seen no suggestion the timber was installed to remedy a leak.[44] Mr Biggelaar said if the ceiling removed was not around the location of the portal frames, Mr Woolgar may not have seen the decayed timber below the planter box.[45]

[25] Mr Biggelaar considered the extent of decay is long term.[46] Under cross-examination, Mr Woolgar accepted it was "absolutely" a leaky home.[47] He considered there is every chance a council inspector would not have seen damage when the garage ceiling was installed because insulation would have been in the way, but he agreed a contractor installing the timber may have seen the damage if insulation was not in the way and it was in that condition at the time.[48]

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40 Biggelaar Brief at [22]-[23].
41 Biggelaar Reply Brief at [24].
42 Biggelaar Brief at [24].
43 Woolgar Brief at [35].
44 Woolgar Brief at [38]-[39].
45 Biggelaar Reply Brief at [6].
46 NOE at 75/11–18.
47 NOE at 202/5–7.
48 NOE at 204/22–34.

[26] Since May 2014 there has been an impasse, as Judge Harrison characterised it in a judgment earlier this year.[49] Mr Ridgway considered Ms Grant's builder unacceptable and refused access to his garage without further assurances. He applied for a declaration the lease gives him an indemnity against any further damage caused by the work. Ms Grant acknowledged liability for damage to unit five from the September 2013 leak. In July 2018, Judge Harrison entered judgment for Mr Ridgway in the District Court, holding the indemnity applied to that water ingress damage, with resolution of quantum awaiting investigation and inspection.[50] Ms Grant still wants to continue with the work she considers appropriate, estimated to take two weeks, but cannot get Mr Ridgway's agreement to access the garage to complete it.

[27] In December 2014, Mr Ridgway sought an injunction against Ms Grant removing the shrink-wrapping, due to concerns that work she proposed to do on the second-floor deck would not be effective. Those proceedings were resolved by a third-party expert ordering the shrink-wrap remain in place on the second-floor deck of unit four. It is still there, completely obscuring the view. Ms Grant has moved out and is renting out the unit. She has given notice to commence arbitration under the cross-lease which, so far, has been to mediation.[51]

Proceedings

[28] In August 2015, Ms Grant brought these proceedings for pre-contractual misrepresentation and breach of warranty against REL and for negligent misstatement against Mr Ridgway. At the hearing, I was advised she discontinued the negligent misstatement cause of action. There was no cause of action of mistake, under s 24 of the Contract and Commercial Law Act 2017 (C&CL Act) and no submission during the proceeding that should be considered.[52] Ms Grant claims damages of $474,101 against REL, comprising:

(a) $186,872 for total remedial works undertaken (comprising $307,755 less $120,883 for non-remedial items);

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49 *Ridgway v Calvert* [2018] NZDC 14253 at [10].
50 At [25] and [27] – [28].
51 NOE at 166/16–25.
52 David McLauchlan "Misrepresentation? Or was it a case for relief on the ground of common mistake?" [2018] NZIJ 13.

(b) $66,666 for consent, professional and other fees;

(c) $195,563 (GST incl) estimated by QPC in October 2015 for additional remedial works required and including an additional 25 per cent to reflect increased costs since then;[53] and

(d) $25,000 of general damages for Ms Grant's stress and anxiety.

[29] The proceeding was originally to be tried in April 2017 but the parties entered a conditional settlement. The conditions were not fulfilled. The trial was held over four days in the week of 30 July 2018. I visited the site, accompanied by counsel, to understand the layout of unit four and its relationship with unit five. In relation to the breach of warranty claim, the plaintiff responded to a request for further particulars about the work on the second-floor deck in May 2016. There was argument at trial as to whether it would be fair for leave to be granted allowing an additional letter of 26 July 2018 particularising the work on the third-floor deck. The trial proceeded on the basis leave was granted, there would be no supplementary evidence regarding these particulars and submissions could be made at closing if required.

Was there a pre-contractual misrepresentation?

