IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA224/2023
[2024] NZCA 353

BETWEEN	PLUMBCO COMMERCIAL AND CIVIL LIMITED (IN LIQUIDATION) Appellant
AND	PLUMBCO NEW ZEALAND LIMITED First Respondent
AND	JASON PATRICK LALLY Second Respondent
AND	MICHAEL JOHN GIBSON Third Respondent

Hearing: 14 March 2023

Court: Katz, Dunningham and Gault JJ

Counsel: M D Branch and K F Shaw for Appellant and Third Respondent
C R Andrews and E Iliev for First and Second Respondents

Judgment: 31 July 2024 at 11.00 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The cross appeal is allowed.

C The third respondent, as the purchaser of the business under the Sale Agreement, and the appellant, as the third respondent's nominee, are jointly and severally liable to pay the outstanding components of the purchase price which have been found to be payable in accordance with the High Court judgment.

D The appellant and third respondent must pay one set of costs to the first and second respondent on a band A basis together with usual disbursements.

REASONS OF THE COURT

(Given by Dunningham J)

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Introduction

[1] On 31 March 2023, following seven days of hearing, Edwards J issued a lengthy judgment determining various disputes that had arisen during the sale and purchase of a plumbing business.[1] As a result, she found that:

(a) Plumbco New Zealand Ltd (Plumbco), succeeded in its claims for payment of amounts due for stock under an agreement for sale and purchase of its business (the Sale Agreement), along with interest on those amounts;[2] and

(b) Mr Lally, Plumbco's director, succeeded in his claim for unpaid instalments of a consultancy agreement he had with the purchaser of the business, Plumbco Commercial and Civil Ltd (PCCL), (the Consultancy Agreement).[3]

[2] PCCL now appeals that decision. PCCL says:

(a) it is not liable to pay the balance claimed as owing for what is described as "stock in trade" because:

(i) some of the stock was not usable; and

(ii) Plumbco did not own all the stock at the time of the sale;

[1] *Plumbco New Zealand Ltd v Plumbco Commercial and Civil Ltd* [2023] NZHC 690 [judgment under appeal].
[2] At [223].
[3] At [222] and [225].

(b) it is entitled to damages because the fixed assets of the business were not sold at book value/market value as represented; and

(c) it was Mr Lally who repudiated the Consultancy Agreement and so, rather than having to pay the balance claimed as owing under that agreement, PCCL claims a partial refund of an instalment it says was already paid.

[3] The vendor, Plumbco, cross-appeals the High Court Judge's findings that only PCCL was liable for the amounts owing under the Sale Agreement.[4] While PCCL was nominated as the purchaser, Plumbco says Mr Gibson, PCCL's director, in whose name the Sale Agreement was initially executed, remains liable under the Sale Agreement to pay the amounts which remain outstanding, including under a subsequently negotiated agreement regarding stock in trade. This issue takes on particular significance as PCCL was placed in liquidation by its shareholders in June 2023.

Background

The parties

[4] Mr Lally, the second respondent, is a qualified and registered plumber, who operated several companies in relation to his plumbing businesses. In 2016, Mr Lally incorporated Plumbco and transferred his existing New Zealand plumbing business and its assets to that company. Plumbco operated out of a head office in Albany, Auckland and some stock was kept in that office. However, the bulk of the stock was stored at a rural farm site in Silverdale, Auckland.

[5] Another of Mr Lally's companies was Hydraware Ltd (Hydraware). It was established to distribute and supply two brands of European plumbing components, being the Uponor range and the Flip Clip range. Plumbco's business used Uponor and Flip Clip plumbing components.

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4 At [80] and [151].

[6] Mr Lally listed Plumbco's business for sale in 2016 with a business broker in Auckland, Divest Ltd, with Mr Ivan Tava handling the sale. An information memorandum (the Information Memorandum) was produced by Divest Ltd which listed the sale price as $2,000,000. This included "[s]tock of approximately $100,000 + Uponor stock of $150,000". The Information Memorandum described "[t]angible assets" as "[p]lant and/or [f]ixtures and [f]ittings" and said that they are "generally stated at the depreciated book value".

[7] Mr Gibson, who was experienced in the construction industry, was looking for a business to purchase and in April 2017 he became interested in purchasing Plumbco's business. He made an offer for the business in May 2017. A period of negotiation between the parties followed, which included a meeting between Mr Lally and Mr Gibson in late June 2017, and a site visit to Plumbco's main offices in Albany where Mr Lally showed Mr Gibson the Hydraware stock. At the time he owned a company, Commercial Hotel Te Awamutu Ltd. On 13 September 2017, the company's name was changed to Plumbco Commercial and Civil Ltd in the expectation, it seems, that it would be the nominated purchaser.

The Sale Agreement

[8] The negotiations culminated in the Sale Agreement, dated 5 July 2017. The Sale Agreement used the standard ADLS form (Fourth Edition 2008 (3)) and attached several pages of further terms. The parties to the Sale Agreement were Plumbco and Mr Gibson and/or nominee. The purchase price for the business was $2,100,000 broken down as follows:

Tangible Assets:	$ 530,000
Intangible Assets:	$ 1,220,000
Stock in Trade:	$ 350,000

[9] The purchase price was to be paid in instalments, with $210,000 payable as a deposit, a further sum of $790,000 payable on settlement, along with $350,000 for stock in trade, $423,000 payable as vendor finance and $327,000 payable as earnout as part of the total purchase price.

[10] Importantly, cl 5 of the Sale Agreement confirmed the stock in trade figure was an estimate only and provided a process, including a joint stocktake, by which the final figure for the stock was to be determined. This part of the Sale Agreement is set out more fully below at [21].

[11] Clause 6.3 provided a vendor warranty that, at the giving and taking of possession, the assets and stock in trade were the unencumbered property of the vendor.

[12] Clause 18 was a due diligence clause which provided that the Sale Agreement was conditional on the purchaser:

> … carrying out a due diligence in respect of the business and the markets affecting the business and being satisfied to its absolute and sole satisfaction as to all matters arising out of such due diligence.

[13] Clause 19 provided that the Sale Agreement was conditional on a management contract being negotiated between the purchaser and Mr Lally within 10 working days from the date of the Sale Agreement.

[14] Clause 20 provided that the Sale Agreement was conditional on an arrangement relating to the purchase of stock being negotiated within 10 days from the date of the Sale Agreement.

[15] A schedule to the Sale Agreement listed the tangible assets which were being purchased, including plant and equipment, vehicles, excavators and a loader, and totalled $530,000.

[16] Following execution of the Sale Agreement, Mr Lally took Mr Gibson and Mr Tava on a tour of the business localities, including the farm site where most of Plumbco's stock (excluding the Uponor and Flip Clip stock) was stored and some site locations for projects which Plumbco was working on at the time.

The Variation

[17] A variation to the Sale Agreement was signed by the parties to the Sale Agreement on 14 July 2017 (the Variation). In it they recorded the following:

> 1. Deposit of $210,000 will be paid on or before 7th August 2017
>
> 2. That Due Diligence clause 18, Management Contract clause 19, Payment for Stock clause 20 and Key Contracts clause 21 are satisfied in all respects and hence the agreement is unconditional
>
> 3. That the earn out period will end early, and relevant amount become due, in any 12 month period following possession in which either the $5 million turnover target or $1 million EBIT is reached
>
> 4. $125,000 per annum is payable to the vendor for his role as a contracted consultant for the length of the earn out period agreed. This is based on the vendor working 20 hours per week and includes an allocation of $5,000 for expenses such as fuel and phone related to his work
>
> 5. Lease on current terms for 12 months

The stocktake

[18] For approximately three days around late September and early October, Mr Gibson and Mr Lally spent time on the Silverdale farm site where stock was counted and recorded on sheets by both parties. In the High Court, PCCL and Mr Gibson disputed that this constituted a joint stocktake within the meaning of the Sale Agreement. PCCL and Mr Gibson also disputed that there was a joint stocktake of the stock held at the Albany office (comprising mainly Uponor and Flip Clip stock) and of the stock held on job sites.

The Consultancy Agreement

[19] On 2 October 2017, PCCL and Mr Lally entered into the Consultancy Agreement for the provision of consulting services which reflected the terms of cl 4 of the Variation. Under the Consultancy Agreement, Mr Lally was contracted to PCCL for one year, for a total sum of $125,000 (excluding GST), to be paid on a monthly basis.

[20] Mr Lally began providing consultancy services on 3 October 2017. He rendered monthly invoices in November and December 2017 which were paid. However, PCCL refused to pay the remaining monthly invoices, asserting that Mr Lally had repudiated the Consultancy Agreement on 9 January 2018 bringing the contract to an end and PCCL had no further obligation to make payments under it.

The Stock Agreement

[21] On 4 October 2017, Plumbco and PCCL executed a Stock Agreement. The key terms (excluding the full table setting out the relevant discounts on the listed stock items) provide as follows:

1) **100% of Uponor Stock @ landed cost to [Plumbco]** — 50% due on the 2nd December 2017; 50% due on the 2nd of March 2018

2) **100% of Gia Flip Clip @ landed cost to [Plumbco]** — 50% due on the 2nd December 2017; 50% due on the 2nd of March 2018

3) **100% of Plumbco New Zealand Stock held in storage at 375 Whitehills Road, RD 1, Silverdale, Auckland**

Databuild [Cost] Center	Item	Stock Agreed Percentage
…		
10	PVC Large 175mm +	25%
	DWV Small 40-150mm	50%
	Pressure Class D	25%
20	Copper	50%
30	Flashing Deck tights	50%
40	MDPE Fittings	50%
	PE 100 HDPE	45%
	Galv Flanges	45%
…	…	…

All Plumbco Dataduild [sic] Cost Centre Items are agreed to be purchased by [PCCL] at the agreed and noted percentage of the listed cost price to [Plumbco].

