IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2011-404-005865
[2012] NZHC 380

IN THE MATTER OF	an appeal against the decision of the District Court at Manukau
BETWEEN	GURPREET SINGH MEENA SINGH Appellants
AND	GLENN DOUGLAS RUTHERFORD WENDY KAREN JOLLY Respondents

Hearing: 6 March 2012

Counsel: D M O'Neill for the Appellants
M Colthart and S Shin for the Respondents

Judgment: 9 March 2012

[RESERVED] JUDGMENT OF WYLIE J

This judgment was delivered by Justice Wylie
On 9 March 2012 at 12.30 pm
Pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date:

Distribution:
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Introduction

[1] The appellants, Mr and Mrs Singh, appeal against a decision given by Judge GA Andrée Wiltens in the District Court at Manukau on 29 August 2011.

[2] The appeal raises a short but interesting point. Where one party to a contract has breached a warranty, is the other party entitled to damages consequent on the breach, when that other party has failed to properly carry out due diligence in accordance with the contract, and proper due diligence would have exposed the error in the warranty?

Factual Background

[3] On 28 March 2007, Mr and Mrs Singh entered into an agreement for sale and purchase with a Mr Rutherford and a Ms Jolly in relation to a lemon and kiwifruit orchard situated in Glenbrook, near Auckland. The purchase price was $1,241,000 plus GST (if any), and the deposit payable was $115,000. The balance of the purchase price was payable on the settlement date — 4 May 2007, or earlier by mutual agreement.

[4] The agreement utilised the standard agreement for sale and purchase of real estate approved by the Real Estate Institute of New Zealand and the Auckland District Law Society (eighth edition, 2006). There were a number of further terms of sale added by the parties:

(a) The contract contained the following "due diligence" clause:

> (20) This agreement is conditional for a period of five (5) working days after the date of signature (by all parties) upon the purchaser completing and satisfying itself as to a due diligence verification programme. For the purposes of this clause "due diligence verification" means the process by which the purchaser, its nominee or nominees satisfy themselves that the subject matter of this agreement, the information provided in respect of it, the purposes for which the purchaser wishes to utilise the property (including local authority consents), including but not restricted to confirmation and acceptance of existing management contracts and supply contracts, title to the property, leases and availability of finance are acceptable and satisfactory in all

> respects to the requirements of the purchaser, its nominee or nominees and its funder in its sole and absolute discretion. This condition is inserted for the sole benefit of the purchaser.

(b) It also contained the following condition:

> (21) This agreement is conditional upon the vendor providing the purchaser with a copy of the current lease (in respect of the 1.5 ha older kiwifruit) between the vendor and Seeka and [the] purchaser then being satisfied as to the production figures and other matters disclosed in the lease. This agreement is conditional upon the surrender of the said lease between the vendor as lessor and Seeka [as] lessee within 10 working days from the date of satisfaction of the conditions contained in clauses 18, 19, 20, 21 and as to finance.

(c) The vendors gave various warranties, including the following:

> (26) The vendor warrants that the property has approx 1.5 canopy ha of older kiwifruit plants and approx 0.9 canopy ha of younger kiwifruit plants and 2.00 canopy ha of lemon trees.

[5] The agreement became unconditional and settlement was completed in May 2007.

[6] Mr Singh had concerns regarding the production achieved following completion of the 2007 kiwifruit harvest. The property had not produced as many trays of kiwifruit as he anticipated. He initially thought that some trays may have been lost in a packhouse. This proved not to be the case. Mr Singh next looked for an explanation by measuring the size of the canopies in the component parts of the orchard that he and his wife had purchased. He checked the canopy sizes himself. He found some discrepancies, so he commissioned professionals to measure the orchard properly. They did so and their measurements established that the size of the three component parts of the orchard were as follows:

(a) older kiwifruit plants — 1.1425 canopy hectares;

(b) younger kiwifruit plants — 0.7682 canopy hectares;

(c) lemon trees — 1.6 canopy hectares.