Law of pre-contractual misrepresentation

[30] Section 35 of the C&CL Act, which substantively re-enacts s 6 of the Contractual Remedies Act 1979, provides:

> **35 Damages for misrepresentation**
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> (1) If a party to a contract (**A**) has been induced to enter into the contract by a misrepresentation, whether innocent or fraudulent, made to A by or on behalf of another party to that contract (**B**),—
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> (a) A is entitled to damages from B in the same manner and to the same extent as if the representation were a term of the contract that has been breached;

[31] A misrepresentation is usually a statement. It concerns past or present fact rather than opinion, unless the opinion is not honestly held or implies other statements

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53 NOE 57/31–32.

of fact.[54] The meaning of the misrepresentation is what it would be reasonably understood to mean in its context and circumstances.[55] Context and circumstances are, therefore, crucial. In recent years New Zealand's irredeemable pluviality has encountered questionable building methods. Accordingly, a variety of cases concern misrepresentations about leaky buildings in different contexts. In *La Grouw v Cairns,* in 2004, O'Regan J dealt with an argument it was unreasonable for a purchaser with access to advice to rely on a representation a house was not leaking from a vendor who was an intermediate purchaser with no particular expertise:[56]

> If Mrs Cairns had stated in response to a question about the present situation, something like "I have experienced leaks in the past, but they are all fixed and as far as I know, there is no current issue with leaks", then Mr Kohler's submission may have had some weight. But what is alleged is that Mrs Cairns simply answered in the negative when asked if the house leaked and a purchaser is entitled to rely on such an answer in the circumstances of this case.

[32] More recently, in *Mason v Magee*, Ms Magee stated "we have never had any issues with this house", after replying "absolutely not" to the question of whether the house was leaky.[57] A majority of the Court of Appeal found the later statement identified her experience as owner for two years as her reason for saying the house was not a leaky home, thereby explaining and qualifying her response.

[33] It must also be reasonable to rely on the misrepresentation. The Court of Appeal in *Magee* made several points about inducement based on case law:[58]

(a) to establish inducement, the representee must show either that:

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

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54 Jeremy Finn, Stephen Todd and Matthew Barber (eds) *Burrows, Finn and Todd on the Law of Contract in New Zealand* (LexisNexis NZ Ltd, Wellington, 2018) at [11.2].

55 *West v Quayside Trustee Ltd* [2012] NZCA 232, [2012] NZCCLR 16 at [30].

56 *La Grouw v Cairns* (2004) 5 NZCPR 434 (HC) at [29].

57 *Magee v Mason* [2017] NZCA 501, (2017) 18 NZCPR 902 at [36].

58 *Magee v Mason,* above n 57, at [42] and [48], relying on *Savill v NZI Finance Ltd* [1990] 3 NZLR 135 (CA) at 145–146. The Supreme Court refused leave to appeal in *Mason v Magee* [2018] NZSC 11.

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

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

(c) It is usual to reduce the material terms to writing, meaning the parties intend to be bound by the document, but each case turns on its own facts.

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

Submissions

[34] Mr Blanchard QC, for Ms Grant, submits I should prefer Ms Grant's and Ms Brooking's evidence that Mr Ridgway said the unit was not a leaky home to Mr Ridgway's evidence that he said it did not leak. But either way, he submits, Mr Ridgway's statement was not an opinion, was unqualified and was a misrepresentation of present fact as the house was actually leaking at the time, as in *La Grouw.* Alternatively, if Mr Ridgway's statement was an opinion, he submits it was not held in good faith and did not have a reasonable basis as it is highly likely he knew it leaked. Mr Blanchard submits Ms Grant was induced to enter the agreement on the basis of the misrepresentation and it was reasonable for her to do so.

