IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2012-404-007500
[2015] NZHC 1957

BETWEEN	ROBIN JOHN LEARY KELLY, PATRICIA ANN KELLY AND LINDA GLASSWELL as Trustees of THE KELLY FAMILY TRUST Plaintiffs
AND	LASQUE CONSTRUCTION LIMITED formerly trading as SIGNATURE HOMES First Defendant
	SIGNATURE RESIDENTIAL LIMITED trading as SIGNATURE HOMES Second Defendant
	SIGNATURE HOMES LIMITED trading as SIGNATURE HOMES Third Defendant
	STEWART CRAIG WILSON Fourth Defendant

Hearing:	25 - 29 May 2015
Appearances:	A R Gilchrist and A V Shinkarenko for Plaintiffs C M Meechan QC and A Durrant for Defendants
Judgment:	18 August 2015

JUDGMENT OF WOOLFORD J

This judgment was delivered by me on Tuesday, 18 August 2015 at 4:00 pm pursuant to r 11.5 of the High Court Rules 1985.

Registrar/Deputy Registrar

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Introduction

[1] The plaintiffs are victims of the ongoing leaky building disaster which has bedevilled the New Zealand building industry in recent years. Their house was completed in March 2002. It leaks, and requires a complete reclad. Because it is now more than ten years since its completion, the plaintiffs are unable to claim against the builder, or others who may have had some responsibility for the leaks such as the supplier and installer of the monolithic cladding, or the former North Shore City Council who inspected the house during its construction, for breach of the original building contract or negligence at the time of the house's construction.

[2] The plaintiffs therefore rely on assurances allegedly given by the builder during meetings in October 2011 and February 2012. They say that such assurances amount to a new contract with the builder and/or two other companies in the Signature Homes stable, under which they can claim the full cost of the reclad. In the alternative, they say that the conduct of the builder was misleading and deceptive under the Fair Trading Act.

[3] In the circumstances of this case, however, such assurances do not amount to a binding legal obligation, nor are they misleading or deceptive. As a consequence, the plaintiffs are unable to succeed in their claim.

Factual background

[4] On 27 July 2001 the plaintiffs, as trustees of the Kelly Family Trust, signed a contract with Lasque Construction Limited (Lasque) for the construction of a house at Lot 61, English Oaks Drive, The Oaks, Albany. Lasque was a Signature Homes franchisee and entitled to use the Signature Homes logo. It is common ground that Lasque and all other franchisees are generically referred to as Signature Homes. In terms of the contract, Lasque was required to comply with all obligations imposed on it under the Building Act 1981. In addition, clause 28.2 specifically provided:

> …The Builder warrants and undertakes that it will obtain a Code Compliance Certificate for such of the Work to be completed by it pursuant to this Agreement on or as soon as practicable after the Date of Substantial Completion.

[5] There was one other provision of significance in the contract. Clause 16.2 provided:

> …Any addition in cost (including Builders margin) resulting from work additional to the Plans and Specifications required by the Local Authority or by … the unworkability or inadequacy of the Plan or Specifications and Addendum (if any) provided by the Client or as a result of any work carried out by the Client or materials supplied by the Client (where applicable) shall be paid by the Client to the Builder as if it were a Sale Contract Variation.

[6] Lasque issued a Certificate of Completion on 6 March 2002. No Code Compliance Certificate was, however, ever obtained by Lasque.

[7] One of the plaintiffs, Dr Robin Kelly, discovered quite by chance, in September 2010, that no Code Compliance Certificate had been issued. Dr Kelly contacted the North Shore City Council (Council), now the Auckland Council. On 22 October 2010, the plaintiffs received a comprehensive letter from the Council advising them that it was not satisfied that the installed cladding systems and other elements complied with the New Zealand Building Code. It advised the plaintiffs that they should engage the services of a certified weathertightness surveyor to investigate all weathertightness issues and provide a report and remedial works proposal for Council approval. Dr Kelly promptly advised the builder, specifically the managing director of Lasque, Mr Stewart Wilson, and the Lasque employee who had been in charge of the construction of the house, Mr Brian Kennedy. The plaintiffs committed to an amicable resolution of the matter and actively engaged with both the Council and Lasque in a co-operative and constructive way.

[8] As part of the overall house maintenance, the plaintiffs had earlier commissioned two independent weathertight surveys in July 2005 and May 2010 from Futuresafe Building Inspections Limited and Buy Sure Property Inspections Limited. Both reports were in general satisfactory and did not reveal any issues with the house, although the 2010 report did identify three areas for further investigation. Accordingly, notwithstanding the initial refusal of the Council to issue a Code Compliance Certificate without a report, the plaintiffs wrote to the Council on or about 5 November 2010 referring to the two earlier surveys and requesting the grant of a Code Compliance Certificate. The plaintiffs also sought a guarantee from Lasque, which they thought might increase the chances of the Council issuing a

Code Compliance Certificate. Accordingly, Lasque provided a "weathertightness guarantee" dated 11 November 2010 to the plaintiffs for submission to the Council. It stated:

> We, your Signature Homes Franchise Builder (Lasque Construction Limited) agree to use best practice when constructing your home, enabling us to guarantee its weathertightness for 10 years.
>
> The guarantee will come into effect from the date of your home's practical completion.
>
> …
>
> The following should be noted with regards to the above property:
>
> - Practical Completion occurred March 2002.
> - The client has two Weathertightness reports and has given copies to the builders, that they have had carried out, as part of a good practise of ensuring their home is maintained to the highest standard. A practise that we encourage all our clients to do when we hand over the home to the owner/s.

[9] On 18 November 2010, the Council notified the plaintiffs that, now that they had visited the site and identified some weathertightness defects, it was obliged to require that these be remedied before it could issue a Code Compliance Certificate.

[10] On 23 November 2010, a comprehensive meeting was held on site between Dr Kelly, Mr Kennedy of Lasque and representatives of the Council. The purpose of the meeting was to review all of the risk issues/defects previously identified by the Council inspections (as recorded in the Council's letter of 22 October 2010) and to work out and prepare a plan of remedial works. Minutes were taken at that meeting.

[11] On 3 December 2010, Dr Kelly wrote for the first time to Mr Gavin Hunt, the executive director of the franchisor, Signature Homes Limited (SHL). Mr Hunt was also a director of Lasque. Dr Kelly says he wrote to Mr Hunt because of advice he received from Mr Kennedy (who is now deceased), who had apparently expressed concern to him that his superiors were keen to back out of any commitment to his house - although Dr Kelly did not disclose this to Mr Hunt. In the letter to Mr Hunt, Dr Kelly noted that Signature Homes had admitted to him and the Council that they were in error in that the final check of the house was completely overlooked. He

noted that he was meeting Mr Wilson later that day and was hopeful that Mr Wilson would address their concerns to their satisfaction. If not, Dr Kelly requested an appointment to meet Mr Hunt.

[12] Dr Kelly advised Mr Hunt later that day that there now appeared to be some way forward and that Mr Wilson and Mr Kennedy would progress with a plan. He therefore did not seek an appointment with Mr Hunt. At the meeting with Mr Wilson, Dr Kelly says he sought clarification about which company was liable for their problem and that Mr Wilson reassured him that Signature Homes was liable for any weathertightness issues. On the other hand, Mr Wilson does not recall there being any discussion about what capacity he was acting in or the status he held or any debate about whose obligation it was to obtain the Code Compliance Certificate.

