IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA486/2023
[2024] NZCA 422

BETWEEN	OHL LIMITED Appellant
AND	PREMIER PROPERTY DEVELOPMENTS LIMITED Respondent

Hearing:	14 May 2024
Court:	Thomas, Fitzgerald and Osborne JJ
Counsel:	J D McBride and E A Gambrill for Appellant S E Wroe and T J M Ashley for Respondent
Judgment:	5 September 2024 at 11.30 am

JUDGMENT OF THE COURT

A **The appeal is allowed. The High Court judgment is set aside and judgment is given for OHL in the sum of $400,000 plus accrued interest calculated pursuant to the Interest on Money Claims Act 2016 from 8 February 2019 to the date of this judgment.**

B **The respondent must pay the appellant costs for a standard appeal on a band B basis, discounted by 10 per cent, together with usual disbursements. We certify for second counsel.**

C **Costs in the High Court are remitted back to the High Court for reconsideration in light of this judgment.**

REASONS OF THE COURT

(Given by Thomas J)

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Introduction

[1] In February 2019, the appellant, OHL Ltd, settled its purchase of one of two units (Unit A) of an Auckland 14-storey unit-titled development from the respondent, Premier Property Developments Ltd (Premier). By agreement, $692,000 (the Retention) was held in a stakeholder's account pending resolution of OHL's claim against Premier for breach of the warranties contained in the agreement for sale and purchase (the ASP).

[2] In July 2021, Premier commenced proceedings seeking the release of the Retention. OHL counterclaimed for damages under the Fair Trading Act 1986 and for breach of warranty. The High Court rejected the Fair Trading Act claim but held that Premier was liable to OHL for breach of warranty. However, OHL had unreasonably refused Premier's offer of a rent guarantee which was a reasonable mitigation measure.

This refusal eliminated any loss arising from the breach.[1] Premier was therefore entitled to recover the Retention.

[3] OHL appeals.

Background

[4] The intensely factual background, which is largely not in dispute, was comprehensively recorded in the judgment under appeal.[2] We therefore use that background supplemented by matters identified by the parties in our description below.

[5] The subject building at 2 Kitchener Street, Auckland is divided into two units. Unit A comprises the basement and ground floor, and contains three hospitality tenancies. Unit B, acquired by OHL in February 2018, comprises two levels of carparks and 10 levels of commercial offices.

[6] Mark Hotchin is the director of OHL and other companies with property interests, including Omara Property Group Ltd (Omara), which in turn owns Karaka Land Holdings Ltd (Karaka). On OHL's acquisition of Unit B, Omara took over as the body corporate's manager. Kerry Finnigan worked for Mr Hotchin at the time of OHL's property transactions with Premier.

[7] Unit A was one of two properties owned by Premier, the other being a commercial property in Tauranga.

[8] In August 2017, Premier appointed Colliers International New Zealand Ltd (Colliers) its general agent to sell Unit A.[3] The Colliers team comprised Adam White, Gawan Bakshi and Simon Felton. Colliers appraised Unit A as having an estimated likely sale value of $4–$4.2 million, later extending the range to $4.4 million.

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1 *Premier Property Developments Ltd v OHL Ltd* [2023] NZHC 1962, (2023) 16 TCLR 625 at [66] and [68].
2 At [3]–[36].
3 Now Colliers New Zealand Ltd.

[9] Knowing Mr Hotchin to be in the process of acquiring Unit B, Mr White saw him as a prospective purchaser of Unit A and contacted Mr Finnigan by email in November 2017 with copies of Unit A's leases and a schedule outlining those tenancies. Mr Hotchin understood Premier to be "seeking something like $4 million for Unit A, which [he] thought was too high". Mr White maintained contact with Mr Finnigan over Mr Hotchin's potential interest in Unit A.

[10] Colliers embarked on a formal marketing campaign in July 2018. The information memorandum (Information Memorandum) described Unit A and its three tenancies, saying it was "Fully Leased". It outlined six investment highlights:[4]

INCOME	Returning $223,500 net p.a.
ADD VALUE	Rental rates are below market rates being achieved in the locality
LOCATION Art Gallery	Vibrant arts & student area, opposite the Auckland
SPLIT RISK	3 tenants increases income security
FLOOR AREA	1,026m^2 (approx.)
TENANT	Long operating hospitality tenants

And:

TENANCY SCHEDULE

TENANT	**AREA**	**NET RENTAL**	**$/M^2**	**EXPIRY**	**[RIGHT OF RENEWAL] REMAINING**	**REVIEW TYPE**	**REVIEW DATE**
Red Pig	568.7m^2	$137,100	$241.08	31-05-2021	2 x 3 years	Market on renewal	1 June 2021 & 2024
Buza Limited	391.0m^2	$62,400	$159.59	01-11-2020	1 x 3 years	Annual [consumer price index]	1 November annually
Ren He	66.3m^2	$24,000	$361.99	20-02-2019	1 x 3 years	Market on renewal	20 February 2019
TOTAL	**1,026.0m^2**	**$223,500**					

[11] The Information Memorandum said that "comprehensive due diligence information", comprising the property's certificate of title, Land Information

[4] Formatting altered as compared to original.

Memorandum report and leases, was available in an online data room. Unit A's ground-floor tenants were Red Pig Ltd and Ren He Ltd, and its basement tenant was Buza Ltd.

The basement

[12] It was the circumstances of the basement tenancy which OHL claims were misrepresented to it. We interrupt the narrative of the sale transaction to explain what had transpired in relation to Buza's tenancy.

[13] Buza's tenancy began in April 2017, at which time it entered into an informal agreement with Premier to pay monthly rent of $5,000 (including outgoings and GST) from 1 May 2017. Manilal Hari, director of Premier, gave evidence that Buza, whose director is Se Woong (Kevin) Lee, "was paying rent informally for a few months to see if Mr Lee could get his business going".

[14] In September 2017, Premier and Buza began discussions as to the terms of a formal lease. Premier emailed Mr Lee saying that the monthly rent would be $5,200 payable from the lease commencement date of 1 November 2017, excluding both GST and monthly outgoings estimated at nearly $1,000. Mr Lee responded he could not meet those costs and would have to close his business. Premier then agreed to Mr Lee's proposal to pay $5,200 (including GST) until March 2018.

[15] The parties entered into an agreement to lease on 8 October 2017, with the lease commencing on 1 November 2017. The lease provided for monthly rent of $5,200 plus GST as well as a percentage of Premier's specified outgoings to be paid on the first day of each month. The same day, the parties' principals also initialled an annotated copy of their September email correspondence to formalise their agreement as to the reduced rent, despite the terms of the lease. Mr Hari's evidence was "[t]he discounted rent that [he] allowed to help [Mr Lee] establish his business finished in March 2018."

[16] From 1 November 2017 to 31 March 2018, Buza's rent was persistently part paid in arrears. Prior to 1 April 2018, by when a total of $26,000 rent should have been paid under the discounted arrangement, Buza had paid a total of $18,600. In the

subsequent months to 1 October 2018, Buza paid a further $4,200 only. Buza was not levied for any outgoings. Premier told Colliers none of this. In response to "a standard question" from Colliers, Mr Hari advised that the tenants "all paid their rent". This information, together with the leases themselves, was the basis for Colliers' marketing material and the Information Memorandum.

Back to the sale

[17] On 24 July 2018, Mr White emailed the Information Memorandum to Mr Finnigan, together with a link to access the further documentation available, such as the leases. Mr White repeated some of the "Investment Highlights", noting "[a]ttractive rental rates" and that the building was "[f]ully [l]eased". Mr White added, referring to OHL's ownership of Unit B:

> I will keep you posted as to how things are developing on this but for you guys surely combining the tower would have substantial benefits/value to the overall picture. Freehold towers are transacting in the 5%s like values on Albert Street and there seems to be plenty of overseas parties at these levels but they won't pay that sort of money for a strata tower — I'm sure you know this though.

