Tadd Management Ltd v Weine (as trustees of the Ruth Weine Family Trust)

High Court Wellington CIV-2019-485-781; [2023] NZHC 764
7, 8, 10, 11 November 2022; 5 April 2023
Gwyn J

Contracts — Misrepresentation — Remedies — Damages — Defendants owned building — Defendants engaged consultant engineer to conduct, and report on, seismic assessment of building — Defendants produced initial seismic assessment (ISA) for defendants — ISA indicated 60 per cent new building standard (NBS) rating — Defendants sold building at auction — Defendants marketed building as having "Good NBS rating" — Defendants caused ISA and covering letter to be distributed to potential purchasers — Plaintiff was successful bidder to purchase building at auction — Plaintiff caused two detailed seismic assessment (DSA) to be completed — First DSA indicated 10 per cent NBS — Second DSA indicated 30 per cent NBS — Plaintiff elected to strengthen building to 100 per cent NBS — Plaintiff sued defendants for misrepresentation as to per cent NBS of building — ISA contained statements of fact, not opinion, so were representations — Defendants' distribution of ISA and covering letter to prospective purchasers represented 60 per cent NBS and "good" NBS rating — Representations were false — Defendants intended prospective purchasers to be induced to purchase building by those representations — Plaintiff was so induced — Contributory negligence not applicable because plaintiff's claim not premised on contractual clause that depended on negligence — Plaintiff's due diligence did not impact upon defendants' liability in misrepresentation — Contract and Commercial Law Act 2017, s 35; Contributory Negligence Act 1947, s 3.

Contracts — Contractual mistake — Common mistake — Plaintiff alleged parties to contract for purchase of building under common mistake that building had 60 per cent NBS rating — Defendants were also influenced by same mistake in entering into contract — Mistake was as to essential nature of contract — Contract and Commercial Law Act 2017, s 24.

Contracts — Breach of contract — Damages — Assessment — Distinction between "actual loss" and "difference in value" approach — Court could not ascertain actual NBS rating of property — Difference in value approach preferred.

Negligence — Standard of care — Consultant engineer and property vendor — Skill and competence of ordinary member of engineering profession — Consultant engineer not negligent in production of ISA or covering letter.

Fair trading — Misleading and deceptive conduct — Contracting out — Contract between consultant engineer and property vendor — Limitation of liability clause — Clause constituted contracting out of statute — Fair and reasonable that parties bound by clause — Fair Trading Act 1986, s 5C.

The defendants, Ruth Weine and Michael Hoffman-Body (the vendors), in their capacity as trustees of the Ruth Weine Family Trust (Trust), were the vendors of a commercial building in Lower Hutt (the Property). The marketing materials for the Property included the statement "Good NBS rating" under the heading "Investment highlights". The plaintiff, Tadd Management Ltd (TADD), bought the Property at auction. Prior to the auction, the vendors' real estate agent provided to TADD and other potential purchasers of the Property an Initial Seismic Assessment (ISA) and explanatory covering letter. The ISA assessed the property as having a 60 per cent NBS (New Building Standard) rating. The ISA was prepared by New Zealand Consulting Engineers Ltd (NZCEL) who had carried out the seismic assessment of the Property. The covering letter was prepared by NZCEL, but it was not aware that the letter would be made available to prospective purchasers. After TADD had bought the building, it commissioned a Detailed Seismic Assessment (DSA), which assessed the building at 10 per cent NBS. It sought a second DSA from a different engineering firm, which assessed the building at 30 per cent NBS. Having received the two DSAs, TADD elected to strengthen the Property to 100 per cent NBS. TADD contracted Armstrong Downes Ltd (ADL), a company with the same directors, to carry out the work on a cost reimbursement basis.

TADD commenced proceedings in the High Court against the vendors claiming that it relied on their representations as to the NBS rating in bidding for and buying the Property, and that it incurred substantial losses as a result. TADD framed its claim in actions for contractual misrepresentation (under s 35 of the Contract and Commercial Law Act 2017 (Act) and common mistake (under s 24 of the Act). As to contractual misrepresentation, TADD contended that it was induced by the vendors' representations as to the per cent NBS to purchase the Property, which were incorrect, and that it suffered loss as a result. As to common mistake, TADD contended that both parties acted under the common mistake that the Property was 60 per cent NBS in entering into the contract.

In defence, the vendors contended that the ISA contained the relevant engineer's opinion only such that it was not an actionable misrepresentation, but in any event, they denied that the ISA was incorrect and that there was a reasonable basis for that opinion. The vendors also denied that TADD was induced by the NBS representations in the marketing materials to purchase the Property. The vendors also raised affirmative defences by way of limitation of liability (by reason of a contractual limitation), contributory negligence (by reason of s 3 of the Contributory Negligence Act 1947 (Contributory Negligence Act) and TADD's failure to undertake proper due diligence by obtaining a DSA of the Property notwithstanding that the ISA stated that it should not be relied on and that detailed inspections might lead to a different result or seismic grade), and voluntary assumption of risk (by way of relying on the ISA in such circumstances and taking the risk of purchasing the Property without undertaking proper due diligence).

The vendors brought a third-party claim against NZCEL to the effect that, if they were liable to TADD, then NZCEL was liable to them for breach of contract and negligence (with respect to the ISA only), and under the Fair Trading Act 1986 (FT Act) (with respect to the ISA and the covering letter). NZCEL relied upon cl 11 of their contract with the vendors, which was a limitation of liability clause, which is set out at [280] of the reasons for judgment. The relevance of the covering letter being allegedly outside the scope of NZCEL's engagement under its contract with the vendors was that, on that ground, the limitation of liability clause in the contract was allegedly unavailable to it. That was alleged to be because, as the vendors contended, the limitation of liability clause constituted unlawful contracting out of the FT Act in contravention of s 5C of that Act.

Held:

Contractual misrepresentation

(1) The term "misrepresentation" is not defined in the Act, so the common law definition applies; that is, a representation of past or present fact that is false or misleading, and excludes statements of intention, opinion and law (see [124]).

(2) A statement of opinion is prima facie not a statement of fact because it is a belief based on grounds incapable of proof and therefore not actionable as a misrepresentation, but a person will be liable for expressing an incorrect opinion where fraud is established or they do not honestly hold the opinion at the time it is expressed and/or there is no reasonable basis for it (see [125]).

(3) Where all the vendors did was make a report available to prospective purchasers, which expressly defined a limited scope of the inspection, this will not amount to misrepresentation (see [132]).

(4) There was nothing in the ISA as provided to prospective purchasers to suggest that it was in the nature of an opinion only (see [136]).

(5) The fact that there are matters of judgment involved in preparing an ISA, which may mean that different engineers reach different conclusions, does not of itself mean that the ISA is merely an opinion (see [139]).

(6) The ISA was an expert report that contained statements of fact, which were not statements of opinion, such that it was a representation (see [145]).

(7) In providing the ISA, the vendors were doing more than simply passing on the seismic assessment because the other materials reinforced or "coloured" the ISA (see [146]).

(8) The statements by the author of the covering letter were opinions, and there was a reasonable basis for those opinions, such that they were not actionable as representations (see [152]).

(9) Although the Covering letter, to the extent it is a statement of opinion, was not separately actionable, those statements would have had the effect of reinforcing in the mind of prospective purchasers that the 60 per cent NBS rating in the ISA was soundly based (see [153]).

(10) The vendors' representations, taken together, amounted to a clear statement that the Property was 60 per cent NBS and that the earthquake rating of the building was "Good", but it was not 60 per cent NBS and, as an earthquake-prone building, it could not objectively be described as "Good" (see [161], [174], [175]).

(11) The inclusion of the template warning in the ISA did not have a material impact on the vendors' liability in misrepresentation (see [169]).

(12) The vendors provided the ISA to potential purchasers to give them assurance about the seismic rating of the Property, and they provided them the covering letter to give additional comfort, and they intended that prospective purchasers would be induced by the NBS representations and, ultimately, those representations had a material effect on TADD's decision to purchase the Property (see [190], [191]).

(13) The inducement to purchase the Property was not negated by TADD's own inquiries (see [194]).

(14) TADD had established its cause of action in misrepresentation (see [195]).

Contributory negligence, voluntary assumption of risk

(15) Contributory negligence did not apply in the present case because the vendors' liability arose from a contractual provision that did not depend on negligence on its part, but in any event, TADD's alleged contributory negligence was not causal and operative (see [204], [205], [206], [207], [208], [209], [210], [211]).

(16) It was unnecessary to separately analyse the affirmative defence of voluntary assumption of risk (see [212]).

Common mistake

(17) The relevant mistake was that the Property was 60 per cent NBS as at the date of sale (see [223]).

(18) For the same reasons as with respect to misrepresentation, TADD was influenced by that mistake to enter into the contract (see [224]).

(19) In addition, the vendors were influenced to enter into the contract by a mistaken view that the Property was 60 per cent NBS (see [225], [226], [227], [228]).

(20) The mistake was as to the essential nature of the Property, TADD did not bear responsibility for that mistake, and both of the parties were influenced by that common mistake at the time of entering into the contract (see [232], [233]).

(21) The mistake resulted, at the time of the contract, in a substantially unequal exchange of values (see [214], [235]).

(22) The contract did not expressly or by implication provide for the risk of mistakes (see [236]).

(23) TADD had established its alternative cause of action in common mistake was established (see [237]).

Relief

(24) It was difficult to apply the actual loss (cost of cure) approach to calculating TADD's loss because, having regard to the evidence, the Court could not determine the actual per cent NBS as at the date of sale and then calculate the cost to bring it up to 60 per cent NBS, such that it was appropriate to assess TADD's loss on the basis of difference in value (see [254], [255], [256]).

(25) Applying that approach, the actual value of the Property as at the date of sale was $835,000, and the purchase price of the Property was $1,427,000, such that the difference in value was $592,000 (see [257]).

(26) There was insufficient evidence to make an assessment of the defendants' position, such that it was premature to address the specific legal questions as to the possible limitation of Mr Hofmann-Body's liability (see [260], [261], [262], [263], [264], [265], [266], [267], [268], [269], [270], [271], [272], [273], [274]).

Third-party claim

(27) The standard of care of an engineer when making a statement is the degree of skill and competence that an ordinary member of the profession would bring to the same task at the time the statement is made (see [306]).

(28) The covering letter was not outside the scope of NZCEL's engagement under the contract with the vendors, such that it was caught by the limitation of liability clause (see [314]).

(29) Having regard to the evidence, it could not be concluded that the ISA was not prepared by NZCEL with reasonable skill, care and diligence (see [315]).

(30) The claim of negligent breach of contract was not made out because the ISA itself was not "erroneous" or "wrong"; the problem was not with the ISA itself, but with the way the vendors used it to market the Property (see [316], [317], [318], [319]).

(31) For the same reasons, the vendors' cause of action in negligence failed (see [323]).

(32) The statements in the covering letter were opinions in the nature of statements of future possibility, and as such statements they were honestly held opinions made upon a reasonable basis (see [324], [325], [326], [327], [328], [329], [330], [331], [332]).

(33) It would not have been reasonable for Ms Weine, or a reasonable person in her situation, to have been misled by the covering letter, or the ISA itself, such that the defendants' claim under the FT Act failed (see [333], [334], [335], [336], [337], [338], [339]).

(34) The wording of the limitation of liability clause was very broad, and it was broad enough to capture a claim under the FT Act (see [359]).

(35) It was fair and reasonable that the parties should be bound by the limitation of liability clause (see [363]).

Cases mentioned in judgment

Adventurer Hobson Ltd v Cockery [2020] NZHC 675, [2020] 2 NZLR 544.

Aldridge v Boe [2012] NZHC 277.

Altimarloch Joint Venture Ltd v Moorhouse HC Blenheim CIV-2005-406-91, 3 July 2008.

Bhargav v First Trust Ltd [2022] NZHC 1710.

Bisset v Wilkinson [1927] AC 177, [1926] All ER Rep 343 (PC).

Cashmore v Sands HC Wanganui CIV-2004-483-7, 7 February 2007.

CBL Insurance Ltd (in liq) v Johnstone (as liquidators of CBL Insurance Ltd (in liq)) [2021] NZHC 1393.

Cochrane v Clark CA66/04, 24 February 2005.

Dairy Containers Ltd v Tasman Orient Line CV [2004] UKPC 22, [2005] 1 NZLR 433, [2005] 1 WLR 215.
David v TFAC Ltd [2009] NZCA 44, [2009] 3 NZLR 239.
Des Forges v Wright [1996] 2 NZLR 758 (HC).
Dymocks Franchise Systems (NSW) Pty Ltd v Bilgoa Enterprises Ltd (1999) 8 TCLR 612 (HC).
Firm PI 1 Ltd v Zurich Australian Insurance Ltd [2014] NZSC 147, [2015] 1 NZLR 432.
Forsikringsaktieselskapet Vesta v Butcher [1989] AC 852, [1988] 2 All ER 43 (EWCA Civ).
Frimley Estate Ltd v Stonewall Homes Ltd (2010) 12 NZCPR 769 (HC).
Glocken Holdings Ltd v CDE Co Ltd (1997) 8 TCLR 278 (HC).
Hunt v Macartney HC Auckland CIV-2010-404-1881, 25 August 2010.
i-Health Ltd v iSoft NZ Ltd [2011] NZCA 575, [2012] 1 NZLR 379.
Johnson v Auckland Council [2013] NZCA 662.
Ladstone Holdings Ltd v Leonora Holdings Ltd [2006] 1 NZLR 211, (2005) 5 NZCPR 766 (HC).
Magee v Mason [2017] NZCA 502, (2017) 18 NZCPR 902.
Malayan Breweries Ltd v Lion Corporation Ltd HC Auckland CL45/88, 6 May 1988.
McLaren Maycroft & Co v Fletcher Development Co Ltd [1973] 2 NZLR 100 (CA).
Merj Holdings Ltd v Sipka Holdings Ltd [2016] NZCA 521, [2016] NZAR 1505.
Mitchell v Murphy (as trustee of the Victor Sydney Trust) [2019] NZHC 3262.
Mitchell v Zhang [2017] NZHC 3208.
MSC Consulting Group Ltd v Oyster Management Ltd [2020] NZCA 417.
New Zealand Motor Bodies Ltd v Emslie [1985] 2 NZLR 569 (HC).
Newell v Garland (1989) 3 TCLR 598 (HC).
PAE (New Zealand) Ltd v Brosnahan [2009] NZCA 611, (2010) 9 NZBLC 102,862.
Philip Moore & Co Ltd v Surridge [2018] NZHC 562.
Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd [2016] NZSC 158, [2017] 1 NZLR 352.
Premium Real Estate v Stevens [2008] NZCA 82, [2009] 1 NZLR 148.
Red Eagle Corporation Ltd v Ellis [2010] NZSC 20, [2010] 2 NZLR 492, (2010) 11 NZCPR 157.
Ridgway Empire Ltd v Grant [2019] NZCA 134, (2019) 20 NZCPR 236.
Roberts v Jules Consultancy Ltd [2019] NZHC 555, (2019) 21 NZCPR 163.
Savvy Vineyards 4334 Ltd v Weta Estate Ltd [2020] NZSC 115, [2020] 1 NZLR 714.
Shen v Ossyanin (No 2) [2019] NZHC 2430, (2019) 20 NZCPR 590.
Sipka Holdings Ltd v Merj Holdings Ltd [2015] NZHC 1980.
Smith v Land House Property Corp (1884) 28 Ch D 7 (EWCA Civ).
Steel v Spence Consultants Ltd [2017] NZHC 398, (2017) 18 NZCPR 540.
Sunnylea Farms Ltd v Gray (2004) 21 NZTC 18,667 (HC).
Trustees Executors Ltd v QBE Insurance (International) Ltd [2010] NZCA 608.
Undrill v Senior HC Blenheim CP9/94, 20 August 1997.

Claim

This was a claim for damages by the purchaser of a property against the vendors for alleged losses arising from misrepresentations with respect to the seismic assessment of the property.

F Collins and *J Perry* for the plaintiff.

RJ Fowler KC, *M Wolff* and *H Dempsey* for the defendants.

A Sheriff and *C O'Fee* for the third party.

Gwyn J.

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Introduction

[1] At an auction on 7 December 2017, the plaintiff, Tadd Management Ltd (TADD), bought a commercial building in Lower Hutt (Property). The vendors of the building were Ruth Weine and Michael Hofmann-Body, as trustees of the Ruth Weine Family Trust (Trust).

[2] Prior to the auction, the vendors' real estate agent provided to TADD and other potential purchasers of the Property an Initial Seismic Assessment (ISA) and explanatory covering letter. The ISA assessed the Property as having a 60 per cent NBS (New Building Standard) rating. The ISA and covering letter were prepared by New Zealand Consulting Engineers Ltd (NZCEL), who had carried out the seismic assessment of the building. The marketing materials for the Property also included the statement "Good NBS rating" under the heading "Investment highlights".

[3] After TADD had bought the building, it commissioned a Detailed Seismic Assessment (DSA) to enable it to assess how it would seismically upgrade the building. That DSA assessed the building at 10 per cent NBS. TADD then sought a second DSA, from another engineering firm, which assessed the building at 30 per cent NBS. Having received the two DSAs, TADD elected to strengthen the Property to 100 per cent NBS.

[4] TADD contracted Armstrong Downes Ltd (ADL), a company with the same directors, to carry out the strengthening and refurbishment work on a cost reimbursement basis.

[5] TADD says it relied on the vendors' representations as to the NBS rating in bidding for and buying the Property. It says it incurred substantial losses as a result.

[6] TADD has brought this claim against the vendors and the vendors have, in turn, brought a third party claim against NZCEL.

Statutory and policy framework

[7] The Ministry of Business, Innovation and Employment (MBIE) has issued technical guidelines for engineering assessments, called "The Seismic Assessment of Existing Buildings" (Guidelines).[1]

[8] The Guidelines provide engineers with the means to assess the seismic behaviour of existing buildings and building parts. The Guidelines are in three parts. Part A provides assessment objectives and core principles to support detailed guidance on the ISA method in part B, and the more extensive DSA method, in part C.

[9] An earthquake rating is the rating given to a building as a whole to indicate the seismic standard achieved. It is expressed in terms of a percentage of the New Building Standard (NBS) achieved (xx percentage NBS). The New Building Standard is intended to reflect the expected seismic performance of a building relative to the minimum human life safety standard required for a similar new building on the same site by cl B1 of the New Zealand Building Code.[2]

[10] The ISA and DSA processes indicate the seismic performance of the building as an earthquake score or rating, expressed as per cent NBS.[3]

[11] An ISA procedure is:[4]

> … essentially a qualitative procedure that observes building attributes, uses these to develop a holistic understanding of how the building would respond to an earthquake and provides an initial assessment of its earthquake rating.