[13] In any event, on 6 December 2010, Mr Wilson, as managing director of Lasque, wrote to the plaintiffs as follows:

> Thank you for the meeting on Friday 3rd December and I must apologise that you had to come into our offices to discuss the issues that have arisen with regards to your home.
>
> As discussed at our meeting:
>
> 1. Signature Homes is liable for any weathertightness issues. BK [Brian Kennedy] will visit on Tuesday, 7th December 2010 (subject to weather) and check the moisture levels.
>
> 2. Where there has been a change of specification in order to obtain a Code of Compliance certificate, Signature Homes will organise the contractor and supervise the work. The cost involved will be met by both parties.
>
> 3. As agreed, we will organise for the flashings to be installed and the moisture check to be done before any other work is carried out. If there is moisture present, then there will be no point in carrying out the other requests, until the moisture has been dealt with.
>
> Update as today
>
> 1. As you saw, BK and myself have today visited your property and carried out the moisture checks. As mentioned, a couple of them were still high, therefore, we will contact Euroclad Ltd (ex Texturite Ltd) and arrange to meet them on site. Once we have met with Euroclad Ltd, we will provide you with a programme of action.
>
> Should you have any queries, please do not hesitate to call me.

[14] On 21 January 2011, another site meeting was held. Dr Kelly, Mr Kennedy of Lasque and representatives of the Council were all present. The invasive inspection of five areas of the house carried out on that day revealed some serious weathertightness issues with the house. As a result, the Council requested that a new, full weathertightness survey be carried out by an approved surveyor. The Council confirmed its earlier advice that no Code Compliance Certificate could be provided until remedial work to the Council's satisfaction was completed.

[15] Following the site inspection on 21 January 2011, Dr Kelly sought a meeting with Mr Hunt. Mr Hunt advised Dr Kelly that he was unavailable and stated:

> I have asked Stew Wilson to personally attend to this urgently and make sure the matter reaches conclusion (this dies [sic.] not necessarily mean to your full satisfaction, I am not sure). It is Stew's responsibility to resolve this matter and I will be assisting him to achieve that.

[16] In February 2011, Lasque engaged the services of a consultant, Mr Peter Beran of North Harbour Building Consultants Limited, to assist with arranging a weathertightness survey and preparation of a plan of remedial works to satisfy the Council's requirements. In a letter to Dr Kelly on 22 February 2011, Mr Wilson, as managing director of Lasque, wrote:

> Had a meeting with Euro Clad last night. The surveyor has requested a further report as the reports you have had done have insufficient information for him and the council. I have given instructions to proceed with the report which will cost between $800 to $1000. We can discuss the splitting of the cost later. Until the report is completed nothing can be done on site.

[17] From the plaintiffs' viewpoint matters were not progressing fast enough and Dr Kelly wrote again to Mr Hunt on 6 March 2011 raising his concerns about delays. On 8 March 2011, Mr Hunt replied:

> My understanding is that the situation was discussed with you last Tuesday and is as follows:
>
> - We must follow the process that the council has implemented. No work can be started until the council and engineers have agreed the way forward;
>
> - A report has been prepared by the engineer, the cost of which is now around $3000 as the whole house has to be checked, not just the damaged area. As per Stew's e-mail of 22/2, the initial estimated cost was between $800 & $1000;

- Once the report is complete, it is forwarded to the council for approval. We are hoping that the existing building consent can be used; if not then a new consent has to be applied for, which is obviously a much more expensive proposition;

- As long as the report clears the rest of the house and the council do not request that all the cladding be removed, we can use the existing building consent, in which case we anticipate being on site and underway within 1 to 2 months;

- If the council decide that the cladding for the whole house needs to be replaced even though the report states it does not require replacement, then we will need to meet to discuss a solution, as it is our current view that Lasque and the supplier's liability relates only to the affected areas.

There is no point in meeting until we have the decision from the Council, otherwise we are only going to be discussing "what-ifs"; there may or may not be an issue between us, and until we know, I see no benefit from meeting. I will not be making a final decision on our position until I have all the facts.

We will contact you once the decision is available.

[18] On 25, 28 and 29 March 2011, Mr Mark Paterson of North Star Inspections (NZ) Limited carried out an inspection of the house and subsequently issued a moisture inspection report. The report noted that the client was Lasque. The report detailed some marginally elevated interior moisture readings as well as a number of elevated exterior moisture readings. It recommended further invasive investigation to establish the full extent of damage to timber and to provide a weathertight solution.

[19] Following North Star's report and the Council's own inspection of the house carried out on 11 July 2011, the plaintiffs received a comprehensive letter from the Council dated 15 August 2011, with an attached Notice to Fix issued by the Council. During the following months Lasque engaged Mr Beran to review the Notice to Fix and to develop a proposed scope of work to address all areas of Building Code contraventions identified in it.

[20] By September 2011 the plaintiffs were frustrated by delays and started to feel insecure about the resolution of the weathertightness problem. On 3 September 2011, Dr Kelly emailed Mr Wilson as follows:

> You will understand that we continue to need full assurance that progress is being made on our house.
>
> We need to be more informed of the proposed plan – we have questions that are best addressed with a face to face meeting, ideally with Northbridge present.
>
> This will ensure that we will not have to resort to seeking a legal opinion. Please treat our request urgently.

[21] Fearing that the delays were in some way intentional, the plaintiffs sought informal legal advice from a friend of theirs, Mr Keith Berman, a senior solicitor of many years experience and former President of the Auckland District Law Society.

[22] On 21 October 2011, Dr Kelly emailed Mr Wilson at 11:06 am requesting another update and "a written skeleton plan of action from Lasque/Signature that takes into account the council dealings". About 40 minutes after sending that email to Mr Wilson, Dr Kelly says he dropped in to see Mr Wilson at the Signature Homes office and specifically sought a pledge from Mr Wilson that the parent company "Signature Homes" would back up their commitment should Lasque "go bust" and his reassurance, because of the delays, that the ten year litigation limitation period was not going to be an issue. Dr Kelly says that at the meeting Mr Wilson reassured him on both these issues, and confirmed that "Signature Homes" would undertake, at their cost, such work as required to obtain a Code Compliance Certificate. Dr Kelly says "he shook hands with Mr Wilson on this". Dr Kelly says that he asked for such assurances because he had decided, after discussing the situation with Mr Berman, that he needed a firm assurance that guarantees, as stated in the Signature Homes magazine, website and advertising material, were to be honoured. Importantly, Dr Kelly says that he was also aware of the ten year limitation period and thought it prudent to enquire about it, since it seemed likely that matters would not be resolved within the ten year period, which was to expire in March 2012.

[23] On the other hand, Mr Wilson says that the meeting was pretty brief and that Dr Kelly simply wanted to know where things were up to with the Council and when the work was going to start. He says that Dr Kelly at no time asked for a pledge in relation to the remedial work, nor was there any mention of the "parent company" making any commitment and certainly no reference to Lasque "going bust". Mr Wilson says that Dr Kelly was concerned about how long everything was taking

and that he wanted some reassurance that Lasque would do the remedial work once the way forward had been cleared with Council.