[35] Mr Bigio QC, for REL, submits the representation the home did not leak was true. Relying on *Magee v Mason,* he submits Mr Ridgway's statement meant there were no apparent leaks or it was a statement of opinion based on the fact there were no complaints by tenants. He submits there was no representation the unit had never leaked in the past. He submits there was no representation as to future leaks. He submits there is no evidence Mr Ridgway knew about leaks and no intention to deceive had been pleaded. He submits it was not reasonable for Ms Grant to rely on Mr Ridgway's statement to cover latent defects of which he was not aware or as a future guarantee of weathertightness where the vendor is a lay person who is himself a subsequent purchaser. If weathertightness was a threshold issue for Ms Grant, Mr

Bigio submits she should have made the Agreement conditional on a building surveyor's report or otherwise provide for it in the Agreement, as she did for the proposed new bedroom.

Was there a misrepresentation here?

[36] There is some dispute about exactly what Ms Grant asked and how Mr Ridgway answered. According to Mr Ridgway, she asked whether the house leaked and he said it did not. But that is very similar in substance to Ms Grant's evidence under cross-examination that she asked whether it was a leaky home and he said it was not.

[37] I do not consider the context of the exchange suggests Mr Ridgway was offering his opinion. Ms Grant's interest was in whether the unit leaked, as a matter of fact. His reply was a representation of fact. It was not qualified by reference to his experience or knowledge or in any other way. It did not concern the building being prone to leak. It is reasonably to be understood to mean the unit did not leak.

[38] I consider Mr Ridgway's answer was a misrepresentation. My impression of Mr Ridgway's evidence is that his self-described "cognitive intelligence" values precision. No doubt he considered he was correct in saying the house did not leak or was not a leaky home, even though he was knew, from the work he had done in 2004, the house had previously leaked. But the Act makes Mr Ridgway liable for innocent misrepresentations, so it is irrelevant he was not aware of the leaks. At the time of his representation in 2010, albeit unbeknownst to him, and unlike in *Mason v Magee*, unit four was actually leaking. From the evidence discovered in 2014 of water ingress causing serious damage to the second and third floors of unit four it is clear it had, by then, been occurring on a long-term basis. That was accepted by all experts.

[39] Like Mrs Cairns in *La Grouw,* Mr Ridgway simply answered in the negative when asked if the house leaked. And, like Ms La Grouw, Ms Grant was entitled to rely on that. Mr Ridgway's behaviour indicated he had expertise and familiarity with the property. He made a statement of fact and had superior knowledge and means of knowledge to Ms Grant. His unqualified language would induce a reasonable person to enter into the Agreement, and I consider his assurance reasonably had a material

effect on Ms Grant entering the Agreement, given the publicity at the time about leaky buildings. Again, like Mrs Cairns, if he had said there had been leaks in the past which were fixed and, as far as he knew, there was no current issue, that would be a different matter. So too if he had qualified his answer with an honest explanation of his experience of the property, as in *Mason v Magee*.

[40] Further, I consider it must have been part of Mr Ridgway's intention that his answer would induce Ms Grant to enter the Agreement. Mr Ridgway was actively attempting to persuade Ms Grant to buy the unit. He had encouraged her to view it and gone to the trouble of erecting timber-framing to demonstrate to her that her view would not be impeded. His answer must have been meant to reassure her the home was of the kind she would like to buy. The leaky building crisis was topical and he would have known concerns about leaks may well have discouraged purchasers.

[41] Mr Ridgway made an unqualified representation of a material fact that induced entry into a contract and was incorrect. He is liable for the consequences.

Was there a breach of warranty?

Law of breach of warranty

[42] Breach of a warranty in a contract can constitute breach of the contract. The warranty in cl 6.2(5) of the Agreement was:

> 6.2 The vendor warrants and undertakes that at the giving and taking of possession:
>
> […]
>
> (5) Where the vendor has done or caused or permitted to be done on the property any works:
>
> (a) any permit, resource consent or building consent required by law was obtained;
>
> (b) the works were completed in compliance with those permits or consents; and
>
> (c) where appropriate a code compliance certificate was issued for those works.