Payment in full will be made on or before the 1st of October 2018

Payment is in full and no deductions or credits will be given.

All stock remains the property of Plumbco New Zealand Limited until paid in full.

Storage of all stock is at [PCCL's] cost

[PCCL] have full access and right to utilise and sell the stock as of the 2nd of October 2017

Settlement and the dispute over stock

[22] The sale was settled on 4 October 2017, the same day the Stock Agreement was executed. PCCL paid the sum of $790,000 on this date and Plumbco transferred the business to PCCL. PCCL took possession of the premises at Albany pursuant to a deed of lease.

[23] Mr Lally then proceeded to calculate the exact sum due for stock relying on the terms of the Stock Agreement, and using the Databuild software system which recorded pricing information for all the plumbing components being transferred.

[24] Mr Lally forwarded the final figure for stock to PCCL on 20 November 2017. However, the final figure was more than the maximum allowed under the Sale Agreement and Mr Gibson declined to take the excess stock.

[25] Soon after this, Mr Gibson informed Mr Lally that he was not going to make payment for stock as he did not believe it was Plumbco's stock and, despite attempts to resolve the impasse, PCCL has not made any payment for stock.[5]

[26] The disagreement over stock led to a breakdown in the relationship between Mr Lally and Mr Gibson. On 9 January 2018, Mr Lally sent Mr Gibson the following email:

> Hi Mike
>
> Your recent emails have required some time to respond to due to the holiday period and the obvious conflict to our [Sale Agreement]. …
>
> The process you have chosen on stock has less than impressed me, and I will review my final position on returning to [PCCL] when this has been resolved. At this time, I will not be returning to [PCCL].
>
> My lawyers have been advised of the current situation and are not available until after the 15th of January 2018 and I don't believe much more can be done or commented upon without their advice.
>
> Jason Lally

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[5] Although it acknowledges it owes payment for some stock, it has retained this as a set-off against PCCL's claims against Plumbco.

[27] PCCL said this email is evidence that Mr Gibson has repudiated the Consultancy Agreement. Accordingly, PCCL promptly removed Mr Lally's access to its information technology system. Mr Lally, however, continued to render invoices for services from January 2018 to September 2018 which were not paid.

The proceedings

[28] In due course, Plumbco and Mr Lally issued proceedings claiming a failure by PCCL and Mr Gibson to make payments due and owing under the Sale Agreement and Stock Agreement totalling $350,363.05 along with interest and costs. There was also a claim by Mr Lally for unpaid invoices which had been issued under the Consultancy Agreement totalling $107,812.50 (including GST).[6]

[29] PCCL and Mr Gibson denied liability to pay for stock which was not usable because it was obsolete or damaged or was not owned by Plumbco at the date of settlement. They also counterclaimed for misrepresentation (or misleading and deceptive conduct) as to the value of the tangible assets, saying they overpaid Plumbco by $129,075 as a result of relying on the representation, and they claimed losses in this amount. They also claimed storage costs for the stock they say PCCL did not agree to buy and for a refund of $5,528.84 which PCCL says is an overpayment on the Consultancy Agreement.[7]

[30] While there were other claims which were argued in the High Court, they are not relevant to this appeal and we say no more about them.

The decision of the High Court

[31] After setting out the background to the transaction (which the parties accept as being a good summary of what occurred), Edwards J proceeded to set out her findings on the evidence she heard. These began with general findings about the credibility and reliability of the evidence given by Mr Lally for Plumbco and by Mr Gibson for

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6 Other claims were resolved, referred to the Disputes Tribunal or not pursued: Judgment under appeal, above n 1, at [48].

7 We note the document listing issues on appeal increased the refund claimed to $11,979.00, being a refund of the October consultancy fees (as explained in Mr Gibson's evidence). It is not clear why that amount is now claimed when the statement of claim seeks $5,528.84.

PCCL, noting that those findings "inform my conclusions on the key issues in dispute and should be read together with the more detailed reasons on each issue".[8] The Judge said that she "generally preferred Mr Lally's evidence to that of Mr Gibson", saying it was "comprehensive, presented in a coherent narrative, and generally consistent with the written record".[9] She also said she found him to be "generally honest and reliable in the account that he gave".[10]

[32] In contrast, while she did not consider that Mr Gibson was dishonest, she found instances where his evidence was inconsistent with the documentary record and she considered his explanations for those inconsistencies were "self-serving".[11] By way of example, she referred to an email that Mr Gibson sent during the stocktake in which he said that he considered 10 per cent of the items at the farm are "not" stock.[12] In his oral evidence, he said this was a typographical error and the email should have read that he considered only 10 per cent of the items "are" stock.[13] The Judge found this explanation implausible saying that the original statement "makes sense of the Stock Agreement, [which was] signed a day after this letter was drafted."[14] The Judge recorded that her overall impression was that much of the defence to Plumbco's claim was "an attempt to re-open matters already agreed and recorded in the [Sale Agreement] and Stock Agreement."[15]

[33] Plumbco's primary claim for unpaid stock totalling $350,363.05 was made up of a combination of: stock held on the farm; Uponor and Flip Clip stock; and stock held on site for project jobs. PCCL only admitted $57,529.27 of that amount was owing, although it withheld payment of that sum by way of set-off on its counterclaims.

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8 Judgment under appeal, above n 1, at [52].
9 At [53].
10 At [54].
11 At [56].
12 At [56].
13 At [56].
14 At [94].
15 At [64].

[34] The Judge noted that PCCL defended the claim for payment for stock on several grounds. These were that:[16]

(a) the parties did not undertake a joint stocktake as required by cl 5 of the Sale Agreement;

(b) the stock was not all usable;

(c) Plumbco had to prove that it owned all the stock as at the date of settlement; and

(d) PCCL only agreed to pay for 100 per cent of the Uponor and Flip Clip stock which was booked for existing contracts.

[35] The Judge then set out the relevant terms of the Sale Agreement, and subsequent agreements which governed the obligation to purchase stock.[17] In particular, cl 5 of the Sale Agreement provided as follows:

> **Stock In trade**
>
> 5.1 Where in this agreement the purchase price is stated as including a sum for stock in trade, that sum is the vendor's estimate of the in-store cost of the stock in trade on the date the vendor executed this agreement and is referred to in this agreement as "the estimated stock value".
>
> 5.2 The actual value of the stock in trade as at the giving and taking of possession shall be determined by joint stock-take by the vendor and the purchaser or their appointees or, if required by either party, by an independent valuer if one can be agreed upon. Due allowance shall be made for obsolete or damaged stock in trade. If the parties cannot agree on an independent valuer, or in the event of any dispute concerning a joint stock-take, either party may serve on the other party notice in writing requiring that the question be determined by an independent valuer to be appointed by the president for the time being of the New Zealand Law Society and the party serving the notice may at any time thereafter refer the dispute for determination. An independent valuer acting under this clause shall act as an expert in determining any question concerning the stock in trade or the value of the stock in trade. The cost of such valuation shall be borne equally by the parties.

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16 At [68].
17 At [69].

5.3 If it is determined that the actual value of the stock in trade exceeds its estimated value by more than the maximum percentage stock value adjustment stated on the front page of this agreement ("the maximum percentage") then the purchaser:

(1) shall elect whether or not to accept all or any part of such excess; and

(2) may choose which items of stock in trade the vendor shall retain in order to reduce the actual value to the estimated value increased by the relevant maximum percentage.

Unless the purchaser notifies the vendor of the purchaser's choice of the excess stock in trade to be retained by the vendor within five (5) working days of the determination of the actual stock value the purchaser shall be deemed to have elected to accept all the stock in trade.

5.4 The vendor shall procure the vendor's lawyer to undertake to the purchaser to retain in trust from the moneys received on settlement a sum equivalent to the total of the maximum percentage of the estimated stock value which sum shall be applied to refund to the purchaser any deficiency in the actual values as compared with the estimated values and any balance shall be paid to the vendor.

5.5 The purchaser shall on or before the possession date pay into the purchaser's lawyer's trust account a sum equivalent to the total of the maximum percentage of the estimated stock value and shall procure the purchaser's lawyer to undertake to retain such sum in trust and it shall be applied in payment to the vendor of any excess of the actual value over the estimated value. Any balance shall be refunded to the purchaser.

5.6 In this agreement where reference is made to the value of stock in trade, such value shall be net of the GST content of any supply made to the vendor of or in relation to that stock in trade.

[36] In summarising the effect of this clause, the Judge noted the purchase price for the business included the sum of $350,000 for stock in trade, but the actual value of the stock in trade as at possession, was to be determined by a joint stocktake in accordance with cl 5.2. A dispute resolution process was set out in cl 5.2 for any questions concerning the stock or its value.[18] In accordance with cl 5.3, if the actual value of the stock exceeded its estimated value by more than 25 per cent, the purchaser had an election to make, which had to be exercised within five working days of the determination of the actual stock value.[19]

18 At [70]–[71].
19 At [72].

[37] While the Sale Agreement provided for the purchase of stock to be negotiated on terms and conditions agreeable to both parties within 10 working days from the date of the agreement, this clause was said to be satisfied in all respects when the parties signed the Variation on 14 July 2017.[20] In fact, though, the Stock Agreement was concluded on 4 October 2017, as set out above at [21].

[38] Having set out that background, the Judge turned to the disputed issues.

Was there a joint stocktake?