[24] This is the first meeting relied upon by the plaintiffs at which they say assurances were given which amount to a binding legal obligation.

[25] Shortly after the meeting concluded, Dr Kelly sent a further email to Mr Wilson at 12:18 pm. He expressed thanks to Mr Wilson for seeing him without notice and requested a short written statement confirming "your intent to perform remedial work".

[26] On 25 October 2011, Mr Wilson, whose email identified him as the managing director of Lasque, wrote to Dr Kelly as follows:

> Confirming our discussion on Friday 21st that Signature Homes will attend to the remedial work on your home.

[27] At about this time, Lasque was being restructured to effectively separate the three strands of its business, being:

(a) Construction of houses for clients as a Signature Homes franchisee; and

(b) Ownership of land for future development; and

(c) Ownership of other key assets, such as show homes and offices.

[28] Lasque's accountant had been emphasising the desirability of separating the company's trading functions from its asset holding functions for some time. One of the Lasque directors had also been through a relationship property split in 2009 and was particularly focused on the desirability of restructuring the shareholding and asset owning arrangements at Lasque. At that time, Lasque had a number of houses under construction and the intention was for it to complete those projects, but not take on any new jobs.

[29] A new company, Signature Residential Limited (SRL), had been incorporated on 18 May 2011 and began trading in October 2011. It was granted the Signature Homes franchise agreements for the North Shore, Rodney and Auckland areas, to commence on 1 January 2012. Staff who had previously been employed by Lasque, including Mr Wilson (who was at that time Lasque's managing director), moved over to SRL with effect from 1 December 2011.

[30] At the same time, Lasque entered into a service agreement with SRL under which SRL was to provide project management services to enable Lasque to complete its existing contracts. One of the outstanding jobs at the time Lasque's business started to wind down was the remediation of the plaintiffs' house.

[31] The email of 25 October 2011 from Mr Wilson was the last communication Dr Kelly had with him as managing director of Lasque. From 1 December 2011, Mr Wilson's emails showed him as the managing director and subsequently, financial director, of SRL.

[32] On 22 December 2011, Dr Kelly received an email from Mr Peter Beran, with attached plans prepared by Mr Gareth Ready, a SRL employee, for submission to the Council. The attached plans were, however, in the name of Lasque.

[33] A further meeting was held on site on 9 February 2012. Dr Kelly, Mr Wilson, Mr Ready, and Mr Neil Purchase, from Euroclad Limited, were present. At the meeting there was a discussion of a number of possible outcomes, including a reclad of some of the walls of the house. On 12 February 2012, Dr Kelly wrote to Mr Wilson:

> Thank you for the meeting last week, and Signature's ongoing commitment to our house.
>
> However, the delay imposed on us this month has created a real problem, and we need further reassurance that covers a number of outcomes.
>
> We have had to do "due diligence" (Trish and I are not the only trustees) and have sought legal advice.
>
> There are still some concerns that we wish addressed, and we are keen for a meeting together with our legal adviser Keith Berman.

> Again, we stress that we are keen for a cordial meeting, and remain confident that this meeting will be a step that leads to a satisfactory outcome, and that we will all avoid a legal battle.

[34] Another meeting was held on 20 February 2012. Dr Kelly, his wife, Mr Berman, Mr Wilson, Mr Ready and Mr Purchase were present. Dr Kelly says that they discussed the proposed plans to be submitted to the Council and "all possible outcomes" and that he and his wife were totally reassured at the end of the meeting that "they" would do all that was required to get a Code Compliance Certificate. Dr Kelly said that Mr Wilson promised them at the meeting that all outcomes were covered. He says that during this discussion about the extent of the repairs, Mr Berman asked what Signature Homes would do if "more" was required than anticipated. Dr Kelly says that Mr Wilson repeated to Mr Berman that Signature Homes would do whatever the Council required to get a Code Compliance Certificate.

[35] Mr Wilson does not recall there being any discussion at that meeting in relation to the capacity in which he attended the meeting. He says the focus was on the extent of the remedial work that would be required in order to meet the Council's concerns. The draft plans for targeted repair that were going to be given to the Council were on the table at the meeting, and these clearly showed that there was only going to be a limited amount of cladding that would be taken off and replaced.

[36] Mr Wilson says that the plans showed recladding up to a certain corner of the house. He recalls Mr Berman asking him "What happens if you find damage beyond that point?" Mr Wilson says his response to him was "Well, then we will go around the corner and as far as we need to, to fix it". Mr Wilson was very clear that the discussion was focused on targeted repair, with limited replacement of the existing cladding, and that at no stage during the meeting did they talk about a complete reclad for the whole house.

[37] This is the second meeting relied upon by the plaintiffs at which they say assurances were given which amount to a binding legal obligation.

[38] On 28 February 2012, Mr Beran submitted his proposed response to the Council's Notice to Fix. The response outlined all of the proposed remedial actions to address the issues raised in the Notice to Fix and relied on the North Star report of March 2011. Mr Beran's proposed plan of remedial works was, however, rejected by the Council. In an email dated 11 April 2012, the Council advised that they required a full invasive investigation.

[39] On 14 April 2012, Mr Beran made a further submission to the Council seeking to address the Council's request for further invasive investigation. This submission included a lab report analysis undertaken by Beagle Consultancy Ltd. A selective invasive investigation was carried out by drilling a number of samples from the previously identified, well-documented risk areas in the house. A laboratory report was commissioned to establish whether there was any evidence of decay fungi present. There was none. This additional submission was similarly rejected by Council in a letter of 6 June 2012.

[40] On 26 June 2012, another site meeting was held between Dr Kelly, Mr Wilson, Mr Beran and Mr Purchase. A further proposal was discussed at the meeting whereby targeted repairs would be undertaken and multiple internal probes installed in the house to provide on-going monitoring of the moisture levels. Dr Kelly and his wife took the position that if this method was acceptable to Council for the issuing of a Code Compliance Certificate, then they would accept it. Dr Kelly says that he sought confirmation of the effectiveness of the probes proposal, but was not satisfied that the answers given by Mr Wilson and Mr Beran would convince the Council to issue a Code Compliance Certificate. As a result, Dr Kelly asked Mr Berman to engage the services of an independent building consultant to review the probes proposal and, to that effect, the plaintiffs engaged Mr Geoff Bayley as a consultant.

[41] A further meeting took place on 23 August 2012 at the Signature Homes offices with Mr Bayley in attendance. There was a broad open discussion on the whole issue of targeted repairs and monitoring probes versus recladding. Mr Bayley talked from his experience and expertise in this matter.

[42] Following on from that meeting, Dr Kelly wrote to Mr Wilson on 26 August 2012 as follows:

> Thank you for the meeting on Thursday.
>
> As you know, from the start we have been supportive of your plans to obtain the Code of Compliance through targeted repairs. However, the meeting, and Geoff Bayley's input, did raise questions about whether this would provide a long term solution.
>
> The use of multiple monitoring probes also seems controversial at present. In addition, Geoff quoted a recent paper from the States saying how difficult it was to target and measure all areas.
>
> However, we are comfortable for you through Alan Light to discuss this approach with Malcolm Arnold or a superior at the Auckland City Council. We do of course want all other "at risk" areas (as indicated by Geoff Bayley) to be more thoroughly examined before submitting our house to the "multiple probe/target repair" option.