[7] There was a clear difference between the actual size of the fruit canopies and the measurements warranted in the sale and purchase agreement. Mr Singh considered that this accounted for the lower than anticipated fruit production in 2007. He and his wife were aggrieved, and they commenced the current proceedings.

The Pleadings

[8] The Singh's statement of claim was straightforward. It contained two causes of action.

[9] The first cause of action was based in contract. The Singhs referred to the warranty contained in cl 26, and referred to the measurements taken of the sizes of the canopies in the orchard. It noted the difference between the warranted sizes, and the measured sizes, and asserted that Mr Rutherford and Ms Jolly had breached the warranty set out in the agreement for sale and purchase. Mr and Mrs Singh then alleged that as a result of that breach, they had or would suffer loss as follows:

Loss of profit in respect of kiwifruit production for the period of 10 years from the date of possession	$108,164
Loss of lemon production for the same period	$107,810
Total	$215,974

This sum was then discounted to its net present value, resulting in a claimed loss of $206,204. There was then a claim for $6,713.18 (inclusive of GST) for steps taken by the Singhs to enlarge the size of the canopies. The total loss was approximately $213,000. Mr and Mrs Singh abandoned any claim for any amount above $200,000 to bring themselves within the District Court's jurisdictional limit, and sought judgment in that sum. They also sought interest and costs.

[10] As a second cause of action, the Singhs alleged that Mr Rutherford and Ms Jolly were in trade, and that they had engaged in misleading and/or deceptive

conduct by making a false warranty. This claim was based on the Fair Trading Act 1986.

[11] It is noteworthy that the statement of claim did not assert negligent misstatement by the vendors and that the Contractual Remedies Act 1979 was not called in aid.

[12] Mr Rutherford and Ms Jolly in their statement of defence referred to the agreement for sale and purchase, and relied on its terms in full. They denied that the Singhs had suffered any production losses, and denied that they were liable to meet their claim. They also denied the allegations made under the Fair Trading Act 1986. As an affirmative defence, they asserted that Mr Singh was an experienced orchardist, and that prior to entering into the agreement for sale and purchase, Mr and Mrs Singh carried out an exhaustive investigation and satisfied themselves regarding all aspects of the property, including the approximate canopy sizes. They asserted that the Singhs had relied on their own knowledge, expertise and investigations in entering into the agreement, and that they did not rely on any representations or warranties made or given by them.

[13] It is noteworthy that Mr Rutherford and Ms Jolly did not rely on contributory negligence. Nor did they allege by way of counterclaim that the Singhs had breached either cl 20 or cl 21. There was no claim for damages in this regard, and no set off was sought.

District Court Judge's Decision

[14] Judge Andrée Wiltens referred to the factual background, to the statement of claim, and to the statement of defence.

[15] The Judge then analysed with the breach of warranty allegation:

(a) He set out cl 26 in the agreement for sale and purchase.

(b) He noted that the lease document referred to in cl 21 had been provided to Mr and Mrs Singh, and that it also referred to 1.5 canopy hectares of kiwifruit. He accepted evidence given by Mr Rutherford and Ms Jolly that they had simply transposed the figure of 1.5 canopy hectares for the older kiwifruit plants directly from the lease into the agreement for sale and purchase, relying upon a measurement done by the lessee.

(c) He noted that Mr Rutherford had planted the younger kiwifruit block himself, and that he had simply compared the structures erected to support the new plants with the structures in place to support the older plants, and calculated that the new block was 0.9 hectares in area. He noted that Mr Rutherford accepted that he was no expert, and that he had not actually done a proper canopy measure.

(d) He recorded Mr Rutherford's evidence that he had purchased the property on the basis that it had two hectares of lemon trees, and that he had sprayed the lemon orchard over the years as if it comprised two hectares of trees.

[16] Judge Andrée Wiltens noted that Mr and Mrs Singh did not themselves measure the canopies, or arrange for others to measure them, either prior to committing themselves to the purchase by making the agreement unconditional, or prior to settlement.

