

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA432/2025
[2026] NZCA 171**

BETWEEN	XIAOYUE WANG AKA CRYSTAL WANG First Appellant
AND	HE WANG AKA WILSON WANG Second Appellant
AND	ANGELINA VANIFATOVA Respondent

Hearing: 26 March 2026
Court: Collins, Mander and Becroft JJ
Counsel: P L Rice for Appellants
G R Grant and M C Frogley for Respondent
Judgment: 11 May 2026 at 10 am

JUDGMENT OF THE COURT

- A The appeal is dismissed.**
- B The appellants must pay the respondent costs for a standard appeal on a band A basis, together with usual disbursements. We certify for second counsel.**
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REASONS OF THE COURT

(Given by Mander J)

[1] This appeal involves the sale of a townhouse that had weathertightness defects. The property was owned by Mr Weiguo Wang (Mr Wang Snr). He let the property

before selling it to the respondent, Angela Vanifatova. By the time of its sale in 2021, Mr Wang Snr was retired and living in China.

[2] The appellants, Mr Wang Snr's daughter, Xiaoyue Wang, who is also known as Crystal Wang, and her husband, He Wang, who is known as Wilson Wang, remained domiciled in New Zealand. They represented Mr Wang Snr and acted as his agents in respect of his responsibilities as the owner and landlord of the property, and as the vendor for the purposes of its sale.

[3] After discovering the property had weathertightness defects, Ms Vanifatova sued Mr Wang Snr. She also sued Mr and Ms Wang, alleging the tort of deceit for fraudulent misrepresentations when marketing and selling the property to her. It was alleged they had misrepresented the true condition of the property by concealing the "tell-tale signs of water ingress", and by answering Ms Vanifatova's due diligence questions with half-truths.¹

[4] Andrew J, who heard evidence and submissions over the course of a six-day trial, found the elements of the tort of deceit alleged against Mr and Ms Wang proven.² Judgment was entered in favour of Ms Vanifatova. Mr and Ms Wang, together with Mr Wang Snr, were ordered to pay remedial costs (\$495,190), consequential losses (\$26,580.45) and general damages (\$30,000) to Ms Vanifatova.³

[5] Mr and Ms Wang appeal the judgment. They rely on two grounds which are alleged to be errors that materially affected the High Court's finding of deceit. They maintain:

- (a) The Judge conflated Mr Wang Snr's contractual obligation of disclosure as the vendor (to provide to Ms Vanifatova any information held to be relevant to the due diligence investigation) with Mr and Ms Wang's common law obligation not to be deceitful.

¹ *Vanifatova v Wang* [2025] NZHC 1532 [judgment under appeal] at [59(a)].

² At [139]. A second cause of action alleging breaches of ss 9 and 43(1)(d) of the Fair Trading Act 1986 failed because neither Mr Wang, Ms Wang nor Mr Wang Snr were held to have been acting "in trade" for the purposes of that Act: see at [113] and [141].

³ At [155]. Judgment was entered against Mr Wang Snr in the same amounts for misrepresentation and breach of contractual warranty.

- (b) The Judge failed to consider whether the elements of the tort were separately proven against Mr and Ms Wang individually.

Factual background

[6] The property is a two-storey townhouse which was part of a unit title development completed in early 2002. The dwelling's exterior cladding comprises a monolithic system which is directly fixed to timber framing. Such buildings are known to be prone to weathertight issues. A feature of the townhouse is a deck situated on the upper floor above three bedrooms. The deck was identified in the evidence as a source of water ingress.

[7] When Mr Wang Snr purchased the property in 2014, he obtained a pre-purchase inspection building report (the Visual Audit report) which did not identify any weathertightness issues. The property was tenanted and managed by a property management company which regularly provided inspection reports to the landlord. These reports were sent to Ms Wang because Mr Wang Snr did not read or speak English.

Weathertightness issues emerge

[8] In October 2014, an inspection report recorded that the tenant had complained about a leak and musty odour in the rear bedroom below the deck. The email to Ms Wang read:

While at the property in the rear downstairs bedroom there was a slight musty odour, the tenant pointed out some dry mould on the carpet and said he had noticed the smell and pulled out the bed and found this strip along the wall. The carpet was not wet but there has obviously been a small leak most likely over the winter months. The area matched up with the drainage pipe on the exterior wall so it might be a good idea to get someone in to check it.

[9] Mr Fruean, the tenant at the time, gave evidence confirming that he asked for the leak to be fixed. Mr Wang and a "builder friend", Mr Zhang, came and applied sealant around the balcony. Mr Fruean continued to complain about the leak which was causing mould and a musty smell in the rear bedroom. The property managers emailed Ms Wang to advise the tenant had informed them of a "bad smell" in the rear bedroom and, in late September 2015, requested her "husband or friend" to "have a

look again”. At that point, Mr Wang contacted Mr Fruean directly. Mr Fruean could no longer live or sleep in the bedroom because the smell was so bad.

[10] In October 2015, Mr Wang arranged for large “cut-outs” to be made to the internal lining of the deck’s parapet and gib board was removed from the rear bedroom’s ceiling and wall. This work exposed an internal pipe in the ceiling void that was connected to one of the drainage outlets in a corner of the deck.

[11] On 10 December 2015, Mr Fruean sent a text to Mr Wang stating:

It has also come to my attention that the other room also has mould and smell caused by the leakage, this is a health risk and I’ve been pushing you guys to get it done asap.

[12] Mr Wang also took up the floating timber floor of the upstairs deck to try and fix the leak coming into the bedroom.