[18] The five per cent figure to which Mr White referred is understood to be the property's capitalisation rate, a value calculated by dividing its rental income by its market value. A higher capitalisation rate can indicate a riskier investment. By estimating what the capitalisation rate will be, the market value of the property can be ascertained. The rate will vary over time, reflecting market changes arising from perceptions of lease security, future rental growth expectations, and investor supply and demand. A lower capitalisation rate gives a higher market value, and vice versa. Thus at Unit A's indicated net rental income of $223,500, a capitalisation rate of five per cent gives the market value of $4.47 million, while six per cent gives $3.725 million.[5]

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[5] We have compiled this explanation from the evidence of Simon Felton, the draft valuation report prepared by Seagar & Partners (Auckland) Ltd and the evidence of the expert valuers. See also Alan Hyam *The Law Affecting Valuation of Land in Australia* (5th ed, The Federation Press, Leichhardt (NSW), 2014) at 172; and Graham Bannock and R E Baxter *The Penguin Dictionary of Economics* (8th ed, Penguin Group, London, 2011) at 48.

[19] On 26 July 2018, Mr White sent Mr Finnigan a shorter-form flyer promoting the property, highlighting its "long running leases … on rates well [below] recent comparables in the area", suggesting that, in combination with Unit B, acquiring Unit A would be "a strategic acquisition for [the] future".

[20] Colliers' four-week campaign met some resistance from its target audience. Halfway through, Colliers reported to Premier:

> Everyone we have spoken to has indicated that they view the unit somewhere in the 6%'s, citing concerns regarding the foot traffic of the area, future stability of the hospitality tenants, and the lack of perceived ability to increase rental rates in future. Buyers have been strong in their opinion that this is a secondary retail location and thus the yield needs to be reflective of additional risk.

Colliers' final marketing report confirmed "the main criticism from the market has been around pricing".

[21] As the intended 16 August 2018 sale date approached, Mr White emailed Mr Finnigan on 9 August 2018, saying, "I believe the vendor will be looking or seeking a yield in the lower 5%'s but I think if $4m was achieved he will treat with someone". Mr White advised Mr Finnigan that he considered Unit A's rentals were all below market rates, including that Buza's tenancy "should be $200 per m2".

[22] Through Mr Finnigan, Karaka then offered unconditionally to buy Unit A for $3.9 million, in exchange for Premier purchasing land owned by Karaka in Karaka, Auckland for $900,000. That same day Mr White informed Mr Finnigan that "[Mr Hari] won't even entertain that idea". Later Mr Hari counteroffered at $3.8 million, without the contemporaneous sale. On 19 and 20 August 2018, Mr White continued unsuccessfully to pursue Mr Finnigan for a cash offer, citing "a strong offer from a Chinese church group" of some $3.9 million and observing "the whole building together … becomes a 5.5%'er perhaps slightly better and … puts it close to $30m in value".

[23] The offer from the Chinese church group was made on 17 August 2018. The initial offer was increased to $3.92 million, with Mr Hari counteroffering $4.35 million. This was rejected and the sale did not proceed.

[24] By email of 28 August 2018, Mr White told Mr Finnigan that Colliers had "pushed hard to have the trade deal signed" but repeated "it is apparent that [Mr Hari] is just not going to entertain [it]". Nonetheless, Mr White said Mr Hari:

> … has shown good will and reduced price to $3.8m which is a close to 6% yield. We pressured him hard to get to this level and there was a high level of reluctance from him. I don't need to go over the benefits of combining this offering with the tower to have a freehold building as I'm sure Seagars will show you the difference in cap rates in their report.

Mr White's reference to "Seagars" was to an anticipated report by Seagar & Partners (Auckland) Ltd (Seagars). On 16 August 2018, Mr Finnigan had instructed Seagars to update its valuation of Unit B and said, "we are looking at buying [Unit A] so will need to know the valuation impact owning 100% of the property would have on the valuation as well".

[25] A draft report from Seagars dated 9 September 2018 valued Unit A at $3.19 million plus GST and Unit B at $22.34 million plus GST with the combined property valued at $26.65 million plus GST (meaning a $1.12 million increase by owning both units). It recorded "Unit A is 100% leased to three retail lessees and is returning a net contract rental of $223,500 [per annum] with a weighted average term to run of 2.3 years". Having reviewed the leases and tenancy schedule, observing "100% of the rentable area is leased" on terms entitling market or inflation-adjusted rentals, the draft report assessed lease security as "weak considering the scale of the tenant companies". Mr Hotchin denied receiving or knowing of the report's content in advance of its disclosure in the proceeding, although documents sourced from Seagars include its 28 September 2018 "[i]nterim invoice" to Omara (another property company associated with Mr Hotchin) for the report. There does not appear to be a final version of the report.

[26] After Colliers' formal sales campaign ended, Mr White continued to push Mr Finnigan for an unconditional offer. On 17 September 2018, Colliers received an offer of $3.55 million from a Loretta Zhang in the name of Yiyang Liu, conditional on her due diligence within 20 working days of agreement. On 20 September 2018, Omara offered $3.2 million, conditional on due diligence within five working days of agreement. On 24 September 2018, Ms Liu accepted Premier's counteroffer of

$3.6 million, still conditional on due diligence to expire on 23 October 2018. Ms Zhang asked Colliers for bank statements or proof of receipt of rent each month, which Colliers asked Mr Hari to supply. On 25 September, Mr Hari declined to do so, saying Premier was "prepared to give a six month rent payment guarantee".

[27] On 26 September 2018, Ms Liu's lawyers emailed Mr Felton of Colliers, saying Ms Zhang "has advised that she is in discussions with you regarding the rental paid by one of the tenants, relief of 40%". Mr Felton gave evidence that Ms Zhang called him to express concerns with Unit A and he asked her to put that information into an email for his discussion with Mr Hari. Mr White said Colliers "had not previously been aware that reduced rent was being paid". He said Colliers was advised of the 40 per cent figure by Mr Hari in discussions of Ms Zhang's query and Mr Hari had advised "something along the lines he was discount[ing] for a new business to get them up and going … helping them out in the space" as "a temporary arrangement and then [the rent] would come back up".

[28] On 11 October 2018, Mr White emailed Mr Finnigan to advise Ms Liu's contract remained "valid" until the end of the following week. Regarding Buza, he noted that, "it has come to light that the vendor is subsidising the rent here to the tune of around 40%". Mr White's evidence was that he discussed the reduced rental payments with Mr Finnigan by telephone call in advance of his email. Under cross-examination, Mr White said, "I literally would have said exactly what Mr Hari had said, and they were like: 'Is that sort of it?', and then it's like: 'Yes, this is all we have been told'". Mr Hotchin's evidence was the call was broadcast on speakerphone by Mr Finnigan, working at the next desk, although it is unclear if he was referring to this call or a later call between Mr White and Mr Finnigan. Mr Hotchin said he understood the "[underwrite] or a shortfall in the rent" was temporary, "a short-term arrangement".

[29] In fact, by 1 October 2018, the rental underwrite between Premier and Buza had already come to an end (as of 1 April 2018) and Buza was $45,060 in arrears on its due rent of $67,860 (that is, 66 per cent unpaid). Buza had ceased paying rent at all after 1 April 2018, something known only to Premier and Buza. Premier did nothing thereafter to enforce Buza's payment of rent.

[30] On 18 October 2018, Ms Zhang emailed Mr Felton under the subject line "problem with the site" and identified a number of issues, including:

> 1. Leaking between two Tenant
> Suppose to cover by the tenants, but seems like they don't have the ability to fix it immediately as red pig is selling the business and the pool hall is paying the 60% of the rent .
>
> …
>
> 3. No Airflow and air conditioning (current cooling system not in a good working condition . For the two [levels] cost to change the cooling tower is a massive job. The minimum cost for both airflow and AC over $100k
>
> …
>
> 7. Current annual rent receiving as $198k. Base on the rent the building value is $3.3m and the CV is $3.4m and the bank value $3.38m.
>
> We are thinking to re-adjust our offer price to $3.4m and we will cover all the issue above and make everyone easier.

[31] Mr Felton's evidence was "[n]one of the potential issues raised by Ms Zhang had ever been disclosed to Colliers by Mr Hari", and (despite Ms Liu's lawyers' 26 September 2018 email to him, and Ms Zhang's conversation with him) "[t]his was the first time [he] was hearing about any of these matters." On 23 October 2018, Mr Felton copied Ms Zhang's email to Mr Hari.