[43] On 7 September 2012, a further meeting was held at the Signature Homes offices. Dr Kelly and his wife were met by Mr Wilson, who introduced them to Mr Scott Parker, who was identified as the contracts manager for SRL. Once Mr Berman and Mr Bayley arrived, Mr Wilson advised Dr Kelly that he was leaving Signature Homes and that Mr Parker was formally taking over their case. A discussion then ensued about the probes and the viability of the proposal. It was pointed out to Mr Wilson that there was no evidence that the probes would necessarily lead to the issue of a Code Compliance Certificate by the Council. The meeting concluded in an agreement that Mr Beran would arrange a pre-lodgement meeting with the Council to get a definitive answer on the use of probes.

[44] Accordingly, a meeting was subsequently arranged at the Council's offices on 4 October 2012, attended by Dr Kelly and his wife, Mr Bayley, Mr Beran, Mr Parker and two Council officers. Minutes were taken by the Council during the meeting, which accurately recorded the discussions that took place. In summary, the effective outcome of the meeting was that the only option which would be acceptable to the Council was a full reclad.

[45] Mr Parker was made redundant by SRL shortly afterwards. The plaintiffs' case was then transferred to SRL's in-house architect and manager of the Ministry of Education ECE Programme, Mr Eric Waldmann.

[46] On 26 October 2012, Dr Kelly wrote to Mr Hunt as follows:

> Erich came round today for a meeting. We were grateful for this.
>
> He has contacted and spoken to the relevant parties who attended the Council meeting. He said the next step is an urgent meeting early next week with the people who could make a decision.
>
> So we are now at the point we thought Signature was at three weeks ago.
>
> To recap briefly:
>
> Signature have admitted responsibility for failing to secure our Code of Compliance, and pledged in front our lawyer in February to rectify this. The Council unprompted by us, have told Signature that the solution is a reclad. After over two years, the way ahead is clear.

[47] In response, Mr Hunt wrote:

> We too are keen to get the matter resolved.
>
> My understanding is that while a reclad is looking the likely option (which will be at a significant cost, responsibility for which will need to be agreed and documented before we get underway), it is still not 100% certain that is the only option.
>
> We will get back to you tomorrow with a suggested meeting date.

[48] A meeting was subsequently held at the plaintiffs' house on 29 October 2012, with Dr Kelly and his wife, Mr Hunt and Mr Waldmann. Dr Kelly says that at the meeting, Mr Hunt accepted responsibility for not obtaining a Code Compliance Certificate for their house, but wrongly expressed the view that the building defects were confined to one isolated area of one wall. Dr Kelly says that Mr Hunt advised them that the only reason Council was demanding a reclad was that the laws had changed. According to Dr Kelly, Mr Hunt accused them of manipulating the system for personal gain and stated that this was the reason his company was not going to pay for the reclad necessary to obtain a Code Compliance Certificate.

[49] On the other hand, Mr Hunt says that the position he took at the meeting was pretty direct – there was no question that Lasque had failed to get the Code Compliance Certificate back in 2002, but what had to be addressed was the current situation, which was a house with only limited defects, but which the Council now said had to be fully reclad in accordance with new requirements introduced since the plaintiffs' house had been built. Mr Hunt said he made it clear to Dr Kelly that if the

whole house was reclad, the plaintiffs would have to meet the lion's share of that cost and that Lasque remained committed to recladding the whole of the rear wall, but that was all.

[50] Following that meeting, the plaintiffs instructed Mr Berman to write to Mr Hunt, which he did by letter dated 29 October 2012. Mr Berman stated:

> The Kellys have lost patience. Unless Signature confirms by 5:00 pm Friday 2 November that it will proceed with the agreed work (that is, a reclad to the extent required by Council in order to issue a CCC), my clients will issue proceedings for breach of contract and for misleading and deceptive conduct under the Fair Trading Act.

[51] Such confirmation was not given, and proceedings were issued in December 2012.

Statement of Claim

[52] There has been some confusion across the proceeding about the basis of this claim.

[53] At the outset of his closing submissions for the plaintiffs, counsel submitted that it was not in dispute that Lasque breached the original building contract by failing to obtain a Code Compliance Certificate, either at the time of practical completion (6 March 2002) or at any time subsequently. He further submitted that "as such" Lasque is now liable to the plaintiffs for the cost of obtaining a Code Compliance Certificate ($494,644), together with consequential losses of five months loss of rental ($3,780) and temporary accommodation ($20,000). In addition, the plaintiffs seek the recovery of general damages ($50,000).

[54] There is, however, no cause of action in the latest version of the statement of claim, being the fifth amended statement of claim, in relation to the breach of the original building contract. Although paragraphs 9 and 10 recite the facts of the undisputed breach of the original contract, the contractual cause of action is pleaded as follows:

> 24. THAT in breach of its agreement made on 25 October 2011 and affirmed on 15 February 2012 to undertake the work, the First Defendant

> and/or Second Defendant and/or Third Defendant has failed and/or otherwise refused to complete the Plaintiffs property, and obtain a Code Compliance Certificate, causing loss to the Plaintiffs.

[55] In other words, the plaintiffs allege a completely new and different contract entered into in 2011, and affirmed in 2012.

[56] If the plaintiffs' statement of claim had contained a cause of action in relation to the breach of the original building contract, the defendants would have pleaded the existence of a ten year limitation period on such claims. Further, there would have been a real issue as to the measure of damages, which are to be assessed at the time of the breach of contract. The plaintiffs' expert was not asked prior to trial to make an assessment whether the house would have received a Code Compliance Certificate in 2002 if the Council had come around and inspected it at that time. When asked at trial, he said it was hard to know if the house would have then got a Code Compliance Certificate. The leaky building problem only started to become apparent at the beginning of 2002 and many non-compliant buildings had been passed by Council.

[57] In addition, if additional work had been required in 2002 in order to receive a Code Compliance Certificate, issues would have arisen as to the parties' responsibilities to meet the cost of such work. Clause 16.2 of the original contract related to the cost of additional work. It provided:

> Any addition in cost (including Builders margin) resulting from work additional to the Plans and Specifications required by the Local Authority or by…the unworkability or inadequacy of the Plan or Specifications and Addendum (if any) provided by the Client or as a result of any work carried out by the Client or materials supplied by the Client (where applicable) shall be paid by the Client to the Builder as if it were a Sale Contract Variation.

[58] None of these issues have been the subject of pleading or evidence because of the way in which the plaintiffs have structured their case. The plaintiffs are therefore unable to directly recover for the undisputed breach of the original building contract.

[59] Looking more closely at the fifth amended statement of claim, the key allegations relate to the meetings identified above, on 21 October 2011 and 20 February 2012. Clause 16 alleges:

> 16 THAT on Friday, 21 October 2011, the first and second named Plaintiffs, on behalf of the Plaintiff Trust, attended at the "Signature Homes" building in Rosedale, and met with the Fourth Defendant. At the meeting, the first and second named Plaintiffs, on behalf of the Plaintiffs, sought from the Fourth Defendant, on behalf of both the First Defendant, and one or more of the Second and Third Defendants, a pledge from the parent body, Signature Homes, of their commitment to undertake any necessary remedial works, should the First Defendant "go bust", and/or should matters not be resolved by the First Defendant within the ten year limitation period by March 2012.