[13] In that same month, Mr Wang engaged a professional waterproofing firm to undertake remedial work on the deck and arranged for the deck membrane to be recoated. The quote provided by the firm referred to the carrying out of a “[w]ater test” and the fibreglassing of the “scupper area” The nature and extent of the work undertaken at this time was in issue at trial, but it is clear Mr Wang applied large amounts of sealant to parts of the deck, including to gaps between the internal fibre cement sheets of the parapet and the timber cap flashings.

[14] During this period, Mr Fruean had to sleep in the living room for some three months while the repair work was completed and the area in the rear bedroom allowed to dry out. Mr Fruean negotiated a reduced rental and refund with Mr Wang because of the long period he could not use his bedroom and the interference it caused with his tenancy.

[15] On 29 January 2016, Mr Fruean sent a text message to Mr Wang describing the leaking in the rear bedroom as having been “a long term problem for [the] house” since they had moved in (being almost two years at that stage). After Mr Fruean moved out of the property in January 2018, the property managers completed an inspection report which noted that in the middle bedroom there was a mark where

there had been a previous leak. In August of that year, the property managers sent a further inspection report to Ms Wang which included a copy of a note from the current tenant advising that when it rained the rear bedroom leaked in the corner and that the front bedroom also leaked.

[16] In July 2019, the new tenant, Mr Hockings, sent a text to Mr Wang advising there was a leak in the front bedroom. He emailed a short videoclip to Mr Wang showing water dripping from the lintel above the window. Mr Wang then requested that Mr Zhang inspect the property. He found the roof gutters blocked with leaves which he removed. However, Mr Hockings' evidence was that he spoke to Mr Wang on some three or four occasions to complain about water leaking into the front bedroom. Mr Hockings said he could recall at least two occasions when Mr Wang lifted the wooden decking and applied sealant to the bottom edges of the deck. While the leaking would stop for a few weeks, it would then return.

[17] In his oral evidence, Mr Hockings referred to having seen visible water staining on the walls of his bedroom (the front bedroom) which extended from the skirting boards that were also "water swollen". He described the carpet in that room as sometimes damp to touch. Mr Hockings also stated that, while the carpet was new when he moved in around February 2019, after the first winter it was already smelling musty, and he described how he and his fellow tenants were using dehumidifiers in every room. Mr Hockings maintained nothing was done to stop the water leaking into his front bedroom or other parts of the address and that the signs of water leaks on the bedroom walls and skirting boards were visually obvious by the time he moved out in December 2020.

The sale process

[18] In March 2020, Mr Wang Snr decided to sell the property. He engaged Bayleys as his real estate agent, and they instructed the preparation of a building inspection report. It found the property to be in average to generally good condition for its age and that it had been well maintained. Non-invasive moisture testing in areas of possible concern were described as producing readings within an acceptable level.

[19] During Bayley's agency, four conditional agreements for sale and purchase were entered into but none proceeded. One of the would-be purchasers, Mr Sue, entered into a conditional agreement that was made subject to a satisfactory builders report. That report completed in June 2020 (the Dillon Sue report) found there to be elevated moisture levels in the wall linings and skirting below the balcony deck, albeit within acceptable levels. Rust was found on the carpet's smooth edge and the skirting was observed which was noted as "indicating [m]oisture". The report recommended further investigation "to establish the condition of the Wall and Deck Framing", that may require invasive testing.

[20] After being advised of the adverse building report, the Wangs instructed their solicitors to obtain a copy. The report was provided on 19 June 2020. In an email to the prospective purchaser on 22 June, the Bayleys agent advised she had met with Mr Wang and the Wangs' builder to review the Dillon Sue report. The email advised that the Wangs were going to make improvements to the property, including cleaning out all the gutters; sealing the fixing on the downpipes and the interior of the drain; removing water from the deck; placing flashings on the deck handrail and the top of the meter box; lifting and cleaning boards from the deck; and thoroughly inspecting the deck membrane with the builder, with a view to "[a]ddress[ing] any imperfections". The purchaser did not proceed with the contract.

[21] On 23 June 2020, Mr Wang went to the property and carried out some remedial work. He lifted the deck boards, water blasted the top of the deck and applied silicone sealant, although the extent of those works was also in issue at trial.

[22] On 1 October 2020, Bayleys withdrew as the selling agents for the property. In the middle of that month, the property managers sent a routine inspection report to the Wangs that noted dampness in two of the downstairs bedrooms and that the tenant had complained of dampness in the front and middle bedrooms.

[23] On 21 December 2020, the property was relisted with different real estate agents, Mr David Wang and Ms Xiaomin Fu of Barfoot & Thompson. The agency agreement records the vendor as having ticked "[n]o" and initialled a statement which reads:

Is the client aware of any past or present water penetration issue(s) affecting the property and/or complex?

[24] In December 2020, the new real estate agents advised the Wangs to paint the deck and interior in preparation for sale. Mr Wang painted the interior of the property, including the three downstairs bedrooms, over the Christmas period. He also installed some new lights and other electrical fittings. Before painting, he injected silicone into the mitre joints and nail holes of the cap flashings on the deck balustrading.

[25] On 13 January 2021, Mr Wang sent a text to one of the agents, Mr David Wang:

For the house viewing this afternoon, if possible, could you please arrive five minutes early and help move the dehumidifier and the fan in the room at the far end downstairs to the garage? To avoid any misunderstandings from the potential buyers.

[26] After Mr David Wang acknowledged he would do so, Mr Wang text him:

I extracted for a whole day and night and only extracted 1 litre of water, the house is now relatively dry.

Ms Vanifatova's purchase of the property

[27] Prior to purchasing the property, Ms Vanifatova obtained a building inspection report which did not identify any weathertightness issues with the property. On 18 January 2021, she made a written offer which was conditional upon confirmation of finance and the completion of due diligence within three working days. Mr Wang Snr accepted the offer the same day. The due diligence clause relevantly provided:⁴

24.0 Due Diligence

This agreement is conditional upon the purchaser being satisfied with the results of a due diligence investigation of the property and the purchaser's intended development of it by 5pm on the [3 working days] after the date of this agreement.