[32] Mr White's evidence was "[f]rom memory, Mr Hari had not said much about the issues that had been raised". Mr Hari's evidence was he authorised Colliers to pass the issues on to OHL. In evidence, Mr White considered the issues he listed to Mr Finnigan to be Ms Zhang "price chipping" without substance for her complaints, a "pretty obvious" tactic used in commercial property negotiations. Mr White called Mr Finnigan to apprise him of the issues Ms Zhang had raised. He said to Mr Finnigan "something along the lines of: they have raised these issues, they have not sent anything to back it up and we have not seen anything from Mr Hari". Mr Finnigan responded that "they wanted to do the deal" and expressed that he knew he would have to put something together pretty quickly. Mr Hotchin's evidence was Ms Zhang's email was not disclosed to him. Under cross-examination he expressly denied knowing of "problems with the air conditioning" or leaks in the premises (except for a May 2018 body corporate insurance claim).

[33] Later on 23 October 2018, and following on from the phone call between Mr White and Mr Finnigan, Colliers supplied a draft sale and purchase agreement, in standard form,[6] for an unconditional offer of $3.5 million for settlement on 6 February 2019, which was endorsed by OHL. In the meantime, communication continued with Ms Liu as the due diligence period on her offer was coming to an end. Ms Liu initially sought an extension to the due diligence date, then alternatively to acquire Unit A unconditionally for $3.4 million with settlement on 11 February 2019 (the agreement then being for settlement within 30 days of unconditionality), ultimately increasing this offer to $3.5 million. Colliers therefore obtained competing offers for Unit A. Colliers recommended OHL's offer to Premier as more reliable. Premier accepted OHL's offer that evening.

[34] Mr Hotchin's evidence about the draft agreement received from Colliers was: "I decided to buy at this price. I signed an unconditional offer, on behalf of OHL." Mr Hotchin was not cross-examined directly on this assertion. The Judge noted that the ASP was signed for OHL by an "authorised signatory" not "director" and the signature (and initialling) appeared to be Mr Finnigan's.[7]

[35] After concluding the ASP, Mr Hotchin explained he was "alerted to a possible leak from upstairs into the downstairs tenancies". He, Mr Finnigan and Miriam Roberts (who also worked for him) met with Mr Lee (Buza's director) and Mr Lee's sister, Lauren Lee. Mr Hotchin's evidence was he understood from that discussion:

> … there were significant issues with the tenancy. The air-conditioning was not working and was leaking, there were problems with the plumbing, and there were issues with electrical wiring.
>
> There was water pouring out of the air-conditioning unit for the basement floor, and flooding it. [Mr Lee] said to me that they were not paying rent because of all the issues with the premises, and that the previous owner had also had significant discount on his rent, and he had effectively given him the business because it was losing so much money.
>
> I understood from [Mr Lee] that the landlord was aware of all of these issues and had told him not to make any complaints about it. I was also told that the

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6 Real Estate Institute of New Zealand and Auckland District Law Society Inc *Agreement for Sale and Purchase of Real Estate* (9th ed, 2012 (7)).

7 Judgment under appeal, above n 1, at [29].

> rent was being paid in cash, sporadically, and that there were no invoices or receipts.

[36] In response to OHL's lawyers' enquiry about any shortfall in rental payments, Premier's lawyers said:

> Buza … is in arrears. Our client has had numerous meetings with the tenant with a view to the tenant being able to sell the business and pay the arrears. To date the tenant has been unsuccessful in securing a sale. All outgoing[s] are paid to date.

Premier offered to underwrite Buza's rent for the balance of its lease to 31 October 2020. The offer was not accepted. The settlement statement accordingly omitted any allocation of rental from Buza as between Premier and OHL.

[37] Meanwhile, Mr Hotchin sought a technical inspection of Unit A's heating, ventilation and air conditioning (HVAC) systems. Metropolitan Air Conditioning & Refrigeration Ltd (Metropolitan) summarised its 18 December 2018 report:

> Generally, the HVAC plant is in very poor condition, a major amount of faults need to be addressed to bring the existing plant up to a satisfactory standard.
>
> It is my opinion and I would strongly recommend total HVAC replacement due to the lack of maintenance and service in the past. The current chiller, air handler, cooling tower and hydronic systems should be decommissioned and removed. The HVAC system should then be replaced with a plant room based [variable refrigerant flow (VRF)] type system as an acceptable modern replacement.
>
> …
>
> We would recommend you allow a HVAC replacement budget figure of $210,000.00 +GST to decommission the existing plant and remove, then install a VRF based system to bring the overall building up to a standard that would be satisfactory to your tenant's requirements.

[38] In reliance on the warranties in the ASP, OHL claimed Premier's waiver of rent and non-disclosure of the leaks in the basement constituted a misdescription of the property. OHL claimed compensation of $692,000 plus GST. Ultimately, on settlement, that sum was deducted from the price paid to Premier and is held by lawyers AlexanderDorrington Ltd as stakeholder. Premier used the balance of funds received to pay down debt on its Tauranga property.

[39] After settlement, OHL terminated Buza's lease for non-payment of rent. The basement since has been untenanted,[8] although OHL has reinstated it to a shell for subsequent lease. OHL has decommissioned the faulty air conditioning system and does not intend replacing it until it secures a basement tenant.

[40] For trial, the parties instructed expert valuers: Reid Quinlan of Seagars' for OHL, and Gary Cheyne of Extensor Advisory Ltd for Premier. Mr Quinlan assessed Unit A's expected value at $3.5 million (plus GST) in February 2019 (when the sale settled). Taking into account the rental shortfall and condition of the air conditioning plant, he assessed Unit A's value based on actual income at $2.83 million, resulting in OHL's capital loss of $670,000 (excluding GST). Mr Cheyne responded with five scenarios based on various assumptions as to the factual position of Unit A's acquisition (discussed in detail below). He assessed Unit A's value in February 2019 at points between $3.4 million and $3.65 million.

The High Court decision

[41] Jagose J began with OHL's counterclaim that Premier had breached the Fair Trading Act by engaging in misleading or deceptive conduct, or conduct likely to mislead or deceive.[9]

[42] The Judge found Premier's description of Unit A in the Information Memorandum in respect of its net annual rent return of $223,500 qualified as misleading and deceptive in the circumstances of Buza's lease, particularly given the Information Memorandum's indications of "below market" rental rates and "income security" from "[l]ong operating hospitality tenants".[10] He found that the misrepresentation was not corrected by the subsequent and incorrect representation on 11 October 2018 that Buza was paying about 60 per cent of its rent as a temporary arrangement to establish its business. By 1 April 2018, it was clear Buza had not and could not establish its business at the lease's rental rate and, by 1 October 2018, Buza

8 This was the position at the hearing before us.
9 Judgment under appeal, above n 1, at [43]; and Fair Trading Act 1986, s 9.
10 At [43].

had paid only one-third of the rent then due, and none since any concession ended on 1 April 2018.[11]

[43] Despite this, the Judge was not satisfied either OHL was misled or deceived by Premier's "contravention" or that the "contravention" was the effective cause of any loss or damage as claimed. He noted that Premier's contact with OHL was via Colliers who dealt with OHL's Mr Finnigan. Critical, in his view, was Mr White's email of 11 October 2018 to Mr Finnigan, which said, "the vendor is subsidising the rent here to the tune of around 40%".[12] The Judge considered that, if the telephone conversation was to communicate that was a temporary arrangement, there was no indication the temporary arrangement had ceased or that Buza's business was established. Even if Mr White's advice understated the extent of the subsidy, his advice was a clear indication that the Information Memorandum could not be relied on in its terms. That indication was reinforced, said the Judge, by Mr White's advice to Mr Finnigan on 23 October 2018 of Ms Zhang's assessment "the pool hall is paying 60% of the rent".[13]

[44] The Judge then addressed reliance. He was troubled that Mr Finnigan did not give evidence. He considered OHL should have explained why Mr Finnigan was not available in order to support its contended reliance on the Information Memorandum, particularly, he said, as Mr Finnigan executed the ASP and not Mr Hotchin. He drew an adverse inference against OHL, not only inferring what Mr Finnigan may have said would not have helped OHL's case but indeed his evidence would have harmed it. He therefore concluded the weight of Mr White's evidence was strengthened and that of Mr Hotchin reduced.[14] The Judge had his doubts about the reliability of Mr Hotchin's evidence in any event, noting errors in his evidence. The Judge noted that the pleading in respect of the 11 October 2018 telephone call recorded Mr Finnigan's attendance but omitted to mention Mr Hotchin. He then referred to what he described as the "coincidence" of Omara's $3.2 million offer, conditional on due diligence, with Seagars' $3.19 million valuation, which suggested to the Judge

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11 At [44].