[17] The Judge found that there had been a breach of warranty, and that use of the term "approximate" in relation to the two kiwifruit canopies could not be used to excuse the shortfall between the actual canopy sizes and the warranted sizes. The Judge was satisfied that a breach of warranty had been made out by the Singhs.

[18] The Judge did not accept that Mr Rutherford and Ms Jolly had engaged in deceptive and/or misleading conduct. He considered that the errors in the contract as to the exact sizes of the canopies were not of their deliberate making.

[19] Judge Andrée Wiltens then went on to consider, under the heading "due diligence", cls 20 and 21 in the agreement. He considered that they had been inserted into the agreement for a reason, and that they could not simply be ignored.

(a) He considered that Mr and Mrs Singh had undertaken rather limited due diligence under cl 20. He noted that on Mr Singh's evidence, due diligence was limited to viewing the property again, questioning the real estate agent, Mr Rutherford and Seeka's (the lessee's) representatives, studying the information provided, including the lease and an assignment of the lease, and getting the home on the property surveyed by a builder. The Judge commented as follows:

> To describe Mr Singh's evidence regarding the due diligence undertaken as vague and uncertain is to give it greater effect than it actually deserved. He was at a loss to explain [w]hat was actually done — he had quite obviously not regarded his due diligence obligations to be significant.

(b) The Judge considered that cl 21 placed a clear obligation on the Singhs to satisfy themselves that the orchard was acceptable and satisfactory in all respects, and that this meant that the Singhs had an obligation to satisfy themselves that the three component parts of the orchard were of appropriate size and producing a sufficient volume of fruit to suit their requirements. He found that the Singhs had to satisfy themselves that the contract they had entered into actually delivered what they wanted and what they had agreed to purchase. He considered that the actual and potential level of fruit production was critically important. He considered that the sizes of the canopies had a direct impact on fruit production and that they were of such importance, that they should have been verified by the Singhs to comply with cl 21.

[20] It was Judge Andrée Wilten's view that "the obligation" to measure the canopies fell squarely upon the Singhs despite the warranty, and that they needed to undertake due diligence in this regard. He considered that the Singh's failure to measure in the circumstances "disentitled" them from claiming compensation for

any breach of the warranty subsequently discovered. In the Judge's view, the shortfalls in canopy coverage were easily ascertainable, and they should have been discovered before the contract was made unconditional. The Judge was convinced that this was the appropriate outcome because:

(a) to decide otherwise would be to render the due diligence requirements nugatory;

(b) alternatively, if the breach of warranty were held to override the obligation of due diligence, there would be no utility "to put such clauses in contracts where warranties were given", and

(c) in a perfect world, due diligence would have demonstrated an inaccuracy or potential breach of warranty, and the matter could have been resolved prior to either party being prejudiced — even if that meant that the purchasers were entitled to rescind.

[21] The Judge ruled that Mr and Mrs Singh did not adequately undertake the due diligence that they had an obligation to complete. He considered that had they done so, the discrepancies would have been obvious and they could have been resolved without any "loss" occurring. He concluded that the Singh's claim must fail because, notwithstanding that there was an obvious breach of warranty, the obligation to undertake adequate due diligence was not fulfilled. He therefore held that Mr and Mrs Singh were "disentitled to make a successful claim in relation to the breach of warranty clause because of their own inadequate due diligence".

Notice of Appeal

[22] The notice of appeal asserted that Judge Andrée Wiltens was wrong in fact and in law. It was asserted that the warranty in relation to canopy cover was part of the agreement for sale and purchase, and that given the warranty, the appellants were not required to undertake due diligence in relation to that issue. It was asserted that the warranty overrode the contractual obligation on the appellants to undertake due diligence in relation to canopy cover. The notice of appeal asserted that once

Judge Andrée Wiltens found that there was a breach of warranty, his enquiry should have stopped there.

[23] It is noteworthy that no notice of appeal or cross appeal was filed by Mr Rutherford and Ms Jolly. It follows that the Judge's finding that the warranty was breached must stand.