[12] The Guidelines contain an Initial Evaluation Procedure (IEP) and a template ISA document. The Guidelines state:[5]

> The expectation is that the IEP will be able to identify, to an acceptable level of confidence and with as few resources as possible, most of those buildings that fall below the earthquake-prone building threshold without catching an unacceptable number of buildings that will be found to pass the test after a DSA. Therefore, an IEP earthquake rating higher than this threshold determined as part of a comprehensive ISA may be sufficient justification under the EPB [Earthquake-prone Building] methodology to confirm the building is not earthquake-prone. Of course the IEP cannot take into account aspects of the building that remain unknown to the engineer at the time the IEP is completed. Therefore, it cannot be considered as reliable as a DSA.

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1 Ministry of Business, Innovation and Employment *The Seismic Assessment of Existing Buildings: Technical Guidelines for Engineering Assessments* (July 2017) (Guidelines).
2 Schedule 1 of the Building Regulations 1992.
3 Guidelines, above n 1, at A3.2.4.
4 At A1.1.
5 At B3.1.

[13] A DSA procedure is a quantitative procedure that can take several forms. It is used to confirm an earthquake rating for a building, particularly when a higher degree of reliability than considered available from a qualitative ISA rating is required.[6]

[14] The Guidelines also recommend that, in addition to the per cent NBS earthquake rating, the corresponding seismic "grade" and relative risk is indicated to provide context. The Guidelines set out the grading system that was developed by the New Zealand Society for Earthquake Engineering (NZSEE) in 2000 and a relative risk description as it relates to life safety:

Table A3.1: Assessment outcomes (potential building status)

Percentage of New Building Standard *(%NBS)*	Alpha rating	Approx risk relative to a new building	Life-safety risk description
>100	A+	Less than or comparable to	Low risk
80–100	A	1–2 times greater	Low risk
67–79	B	2–5 times greater	Low to Medium risk
34–66	C	5–10 times greater	Medium risk
20 to <34	D	10–25 times greater	High risk
<20	E	25 times greater	Very high risk

[15] An earthquake-prone building is defined in the Building Act 2004 as:[7]

> **133AB Meaning of earthquake-prone building**
>
> (1) A building or a part of a building is **earthquake prone** if, having regard to the condition of the building or part and to the ground on which the building is built, and because of the construction of the building or part,—
>
> (a) the building or part will have its ultimate capacity exceeded in a moderate earthquake; and
>
> (b) if the building or part were to collapse, the collapse would be likely to cause—
>
> (i) injury or death to persons in or near the building or on any other property; or
>
> (ii) damage to any other property.
>
> (2) Whether a building or a part of a building is earthquake prone is determined by the territorial authority in whose district the building is situated: *see* section 133AK.
>
> (3) For the purpose of subsection (1)(a), **ultimate capacity** and **moderate earthquake** have the meanings given to them by regulations.

[16] The definition of earthquake-prone building was revised in the Building (Earthquake-prone Buildings) Amendment Act 2016. The definition now:

(a) makes it clear that a building can be earthquake prone by virtue of its parts;

(b) makes it clear that a building must be assessed for its expected performance and possible consequence; and

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6 At A1.1.

7 (Emphasis original).

(c) ties the meaning to a moderate earthquake—that is, the earthquake shaking used to design a new building at that site if it were designed on the commencement date.

[17] The Guidelines clarify that a building rated less than 34 per cent NBS is an earthquake-prone building.[8]

[18] An earthquake risk building is a building that falls below the threshold for acceptable seismic risk, as recommended by the NZSEE—that is, less than 67 per cent NBS or two-thirds new building standard.

Background

The property

[19] The Property is a three-storey commercial building at 134 Queens Drive, Lower Hutt. It is located on the northern fringe of the core Lower Hutt CBD, fronting Queens Drive, with access to Melling Bridge and State Highway 2. The Property is on an earthquake fault line.

[20] It is a triangular shaped building and, at the time of auction, had ground floor office and/or retail space, upper-level office accommodation and 12 on-site carparks. The building was designed in 1986 and built in 1987. The Property was purchased by the Trust in July 1993.

[21] The marketing materials for the building state that, as at 7 December 2017, it was configured into 10 office suite tenancies but at the time of auction there was only one current tenant.

The parties

TADD

[22] TADD was set up in 2005. Simon Taylor and Tony Doile are the owners and directors of the company. TADD initially employed management staff but also over time purchased properties. It first purchased and developed office premises at 1 Aglionby Street, Melling, to house TADD's employees.

[23] TADD now owns three commercial properties, 1 Aglionby Street, 108 Nelson Street and 134 Queens Drive (the Property in question in this proceeding).

[24] In 2017, TADD was seeking a commercial property in the Hutt Valley, with a view to refurbishing it to a high standard, to showcase the Company's skills and build rental income and equity.

The defendants

[25] The Trust was incorporated in about 1993 for the benefit of Ruth Weine's children and grandchildren, who are the beneficiaries of the Trust. Ruth Weine and Michael Hofmann-Body are the trustees of the Trust. Ms Weine and Mr Hofmann-Body are both professional trustees of the Trust; neither of them is a beneficiary of the Trust.

[26] The Trust owns one other commercial property and Ms Weine outside of the Trust has control or management of another five commercial properties. Her evidence was that she had been a landlord in that sense since about 1985. Her evidence was also that rental is the only source of income for the Trust, other than bank interest. Ms Weine had general oversight of any maintenance work on the Property, including any necessary refurbishment work.

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8 At A6.5.

[27] Mr Hofmann-Body is a partner in a law firm.

New Zealand Consulting Engineers Ltd (NZCEL)

[28] NZCEL is an engineering firm, led by its principal, Peter Johnstone. Mr Johnstone is a structural engineer with more than 45 years' experience. NZCEL was contracted by Ms Weine, on behalf of the Trust, to carry out an ISA for the Property.

Marketing of the property

[29] In May 2017, the Trust decided to sell the Property and engaged Capital Commercial (2013) Ltd—a part of Bayleys Realty Group (Bayleys)—a company that specialises in the marketing and sale of real estate, to list the Property for sale.

[30] After discussion between Ms Weine and two Bayleys' real estate agents, the Trust decided to auction the Property, and to do so in late 2017, to enable any necessary preparation for sale.

[31] A Bayleys' representative advised the trustees to obtain an ISA of the Property to provide to potential purchasers of the Property and to include in the marketing materials.

[32] The Trust then engaged NZCEL to undertake an ISA of the Property and prepare a report. Ms Weine had previously dealt with Peter Johnstone, the principal of NZCEL. Mr Johnstone assigned one of NZCEL's senior structural engineers, Juliane Spaak, to carry out the ISA.

[33] On 15 August 2017, NZCEL provided Ms Weine with the ISA for the Property. The ISA rated the building at 60 per cent NBS.

[34] On 6 October 2017, NZCEL provided the Trust with the summary report template used for the ISA (IEP).

[35] In early October 2017, the Trust provided the ISA prepared by NZCEL to Bayleys to provide to any potential purchasers of the Property.

[36] In early November 2017, as part of the marketing materials for the Property, Bayleys created an Information Memorandum which provided basic information such as floor area, potential net rental, a general overview, profitability and other site particulars. The Information Memorandum included a page headed "Investment highlights". The list of highlights included "Good NBS rating".

[37] In addition to the Information Memorandum, the marketing materials available to potential purchasers of the Property included copies of the Title, the deeds of lease and renewal of the then current lease, plans for the Property and the ISA.

[38] On 14 November 2017, Bayleys provided Ms Weine with the first weekly report regarding the sales campaign. The report summarised common perceived issues with the Property at that stage as being lacklustre office tenant support, an NBS rating of 60 per cent, and the tired and dated fit-out.

[39] On 16 November 2017, Ms Weine emailed Bayleys regarding the first weekly report. Ms Weine said: "… your weekly report mentions concerns about 60 % earthquake rating. I also gave you a letter from {Peter Johnston [sic] of nz engineers) which said 70% may be reached on further investigation. When I decided to market it there was not the time to take the engineering to the next stage but this should have perhaps been included in your information pack??"

[40] That letter, from Peter Johnstone to Ms Weine dated 6 October 2017 (the Covering letter), was subsequently made available to prospective purchasers.

[41] Bayleys' second and third weekly reports on the sales campaign were received by Ms Weine on 21 and 29 November 2017. The second report included a significant number of new enquirers but noted that issues with dated design and seismic rating continued to be raised. It noted particularly grey areas as being the cost required to refurbish and revert the Property to a more open plan layout and the costs required to improve the seismic rating of the Property, including a scheme to improve the Dycore floors.

[42] The third weekly report recorded that there were two components considered to be "stumbling blocks" for those parties looking to change the use of the Property to residential. One of these was seismic upgrade, as apparently the ISA made it difficult to ascertain what may be required to upgrade to possibly 100 per cent NBS.

[43] Ms Weine received Bayleys' fourth weekly report on 6 December 2017. This report recorded that Tony Doile, one of TADD's joint directors, was still showing interest in the Property but that he was "hard on price" due to the high level of outlay to refurbish and strengthen the building.

[44] On 7 December 2017, TADD successfully bid for the Property at auction, for a sum of $1,227,000. Settlement occurred on 19 January 2018.

Pre-auction inspection by plaintiff

[45] In early November 2017, Bayleys had notified TADD that the Property was on the market and sent them the information pack for the Property. Mr Doile also downloaded the ISA and Covering letter from Bayleys' website.

[46] Mr Taylor and Mr Doile arranged with Bayleys to view the building before the auction. Mr Doile recollected that the building was a "rabbit warren" and was largely vacant at the time. It had numerous small rooms which he and Mr Taylor thought could be improved by opening it up and improving the natural light and modernising the spaces, to have an open plan office environment in order to attract larger, good quality tenants.

[47] Mr Taylor and Mr Doile said that, from their inspection of the Property and review of the ISA, they had noted several points regarding necessary seismic strengthening of the building. The issues they identified were:

(a) The flooring was Dycore pre-cast floor panels.[9] Mr Doile observed that, having strengthened other buildings in the Hutt Valley with Dycore floors, they presumed that the installation of metal seating brackets between the floors and the beams would be sufficient to increase the NBS rating.

(b) The secondary stairwell might be taken out and the gaps left on each floor infilled with concrete. This would be for the primary purpose of gaining more floor area, but they also thought it would assist to increase the NBS rating.

(c) The likely need for ReidBraces or similar to tie back the front columns. The ISA had identified a risk of the front columns swaying and Mr Doile's experience was that the usual solution is to tie them back with bracing, which Mr Doile said is straightforward to install.

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9 Dycore is a type of hollowcore floor, which comprises pre-cast concrete slabs. Issues about the potential loss of seating or structural failure of hollowcore floor units became particularly apparent after the 2011 Christchurch earthquake.

(d) The likely need for strengthening of the blockwork on the northern elevation on the top level of the building.

[48] TADD budgeted $1.3 million for the refurbishment and seismic strengthening works they anticipated to be completed over an eight month period. Mr Doile's evidence was that he and Mr Taylor thought that all of the anticipated work would be straightforward, with limited impact on their proposed programme for refurbishment of the building and would enable them to work around the existing and only tenant at the time, who operated from the western side of level two of the building.

Causes of action

[49] The plaintiff pleads two causes of action:

(a) contractual misrepresentation; and, in the alternative,

(b) common mistake.

[50] The case for each of the parties is briefly summarised as follows.

Summary of plaintiff's case

[51] The plaintiff says it was induced by the defendants' representations as to the per cent NBS rating to purchase the Property. Those representations were incorrect and it suffered loss as a result. Alternatively, the plaintiff says both parties acted under the common mistake that the Property was 60 per cent NBS in entering into the contract for sale and purchase.

Summary of defendants' case

[52] The defendants' case is that the ISA contained the relevant engineer's opinion only and is therefore not actionable as a misrepresentation. They deny that the opinion contained within the ISA was incorrect and also say there was a reasonable basis for the engineer's opinion. They deny that the plaintiff was induced by the marketing materials and the NBS representations in them to purchase the Property.

[53] The defendants advance the same arguments in response to the alternative pleading of mistake and also say they were not influenced by the pleaded mistake to enter into the contract and the mistake was not as to the essential nature of the contract.

Affirmative defences

[54] The defendants plead three affirmative defences:

(a) limitation of liability;

(b) contributory negligence; and

(c) voluntary assumption of risk.

[55] The limitation of liability defence is based on cl 18.1(2) of the Agreement for Sale and Purchase (ASP) of the Property. The defendants say that if the plaintiff has suffered any loss for which they would otherwise be liable (which is denied), then any award in favour of the plaintiff against Mr Hofmann-Body is limited by cl 18.1(2) and excludes any amount beyond the amount recoverable from the assets of the Trust.

[56] The defendants also rely on s 3 of the Contributory Negligence Act 1947 and say that any loss or damaged suffered by the plaintiff has been caused wholly, or contributed to, by the conduct of the plaintiff which failed to make reasonable enquiries or take reasonable steps which a prudent purchaser would otherwise have made before proceeding to purchase the Property. In particular, the defendants say that the plaintiff failed to undertake

proper due diligence by obtaining a DSA of the Property notwithstanding that the ISA stated that it should not be relied on and that detailed inspections might lead to a different result or seismic grade. On that basis, the defendants say that any damages recoverable by the plaintiff ought to be reduced.

[57] The defendants say that if they are liable to the plaintiff, the plaintiff purchased the Property in circumstances where it was aware or ought reasonably to have been aware that the ISA should not be relied on by any party, as detailed inspections and engineering calculations, or engineering judgments based on them, had not been undertaken and these might lead to a different result or seismic grade. Having regard to that, the plaintiff therefore voluntarily and knowingly assumed the risk of proceeding with the purchase of the Property without undertaking proper due diligence in relation to the seismic grade of the Property.

[58] The defendants in turn say if they are liable to the plaintiff, then NZCEL is liable to the defendants for breach of contract, negligence and under the Fair Trading Act 1986.

The evidence

[59] The plaintiff's witnesses of fact were:

(a) Simon Taylor, an owner and director of TADD. Mr Taylor gave evidence as to TADD's position, the background to the purchase of the Property and what TADD did after buying the property.

(b) Tony Doile, who is also one of the owners of TADD. Mr Doile gave evidence as to TADD's purchase of the building, reliance on the representations and the actions TADD took in relation to the building.

(c) Gabriela Newman, who is a director of Virtual Business Solutions Ltd. Ms Newman's brief of evidence covered the pre-purchase financial analysis she carried out for TADD to assist in assessing the financial viability of buying the building. She also gave written evidence as to the financial arrangements for refurbishment/seismic strengthening.

[60] The plaintiff's expert witnesses were:

(a) Jeremy Simpson, a property valuer. Mr Simpson gave evidence as to the difference in value of the building by reason of its earthquake-prone status. He also gave evidence as to a rental assessment for the building.

(b) Philip Hebden, a quantity surveyor. Mr Hebden gave evidence as to the additional costs incurred by reason of the building being earthquake-prone and the costs attributable to bringing the building from earthquake prone to 70 per cent NBS.

(c) Natasha Possenniskie, who is a quantity surveyor and an experienced Engineer to Contract. Ms Possenniskie provided written evidence as to the period of time TADD's proposed refurbishment project would have taken if the building had an NBS rating of 60 per cent NBS and the basis of instructing ADL, a company related to TADD, to carry out work on the building.

(d) Stuart Preston, who is a director of Certa Engineering Ltd (Certa) and a Chartered Professional Engineer with experience in seismic assessments. Mr Preston gave evidence as to the DSA carried out by Certa and seismic strengthening for the building and he also

responded to Mr Robertson's evidence for the defendants as to the definition of an "earthquake prone" building and what that meant in terms of Certa's DSA.

(e) Thomas Smith, who is a civil and structural engineer employed by Spencer Holmes Ltd (Spencer Holmes). Mr Smith gave evidence as to the DSA carried out by Spencer Holmes and the nature and cost of seismic strengthening of the building.

[61] For the defendants, evidence was given by:

(a) Ruth Weine, one of the defendant trustees of the Trust, whose evidence covered the Trust's decision to sell the Property, the process of sale and obtaining the ISA.

(b) Trevor Robertson, an expert engineer, whose evidence covered:
  (i) a review of NZCEL's ISA report;
  (ii) a review of the DSAs obtained by the plaintiff from Certa and Spencer Holmes;
  (iii) Mr Robertson's own ISA of the building at 43 per cent NBS;
  (iv) the nature and process of both an ISA and a DSA and the differences between them;
  (v) the various scopes to upgrade the building, including from 10 per cent NBS (as calculated by Certa) to 67 per cent NBS, and differences such as between 60 per cent NBS and 70 per cent NBS;
  (vi) the work that would have had to be done or that the plaintiff intended to do, regardless; and
  (vii) the work that had been done but cannot be attributed to any question of liability in this proceeding.

(c) Grant Hunt, an expert building and quantity surveyor, whose evidence covered:
  (i) the limitations and risks in relying on ISAs to assess the work necessary for structural strengthening and costings;
  (ii) the likely costs of Mr Robertson's and Spencer Holmes' respective scopes; and
  (iii) a review of how the works would or should have been carried out.

(d) Mark Hourigan and Andrew Smith, both Bayleys' agents, provided written evidence as to the marketing of the Property.

[62] For the third party, NZCEL, Peter Johnstone provided evidence as to the accuracy, in his view, of the ISA and the two DSAs.

Seismic assessments of the property

[63] In total, there were four seismic assessments of the Property. The first was the ISA carried out by NZCEL, dated 17 August 2017. This assessed the building's rating at 60 per cent NBS.

[64] The second was the DSA which TADD obtained from Certa, on 7 May 2018, to assist TADD with planning its seismic strengthening work for the building. The Certa DSA rated the building at 10 per cent NBS (less than the level of 34 per cent NBS, below which a building is deemed to be earthquake-prone).

[65] The third assessment was from Spencer Holmes, provided to TADD on 14 August 2018. The Spencer Holmes' DSA rated the building at 30 per cent NBS.

[66] Finally, Mr Robertson for the defendants reviewed the ISA and both DSAs. Using the ISA template, Mr Robertson assessed the Property as having an approximately 43 per cent NBS rating.