12 We note that in the judgment under appeal, the Judge erroneously referred to the "11 October 2023 email".

13 At [47].

14 At [48], citing *Ithaca (Custodians) Ltd v Perry Corp* [2004] 1 NZLR 731 (CA) at [153]–[155].

that Mr Finnigan at least may have been aware of the latter even if Mr Hotchin were not.[15]

[45] The Judge also rejected OHL's claim of misleading or deceptive conduct based on the representation that the basement tenancy could potentially return $200 per week rent rather than the $160 shown on the tenancy schedule. The Judge noted that the representation was made in the context of comparable rentals and there was no evidence to suggest the assessment erred. He therefore found that particular representation neither misleading nor deceptive.[16]

[46] For those reasons, the Judge rejected OHL's Fair Trading Act claim.[17]

Contractual warranties

[47] The Judge did not consider the Information Memorandum's description of Unit A as "[f]ully [l]eased" under the tenancy schedule alone sufficient to constitute an error, omission or misdescription of Unit A for the purposes of the ASP warranty.[18] He concluded OHL's evidence fell a long way short of establishing that Premier had failed to disclose receipt of any qualifying notice from any tenant which could have constituted a breach of warranty. This referred to Mr Hotchin's evidence that representatives of Buza had complained of leaks in the basement. The Judge regarded that as inadmissible hearsay.[19]

[48] In respect of the air conditioning, the Judge rejected —any breach of warranty on the basis there was inadequate evidence that, at the date of the ASP, Premier did not have sufficient foundation to warrant that the air conditioning and ventilation plant would be in "reasonable working order" at settlement. The Judge accepted that the company used by OHL to assess the air conditioning, Metropolitan, identified a variety of non-operational components. However, he concluded the evidence was at best quantitative rather than qualitative, saying he was unable to assess whether the non-operational components meant the plant was not in "'reasonable working order',

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15 Judgment under appeal, above n 1, at [49]; citing Evidence Act 2006, s 17.
16 At [50].
17 At [52].
18 At [53].
19 At [54].

given its age and condition".[20] In any event, he concluded that Metropolitan's report was inadmissible hearsay if relied on for the truth of its contents, rejecting its admission as a business record because he had no information by which to assess the report author's unavailability as a witness.[21]

[49] Finally, the Judge considered the warranty contained in cl 7.1(2) of the ASP which provided that the vendor had not given any consent or waiver affecting the property that had not been disclosed in writing to the purchaser. He concluded that Premier's agreement to Buza's reduced rent payments until 31 March 2018 and non-enforcement of the unpaid rent after that date constituted a waiver affecting Unit A. This waiver was not disclosed to OHL in writing, meaning that Premier was in breach of the warranty.[22] In the circumstances, he did not need to determine if it would also breach cl 6.4 of the ASP but was inclined to the view that it did.[23]

Loss or damage

[50] The Judge noted that the point of a contractual warranty was that OHL was entitled to rely on it without further enquiry, and there could be no question of contended contributory negligence.[24]

[51] The Judge concluded the only difference in Unit A's value attributable to the breach of the cl 7.1(2) warranty came from the loss of income for the balance of Buza's lease, saying that non-disclosure of Premier's consent and waiver, even if a misdescription of Unit A, "carried nothing more than that cashflow disadvantage".[25] This was because, having rejected OHL's claim of misleading and deceptive conduct, he was considering the loss which flowed from the breach of warranty only. He did not consider OHL was justified in refusing Premier's offer of a rent underwrite.[26]

[52] While the expert valuation evidence had addressed a number of different scenarios in assessing the value of Unit A, the Judge focused only on the scenario

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20 At [55].
21 At [55]; and Evidence Act, s 19.
22 At [56]–[58].
23 At [58].
24 At [59], citing *Ling v YL NZ Investment Ltd* [2018] NZCA 133, (2018) 20 NZCPR 830 at [34].
25 Judgment under appeal, above n 1, at [63].
26 At [65]–[66].

which addressed the value of Unit A with an underwrite of the Buza rental for 20 months until lease expiry. That resulted in an agreed value of Unit A at $3.45 million.[27] Given the difficulties experienced by OHL in leasing the basement, the Judge rejected the valuers' assumption that it could be leased for $180 per square metre. He also rejected their assumption that an allowance of $210,000 was required for air conditioning replacement.[28] That led him to conclude that Premier's offer of a rent underwrite equated exactly to OHL's loss:

> [66] I therefore hold, on its breach of warranty, Premier is liable to OHL in the amount of Buza's rent for the period from OHL's acquisition of Unit A to the expiry of Buza's lease, which Premier's offer of a rent underwrite was reasonable for OHL to accept in complete elimination of any loss arising from the breach.

The Fair Trading Act claim

[53] The Fair Trading Act stipulates that no person shall, in trade, engage in conduct that is misleading or deceptive, or is likely to mislead or deceive.[29] This provision is "directed to promoting fair dealing in trade by proscribing conduct which, examined objectively, is deceptive or misleading in the particular circumstances".[30] It is enough if the conduct has the potential to mislead or deceive — no intention to do so is required.[31]

[54] In this case, the Judge accepted that Premier was in trade,[32] and there was no challenge to this finding before us. We note that "in trade" is a broad term,[33] and agree with the Judge's finding. Premier also owned a commercial property in Tauranga. Mr Hari's intention was to apply the surplus from Unit A's sale to acquisition of further commercial property for letting.

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27 At [64].
28 At [64]–[65].
29 Fair Trading Act, s 9.
30 *Red Eagle Corp Ltd v Ellis* [2010] NZSC 20, [2010] 2 NZLR 492 at [28].
31 At [28], n 14, citing *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216 at 228, and *Neumegen v Neumegen and Co* [1998] 3 NZLR 310 (CA) at 317.
32 Judgment under appeal, above n 1, at [45]–[46].
33 *Red Eagle Corp Ltd v Ellis*, above n 30, at [26], n 13.

Were the Representations misleading or deceptive?

[55] OHL's statement of counterclaim defined "the Representations" as:

> (a) prior to signing the [ASP], it received an "information memorandum" for 1/2 Kitchener Street, prepared by Colliers and dated 24 July 2018, indicating that the property was "fully leased" and that Buza was paying $62,400 per annum, being $159.59 per square meter;
>
> (b) on 9 August 2018, Colliers' Adam White sent an email to OHL's [Mr] Finnigan, advising that the rental rate for the Buza space "should be $200 per m2";
>
> (c) on 11 October 2018, Colliers' sent OHL's [Mr] Finnigan an email advising that Buza was paying about 60% of its rent;
>
> (d) at around this time, 11 October 2018, Mr Finnigan was told, in a telephone call with Colliers' [Mr] White, that this was a temporary arrangement, effectively offered as an incentive to the tenant while Buza got its business up and running; and
>
> (e) Colliers never suggested that Buza was not paying any rent at all, or that this arrangement was effectively permanent.

[56] There is no dispute that Colliers was at all material times Premier's agent.

[57] The test as set out in *Red Eagle Corp Ltd v Ellis*, is whether a "reasonable person in the claimant's situation — that is, with the characteristics known to the defendant or of which the defendant ought to have been aware — would likely have been misled".[34] We accept that, for the purposes of the assessment, OHL has the characteristics of a commercial property investor.

[58] We accept Mr McBride's submission for OHL that, in a sale of commercial property, a purchaser is dependent upon the vendor for information as to whether any tenant is materially non-compliant with its lease. These are matters peculiarly in the knowledge of the vendor. In *Sullivan v Wellsford Properties Ltd*, this Court found a failure to disclose relevant information by Wellsford Properties Ltd constituted a breach of s 9 of the Fair Trading Act, despite the buyers being experienced property investors who knew of the difficulties and uncertainties associated with the recovery of operating expenses.[35] They had to rely on Wellsford Properties to provide

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34 At [28].
35 *Sullivan v Wellsford Properties Ltd* [2019] NZCA 168 at [78].

information relating both to the total operating expenditure and the amount actually recovered from the tenants. Only Wellsford Properties held that information. This Court concluded that disclosure of invoiced operating expenses without disclosing the fact a tenant had raised a specific challenge to its liability under one of the invoices disclosed was misleading and deceptive conduct.[36]

[59] While the Judge considered the Information Memorandum qualified as misleading and deceptive, and that this was not corrected by the 11 October representation,[37] he did not specifically address the pleaded Representations. In our view, there can be no real challenge to the conclusion that the Information Memorandum, coupled with the partial and incorrect disclosure in Colliers' email of 11 October 2018 and telephone call around that time, without ever clarifying that Buza was not paying any rent at all, was misleading and deceptive.

