IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA329/2024
[2026] NZCA 176

	BETWEEN	DAVINDER SINGH RAHAL Appellant
	AND	AMEET BHARGAV AND RENU KHAJURIA Respondents

Hearing:	16 June 2025 (further submissions received 12 and 29 September 2025)
Court:	Palmer, Dunningham and Grice JJ
Counsel:	A T Grant and D E Archibald for Appellant S E Wroe and G R Grant for Respondents
Judgment:	13 May 2026 at 11.00 am

JUDGMENT OF THE COURT

A The appeal is allowed in part.

B The cross-appeal is allowed.

C The following awards of damages are set aside:

(a) $270,000 (including GST) for breach of the Fair Trading Act 1986;

(b) $51,840 for consequential losses; and

(c) $80,000 for general damages.

D The following awards of damages are substituted:

(a) $688,868.40 (including GST) for breach of the Fair Trading Act 1986;

(b) $103,107 for consequential losses; and

(c) $35,000 for general damages.

E **Mr Rahal must pay one set of costs to Mr Bhargav and Ms Khajuria for a standard appeal on a band A basis, together with usual disbursements. We certify for second counsel.**

REASONS OF THE COURT

(Given by Palmer J)

Table of contents

Summary

[1] Mr Ameet Bhargav and Ms Renu Khajuria bought a residential property in Auckland from Mr Davinder Rahal and First Trust Ltd (FTL), the company of which Mr Rahal was a director and shareholder. The house was leaky. After a trial in the High Court, Hinton J found FTL liable in contract and FTL and Mr Rahal jointly liable for breach of s 9 of the Fair Trading Act 1986 (FTA) (judgment under appeal).[1] Mr Rahal appeals the imposition of personal liability on him under the FTA, the High Court's approach to damages under the FTA, and the quantum of general damages awarded under the FTA. Mr Bhargav and Ms Khajuria cross-appeal the High Court's approach to FTA damages.

[2] We dismiss Mr Rahal's appeal of the imposition of personal liability on him under the FTA. There was more than enough evidence to justify the High Court's conclusion that Mr Rahal was sufficiently personally involved in the misleading and deceptive conduct which caused loss to warrant liability under the FTA.

[3] We allow Mr Bhargav and Ms Khajuria's cross-appeal regarding the High Court's approach to damages for breach of s 9 of the FTA, and dismiss Mr Rahal's appeal of that approach. Damages for breach of s 9 of the FTA are assessed by examining what loss or damage was caused by the breach of the s 9 duty not to mislead. In the circumstances of this case, Mr Bhargav and Ms Khajuria were effectively locked into retaining the leaky property, living in it, enduring the physical and mental health consequences of doing so with their family, and repairing the property, for which it was reasonable for them to incur expenditure. Accordingly, Mr Rahal is liable for the costs of remediation and consequential losses. We set aside the awards of $270,000 (including GST) for breach of the FTA and $51,840 for consequential losses, and substitute $688,868.40 (including GST) and $103,107 respectively.

[4] We allow Mr Rahal's appeal of the quantum of $80,000 general damages awarded under the FTA. There was no principled basis for departing from the

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1 *Bhargav v Rahal* [2023] NZHC 1054 [judgment under appeal].

approach taken in recent, comparable authorities. We substitute an award of $35,000, consistent with the conventional range and adjusted for inflation.

What happened?

[5] In the judgment under appeal, the High Court summarised the bare underlying facts as follows:

> [1] In May 2020 Ameet Bhargav and Renu Khajuria purchased a property [in] Goodwood Heights, Auckland (the property). The property transpired to be a leaky home.
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> [2] First Trust Ltd (FTL), the first defendant, sold the property to the plaintiffs. At all material times Mr Rahal, the second defendant, was director and shareholder of FTL, along with his wife.
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> [3] The plaintiffs brought claims against the first defendant for breach of contractual warranty (that any work on the property requiring building consent had received the required consent) and against the first and second defendants for misleading or deceptive conduct under s 9 of the Fair Trading Act 1986 (FTA). There were also claims against the other defendants and various third-party actions described below, which were all discontinued prior to the fixture in November 2023.

[6] For context, further relevant facts are:

(a) FTL bought the property for $550,000, with settlement occurring in July 2019. After that, Mr Rahal's health declined and he stepped back from involvement in its management. He decided, with his friend Mr Sikka and Mr Sikka's brother-in-law Mr Manprit Singh, that limited renovations would be made to the property and Mr Sikka assumed responsibility for them.[2] Building consents were not obtained for the work.[3]

(b) FTL sold the property to Mr Bhargav and Ms Khajuria for $665,000 in March 2020.[4] The real estate agent, Mr Bal, assured Mr Bhargav and Ms Khajuria there were no weathertightness issues, which was

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2 At [43].
3 *Bhargav v First Trust Ltd* [2023] NZHC 174 [set aside judgment] at [4].
4 Judgment under appeal, above n 1, at [47].

supported by Mr Mehta, a building inspector engaged by Mr Bhargav and Ms Khajuria.[5]

[7] The fact the home was leaky quickly became clear. When contacted, FTL through Mr Rahal, denied any knowledge of weathertightness issues. In August 2021, Mr Bhargav and Ms Khajuria commenced proceedings in the High Court.

[8] Initially, the proceedings were not defended. On 20 July 2022, Hinton J gave judgment by way of formal proof in favour of Mr Bhargav and Ms Khajuria against four defendants, including FTL and Mr Rahal, for breach of contractual warranty and misleading conduct under s 9 of the FTA (formal proof judgment).[6] The defendants were liable jointly and severally for $861,113.[7]

[9] On 10 February 2023, Tahana J set aside the findings as to contractual damages and FTA liability and quantum of damages on the basis the delay was reasonably explained, there were arguable defences, and there would be no irreparable harm to Mr Bhargav and Ms Khajuria.[8]

[10] Eventually, the only claims remaining for trial were those of Mr Bhargav and Ms Khajuria against FTL and Mr Rahal.[9] The trial was held from 9 to 17 November 2023. On 2 May 2024, Hinton J issued judgment finding:[10]

(a) FTL was liable for breach of contractual warranty for $688,868.40 (including GST) for the cost of repair, $103,107 for consequential losses, $35,000 of general damages, interest, and costs; and

(b) FTL and Mr Rahal were jointly and severally liable for $270,000 (including GST) for breach of s 9 of the FTA, $51,840 for consequential losses, $80,000 in general damages, interest, and costs.

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5 At [49]–[50].
6 *Bhargav v First Trust Ltd* [2022] NZHC 1710 [formal proof judgment].
7 At [93].
8 Set aside judgment, above n 3.
9 Judgment under appeal, above n 1, at [19]. See also *Bhargav v First Trust Ltd* [2024] NZHC 2128 [final costs judgment].
10 Judgment under appeal, above n 1, at [147]–[148].

[11] Mr Rahal appeals the imposition of personal liability on him under the FTA, the High Court's approach to damages under the FTA, and the quantum of the award of general damages under the FTA. FTL also brought, but upon liquidation abandoned, an appeal. Mr Bhargav and Ms Khajuria cross-appeal the High Court's approach to FTA damages.

Issue 1: should Mr Rahal have been personally liable?

FTA liability

[12] Section 9 of the FTA provides "[n]o person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive".