[43] In March and April 2004, the Building Act 1991 was in force. Section 32(1) provided it was not lawful for building work to be carried out except in accordance with a consent. Subsection (2) provided that did not apply in respect of any building work specified in the Third Schedule. The Third Schedule relevantly stated:

> A building consent shall not be required in respect of the following building work:
>
> (ab) Any other lawful repair with comparable materials, or replacement with a comparable component or assembly in the same position, of any component or assembly incorporated or associated with a building, but excluding:
>
> […]
>
> (iii) The repair or replacement of any component or assembly that has failed to satisfy the provisions of the building code for durability.

[44] The Building Code, in Schedule 1 to the Building Regulations 1992, contained provisions for durability in cl B2, relevant to (ab)(iii). It required materials and methods to be sufficiently durable to satisfy the other requirements of the Code for the specified time period. It provided:

> **Clause B2 — Durability**
>
> **Objective**
>
> **B2.1** The objective of this provision is to ensure that a building will throughout its life continue to satisfy the other objectives of this code.
>
> **Functional requirement**
>
> **B2.2** Building materials, components and construction methods shall be sufficiently durable to ensure that the building, without reconstruction or major renovation, satisfies the other functional requirements of this code throughout the life of the building.
>
> **Performance**
>
> **B2.3** *[Revoked]*
>
> **B.2.3.1** Building elements must, with only normal maintenance, continue to satisfy the performance requirements of this code for the lesser of the specified intended life of the building, if stated, or:
>
> (a) the life of the building, being not less than 50 years, if:
>
> (i) those building elements (including floors, walls, and fixings) provide structural stability to the building, or

(ii) those building elements are difficult to access or replace, or

(iii) failure of those building elements to comply with the building code would go undetected during both normal use and maintenance of the building.

(b) 15 years if:

(i) those building elements (including the building envelope, exposed plumbing in the subfloor space, and in-built chimneys and flues) are moderately difficult to access or replace, or

(ii) failure of those building elements to comply with the building code would go undetected during normal use of the building, but would be easily detected during normal maintenance.

(c) 5 years if:

(i) the building elements (including services, linings, renewable protective coatings, and fixtures) are easy to access and replace, and

(ii) failure of those building elements to comply with the building code would be easily detected during normal use of the building.

[…]

[45] "Building element" is defined to mean:[59]

> Any structural or non-structural component and assembly incorporated into or associated with a building. Included are fixtures, services, drains, permanent mechanical installations for access, glazing, partitions, ceilings and temporary supports.

[46] In effect, if someone is just replacing a building component or assembly a consent is not required. But if that component or assembly, incorporated into or associated with a building, fails to perform for the applicable durability period, replacing it will require a consent under the exception in (ab)(iii) of the Third Schedule. Presumably, that it because additional assurance is required about a component or assembly that has failed during the period it is supposed to be durable.

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[59] Building Regulations 1992, sch 1, cl A2.

[47] The performance requirements of the Building Code include particular requirements as to moisture. Relevantly, at the time of the work in 2004, the Building Code imposed particular requirements in respect of external moisture, providing at cl E2:

> **Objective**
>
> **E2.1** The objective of this provision is to safeguard people from illness or injury which could result from external moisture entering the building.
>
> **Functional requirement**
>
> **E2.2** Buildings shall be constructed to provide adequate[60] resistance to penetration by, and the accumulation of, moisture from the outside.[61]
>
> **Performance**
>
> **E2.3.1** Roofs shall shed precipitated moisture. In locations subject to snowfalls, roofs shall also shed melted snow.
>
> **E.2.3.2** Roofs and exterior walls shall prevent the penetration of water that could cause undue dampness, or damage to building elements.
>
> **E.2.3.3** Walls, floors and structural elements in contact with the ground shall not absorb or transmit moisture in quantities that could cause undue dampness, or damage to building elements.
>
> **E.2.3.4** Building elements susceptible to damage shall be protected from the adverse effects of moisture entering the space below suspended floors.
>
> **E.2.3.5** Concealed spaces and cavities in buildings shall be constructed in a way which prevents external moisture being transferred and causing condensation and the degradation of building elements.
>
> **E.2.3.5** Excess moisture present at the completion of construction, shall be capable of being dissipated without permanent damage to building elements.