Misrepresentation

[67] The plaintiff's first cause of action is brought under s 35 of the Contract and Commercial Law Act 2017 (Act) which provides:

> **35 Damages for misrepresentation**
>
> (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**),—
>
> (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; and
>
> (b) A is not, in the case of a fraudulent misrepresentation, or of an innocent misrepresentation made negligently, entitled to damages from B for deceit or negligence in respect of the misrepresentation.
>
> …

Plaintiff's submissions

The representations

[68] The plaintiff's amended statement of claim pleads the following as the representations on which it relied:

(a) The Bayleys' Information Memorandum which stated "Good NBS rating" under the heading "Investment highlights".

(b) The ISA which stated, among other things:[10]

(i) the 60 per cent NBS rating;

(ii) that an ISA assessment was "usually more conservative than DSA"; and

(iii) "Normally, a building which rates around that [60%NBS] with an ISA is probably going to exceed 70%NBS if a more detailed analysis or DSA is carried out."

The Information Memorandum

[69] The plaintiff says that by making the statement "Good NBS rating", the vendors represented that the building was in a good seismic condition and that the building was essentially ready for immediate commercial letting by a purchaser and occupation by a commercial tenant.

The ISA

[70] Ms Spaak undertook the ISA assessment and provided an updated ISA to the Trust on 17 August 2017 that assessed the Property at 60 per cent NBS. A page headed "Assessment Outcomes" in the ISA report provided as follows:

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10 I note that (b)(ii) and (iii) were contained in the Covering letter rather than the ISA itself.

4. Assessment Outcomes

Assessment Status (Draft or Final)	Final	
Assessed *%NBS* Rating	60%NBS (IL2)	
Seismic Grade and Relative Risk (from Table A3.1)	Alpha rating C 5 to 10 times the risk of a new building	
For an ISA:		
Describe the Potential Critical Structural Weaknesses	Torsional behaviour of the building will attract forces in the front columns. Heavy spandrel beams along front increase introduced shear forces in column, this needs to be investigated further. It has not been taken into account and could be checked via detailed assessment if required.	
Does the result reflect the building's expected behaviour, or is more information/ analysis required?	Yes—the ISA is sufficient	
If the results of this ISA are being used for earthquake prone decision purposes, **and** elements rating <34*%NBS* have been identified:	*Engineering Statement of Structural Weaknesses and Location*	*Mode of Failure and Physical Consequence Statement(s)*
	Transverse direction weak, just moment frames Irregularity in stiffness due to rear wall Front columns short due to spandrel beams Cantilevered blockwork wall at top however supported by steel frames	Due to stiffness irregularity of this building the front columns will sway and this will lead shear failure.
Recommendations	Undertake Detailed Assessment could proof [sic] it is better than 60% NBS.	

Covering letter

[71] The Covering letter was provided to Ms Weine on 6 October 2017. It said:

> Dear Ruth
>
> This is just a note to cover our recent discussion.
>
> You asked us to carry out an initial seismic assessment on your building at 134 Queens Drive. Basically, it is a 3 storey building, triangular in plan, constructed around 1986.
>
> An ISA (Initial Seismic Assessment) is a relatively coarse process to simply assess a building to give an approximate %NBS. It is not as sophisticated nor as accurate and usually more conservative than DSA (Detailed Seismic Assessment).
>
> The result of the ISA was a 60% NBS on your building.
>
> Normally, a building which rates around that with an ISA is probably going to exceed 70% NBS if a more detailed analysis or DSA is carried out.
>
> Therefore, it is most likely, but not guaranteed, a better assessment (more costly and detailed) will give a higher rating on the building.
>
> The main problem with the building is that the columns are "weaker" than the beams and therefore can lead to column hinging under a code earthquake. The design and analysis methods have moved on a long way from the 1984 code to which this building was designed.
>
> In summary then the 60% NBS can probably be bettered with more input.
>
> Yours sincerely
>
> Peter Johnstone
>
> Managing Director

[72] The plaintiff's amended statement of claim does not specifically refer to the Covering letter, but in its submissions, the plaintiff relied on the Covering letter as supporting the 60 per cent NBS assessment and relied on it as part of the defendants' representations. The plaintiff refers to the representations in these materials collectively as the NBS Representations.

[73] By providing the ISA and the Covering letter to prospective purchasers, the vendors represented that:

(a) there had been an engineering assessment of the building;
(b) it had a good seismic rating;
(c) the rating was over 60 per cent NBS;
(d) this rating was conservative; and
(e) it would likely be improved on a more detailed assessment.

Context

[74] The plaintiff says that the context in which the NBS representations were made is important when assessing what a reasonable person would have understood them to be or mean in all the circumstances.[11]

[75] First, the Property was a three-storey building, which the plaintiff purchased for $1,427,000 plus GST.

[76] Second, it was a commercial building and therefore, its NBS rating was of critical importance to prospective purchasers. That is confirmed by the fact the marketing materials stated the Property's good NBS rating was an "Investment highlight". The plaintiff purchased the Property intending to let it to commercial tenants.

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11 *Ridgway Empire Ltd v Grant* [2019] NZCA 134, (2019) 20 NZCPR 236 at [11].

[77] Third, the defendant vendors are sophisticated owners. Ms Weine was an experienced landlord, with control over multiple commercial properties, over many years. Her experience as a landlord included seismic strengthening with a contract value of approximately $600,000. Mr Hofmann-Body, her co-trustee, is a partner in a law firm.

[78] In addition, Ms Weine had superior knowledge of the Property, having owned and managed it for 25 years.

[79] Finally, in relation to context, the plaintiff could not have checked any statement in the Covering letter and the ISA without obtaining its own report. The Property was sold at auction with only a four week period between the Property being advertised and the auction being conducted and this limited the time for prospective purchasers to conduct any due diligence. In particular, there would not have been time for a prospective purchaser to obtain a DSA. In addition, a DSA would have cost $20,000–$30,000. The point of the vendors obtaining and disclosing the ISA and the Covering letter was to avoid the need for purchasers to obtain their own report, particularly given that short marketing period.

[80] The plaintiff acknowledges that, under the heading "Describe the Potential Critical Structural Weaknesses", the ISA said:

> Torsional behaviour of the building will attract forces in the front columns. Heavy spandrel beams along front increase introduced shear forces in column, this needs to be investigated further. It has not been taken into account and could be checked via detailed assessment if required.

[81] However, it says, this note was "sandwiched" between the statement that the building was 60 per cent NBS and the statement that a detailed assessment could prove it is better than 60 per cent NBS. Viewed objectively, there was nothing to alert prospective purchasers that these elements signalled there were major issues which meant that the building was at a high risk of being earthquake prone or at any risk of being earthquake prone.

Inducement

[82] The plaintiff says that it was induced by the NBS representations and acted in reliance on them to successfully bid on the Property at auction and enter into the ASP of the Property.

[83] Mr Taylor said that, based on their visual inspection of the Property, he and Mr Doile were aware they would have to some seismic strengthening. He was also aware from the ISA that certain structural weaknesses would have to be dealt with. But Mr Taylor says he had read the Covering letter from NZCEL and saw it as being "very positive".

[84] Both Mr Doile and Mr Taylor gave evidence that, from their inspection of the Property and in view of the ISA and the NZCEL comments, they were comfortable that the seismic strengthening they were planning to do to maximise the NBS rating was manageable within their refurbishment budget. Mr Doile says the Covering letter and the ISA gave him comfort that they could do limited seismic strengthening and that would increase the building's rating. Both TADD directors said that, prior to purchasing the Property, they were not familiar with the difference between an ISA and a DSA.

[85] Mr Taylor says that the ISA and the comments made in the Information Memorandum that the building had a good NBS rating was the basis on which he concluded that the building was a good purchase. It also assisted him in

assessing that $1.3 million over an eight month period would be sufficient to modernise the building and take it close to 100 per cent NBS.

[86] The plaintiff says it is clear that the vendors wanted to give potential purchasers peace of mind on the seismic rating so as to achieve the highest price possible. To that end, a seismic assessment was recommended by the vendor's agents and the Covering letter from NZCEL was clearly designed to be passed on to potential purchasers. The materials provided to prospective purchasers were intended to be relied on. There was no warning or note in the Covering letter, which a layperson would have found easier to read than the ISA, that the NBS rating could be significantly lower.

[87] The plaintiff says the Covering letter is unusual in that it adopts a tone reflective of a marketing approach, rather than a neutral explanation of the seismic assessment. It is not expressed in a limited or cautious way, but rather is very positive that the NBS rating is likely to be higher.

[88] The vendors endorsed the Covering letter and ISA by stating in the marketing material that, as an "Investment highlight", the Property had a "Good NBS rating". This was an unqualified statement of fact and made no reference to the seismic assessment.

[89] There was no reason for the plaintiff to make its own independent inquiries:

(a) the seismic assessment and Covering letter were procured by the vendors just before the auction, and were provided as part of the marketing material;

(b) the seismic assessment was represented as a "seismic assessment" in the marketing materials, not as a "provisional" assessment or similar;

(c) the author of the Covering letter was the principal of a reputable engineering company. It would not be reasonable to expect the purchasers to duplicate their report by commissioning another engineer to investigate; and

(d) the seismic assessment stated that it was a final assessment and that no further investigations were required.

[90] In any event, the Property was for sale by auction, with a limited marketing timeframe (7 November to 7 December 2017). This meant potential purchasers were prevented from making anything other than limited inquiries into the seismic condition of the building.

[91] The plaintiff says that from the chronology, it is reasonable to infer, first, that the vendors saw an advantage in having a covering letter expressed in positive terms from NZCEL to help sell the Property for the highest price. Second, that obtaining a more detailed assessment was considered by the vendors, but there was insufficient time to carry out an assessment, or the cost was prohibitive. Third, the vendors were prepared to take the risk of overstating the per cent NBS rating, as they knew that an earlier email from Ms Spaak had advised that the building was unlikely to exceed 60 per cent NBS.

[92] Even if relative sophistication were relevant, as alleged by the vendors, the plaintiff says the vendors were themselves also sophisticated commercial property owners. Although the directors of the plaintiff were experienced, as owners of a construction business, that should not exclude them from being able to rely on a professional report that was provided and accompanied by a covering letter in positive terms. Their professional acumen was not derived

from seismic inspections. They are not engineering experts. Their evidence was that on seismic strengthening projects they relied on detailed plans and specifications.

Detailed seismic assessments

[93] After it had purchased the Property, TADD obtained a DSA carried out by Certa, dated 7 May 2018, for the purpose of assessing how it could go about seismically strengthening the building. The Certa DSA concluded that the building had a seismic rating of 10 per cent NBS. It was thus an earthquake-prone building under the Building Act, being a building with an NBS rating of less than 34 per cent NBS.[12]

[94] The plaintiff then obtained a further DSA, in August 2018, carried out by Spencer Holmes, which concluded that the building had a seismic rating of 30 per cent NBS.

NBS representations incorrect

[95] The plaintiff says the NBS representations were incorrect in that:

(a) the 60 per cent NBS rating in the ISA was not "conservative"; not only did it not increase as a result of a DSA, it decreased by approximately one half;

(b) the Property did not have an NBS per cent rating of 60 per cent and instead had a rating of less than 34 per cent NBS;

(c) the Property did not have a "Good" NBS rating and was instead an earthquake-prone building; and

(d) the Property was therefore not suitable for immediate commercial letting by a purchaser and occupation by a commercial tenant.

[96] As a result of the Property being an earthquake-prone building, it:

(a) by law requires significant earthquake strengthening works; and

(b) had, at the time of sale, no improvements value, that is the true value of the Property at that time was its land value only, being $875,000.

Alleged loss

[97] The plaintiff alleges it suffered loss, being the cost of the required earthquake strengthening to the Property, or the diminution in value of the Property, together with consequential losses.

Defendants' submissions

[98] The defendants' position is that the ISA and the representation in the Bayleys' Information Memorandum that the Property had a good NBS rating, were opinions and therefore not actionable, even if erroneous.[13] Even if the representations were not opinions, they were not false or wrong.

[99] In any event, the plaintiff was not induced by the representations to purchase the Property.

Opinion

[100] The defendants say that NZCEL's ISA as to the NBS rating is a mere "limited and cautious opinions", constrained in scope, made by an expert who was competent to express such an opinion.[14]

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12 Regulation 8 of the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005.

13 *Bisset v Wilkinson* [1927] AC 177 at 183, [1926] All ER Rep 343 (PC).

14 *Aldridge v Boe* [2012] NZHC 277 at [220]–[221].

[101] By providing NZCEL's ISA to prospective purchasers, the defendants merely passed on a competent expert's opinion, doing so honestly and on the reasonable basis that this opinion sufficiently conveyed that further assessment was necessary.

[102] NZCEL followed the Guidelines when carrying out the ISA procedure and forming its opinions on the seismic strength of the Property. It follows that there is a reasonable basis for NZCEL's opinions as outlined in the ISA, in accordance with *David v TFAC Ltd*.[15] Even if the opinions in the ISA were erroneous (which the defendants deny), those opinions were reasonably and honestly held and are not actionable as misrepresentations.[16]

[103] The defendants also say that the wide range of engineering opinions on the per cent NBS rating, demonstrated by the ISA, the two subsequent DSAs and an ISA prepared by Mr Robertson, demonstrate that the ISA was, as the Covering letter asserts, a "coarse" opinion. They also say that the ISA process and the DSA process are not alike.

[104] The defendants also deny that the plaintiff was induced by the marketing materials and the NBS representations in them to purchase the Property.

[105] The defendants note that the ISA contained a disclaimer on each page, in the following form:

> **WARNING!!** *This initial evaluation has been carried out solely as an initial seismic assessment of the building following the procedure set out in the New Zealand Society for Earthquake Engineering Document "Assessment and Improvement of the Structural Performance of Buildings in Earthquakes, June 2006". This spreadsheet must be read in conjunction with the limitations set out in the accompanying report, and should not be relied on by any party for any other purpose. Detailed inspections and engineering calculations, or engineering judgements based on them, have not been undertaken, and these may lead to a different result or seismic grade.*
>
> (emphasis original)

[106] These warnings inform the reader that the ISA is non-exhaustive and also warn against placing reliance on the assessment until corroborated by further assessment. The warnings are comparable to those in *Aldridge v Boe*,[17] although the defendants acknowledge that the provisos in NZCEL's ISA are less explicit than was the case in *Aldridge v Boe*. The defendants say the wording and number of warnings in the NZCEL report ultimately narrow the scope of the opinion to a sufficiently similar level to *Aldridge v Boe*.

[107] The defendants also point to the Covering letter which noted that an ISA is a "relatively coarse process", that an ISA was "usually" more conservative than an ISA but a higher rating on a DSA was "not guaranteed". The use of the words "usually" and "not guaranteed" in the Covering letter shows that the reader should contemplate that a detailed assessment may reveal either a higher or lower per cent NBS rating.

ISA not false or wrong

[108] The defendants say that, even if the representations in the ISA were not mere "opinion", they were not erroneous because:

(a) An ISA cannot be compared like-for-like with a DSA. The fact that the DSAs arrived at a different per cent NBS does not render the ISA wrong.

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15 *David v TFAC Ltd* [2009] NZCA 44, [2009] 3 NZLR 239 at [43].

16 *Bisset v Wilkinson*, above n 13, at AC 183.

17 *Aldridge v Boe*, above n 14, at [217]–[219].

(b) In any event, the DSAs were flawed.

(c) NZCEL followed the ISA procedure in part B of the Guidelines when carrying out the ISA procedure and forming its opinions on the seismic strength of the Property. There was therefore a reasonable basis for the conclusions in the ISA, even if the opinion subsequently turned out to be incorrect.[18]

[109] First, an ISA has a different purpose and is a different assessment from a DSA. The result of a DSA does not render incorrect a different result in an ISA.

[110] The ISA template does not generally look at detail (an ISA is typically completed within two–three days) but assesses the global robustness of the building to withstand earthquake actions. An ISA specifically targets a rating under the Building Act.

[111] A DSA assesses the strength of individual components of a building, in addition to global performance, and defines the building rating as the lowest rating of any single element of the building, irrespective of how easily that element can be corrected, and irrespective of whether failure of that element will initiate collapse. A DSA typically takes between several weeks and several months to complete. Accordingly, a DSA exceeds the assessment involved in an ISA and it is reasonable that the results will different. The defendants say it is not unusual for a DSA result to be lower than an ISA result, due to the differences in the type of assessment.

[112] The defendants also challenge the accuracy of the two DSAs obtained by the plaintiff. Mr Robertson, the defendants' expert witness, says the key issue is whether collapse of all or part of the building is likely. Certa and Spencer Holmes have both identified the per cent NBS of individual components of the Property in accordance with the Guidelines and applied the lowest of these as the rating for the Property, irrespective of whether the yielding of that component is likely to lead to collapse. While Mr Robertson acknowledges that one portion of the Guidelines[19] seems to support that interpretation, he says that elsewhere, the Guidelines clarify that it is that lowest element that will lead to collapse (hence injury or death).[20]

[113] The essence of Mr Robertson's criticism is that Certa and Spencer Holmes have both declared the Property as earthquake-prone on the basis of yielding of a component that will not lead to collapse and hence, in his view, is not consistent with the definition of an earthquake-prone building in the Act.

[114] Finally, the defendants say that while the per cent NBS rating for the Property differed between Mr Robertson's ISA assessment of the Property and NZCEL's ISA (43 per cent NBS, compared to 60 per cent NBS), the conclusion of Mr Robertson's assessment was that the Property was classified as Grade C, being earthquake risk but not earthquake-prone, and the same alpha grade achieved by NZCEL's ISA.

[115] Mr Robertson, in carrying out his own assessment, concludes that the NZCEL report was prepared correctly and in accordance with the ISA procedure in part B of the Guidelines.

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18 *David v TFAC Ltd*, above n 15, at [43].
19 Guidelines, above n 1, at A6.1.
20 At A6.3.

[116] The defendants say it is significant that the plaintiff's engineers have not challenged the accuracy of NZCEL's ISA; they merely state it does not compare with the DSAs obtained by the plaintiff. Nor did the plaintiff carry out its own ISA assessment against which NZCEL's ISA could have been compared.

Inducement

[117] The defendants say that the plaintiff was not induced by the NBS representations. The plaintiff is a sophisticated business party with significant experience in purchasing commercial buildings, undertaking refurbishment and strengthening, and with industry knowledge. TADD's directors were prepared to rely on that expertise when estimating the cost of seismic upgrade work they considered necessary. Mr Doile had turned his mind to the high level of outlay required to refurbish and strengthen the Property before the plaintiff decided to purchase it.