[60] Clause 16 is not clearly expressed. At the time (21 October 2011), Lasque was clearly liable for its breach of the original building contract because the ten year limitation period had not yet expired (although the amount of damages is another issue). The clause refers to a pledge being sought from the parent body should Lasque "go bust" and/or should matters not be resolved by Lasque within the ten year limitation period by March 2012. Signature Homes is referred to as "the parent body", yet Lasque was not a subsidiary of SHL. Nor was it a subsidiary of SRL. The clause also talks of "their commitment" when referring to the parent body as if there was more than one parent body. The clause further refers to the pledge being sought from Mr Wilson on behalf of both Lasque and one or more of SRL and SHL. But speaking of a pledge on behalf of Lasque does not make sense, because the pledge was to take effect in the event that Lasque went "bust" or did not resolve matters within ten years.

[61] Clause 17 does, however, make the plaintiffs' case somewhat clearer. It pleads that Mr Wilson gave assurances, on behalf of SRL and SHL, and specifically committed SRL or SHL to meet the obligations that were owed by Lasque. Presumably the obligations that are being referred to as "owed by" Lasque include obtaining a Code Compliance Certificate. Clause 17 does not allege that a pledge was also given by Lasque.

[62] Clause 18 alleges that at the time of the meeting referred to in paragraph 16, when Mr Wilson advised that Signature Homes would undertake, at their cost, such work as required to obtain a Code Compliance Certificate, Mr Wilson was a director of SRL and SHL under the extended definition of director in s 126(1)(a) of the Companies Act 1993, and was an actual appointed director of SRL from 1 December 2011.

[63] As an alternative, paragraph 19 alleges that "at all material times Mr Wilson gave promises and advices to the plaintiffs that one or more of SRL and/or SHL would do, at their expense, such work necessary to obtain a Code Compliance Certificate for the property". Clause 19 also gives particulars of what is said to be the holding out of Mr Wilson by Mr Hunt, SRL and SHL as having actual or apparent authority to give such promises and advices, and as having the authority to exercise powers which a director, employee or agent of a company carrying on business of a kind carried on by the company customarily has authority to exercise.

[64] Clause 20 relates to the second key meeting on 20 February 2012. Clause 20 alleges:

> 20. THAT at a meeting held at Signature Homes' offices on 20 February 2012…the Fourth Defendant (both for himself and on behalf of the Second Defendant and/or the First and/or Third Defendant) confirmed to the Plaintiffs representatives that Signature Homes had agreed to undertake the necessary work, and pledged to rectify the position, so that the property could obtain a Code Compliance Certificate, and pledged to finish and fix the Plaintiffs property, so that such a Certificate could be obtained. At the meeting, the Fourth Defendant was absolute in his assurance that a Code Compliance Certificate was "Signature Homes" responsibility, even if the work to obtain the Code Compliance Certificate was more extensive than anticipated and that Signature Homes would do whatever was required to obtain the Certificate.

[65] Again, clause 20 is not clearly expressed. Reference is made a number of times to Signature Homes without identifying which particular company is being referred to. Reference is also made to Mr Wilson confirming both for himself and on behalf of Lasque, SRL and SHL that Signature Homes had agreed to undertake the necessary work. It is difficult to understand what is meant by that claim.

[66] Clauses 21, 22 and 23 relate to issues of consideration, the capacity in which Mr Wilson was acting and the benefit to the defendants by committing SRL and SHL to the work required to obtain a Code Compliance Certificate.

[67] Clause 24 then alleges:

> 24. THAT in breach of its agreement made on 25 October 2011 and affirmed on 15 February 2012 to undertake the work the First Defendant and/or Second Defendant and/or Third Defendant has failed and/or otherwise

> refused to complete the Plaintiffs property, and obtain a Code Compliance Certificate, causing loss to the Plaintiffs.

[68] Again, Clause 24 is not clearly expressed. It refers to the affirmation, on 15 February 2012, of an agreement made on 25 October 2011. The dates appear to be incorrect. It seems likely that the clause refers to the meetings held at Signature Homes' offices on 21 October 2011 and 20 February 2012, which are pleaded in clauses 16 and 20. Clause 24 also appears to allege that Lasque gave a pledge, notwithstanding that clauses 17 and 19 refer only to advices and assurances on behalf of SRL and SHL.

[69] The Fair Trading Act cause of action is also not clearly expressed. Clause 27 lists seven separate ways in which the plaintiffs claim that the conduct of SRL, SHL and Mr Wilson was misleading and deceptive. For example, clause 27(a) alleges:

> 27 THAT the conduct of the Second to Fourth Defendants was misleading and deceptive in that
>
> (a) They represented that the entity or entities for the time being trading as "Signature Homes" accepted responsibility for undertaking all the necessary work required to obtain a Code Compliance Certificate and were willing and/or ready and/or able to resolve the matter amicably and cordially.

[70] The clause refers to the entity or entities for the time being trading as "Signature Homes" without specifying which company or companies is or are said to have accepted responsibility. The Fair Trading Act claim appears to rely on the same factual circumstances as the contractual claim.

[71] I have made extensive reference to the fifth amended statement of claim as it reflects a basic lack of clarity in the plaintiffs' allegations. It is this basic lack of clarity in the pleadings and in the evidence that is a major stumbling block to the plaintiffs' contractual and Fair Trading Act claims.

Statements by Mr Hunt as director of SHL

[72] The evidence clearly shows that the actual executive director of SHL, Mr Hunt, never gave any assurances to Dr Kelly that Lasque or another company in the Signature Homes stable would do "whatever was necessary" to obtain a Code

Compliance Certificate for the plaintiffs' house. Dr Kelly first contacted Mr Hunt on 3 December 2010. Mr Hunt's first substantive statement to Dr Kelly was in an email dated 24 January 2011:

> I have asked Stew Wilson to personally attend to this urgently and make sure that matter reaches conclusion (this dies [sic] not necessarily mean to your full satisfaction**,** I'm not sure). It is Stew's responsibility to resolve this matter and I will be assisting him to achieve that.

[73] Mr Hunt's last substantive statement to Dr Kelly was in an email immediately prior to the watershed meeting on 29 October 2012, following which the plaintiffs instructed Mr Berman to formally act for them. The email states:

> My understanding is that while a reclad is looking the likely option (which will be at a significant cost, responsibility for which will need to be agreed and documented before we get underway), it is still not 100% certain that is the only option.

[74] Between the first and last substantive statements made by Mr Hunt to Dr Kelly, he was consistent in his approach. For instance, in his email to Dr Kelly on 8 March 2011 he stated:

> As long as the report clears the rest of the house and the Council do not request that all the cladding be removed, we can use the existing building consent, in which case we anticipate being on site and underway within one to two months:
>
> If the Council decide that the cladding for the whole house needs to be replaced even though the report states that it does not require replacement, then we will need to meet to discuss the solution, as it is our current view that Lasque and the supplier's liability relates only to the affected areas.