[39] In respect of whether there was a joint stocktake, the Judge held there was, noting that Mr Lally and Mr Gibson spent three days at the farm site counting stock and that the Stock Agreement was executed after this process had been completed.[21] She rejected PCCL and Mr Gibson's contention that a further stage was intended to the stocktaking process whereby unusable stock was to be excluded in the final determination of value, saying that this argument "is at odds with an objective interpretation of the Stock Agreement".[22] The Stock Agreement did not anticipate a further stage to the joint stocktake or a further review for usability, but rather, it had "all the hallmarks of a concluded agreement, including express clauses dealing with payment, the passing of risk, and storage of stock".[23]

[40] Importantly, the fact that a number of categories of stock were recorded to be paid at a reduced percentage suggested that an assessment of condition and usability had already taken place.[24] In that regard, she accepted Mr Lally's evidence that these percentage adjustments reflected the age and condition of the stock and included an allowance for the inconvenience of staff needing to visit the farm site to uplift stock.[25] She also considered this was consistent with an email sent by Mr Gibson on 26 September 2017, prior to completion of the stocktake, where he described the percentage reductions offered on some items as "very generous".[26]

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20 At [74]–[75].
21 At [82].
22 At [83].
23 At [83].
24 At [84].
25 At [88].
26 At [89].

[41] While counsel for PCCL and Mr Gibson relied heavily on a passage in cross-examination, where Mr Lally accepted that if an item was not usable and was non-compliant then it would be taken out of the list, the Judge considered this review for usability and condition had taken place when Mr Lally and Mr Gibson attended the farm site.[27] This was supported by the letter dated 2 October 2017 and emailed the following day in which Mr Gibson raised concerns with Mr Lally about the utility of some of the stock stored at the farm.[28] It was in this letter that Mr Gibson expressed the view that "10 per cent of items at the farm are not stock".[29]

[42] The Judge considered, construed objectively, Mr Gibson was raising his concerns in this letter and these were then resolved and addressed in the Stock Agreement. If the Stock Agreement did not resolve Mr Gibson's concerns then the Judge observed he should not have signed it.[30] In the Judge's view, the exchange referred to in cross-examination did not indicate that a separate process would be completed, nor did those statements erode the agreement reached in the Stock Agreement. Rather, she held, "they were a pragmatic acknowledgement that despite best efforts, there could be some stock accidentally included that was not in fact usable, and on that basis should be excluded."[31]

[43] In terms of whether there was a joint stocktake of the Uponor and Flip Clip stock, the Judge accepted that a joint stocktake had not been undertaken. However, in that regard, she found that Mr Gibson agreed to the stock being counted by Plumbco staff and waived any requirement for the stocktake to be joint.[32] She also noted that Mr Gibson had viewed the stock held at the office, which was mostly Uponor and Flip Clip stock and confirmed, in his 2 October 2017 letter, that "most of the products there are stock".[33]

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27 At [90]–[92].
28 At [92].
29 At [93].
30 At [95].
31 At [99].
32 At [104].
33 At [108].

[44] Finally, she noted that the provision in the Stock Agreement, which provided that 100 per cent of the Uponor and Flip Clip stock was to be purchased at landed cost to Plumbco, only made sense if the quantities of that stock had been identified.[34]

[45] In terms of stock that was on-site at current projects or being used for current contracts, the Judge recorded that PCCL and Mr Gibson conceded in opening submissions that they agreed to pay for that stock.[35] However, even if that had not been conceded the Judge said she would have found that Mr Gibson waived the requirement for a joint stocktake in relation to this stock also, as he was willing to pay for stock which was already committed to contracted jobs and was no doubt content for Plumbco staff to do the actual counting of such stock.[36]

[46] In terms of the Uponor and Flip Clip stock, the Judge rejected an argument that the Stock Agreement only committed the purchaser to acquire any such stock (which was owned by Hydraware) if it was already committed to an existing contract and, with reference to the email sent on 3 October 2017, that where it was "not being specified by any project" he would purchase it at a 50 per cent discount.[37] She considered that such an interpretation sat uncomfortably with the plain meaning of the Stock Agreement and the wider factual matrix.[38] This included that there was no separate agreement concluded for the purchase of the Uponor and Flip Clip stock at a 50 per cent discount. She also observed that while the sale was of Plumbco's business, it was always clear that the sale was to include the Uponor and Flip Clip stock and it was always understood by Mr Gibson that this stock was owned by a separate legal entity, Hydraware.[39] The Judge observed that "the legal ownership of the stock was of little importance to Mr Gibson. He said as much in his evidence".[40]

Was Plumbco required to prove ownership of the stock?

[47] The next argument addressed in the judgment was whether Plumbco was required to prove it owned the stock at the date of settlement. The Judge observed that

[34] At [109].
[35] At [112].
[36] At [114].
[37] At [118].
[38] At [121].
[39] At [123].
[40] At [132].

PCCL did not claim for a breach of the warranty in cl 6.3 of the Sale Agreement as to ownership of the stock. Rather, it asserted that Plumbco must prove that it owned the stock at the time of settlement in order to recover the outstanding sum due.[41] On this issue, the Judge held that ownership was not an element of either cause of action in this case and it was not a pre-requisite to recovering the unpaid purchase price for the stock. In other words, Plumbco did not need to prove ownership to prove its claim.[42]

[48] She also held that ownership issues did not constitute a defence to Plumbco's claim in this case as PCCL did not contend that it had suffered any loss by virtue of Plumbco not owning the stock. Indeed, she said it could not, given it has received, and even used, the stock it agreed to purchase but has not paid for.[43] As PCCL agreed it would purchase the stock and agreed the price for the stock, the question of ownership was only relevant if it impinged on PCCL's rights in relation to that stock, which it did not.[44]

[49] In any event, ownership of the stock had been transferred to Plumbco by the date of settlement, or by 5 February 2018 at the latest, which was when Mr Lally advised his accountant that a transfer of the stock to Plumbco should be recorded in that company's 2017 accounts. Any defence to the claim by PCCL on this basis could not therefore be maintained beyond that date.[45]

[50] Accordingly, the Judge held that PCCL was liable to pay for the stock at a price calculated in accordance with the Stock Agreement and to pay interest on the late payment at the 10 per cent rate stipulated in the Sale Agreement.[46]

[51] Relevantly, though, she noted that:

> [151] … judgment for the unpaid stock component of the purchase price shall be entered against PCCL, as opposed to Mr Gibson. Although Mr Gibson is the named party to the [Sale Agreement], it is evident that PCCL was his nominated purchaser. There is no real dispute that PCCL took on

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41 At [136].
42 At [140].
43 At [141].
44 At [143].
45 At [145].
46 At [150].

> liability to purchase the business, including the stock, and is the entity properly liable for that part of the purchase price.

This reflected her earlier finding that:

> [80] However, I consider the two agreements must be read and understood together. Both formed part of the agreement in relation to the purchase of stock which was a component of the total purchase price for [Plumbco's] business. Construed in context, PCCL, and not Mr Gibson, was the purchaser for the business, and it is that entity which is liable for any outstanding component of the purchase price.

This finding that PCCL was the only party liable on Plumbco's claims for payment under the Sale Agreement and the Stock Agreement is the subject of Plumbco's cross-appeal.

Was the value of the tangible assets misrepresented?

[52] The next issue which is raised on appeal is whether Plumbco misrepresented the value of the tangible assets sold as part of the Sale Agreement. The tangible assets include plant and equipment, vehicles, excavators and a loader.

[53] This claim was advanced in two ways which the Judge treated as alternative causes of action. The first was a claim for misrepresentation, which she treated as arising under s 35 of the Contract and Commercial Law Act 2017 (CCLA). The second was pleaded under the Fair Trading Act 1986 (FTA), which she treated as a claim under ss 9 and 43 of that Act.[47]

[54] The pleaded misrepresentation relied on by PCCL comprised statements made in the Information Memorandum provided to Mr Gibson, and the schedule annexed to the Sale Agreement which listed the tangible assets and their assigned values.

[55] The Information Memorandum set out the various components of the business which comprised the asking price of $2,000,000. These included "[t]he assets of Plumbco as a going concern" and "[f]ixed assets at $100,000". As already noted, the Information Memorandum defined tangible assets as "[p]lant and/or [f]ixtures & [f]ittings" and said that these are "generally stated at the depreciated book value".

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[47] At [154].

[56] The Judge observed that the fixed asset component of the purchase price did not remain at $100,000 and the overall asking price changed. The final sum stipulated in the Sale Agreement for these assets (excluding stock in trade) was $530,000 which was broken down as follows:

Fixed Assets	
Plant & Equipment	
Power Tools	$ 27,000
Scaffolding, Ladders	$ 20,000
Hand Tools	$ 10,000
Lasers & Specialist Equipment	$ 50,000
HDPE Welders, Generators	$ 30,000
Draingage [sic] Equipment	$ 40,000
Office Equipment, Computers	$ 25,000
Warehouse equipment, 8x Containers	$ 20,000
Site Office	$ 8,000
Total Plant & Equipment	**$ 230,000**
Vehicles	
Mitsubishi Triton JSK308	$ 30,000
Mitsubishi Triton KAR598	$ 30,000
Holden Rodeo CMU443	$ 8,000
Toyota Camry CQR375	$ 6,000
2x Mitsubishi L300 Vans	$ 16,000
Total Vehicles	**$ 90,000**
Excavators & Loader	
Kobelco 5 Tn Excavator SK50SR-3	$ 35,000
Kobelco 4 Tn Excavator SK40SR-2	$ 32,000
Yanmar 2 Tn Excavator VIO20	$ 18,000
Komatsu Loader WA40-3EO	$ 45,000
Kobelco 13.5 Tn Excavator	$ 80,000
Excavators & Loader TOTAL	**$ 210,000**
TOTAL	**$ 530,000**

[57] PCCL said that there was a representation by the vendor that all these tangible assets would be transferred "generally" at "depreciated book value".[48] The Judge observed that the word "generally" contained in the statement relied on, introduced both an element of equivocality and a degree of ambiguity into this statement.[49] However, counsel for PCCL and Mr Gibson, in closing submissions, proceeded on the basis that the represented value was "market value" which, in the Judge's assessment, suggested that Mr Gibson was not relying on the representation in the Information Memorandum at all.[50]

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48 At [160].
49 At [164].
50 At [165].