[118] Given that, the plaintiff would likely be, or should have been, familiar with the function of an ISA and aware of its preliminary and basic or coarse nature and the desirability of carrying out further NBS assessment, particularly before purchasing the Property.

[119] Even if the plaintiffs did not know the difference between an ISA and a DSA, the qualifications and limitations in the ISA documents, which stated the limited nature of an ISA and warned of the dangers of reliance on just that, should have alerted them to the need to obtain a DSA.

[120] The defendants also say that the Guidelines contemplate that an ISA will be followed by a DSA process where important decisions need to be made on a building's seismic status:[21]

> If important decisions need to be made that rely on a building's seismic status, it is expected that an ISA would be followed by a Detailed Seismic Assessment (DSA). Such decisions could include those relating to pre-purchase due diligence, arranging insurance, or before designing seismic retrofit works.

[121] Following purchase of the Property, the plaintiff had to obtain a DSA to assess how it would seismically upgrade the Property. The defendants say this demonstrates that the plaintiff was always going to have to obtain a DSA to carry out its purpose for purchasing the Property, namely to strengthen and refurbish it.

[122] The representation in the Information Memorandum that the Property had a "Good" NBS rating was correct. But the plaintiff knew, or ought to have known, that the defendants and their real estate agent did not have the expertise required to reach a conclusion on the seismic strength of the Property and did not hold themselves out as having this expertise, and that the representation was a reference to NZCEL's ISA, elsewhere in the materials.

[123] The defendants also say that the plaintiff's own, independent inquiries brought any reliance on the representations in the information memorandum and the NZCEL report to an end, thereby negating any alleged misrepresentation.

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21 At B1.1.

Discussion

Relevant principles of misrepresentation

[124] The term "misrepresentation" is not defined in the Act, so the common law definition applies.[22] The authors of *Burrows, Finn and Todd on the Law of Contract in New Zealand* explain that "a misrepresentation is a representation of past or present fact that is false or misleading, and excludes statements of intention, opinion and law."[23]

[125] A statement of opinion is prima facie not a statement of fact because it is a belief based on grounds incapable of proof and therefore not actionable as a misrepresentation. Generally, a person will only be liable for expressing an incorrect opinion where fraud is established[24] or they do not honestly hold the opinion at the time it is expressed and/or there is no reasonable basis for it.[25]

[126] But as Potter J said in *Aldridge v Boe*:[26]

> However, an expression of opinion contains an implied statement that:
> (a) The representor actually holds the opinion; and
> (b) There are reasonable grounds for such an opinion to be held, especially where the representor has greater knowledge of the situation than the representee.

[127] So, in *Smith v Land House Property Corp*, a statement of opinion was held to contain a representation that the statement maker had information that justified that opinion. Lord Justice Bowen said:[27]

> In a case where the facts are equally well-known to both parties, what one of them says to the other is frequently nothing but an expression of opinion. … But if the facts are not equally well-known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of material fact, for he impliedly states that he knows facts which justify the opinion.

[128] The statement alleged to be a misrepresentation must be fairly capable of the meaning which is now being alleged.[28] The Court must consider the words used in context and what a reasonable person would have understood them to mean in all the circumstances. Relevant considerations include the nature and subject-matter of the transaction, the respective knowledge of the parties, their relative positions and the words used. As the Court of Appeal said in *Ridgway Empire Ltd v Grant*:[29]

> Whether there has been a misrepresentation of fact is not determined merely by considering the literal meaning of the words used without regard to the context. The enquiry is what a reasonable person would have understood from those words in all the circumstances. Relevant considerations will often include the nature and subject-matter of the transaction, the respective knowledge of the parties, their relative positions and the words used. Where a party with superior knowledge takes

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22 *Ware v Johnson* [1984] 2 NZLR 518 (HC) at 537–538; and *Aldridge v Boe*, above n 14, at [192].

23 Stephen Todd and Matthew Barber *Burrows, Finn and Todd on the Law of Contract in New Zealand* (7th ed, LexisNexis, Wellington, 2022) at [11.2.1].

24 *Bisset v Wilkinson*, above n 13, at AC 183.

25 *David v TFAC Ltd*, above n 15, at [43].

26 *Aldridge v Boe*, above n 14, at [194] (footnotes omitted).

27 *Smith v Land House Property Corp* (1884) 28 Ch D 7 (EWCA Civ), cited in *Aldridge v Boe*, above n 14, at [195].

28 *Magee v Mason* [2017] NZCA 502, (2017) 18 NZCPR 902.

29 *Ridgway Empire Ltd v Grant*, above n 11, at [11] (footnotes omitted).

it upon itself to make a representation of fact without qualifying it by reference to the basis for its assertion, it will generally have to accept the consequences of being wrong. However, each case will ultimately turn on its own facts.

[129] Any reliance must be reasonable.[30]

[130] A party to a contract is liable under s 35 of the Act for misrepresentation made by his or her agents.[31]

[131] A purchaser's independent inquiries may bring reliance to an end, so negating the effect of a misrepresentation (but that need not be so).[32]

[132] Where all the vendors did was make a report available to prospective purchasers, which expressly defined a limited scope of the inspection, this will not amount to misrepresentation.[33]

Application of the principles regarding misrepresentation

[133] I turn to apply the relevant principles to the facts of this case.

[134] The representations are set out at [68] above. The plaintiff says the representations meant:

(a) The Property had a seismic rating of 60 per cent NBS.
(b) This was a "Good" rating and an "Investment highlight".
(c) The rating would likely improve on a more detailed assessment.

Were the representations an "opinion"?

ISA

[135] The ISA was prepared by an experienced and reputable engineer. It was a comprehensive assessment based on the industry template, the IEP in the Guidelines. The "Assessment Status" was stated to be "Final". The response to the question "Does the result reflect the building's expected behaviour, or is more information/analysis required?" was "Yes—the ISA is sufficient". The ISA stated the "Assessed %NBS Rating" as 60 per cent NBS. Under the heading "Recommendations", the ISA said "Undertake Detailed Assessment could proof [sic] it is better than 60%NBS".

[136] There is nothing in the ISA as provided to prospective purchasers to suggest that it is in the nature of an opinion only.

[137] The ISA also stated the "Seismic Grade and Relative Risk" as "Alpha rating C". Later in the ISA, it states: "Potentially Earthquake Prone? No. Potentially Earthquake Risk? Yes".

[138] To the extent an ISA gives a grade A–E (with a broad range within each grade),[34] it could be categorised as a "coarse" assessment. But the primary emphasis in the ISA is on 60 per cent NBS and the IEP and the ISA as made available to potential purchasers did not include the Guidelines themselves or additional material that may have put the alpha rating in context.

[139] The fact that there are matters of judgment involved in preparing an ISA, which may mean that different engineers reach different conclusions, does not of itself mean that the ISA is merely an opinion (although I accept

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30 *Vining Realty Group Ltd v Moorhouse* [2010] NZCA 104, (2011) 11 NZCPR 879.
31 *Wakelin v RH & EA Jackson Ltd* (1984) 2 NZCPR 195 (HC), decided under the equivalent legislation in force at the time.
32 *Magee v Mason*, above n 28, at [48(c)].
33 *Aldridge v Boe*, above n 14, at [221]–[222].
34 See at [14] above.

that may be relevant to the issue of whether the engineer, in preparing the ISA, was negligent or in breach of contract).

[140] As the authors of *Burrows, Finn and Todd on the Law of Contract in New Zealand* note, in general terms, the courts will find a statement to be a mere opinion when, to the knowledge of the representee, the representor cannot be certain of its truth:[35]

> … This may be because the statement is of a nature that is inherently contestable, such as a statement of taste. It may also be because, in the circumstances as understood by the representee, the representor is not in a position to actually know the truth of the statement he or she is making.

[141] In my view, the ISA is not in this category. While it is recognised by experts in the field that, because of the qualitative nature of an ISA, two or more experienced engineers may differ, sometimes significantly,[36] the ISA is not akin to a statement of taste. Nor were the circumstances as understood by the plaintiff (or other prospective purchasers) such that the engineer did not know the truth of the statement made in the ISA.

[142] As I have noted, context, including the respective knowledge of the parties at relevant times, is important in order to determine what a reasonable person would have understood from the words used in all the circumstances.[37] Prospective purchasers (including the plaintiff) did not know that the Covering letter was Mr Johnstone's record of his telephone conversation with Ms Weine, in which Ms Weine specifically asked if the per cent NBS rating in the ISA could be improved, and that he was unaware it would be provided to prospective purchasers. Nor was the plaintiff made aware that the discussion recorded in the Covering letter followed Ms Weine's receipt of the 5 September 2017 email from Ms Spaak which advised that there was no chance of bringing the rating above 60 per cent NBS. Prospective purchasers were not provided with the 5 September 2017 email. Knowledge of the broader context and detail might have indicated to the plaintiff the potentially contestable nature of the ISA.

[143] In that sense, this case is similar to *New Zealand Motor Bodies Ltd v Emslie*, where Barker J considered that where there is an imbalance of knowledge about the statements, then "a statement of opinion by the one who knows facts best involves very often a statement of material fact, for he impliedly states that he knows facts which justify his opinion".[38]

[144] The ISA does contain reservations and caveats. These are relevant to the question whether it was reasonable for the plaintiff to rely on/be induced by the ISA (considered below). But those caveats/reservations do not turn what is otherwise a statement of fact into an opinion.

[145] The ISA was an expert report containing statements of fact. I do not think it can be read as a statement of opinion. I conclude it was a representation.

[146] I also accept that, in providing the ISA, the vendors were doing more than simply passing on the seismic assessment. The ISA was presented to prospective purchasers together with the Information Memorandum and the

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35 Todd and Barber, above n 23, at [11.2.1(c)].
36 Guidelines, above n 1, at B3.5.
37 *Ridgway Empire Ltd v Grant*, above n 11, at [11].
38 *New Zealand Motor Bodies Ltd v Emslie* [1985] 2 NZLR 569 (HC) at 593, citing *Smith v Land House Property Corp* (1884) 28 Ch D 7 (EWCA Civ) at 15 per Bowen LJ.

Covering letter. The other materials reinforced, or "coloured" the ISA, although there may be a question whether, separately, they could be said to constitute representations.

Covering letter

[147] The Covering letter includes the following statements: "You asked us to carry out an initial seismic assessment on your building … The result of the ISA was a 60% NBS on your building." Those statements are representations and reinforce the representation in the ISA.

[148] However, the other statements in the Covering letter that relate to possibly improving the per cent NBS rating are, in my view, statements of opinion. Those statements are:

- "Normally, a building which rates around that with an ISA is probably going to exceed 70% NBS if a more detailed analysis or DSA is carried out".
- "Therefore, it is most likely, but not guaranteed, a better assessment … will give a higher rating on the building".
- "In summary then the 60%NBS can probably be bettered with more input".

[149] They are clearly expressed as predictions of a future possibility, not as an authoritative assertion of future fact. It is also relevant that Mr Johnstone provided the Covering letter to Ms Weine without appreciating that it would be given to prospective purchasers.

[150] An expression of opinion carries the implied assertion that the opinion is honestly held. If it can be proved that the representor did not hold the opinion there may be an actionable representation. Here, Mr Johnstone's evidence was that in his experience a DSA is likely to result in a higher per cent NBS rating in the majority of cases. In cross-examination, Mr Johnstone referred to NZCEL carrying out a large number of building assessments, most on relatively complex and larger buildings. He said, "In all cases, all cases, we get a better number if we do a better analysis … that is why I said that in my letter, that I think with a proper analysis, we could get a better answer and to add another 10% on, to my thinking, was achievable. And it's been … borne out by probably 100 assessments or strengthening jobs we do a year".

[151] Mr Johnstone's opinion is supported to some extent by the Guidelines which state, for example: "The IEP is intended to be somewhat conservative, identifying some building as having a lower %NBS rating than might be shown by subsequent detailed investigations to be the case".[39]

[152] I conclude that there was a reasonable basis for the opinion expressed by Mr Johnstone in the Covering letter. I find that the statements set out at [148] above are opinions and not actionable as representations.

[153] Although the Covering letter, to the extent it is a statement of opinion, is not separately actionable, I accept that those statements, in the absence of the additional information referred to at [142] above, would have had the effect of reinforcing in the mind of prospective purchasers that the 60 per cent NBS rating in the ISA was soundly based.

[154] I also accept the plaintiff's submission that, from a purchaser's perspective, the Covering letter is unusual. It does not follow the format proposed in the Guidelines and offer a neutral explanation of the seismic

39 Guidelines, above n 1, at B3.4.

assessment or contain a warning or note, which a layperson would have found easier to read than the ISA, that the NBS rating could be significantly lower. Ms Weine had that broader context, but prospective purchasers did not. The Guidelines recommend that engineers make sure building owners and other recipients of IEP assessment reports are fully aware of the limitations of the IEP when discussing results.[40] The Guidelines state:[41]

> The way the results of an ISA are reported is extremely important to make sure these are appropriately interpreted and their reliability is correctly conveyed.
>
> Recipients of an ISA must be warned of its limitations and the need to proceed to a DSA if any decisions reliant on the seismic status of the building are contemplated.
>
> To avoid any misinterpretation by building owners and/or tenants of an ISA result it is recommended that the ISA (typically expected to be in the form of an IEP) is accompanied by a covering letter. This letter should describe the:
>
> - building
> - scope of the assessment and information available for this
> - rationale for the various decisions made
> - limitations of the process, and
> - implications of the result.
>
> Refer to Appendix BC for a template covering letter showing how these aspects might be addressed.

[155] The vendors did not provide the standard covering letter for ISAs commissioned by the building owner or tenant that is provided by MBIE.

Information memorandum

[156] Finally, I consider the Information Memorandum. The vendors endorsed the ISA by stating in the marketing material that, as an "Investment highlight", the Property had a "Good NBS rating". I accept this was an unqualified statement of fact; it and made no reference to the ISA and stood independently.

Were the NBS representations incorrect?

[157] The submissions presented to the Court largely focused on the question "was the ISA wrong?". That is a different question from the question the Court has to answer, which is "were the NBS representations incorrect?". I find that the representations that the Property was 60 per cent NBS and that this was a "Good" rating were incorrect.

[158] The ISA assessed the Property as having a 60 per cent NBS rating. The two DSAs were obtained independently of each other, both for the purpose of strengthening the building, but came to essentially the same conclusion (albeit by different methods): the Certa DSA assessed the Property at 10 per cent NBS and the Spencer Holmes DSA at 30 per cent NBS. That is, both rated the Property as an earthquake-prone building. Mr Robertson's ISA, obtained for the purpose of this litigation, rated the Property at 43 per cent NBS—that is, an earthquake risk building. The Robertson ISA put the Property in the same alpha category (C) as the ISA.

[159] While all the experts agree that ISAs and DSAs involve a different process and serve somewhat different purposes, they are not ultimately measuring different things. As the Guidelines note:[42]

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40 At B3.4.
41 At B5.1.
42 At A3.2.4.

> The use of *%NBS* to describe the result from all levels of assessment (ISA through to DSA) is deliberate. The rating for the building need only be based on the lowest level of assessment that is warranted for the particular circumstances. The *%NBS* assessed using a full DSA process is expected to be more reliable than one assessed using an ISA, but the latter may be sufficient to provide a result that the engineer is confident reflects the expected building behaviour.

[160] The Guidelines also note that the calculation of per cent NBS "is essentially the same for both the ISA (typically via the IEP) and the DSA".[43]

[161] The vendors' representations taken together amounted to a clear statement that the Property was 60 per cent NBS and that the earthquake rating of the building was "Good". It was not 60 per cent NBS. Nor, as an earthquake-prone building, could it objectively be described as "Good". While it is simply not possible to say what per cent NBS the Property was at the relevant time, both the Certa DSA and the Spencer Holmes DSA reached a substantially lower per cent NBS rating.

[162] Mr Robertson takes issue with the accuracy of the two DSAs. The disagreement results primarily from Mr Robertson's interpretation of "earthquake prone" in the Building Act.

[163] Mr Robertson's evidence on this point differed from that of Mr Preston, from Certa, who gave evidence for the plaintiff. Mr Preston's interpretation of the definition of an earthquake-prone building under s 133AB of the Building Act is that a building may be earthquake-prone if a part of the building, as opposed to the entire building, may collapse and likely lead to injury or death. Mr Preston says he understands that his interpretation reflects the general consensus in the engineering industry.

[164] I accept that Mr Preston's interpretation of "earthquake prone" is correct. The definition in the Building Act presumes collapse. As the Westlaw commentary to the Building Act notes:[44]

> The second part of the test in s 133AB(1)(b) has been changed from a "likelihood of collapse" test (the previous s 122(1)(b) required an assessment of whether the building "would be likely to collapse") to a consequence test. This test presumes the building will collapse, and asks whether the collapse would be likely to cause injury or death to persons in or near the building. The test does not require an assessment of whether the building will be likely to collapse, as the likelihood of a building collapsing in an earthquake is too uncertain to predict and not capable of an engineering assessment. …

[165] Even if I accept the defendants' submission that DSAs and ISAs are not directly comparable, and Mr Robertson is correct in his criticism of the Certa and Spencer Holmes DSAs, the ISA from Mr Robertson, prepared as the defendants' expert, for the purpose of this litigation, was considerably lower than the ISA 60 per cent NBS rating. On that basis alone, I could conclude that the representations were not correct.

[166] Mr Robertson's evidence also relies on the alpha grading of the Property. He says that an ISA is an inexact, approximate, calculation, which is why the NZSEE grading system, adopted in the Guidelines, grades A to E, rather than calculating per cent NBS. Both his ISA and the NZCEL ISA result in the building being Grade C. But observing that both ISAs rated the Property as Grade C does not assist the defendants. The representations did not refer to

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43 At A6.2.

44 At BL133AB.01.

the Property as a Grade C or "earthquake risk" building. The Property was marketed by the defendants as having a rating of 60 per cent NBS, which was stated to be "Good", and the plaintiff relied on this.

[167] I accept that NZCEL followed the ISA procedure in part B of the Guidelines when carrying out the ISA procedure and reaching its conclusions on the seismic strength of the Property. There was therefore a reasonable basis for the conclusions in the ISA, even if the conclusions turned out to be different from those in subsequent assessments.[45] That submission is relevant to the third party claim but, again, does not assist the defendants to establish that the representations were not incorrect.