Judgment under appeal

[13] The High Court stated:

> [71] It is well-established that liability for misleading conduct under s 9 can extend to a defendant who was not trading directly on his or her own account, but rather was acting as a director (or senior employee). For such a defendant to be found personally liable under s 9 a plaintiff must be able to point to conduct directly attributable to the defendant which was in itself misleading or deceptive. The conduct or representation must be made by the defendant personally. It is not sufficient that a director assisted or procured a company to make the impugned representation. Liability of a director as principal of a company is commonly imposed where that director is the "alter ego" of the company and the only person authorised to act on its behalf.
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> [72] Mr Rahal accepts that he was acting "in trade", but says that his involvement in the conduct admitted by FTL is not of a character that makes imposition of personal liability under the FTA appropriate. He says the evidence establishes that Mr Sikka and Mr Singh were "aware of the leaks while acting as FTL's agent and making the representations" but that he had no knowledge of the defects prior to the sale to the plaintiffs and was not involved in the representations. I disagree.
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> [73] While I accept the defendants' submission that it was Mr Sikka who was more directly involved in the renovation work, I find that he was acting on behalf of and under the direction of Mr Rahal. The evidence shows that although quotes for renovations were provided to Mr Sikka, it was Mr Rahal who approved them and who had control. No work was undertaken without Mr Rahal's authorisation. Whatever the arrangement at the outset over the deposit, that was repaid. I am satisfied that Mr Sikka's involvement was as a friend trying to help. Mr Sikka was not a "partner" with Mr Rahal in any legal sense, rather he was assisting and acting on behalf of Mr Rahal. He was a mere conduit or agent. I accept Mr Sikka's evidence and reject that of Mr Rahal. Therefore, for the purposes of the FTA, acts of Mr Sikka (which

the defendants accept are misleading and deceptive conduct for the purposes of s 9) should be deemed to have been engaged in also by Mr Rahal.

[74] The defendants submit that such a conclusion is contrary to the principle of separate corporate personality. They say that if Mr Sikka was acting on behalf of anyone, it was FTL, not Mr Rahal. Again, I disagree. The objectives of the FTA would be frustrated were directors able to avoid personal liability under s 9 by procuring third parties, acting under the authority of that director, to engage in misleading and deceptive conduct. The courts have not regarded separate corporate personality as precluding personal liability for directors and I do not consider the corporate veil does so in this context.

[75] For the reasons discussed below, I am also satisfied that before Mr Rahal made the decision to sell the property and sign the sale and agency agreements, he was personally aware the property was leaky and that therefore his failure to disclose this information constituted misleading conduct for the purposes of s 9.

[76] First, the plaintiffs say, and I agree, that based on the evidence of the other witnesses who viewed the property in 2019, being Mr Punj, Mrs Bell and Mr Sikka, it is inherently implausible that Mr Rahal was not aware of the weathertightness issues at the time FTL purchased the property. It is improbable that Mr Rahal would conclude that gib had been removed from the wall and ceiling in a bedroom because of issues with the showers or washing machine or a faulty extraction fan. It is equally improbable that Mr Punj would have offered that as an explanation for removed gib. I found Mr Punj a particularly credible witness and accept his evidence in totality, including as to the advice he gave Mr Rahal and Moheet and that Mr Rahal climbed up the ladder to inspect the ceiling. It is clear from the evidence that a visual inspection of the property clearly showed that the area had recent issues and leaks. Such is confirmed by Mr Punj, Mrs Bell and Mr Sikka, all of whom I found to be credible witnesses. In all material respects I prefer the evidence of those witnesses over that of Mr Rahal.

[77] I also agree with the plaintiffs that it can be inferred from the defendants' unexplained failure to call Moheet Rahal (Mr Rahal's son) as a witness that his evidence would not have been helpful to the defendants. He had the first conversations with Mr Punj when Mr Punj says he told him that the house had weathertightness issues.

[78] I am satisfied that Mr Rahal was well aware of and in fact authorised the "cover up" works conducted post-purchase. As discussed above, while Mr Sikka had more direct involvement with works on the property, it was Mr Rahal who maintained the control over those works. Further, Mr Rahal accepted in evidence that it was he who decided to sell the property and signed the agreements with Mr Bal and the plaintiffs. He was aware that the plaintiffs were presented with a false impression of the house.

[79] Even if Mr Rahal was not aware of the full extent of the problem, he was aware that the property suffered weathertightness issues and that those issues had been "covered up". His failure to disclose that information constituted misleading and deceptive conduct by Mr Rahal personally. As director of FTL, he was responsible for the renovation, presentation and marketing of the property. He is the alter ego of FTL. Mr Rahal is jointly and severally liable with FTL under s 9 of the FTA …

> [80] Even were I not satisfied that Mr Rahal was liable as principal, I would have found him liable as an accessory under s 43(1)(d). He was at the very least knowingly concerned in, or party to, FTL's contraventions of s 9.

Submissions

[14] Mr Grant, for Mr Rahal, submits the High Court erred in concluding that, as director of FTL, Mr Rahal was personally in trade and engaged in misleading and deceptive conduct, which should be attributable only to FTL. The standard for personal liability is high, conduct-based, and requires assessing Mr Rahal's actual involvement in misleading the purchasers. Imposition of personal liability on a director where the company is the contracting party risks inconsistency with the doctrine of separate corporate personality. Here:

(a) Mr Rahal was not sufficiently involved in the renovations to be held personally liable. He only attended a single meeting and approved a quote. He had a peripheral role.

(b) Mr Rahal's involvement with the sale process was only to sign the agency agreement and the contract, which was insufficient. He had no face-to-face contact with the purchasers. Mr Bal drove the process.

(c) Mr Sikka was responsible on FTL's behalf for the representations to the purchasers and assumed personal responsibility for the work that was found to have misled and deceived the purchasers.

(d) Mr Sikka acted as agent on behalf of FTL, not Mr Rahal, making financial contributions to FTL's purchase of the property, arranging finance, arranging the renovations, and arranging a real estate agent for sale.

[15] Ms Grant, for Mr Bhargav and Ms Khajuria, submits the High Court was correct to find Mr Rahal personally liable for breach of the FTA as a principal, or alternatively as an accessory who knowingly assisted his trustee company in its admitted breaches. He was the lead actor and puppet-master in relation to the renovations and sale.

Personal liability under the FTA

[16] The Judge's factual findings about Mr Rahal's conduct were careful, considered and compelling. She had the advantage of hearing the witnesses' evidence and her credibility findings are bolstered by that.[11]

[17] Mr Rahal was a director of FTL which was the sole trustee of a trust of the same name established by Mr and Ms Rahal. There was no dispute that Mr Rahal and FTL were engaged in trade.[12] Mr Rahal confirmed under cross-examination that Ms Rahal, the other director and 50 per cent shareholder, was not involved with the business of FTL. As this Court stated in *Kinsman v Cornfields Ltd*:[13]

> [27] … It will be a rare case where a director who participates directly in negotiations as to his or her company's business will be able to avoid s 9 liability simply on the basis that he was acting only on the company's behalf. …

[18] Mr Rahal says that his role in the renovations was limited and peripheral. But the Judge considered and rejected his evidence and did not agree. She found Mr Sikka acted on behalf, and under the direction, of Mr Rahal, who approved quotes, authorised all the work, and exercised control over the renovations.[14] There was more than enough evidence to sustain that finding. The first site meeting Mr Rahal attended was with Mr Singh, a builder, to arrange a building report required for bank financing. Mr Sikka's evidence was that Mr Rahal showed Mr Singh around the house and Mr Singh recommended recladding to address moisture problems. Mr Rahal sent Mr Singh's initial quote to FTL's bank manager and used his personal email address and name in his communications about the property with the bank. He also rejected the quote and decided to undertake a reduced scope of works. Because of this, nothing was done to address the leaks.

[19] Mr Rahal also seeks to minimise his role with the sale process. But his evidence was that he signed the agency agreement with Mr Bal as well as the sale and

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11 See *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [13]; and *Green v Green* [2016] NZCA 486, [2017] 2 NZLR 321 at [31], citing *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 (CA) at 199.

12 Judgment under appeal, above n 1, at [72].

13 *Kinsman v Cornfields Ltd* (2001) 10 TCLR 342 (CA).