[60] We are therefore satisfied that a reasonable person with OHL's characteristics would have been misled by four of the five Representations as follows:

(a) the statement in the Information Memorandum stating that Buza was paying rent of $62,400 per annum, being $159.59 per square metre;

(b) Colliers' 11 October 2018 email to OHL conveying Premier's advice that Buza was paying about 60 per cent of its rent when it was not;

(c) Colliers' verbal advice to OHL on or about 11 October 2018 to the effect that a 40 per cent rent subsidy was a temporary arrangement as an incentive to Buza while it established its business; and

(d) Premier's failure to inform OHL that in fact Buza was not paying any rent at all.

[61] We agree with the Judge that Colliers' representation that the basement tenancy could potentially recover $200 per week in rent, rather than the $160 shown on the

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36 At [78].
37 Judgment under appeal, above n 1, at [43]–[44].

tenancy schedule, was not misleading or deceptive. While OHL referred to the fact that the space was difficult to rent and Buza had defaulted on its rental obligations, as the Judge noted,[38] the Representation expressly referred to "[c]omparable rentals" as the basis for its assessment of market rates. There was no evidence before the Judge to suggest that assessment erred.

Was OHL misled or deceived by the Representations?

[62] Once a breach of the Fair Trading Act is proved, the court must look to see whether it is proved that the plaintiff suffered loss or damage "by" the conduct of the defendant.[39] This has been said to require a "common law practical or common-sense concept of causation".[40] The first question is whether the plaintiff was actually misled or deceived by the defendant's conduct. Then the court needs to ask whether the defendant's misleading or deceptive conduct was an operating cause of the claimant's loss or damage in order for the court to exercise its jurisdiction to order a remedy under s 43 of the Fair Trading Act.[41] In other words, there must be a "clear nexus" between the conduct and the loss or damage.[42]

[63] The Judge was somewhat exercised by the fact Mr Finnigan did not give evidence.[43] We do not share that concern. Mr Hotchin is the sole director of OHL. His evidence that he was in the office with Mr Finnigan at the time of the telephone call with Colliers concerning Buza's rent situation was not disputed. It is inconceivable that Mr Finnigan was not reporting on a regular basis to Mr Hotchin in connection with the proposed purchase of Unit A. If it was Mr Finnigan who signed the ASP, he could only have done so if authorised by Mr Hotchin. We consider the Judge significantly overstated the significance of the fact Mr Finnigan was not a witness in the case.

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38 At [50].
39 *Red Eagle Corp Ltd v Ellis*, above n 30, at [29].
40 At [29], quoting *Wardley Australia Ltd v the State of Western Australia* (1992) 175 CLR 514 at 525 per Mason CJ, Dawson, Gaudron and McHugh JJ.
41 *Red Eagle Corp Ltd v Ellis*, above n 30, at [29].
42 At [29], citing *Goldsbro v Walker* [1993] 1 NZLR 394 (CA) at 401 per Richardson J; and *Cox & Coxon Ltd v Leipst* [1999] 2 NZLR 15 (CA) at 38 per Tipping J.
43 See discussion in the judgment under appeal, above n 1, at [48].

[64] The Judge relied on the communication between Colliers and OHL on 11 October 2023 to the effect that Premier was subsidising Buza's rent by around 40 per cent. The Judge interpreted that as a clear indication that the Information Memorandum could not be relied on.[44] But the Representations include the advice on 11 October (which was, of course, incorrect), the indication the subsidy was a temporary arrangement and the failure to inform OHL that Buza was not paying any rent at all. Mr Hotchin's evidence was that the Buza rental represented 28 per cent of Unit A's income and he regarded the Representations as significant and material.

[65] Likewise, we are not convinced by the Judge's concern about the coincidence of Omara's offer. The Judge referred to this in the context of his doubts about the reliability of Mr Hotchin's evidence.[45] His comments carried with them the suggestion that it was the Seagars valuation, which discussed the uplift in value if Units A and B were in single ownership, which influenced OHL's offer for Unit A rather than the Representations. It does not matter, for the purposes of the Fair Trading Act claim and issues of reliance, that OHL saw an additional benefit in purchasing Unit A so as to have ownership of the whole building with the commensurate increase in its value. Even if there were particular advantages in OHL purchasing Unit A as compared to any other purchaser, that does not detract from its reliance on information about the rental stream which is almost inevitably and invariably a factor relevant to the price a purchaser will pay for a property.

[66] Mr Hotchin said as much in evidence, stating that, while owning Units A and B together added significant value, Unit A had to "stand on its own two legs and pay its [way]".

[67] Unless OHL had intended immediately to terminate the leases, proposing, for example, a full re-development of the building, then it is plain that the rental stream was important. That is so no matter what price a purchaser pays.

[68] In any event, Premier's expert valuer, Mr Cheyne, while asserting owning both units would give rise to an uplift in value, had to accept that there was another

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44 At [47].
45 At [49].

unconditional offer for Unit A for $3.5 million. Mr Cheyne conceded that while potentially OHL, as the owner of Unit B, could have paid a premium, it appears that did not happen.

[69] We are satisfied from the evidence that OHL was misled and deceived by the Representations, which were an effective cause of its loss.

Was OHL's own conduct an operative cause of its loss?

[70] The Supreme Court in *Red Eagle* recognised that another operating cause of loss or damage may be a plaintiff's own conduct in failing to take reasonable care to look after his or her own interests. That does not disqualify the claim but the proper exercise of the court's discretion may lead it to conclude that part only of the amount of the loss or damage should be paid by the defendant.[46]

[71] Premier says that OHL's conduct was an operative cause of its loss because:

(a) Mr Hotchin, as director, did not undertake any due diligence beyond looking at the leases until OHL had entered into the unconditional ASP despite effectively being on notice that Buza was not paying its full rental;

(b) OHL knew, or ought to have known, that Buza was struggling to establish its business to the extent it could not meet rental payments a year into the lease, therefore, in Ms Wroe's submission for Premier, OHL assumed the risk that Buza might not have a viable business; and

(c) rather than ask questions and properly assess the risk, OHL in fact increased its previous offer, despite being given more information that ought to have made it more cautious.

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[46] *Red Eagle Corp Ltd v Ellis*, above n 30, at [30].

[72] On that basis, Premier claims that any losses suffered by OHL should be reduced by 40 to 50 per cent in line with the approach taken in other cases.[47]

[73] We accept Mr McBride's submission to the effect that, in the circumstances of a case such as this, a vendor cannot advance a succession of misleading statements and then point to inconsistencies between them to avoid liability for misstatements, or blame the purchaser for not carrying out further due diligence.

[74] The circumstances of the present case can be distinguished from those in other cases relied on by Premier where matters were drawn to the various plaintiffs' attention. Red Eagle Corp Ltd was given misleading information that a person seeking a loan owned considerable assets when she did not.[48] Red Eagle Corp Ltd did not carry out any checks to verify the truth of the representation before advancing the loan.[49] In *WaikatoLink Ltd v Comvita New Zealand Ltd*, Comvita New Zealand Ltd was on express notice of the risk involved in the transaction but was prepared to proceed regardless in order to protect its position.[50] It did so without protecting itself in the contractual arrangement.[51] The appellant in *Roberts v Jules Consultancy Ltd (in liq)* was purchasing a residential property under a conditional sale and purchase agreement. He was provided with disclosure and a Land Information Memorandum which provided notice of weathertightness issues in the building but he did not take professional advice or obtain a building report.[52] In *Shabor Ltd v Graham*, a due diligence provision in a tender would have enabled the plaintiff to consider whether figures which had been supplied were overstated.[53]

[75] In the present case, the statement to the effect that Buza was still enjoying a 40 per cent rent holiday quite some time into its occupation of the premises suggested it was not being entirely successful in establishing its business. That being so, we

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47 For example: 50 per cent reduction in *Red Eagle Corp Ltd v Ellis*, above n 30; 50 per cent reduction in *WaikatoLink Ltd v Comvita New Zealand Ltd* (2010) 12 TCLR 808 (HC); 40 per cent reduction in *Roberts v Jules Consultancy Ltd (in liq)* [2021] NZCA 303, (2021) 22 NZCPR 288; and 30 per cent reduction in *Shabor Ltd v Graham* [2021] NZCA 448, [2021] NZCCLR 26.