Effect of the warnings

[168] As set out at [105] above, the ISA contained a template warning on most pages, advising that the evaluation had been carried out solely as an initial seismic assessment, should be read in conjunction with the limitations set out in the accompanying report and should not be relied on "for any other purpose".

[169] In my view, the warning does not have a material impact on the defendants' liability in misrepresentation. The warning is generic and does not include any specific or identifying details regarding the Property. Although it refers to "the limitations set out in the accompanying report", there is no clear indication what those limitations are. In addition, the last sentence suggesting that more detailed inspections might lead to a different result must be read in the context of the Covering letter and the ISA itself, which suggested that a "different result" was likely to be a higher per cent NBS rating.

[170] As the plaintiff acknowledges, the ISA did identify potential critical structural weaknesses including issues with the front columns, which the ISA also noted could be subject to subsequent detailed assessment. But that was, as the plaintiff submits, "sandwiched" between the statement that the building was 60 per cent NBS and the statement that a detailed assessment could prove it is better than 60 per cent NBS. Viewed objectively, there was nothing to alert prospective purchasers that these elements meant there were major issues and that the building was at a high risk of being earthquake-prone or at any risk of being earthquake-prone.

[171] Finally, as the Court of Appeal observed in *Ridgway Empire Ltd v Grant*,[46] the context in which the representation is made is important. This transaction concerned the sale of a commercial building, for a significant sum. The building's seismic assessment was plainly important for all prospective purchasers—both those who planned to use it for commercial purposes and those considering a conversion to residential purposes.

[172] The Property was the subject of a sophisticated marketing campaign. One of the owners, Ms Weine, was an experienced and sophisticated building owner. Mr Hofmann-Body, the other trustee, was an experienced lawyer.

[173] The short timeframe between advertising and sale of the Property necessarily limited prospective purchasers' own more detailed inquiries. It appears this was a significant factor in the vendors not proceeding to get a DSA prior to offering the Property for sale.

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45 *David v TFAC Ltd*, above n 15, at [43].
46 *Ridgway Empire Ltd v Grant*, above n 11, at [11].

[174] Taking that context into account as the backdrop to the specific representations, I accept that the representations as a whole represented that:

(a) the building had a 60 per cent NBS rating; and

(b) this was a "good" rating.

[175] Those representations were not correct.

Inducement

[176] To establish inducement, the plaintiff must show either that:

(a) the vendors intended that the plaintiff would be induced by the misrepresentations to enter the contract; or

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

[177] The misrepresentations need not be the sole inducement to enter the contract; it is enough if it was a significant influencing factor.[47]

[178] It is not disputed that, on advice from Bayleys, the vendors engaged NZCEL to undertake a seismic assessment of the Property and prepare a report for the purpose of marketing the Property.

[179] The chronology (at [19]–[44] above) is instructive.

[180] The ISA was provided by the vendors to Bayleys on 15 August 2017.

[181] On 5 September 2017, NZCEL emailed Ms Weine and stated that NZCEL could prepare a DSA but believed there would be no chance of achieving a per cent NBS rating above 60 per cent NBS. That email refers to discussions between Ms Weine and Ms Spaak but there was no direct evidence before the Court as to what they discussed.

[182] On 11 September 2017, NZCEL sent a further email to Ms Weine confirming that they would look into calculations for the Property obtained from the Council file but would not spend much time or money on it.

[183] Sometime later, Mr Johnstone had a telephone conversation with Ms Weine. Mr Johnstone's evidence is that he prepared the Covering letter to record that discussion. He says during the telephone call, Ms Weine asked "is there any way we can get a better ISA number than 60%?". Mr Johnstone's response is recorded in the Covering letter. Mr Johnstone's evidence is not challenged.

[184] On 6 October 2017, NZCEL sent a final version of the ISA to the vendors together with the Covering letter which stated that the 60 per cent NBS rating would likely be bettered if a DSA were undertaken.

[185] In the period 6–8 October 2017, the vendors sent the ISA to Bayleys. Ms Weine's evidence is that it was intended that Bayleys would provide these to any potential purchasers.

[186] On 7 November 2017, Bayleys began to market the Property for sale. In order to explain the seismic rating of the Property, Bayleys made the ISA available to potential purchasers.

[187] Bayleys' first weekly report on the sales campaign, sent to the vendors on 14 November, highlighted that the potential purchasers had an issue with the NBS rating being only 60 per cent NBS.

[188] On 16 November 2017, after receiving the first report, Ms Weine emailed Bayleys to highlight the Covering letter provided by NZCEL and the comment in it that it may reach 70 per cent NBS "on further investigation".

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47 *New Zealand Motor Bodies Ltd v Emslie*, above n 38, at 595.

As already noted,[48] in her email, Ms Weine proposed that the Covering letter be provided to prospective purchasers.

[189] The Covering letter was then provided to prospective purchasers. Mr Johnstone's evidence is that the Covering letter was his record of a telephone discussion with Ms Weine. However, that informal context is not apparent on its face and was not advised to prospective purchasers. Nor were they advised that the engineer who had carried out the ISA had previously told Ms Weine that the 60 per cent NBS rating was unlikely to improve if a DSA was carried out.

[190] I accept that the clear inference from this sequence of events is that Ms Weine provided the ISA to give potential purchasers assurance about the seismic rating of the Property. I also accept that Ms Weine directed the Covering letter be provided to purchasers in order to give additional comfort. She did not dispute this in cross-examination.

[191] I find that the vendors intended that prospective purchasers would be induced by the NBS representations and those representations had a material effect on the plaintiff's decision to purchase the Property.

Did plaintiff's own inquiries negate the inducement?

[192] The plaintiff's directors inspected the Property pre-purchase, with refurbishment and strengthening in mind. They also accessed the drawings of the Property held on the Hutt City Council record when planning how to refurbish and strengthen the Property. Those inquiries did not necessarily negate their inducement.[49] There is no evidence that the Council file contained anything that might have alerted TADD to potential seismic rating issues. I accept that Mr Taylor and Mr Doile knew enough about seismic strengthening to be able to estimate the cost of the three elements they had concluded would need work. That is not the same as being familiar with the ISA or DSA processes. Mr Doile and Mr Taylor's experience with and expertise in commercial buildings was not derived from expertise in assessing seismic rating. The evidence from both of them was that at the relevant time, they did not know the difference between an ISA and a DSA. Their expertise and inquiries did not render them more expert in the field of seismic rating than a lay person.[50]

[193] It was not relevant that the plaintiff was always going to have to obtain a DSA. As the evidence made clear, the timing meant that it was not feasible to do so before the auction. In any event, the plaintiff obtained the DSA to inform it about how to go about the seismic strengthening Mr Taylor and Mr Doile had concluded was necessary from their pre-purchase inspection.

[194] I conclude that the inducement to purchase the Property was not negated by the plaintiff's own inquiries. Inducement is made out.

[195] The plaintiff's first cause of action in misrepresentation is made out.

Contributory negligence

[196] The defendants' claim of contributory negligence gives rise to several issues:

(a) Does the concept of contributory negligence apply, given that the plaintiff's claim is framed only in contract?

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48 At [39] above.

49 *Magee v Mason*, above n 28, at [48(c)].

50 See *Steel v Spence Consultants Ltd* [2017] NZHC 398, (2017) 18 NZCPR 540 at [37].

(b) If so, did the plaintiff fail to heed the relevant warnings on the ISA and make its own assessment?

[197] The defendants say that as a matter of law, if a liability exists for "fault" as defined in s 2, the Contributory Negligence Act can apply. The defendants say it is settled law that where there is coextensive liability in contract and in negligence the Act can apply, even if, as here, the plaintiff chooses to frame its action in contract.[51]

[198] The definition of fault within s 2 is "negligence, breach of statutory duty, or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence".

[199] The defendants rely on a number of New Zealand authorities where it has been held contributorily negligent for a purchaser of a house to fail, prior to purchase, to investigate the risk that a building was a leaky home.[52]

[200] Here, the defendants say, the claim against them is premised on a negligent misrepresentation. So, as a matter of law, questions of contribution can arise.

[201] The defendants rely on the plaintiff's failure to have regard to what it says were the numerous boxed warnings in the ISA (on 10 of 19 pages)[53] and proceeding to purchase the Property. The plaintiff also failed to seek more detail and chose instead to rely on its directors' own assessment, both as to the work required and the cost. The defendants say the plaintiff apparently did not consider making a pre-auction conditional offer or to tailor offers it did make in light of the limited information and numerous qualifications on the information provided.

Plaintiff's submissions

[202] Counsel for the plaintiff acknowledges that contributory negligence might, as a matter of law, be available in respect of a claim in contract but says that this case falls within Hobhouse J's first category in *Forsikringsaktieselskapet Vesta v Butcher*[54] and in any event, contributory negligence would not be applicable on the facts. The plaintiff says this case is analogous to the situation of a buyer receiving goods which turn out to have defects, citing Sirko Harder's article "Contributory Negligence in Contract and Equity":[55]

> When receiving the goods, the buyer is not obliged (in the sense of a "duty to oneself") to immediately check them for defects but can rely on the seller's warranty that they are fit for purpose.

[203] The defendants represented the Property was 60 per cent NBS. The plaintiff was entitled to rely on those representations without checking, particularly in the context of the very short sale process.

Discussion

[204] Section 3(1) of the Contributory Negligence Act provides for an apportionment of liability "[w]here any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons".

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51 *Forsikringsaktieselskapet Vesta v Butcher* [1989] AC 852 at 867, [1988] 2 All ER 43 (EWCA Civ) and on appeal at AC 890.

52 See for example *Johnson v Auckland Council* [2013] NZCA 662.

53 The warning is set out in full at [105] above.

54 See at [205] below.

55 Sirko Harder "Contributory Negligence in Contract and Equity" (2014) 13(2) Otago LR 307 at 325–326.

[205] The plaintiff's first cause of action is framed as a contractual misrepresentation claim. It alleges that the NBS representations were incorrect. It does not allege that the representations were negligently made.

[206] While in order for the Contributory Negligence Act to apply, the defendant's fault must constitute "negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort", tort need not be the only basis of liability:[56]

> Where there is a co-extensive liability in contract and in negligence the Act still applies. The existence of a liability in contract as well is immaterial. The position is the same where liability in negligence exists, but the plaintiff chooses to frame his or her action only in contract. The definition of "fault" refers only to conduct which gives rise to "a" liability in tort and does not require that the claim actually be framed in tort. Indeed, there is no objection in principle to the imposition of concurrent liability for negligence and breach of contract, and so in all such cases the Act can apply.

[207] The English case of *Forsikringsaktieselskapet Vesta v Butcher* is relevant to apportionment of contractual liability by way of contributory negligence.[57] In that case, Hobhouse J, at first instance, analysed the application of the contributory negligence statute to contract actions into three categories:[58]

(a) Where the defendant's liability arises from some contractual provision which does not depend on negligence on the part of the defendant.

(b) Where the defendant's liability arises from a contractual obligation which is expressed in terms of taking care but does not correspond to a common law duty to take care which would exist in the given case independently of contract.

(c) Where the defendant's liability in contract is the same as his liability in the tort of negligence independently of the existence of any contract.

[208] However, as the authors of *Todd on Torts* go on to note, where a plaintiff sues only for breach of a strict contractual duty that does not depend on negligence, the Act cannot then be raised as a defence to the plaintiff's claim.[59]

[209] In *Vining Realty Group Ltd v Moorhouse*, the plaintiff's claim was for alleged misrepresentation in respect of a property the plaintiff purchased from the defendants. The claim was brought under s 6 of the now-repealed Contractual Remedies Act 1979, which is in substantially similar terms as s 35 of the Act, under which this claim is brought. The High Court had held that contributory negligence was a defence available to the defendants, although they were sued only in contract.[60] Justice Wild concluded that the case came within Hobhouse J's second category as, in his view, "the misrepresentations sued upon by the plaintiff are essentially negligent misrepresentations". The

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56 Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters New Zealand, Wellington, 2019) at 1158 (footnotes omitted).

57 *Forsikringsaktieselskapet Vesta v Butcher*, above n 51.

58 At 508.

59 *Vining Realty Group Ltd v Moorhouse*, above n 30, at [64]–[67], citing Stephen Todd (ed) *The Law of Torts in New Zealand* (4th ed, Brookers, 2005).

60 *Altimarloch Joint Venture Ltd v Moorhouse* HC Blenheim CIV-2005-406-91, 3 July 2008 at [102]–[106].

Court of Appeal disagreed, finding that it came within Hobhouse J's first category, and noting that liability under s 6 of the Contractual Remedies Act does not turn on negligence.[61] Contributory negligence was therefore not available as a defence.

[210] I find that this case is also one that falls within Hobhouse J's first category and therefore contributory negligence does not apply.

[211] Even if the doctrine of contributory negligence were relevant, ordinary principles of causation and remoteness will apply. For the same reasons I have set out able in relation to inducement, I conclude that the plaintiff's alleged contributory negligence was not causal and operative.

[212] I do not separately analyse the affirmative defence of voluntary assumption of risk because it appears to me that this defence merged with the arguments made regarding contributory negligence in both parties' submissions.

Common mistake

[213] Although I have found for the plaintiff in misrepresentation, in case my primary conclusion is wrong, I also address the alternative cause of action, common mistake.

[214] Section 24 of the Act provides:

> **24 Relief may be granted if mistake by one party is known to another party or is common or mutual**
>
> (1) A court may grant relief under section 28 to a party to a contract if,—
>
> (a) in entering into the contract,—
>
> (i) the party was influenced in the party's decision to enter into the contract by a mistake that was material to that party, and the existence of the mistake was known to the other party or to 1 or more of the other parties to the contract; or
>
> (ii) all the parties to the contract were influenced in their respective decisions to enter into the contract by the same mistake; or
>
> (iii) the party and at least 1 other party were each influenced in their respective decisions to enter into the contract by a different mistake about the same matter of fact or of law; and
>
> (b) the mistake or mistakes resulted, at the time of the contract,—
>
> (i) in a substantially unequal exchange of values; or
>
> (ii) in a benefit being conferred, or an obligation being imposed or included, that was, in all the circumstances, a benefit or an obligation substantially disproportionate to the consideration for the benefit or obligation; and
>
> (c) in a case where the contract expressly or by implication provides for the risk of mistakes, the party seeking relief (or the party through or under whom relief is sought) is not obliged by a term of the contract to assume the risk that that party's belief about the matter in question might be mistaken.
>
> (2) The relief may be granted in the course of any proceeding or on application made for the purpose.

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61 *Vining Realty Group Ltd v Moorhouse*, above n 30, at [66].

(3) For the purposes of subsection (1)(a)(i) and (iii), the other party or other parties must not be a party or parties who have substantially the same interest under the contract as the party seeking relief.

Plaintiff's submissions

[215] The plaintiff refers to David McLauchlan's commentary on *Magee v Mason*, where Professor McLauchlan observes that the appellants in that case could have pleaded mistake, in addition to their (unsuccessful) claim of misrepresentation.[62]

[216] The plaintiff says there was a common mistake here:

(a) Both parties to the contract for the sale of the Property believed that the building's seismic rating was 60 per cent NBS (or higher).

(b) That was a mistaken belief.

(c) Both parties were influenced in their decision to enter into the contract by reason of that mistake.

(d) The mistake resulted in a substantially unequal exchange of values, because the actual value of the building as an earthquake-prone building was substantially less than the purchase price (namely the market value, as determined by the auction on 7 December 2017).

(e) Alternatively, the mistake resulted in a benefit being conferred on the vendors (the purchase price) that was substantially disproportionate to the consideration for the benefit (an earthquake-prone building).

(f) Alternatively, the mistake resulted in an obligation being imposed on the plaintiff (the obligation to seismically strengthen the building) that was substantially disproportionate to the price.

(g) The sale contract did not oblige the plaintiff to assume the risk of the mistake.

Defendants' submissions

[217] The defendants say that common mistake is not applicable on the facts. First, the parties were not influenced in their respective decisions to enter into the contract by the same mistake. The plaintiff asserts that its mistake was that it assumed the building definitely was 60 per cent NBS at date of sale as a matter of fact. But the defendants say they were not influenced by any such mistake and always knew the ISA and the letter was a "coarse" estimate and that a DSA could yield a different result.

[218] Nor do the defendants accept that the plaintiff's "mistake" was as to the essential nature of the subject-matter of the contract. The plaintiff carried out its own inspection of the Property and proceeded based on its pricing of anticipated works, informed by its professional knowledge. That points to the plaintiff having taken a calculated risk as to the purchase price.

[219] Counsel for the defendants also submitted that the defendants had already made the decision to sell the Property and were then advised by Bayleys to obtain an ISA to provide to potential purchasers. The result in the ISA had no bearing on the defendants' decision to sell, it was merely an ideal time for them to sell and the decision to sell pre-dated NZCEL's engagement and completion of the ISA.

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62 David McLauchlan "Misrepresentation? Or was it a case for relief on the ground of common mistake?" [2018] NZLJ 13.

[220] The plaintiff chose to proceed on a limited seismic assessment, or chose to limit its inquiries or assessment, and is therefore ignorant, rather than mistaken and there has been no requirement for the plaintiff to assume any specific risk.

Discussion

[221] The legal principles relating to common mistake are also well-established:

(a) The Court may grant relief if all the parties were influenced in their respective decisions to enter into the contract by the same mistake.[63]

(b) The mistake or mistakes must have resulted, at the time of the contract, in a substantially unequal exchange of values, or in a benefit being conferred or an obligation imposed that was substantially disproportionate to the consideration for the benefit or obligation.[64]

(c) The mistake must be as to the essential nature of the subject matter of the contract.[65]

(d) Both parties must have mistakenly accepted in their minds the existence of some fact which affects to a material degree the worth of the consideration given by one of the parties.[66]

(e) A party who gives no thought to whether a particular matter exists or not is ignorant of it, rather than mistaken as to it.[67]

(f) A party is unlikely to seek relief unless it has been required to assume the risk of the mistake, and therefore some specificity and not merely a general assumption of risk is required.[68]

[222] The issues arising are:

(a) What was the mistake?

(b) Were the defendants influenced by that mistake to enter into the contract?

(c) Was the mistake as to the essential nature of the contract?

[223] The alleged mistake is that the Property was 60 per cent NBS as at the date of sale.

[224] The core issue in dispute is whether the parties were influenced by that mistake to enter the contract. I have already discussed the effect of the plaintiff's own inspection and experience. As in relation to the misrepresentation claim, I conclude that does not negate the influence on the plaintiff of the mistake as to the building being 60 per cent NBS.