14 Judgment under appeal, above n 1, at [73].

purchase agreement. He accepted under cross-examination that he made the decision to sell the property. FTL admitted at trial that it acted in a misleading and deceptive manner in presenting the property to the purchasers as newly renovated, covering up evidence of defects and damage, carrying out work to mitigate and conceal the effect of the leaks without addressing their cause, failing to disclose the existence of damage and leaks, and choosing not to re-engage Harcourts to sell the property which would have required a clean building report.[15] Mr Rahal made those decisions. There is more than enough evidence to ground the Judge's findings on these matters as well.

[20] Overall, there was more than enough evidence to justify the Judge's findings of fact about Mr Rahal's role and credibility and her conclusion that Mr Rahal was sufficiently personally involved in the misleading and deceptive conduct which caused loss to warrant liability under the FTA.

[21] We do not accept Mr Grant's submission that there is a risk of inconsistency in these findings with the doctrine of corporate personality. Mr Rahal was the alter ego of FTL. As this Court stated in *Body Corporate 202254 v Taylor*:[16]

> [19] … the courts have not regarded corporate form (and particularly the separate legal identity of companies) as precluding personal liability on the part of senior employees who engage in misleading and deceptive conduct.

[22] The appeal on this issue is dismissed.

Issue 2: was the High Court's approach to FTA damages correct?

FTA damages

[23] Section 1A of the FTA provides:

> (1) The purpose of this Act is to contribute to a trading environment in which—
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> (a) the interests of consumers are protected; and

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15 At [67].

16 *Body Corporate 202254 v Taylor* [2008] NZCA 317, [2009] 2 NZLR 17. See also *Kinsman,* above n 13, at [27]; and *Specialised Livestock Imports Ltd v Borrie*, CA72/01, 28 March 2002 at [25]–[28].

(b) businesses compete effectively; and

(c) consumers and businesses participate confidently.

(2) To this end, the Act—

(a) prohibits certain unfair conduct and practices in relation to trade; and

(b) promotes fair conduct and practices in relation to trade; and

(c) provides for the disclosure of consumer information relating to the supply of goods and services; and

(d) promotes safety in respect of goods and services.

[24] Section 9 prohibits any person, in trade, from engaging in conduct that is misleading or deceptive or is likely to mislead or deceive. In economic terms, misleading or deceptive conduct can involve exploitation of an information asymmetry. By imposing liability on those who engage in such conduct, s 9 of the FTA internalises the costs of, and deters, the conduct by shifting the risk to those best able to know whether a statement is true. That protects consumer interests, promotes effective competition, fair market conduct and confidence in trade. The FTA was modelled on Australian legislation.[17]

[25] Section 43 of the FTA applies if, according to subs (1)(a), a person has suffered loss or damage by the conduct of another person that does or may constitute a contravention of parts of the Act, including s 9. Section 43(3) sets out the orders that may be made, including an order that all or part of a contract is void or varied, an order to refund money or return property, or to repair or provide parts for goods supplied, or to supply specified goods. Relevantly here, s 43(3)(f) empowers the Court to award damages for breach of s 9 of the FTA for "the amount of the loss or damage". This is a statutory remedy.

[26] In 1999, in *Cox & Coxon Ltd v Leipst*, a full court of this Court considered the approach to damages under the predecessor of s 43(3)(f), s 43(2)(d), which was materially the same.[18] In that case, a real estate agent misrepresented the income

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17 Trade Practices Act 1974 (Cth).

18 *Cox & Coxon Ltd v Leipst* [1999] 2 NZLR 15 (CA).

generated from pears previously harvested and sold from the property.[19] The judgment is often cited as the foundation of the approach to damages under the FTA.[20] It is sometimes cited for the proposition that "expectation damages" are not available for breach of s 9.[21] That was the ultimate view of the High Court here.[22] But the judgments in *Cox & Coxon Ltd v Leipst* were more nuanced than that. The issue was whether the remedy of damages could extend to the recovery of future profits that would have been earned if the representation had been accurate.[23]

[27] Gault J, who substantively agreed with the majority of the Court, Henry and Blanchard JJ, considered the observations of Cooke P and Richardson J in *Goldsbro v Walker* in 1993:[24]

(a) Cooke P considered that, as a discretionary remedy, there was no compelling reason to hold that "the only course open to the Court, where no other form of relief is appropriate, is to order payment of a sum representing the full loss".[25]

(b) Richardson J observed that "the discretions under [s 43] are to be exercised so as to give effect to the policy of the [FTA]" and not to "apply conventional common law rules relating to traditional causes of action".[26] It is "a matter of doing justice to the parties in the circumstances of the particular case and in terms of the policy of the [FTA]".[27]

[28] The majority in *Cox & Coxon Ltd v Leipst* noted that the common law measure of damages in tort for deceit or fraudulent or negligent misrepresentation "is to put the

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19 At 16–17.
20 See, for example, Stephen Todd and Matthew Barber *Burrows, Finn and Todd on the Law of Contract in New Zealand* (7th ed, LexisNexis, Wellington, 2022) at [11.3.3].
21 See, for example, *PGG Wrightson Real Estate Ltd v Routhan* [2023] NZCA 123, [2023] NZCCLR 7 at [122]; and *Gavigan v Eichelbaum* [2017] NZCA 412, [2018] 2 NZLR 530 at [39].
22 Judgment under appeal, above n 1, at [135]–[141].
23 *Cox & Coxon Ltd v Leipst,* above n 18, at 18 per Gault J.
24 At 21–22, citing *Goldsbro v Walker* [1993] 1 NZLR 394 (CA).
25 *Goldsbro v Walker,* above n 24, at 399.
26 At 403.
27 At 404.

wronged party in the same position as if the representation had not been made — not as if it had been true".[28] They stated:[29]

> Section 9 creates a duty not to mislead. If the duty has been breached money may be awarded to make good, or compensate for, loss or damage which has been caused by the breach. Where there has been an actionable wrong, it is a general and basic principle of law that the remedy by way of monetary award is to put the wronged party in the same position as he or she would have been but for the wrong. Where the wrong is misrepresentation leading to a contract for purchase of property, the position to be restored is that which would have enured had the misrepresentation not been made. This demonstrates what we see as the fallacy in Mr Lawson's argument. Had there been no misrepresentation, that is no breach of duty, there is no logical basis for asserting the purchasers here would have obtained the benefit now claimed. If they would not have purchased at all, then prima facie the loss would be based on the difference between the value of the property and the price paid *or, in some circumstances, the loss of an opportunity to buy a different property*. On the other hand, if they still would have purchased, the resulting loss could only be one arising in some collateral way, such as lost opportunity to buy at a reduced price or some other direct out of pocket consequence.
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> The only duty which can give rise to a claim for lost benefit or loss of expectation is one which imposes an obligation to perform the representation. Here the wrong complained of is making the representation, not in failing to honour it. To say that a particular representation is promissory in nature is unhelpful and does not assist the present argument. The promise must be one which is enforceable at law if it is to give rise to a remedy. *Section 43(1) does not purport to make a representation enforceable against a representor. It says there is liability for loss or damage resulting from the representation*. The difference is real and substantive.
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> To hold that misrepresentation inducing a contract can give rise to a claim for expectation losses under s 43(2)(d) is to turn on its head the whole rationale of the measure of damages for a civil wrong. As we have said, the wrong here was making a misleading statement. Failing to make good a misleading statement does not constitute a breach of the Act. It is fundamental that the remedy must be directed to the consequences of the breach of the imposed duty, and not to consequences which are attributable to some other cause which is not the subject of an actionable duty.
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> In short, there is no justifiable basis for construing s 43(1) in such a way as to give a representee a right to enforce a representation which is misleading. Absent such a right, entitlement to damages for non-performance of the representation, ie for loss of benefit, cannot lie. A person cannot claim that to which he or she is not entitled.