...

The vendor undertakes and agrees to:

- (a) allow the purchaser together with consultants employed by the purchaser full access to the property for the purposes of the due diligence investigation;
- and

⁴ Emphasis added.

(b) provide to the purchaser any information held relating to the property relevant to the due diligence investigation.

[28] The sale and purchase agreement also contained a special condition, inserted by Barfoot & Thompson:

21.0 The Purchaser acknowledges and accepts that neither the vendor or the agent hold themselves out to have any expertise as to the weather tightness, condition or integrity of the exterior cladding to the dwelling (which is monolithic and/or with no cavity) nor have the vendor and/or agent made any representation in relation to such matter. The Purchaser acknowledges that in entering into this agreement they have verified such aspect/matter to their entire satisfaction and have based their decision in reliance solely on their own judgement and enquiry. In this clause “agent” means the real estate agent or licensee.

[29] During the due diligence period, text and email correspondence was exchanged between the various parties, including Mr David Wang. These communications were the subject of some focus by the trial Judge. They were described by him as “critical to understanding and analysing the claim of misrepresentation” by the Wangs, in particular what Ms Vanifatova had requested to know and whether the information she was provided was misleading or “half true” as alleged.⁵

Subsequent events

[30] After settlement of the sale and purchase agreement on 26 February 2021, Ms Vanifatova moved into the house. Within a few months she experienced water leaking into one of the downstairs bedrooms. She engaged professional firms to investigate the leaks, including a specialist weathertightness building surveyor. A subsequent report of 1 February 2022 summarised the following findings:

The investigation concluded that there has been a weathertightness failure of the first floor enclosed deck which has caused decay damage to the structural timber framing of the external walls to the property. This failure is due to poor design of the timber framed parapet which now requires recladding in its entirety. Failure to remediate the parapet and subsequent adjoining framing with immediate effect will result in exacerbated deterioration to existing framing, increasing the cost of the remedial works.

Upon review of the extent of damage and the condition of the paintwork, cross-referenced against photographs provided by the client, it is believed that the damage would have been apparent to the previous owner of the property, and has been remediated on a superficial level only prior to the sale.

⁵ Judgment under appeal, above n 2, at [49].

The proposed remedial solution is full replacement of the external walls, joinery, and parapet surrounding the enclosed deck and areas beneath. Internal walls and ceiling linings are to remain as existing. A new cladding system installed over a ventilated cavity is proposed to the new structural framing of the external walls and parapet.

[31] Proceedings were issued by Ms Vanifatova in April 2022.⁶

The High Court decision

[32] In addressing the respective claims against the Wangs, Andrew J identified a number of factual issues he was required to address. The Judge found that, in response to the water ingress, Mr Wang attempted various remedial works in 2015, and that when he and Mr Zhang made their investigations at that time they would have likely observed visible decay to the timber studs and nogs that had been exposed to locate the leak(s). They would also have seen water damage to other areas of the downstairs bedrooms. In making that determination, the Judge rejected the Wangs' evidence that no evidence of water ingress had been found and no repairs undertaken at that time.⁷

[33] The Judge preferred the evidence of Ms Vanifatova's expert witness, Mr Ball, who he found to be a "compelling and persuasive" witness.⁸ Mr Ball stated that in the course of his inspections, he found clear evidence of repair work to the interior-facing side of the deck parapet above where the moisture ingress problems had been identified, and the presence of new treated timber in the ceiling of the rear bedroom. The original timber in the dwelling was untreated.⁹

[34] In relation to the issue of the Wangs' knowledge of weathertightness issues that were not disclosed, the Judge noted Mr Wang Snr's acceptance that Mr and Ms Wang, while acting within the scope of their authority (about which there was no dispute), were acting as his agents and that their knowledge could be legitimately imputed to him. The Judge found that Mr and Ms Wang "stood in the shoes of Mr Wang Snr and sold the property essentially as the vendor", having "full and largely unrestricted

⁶ Ms Vanifatova also sued the company responsible for preparing the pre-purchase inspection report she commissioned. Settlement was reached with that defendant and the settlement sum of \$75,000 less scale costs of \$10,952 was deducted from the damages awarded against the Wangs: see at [54] and [151].

⁷ At [64].

⁸ At [64].

⁹ At [64].

authority to do so”.¹⁰ The Judge concluded that Mr and Ms Wang knew there were significant water ingress problems and that, at the time of the sale and purchase agreement, they had known about these issues for some considerable time.¹¹

[35] The Judge preferred and accepted the evidence of Ms Vanifatova’s witnesses “on critical factual events, including the history of leaking problems”, which the Judge held demonstrated that Mr and Ms Wang were “very aware of the issue”.¹² Those witnesses included the tenants, Mr Fruean and Mr Hockings; representatives of the property managers who completed reports about the dwelling’s state; and Ms Vanifatova’s expert building witness, Mr Ball.¹³

[36] In regard to the issue of damage in the area of the opened wall and ceiling cavities, the Judge accepted and adopted Mr Ball’s evidence, and rejected that of Mr Wang and Mr Zhang. Mr Ball gave evidence based on a photograph taken by Mr Fruean in October 2015 that showed the exposed internal wall and ceiling in the rear bedroom. Mr Ball identified visible water damage—including decay, water staining, and mould growth to the internal timbers—and staining and discolouration of the synthetic building wrap associated with mould growth. Mr Ball’s opinion was that the photograph was “indisputable evidence” that this rear bedroom wall had been subject to significant visible damage from the weathertightness failures of the deck and/or the balustrade at the time it was opened up in 2015.¹⁴

[37] The Judge held it was implausible these visible signs of timber decay in 2015 were not observable at the time the internal cavities were revealed and that, thereafter, there continued to be ongoing complaints about water ingress issues. The Judge found that Mr Wang had been actively involved on most occasions where attempts were made to resolve the leaks, but that “the complaints kept coming”.¹⁵ In that regard, it was noted that Mr Wang obtained a quote from a waterproofing company in 2015 for “deck remedial work”, which was evidence of his knowledge of the problem.¹⁶

¹⁰ At [69].