[225] The defendants say they were not influenced by the mistake. They knew the ISA was a "coarse estimate" only.

[226] It does not sit well for the defendants to assert that they had no belief that the Property had a 60 per cent NBS rating, when their marketing campaign for the Property featured that very fact. Although, as Ms Weine says, the ISA may initially have been obtained because the real estate agent said that is what the vendors should do, it was Ms Weine's decision then to ask

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63 Section 24(1)(a)(ii) of the Contract and Commercial Law Act 2017.

64 Section 24(1)(b).

65 *Ware v Johnson*, above n 22, at 539.

66 At 540.

67 *Ladstone Holdings Ltd v Leonora Holdings Ltd* [2006] 1 NZLR 211, (2005) 5 NZCPR 766 (HC) at [85]–[86].

68 *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd* [2016] NZSC 158, [2017] 1 NZLR 352 at [8].

Mr Johnstone for a letter about the possibility of the NBS rating being higher than 60 per cent NBS and it was Ms Weine who proposed to Bayleys that the Covering letter be provided to prospective purchasers. In any event, Ms Weine gave evidence that she had no reason not to believe the represented rating of 60 per cent NBS. Although Ms Weine said she could not recollect the circumstances or detail of her conversation with Mr Johnstone, I infer that she made a specific request to Mr Johnstone to write the letter in order to give prospective purchasers further comfort that the building had a good seismic rating of at least 60 per cent and probably higher.

[227] Nor as a matter of law do I accept the defendants' submission on this point. To "influence" is simply to "have an effect on". As Whata J said in *Shen v Ossyanin (No 2)*:[69]

> To "influence" is simply to "have an effect on". That is the ordinary meaning of "influenced", and that meaning accords with the remedial purpose of s 24 of the Act—that is, to provide a remedy for the arbitrary effects of mistake. Further, as stated in *Ware v Johnson*, "the Act cannot mean that both parties must be induced by the mistake to enter into the contract". Rather, to be influenced "means no more than that both parties must necessarily have "mistakenly accepted in their minds the existence of some fact which affects to a material degree the worth of the consideration given by one of the parties."

[228] I conclude that the vendors were, in a *Ware v Johnson* sense, influenced to enter into the contract by a mistaken view that the Property was 60 per cent NBS.

[229] The second submission for the defendants is that the alleged mistake was not as to the essential nature of the contract. The defendants say that the plaintiff carried out its own inspection of the Property, assessed the structural elements and carried out the pricing of anticipated works based on Mr Doile and Mr Taylor's own professional knowledge. The plaintiff was ignorant, rather than mistaken, in accordance with *Ladstone Holdings Ltd v Leonora Holdings Ltd*.[70]

[230] The defendants rely on *Shen v Ossyanin (No 2)*. In *Shen v Ossyanin (No 2)*, the purchaser was found to be unreasonable in relying on the representations made by the vendor. Mr Shen was a sophisticated buyer of properties. He was told that the house appeared to have a weathertightness issue. But he did not seek a warranty as to the fitness of the property and none was given; nor did he seek expert advice. In that case, the situation came close to the purchaser knowingly assuming the risk of the mistake. I accept the plaintiff's submission that the key factors that were relevant in Shen are absent from this case.

[231] Here, there was an asymmetry of information in favour of the vendors, which points against a finding of fault or ignorance on the part of the plaintiff. Ms Weine was a sophisticated and experienced commercial property owner. She bore some of the responsibility for the mistake:

(a) After she had obtained the ISA from NZCEL, together with the email from Ms Spaak, stating that there was no chance that further analysis would increase the seismic rating above 60 per cent NBS, Ms Weine had a discussion with Mr Johnstone. He subsequently provided the

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69 *Shen v Ossyanin (No 2)* [2019] NZHC 2430, (2019) 20 NZCPR 590 at [24] (footnotes omitted).

70 *Ladstone Holdings Ltd v Leonora Holdings Ltd*, above n 67, at [79].

Covering letter which, in contrast to Ms Spaak's email, said it was "most likely, but not guaranteed" that the NBS rating would be higher than 60 per cent on a more detailed assessment.

(b) Ms Weine did not disclose to prospective purchasers that she had been informed by Ms Spaak, who carried out the ISA, that there was no chance that further analysis would increase the rating above 60 per cent NBS, or the context in which Mr Johnstone wrote the Covering letter. I conclude that in choosing not to make that disclosure, Ms Weine failed to give prospective purchasers information which might have led them to make further inquiries as to the seismic rating of the property.

[232] I accept that the mistake was as to the essential nature of the Property and that the plaintiff did not bear responsibility for that mistake:

(a) The ISA was carried out by NZCEL, a reputable and experienced professional engineering firm.

(b) TADD did not have any particular expertise in seismic assessments.

(c) The ISA stated that it was a final assessment and that no further investigation was required.

(d) It was reasonable for TADD to rely on the ISA. There was no reason for it not to do so.

(e) It is clear that none of the other prospective purchasers obtained a DSA or were concerned as to the reliability of the ISA.[71]

[233] I accept that, at the time of entering into the contract to sell the Property, both the plaintiff and the defendants were influenced by a common mistake that the Property was at least 60 per cent NBS.

[234] The further relevant requirements of s 24[72] are that the mistake resulted, at the time of the contract, in a substantially unequal exchange of values[73] and that the contract did not expressly or by implication provide for the risk of mistakes.[74]

[235] As to substantially unequal exchange of values, whichever means of assessment is used (see [214(d)] above), that is made out.

[236] The contract did not expressly or by implication provide for the risk of mistakes.

[237] I find that the alternative claim in common mistake is made out.

Relief

Plaintiff's submissions

[238] The plaintiff alleges it suffered loss as a result of being induced by the NBS representations to buy the Property. Those losses are:

(a) the cost of the required earthquake strengthening, being $753,371.56; or, alternatively, the consequent diminution in the value of the Property, being the monetary difference between the consideration paid by the plaintiff for the Property and its actual value, being $552,000;

(b) loss of rental for the period from 1 May 2019 to 30 April 2020, being the period during which the building was vacated for earthquake strengthening, being $289,300;

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71 This is apparent from Bayleys's marketing reports for weeks one and four.
72 Contract and Commercial Law Act.
73 Section 24(1)(b)(i).
74 Section 24(1)(c).

(c) engineering fees incurred by the plaintiff to ascertain the correct NBS rating, being $40,342.50 plus GST; and
(d) financing costs incurred on the purchase price up to the date that the building was able to be leased again, being $159,522.75.

[239] The plaintiff sets out three possible bases for the calculation of quantum. These are actual loss; cost of cure; and difference in value.

[240] The plaintiff's actual loss is the cost of seismic strengthening of the building to 100 per cent NBS, assessed by Mr Hebden as $865,615.39.

[241] Other aspects of the actual loss incurred are:
(a) surrender fee to tenant to enable seismic strengthening work to proceed of $35,000;
(b) loss of rent from the tenant from 30 June 2019 (the date of surrender of the lease) to 30 June 2020 (the actual expiry date of that lease) at $16,500 per annum, being 17 months at $1,375 per month, which gives a loss of $23,375;
(c) loss of rental income, estimated by Mr Hebden at $38,921.48; and
(d) cost of an additional DSA (Spencer Holmes) at $17,842.40.

[242] The plaintiff acknowledges that if actual loss is adopted as the measure of loss, a realistic discount would be appropriate for betterment, because it has strengthened the Property to 100 per cent NBS. However, it says any such discount should be modest, given that the building would have had a high (albeit it not 100 per cent NBS) seismic rating in the counterfactual scenario.

[243] If a betterment discount of 30 per cent was applied ($259,684.61), to in effect treat the building as being at 70 per cent NBS, then the resulting cost of the seismic strengthening is $605,930.78.

[244] The cost of cure is calculated on the basis of the cost to achieve 60–70 per cent NBS, at $500,458.58. In addition, the plaintiff would seek:
(a) surrender fee to tenant—$35,000;
(b) loss of rent from the tenant—$23,375;
(c) cost of additional DSA (Spencer Holmes)—$17,842.40 plus GST; and
(d) loss of rental income during seismic improvement works to bring the building from earthquake-prone to 60–70 per cent NBS. That period is estimated at 23.28 weeks and the loss estimated at $38,921.48.

[245] The cost of cure calculation gives a total of $615,597.46 plus GST.

[246] The third basis of calculation advanced by the plaintiff is the difference in value between the building in its quality as represented (60–70 per cent NBS) and its true quality (earthquake-prone). This is calculated as:
(a) value of building in its quality as represented (the purchase price): $1,427,000;
(b) less the value of building at its actual quality (earthquake-prone): $835,000;[75]
(c) the difference in value is $592,000; and
(d) plus the cost of the additional DSA (Spencer Holmes): $17,842.40.

[247] This results in a total loss of $609,842.40.

[248] The plaintiff also seeks interest on the amount recoverable under the Interest on Money Claims Act 2016, whichever measure of loss is adopted.

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75 Based on Mr Simpson's evidence (at [13]).

[249] The plaintiff says that under the claim of misrepresentation, the contractual measure of loss is appropriate, namely actual loss. Under the claim of common mistake, the appropriate measure is either cost of cure or difference in value.

[250] The plaintiff says that where the breach arises from a transfer of property, which is either defective or not of the quality promised, the basic loss is the value of the property as represented, less its market value in fact. However, the Court of Appeal has made it clear that the full cost of the strengthening could be treated as being equivalent to the difference in value in relation to a seismic rating being misrepresented.[76]

[251] This means, the plaintiff submits, the Court can either adopt the cost of the strengthening work or the valuation evidence to determine the difference in value.

Defendants' submissions

[252] The defendants say that there are two appropriate approaches to relief for the misrepresentation claim:

(a) The diminution in value of the building, being the difference between what was paid and its actual value. On the basis of the valuation evidence as to the actual value of the Property at date of sale if as an earthquake-prone building, that would be $1,427,000 less $835,000, giving a diminution in value of $592,000.

(b) The actual cost of "cure" which would require the Court to determine what the per cent NBS rating was at the date of sale and to determine the cost of bringing the Property from that point to 60 per cent NBS (given the building has in fact been strengthened subsequent to sale to 100 per cent NBS).

[253] The defendants say that any judgment should be for the lesser of those alternatives.

Discussion

[254] I agree that there are in fact two, rather than three approaches to calculating the plaintiff's loss. Actual loss is, as the plaintiff acknowledges, in fact "cost of cure".

[255] The difficulty with the actual loss/cost of cure approach is that it requires the Court to determine the actual per cent NBS as at the date of sale and then calculate the cost to bring it up to 60 per cent NBS (the plaintiff says 60–70 per cent NBS). While it is possible to conclude, as I have done, that the 60 per cent NBS was not correct, it is difficult to pinpoint what in fact the per cent NBS was at the date of sale: Mr Robertson's alternative NBS said 43 per cent, but neither Certa nor Spencer Holmes completed an ISA. Their respective DSAs concluded the building was 10 per cent and 30 percent NBS.

[256] For that reason, I have concluded that it is appropriate to assess the plaintiff's loss on the basis of difference in value. That is, the value of the Property as represented, less its market value in fact, rather than the cost of strengthening the Property to 100 per cent NBS, as in *Merj Holdings Ltd v Sipka Holdings Ltd*.[77] This approach has the benefit of simplicity and avoids the uncertainty that comes with making an assessment as to betterment, or the

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76 *Merj Holdings Ltd v Sipka Holdings Ltd* [2016] NZCA 521, [2016] NZAR 1505 at [25].

77 *Merj Holdings Ltd v Sipka Holdings Ltd*, above n 76, at [25]. The Court of Appeal's

difference between the Spencer Holmes and Robertson designs. Also, as the plaintiff notes, it best reflects the "substantially unequal exchange of values".[78]

[257] Mr Simpson's valuation evidence for the plaintiff, from September 2021, was that the actual value of the Property as at the date of sale was $835,000. The defendants do not dispute this valuation. The value of the Property as represented, that is the purchase price, was $1,427,000. The parties agree that the difference in value is $592,000.

[258] In addition, the plaintiff incurred the cost of an additional DSA (Spencer Holmes), which was $17,842.40.

[259] The plaintiff also claims interest on the loss, pursuant to the Interest on Money Claims Act 2016. Adopting the difference in value approach, interest runs from the date of the loss, that is the settlement date of 19 January 2018 to the date of judgment. As at the date of hearing, this was $74,804.71.

Trustee liability

[260] The final question as between the plaintiff and the defendants relates to a possible limitation of Mr Hofmann-Body's liability.

Defendants' submissions

[261] As noted at [54] above, the defendants plead an affirmative defence in respect of Mr Hofmann-Body's liability. They say that as a professional trustee, Mr Hofmann-Body's liability is limited, by cl 18.1(2) of the ASP of the Property, to the amount recoverable from the assets of the Trust.

[262] Clause 18.1(2) provides:

> If that person has no right to or interest in any assets of the trust except in that person's capacity as a trustee of the trust, that person's liability under this agreement will not be personal and unlimited but will be limited to the actual amount recoverable from the assets of the trust from time to time ("the limited amount"). If the right of that person to be indemnified from the trust assets has been lost or impaired, that person's liability will become personal but limited to the extent of that part of the limited amount which cannot be recovered from any other person.

[263] On that basis, the defendants say that if the plaintiff has suffered any loss for which they would otherwise be liable (which is denied), then any award in favour of the plaintiff against Mr Hofmann-Body is limited by cl 18.1(2) and excludes any amount beyond the amount recoverable from the assets of the Trust.

Plaintiff's submissions

[264] Limitation of liability is an affirmative defence and the onus of proof is on the defendants. The plaintiff says the only evidence provided by the defendants is the Trust Deed, which was executed in June 1993. The plaintiff has no way of knowing whether any additional trust documents exist, such as deeds of variation. Nor is there any reference in the defendants' evidence or discovery as to the extent to which the defendants have searched for such documentation.

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comment was obiter and made in the context of an application for leave to appeal a High Court decision remitting the question of damages to the District Court.

78 Section 24(b)(i) of the Contract and Commercial Law Act.

[265] Nor is there any evidence from the defendants as to, first, Mr Hofmann-Body's right to or interest in the Trust's assets, or second, whether the quantum of the plaintiff's claim would or might exceed the value of the assets of the Trust.

[266] Accordingly, the plaintiff says that, on the evidence before the Court, it is not possible to make a finding that the liability of Mr Hofmann-Body is limited to the assets of the Trust.

[267] In any event, the issue will become relevant only if the assets of the defendants, combined with any recovery from the third party, are insufficient to satisfy the defendants' liability to the plaintiff. Counsel says that if the issue becomes relevant at some stage after judgment, it can be addressed separately by the Court at that point.

[268] Without prejudice to the submission already advanced, the plaintiff's view is that if the Court does find that Mr Hofmann-Body's liability is limited to the assets of the Trust, the value of the assets should be assessed as at the date that the ASP was certified as being unconditional, on 13 December 2017.[79]

[269] The plaintiff argues that the wording of cl 18.1(2) evidences an intention that Mr Hofmann-Body's liability:

(a) is to be defined by an actual amount;
(b) that amount is to be calculated by reference to the amount recoverable from the assets of the Trust at a certain point in time; and
(c) the correct time for calculation is the date that the ASP was certified as being unconditional.

[270] The plaintiff says the addition of the words "from time to time" in cl 18.1(2) do not displace a finding that the correct time for calculation is the date that the ASP was certified as being unconditional. In the context of clauses that limit a trustee's liability, the normal meaning of the expression "from time to time" is "at the time payment under the relevant document is required of the trust".[80]

[271] If there is a shortfall in the current assets of the Trust, such that an award to the plaintiff cannot be met, the plaintiff says that cl 18.1(2) does not operate to entirely exclude personal liability of a trustee whose liability would otherwise be limited.[81]

[272] While there is no evidence before the Court that there will be such a shortfall, the plaintiff says the trustee would then be personally liable to account for the shortfall if there are insufficient funds to meet the claim.

Discussion

[273] The Court has only the trust deed before it. I accept that it is not possible on the evidence currently before the Court to assess:

(a) The value of the Trust's assets, both as at the date the ASP of the Property became unconditional and at the date of this judgment.
(b) Whether the amount of the judgment against the defendants, in favour of the plaintiff, exceeds the Trust's assets.
(c) Whether Mr Hofmann-Body has any right to or interest in the Trust's assets.

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79 *Frimley Estate Ltd v Stonewall Homes Ltd* (2010) 12 NZCPR 769 (HC) at [18].
80 KR Ayers "Limiting trustees' liability to lenders" (1996) NZLJ 181 at 183.
81 *Frimley Estate Ltd v Stonewall Homes Ltd*, above n 79, at [18].

[274] In those circumstances, I conclude that there is insufficient evidence before the Court regarding the assets of the Trust to make an assessment of the defendants' position, and it is therefore premature to address the specific legal questions raised by the plaintiff. This is reflected in my orders at [363] below.

Third-party claim

[275] The defendants' claims against NZCEL are predicated on the plaintiff's allegations against the defendants being upheld. Having found that the defendants are liable to the plaintiff, it is necessary to go on to consider the third party claim against NZCEL.

[276] The defendants and NZCEL entered into an agreement (Agreement) dated 27 June 2017 (Agreement).

[277] The Agreement states, among other things:

> …
> ***Scope and nature of the Services***
> IEP & report for a building. 3 storey building, late 1970s.
> …
> ***Information or services to be provided by the Client***
> Drawings of the building
> The Client engages the Consultant to provide the Services described above and the Consultant agrees to perform the Services for the remuneration provided above. Both Parties agree to be bound by the provision of the Short Form Model Conditions of Engagement (overleaf) and any variations noted below. Once signed, this agreement, together with the conditions overleaf and any attachments, will replace all or any oral agreement previously reached between the Parties.
> …

[278] The parties agreed to be bound by the terms of the "Short Form Model Conditions of Engagement", which is incorporated as part of the Agreement, with one variation which is not relevant to the defendants' claim against NZCEL.

[279] The Short Form Model Conditions of Engagement include:

> …
> 4. In providing the Services the Consultant shall exercise the degree of skill, care and diligence normally expected of a competent professional.
> …
> 6. The Client may order variations to the Services in writing or may request the Consultant to submit proposals for variation to the Services. Where the Consultant considers a direction from the Client or any other circumstance is a Variation the Consultant shall notify the Client as soon as practicable.
> …

[280] Materially, cls 10–11 of the Model Conditions comprise a limitation of liability. Clause 13 requires that NZCEL, as the consultant, has professional indemnity insurance for the amount of liability under cl 11.