[75] Mr Hunt was known by the plaintiffs to be the owner and executive director of SHL. That is why Dr Kelly first approached him. The plaintiffs do not, however, allege that Mr Hunt gave a pledge on behalf of Lasque or any other company in the Signature Homes stable that they would do whatever was necessary to obtain a Code Compliance Certificate for the plaintiffs' house, because there is no evidence that he did. On the contrary, he clearly acknowledged only limited liability on behalf of Lasque in his email of 8 March 2011.

Statements by Mr Wilson

[76] Instead, the plaintiffs say that the pledge was made on behalf of Lasque, SRL and SHL by Mr Wilson. Mr Wilson was initially the managing director of Lasque and then SRL from 1 December 2011. He was never a director of SHL.

[77] Mr Wilson has always accepted that Lasque was at fault in not obtaining a Code Compliance Certificate upon completion of the plaintiffs' house, and he appears to have been committed to remediation of the weathertightness issues in order to obtain a Code Compliance Certificate. Mr Wilson undoubtedly made statements such as "Signature Homes is liable for any weathertightness issues" and "Confirming our discussion on Friday 21st that Signature Homes will attend to the remedial work on your home". Mr Wilson also acknowledges being questioned by Mr Berman "What happens if you find damage beyond that point?" and answering "Well then we will go around the corner and as far as we need to fix it." The first of these two statements was, however, made ten months before the first meeting relied upon by the plaintiffs and is not referred to or relied upon in the statement of claim. The second statement was, however, made following the first meeting and the answer to Mr Berman's question was given at the second meeting.

[78] However, two issues were unresolved at the time of the two meetings at which the plaintiffs say assurances were given which amount to a binding legal obligation. The first was the extent of the repairs required, and the second was the proportion of the work that would be paid for by Lasque. The second issue could not be resolved until the first was resolved.

[79] Mr Wilson was always hopeful that the Council would accept a targeted repair rather than a complete reclad. It was not until the meeting at the Council's offices on 4 October 2012 that the Council confirmed that the various proposals put forward by Lasque for remediation which were short of a complete reclad were not acceptable. This meeting with the Council took place eight months after the second meeting relied upon by the plaintiffs, and a year after the first meeting relied upon by the plaintiffs. So when Mr Wilson wrote to Dr Kelly "Confirming our discussion on

Friday, 21st that Signature Homes will attend to the remedial work on your home", neither party knew what would ultimately be required.

[80] More importantly, the issue of the proportion of the work that would be paid for by Lasque was also unresolved. The statement by Mr Wilson that "Signature Homes will attend to the remedial work on your home," should be seen in light of the earlier advice given by Mr Wilson to Dr Kelly in an email dated 6 December 2010:

> Signature Homes is liable for any weathertightness issues …
>
> Where there has been a change of specification in order to obtain a Code of Compliance certificate, Signature Homes will organise the contractor and supervise the work. The cost involved will be met by both parties.

[81] This is clearly a reference to clause 16.2 of the original building contract, which specifically provided that any addition in costs resulting from work additional to the plans and specifications required by the Council, shall be paid by the plaintiffs to Lasque.

[82] Although Lasque paid for the various reports on the house which were obtained during the period, Mr Wilson had also advised Dr Kelly that the cost of those should be shared. In an email to Dr Kelly on 22 February 2011, Mr Wilson wrote:

> The surveyor has requested a further report as the report you have had done have insufficient information for him and the Council. I have given instructions to proceed with the report which will cost between $800 to $1000. We can discuss the splitting of the cost later.

[83] Although not sent to Dr Kelly, Mr Wilson made his position quite clear in an email to Mr Hunt on 7 March 2011:

> What the engineer, surveyor and Euro Clad are pushing for is that we only need to replace the affected area which [sic] the damage has been caused by the deck penetrations. If the Council make us reclad the whole building then we will get into a dispute with the Kelly's on who is paying for the area that is not damaged. Hardies and Euro Clad will only pay for the damaged area.

[84] That email is prescient, as the Council is now insisting on a complete reclad and Lasque is in dispute with the Kellys as to the proportion of the work that will be paid for by Lasque.

[85] The two contested statements made by Mr Wilson, following the first meeting and in the second meeting, therefore cannot properly be interpreted as meaning that Lasque or some other company in the Signature Homes stable would do whatever was necessary to obtain a Code Compliance Certificate for the plaintiffs' house, given the pre-existing factual context of clause 16.2 of the original building contract (stating that costs resulting from work additional to the plans and specifications required by the Council shall be paid by the Kellys) and the advice both Mr Hunt and Mr Wilson gave to Mr Kelly.

[86] That advice is detailed in Mr Hunt and Mr Wilson's emails:

(a) of 6 December 2010 ("where there has been a change of specification in order to obtain a Code of Compliance Certificate…the cost involved will be met by both parties")

(b) 24 January 2011 ("if the Council decide that the cladding for the whole house needs to be replaced, even though the report states that it does not require replacement, then we will need to meet to discuss a solution as it is our current view that Lasque and the supplier's liability relates only to the affected areas")

(c) 22 February 2011 ("we can discuss the splitting of the costs later"); and

(d) 8 March 2011 ("this [does] not mean to your full satisfaction").

[87] These clear statements of intent date from before the first meeting relied upon by the plaintiffs at which they say assurances were given which amount to a binding legal obligation. These contradict the basis on which the plaintiffs say they entered a new contract with Lasque.

[88] Mr Wilson simply reaffirmed Lasque's intention to carry out the remedial work as required in the original contract. No new contract with Lasque was created.

Capacity of Mr Wilson

[89] The plaintiffs claim in paragraph 17 of the statement of claim that at the meeting on 21 October 2011, Mr Wilson gave assurances on behalf of both SRL and SHL, and specifically committed SRL and SHL to meeting the obligations that were owed by Lasque. The plaintiffs also claim in paragraph 20 that at the meeting on 25 February 2012, Mr Wilson confirmed both for himself and on behalf of SRL and/or Lasque and/or SHL that "Signature Homes" had agreed to undertake the necessary work so that the property could obtain a Code Compliance Certificate.

[90] It is not in dispute that Mr Wilson could and did speak on behalf of Lasque as a director of the company until 6 September 2012. He also almost always referred to Lasque as Signature Homes. This is acknowledged by the plaintiffs who specifically plead in the statement of claim that Lasque traded as Signature Homes.

[91] The question is whether, when Mr Wilson talked of Signature Homes, he was referring just to Lasque or to some other company as well. Two other possible companies are identified by the plaintiffs – SRL and SHL.

Capacity to bind SRL

[92] SRL was, however, only incorporated on 18 May 2011 and did not begin trading until October 2011. On 30 November 2011, SRL entered into the agreement with Lasque to provide project management services in order to enable Lasque's contractual obligations to be completed. Mr Wilson became a director of SRL on 1 December 2011 and SRL took over the Signature franchise from Lasque with effect from 1 January 2012. Mr Wilson remained a director of SRL until 6 September 2012, when he resigned as a director of both Lasque and SRL.