Submissions

[24] Mr O'Neill, for the Singhs, submitted that Judge Andrée Wiltens was wrong to find that, notwithstanding the warranty as to the canopy coverage of the three component parts of the orchard, the appellants should have checked the measurements themselves pursuant to the due diligence clause. He submitted that the Judge's ruling rendered the warranty meaningless. He submitted that the due diligence clause, and the condition clause, did not relieve Mr Rutherford and Ms Jolly of their obligations pursuant to the warranty, and that the warranty was part of the bargain that the parties had struck. He argued that in general, the maker of a warranty undertakes strict liability for what he or she asserts, and that the very purpose of seeking a warranty is to protect the person to whom it is given against error. He argued that the Singhs, having been given a warranty were entitled to rely on it, and that the due diligence clause went to other aspects of the agreement for sale and purchase. He accepted that I was not in a position to consider whether the breach of warranty was causative of the appellants' loss, and if so, what damages should flow as a result. He argued that I should remit the matter to the District Court so that it can make a finding on those issues.

[25] Mr Colthart, for Mr Rutherford and Ms Jolly, submitted that the Judge's decision was correct on two bases:

(a) First, he submitted that the Judge had not erred because he held that the breach of warranty by Mr Rutherford and Ms Jolly did not cause the Singh's loss. Rather, the Judge found that it was the Singh's failure to exercise proper due diligence which caused them loss. He argued that on this basis, the issue of which clause took priority

became irrelevant. Rather, he submitted that the essential enquiry was — what caused the appellants' loss? If the appellants' loss was caused by their own failure to carry out due diligence, he submitted that any breach of the warranty became irrelevant.

(b) In the alternative, he argued that the Singhs were guilty of contributory negligence to such an extent that they were responsible for their alleged loss. He relied on s 3 of the Contributory Negligence Act 1947, and referred to the judgment of Cooke P in the Court of Appeal in *Mouat v Clark Boyce*.[1] He argued that whatever the source of the duty, whether it be tort, contract, equity, or a combination of some or all of them, the Contributory Negligence Act 1947 can apply. He argued that here, negligence was implicitly part of the Singh's causes of action, and submitted that they could have framed their claim in tort.

Analysis

[26] The representations as to the canopy coverage areas were expressed to be a warranty by the vendors. There were a number of other warranties contained in the agreement, notably in cl 6 in the standard form agreement, and also in the further terms of sale. For example, in the further terms of sale, the vendors warranted:

(a) that they were registered for the purposes of the Goods and Services Tax Act 1985;

(b) the production figures for the lemon orchard over various periods, and

(c) that an export spray programme would be applied to the kiwifruit plants.

[27] Clause 6(5) in the standard form agreement recorded that the breach of any warranty contained "in that clause" would not defer the obligation to settle, but that

[1] *Mouat v Clark Boyce* [1992] 2 NZLR 559 at 565.

settlement would be without prejudice to any rights or remedies available to the purchaser at law or in equity, including but not limited to the right to cancel the agreement under the Contractual Remedies Act. In its terms, this provision applied only to the warranties contained in cl 6 and it did not extend to the additional warranties given in the further terms of sale.

[28] Traditionally, at common law, the terms of a contract were classified as being either "conditions" or "warranties". Any breach of a condition entitled the innocent party, if he so chose, to treat himself as discharged from further performance under the contract, and in any event, to claim damages for loss sustained by the breach. A breach of warranty, on the other hand, did not entitle the innocent party to treat himself as discharged, but to claim damages only.[2] There was considerable difficulty with this classification. There was no adequate judicial definition of either term,[3] and it was often very difficult to decide whether a representation that contained a promise amounted to a condition, or a warranty. The question could only be decided by looking at the contract in light of the surrounding circumstances.[4]

[29] Modern New Zealand contract law no longer preserves the distinction between conditions and warranties, although s 7(4) of the Contractual Remedies Act 1979 does preserve a distinction between stipulations in a contract, with its references to essentiality and substantiality. It is not breach of every stipulation in a contract which entitles the innocent party to cancel.