[48] So, if a building component or assembly failed to satisfy these requirements within the relevant durability period, its repair or replacement required consent.

[49] After the trial, the parties provided me with the Approved Document for New Zealand Building Code: Durability Clause B2 (the Acceptable Solution) which applied

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60 Adequate is defined in Building Regulations 1992, sch 1, cl A2 as "adequate to achieve the objectives of the building code".

61 Requirement E2.2 shall not apply to buildings in which moisture from outside would result in effects which are no more harmful than those likely to arise indoors during normal use.

at the time of the 2004 works. The Acceptable Solution B2/AS1 provides guidance on compliance with the Building Code. It was produced and approved at the time by the Building Industry Authority, a statutory body established by the Building Act 2003. If followed, it must be accepted by a building consent authority as evidence of compliance with the Building Code.[62] Relevantly, it provides guidance on the applicable durability period for particular building elements under B2.3.1. Its examples of durability requirements for protective coatings are: five years for "easy to access and replace"; 15 years for "roofing membranes" and 50 years for "inaccessible or difficult to access or replace".[63] Examples of roofing are: 15 years for non-structural roofing; and 50 years for structural roofing.

Submissions

[50] Mr Blanchard, for Ms Grant, submits there was a breach of warranty in cl 6.2(5) of the Agreement because the 2004 works on the second and third-floor decks required building consents which were not obtained. He submits consent was required because the decks "contributed to the structural behaviour" of the building and failed within the required durability period. He submits the second-floor deck was not a replacement because the tiles were simply added. He submits the durability period under the Acceptable Solution was 50 years because the relevant elements were difficult to access or replace or were structural or failure would go undetected in normal use and maintenance. Alternatively, he submits the evidence shows the decks leaked after less than 15 years.

[51] Mr Bigio, for REL, submits there was no breach of warranty because a consent was not required under the Third Schedule to the Building Act 1991. He submits the tiling on the second and third-floor decks constituted a replacement of the surface of the deck or of the tiles that were previously there, but did not require consent because the tiles had not failed. He submits there is no evidence the membrane replaced on the third-floor deck had failed, pointing to the IPL report prepared at the time; particularly not within the relevant durability period for a roofing membrane, which he says was 15 years in reliance on the Acceptable Solution. He also submits there is

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62 Building Act 1991, s 49.
63 At 17.

no proof any breach of warranty caused damage because there is no evidence as to how the Council would have treated an application for consent at the time and there is no evidence the damage arose from the failure to obtain a consent.

Was there a breach of warranty here?

[52] The relevant work was done in 2004. It involved removal of the surface of the third-floor deck, laying a new waterproof membrane and laying new tiles because of water ingress.[64] It also involved laying the same new tiles over the top of existing tiles on the second-floor deck, which I accept was for cosmetic reasons.

[53] The evidence before me does not support the proposition the tiles on the second-floor deck had failed when they were replaced in 2004. The evidence does support the proposition the third-floor deck as a whole had failed to comply with the Building Code by 2004. It did not comply with the functional requirement in E2.2 nor performance standards 2.3.3 and 2.3.4. The deck's failure was a cause of the water ingress discovered then and was the primary reason why the tiles and membrane were replaced. I further consider, on the balance of probabilities the membrane had failed. I do not regard the IPL report as convincing evidence to the contrary. The report did not focus on the membrane, it is not clear the membrane was assessed and the report itself states it addresses only the structural elements of the building.

[54] The best evidence is the original membrane and tiles were installed in 1983. I consider its durability requirement was 15 years. The deck here fits the description in B.2.3.1 of building elements being moderately difficult to access or replace. I am also influenced by the durability of roofing membranes in the Acceptable Solution being 15 years. By comparison, protective coatings that are easy to access and replace have a durability period of five years, and those that are inaccessible or difficult to access or replace have a durability requirement of 50 years. The membrane here, under the tiles, was not easy to access and replace, but neither was it inaccessible or difficult to access or replace. The membrane itself did not contribute to structural stability but was part of the building envelope, specifically referred to as having a 15-year durability period in cl B2.3.1.