¹¹ At [71].

¹² At [71].

¹³ At [71].

¹⁴ At [73]–[75].

¹⁵ At [77]–[78].

¹⁶ At [79].

[38] The Judge rejected Mr Wang’s attempt to “downplay his awareness of the contents of [the Dillon Sue] report” that had been provided at their solicitors’ request.¹⁷ In that regard, it was noted the report had been treated seriously and resulted in Mr and Ms Wang calling in their advisor on building matters to review its contents, something in which Mr Wang was directly involved. The Judge concluded the Wangs knew by this time that the water ingress problems had not been resolved and that actual damage caused by this problem existed in the house. While some work was undertaken, only some four months later, in October 2020, the property manager’s inspection report to Ms Wang informed her that it was damp in two of the downstairs bedrooms.¹⁸

[39] The Judge found Ms Vanifatova to be a credible witness. He accepted she made “unrelenting” inquiries about weathertightness issues during the due diligence period.¹⁹ The Judge concluded the Wangs were aware there were significant weathertightness issues and that they had known this for some considerable time. It was noted Mr Wang had been directly involved in some of the repairs, including the remedial works carried out in 2015, and that he would have understood and been concerned about the complaints regarding ongoing leaking. The Judge rejected Mr Wang’s suggestion the works he undertook were simply in the nature of routine maintenance.²⁰

[40] The Judge found Mr and Ms Wang were under some pressure to sell the property and that they made a deliberate decision not to disclose all of the information they knew about the weathertightness issues, including the Dillon Sue report and the nature and extent of the remedial works carried out in 2015. Having regard to the obvious awareness of the importance of the weathertightness issues at the time Ms Vanifatova entered into the sale and purchase agreement, and the Wangs’ onerous due diligence obligations which required them to provide her with information they held relating to the property, the Judge concluded the non-disclosure was deliberate.²¹

¹⁷ At [80].

¹⁸ At [80]–[83].

¹⁹ At [86].

²⁰ At [88]–[90].

²¹ At [90]–[92].

[41] In relation to the issue of whether the dishonesty/fraudulent element of the tort of deceit had been made out, the Judge held that:

[105] Both [Mr and Ms Wang] knew that Ms Vanifatova was anxious and insistent about seeking information about weathertightness issues. They were aware of the Dillon Sue report, and they knew that the reason Mr Sue had not concluded his purchase was because of the report he received. They knew there was a history of leaking with the property that had not been resolved. They both knew that the ongoing attempts to remedy the problems had not been successful. They knew that the remedial works carried out in 2020, upon receiving the Dillon Sue report, were an attempt to try and eliminate any evidence of weathertightness issues. They were aware that another property in the same complex, namely 88K, had had leaking problems with its deck. They knew that Ms Vanifatova was aware of that issue and that she had sought assurances in relation to their property because of it. They were aware also that the other pre-inspection reports had not raised issues. I also find it reasonable to infer that they knew that the contractual obligations of Mr Wang Snr were to disclose all relevant information — and they knew that he was dependent on them in the provision of that information.

[42] The Judge found that incomplete information was provided to Ms Vanifatova on the afternoon of 20 January 2021.²² In response to a request from her that the vendor send an email listing all the work that had been done to the building, Ms Wang sent a WeChat message that was forwarded by one of the real estate agents to Ms Vanifatova, but with the omission by the agent of the words included in the original message, “[w]e are not aware of any weathertightness issue of the property”. The forwarded message read:

Hi David

The previous owner have made new floating deck and We have done deck deep clean and waterproof in 2015.

We also down new interior painting, washed fence, new deck painting, new LED downlights, new switches powerpoints at end of 2020 and down new carpet and curtains one years ago.

[43] This was assessed by the Judge as having given a “material and significantly different impression as to the nature and extent of the remedial works” completed by the Wangs.²³ The Judge observed the bulk of the information conveyed in that and other crucial messages related to interior non-structural work, which would not give rise to any concern about weathertightness issues, and that the description of the work

²² At [106].

²³ At [106].

undertaken in 2015 was “fundamentally different from the significant remedial works actually attempted at that time”.²⁴ The Judge found that work had included structural remediation, such as the replacement of timber, for which a building consent should have been obtained.²⁵ The Judge concluded:

[107] I find that the partial and limited disclosure of detail about the remedial works carried out in 2015 and subsequently (i.e. multiple applications of sealant) was deliberate and dishonest. So, too, was the withholding of the Dillon Sue report. These omissions were intended to and did create a false impression about the state of the dwelling and its history. The necessary element of dishonesty for the tort of deceit is thus made out.