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28 *Cox & Coxon Ltd v Leipst*, above n 18, at 25 per Henry and Blanchard JJ.

29 At 26 (emphasis added).

[29] In concluding, they added:[30]

> In this judgment we have been concerned to consider only what are truly expectation losses where a contract has eventuated as a result of the misrepresentation. *Other consequential losses, such as loss of opportunity to obtain an alternative asset, loss of opportunity to obtain the asset in question at a lesser price, wasted expenditure, trading losses, and so on may well be compensable in some circumstances*. Some of those consequences have come under consideration in respect of the Australian legislation. All would appear to be of a kind which, if established by evidence, could well come within s 43. This however is not, as pleaded and run, one of those cases.

[30] Richardson P and Tipping J dissented. Tipping J, with whom Richardson P generally agreed, considered nothing in the FTA suggested that notions of contract or tort were intended to be imported implicitly into the FTA but that "Parliament was signalling a new approach untrammelled by historical causes of action and their criteria for the assessment of damages".[31] He said:[32]

> Assessment of damages is essentially a question of fact. Such rules or general principles as are formulated are simply for general guidance. An unduly rigid approach is not appropriate … The most the Court can usually do in the damages area is to lay down prima facie rules which will apply in particular situations in the absence of good reason to depart from them.
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> If it is reasonable to expect the purchaser to resell on discovering the misrepresentation, the notional resale method will prima facie be appropriate. If it is reasonable for the purchaser to retain the property purchased, despite the misrepresentation, the present value of future losses method will prima facie be appropriate. There is a conceptual link with the contrast in building and structural damage cases between diminution in value and reinstatement. … In that area the reasonableness of reinstatement usually guides the Court's decision.

[31] The following year, in *Lane Group Ltd v D I & L Paterson Ltd*, this Court considered a misrepresentation about financial information which caused the plaintiff to purchase a business without a supply contract, which they would not have done but for the misrepresentation.[33] It upheld the award of damages resulting from not having had such a supply contract.[34] Tipping J stated that "[t]he concepts of reliance loss and

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30 At 28 (emphasis added).

31 At 16 and 30.

32 At 31, citing *New Zealand Land Development Co Ltd v Porter* [1992] 2 NZLR 462 (HC) and *Warren & Mahoney v Dynes* CA49/88, 26 October 1988, where there was no difference in the measure of damages that might be awarded according to whether the action was founded in tort or contract.

33 *Lane Group Ltd v D I & L Paterson Ltd* [2000] 1 NZLR 129 (CA) at [77]–[78].

34 At [68] and [78].

expectation loss are not necessarily to be seen as mutually exclusive, nor as involving bright-line distinctions".[35]

[32] In 2002, in *Harvey Corporation Ltd v Barker*, Blanchard J reiterated:[36]

> [13] Unfortunately the majority decision of this Court in *Cox & Coxon* appears not to have dispelled misapprehension concerning what damages are and are not claimable under s 43. The majority opinion, which now has the apparent endorsement of the High Court of Australia … was that a representation cannot give rise to a claim for a lost benefit or a loss of expectation where the defendant is under no obligation to perform the representation. Section 43 is directed against the making of a false representation, as opposed to the failure to perform it. …
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> [14] The agent, Harveys, of course had no obligation to perform the contract and to fulfil the bargain made by the vendors. *The proper question in a claim against Harveys under s 43 is whether the Barkers are worse off as a result of the making of the representation — by changing their position in reliance on it* — not whether they have been unable to realise a benefit because of the failure of the vendors to convey a property without the defect complained of. *The Barkers accordingly had to prove that the misrepresentation of the property had caused them to act in a way which resulted in a loss*. Normal measures of such a loss are whether what has been acquired is worth less than what was paid and/or whether there has been wasted expenditure. …
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> [15] *The claim might have succeeded if the Barkers had shown that, had they known the true situation, they would not have purchased the property at all*. But there was no evidence to this effect; nor was it pleaded. *Furthermore, they would still have had to have shown a monetary loss — a failure to obtain a property of a market value equal to the price they actually paid* — not merely a disappointed expectation of being better off than they now find themselves. On the evidence of the valuer, they could have resold the property at market value and recouped all the money they paid.
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> …
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> [17] *A claimable loss might also have been shown if the Barkers had called evidence to prove, had this been the position, that because they were induced to purchase the Daniels' property, they missed the opportunity of purchasing an alternative property. But in order to show loss, they would also have had to show that they would have obtained that other property below its market value,* for otherwise their purchase of the Daniels' property at (slightly below) market value would not have left them worse off.

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35 At [77]. See also *Joblin Insurance Brokers Ltd v M E Joblin Insurances Ltd* [2001] 1 NZLR 753 (HC) at [20] where Hammond J distinguished "actual" damages from both reliance and expectancy damages, noting that losses flowing directly from the misleading statement might often exceed the expectancy interest.

36 *Harvey Corporation Ltd v Barker* [2002] 2 NZLR 213 (CA) (footnotes omitted and emphasis added).

[33] These cases have been cited by this Court as recently as 2021 in *Roberts v Jules Consultancy Ltd (in liq)* as providing the well-settled general principles to the assessment of damages under the FTA.[37]

Judgment under appeal

[34] In relation to the breach of s 9 of the FTA, the High Court relied on this Court's decisions in *Roberts v Jules Consultancy Ltd (in liq)* and *PGG Wrightson Real Estate Ltd v Routhan* for the propositions that the proper measure of damages under the FTA was "the difference between the price paid and the value of the property received in return" and that expectation damages, for failure to achieve a promised expectation, are not available in tort or for breach of the FTA.[38] The Judge stated:[39]

> [140] The appropriate date of valuation is March 2020, the time of purchase and date of breach.
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> [141] The defendants submit that damages should be limited to $185,000 being the difference between the purchase price paid of $665,000 and the value of the property, which was only land value of $480,000. However, I consider this is a case where loss of opportunity should also be taken into account and I am prepared to proceed on the basis that the plaintiffs would have been able to similarly purchase a property worth more than they paid, by an amount of $85,000.
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> [142] The plaintiffs are therefore entitled to damages of $270,000 for FTL and Mr Rahal's breach of s 9 of the FTA. FTL and Mr Rahal are jointly and severally liable for that amount.

[35] The Judge also awarded damages for consequential losses of rental income up to trial and pre-litigation expert costs, that was calculated at $51,840, general damages of $80,000 (examined in the next issue), interest and costs in respect of breach of s 9 of the FTA.[40]

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37 *Roberts v Jules Consultancy Ltd (in liq)* [2021] NZCA 303, (2021) 22 NZCPR 288 at [59]–[64], citing *Goldsbro v Walker,* above n 24, *Cox & Coxon Ltd v Leipst,* above n 18, *Harvey Corporation Ltd v Barker*, above n 36 and *Henville v Walker* [2001] HCA 52, (2001) 182 ALR 37 at [132].

38 Judgment under appeal, above n 1, at [138], citing *Roberts v Jules Consultancy Ltd (in liq),* above n 37, at [72] and *PGG Wrightson Real Estate Ltd v Routhan*, above n 21, at [122].

39 Judgment under appeal, above n 1 (footnotes omitted).

40 At [148].

Submissions

[36] Mr Grant submits:

(a) The Judge erred in awarding damages of an additional $85,000 for a lost opportunity to purchase an alternative property. Damages awarded under s 43 exclude expectation damages. Had the purchasers not been misled and not purchased the property, they would have retained the $665,000 purchase price. The value of the property they received was $480,000 so $185,000 makes them whole. Rewarding them for what they might otherwise have done is unduly speculative and unsupported by evidence of what they could have obtained in another property.