48 *Red Eagle Corp Ltd v Ellis*, above n 30, at [32]–[33].

49 At [39].

50 *WaikatoLink Ltd v Comvita New Zealand Ltd*, above n 47, at [166] and [169].

51 At [167].

52 *Roberts v Jules Consultancy Ltd*, above n 47, at [53] and [95].

53 *Shabor Ltd v Graham*, above n 47, at [76].

agree that OHL was on notice that the tenant was experiencing some difficulties. What it was not aware of was that Buza could not pay any rent at all.

[76] We note that another prospective purchaser had asked for bank statements to prove Buza was in fact paying its rent but Premier refused to supply them. In his evidence, Mr Hotchin pointed out that Premier had insisted on a "cash unconditional" offer, which denied OHL the opportunity to carry out due diligence. Having insisted on that, it was, in Mr Hotchin's opinion, incumbent on Premier to ensure that full disclosure of material matters had been made. We agree.

[77] As we discuss under the heading of loss, the $3.5 million value of Unit A as at settlement was on the basis of the basement tenant paying 60 per cent of its rent for a temporary period only. That value represented the price OHL was prepared to pay on the basis of the information Premier supplied to it and on which it was entitled to rely.

[78] Further, as we now discuss, Premier breached its warranty to OHL, entitling OHL to recover its consequential loss regardless of whether OHL should have made further enquiry.

Contractual warranties

[79] The ASP was in the form approved by the Real Estate Institute of New Zealand Inc and by the Auckland District Law Society Inc.[54] As this Court recognised in *Sullivan*, this standard form agreement is a carefully drafted document creating a detailed contractual relationship between vendors and purchasers of real estate, allocating risk on an objectively reasonable basis.[55]

[80] OHL claimed a breach of cl 6.4 of the ASP, saying that the tenancy schedule to the ASP represented that Buza's rent was $62,400 plus GST per annum but it was not paying, and had never paid, rent at that level. It also claimed a breach of the warranty in cl 7.1 because Premier had failed to disclose it had received notice and/or demand

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54 Auckland District Law Society and Real Estate Institute of New Zealand *Agreement for Sale and Purchase of Real Estate* (9th ed, 2012) [standard form agreement]. The Auckland District Law Society is now the Law Association Inc.

55 *Sullivan v Wellsford Properties Ltd*, above n 35, at [67].

and/or had knowledge of an outstanding requirement from a tenant of the property and/or had given a waiver to Buza regarding the requirement to pay rent.

[81] The relevant clauses of the ASP are as follows:

> 6.4 Except as provided by sections 38 to 42 of the Contract and Commercial Law Act 2017, no error, omission, or misdescription of the property or the title shall enable the purchaser to cancel this agreement but compensation, if claimed by notice before settlement in accordance with subclause 8.1 but not otherwise, shall be made or given as the case may require.
>
> …
>
> 7.1 The vendor warrants and undertakes that at the date of this agreement the vendor has not:
>
> (1) received any notice or demand and has no knowledge of any requisition or outstanding requirement:
>
> …
>
> (c) from any tenant of the property; or
>
> …
>
> (2) given any consent or waiver,
>
> which directly or indirectly affects the property and which has not been disclosed in writing to the purchaser.

[82] The Judge inclined to the view that there had been a breach of cl 6.4.[56] We are not convinced that cl 6.4 is directed towards circumstances such as these. Clause 6.4 concerns any error, omission or misdescription of the property or the title. Clause 6 as a whole is headed "[t]itle, boundaries and requisitions". The property is defined as the property described in the ASP.[57] The front page of the ASP contains a box headed "PROPERTY" and contains the address, estate (in this case stratum in freehold), and legal description. The tenancies are referred to in a separate box.

[83] In any event, like the Judge, we need not determine whether cl 6.4 has been breached as there was clearly a breach of cl 7.1(2) in respect of Premier's implicit consent to, and waiver of, Buza's obligation to pay any rent at all from 31 March 2018. The warranty relates only to any consent or waiver which has not been disclosed in writing to the purchaser. The written disclosure of the reduced rental was misleading

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56 Judgment under appeal, above n 1, at [58].

57 Standard form agreement, above n 54, at cl 1.1(15).

and there was a complete failure to reveal that Buza had paid no rent from 31 March 2018. As required by the warranty, that waiver directly (or indirectly) affected the property.

The air conditioning warranty claim

[84] Mr Hotchins' evidence was that, following execution of the ASP, he discovered significant issues with the air conditioning at Unit A. In particular, in Buza's tenancy only one of the six hydronic air conditioning units worked. That was accepted in evidence by Mr Hari for Premier, who also accepted that all of the hydronic systems in the building were in "very poor condition". Mr Hari insisted the main system was working but that the hydronic systems were not maintained.

[85] The relevant provision of the ASP reads:

> 7.2 The vendor warrants and undertakes that at settlement:
>
> (1) The chattels and all plant, equipment, systems or devices which provide any services or amenities to the property, including, without limitation, security, heating, cooling, or air-conditioning, are delivered to the purchaser in reasonable working order, but in all other respects in their state of repair as at the date of this agreement (fair wear and tear excepted) but failure so to deliver them shall only create a right of compensation.

[86] The Judge interpreted cl 7.2(1) of the ASP as requiring evidence that Premier "lacked foundation at the date of the agreement to warrant the air conditioning and ventilation plant would be in 'reasonable working order' at settlement".[58] We agree with Mr McBride that the purpose of cl 7.2(1) is to warrant the condition of the items as at settlement. It is an express warranty as to a future state of affairs.[59] The issue therefore was whether the air conditioning unit was in reasonable working order as at settlement.

[87] There was, however, no expert evidence to the Court about the condition of the air conditioning and cost of repair.

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58 Judgment under appeal, above n 1, at [55].

59 *Property Ventures Investments Ltd v Regalwood Holdings Ltd* [2010] NZSC 47, [2010] 3 NZLR 231 at [59] per Blanchard, McGrath and Wilson JJ.

[88] Mr Hotchin obtained a quote which recommended replacing the whole system at a cost of $210,000. The Judge correctly ruled the report inadmissible as to the truth of its contents.[60] The writer was not called and the report could not be admitted as a business record because the requirements of s 19(1) of the Evidence Act 2006 were not complied with.

[89] Although there was evidence that some of the hydronic systems were not working, how and the extent to which that impacted the operation of the whole air conditioning system and whether it was in reasonable working order was not before the Court. We note that the air conditioning system continued to serve the tenancies until 2022.

[90] OHL had the onus of proving the alleged breach and associated damages but failed to do so.

What losses did OHL suffer?

[91] As we have reached a different conclusion from the Judge as to the Fair Trading Act claim, we now need to address the question of damages. In its counterclaim, OHL sought judgment for "at least $460,000" plus interest and costs. As will be apparent from the discussion which follows, we take a broader view of the loss which flows from the breach of warranty.

[92] The general principle is that contractual damages should "put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed".[61] It is well established that the "assessment of damages is

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60 Judgment under appeal, above n 1, at [54]; and Evidence Act, ss 17 and 4 definition of "hearsay statement".

61 See generally *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726 at [23] per Elias CJ, quoting *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528 (CA) at 539 per Asquith LJ. See also H G Beale (ed) *Chitty on Contracts* (35th ed, Sweet & Maxwell, London, 2023) at [30-001], which attributes the original statement to Parke B in *Robinson v Harman* (1848) 1 Ex 850 at 855.

a question of fact and should not be trammelled by rigid rules".[62] Under the Fair Trading Act, damages has been approached as a matter of "doing justice to the parties in the circumstances of the particular case and in terms of the policy of the Act".[63]

[93] While there is a different approach in the assessment under the Fair Trading Act compared to the assessment of damages for breach of warranty, there is no dispute in this case that the same result will flow.

[94] When the breach of warranty is coupled with the misleading and deceptive conduct, we are satisfied that the correct measure of damages is the difference between the value of Unit A as at the settlement date on the basis of the situation as represented to OHL as against its value had the true position been known.

[95] In *Sullivan*, this Court noted that capitalisation of net rent was the appropriate method for valuing the property in that case.[64] In Ms Wroe's submission, *Sullivan* should not be interpreted to mean commercial properties will always be valued by the net rental income they generate. In her submission, the valuation evidence acknowledged that it would not always be possible to use a capitalisation rate to calculate loss and in *Sullivan* the parties were negotiating specifically about an appropriate capitalisation rate. The Judge in this case fully engaged with the valuers' expert evidence and was then entitled to make his own assessment as to loss. She maintained that Mr Cheyne's evidence should be preferred.