[44] In addressing the cause of action of deceit specifically brought against Mr and Ms Wang, the Judge concluded that Ms Vanifatova had proven the necessary elements of that tort against both of them. The Judge considered they had made false representations which they knew to be untrue with the intention that Ms Vanifatova should act on them.²⁶ The Judge expressed his conclusion in the following way:

[140] As I have concluded, [Mr Wang] misrepresented the true condition of the property by concealing the tell-tale signs of water ingress. I also find that both [Mr and Ms Wang] answered the plaintiff’s due diligence questions with half-truths, knowing that the information provided was incomplete and with the intention that it should deceive Ms Vanifatova. Neither [Mr Wang nor Ms Wang] honestly believed that the incomplete information provided was a full and accurate picture of the remedial works that had been carried out — and they knew that the remedial works (not disclosed) that had in fact been carried out were indicative of significant weathertightness defects. As I have discussed above, they both also knew that the defects that they attempted to repair in 2015 had not in fact addressed the problem. There have been ongoing leaking problems, and this had been documented (in part) by the Dillon Sue report. However, [Mr and Ms Wang] did not disclose the Dillon-Sue report; the disclosure of the Visual Audit report only was, in the circumstances, dishonest. It was sent in direct response to a question from Ms Vanifatova to ask the vendor for documentation: “anything they have to show there is no weathertightness issue.”

The required approach to the appeal

[45] In exercising their general rights of appeal, Mr and Ms Wang are entitled to judgment in accordance with the opinion of this Court even where that may involve an assessment of fact and degree and entails a value judgment.²⁷ However, as the

²⁴ At [106].

²⁵ At [106].

²⁶ At [139].

²⁷ *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [16].

appellants, they bear the onus of satisfying this Court that it should differ from the decision the subject of the appeal.²⁸

[46] The appeal court is required to exercise caution when considering challenges to findings of credibility where the trial court has had the advantages of seeing and hearing the witnesses and been able to evaluate the strength of the evidence as it progressively unfolds within the context of the trial as a whole.²⁹ That caveat will have particular resonance in a case such as this, the outcome of which was heavily dependent on factual findings and credibility assessments that led the trial Judge to reject Mr and Ms Wang's claims of having an honest belief the property had no weathertightness issues and that they lacked knowledge of these defects.

The tort of deceit

[47] In order to prove tortious deceit, deliberate fraud must be proved.³⁰ Such fraud will be proved if it is shown that a false representation has been made which a defendant knew to be untrue, or was reckless as to its truth. Recklessness will only be sufficient if there is conscious indifference to the truth.³¹ The defendant must have intended the representation be relied upon by the claimant, and the claimant must have relied on it.³²

[48] Ordinarily, non-disclosure of the truth will not be sufficient to found the tort of deceit.³³ However, as with the law of misrepresentation in relation to a matter of past or present fact, while as a general rule silence cannot amount to a misrepresentation, a deliberate falsity can arise from intentional omission, silence or inaction. The learned authors of *The Law of Contract in New Zealand* summarised the position as follows:³⁴

²⁸ At [4].

²⁹ At [13]; and *Green v Green* [2016] NZCA 486, [2017] 2 NZLR 321 at [29]–[34], citing *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 (CA) at 199.

³⁰ *Amaltal Corporation Ltd v Maruha Corp* [2007] 1 NZLR 608 (CA) at [48], citing *Derry v Peek* (1889) 14 App Cas 337 (HL) at 374 per Lord Herschell.

³¹ *Amaltal Corporation Ltd v Maruha Corp*, above n 30, at [50].

³² At [46]; *Derry v Peek*, above n 30, at 374; and Andrew Tettenborn (ed) *Clerk & Lindsell on Torts* (24th ed, Sweet & Maxwell, London, 2023) at [17-01].

³³ *Amaltal Corporation Ltd v Maruha Corp*, above n 30, at [47].

³⁴ Stephen Todd and Matthew Barber *Burrows, Finn, and Todd on the Law of Contract in New Zealand* (7th ed, LexisNexis, Wellington, 2022) at [11.2.1(g)] (footnotes omitted).

As a general rule, mere silence cannot amount to a misrepresentation. If silence distorts a positive representation, however, then this may amount to misrepresentation for the purposes of s 35 [of the Contract and Commercial Law Act 2017]. A party to a contract may be legally justified in remaining silent about some material fact, but if he or she ventures to make a representation upon the matter it must be a full and frank statement, and not such a partial and fragmentary account that what is withheld makes that which is said false. A half-truth may in fact create a misleading impression because of what it leaves unsaid.

[49] As was recognised by Andrew J, the present case was not one of misrepresentation by positive assertions. It was Ms Vanifatova's case that there was deliberate misrepresentation by concealment, omission and half-truths. Her case was that the incomplete nature of the disclosure gave a false impression about the state of the building.³⁵ As noted earlier, the trial Judge found the Wangs knew there were significant weathertightness defects with the property, yet they deliberately provided a false impression there had not been any real such issues.³⁶

First appeal ground

Alleged conflation of the vendor's contractual duty of disclosure with the appellants' common law duty not to be deceitful

[50] Mr and Ms Wang argued that, because they were not the vendor, they had no legal or equitable obligation to provide Ms Vanifatova with information, and that the explicit contractual obligation imposed by the disclosure clause of the sale and purchase agreement (cl 24(b)), set out at [27], did not apply to them. Mr Rice, on behalf of the appellants, submitted the Judge appeared to treat this obligation of disclosure as binding on all the Wangs, not just Mr Wang Snr in his capacity as the vendor, and erroneously assessed Mr and Ms Wang's actions relating to disclosure against the contractual obligation owed by the vendor.

[51] It was submitted that, while the Judge acknowledged Mr and Ms Wang were not parties to the sale and purchase agreement, it was apparent he considered it reasonable to infer they both knew of the contractual obligations of Mr Wang Snr to disclose all relevant information when there was no factual basis for this inference. It was argued there was no evidence they had read, let alone understood the terms of the

³⁵ Judgment under appeal, above n 2, at [5]–[7].

³⁶ At [90]–[92].

contract or received any legal advice in relation to it. They were not proficient in English. Reliance was placed on Mr Wang's evidence that one of the real estate agents, Mr David Wang, had not explained to them the obligation to provide information and that they only provided that which the agent requested.