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64 Ridgway Brief of Evidence at [18]–[20].

[55] I cannot conclude, on the evidence available, the membrane failed within its period of required durability, which expired in 1998. The only relevant evidence is a letter in 1991 by Hoffman Plumbing which suggests the deck system as a whole had failed in some way by then. But that is not enough to satisfy me the membrane and tiles had failed by 1998.

[56] So I am not satisfied a building consent for the work undertaken in March and April 2004 was required. That is consistent with the advice Mr Ridgway received at the time. Accordingly, I do not consider he breached the warranty in cl 6.2(5).

Quantum of damages

Relevant law

[57] It is agreed the plaintiff would be entitled to damages for misrepresentation in the same manner and to the same extent as if the representation were a term of the contract, in accordance with s 35 of the C&CL Act. The usual approach is to assess the diminution of value but a "cost of cure" approach can be adopted where that does not yield an appropriate measure.[65] The onus is on the plaintiff to establish both the fact of damage and its amount on the balance of probabilities. If the plaintiff does so, the onus shifts to the defendant to prove the presence of "betterment" and its value.[66]

Submissions

[58] If either cause of action is upheld, Mr Blanchard submits the correct measure of damages is the cost of repair, following *La Grouw.* This was estimated in a quote prepared by Ms Grant's builder Mr Coburn in October 2015. He confirmed under cross-examination he was prepared at the time to carry out the work for the quoted price.[67] Mr Blanchard also points to Prendos's estimate for Mr Ridgway in August 2014, based on the consent drawings,[68] of $220,315 for the work still to be done, higher than the amount claimed. He submits the defendants have not proven there is betterment involved in the works and proposed works.

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65 *Western Park Village Ltd v Baho* [2014] NZCA 630, (2014) 16 NZCPR 139 at [63].
66 *J & B Caldwell Ltd v Logan House Retirement Home Ltd* [1999] 2 NZLR 99 (HC) at 110.
67 NOE at 58/1–14.
68 NOE at 149/24–151/33.

[59] Mr Bigio submits the work done to the third-floor deck was not a like for like repair but obviously part of a lifestyle choice. He submits the assertions by some witnesses that the cost of reinstatement of the deck would have been the same or higher as what was done are unsupported by calculations and amount to an ex post facto rationalisation. He submits Ms Grant failed to discharge her obligation to make a claim for damages on the basis of accepted principles.

What is the appropriate amount of damages?

[60] The evidence of the cost of remediation here is relatively limited. But Mr Coburn's invoices for work done and estimate for work proposed, which he accepted would bind him, are evidence of the cost of repairing the damage. Mr Biggelaar's expert evidence supports its reasonableness. Mr Ridgway did not adduce evidence to the contrary, though he had the opportunity to do so. Neither did he adduce evidence identifying and quantifying any betterment not accounted for in Ms Grant's claim.

[61] I agree the costs identified by Ms Grant relating to non-remedial items should not count. I do not consider any of the costs she identifies as relating to remedial items should not count. I agree the $25,000 of damages sought for stress and anxiety is a reasonable measure. The courts will take a reasonably robust approach when assessing damages, given the circumstances.[69] I do so here, in the absence of evidence to the contrary, by accepting the damages sought by Ms Grant are appropriate.

Result

[62] I uphold Ms Grant's claim against REL that its agent, Mr Ridgway, made a pre-contractual misrepresentation, for which I award damages to her of $474,101. I decline Ms Grant's claim against REL for breach of warranty. If costs cannot be agreed, I give leave for Ms Grant to file a memorandum of no more than five pages regarding costs within 10 working days of this judgment and REL to file a memorandum the same length within 10 working days of that.

Palmer J

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69 *Ratcliffe v Evans* [1892] 2 QB 524 (EWCA).