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62 See *Northash Ltd v Zeff Farms Ltd* [2022] NZCA 471, [2023] 2 NZLR 202 at [35]; *Cornwall Park Trust Board Inc v Chen* [2016] NZCA 65; [2016] 2 NZLR 637 at [99]; and *New Zealand Land Development Co Ltd v Porter* [1992] 2 NZLR 462 (HC) at 466, approved of by the Court of Appeal in *Maori Trustee v Rogross Farms Ltd* [1994] 3 NZLR 410 (CA) at 419. See also *Marlborough District Council v Altimarloch Joint Venture Ltd*, above n 61, where Tipping J in the Supreme Court observed, to similar effect:

> [156] It is as well to remember at the outset that what damages are appropriate is a question of fact. There are no absolute rules in this area, albeit the courts have established prima facie approaches in certain types of case to give general guidance and a measure of predictability. The key purpose when assessing damages is to reflect the extent of the loss actually and reasonably suffered by the plaintiff. The reference to reasonableness has echoes of mitigation. A plaintiff cannot claim damages which could have been avoided or reduced by the taking of reasonable steps.

63 *Goldsbro v Walker,* above n 42, at 404 per Richardson J, approved in *Red Eagle Corp Ltd v Ellis*, above n 30, at [31].

64 *Sullivan v Wellsford Properties Ltd*, above n 35, at [114].

[96] Mr McBride pointed out that OHL paid $3.5 million for Unit A, representing a capitalisation rate of 6.39 per cent to access income of $224,500. He noted that OHL could have sought damages on the basis that Buza's rent should have been omitted altogether, which would have produced a loss of $975,000. OHL recognises, he said, that was too extreme, and a fairer approach would be simply to adjust the capitalisation rate. Mr McBride accepted that loss is valued at the date it was suffered, but submitted this Court must also consider subsequent events to see whether they provide a reliable indication or reflection of such loss.[65] Mr McBride then referred to the evidence that OHL has been unable to find a new tenant for the basement. Mr McBride also pointed out that, although the High Court found OHL had lost 20 months' rental ($104,000), it did not give judgment in its favour for that amount.

[97] Mr McBride did not dispute the Judge's view that the basement rent would not be more than $160 per square metre. On that basis, he submitted that Mr Quinlan's original assessment of loss should be adopted, accounting for the costs of finding a new tenant at $62,400 per annum and adjusting the capitalisation rate.

The evidence

[98] Reid Quinlan, OHL's expert, adopted the actual sale price of $3.5 million as the most accurate valuation of Unit A on a fully leased basis as at February 2019.[66] In his view, the contract rent for the basement of $160 per square metre did not appear high for a tenancy of that nature, but the rent was not being paid. As at the date of the High Court hearing, the basement was being marketed for lease by OHL but had remained vacant. In Mr Quinlan's opinion, a prudent purchaser faced with a vacant basement tenancy would face cashflow shortfalls that would be a consideration when negotiating the purchase price.[67]

[99] On a net income basis, Unit A was 28 per cent vacant, leading Mr Quinlan to conclude that, taking into account non-recoverable operating expenses from the vacant

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65 Relying on *Kizbeau Pty Ltd v WG & B Pty Ltd* (1995) 184 CLR 281 at 291.

66 All assessments of value are exclusive of any GST.

67 Eighteen-month vacancy period; three months' letting fee; six months' rent-free fitout and make-good allowance; six months' rental incentive; and 18 months' operating expenses shortfall (approximately $19,140 per annum).

space, the net receivable income would be closer to 60 per cent of the fully let income until such time as a new tenant could be found. He referred to that impact on the amount banks will lend against investment properties and that small passive investors seeking high income yields and income leverage would be deterred. Prospective purchasers still interested in a higher risk acquisition would invariably seek a higher yield to compensate for the financing and risk aspects of the purchase and would face less competition from buyers.

[100] Mr Quinlan's evidence was that a fair value for Unit A would require a 0.5 per cent adjustment to the capitalisation rate from 6.39 per cent to 6.89 per cent to recognise the changed risk profile as well as there being a reduced cash flow while a new tenant was found, plus the cost of installing new air conditioning.

[101] Including capital expenditure of $210,000 on air conditioning, Mr Quinlan assessed the value of Unit A as $2,830,000. That led to his conclusion that the loss from the expected value on acquisition of $3,500,000 was $670,000.

[102] Following expert caucusing, Mr Quinlan agreed that a new tenant might pay more for the basement area following upgrades and reduced his assessment of loss to $500,000.

[103] Mr Cheyne, Premier's expert, considered Mr Quinlan's adoption of a rental of $160 per square metre for the basement was a little low and took what he considered to be a market rate of $200 per square metre.

[104] Mr Cheyne disagreed with Mr Quinlan's adjustment of the capitalisation rate, considering it to be double counting. He said there was already investment risk arising from the nature of the space itself, describing the basement as "indifferent (at best) basement space which would be difficult to lease in the best of times". He noted there were 20 months remaining under the Buza lease which was a very short period of certainty of income, and that those factors were accounted for in the base capitalisation rate of 6.4 per cent which had led to the purchase price of $3,500,000. He concluded that ultimately, and particularly with 20 months remaining under the Buza lease, any adjustment to the purchase price stemmed from cashflow issues alone.

[105] Mr Cheyne agreed with Mr Quinlan's approach to the air conditioning as it affected the value of the property, being of the opinion that, provided it was in reasonable working order, the market would not make any deduction for its age, it being incorporated within the higher capitalisation rate for older buildings.

[106] Of the five scenarios Mr Cheyne discussed, three were addressed by the experts in caucus and were the focus of their evidence before the High Court.[68]

Scenario A

[107] Unit A was valued as at the date of settlement, 8 February 2019, and on the basis of the Representations — knowing that 60 per cent only of Buza's rent was being paid but that this would have no material ongoing cashflow impact — and that the air conditioning was in working order.

[108] Both valuers agreed Unit A had a value of $3,500,000, the capitalisation rate being 6.40 per cent.

Scenario C

[109] Scenario C assumed the Buza lease had been repudiated, the premises were vacant and air conditioning replacement at a cost of $210,000 plus GST was required. $157,626 was required for lease-up costs and agency fees, in order to let the basement at $180 per square metre.

[110] Mr Quinlan assessed the value at $3,000,000, with a capitalisation rate of 6.90 per cent. Mr Cheyne assessed the value at $3,300,000 with the capitalisation rate unchanged.

Scenario E

[111] The basis of valuation was the same as for Scenario C but with Premier underwriting the Buza rental for 20 months until lease expiry. The valuers agreed a value for Unit A of $3,450,000 with the capitalisation rate being 6.40 per cent.

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[68] Mr Quinlan had no instructions on two of the scenarios and they were therefore not considered by the experts in their caucusing or when giving evidence.

Mr Cheyne explained that the offer of the underwrite significantly reduced the cashflow risk to the purchaser, saying if Buza were to go out of business, as had transpired, the property owner had a 20-month period in which to re-tenant the basement. Further, given the short period remaining under the lease (20 months until the tenant's right of renewal), the owner might well face the costs of re-tenancy in any event. The experts also built in the opportunity to increase the rent from $160 per square metre to $180 per square metre.

Our assessment

[112] Unfortunately, none of the five scenarios were on all fours with either the findings of the High Court or our own as we have outlined. They were based on a higher per square metre rental for the basement than was realistically achievable, and included the costs of replacement air conditioning, something both we and the High Court reject.

[113] The difference between the experts related to the correct approach to the capitalisation rate. Mr Cheyne was challenged on his use of a capitalisation rate of 6.4 per cent, being the same as that applied for a purchase price of $3.5 million with three tenants in place all paying rent. He did not accept that the difference between the information in the Information Memorandum (three tenants and income security) and an empty basement tenancy would result in the need to adjust the capitalisation rate on account of the different risk profile.

[114] Further, Mr Cheyne did not accept that his 12-month allowance for re-letting the basement was light. He acknowledged the particular location was difficult. That demonstrates to us the significance of having a secure tenant. It signalled to OHL that a tenant considered the basement was viable and was able to make a business work there. We accept Mr McBride's submission that it followed that, had OHL known the business was a failure, then it would have adjusted the capitalisation rate and allowed more time to find a tenant.