[52] We do not consider the trial Judge conflated the vendor's contractual duty of disclosure with the Wangs' own common law duty not to deceive the purchaser. The undeniable and overarching consideration when assessing Mr and Ms Wang's conduct is that they were acting as Mr Wang Snr's agents for the purposes of the sale. There can be no realistic challenge to the Judge's finding that they essentially "stood in the shoes" of Mr Wang Snr and sold the property essentially as the vendor.³⁷

[53] Their communications during the negotiation of the sale to Ms Vanifatova, in particular with the real estate agent to whom they provided information and instructions, as they did to their solicitors, were made on behalf of the vendor, Mr Wang Snr. Mr Wang Snr's own liability, which was based on contractual misrepresentation, rested on the incomplete nature of the disclosure which Mr and Ms Wang bore responsibility to provide. To that extent, Ms Vanifatova's claims against Mr Wang Snr and the appellants were inextricably woven. The additional element required to prove tortious deceit on the part of the appellants was that this misrepresentation, as a result of material partial or incomplete disclosure, was fraudulent in the sense it was deliberate and dishonest.

[54] Ms Wang admitted she was authorised by her father to reply to queries about the property on his behalf, and both she and Mr Wang were aware of the three-working-day due diligence period. Moreover, they were well aware that Ms Vanifatova was gathering information during that period for the purpose of deciding whether to proceed with the purchase of the property. Ms Wang accepted in cross-examination that the contract had been explained to her by the real estate agents and that she understood both the due diligence clause and the obligation on the vendor pursuant to that condition to supply information that was relevant to the purchaser's due diligence investigation. In that regard, Mr Wang acknowledged in his evidence

³⁷ At [69].

that he assisted Ms Wang in compiling the answers to Ms Vanifatova’s questions—including about the work done on the building, and that he was aware of the importance of the information provided to her and that it was complete and correct.

[55] As identified by the trial Judge, the critical focus for the purposes of assessing the allegation of tortious deceit was the three-working-day due diligence period provided by the sale and purchase agreement. The information provided by Mr and Ms Wang during this period was found to be incomplete and materially incorrect because it wrongly conveyed the impression there had been no issues from water ingress to the property. The appellants’ tortious liability did not arise from a contractual breach of the disclosure clause to provide the purchaser with any information relating to the property relevant to the due diligence investigation, but from the incomplete and partial provision of information by the appellants in response to specific requests made during the due diligence period. The nature of that disclosure was found to have “half-truths” that were intended to deceive the purchaser.³⁸

[56] To that extent, proof of either Mr and/or Ms Wang’s reading or knowledge of the particular clause in the sale and purchase agreement was not critical. However, we are, in any event, satisfied there was a proper evidential basis upon which the trial Judge was entitled to conclude the appellants were aware of the due diligence obligation imposed by the contract, at least to the extent of knowing of the need to provide accurate information in response to Ms Vanifatova’s due diligence inquiries and to furnish her with all relevant information.

Second appeal ground

Alleged failure to consider the liability of each appellant separately

[57] Mr Rice submitted that, while the trial Judge expressly acknowledged the need to consider the dishonesty element of the tort of deceit individually in respect to Mr and Ms Wang, he did not do so. It was alleged the Judge adopted an illegitimate “collective approach” to their state of knowledge, and therefore to their liability,

³⁸ At [119]–[121].

because they had acted collectively in providing the information to the real estate agent that was furnished to Ms Vanifatova, and were husband and wife.

[58] In support of this ground, it was submitted the Judge erred in finding that the Dillon Sue report had been available to both appellants and was “closely examined by [them]”.³⁹ While Mr Wang acknowledged the report was discussed at a meeting with their solicitors after they had instructed them to obtain a copy, his evidence was that he understood the report was “okay”. Ms Wang’s evidence was that she never saw the report. Similarly, in respect of the work carried out in 2015, Mr Rice argued the Judge erred in finding that both appellants had collectively failed to disclose the extent of that work. It was submitted that Ms Wang’s evidence was that she was not aware of “the full extent” of the building work carried out in 2015, and that she did not know what work was done by Mr Wang. It was argued her knowledge of what had been done was only based on what her mother and Mr Wang had told her about that work, and that she made the list she sent to one of the real estate agents to be forwarded to Ms Vanifatova on that basis.

[59] This ground of the appeal largely relies on the acceptance of particular parts of the appellants’ evidence. It rests upon discrete or isolated answers they provided without regard to the Judge’s overall adverse credibility findings and his assessment of what we, as did the Judge, consider to have been the unavoidable overall effect of all the evidence. As was acknowledged by Mr Rice, the Judge was cognisant of the need to consider whether the element of dishonesty or fraud had been proven individually against Mr and Ms Wang as separate parties in order to find each of them liable. This requirement was not overlooked by the Judge. However, equally, the Judge was entitled to have regard to their close relationship as husband and wife who acted in concert, and continued to act together in respect of the property in their capacity as the agents of Mr Wang Snr.

[60] We do not consider the Judge erred when regard is had to all the evidence. It revealed that over many years Mr and Ms Wang, in a coordinated way, had sought to perform Mr Wang Snr’s obligations as his representative—both as a landlord during

³⁹ At [87].

the course of successive tenancies and as a vendor throughout the lengthy efforts to market the property which came to a head during the sale process involving Ms Vanifatova. As an example of the former capacity in which they acted, the Judge found it to be implausible that Mr and Ms Wang were unaware of the ongoing complaints of the tenants regarding water ingress as they were each respectively communicating with the property managers and the tenants about these issues.⁴⁰

[61] To suggest they would not have been talking to each other about these matters and informing the other of developments is unreasonable. Similarly, during the period the property was trying to be sold, in particular to Ms Vanifatova, there are WeChat messages between them which demonstrate the level of dialogue about that process and the due diligence inquiries the purchaser was making regarding the property.