Rather, she said, "he assumed the values in the schedule were market values and proceeded on that basis".[51]

[58] In terms of the scope of the representation, the Judge did not consider it applied to the vehicles, excavators and the loader which were all owned by the Lally Family Trust and did not form part of the pool of assets offered for sale in the Information Memorandum.[52] In an email from the business brokers to Mr Gibson on 18 May 2017, the following was recorded:

> You'll see in the stock, plant and equipment list **attached** that the vendor has divided the assets between three entities: Plumbco (which is on sale), Hydraware and the Lally [Family] Trust.
>
> An estimated $200k of stock and $230k worth of the listed equipment will be *included* in the sale price of [Plumbco]. The Hydraware and Lally [Family] Trust items are *additional* to the sale price.

[59] Properly construed, the Judge considered the list attached to this email was an offer:[53]

> … independent of any representations in the [Information Memorandum], which only related to the [Plumbco] assets then offered for sale. Any representation as to value contained in that [Information Memorandum] did not affect the additional assets offered for sale.

[60] She concluded, therefore, that to the extent there was an actionable misrepresentation arising out of the Information Memorandum, it only captured the tangible assets offered for sale by Plumbco.[54]

[61] The Judge then turned to consider whether the alleged misrepresentation induced entry into the contract. That is, whether it was relied on and was one of the reasons why the contract was concluded.[55] In the Judge's assessment, Mr Gibson did not rely on the alleged representation when entering into the Sale Agreement.[56] First, as she had already concluded, the statement itself had a degree of equivocality. Second, there was a significant exchange of financial information in the months that

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51 At [166].
52 At [168].
53 At [171].
54 At [172].
55 At [173].
56 At [175].

followed receipt of the Information Memorandum and before the agreement was concluded. This included agreeing to buy the additional assets at a stipulated price.[57] Furthermore, Mr Gibson conceded in his evidence that he "did not expressly proceed on the basis that every item would be transferred to PCCL at depreciated [b]ook [v]alue".[58]

[62] In her assessment, Mr Gibson's main concern was whether the values listed in the schedule were market values for those assets.[59] That was supported by the fact that Mr Gibson said he was seeking valuations of the plant and equipment prior to executing the Sale Agreement in order to verify the values in the schedule.[60] While Mr Gibson did not proceed to get such valuations, citing a lack of time, the Judge concluded his purpose in wanting them was to verify the market value of the assets stated in the schedule.[61] In addition, in the absence of any valuation of these assets, Mr Gibson's evidence was that he was placing trust in Mr Lally that the values in the schedule were accurate. The Judge held that meant he was relying on the integrity of Mr Lally in assigning market values to the assets, and not relying on the accuracy of the representation as to depreciated book value.[62]

[63] Furthermore, the Judge observed that Mr Gibson's main concern was with the value of the vehicles, excavators and loaders, as these were the highest value items he was purchasing but, as she had found, these were not captured by the representation in the Information Memorandum.[63]

[64] In summary, the Judge found that Mr Gibson was not relying on the representation made in the Information Memorandum when he entered into the Sale Agreement. He was focused on checking that the values in the Sale Agreement were market values, rather than depreciated book values and, in the end, he decided to simply accept that the figures stated in the Sale Agreement were market value and he

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57 At [176].
58 At [177].
59 At [177].
60 At [178].
61 At [180].
62 At [181].
63 At [182].

proceeded on that basis.[64] For that reason, she concluded PCCL was not induced by the representation in the Information Memorandum to enter into the Sale Agreement.[65] This finding was "fatal" to both the claim for misrepresentation under s 35 of the CCLA and the claim for relief under s 43 of the FTA.[66]

[65] Furthermore, even if there was inducement, there was no causal link between the representation and any subsequent loss. The Judge observed there was an "evidential vacuum" on what the loss would have been, because PCCL had not provided an accurate list of what had been delivered as part of the sale and what the book value of those assets was (although it blamed Plumbco for not providing that information).[67] In that regard, the Judge observed:[68]

> … to blame the vendor for not providing the information required to show the representation relied on was breached, and loss has been suffered as a consequence, rather undermines the integrity of the misrepresentation claim.

Was the Consultancy Agreement repudiated?

[66] The final issue considered in the judgment which is relevant to this appeal is whether Mr Lally repudiated the Consultancy Agreement — justifying its cancellation — and so PCCL was no longer obligated to make payment under the Sale Agreement as claimed by Mr Lally.

[67] The terms of the Consultancy Agreement are set out above at [19]. Mr Lally claim the sum of $107,812.50 (including GST), being the total of unpaid invoices from January 2018 to September 2018.[69] Mr Lally's entitlement to that sum turned on whether or not he had repudiated the Consultancy Agreement entitling PCCL to cancel it under s 36 of the CCLA.[70] That section provides:

> (1) A party to a contract may cancel the contract if, by words or conduct, another party (B) repudiates the contract by making it clear that B does not intend to—

64 At [182].
65 At [190].
66 At [191].
67 At [195].
68 At [195].
69 At [199].
70 At [201].

(a) perform B's obligations under the contract; or

(b) complete the performance of B's obligations under the contract.

[68] PCCL relied on Mr Lally's email, dated 9 January 2018 to Mr Gibson, as set out above at [26], as evidence that Mr Lally no longer intended to perform his obligations under the agreement.[71]

[69] The Judge, however, was not satisfied that this constituted sufficient evidence of an unequivocal intention not to perform the Consultancy Agreement when assessing it in light of the "high threshold for a finding of repudiation".[72]

[70] The Judge's reasons included:

(a) The timing of the email, noting it was sent during the summer holiday period in response to an email sent on 28 December 2018 and the statements about returning to PCCL could be interpreted as relating to returning to the office after the holiday break. That is, he would continue to work for PCCL but not return to PCCL's office.[73]

(b) The email did not say that Mr Lally would not return to work at all but rather that he would "review" his "final position" on returning when the dispute over stock had been resolved and that he wished to speak to his lawyers first. The Judge considered this was inconsistent with an unequivocal intention not to continue to provide consultancy services.[74]

(c) Mr Gibson did not appear, at least initially, to treat it as repudiation as he responded saying: "Ok that is fine I shall wait until I hear further from your people".[75]

71 At [204].
72 At [206].
73 At [207].
74 At [208].
75 At [209].

(d) Mr Lally's conduct after sending the email was inconsistent with repudiation. The Judge accepted his evidence that he continued to answer phone calls from clients and PCCL staff and continued to express an intention to work even though PCCL removed his access to the work email address and the PCCL database. On 2 February 2018, Mr Lally wrote to Mr Gibson seeking to have his email reinstated and said "irrespective of email access, I intend to carry on my role under that contract until it ends".[76]

(e) She did not consider that removal of furniture from the office during the summer break was consistent with repudiation. She accepted Mr Lally's evidence that this had previously been agreed to by Mr Gibson and the furniture was replaced with items belonging to the Lally Family Trust.[77] This was consistent with an earlier exchange between Mr Gibson and Mr Lally where it was agreed he could take some of the office furniture so long as he replaced it "with similar so not to disrupt work".[78]

(f) The Judge also did not consider a letter written by Mr Lally to Mr Gibson, on 20 February 2018, where he said he would consider notifying relevant authorities that his Gasfitting Certifier's licence had not been eligible for Council inspections and project certification since 8 January 2018, was evidence of repudiation.[79] Rather, it was consistent with the fact Mr Lally had been prevented from certifying work by being cut off from PCCL's email and databases and with him wanting to ensure his certifying number was not being used improperly.[80]

(g) Similarly, the Judge placed no weight on a report by the Plumbing and Drainage Board which recorded that Mr Lally left PCCL in

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76 At [210].
77 At [211].
78 At [212].
79 At [213].
80 At [214].

December 2017, noting the report was dated 2019, it was simply the report writer's interpretation of what Mr Lally had said, and the report writer was not called to give evidence.[81]

[71] In summary, she found that Mr Lally did not evince an intention to cease performing the Consultancy Agreement on 9 January 2018 or at any time thereafter, and PCCL's purported termination of the Consultancy Agreement was itself a repudiation of the Sale Agreement.[82] For that reason, Mr Lally's claim for payments due under the Consultancy Agreement was allowed and PCCL's counterclaim was dismissed.[83]

The appeal

[72] The appellant, PCCL, appeals the High Court's judgment on a number of grounds. However, as the submissions for the respondents observe, the appellant had not presented any written submissions in support of the following grounds of appeal, nor are they included in the agreed list of issues, and we treat them as having been abandoned:

(a) whether the Judge was right to find PCCL waived its right to a joint stocktake of Uponor and Flip Clip Stock and conceded, in opening, that it agreed to pay for stock which was on-site at current projects; and

(b) whether the Judge was right to reject PCCL's argument that it only agreed to pay for the Uponor and Flip Clip stock which was required for existing contracts.