[93] Mr Wilson, therefore, cannot have been a director of SRL at the date of the first meeting relied upon by the plaintiffs at which they say assurances were given which amount to a binding legal obligation. Dr Kelly acknowledged in cross-

examination that he was not even aware of the new company SRL as at 21 October 2011. He, therefore, could not have sought a pledge from Mr Wilson on behalf of SRL at the meeting on 21 October 2011 as pleaded in paragraph 16 of the statement of claim. Mr Wilson also later signed the project management agreement with SRL on behalf of Lasque, which specifically provided that SRL was not liable for any loss occasioned by any defect in the design of the work or materials supplied by Lasque.

[94] These factors, in my view, show that Mr Wilson cannot have been referring to SRL when he talked of Signature Homes agreeing to undertake the work necessary to obtain a Code Compliance Certificate.

Capacity to bind SHL

[95] The second company identified by the plaintiffs, SHL, was the franchisor. Mr Wilson was never a director of that company. For the plaintiffs to succeed in their contractual claim against SHL, they must establish that Mr Wilson was a de facto director under s 126 of the Companies Act, or that he was held out as having authority to make contractual commitments on behalf of SHL.

[96] I am of the view, however, that that the plaintiffs have not produced sufficient evidence to establish directorial function or assumption of directorial status by Mr Wilson, nor that he was held out as having authority to make contractual commitments on behalf of SHL.

[97] Section 126(1) of the Companies Act 1993 provides:

> (1) In this Act, director, in relation to a company, includes
>
> (a) A person occupying the position of director of the company by whatever name called; …

[98] This section allows a person to be considered a "de facto" director of a company, notwithstanding that he or she has not been formally appointed as such. A de facto director is one who is held out by the company and purports to act as a director.[1]

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1 *Delegat v Norman* [2012] NZHC 2358.

[99] *Re Hydrodam (Corby) Ltd* is clear as to the requirements to be a de facto director:[2]

> A de facto director is a person who assumes to act as a director. He is held out as a director by the company, and claims and purports to be a director, although never actually or validly appointed as such. To establish that a person was a de facto director of a company it is necessary to plead and prove that he undertook functions in relation to the company which could properly be discharged only by a director. It is not sufficient to show that he was concerned in the management of the company's affairs or undertook tasks in relation to its business which can properly be performed by a manager below board level.

[100] No evidence has been offered in relation to any directorial functions carried out by Mr Wilson in relation to SHL, nor is there any indication that he actively, willingly assumed a directorial capacity, as is required under s 126(1)(a).[3] Although the plaintiffs claim that they rely on Mr Wilson being "on an equal footing with [the other directors] in directing the affairs of the company,"[4] to prove that s 126(1)(a) applies, the position of Mr Hunt as a superior to Mr Wilson appears to have been understood by Dr Kelly and his wife, as discussed below at [104].

[101] The claim that Mr Wilson was held out as having authority to bind SHL requires a principal to "represent, or permit it to be represented, that another person has the authority to act on his behalf."[5] This requires a holding out or representation by words or conduct, by a principal, which the plaintiffs relied on in entering into an agreement.[6] This cannot be "self-authorisation", but must be acts on behalf of the principal which suggest to others that the principal has assented to the agent dealing on their behalf. [7]

[102] The plaintiffs have listed a large number of particulars of the holding out of Mr Wilson as having the authority to bind SHL, but they are neither singularly or cumulatively sufficient to prove either deemed directorship, or apparent authority. For instance, one of the particulars listed is "General publicity via media exposure of

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2 *Re Hydrodam (Corby) Ltd (in liq)* [1994] BCC 161 at 163.
3 *Delegat v Norman,* above n 1, at [31].
4 *Delegat v Norman*, above n 1, at [32].
5 *New Zealand Tenancy Bonds Ltd v Mooney* [1986] 1 NZLR 280 at 283.
6 *Armagas Ltd v Mundogas SA* [1986] AC 717 (HL) at 777.
7 *Armagas Ltd v Mundogas SA* [1986] 1 AC 717 (HL) at 776 – 779, confirmed in New Zealand by *Savill v Chase Holdings (Wellington) Ltd* [1989]1 NZLR 257 (CA) at 312 – 313.

Gavin Hunt's role in [SHL] as managing director and owner of [SHL], including via television and newspaper advertisements and the defendants' website". Although the extract from the Signature Homes website produced in evidence has a photograph of Mr Hunt and his wife as owners of the franchisor, there is no mention in the extract of Mr Wilson at all or any connection he may have with SHL.

[103] Another particular listed is "The Plaintiffs' attendance of [sic] the First or Second or Third Defendants' place of business at 5 Antares Place, Rosedale, North Shore, as well as street front signage of "Signature Homes" appearing outside the Signature Homes offices". It is not in dispute that Lasque operated from offices in a building that had a Signature Homes sign outside, but the plaintiffs knew and have specifically pleaded that Lasque traded as Signature Homes. The fact that SHL may have had offices in the same building does not advance the plaintiffs' case that SHL held out Mr Wilson as having the authority to bind SHL.

[104] It is also of significance, in my mind, that when Dr Kelly thought that Mr Wilson was not progressing matters fast enough he approached Mr Hunt as the owner of the franchisor. Dr Kelly continued to involve Mr Hunt whenever he had issues with Mr Wilson. This supports the view that plaintiffs understood Mr Wilson's authority as being limited.

[105] The plaintiffs have not proved, therefore, that Mr Wilson was held out by the company as having the authority to bind SHL, nor that he met the necessary standard for a director under s 126(1)(a). Accordingly, he did not have the capacity to bind SRL or SHL to any assurances that he made as to the extent of the remedial work these companies would carry out to obtain a Code Compliance Certificate for the plaintiffs.

Consideration

[106] The plaintiffs acknowledge that, to succeed in their contractual claim, they are required to prove the elements of the formation of a new contract, which includes showing consideration for the alleged promise that everything which was necessary to obtain a Code Compliance Certificate for the plaintiffs' house would be done. The plaintiffs say that the alleged consideration is their express or implied agreement to

not bring a claim against Lasque within the ten year limitation period. This is said to have occurred at the first meeting on 21 October 2011. To be valid consideration, forbearance to sue must be either an express promise, or an express request with actual forbearance, or an implied request with actual forbearance.[8]

[107] The meeting on 21 October 2011 was a short one between Dr Kelly and Mr Wilson. It was unscheduled. There is some conflict of evidence about what was discussed at the meeting. There were no minutes kept. The best evidence of what was actually discussed are the emails immediately before and after the meeting. At 11:06 am, about 40 minutes before the meeting, Dr Kelly wrote:

> Hello Stewart
>
> We need another update – and a written skeleton plan of action from Lasque/Signature that takes into account the council dealings. Because time is marching on, we feel the need for a meeting the week after next – 1230 November 1st suits us.
>
> It would be good if Peter could be there too.

[108] At 12:18 pm, immediately after the meeting, Dr Kelly wrote:

> Hello Stewart
>
> Thanks for seeing us so spontaneously today. As we said, we need a short written statement confirming your intent to perform remedial work. This will allow us to remain patient and calm while discussions continue with the council etc. Once we have this statement, we'll reassess the need for a meeting on Nov 1st.