> …
> 10. Where the Consultant breaches this Agreement, the Consultant is liable to the Client for reasonably foreseeable claims, damages, liabilities, losses or expenses caused directly by the breach. The Consultant shall not be liable to the Client under this Agreement of the Client's indirect, consequential or special loss, or loss of profit, however arising, whether under contract, in tort or otherwise.

> 11. The maximum aggregate amount payable, whether in contract, tort or otherwise, in relation to claims, damages, liabilities, losses or expenses, shall be five times the fee (exclusive of GST and disbursements) with a maximum limit of $NZ500,000.
>
> …
>
> 13. The Consultant acknowledges that the Consultant currently holds a policy of Professional Indemnity insurance for the amount of liability under clause 11. The Consultant undertakes to use all reasonable endeavours to maintain a similar policy of insurance for six years after the completion of the Services.
>
> …

[281] The fees paid by the defendants to NZCEL were $2,540 (exclusive of GST and disbursements). If the limitation clauses are operative in respect of a claim by the defendants against NZCEL, they limit recovery of damages to $12,700.

Defendants' submissions

[282] The defendants plead breach of contract, negligence and misleading and deceptive conduct under the Fair Trading Act 1986 (FTA).

[283] The contractual breaches alleged by the defendants are that NZCEL failed to prepare an ISA that represented the correct per cent NBS rating for the Property and the ISA was not prepared with reasonable skill, care and diligence, in that it reached an incorrect conclusion on the NBS rating.

[284] The defendants also plead that NZCEL owed the defendants a duty of care when undertaking its assessment of the Property's NBS rating and the preparation of the ISA, to carry out any work with the degree of skill, care and diligence normally expected of a competent professional. The defendants say NZCEL negligently breached that duty by failing to prepare an ISA that represented the correct per cent NBS rating for the Property and/or carried out its work in such a way that it fell below the standard of reasonable skill and care expected of a professional engineer.

[285] The FTA claim relates to the ISA and the Covering letter which, the defendants say, misled and/or deceived them as to the correct per cent NBS rating for the Property, in breach of s 9 of the FTA.

[286] The defendants concede that cl 11 of the Agreement limits NZCEL's liability to five times its fee in the context of the claims for breach of contract and negligence. But they say it does not apply to the Covering letter, which falls outside of the scope of NZCEL's engagement and, in respect of the additional claim for misleading and deceptive conduct under s 9 of the FTA, the default position applies. That is, NZCEL has not contracted out of its obligations under the FTA and is unable to do so.

[287] They say the Trust is not "in trade".[82] The Trust held the Property as landlord to receive rental and only elected to sell once the Property ceased to be beneficial for that purpose. This was the simple disposition of an asset; the Trust was not participating in an "activity of commerce" or an "undertaking" in doing so. The defendants rely on *Malayan Breweries Ltd v Lion Corporation Ltd* and *Cashmore v Sands* for that submission.[83] The Trust is not

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82 Section 5D of the Fair Trading Act 1986.

83 *Malayan Breweries Ltd v Lion Corporation Ltd* HC Auckland CL45/88, 6 May 1988 at 82 et seq; and *Cashmore v Sands* HC Wanganui CIV-2004-483-7, 7 February 2007.

a builder or property developer, and nor is it in the business of buying and selling buildings (or upgrading and developing buildings).

[288] The defendants also say that the limitation of liability clause does not specifically allow for the type of conduct or expressly exclude claims under the FTA. The parties have not contracted out of s 9, s 12A, s 13 or s 14(1) of the FTA,[84] which is necessary for the s 5D exception to apply.[85] The Agreement makes no explicit reference to these provisions, nor is there a clause purporting to contract out of the FTA altogether.

[289] The defendants say that as a result of NZCEL's breaches, they relied on the ISA when marketing the Property for sale and the plaintiff relied on the ISA when purchasing the Property. If the defendants are liable to the plaintiff, NZCEL is therefore liable to the defendants.

NZCEL submissions

[290] NZCEL says that the ISA was not incorrect, nor negligently prepared. If it was, NZCEL's advice did not cause TADD's loss. It says the limitation of liability clause applies in respect of all three causes of action against it.

[291] As to the "correctness" of the ISA, NZCEL says an ISA is a different and less detailed assessment than a DSA. Several inputs into the IEP require the exercise of judgment and opinion by the assessing engineer and these can materially impact the assessed per cent NBS. The two principal judgment inputs are a building's ductility and "Factor F", which is where an engineer can make an allowance for other factors that the engineer considers should be taken into account regarding the building.

[292] Here, the matters of judgment which the experts agree can significantly impact on the ISA outcome were within the range of professional judgment. Mr Robertson's evidence for the defendants was that the ISA was prepared "correctly" and in accordance with the Guidelines. The ISA appropriately highlighted the main issues with the building.

[293] NZCEL also says that, in assessing the defendants' claim, NZCEL's advice must be read together. The advice to the Trust comprised the ISA itself, but also Ms Spaak's 15 August 2017 email to Ms Weine, which said "We expect the same result for a detailed assessment" and, consistent with that, Ms Spaak's 5 September 2017 email to Ms Weine which said "… we could do a DSA but we believe there is no chance of bringing it above 60% NBS". The 6 October Covering letter, which advises that a DSA is much more comprehensive than an ISA, is also part of the overall advice. When read together, the advice conveys that a DSA is more complex than an ISA, and the ISA figure may change if a DSA is obtained. NZCEL should not be prejudiced because some aspects of its advice were not disclosed to prospective purchasers, including the plaintiff.

[294] NZCEL says that, in any event, the wording of cl 11 of the Agreement is broad enough in its terms to capture the FTA claim, as well as the contract and tort claims.

[295] It also says that cl 11 is operative in relation to the FTA claim, by virtue of s 5D of the FTA. Section 5D provides an exception to the long-standing general rule that parties are unable to contract out of the Act, for parties in trade.

[296] NZCEL says all the requisite elements of s 5D are present in this case:

(a) the Agreement was in writing;

(b) the services were supplied and acquired in trade;

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84 Only s 9 of the Fair Trading Act is relevant here.

85 Section 5D(3)(c)(ii).

(c) all parties to the Agreement were in trade and agreed to contract out; and

(d) it is fair and reasonable that the parties are bound by the provision in the Agreement.

[297] NZCEL says its advice was not causative of any loss the plaintiff has suffered: NZCEL did not damage the Property and the Property is not earthquake-prone because of anything NZCEL has done. If its advice was incorrect and the Property has a lower per cent NBS than it assessed, there is a question whether the defendants have received a windfall for an asset that had a value substantially less than the plaintiff paid. NZCEL says it should not be liable to the defendants if they have to pay back that windfall, as that would effectively mean giving back the windfall to the defendants.

[298] NZCEL relies on *MSC Consulting Group Ltd v Oyster Management Ltd*.[86] In *MSC Consulting Group Ltd v Oyster Management Ltd*, MSC was engaged by the manager of a commercial building in Auckland to undertake a review of the building's seismic performance, to reassure the manager and the tenants of the building. MSC produced an IEP which concluded the building had an NBS rating of 72 per cent. The building manager then commissioned MSC to prepare a detailed engineering evaluation (DEE) which was provided to the building manager and tenants of the building (including the ANZ bank) in September 2012. The DEE assessed the building at 87 per cent NBS. In October 2014, Oyster Management Ltd entered into a conditional agreement to buy the building. During the due diligence process, the manager provided Oyster with a copy of the DEE. The purchase of the building became unconditional in November 2014. In April 2017, ANZ instructed another firm of engineers to undertake a high-level review of MSC's IEP and DEE. That report assessed the building as having an per cent NBS rating of less than 20 per cent. MSC subsequently revised its rating to 23 per cent NBS.

[299] Oyster brought proceedings against MSC, including a claim for misstatements in the IEP and DEE reports.

[300] On appeal from the High Court's refusal to grant summary judgment to MSC and to strike out the claim against it, the Court of Appeal said:[87]

> On one analysis, if the previous owner had discovered the true position during its period of ownership, it could not have recovered the cost of earthquake strengthening in a claim for negligent misstatement. *That loss was not caused by its reliance on the report. The effect of its reliance on the report was a false sense of security and delayed discovery of the building's structural weakness*. The losses would have been limited to losses consequential on that delay such as increases over time in the cost of earthquake strengthening, the inability to take advantage of a more favourable rental market and losses associated with tenanting decisions including wasted expenditure.

[301] The Court went on to say:[88]

> How, we asked, can it be right for there to be dramatically expanded liability just because the building has changed hands, especially bearing in mind the general principle that only losses within the scope of the duty are recoverable?

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86 *MSC Consulting Group Ltd v Oyster Management Ltd* [2020] NZCA 417.
87 At [55] (emphasis added).
88 At [57].

[302] NZCEL says that analysis applies in this case too. The effect of any reliance on NZCEL's report is a false sense of security in, and delayed discovery of, the Property's structural weaknesses. It is the structural weakness that is the plaintiff's concern, and that structural weakness has not been caused by NZCEL.

Discussion

[303] The defendants' first two causes of action relate only to the ISA itself. The FTA claim relates to the ISA and to the Covering letter. The defendants say that the Covering letter is outside the ambit of the contract between the parties.

Breach of contract

[304] The contractual breaches alleged against NZCEL are that:

(a) The ISA incorrectly assessed the Property as having a 60 per cent NBS rating.

(b) The ISA was not prepared with reasonable skill, care and diligence.

[305] I consider the second of these first.

[306] The standard of care of an engineer when making a statement is the degree of skill and competence that an ordinary member of the profession would bring to the same task at the time the statement is made.[89] As NZCEL submits, the standard is similar to the standard in the Agreement which it signed with the Trust, which said "In providing the Services the Consultant shall exercise the degree of skill, care and diligence normally expected of a competent professional."

[307] The only evidence that directly addressed the manner in which the NZCEL ISA was prepared was from Mr Johnstone for NZCEL and Mr Robertson for the defendants. Mr Robertson says he carefully examined the NZCEL report and performed his own independent ISA. Mr Robertson disagrees with NZCEL's approach to the ISA in some respects. His criticisms of the ISA relate to the building global ductility[90] and Factor F.[91] Mr Johnstone responds to these differences by explaining the approach that was taken by NZCEL to choose a ductility factor of three and by explaining the factors that influenced Factor F.

[308] And, NZCEL submits, those disagreements were matters of professional judgment and the outcomes were within the scope of that judgment and do not demonstrate negligence by NZCEL.

[309] Mr Robertson himself says in relation to ductility "at ISA level of investigation, this is entirely a judgement call based on observations of the building and its drawings".

[310] NZCEL also notes that, other than those two differences, Mr Robertson's evidence is that, while his rating of 43 per cent NBS differed from NZCEL's rating of 60 per cent NBS, his result achieves the same classification as NZCEL—that is, Grade "C" (earthquake risk).

[311] As Mr Robertson noted: "I disagree with some aspects of NZCEL's ISA and the statements made by NZCEL. However, I consider the ISA was prepared correctly, and in accordance with the ISA procedure in Part B of the MBIE Guidelines."

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89 *McLaren Maycroft & Co v Fletcher Development Co Ltd* [1973] 2 NZLR 100 (CA) at 107–108.

90 NZCEL uses a factor of 3.0 and Mr Robertson uses a factor of 2.0.

91 NZCEL uses a factor of 1.2; Mr Robertson says it should not have exceeded 1.0.

[312] In relation to Mr Johnstone's Covering letter, Mr Robertson disagrees with the statement that the ISA is "probably" going to exceed 70 per cent NBS following a DSA. Mr Robertson says that neither the building drawings nor the ISA process gave support for this prediction. Mr Robertson notes that the ISA correctly identifies the building's potential critical structural weakness, which is why he considers that the 70 per cent NBS prediction should not have been made. He also identifies two other critical structural weaknesses: first, the hollow-core floors have only a 50 mm seating on the support beams; second, the highly torsional building (that is the stiff block wall right over to the side). For these reasons, he says the predictions of a better result should not have been made.

[313] Mr Johnstone disagreed with Mr Robertson on the question whether a DSA was likely to lead to a higher per cent NBS than the ISA. His evidence was that NZCEL carries out approximately 100 assessments or strengthening jobs per year and, based on that experience, "we get a better number if we do a better analysis". There is some support for that view in the Guidelines which state, for example, "The IEP is intended to be somewhat conservative, identifying some buildings as having a lower *%NBS* rating than might be shown by subsequent detailed investigation to be the case."[92]

[314] I do not accept that the Covering letter was outside the scope of NZCEL's engagement, and therefore not caught by the limitation of liability clause. The contract was general in its terms—"Scope and nature of the Services: IEP & report for a building. 3 storey building, late 1970s" and certainly broad enough to capture incidental services such as the Covering letter, which was a record of a telephone conversation initiated by Ms Weine, and directly related to the ISA. It was not a case of Mr Johnstone undertaking work for which NZCEL was not engaged. Nor did Mr Johnstone know the Covering letter was to be provided to, and possibly relied on, by prospective purchasers.

[315] On the basis of Mr Johnstone's evidence and the defendants' own evidence, from Mr Robertson, I cannot conclude that the ISA was not prepared with reasonable skill, care and diligence.

[316] Turning to the first limb of the breach of contract claim (failure to prepare an ISA that represented the correct per cent NBS rating), notwithstanding my conclusion that the ISA was an expert report in the hands of the plaintiff, as the Guidelines note, "[d]ue to the qualitative nature of the ISA it should not come as a surprise that, in some circumstances, assessments of the same building by two or more experienced engineers may differ—sometimes significantly".[93] The Guidelines require that the factors on which the relevant judgments are based are articulated. Those articulations might be found to be wrong. That is not the case here. There is no evidence that the judgment inputs made by Ms Spaak were outliers. Mr Robertson would have used different inputs but overall he agreed that a proper process was followed.

[317] The ISA itself is not "erroneous" or "wrong". But what the vendors represented about the status of the Property, including by reference to the ISA, was incorrect, as assessed by all of the other three seismic assessments

92 Guidelines, above n 1, at B3.4.
93 Guidelines, above n 1, at A9.

conducted. The problem here is not with the ISA itself, but with the way the vendors used it to market the Property.

[318] The statement in the ISA that the Property was 60 per cent NBS was subsequently contradicted by the two DSAs and Mr Robertson's ISA. However, the defendants' own evidence (from Mr Robertson) is that NZCEL prepared the ISA correctly and in accordance with the Guidelines. To that extent, NZCEL exercised the "degree of skill, care and diligence normally expected of a competent professional", in terms of cl 4 of the Agreement. I accept that, where Mr Robertson would have taken a different approach from NZCEL (in respect of global ductility and Factor F), those differences were within the acceptable range of professional judgment and did not indicate negligence by NZCEL.

[319] The defendants' claim of negligent breach of contract is not made out.

[320] The defendants also plead a separate breach of contract, that the ISA incorrectly assessed the Property at 60 per cent NBS. Although not pleaded this way, I infer that the defendants rely on an implied term of the Agreement that the NBS rating in the ISA would be correct.

[321] I do not think that cause of action is made out either. As I have already found, NZCEL exercised the requisite due skill and care. All parties accept that an ISA is different to a DSA and that, even within the strictures of an ISA, reasonable careful experts may arrive at different results, which are nevertheless within the range of professional judgment.

[322] That finding is not inconsistent with my finding that the representations made by the defendants to the plaintiff (including the statement in the ISA of a 60 per cent NBS) were incorrect. The representations arose in a different relationship—there, as between the plaintiff and the defendants, whereas the breach of contract issue arises as between the defendants and the third party. As I have found, the representations were made as a "package" and were made by the defendants to the plaintiff (and other prospective purchasers) in the absence of the further information known by the defendants which might have changed the plaintiff's interpretation of, and reliance on, the representations.

Negligence

[323] In relation to the negligence cause of action, it is not disputed that NZCEL owed a duty of care to the defendants to carry out any work with the degree of skill, care and diligence normally expected of a competent professional. But, for the same reasons as in relation to the contractual negligence cause of action, the defendants' second cause of action in negligence must fail.

Fair Trading Act

[324] The defendants seek to avoid the effect of cl 11 (the limitation of liability clause) by pleading that the ISA and the Covering letter misled and/or deceived the defendants, in breach of the FTA.

[325] Section 9 of the FTA provides:

> **9 Misleading and deceptive conduct generally**
>
> No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

[326] The purpose of s 9 is to promote fair dealing in trade by prohibiting conduct which, when examined objectively, is deceptive or misleading in the particular circumstances of the case. That analysis is contextual: conduct towards a sophisticated businessperson may be less likely to be capable of misleading or deceiving than similar conduct directed towards a consumer.[94] The conduct as a whole must be looked at, rather than discrete elements of it.[95]

[327] The leading decision in determining whether conduct is misleading or deceptive or is likely to mislead or deceive is the decision of the Supreme Court in *Red Eagle Corporation Ltd v Ellis*.[96] The Court held that whether there is misleading or deceptive conduct should be assessed by asking the following question:[97]

> It is, to begin with, necessary to decide whether the claimant has proved a breach of s 9. That section is directed to promoting fair dealing in trade by proscribing conduct which, examined objectively, is deceptive or misleading in the particular circumstances. Naturally that will depend upon the context, including the characteristics of the person or persons said to be affected. Conduct towards a sophisticated businessman may, for instance, be less likely to be objectively regarded as capable of misleading or deceiving such a person than similar conduct directed towards a consumer or, to take an extreme case, towards an individual known by the defendant to have intellectual difficulties. Richardson J in *Goldsboro v Walker* said that there must be an assessment of the circumstances in which the conduct occurred and the person or persons likely to be affected by it. The question to be answered in relation to s 9 in a case of this kind is accordingly whether a reasonable person in the claimant's situation—that is, with the characteristics known to the defendant or of which the defendant ought to have been 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. Of course the fact that someone was actually misled or deceived may well be enough to show that the requisite capacity existed.

[328] Section 9 is not intended to provide a mechanism to deal with every situation in which parties consider that they have suffered a loss as a result of accepting the views of those acting for them. As (then) Elias J said in *Des Forges v Wright*, s 9 "is not to be turned into a general warranty by a vendor of the expectations of the purchaser".[98]

Opinion or statement of fact?