[73] The remaining issues on appeal, as set out in the agreed list of issues, can be summarised as follows:

(a) Was Plumbco required to prove that the stock was usable in order to claim payment for it?

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81 At [218].
82 At [219].
83 At [22].

(b) Was Plumbco required to prove that it owned the stock at the time of settlement in order to pursue its claim for payment of that stock?[84]

(c) Were the Judge's conclusions on the claim for misrepresentation and/or breach of the FTA arising from the statement in the Information Memorandum as to fixed assets generally being at book value, correct?

(d) Did Mr Lally repudiate the Consultancy Agreement with the consequence that the appellant was entitled to a refund?

(e) Was the Court correct to find that in relation to the matters in dispute under the Sale Agreement, Mr Gibson was not personally liable?

[74] We address each of these issues in turn.

Was Plumbco required to prove that the stock was usable in order to claim payment for it?

Submissions

[75] Mr Branch, counsel for PCCL, submits that the Court was wrong to decide that any issues of usability (including compliance) were resolved by way of the stocktake undertaken at the farm site.

[76] In particular, PCCL says the 3 October 2017 email sent after the stocktake at the farm had been completed, supports PCCL's position. Mr Branch submits that this email raises a number of concerns about the usability of the stock and is consistent with there being, first, a recording of the stock the vendor wanted to be paid for, with a later agreement to be reached on whether that stock qualified as stock in trade.

[77] PCCL says there were a number of other facts that pointed against the farm stocktake constituting a review for usability and condition saying:

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84 We consider that appeal points (a) and (b), as expressed, also capture the appellant's concern as to which party bore the evidential onus on these issues.

(a) at the date of the farm stocktake Mr Gibson had no knowledge of the stock;

(b) during the stocktake Mr Gibson sat outside the containers and was merely recording what he was told by Mr Lally as to description and quantity of stock which was inside the container;

(c) there was no Stock Agreement in place even though the Sale Agreement was conditional on that being agreed;

(d) stock that was of no use, non-compliant, or worthless, even if discounted by, for example, 50 per cent, was overpriced by 50 per cent;

(e) Mr Lally gave other evidence of listing stock himself and calling it a joint stocktake on the basis he believed that was agreed to; and

(f) Mr Lally accepted in cross-examination that stock which was not usable and non-compliant would come out of the list before any discount was applied.

[78] Mr Branch submits that this evidence makes it clear that whether the stock was usable and/or compliant was not dealt with at the time of the farm stocktake and there would be a later consideration of that issue, and then a "washup". Only at that point would there have been a completed joint stocktake. On that basis, he submits that Plumbco had the evidential onus of proving that the stock it wanted to be paid for was usable and/or compliant.

Discussion

[79] We accept at the outset, as Mr Andrews, counsel for Plumbco, notes, that the challenge to usability is apparently confined to just one category of the stock in trade sold, being the farm stock comprising $114,867.73 of Plumbco's $350,363.05 claim for unpaid stock. The email sent on 3 October 2017 does not raise any particular issues with the stock Mr Gibson had seen stored at Plumbco's office. While the same email raised issues about whether PCCL should purchase the Uponor and Flip Clip stock,

that was not based on concerns about its usability, but rather, whether Plumbco would need to use it all.

[80] While PCCL relies on Mr Gibson's email of 3 October 2017 to suggest that a review of usability was still to take place, we accept, as the Judge found, that the Stock Agreement, and particularly the price adjustments in the third column of that agreement, recorded resolution of the issues raised by Mr Gibson regarding the condition or usability of the stock. The Stock Agreement contained no qualification or exception in relation to usability or any reference to a later assessment of usability.

[81] We also note that, in Mr Lally's evidence, which the Judge found credible and reliable, there was an extensive explanation of how, during the farm stocktake, there was an assessment of usability. Mr Lally says that the stock he was describing and which ended up on the stock sheets, "was all stock usable in the business [Plumbco] was selling [Mr Gibson]". In particular, Mr Lally described in considerable detail how the stocktake process was conducted, including the fact that, with each item, Mr Lally gave Mr Gibson "a short explanation of what the product was and its purpose". He explains how he excluded stock that was not usable or said he would give it to Mr Gibson free of charge given factors such as its age or appearance.

[82] By way of example, Mr Lally listed a large number of items which were excluded in the stocktake process being:

> 42.1 Almost all of drainage pipe and fittings (concrete, earthenware, PVC, stainless steel, cast iron);
>
> 42.2 Approximately 25% of Fusiotherm pipes;
>
> 42.3 Almost all of Wefatherm pipes;
>
> 42.4 Approximately 35% of gas and water valves, including regulators and hoses;
>
> 42.5 Almost all of Water meters;
>
> 42.6 Approximately 35% of the pipe clips of all sizes;
>
> 42.7 Approximately 20% of brass and copper materials;
>
> 42.8 Most of the sanitary and tapware;
>
> 42.9 Approximately 75% of galvanised pipe and pipe fittings;

42.10 Approximately 75% of MDPE pipe fittings; and

42.11 Approximately 75% of PVC traps.

[83] Mr Lally's evidence was that none of the damaged stock was counted or charged to Mr Gibson, and he says he discussed these things with Mr Gibson during the course of the stocktake. Mr Lally says:

> I only sold him usable stock, as I agreed to. I addressed his concerns about usability, appearance and condition, and also the perceived inconvenience of the stock being located out of town, in the stock percentage adjustments that we agreed and applied to all of the various categories of stock in the Stock Agreement.

We also note that items Mr Gibson complains about, (for example, old taps, a stainless steel urinal and sink for public toilets), were not listed in the Stock Agreement and so he was not charged for them.

[84] It is clear that the discounts negotiated for usable stock accommodated the fact that some of it was not in as new condition, or otherwise would not be economic to buy at full price. As Mr Lally explained in evidence, most plumbing products were manufactured to be highly durable, but "dust, minor marks, scuffs, are quite normal and acceptable" and so products may be usable even if not in perfectly new condition.

[85] Issues of usability were clearly live prior to concluding the Stock Agreement as Mr Gibson, having participated in the farm stocktake, then raised his concerns about the condition of some of the stock (for example, black pipe and fittings that would "require cleaning before being fitted", metal fittings which were exhibiting some corrosion, or items such as rubber pipe connectors which needed parts). He also proposed options for dealing with these concerns, including to "look at the value put on the above items when they are valued and consider the cost to the business to use the products".

[86] In our view, it is a logical inference that, having seen the stock and raised these concerns about the condition and usability of some of it, the Stock Agreement, which was concluded after this, must be taken as the parties' resolution of those issues and that bargain should be upheld in the absence of any ground for avoiding it.

[87] The Stock Agreement sets out in detail the description of stock items, the number of them and then the percentage discount negotiated, ranging from 25 per cent to 75 per cent. While Mr Branch argues that even at, say, a 50 per cent discount, non-usable stock would be overpriced, that ignores the fact that: first, non-usable stock had been excluded in the calculation of price, as discussed above at [81] to [83]; and, second, a significant amount of usable stock was being sold to PCCL at a considerable discount. Essentially, while he was buying all the stock, he was only paying for usable stock.

[88] We are satisfied that the Stock Agreement committed PCCL to buying the listed stock at the agreed percentage discount and the agreement, on its face, does not envisage any further stage of negotiation. In short, the Stock Agreement bound PCCL to:

> (a) buy 100 per cent of Uponor and Flip Clip stock at the landed cost to Plumbco; and
>
> (b) 100 per cent of the Plumbco stock held in storage at the farm site at the total of the varying percentages of the cost price to Plumbco for each of the 43 categories of stock listed in the Stock Agreement.

Furthermore, as we explain in more detail below at [155] and [156], the Stock Agreement formed part of the obligations the parties to the Sale Agreement agreed to perform and so Mr Gibson was also bound by its terms and obliged to pay the calculated stock value by virtue of cl 5 of the Sale Agreement.

[89] While PCCL places significant reliance on the section of cross-examination of Mr Lally,[85] we see no reason to depart from the Judge's factual finding that:

> [99] Seen in context, I consider Mr Lally's assurances to Mr Gibson … that if it turned out later that any item in the stocktake was non-compliant then it would be taken out, were not indicative of the separate process to be completed. Nor were those statements intended to erode the agreement reached in the Stock Agreement. Rather, they were a pragmatic acknowledgement that despite best efforts, there could be some stock

85 See judgment under appeal, above n 1, at [90].

> accidentally included that was not in fact usable, and on that basis should be excluded.

[90] Given Mr Lally's evidence that any unusable stock was excluded from being priced in the stocktake process, which was clearly accepted by the Judge, we consider her conclusion on the significance of this passage of cross-examination, was correct and should be upheld.

[91] The fact that a full stock list was not provided to Mr Gibson until 20 November 2017, a month after transfer of possession of the business, does not change this conclusion. We accept this was not a fresh count of stock, but was instead a compilation of earlier stock sheets to which had been added the agreed pricings for the stock items. The subsequent calculation of price in accordance with the Stock Agreement, did not undermine the agreement reached. Rather, it was simply the mechanism by which the total stock value was derived for the purposes of cl 5.2 of the Sale Agreement in accordance with the Stock Agreement.

[92] In short, nothing raised by the appellant persuades us that the Judge's conclusions on the binding nature of the Stock Agreement were wrong.