(b) In response to the cross-appeal, since *Cox & Coxon Ltd v Leipst* it has been established law that the Court should attempt to put the non-breaching party back in the position it was in prior to the breach. It is not the policy of the FTA to enforce performance of obligations. There is no basis for factors such as the innocence or deliberateness of the breach or the role of the breaching party being taken into account because they are not relevant to the loss suffered. Authorities such as *Mitchell v Murphy* and *Macfarlane v Informed House Inspections Ltd*, which appear to point the other way, are in error.[41]

[37] Ms Wroe, for Mr Bhargav and Ms Khajuria, submits:

(a) In response to the appeal, the FTA provides for flexibility in relation to the measure of damages and date of assessment. The $85,000 was the difference between the price paid and the unblemished value of the property. Another way of looking at it is that it represents the increase in value in the property to trial. Simply refunding the difference between purchase price and actual value does not put Mr Bhargav and Ms Khajuria back in a position of having a sufficient deposit and

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41 *Mitchell v Murphy (as trustee of the Victor Sydney Trust)* [2019] NZHC 3262; and *Macfarlane v Informed House Inspections Ltd* [2023] NZHC 934, (2023) 24 NZCPR 60.

borrowing capacity to repurchase in the market in their chosen suburbs. Had they not bought this property they would have purchased another one at that time but interest rates and loan to value ratios have changed since then. Their loss is now being unable to buy a comparable property and unable to finance a mortgage at the same level should they sell and try to repurchase. Factoring in a loss of opportunity is one way of trying to do justice between the parties if the High Court was correct to exclude damages based on repair costs. It restores the capital gain that could have been achieved had they bought a different property and did not own this one that, at trial, was worth about as much as their mortgage.

(b) In support of the cross-appeal, there is no bright-line between expectation and reliance losses in the FTA. The Judge erred in interpreting this Court's decision in *PGG Wrightson Real Estate Ltd v Routhan* as a general statement that the costs of repairs is never recoverable under the FTA.[42] The case law does not so limit available damages in a case such as this one, which does not involve misrepresentations by professionals. The evidence is, but for the misrepresentation, Mr Bhargav and Ms Khajuria would not have purchased the property and would have looked for another. Instead, they were "locked into" a property worth $480,000 with a mortgage of $600,000 they could not pay off by selling and they could not afford the required repairs. They lost their ability to buy their first home in one of their chosen suburbs. The Judge awarded damages for breach of contractual warranty based on repair costs based on considerations that apply equally to breach of the FTA.

Approach to FTA damages

[38] FTA damages under s 43(3)(f) of the FTA, for breach of s 9, are assessed on the basis of compensating for the loss or damage caused by the breach of the s 9 duty not to mislead. It is necessary to examine specifically what those losses are, as

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42 *PGG Wrightson Real Estate Ltd v Routhan,* above n 21, at [122].

demonstrated by the case law above. Using shorthand labels can obscure the assessment required. Rather, a court should ask:

(a) What losses did the misleading and/or deceptive conduct cause the plaintiffs?

(b) What award of damages will make good that loss?

[39] This requires assessment of the particular circumstances of the plaintiffs. Did the misleading and/or deceptive conduct, here a misrepresentation as to the weathertightness of a house, lead them to purchase a property that they would not otherwise have purchased? The Judge found that it did.[43] Ordinarily, that would mean that the loss the plaintiffs suffered from the misrepresentation would be adequately compensated by damages equivalent to the difference between the price they paid and the actual value of the property they bought, assessed in the High Court to be $185,000. That is what Mr Grant submits should be the damages.

[40] But the emphasis added to the passages of the judgments quoted above demonstrates that is not necessarily the whole story, depending on the circumstances of the plaintiffs:

(a) In some circumstances, plaintiffs who would not otherwise have bought the property but for the misrepresentation may be able to recover damages for the loss of an opportunity to buy the property at a reduced price, as the majority in *Cox & Coxon Ltd v Leipst* stated.[44]

(b) In some circumstances, plaintiffs may be able to recover damages for wasted expenditure, as the majority also stated.[45]

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43 Judgment under appeal, above n 1, at [141] and [143].

44 *Cox & Coxon Ltd v Leipst,* above n 18, at 26. The minority agreed that if it is reasonable for the purchaser to retain the property, the present value of future losses would be an appropriate measure of damages, noting that the reasonableness of reinstatement will typically guide the Court's decision: at 31 per Tipping J.

45 At 28.

(c) Plaintiffs who would not have purchased a misrepresented property may be able to recover damages if that caused them to miss the opportunity to purchase an alternative property.[46]

[41] Here, the value of what Mr Bhargav and Ms Khajuria received was, *to them*, significantly less than the market value of the property even in its leaky state. In the formal proof judgment, the Judge stated:[47]

> [76] The plaintiffs have been saddled with a leaky home in need of repair or demolition. If they sold, they would likely have insufficient funds to buy a replacement. They would have real uncertainty if they cannot find a replacement property and it is problematic to effectively require them to do so. Mr Rahal and FTL sold the property to the plaintiffs by employing deceptive conduct so that they would not find themselves in the position of facing the same financial burden. …
>
> [77] In these circumstances it is appropriate for the plaintiffs to obtain performance-based damages, being the cost of repair, for both the breach of warranty and the FTA claims.

[42] The financial circumstances of Mr Bhargav and Ms Khajuria meant they were not able in practice to realise the value of the property they purchased. They could not sell the property because its value as a leaky home was less than their mortgage. Instead, they were locked into retaining the leaky property, living in it, enduring the physical and mental health consequences of doing so with their family, and repairing the property, in which it was reasonable for them to incur expenditure. It does not make sense to award damages on the basis of possible resale when resale was not possible.

[43] The effect of Mr Rahal's misrepresentation was to cause the proven reasonable losses associated with Mr Bhargav and Ms Khajuria being locked into ownership of the property. These losses do not derive from the expectation of Mr Bhargav and Ms Khajuria as to what they were going to receive from buying the property. They were suffered because of Mr Rahal's misrepresentation. Accordingly, we consider that Mr Rahal is liable in damages under the FTA to Mr Bhargav and Ms Khajuria for the losses they suffered from being locked into ownership of the property.

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46 *Harvey Corporation Ltd v Barker*, above n 36, at [17].
47 Formal proof judgment, above n 6.

[44] First, those losses include the estimated cost of remedial work. The Judge awarded damages for this in the formal proof judgment but, after trial, considered that "expectation damages" including for the costs of repair, are not recoverable for breach of the FTA.[48] The Judge relied on this Court's judgment in *Roberts v Jules Consultancy Ltd (in liq)*.[49] But, as we explained above, the Court there was well aware of the nuanced approach to damages under the FTA. And the property in that case was not unsaleable, so the misrepresentation did not necessarily cause the repair costs.[50]

[45] The Judge also relied on this Court's decision in *PGG Wrightson Real Estate Ltd v Routhan*.[51] We do not agree that the cited statement in that judgment prevents recovery of the costs of repair here, as it did in that case. The statement referred to damages for expenditure to realise a promised profit, not the cost of repairs. That these are distinguishable is clear when read in the context of the case law traversed above, including *Harvey Corporation Ltd v Barker*, and also in light of the judgment's subsequent clarification that the difference between the price paid and the true market value of the property is "the *normal* measure of loss".[52] We deal with the implications of the Supreme Court's subsequent judgment in that case below.

[46] Applying the case law until the Court of Appeal's decision in *PGG Wrightson Real Estate Ltd v Routhan*, it was reasonable for Mr Bhargav and Ms Khajuria to incur the costs of remediation because of being locked into ownership of the property. This is not a matter of meeting the cost of achieving a benefit promised, but of meeting the actual costs that, in these circumstances, Mr Rahal's misrepresentation caused Mr Bhargav and Ms Khajuria. The High Court awarded damages against FTL for breach of the contractual warranty for the amount of the estimated cost of remedial work that was subsequently fixed at $688,868.40 (including GST).[53] We would award

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48 At [77]; and judgment under appeal, above n 1, at [138]–[139].