[62] We are satisfied the Judge was entitled to conclude that Mr and Ms Wang acted in concert in respect of the recurring weathertightness issues over a very long period, during which successive attempts were made to locate the leak(s) and remedy the problem. Throughout this period, Ms Wang liaised with the property managers and received reports from them about the recurring problems relating to water ingress and the effects on the property. Mr Wang was directly involved in attempting to resolve these issues and spoke with the tenants about them. Despite the extensive works carried out in 2015, which required the removal of internal linings and the replacement of timber, and which saw the tenant having to quit his bedroom for some three months, neither those works nor Mr Wang's iterative efforts to apply sealant and effect other repairs resulted in the weathertightness issues being satisfactorily resolved on any lasting basis. It is clear that the elongated sale process was impeded because of the existence of this issue—one which both Mr and Ms Wang must have been aware given the chronic defect that had dogged the property over such a long time.

[63] Both Mr and Ms Wang were aware at the time Ms Vanifatova was carrying out her due diligence that she was seeking all relevant information relating to weathertightness issues, including details of the works carried out on the house. The Dillon Sue report, which would have alerted Ms Vanifatova to the weathertightness

⁴⁰ At [72].

issues (existing or potential), was withheld. It was sought to be argued that Ms Wang did not have direct knowledge of the contents of that report. However, the Judge was entitled to reject that claim given the centrality of the report to the failure of the earlier conditional sale agreement for which it was prepared and the documentary record of the couple's communications over the due diligence period, during which they liaised with one of their real estate agents about the provision of information in response to Ms Vanifatova's requests.

[64] We consider the appellants' submission that their involvement with and/or knowledge of various aspects of the weathertightness issues—in particular, the extent of the work undertaken to remedy those problems and the concerns raised in the Dillon Sue report—was siloed (the one from the other depending on who was directly involved in particular events) is unrealistic. Given the circumstances in which the appellants coordinated their efforts to manage Mr Wang Snr's tenanted property and to effect its sale, we consider that, to the extent the Judge's conclusions as to the individual liability of each appellant relied on drawing inferences from the evidence about their separate states of knowledge, those inferences were available and entirely reasonable.

Supplementary issues raised in support of the identified grounds

[65] Mr Rice made a number of other submissions in support of the appeal in an endeavour to identify error by the trial Judge in his approach to Ms Vanifatova's claim. We deal with each of those topics in turn.

Identification of the misrepresentation(s)

[66] Mr Rice referred us to the statement of claim in which Ms Vanifatova alleged the vendor had made two misrepresentations, namely that the dwelling was in good condition and did not have, nor had in the past, any issues with weathertightness. However, he submitted no "express" representations to that effect were alleged. He referred to various particulars identified in the pleadings which nominated various acts and omissions by the vendor or his agents. These included the provision of the seven-year-old Visual Audit report; the email of 20 January 2021, sent by one of the real estate agents in response to Ms Vanifatova's inquiry, describing the work

completed to the property; the failure to disclose the dwelling was leaky; and the alleged carrying out of certain “[c]oncealment [w]orks”.

[67] Mr Rice sought to argue that the precise identification in the judgment of the actual misrepresentation(s) found to have been made by the appellants is difficult because the Judge’s findings were “expressed in general terms” and that the pleaded acts and omissions that were ultimately proved were not fairly capable of implying a representation that the building had no real weathertightness issues.

[68] We do not consider there was any error in the Judge’s approach to Ms Vanifatova’s claim. Her case was not based upon a misrepresentation that took the form of an expressly articulated but erroneous assertion. Ms Vanifatova’s case rested on an allegation that the appellants knowingly misrepresented the true condition of the property by omitting or partially disclosing their knowledge of the history of its weathertightness issues and the work that had been undertaken over the years to remediate an ongoing problem that remained extant.

[69] For the reasons set out earlier in this judgment, the law recognises that misrepresentations can result from the provision of incomplete or partial information which presents a false impression of the true situation. In this instance, the essence of the appellants’ tortious liability rested not on the truth or falsity of a positive or explicit statement they made, but on the combination of the information they chose to provide and that which was deliberately withheld, which together resulted in them knowingly misrepresenting the true position.

[70] The relevance of the pleaded provision of the 2014 Visual Audit report, prepared some seven years earlier to a purchaser who the appellants knew was concerned about potential weathertightness issues and was seeking all relevant information regarding that issue, is that there was a very recent building report (the Dillon Sue report) that was available. That report was far more apposite to Ms Vanifatova’s inquiry but was withheld. Significantly, that report alerted the reader to potential watertightness problems that had caused an earlier prospective purchaser to abandon a conditional contract to purchase the property.

[71] Mr Rice argued that the email of 20 January 2021 was an objectively true account of the work done to the building. The Judge found that it was not. In addition to other deficiencies, it failed to disclose the full extent of the building work carried out in 2015, including the replacement of timber, and gave a misleading impression of whether there had been persistent ongoing weathertightness issues.⁴¹ As previously discussed, to suggest Ms Wang was unaware of the nature and extent of the remedial work at that time is not tenable given the impact of the works over many months on the tenancy and Mr Fruean's demands that he be compensated for the inconvenience. Moreover, Ms Wang's response to that particular inquiry must be placed in the context of a series of questions asked by Ms Vanifatova over the due diligence period regarding the property's weathertightness. These included several questions which directly raised that issue because, in order to obtain finance from the bank, she herself needed to be able to warrant to the bank that the property, neither in the past, nor currently, had weathertightness issues.