[115] That different risk profile under Scenario C (assuming the Buza lease had been repudiated) led Mr Quinlan to say the capitalisation rate had to be adjusted. Mr Quinlan emphasised that, with one tenancy vacant, there was a different risk profile

and perhaps a different purchaser who might consider buying Unit A because of the cashflow shortfall making funding more difficult, which would deter someone looking for a passive investment and, as a result, reduce the pool of buyers. In his view, therefore, it was appropriate to increase the capitalisation rate to 6.9 per cent. In terms of the leasing-out costs, leasing out such a basement might well take longer, meaning he adjusted the cashflow. He noted Mr Cheyne's opinion that the cashflow only needed to be adjusted but reiterated his opinion that the capitalisation rate also needed to be adjusted.

[116] In our view, the conclusion in respect of Scenario E has significant problems attached to it, because of the assumption the basement could command a rent of $180 per square metre, the 12-month period assumed for re-letting and the maintenance of the capitalisation rate at 6.4 per cent. The latter does not seem consistent with the earlier evidence, particularly that of Mr Quinlan. Mr Cheyne explained that the period of 12 months was taken because there was a rent underwrite for 20 months, meaning the expert assumed a period of 32 months until a new tenant was found. He observed that was not the expectation, although, of course, as at the date of the hearing, June 2023, the basement had been empty for over three years.

[117] Respectfully, we cannot agree with the High Court's assessment that the only difference in Unit A's value attributable to Premier's breach of warranty is the loss of income for the balance of Buza's lease and that the non-disclosure of Premier's waiver "carried nothing more than that cashflow disadvantage".[69] This is particularly the case when the wider considerations of the misleading and deceptive conduct are taken into account.

[118] We consider Mr Quinlan's evidence on the need to adjust the capitalisation rate as compelling. In our view, the fact Buza was paying no rent at all materially changed the risk profile for Unit A. There is a considerable difference between a tenant paying a reduced rental for the purposes of establishing a business, even if that took longer than originally anticipated, and a tenant who has ceased paying any rent at all. The former presents a picture of a tenant committed to establishing a business and the

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69 Judgment under appeal, above n 1, at [63].

latter a tenant who has given up, indicating that the business cannot be successfully established and the lease will not be renewed.

[119] We conclude that Scenario C is the appropriate one for assessing OHL's loss. However, like the Judge, we consider the basement rental at $180 per square metre is not justifiable and the appropriate rental figure is $160. The cost of the air conditioning needs to be removed. The valuers agreed that, provided the air conditioning was in reasonable working order, the market would not make any deduction for its age, that being incorporated within the higher capitalisation rate for older buildings.

[120] The capitalisation rate needs to be increased from the original 6.4 per cent but, as accepted by Mr McBride, needs to be slightly reduced from Mr Quinlan's capitalisation rate of 6.9 per cent, which also reflects the need to replace elements of the air conditioning. Following Mr Mc Bride's invitation that we do so and noting this Court's comment in *Sullivan* that there is "no science in" capitalisation rates,[70] we consider it is appropriate to take a capitalisation rate of 6.8 per cent. The result is as follows:

Market Rents				
Red Pig - contract				$137,100
Ren He - contract				$24,000
Basement – new lease	389.2 sq metres @ $160			$62,272
				$223,372
Conversion to Value				
Capitalised @	6.8 %			$3,284,882
Less:				
Let Up Costs				
Lease Up Costs	24 months	$140,112		
Agency Fees	25%	$17,514		
			$157,626	
				$3,127,256
				Say $3,100,000

[70] *Sullivan v Wellsford Properties Ltd*, above n 35, at [115].

[121] We conclude the value of Unit A as at 8 February 2019 was $3,100,000. OHL paid $3,500,000, meaning its loss was $400,000.

Did OHL fail to mitigate its loss when it declined the rent guarantee?

[122] At common law, a victim of a breach is under a duty to take all reasonable steps to mitigate loss and is debarred from claiming damages which are due to neglect in mitigating the initial loss.[71] The test is what a reasonable person would have done in their position.[72]

[123] Ms Wroe emphasised that the High Court had considered the offer of a rent guarantee and found that it would have been reasonable for OHL to have accepted it.[73]

[124] Mr McBride referred to Mr Hotchin's evidence that the offer of a rent guarantee was "highly unattractive" to him. Mr Hotchin explained he purchased Unit A on the basis there was an actual tenant paying rent in the basement. That confirmed to him that the space was attractive to tenants and could generate income. He said, if the tenant were unable to pay the rent, he would have expected the landlord to terminate the lease and repurpose the space. The fact the tenant had been allowed to continue in the space suggested to Mr Hotchin that the space in fact was not attractive and Buza had been allowed to remain there while Unit A was marketed for sale.

[125] Mr Hotchin said a rent guarantee was offered only after he discovered the Information Memorandum was misleading and that the guarantee would have enabled Premier to maintain the purchase price at $3.5 million based on the notional capitalised income. That, he said, was a cheap and effective way for Premier to try and maintain the purchase price, even after it had misrepresented the level of income generated from Unit A. Mr Hotchin had serious concerns about whether the space was even rentable, something which, by the time of trial, he confirmed had been well founded, as the space was at that time still vacant.

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71 Beale *Chitty on Contracts*, above n 61, at [30-098]. It is not strictly a duty but rather a restriction on the damages recoverable, which will be calculated as if the claimant had acted reasonably to minimise losses: see [30-100]. See also Stephen Todd and Matthew Barber *Burrows, Finn and Todd on the Law of Contract in New Zealand* (7th ed, LexisNexis, Wellington, 2022) at [21.2.4(a)].

72 H G Beale, above n 61, at [30-101].

73 Judgment under appeal, above n 1, at [66].

[126] The offer of the rent underwrite was as follows:

> 4. On the basis that the current tenant, Buza Limited, fails to pay the rent and outgoings due under the lease our client is willing, in respect of the Buza Limited tenancy, to give our firm an irrevocable instruction to hold the total amount of rent and outgoings pertaining to these premises in our trust account and to pay the same to your client on a monthly basis for the remainder of the initial term of the tenancy, being the 31st October 2020,with our client reserving the right to arrange a third party tenant for that period on the basis the current Tenant's lease is terminated immediately. If Buza Limited commences the lease payments to your client and your client agrees to allow its tenancy to continue, our client will only be responsible for meeting any shortfall in such payments until the 31st October 2020.
>
> 5. If your client wishes to relet the premises at any time prior to the 31st October 2020, our client will meet any shortfall in the rent from the funds held in our trust account, subject only to the rental arrangements to the third party being acceptable to our client.

[127] We can well understand why that was not an attractive proposition to OHL. The idea that Premier, who had misled OHL in material respects, should have the ability to arrange a third-party tenant would seem a fraught proposition and certainly not what OHL had contracted for. It was a very different proposition from buying a property with an established tenant. Further, any third party leasing the basement prior to 31 October 2020 at less than $160 per square metre had to be "acceptable" to Premier.

[128] We therefore disagree with the Judge's conclusion that it would have been reasonable for OHL to accept Premier's offer of a rent underwrite and that the underwrite as offered would have completely eliminated OHL's loss. It was not an unconditional rent underwrite and did not put OHL in the position of having a fully leased property with three long-operating tenants providing increased income security,[74] and with a capitalisation rate of 6.4 per cent. At most, Premier's offer responded to a temporary cashflow disadvantage arising from Buza's failure to pay the rent, rather than to the changed risk profile of the property.

Costs

[129] The parties agree that costs should be awarded on a band B basis. While OHL has succeeded on appeal, it was unsuccessful in respect of the air conditioning claim.

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[74] With one tenant paying 60 per cent wile establishing its business.

That being a relatively small issue in the context of the overall appeal, we discount costs by 10 per cent.

[130] The issue of costs in the High Court will be remitted to that Court.

Result

[131] The appeal is allowed. The High Court judgment is set aside and judgment is given for OHL in the sum of $400,000 plus accrued interest calculated pursuant to the Interest on Money Claims Act 2016 from 8 February 2019 to the date of this judgment.

[132] The respondent must pay the appellant costs for a standard appeal on a band B basis, discounted by 10 per cent, together with usual disbursements. We certify for second counsel.

[133] Costs in the High Court are remitted back to the High Court for reconsideration in light of this judgment.

Solicitors:
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