49 Judgment under appeal, above n 1, at [138], citing *Roberts v Jules Consultancy Ltd (in liq)*, above n 37, at [72].

50 *Roberts v Jules Consultancy Ltd (in liq)*, above n 37, at [76] and [79].

51 Judgment under appeal, above n 1, at [138], citing *PGG Wrightson Real Estate Ltd v Routhan*, above n 21, at [122].

52 *PGG Wrightson Real Estate Ltd v Routhan*, above n 21, at [128] (emphasis added).

53 Judgment under appeal, above n 1, at [147].

the same amount in damages against Mr Rahal under the FTA, as the alter ego of FTL and a principal.

[47] We do not consider that the other cases Mr Grant relies upon impact on that legal position:

(a) We traversed *Harvey Corporation Ltd v Barker* above and explained the nuanced reasoning.[54] As to the result, there was no evidence the purchaser there, had they known the true situation, would not have purchased the property anyway.[55]

(b) In *Shabor Ltd v Graham*, this Court held that the purchaser of a farm who had relied upon a misrepresentation could recover damages under the FTA for the difference between the purchase price and the actual value of the farm.[56] It held that liability for operating losses was less clear, traversing *Cox & Coxon Ltd v Leipst* and *Harvey Corporation Ltd v Barker*.[57] But that is because it found that the operating losses represented costs incurred to improve the quality of the farm, not in reliance on the misrepresentation.[58]

[48] We note that the cost of repairs has been awarded in damages for breach of s 9 of the FTA in other cases, including recently:

(a) In 2019, in *Mitchell v Murphy*, the High Court awarded repair costs to the owner of a leaky building for both contractual and FTA claims, noting that was not disputed by the parties.[59]

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54 *Harvey Corporation Ltd v Barker*, above n 36.
55 At [15].
56 *Shabor Ltd v Graham* [2021] NZCA 448, [2021] NZCCLR 26 at [62].
57 At [63]–[65].
58 At [66].
59 *Mitchell v Murphy (as trustee of the Victor Sydney Trust)*, above n 41, at [292], [332] and [372].

(b) In 2023, in *Macfarlane v Informed House Inspections Ltd*, the High Court awarded damages for the costs of repairing a leaky home in a formal proof judgment, relying on *Cox & Coxon Ltd v Leipst*.[60]

[49] Additionally, in 2023, this Court in *Leisure Investments NZ Ltd Partnership v Grace* awarded damages in tort, not under the FTA, based on notional repair rather than diminution of value.[61]

[50] Second, in the judgment under appeal, the Judge awarded $85,000 in damages for not being able to purchase a property worth that much more than Mr Bhargav and Ms Khajuria paid, the amount by which the price they paid was less than the unblemished value of the property.[62] This was awarded in the context of the Judge considering she could not award the cost of repairs in damages under the FTA. This was not a loss caused by the misrepresentation, when losses are assessed on the basis that Mr Bhargav and Ms Khajuria were locked into ownership of their property and were or are repairing it. Once repairs are complete, and compensated for, there will be no loss of value occasioned from what they could alternatively have purchased. They will have a property worth whatever it is worth in the current market, having been compensated for the losses caused by the misrepresentation.

[51] Third, and similarly, the Judge awarded damages equivalent to the difference between the price Mr Bhargav and Ms Khajuria paid and the actual value of the property they bought, at $185,000.[63] However, that is not a realised loss deriving from the misrepresentation if they do not sell the property. And it does not eventuate if the property is repaired.

[52] Fourth, for breach of s 9 of the FTA, the Judge awarded $51,840 (adjusted from $44,400) for consequential losses, being the lost rental income from the breach until the date of judgment.[64] However, the Judge awarded fuller damages for consequential

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60 *Macfarlane v Informed House Inspections Ltd,* above n 41, at [101] and [121(a)].
61 *Leisure Investments NZ Ltd Partnership v Grace* [2023] NZCA 89, [2023] 2 NZLR 724 at [185]–[186].
62 Judgment under appeal, above n 1, at [141].
63 At [141]–[142].
64 At [143]; and final costs judgment, above n 9, at [14]–[15] and [58(b)].

losses arising from FTL's breach of contractual warranty that were subsequently fixed at $103,107, being:[65]

(a) Costs of assessing and quantifying damage to property: $19,100;

(b) Lost rental income until remediation (estimated to commence in September 2024): $55,440 (adjusted from $64,680);

(c) Anticipated lost rental income during remediation: $5,760 (adjusted from $7,280);

(d) Cost of alternative accommodation during remediation: $18,000 (adjusted from $19,500); and

(e) Removal costs: $4,807.

[53] Again, all those costs were incurred as a result of the misrepresentation, which meant potential boarders were not willing to board, the commissioning of experts was necessary, and alternative accommodation was required during the repairs. Therefore, they too are compensable under the FTA. The quantum of consequential losses, $103,107, substitutes for the lost rental income of $51,840 that the High Court awarded as damages for the consequential losses of breach of the FTA.

Does Routhan *make a difference?*

[54] After the hearing of this appeal, the Supreme Court released its decision in *Routhan v PGG Wrightson Real Estate Ltd*.[66] It concerned liability for negligent misstatement and under the FTA of a real estate agent for a careless misrepresentation of recent milk production on a dairy farm that was purchased by the plaintiffs. The duty was to take care to provide accurate information. The purchasers would not have bought the farm had they known the truth. They lost their equity after being forced to sell the farm.[67]

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65 Judgment under appeal, above n 1, at [128] and [130]; and final costs judgment, above n 9, at [13], [15] and [57(b)].

66 *Routhan v PGG Wrightson Real Estate Ltd* [2025] NZSC 68, [2025] 1 NZLR 306.

67 At [2].

[55] The Court of Appeal had applied the line of cases in England and Wales deriving from the House of Lords decision of *South Australia Asset Management Corp v York Montague Ltd (SAAMCO).*[68] Those decisions explored the relevance of the scope and purpose of the relevant duty to the factors contributing to the claimant's loss for which the defendant is responsible.[69] This Court held that the agent assumed a responsibility to provide accurate information but could not be held liable for the losses occasioned by a dramatic fall in price of milk, the forced sale of properties 10 years later or other post-purchase decisions.[70] Due to the limited scope of the agent's duty, and the fact the purchaser was not locked into the purchase,[71] this Court limited damages in negligence and under the FTA to the difference between the price paid and the value of the farm if it had been correctly described, assessed at the time of purchase.[72]

[56] The Supreme Court overturned the result. We can do no better than quote the Court's own summary of the conclusions reached on the principal issues from its three sets of reasons:[73]

> [4] A majority comprising Winkelmann CJ, Glazebrook, Ellen France and Miller JJ confirmed that the "scope of duty" principle, which was discussed in *SAAMCO*, forms part of New Zealand's law of negligence. The principle requires the Court to consider the position at the time the defendant's duty arose or was assumed *and inquire for what kinds of risk was the defendant taking responsibility and whether the allocation of risk was a fair one in the circumstances*. This helps to ensure *a defendant is liable only for harm that resulted from the risks that made the defendant's conduct negligent in the first place*.
>
> …
>
> [6] Separate from the scope of duty principle, *SAAMCO* has been understood as creating a "cap" for liability. If the defendant negligently provided the plaintiff with information for the purpose of helping them to decide upon a course of action, then the defendant's liability was said to be limited to the foreseeable consequences of that information being wrong.

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68 *PGG Wrightson Real Estate Ltd v Routhan*, above n 21, at [109]–[114], citing *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 (HL), *Hughes-Holland v BPE Solicitors* [2017] UKSC 21, [2018] AC 599, *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20, [2022] AC 783 and *Meadows v Khan* [2021] UKSC 21, [2022] AC 852.