[72] In summary, Ms Vanifatova sought to know whether there had been any problems with water ingress, what work had been done on the outside deck or cladding and to the building more generally, and whether there was any information from a builder or council to confirm what work had been done on the property. Ms Vanifatova also specifically inquired as to whether the vendor had any information to show the building did not have weathertightness issues. To respond by providing the Visual Audit report but not the Dillon Sue report was telling. There was no disclosure of the fact there had been a leak in the rear bedroom in 2015 and a further leak in the front bedroom in 2019, nor was there reference to the serial applications of sealant to the deck to address moisture issues in downstairs bedrooms.

[73] We accept to some extent that the respondent's reliance on "[c]oncealment [w]orks" may not have been particularly probative of the appellants' intention to mislead or of their intent to deceive the respondent. Given the nature of the works carried out in the rear bedroom in 2015, it is apparent the room needed to be redecorated at that time. Similarly, the recent renovations carried out over the 2020 to 2021 Christmas period, it appears at the suggestion of the new real estate agent, may

⁴¹ At [106].

well have been undertaken in an effort to market the property. However, given the persistent latent defect and what Mr Ball considered would have been the obvious water damage to the interior paintwork which would have otherwise been visible upon inspection by any purchaser, the redecorating works did have the effect of covering over the signs that may have alerted a prospective purchaser to a problem with water ingress.

The dishonesty of the appellants

[74] Mr Rice challenged the Judge's conclusions regarding the appellants' misrepresentation about the true condition of the property and whether it had suffered from weathertightness problems by referencing their evidence on three discrete topics. Namely, the full extent of the "remedial" works undertaken in 2015; the multiple applications of sealant by Mr Wang; and the Dillon Sue report. In relation to each of these matters, Mr Rice traversed Mr and Ms Wang's evidence that was given by them at trial for the purposes of defending Ms Vanifatova's claim.

[75] The inherent flaw in that approach is that it ignored the specific findings of credibility the Judge made that led him to conclude that neither Mr Wang nor Ms Wang honestly believed the incomplete information that was provided was a full and accurate picture of the remedial works that had been carried out. Further, it ignores the Judge's conclusion that they knew the works which had not been disclosed were indicative of significant weathertightness defects. The appeal cannot be advanced by repeating the appellants' evidence that was rejected by the Judge on credibility grounds, after having assessed the overall effect of the totality of the evidence and accepted the conflicting testimony of witnesses called by and on behalf of Ms Vanifatova.

[76] Mr Rice submitted there was no evidence that Mr Wang was provided with a copy of the Dillon Sue report or that he had read it. He maintained he thought everything in it was "okay". Such a position does not stand scrutiny when other evidence is taken into account. The real estate agent told Mr and Ms Wang that the prospective sale to Mr Sue had fallen over because of this adverse building report. There is an email addressing all three Wangs which explicitly records the real estate

agent having been called by Mr Sue and being advised he was cancelling the agreement because he was not happy with the building report. He would not entertain a price reduction, as was suggested by the agent.

[77] The agent advised the Wangs they had the right to ask for a copy of the report and recommended they get their solicitor to request it. The message was sent to the email account regularly used by Ms Wang. The appellants' solicitors were duly instructed. After receiving the report, Mr Wang and his builder reviewed it. As a result, the agent sought to re-engage with Mr Sue by advising him of listed improvements to be made to the property in response to the report. In light of that sequence of events, it is understandable why the trial Judge rejected Mr Wang's minimisation of his awareness of the report's content.

[78] Notably, the tenant, Mr Hockings, recalls that around this time, in June 2020, Mr Wang and another man carried out work on the dwelling which included lifting the floating deck and applying sealant around its bottom edge, above the window of the front bedroom. Mr Wang disputed the location of the application of the sealant, maintaining he only applied it to the mitred joints and nail holes of the balustrade cap flashing. However, as he was entitled, the Judge preferred Mr Hockings' evidence and found that Mr Wang had closely examined the Dillon Sue report.

[79] The Judge concluded that upon receipt of that report, the appellants must have known the water ingress problems had not been fixed and that signs of water ingress existed in the dwelling.⁴² Some four months later, the property managers, in their subsequent inspection report, advised Ms Wang there was damp in two of the downstairs bedrooms and that the tenant had complained of damp in the front and middle rooms.

Objection to other judicial criticism of the appellants' evidence

[80] Finally, Mr Rice sought to contest the Judge's rejection of Mr Wang's evidence about there being no real or significant water ingress issues. It is not necessary to go into detail regarding the Judge's observations and criticisms about parts of Mr Wang's

⁴² At [80]–[81].

evidence. We simply observe that, having regard to the overall state of the evidence, we consider the trial Judge, after having seen and heard all the witnesses, was entitled to be sceptical of Mr Wang’s position in respect of the various matters in dispute. These included him blaming the tenants for dampness issues due to “poor ventilation”; the absence of any mention by Mr Wang of blackening on the timber framing until the photograph from Mr Fruean was discovered; Mr Wang’s denial that the Dillon Sue report was unsatisfactory; and his explanation that a dehumidifier was deployed prior to an open home for paint fumes, which was found by the Judge to be only partly true as it was also there for moisture issues.⁴³

[81] We do not consider these matters were particularly material to the overall rejection of the appellants’ position that the property did not suffer from weathertightness issues and their claimed honest belief it had never done so. Mr Rice sought to reformulate the essential issue as being whether the appellants honestly believed the property was not a “leaky building”. That was not the pleaded misrepresentation. Rather, it was whether the property did not have, or had not in the past had, any issues with weathertightness, and it was that misrepresentation which the Judge concluded had been deliberately and dishonestly made.

Result

[82] For the above reasons, the appeal is dismissed.

[83] The appellants must pay the respondent costs for a standard appeal on a band A basis with usual disbursements. We certify for second counsel.

Solicitors:
Essence Law, Auckland for Appellants
Grant & Co, Auckland for Respondent

⁴³ At [76].