[30] In the present case, Judge Andrée Wiltens found that Mr and Mrs Singh placed emphasis on "exact canopy hectares". Indeed, they sought assurance from Mr Rutherford and Ms Jolly in this regard before they entered into the agreement for sale and purchase. Representations were made by Mr Rutherford and Ms Jolly and those references were confirmed and repeated in the warranty given in cl 26.

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2 See HG Beale (ed) *Chitty on Contracts* (13th ed, Sweet & Maxwell, London, 2008) vol 1 at [12-019].
Ibid, at [12–019] and [24–038].

3 John Burrows, Jeremy Finn and Stephen Todd *Law of Contract of New Zealand* (4th ed, LexisNexis, Wellington, 2012) at [8.1].

4 *Bentsen v Taylor, Sons & Co* [1893] 2 QB 274 at 281.

[31] Where somebody warrants something, the person giving the warranty binds himself or herself to it.[5] A warranty is a statement of something which the party undertakes should be part of the contract,[6] and if a representation is made in the course of dealings for a contract for the very purpose of inducing the other party to act on it, and it actually induces the other party to act on it by entering into the contract, that is prima facie ground for inferring that the representation was intended as a warranty.[7]

[32] In general, the maker of a warranty undertakes strict liability for what he or she warrants and a warrantor assumes the risk that his or her belief about the matter warranted might be mistaken. From the innocent party's perspective, the purpose in seeking a warranty is to protect against error.[8]

[33] Here, Mr Rutherford and Ms Jolly gave the warranty contained in cl 26. It seems from Judge Andrée Wiltens' decision that they were casual in giving that warranty. In relation to the older kiwifruit orchard, they relied upon measurements undertaken by their tenant. In relation to the younger kiwifruit orchard, and the lemon tree orchard, they relied on assumptions. No attempt was made by them to check the size of the canopies before the warranty was given.

[34] The warranty was clearly wrong. There was a significant discrepancy between the areas warranted and the actual areas. The Singhs are entitled to sue for breach of the warranty, and prima facie they should be entitled to such damages as they have suffered as resulted from the breach.

[35] Judge Andrée Wiltens found that the Singhs were "disentitled" to make a successful claim for breach of the warranty because of their own inadequate due diligence.

[36] Did the obligation to check the size of the canopies pass to the Singhs pursuant to either the cl 20, or cl 21, of the agreement for sale and purchase?

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5 *Oscar Chess Ltd v Williams* [1957] 1 All ER 325 at 327–328.
6 *Chanter v Hopkins* (1838) M & W 339.
7 *Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd* (1965) 2 All ER 65 at 67.
8 *Tower Corporation v Rama* CA 173/94, 11 May 1995 at 14.

[37] There is limited support, albeit obiter, for the proposition that inadequately conducted due diligence can prevent a purchaser from suing for breach of warranty. In *Spicers Paper (NZ) Ltd v Whitcoulls Group Ltd*,[9] Master Kennedy Grant held that actual knowledge of an error in a warranty is required before the right to sue for breach of warranty is lost, and that mere disclosure by the vendor of material revealing the error does not suffice. He expressed the view, obiter, that a defendant might lose, assessed on conventional principles for loss (if any), the protection of the requirement of actual knowledge if he or she failed to conduct adequate due diligence.[10] He relied upon the general principle that a party to a contract cannot take advantage of the non-fulfilment of a provision in it that is due to his own default.

[38] With respect, I am unable to agree with this obiter comment. In my judgment, there is no good reason to focus on the plaintiff's failure to properly carry out due diligence, rather than on the defendant's breach of a warranty. The purpose in a purchaser seeking, and a vendor giving, a warranty, is to give an assurance as to the accuracy of the matter warranted. When a warranty is given, this is likely to affect the expectations of the purchaser. He or she can take confidence from the warranty. A party with the benefit of a warranty may well not focus due diligence (when it is available) on the warranted matter, or may only undertake limited due diligence in relation to the warranted matter.