[329] The first question is whether advice of the kind embodied in the ISA and the Covering letter can amount to misleading or deceptive conduct under the FTA, or whether it comprises a statement of opinion. If opinion, it is not actionable if it is a reasonably held, reasonably based opinion.[99] In addition, representations can only be misleading or deceptive where they relate to present or past facts. Predictions as to the future will only be misleading or

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94 *Red Eagle Corporation Ltd v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492, (2010) 11 NZCPR 157 at [28].
95 *Premium Real Estate v Stevens* [2008] NZCA 82, [2009] 1 NZLR 148 at [48]–[49].
96 *Red Eagle Corporation Ltd v Ellis*, above n 94, at [28].
97 At [28] (footnotes omitted).
98 *Des Forges v Wright* [1996] 2 NZLR 758 (HC) at 764.
99 *Premium Real Estate v Stevens*, above n 95, at [54].

deceptive if the person making the prediction knew it to be false or did not have an appropriate basis for making such a statement.[100]

[330] As I have previously concluded, parts of the Covering letter amounted to prediction of a future possibility. If there were any doubt about that conclusion as between the plaintiff and the defendants, as between Ms Weine and NZCEL, the context in which the letter was provided makes it very clear that it was a statement of future possibility. In addition, as previously discussed, Ms Weine had the additional context of the email exchanges with Ms Spaak.

[331] I have also concluded that Mr Johnstone's letter was, as a prediction of a future possibility, an honestly held opinion. While Mr Robertson is critical of the statement in the Covering letter that a DSA is likely to result in a higher per cent NBS rating, Mr Johnstone gave clear evidence that, in his extensive experience of undertaking building seismic assessments, generally a better per cent NBS is obtained on a more detailed assessment. As I have noted, the Guidelines provide some support for that view.

[332] I reiterate that there was a reasonable basis for the opinion expressed by Mr Johnstone in the Covering letter.

[333] Was it reasonable for the Trust (in effect, Ms Weine) to have been misled by the Covering letter? Ms Weine already had the email provided by Ms Spaak which said "we believe there is no chance of bringing [the Property] above 60% NBS". It was Ms Weine who nevertheless pressed Mr Johnstone as to whether a better result could be prepared. That conversation was reflected in the October Covering letter.

[334] I turn to the question posed in *Red Eagle Corporation Ltd v Ellis*, whether a reasonable person in Ms Weine's situation would likely have been misled or deceived. The FTA does not define the words "mislead" and deceive". The *Concise Oxford English Dictionary* defines "mislead" as "cause to have a wrong impression about someone or something".[101] It defines "deceive" as "deliberately cause (someone) to believe something that is not true".[102]

[335] The second limb—"deceive"—has no application here. There is no suggestion that NZCEL withheld information from the defendants or deliberately downplayed factors relevant to the per cent NBS rating, as in a number of "leaky building" cases where a claim under the FTA succeeded.[103] On the contrary, the email communications between Ms Weine and Ms Spaak and the discussion between Ms Weine and Mr Johnstone, recorded in the Covering letter, make clear that the front columns of the building were a "limiting factor" and a more detailed assessment might result in a different rating.

[336] I conclude that it would not have been reasonable for Ms Weine, or a reasonable person in her situation, to have been misled by the Covering letter.

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100 *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgoa Enterprises Ltd* (1999) 8 TCLR 612 (HC) at [302].

101 Catherine Soanes and Angus Stevenson *Concise Oxford English Dictionary* (online ed, 11th ed, Oxford University Press, Oxford, 2008).

102 Soanes and Stevenson, above n 101.

103 See for example *Steel v Spence Consultants Ltd* [2017] NZHC 398, (2017) 18 NZCPR 540; *Roberts v Jules Consultancy Ltd* [2019] NZHC 555, (2019) 21 NZCPR 163; and *Bhargav v First Trust Ltd* [2022] NZHC 1710.

[337] As to whether Ms Weine might have been misled by the ISA, as the Supreme Court emphasised in the *Red Eagle Corporation Ltd v Ellis* case, the Court should not apply a rigid approach. Variation in circumstances from case to case requires a flexible approach. Applying that approach, I note Ms Weine is, and was at the relevant time, a sophisticated and experienced businesswoman. She had contracted with NZCEL on two other occasions, in relation to commercial properties she owned in her personal capacity. She had had several conversations with Ms Spaak about its limitations and the unlikelihood of being able to obtain a higher per cent NBS rating for the Property on a more detailed assessment. Ms Weine had nevertheless subsequently inquired of Mr Johnstone whether he thought a higher rating could be achieved. Ms Weine had also discussed with Ms Spaak the possibility of getting a DSA for the Property but, I infer, decided not to because of the consequential delay to the sale, and possibly the cost. She was therefore aware of the limitations, and possible variability, of seismic assessments.

[338] I conclude that a reasonable person in Ms Weine's situation would not have been likely misled by the ISA and she was not actually misled.

[339] The defendants' claim under the FTA therefore fails.

Effect of ss 5C and 5D of the FTA

[340] In the event I am wrong in that conclusion, I go on to consider whether the limitation of liability clause in the Agreement would apply to any liability on NZCEL under the FTA.

[341] Section 5C of the FTA provides:

> **5C No contracting out: general rule**
>
> (1) The provisions of this Act have effect despite anything to the contrary in any agreement.
>
> (2) A provision of an agreement that has the effect of overriding a provision of this Act (whether directly or indirectly) is unenforceable.
>
> …

[342] Section 5D provides an exception to the general rule in s 5C, if various conditions are satisfied. Section 5D states:

> **5D No contracting out: exception for parties in trade**
>
> (1) Despite section 5C(1) and (2), if the requirements of subsection (3) are satisfied, parties to an agreement may include a provision in their agreement that will, or may (whether directly or indirectly), allow those parties to engage in conduct, or to make representations, that would otherwise contravene section 9, 12A, 13, or 14(1); and in that case,—
>
> (a) the provision is enforceable; and
>
> (b) no proceedings may be brought by any party to the agreement for an order under section 43 in relation to such a contravention of section 9, 12A, 13, or 14(1).
>
> (2) A provision of the kind referred to in subsection (1) includes, for example,—
>
> (a) a clause commonly known as an entire agreement clause:
>
> (b) a clause that acknowledges that a party to the agreement does not rely on the representations or other conduct of another party to the agreement, whether during negotiations prior to the agreement being entered into, or at any subsequent time.
>
> (3) The requirements referred to in subsection (1) are that—
>
> (a) the agreement is in writing; and

(b) the goods, services, or interest in land are both supplied and acquired in trade; and
(c) all parties to the agreement—
(i) are in trade; and
(ii) agree to contract out of section 9, 12A, 13, or 14(1); and
(d) it is fair and reasonable that the parties are bound by the provision in the agreement.

(4) If, in any case, a court is required to decide what is fair and reasonable for the purposes of subsection (3)(d), the court must take account of all the circumstances of the agreement, including—
(a) the subject matter of the agreement; and
(b) the value of the goods, services, or interest in land; and
(c) the respective bargaining power of the parties, including—
(i) the extent to which a party was able to negotiate the terms of the agreement; and
(ii) whether a party was required to either accept or reject the agreement on the terms and conditions presented by the other party; and
(d) whether the party seeking to rely on the effectiveness of a provision of the kind referred to in subsection (1) knew that a representation made in connection with the agreement would, but for that provision, have breached section 12A, 13, or 14(1); and
(e) whether all or any of the parties received advice from, or were represented by, a lawyer, either at the time of the negotiations leading to the agreement or at any other relevant time.

(5) To avoid doubt, nothing in this section—
(a) prevents the Commission from bringing proceedings for an offence under this Act (including an offence under section 12A, 13, or 14(1)) against a party to the agreement referred to in subsection (1):
(b) limits the application of subpart 3 of Part 2 of the Contract and Commercial Law Act 2017.

[343] The defendants submit that not all of the criteria in s 5D(3) are satisfied and therefore the limitation of liability clause in the Agreement cannot apply to the FTA claim against NZCEL. In particular, they say the Trust did not acquire the services from NZCEL in trade and did not agree to contract out of s 9, s 12A, s 13 or s 14(1).

[344] I first consider whether the Trust was "in trade".

[345] "Trade" has a wide definition:[104]

> **trade** means any trade, business, industry, profession, occupation, activity of commerce, or undertaking relating to the supply or acquisition of goods or services or to the disposition or acquisition of any interest in land

[346] It is well-accepted that a person who engages in a one-off transaction for the sale of land may be acting "in trade" for the purposes of the FTA.[105] In *Red Eagle Corporation Ltd v Ellis*, the Supreme Court commented on the meaning of "in trade" in the following terms:[106]

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104 Section 2 of the Fair Trading Act.

105 *Cochrane v Clark* CA66/04, 24 February 2005 at [36], referring to *Undrill v Senior* HC Blenheim CP9/94, 20 August 1997 and *Sunnylea Farms Ltd v Gray* (2004) 21 NZTC 18,667

> This is a broad term encompassing all kinds of commercial dealing by the party whose conduct is under examination. The section applies to transactions between large, sophisticated corporations as well as to those of persons dealing with consumers.

[347] Whether a one-off transaction is "in trade" is a question of fact to be determined on the facts and circumstances of the particular case.[107] However, as Venning J observed in *Mitchell v Zhang*, the wording of the definition of "trade" supports a finding that there must be some element of commercial dealing in the disposition.[108]

[348] The Trust has been a commercial landlord since 1993 and has owned the Property since that time. It owns another commercial property in Levin. It held the Property for the purposes of receiving rental and sold it only when it was no longer useful for that purpose. However, the business of ownership of a building or buildings for the purpose of commercial rental must necessarily or implicitly encompass a sale of the building.[109] The sale of a capital asset, when the everyday business of the vendor does not include involvement in buying and selling such activities, can be activity "in trade".[110]

[349] Similarly, in *Cashmore v Sands*, while the High Court found that the sale by a family trust of a farm property was not a sale of land "in trade", there, the sale was motivated by personal (family) reasons.[111] The Judge found that there was no suggestion that the sale proceeds were to be used to engage in further activities of commerce, as for example, by buying another farm. There was not any continuity of farming activities such as to give the transaction a commercial flavour. That is unlike the present case.

[350] I conclude that the Trust was "in trade" when it sought the ISA from NZCEL, for the purpose of selling the Property.

[351] As to whether the defendants agreed to contract out of the FTA, relevant factors include that the Trust is managed by two professional trustees, one of whom is a lawyer who charges for the professional services he renders to the Trust. The Trust signed the Agreement at arms-length with NZCEL for the provision of services, for NZCEL to undertake an assessment of one of the Trust's commercial buildings. The Agreement provides a framework of rights and obligations between the parties. Ms Weine was familiar with engaging NZCEL to provide structural engineering services for two commercial buildings she owned. In this case, she was contracting with NZCEL on the same contractual terms contemporaneously.

[352] The Agreement includes a provision whereby the parties "contract out" of their rights by way of a limitation on liability. The question is whether by that provision the parties were agreeing to limit NZCEL's liability in relation to any FTA claim.[112]

[353] Clause 11 is set out at [276] above.

(HC). See also *Mitchell v Zhang* [2017] NZHC 3208 at [69]; and *Mitchell v Murphy (as trustee of the Victor Sydney Trust)* [2019] NZHC 3262 at [265].

106 *Red Eagle Corporation Ltd v Ellis*, above n 94, at [26], fn 13.

107 *Mitchell v Murphy (as trustee of the Victor Sydney Trust)*, above n 105, at [265] citing *Hunt v Macartney* HC Auckland CIV-2010-404-1881, 25 August 2010 at [27].

108 *Mitchell v Zhang*, above n 105, at [73].

109 *Glocken Holdings Ltd v CDE Co Ltd* (1997) 8 TCLR 278 (HC).

110 *Newell v Garland* (1989) 3 TCLR 598 (HC).

111 *Cashmore v Sands* [2007] BCL 267, (2007) 8 NZBLC 101,897 (HC).

112 The only Fair Trading Act claim in this proceeding is under s 9.

[354] The approach to the interpretation of exclusion and limitation clauses was discussed by the Supreme Court in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*,[113] and summarised in *Savvy Vineyards 4334 Ltd v Weta Estate Ltd*:[114]

> [24] There is no dispute as to the approach to interpretation applicable. The approach is that set out by this Court in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*. The Court in that case said the approach was an objective one. The Court went on to accept that "in interpreting commercial contracts the courts should have regard to their commercial purpose and to the structure of the parties' bargain, to the extent that they can reliably be identified". The Court also said:
>
> > [63] While context is a necessary element of the interpretive process and the focus is on interpreting the document rather than particular words, the text remains centrally important. If the language at issue, construed in the context of the contract as a whole, has an ordinary and natural meaning, that will be a powerful, albeit not conclusive, indicator of what the parties meant. But the wider context may point to some interpretation other than the most obvious one and may also assist in determining the meaning intended in cases of ambiguity or uncertainty.

[355] As Gault J concluded in *CBL Insurance Ltd (in liq) v Johnstone (as liquidators of CBL Insurance Ltd (in liq))*,[115] this approach to contractual interpretation applies to exclusion and limitation clauses.[116]

[356] The services to be provided by NZCEL are defined as "IEP & report for a building. 3 storey building, late 1970s". The Agreement constitutes the whole agreement between the parties.

[357] While Churchman J in *Philip Moore & Co Ltd v Surridge* concluded[117] that there was no indication that the parties in that case had applied their minds at all to the FTA, let alone specifically agreed to contract out of s 9, s 12A, s 13 or s 14(1), that case was not directly analogous. It concerned a whole agreement clause in a deed of settlement in a family dispute involving a joint venture agreement. In my view, a whole agreement clause can be differentiated from a limitation of liability clause. A limitation of liability clause is not per se allowing the parties to engage in otherwise contravening conduct—it is not allowing misleading and deceptive conduct. Here, the terms of the Agreement reflect the parties' agreement that there should be a cap on NZCEL's liability for contravening conduct, of any sort.

[358] In *Adventurer Hobson Ltd v Cockery*, where the plaintiff contracted the defendant's company to prepare a fire safety report setting out the legislative requirements for converting commercial premises into hostel

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113 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432.

114 *Savvy Vineyards 4334 Ltd v Weta Estate Ltd* [2020] NZSC 115, [2020] 1 NZLR 714 per Ellen France J (footnotes omitted).

115 *CBL Insurance Ltd (in liq) v Johnstone (as liquidators of CBL Insurance Ltd (in liq))* [2021] NZHC 1393 at [90].

116 While noting that in *Dairy Containers Ltd v Tasman Orient Line CV* [2004] UKPC 22, [2005] 1 NZLR 433, [2005] 1 WLR 215, the Privy Council said that any ambiguity or lack of clarity must be resolved against the party seeking to exclude or limit liability. However, the Court of Appeal expressed its reservations about that comment, in *i-Health Ltd v iSoft NZ Ltd* [2011] NZCA 575, [2012] 1 NZLR 379, and, as the Court of Appeal said in *Trustees Executors Ltd v QBE Insurance (International) Ltd* [2010] NZCA 608, there is a need for a genuine ambiguity to exist before the contra proferentem rule is applied by a court.

117 *Philip Moore & Co Ltd v Surridge* [2018] NZHC 562 at [145].

accommodation and the costs for conversion, the High Court held that a limitation clause with the same wording as cl 11 limits recovery under s 9 of the FTA to five times the fee charged, as a consequence of s 5D.[118]

[359] Although cl 11 does not specifically mention the FTA, the wording of the clause is very broad, capturing an extensive range of potential claims, damages, liabilities and losses against NZCEL. The ordinary and natural meaning of the words "whether in contract, tort or otherwise" is in my view broad enough to capture a claim under the FTA, and limits NZCEL's liability to five times the amount paid by the Trust under the Agreement.

[360] Finally, in terms of the s 5D criteria, is it fair and reasonable that the parties are bound by the limitation of liability clause?

[361] The High Court in *Sipka Holdings Ltd v Merj Holdings Ltd*,[119] a decision that predated enactment of s 5D of the FTA, discussed the application of the similar "fair and reasonable" requirement in s 4 of the Contractual Remedies Act 1979. As Wylie J noted, s 4(1) conferred a wide discretion to determine whether it was reasonable that (in that case) an "entire agreement" clause should be conclusive.[120] Factors said to be relevant to the decision included the subject matter and value of the transaction, the respective bargaining strengths of the parties and whether any party was represented or advised by a solicitor at the time of the negotiations or other relevant time. The Court noted that the apparent purpose of s 4(1) is:[121]

> … to protect one party's relative vulnerability from another party's power to impose an exemption from liability which is contrary to the factual reality or an existing legal obligation and is thus unreasonable and unfair. The section is a mechanism for striking balances, both individually between parties and conceptually between freedom of contract and unfair or unreasonable commercial conduct.

[362] The factors detailed at [333] above are relevant to this assessment. The Agreement was an established, widely used, standard form contract; Ms Weine was an experienced business person, engaged in the ownership and management of commercial properties; she had engaged NZCEL on the same terms of contract on two other occasions; NZCEL received $2,540 (excluding GST and disbursements) under the Agreement, in contrast to the sale price of $1,227,000 for the Property received by the defendants.

[363] In my assessment, the parties had equal bargaining strength and the defendants were not a relatively vulnerable party in entering into the Agreement. I conclude that it is fair and reasonable that the parties be bound by the limitation of liability clause.

Outcome

[364] The defendants are liable to the plaintiff for contractual misrepresentation and, in the alternative, common mistake.

[365] The defendants must pay the plaintiff $592,000, the difference in value between the Property as represented and the actual value of the Property, plus $17,842.40, the cost of the Spencer Holmes DSA, together with interest on that total sum from the date the cause of action arose until the judgment debt is paid pursuant to the Interest on Money Claims Act.

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118 *Adventurer Hobson Ltd v Cockery* [2020] NZHC 675, [2020] 2 NZLR 544 at [110].

119 *Sipka Holdings Ltd v Merj Holdings Ltd* [2015] NZHC 1980 at [56].

120 At [56].

121 At [56], citing *PAE (New Zealand) Ltd v Brosnahan* [2009] NZCA 611, (2010) 9 NZBLC 102,862 at [15].

[366] The defendants' claims against the third party in contract, negligence and under the FTA, fail.

Further evidence regarding the assets of the trust

[367] The parties can submit further evidence regarding the assets of the Trust and other matters regarding the trustee liability issue if they seek further resolution on this issue.

Costs

[368] I expect the parties should be able to agree costs, based on my findings in favour of the plaintiff and the third party, as set out above. If they are unable to do, brief memoranda are to be filed within 21 working days of this judgment.

Reported by: Justin Carter, *Barrister*