[93] Given our conclusions on these issues, the submissions on the evidential onus fall away. Through the joint stocktake process, the parties agreed that while PCCL acquired all the stock, the purchaser would only pay the agreed price for the stock that was assessed as usable. Any disputes during this process could be resolved by the dispute resolution process in cl 5 of the Sale Agreement. However, once the Stock Agreement was entered into, it must be held it was binding, unless circumstances for avoiding it arise. In these circumstances, no onus falls on Plumbco to do anything more than prove the existence of the Stock Agreement and the failure of PCCL and Mr Gibson to fulfil its terms.

[94] This ground of appeal is dismissed.

Was Plumbco required to prove the stock was the property of Plumbco at settlement?

Submissions

[95] PCCL's argument that Plumbco had to prove the stock was its property at the time of settlement was linked to a broader argument that to be stock in trade (and therefore to trigger the obligation to buy it), the stock had to be owned by Plumbco. In support of this argument, PCCL points to the fact the Stock Agreement is only between Plumbco and PCCL and assumes Plumbco owns the stock because it refers to the stock being sold at the agreed percentage of the "listed cost price to [Plumbco]" and that it would remain "the property of [Plumbco] until paid in full". PCCL's argument that there was an onus on Plumbco to prove that what was listed in the Stock Agreement was owned by Plumbco was advanced as being a separate obligation from the warranty cl at 6.3(1) of the Sale Agreement.

[96] Furthermore, PCCL says Plumbco admitted that it had to own the stock because it admitted the following pleading:

> … on a proper interpretation of the [Stock Agreement] (either read on its own or together with the [Sale Agreement]):
>
> (a) 'Uponor Stock' and 'GIA Flip Clip' and '[Plumbco] stock held in storage at 375 Whitehalls [sic] Road' meant the relevant "Stock in Trade" had to be the unencumbered property of the First Plaintiff as at settlement[.]

[97] On the basis of this admission alone, PCCL submits that any stock that was not the property of Plumbco at the giving and taking of possession (by which it meant the Uponor and Flip Clip stock) was not stock in trade. If it was not stock in trade, then the appellant was not required to take it, or pay for it.

[98] The first and second respondents, however, say that in acknowledging the requirement that the stock be unencumbered property of the vendor at the date of settlement, they were doing no more than acknowledging and admitting the effect of the warranty at cl 6.3(1) of the Sale Agreement. To suggest that this admission amounted to any more than this would be unjust and contrary to the proper construction of the Sale Agreement.

[99] In any event, Plumbco's claim is in contract. As the vendor, it promised to convey the stipulated assets to the purchaser. It is not necessary for the vendor to own the assets at the time the contract is entered so long as it can transfer them to the purchaser at the time of settlement. If they can, the purchaser is obliged to pay for them, which is what is sought here.

Discussion

[100] We accept the High Court Judge's analysis of this argument as "technical and unmeritorious".[86] There can be no doubt that, from the outset, Mr Gibson and PCCL knew that the Flip Clip and Uponor stock was owned by Hydraware, another of Mr Lally's companies. That was made clear in several documents exchanged in the negotiation process. By way of example, the email of 18 May 2017 sent by Mr Tava's son to Mr Gibson, stated the following:

> You'll see in the stock, plant and equipment list **attached** that the vendor has divided the assets between three entities: Plumbco (which is on sale), Hydraware and the Lally [Family] Trust.
>
> An estimated $200k of stock and $230K worth of the listed equipment will be *included* in the sale price of [Plumbco]. The Hydraware and Lally [Family] Trust items are *additional* to the sale price.

[101] There are also exchanges in the negotiations where Mr Gibson expressly considers whether to purchase the Flip Clip and Uponor stock or not. For example, in May 2017, Mr Tava listed the Flip Clip and Uponor stock as "optional" and it was given a value of $291,000. Mr Gibson declined to buy it at that stage. Similarly, in his offer of 2 June 2017, he did not offer to buy it. However, following the farm stocktake, Mr Gibson said in his 3 October email he would take that stock, but only at a 50 per cent discount on price.

[102] Mr Gibson subsequently sought to explain the reference to the purchase of 100 per cent of this stock in the Stock Agreement as being because he "believed that there may be some Uponor and Flip Clip stock [at Plumbco's office and at the farm] that was owned by [Plumbco] and necessary for [Plumbco's] upcoming work", and that this was all he agreed to buy.

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86 At [143].

[103] However, again, we consider the terms of the Stock Agreement supersede any debate about what comprises "stock in trade" and make it clear what PCCL had contracted to buy. As Plumbco says, this was not a case of additional stock which was owned by a different entity being added without PCCL's consent. PCCL agreed to buy the Flip Clip and Uponor stock knowing that the stock was owned by another company, Hydraware.

[104] We consider PCCL's attempt to distinguish between Uponor and Flip Clip stock which it believed was owned by Plumbco, and that which was owned by Hydraware, cannot override the clear terms of the Stock Agreement. If the Uponor and Flip Clip stock being bought was only Plumbco's stock, it would not have been necessary to list it separately in the Stock Agreement from the other Plumbco stock.

[105] Accordingly, we agree with the Judge's conclusion that there was no misunderstanding that the Uponor and Flip Clip stock was owned by the separate legal entity,[87] Hydraware, even though it was being sold as part of the Plumbco sale, and PCCL agreed to buy that stock as part of the business purchase. We are satisfied that a reasonable person having all the background knowledge available to the parties at the time the Stock Agreement was entered into would understand it as requiring PCCL to purchase Hydraware's Uponor and Flip Clip stock.[88]

[106] Having found the Stock Agreement included all the Uponor and Flip Clip stock that was transferred at settlement, we concur with the Judge's finding that no requirement to prove ownership arose.[89] Plumbco did in fact transfer these goods to PCCL, and subsequently ensured that its accounts recorded the fact the stock was transferred from Hydraware to Plumbco in the 2017 financial year. This means, as counsel for Plumbco pointed out, that when the proceedings were commenced, the stock transfer from Hydraware to Plumbco had been formalised. At that point, PCCL could not pursue the argument because:

(a) the Sale Agreement had not been cancelled;

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87 At [130].

88 Adopting the objective test to contractual interpretation as articulated by Arnold J in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [60].

89 Judgment under appeal, above n 1, at [140].

(b) demand for payment for the stock continued to be maintained; and

(c) any refusal to complete on the grounds of Plumbco not owning the stock could not be sustained beyond 5 February 2018, which is when Mr Lally instructed his accountant to ensure the transfer of stock to Plumbco was reflected in the 2017 accounts.

[107] In summary, we accept the Judge's conclusions that:

(a) Ownership is not an element of Plumbco's cause of action for debt and breach of contract, so Plumbco does not need to prove ownership to prove its claim.[90]

(b) Ownership issues do not constitute a defence to Plumbco's claim because PCCL cannot contend it has suffered any loss arising from the ownership issue, nor could it, given it has received and even used the stock it agreed to purchase.[91]

(c) Mr Gibson was always aware that the Uponor and Flip Clip stock was owned by another entity but was not particularly concerned about that. He only raised the ownership issue on 5 February 2018.

(d) Even if ownership needed to be established, ownership had been transferred to Plumbco by the date of settlement or by 5 February 2018 at the latest, and any defence based on a lack of ownership could not be maintained beyond those dates.[92]

[108] This ground of appeal is dismissed.

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90 At [140].
91 At [141].
92 At [143].

Were the Judge's conclusions on the claim for misrepresentation and/or breach of the FTA, correct?

Submissions

[109] The appellant submits that the Judge was wrong to deny liability for the representation that the tangible assets would be transferred generally in accordance with depreciated book value. The Judge made this finding primarily on the following grounds:[93]

(a) many of the assets in question were owned by the Lally Family Trust and those assets were not subject to any representation contained in the Information Memorandum provided to Mr Gibson in April 2017; and

(b) there was no reliance on this representation as she found PCCL was seeking to have the assets transferred at market value.

[110] Mr Branch submits that while the Lally Family Trust assets were originally optional, they were subsequently included in the Sale Agreement. The schedule of fixed assets to be purchased did not stay at the $100,000 referred to in the Information Memorandum and, on 29 May 2017, Mr Tava represented to PCCL that the fixed assets were now "$450K including vehicles & excavators (not including 13.5 ton excavator)".[94] Mr Branch submits that this extended the representation to all the tangible assets offered for sale, not just those listed in the initial Information Memorandum.

[111] Mr Branch then submits that the representation (which covered the expanded list of fixed or tangible assets) induced the entry into the Sale Agreement and the decision to declare it unconditional. He says that confirming the due diligence clause does not mean the right to rely on the representation was lost. The representation should therefore be treated as if it was a term of the Sale Agreement. He says the term was breached because the fixed assets did not equal the represented value and PCCL

93 At [168]–[171].

94 The term "fixed assets" and "tangible assets" are used interchangeably both in the High Court judgment and here.

is entitled to damages which it quantifies as the difference between the market value of the assets purchased and the price which they were purchased at.

[112] Mr Branch acknowledges that Plumbco never provided information about the book value of the assets. However, because Mr Lally acknowledged in cross-examination that he intended to represent that the assets were at market value, the appellants focused on that concession rather than using the "unknown depreciated values in order to calculate the Appellant's loss". The appellant says it focused on this concession because it:

(a) removed any uncertainty created by the word "generally"; and

(b) avoided any argument about whether the representation as to book value applied to the assets later added.

However, he says PCCL did not give up on its claim that if it could not prove the market value claim, it could rely on the representation as to book value.

[113] In relation to the Judge's finding that there was no reliance on the representation, Mr Branch submits there was no basis for rejecting Mr Gibson's evidence that he relied on the assets as being offered for sale at book value or market value and if they were not, he would have reduced the price he agreed to pay for them.