[39] In my view, a warranty given to allay a purchaser's concerns, will not generally prevent a purchaser from suing for breach of warranty on the basis of inadequately conducted due diligence. There is support for this view in the authorities. I refer to *Foot Brothers Ltd v Kevith Holdings Ltd & Ors*.[11] In this case, the plaintiff purchased the defendant's business assets. He subsequently alleged that the defendant had breached a number of warranties contained in the sale and purchase agreement. Due diligence was carried out before the agreement was concluded and the plaintiff had sought warranties to allay his concerns. One of the warranties was to the effect that the defendant warranted to the plaintiff that none of

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9 *Spicers Paper (NZ) Ltd v Whitcoulls Group Ltd* HC Auckland CP 181/94, 8 September 1994.
10 Ibid, at 27.
11 *Foote Brothers Ltd v Kevith Holdings Ltd & Ors* HC Auckland CP 61/96, 9 April 1998.

the stock the subject of the agreement was obsolete, or slow moving. This warranty proved to be wrong. The defendant argued that the plaintiff had ample opportunity to ascertain the stock position, and that the plaintiff could therefore not rely upon the warranty. Patterson J considered that the due diligence exercise undertaken by the plaintiff strengthened the plaintiff's position, rather than weakened it. He observed that one of the purposes of due diligence is to identify matters of importance, and if they are not resolved prior to the completion of the agreement for sale and purchase, appropriate covenants and warranties can be included in the agreement to protect the purchaser.[12] He held that the plaintiff could claim under the warranty in respect of obsolete or slow-moving stock.

[40] I note that this case bears some factual similarities to the present appeal. Mr and Mrs Singh sought assurances as to canopy sizes before concluding the agreement for sale and purchase. Assurances were given and they were then repeated in cl 26.

[41] In *Ford v Ryan*,[13] MacKenzie J held that a warranty contained in an agreement for sale and purchase of a house could be relied on, notwithstanding that the purchaser had obtained a building report before the contract was declared unconditional, and notwithstanding that the purchasers were aware of the most significant deficiencies in the dwelling. He did not consider that the purchaser's knowledge relieved the defendants of their obligations assumed under the warranty clause.[14]

[42] Each case must, of course, turn on its own facts and the primary consideration will always be the terms of the contract in issue before the parties.

[43] Here, my view is reinforced by the provisions of the agreement for sale and purchase.

(a) Clause 20 did not impose an absolute obligation on the Singhs. Rather, it gave them the right to undertake what was referred to in the

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12 Ibid, at 19.
13 *Ford v Ryan* HC Wellington CIV-2005-485-845, 13 December 2007.
14 Ibid, at [33].

clause as "due diligence verification". The clause expressly recorded that the condition had been inserted for the sole benefit of the Singhs. It follows that they could waive it. If the Singhs had waived the right to undertake due diligence, they would still have been entitled to sue on the warranty. It can make no difference if they undertake only limited or partial due diligence, provided that due diligence does not expose the error in the warranty prior to confirmation.

(b) Clause 20 was a general "due diligence" clause. It extended to every aspect of the transaction. The clause was still effective even if the Singhs did not check the canopy sizes. The maxim *generalia specialibus non derogant* applies.

(c) Clause 21 was not a due diligence clause. Rather, it was a condition. Inter alia, it required Mr Rutherford and Ms Jolly to provide the Singhs with a copy of the lease of the orchard property, and required the Singhs to be satisfied as to the production figures and other matters disclosed in the lease. In its terms, the clause was limited to matters disclosed in the lease. The clause did not expressly require the Singhs to check the size of the canopies of the three component parts of the orchard. As I understand it from Judge Andrée Wiltens' judgment, the lease did contain the same canopy coverage area for the older kiwifruit orchard as had been warranted by Mr Rutherford and Ms Jolly. This may well have reinforced the Singh's belief that the warranty could be relied on. Moreover, while production is tied with the size of the canopies of the fruit trees, canopy coverage is not the sole issue driving production. In my view, the Judge went too far when he held that there was an obligation on the Singhs to satisfy themselves that the three parts of the orchard were an appropriate size and producing a sufficient volume of fruit to suit their requirements.[15] He was reading into the clause obligations that are not expressly set out.