69 *PGG Wrightson Real Estate Ltd v Routhan*, above n 21, at [109]–[114].

70 At [116]–[118]

71 At [133]–[134], citing *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) at [185]–[186].

72 *PGG Wrightson Real Estate Ltd v Routhan*, above n 21, at [128] and [134].

73 *Routhan v PGG Wrightson Real Estate Ltd*, above n 66 (footnotes omitted and emphasis added).

> [7] A majority comprising Glazebrook, Kós and Miller JJ held that the Court of Appeal erred by using the *SAAMCO* cap as the "normal" measure of damages in this case.
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> …
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> [9] Glazebrook, Kós and Miller JJ found that PGG's duty of care extended both to the risk that the Routhans would pay too much for the farm and to the risk that the Routhans would produce less than the represented historical average following acquisition. That was because of PGG's role in negotiating and documenting the contract between the Routhans and the vendor. PGG knew why the Routhans wanted the historical production information, it assumed responsibility for having that information verified and updated by the vendor, and it knew the Routhans would rely upon that information because only the vendor (or the dairy company, with the vendor's authorisation) could verify it.
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> …
>
> [11] The Court was unanimous that PGG could not be held liable for the full extent of post-purchase loss claimed by the Routhans.
>
> [12] Glazebrook, Kós and Miller JJ found that PGG was liable only for the following heads of loss:
>
> (a) $480,500, being the amount the Routhans overpaid by reference to expert evidence of the farm's market value had its actual production been known;
>
> (b) $150,000, being the cost of additional fertiliser spent in an attempt to achieve the production they had been led to expect. The farm's capacity to grow grass was crucial to its milk production; and
>
> (c) $150,000, being the cost of a re-pasturing programme undertaken by the Routhans, on advice, to try improve pasture quality and therefore production.
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> …
>
> [14] However, Glazebrook, Kós and Miller JJ found that PGG was not liable for other heads of loss: namely, revenue shortfalls, increased debt servicing costs, additional supplementary feed, and the Routhans' long-term capital investments into the farm. These losses either were not caused in fact by PGG's breach, or they were not reasonably foreseeable, or the evidence did not make clear how much was attributable to PGG's breach, or they were already counted in other awards, notably the overpayment for the farm.

[57] Mr Grant submits the Supreme Court's judgment in *Routhan* does not permit expectation damages to be recoverable for breach of the FTA. Mr Rahal is taken, under the FTA, to have assumed a duty to return Mr Bhargav and Ms Khajuria to the position they were in before they relied upon his misleading conduct. That is

represented by the difference between the purchase price and the actual value they received. *Routhan*'s award of damages for costs incurred to improve the production values of the farm is distinguishable from this case because it involved incorrect representations by a professional so a different, less heightened, duty was assumed in this case than in *Routhan*. In any event, awarding the cost of repair is an award of expectation damages and *Routhan* does not stand for the proposition that expectation damages are recoverable for breach of the FTA, as Kós J observed.[74] The Supreme Court disallowed costs reflective of a performance of a separate contract as they did not fall within PGG's duty, which should be true of Mr Rahal too.

[58] Ms Wroe submits the Supreme Court's award of damages for negligence in *Routhan* was not limited to diminution in value but included post-purchase expenditure aimed at remediating the property to meet the represented facts. The Court did not rule categories of damages in or out per se. All members of the Court supported a flexible approach which assessed whether the particular damage is sufficiently linked to the breach to merit recovery. Here, the risk that eventuated was the Mr Bhargav and Ms Kharjuria were not able to sell to move to a leak-free home, were forced into a negative equity situation, living in sub-standard housing with their young family, and having to repair the property themselves. There is no policy reason not to award repair costs, which the High Court found was fair in these circumstances.

[59] The passages above illustrate that the majority of the Supreme Court in *Routhan* examines *SAAMCO* as authority for a scope of duty principle in the law of negligent misstatement, establishing that recoverable loss is limited not only by causation and remoteness but also by the scope of the defendant's duty. That is consistent with its treatment in previous New Zealand case law.[75] That history is what leads the Court to emphasise the duty owed by the defendant. We apprehend that the emphasis on the duty owed is more relevant to assessing damages in negligence rather than under the FTA, where the scope of the relevant duty (not to mislead) is defined statutorily. But it is not inconsistent with the approach to damages under the FTA.

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74 At [323].

75 At [139]–[146], citing, for example, *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 (CA).

[60] As to causation in fact, Glazebrook and Miller JJ stated there must be sufficient connection between the losses actually suffered and the breach of duty.[76] Kós J agreed with their judgment[77] and carefully distinguished the scope of damage for which the defendant is liable from the scope of duty.[78] He relied upon *Harvey Corporation Ltd v Barker* in saying that "[f]ulfilment of transactional expectations is not tort's function".[79] In applying that to the facts of the case in *Routhan*, that majority held that PGG was liable, not only for the amount the purchasers overpaid for the farm, but also for reliance-based costs consequential on the misstatement.[80]

[61] Here, Mr Rahal effectively took the risk that Mr Bhargav and Ms Khajuria would be locked into retaining the property he sold them. The absence of that factor was particularly emphasised by this Court in *PGG Wrightson Real Estate Ltd v Routhan* when limiting the damages in the usual way.[81] The Supreme Court's reasoning did not dwell on this point. The Supreme Court's approach to damages for negligent misstatement in *Routhan* can be viewed as similar to the case law traversed above regarding damages for breach of the duty not to mislead under s 9 of the FTA. Glazebrook and Miller JJ held that "some post-purchase losses were as directly attributable to PGG's breach of duty as was the overpayment" and were recoverable.[82] It was expenditure that would not have been incurred but for PGG's breach of duty.[83]

[62] We consider the Supreme Court's decision in *Routhan* reinforces, and does not contradict, the case law traversed above regarding FTA damages.

[63] We dismiss Mr Rahal's appeal on this ground and allow the cross-appeal of Mr Bhargav and Ms Khajuria. We would set aside the High Court's award of $270,000 (including GST) of damages against Mr Rahal for breach of s 9 and $51,840 of

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76 At [152], citing *Price Waterhouse v Kwan* [2000] 3 NZLR 39 (CA) at [28] and Stephen Todd "Causation and Remoteness of Damage" in Stephen Todd (ed) *Todd on Torts* (9th ed, Thomson Reuters, Wellington, 2023) 1239 at [19.1]–[19.2].

77 *Routhan v PGG Wrightson Real Estate Ltd*, above n 66, at [238] and [262], citing *Price Waterhouse v Kwan,* above n 76, at [28].

78 At [261], citing *Price Waterhouse v Kwan*, above n 76, at [25].

79 *Routhan v PGG Wrightson Real Estate Ltd*, above n 66, at [314].

80 At [233] per Glazebrook and Miller JJ and [326] per Kós J.

81 *PGG Wrightson Real Estate Ltd v Routhan*, above n 21, at [129]–[134].

82 *Routhan v PGG Wrightson Real Estate Ltd*, above n 66, at [189].

83 At [226].

consequential losses, and substitute an award of damages, owed jointly and severally with those owed by FTL, of:

(a) $688,868.40 (including GST) for the cost of remediation; and

(b) $103,107 for consequential losses.

[64] The award of costs and interest are not challenged and not disturbed. We examine general damages next.

Issue 3: were the general damages awarded excessive?

Law of general damages

[65] Compensation for non-economic loss can be recognised in an award of general damages, reflecting stress, anxiety and inconvenience to the plaintiffs. It is difficult to fix a monetary amount for such effects. The courts will be particularly influenced by the desirability of consistency in treating like cases alike.