[114] In terms of the Judge's conclusions on the quantification of loss, Mr Branch submits that as the appellants never received evidence of the book value, they used market value on the basis that the market value could not be higher than those figures.[95] The loss suffered by PCCL is therefore quantified at $267,580, being the difference between what PCCL says is market value for the assets and the sum PCCL actually paid for the assets under the contract.

[95] The asserted basis for this was said to be the fact that, under the Goods and Services Tax Act 1985 supplies between associated persons are "deemed" to occur at open market value.

Discussion

[115] In our view, the starting point is whether a sufficiently clear representation was made at all that could be relied on. The Judge considered the alleged representation itself had a degree of ambiguity and equivocality in it. It was unclear whether it meant that some fixed assets were listed at book value and some were not, or whether, globally, the total value of the fixed assets was generally in accordance with book value. Without clarification of that, it is difficult to see that there was an unambiguous representation made from the outset.

[116] However, more importantly, this was claimed to be a representation as to the reasonableness of the price at which these assets were offered, but Mr Gibson never received the book values, so never knew what they were. It appears he made an assumption (which was not part of the representation), that book values would mean the assets were offered at, or less than, market value. However, there was no evidence called to prove that book value would inevitably reflect or be less than market value. The evidence that a supply between associated persons is "deemed" to be market value for GST purposes is insufficient to support such an assertion. Furthermore, in evidence, Mr Gibson accepted that book value and market value could be different and one was not inevitably less than the other, because he said he was prepared to accept, for the purposes of quantifying his loss book value or market value "whichever is [the] higher", as the value received.

[117] While Mr Branch says PCCL then relied on a concession made by Mr Lally in evidence, a concession made at that stage cannot amount to a representation that the appellants relied on in entering the contract. In any event, when asked in cross-examination if the tangible assets making up the new asking price of $450,000 needed to be transferred at book value, all Mr Lally said was:

> A. I don't believe that was the case, it was market value. From absolute memory I believe it was a market value that we ended up dealing with.
>
> Q. So not book value, but you agree that they had to be transferred at market value, is that right?
>
> A. At a market value, yes, I would assume, on memory, yes.

[118] This does not go so far as to say that Mr Lally ever represented the assets were being sold at market value. More importantly, though, the pleadings never asserted that there was reliance on a representation that the items were being sold at market value. It was not open to the appellants to change the nature of the claimed representation during the proceedings in this way.

[119] We therefore consider the evidence as to market value is irrelevant to this pleading and does not assist with quantifying loss, in the absence of appropriate expert evidence that book value would always be less than, or equivalent to, market value. For that reason, we also accept the Judge's conclusion that the fact the appellants could not quantify the effect of the representation in order to quantify loss, "rather undermines the integrity of the misrepresentation claim".[96]

[120] While our finding that the representation had no proven meaning means this ground of appeal cannot succeed, for completeness, we comment on the other findings made in respect of this claim.

[121] We do not accept that the representation that assets were priced at book value could extend to the vehicles, excavations, and loaders. Those were not the subject of the Information Memorandum that was provided to Mr Gibson. They were assets of the Lally Family Trust which Mr Gibson subsequently agreed to purchase in conjunction with the Plumbco business.

[122] We also record that, during the appeal hearing, it was pointed out that a further information memorandum was prepared in June 2017 adding these items to the list of tangible assets being offered for sale. However, we do not accept the evidence goes so far as to prove that Mr Gibson received and relied on this. While Mr Tava acknowledges preparing an updated information memorandum in June 2017, he says he did not recall ever providing that to Mr Gibson. Mr Gibson says in evidence he does not think he ever had a full copy of the amended information memorandum, although he thinks he remembers seeing it during the negotiations. This is an insufficient basis on which to say that he saw and relied on the alleged representation applying to the expanded list of fixed assets which were now being offered for sale.

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[96] Judgment under appeal, above n 1, at [195].

Accordingly, we are satisfied the purported representation only applied to the assets listed in the first Information Memorandum as tangible assets, and not to the extended list of fixed assets attached to the schedule to the Sale Agreement.

[123] The appellant is also critical of the Judge focusing on reliance for the purpose of a claim in misrepresentation under the CCLA and not considering the claim under the FTA where Mr Branch says that reliance is not required to be established to find a breach of s 9 in the FTA.[97] He submits the issue of reliance should have been dealt with in the application under s 43 of the FTA and, there, the question of whether reliance was reasonable or not, is a matter to be considered as part of the appropriate remedy to be awarded. That is, if the appellant was unreasonable in its reliance, that may reduce the compensation figure, rather than go to whether a breach of s 9 has been established at all.

[124] However, here, the FTA is invoked, not in the abstract, but rather as a defence to the claim to pay in full for the assets listed in the contract. The appellant relies on s 43 to be relieved of part of its contractual obligation to pay the asking price for the tangible assets on the ground it has suffered loss or damage by the breach of s 9. Consequently, the appellant needs to show that it has suffered loss or damage by conduct of the other party in contravening s 9. Here, the Judge has found, and we agree:

(a) the purported representation only applied to the tangible assets listed in the Information Memorandum; and

(b) there was no reliance on the assets being at book value, but rather, the purchaser expected the assets to be offered at market value and was planning to check this by obtaining independent valuations.

In these circumstances there was no causal link between the representation and any subsequent loss, and the Judge's conclusions both under the CCLA and the claim for relief under s 43 of the FTA are upheld.

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[97] *Leigh v MacEnnovy Trust Ltd* HC Auckland CIV-2009-404-3631, 31 March 2010.

[125] This ground of appeal is dismissed.

Did Mr Lally repudiate the Consultancy Agreement with the consequence that the appellant was entitled to a refund?

Submissions

[126] The fourth issue raised by the appellants is whether Mr Lally repudiated the Consultancy Agreement, thereby justifying PCCL's termination of that agreement and refusal to pay the balance of the instalments.

[127] PCCL relies on the 9 January 2018 email set out above at [26], saying that it reasonably took this to be an abandonment of the Consultancy Agreement given the wording used and Mr Lally's actions over the Christmas holidays. In particular, PCCL relies on Mr Lally clearing out his personal effects from the office (something PCCL says the Judge did not refer to) which Mr Branch says leaves no real doubt that Mr Lally had abandoned his consultancy role. Mr Lally's claims that he continued to talk to Mr Boyd and Mr Hooper, two employees of Plumbco who continued working for the business on its transfer, were rejected by them. Furthermore, Mr Branch says Mr Lally's denials that he had said he had left the company in December 2017, in the context of a Plumbing and Drainage Board complaint, were implausible.

Discussion

[128] As the Judge identified, the test for repudiation is that set out in s 36 of the CCLA. The question of whether a contract has been repudiated is a question of fact and must be determined objectively, from a consideration of all the circumstances.[98] Repudiation will not be lightly inferred, and the evidence must show an "unequivocal intention not to perform the contract".[99]

[129] In this regard, the Judge set out a comprehensive list of reasons why she considered the 9 January 2018 email insufficient to show that Mr Lally did not intend to perform his obligations under the contract.[100]

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98 *Devonport Borough Council v Robins* [1979] 1 NZLR 1 (CA); and *Mt Pleasant Estates Co Ltd v Withell* [1996] 3 NZLR 324 (HC).

99 *Kumar v Station Properties Ltd* [2015] NZSC 34, [2016] 1 NZLR 99 at [58].

100 Judgment under appeal, above n 1, at [206]–[219].

[130] In our view, the starting point is the email. We consider the natural meaning to be taken from the second paragraph is that Mr Lally still had not determined his final position, but that the impasse over the stock issues created a problem. The logical inference was that if these were resolved, there was no impediment to him continuing.

[131] We consider that reading of the email is supported by the fact there is some evidence that Mr Lally did continue to do some work on behalf of PCCL. While Mr Hooper or Mr Boyd could not recall him contacting them after that date, there was other evidence of him working for PCCL, including contacting Scarborough Construction in respect of progress on a large apartment project on 10 January 2018. However, his ability to continue to do that was then thwarted by PCCL removing his access to the work email address and the PCCL database on 12 January 2018.

[132] The evidence as to the removal of personal effects from the office does not change that. This was done at the same time as the previously agreed change of furniture. Mr Lally explained in evidence that, as he was in the midst of a clean out of the office, there were years' worth of personal information stored at the office that did not pertain to the business, and it was "a time to clean the office up [with] intentions to come back in the New Year and start afresh". This is consistent with Mr Lally's stated position that he was reviewing his position and taking legal advice, and that he had not finally determined what he was doing. Similarly, if he did say he left PCCL in December 2017 in a subsequent Drainage and Plumbing Board investigation, that did no more than reflect the practical reality that he was unable to continue working for them in 2018 because his work email address was removed.

[133] For these reasons, we are satisfied the Judge's decision on whether the contract was repudiated was correct.

[134] This ground of appeal is dismissed.

Was the Court correct to find that in relation to the matters in dispute under the Sale Agreement, Mr Gibson was not personally liable?

Submissions for Plumbco

[135] The last issue arising is raised by the first respondent, Plumbco, challenging the Judge's finding that judgment should be entered against PCCL alone as opposed Mr Gibson as well, as set out at [51] above.

[136] Mr Andrews submits that the identity of the purchaser under the Sale Agreement, and therefore the party liable for breach of any of the purchaser's obligations thereunder, was not put in contention in the High Court proceedings. The fact Mr Gibson was the purchaser under the Sale Agreement was admitted in the pleadings. There was no affirmative defence pleaded that suggested Mr Gibson ceased to become a party to the Sale Agreement and therefore no longer liable as the purchaser under it. In light of this fact, there was no basis for the Judge to depart from the accepted position in the pleadings as to the identity of the purchaser.