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[15] See *Singh v Rutherford* DC Manuaku CIV-2008-055-0042, 29 August 2011 at [48].

[44] There is an additional difficulty in the way of Mr Rutherford and Ms Jolly. Their statement of defence did not plead by way of counterclaim breach of cls 20 or 21. It would have been open to them to have pleaded a breach of those clauses by the Singhs, in relation to matters not under warranty. Any counterclaim would have been an independent proceeding. They could have claimed damages for breach by the Singhs and claimed a set off against such damages as are payable by them to the Singhs for breach of the warranty provision.

[45] It follows that in my judgment, Judge Andrée Wiltens erred when he held that the Singhs were "disentitled" to make a successful claim in relation to the breach of warranty clause, because of their own inadequate due diligence. The Singhs were entitled to rely on the warranty and they were not obliged to undertake their own measurements of the coverage of the canopies.

[46] I deal briefly with the argument made by Mr Colthart that the Contributory Negligence Act applies, and that the Singhs were negligent in carrying out their due diligence obligations, and that this was causative of their loss.

[47] Clause 3(1) of the Contributory Negligence Act provides for an apportionment of liability "where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons". Fault is defined in s 2 as follows:

> Fault means 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.

[48] As has been noted by various commentators, in a number of cases the definition has been taken to mean that before the Act can apply, the defendant must be a tortfeasor.[16] However, in *Mouat v Clark Boyce*, Cooke P considered (in obiter) that whatever the source of a duty of care, whether derived from tort, contract, equity, or all of them, the Act can apply whenever negligence is an essential ingredient of the plaintiff's cause of action.[17]

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[16] Burrows, Finn and Todd *Law of Contract in New Zealand*, above n 3, at [21.2.5]; Stephen Todd (ed), *The Law of Torts in New Zealand* (5th ed, LexisNexis, Wellington, 2009) at [21.204(2)].

[17] *Mouat v Clark Boyce* [1992] 2 NZLR 559 (CA) at 564–565.

[49] In the present case, the Singhs' statement of claim did not rely on negligence. It was based in contract, and on the Fair Trading Act. Negligence was not an essential ingredient of their causes of action. It follows that contributory negligence was not available as a defence.[18] Further and in any event, the matter was not pleaded by Mr Rutherford and Ms Jolly. It was raised for the first time in the submissions filed on their behalf for this appeal hearing.

[50] It follows that the appeal is allowed.

Causation/Damages

[51] I do not have sufficient materials before me to make any findings as to causation and/or quantum. I do not have the briefs of evidence, or a transcript of the hearing before the District Court, and no submissions have been made to me in relation to the damages issue. It follows that I remit the matter back to the District Court pursuant to r 20.19 of the High Court Rules 2008 so it can consider whether the damages claimed by the Singhs were caused either in whole or in part by the breach of warranty and if so, what damages should flow to the Singhs from breach of the warranty provision.

Costs

[52] The Singhs are entitled to their costs on this appeal. I fix those costs on a 2B basis. I anticipate that counsel will be able to agree on costs. In the event that the parties are unable to agree on quantum, then:

(a) The Singhs are to file a memorandum detailing the costs they claim within 10 working days of the date of this judgment.

(b) Mr Rutherford and Ms Jolly are to file a memorandum in response within a further 10 working-day period.

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[18] *Vining Realty Group Ltd v D S & J W Moorhouse & Ors* [2010] NZCA 104 at 64–67; Point not taken on appeal in *Marlborough District Council v Altimarloch Joint Venture Ltd & Ors* [2012] NZSC 11.

I will then deal with costs on the papers, unless I require the assistance of counsel.

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Wylie J