[109] Four days later, Mr Wilson replied:

> Hi Robyn and Trish
>
> Confirming our discussions on Friday 21st that Signature Homes will attend to the remedial work on your home.
>
> Regards
> Stewart
>
> Stewart Wilson
> Managing Director
> Lasque Construction Ltd

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8 *Attorney-General for England v Wales v R* [2002] 2 NZLR 91 (CA) at [40] and [42].

[110] In his emails to Mr Wilson, Dr Kelly makes no reference to the ten year limitation period or the possibility of legal proceedings prior to its expiration. He also makes no reference to a pledge to be sought from other companies in the Signature Homes stable. Before the meeting, Dr Kelly wanted an update and a plan of action. What is recorded as having been discussed at the meeting is the plaintiffs' need for a short written statement confirming "your intent to perform remedial work," which Mr Wilson provided four days later as managing director of Lasque, trading as Signature Homes. The email correspondence and the relatively brief and informal nature of the meeting is more consistent with Mr Wilson's evidence that Dr Kelly wanted to know where things were up to with the Council and when the work was going to start. Mr Wilson says that at no time did Dr Kelly ask for a pledge in relation to the remedial work nor was there any mention of the "parent company" making any commitment and certainly no reference to Lasque "going bust".

[111] There is also no reference to the ten year limitation period or its expiry in March 2012 in any of the other correspondence between the parties. Mr Berman, the lawyer called in by the plaintiffs and who was present at the second meeting relied on, confirms that there was no discussion about legal proceedings or the cost of proceedings at that meeting. The plaintiffs claim that the second meeting confirmed the agreement made at the first meeting, yet there is no record of confirmation of any express or implied agreement not to bring a claim against Lasque at the second meeting. This is despite the fact that the ten year limitation period was due to expire on 6 March 2012.

[112] In those circumstances, I am of the view that the plaintiffs have failed to prove that consideration, in the form of either an express or implied agreement to not bring a claim against Lasque within the ten year limitation period, was given at the meeting on 21 October 2011.

Conclusion on contractual claim

[113] Lasque has always accepted that it was in breach of the original building contract signed by it on 27 July 2001. It remains in breach of the original contract,

but there is no cause of action in the fifth amended statement of claim which relates to the breach of the original contract.

[114] The pleaded claim of a new contract entered into on 21 October 2011 and confirmed on 20 February 2012 fails. The terms of any new contract are uncertain. The parties to any new contract are uncertain. The plaintiffs have also failed to prove that there was any consideration for a new contract.

[115] In my view, Mr Wilson's statement that Signature Homes would attend to the remedial work on the plaintiffs' home was a confirmation of Lasque's intention to carry out the remedial work, which it believed it was obliged to carry out under the original contract, namely, the targeted repair of parts of the house only where there was water ingress and damage. In stating that intention, I am of the view that Mr Wilson was not entering into a new contract on behalf of Lasque or another company not party to the original contract. He was merely reaffirming the original contract.

[116] A further difficulty for the plaintiffs is s 27 of the Property Law Act 2007, which provides that a contract of guarantee must be in writing and signed by the guarantor. A contract of guarantee is defined as meaning a contract under which a person agrees to answer to another person for the debt, default or liability of a third person.[9] If the plaintiffs say SRL or SHL had agreed to guarantee Lasque's performance of the original building contract and do whatever was necessary to obtain a Code Compliance Certificate for the house, s 27 requires both writing and a signature to ensure there is clarity about the nature of the commitments and certainty of the guarantor's intention to make the commitment. In the circumstances of this case there is neither clarity nor certainty.

Fair Trading Act claim

[117] The Fair Trading act claim can be dealt with shortly, as it relies on the same factual circumstances as the contractual claim. Section 9 of the Fair Trading Act prohibits conduct, in trade, which is misleading or deceptive or likely to be

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9 Property Law Act 2007, s 27(4).

misleading or deceptive. The accepted test for analysing whether conduct breaches s 9 is to consider first, whether the conduct actually breaches s 9, and then whether the loss or damage suffered was through the conduct of the defendant.[10]

[118] As noted,[11] clause 27 of the fifth amended statement of claim lists seven separate ways in which the plaintiffs' claim that the conduct of SRL, SHL and Mr Wilson was misleading and deceptive. Most are predicated on the basis that an entity or entities trading as Signature Homes had agreed to accept responsibility for undertaking all the necessary work required to obtain a Code Compliance Certificate for the plaintiffs' house, but that SRL, SHL and/or Mr Wilson knew that Signature Homes never or no longer intended to undertake that work and concealed or failed to disclose that fact from or to the plaintiffs. I have, however, already found that the plaintiffs have failed to prove that a new contract to that effect was entered into at the short, informal and impromptu meeting between Dr Kelly and Mr Wilson on 21 October 2011.

[119] One of the ways in which the plaintiffs claim that the conduct of SRL, SHL and Mr Wilson was misleading and deceptive is that they concealed or failed to disclose or clarify the nature of the business relationship between Lasque and SRL, including the nature and effect of the management service agreement between them. The plaintiffs have not persuaded me that SRL, SHL and Mr Wilson were obliged to advise the plaintiffs of the restructuring of Lasque's business or how Lasque was to ensure that it continued to be able to meet its contractual obligations after the transfer of the Signature Homes franchise to SRL. In any event, it is difficult to see how the plaintiffs' claimed losses could have flowed from a failure to disclose the business restructuring to the plaintiffs.

[120] Another of the ways in which the plaintiffs claim that the conduct of SRL, SHL and Mr Wilson was misleading and deceptive was that they led the plaintiffs to believe that the proposed targeted repairs would lead to completion of the project and the issuance of a Code Compliance Certificate when they knew or ought to have known that the proposed targeted repairs would not be acceptable to the Council.

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10 *Red Eagle Corporation v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492.
11 At [69].

[121] I am of the view, however, that Mr Wilson genuinely advanced a targeted repair proposal in the belief that this approach could meet the Council's concerns. The plaintiffs have not led any evidence to the contrary. Although Mr Wilson did refer in his email of 7 March 2011 to Mr Hunt to the possibility of the Council requiring a full reclad of the house, he was not disingenuous in advancing a targeted repair proposal.

[122] The pleaded claim of misleading and deceptive conduct under the Fair Trading Act fails. The seven separate ways in which the plaintiffs' claim that the conduct of SRL, SHL and Mr Wilson was misleading and deceptive are predicated on the unproven assertion that a new contract was entered into on 21 October 2011.

Result

[123] The plaintiffs' claim is dismissed. I do, however, have considerable sympathy for the plaintiffs who are victims of the on-going leaking building disaster which has bedevilled the New Zealand building industry in recent years. The plaintiffs were forced to formulate their claim in the way they have because of the expiry of the ten year limitation period on what would have been a relatively straightforward claim against Lasque for breach of the original building contract. I therefore urge the parties to try and reach some accommodation, even at this stage, after the dismissal of the plaintiffs' claim. I do so because at the time the ten year limitation period expired and the plaintiffs lost their right to sue on the original contract, the parties were engaged in genuine, good faith negotiations.

[124] If costs of this proceeding remain an issue, memoranda are to be filed within 28 days of the date of this judgment.

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Woolford J