[66] In 2010, in *O'Hagan v Body Corporate 189855* (*Byron Avenue*), three judges of this Court considered the appropriate method of determining the quantum of general damages for non-economic loss in the context of leaky building cases in tort:[84]

(a) Baragwanath J noted the decision of this Court in *Mouat v Clark Boyce*, in 1992, where Cooke P stated an award of $25,000 was on the high side in a solicitor's negligence case, but allowed it to stand.[85] Baragwanath J noted the imprecision of the value judgment of such decisions and the advantages of the trial Judge who heard the evidence of the effect of stress on plaintiffs, to whose judgment he accorded a "margin of appreciation".[86] He surveyed the quantum of general damages in a number of leaky building cases of those who occupied the property and those who did not.[87] He set damages for two residents at

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84 *O'Hagan v Body Corporate 189855* [2010] 3 NZLR 445 (CA) [*Byron Avenue*].
85 At [111], citing *Mouat v Clark Boyce* [1992] 2 NZLR 559 (CA) at 569.
86 *Byron Avenue,* above n 84, at [112]–[113].
87 At [115]–[117].

$25,000 each, for a particularly stressed non-resident at $20,000, for non-residents at $15,000 and the single sum where the burden is shared at $20,000 to $25,000.[88] Those figures took some account of inflation since the *Mouat v Clark Boyce* judgment.[89]

(b) William Young P considered this Court has a role in giving general guidance as to appropriate levels of compensation for such damages but agreed with Baragwanath J that it was not an ideal case for such guidance given the limited material before the Court.[90] He supported awards, which he acknowledged involved elements of "rough justice", on the bases that:[91]

(a) such awards should not be made in favour of corporate owners;

(b) $15,000 is appropriate per unit for non-occupiers; and

(c) $25,000 is appropriate per unit for occupiers.

(c) Arnold J agreed with the figures proposed by the other members of the Court.[92]

[67] In *MacFarlane v Informed House Inspections Ltd*, in awarding $30,000 of general damages under s 9 of the FTA in a leaky building context, McQueen J referred to *Byron Avenue* and to Hinton J's judgment in the formal proof judgment in this case.[93] In the formal proof judgment, Hinton J accepted Ms Wroe's submission that an award of $30,000 be granted "to reflect both inflation over the 12 years since *Byron Avenue* was decided and the high level of stress and anxiety the plaintiffs have endured as a result of occupying the defective property for over two years".[94]

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88 At [127]–[129].
89 At [126].
90 At [152].
91 At [153]–[154].
92 At [196].
93 *MacFarlane v Informed House Inspections Ltd,* above n 41, at [118].
94 Formal proof judgment, above n 6, at [85].

Judgment under appeal

[68] The High Court stated in relation to breach of contractual warranty:[95]

> [131] The plaintiffs claim general damages for stress, anxiety and inconvenience incurred as a result of buying a non-weathertight home and living in damp and mouldy conditions together with a baby for some years. The evidence is clear that the plaintiffs have suffered significantly as a result. The statement of claim seeks $35,000, but the plaintiffs argue that I could award a greater sum. They did not specify what it might be. The defendants accept general damages are appropriate, at a level of $35,000.
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> [132] As I held in my formal proof judgment, I agree this is a case for general damages. I consider it would have been particularly devastating for the plaintiffs to see significant water ingress the day after settlement and to live in the circumstances they have. It is relevant in this regard that they were known to be young first home buyers. I consider general damages should be in the order of $80,000 in a case such as this, given the level of suffering and the fact there are two plaintiffs. Although the sum of $35,000 seems to be the generally accepted award, there are and can be exceptions and there was a discussion in court as to my ability to order a greater award.
>
> [133] While general damages of $80,000 are justified in this case, having fixed damages on the higher basis of repair costs for FTL's breach of contractual warranty, it would not do justice between the parties to allow general damages in full under this head. General damages are fixed at $35,000 for FTL's breach of contractual warranty.

[69] In relation to general damages for breach of s 9, the Judge stated:

> [144] As the defendants also accept, the plaintiffs are entitled to general damages for a breach of the FTA. For the reasons given earlier, I fix such damages at $80,000 for purposes of the FTA claims.

Submissions

[70] Mr Grant submits that the quantum of $80,000 is excessive, out of step with recent, similar precedent and risks unfairness to Mr Rahal and ratcheting up awards in future cases. The Judge's formal proof judgment, 18 months earlier, awarded $30,000 and the only material difference was the purchasers had lived in the property for an additional 18 months or so. In their latest statement of claim, the purchasers sought $30,000. At trial, Mr Rahal and FTL accepted an uplift of $5,000 might be appropriate and the prevailing tariff can increase with inflation. But there is no sound or principled basis for the quantum awarded. $35,000 must be the ceiling.

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95 Judgment under appeal, above n 1 (footnotes omitted).

[71] Ms Grant submits the reasons for the award were that there were two plaintiffs, they suffered significantly including in terms of their health and mental health and that of their young son, and it was particularly devastating to live in the circumstances they did. The Judge heard first hand from Mr Bhargav and Ms Khajuria, a young couple whose plans and hard work and savings were completely derailed by the deliberately misleading and deceptive conduct of FTL and Mr Rahal in relation to their first home. The Judge correctly relied on a case which awarded $50,000 in general damages to each of two plaintiffs.[96] But, in any event, it is submitted no other case supporting a lesser quantum has the same facts because the culpability in this case is higher. The Judge was exercising a statutory discretion for which there is an evidential foundation and the award ought to be upheld.

Quantum of general damages

[72] We accept Mr Grant's submission that it is conventional for general damages to be awarded on the basis of each dwelling (or unit, in the case of apartments) rather than each person in the dwelling. There is no reason to depart from that here. Neither was there evidence that the undoubted stress caused to Mr Bhargav and Ms Khajuria was materially higher than that in the similar cases referred to.

[73] We take judicial notice of the time value of money, calculated using the Reserve Bank's inflation calculator based on the general consumer price index. On that basis:

(a) $15,000 in March 2010, when *Byron Avenue* was issued, would be $21,323 in May 2024 when the judgment under appeal was issued;

(b) $25,000 in March 2010, when *Byron Avenue* was issued, would be $35,539 in May 2024 when the judgment under appeal was issued.

[74] We acknowledge the elements of rough justice that William Young J identified in such guidance, and do not detract from the discretion a trial judge must have to adjust for particular circumstances to do justice in the individual case.[97] With that

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96 Judgment under appeal, above n 1, at [132], citing *Heslop v Cousins* [2007] 3 NZLR 679 (HC).
97 *Byron Avenue,* above n 84, at [154].

said, we update William Young J's guidance as to the award of general damages for non-economic loss in leaky building cases to May 2024 on the basis:

(a) $21,000 is appropriate per unit, or dwelling, for non-occupiers; and

(b) $35,000 is appropriate per unit, or dwelling, for occupiers.

[75] We uphold the appeal on this ground, set aside the award of $80,000 in general damages, and substitute an award of $35,000.

Costs

[76] Mr Bhargav and Ms Khajuria have had substantial success in these proceedings. Accordingly, Mr Rahal must pay one set of costs to Mr Bhargav and Ms Khajuria for a standard appeal on a band A basis, together with usual disbursements. We certify for second counsel.

Result

[77] The appeal is allowed in part.

[78] The cross-appeal is allowed.

[79] The following awards of damages are set aside:

(a) $270,000 (including GST) for breach of the Fair Trading Act 1986;

(b) $51,840 for consequential losses; and

(c) $80,000 for general damages.

[80] The following awards of damages are substituted:

(a) $688,868.40 (including GST) for breach of the Fair Trading Act 1986;

(b) $103,107 for consequential losses; and

(c) $35,000 for general damages.

[81] Mr Rahal must pay one set of costs to Mr Bhargav and Ms Khajuria for a standard appeal on a band A basis, together with usual disbursements. We certify for second counsel.

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