[137] Mr Andrews also points out that the Judge appears to have erroneously proceeded on the basis that the exercise of the right of nomination relieved the named purchaser, Mr Gibson, of the burden of the contract. However, Mr Andrews points out that is not the position at common law, which is as follows:[101]

> Though the nominee may enforce the benefit of the contract, the original contracting party remains a party to the contract and may also enforce its terms, as well, of course, as remaining liable to the other party for the performance of the burden of their promises.

[138] Furthermore, that is contrary to the express words of the Sale Agreement which say:

> Where the purchaser executes this agreement with provision for a nominee, or as agent for an undisclosed principal, or on behalf of a company to be formed, the purchaser shall at all times remain liable for all of the obligations of the purchaser.

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[101] Donald McMorland *Sale of Land* (4th ed, Cathcart Trust, Auckland, 2022) at 92 (footnotes omitted).

[139] Accordingly, as a matter of contract, Mr Gibson could not escape liability by nominating PCCL as the purchaser.

[140] In order to release Mr Gibson from his obligations under the Sale Agreement, there would need to be evidence of an effective novation of the Sale Agreement, whereby a new agreement was entered into with PCCL as the purchaser and the prior agreement extinguished, thereby releasing Mr Gibson from his obligations. In the absence of any evidence to support this, that cannot be the case.

[141] Mr Andrews submits the Judge's conclusion at [151] on liability under the Stock Agreement appears to be based on the fact that PCCL was nominated as the purchaser (albeit informally, as we were not referred to any formal document effecting this nomination) and PCCL was the only party named a purchaser in the Stock Agreement. However, he submits that the Stock Agreement simply gave effect to the stocktaking provisions of cl 5.2 of the Sale Agreement. The fact that only PCCL's name appeared on the Stock Agreement was, in Mr Andrews' submission, simply reflective of the reality that just prior to settlement, Mr Gibson had decided to treat PCCL as his nominee under the Sale Agreement.

[142] However, the fact that the Stock Agreement was in PCCL's name only, did not alleviate Mr Gibson of his obligations under the Sale Agreement which included to pay for stock in accordance with a subsequently negotiated Stock Agreement. The Stock Agreement is, in effect, "parasitic" on the Sale Agreement as it simply gives effect to the stock adjustment provisions in that Agreement. It does not change the fact that Mr Gibson remains liable to pay for the business assets under the Sale Agreement.

[143] For these reasons, the Judge's findings at [80] and [151] of the judgment determining that Mr Gibson was not liable under the Sale Agreement was wrong and should be rectified on appeal.

Submissions for Mr Gibson

[144] Mr Branch accepts that Mr Gibson was the purchaser under the Sale Agreement. However, he points out that in the pleadings he denies liability under

the Stock Agreement because it was entered into by PCCL. He points out that all parties accepted there had been a nomination and what was at issue was whether the parties had, outside of the Sale Agreement, independently contracted in relation to aspects of the purchase.

[145] For this reason, he submits the Judge was right to focus on who was liable for "any outstanding component of the purchase price".[102] Here, he says the Sale Agreement was conditional on the Stock Agreement being executed. So, until that arose, no issue of nomination arose. In his submission, a nomination is where the nominee settles the already unconditional obligation. Here, while the Sale Agreement had been declared unconditional, that was not correct as there were matters still to be resolved including the negotiation of an agreement over what stock was to be acquired.

[146] In this case, the Judge had to determine who was liable for any outstanding component of the purchase price. This required the Judge to determine whether, in concluding the Stock Agreement, Plumbco and PCCL had contracted outside of the Sale Agreement.

[147] Here, he says there is no real dispute that:

(a) The Sale Agreement was conditional on the Stock Agreement being executed, so until that was achieved, no issue of nomination arose.

(b) Plumbco and PCCL clearly agreed that the obligations in relation to the Stock Agreement were between them as contracting parties. It was not a case of the nominee being nominated to perform the original purchaser's obligations.

For these reasons, PCCL was the only party liable under the Stock Agreement.

[148] Finally, Mr Branch says the fact that PCCL has subsequently gone into liquidation has no bearing on this issue. Any determination on what the contractual obligations were, has to be assessed at the time the particular contract was made.

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[102] Judgment under appeal, above n 1, at [80].

Discussion

[149] In our view, there can be no dispute that Mr Gibson remains liable to perform the Sale Agreement, both in law, as the original contracting party,[103] and by virtue of cl 1.3(2) of the Sale Agreement which reiterates the continuing liability of the named purchaser notwithstanding the Sale Agreement provided for a nominee.

[150] It seems the key difference between the parties is that Plumbco maintains that Mr Gibson, as the contracting party to the Sale Agreement, remains liable for performance of all aspects of the Sale Agreement, including to pay for stock in trade, albeit that the Stock Agreement was drafted in the name of PCCL and Plumbco. In contrast, Mr Gibson argues that Plumbco and PCCL contracted outside the Sale Agreement in relation to the stock in trade and so only PCCL was liable under that separate agreement.

[151] The Judge's reasoning for entering judgment against PCCL alone appears to be on the basis of PCCL's nomination as purchaser which meant that "PCCL took on liability to purchase the business, including the stock".[104]

[152] We accept Plumbco's arguments that the nomination of PCCL as purchaser did not affect Mr Gibson's continuing liability for performance of all aspects of the Sale Agreement. Both under the common law, and pursuant to cl 1.3(2) of the contract, the named purchaser remains liable for all the obligations of the purchaser under the contract and judgment should have been entered against both PCCL and Mr Gibson in respect of unfulfilled obligations under the Sale Agreement.

[153] That then leaves Mr Gibson's argument that, contrary to the Judge's findings that:[105]

(a) the two agreements must be read and understood together; and

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103 *Rivette v Atrax Group New Zealand Ltd* (2010) 11 NZCPR 723 (HC) at [12].
104 Judgment under appeal, above n 1, at [151].
105 At [80].

(b) both form part of the Sale Agreement in relation to the purchase of stock which was a component of the total purchase price for Plumbco's business,

the Stock Agreement stood alone and was solely PCCL's liability.

[154] While the Stock Agreement was drafted in the name of PCCL and Plumbco only, we consider it must be seen as defining the obligations to purchase stock in trade under the Sale Agreement. We say this because:

(a) the Sale Agreement expressly stated that the business assets being sold were:

(i) tangible assets of $530,000;

(ii) intangible assets of $1,220,000;

(iii) stock in trade of $350,000;

(b) the Sale Agreement included a further provision in relation to stock in trade as set out at cl 5, for the purpose of determining the actual value of stock in trade by reference to the estimate included in the Sale Agreement with a due allowance to be made for obsolete or damaged stock in trade;

(c) the Sale Agreement included several conditions, including at cl 20.1, that it was conditional on an arrangement related to the purchase of stock being negotiated on terms and conditions agreeable to both parties, within 10 working days from the date of Agreement;

(d) the variation executed on 14 July 2017, still naming Plumbco as vendor and Mr Gibson and/or nominee as purchaser, confirmed that all conditions were satisfied and that the Sale Agreement was unconditional.

[155] We are satisfied that the obligation to pay for the stock in trade under the Sale Agreement endures and is the responsibility of both Mr Gibson and PCCL. The Stock Agreement is, as Mr Andrews submits, "parasitic" on the Sale Agreement and while it was drafted after PCCL had been informally nominated as purchaser, it defined the purchaser's obligations in respect of paying for stock in trade under the Sale Agreement. By entering the Sale Agreement, Mr Gibson agreed to pay for stock in trade in accordance with the terms of the subsequently negotiated Stock Agreement whether he, or just his nominee, executed that subsequent agreement.

[156] In particular, cl 5 places the obligation on the vendor and the purchaser or their appointees to determine the actual value of the stock in trade as at the giving and taking of possession. Once the actual value of the stock in trade is determined, the onus is on the purchaser to respond within a given timeframe, failing which "the purchaser shall be deemed to have elected to accept all the stock in trade", and it is the purchaser's obligation under cl 5.5 to provide the funds to pay for the actual value of the stock by requiring the purchaser to pay into the purchaser's lawyer's trust account the maximum percentage of the estimated stock value and procuring the purchaser's lawyer to undertake to apply that sum in payment of any excess of the actual value over the estimated value. Thus, while Mr Gibson's nominee, and Plumbco, may have gone through the process to identify what was stock in trade and to quantify the amount payable for it, it is envisaged that task can be delegated by the vendor and purchaser. It remains the purchaser's obligation under the Sale Agreement to make payment for the stock in trade.

[157] Accordingly, we are satisfied that judgment should have been entered against both Mr Gibson and PCCL for performance of all aspects of the Sale Agreement, including payment for the stock in trade, notwithstanding the identity and value of the stock in trade was fixed under the Stock Agreement which Mr Gibson was not a named party. That did not overtake Mr Gibson's obligation to make payment for stock in trade under the Sale Agreement itself.

[158] The cross-appeal is allowed.

Result

[159] The appeal is dismissed.

[160] The cross appeal is allowed.

[161] The third respondent, as the purchaser of the business under the Sale Agreement, and the appellant, as the third respondent's nominee, are jointly and severally liable to pay the outstanding components of the purchase price which have been found to be payable in accordance with the High Court judgment.

[162] The appellant and third respondent must pay one set of costs to the first and second respondent on a band A basis together with usual disbursements.

Solicitors:
Harkness Henry, Hamilton for Appellant and Third Respondent
McVeagh Fleming Lawyers, Auckland for First and Second Respondents